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MICHAEL A. GRASSMUECK

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

SUNWEST MANAGEMENT, INC.,
CANYON CREEK DEVELOPMENT,
INC., CANYON CREEK FINANCIAL,
LLC, AND JOHN M. HARDER,

Defendants,

DARRYL E. FISHER, ET AL.,

Relief Defendants.

Case No. 09-6056-HO

**MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
RECEIVER MICHAEL A.
GRASSMUECK'S MOTION FOR
APPROVAL OF SETTLEMENT WITH
GROVE, MUELLER & SWANK, P.C.
AND FOR ENTRY OF CLAIMS BAR
ORDER**

MICHAEL A. GRASSMUECK, Receiver,

Plaintiff

vs.

GROVE, MUELLER & SWANK, P.C.

Defendant

Case No. 09-CV-0650-HO

MEMORANDUM OF POINTS AND AUTHORITIES

The Receiver seeks approval of a settlement and form of settlement agreement with Grove, Mueller & Swank, P.C. ("GMS") and pursuant to the terms of the settlement, seeks entry of a "Claims Bar Order" as more fully set forth below and in the proposed order.

I. BACKGROUND

Pursuant to orders entered by this Court March 10, 2009, May 27, 2009, and August 28, 2009 ("Receivership Orders") in *SEC v. Sunwest Management, Inc.*, Case No. 09-6056-HO (the "SEC Action"), Michael A. Grassmueck is the duly appointed and acting receiver for Sunwest Management, Inc., Canyon Creek Development, Inc., Canyon Creek Financial, LLC, Fuse Advertising, Inc., KDA Construction, Inc., and other entities named in the Receivership Orders (the "Receivership Entities"). On October 2, 2009 the Court entered an order approving and establishing a Distribution Plan in the SEC Action. Among other things, the Distribution Plan provides for the treatment of claims. The Court also entered certain orders establishing a claims process. (See SEC Action Docket #941).

The Receiver has asserted claims against GMS on behalf of Sunwest investors and the Receivership Entities in *Grassmueck v. Grove, Mueller & Swank, P.C.*, Case No. 09-CV-0650-HO, (the "GMS Case"). The Receiver has also received assignments of claims, asserted or unasserted, against GMS from Sunwest investors, creditors, and claimants (the "Third Party Claims"), pursuant to the Plan of Distribution approved on October 2, 2009, in the SEC Case; the Receiver's, CRO's and Debtor's Second Amended Joint Plan of Reorganization (May 27, 2010), filed in the Bankruptcy Case; and the Order Re Assignment of All Sunwest Investors' and Claimants' Rights and Claims Against Certain Third Parties to Receiver dated April 7, 2011 (the "Assignment Order").

GMS has and continues to assert that there is no merit to the various causes of action and claims brought against or proposed to be brought against it, and the

Receiver continues to dispute claims alleged against the Receivership Estate by
GMS.

The Receiver, through special mediation counsel, and GMS, including its
counsel, Lindsay Hart Neil & Weigler, LLP, engaged in various settlement
discussions and mediation sessions, and reached terms on a resolution of the
disputes. The terms of the resolution were then put into a written Settlement
Agreement. A copy of the proposed Settlement Agreement has been submitted
herewith as Exhibit 1. The Settlement calls for payment of \$1,350,000 to the
Receiver. The Settlement Agreement also calls for GMS to release any claims
GMS may have against the Receivership Entities, with the exception of an
administrative claim in the amount of \$228,381.26, which shall be approved by the
Receivership. The Settlement Agreement also provides for mutual releases.

The Settlement also calls for the Receiver to seek a Claims Bar Order in the
SEC Action. The Claims Bar Order would bar or enjoin enumerated persons from
asserting certain claims against GMS. The Claims Bar Orders will be binding on
the Receiver; the CRO; the Debtor; all Sunwest investors, creditors, and claimants,
known and unknown; all parties in any pending federal or state court litigation
involving GMS; all parties in any arbitrations involving Sunwest investments; the
Receivership Entities; Sunwest Entities; the HFG Parties; all other professionals
who provided services to the Receivership Entities, Sunwest Entities, and the HFG
Parties; all persons or entities who receive the notice; and any other interested
parties who may have Sunwest-related claims.

The proposed Claims Bar Order would apply to all claims against GMS for
damages or other remedies arising from or related to their conduct related to the
activities of Sunwest Entities, including Sunwest Management, Inc., and their
principals, including claims arising from the sale, purchase, or solicitation of
Sunwest investments and all claims for contribution or indemnity made by any
person or entity arising from the same or related common core of operative facts

addressed in the SEC Case or the Barred Claims. These claims include, but are not limited to, claims on guarantees, claims made under Section 10 of the 1934 Act and Rule 10b-5 (including, but not limited to, any claims for malpractice, negligence, breach of fiduciary duty, unsuitability, fraud, misrepresentation, or negligence), violation of the 1933 Act, violations of any other applicable securities laws (both federal and state for both primary and secondary liability), breach of contract, misrepresentation, conversion, vicarious/control person liability, aiding and abetting liability, professional negligence, breach of fiduciary duty, negligence, compensatory damage claims, punitive damage claims, attorneys fees claims, and all claims related thereto and thereafter, and any other claims arising from the sale, purchase, or solicitation of Sunwest investments, or the common core of operative facts addressed in the Sunwest Proceedings.

II. RELIEF REQUESTED

The Receiver asks the Court to enter a Settlement Order that will approve the Settlement and the form of Settlement Agreement and enter a Claims Bar Order. Specifically, the Receiver respectfully requests that the Court:

- (1) Find and conclude that adequate notice of this Settlement Approval Motion and due process was afforded to all interested parties;
- (2) Find and conclude that the Settlement and the Settlement Agreement are fair, reasonable and adequate;
- (3) Approve the Settlement and the Settlement Agreement and authorize the Receiver to perform the Settlement;
- (4) Order that, except as otherwise provided in the Settlement Agreement or as otherwise provided in the proposed Settlement Approval Order, claims by third parties against the Settling Brokers are barred;
- (5) Retain jurisdiction over the matter; and,
- (6) Determine that the Settlement Order is a final decision under Rule 54(b) of the Federal Rules of Civil Procedure.

III. EVIDENCE RELIED UPON

The Motion relies on the following evidence in support:

1. The Settlement Agreement, which is attached hereto as Exhibit 1 and the supporting exhibits thereto;
2. The Declaration of Michael A. Grassmueck in support of the Motion; and,
3. The records and files in the SEC Action.

IV. SUPPORT FOR THE MOTION

The Receiver believes that the Settlement and Settlement Agreement are in the best interests of the investors and creditors of the Receivership Entities. The factors that led to this conclusion by the Receiver include: (1) The time and risks associated with pursuing claims against GMS and collecting a judgment (such as appeals and bankruptcy filings) are significant; (2) the additional cost to the Receivership Estate of pursuing claims against GMS would be substantial; and (3) obtaining releases of claims and interests reduces the exposure of the Receivership Estate.

In sum, the Receiver has balanced the risks of recovery and costs and concluded that the Settlement is in the best interests of the investors and creditors.

V. ARGUMENT

A. The Settlement Should Be Approved Because It Is In The Best Interests of the Investors and Creditors.

In considering whether to approve a settlement or compromise in an equity receivership, a court generally should look for guidance in FRCP 16, Federal Rule of Bankruptcy Procedure 9019, and Bankruptcy Code § 105.

Courts recognize that equity receivers are to administer an estate as nearly as possible in accordance with the practice for the administration of estates in bankruptcy. *See C.F.T.C. v. Topworth International*, 205 F.3d 1107 (9th Cir. 2000); *In re Mumford, Inc.* 97 F.3d 449, 452, 455 (11th Cir. 1996). Court approval of a proposed compromise negotiated by a bankruptcy trustee "is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interests

of the estate nor fair and equitable for the creditors." *In re MGS Marketing*, 111 BR 264, 266-267 (9th Cir. BAP 1990).

The Ninth Circuit has articulated four factors for courts to consider in approving a compromise of litigation brought by a bankruptcy trustee:

1. Probability of success in litigation;
2. The difficulties, if any, to be encountered in the matter of collection;
3. The complexity of the litigation and the expense, inconvenience, and delay necessarily attending; and
4. The paramount interest of creditors and a proper deference to their reasonable views.

In re Woodson, 839 Fed. 2d 610, 620 (9th Cir. 1988).

The Settlement here satisfies those factors, and is fair and equitable to the claimants and investors of the Receivership Entities.

First, GMS continues to deny and dispute the Receiver's claims in the GMS Case, and to assert the validity of the claims GMS filed in the Receivership. The Receiver has objected to the claims filed by GMS in the Receivership, and continues to assert the claims in the GMS Case. Neither side can be certain of a particular outcome.

Second, absent the Settlement, difficulties are likely to be encountered in collecting judgments that might be obtained by the Receiver on claims against GMS. Collection of a judgment against GMS is problematic and could involve an extended process yielding uncertain results. For example, the collection of a substantial judgment could be delayed or even defeated by appeals and bankruptcy filings. The settlement provides a significant actual recovery. The value to the Receivership estate in the certainty of having funds paid as provided in the Settlement Agreement rather than after years of litigation is a positive factor which supports the settlement.

Third, had the claims not been settled, the cost to prosecute claims in the GMS case and address the GMS claims in the Receivership would be substantial. The matters at issue cover a significant period of time and multiple entities and transactions. The

litigation would consume significant judicial resources, in both this Court and the state courts, and the resources of the parties.

Fourth, the paramount interest of investors and creditors is best served by the Settlement, which provides a significant recovery and reduces the expense and exposure of the Receivership Estate on claims.

B. A Federal Court Has Authority to Approve The Settlement And Bar Third-Party Claims.

Federal courts have a strong interest in facilitating settlement before trial. FRCP 16. "Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible." Fed. R. Civ. P. 16(c), Advisory Committee Notes. Further, a District Court supervising an equity receivership has "extremely broad" inherent equity power "to fashion effective relief." *S.E.C. v. Hardy*, 803 F. 2d 1034, 1037 (9th Cir. 1986); *S.E.C. v. Wenke*, 622 F. 2d 1363, 1369 (9th Cir. 1980). This equity power is at least as broad as the power of a bankruptcy court to enter an appropriate bar order. *Munford*, 97 F. 3d at 455 (relying on Section 105(a) of the Bankruptcy Code and Rule 16 to affirm bankruptcy court's entry of a bar order); *Fleet National Bank v. H&D Entertainment, Inc.*, 926 F. Supp. 226, 240-42 & n. 56 (D. Mass. 1996) ("What is permitted under the Bankruptcy Code, generally is, therefore, a fortiori, permissible under the receivership law.").

As noted above, one significant obstacle to settlement has been the concern of GMS that it may later be faced with third-party claims for indemnity, contribution, or other relief based upon the same facts and conduct that support the Receiver's claims and Third Party Claims. Unless a global settlement which resolves all potential claims can be reached, a settling party may not be able to reduce its financial exposure by entering into a particular individual settlement and, therefore, may have little incentive to do so. While such financial exposure theoretically can be terminated by a full settlement between all potential plaintiffs and a defendant, as a practical matter a comprehensive settlement

EXHIBIT 1

(SETTLEMENT AGREEMENT)

SETTLEMENT AGREEMENT

This settlement agreement (this "Agreement") is made as of April 7, 2011, by and between Michael A. Grassmueck (the "Receiver"), in his capacity as Receiver for the Receivership Entities, and Grove, Mueller & Swank, P.C. ("GMS").

RECITALS

A. "Debtor," "Receivership Entities," "HFG Parties," and "Sunwest Entity" have the meaning set forth in the Receiver's, CRO's, and Debtor's Second Amended Joint Plan of Reorganization (May 27, 2010), docket number 1272, filed on May 27, 2010, in the bankruptcy case entitled *In re Stayton SW Assisted Living, L.L.C.*, Case No. 09-cv-6082-HO (the "Bankruptcy Case"), pending before the Honorable Michael J. Hogan in the United States District Court for the District of Oregon (the "Court").

B. "Sunwest Proceedings" refers to the Bankruptcy Case and *SEC v. Sunwest Management, Inc.*, Case No. 09-cv-6056-HO (collectively the "SEC Case").

C. The Receiver has filed claims against GMS on behalf of the Receivership Entities, in the case entitled *Michael A. Grassmueck v. Grove, Mueller & Swank, P.C.*, Case No. 09-CV-0650-HO (the "Filed GMS Case"). The Receiver has also asserted unfiled claims against GMS on behalf of the Receivership Entities and Sunwest investors. In this regard, the Receiver has received assignments of claims, asserted or unasserted, against GMS from Sunwest investors, creditors, and claimants (the "Third Party Claims"), pursuant to the Plan of Distribution approved on October 2, 2009, in the SEC Case; the Receiver's, CRO's and Debtor's Second Amended Joint Plan of Reorganization (May 27, 2010), filed in the Bankruptcy Case; and the Order re Assignment of All Sunwest Investors' and Claimants' Rights and Claims Against certain Third Parties to Receiver dated April 7, 2011. (These claims are referred to collectively as the "GMS Claims".) This Agreement shall only be effective once all Sunwest investors, creditors, and claimants (as described in the Unopposed Motion for and Order on a Determination of Assignment of All Sunwest Investors' and Claimants' Rights and Claims Against certain Third Parties to Receiver) are deemed to have assigned their rights to the Receiver, and no collateral or appellate challenge to that order is pending, and the deadline for filing such challenges has passed.

D. In exchange for a full and complete release of the GMS Claims, as detailed below, GMS and its insurance carrier have agreed to pay the Receiver \$1,350,000 and to release any claims GMS may have against the Receivership Entities, with the exception of an administrative claim in the amount of \$228,381.26, which shall be approved by the Receivership Estate and paid in full satisfaction of claims GMS has filed in the Receivership, receipt of which is hereby acknowledged by GMS. (Additionally, the above-stated amount of the administrative claim does not preclude GMS from separately pursuing the 20% hold-back previously retained by the Receiver.) Both payments will be due 30 days after this Agreement is approved and the Claims Bar Order referred to herein is final and nonappealable.

E. Based on their investigation, counsel representing individual claimants, as well as the Receiver and his counsel, have concluded that the terms of this Agreement are fair, reasonable, and adequate as to all Sunwest entities, investors, creditors, and claimants, and in their best interests. The Receiver has agreed to the terms of this Agreement after considering: (1) the benefits that the Sunwest entities, investors, creditors, and claimants will receive from the settlement of the GMS Claims; (2) the attendant risks of litigation; (3) the difficulties, expense, and delays inherent in such litigation; (4) the belief that the Agreement is fair, reasonable, and adequate, and in the best interests of the Sunwest entities, investors, creditors, and claimants; and (5) the desirability of permitting the Agreement to be consummated as set forth herein.

F. The purpose of this Agreement is to settle and resolve all GMS Claims and all claims that have been or could be asserted against GMS involving the common core of operative facts addressed in the SEC Case and including any claims that any entities affiliated with or related to the Receiver, Sunwest Entities, Receivership Entities and HFG Parties may have against GMS, including Third Party Claims. Where any claim or allegation asserted against GMS involves allegations of wrongdoing by GMS, GMS expressly deny that there is any merit to such claims and expressly deny liability. This Agreement will not be deemed to constitute an admission of liability or of the validity of any claim, or of the truth of any allegation. In exchange for the mutual promises set forth herein, the parties hereby settle the GMS Claims on the terms set forth below.

AGREEMENT

1. Agreement Subject to Court Approval. This Agreement is subject to and contingent upon approval by the Court and shall not be effective until entry of the order approving this Agreement. The Receiver shall use best efforts to obtain Court approval as soon as possible, and shall file a motion to approve this Agreement no later than August 18, 2011.

2. Final Claims Bar Order. The Receiver, on behalf of himself, the CRO, the Sunwest Entities, the Receivership Entities, the HFG Parties, any entities related or affiliated to the Sunwest Entities or Receivership and all investors, creditors, and claimants of the Sunwest Entities and Receivership Entities, will seek entry of a final claims bar order in the SEC Case (the "Claims Bar Order"). The Claims Bar Order sought shall prohibit any person from asserting claims arising from or relating to the common core of operative facts addressed in the SEC Case, or arising from or relating to any work performed by GMS for any of the Sunwest Entities, at any time in the future in any forum against GMS or any of its past, present and future partners, owners, members, managers, directors, officers, control persons, employees, registered representatives, agents, successors, assigns (if any), attorneys, insurers, heirs, and estates ("Barred Claims"). The Receiver will provide the best notice practicable of the Assignment Order and the proceedings to approve and implement this Agreement (the "Notice"). The Notice will be given to the following persons or entities: (a) any person who has submitted proof of a claim against Sunwest in the Receivership proceedings; (b) all persons identified in Exhibit A to this Agreement as non-settling Sunwest investors; (c) all of the parties in Sunwest Proceedings through the electronic mail notice list; (d) any person against whom the Receiver has filed a claim in any of the Sunwest Proceedings; (e) all parties represented by any attorney who signs this Agreement; and, (f) to the extent not included above, to any person or entity who was an investor of a Sunwest Entity or the HFG Parties, individually or collectively, as of March 3, 2009.

a. Claims Bar Order Applies to All People Who Had Notice of the Order. Specifically, the Claims Bar Order will be binding on the Receiver; the CRO; the Debtor; all Sunwest investors, creditors, and claimants, known and unknown; all parties in any pending federal or state court litigation involving Sunwest or GMS; all parties in any arbitrations involving Sunwest investments; the Receivership Entities; Sunwest Entities; the HFG Parties; all other professionals who provided services to the Receivership Entities, Sunwest Entities, and the HFG Parties; all persons or entities who receive the Notice; and any other interested parties who may have Sunwest-related claims.

b. Scope of Claims Bar. The Claims Bar Order shall apply to all claims against GMS for damages or other remedies arising from or related to their conduct related to the activities of Sunwest Entities, including Sunwest Management, Inc., and their principals, including claims arising from the sale, purchase, or solicitation of Sunwest investments and all claims for contribution or indemnity made by any person or entity arising from the same or related common core of operative facts addressed in the SEC Case or the Barred Claims. These

claims include, but are not limited to, claims on guarantees, claims made under Section 10 of the 1934 Act and Rule 10b-5 (including, but not limited to, any claims for malpractice, negligence, breach of fiduciary duty, unsuitability, fraud, misrepresentation, or negligence), violation of the 1933 Act, violations of any other applicable securities laws (both federal and state for both primary and secondary liability), breach of contract, misrepresentation, conversion, vicarious/control person liability, aiding and abetting liability, professional negligence, breach of fiduciary duty, negligence, compensatory damage claims, punitive damage claims, attorneys fees claims, and all claims related thereto and thereafter, and any other claims arising from the sale, purchase, or solicitation of Sunwest investments, or the common core of operative facts addressed in the Sunwest Proceedings.

c. Express Beneficiaries. This Claims Bar Order shall inure to the benefit of GMS and its past, present and future partners, owners, members, managers, directors, officers, control persons, employees, registered representatives, agents, successors, assigns, attorneys, insurers, heirs, and estates.

3. Releases.

a. Receiver's Release of GMS. Upon GMS's performance under this Agreement and payment of \$1,350,000, the CRO and the Receiver, on their own behalf in their capacities as CRO and Receiver, and on behalf of the Debtor, Receivership Entities, Sunwest Entities, and Sunwest investors and claimants, and any and all of their agents, advisors, employees, successors, personal representatives, and assigns (if any), and each of them (collectively, the "Sunwest Releasing Parties"), hereby release, acquit, and forever discharge GMS, and each of its past, present and future partners, owners, members, managers, directors, officers, control persons, employees, registered representatives, agents, successors, assigns (if any), attorneys, insurers, heirs, and estates, and each of them (collectively the "GMS Released Parties") from all of the Barred Claims and from any and all claims, liabilities, demands, actions, suits, causes of action of every kind and nature, demands for damage, expenses, attorney fees, and compensation of every kind and nature whatsoever, that the Sunwest Releasing Parties had, currently have, or may have in the future, whether arising in contract or tort, including without limitation any relating to fraud, including without limitation fraud in the inducement, whether known or unknown, contingent or matured, foreseen or unforeseen, asserted or unasserted, including, but not limited to, all claims for compensatory, general, special, consequential, incidental, and punitive damages, attorney fees, and equitable relief, except as set forth in this Agreement.

b. GMS's Release of Receiver, CRO, Debtor, Receivership Entities, and Sunwest Entities. Upon the Receiver's performance under this Agreement and payment of an administrative claim in the amount of \$228,381.26, receipt of which is hereby acknowledged by GMS, GMS, on behalf of itself and any and all of its principals, owners, members, partners, agents, advisors, employees, successors, and assigns (if any), and each of them (collectively, the "GMS Releasing Parties"), hereby release, acquit, and forever discharge the Receiver, CRO, Debtor, Receivership Entities, Sunwest Entities, and Sunwest investors and claimants, any and all of their agents, advisors, employees, successors, personal representatives, and assigns (if any), and each of them, from any and all claims, liabilities, demands, actions, suits, causes of action of every kind and nature, demands for damage, expenses, attorney fees, and compensation of every kind and nature whatsoever, that GMS Releasing Parties had, currently have, or may have in the future, whether arising in contract or tort, including without limitation any relating to fraud, including without limitation fraud in the inducement, whether known or unknown, contingent or matured, foreseen or unforeseen, asserted or unasserted, including, but not limited to, all claims for compensatory, general, special, consequential, incidental, and punitive damages, attorney fees, and equitable relief, except as set forth in this Agreement and including any claims filed in the Receivership. However, the above-stated amount of the administrative claim does not

preclude GMS from separately pursuing the 20% hold-back previously retained by the Receiver.

c. To the extent permitted by law, all parties who have released Claims under this Agreement are deemed to have expressly waived, released, and forever discharged any and all defenses, provisions, rights and benefits that may be available under:

(1) Section 1542 of the California Civil Code, which provides:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

and/or

(2) Any statute, law, or the common law of any jurisdiction which is similar, comparable or equivalent to Section 1542 of the California Civil Code.

d. Nothing in the above releases and covenants will be construed to release Claims that the Receiver and the Sunwest investors, creditors, and claimants may have against anyone other than the GMS Released Parties, including any other person or entity not expressly named or referred to herein.

e. And, except as provided in the following sentence, GMS and its insurer agree not to initiate a claim for contribution or indemnification against any person or entity arising out of, or related to, the Barred Claims. In the event any person or entity asserts a claim for contribution against GMS, then GMS party shall be entitled to pursue counter-claims against that person or entity under any legal theory that may be available to it, including contribution and indemnity. As a condition of any settlement with any other person or entity, the Receiver, investor claimants, and Sunwest shall require that such settling person or entity release or promise not to pursue, or promise not to pursue, all claims for contribution and indemnification against persons who have settled with the Receiver.

4. Payment of Insurance Settlement Proceeds. Thirty (30) days after approval of this Agreement and after the Claims Bar Order has become final and nonappealable, GMS shall pay to the Receiver \$1,350,000.

5. Dismissal of Filed GMS Case. Upon mutual execution of this Agreement, the Receiver shall immediately take the appropriate steps to obtain a voluntarily dismissal of the Filed GMS Case with prejudice, and without payment of fees or costs by either party.

6. Attorney Fees and Costs. Each party shall bear its own attorney fees and costs in connection with this Agreement.

7. Complete Agreement. This Agreement sets forth all (and is intended by the parties to be an integration of all) of the representations, promises, agreements, and understandings between the parties hereto with respect to settlement of the claims between them, and there are no representations, promises, agreements, or understandings, oral or written,

express or implied, between the parties other than as set forth in this Agreement.

8. Good Faith and Cooperation. The parties intend to consummate this Agreement and agree to cooperate reasonably to the extent necessary to effectuate and implement all terms and conditions of this Agreement.

9. Exclusive Jurisdiction. The parties agree that the Court shall have exclusive jurisdiction over and shall be the exclusive venue for any action to interpret or enforce this Agreement.

10. Governing Law and Interpretation. This Agreement will be construed and interpreted in accordance with the laws of the State of Oregon. This Agreement is the product of negotiations between the parties. Each party to this Agreement is represented and advised by counsel, or had the opportunity to be represented and advised by counsel, in regard to the negotiation, drafting, and execution hereof. As such, the language of this Agreement shall be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.

11. Capacity. Each party represents that this Agreement is freely, voluntarily, and validly executed. Each party is relying solely upon his or her own judgment and the judgment of each party's own counsel in making this Agreement and has not been influenced by any representations or statements made by any other person. Each party has the legal capacity and authority to enter into this Agreement.

12. Counterparts. This Agreement may be executed in one or more counterparts and shall be deemed to have been executed and delivered when transmitted by email or fax to the other party. All executed counterparts and each of them shall be deemed to be one and the same instrument. The parties agree that a printed reproduction from an electronic record of this Agreement shall be equivalent to, and may be substituted for, the original of this Agreement.

RECEIVER FOR THE RECEIVERSHIP
ENTITIES

GROVE, MUELLER & SWANK, P.C.

Michael A. Grassmueck

By: _____
Its: _____

[name of GMS' insurance carrier]

By: _____
Its: _____

APPROVED AS TO FORM:

Michael J. Esler, Esler Stephens & Buckley,
LLP
Attorneys for Certain Claimants

Lindsay Hart Neil & Weigler. LLP
Attorneys for GMS

John Spencer Stewart, Stewart Sokol & Gray
Attorneys for Receiver

EXHIBIT A

None known.