

11:21 AM 08/10/2011

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON (Eugene)

**JOHN E. and MARY JANE SEMASKO,** )  
husband and wife and individually and as )  
trustees of the Semasko Living Trust Dated 1- )  
31-95; **SEMASKO'S ENGLEWOOD )**  
**HEIGHTS, LLC; SEMASKO'S CHESTNUT )**  
**HILL, LLC; and SEMASKO'S CARNEGIE )**  
**VILLAGE, LLC** all Oregon limited liability )  
companies, in their own behalf and in behalf of )  
all similarly situated investors, )

Case No. 10-cv-06335-HO

**ORDER PRELIMINARILY  
APPROVING CLASS ACTION  
SETTLEMENT AND SETTING  
PROCEDURES**

Plaintiffs,

v.

**THOMPSON & KNIGHT LLP,** a Texas )  
limited liability partnership; and **GEFFEN )**  
**MESHER & COMPANY, P.C.,** an Oregon )  
professional corporation, )

Defendants.

**SECURITIES AND EXCHANGE )**  
**COMMISSION,** )

Case No. 6:09-cv-06056

Plaintiff,

v.

**SUNWEST MANAGEMENT, INC., )**  
**CANYON CREEK DEVELOPMENTS, )**  
**CANYON CREEK FINANCIAL, JON )**  
**HARDER,** )

Defendants,

and

**DARRYL FISHER, J. WALLACE )**  
**GUTZLER, KRISTIN HARDER, ENCORE )**  
**INDEMNITY, SENENET LEASING )**  
**COPANY, FUSE ADVERTISEMENT, INC., )**  
**DKA CONSTRUCTION, INC. )**  
**HAMSTREET & ASSOCIATES, and )**  
**CLYDE HAMSTREET,** )

Relief Defendants.

WHEREAS, Plaintiffs and defendant Geffen Mesher & Company, P.C. (“Geffen”) in the above-captioned litigation (the “Class Action”) have entered into a settlement agreement (the “Agreement”), after extensive, arms-length settlement negotiations, including mediation with the Hon. Judge Velure (ret.);

WHEREAS, the Parties have reached a settlement, pursuant to which plaintiffs have filed an Unopposed Motion for an order preliminarily approving the Settlement of this Action upon the terms and conditions set forth in the Agreement, pursuant to Federal Rule of Civil Procedure 23(e); and

WHEREAS, the Court has reviewed and considered the Agreement and accompanying Exhibits, and the Parties’ application for such an order and found good cause for the same;

NOW, THEREFORE, IT IS HEREBY ORDERED:

**A. Settlement Class**

1. The Court preliminarily finds that the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) and (b)(3) have been met. Pursuant to Federal Rule of Civil Procedure 23(c)(1) and for purposes of settlement only, the Court hereby conditionally certifies the Class Action as a class action on behalf of the following Settlement Class:

All individuals and entities that made investments in the Sunwest Enterprise<sup>1</sup> on or after January 1, 2002. The securities were in the form of investor, noncommercial notes, tenancy-in-common (“TIC”) interests, membership interests, preferred membership interests, or limited partnership interests in one or more properties managed by or affiliated with Sunwest Management, Inc.

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<sup>1</sup> The “Sunwest Enterprise” included Sunwest Management, Inc., Canyon Creek Development, Inc., Canyon Creek Financial, LLC, and numerous other affiliated, single-purpose entities that were created by entities owned or controlled by Sunwest Management, Inc., Jon M. Harder, and/or Darryl E. Fisher for the purpose of owning and operating senior living facilities and other real estate developments.

2. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court hereby appoints the named Plaintiffs in the Complaint filed in the Class Action as Class Representatives of the Settlement Class.

3. Having considered the factors set forth in Rule 23(g)(1) of the Federal Rules of Civil Procedure, and having found Class Counsel to be adequate, the Court hereby appoints Esler, Stephens & Buckley LLP as Class Counsel to represent the Settlement Class.

4. The Court, having conducted a preliminary assessment of the fairness, reasonableness, and adequacy of the Agreement, hereby finds that the settlement falls within the range of reasonableness meriting further proceedings and possible final approval. The Court hereby preliminarily approves the Agreement, and the terms and conditions of the settlement set forth therein, subject to further consideration in the Fairness Hearing described below.

**B. Fairness Hearing**

5. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court will hold a Fairness Hearing not less than thirty (30) days from the date of this Order. The Court will hold the Fairness Hearing on September 20, 2011 at 1:30 p.m., for the purposes of:

(a) Finally determining whether the Settlement Class meets all applicable requirements of Federal Rule of Civil Procedure 23 and, thus, whether the Action should be certified as a class action for purposes of effectuating the Settlement;

(b) Determining whether the Settlement on the terms and conditions set forth in the Agreement is fair, just, reasonable and adequate to the Settlement Class and should be approved by the Court;

(c) Considering whether the Court should enter an Order Approving Class Action Settlement and Judgment; and

(d) Ruling upon such other matters as the Court may deem necessary and appropriate.

6. The Parties may modify the Agreement prior to the Fairness Hearing, so long as such modifications do not materially change the terms of the Settlement provided thereunder. The Court may approve the Agreement with such modifications as may be agreed to by the Parties, if appropriate, without further notice to the Settlement Class.

7. Any Settlement Class Member who desires to object to the Settlement must both file with the Clerk of this Court and serve on the Parties' counsel by hand or first-class mail a notice of the objection(s) and the grounds for such objections, together with all papers that the Settlement Class Member desires to submit to the Court at the Fairness Hearing. The Court will consider such objection(s) and papers only if such papers are received on or before seven (7) business days prior to the Fairness Hearing (the "Opt-Out and Objection Date"), which shall be set forth in the Class Notices, by the Clerk of the Court and by each of the Parties' Counsel. Such papers must be sent to each of the following persons:

Clerk of Court  
Wayne Morse United States Courthouse  
405 East 8th Avenue, Suite 2100  
Eugene, Oregon 97401

Gary V. Abbott  
Abbott Law Group  
111 Southwest Fifth Avenue, Suite 2650  
Portland, Oregon 97204  
Attorney for Geffen Mesher

John Spencer Stewart  
Stewart Sokol & Gray LLC  
2300 Southwest First Avenue, Suite 200  
Portland, Oregon 97201  
Attorney for Receiver

Michael J. Esler  
Esler, Stephens & Buckley LLP  
888 Southwest Fifth Avenue, Suite 700  
Portland, Oregon 97204-2021  
Attorney for Plaintiffs

8. All objections must include a reference to *Semasko etal v. Thompson & Knight LLP and Geffen Mesher & Company, P.C.*, the name, address, and telephone number of the person submitting the objection, the reasons for objecting to the Settlement, the submitting person's signature. Each person submitting an objection must state whether he or she (or his or her representative) intends to appear at the Fairness Hearing.

9. Any response to timely, completed objections must be filed with the Court and served no later than seven (7) business days prior to the Fairness Hearing.

10. Attendance at the hearing is not necessary; however, any person wishing to be heard orally with respect to approval of the Settlement is required to provide written notice of their intention to appear at the Fairness Hearing no later than the deadline set forth in the Class Notices. Persons who do not intend to oppose the Settlement or attorneys' fees and expenses need not take any action to indicate their approval. A person's failure to submit a written objection in accordance with the Objection Deadline and the procedure set forth in the Class Notices waives any right the person may have to object to the Settlement or to appeal or seek other review of the Order Approving Class Action Settlement and Judgment.

11. Any Member of the Settlement Class may enter an appearance in the Action at his or her own expense, individually or through counsel. All Settlement Class Members who do not enter an appearance will be represented by Class Counsel.

12. All papers in support of the Settlement and any application for an award of attorneys' fees and expenses and/or incentive awards must be filed with the Court and served at least four (7) business days prior to the Fairness Hearing.

**C. The Court Approves the Form and Method of Class Notice**

13. The Court approves, as to form and content, the proposed Class Notice, which is Exhibit B to the Memorandum in support of the Unopposed Motion for Preliminary Approval of Class Action Settlement ("Unopposed Motion").

14. The Court finds that the mailing and distribution of the Class Notice and publication of the Summary Notice substantially in the manner and form set forth in the Unopposed Motion, meets the requirements of Federal Rule of Civil Procedure 23 and due

process, is the best notice practicable under the circumstances, and constitutes due and sufficient notice to all persons entitled thereto.

15. The Court approves the designation of Michael Grassmueck to serve as the Court-appointed Claims Administrator for the Settlement. The Claims Administrator shall disseminate the Class Notice, supervise and carry out the processing of Claims and other administrative functions, and respond to Settlement Class Members inquiries, as set forth in the Settlement and this Order, under the direction and supervision of the Court.

(a) The Court directs the Claims Administrator to establish a Settlement website, making available copies of this Order, the Class Notice, the Agreement and all other Exhibits to the Unopposed Motion, a toll-free hotline, and such other information as may be of assistance to Settlement Class Members or required under the Settlement.

(b) The Claims Administrator is ordered to provide Notice no later than ten (10) business days after the date of this Order (the "Notice Date").

(c) The claims Administrator shall file with the Court proof of compliance with the Notice Program no later than seven (7) business days prior to the Fairness Hearing.

16. The costs to provide notice, including processing of Claims, creating and maintaining the website, and all other reasonable and appropriate Claims Administrator expenses, shall be paid from the Litigation Trust as defined in the Agreement.

17. Recipients of the Class Notice that hold securities from the Sunwest Enterprise for the beneficial interests of another person or organization other than themselves, shall, within ten (10) days after receipt of the Class Notice, either (1) send a copy of the Class Notice by first class mail to all such persons or organizations, or (2) provide a list of the names and addresses of such persons or entities to the Claims Administrator, as discussed further in the Class Notice.

**D. Procedure for Settlement Class Members to Participate in the Settlement**

18. All Settlement Class Members shall be bound by all determinations and judgments in the Action concerning the Settlement, whether favorable or unfavorable to the Settlement Class.

19. The Claims Administrator shall have the authority to determine Claim eligibility and calculate payment amount in accordance with the terms and conditions of the Settlement and the Amended Distribution Plan. The Claims Administrator is directed to use as a basis for these determinations the claim determinations made in connection with earlier class action settlements in the SEC Case and related litigation. Any dispute related to such determinations shall be resolved by the Court after a good-faith effort by the Parties to resolve such disputes informally. The Claims Administrator shall have the right to contact Settlement Class Members for the purpose of validating information relating to Claims. The Claims Administrator shall maintain records of all Claims and the disposition thereof until ninety (90) days after the date on which all Claims have been finally resolved, and such records will be made available, upon request to Class Counsel and Geffen's counsel.

20. Each person who does not exclude himself or herself from the Settlement shall be deemed to have submitted to the jurisdiction of the Court and shall be bound by all of the terms of the Settlement, including the terms of the Order Approving Class Action Settlement and Judgment and the releases provided for in the Agreement.

21. All proceedings with respect to the administration, processing, and determination of Claims and the determination of all controversies relating thereto, including disputed questions of law and fact with respect to the validity of Claims, shall be subject to the jurisdiction of the Court.

**E. Procedure for Requesting Exclusion from the Settlement Class**

22. Any person filing within the definition of the Settlement Class may, upon his or her request, be excluded from the Settlement Class. Any such person must submit a completed Request for Exclusion, signed by the person, to the Claims Administrator post-marked on the date no later than the Opt-out Deadline (i.e., seven (7) business days prior to the Fairness Hearing), as set forth in the Class Notice. Requests for Exclusion purportedly filed on behalf of groups of persons are prohibited and will be deemed to be void.

23. Any Settlement Class Member who does not send a completed, signed Request for Exclusion to the Claims Administrator post-marked on or before the Opt-Out Deadline will be deemed to be a Member of the Settlement Class for all purposes and will be bound by all further orders of the Court in this Action and by the terms of the Settlement, if finally approved by the Court.

24. The Claims Administrator shall provide Class Counsel and counsel for Geffen with a list of all timely Requests for Exclusion within three (3) business days after the Opt-Out Deadline.

**F. Miscellaneous Provisions**

25. Pending final determination of whether the Settlement should be approved, all discovery and all proceedings in the Class Action unrelated to the approval of the Settlement are stayed.

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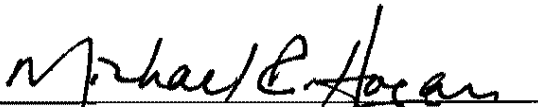
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26. The Court retains exclusive jurisdiction to consider all further applications arising out of or connected with the proposed Settlement.

DATED this 10<sup>th</sup> day of August, 2011.

IT IS SO ORDERED:

  
Hon. Michael R. Hogan  
United States District Judge

SUBMITTED BY:  
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