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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 JON M.
HARDER,

Defendants,

DARRYL E. FISHER, J. WALLACE
GUTZLER, KRISTIN HARDER, ENCORE
INDEMNITY MANAGEMENT, LLC,
SENET LEASING COMPANY, FUSE
ADVERTISING, INC. KDA CONSTRUCTION,
INC., CLYDE HAMSTREET, and CLYDE A .
HAMSTREET & ASSOCIATES, LLC,

Relief Defendants.

In Re: STAYTON SW ASSISTED LIVING,
L.L.C. (Constituting the Sunwest Unitary
Enterprise as determined by the Order Entered
on October 2, 2009 in U.S. District Court
Case No. 09-cv-6056-HO),

Debtor

Case No. 09-CV-6056-HO

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER
ESTABLISHING ALLOWED
CLAIMS AMOUNTS**

USDC Case No. 09-cv-6082-HO

Bankruptcy Court Case No. 08-36637-tmb11
(Reference Withdrawn)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this Motion, the Receiver seeks to establish an allowed "Tranche A" amount for submitted Claims, pursuant to the Distribution Plan. The Receiver has conducted a claims review process as contemplated by the Distribution Plan and the orders of the Court, as set forth herein and the supporting declaration of the Receiver. This Motion seeks to establish allowed Tranche A amounts for Claims, including those where the Receiver and Claimant have mutually agreed to an allowed claim amount, whether through the consent process, mediation or otherwise and those where agreement has not been reached for which the Receiver seeks an order establishing the Receiver's proposed treatment as the allowed amount. (As to unresolved claims which a Claimant elected not to mediate, the Receiver's proposed treatment should be deemed consented to as the allowed amount.)

The Receiver's goal is the efficient and equitable administration of claims in this case in accordance with the Distribution Plan. The Receiver respectfully requests that the Court enter an order establishing an allowed Tranche A amount for the Claims in the amounts set forth in Exhibit "1", and disallowing the remainder of the Claims in their entirety for purposes of the Tranche A determinations.

II. STATEMENT OF FACTS

A. The SEC Action and Appointment of the Receiver.

On March 2, 2009, the Securities and Exchange Commission (the "SEC") filed its Complaint in this action ("SEC Action") naming Sunwest Management, Inc. ("SMI"), Canyon Creek Development, Inc., Canyon Creek Financial, LLC and Jon M. Harder as defendants and Darryl E. Fisher, J. Wallace Gutzler, Kristin Harder, Encore Indemnity Management, LLC, Senenet Leasing Company, Fuse Advertising, Inc., KDA Construction, Inc., Clyde Hamstreet, and Clyde A. Hamstreet & Associates, LLC as relief defendants. The SEC's Complaint alleged violations of federal securities laws. In summary, the Complaint alleged securities fraud in the

offering of various investments in Receivership Entities and that the parties in control of the Sunwest enterprise commingled funds. In conjunction with the SEC Action, the SEC requested injunctive relief and the appointment of a receiver.

The Court entered its Order Granting Preliminary Injunction and Appointing Receiver on March 10, 2009, appointing Michael Grassmueck as receiver over SMI and other entities identified in Exhibit A to that order. The Court subsequently appointed Michael Grassmueck as receiver over additional entities pursuant to additional orders entered by the Court on May 27, 2009 and August 28, 2009, as set forth on Exhibits A-2 and A-3, respectively, to those orders. (Collectively, the "Receiver Orders.")

Pursuant to the Receiver Orders, the Receiver, among other things, investigated the financial condition of the Receivership Entities, the disposition of investor funds, and the extent of comingling of funds among the Defendants and Receivership Entities. The Receiver also worked with and advised the Management Committee and Chief Restructuring Officer ("CRO") for Sunwest, Clyde Hamstreet, concerning the various bankruptcy cases, the disposition of assets and a restructuring plan.

The Receiver also developed, in coordination with the CRO, a Distribution Plan for the distribution of assets and value to creditors and investors of the Sunwest Enterprise.

B. Approval of the Distribution Plan.

On August 25, 2009, the Receiver and the CRO jointly submitted their proposed Distribution Plan to the Court for approval. On September 23, 2009, the Court held a hearing on the Distribution Plan, among other matters. On October 2, 2009, the Court entered an order approving the Distribution Plan in the SEC Action. The Distribution Plan establishes how claims against the Receivership Entities are calculated for purposes of establishing "Allowed Claims;" how Allowed Claims are treated as to priority and source of Plan Distributions; and what the source of Plan Distributions will be and how they will be created. The approval of the Distribution Plan recognized a unitary enterprise. The Distribution Plan also contemplated the use of a Chapter 11 Reorganization Plan. Pursuant to the Court's order approving the Distribution

Plan, the Sunwest Unitary Enterprise constituted the Debtor in the bankruptcy case Stayton SW Assisted Living, LLC, U.S.D.C Case No. 09-CV6082-HO (the "Bankruptcy Case").

The Distribution Plan called for a Claims Process which would establish the required Proof of Claim form, procedures for claim submission, a Claims Bar Date, a method for determining Allowed Claims, and procedures for resolving objections to Claims.

C. The Receiver's Claims Procedures Motion.

On August 25, 2009, concurrently with the submission of the proposed Distribution Plan, the Receiver filed his "Motion for Order Approving Claims Procedures, Establishing Claims Bar Date, and Approving Other Related Relief." [SEC Docket No. 549] (The Receiver's Claims Procedures Motion). The Receiver's Claims Procedures Motion sought to establish a claims bar date and approval of the forms for the Proof of Claim, Notice of Election and Notice of Claims Bar Date.

The Receiver's Claims Procedures Motion also proposed a claim review and allowance process. A claims process was and is necessary in order to allow the Receiver to determine the maximum amount of claims that will be entitled to Plan Distributions of cash and/or securities. The Receiver's Claims Procedures Motion proposed having the Receiver compare the Proofs of Claim against Sunwest records and any other information previously received with respect to such Proofs of Claim.

The Receiver's Claims Procedure Motion also provided for the Receiver, following his review of submitted Proofs of Claim, to file a motion to establish an allowed Tranche A amount (MIMO portion) for allowed claims.

The Court held a hearing on the Receiver's Claims Procedures Motion on September 23, 2009 and took the matter under submission.

D. The Debtor's Motion For Coordinated Claims Procedures.

On October 6, 2009, the Debtor in the Bankruptcy Case, constituting the Sunwest Unitary Enterprise, filed its Motion to Establish Coordinated Claims and Noticing Procedures. [Bankruptcy Case Docket No. 364] The Debtor's Motion to Establish Coordinated Procedures

sought to allow the use of joint notice and joint proof of claim forms to be distributed to all creditors, investors and other parties in interest in the SEC Action and the Bankruptcy Case. Like the Receiver's Claims Procedure Motion, the Debtor's motion proposed mailed notice to investors and creditors and other interested parties including notice of the Distribution Plan, the approved Proof of Claim form and Notice of Election forms. The Debtor's motion also sought to establish a joint claims agent and noticing agent to receive, record and maintain copies of all proofs of claims and proofs of interest filed in the cases, to prepare and serve notices, and other claims-related technical matters.

E. **The Court's Claims Procedures Order.**

On November 3, 2009, the Court entered its "Order Granting Receiver's Motion for Order Approving Claims Procedures, Establishing Claims Bar Date and Approving Other Related Relief; and (2) Debtor in Possession's Motion to Establish Coordinated Claims and Noticing Procedures" (the "Claims Procedures Order"). [SEC Action Docket No. 941; Bankruptcy Case Docket No. 513.] The Claims Procedures Order granted the motions of the Receiver and the Debtor regarding the Claims Process. The Order approved the forms for the Proof of Claim, Notice of Election, and Notice of the (1) Court Approval of Distribution Plan for SunWest Enterprise and SEC Receivership case; (2) Chapter 11 Bankruptcy Case and (3) Claims Bar Date for SEC Receivership Case and Chapter 11 Case. The final Proof of Claim form The claim form was the result of mediation between the TIC, LLC and Management Committees and counsel for a number of investors. The claim form was created in order to minimize the information claimants would need to provide to the Receiver up front. Instead of requiring claimants to submit substantial amounts of information at the outset, the parties wanted the Receiver to use Sunwest Management records to audit claims.

The Claims Procedures Order also approved the "Claims Process" described in the claims procedures motions, including the use of Summary Proceedings for the determination of objections to Claims. (Claims Procedures Order, ¶ 7).

The Claims Procedures Order initially set a deadline to submit a Proof of Claim as January 15, 2010. (Claims Procedures Order, ¶ 2). The Claims Bar Date was subsequently extended to March 31, 2010 by orders of the Court. [Docket Nos. 1000 and 1007 in the SEC Action and 671 and 687 in the Bankruptcy Case]. The March 31 date was subsequently extended to April 30, 2010 by further order of the Court. [SEC Action Docket No. 1139; Bankruptcy Case Docket No. 1044].

F. **Notice to Investors and Creditors.**

Pursuant to the Debtor's Motion to Establish Coordinated Claims and Noticing Procedures, and the Claims Procedures Order, the parties engaged BMC Group as noticing agent. (Declaration of Michael Grassmueck, ¶ 10) ("Grassmueck Decl.") As set forth in the Affidavit of Service filed by BMC Group [Docket No. 962, filed November 19, 2009, and Docket No. 976], BMC Group served the interested parties in these matters as indicated on Exhibit A to the Affidavit of Service. Service commenced November 5, 2009 and was completed on November 9, 2009. The Affidavit of Service identifies and attaches the documents that were served. The documents include the Proof of Claim form, Notice of Election form, Notice of TIC Election Cancellation form, Debtor's Motion for Substantive Consolidation of Assets and Liabilities of Sunwest-related Entities, Notice of Meeting of Creditors, and Notice of (1) Court Approval of Distribution Plan for Sunwest Enterprises and SEC Receivership Case; (2) Chapter 11 Bankruptcy Case; and (3) Claims Bar Date for SEC Receivership Case and Chapter 11 Case.

In addition, the Claims Procedures Order, Proof of Claim form and Notice of Election form were made available on the Receiver's website. The Receiver also posted lists of facilities, sorted by facility name, state and entity name, to assist potential Claimants. The Distribution Plan and other important documents also remained available on the Receiver's website. The Proof of Claim and Election forms, among other documents, were also made available on the CRO's website. (Grassmueck Decl., ¶ 11).

Further, BMC Group maintained a website that included substantial information regarding the claims process in the Sunwest matter. The website included the Claims Procedures Order, the

Notice of Election form, the Proof of Claim form, list of entities, links to investor updates, important dates, "frequently asked questions", and searchable court dockets for both the SEC Action and the Bankruptcy Case, among other claims-related information. In addition to having the ability to obtain paper copies from the website, the BMC Group website allowed potential Claimants to submit a Proof of Claim electronically online through the website. (Grassmueck Decl., ¶ 12).

In order to assist investors and creditors and to facilitate efficient filing and processing of claims, the Receiver posted a "frequently asked questions" document relating to the claims form and claims process on his website, along with the Claims Procedures Order and related forms. Further, in February 2010, the Receiver made available a detailed explanation of the Proof of Claim form, with each portion of the Proof of Claim Form numbered and explained. In addition, on July 7, 2010, the Receiver hosted a "webinar" online to clarify the claims process and address common questions and concerns. The recording of the webinar, as well as a pdf file of the slides presented, were also made available on the Receiver's website. The parties also established a Sunwest claims hotline (a toll free number), and a dedicated email address for Sunwest claims. (Grassmueck Decl., ¶ 13).

G. Claims Intake

The Proof of Claim Forms and Election Forms provided for the Proof of Claim and Elections to be submitted to BMC Group at the addresses provided, or to submit them online. To be thorough and inclusive, the Receiver also obtained and considered Proofs of Claim and Elections sent to other addresses including the CRO, Debtors' counsel, the Receiver's office, and those claims filed directly with the Court in the Bankruptcy Case. Claims forms were submitted to BMC for compiling, scanning and quality control. The Receiver received the Proof of Claims forms from BMC in four batches from April 13 to May 24, 2010. (Grassmueck Decl., ¶ 14).

Each claim was assigned a number. When a Claimant amended their Claim information with BMC, a new and distinct claim number was assigned. Many Claimants filed multiple Proofs of Claims for the same loss, creating duplicate claims. If a Claimant checked multiple claim types

on one Proof of Claim form, the claim was "split" in order to evaluate each claim type separately, with each receiving a claim number. If a claimant filed one Proof of Claim for investments in multiple properties, the claim was also split in order to evaluate each investment separately. (Grassmueck Decl., ¶ 15).

H. **Claims Auditing.**

The Receiver spent significant time working with Sunwest and the CRO to obtain all payment and investment records, which were then used to audit claims. The Receiver's office also reviewed any documentation submitted with the Proof of Claim. (Grassmueck Decl., ¶ 16).

Once all Claims were initially audited for a particular Claimant, the Receiver sent the Claimant a letter that described the proposed treatment of their claim. These individual letters were sent out May 1 through June 30, 2010 as part of the standard operating procedure of the initial claims audit. In many cases, Claimants submitted additional documentation or explanation regarding Claims to which the Receiver was proposing an objection in whole or in part. The Receiver also engaged in telephone calls and other correspondence with Claimants to attempt to resolve claims issues and address discrepancies between the Claimants assertion of a Claim and the records of the Receivership Entities. Through this process, the Receiver's office was able to resolve a substantial number of the initially disputed claims. (Grassmueck Decl., ¶ 17).

Overall, after "splitting" certain claims to address Proof of Claim forms that included multiple claims or categories, the Receiver's office evaluated 11,821 numbered claims. (Grassmueck Decl., ¶ 18).

I. **Mediation Of Claims**

On September 24, 2010, the Court entered an Order in the SEC Action [Docket No. 1522] and in the Bankruptcy Case [Docket No. 1694] setting mediation for October 18, 19 and 20, 2010 with regard to all Claims that remained disputed or as of the date of the order were unliquidated and contingent (the "Mediation Order"). The Mediation Order required all parties with claims which were disputed or contested by the Receiver to notify the Receiver and the Court of their

intent to attend the mediation. The parties were directed to contact the Receiver to determine which day their claims would be mediated. (Mediation Order and Grassmueck Decl., ¶ 19).

Notice of the Mediation Order was provided to the Claimants. The Receiver sent a letter to Claimants, a true and correct copy of which is attached as Exhibit A to the Grassmueck Declaration. A copy of the letter and the Mediation Order were also posted on the Receiver's website for this case. The letter informed Claimants that if they disputed the Receiver's proposed treatment of their claims, that they needed to read the enclosed Mediation Order closely, and that the Mediation Order required Claimants that disagreed with the Receiver's proposed treatment to appear at the courthouse for mediation starting at 9:00 a.m. on October 18, 19 and 20, 2010. The letter, and the Mediation Order, also instructed Claimants that if they disputed a claim treatment, they must notify the Court and Receiver of their objection and to determine which day their claim would be mediated. (Grassmueck Decl., ¶ 20).

In September and October 2010, the Receiver's office undertook a further consent process. The Receiver attempted to contact all Claimants for the purposes of resolving any remaining disputes and obtaining the Claimants' written consent to the treatment of their claims. The Receiver obtained consent forms on over 5,221 claims. (Grassmueck Decl., ¶ 21).

In response to contacts made by Claimants directly to the Receiver or through notices of intent to appear at mediation filed with the Court, the Receiver created a schedule for the mediation of Claims on October 18 through 20. The Receiver, his staff and professionals then participated in those mediations pursuant to the Mediation Order. A number of additional previously disputed or contested Claims were resolved between the Receiver and Claimants. Certain other Claims, although mediated, were not resolved through the mediation process. (Grassmueck Decl., ¶ 22).

As a result, there are several categories of claims resolution. First, certain determination of Claims were agreed to at or before mediation. Second, for certain Claims for which the Receiver had previously proposed a certain allowed amount, the Claimants elected not to participate in mediation pursuant to the Mediation Order, and the Receiver's position is that such Claims should be set in the amount proposed by the Receiver. Third, certain Claims went through the mediation

process but were not resolved in that process, and the Receiver proposes allowing such Claims in the amounts previously proposed by the Receiver.

III. ARGUMENT

As set forth above, the Court has previously approved the Distribution Plan, which established parameters for claims treatment and methodology for allowing claims, and the claims process employed here. The Receiver has conducted the claims review process in accordance with the Distribution Plan, the approved Claims Process, and the Mediation Order, and participated in numerous mediations to address Claims.

The Receiver made significant efforts to assist potential Claimants in understanding the claims process, the Proof of Claim form, and the proposed treatment of their claims. The Receiver's goal was an efficient, transparent, and equitable administration of claims in this case in accordance with the Distribution Plan, and the Receiver believes those goals were met. (Grassmueck Decl., ¶¶ 5-8, 10-13).

The Claims Process and the Distribution Plan call for the Receiver to bring this Motion to establish an allowed "Tranche A" amount for submitted Claims.

A. The Proposed Allowed Amounts For Claims

The attached Exhibit 1 sets forth the proposed allowed "Tranche A" amount for submitted Claims. Exhibit 1 sets out the Claims in order by claim number. The Receiver has also submitted under seal for the Court a similar chart that includes the identity of the Claimant for each Claim. Each line entry includes the assigned claim number (each Claimant was informed of their claim number), the amount claimed by the Claimant, and the Receiver's proposed (or agreed, if applicable) allowed amount for the Claim. (Grassmueck Decl., ¶ 9). If a claim was not allowed in full or the treatment of the claim was otherwise adjusted, the claim entry on Exhibit 1 includes an explanation code that identifies the adjustment. These explanation codes are set out further below.

Exhibits 2-10 segregate the Claims in Exhibit 1 by consent status pursuant to the consent status exhibit key:

Category A indicates claims that were allowed in full. For reference, Exhibit 2 hereto contains the Category A claims as extracted from the full Claims list.

Category B identifies claims subject to a Lone Star settlement. For reference, Exhibit 3 hereto contains the Category B claims as extracted from the full Claims list.

Category B&C identifies claims subject to both categories B and C. For reference, Exhibit 4 hereto contains the Category B claims as extracted from the full Claims list.

Category C indicates claims that are subject to the LLC member settlement. For reference, Exhibit 5 hereto contains the Category C claims as extracted from the full Claims list.

Category D indicates claims that are subject to other elections under the Distribution Plan. For reference, Exhibit 6 hereto contains the Category D claims as extracted from the full Claims list.

Category E indicates claims where the Claimant has signed a consent form agreeing to the Receiver's determination of the Claim. For reference, Exhibit 7 hereto contains the Category E claims as extracted from the full Claims list.

Category F identifies Claimants that refused to consent but did not participate in mediation pursuant to the Mediation Order. For reference, Exhibit 8 hereto contains the Category F claims as extracted from the full Claims list.

Category G indicates claims that have been waived through other settlements or agreements. For reference, Exhibit 9 hereto contains the Category G claims as extracted from the full Claims list.

Category H identifies claims where the Receiver did not receive any response from the Claimant during the Receiver's efforts, under the Mediation Order, to contact all Claimants. The Receiver sent notice to these Claimants and attempted, where a

phone number was available, to reach them by telephone or, if available, by email, but received no response. These Claimants did not participate in mediation of their Claims pursuant to the Mediation Order. For reference, Exhibit 10 hereto contains the Category H claims as extracted from the full Claims list.

B. Claims Determination for Non-Agreed Claims

As to Claims on which no agreement was reached, either because the Claimant did not participate in mediation or because mediation did not resolve the Claim, the Receiver recommends establishing an allowed Tranche A amount for such Claims as determined under the Claims review process and set forth on set forth on Exhibit "1", including disallowing claims in whole or in part.

The Receiver has identified certain objections to Claims or has otherwise adjusted the Claimed Amount to reach the proposed Allowed Amount. Exhibit "1," and the applicable exhibits broken out by consent status, set forth an explanation code or codes, as applicable, identifying these objections or explanations for each adjusted Claim. The Receiver has provided a code key to identify those objections. The Receiver's objections or adjustments are explained below.

Objection No. 1: Claim Beyond Allowable MIMO Amount

Pursuant to the Distribution Plan, the Receiver's Claims Procedure Motion, and the Court's Claims Procedure Order, the purpose of this Omnibus Motion is to establish an allowed Tranche A amount, or MIMO portion, for Claims. MIMO, or "Money In/Money Out," is defined in the Distribution Plan (Distribution Plan, p. 10, Section IV):

Cash or any other material tangible value given or transferred to any of the Defendants, the HFG parties or the Receivership Entities for the purposes of investment, in the Sunwest Enterprise . . . ("Money-In") is reduced by all payments of principal, interest, rent, fees or other payments, distributions or transfers of funds, securities or other property or any other material tangible value paid, distributed or transferred out (for any reason) after January 1, 2006 arising from or related the Investors' investment in the Sunwest Enterprise" ("Money-Out"). The difference of the Money-in *less* the Money-out is the MIMO Allowed Claim.

For Investor Claims and Unsecured Creditor Claims, Tranche A is calculated as the MIMO Allowed Claim. All other amounts that a Claimant asserts that it is owed for any reason fall beyond the Tranche A amount. Such excluded amounts might include, unpaid rents, interest, fees, expenses, legal costs, penalties, lost opportunity costs or other "benefit of the bargain" type claims. Some portion of the disallowed amount may constitute a Tranche B claim, or may constitute some unallowed item under the Distribution Plan. The Receiver proposes to allow the MIMO Allowed Claim (subject to other objections), and disallow any amount beyond such allowed amount.

Objection No. 2: Claim Cannot be Substantiated

Objection Code No. 2 identifies Claims that could not be effectively substantiated. The Receiver's office audited claims using Sunwest records and resources and documentation provided by the Claimant with their original submission of the Proof of Claim. Further, as set forth above, the Receiver sent each Claimant notice of the Receiver's proposed determination of their Claim, including problems with a lack of proof or substantiation. The Receiver worked with Claimants to resolve these issues. At this point, Objection 2 made to a Claim means that even after sending such notice, the Receiver's office did not receive sufficient further proof from the Claimant or other sources to substantiate the Claim. In some cases, only a portion of a Claim could not be substantiated, and the Receiver has recommended allowance of the portion of the Claim that has been sufficiently substantiated. In other cases, the entire claim could not be substantiated. To the extent that Claims could not be substantiated, despite the efforts of the Receiver's office to verify them through Sunwest and other records and the opportunity of the Claimant to provide additional information, the Receiver is recommending that such Claims not be allowed.

Objection No. 3 and 15: Payment of Claim Falls Outside of the Claims

Process.

A number of claims were received that, while they may (or may not) contain a valid obligation, responsibility for such obligation payment falls outside of the Receivership or Bankruptcy claims process. For example, some trade creditors submitted claims on leases where the leases are being assumed or adopted as part of the Blackstone sale. Another example are claims submitted by residents or their heirs for such things as entry fees (for which they may have

some claim for return) or for payments under equity endowments where residents have passed away, resulting in an annuity like payment. The Distribution Plan provides that "claims of senior living residents regarding their lease, occupancy, level of service or care, and similar tenancy based contract claims, will not be dealt with by the Distribution Plan, and will instead flow through and remain liabilities of the Reorganized Company." (Distribution Plan, section VI.A.3.(f).) (The Receiver's office worked with Claimants who contacted the Receiver's office on these issues in an effort to direct them to the appropriate party.) With the exception of two Divestco facilities where certain claims were allowed, the Receiver objects that such claims are not properly part of the claims process and are the responsibility of other parties. (The Receiver, in making such objection, is not opining, one way or the other, as to the validity of the obligation claimed).

Objection No. 4: Duplicate or Overlapping Claim.

Objection Code No. 4 identifies Claims that are duplicative of other Claims made by the Claimant. Claims should not be allowed more than once. This situation arose in several circumstances. In some cases, a Claimant submitted a Proof of Claim form and subsequently submitted the same or an amended version of the same Proof of Claim. In such cases, the Receiver's office generally relied on the later -filed Proof of Claim and treated it as superseding the previous Proof of Claim. The superseded Claim is identified with Objection Code 4.

Another duplicate situation arose where a Claimant submitted the same Claim through multiple channels—some combination of the bankruptcy proceedings, paper submission to BMC Group, and/or an electronically submitted version of the claim submitted through the BMC Group website. Typically, each version of the Claim would have been assigned a claim number, and the objection identifies those that are duplicates.

A third situation in which duplicate claims arose, leading to Objection 4, is where a Claimant submitted a Proof of Claim with multiple boxes checked designating the purported type of claim. Typically, a separate claim number would have been assigned to each designation for the same claim amount, for tracking and auditing purposes. Upon auditing such claims, certain of

those claims would then be deemed duplicative of the same claim under the other, appropriate category for the claim.

In short, Objection 4 is used as a means of ensuring, notwithstanding duplicate submissions or splitting of claims for tracking purposes, that the same underlying claim is not allowed more than once.

Objection No. 5: Corrected Category of Claim.

Objection Code 5 designates a Claim that the Receiver's office has reclassified in order to correctly audit the Claim. The category of claim designated by the Claimant was found to be inaccurate. For example, it appeared from auditing the Proof of Claim forms that a number of TIC investors mistakenly checked the "LLC Member" claim box, apparently because they personally used a limited liability company to make their TIC investment in the Sunwest Enterprise. While indeed such a TIC investor was a member of their *own* LLC, for purposes of making their investment, they were not a "LLC Member or Partner" as used for purposes of the Distribution Plan and the Proof of Claim form.

In other instances, Claimants identified their Claim as a Secured Creditor Claim where, upon review and audit, the Claimant was not in fact secured.

A third category is where a Claimant identified their Claim as an administrative claim (and only administrative claim) where such claim falls outside the definition of an Administrative Claim under the Distribution Plan. Such claims were reclassified into another category (if possible). (This objection would not have been used in a situation where a Claimant submitted a Proof of Claim that had multiple claim-types checked including administrative claim, where one of the other checked categories applied but the administrative claim designation did not.) Claimants were informed of these circumstances in the letters sent to each Claimant.

Objection No. 6: Claim Received After Claims Bar Date.

Objection Code 6 identifies an untimely submission of a Proof of Claim. The Court's Claims Procedures Order set an initial Claims Bar Date of January 15, 2010. That Claims Bar Date was subsequently extended first to March 31, 2010 and subsequently to April 30, 2010. The Distribution Plan defines the Claims Bar Date as the deadline for a Proof of Claim to be timely

filed, which deadline will set by Court order. "Any Proof Claim filed after the Claim Bar Date can be, upon Court order, disallowed or subordinated to timely-filed Proofs of Claim." (Distribution Plan page 7, Section IV). The Proof of Claim form also stated "failure to submit a timely Proof of Claim Form may result in you being denied the right to share in distributions under the Distribution Plan, or through the Bankruptcy Case involving the Sunwest Unitary Enterprise."

Although the Proof of Claim Form designated BMC Group as the address to submit claims, the Receiver also considered a Proof of Claim timely received if it was received by the Receiver's office, CRO's office, or their counsel.

Objection No. 7: Lack of Authority to File Claims/Unsigned Claim.

Objection Code 7 identifies Claims where the authority to file a Proof of Claim was not established. Some Proofs of Claims were filed "on behalf of" someone other than the person actually submitting the Claim, without submitting a power of attorney or other substantiation of that person's authority to file the Claim. In other instances, a Proof of Claim may not have been signed. The Proof of Claim form states that the person filing the claim must sign it, and a power of attorney, if any, should be attached. The Receiver's office tried to resolve such issues by contacting Claimants where the Proof of Claim was unsigned or where there was a lack of proof as to the person's authority to file on behalf of the actual alleged claim holder. Most of these issues were resolved, and as a result Objection 7 is rare among the objections on Exhibit "1".

In order to guard against fraud and other issues inherent in unsigned claims or claims allegedly submitted "on behalf of" others where there is lack of evidence of the authority to do so, the Receiver has objected to such Claims.

Objection No. 8: Netting of Claim.

Objection Code 8 identifies a Claim that, while allowed, was reduced by netting it against the net profit from investment in a Claimant's other property or properties in the Sunwest Enterprise. In other words, the objection is not to the propriety of the claim submitted, but rather that it requires further application of the MIMO principle pursuant to the Distribution Plan. (See Distribution Plan Section IV, page 10 defining MIMO, as above). For example, some Claimants who submitted LLC Member claims were also TIC Investors in properties in which were

refinanced. The refinancings allowed the TIC investors to get their investment (and additional funds) back. Similarly, Lonestar claimants, who were repaid their full investments, may require such further MIMO application on submitted Claims.

Objection No. 9: Understatement of Money Out.

Objection Code 9 indicates Claims that have been adjusted due to a discrepancy in the "Money Out" portion of the MIMO calculation as stated by the Claimant. The Proof of Claim form had a line item for the "Amount received since January 1, 2006 (for any reason)." In circumstances where the audit process revealed that the amount stated on the Proof of Claim form as the "amount received since January 1, 2006" was lower than the amount which the Receiver's office was able to substantiate through the Sunwest records and other sources, Objection Code 9 was noted, and an adjustment was made to the allowed amount of the Claim to reflect the corrected "Money Out" component. In other circumstances, Claimants submitted a Proof of Claim which stated an Amount Claimed that did not reflect a deduction for the "amount received" stated on the Proof of Claim form; in other words, the Claimant had not done the mathematical calculation on the amount of claim.

Because the Distribution Plan defines Tranche A as a MIMO Allowed Claim, and MIMO is the difference between Money in and Money out, these Claims should be adjusted to reflect the corrected "money out" portion of the calculation as determined by the Receiver's claims audit process.

Objection No. 10: Prospective Claims.

Objection Code 10 identifies forward looking or prospective claims, which are not appropriate for a MIMO Allowed Claim. Objection Code 10 was primarily used where trade creditors filed precautionary objections. For example, some trade creditors with leases made claims based on uncertainty about whether they will be paid going forward, and filed precautionary claims for lease payments for the balance of the lease term (after the Claims Bar Date). Ordinary unsecured trade creditors of the Receivership Entities fall within the category of Unsecured Creditor Claims. Tranche A for Unsecured Creditor Claims are calculated as a MIMO

Allowed Claim. The prospective, precautionary claims denoted by Objection Code 10 are not appropriate for a MIMO Allowed Claim. The Receiver recommends that they be disallowed.

Objection No. 11: "Amount Claimed" Cannot Be Determined.

Objection Code 11 denotes a Claim where the "amount claimed" by the Claimant could not be determined: the Proof of Claim form submitted by the claimant left the line for the amount claimed blank, and despite the Receiver's efforts, the amount claimed could not be determined from the schedules or documents that might have been submitted with the Proof of Claim. (This issue did not arise with electronically submitted Proof of Claim Forms to the BMC Group website, because claimants were required to fill in the amount claimed line item before being able to submit the Proof of Claim). This is a relatively rare objection among the claims submitted. The Receiver cannot allow a Claim in an unknown amount, and recommends that such Claims be disallowed.

Objection No. 12: Claim Against Non-Receivership Entity.

Objection Code 12 denotes a Claim that was made against an entity that is not a part identified as a Receivership Entity. The entity may have been a part of Sunwest at some time, but prior transactions disposed of the property or entity. The entity does not appear on Exhibits "A-1", "A-2" or "A-3" to the Receivership Orders identifying the Receivership Entities. In the preliminary letters to Claimants, Claimants were informed if the entity or facility to which the Proof of Claim referred could not be located or determined, and Claimants were asked for any help they could provide in identifying trade names or other alternative names for the entity or facility. The Receiver also posted lists of entities sorted by entity name, by facility name and by state in an effort to assist Claimants.

The Distribution Plan consolidated claims against any Receivership Entity, claims against any employee of a Receivership Entity arising from or related to their actions taken in the scope and course of their employment, claims to any assets of any Receivership Entity, and all Sunwest related claims against the HFG Parties. Objection Code 12 identifies Claims which do not fall within those categories.

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Objection No. 13: Claim Waived Under A Prior Agreement.

Objection Code 13 identifies claims that were waived or released by the Claimant under a prior agreement with Sunwest. The Receiver obtained from Sunwest a list of persons or entities that had released and waived claims under agreements with Sunwest. The Receiver notified such Claimants of this objection in the Receiver's preliminary determination letter. Only a few such Claimants responded to the Receiver to inquire further. The Receiver directed these Claimants to the appropriate person at Sunwest who could respond to their questions regarding the release or waiver of claims. After such referrals, the Receiver is not aware of any of those referred Claimants contacting the Receiver to further dispute the proposed determination.

Objection Code 13 also identifies claims that were released or waived as part of a settlement or other resolution during the Receivership and Bankruptcy cases. For example, a settlement may have been reached where a claims were waived. Objection Code 13 designates those waived or released claims.

Because claims that were previously released or waived are not valid claims, such Claims should be disallowed.

Objection No. 14: Claim by Sunwest Enterprise

Objection Code 14 denotes a claim that was filed by a claimant that is or was a part of the Sunwest Enterprise such as a named defendant or former Sunwest entity.

Objection No. 15: Claim Addressed Outside of Claim Process

This objection is substantially similar to Objection 3, in that it addresses asserted claims that are not part of the Claims Process and are not entitled to a Plan Distribution because the claim or obligation is the responsibility of an entity outside of the Receivership Entities, including precautionary resident or facility-related claims for facilities being sold to Blackstone. See Objection 3.

Objection No. 16: Claimant Subject to Third Party Claims or Disgorgement

Objection Code 16 identifies an objection to a Claim because the Claimant is in existing or potential litigation by the Receiver for Third Party Claims and/or disgorgement of Ill-Gotten Gains. On Exhibit 1, Objection Code 16 applies to the firm Grover Mueller & Swank, which is

subject to existing litigation by the Receiver, and the firm Garrett Hemann Robertson PC, which has been notified of proposed litigation. Because such Claims are subject to resolution of Third Party Claims or other pending or proposed actions against the Claimants, the Receiver proposes to disallow such Claims at this time. The Distribution Plan provides for the disallowance of claims of entities that are liable to the Receivership Estate until such liabilities are paid in full (Distribution Plan VIII.A). Further, these two claimants are professional firms submitting claims for professional fees; those professional fees are directly related to the services at issue in the actions which the Receiver has brought or proposes bringing against these firms.

Objection No. 17: Claimant Seeks Treatment Beyond the Scope of the Distribution Plan

Objection Code 17 designates Claims where the Claimant has submitted a Proof of Claim which requests that the Receiver act on the Claim or related distribution in a manner not authorized by or contrary to the Distribution Plan.

Certain Claimants represented by the Connolly law firm have inserted a statement in their Proof of Claim forms that they are not assigning their claims to the Receivership Estate. The Distribution Plan states that "the right to receive Plan Distributions shall be deemed to be made in exchange for an assignment to the Receivership Estate of a Claimant's right, if any, that it held as of the first Receiver Order to assert a claim against any Receivership Entity, any employee of Receivership Entity for conduct in the course and scope of employment, any Sunwest related HFG party, or any other third party. . . ."

Other claims, submitted by parties represented by the Esler Stevens & Buckley firm, have submitted Proof of Claim forms that state that they have entered into an agreement to pool their recoveries and share in the proceeds.

The Receiver does not intend, in proposing the allowance of Claims, to expressly or impliedly agree to any terms or conditions stated in a Proof of Claim that purport to vary, negate or add to any terms or requirements of the Distribution Plan, whether it be as to assignment of claims, any obligation to recognize pooling of recoveries and claims, or otherwise. The Receiver objects to any such special conditions submitted within the Proofs of Claim.

Objection No. 18: No Proof of Claim

Objection Code 18 designates a document that was submitted in the Claims Process but is not a Proof of Claim and does not otherwise present a claim request. In some cases, the Receiver received an election form but without any accompanying Proof of Claim. The Receiver has not objected to Claims that were not filed on a Proof of Claim form but otherwise could be construed as a claim (identified a claim, claim amount, claimant and/were signed). In short, Code 18 identifies a document that was assigned a claim number but does not present a claim.

Objection No. 19: Claim Waived by Distribution Plan Election

Objection Code 19 identifies Claims that have been waived or released due to the Claimant's decision to make certain elections under the Distribution Plan. The Distribution Plan set forth certain elections that Investors could make, including the PM and LLC Election, TIC Election and Bare Land Investor Election. The Distribution Plan provides that the PM and LLC Election is made "in lieu of having an Allowed Claim." (Distribution Plan, page 21, section VI.B.2.(c).) The Bare Land Investor Election similarly provides that "in the event of such election, rather than receive any Plan Distribution under the Distribution Plan on account of holding an Allowed Claim, the electing Bare Land Investor shall retain its interests in the Bare Land" (Distribution Plan, page 23, section VI.B.2.(e).) Objection Code 19 identifies Claims where the Claimant has made such an election and therefore does not have a right to an Allowed Claim.

C. **Deficiency Claims of Secured Creditors**

Certain secured creditors that held loans secured by real property or, in certain cases, personal property, have asserted purported deficiency claims for the difference between what they assert they are owed and what they recovered by way of foreclosure or other disposition of the security. A significant number of the deficiency claims have been resolved by agreement, and the agreed number is reflected in Exhibit 1.

With certain other lenders, the Receiver was not able to reach an agreed resolution despite the Receiver's efforts and the opportunity for mediation (which not all lenders with such claims participated in). The Receiver has evaluated claims for alleged deficiencies pursuant to the Distribution Plan. The Receiver has taken the principal balance as of January 1, 2006 and subtracted payments made between January 1, 2006 and December 31, 2008 to establish a MIMO amount. The difference between the MIMO amount and the amount realized from a foreclosure sale or other disposition is the deficiency amount. The Receiver notes that to the extent a Secured Lender has not foreclosed on a property, an actual deficiency has not been established or incurred.

As to Secure Lenders that did not reach agreement with the Receiver on a deficiency claim, the Receiver proposes setting a deficiency in the amount set forth in Exhibit 1 and as further explained in Exhibit 11 hereto.

A further mediation with Vestin is scheduled for November 30, 2010. For purposes of this Motion, the Receiver has set the deficiency claim for Vestin as zero.

D. Lone Star Claimants

Certain of the claims are by Claimants against whom the Receiver believes the Estate has claims to recover certain transfers of funds made to them as the result of what is referred to as the Lone Star sale transaction, in which assets consisting of 45 senior living facilities (the "Lone Star Properties") were sold to LSREF Golden Age Acquisition LLC January 2009 (the "Lone Star Sale"). Some Claimants received payments ultimately generated by the Lone Star Sale. The Receiver believes that those payments are subject to claims for, without limitation, fraudulent transfer, unjust enrichment, disgorgement and preference claims. Certain Lone Star Claimants have disputed those claims, and the parties engaged in several mediation sessions.

The Receiver and certain Lone Star Claimants have reached terms on settlement through mediation. **The Receiver's intention is to treat all Lone Star Claimants pursuant the settlement terms, unless such a Claimant affirmatively objects to such treatment as part of this Motion.** Pursuant to Section XIII.A of the Distribution Plan, no holder of an otherwise Allowed Claim who is liable for avoidance actions or other third party claims shall receive any

Plan distribution until full payment to the Receiver of the liability. (The purpose of this Motion is to set the amount of the Tranche A portion of Allowed Claims. The setting of such allowed amounts is not and shall not be construed as a waiver of the Receiver's position regarding the Lone Star recipients or of Section XIII.A of the Distribution Plan.)

The proposed Lone Star settlement terms are set forth on Exhibit 12 hereto.

E. **Connolly Claimants**

Claimants represented by attorney Paul Connolly have disputed certain claims determinations proposed by the Receiver. Mr. Connolly attended mediation on the dates under the Mediation Order, but to the Receiver's knowledge only addressed claims relating to the application of MIMO. As such, the Receiver's position is that other claims were not mediated, and the Receiver's position in all other such claims should be adopted. Nonetheless, certain categories of Connolly-presented claims are addressed below.

Attorneys' Fees: (E1903, E1914, E1915, E1927) The Connolly submitted claims include purported administrative claims for attorneys fees. Attorneys fees are not a proper administrative claim. Professional fees in these proceedings have been submitted to the Court for review and approval by the Court.

Emerald Square/Park Place: (E1165D, E1212D, E1210D, E1224D) These claims relate to purported security interests held in the entity interests of Harder and Fisher as security for other obligations. The Receiver has set the allowed amount at zero, as the interests of Harder and Fisher were contributed to the estate and then consolidated into the assets of the estate. Any purported security interests in those interests have nothing to attach to, and there is no perfected interest in any proceeds.

Released Claims: Certain Connolly-submitted claims relate to facilities as to which the claimants released claims under prior settlement agreements. These include claims related to Hawthorne Gardens/Portland Senior Living (E0654A, E0655A, E0658A, E0660A, E1471, E0666A, E0661A, E0665A, and E0668A, E1006A, E1006B, E1006C) and Framatone/Smart Park 3 Leasing LLC (E1228, E1096, E1469, E1471, E1234, E1097, E1098, E1236, E1095, E1099).

The Framatome/Smartpark claimants have since characterized their claims as not MIMO claims, but as rights to a share of the DWT settlement; this does not constitute a Tranche A claim for purposes of setting claims amounts at this time, which will be accomplished pursuant to the terms of the Distribution Plan and related third party litigation procedures.

MIMO/Netting: Certain Connolly-submitted claims were subject to netting; See Objection Code 8 above.

Other claims are adjusted or disputed as set forth on Exhibit 1.

F. **Other Claims**

Certain other claims were mediated but remain potentially unresolved. Among these are Venable claims for attorneys' fees (Claims E1933, E1934, E1936, E1939, E1942, E1944, E1945)(for fees the Receiver contends were unauthorized or unapproved in the bankruptcy proceedings to which they relate); Claim C5583 (contested); and claims which the Claimants were to provide further proof of additional amounts or otherwise accept the Receiver's determination (C5381 and C2236).

The Receiver seeks an order approving each of the proposed amounts in Exhibit 1 for all Claims, regardless of whether a claim is specifically identified in this memorandum.

G. **Costs of Non-Mingled Property Elections**

Certain Claimants asserted a Non-Mingled Property Election under Section IX.A. of the Distribution Plan. These Claimants were not successful, either withdrawing their claims before the hearing or having an adverse determination at the hearing on the Non-Mingled Property Elections. The Distribution Plan provides in such circumstances that the "Allowed Claims of such Retaining Owners or Electing Owners shall be reduced by the expense to the Receivership Estate incurred in responding to the attempted exercise of such Distribution Plan exception, including, without limitation, attorneys' fees and costs." (Distribution Plan, page 34, section IX.A.) The properties which asserted a non-mingled property election are: Smart Park 1; Smart Park 3; Smart Park 5; Fairway Group 1; Hermiston Terrace; Morgan Hill; Waterford in Bellevue; Crown Pointe; Lassen House; and the Bluffs at Northwoods. Where such election was joined by more than one

proposed retained owner, the Receiver proposes allocating the costs and fees related to that property pro rata among the electing or retaining owners.

A portion of the attorneys' fees and costs incurred in responding to the attempted exercise of such an election has not yet been approved by the Court and therefore the Receiver has not applied the Non-Mingled Property Election fees and costs to the Claims at this time. The Receiver reserves the right to supplement this filing to reduce the Allowed Claim, if any, of the non-prevailing Retaining Owners or Electing Owners for their Distribution Plan election pursuant to the provisions of the Distribution Plan.

H. **Reservation of Rights**

The Receiver has taken significant effort to ensure the accuracy and completeness of the treatment of Claims and the exhibits setting forth the proposed allowed amount. The Receiver reserves the right to make any corrections or further adjustments as may become necessary or prudent. The setting of such allowed amounts is not and shall not be construed as a waiver of any further claims or rights of the Receiver or the estate, or of Section XIII.A of the Distribution Plan.

IV. **CONCLUSION**

The Receiver respectfully requests that the Court enter an order establishing an allowed Tranche A amount for the Claims in the amounts set forth in Exhibit "1", and disallowing the remainder of the Claims in their entirety as set forth in Exhibit "1" for purposes of the Tranche A determinations, and for such other relief as the Court deems just and necessary.

Dated: November 10, 2010

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