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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL GRASSMUECK, Receiver,

Plaintiff,

v.

DAVIS WRIGHT TREMAINE LLP, a
Washington limited liability partnership,

Defendant.

Case No. CV 09-651-ST

COMPLAINT
(Professional negligence; breach of
fiduciary duty; negligent misrepresentation;
aiding and abetting breach of fiduciary
duty; disgorgement)

JURY TRIAL REQUESTED

Plaintiff Michael Grassmueck (“Receiver”) alleges as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction of this matter under 28 USC §§ 1345 and 1367.
2. Venue in this court is proper under 28 USC § 1391.

PARTIES

3. Pursuant to the Orders of this court entered March 10, 2009, and May 27, 2009, in the action entitled *SEC v. Sunwest Mgmt., Inc.*, Case No. 09-CV-6056-HO, plaintiff Michael Grassmueck is the duly appointed and acting receiver for several entities listed in those Orders (collectively, the “Receivership Entities”). The Receivership Entities include Sunwest Management, Inc. (“Sunwest”), Canyon Creek Development, Inc. (“CCD”), Canyon Creek Financial, LLC (“CCF”), Fuse Advertising, Inc., KDA Construction, Inc. (“KDA”) (collectively, “the Receivership Companies”), and numerous other entities affiliated with various senior living facilities and real estate developments, most of which are limited liability companies (collectively, “the Receivership Facilities”). Among other things, the Orders authorize the Receiver to pursue all claims of the Receivership Entities against third parties for the benefit of investors and creditors of the Receivership Entities. The claims asserted in this action fall within that provision of the Orders and this Court thus has ancillary and supplemental jurisdiction over them.

4. All of the Receivership Entities are or were Oregon organizations having their principal place of business in Salem, Oregon. At all material times, Sunwest was primarily engaged in the business of managing senior living facilities. CCD was primarily engaged in the business of developing and purchasing new facilities for Sunwest to manage. CCF was primarily engaged in the business of overseeing the various broker-dealers who funneled investors to

provide equity for facilities. Fuse Advertising, Inc., is an assumed business name of Fuse Advertising Agency, Inc., previously known as Fuse Ad Agency, Inc. (collectively, “Fuse”); Fuse was primarily engaged in the business of advertising the facilities. KDA was primarily engaged in the business of doing construction work on new facilities as well as repair and improvement work on existing facilities. The Receivership Facilities are primarily engaged in the business of owning and operating the facilities. The principals of the Receivership Entities (“Principals”) each owned all or part of all of them either directly or indirectly and exercised control over all of them; the Principals include Jon M. Harder (“Harder”), Darryl Fisher (“Fisher”), Curtis Brody, Wallace Gutzler, Mike Deines, Daniel Fish, Sebastian Brown, Mark Wentzein, Tom Biesiadecki, David Thurber, Tom Eyserbeck, Jeff Schumacher, Johnny Dinh, Shaine Pearse, James Estes, Tom Wettlaufer, Tim Harmon, and others. Additionally, various friends, affiliates, and business partners of the Receivership Entities and Principals (collectively, the “Affiliates”) also contributed to the business plan of the Receivership Entities. The Receivership Entities, Principals, and Affiliates shall hereinafter be referred to collectively as the “Sunwest Entities” and their business operations as the “Sunwest Enterprise.”

5. Defendant Davis Wright Tremaine LLP is a Washington limited liability partnership with its principal place of business in Seattle, Washington. The actions and omissions of Davis Wright Tremaine LLP and its employees and attorneys (collectively, “DWT”) described below occurred in DWT’s Portland, Oregon, office.

COMMON FACTUAL ALLEGATIONS

The Sunwest Enterprise

6. Sunwest, the first of the Receivership Entities, was founded in 1992. By 2001, the Receivership Entities owned and operated approximately 20 senior living facilities. Rapid

growth increased that number to over 270 facilities by 2008.

7. The Sunwest Entities' business plan was to grow through the development and purchase of new facilities which would be owned by the Principals and managed by Sunwest. In simplified terms, the business plan operated in the following manner: To finance the development and purchase of new facilities, a Sunwest-affiliated entity would obtain loans from banks and other lending institutions ("Lenders"), as well as raise private funds from investors. After developing or purchasing a facility, Sunwest's goal was to increase the facility's occupancy rate to around 95%, which would increase revenues and the value of the facility. The borrowing entity would then refinance its loan and use the proceeds of the refinancing to buy out the private investors. With the investors paid off and higher revenues from residents, the Receivership Facilities would have a positive net operating income, which would add to the Sunwest Enterprise's overall bottom line.

8. The details of the business plan were more complicated. Beginning in 2006, for every facility that Sunwest developed or purchased, it created two Receivership Facilities: one to own the facility (the "Property Company") and one to operate it (the "Operating Company"). Each Operating Company (a) leased its facility from the Property Company that owned the facility, and then (b) subcontracted the work of actually managing the facility to Sunwest. CCD took over the role of developing and purchasing new facilities in 2001. Starting in 2005, CCF took over the role of overseeing the various broker-dealers who funneled investors to the facilities and distributing investor-relations materials to potential investors.

9. Generally, this is how loans were obtained from Lenders to finance the development and purchase of new facilities: The Property Company that was to own the facility would obtain the loan, and it would be guaranteed by Harder and Fisher. In some cases, the loan

would be cross-collateralized over multiple facilities, so that a default on the part of any facility would constitute a default on the part of all of the facilities subject to a loan from the same lender. Additionally, for any given facility, the combined amount of the loan and the funds raised from investors would exceed the amount needed to develop or purchase the facility. The excess amount of the loan was to be held in reserve by the Receivership Facilities that owned and operated the facility. The Receivership Companies told investors that the reserves would be used as a cushion to ensure payment of the Receivership Facilities' debts during the first several months after the development or purchase, including to pay the investors "rent."

10. The Sunwest Entities' business plan also included an inter-entity loan component: Most facilities had cash flow problems and a negative net worth due to various problems including: (a) an occupancy rate below 95%; (b) a longer delay than anticipated in reaching a 95% occupancy rate; (c) greater costs than anticipated; (d) lower revenues than anticipated; and (e) an inability to refinance the original loan on favorable terms. Receivership Facilities afflicted with those problems often had difficulty paying their debts, including the "rent" to investors. In order to pay those debts, the Receivership Companies used a system of inter-entity loans whereby an ailing Receivership Facility's debts were paid with funds loaned from other Sunwest Entities, including from other Receivership Facilities' positive cash flow or reserves. Ailing Receivership Facilities were not the only beneficiaries of the inter-entity loans; almost every Sunwest Entity also frequently obtained loans from other Sunwest Entities, whether to pay pending bills or to serve as advances in financing new business operations or personal expenses. The details of most inter-entity loans, including their purposes, were never documented with promissory notes or similar instruments. This inter-entity lending took place on a daily basis based on the immediate cash needs of particular facilities and the immediate cash status of

others; that is, the question asked was simply, “Who has cash that we can move?” This lending was not disclosed to investors, and violated the terms of the operating agreements of the Receivership Facilities and the terms of the loan documents between the Receivership Entities and the Lenders.

11. The inter-entity loans, as well as funds used to repay those loans, were generally funneled through a bank account known as “the clearing account” before distribution to the entities receiving the loans. The clearing account also contained other funds being disbursed from one Sunwest Entity to another, including: (a) loans made from one Receivership Company or Affiliate to another ; (b) Harder’s salary from the various Receivership Entities that employed him; and (c) disbursements to Harder from Sunwest Entities in which he had an ownership interest. Accordingly, the funneling of Receivership Facility loans through the clearing account constituted a commingling of Receivership Facility funds and loans, non-Receivership Facility funds and loans, and Harder’s personal funds and loans. Indeed, on a monthly basis, a Sunwest employee would transfer funds from the clearing account into Harder’s personal account to pay for his personal family bills, and funds often were transferred to him or his family on an ad hoc basis as well. Several Principals had access to the clearing account, as did Harder’s wife. Inter-entity loans were also funneled through various bank accounts in addition to the clearing account. Those accounts also regularly included a commingled amount of business and personal funds of various Sunwest Entities. One of those accounts was an overdraft account with Wells Fargo, which was intended to be used solely to pay the numerous overdraft fees that Wells Fargo charged due to the high number of overdrafts that the Sunwest Entities experienced on their Wells Fargo accounts, but which instead was also used to make loans and other payments to various Sunwest Entities, including Receivership Facilities. This commingling of funds also was

not disclosed to investors, and violated the terms of the operating agreements of the Receivership Facilities and the terms of the loan documents between the Receivership Facilities and the Lenders.

12. Generally, an individual invested in a given facility by becoming a member of a single-purpose limited liability company, organized in Oregon, which held a fractional tenant-in-common interest (“TIC”) in the real property of the facility (“TIC LLC”). For each facility, there were multiple investors holding TICs through their respective TIC LLCs. Each TIC LLC leased its interest to the facility’s property company in return for regular “rent” payments, which flowed from the TIC LLC to the investor. Additionally, the Operating Company retained the right to buy out the TIC LLCs through a purchase option agreement that each TIC LLC executed. Many investors sought to engage in like-kind exchanges under section 1031 of the Internal Revenue Code, and the TIC LLC structure was designed to make investment in the facilities attractive to those investors. The offering memoranda and investment opportunities were securities but were never registered as securities with any state or federal authority.

13. Because the financial performance of the various Receivership Facilities was inadequate to sustain them, the perpetuation and growth of the Sunwest Enterprise depended on attracting new capital from Lenders and investors to pay off outstanding debts to existing Lenders and investors. To keep the Sunwest Enterprise afloat, over \$400 million was collected from over 2,000 investors and more than \$1.7 billion was collected from numerous Lenders. Although, according to a 2006 due diligence report by Crown Capital Securities, Inc., the Receivership Entities had a negative net worth of \$25 million, and although the Receivership Entities failed to obtain the enterprise-wide or near-enterprise-wide refinancing that they sought in 2007, the scheme was so successful that investors received almost every payment due to them

until June 2008, when the economic crisis and credit crunch finally caught up with it; from that point forward, there have been no payments to investors. Numerous investor lawsuits, including a putative class action, have resulted, as well as numerous lawsuits and foreclosure actions brought by Lenders, and the bankruptcy filing of Harder.

The Offering Memoranda

14. To attract investors, CCD, CCF, and the Property and Operating Companies for the facilities for which investment was sought would have offering memoranda prepared describing the facilities, their finances, and the investment opportunities and risks. The offering memoranda contained numerous misstatements and omissions of material fact which rendered them misleading, including the following:

- a. that investor funds would be loaned to Sunwest Entities other than the property and operating companies of the facilities in which the investors' TIC LLCs had an interest;
- b. that funds from other investors had in the past been loaned to Sunwest Entities other than the property and operating companies of the facilities in which those investors' TIC LLCs had an interest;
- c. that investor funds would be commingled with funds of Sunwest Entities other than the property and operating companies of the facilities in which the investors' TIC LLCs had an interest;
- d. that funds from other investors had in the past been commingled with funds of Sunwest Entities other than the property and operating companies of the facilities in which those investors' TIC LLCs had an interest;
- e. that the commingling and inter-entity lending violated the operating

- agreements of the Receivership Facilities;
- f. that the commingling and inter-entity lending violated the terms of the loans from Lenders to the Receivership Facilities;
 - g. that numerous Receivership Entities were in default or near-default of various obligations they owed totaling hundreds of millions of dollars, which would render continued payment of rent to investors nearly impossible;
 - h. that the true net worth of the Receivership Entities was significantly negative;
 - i. that the Receivership Entities failed to obtain enterprise-wide or near-enterprise-wide refinancing that they sought in 2007; and
 - j. that the success of any particular Receivership Facility depended not on the independent ability of that Facility to achieve positive net operating income, but rather on the ability of the Sunwest Entities to obtain new financing from new Lenders and investors.

15. As a result of these misstatements and omissions, most investors who provided funds to the Sunwest Enterprise are claiming entitlement to a number of remedies, including rescission of the investments as provided by applicable law.

The Role of DWT

16. DWT provided general representation, counsel, and assistance to all of the Receivership Entities from about 1999 until June 2008. In that regard, DWT prepared, or participated materially in the preparation of, at least 120 offering memoranda for investors. DWT also prepared, or participated materially in the preparation of, opinion letters for Lenders deciding whether or not to lend money to the Receivership Entities. DWT similarly prepared, or participated materially in the preparation of, the loan agreements, operating agreements and

managing documents for the Receivership Entities and TIC LLCs, as well as other agreements that formed the basis of the business in which the Sunwest Entities and TIC LLCs engaged. Additionally, one or more DWT attorneys attended board meetings of the Receivership Companies, helped design and implement the overall business plan as it related to the selling of TICs to investors, communicated directly with investors to encourage them to invest and reassure them about their actual and prospective investments in the TIC LLCs, and provided direct oversight to CCF in its efforts to sell TIC interests to investors. Toward the end, DWT was literally churning out offering memoranda to induce investors to provide cash for the Sunwest Enterprise, despite their knowledge of its serious financial problems. In short, DWT played a critical role in creating, sustaining and propping up the Sunwest Enterprise. DWT received substantial fees for its lawyers' work on behalf of the Receivership Entities, totaling millions of dollars.

17. During its work for the Receivership Entities, DWT knew or should have known about the following problems:

- a. that the various Receivership Entities had conflicting interests because, for instance, the Sunwest Entities required additional cash to survive, and used individual facilities to support the entire Sunwest Enterprise;
- b. that the Principals were breaching their fiduciary duties to the Receivership Entities by causing breaches of loan agreements and operating agreements, selling unregistered securities, selling securities through the use of material misrepresentations and omissions, and other actions and omissions;
- c. that the Sunwest Entities engaged in the inter-entity lending described above;
- d. that there was little or no documentation of most inter-entity loans;

- e. that the Sunwest Entities commingled funds belonging to the various Sunwest Entities and TIC LLCs in the clearing account and other accounts;
- f. that the commingling violated the operating agreements of the Receivership Facilities;
- g. that the inter-entity lending violated the operating agreements of the Receivership Facilities;
- h. that the commingling violated the terms of the loans from Lenders to the Receivership Facilities;
- i. that the inter-entity lending violated the terms of the loans from Lenders to the Receivership Facilities;
- j. that the Receivership Entities were marketing and selling the offering memoranda and investment opportunities without their being registered as securities or otherwise treated as such;
- k. that the offering memoranda contained material misrepresentations and omissions as described in paragraph 14;
- l. that a large number of the Receivership Entities had a negative net worth;
- m. that the Receivership Entities failed to obtain enterprise-wide or near-enterprise-wide refinancing that they sought in 2007;
- n. that numerous Receivership Entities were in default or near-default of various obligations totaling hundreds of millions of dollars, which would render continued success of the Entities and repayment of the Lenders and investors nearly impossible;
- o. that the Sunwest Enterprise amounted to a Ponzi-like scheme; and

- p. that the Sunwest Enterprise would result in the failure of the Receivership Entities and numerous lawsuits against the Receivership Entities.

18. During its work for the Receivership Entities, DWT owed each and all of those entities fiduciary duties, including the duty of loyalty, the duty not to make misrepresentations to a client, the duty to defend and protect a client's interests, and the duty to exercise such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of the tasks they undertake. In addition, through the involvement of DWT lawyers in the business activities and operations of the Sunwest Enterprise, DWT owed fiduciary duties to the Receivership Entities beyond those of an attorney to a client.

FIRST CLAIM FOR RELIEF

(Professional Negligence)

19. The Receiver realleges paragraphs 1 through 18.
20. DWT committed professional malpractice in its representation of the Receivership Entities in that it negligently:
- a. failed to disclose or obtain waivers of potential and actual conflicts of interest in their joint representation;
 - b. represented them simultaneously when their interests were in actual conflict;
 - c. failed to obtain adequate skill and knowledge to competently represent them;
 - d. failed to advise them about the problems described in paragraph 17;
 - e. failed to advise them to cure the problems described in paragraph 17;
 - f. failed to cure the problems described in paragraph 17; and
 - g. participated in and materially aided the problems described in paragraph 17.

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21. As a direct and natural result of DWT's malpractice, all of the Receivership Entities have suffered substantial damages well in excess of \$400 million dollars, including their failure as ongoing enterprises, their inability to pay the debts and claims of the various Lenders and investors, and the amounts that they paid DWT for its services.

22. The Receivership Entities are entitled to a judgment in their favor and against DWT in the full amount of their damages plus prejudgment interest.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

23. The Receiver realleges paragraphs 1 through 18.

24. DWT breached its fiduciary duties to the Receivership Entities in that it :

- a. failed to disclose or obtain waivers of potential and actual conflicts of interest in their joint representation;
- b. represented them simultaneously when their interests were in actual conflict;
- c. failed to obtain adequate skill and knowledge to competently represent them;
- d. failed to advise them about the problems described in paragraph 17;
- e. failed to advise them to cure the problems described in paragraph 17;
- f. failed to cure the problems described in paragraph 17; and
- g. participated in and materially aided the problems described in paragraph 17.

25. As a direct and natural result of DWT's breach of its fiduciary duties, all of the Receivership Entities have suffered substantial damages well in excess of \$400 million dollars, including their failure as ongoing enterprises, their inability to pay the debts and claims of the various Lenders and investors, and the amounts that they paid DWT for its services.

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26. The Receivership Entities are entitled to a judgment in their favor and against DWT in the full amount of their damages plus prejudgment interest.

THIRD CLAIM FOR RELIEF

(Negligent Misrepresentation)

27. The Receiver realleges paragraphs 1 through 18.

28. DWT's actions and omissions during the course of representing the Receivership Entities constituted a representation that none of the problems described in paragraph 16 existed and that, even if they did, they were not actually problems. That representation was made for the guidance of the Receivership Entities in the operation of their businesses, and it was false, as DWT knew or should have known in the exercise of reasonable care. DWT failed to exercise reasonable care in obtaining and providing the information to the Receivership Entities that was false.

29. The Receivership Entities relied on the advice and counsel of DWT at a time when DWT knew or should have known of the problems described in paragraph 17. The Receivership Entities' reliance on DWT's misrepresentations was reasonable considering the attorney/client relationship and the reasonable expectation that DWT would be looking out for the best interests of the Receivership Entities.

30. As a direct and natural result of DWT's negligent misrepresentation, all of the Receivership Entities have suffered substantial damages well in excess of \$400 million dollars, including their failure as ongoing enterprises, their inability to pay the debts and claims of the various Lenders and investors, and the amounts that they paid DWT for its services.

31. The Receivership Entities are entitled to a judgment in their favor and against DWT in the full amount of their damages plus prejudgment interest.

FOURTH CLAIM FOR RELIEF**(Aiding and Abetting Breach of Fiduciary Duty)**

32. The Receiver realleges paragraphs 1 through 18.

33. The Principals each owed a fiduciary duty to act in the best interests of the Receivership Entities, separately considered. In addition, the Principals owed a fiduciary duty of full disclosure to the Receivership Entities. The Principals breached their respective fiduciary duties when they caused the problems described in paragraph 17 and failed to disclose or cure those problems.

34. DWT had actual knowledge of one or more breaches of fiduciary duties by the Principals, and DWT provided substantial assistance to the Principals with respect to those breaches by participating in and helping create the problems described in paragraph 17.

35. In the alternative, DWT owed a separate duty to each of the Receivership Entities, which separate duty was breached in the manner set forth in paragraph 24, and in the breach of that duty owed to each Receivership Entity DWT provided substantial assistance to the Principals in their breaches of fiduciary duties to the Receivership Entities.

36. As a direct and natural result of (a) the Principals' breaches of their respective fiduciary duties and (b) DWT's aiding and abetting those breaches, all of the Receivership Entities have suffered substantial damages well in excess of \$400 million dollars, including their failure as ongoing enterprises, their inability to pay the debts and claims of the various Lenders and investors, and the amounts that they paid DWT for its services.

37. The Receivership Entities are entitled to a judgment in their favor and against DWT in the full amount of their damages plus prejudgment interest.

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FIFTH CLAIM FOR RELIEF**(Disgorgement)**

38. The Receiver realleges paragraphs 1 through 18.

39. DWT's simultaneous representation of the various Receivership Entities despite the conflicts of interest between those entities violated DWT's fiduciary duties to the Receivership Entities and the Oregon Code of Professional Responsibility. Accordingly, DWT must disgorge all fees it received from the Receivership Entities in the course of representing them. DWT owes those fees, which plaintiff is informed and believes total no less than \$2 million, to the Receivership Entities from which they came, plus prejudgment interest thereon from the dates when DWT received those fees.

WHEREFORE, the Receiver prays for judgment against DWT as follows:

1. On his first four claims for relief:
 - a. For damages in an amount according to proof, but not less than \$400 million;
 - b. For prejudgment interest;
 - c. For costs of suit herein incurred; and
 - d. For such other and further relief as the court deems proper.
2. On his fifth claim for relief:
 - a. For damages in an amount according to proof, but not less than \$2 million;
 - b. For prejudgment interest;
 - c. For costs of suit herein incurred; and
 - d. For such other and further relief as the court deems proper.

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3. Plaintiff requests trial by jury.

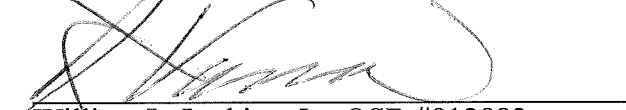
DATED this 11th day of June, 2009.

ALLEN MATKINS LLP



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