

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT

No. D-1329-CV-2012-02350

LYNN HARTENBERGER and NANCY STEVENS,
Individually and on Behalf of a Class of Similarly
Situated Persons,

Plaintiffs,

v.

HIGH DESERT INVESTMENT CORPORATION and
ALBUQUERQUE ACADEMY,

Defendants.

**ORDER PRELIMINARILY APPROVING CLASS SETTLEMENT, DIRECTING THE
ISSUANCE OF CLASS NOTICE AND SCHEDULING A FINAL FAIRNESS HEARING**

Plaintiffs, acting individually and as representatives of the Settlement Class to be certified herein for settlement purposes only, having come before the Court pursuant to Rule 1-023(E) NMRA to request preliminary approval of a proposed Settlement Agreement between Plaintiffs and Defendants, High Desert Investment Corporation and Albuquerque Academy (“Defendants”), and the Court, having considered the proposed terms and conditions of settlement and the presentation of counsel, hereby FINDS:

1. This action (the “Action”) was originally filed on October 31, 2012 and subsequently, on December 18, 2013, Plaintiffs filed their Second Amended Class Action Complaint. The Second Amended Class Action Complaint is the operative complaint in the Action. Plaintiffs alleged they suffered damages as a result of real estate purchases they made in the Mariposa East Subdivision in Sandoval County, New Mexico that was developed by High Desert Investment Corporation;

2. This Court has jurisdiction over the parties and subject matter herein;

3. The parties conducted extensive discovery and investigation and engaged in aggressive litigation of the Action during the last two years;

4. Following extensive arms-length settlement negotiations, the parties agreed to a formal Settlement Agreement, subject to Court approval, which the parties have recommended to the Court for preliminary approval;

5. For purposes of the settlement of the Action (and only for such purposes, and without an adjudication of the merits), the Court preliminarily finds that the requirements of the New Mexico Rules of Civil Procedure have been met in that:

(a) The proposed "Settlement Class" shall mean any and all persons and entities who purchased or acquired real property, consisting of unimproved residential lots or improved residential lots (lots with a completed residence or where construction on a residence has commenced), within the Mariposa East Subdivision from the date of its inception through June 20, 2012. The Settlement Class excludes the following: (i) any person or entity who purchased, pursuant to a single deed, more than three (3) lots in the Mariposa East Subdivision; (ii) any person or entity who purchased or otherwise acquired an unimproved development tract in the Mariposa East Subdivision; (iii) the Defendants and their respective parent companies, subsidiaries and affiliated business entities; (iv) any person who is currently, or who was for the period from the date of inception of the Mariposa East Subdivision through June 20, 2012, a managerial employee, officer, director, member or trustee of either the Albuquerque Academy or High Desert Investment Corporation; (v) any financial institution that acquired improved or unimproved property in the Mariposa East Subdivision as a result of a default pursuant to a mortgage or other security instrument; and (vi) any affiliated person or entity of

any party excluded in subsections (i), (ii), (iii), or (v) above. Exhibit 1 attached hereto is a list of all persons and entities that have been identified by Class Counsel as excluded from the Settlement Class pursuant to subsections (i), (ii), (iii) (v) and (vi) based on Class Counsel's due diligence and review of relevant records. There shall be a rebuttable presumption that Exhibit 1 is a complete list of persons and entities excluded from the Settlement Class pursuant to subsections (i), (ii), (iii) (v) and (vi). However, in the event an entity or person is not listed on Exhibit 1 but is excluded pursuant to the definitions for exclusion stated in paragraphs (i), (ii), (iii) (v) and (vi), the definitions for exclusion shall prevail. Notwithstanding any of the exclusions set forth above, including the exclusion defined in subsection (i), SunWest Trust, Inc., as custodian for the Nola Kay Stofac IRA, shall be included in the Settlement Class.

(b) The commonality requirement of Rule 1-023(A) generally is satisfied when members of the proposed class share at least one common factual or legal issue. Here, Plaintiffs have alleged several questions of fact and law purportedly common to the Settlement Class. Considering the allegations in the pleadings on file, the Court preliminarily finds that these allegedly common questions of fact and law predominate over questions of fact and law affecting only individual members of the Class.

(c) Based on Plaintiffs' allegations and the presentation of Class Counsel, the Court preliminarily finds that the claims of the representative Plaintiffs are typical of the claims of the Settlement Class, and that the representative Plaintiffs and their attorneys will fairly and adequately protect the interests of the Settlement Class, in that (i) the interests of the named Plaintiffs and the nature of their alleged claims are consistent with those of the Settlement Class, (ii) there appear to be no conflicts between or among the representative Plaintiffs and the Class

Members, (iii) the representative Plaintiffs have been and appear to be capable of continuing to be active participants in both the prosecution and the settlement of this Action, and (iv) the representative Plaintiffs and the Class Members are represented by qualified, experienced, and reputable counsel.

(d) The Court preliminarily finds that a resolution of this Action in the manner proposed by the Settlement Agreement is superior to other available methods for a fair and efficient adjudication of the Action;

6. In making these preliminary findings, the Court has considered, among other factors: (i) the interests of Class Members in individually controlling the prosecution or defense of separate actions; (ii) the impracticability or inefficiency of prosecuting or defending separate actions; (iii) the extent and nature of any litigation concerning these claims already commenced; and (iv) the desirability of concentrating the litigation of the claims in a particular forum;

7. Based on the foregoing findings, the Court hereby preliminarily certifies the Settlement Class for settlement purposes under Rule 1-023(B)(3). The Court finds that the Settlement Class is sufficiently well-defined and cohesive;

8. The Settlement Agreement contains a proposed Notice of Class Action Settlement for the purpose of providing both direct and individualized notice to the Settlement Class and a proposed publication notice;

9. The Court has carefully and rigorously considered the settlement terms, the Settlement Agreement and the exhibits thereto, and all of the other pleadings, papers, testimony, exhibits, discovery, and oral arguments herein, and the presentations of counsel for both sides regarding preliminary approval of the proposed Settlement;

10. The Court preliminarily finds that the settlement terms are fair, reasonable and adequate and in the best interests of the Class, considering possible benefits to the Class that could be achieved by further litigation, the length of time this action has been pending, the expenses of further litigation, the risk and costs of further delay, the complexity of this litigation, and the risk to the Class of achieving a less favorable outcome, and the Court has determined that it would be in the best interests of the parties and the ends of justice for this Court to conduct a final approval hearing regarding the proposed settlement; and

11. Good cause appearing therefore,

IT IS HEREBY ORDERED as follows:

1. The Court finds that the Settlement Class is adequately represented by the named Plaintiffs, Lynn Hartenberger and Nancy Stevens, and by attorneys Bauman, Dow & Leon, P.C. (Christopher P. Bauman and Deborah Stambaugh), P.O. Box 30, Albuquerque, NM 87190 and Sanders & Westbrook, PC (Duff Westbrook, Maureen Sanders and Brian Moore), 102 Granite NW, Albuquerque, New Mexico 87102 (collectively "Class Counsel").

2. The Court hereby preliminarily approves the proposed Settlement set forth in the Settlement Agreement as fair, reasonable, and adequate to the Class and within the range of possible final judicial approval. The Court specifically finds that the proposed settlement resulted from extensive arms-length negotiations and is sufficient to warrant notice thereof to Class Members.

3. The terms used herein shall have the same meaning as defined in the Settlement Agreement filed with the Court and incorporated herein by reference.

4. Pending resolution of the settlement proceedings, the Court hereby asserts jurisdiction over all of the Class Members for the purposes of effectuating this settlement and releasing their claims.

5. Pending resolution of these settlement proceedings, no Class Member shall commence or prosecute, either directly or through another person or entity, any action or proceeding in any court or tribunal asserting any of the settled claims against any Defendant or other released party.

6. The Settlement Agreement does not constitute an admission, concession, or indication by the Defendants of the validity of any allegations, assertions, or claims in this Action or of any wrongdoing, liability, or violation of law by the Defendants.

7. **Final Fairness Hearing.** A hearing (the "Final Fairness Hearing") will be held on May 27, 2015 at 9:00 a.m. in Courtroom 302 of this Court to determine:

- a) whether this action should be finally certified as a class action for settlement purposes;
- b) whether the proposed settlement of this Action should be approved as fair, reasonable and adequate;
- c) whether this Action should be dismissed with prejudice pursuant to the terms of the Settlement Agreement;
- d) whether Class Members should be bound by the release set forth in the Settlement Agreement;
- e) whether Class Members should be permanently enjoined from (among other things) filing, commencing, prosecuting, maintaining, intervening in, participating in (as class members or otherwise), or receiving any benefits from, any other lawsuit, arbitration, or administrative, regulatory or other proceeding or order in any jurisdiction based on or relating to the claims and causes of actions, or the facts and circumstances related thereto, in this Action and/or the Released Claims; and
- f) whether Class Counsel's application for an award of attorneys' fees and expenses, and Plaintiffs' application for an incentive award, should be approved.

9. **Pre-Hearing Notices to Class Members.** Subject to the terms of the Settlement Agreement, Class Counsel shall cause the notices described below to be provided to potential Settlement Class Members.

10. **Notice by Mail.** Class Counsel shall mail the Settlement Class Notice substantially in the form filed with this Court as Exhibit A to the Settlement Agreement to the last-known address of each reasonably identifiable potential Class Member. The Settlement Class Notice shall be sent by first-class mail, postage prepaid, no later than forty-five (45) days before the Fairness Hearing. ✓

11. **Notice by Publication.** In addition to mailing the Settlement Class Notice, Class Counsel shall publish a summary publication notice substantially in the form filed with this Court as Exhibit B to the Settlement Agreement. The Publication Notice shall be published on two occasions, no later than 30 days before the Final Fairness Hearing, in the following publications: the *Albuquerque Journal* and *Rio Rancho Observer*.

12. **Proof of Mailing.** At or before the Final Fairness Hearing, Class Counsel shall file with the Court a proof of mailing of the Settlement Class Notice and a proof of publication of the Publication Notice.

13. **Findings Concerning Notice.** Having considered, among other factors, (a) the cost of giving notice by various methods, (b) the resources of the representative Plaintiffs, (c) the stake of each Class Member and (d) the possibility that certain Class Members might desire to exclude themselves from the Class or appear individually, the Court finds that notice given in the form and manner provided in paragraphs 10 and 11 of this Order is the best practicable notice and is reasonably calculated, under the circumstances, to apprise the Class Members (i) of the pendency of this Action, (ii) of their right to object to the settlement or exclude themselves from

the Settlement Class and the proposed settlement, (iii) that any judgment, whether favorable or not, will bind all Class Members who do not request exclusion, (iv) that should a Class Member seek exclusion then the Defendants, in their sole discretion, may declare the Settlement Agreement null and void; and (v) that any Class Member who does not request exclusion may object to the settlement and, if he or she desires, enter an appearance personally or through counsel. The Court further finds that the Settlement Class Notice and Publication Notice provided in the Settlement Agreement are written in plain English and are readily understandable by Class Members. In sum, the Court finds that the proposed notice texts and methodology are reasonable, that they constitute due, adequate and sufficient notice to all persons entitled to be provided with notice, and that they meet the requirements of the New Mexico Rules of Civil Procedure.

14. **Exclusion from Class.** Any Class Member who wishes to be excluded from the Class must send a written request for exclusion to Class Counsel for the Class, at the address provided in the Settlement Class Notice. Class Counsel shall file and serve all such exclusion requests with the Clerk of the Court no later than ^{Seven J.A.} fifteen (7) days before the Final Fairness Hearing. Any such exclusion request must be sent by first-class mail, postage prepaid, and must be postmarked no later than May 12, 2015 and received by Class Counsel within five (5) days after mailing. The exclusion request must contain the name, address, and daytime telephone number of the person requesting to be excluded from the Class; information sufficient to identify their ownership interest in the Mariposa East Subdivision; a statement of the reasons for their request to be excluded; and their signature. If the proposed settlement is approved, all Class Members shall be bound as to by all subsequent proceedings, orders and judgments in this action. ✓

15. If this Court ultimately determines not to approve this proposed Settlement Agreement, or should any decision of this Court approving the proposed Settlement Agreement be reversed on appeal, then the findings made in this Order shall become null and void and the issues to which those findings relate herein shall remain for decision by this Court as if the proposed Settlement Agreement had not been entered into.

16. Any Class Member may enter an appearance *pro se* or through counsel of such Member's own choosing and at such Member's own expense. Any Class Member who does not enter an appearance or appear *pro se* will be represented by Class Counsel.

17. Should Final Approval be granted all Class Members shall be completely and forever enjoined from filing, commencing, prosecuting, intervening in, or participating in (as Class Members or otherwise), any lawsuit in any jurisdiction based on or relating to the Action and/or the Released Claims, and all persons shall be enjoined from filing, commencing or prosecuting a lawsuit as a class action on behalf of Class Members who have not timely excluded themselves, based on or relating to the Action and/or the Released Claims. Furthermore, such Class Members, who have not timely excluded themselves, shall be bound by the Settlement Agreement if it is approved by the Court at the Final Fairness Hearing. Any person or entity who knowingly violates the injunction shall pay all reasonable attorneys' fees and costs Defendants incur as a result of the violation.

18. Any Class Member who wishes to object to the Settlement on any grounds must serve that objection by first-class mail, postmarked on or before fifteen (15) days prior to the Final Fairness Hearing, on: (i) Class Counsel, Bauman, Dow & Leon, P.C. (Christopher P. Bauman and Deborah Stambaugh), P.O. Box 30, Albuquerque, NM 87190; and (ii) Defendants' counsel Peifer, Hanson & Mullins, P.A. (Charles Peifer and Cerianne Mullins) P.O. Box 25245,

Albuquerque, NM 87125-5245 and Miller Stratvert, P.A. (Richard L. Alvidrez and Nathan A. Cobb), P.O. Box 25687, Albuquerque, NM 87125.

19. In order to be considered by the District Court, any objection must be legible and must contain the following information: (i) the case name and case number of this Action; (ii) Objector's name, address, and daytime telephone number; (iii) information sufficient to identify the Objector's ownership interest in the Mariposa East Subdivision; (iv) a statement, in clear and concise terms, of the objection to the Settlement and a detailed statement of the grounds for such objection; (v) all documents or writings which the Objector wants the District Court to consider, if any; (vi) a summary of any legal and/or factual support the Objector wants the District Court to consider; and (vii) a detailed description of any documents or witness statements the Objector wants the District Court to consider. An objection also must contain a statement that the Class Member has not opted out of the Action, and such statement must be signed personally by the Class Member so objecting. Any objection which is not timely mailed, or which fails to satisfy all the foregoing requirements, shall be forever barred. A Class Member, whether or not represented by separate legal counsel, who fails to timely mail an objection shall be bound by all terms of the Settlement Agreement and by all proceedings, orders and judgments by this Court in the Action. A Class Member may object either on his or her own behalf or through any counsel retained at that Class Member's expense. Class Counsel and Defendants' Counsel shall submit all such objections to the Court four (4) days prior to the Final Fairness Hearing.

20. If a Class Member retains an attorney, the attorney must: (i) file a notice of appearance with the Clerk of the Court no later than fifteen (15) days before the Final Fairness Hearing or as the Court may otherwise direct; and (ii) serve by first-class mail copies of same on

Class Counsel and Defendants' Counsel at the addresses set forth in Paragraph 18, above, postmarked no later than fifteen (15) days before the Final Fairness Hearing.

21. Class Members who are not represented by an attorney and who have properly and timely filed objections in compliance with Paragraphs 18 and 19, above, may appear at the Final Fairness Hearing if they file with the Court a notice of intention to appear at the Final Fairness Hearing, serving by first-class mail Class Counsel and Defendants' Counsel at the addresses set forth in Paragraph 18, above, postmarked no later than fifteen (15) days prior to the Final Fairness Hearing.

22. Class Members who are represented by an attorney and who have properly and timely filed objections in compliance with Paragraphs 18 and 19, above, may appear at the Final Fairness Hearing if they comply with the following: (i) serve by first-class mail on Class Counsel and Defendants' Counsel at the addresses set forth in Paragraph 18, above, postmarked no later than fifteen (15) days prior to the Final Fairness Hearing, a notice of intention to appear at the Final Fairness Hearing; and (ii) no later than fifteen (15) days prior to the Final Fairness Hearing, move to intervene in this action, filing and serving on Class Counsel and Defendants' Counsel, a motion to intervene, complying with all state and local rules of procedure.

23. Any Class Member who is not represented by an attorney and who does not timely serve a proper written objection on Class Counsel and Defendants' Counsel postmarked on or before fifteen (15) days prior to the Final Fairness Hearing, and file a notice of intention to appear no later than fifteen (15) days prior to the Final Fairness Hearing, shall not be permitted to object or appear at the Final Fairness Hearing, shall be deemed to have waived and forfeited any and all rights he or she may have to appear and address the District Court at the Final Fairness Hearing, shall be foreclosed from raising any objection at the Final Fairness Hearing,

and shall be bound by all of the terms of the Settlement Agreement and by all proceedings, orders and judgments by this Court in the Action. Any Class Member who is represented by an attorney and who does not timely file and deliver a proper written objection, a successful motion to intervene as described above, and a notice of intention to appear no later than fifteen (15) days prior to the Final Fairness Hearing, shall not be permitted to object or appear at the Final Fairness Hearing, shall be deemed to have waived and forfeited, and shall be foreclosed from raising, any objection at the Final Fairness Hearing and any and all rights he or she may have to appear and address District Court at the Final Fairness Hearing, shall be bound by all of the terms of the Settlement Agreement and by all proceedings, orders and judgments by this Court in the Action.

24. Class Counsel are authorized to act on behalf of Class Members in this Action with respect to all acts or consents required by, or which may be given pursuant to the Settlement Agreement, or such other acts which are reasonably necessary to consummate the proposed Settlement.

25. Seven (7) days prior to the Final Fairness Hearing, Class Counsel shall file with this Court, and serve on Defendants, copies of all submissions in support of final approval of the proposed Settlement Agreement.

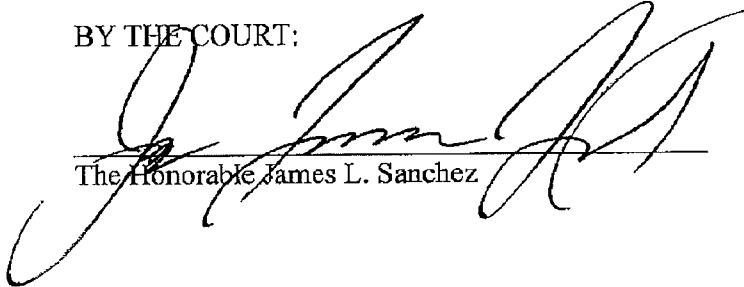
26. Seven (7) days prior to the Final Fairness Hearing, Class Counsel shall file with the Court, and serve on Defendants' counsel, the Class Counsel's application for attorneys' fees and reimbursement of litigation expenses and the Class Representative's application for an incentive award. Final determination of Class Counsel's fee and litigation expense application, and of the Class Representative's application for an incentive award, shall be made at the Final Fairness Hearing.

27. The Final Fairness Hearing and all dates provided for herein, may from time to time, and without further notice to the Class, be continued or adjourned by order of the Court.

28. The Court reserves the right to approve the Settlement Agreement with such modifications as may be agreed to by the parties to the Settlement Agreement and without requiring further notice to the Class Members.

DATED this 9th day of April, 2015.

BY THE COURT:



The Honorable James L. Sanchez

SUBMITTED BY:

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Attorneys for Defendant High Desert Investment Corporation

List of individuals and entities excluded
from the Class

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ASW Realty Partners, LLC
B&B Real Estate Investments LLC
Beal Bank
Beal Nevada Corporation
Bravo Land Investors, LLC
BT Homes, Inc.
Burmout Investments, Inc.
Burmout Investments, Inc.
Charter Bank
Charter Building & Development Corp.
Charter Homes, Inc.
Exchange Accommodation Title Holder, LLC
Federal Deposit Insurance Corporation
First Community Bank
JDZT LLC
LLP Mortgage, Ltd.
Mariposa Land Holdings, LLC
Mariposa Ventures, LLC
Mesa Verde Development Corporation
Mock Associates, Inc.
New Mexico Bank & Trust
RHS Properties, Inc.
Scott Patrick, Inc.
Sierra Vista at Mariposa, LLC
Sivage Community Development, LLC
Sky View Homes, Inc.
The Bank of New York Mellon
The Peaks, LLC
The Troughs, LLC
U.S. Bank National Association

