

1 Robert L. Brace, Esq., SBN 122240
2 Email: rlbrace@hbsb.com
3 Peter L. Candy, Esq., SBN 149976
4 Email: pcandy@hbsb.com
5 Michael P. Denver, Esq., SBN 199279
6 Email: mpdenver@hbsb.com
7 **HOLLISTER & BRACE**
8 P.O. Box 630
9 Santa Barbara, CA 93102
10 Telephone: 805.963.6711
11 Facsimile: 805.965.0329

12 Thomas G. Foley, Jr., Esq., SBN 65812
13 Email: tfoley@foleybezek.com

14 **FOLEY, BEZEK, BEHLE**
15 **& CURTIS, LLP**
16 15 W. Carrillo Street
17 Santa Barbara, CA 93101
18 Telephone: 805.962.9495
19 Facsimile: 805.962.0722

20 *Attorneys for the Hunter Plaintiffs and the Class*

Anthony R. Zelle, Esq., Mass. SBN 548141
Email: tzelle@zelmcd.com
Brian McDonough, Esq., Mass. SBN 637999
Email: bmcDonough@zelmcd.com
Thomas Evans, Esq., SBN 552820
Email: tevans@zelmcd.com
ZELLE MCDONOUGH & COHEN LLP
101 Federal Street, 14th Floor
Boston, MA 02110
Telephone: 617.742.6520 x219
Facsimile: 617.742.1393
(Appearing *Pro hac vice*)

Attorneys for Plaintiff Quirk Infiniti, Inc. and the Class

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN JOSE DIVISION**

17 **IN RE: EDWARD H. OKUN INTERNAL**
18 **REVENUE SERVICE § 1031 TAX**
19 **DEFERRED EXCHANGE LITIGATION**

20 MDL No. 2028

21 Anita Hunter, et al. v. Edward H. Okun, et al.
N.D., California, C.A. No. 5:07-2795-JW

22 Quirk Infiniti, Inc. v. Wachovia Bank, N.A.
23 D. Massachusetts, C.A. No. 1:08-12060

Case No. 07-cv-2795 JW

Assigned to Hon. James Ware

**DECLARATION OF ROBERT L.
BRACE IN SUPPORT OF MOTION
FOR PAYMENT OF ATTORNEYS'
FEES AND REIMBURSEMENT OF
COSTS FROM WAVE I SETTLEMENTS**

24 I, Robert L. Brace, am an officer of Hollister & Brace, a professional corporation
25 ("H&B"). I am a trial attorney representing the plaintiffs in the above-captioned class action.

26 Based upon my own personal knowledge I declare as follows:

27
28 ///

1 **I. INTRODUCTORY STATEMENT**

2 1. This Declaration and the accompanying Motion are submitted to: (i) inform the
3 Court of the efforts of myself and others to recover funds to repay the Plaintiffs' lost 1031
4 exchange funds; (ii) request the reimbursement of litigation costs and expenses incurred on
5 behalf of the Settlement Class, from inception of the action through June 30, 2009; (iii)
6 request that \$1,000,000 of the Wave I Class recovery be used to defray a portion of the
7 expenses incurred by the Trustee in the Okun Bankruptcy proceedings to hire Deloitte
8 Financial Advisory Services, LLC ("Deloitte") for services which benefitted the Class; (iv)
9 request the payment of attorney fees amounting to 25% of the "net" recovery allocated to the
10 Settlement Class, less \$500,000; and (v) request the Court to order that the remainder of the
11 Wave I Class recovery be distributed to the individual Settlement Class members on a pro rata
12 basis.

13 2. The request is made pursuant to: (i) the terms of the Class/Trustee Agreement
14 approved by the Court in Wave I; (ii) the terms of the Fee Agreements between Class Counsel
15 H&B, Foley, Bezek, Behle & Curtis LLP ("FBBC") and Zelle, McDonough & Cohen
16 ("ZMC") (collectively, H&B, FBBC and ZMC are referred to herein as "HBFZ")¹ and their
17 respective clients; and (iii) the terms of the Wave I Settlements totaling \$88,247,500.

18 **II. CLASS COUNSEL AND THE 25% FEE AGREEMENT**

19 3. The above-captioned class action styled *Hunter, et al. v. Okun, et al.*, U.S.D.C.
20 for the N. Dist. of Cal. Case No.07-CV-2795-JW ("Hunter I"), was originally filed in May
21 2007. H&B and FBB&C were affiliated into the case in May 2008. ZMC, which filed the
22 related above-captioned action styled *Quirk Infiniti, Inc. v. Wachovia*, U.S.D.C. for the Dist.
23 of Mass. Case No.1:08-CV-12060 (the "Quirk Action"), became co-counsel with H&B and
24 FBB&C in April 2009 after the Quirk Action was transferred to this Court for consolidation
25 with Hunter I by the United States Judicial Panel for Multi-District Litigation. Collectively,
26 Hunter I and the Quirk Action are referred to herein as the "MDL Action."

27
28 ¹ The Parr Law Group, which originally represented Plaintiff Anita Hunter in the above-captioned action styled *Hunter, et al. v. Okun, et al.*, U.S.D.C. for the N. Dist. of Cal. Case No.07-CV-2795-JW, is also included within the meaning of "HBFZ" as used herein.

1 4. In the MDL Action, there are seven named representative Plaintiffs with
2 approximately \$11,300,000 in missing trust assets. The representative Plaintiffs include:
3 Anita Hunter (“Hunter”) doing business in Santa Clara County, who lost \$1,365,294.58;
4 CellTex Site Services, Ltd. (“CellTex”), doing business in San Antonio, Texas who lost
5 \$2,107,900.00; Grande Investment, LLC (“Grande Investment”) from Littleton, Colorado,
6 who lost \$1,227,341.51; Johnna Bozzo (“Bozzo”), doing business in Nassau County, New
7 York, who lost \$359,064.65; Robert J. Buono (“Buono”), doing business in San Mateo
8 County, California, who lost \$1,002,405.24; 409 Sherman Ave., LLC (“409 Sherman”), doing
9 business in San Mateo, California, who lost \$3,236,560.55; and Quirk Infiniti, Inc. (“Quirk”)
10 doing business in Massachusetts who lost \$2,000,000. These damage numbers do not include
11 tax liability or other consequential damages.

12 5. I have also obtained written fee agreements from two other victims who
13 respectively lost \$135,000 and \$1,042,150.32. Collectively, HBFZ’s nine clients lost
14 exchange funds (“Exchange Funds”) totaling approximately \$12,500,000.

15 6. An exemplar copy of the Fee Agreement signed by H&B’s clients and
16 representative plaintiffs (without exhibits) is attached as Exhibit 1 hereto. Each of the seven
17 representative Plaintiffs and the two other H&B clients executed a fee agreement with the
18 same terms and conditions. Pursuant to the agreement, each client agreed to act as a class
19 representative if necessary and agreed to pay Class Counsel a contingency fee equal to 25% of
20 the “net” funds recovered. The manner by which the “net” recovery is calculated pursuant to
21 the terms of the fee agreement is discussed below.

22 **III. THE WAVE I SETTLEMENTS**

23 7. A detailed discussion of the factual background and the procedural steps which
24 led up to the Wave I Settlements is set forth in the Memorandum and Declaration offered in
25 support of Plaintiffs’ Motion to Preliminarily Approve the Settlements (Docket No. 201) and
26 Plaintiffs’ Motion for Final Approval of the Wave I Settlements (Docket No.283), both of
27 which were granted by the Court.
28

1 8. Pursuant to the terms of the Wave I Settlements, the Settling Defendants will
 2 contribute \$88,247,500 in cash. As more specifically set forth in the Wave I Settlement
 3 Agreements, these funds will be paid to resolve, among other things, any and all claims by the
 4 Plaintiffs and the class of 1031 exchangers ("Exchangers") arising out of the collapse of the
 5 1031 Tax Group and the six affiliated qualified intermediaries ("QIs") purchased by Ed Okun
 6 ("Okun").² Copies of the Wave I Settlements are in the Court file. (Docket Nos. 220-222).

7 9. Of the Wave I Settlement funds totaling \$88,247,500, \$43,247,500 is to be
 8 paid pursuant to the "Schedule 'A' Settlements",³ while the remaining \$45,000,000 is to be
 9 paid by defendant Wachovia Bank pursuant to the terms of its settlement.

10 **IV. THERE ARE NO OPT-OUTS**

11 10. No potential Settlement Class members opted out of the Wave I Settlement
 12 Class.⁴

13 **V. THE DIVISION OF SETTLEMENT FUNDS AND DELOITTE** 14 **EXPENSES BETWEEN THE SETTLEMENT CLASS AND THE**

15 ² The six QIs Okun purchased are: Atlantic Exchange Co., LLC; Security 1031 Services, LLC; Real Estate
 16 Exchange Services, Inc.; National Exchange Services QI, Ltd.; Investment Exchange Group; and 1031
 17 Advance, Inc

18 ³ The Schedule A Settlements are:

Party	Amount
Kluger Peretz Kaplan & Berlin ("KPKB")	\$12,380,000
Underwriters at Lloyd's of London ("Lloyds")	4,600,000
Continental Casualty Company ("CNA")	13,000,000
Federal Insurance Company ("Federal")	7,000,000
Twin City Fire Insurance Company ("Twin City")	3,250,000
Daniel E. McCabe, Shirley L. McCabe, Andrew C. McCabe, Chad J. Greenberg and J. Peter McCann ("McCabe Group")	1,250,000
William D. Bennett ("Bennett")	400,000
William A. Hazel, Patrick Dowdall, James F. Livesey, Charles D. Subrt ("AEC Defendants")	107,500
David B. Shefman and Marga R. Shefman, (the "Shefmans")	10,000
Janet Dashiell ("Dashiell")	75,000
Steven Allred ("Allred")	250,000
Michael J. Rosen ("Rosen")	925,000
Total:	\$ 43,247,500

19
 20
 21
 22
 23
 24
 25
 26
 27
 28 ⁴ A "Conditional" Objection and Opt Out was filed by a group of Exchangers known at the "Alvarez Parties" (Docket No.273), but it was withdrawn (Docket No. 282).

1 **BANKRUPTCY ESTATES PURSUANT TO THE CLASS/TRUSTEE**
2 **AGREEMENT**

3 10. As addressed in the Motion for Preliminary Approval of the Wave I
4 Settlements (Docket No. 201), pursuant to the terms of the Class/Trustee Agreement, Wave I
5 Settlement proceeds are allocated between the Bankruptcy Estates and the Settlement Class as
6 follows: (i) the Schedule "A" Settlement funds totaling \$43,247,500 are allocated 100% to
7 the Estates; and (ii) the \$45,000,000 Wachovia payment is allocated 60% (\$27,000,000) to the
8 Estates and 40% (\$18,000,000) to the Settlement Class.

9 11. A qualified settlement fund ("QSF") has been established pursuant to 26
10 C.F.R. § 1.468B et. seq., into which, the Wave I Settlement funds allocated to the Class
11 (\$18,000,000 of the \$45,000,000 to be paid by Wachovia) shall be deposited. Gerard A.
12 McHale, the Trustee in the related Bankruptcy proceedings, has been appointed as the Trustee
13 of the QSF.

14 12. The contingency fee which Plaintiffs now seek the Court to approve is based
15 upon the "Net Settlement". The Net Settlement is the gross amount recovered and allocated
16 to the Class (\$18,000,000), reduced by (i) allowable litigation costs incurred from inception
17 through June 30, 2009, which, as discussed below, total \$70,921.85, as well as (ii) the
18 \$1,000,000 to be paid to Deloitte pursuant to the terms of the Class/Trustee Agreement.
19 Collectively, these expenses total \$1,070,921.85.

20 13. Prior to negotiation of the Class/Trustee Agreement, Deloitte provided
21 substantial financial advice and analysis to the Trustee with respect to, among other things,
22 the investigation of various claims, including claims which have been and/or will be pursued
23 by both Plaintiffs and the Trustee. Some of the work by Deloitte proved useful in presenting
24 the Trustee's claims and reaching settlements with the Schedule "A" Parties, which benefitted
25 the Class as unsecured creditors of the Estates. In addition, the Class/Trustee Agreement
26 provided HBFZ access to Deloitte's work product, which is proving beneficial in terms of the
27 Class's ability to prosecute its claims against remaining defendants. As such, the Class and
28 Trustee agreed to allocate a portion of the costs of Deloitte's work to the Class. Accordingly,

1 the Class/Trustee Agreement provides that the fees and expenses for Deloitte's work, prior to
 2 the date of the Agreement, will be allocated as follows: (i) \$1 million to the general
 3 administration of the Estates, paid solely by the Estates; (ii) \$1.5 million to claims against the
 4 Schedule "A" Parties, to be paid by the Estates from the first proceeds from claims against the
 5 Schedule "A" Parties;⁵ and (iii) the balance to the recovery from the Wachovia Claims, with
 6 \$1 million to be paid by the Class and the balance by the Estates.⁶ Thus, with respect to the
 7 Wave I Settlements, the Class/Trustee agreement provides that the Class will pay \$1,000,000
 8 from the Class' share of the Wachovia funds (\$18,000,000) to reduce the Deloitte expenses
 9 incurred prior to the execution of the Class/Trustee Agreement. The Trustee is to pay the
 10 remainder of the Deloitte expenses incurred prior to the execution of the Class/Trustee
 11 Agreement.⁷

12 VI. THE REQUEST FOR FEES AND COSTS OUT OF THE CLASS RECOVERY

13 14. Pursuant to the fee agreements executed by the representative Plaintiffs, Class
 14 Counsel is entitled to a 25% Contingency Fee on the "net" funds recovered on behalf of the
 15 Settlement Class (the "Net Settlement").

16 15. Pursuant to the Class/Trustee Agreement, Class Counsel may only request the
 17 Court to approve a fee on funds which have been allocated to the Class. In Wave I, the only
 18 settlement funds allocated to the Class are \$18,000,000 of the \$45,000,000 to be paid by
 19 Wachovia. Thus, this fee application is limited to the \$18,000,000 of the Wachovia
 20 Settlement allocated to the Settlement Class. Class Counsel is not seeking a contingency fee
 21

22 ⁵ The Class/Trustee Agreement provided that the \$1.5 million to be paid pursuant to item (ii), above, was subject to
 23 later adjustment based on any *pro rata* allocation of these recoveries between the Estates and the Class. However,
 24 as the Class is not sharing in the Schedule A Settlements, which are the "first funds" collected from Schedule A
 Parties, the Class is not responsible for paying any of this amount.

25 ⁶ The Class/Trustee Agreement provided that the balance of the Deloitte expense incurred prior to the execution of
 26 the Agreement as referenced in item (iii), above, is to be paid out of the first funds recovered from Wachovia or
 Lockton. However, as Wachovia has settled and Lockton has not, the balance is to be paid from the Wachovia
 recovery.

27 ⁷ With regard to Deloitte's fees and expenses incurred after the date of the Class/Trustee Agreement, Plaintiffs and
 28 the Trustee have agreed to mutually determine the appropriate allocation, based on the claims in connection with
 which the services were rendered, and the allocation of the proceeds as between the Estates and the Class.

1 on the remaining \$70,247,500 in Wave I Funds.

2 16. While Class Counsel agreed not to seek a contingency fee on the Schedule A
3 Settlements or the portion of the Wachovia Settlement allocated to the Estates, Class Counsel
4 will be paid on an hourly basis by the Trustee for time spent in obtaining this Court's approval
5 of the settlements, and, the Bar Orders required by each settlement. Class Counsel's bill for
6 processing the Schedule A Settlements and obtaining the Bar Orders totals \$230,459.12,
7 which includes fees of \$224,525 and expenses of \$5,934.12. The Trustee's payment of the
8 \$230,459.12 to Class Counsel for processing the settlements is separate and apart from the
9 contingency fee which Plaintiffs now seek the Court to approve.

10 17. The contingency fee which Plaintiffs now seek the Court to approve is based
11 upon the "Net Settlement". The Net Settlement is the gross Class recovery (\$18,000,000)
12 deducted by the Deloitte expense of \$1,000,000 and the allowable litigation costs and
13 expenses incurred by Class Counsel from case inception through June 30, 2009, which total
14 \$70,921.85. Combined, these expenses total \$1,070,921.85. [See the below discussion
15 addressing the costs to be reimbursed].

16 18. If all the requested costs are approved by the Court, the gross Class recovery of
17 \$18,000,000 minus the claimed costs totaling \$1,070,921.85, provides a Net Settlement of
18 \$16,929,078.15. 25% of that net amount is \$4,232,269.54, and that is the amount that the
19 class representatives and other HBFZ clients agreed would be Class Counsel's fee in helping
20 to create the common fund.

21 19. While the contractual fee is 25% of the Net Settlement, pursuant to the
22 Class/Trustee Agreement, the contingency fee to be sought by Class Counsel will be limited
23 to the lesser between: (i) the contractual fee agreed to by the Class Representatives (25% of
24 the net recovery); and, (ii) 1.7 times Plaintiffs' Counsels' hourly rates for time spent on the
25 litigation.

26 20. From the inception of the Okun litigation through June 30, 2009, HBFZ
27 attorneys and staff have expended nearly 6,000 hours on this matter. The billing rate for each
28 attorney and staff member and the hours each has worked on this case are set forth in Exhibit

1 2. The total billing at each respective attorneys' and staff members' hourly rate totals
 2 \$2,604,388.50. Class Counsel's time at hourly rates, multiplied by 1.7, plus the time spent by
 3 The Parr Law Group at its regular billable rates (not multiplied by 1.7), provides
 4 \$4,391,928.45 (the "1.7 times hourly rates amount").⁸ That is more than the contractual 25%
 5 fee, which totals \$4,232,269.54.

6 21. With respect to Wave I, because the 25% contractual fee (\$4,232,269.54) is
 7 less than the 1.7 times hourly rates amount (\$4,391,928.45), Class Counsel expected to
 8 request the Court to approve Wave I fees equal to 25% of the Class recovery, or
 9 \$4,232,269.54. However, in the past month, Class Counsel and Counsel for the Trustee each
 10 recognized that they were interpreting the "fee" portion of the Class/Trustee Agreement
 11 differently, and a dispute arose over the amount of fees Class Counsel should request in
 12 relation to Wave I. To resolve that dispute, Class Counsel agreed to limit their fee request in
 13 Wave I to the 25% contractual fee (\$4,232,269.54), less \$500,000, or \$3,732,269.54. The
 14 agreed upon reduction is applicable to Wave I only. Future fee requests, if any, will be
 15 limited to the lesser between (i) the 25% contractual fee and (ii) 1.7 times hourly rates amount
 16 without any reduction.

17 22. Class Counsel is requesting fees of \$3,732,269.54 (including the \$500,000 fee
 18 reduction), and costs of \$1,070,921.85. If all requested fees and costs are approved, the sum of
 19 \$13,196,808.61 in Wave I Class funds will remain available for distribution to Settlement
 20 Class members.

21 **VII. THE PLAN OF DISTRIBUTION TO SETTLEMENT CLASS MEMBERS**

22 23. Pursuant to the Wave I Final Approval Order (Docket No.304), after the
 23 payment of approved fees and costs, and upon further orders of the Court, the QSF Trustee
 24 shall distribute the remaining Wave I funds to Settlement Class members on a pro rata basis,
 25

26 ⁸ The billable amount for time expended on the file from case inception through June 30, 2009 at each plaintiffs'
 27 firm's hourly rates is as follows: H&B - \$1,496,071.50; ZMC - \$641,040.00; FBB&C - \$416,517.00; and, The
 28 Parr Law Group - \$50,760.00. The "1.7 times hourly rates amount" of \$4,391,928.45 is comprised of the
 combined noted billable time expended by H&B, ZMC and FBB&C, multiplied by 1.7, plus the \$50,760 in
 billable time expended by The Parr Law Group. The Parr Law Group's time is not multiplied by 1.7 as that firm is
 not a part of the Class/Trustee Agreement.

1 with each Settlement Class member's pro rata share calculated as follows: (i) Each
 2 Settlement Class member's approved lost Exchange Amount⁹ plus Exchange Agreement
 3 Contractual Interest,¹⁰ if any, shall be divided by the total of all Settlement Class members'
 4 lost Exchange Amounts plus Exchange Agreement Contractual Interest; and (ii) the resulting
 5 percentage shall be multiplied against the total amount to be distributed to the Settlement
 6 Class to determine each Settlement Class member's pro rata share. A schedule identifying the
 7 Settlement Class members, their lost Exchange Amounts, Exchange Agreement Contractual
 8 Interest, if any, and the amounts each will receive from the \$13,196,808.61 in remaining
 9 Wave I Class funds (if all fees and costs are approved) is attached hereto as Exhibit 3. The
 10 figures set forth in Exhibit 3 were derived from, among other sources, QI bank records,
 11 Exchange Agreements, other exchange documentation, input from Exchangers and their
 12 respective assignees ("Claims Buyers"), if any. HBFZ is in the process of communicating
 13 with Exchangers and Claims Buyers to confirm the accuracy of the lost Exchange Amounts
 14 and the status of the assignments to Claims Buyers, if any. To the extent HBFZ learns
 15 information which effects the distribution amounts set forth in Exhibit 3, HBFZ will advise
 16 the Court in advance of, or at the hearing on this motion. To the extent HBFZ learns that
 17 there is a dispute between an Exchanger and their respective Claims Buyer over who between
 18 them is to be paid, HBFZ will also advise the Court of that circumstance at or before the
 19 hearing.

20 **VIII. THE REQUEST FOR FEES AND COSTS IS REASONABLE**

21 24. H&B became involved in the case over a year-and-a-half-ago. Since then,
 22 Class Counsels' efforts in this litigation have not been compensated as the attorneys' fee has
 23

24 ⁹ Each Settlement Class member's "Exchange Amount" means the principal amount deposited by the Settlement
 25 Class member with the applicable 1031 Debtor under the applicable Exchange Agreement which was lost due to
 the insolvency of the applicable 1031 Debtor.

26 ¹⁰ "Exchange Agreement Contractual Interest" means such stated interest, if any, as shall have accrued pursuant to
 27 the terms of the applicable Exchange Agreement up to and through the date the applicable 1031 Debtor filed its
 respective Petition in Bankruptcy.

1 been wholly contingent upon the result achieved. Significant time, resources and monetary
2 expenditures were devoted to the litigation culminating in Wave I. As compensation for the
3 efforts on behalf of the Class, HBFZ requests this Court to: (i) approve the reimbursement of
4 all unreimbursed costs of litigation incurred through June 30, 2009 totaling \$70,921.85; (ii)
5 approve the use of \$1,000,000 from the Wave I Class recovery to defray the Deloitte expense;
6 and (iii) approve a fee equal to the 25% contractual fee (\$4,232,269.54), less \$500,000, or
7 \$3,732,269.54.

8 **A. Tasks Undertaken on Behalf of the Class which Support the Request for**
9 **Attorneys' Fees.**

10 25. Wave I represents a substantial recovery to the Settlement Class members.

11 26. The favorable result presented in Wave I was, in part, the result of the efforts
12 of HBFZ.

13 27. Prior to commencing this action, I, along with other lawyers at H&B had
14 successfully conducted complex litigation, as noted in my resume attached as Exhibit 4
15 hereto. The valuable lessons learned in my prior complex cases were applied to the case at
16 bar and aided HBFZ in avoiding the many pitfalls associated with this complex litigation.

17 28. Over the past year-and-a-half, substantial time and effort was expended by me,
18 Michael P. Denver, and, Peter L. Candy of H&B, and at least three full-time H&B staff
19 members. Likewise, Anthony Zelle and Brian McDonough of ZMC, and Thomas Foley of
20 FBBC, devoted significant time and effort to the case. The time and labor intensive and
21 costly efforts we undertook include, among other things, substantial claims investigation,
22 researching the applicable law, working with the Trustee and his counsel, gathering claims
23 information, creating and updating the claims database, reviewing voluminous documents
24 produced by parties and non-parties, preparing and filing the Amended Complaint in this
25 action and the Complaint in the related action styled *Anita Hunter, et al. v. Citibank, N.A., et*
26 *al.*, Case. No. 09-CV-2079-JW, attending settlement conferences and strategy sessions,
27 negotiating settlements, and obtaining preliminary and final Wave I Settlement approval and
28 Settlement Class certification. All of these efforts were necessarily expended on behalf of the

1 Class and, at least in part, contributed to the favorable result presented by Wave I.

2 29. Since being retained by the representative plaintiffs, Michael P. Denver, Peter
3 L. Candy, and I, along with the supporting staff at H&B, have expended over 4,000 hours in
4 prosecuting the litigation, as set forth in Exhibit 2 hereto. Exhibit 2 details the time expended
5 in this action by H&B personnel (from case inception through June 30, 2009) which is
6 submitted to the accounting department at my firm and input into the computerized
7 accounting software as a regular course of practice. Exhibit 2 also contains the time records
8 for co-counsel's firms. Combined, HBFZ spent nearly 6,000 hours on the litigation from case
9 inception through June 30, 2009.

10 30. Actions performed on behalf of the Class by HBFZ and supporting staff
11 include the following tasks:

- 12 • reviewed thousands of pages of documents produced by,
13 among others, numerous defendants, putative Class
14 Members, state agencies, and the Federation of Exchange
 Accommodators;
- 15 • communicated back and forth with the Trustees' attorneys;
- 16 • communicated back and forth with defendants' attorneys;
- 17 • performed legal research on the various legal theories
18 applicable to the facts as they have developed;
- 19 • interviewed numerous witnesses;
- 20 • conducted meetings with numerous claimants;
- 21 • drafted and filed pleadings in this action and in the *Hunter*
22 *v. Citibank* action;
- 23 • created and maintained a database of claimants and claim
24 information;
- 25 • performed preliminary claims analysis and administration
26 activities;
- 27 • prepared for and participated in settlement conferences;
- 28 • obtained preliminary and final approval of the Wave I
 Settlements;

- 1 • reviewed numerous and voluminous bank documents and
2 traced substantial amounts of stolen trust funds;
- 3 • designed and posted information on Hollister & Brace's
4 website at www.hbsb.com;
- 5 • communicated with class claimants by telephone, email and
6 letters; and
- 7 • attended Court hearings in this action, in *Hunter v.*
8 *Citibank*, and in the related Okun Bankruptcy Proceedings
9 in New York before Judge Glenn.

9 **B. Analysis of the Requested Attorneys' Fee.**

10 31. Class Counsels' efforts to date in this Class Action have not been
11 compensated.

12 32. As compensation for Class Counsel, HBFZ requests this Court to approve the
13 payment of a fee equal to the 25% of the Wave I Net Settlement recovered on behalf of the
14 Settlement Class, less the agreed upon \$500,000 reduction.

15 33. As indicated above, the Net Settlement is calculated by first considering the
16 gross Wave I funds allocated to the Settlement Class which totals \$18,000,000. The Net
17 Settlement is the gross deducted by allowable costs and fees, which, if they are all approved
18 by the Court, will total \$1,070,921.85. Therefore, the Net Settlement is \$16,929,078.15. The
19 contractual fee agreement provides for a fee equal to 25% of that amount, or \$4,232,269.54.

20 34. There were over 300 Exchangers victimized by the collapse of Okun's QIs. Of
21 that number, 9 Exchangers who combined lost in excess of \$12,500,000 have executed 25%
22 contingency fee agreements. None of the remaining Settlement Class Members opted out of
23 Wave I, and none objected to a 25% fee. The contractual 25% fee has been accepted by the
24 Class representatives and by those who have not signed the agreement.

25 35. The application of a percentage based attorneys' fee as to the Settlement Class
26 Members who have not signed the 25% fee agreement is the appropriate method to calculate
27 HBFZ's fee because, among other things, it aligns the lawyers' interest in being paid a fair fee
28 with the interest of the Settlement Class in achieving the maximum recovery in the shortest

1 amount of time required under the circumstances.

2 36. Pursuant to the authority and discussion set forth in the concurrently filed
3 Memorandum offered in support of the Wave I fee application, the Ninth Circuit favors the
4 use of percentage based attorneys' fees in common fund cases and Class Counsel's percentage
5 fee request is in line with numerous decisions within the Ninth Circuit.

6 37. The 25% contractual fee is appropriate when measured by the Lodestar
7 method, which is used by some courts but which is not the preferred method in the Ninth
8 Circuit. The Lodestar method bases fees on time expended, hourly rates, and a specified
9 number of enhancement factors. The typical Lodestar fee is calculated by applying a Lodestar
10 Multiplier to the hourly rate to increase that rate to reflect the risk taken on and the result
11 achieved for the Class by Class Counsel.

12 38. The detailed billing information for HBFZ from the inception of the case to
13 June 30, 2009 is set forth in Exhibit 2 hereto.

14 39. From case inception through June 30, 2009, HBFZ attorneys and staff have
15 expended nearly 6,000 hours on this Class Action. The billing rate for each attorney and staff
16 member and the hours each has worked on this case are set forth in Exhibit 2. The total
17 billing at each respective attorneys' and staff members' hourly rate totals \$2,604,388.50. The
18 contractual 25% fee totals \$4,232,269.54. Therefore, the application of a modest Lodestar
19 multiplier to the hourly rates for attorney and staff time spent on this case by HBFZ reveals
20 that the 25% contractual attorney fee would be entirely reasonable.

21 40. The representative Plaintiffs support the 25% contractual fee, a percentage well
22 within the range endorsed by decisions at the Ninth Circuit and District Court level in this
23 Circuit, as well as other courts throughout the United States. While HBFZ is seeking a fee
24 which is \$500,000 less than the 25% contractual fee, based upon the below factors, the 25%
25 contractual fee would be an appropriate fee for Class Counsel in this case. The relevant
26 factors are:

27 **(a) The result achieved.**

28 41. Pursuant to the terms of the Wave I Settlements, the Settling Defendants will

1 contribute \$88,247,500 in cash. Of this amount, \$18,000,000 has been allocated to the Class
2 for contingency fee computation purposes. The balance of \$70,247,500 will be paid to the
3 Estates. HBFZ submits that the allocations set forth in the Class/Trustee Agreement are
4 reasonable in view of the fact that the Plaintiffs, as Exchangers, constitute the vast majority
5 of claims asserted against the Estates, and thus the effect of the allocations are minimal. The
6 fact that portions of the Wave I Settlements (and additional settlements, if any), have been
7 allocated to the Estates will have a *de minimis* effect on the distributions made to the Class -
8 whose claims constitute in excess of ninety-nine percent (99%) of the general, unsecured
9 creditor body of the Estates. Furthermore, Class Counsel voluntarily agreed to waive any
10 claim to a contingency fee on the \$70,247,500 allocated to the Estates, thus maximizing
11 Plaintiffs' ability to recover as creditors of the Estates.

12 42. While HBFZ agreed not to seek a contingency fee on the \$70,247,500
13 allocated to the Estates, the favorable result presented by Wave I as a whole was obtained, at
14 least in part, through all of the above-described efforts of Class Counsel without the necessity
15 of a lengthy trial, or post trial appeals. It was achieved through extensive and creative
16 prosecutorial investigative efforts. As a consequence, the Settlement Class members will
17 receive compensation for their loss of Exchange Funds. They will avoid the very substantial
18 risk of being denied a recovery in the absence of the settlements.

19 **(b) The risks taken as to liability and damages.**

20 43. Substantial risks in this litigation made it far from certain that an ultimate
21 recovery would be obtained.

22 44. Despite the fact that certain of Plaintiffs' allegations had received some degree
23 of support from the documentary evidence and witness testimony obtained, there remained
24 many uncertainties in Plaintiffs' case. The crux of the Plaintiffs' Complaint against the crime
25 policy carriers (CNA, Twin City and Federal) turned on, among other things, the carriers'
26 coverage obligations and policy limits under their respective policies. The scope of that
27 coverage, as amended by the 1031 Exchange Endorsements, presents unique issues, ones
28 which are nearly of first impression. While no known published opinion exists, I, along with

1 Michael P. Denver of H&B, and several other plaintiffs' lawyers did actually litigate the
2 scope of the coverage in virtually identical litigation arising out of the collapse of Southwest
3 Exchange, Inc. ("SWX"), a large QI located in Las Vegas, Nevada. SWX collapsed when one
4 Donald K. McGhan looted Exchange Funds and used them as his own, in exactly the same
5 manner as Okun. The QIs in this matter, similar to the QIs in the SWX matter, held the same
6 commercial crime coverage. The scope of the coverage was litigated in the SWX matter
7 through the summary judgment stage. The insurance carriers' motions for summary judgment
8 were denied, and the matter settled before a trial on the merits. While Plaintiffs in this case
9 believe they could have prevailed on the coverage issues at trial, establishing coverage under
10 the applicable crime policy terms would have been expensive and challenging. The outcome
11 would have depended largely upon (i) the scope of coverage as determined by the Court and
12 (ii) how the underlying facts could be juxtaposed against the grants of coverage and/or
13 exclusions thereto. This presents numerous uncertainties.

14 45. Further uncertainty surrounded the crux of Plaintiffs' claims against the QI
15 sellers. These claims turned on Plaintiffs' allegations that the QI sellers owed and breached
16 fiduciary duties, and specifically whether the sellers adequately investigated Ed Okun and/or
17 failed to control him. The relevant factual scenarios varied considerably with respect to the 6
18 different QI seller groups, which in turn result in varying outcomes at trial. This also
19 presented numerous uncertainties.

20 46. Finally, the Class claims against Wachovia focused on Wachovia's conduct
21 whereby Plaintiffs contend Wachovia "knowingly" aided and abetted Okun's breaches of
22 fiduciary duties. The success of these claims arguably turns on, among other things, Plaintiffs
23 ability to prove that Wachovia had actual knowledge of Okun's use of money on deposit at
24 Wachovia was wrongful. While plaintiffs contend the documentary support for their claims is
25 strong, like everything in litigation, the outcome is subject to uncertainty. Wachovia's
26 agreement to pay nearly 1/3 of the \$150,000,000 in lost Exchange Funds could not be refused.

27 47. Plaintiffs and the Defendants (and their carriers) strongly disagree on the
28 import of the documents produced and the witnesses' testimony. No one can say for sure

1 whose interpretations and inferences a jury would ultimately favor. There were also
2 substantially disputed issues of loss causation. The combination of these factors presented
3 numerous uncertainties regarding potential litigation outcomes.

4 **(c) The skill required and the quality of work.**

5 48. A considerable effort on the part of Class Counsel was required to produce
6 Wave I. The successful prosecution of the complex claims at issue required the participation
7 of highly skilled and specialized attorneys. Both Plaintiffs and Defendants were represented
8 by lawyers with vast experience in complex litigation.

9 49. Plaintiffs' counsel and staff spent nearly 6,000 hours on this matter from case
10 inception through June 30, 2009, reviewing documents, interviewing witnesses,
11 communicating with Class members, creating and updating the claims database, amending the
12 Complaint, preparing and filing the related *Hunter v. Citibank* Complaint, drafting pleadings,
13 appearing in the New York Bankruptcy Proceedings, managing the related actions, attending
14 settlement conferences, negotiating and documenting the highly complex settlements,
15 obtaining Class Certification for settlement purposes, obtaining preliminary settlement
16 approval, noticing the Class thereof, obtaining final settlement approval, and working with the
17 Trustee and his counsel. All of these tasks and many more were necessarily undertaken to
18 obtain the favorable Wave I result.

19 **(d) The novelty and difficulty of the questions presented.**

20 50. The Wave I portion of the litigation encompassed numerous areas of complex
21 law including RICO, insurance coverage, trust law, Rule 23 Class Certification hurdles, and
22 the general procedural and logistical complexities associated with a case involving numerous
23 parties located in many different states. All of these issues and more were addressed by Class
24 Counsel.

25 **(e) The contingent nature of the case and the financial burden carried
26 by Plaintiffs' counsel.**

27 51. HBFZ has not yet been compensated for its efforts prosecuting this litigation.
28 HBFZ has incurred \$70,921.85 in expenses litigating for the benefit of the Class from case
inception through June 30, 2009. Any fee award to Class Counsel with regard to funds

1 benefitting the Class from Wave I is and has always been at risk and completely contingent on
2 the result achieved.

3 **(f) A 25% fee award reflects the low end of the market rate in similar**
4 **complex contingent litigations.**

5 52. As discussed in the accompanying Memorandum of Law, 30% contingency fee
6 awards are well within the standard applied by the Courts of the Ninth Circuit for common
7 fund cases. HBFZ and their 9 clients (who lost over \$12,500,000) agreed to a 25%
8 contingency fee, which is on the low end of the market rates.

9 53. The 25% contingency fee agreement was intended to compensate Class
10 Counsel for their efforts to recover the lost exchange funds. The class representatives and two
11 other members of the Settlement Class executed the 25% fee agreement. The remaining
12 Settlement Class Members should be treated equally.

13 **(g) Avoidance of unjust enrichment requires a uniform fee as to**
14 **both the members of the Settlement Class who executed a 25%**
15 **contingency fee agreement and those who did not.**

16 54. Courts in the Ninth Circuit find it appropriate to consider the percentage
17 attorney fee agreed to by one group when determining the percentage to be applied to a
18 second group. This is so that all beneficiaries to the common fund pay for the benefit they
19 receive, especially if the attorneys' efforts benefited both groups simultaneously. *Paul,*
20 *Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 269-270 and 272 (9th Cir. 1989). Here,
21 either the class representatives and the two other Settlement Class members who executed the
22 25% contingency fee agreement, or those Settlement Class Members who did not execute it
23 (but who have accepted it by not objecting to it in conjunction with the Wave I approval
24 process) will be unjustly enriched at the expense of the other if the Court does not apply a
25 consistent fee to the funds recovered for the Settlement Class.

26 55. Based upon my 24 years of experience, I can say that all of the fees incurred by
27 HBFZ were necessary to the prosecution of the case and the 25% contractual fee
28 (\$4,232,269.54) would reasonable in this case. The requested fee, which is the 25%

1 contractual fee, less \$500,000, or \$3,732,269.54, is even more reasonable in terms of
2 providing greater benefits to the Class.

3 **C. Class Counsel's Expenses are Reasonable and Were Necessarily Incurred to**
4 **Achieve the Benefit Obtained.**

5 56. As set forth in Exhibit 2 hereto, which contains a summary of the expenses
6 incurred by HBFZ in this case as well as the details of the summarized charges, HBFZ has
7 incurred costs and expenses in an aggregate amount of \$70,921.85 prosecuting this litigation
8 on behalf of the Plaintiffs and Settlement Class members from case inception through June 30,
9 2009.

10 57. Exhibit 2 sets forth the expenses incurred by H&B personnel on behalf of the
11 class which are submitted to the accounting department at my firm and input into the
12 computerized accounting software as a regular course of practice. Exhibit 2 also contains the
13 like reports for FBBC, ZMC and the Parr Law Group.

14 58. Based upon my 24 years of experience, I can say that all of the costs and
15 expenses incurred by HBFZ were necessary to the prosecution of the case and they are
16 reasonable.

17 59. Costs incurred by HBFZ from case inception through June 30, 2009 are as
18 follows:

Expense Description	Total
Process Service	\$ 3,326.70
Misc. - Admission fee - Pro Hac Vice	\$ 705.00
Misc. - Corporate kit	\$ 15.00
Filing Fee	\$ 681.04
Delivery Exp. (outside services)	\$ 2,374.11
Computer Services	\$ 16,790.00
Computerized Legal Research	\$ 4,101.44
Travel Expenses	\$ 27,286.85
Meeting/Meal Expense	\$ 595.43
Telephone Expense	\$ 561.74
Copy Expense (outside services)	\$ 4,662.18
Telecopy Exp.	\$ 102.00
Copy Expense (In-House)	\$ 7,190.96
Delivery Exp. - Other	\$ 37.50
Telephone	\$ 1,688.97
Postage	\$ 802.93

1 60. The above costs are reasonable and represent less than 1% of the gross
2 recovery.

3 61. A portion of the requested fee is attributed to fees incurred by Plaintiffs'
4 counsel for paralegal/claims administrators retained for this case to: review the claims files
5 produced by victims and the Trustee communicate with victims, defendants, the Trustee's
6 staff and others; create viable databases for mailing information including the court-approved
7 Notice; service of process; and managing the many files.

8 62. The hours expended and work performed by the paralegals/claims
9 administrators of HBFZ are set out in Exhibit 2. The paralegals/claims administrators were
10 hired by HBFZ to assist in the litigation. The cost of retaining these professionals is not
11 submitted as a cost of litigation, but as a portion of the requested fee. These fees would not
12 have been incurred but for the necessity created by the prosecution of this case.

13 63. In-house paralegal/claims administration fees have been billed at rates ranging
14 from \$125.00 to \$200.00 per hour, which includes the salaries paid as well as the overhead,
15 among other things, for computers, phones, record storage, and the space needed to perform
16 the tasks assigned.

17 64. This Declaration and the accompanying Motion sets forth the reasons for
18 which this Court should approve the 25% contingency fee (\$4,232,269.54) agreed to by
19 HBFZ and their clients, less \$500,000, or \$3,732,269.54.

20 65. I request the Court to approve the fees and costs submitted and to issue an
21 Order directing the approved fees and costs to be paid by the QSF Trustee to Hollister &
22 Brace, who will hold the money in trust for the benefit of H&B, FBBC, ZMC and the Parr
23 Law Group.

24 66. This application for fees and costs is made based upon the Wave I Settlements
25 and the costs of litigation incurred from case inception through June 30, 2009. Class Counsel
26 will submit future fee and cost applications to the Court for approval as is appropriate based
27 on future settlements and costs incurred.

28

1 I declare under penalty of perjury under the laws of the United States of America that
2 the foregoing is true and correct. Executed this 6 day of November, 2009 at Santa
3 Barbara, California.

4 
5 _____
6 ROBERT L. BRACE

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28