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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

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR PAYMENT OF
ATTORNEYS' FEES,
REIMBURSEMENT OF COSTS, AND
DISTRIBUTION OF WAVE I FUNDS TO
SETTLEMENT CLASS MEMBERS;
MEMORANDUM OF POINTS &
AUTHORITIES**

Hearing Date: December 14, 2009
Time: 9:00 a.m.

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on December 14, 2009, at 9:00 a.m., or as soon
3 thereafter as the matter can be heard by United States District Judge James Ware, at the
4 United States District Court for the Northern District of California, San Jose Division, located
5 at 280 South 1st Street, San Jose California, 95113, Plaintiff Anita Hunter, on behalf of herself
6 and the Class of all persons similarly situated (hereinafter collectively referred to as
7 "Plaintiffs" or the "Settlement Class"), will and hereby does move the Court to enter an Order
8 approving the following payments to be made from the \$18,000,000 in the Wave I Settlement
9 funds allocated to the Settlement Class:

10 (i) reimbursement of \$70,921.85 in litigation costs and expenses incurred on behalf of
11 the Settlement Class, from inception of the action through June 30, 2009;

12 (ii) payment of \$1,000,000 in expenses allocated to the Settlement Class under the
13 Class/Trustee Agreement to defray a portion of the cost for services rendered by Deloitte
14 Financial Advisory Services, LLC which benefitted the Class;

15 (iii) payment of attorney fees amounting to \$3,732,269.54, which is 25% of the "net"
16 recovery allocated to the Settlement Class, less an agreed upon reduction of \$500,000; and

17 (iv) distribution to the individual Settlement Class members on a pro rata basis the
18 remaining \$13,196,808.61 in Wave I Settlement funds allocated to the Settlement Class.

19 This Motion is based on this Notice, the accompanying Memorandum of Points &
20 Authorities, the Declaration of Robert L. Brace, all documents and arguments submitted in
21 support hereof and the complete Court file.

22 DATED: November 9, 2009

By: /s/ Robert L. Brace

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MEMORANDUM OF POINTS & AUTHORITIES

I.

SUMMARY OF REQUEST FOR FEES AND COSTS FROM THE WAVE I SETTLEMENTS

The Court granted Final Approval of the Wave I Settlements on October 7, 2009 (Docket No. 304). The Wave I Settlements are comprised of the "Schedule A Settlements" totaling \$43,247,500 and the Wachovia Settlement for \$45,000,000. The combined proceeds from the Wave I Settlements will result in cash payments totaling \$88,247,500.

The Class/Trustee Agreement, which was approved by the Court in conjunction with the Wave I Settlements, allocates the Wave I Settlement funds (\$88,247,500) between the Estates in Bankruptcy and the Settlement Class. Pursuant to the Class/Trustee Agreement, 100% of the Schedule A Settlements (\$43,247,500), and 60% of the Wachovia Settlement (\$27,000,000), is allocated to the Estates in Bankruptcy, a figure totaling \$70,247,500. The remaining 40% of the Wachovia Settlement (\$18,000,000) is allocated to the Settlement Class.

Pursuant to the Class/Trustee Agreement, Plaintiffs, through their counsel Hollister & Brace ("H&B"), Foley, Bezek, Behle & Curtis ("FBBC") and Zelle McDonough & Cohen ("ZMC") (collectively, "HBFZ" or "Class Counsel"),¹ agreed to limit the reimbursement of their litigation costs and the payment of their attorney fees to the portion of the Wave I Settlement funds allocated to the Settlement Class. As such, the present motion for reimbursement of litigation costs and payment of attorney fees, applies only to the \$18,000,000 in Wave I Settlement funds allocated to the Settlement Class.

Plaintiffs request approval from the Court for the Trustee of the Qualified Settlement Fund (the "QSF Trustee") to reimburse litigation expenses incurred on behalf of the Settlement Class from the inception of the action through June 30, 2009. These litigation

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 encompassed by the meaning of "HBFZ" as used herein.

1 expenses total \$70,921.85. Additionally, Plaintiffs request approval from the Court for the
2 QSF Trustee to pay \$1,000,000 in expenses allocated to the Settlement Class under the
3 Class/Trustee Agreement to defray a portion of the cost for services rendered by Deloitte
4 Financial Advisory Services, LLC (“Deloitte”) which benefitted the Class. In sum, Plaintiffs
5 request that a total of \$1,070,921.85 in litigation expenses be paid from the \$18,000,000 in
6 Wave I Settlement funds allocated to the Settlement Class.

7 Plaintiffs also request Court approval of a 25% contingency fee, applied to the “net”
8 recovery allocated to the Settlement Class, less an agreed upon reduction of \$500,000. The fee
9 agreement between Class Counsel and their clients calls for a fee equal to 25% of the
10 Settlement Class members’ “net” recovery (the “Net Settlement”). The Net Settlement is
11 calculated by deducting Court-approved litigation expenses (including the Deloitte expense)
12 from the Settlement Class’s gross share of the Wave I Settlement funds (\$18,000,000).

13 If \$1,070,921.85 in litigation expenses is approved by the Court, the Net Settlement
14 will amount to \$16,929,078.15. Plaintiffs are requesting approval of a 25% contingency fee
15 applied to this figure, or \$4,232,269.54, less a reduction of \$500,000. The reduction was
16 agreed to by Class Counsel and the Bankruptcy Trustee to resolve a dispute over
17 interpretation of the Class/Trustee Agreement. A 25% contingency fee of \$4,232,269.54 less
18 \$500,000 amounts to \$3,732,269.54. As such, Plaintiffs request that \$3,732,269.54 in attorney
19 fees be approved by the Court.

20 Finally, if litigation expenses of \$1,070,921.85 are approved, and attorneys fees of
21 \$3,732,269.54 are approved, the sum of \$13,196,808.61 in Wave I Settlement funds will remain
22 for distribution to the Settlement Class members. Plaintiffs request the Court to order these
23 remaining funds to be distributed to the members of the Settlement Class on a pro rata basis.

24 A proposed Order is submitted concurrently herewith which the Court may execute at
25 the December 14, 2009 hearing. The Court’s execution of the proposed Order will compliment
26 the Order the Trustee in the Bankruptcy proceedings anticipates will be executed by Judge
27 Glenn to approve the payment of the Trustee’s fees and costs from the balance of the Wave I
28

1 Settlement funds. As indicated above, the balance of the Wave I Settlement funds allocated to
2 the Estates amounts to \$70,247,500.

3 II.

4 **FACTS RELEVANT TO HBFZ'S REQUEST FOR FEES AND COSTS**

5 **A. Summary of Wave I Settlements**

6 The Wave I Settling Defendants have agreed to pay \$88,247,500 to settle all claims
7 against them by, among others, the hundreds of I.R.S. Code §1031 exchangers ("Exchangers")
8 who were victimized by the collapse of The 1031 Tax Group, LLC and the six affiliated
9 Qualified Intermediaries ("QIs")² owned or controlled by Ed Okun. A detailed discussion of
10 the factual background and the procedural steps which led up to the Wave I Settlements is set
11 forth in the Memorandum and Declaration offered in support of Plaintiffs' Motion to
12 Preliminarily Approve the Settlements (Docket No. 201), and Plaintiffs' Motion for Final
13 Approval of the Wave I Settlements (Docket No.283). In brief summary, the Wave I cash
14 Settlements are comprised of the "Schedule A Settlements" totaling \$43,247,500 and the
15 Wachovia Settlement for \$45,000,000. The Wave I Settlements provide a good result at such
16 an early stage of this complex case. It was the flexible and creative efforts of HBFZ and the
17 Trustee's counsel that resulted in the recovery of \$88,247,500 without a trial.

18 **B. Court Approval of Wave I Settlements**

19 The Wave I Settlements were preliminarily approved on June 22, 2009 (Docket No.
20 226). The Court approved Notice was mailed to, among others, the hundreds of Exchangers
21 to inform these potential Class Members of their rights related to the Wave I Settlements,
22 including their rights to opt-out of the Class and to object to Class Counsel's request for a fee
23 capped at 25%. No Settlement Class Members objected to the requested 25% contingency
24 fee. Nor did any Exchangers opt out of the Settlement Class.³ The Court granted Plaintiffs'
25 motion for final approval of the Wave I Settlements on October 7, 2009 (Docket No.304).

26 ² The six QIs are: Atlantic Exchange Co., LLC; Security 1031 Services, LLC; Real Estate Exchange Services,
27 Inc.; National Exchange Services QI, Ltd.; Investment Exchange Group; and 1031 Advance, Inc

28 ³ A "Conditional" Objection and Opt-Out was filed by a group of Exchangers known as the "Alvarez Parties"
(Docket No.273), but it was withdrawn (Docket No.282).

1 **C. Allocation of Wave I Settlement Funds**

2 The Class/Trustee Agreement was approved by the Court in conjunction with the
3 Wave I Settlements (Docket No.304). A detailed discussion of the Class/Trustee Agreement,
4 including its underlying purposes and benefits, is provided in the Memorandum and
5 Declaration offered in support of Plaintiffs' Motion to Preliminarily Approve the Wave I
6 Settlements (Docket No. 201). In relevant part, the Class/Trustee Agreement allocates the
7 Wave I Settlement funds (\$88,247,500) between the Estates in Bankruptcy and the Settlement
8 Class. Pursuant to the Class/Trustee Agreement, 100% of the Schedule A Settlements
9 (\$43,247,500), and 60% of the Wachovia Settlement (\$27,000,000), is allocated to the Estates
10 in Bankruptcy, an amount totaling \$70,247,500. The remaining 40% of the Wachovia
11 Settlement (\$18,000,000) is allocated to the Settlement Class.

12 As more fully described in the Memorandum and Declaration offered in support of
13 Plaintiffs' Motion to Preliminarily Approve the Wave I Settlements (Docket No. 201), the
14 allocations set forth in the Class/Trustee Agreement are reasonable in view of the fact that the
15 Plaintiffs, as Exchangers, constitute the vast majority of claims asserted against the Estates,
16 and thus the effect of the allocations are minimal in terms of their recovery. The fact that
17 portions of the Wave I Settlements (and additional settlements, if any), have been allocated to
18 the Estates will have a *de minimis* effect on the distributions made to the Class - whose claims
19 constitute in excess of ninety-nine percent (99%) of the general unsecured creditor body of the
20 Estates. Furthermore, Class Counsel voluntarily agreed to waive any claim to a contingency
21 fee on the \$70,247,500 allocated to the Estates, thus maximizing Plaintiffs' ability to recover
22 as creditors of the Estates.

23 **D. Agreements Affecting Plaintiff's Request for Fees**

24 There are several agreements currently in place which affect the amount of fees
25 Plaintiffs are requesting pursuant to this motion. To begin with, HBFZ has executed fee
26 agreements with all seven (7) Class Representatives and two (2) additional Settlement Class
27 members. These fee agreements each state that HBFZ is entitled to be paid 25% of the "net"
28 funds recovered on behalf of the Settlement Class ("Net Settlement"). The Net Settlement is
calculated by reducing the gross amount recovered by allowable litigation expenses. The
terms of these nine (9) executed fee agreements should be applied "across the board" to all
Settlement Class Members so that the fee to be paid from the Wave I Settlement funds is

1 uniform with respect to all Settlement Class Members. Consistent application of the fee is
2 necessary to equitably distribute the costs of prosecuting the litigation and avoid the unjust
3 enrichment of certain Settlement Class members vis a vis others.

4 In addition to the fee agreements, there is the Class/Trustee Agreement, where
5 Plaintiffs, through their counsel HBFZ, agreed to limit the reimbursement of their litigation
6 costs and the payment of their attorney fees to the portion of the Wave I Settlement funds
7 allocated to the Settlement Class. Because of this, the present motion, brought by Plaintiffs for
8 reimbursement of litigation costs and payment of attorney fees, applies only to the
9 \$18,000,000 in Wave I Settlement funds allocated to the Settlement Class. In other words, the
10 \$18,000,000 allocated to the Settlement Class is the gross amount from which allowable
11 litigation costs are to be deducted resulting in a "net" figure used for purposes of determining
12 Class Counsel's fee for Wave I.

13 The Class/Trustee Agreement, in addition to allocating a portion of the overall recovery
14 to the Settlement Class for purposes of deducting costs and determining fees, also places a cap
15 on the amount of fees HBFZ can request. By executing the Class/Trustee Agreement, HBFZ
16 voluntarily agreed that their fee for the entirety of the Okun related litigation would be limited
17 to the lesser between (i) the contractual 25% fee, and, (ii) 1.7 times HBFZ's hourly rates for
18 time spent on the litigation. The limitation necessitates a comparison of HBFZ's proposed
19 25% contingency fee and 1.7 times HBFZ's hourly rates for time spent on the litigation. The
20 Class/Trustee Agreement requires that HBFZ's requested fee be limited to the lesser of these
21 amounts.

22 As discussed in the accompanying Declaration of Robert L. Brace, from case inception
23 through June 30, 2009, HBFZ spent almost 6,000 hours on the Okun litigation. All of that
24 time was necessarily expended and the efforts all played some role in the creation of the Wave
25 I Settlements. The total billing at each respective attorneys' and staff members' hourly rate
26 totals \$2,604,388.50. Class Counsel's time at hourly rates, multiplied by 1.7, plus the time
27 spent by The Parr Law Group at its regular billable rates (not multiplied by 1.7), provides
28

1 \$4,391,928.45 (the "1.7 times hourly rates amount").⁴ This figure is more than the contractual
 2 25% fee, which totals \$4,232,269.54. As a result, the fee that Plaintiffs are requesting be
 3 approved for Wave I is based upon the contractual fee agreed to by the Class Representatives,
 4 namely 25% of the net recovery. Counsel's future fee applications based on future recoveries,
 5 if any, will follow form such that, at the conclusion of the Okun litigation, Class Counsel's fee
 6 for the entire representation will be limited to the lesser between the contractual 25% fee and
 7 1.7 times Plaintiffs' Counsels' hourly rates for time spent on the litigation.

8 Within the past month, Class Counsel and Counsel for the Trustee each recognized
 9 that they were interpreting the "fee" portion of the Class/Trustee Agreement differently. A
 10 dispute arose over the amount of fees Class Counsel should request in relation to Wave I. To
 11 resolve that dispute, Class Counsel agreed to limit their fee request in Wave I to the 25%
 12 contractual fee of \$4,232,269.54, less \$500,000. The agreed upon reduction amounts to a
 13 requested fee of \$3,732,269.54. The agreed upon reduction is applicable to Wave I only.
 14 Future fee requests, if any, will be limited to the lesser between (i) the 25% contractual fee
 15 and (ii) 1.7 times HBFZ's hourly rates - without any reduction.

16 **E. Costs Incurred on Behalf of the Settlement Class**

17 As indicated above, the contingency fee which Plaintiffs now seek the Court to
 18 approve is based upon the "Net Settlement". The Net Settlement is the gross amount
 19 recovered and allocated to the Class (\$18,000,000), reduced by allowable litigation costs
 20 incurred from inception through June 30, 2009. These costs, totaling \$70,921.85, are
 21 described in detail in the accompanying Declaration of Robert L. Brace. The Net Settlement
 22 also includes \$1,000,000 to be paid to Deloitte pursuant to the terms of the Class/Trustee
 23 Agreement. In sum, Plaintiffs request that a total of \$1,070,921.85 in litigation expenses be
 24 paid from the \$18,000,000 in Wave I Settlement funds allocated to the Settlement Class.

25 _____
 26 ⁴ 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 Deloitte has provided substantial financial advice and analysis to the Trustee with
2 respect to, among other things, the investigation of various claims, including claims which have
3 been and/or will be pursued by both Plaintiffs and the Trustee. Some of the work by Deloitte
4 proved useful in presenting the Trustee's claims and reaching settlements with the Schedule
5 "A" Parties. This work benefitted the Class as unsecured creditors of the Estates. In addition,
6 the Class/Trustee Agreement provides HBFZ access to Deloitte's work product, which is
7 proving beneficial in terms of the Class's ability to prosecute its claims against remaining
8 defendants. As such, the Class/Trustee Agreement allocates a portion of the costs of Deloitte's
9 work to the Class. With respect to the Wave I Settlements, the Class/Trustee Agreement
10 provides that the Class will pay \$1,000,000 from the Class's share of the Wachovia funds
11 (\$18,000,000) to reduce the Deloitte expenses incurred prior to the execution of the
12 Class/Trustee Agreement. The Trustee is to pay the remainder of the Deloitte expenses
13 incurred prior to the execution of the Class/Trustee Agreement.

14 **F. Plaintiffs' Request for Fees and Costs**

15 Based on the foregoing, Class Counsel has incurred \$70,921.85 in litigation expenses
16 through June 30, 2009, and the Class is required to pay an additional \$1,000,000 pursuant to
17 the Class/Trustee Agreement to reduce the Deloitte expense. Combined, these expenses total
18 \$1,070,921.85. The gross class recovery (\$18,000,000) less these expenses, provides the Net
19 Settlement which is \$16,929,078.15. HBFZ is contractually entitled to 25% of that amount
20 pursuant to its fee agreements with its clients. The 25% contingency fee is less than 1.7 times
21 HBFZ's hourly rates, and therefore compensation pursuant to the percentage fee is consistent
22 with the requirements of the Class/Trustee Agreement. 25% of \$16,929,078.15 amounts to
23 \$4,232,269.54. This figure, less the agreed upon reduction of \$500,000, amounts to a
24 requested Wave I Class Counsel fee of \$3,732,269.54. A summary calculation of the amount
25 that Plaintiffs request be approved for Wave I fees and costs is provided as follows:
26
27
28

1	Settlement Cash	\$88,247,500
2		
3	Gross amount allocated to the Estates (Pursuant to the Class/Trustee Agreement)	\$70,247,500
4		
5	Gross amount allocated to Settlement Class (Pursuant to the Class/Trustee Agreement)	\$18,000,000
6	Less- Litigation costs	\$70,921.85
7	Less- Deloitte Expense	\$1,000,000
8	Net Settlement	\$16,929,078.15
9		
10	Less- 25 % of Net Settlement for Class Counsels' fee (\$4,232,269.54) reduced by \$500,000 per agreement between Bankruptcy Trustee and Class Counsel	\$3,732,269.54
11		
12		
13		
14	Remaining funds available for distribution to the Settlement Class	\$13,196,808.61
15		

III.

THE LAW REGARDING ATTORNEYS' FEES IN COMMON FUND CASES

A. A Reasonable Percentage Of The Fund Recovered Is The Appropriate Approach To Awarding Attorneys' Fees In Common Fund cases

For Class Counsel's efforts in helping to create an \$88,247,500 cash recovery, \$18,000,000 of which is allocated to the Settlement Class, HBFZ is applying for compensation. Since 1882, the United States Supreme Court has consistently held that a person who successfully maintains a lawsuit that creates a common fund is entitled to reasonable compensation. *See Trustees v. Greenough*, 105 U.S. 527, 26 L. Ed. 1157 (1882). Furthermore, according to the Supreme Court, the percentage method is a proper method for assessing the reasonableness of attorneys' fees in common fund cases. *Central R. & Banking Co. of Georgia v. Pettus*, 113 U.S. 116, 124-125, 28 L. Ed. 915, 5 S. Ct. 387 (1885) *citing Trs.*

1 *v. Greenough*, 105 U.S. 527 (1882); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67, 83
2 L. Ed. 1184, 59 S. Ct. 777 (1939).

3 **B. The Ninth Circuit Follows The Percentage Method For Assessing The**
4 **Reasonableness Of Attorneys' Fees in Common Fund Class Actions.**

5 While a district court in the Ninth Circuit has discretion to award fees in common fund
6 cases based on either the Lodestar/multiplier method or the percentage method (*In re*
7 *Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. Ariz. 1994)), the
8 Ninth Circuit has expressly approved the use of the percentage method in common fund cases.
9 *See Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268 (9th Cir. Haw. 1989), *Six Mexican*
10 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. Ariz. 1990), and *Torrissi v.*
11 *Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir. Ariz. 1993). *Paul, Johnson* was one of the
12 earliest Ninth Circuit decisions to endorse the use of the percentage fee recovery
13 methodology.

14 Within months of the *Paul, Johnson* decision, Judge Marilyn Hall Patel wrote her
15 well-reasoned and pivotal decision in *In re Activision Securities Litigation*, 723 F. Supp. 1373
16 (N.D. Cal. 1989). In that decision, Judge Patel analyzed in detail what she saw as the
17 underlying weaknesses of the Lodestar/multiplier fee methodology:

18 The question this court is compelled to ask is, "Is this process necessary?"
19 Under a cost-benefit analysis, the answer would be a resounding, "No!"
20 Not only do the *Lindy* and *Kerr-Johnson* analyses consume an undue
21 amount of court time with little resulting advantage to anyone, but, in fact,
22 it may be to the detriment of the class members. They are forced to wait
23 until the Court has done a thorough, conscientious analysis of the
24 attorneys' fee petition. Or, class members may suffer a further diminution
25 of their fund when a special master is retained and paid from the fund.
Most important, however, is the effect the process has on the litigation and
the timing of settlement. Where attorneys must depend on a Lodestar
approach there is little incentive to arrive at an early settlement. The
history of these cases demonstrates this as noted below in the discussion of
typical percentage awards. . . .

26 *In Re Activision*, 723 F.Supp at 1375-76.

27 Similar to the Ninth Circuit, other circuit courts favor the percentage-of-recovery
28 approach over the Lodestar/multiplier fee methodology for the award of attorneys' fees in

1 common fund cases. In fact, two circuits have ruled that the percentage method is mandatory
 2 in common fund cases. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993);
 3 *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. Fla. 1991). Other
 4 circuits and commentators have expressly approved the use of the percentage method.
 5 *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. Colo. 1994); *Brown v. Phillips Petroleum Co.*, 838
 6 F.2d 451, 454 (10th Cir. Colo. 1988) (footnote 16 of *Blum* recognizes both “implicitly” and
 7 “explicitly” that a percentage recovery is reasonable in common fund cases); *Harman v.*
 8 *Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. Ill. 1991); *In re First Fidelity Bancorporation*
 9 *Sec. Litig.*, 750 F. Supp. 160 (D.N.J. 1990); *Report of the Third Circuit Task Force, Court*
 10 *Awarded Attorney Fees in Antitrust Litigation: Making the System Fairer*, 57 *Fordham L.*
 11 *Rev.* 51, 100 (Oct. 1988).

12 IV.

13 A 25% FEE AWARD IS APPROPRIATE AND JUSTIFIED FOR WAVE I

14 In view of the risks faced by Class Counsel, the favorable result obtained, the quality
 15 of the representation, and the financial commitment Class Counsel has made to the case, an
 16 award of 25% of the recovery obtained for the Settlement Class is reasonable, appropriate,
 17 and justified. The following is a discussion of the factors relevant to a fee determination as
 18 applied in this case:

19 A. The Result Achieved

20 Courts have consistently recognized that the result achieved is a major factor to be
 21 considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 76 L. Ed. 2d 40,
 22 103 S. Ct. 1933 (1983) (“most critical factor is the degree of success obtained”); *In re King*
 23 *Resources Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) (“the amount of the
 24 recovery, and end result achieved are of primary importance, for these are the true benefit to
 25 the client”); *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988)
 (“The quality of work performed in a case that settles before trial is best measured by the
 benefit obtained.”), *aff'd*, 899 F.2d 21 (11th Cir. Fla. 1990).

26 Settlements providing \$88,247,500 in immediate cash have been obtained without the
 27 necessity of a lengthy trial and post-trial appeals. Of that amount, \$18,000,000 has been
 28 allocated to the Settlement Class. The balance of \$70,247,500 allocated to the Estates will

1 have a *de minimis* effect on the distributions made to the Class - whose claims constitute in
2 excess of ninety-nine percent (99%) of the general unsecured creditor body of the Estates.
3 This favorable resolution was achieved in part as a result of very extensive and creative
4 prosecutorial efforts of Class Counsel, as detailed in the accompanying Declaration of Robert
5 L. Brace. As a result, Wave I will at least partially compensate the members of the Class for
6 the losses they sustained at the hands of the collapsed Exchange Entities. They will avoid the
7 prospect of being completely denied a recovery, a substantial risk considering the practical
8 and legal circumstances of the case. Such a positive result at this early stage of this complex
9 case justifies a fee award of 25%.

10 **B. The Risks Both As To Liability And Damages**

11 Numerous cases have recognized that risk is an important factor in determining
12 appropriate fee awards. *In re Washington Public Power Supply System Securities Litigation.*,
13 19 F.3d 1291, 1299-1301 (9th Cir. Ariz. 1994)(“WPPSS”); *Detroit v. Grinnell Corp.*, 495
14 F.2d 448, 470 (2d Cir. N.Y. 1974); *Lindy Bros. Builders v. American Radiator & Standard*
15 *Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. Pa. 1976). Uncertainty regarding the prospect of
16 obtaining an ultimate recovery is considered highly relevant to determining risk. *WPPSS*, 19
17 F.3d at 1300; *Lindy*, 540 F.2d at 117; *Detroit*, 495 F.2d at 470. Appropriate consideration
18 must be given to the risks assumed by Plaintiff’s counsel in undertaking litigation on behalf of
19 clients. *King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 636-37 (D. Colo. 1976).

20 The risks and uncertainties associated with the issues raised in Wave I of this litigation
21 were significant. These issues, set forth in detail in the accompanying Declaration of Robert
22 L. Brace, made it far from certain that an ultimate recovery would be obtained. Indeed, it was
23 the experience and skill of Class Counsel and the other lawyers that enabled \$88,247,500 (in
24 immediate cash) to be obtained without the necessity of a lengthy trial and post-trial appeals.
25 The Wave I Settlements provide a good result at such an early stage of this complex case, and
26 a fee award of 25% should be considered both reasonable and appropriate.
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1 **C. The Novelty And Difficulty Of The Questions Presented**

2 Courts have recognized that the novelty and difficulty of the issues in a case are
3 significant factors to be considered in making a fee award. *See, e.g., Leyse v. Corporate*
4 *Collection Servs.*, 2008 U.S. Dist. LEXIS 21433 (S.D.N.Y. Mar. 19, 2008). As the Court in
5 *Leyse* pointed out:

6 Cases of first impression generally require more time and effort on the
7 attorney’s part. Although this greater expenditure of time in research
8 and preparation is an investment by counsel in obtaining knowledge
9 which can be used in similar later cases, he should not be penalized for
undertaking a case which may “make new law.” Instead, he should be
appropriately compensated for accepting the challenge.

10 *Id.* at *8-*9.

11 The present litigation encompasses numerous areas of law that are both novel and
12 complex, including Ponzi scheme law, Commercial Crime insurance contract interpretation,
13 insurance broker duties and liabilities, trust law, Rule 23 class certification hurdles, and the
14 general complexities associated with a case involving victims and defendants located in many
15 different states. Absent the resolution obtained in the Wave I Settlements, these complex
16 factual and legal questions would have continued to be the subject of fierce debate. Class
17 Counsel is entitled to appropriate compensation for accepting the challenges presented and
18 producing a favorable result. A percentage fee of 25% should be considered fair and
19 reasonable.

20 **D. The Contingent Nature Of The Case And The Financial Burden Carried**
21 **By HBFZ**

22 A determination of a fair fee must include consideration of the contingent nature of the
23 fee and the difficulties which were overcome in obtaining a settlement.

24 It is an established practice in the private legal market to reward
25 attorneys for taking the risk of non-payment by paying them a
26 premium over their normal hourly rates for winning contingency cases.
27 *See Richard Posner, Economic Analysis of Law* §21.9, at 534-35 (3d
28 ed. 1986). Contingent fees that may far exceed the market value of the
services if rendered on a non-contingent basis are accepted in the legal
profession as a legitimate way of assuring competent representation for

1 plaintiffs who could not afford to pay on an hourly basis regardless of
2 whether they win or lose.

3 *WPPSS*, 19 F.3d at 1299.

4 Class Counsel entered into a 25% contingency fee agreement with the representative
5 Plaintiffs and the same agreement with two other plaintiffs. In prosecuting this case through
6 June 30, 2009, HBFZ has incurred \$70,921.85 in expenses on behalf of the putative class.
7 Additionally, Class Counsel agreed to pay \$1,000,000 of the Deloitte expense from the
8 Wachovia recovery. The reimbursement of these expenses and the recovery of any fee in this
9 matter have always been at risk and completely contingent on the results achieved. Class
10 Counsel's efforts to recover funds in this litigation have been wholly uncompensated to date.

11 **E. A 25% Fee Award Reflects The Low End Of The Market Rate In Similar
12 Complex, Contingent Litigations**

13 With respect to an appropriate "benchmark" for percentage fees in common fund
14 cases, Judge Patel's decision in *In re Activision* is again instructive. After lengthy analysis,
15 Judge Patel determined that the appropriate benchmark for a percentage fee was 30% of the
16 common fund recovered. (In *In re Activision*, 723 F. Supp. at p. 1378.) Judge Patel explained
17 her rationale as follows:

18 As documented by the lengthy list of cases below, this court finds that in
19 most recent cases the benchmark is closer to 30%. Therefore, the court
20 finds that a figure of approximately 30% is substantially justified. This
21 court's review of recent reported cases discloses that nearly all common
22 fund awards range around 30% even after thorough application of either
23 the Lodestar or twelve-factor method. *Id.* at 1377.

24 25% is the percentage that the Plaintiffs agreed would be the maximum fee to HBFZ
25 for efforts expended to collect assets to pay the unpaid claims. A 25% fee is a percentage that
26 is well within the range, and in fact, is on the low end of awards regularly made by the district
27 courts in common fund cases throughout this Circuit. The maximum 25% fee is expressly
28 supported by the Bankruptcy Trustee whose views should be given substantial weight, given
the Trustee's appointment in the related Bankruptcy Proceedings and whose sole objective is
to collect funds to pay unpaid claims. In addition, the requested fee reflects the private

1 marketplace, a result repeatedly encouraged by the courts. *See In Re: Continental Illinois Sec.*
 2 *Litig.* 962 F.2d 566, 572 (7th Cir.Ill. 1992).

3 In private litigation, attorneys regularly contract for contingent fees between 30% and
 4 40% directly with their clients. *See In re M.D.C. Holdings Sec. Litig.*, 1990 U.S. Dist. LEXIS
 5 15488, Fed. Sec. L. Rep. (CCH) P95474 (S.D. Cal. Aug. 30 1990) (“In private contingent
 6 litigation, fee contracts have traditionally ranged between 30% and 40% of the total
 7 recovery.”); *Phemister*, 1984 U.S. Dist. LEXIS 23595, at *40-41 (“Contingent fee
 8 arrangements in non-class action damage lawsuits use the simple method of paying the
 9 attorney a percentage of what is recovered for the client. The more the recovery, the more the
 10 fee. The percentages agreed on vary, with one-third being particularly common.”); *Kirchoff v.*
 11 *Flynn*, 786 F.2d 320, 323 (7th Cir. Ill. 1986) (observing that “40% is the customary fee in tort
 12 litigation” and noting, with approval, contract providing for one-third contingent fee if
 13 litigation settled prior to trial). These percentages are the prevailing market rates throughout
 14 the United States for contingent representation. The requested 25% fee is below the
 15 prevailing market rate.

16 **V.**

17 **PLAINTIFF’S COUNSEL’S EXPENSES ARE REASONABLE AND WERE**
 18 **NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED**

19 HBFZ has incurred (through June 30, 2009) costs and expenses in prosecuting this
 20 litigation on behalf of the Class in the total amount of \$70,921.85. These expenses are
 21 categorized and explained in the Declaration of Robert L. Brace (see Exhibit 2) and they are
 22 also summarized at the beginning of Exhibit 2 for easier reading.

23 The categories of expenses for which counsel seek reimbursement are the type of
 24 expenses routinely charged to hourly paying clients. For this reason, they are properly
 25 reimbursed out of the common fund. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. Cal.
 26 1994) (“Plaintiff may recover as part of the award of attorney’s fee those out-of-pocket
 27 expenses that would normally be charged to a fee paying client.”) *See also Bratcher v. Bray-*
 28 *Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 725-26 (10th Cir. Okla. 1993) (expenses

1 reimbursable if they would normally be billed to client); *Abrams v. Lightolier, Inc.*, 50 F.3d
2 1204, 1225 (3d Cir. N.J. 1995) (expenses recoverable if customary to bill clients for them);
3 *Mitland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) (“Attorneys may
4 be compensated for reasonable out-of-pocket expenses incurred and customarily charged to
5 their clients, as long as they ‘were incidental and necessary to the representation’ of those
6 clients.”)

7 The documents produced in this multi-party case have been voluminous. HBFZ
8 reviewed, analyzed and copied many thousands of pages of relevant documents produced by
9 both parties and non-parties. Duplication of these documents was necessary for the effective
10 prosecution of the case. HBFZ incurred significant copying costs. These costs are customarily
11 reimbursed in common fund cases. *See In re McDonnell Douglas Equip. Leasing Sec. Litig.*,
12 842 F. Supp. 733, 746 (S.D.N.Y. 1994).

13 Counsel incurred travel expenses necessary to attend multiple hearings, meetings,
14 dozens of depositions and settlement conferences in various part of the country. The travel
15 expenses incurred by HBFZ were necessary, reasonable in amount, and are properly charged
16 against the fund created. *See McDonnell Douglas*, 842 F. Supp. at 746; *Genden v. Merrill*
17 *Lynch, Pierce, Fenner & Smith*, 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

18 Finally, a significant component of the expenses incurred by H&B are the fees of Tom
19 Brooks, the computer database consultant/expert who assisted greatly in the creation of a
20 database needed to organize and monitor victims’ claims. Mr. Brooks’ fees and expenses were
21 reasonable and necessarily incurred.

22 Exhibit 2 to the Declaration of Robert L. Brace contains detailed reports showing
23 itemized charges incurred by HBFZ. These reports were created by H&B, FBBC, ZMC and
24 the Parr Law Group’s respective accounting departments. For easier reading, a summary of
25 these costs and expenses are set forth at the beginning of Exhibit 2.

26 In addition to HBFZ’s costs and expenses totaling \$70,921.85, the Class is required by
27 the terms of the Class/Trustee Agreement to pay \$1,000,000 from the Wave I Class funds to
28 defray the Deloitte expenses which benefitted the Class. Deloitte has provided substantial

1 financial advice and analysis to the Trustee with respect to, among other things, the
 2 investigation of various claims, including claims which have been and/or will be pursued by
 3 both Plaintiffs and the Trustee. Some of the work by Deloitte proved useful in presenting the
 4 Trustee's claims and reaching settlements with the Schedule "A" Parties. This work benefitted
 5 the Class as unsecured creditors of the Estates. In addition, the Class/Trustee Agreement
 6 provides HBFZ access to Deloitte's work product, which is proving beneficial in terms of the
 7 Class's ability to prosecute its claims against remaining defendants. HBFZ's costs and
 8 expenses of \$70,921.85, when combined with the \$1,000,000 owed to Deloitte, amount to
 9 total litigation expenses of \$1,070,921.85. This figure is roughly 6% of the \$18,000,000 in
 10 Wave I Settlement funds allocated to the Class. The Court should view the amount as
 11 reasonable in view of the risks faced and the result obtained.

12 **VI.**
 13 **REMAINING FUNDS SHOULD BE DISTRIBUTED PRO RATA TO CLASS**
 14 **MEMBERS**

15 Pursuant to the Wave I Final Approval Order (Docket No. 304), Gerard McHale has
 16 been designated as the QSF Trustee and will serve as the payee of Settlement funds allocated
 17 to the Settlement Class. The gross amount of the Wave I recovery allocated to the Class is
 18 \$18,000,000. If all of the claimed litigation costs totaling \$70,921.85 are approved, the
 19 payment of \$1,000,000 to reduce the Deloitte expense is approved, and attorney fees of
 20 \$3,732,269.54 are approved, the sum of \$13,196,808.61 will remain for distribution to the
 21 Settlement Class members. These funds will be distributed by the QSF Trustee to Settlement
 22 Class members on a pro rata basis, with each Settlement Class member's pro rata share
 23 calculated as follows: (i) Each Settlement Class member's approved lost Exchange
 24 Amount⁵ plus Exchange Agreement Contractual Interest,⁶ if any, shall be divided by the total
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27 ⁵ Each Settlement Class member's "Exchange Amount" means the principal amount deposited by the Settlement
 28 Class member with the applicable 1031 Debtor under the applicable Exchange Agreement which was lost due to
 the insolvency of the applicable 1031 Debtor.

1 of all Settlement Class members' lost Exchange Amounts plus Exchange Agreement
2 Contractual Interest; and (ii) the resulting percentage shall be multiplied with the total amount
3 to be distributed to the Settlement Class to determine each Settlement Class member's pro rata
4 share. Plaintiffs request the Court to direct the QSF Trustee to distribute the \$13,196,808.61
5 to Settlement Class members on a pro rata basis pursuant to the formula described above. A
6 schedule showing the Settlement Class members' respective shares of the Wave I recovery is
7 attached as Exhibit 3 to the Declaration of Robert L. Brace.

8 **VII.**
9 **CONCLUSION**

10 Plaintiffs request an Order from the Court instructing the QSF Trustee, upon receipt of
11 the \$18,000,000 allocated to the Settlement Class, to: (i) reimburse HBFZ the \$70,921.85 in
12 litigation costs and expenses incurred on behalf of the Settlement Class, from inception of the
13 action through June 30, 2009; (ii) pay the \$1,000,000 in expenses allocated to the Settlement
14 Class under the Class/Trustee Agreement to defray a portion of the services rendered by
15 Deloitte Financial Advisory Services, LLC, which benefitted the Class; (iii) pay HBFZ
16 attorney fees amounting to \$3,732,269.54, which is 25% of the "net" recovery allocated to the
17 Settlement Class, less an agreed upon reduction of \$500,000; and (iv) distribute to the
18 individual Settlement Class members on a pro rata basis the remaining \$13,196,808.61 in
19 Wave I Settlement funds allocated to the Settlement Class.

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26 ⁶ "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
28 respective Petition in Bankruptcy.

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By: /s/ Robert L. Brace

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