

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: :
: :
THE 1031 TAX GROUP, LLC, *et al.*, :
: :
Debtors. :
-----X

Chapter 11
Case No. 07-11448 (MG)
Jointly Administered

In re: :
: :
INVESTMENT PROPERTIES OF :
AMERICA, LLC., *et al.*, :
: :
Debtors :
-----X

Chapter 11
Case No. 07-13621 (MG)
Jointly Administered

GERARD A. McHALE, Jr., not :
Individually but solely in his capacity as :
Chapter 11 trustee for THE 1031 TAX :
GROUP, LLC, et al., :
: :
Plaintiffs, :
: :
-----X

-v-

Adv. Pro. No. 08-01604 (MG)

WACHOVIA BANK, NATIONAL :
ASSOCIATION, WACHOVIA :
EXCHANGE SERVICES, INC., :
WACHOVIA CAPITAL MARKETS, LLC, :
WACHOVIA FINANCIAL SERVICES, :
INC., and WACHOVIA MORTGAGE :
CORPORATION, :
: :
Defendants. :
-----X

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

-----X
ANITA HUNTER, *et al.*, :
 :
 Plaintiffs, : Case No. 5:07-CV-02795-JW
 :
 -v- :
 :
 EDWARD H. OKUN, *et al.*, :
 :
 Defendants. :
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SETTLEMENT AND RELEASE AGREEMENT WITH WACHOVIA PARTIES

The Parties hereto agree to the following terms of this Settlement and Release Agreement (the “Agreement”), made as of May 28, 2009.

PARTIES

Gerard A. McHale, Jr. (the “Trustee”), not individually but in his capacity as Chapter 11 Trustee for The 1031 Tax Group, LLC, *et al.* (the “1031 Debtors”).¹

Anita Hunter, Sherman Ave., LLC, Johanna Bozza, Robert J. Buono, Coltex Site Services, Ltd. and Grande Investment, LLC (collectively, the “Class Representatives”) as class representatives of a putative class in an action filed against, among others, Wachovia N.A. (as defined below), *Hunter v. Okun, et al.*, Case No 5:07-CV-02795-JW (United States District Court, Northern District of California) (the “Class Litigation”).

Quirk Infiniti, Inc. (“Quirk”), as class representative of a putative class in an action filed against Wachovia N.A., *Quirk Infiniti, Inc. v. Wachovia Bank, National Association*, Case No.:

¹ The 1031 Debtors are The 1031 Tax Group, LLC; 1031 Advance 132 LLC; 1031 Advance, Inc.; 1031 TG Oak Harbor, LLC; Atlantic Exchange Company, Inc.; Atlantic Exchange Company, LLC; Investment Exchange Group, LLC; National Exchange Accommodations, LLC; National Exchange Services QI, Ltd.; NRC 1031, LLC; Real Estate Exchange Services, Inc.; Rutherford Investment, LLC; Security 1031 Services, LLC; Shamrock Holdings Group, LLC; and AEC Exchange Company, LLC.

1:08-cv-12060-JLT (United States District Court, District of Massachusetts) (the “Quirk Litigation”).

Wachovia Bank, National Association (“Wachovia N.A.”), a national association organized under the National Bank Act , with its principal place of business located at 301 South College Street, Charlotte, North Carolina 28288, and with locations throughout this District.

Wachovia Exchange Services, Inc. (“Wachovia Exchange”), incorporated in North Carolina, with its principal place of business located at 100 North Main Street, Winston Salem, North Carolina.

Wachovia Capital Markets LLC (“Wachovia Capital”), an entity registered in North Carolina with its principal place of business located at 301 South College Street, Charlotte, North Carolina 28288.

Wachovia Financial Services, Inc. (“Wachovia Financial”), incorporated in North Carolina with its principal place of business located at 301 South College Street, Charlotte, North Carolina 28288.

Wachovia Mortgage Corporation (“Wachovia Mortgage”), incorporated in North Carolina with its principal place of business located at Two Wachovia Center, Charlotte, North Carolina. (Wachovia N.A., Wachovia Exchange, Wachovia Capital, Wachovia Financial and Wachovia Mortgage are affiliates of one another, and with their affiliates, subsidiaries and parents, along with Wells Fargo & Company and its subsidiaries and affiliates, are referred to collectively herein as “Wachovia”).

RECITALS

WHEREAS:

A. On or about September 8, 2005, Wachovia Mortgage loaned Edward H. Okun (“Okun”) approximately \$3 million secured by a mortgage on a property located at 394 South Hibiscus Drive, Miami, Florida (the “Hibiscus House”).

B. On or about September 8, 2005, Wachovia N.A. also loaned Okun approximately \$1,080,000 pursuant to a line of credit which was secured by the Hibiscus House (collectively, the “Hibiscus Loans”).

C. On or about September 20, 2005, Wachovia N.A. and Wachovia Capital provided approximately \$80 million in financing to two entities owned and/or controlled by Okun, namely West Oaks Trust and IPofA West Oaks Mall, LP, for the acquisition of the West Oaks Mall in Houston, Texas (the “WOM Loan”).

D. On or about January 31, 2006, Wachovia, N.A. and Wachovia Capital loaned approximately \$3 million to IPofA WOM JCP, LP (the “JC Penney Loan”), an entity owned and/or controlled by Okun, to acquire certain property adjacent to the West Oaks Mall in Houston, Texas (the “West Oaks Mall”) known as the “JC Penney Property,” which loan is secured by a mortgage on that property.

E. On or about March 29, 2006, Wachovia Financial made a loan of approximately \$8.1 million to Okun Water Ltd. secured by a yacht known as the Simone Yacht (the “Simone Yacht Loan”).

F. On or about June 26, 2006, Wachovia N.A. and Wachovia Capital received repayment on the WOM Loan (the “WOM Loan Repayment”).

G. On or about August 8, 2006, Wachovia N.A. and Wachovia Capital loaned approximately \$28,400,000 to IPofA Salina Central Mall, LLC (the “Wachovia Salina Loan”).

to purchase a property known as the “Salina Mall,” which loan is secured by a mortgage on the Salina Mall. This loan was amended in or about February 2007.

H. In or about October 2006, Wachovia provided approximately \$6 million in financing and obtained separate mortgages on properties at 39 Aaron Road (“39 Aaron Road”) and 49 Aaron Road (“49 Aaron Road”), in Wolfeboro, New Hampshire, owned by Okun as Trustee for the Edward H. Okun Amended and Restated Revocable Trust (the “Okun Trust”). These loans are referred to as the “39 Aaron Road Loan” and the “49 Aaron Road Loan,” respectively.

I. The Hibiscus Loans, the JC Penney Loan, the Wachovia Salina Loan (as amended), the 39 Aaron Road Loan, and the 49 Aaron Road Loan remain outstanding.

J. On May 14, 2007, all of the 1031 Debtors, except one,² filed with the Bankruptcy Court for the Southern District of New York voluntary petitions for relief under chapter 11 of the Bankruptcy Code. By Order of the Bankruptcy Court dated May 22, 2007, the 1031 Debtors’ cases are being jointly administered.

K. On October 25, 2007, the Bankruptcy Court entered an Order appointing the Trustee as trustee for the 1031 Debtors, and the Trustee represents that he has duly qualified and is authorized to enter into this Agreement, subject to the necessary court approvals discussed herein.

L. On or about October 11, 2007, Okun and Simone Bolani entered into that certain agreement (the “Asset Transfer Agreement”) pursuant to which they transferred, with the exception of certain vehicles and residences, all of their property and assets (collectively the “Transferred Assets”), including, but not limited to, all claims and chooses in action, to the

² One of the 1031 Debtors, AEC Exchange Company, LLC, subsequently filed its petition on June 11, 2007.

1031 Debtors. On October 26, 2007, the Court entered an order approving the Asset Transfer Agreement.³

M. In 2008, the Simone Yacht was sold by the Trustee, and Wachovia Financial received partial repayment on the Simone Yacht Loan (the “Simone Yacht Loan Repayment”).

N. On or about May 30, 2007, the Class Representatives filed the Class Litigation in the United States District Court for the Northern District of California (the “Class Action Court”) seeking to proceed as a putative class (“Putative Class”) on behalf of themselves and “all others similarly situated” exchangers (“Class Members”). On or about November 24, 2008, Wachovia N.A. was added as a defendant in the Class Litigation.

O. On or about October 3, 2008, the Trustee brought an adversary proceeding against Wachovia (Adv. No. 08-01604 (MG)) (the “Adversary Proceeding”), asserting various claims relating to some or all of the loans described in Recitals A through H, above and other conduct described in the Adversary Proceeding.

P. On or about November 14, 2008, Quirk, as class representative (the “Quirk Representative”) of a putative class (the “Quirk Class”), filed the Quirk Litigation, which, prior to the decision of the U.S. Judicial Panel on Multi-District Litigation (the “MDL Panel”) described below, had been pending in the United States District Court for the District of Massachusetts.

Q. On or about January 20, 2009, the Trustee and the Class Representatives entered into an agreement concerning the prosecution of claims by the Trustee and by the Class Representatives (as later amended, the “Class-Trustee Agreement”).

³ Prior to executing the Asset Transfer Agreement, Okun caused chapter 11 cases to be commenced for IPofA West Oaks Mall, LP, IPofA WOM Master LeaseCo, LP and IPofA West Oaks Mall LeaseCo, LP (the “WOM Entities”), in the United States Bankruptcy Court for the Eastern District of Virginia.

R. On or about February 26, 2009, the Quirk Representative joined the Class-Trustee Agreement, which was approved by the Bankruptcy Court on May 18, 2009.

S. On or about April 15, 2009, the MDL Panel ordered that the Class Litigation and the Quirk Litigation proceed in the Class Action Court, and hereafter the term Class Litigation shall be deemed to include the Quirk Litigation, the term Class Representatives shall be deemed to include the Quirk Representative, and the term Putative Class shall be deemed to include the Quirk Class.

T. On or about December 17, 2008, Wachovia filed a motion seeking to intervene in an action entitled *Sears Roebuck and Co. v. IPofA Salina Central Mall, LLC*, Case No. 08-4125-SAC, pending in the United States District Court for the District of Kansas, Topeka, for the purpose of, among other things, foreclosing on the Salina Mall (the “Kansas Foreclosure Action”).

U. On or about February 6, 2009, the Trustee filed a motion seeking to intervene in the Kansas Foreclosure Action (the “Trustee Intervention Motion”), which motion is currently *sub judice*.

V. Wachovia believes that it has valid defenses to the claims asserted against it or which could have been asserted against it in the Adversary Proceeding and the Class Litigation including, without limitation, claims concerning the WOM Loan Repayment, the Simone Yacht Loan Repayment, and the validity of its liens in connection with the Hibiscus Loans, the JC Penney Loan, the Wachovia Salina Loan (as amended), the 39 Aaron Road Loan and the 49 Aaron Road Loan (collectively, the “Litigation Claims”).

W. The Parties wish, on the terms set forth herein, to resolve their differences concerning the foregoing matters without resort to expensive and time-consuming litigation, the outcome of which would be uncertain.

NOW THEREFORE, in consideration of the foregoing, the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

THE AGREEMENT

1. **Rules of Construction and Definitions.** As used herein, the following rules of construction and definitions apply to this Agreement, including the Exhibits to this Agreement.

1.1. The definitions below apply to capitalized terms wherever those terms appear in this Agreement, including the prefatory paragraphs and recitals above, the sections below, and the Exhibits hereto. Capitalized terms in the prefatory paragraphs and recitals above, the sections below, and the Exhibits hereto have the meanings ascribed to them therein to the extent they are not otherwise defined in this Section. Each defined term stated in the singular shall include the plural and each defined term stated in the plural shall include the singular. The word “including” when used in this Agreement means “including but not limited to.” The word “herein” when used in this Agreement refers to the entirety of the Agreement, including the Exhibits hereto.

1.2 “Approval Order” means one or more Orders, which may include the Confirmation Order, approving the terms of the settlement contained in this Agreement, and which are entered by the Bankruptcy Court in accordance with Bankruptcy Rule 9019(a), that collectively contain language substantially in the form of **Exhibit 1** hereto, including any non-material modifications thereto, or other language agreed to by the Parties or required by the

Bankruptcy Court. A motion seeking approval of a disclosure statement relating to a Plan which seeks the Approval Order shall constitute a motion seeking the Approval Order.

1.3 “Bankruptcy Case” means, collectively, the chapter 11 cases of the 1031 Debtors and the currently-pending chapter 11 cases of the IPofA Debtors.

1.4 “Bankruptcy Code” means Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended from time to time.

1.5 “Bankruptcy Court” means the United States Bankruptcy Court for the Southern District of New York and, to the extent it exercises jurisdiction over the Bankruptcy Case, the United States District Court for the Southern District of New York.

1.6 “Bankruptcy Court Protection Order” means one or more orders of the Bankruptcy Court, which may include the Confirmation Order, permanently barring, enjoining and restraining all Exchangers and other creditors of the 1031 Debtors from prosecuting Claims against Wachovia as set forth in **Exhibit 2.1** hereto.

1.7 “Claim” means any past, present, or future claim, demand, action, cause of action, suit, or liability of any kind or nature whatsoever, whether at law or in equity, known or unknown, asserted or unasserted, anticipated or unanticipated, accrued or unaccrued, or fixed or contingent, that has been, or may or could be asserted, whether seeking damages (including compensatory, punitive or exemplary damages) or equitable, mandatory, injunctive, or any other type of relief, including cross-claims, counterclaims, third-party claims, suits, lawsuits, administrative proceedings, notices of liability or potential liability, or arbitrations. To the extent not included in the preceding sentence, “Claim” also includes “claim” as defined in Bankruptcy Code Section 101(5).

1.8 “Class Action Bar Order” means one or more orders entered pursuant to Rule 23, F.R.C.P. by the Class Action Court, which operates both to release Wachovia from all liability to Exchangers and to bar and enjoin all Exchangers from prosecuting any Claims against Wachovia as set forth in **Exhibit 2.2** hereto, and which contains a contribution bar and judgment reduction provision substantially similar in form and effect to **Exhibit 3** annexed hereto, including any non-material modifications thereto, or other language agreed to by the Parties or required by the Class Action Court.

1.9 “Confirmation Order” means a Final Order of the Bankruptcy Court confirming a Plan.

1.10 “Creditor” has the meaning assigned to it in Section 101(10) of the Bankruptcy Code and includes, without limitation, any person or Entity that has filed a proof of Claim against the 1031 Debtors’ Estates or who has been listed as a Creditor of the 1031 Debtors, without prejudice to the Trustee’s right to object to any Claim or amend the 1031 Debtors’ Schedules, which were filed by the 1031 Debtors with the Bankruptcy Court.

1.11 “Entity” has the meaning ascribed to it in Bankruptcy Code Section 101(15).

1.12 “Estate” means the estate of one or more of the 1031 Debtors created pursuant to Section 541 of the Bankruptcy Code.

1.13 “Exchanger” means every Entity that has (a) asserted a Claim against one or more of the 1031 Debtors in the Bankruptcy Case which arises out of their deposit of funds with one or more 1031 Debtors in their capacity as a “qualified intermediary” pursuant to Section 1031 of the Internal Revenue Code; (b) is listed as a valid Creditor on the Schedules filed by a 1031 Debtor with the Bankruptcy Court as a result of their deposit of funds with one or

more of the 1031 Debtors in their capacity as a “qualified intermediary” pursuant to Section 1031 of the Internal Revenue Code, without prejudice to the Trustee’s right to object to any such Claim or to amend the 1031 Debtors’ Schedules; and/or (c) is among the Entities included within the Putative Class in the Class Litigation.

1.14 “Execution Date” means the first date on which all of the Parties have executed and delivered this Agreement. This Agreement shall be deemed delivered when the last Party sends an executed copy of this Agreement by electronic mail or overnight delivery in accordance with Section 9 hereof.

1.15 “Final Order” means an order as to which the time to appeal, petition for certiorari, or move for reargument or rehearing has expired, and as to which no appeal, petition for certiorari, or other proceedings for reargument or rehearing shall then be pending, or as to which any such right to appeal, petition for certiorari, reargue, or rehear shall have been waived in writing.

1.16 “IPofA Debtors” means, collectively, Investment Properties of America, LLC, IPofA Shreveport Industrial Park, LLC and Crossroads Miami Logistics Center, LLC.

1.17. “Motion” means the motion to dismiss filed by Wachovia in the Adversary Proceeding.

1.18. “Parties” means, collectively, the Trustee, the Class Representatives, Quirk, Wachovia N.A., Wachovia Exchange, Wachovia Capital, Wachovia Financial and Wachovia Mortgage.

1.19. “Party” means any of the Parties individually.

1.20. "Payment Date" means the date set forth in Section 2.1 of this Agreement, upon the occurrence of which the Settlement Amount shall be delivered to the Trustee, on behalf of the 1031 Debtors' Estates and the Putative Class, in accordance with Section 4.1 hereof.

1.21. "Plan" means the joint plan of reorganization filed by the Trustee on or about February 20, 2009, and any amendments thereto.

1.22. "Settlement Amount" means the sum of forty-five million dollars (\$45,000,000).

2. **Bankruptcy and Other Court Obligations.**

2.1 Sections 3, 4, 9, 10 and 11 below shall be effective as of the Execution Date. Provided that the Agreement has not become null and void pursuant to Section 2.2 below, the Payment Date shall occur seven (7) business days after the Approval Order has been entered and has become a Final Order, and either

(a) the Bankruptcy Court Protection Order has been entered and has become a Final Order; or

(b) the Class Action Bar Order has been entered and has become a Final Order.

2.2 This Agreement, except for Section 8, shall become null and void *ab initio* and of no further force or effect ("null and void"):

(a) twenty days after the entry by the Bankruptcy Court of a Final Order refusing to enter the Approval Order; or

(b) by notice in writing from the Trustee to Wachovia or from Wachovia to the Trustee declaring the Agreement null and void in the event that the Approval Order, and either the Bankruptcy Court Protection Order or the Class Action Bar Order, have not

been entered by the date which is one year after the Execution Date, provided that in the event that the Approval Order, and either the Bankruptcy Court Protection Order or the Class Action Bar Order, are entered after the date which is one year after the Execution Date but prior to the giving of the notice provided for herein, the Agreement shall not become null and void, and the Agreement shall be effective in accordance with Section 2.1.

2.3 If this Agreement becomes null and void pursuant to Section 2.2 hereof, or is terminated for any other reason by Final Order of the Bankruptcy Court or the Class Action Court, then (a) the Parties shall have all of the rights, defenses, and obligations that they would have had absent this Agreement; and (b) any and all otherwise applicable statutes of limitations or repose, or other time-related deadlines or limitation, shall be deemed to have been tolled by virtue of this Agreement for the period from the Execution Date through the date that is ten days after this Agreement becomes null and void.

2.4 Upon the Execution Date, (a) Wachovia shall take no further action on the Motion except that it shall request the Bankruptcy Court to hold the Motion in abeyance pending consideration of the Plan and the applications for the Approval Order, the Bankruptcy Court Order and the Class Action Bar Order; and (b) the Trustee, the Class Representatives and Wachovia shall request a stay of the Adversary Proceeding and the Class Litigation against Wachovia, except for purposes of seeking the Approval Order, the Bankruptcy Court Protection Order and the Class Action Bar Order.

2.5 Upon the Execution Date, (a) the Trustee, on behalf of IPofA Salina Central Mall, LLC, shall request that the court hearing the Kansas Foreclosure Action withhold any decision on the Trustee Intervention Motion until further notified in writing by the Trustee and Wachovia; (b) if the foreclosure sale in the Kansas Foreclosure Action occurs prior to the

Payment Date, Wachovia agrees that the Trustee's constructive trust and equitable lien claims relating to the Salina Mall shall be preserved and may be pursued against the sale proceeds received by Wachovia with all of the Trustee's rights in and claims relating to the Salina Mall, if any, transferred, to such proceeds (regardless of whether such proceeds are commingled), and with Wachovia reserving all of its rights and defenses in connection with such claims, in the event that this Agreement becomes null and void or is otherwise terminated pursuant to Sections 2.2 or 2.3 hereof, provided that, upon the Payment Date, this subsection "(b)" shall become ineffective; (c) the Trustee, on behalf of IPofA Salina Central Mall, LLC and IPofA WOM JCP, LP, shall consent to and shall not take any action to oppose or contest Wachovia's right to obtain judgments on its notes and/or foreclose on any of the Wachovia Salina Loan, the Salina Mall, the JC Penney Loan or the JC Penney Property, which foreclosure actions may be prosecuted by Wachovia as, when and how it sees fit upon and after the Execution Date; and (d) the Trustee shall consent to and shall not take any action to oppose or contest Wachovia's right to obtain judgment on its notes and/or to foreclose on any of the Hibiscus Loans, the 39 Aaron Road Loan or the 49 Aaron Road Loan; however, should Wachovia obtain any proceeds from the Hibiscus Loans, the 39 Aaron Road Loan or the 49 Aaron Road Loan prior to the Payment Date, Wachovia agrees that any claims by the Trustee relating to those loans shall be preserved and may be pursued against the sale proceeds received by Wachovia with all of the Trustee's rights in and claims relating to those loans, if any, transferred to such proceeds (regardless of whether such proceeds are commingled), and with Wachovia reserving all of its rights and defenses in connection with such claims, in the event that this Agreement becomes null and void or is otherwise terminated pursuant to Sections 2.2 or 2.3 hereof, provided that, upon the Payment Date, this subsection "(d)" shall become ineffective. Notwithstanding anything to the contrary

herein, the Trustee's consent to any foreclosure action discussed in this Section 2.5 shall not be deemed, nor shall it be argued by Wachovia to operate as, a waiver of or to otherwise affect any of the Trustee's rights to assert a claim against the proceeds of such a foreclosure as outlined in this Section 2.5.

2.6 Upon the Payment Date, the Trustee, on behalf of IPofA Salina Central Mall, LLC, shall withdraw the Trustee Intervention Motion, with prejudice.

3. **Court Approval.**

3.1 The Trustee and the Class Representatives shall proceed in good faith and make all reasonable efforts to obtain entry of the Approval Order, the Bankruptcy Court Protection Order and the Class Action Bar Order as expeditiously as is practicable, and Wachovia will reasonably cooperate with the Trustee and the Class Representatives to obtain entry of the foregoing.

(a) Immediately upon the Execution Date, the Trustee, in his sole discretion, of behalf of himself and the Class Representatives, may make the disclosure concerning this Agreement which is contained in **Exhibit 4** hereto (the "Permitted Disclosure").

(b) Except as may be needed (i) to obtain Bankruptcy Court or Class Action Court approval of this Agreement, including reasonably necessary discussion thereof in a disclosure statement under Bankruptcy Code section 1125, or with creditors in the Bankruptcy Case or Class Members, (ii) in an action or proceeding to enforce the terms of this Agreement, (iii) by order of any court of competent jurisdiction, or (iv) as may otherwise be agreed upon in writing by the Parties hereto, (x) settlement negotiations leading up to this Agreement shall remain confidential in accordance with the existing agreement between the Trustee, the Putative Class and Wachovia, (y) no Party to this Agreement shall issue any press release or make any

internet or web site posting, or make any other statement which is distributed to and available to the general public concerning this Agreement or negotiations or discussions associated with this Agreement other than the Permitted Disclosure, and (z) any evidence of the terms of this Agreement or negotiations or discussions associated with this Agreement shall be inadmissible in any action or proceeding for purposes of establishing any rights, duties, or obligations of the Parties. In the event that a Party hereto receives a subpoena or request for the information provided for in this sub-section, it shall promptly notify the other Parties in accordance with Section 9 hereof, in order to provide such other Parties an opportunity to object or seek a court order for protection from such disclosure.

(c) Immediately upon the Execution Date through the date of entry of the Approval Order or the date on which the Agreement becomes null and void or is otherwise terminated pursuant to Sections 2.2 or 2.3 hereof, Wachovia shall be precluded from pursuing or prosecuting any Claims, objections, motions, briefs, discovery requests or pleadings in the Bankruptcy Court in or with respect to the Bankruptcy Case, except in response to a court order or to discovery directed to the Trustee or Wachovia regarding this Agreement, Wachovia's communications with the Trustee, or filings or papers addressing this Agreement or Wachovia's rights or obligations, provided, however, that Wachovia shall provide the Trustee with drafts of any such proposed filings at least three business days in advance of filing or as soon thereafter as is practicable, and shall consider reasonable requests for additions, deletions or changes.

4. **Payment of the Settlement Amount**

4.1 Within twenty-one days of the Execution Date, Wachovia shall deposit the Settlement Amount into a segregated account at Wachovia, N.A., which shall earn interest at Wachovia N.A.'s then-existing commercial deposit rate of interest. On the Payment Date,

Wachovia shall pay the Settlement Amount to the Trustee for the benefit of the 1031 Debtors' Estates and the Putative Class, as provided by the Class-Trustee Agreement, and the orders of the Class Action Court and the Bankruptcy Court.

4.2 Wachovia shall not seek reimbursement directly or indirectly from the Trustee, the 1031 Debtors, the Class Representatives or any non-party insurers of the 1031 Debtors, for any payment Wachovia is required to make under this Agreement, whether by way of a Claim for contribution, indemnification, subrogation, retrospective premium, deductible, or otherwise; provided that nothing in this Section 4.2 shall preclude Wachovia from seeking reimbursement from any of its insurance carriers, nor is this paragraph intended to affect the rights, obligations, and relationship by and among Wachovia, its members or employees of its members, partners, or its insurance carriers.

5. **Releases**

5.1 Upon the Approval Order, and either the Bankruptcy Court Protection Order or the Class Action Bar Order, becoming Final Orders, and without further action by any Party:

(a) The Trustee, on behalf of himself and each of the 1031 Debtors' Estates, fully, finally, and completely releases and waives any and all Claims of the Trustee, the 1031 Debtors, and their Estates against Wachovia arising out of or in connection with the Litigation Claims or the Bankruptcy Case, except Claims for a breach of this Agreement.

(b) The Class Representatives, on their own behalf and on behalf of the Putative Class, fully, finally, and completely release and waive any and all Claims against Wachovia arising out of or in connection with the Litigation Claims or the Bankruptcy Case, except Claims for a breach of this Agreement.

(c) Wachovia fully, finally and completely releases and waives any and all Claims against any of the 1031 Debtors, the Trustee, and the Class Representatives, on their own behalf and on behalf of the Putative Class, arising out of or in connection with the Litigation Claims or the Bankruptcy Case, except Claims for a breach of this Agreement.

(d) The Parties acknowledge and agree that the Settlement Amount hereunder represents a compromise of all alleged damages including but not limited to lost exchange funds, tax liabilities, attorneys' fees, costs, and any other consequential and/or punitive damages.

5.2 The Parties acknowledge they have been advised by their respective legal counsel and are familiar with the provisions of Section 1542 of the California Civil Code, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of the executing of the release which if known by him or her must have materially affected his or her settlement with the debtor.

5.3 In furtherance of this Agreement, the Parties expressly waive any and all rights they may have under any contract, statute, code, regulation, ordinance, or the common law, which may limit or restrict the effect of a general release as to the Litigation Claims or the Bankruptcy Case that they do not know or suspect to exist in their favor at the time of the execution of this Agreement.

5.4 Nothing in this Section 5 is intended to, or shall be construed to, release, waive, or otherwise affect the Parties' rights and obligations under this Agreement.

5.5 Nothing in this Agreement shall constitute a release, waiver, or assignment of any of the 1031 Debtors' or the Putative Class' rights against any Entity other than Wachovia.

5.6 By entering into this Agreement, the Parties have not waived any right, obligation, privilege, defense, or position they may have asserted or might assert in connection with any Claim, matter, Entity, or insurance policy outside the scope of this Agreement, including, without limitation, any claims which Wachovia may have against the Trustee, in his individual capacity but not as Trustee, or any member of the Putative Class in connection with any loans or transactions where the Trustee, in his individual capacity but not as Trustee, or any member of the Putative Class has or may have obligations to Wachovia which are not related to the Litigation Claims or the Bankruptcy Case.

6. **Representations and Warranties of the Parties**

6.1 Each of the Parties separately represents and warrants that it has the requisite power and authority to enter into this Agreement and to perform the obligations imposed on it by this Agreement, subject in the Trustee's case to the Approval Order becoming a Final Order, and in the Class Representatives' case to the Class Action Court approving this Agreement.

6.2 Each of the Parties separately represents and warrants that the execution and delivery of, and the performance of the obligations contemplated by, this Agreement has been approved by duly authorized representatives of the Party, subject in the Trustee's case, to the Approval Order becoming a Final Order, and in the Class Representatives' case to the Class Action Court approving this Agreement.

6.3 Each of the Parties separately represents and warrants that the Party has expressly authorized its undersigned representative to execute this Agreement on the Party's behalf as its duly authorized agent and that the Party has carefully read the Agreement, knows and understands the contents hereof, and is freely executing the Agreement.

6.4 Each of the Parties separately represents and warrants that this Agreement has been thoroughly negotiated and analyzed by its counsel and has been executed and delivered in good faith, pursuant to arms' length negotiations, and for good and valuable consideration.

7. **Entire Agreement**

7.1 This Agreement and all its Exhibits constitute a single integrated written contract that expresses the entire agreement and understanding between the Parties with respect to matters that are the subject of this Agreement. If any material provision hereof is deemed unenforceable, then the Agreement as a whole shall be deemed terminated and null and void by written notice, and the rights and obligations of the Parties shall be the same as if the Agreement were terminated and became null and void by written notice in accordance with Section 2.2 hereof. Except as otherwise expressly provided herein, this Agreement supersedes all prior communications, settlements, and understandings between the Parties and their representatives regarding the matters addressed by this Agreement. Except as explicitly set forth in this Agreement, there are no representations, warranties, promises, statements, or inducements, whether oral, written, expressed, or implied, that in any way affect or condition the validity of this Agreement or alter or supplement its terms. Any representations, warranties, promises, statements, or inducements, whether made by any Party or any agents of any Party, that are not contained in this Agreement shall not be valid or binding. If the facts or law related to the subject matter of this Agreement are found hereafter to be other than is now believed by any of the Parties, then each of them expressly accepts and assumes the risk of such possible difference of fact or law, and agrees that this Agreement nonetheless shall be and remain effective according to its terms.

8. **No Admissions by Parties.** This Agreement represents a compromise of disputed Claims and Litigation Claims, and this Agreement shall not be deemed an admission or concession by any Party with respect to any factual or legal contention or position. Nothing contained in this Agreement shall be deemed an admission by the Trustee or any Debtor as to the validity of any of the positions or defenses that have been or could have been asserted by Wachovia, nor shall it be deemed an admission by Wachovia as to the validity of any of the positions or Claims that have or could have been asserted by the Trustee, the Putative Class or any Debtor.

9. **Notice** Any and all statements, communications, or notices to be provided pursuant to this Agreement shall be in writing and sent by electronic mail or overnight delivery service. Such notices shall be sent to the individuals listed below, or to such other individuals as the respective Party may designate in writing from time to time.

For Wachovia:

Van Beck, Esq.
Wells Fargo Wachovia
One Wachovia Center - 32nd Floor
301 South College Street
Charlotte, North Carolina 28288-0630
van.beck@wachovia.com

with a copy to:

Jordan W. Siev, Esq.
Reed Smith LLP
599 Lexington Avenue
New York, New York 10020
jsiev@reedsmith.com

For the Trustee:

Jonathan L. Flaxer, Esq.
Michael S. Devorkin, Esq.
Golenbock Eiseman Assor Bell & Peskoe LLP
437 Madison Avenue
New York, NY 10022
(212) 907-7300
jflaxer@golenbock.com

For the Class:

Robert L. Brace, Esq.
Hollister & Brace
1126 Santa Barbara Street
Santa Barbara, CA 93101
(805) 963-6711
RLBrace@hbsb.com

10. **Dispute Resolution**

10.1 The Parties agree that before resorting to litigation they will attempt to resolve informally any disputes arising under this Agreement through good faith negotiations for

a period of sixty (60) days after written notification of such dispute unless, in any Party's good faith belief, more immediate judicial relief is required.

10.2 Except for disputes that must be resolved by the Class Action Court, the Parties agree to submit all disputes relating to this Agreement to the jurisdiction and venue of the Bankruptcy Court. If the Bankruptcy Court refuses to exercise jurisdiction over any such dispute, the Parties may submit such dispute to any court of competent jurisdiction. The Parties expressly consent to the jurisdiction of the state and federal courts in New York County, New York over them for such purposes, and waive any objection to proceeding in such courts on the basis of lack of personal jurisdiction over them, *forum non conveniens*, or similar arguments. The validity, construction and enforcement of this Agreement shall be governed by the laws of the State of New York without regard to choice of law principles.

11. **Miscellaneous**

11.1 Each Party agrees to take such steps and to execute any documents as may be reasonably necessary or proper to effectuate the purpose and intent of this Agreement and to preserve its validity and enforceability. In the event that any action or proceeding of any type whatsoever is commenced or prosecuted by any Entity not a Party hereto to invalidate, interpret, or prevent the validity, enforcement, or carrying out of all or any of the provisions of this Agreement, the Parties mutually agree, represent, warrant, and covenant to cooperate fully in opposing such action or proceeding.

11.2 The Parties agree that they negotiated this Agreement at arms' length and in good faith, with each Party receiving advice from independent legal counsel, and that no part of this Agreement should be construed against a particular Party because of the identity of the drafter.

11.3 Titles and captions contained in this Agreement are inserted only as a matter of convenience and are for reference purposes only. Such titles and captions in no way are intended to define, limit, expand or describe the scope of this Agreement, nor the intent of any provision thereof.

11.4 Except as expressly set forth herein, all Parties shall bear their own costs and expenses incurred in connection with the Litigation Claims and/or this Agreement.

11.5 This Agreement cannot be amended, altered or modified except by a written agreement duly executed by each Party to be charged or its heirs, successors or assigns.

11.6 The terms and conditions of this Agreement shall be binding on the Parties hereto and their heirs, successors and assigns.

11.7 This Agreement may be executed in counterpart originals, all of which, when so executed and taken together, shall be deemed an original and all of which shall constitute one and the same instrument. Each counterpart may be delivered by email (as a pdf attachment), and an emailed signature shall have the same force and effect as an original signature.

Signatures Are On This Page and The Following Two Pages

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date(s) indicated below

**GERARD A. MCHALE, JR., SOLELY IN HIS CAPACITY
AS CHAPTER 11 BANKRUPTCY TRUSTEE FOR THE 1031
DEBTORS.**

Date: May ____, 2009

CLASS REPRESENTATIVES

By: 

ANITA HUNTER

Date: May 28, 2009

QUIRK INFINITI, INC., ON BEHALF OF THE QUIRK REPRESENTATIVE

By:

Name: _____

Title: _____

Date: May __, 2009

WACHOVIA BANK, NATIONAL ASSOCIATION

By:

Name: _____

Title: _____

Date: May __, 2009

WACHOVIA EXCHANGE SERVICES, INC.

By:

Name: _____

Title: _____

Date: May __, 2009

CLASS REPRESENTATIVES

By:

ANITA HUNTER

Date: May ___, 2009

QUIRK INFINITI, INC., ON BEHALF OF THE QUIRK REPRESENTATIVE

By:

Name: _____

Title: _____

Date: May 28, 2009

WACHOVIA BANK, NATIONAL ASSOCIATION

By:

Name: _____

Title: _____

Date: May ___, 2009

WACHOVIA EXCHANGE SERVICES, INC.

By:

Name: _____

Title: _____

Date: May ___, 2009

WACHOVIA CAPITAL MARKETS LLC

By:

Name: _____

Title: _____

Date: May ____, 2009

WACHOVIA FINANCIAL SERVICES, INC.

By:

Name: _____

Title: _____

Date: May ____, 2009

WACHOVIA MORTGAGE CORPORATION

By:

Name: _____

Title: _____

Date: May ____, 2009

Exhibit 1

Terms of the Approval Order

FINDINGS OF FACT AND CONCLUSIONS OF LAW:¹

Jurisdiction, Final Order and Statutory Predicates

A. The Court has jurisdiction over the motion dated _____, 2009, of Gerard A. McHale, Jr., as Chapter 11 Trustee (the “Trustee”) of the 1031 Debtors and as sole member of the IPofA Debtors, to approve the Agreement (the “Motion”) [and confirm the 1031 Debtors’ proposed plan of reorganization] and the relief requested therein, including responses and objections thereto, if any, pursuant to 28 U.S.C. §§ 157 and 1334, has jurisdiction over all parties to the Agreement, and this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A)[, (E), (H), (K) and (O)]. Venue of these cases and the Motion in this district is proper under 28 U.S.C. §1409.

B. This Order constitutes a final and immediately appealable order within the meaning of 28 U.S.C. § 158(a).

C. The predicates for the relief sought in the Motion are Bankruptcy Code §105(a) [and 1129] and Bankruptcy Rule 9019.

Retention of Jurisdiction

D. It is necessary and appropriate for the Court to retain jurisdiction to, among other things, interpret and enforce the terms and provisions of this Order and the Agreement, and to adjudicate, if necessary, any and all disputes arising under or relating in any way to, or affecting, any of the transactions contemplated under the Agreement.

Notice of the Motion

E. The Debtors have provided due and adequate notice of the Motion, the hearing thereon (the “Hearing”), the Agreement, and the subject matter thereof to all parties in interest pursuant to Bankruptcy Rules 2002 and 6004. Such notice was good and sufficient under the particular circumstances, and no further notice is necessary. Without limiting the generality of the foregoing, adequate notice of the Motion, the Hearing and the Agreement has been provided, and a reasonable opportunity to object or be heard with respect to the Motion and the relief requested therein has been afforded, to all parties in interest, including without limitation (i) the Official Committee of Unsecured Creditors appointed in this case; (ii) the United States Trustee;

¹ The findings and conclusions set forth herein constitute the Court’s findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such. Defined terms herein have the same meanings as in the Motion.

(iii) Okun; and (iv) all other Entities that, as of the date the Motion was filed, had filed a notice of appearance and demand for service of papers in the Bankruptcy Case or were otherwise listed on the 2002 Service List maintained by the Trustee in the Bankruptcy Case.

The Potential Claims

F. As alleged in the complaint in the Adversary Proceeding, from early 2005 through the Petition Date, Wachovia Bank National Association (“Wachovia N.A.”) and its affiliates served as a personal banker for Edward H. Okun (“Okun”), a lender to Okun and various Okun-related entities (including affiliates of Investment Properties of America LLC (“IPofA”), a commercial banker for the 1031 Debtors and many IPofA entities, and an agent for one of the 1031 Debtors, National Exchange Services QI, Ltd. (“NES”), pursuant to a written agency agreement.

G. The Trustee alleges that more than \$150 million of the 1031 Debtors’ funds were misappropriated prior to the bankruptcy by Okun and others, and that Wachovia N.A., as well as certain of its affiliates (Wachovia N.A. and its subsidiaries and affiliates, along with Wells Fargo & Company and its subsidiaries and affiliates, are referred to collectively herein as “Wachovia”) aided and abetted such misappropriations. The Trustee also alleges that Wachovia was the recipient of various fraudulent transfers of assets of the 1031 Debtors, including in the form of (i) funds misappropriated from the 1031 Debtors and paid to Wachovia in repayment of loans made to third parties, and (ii) liens obtained by Wachovia, and proceeds received by Wachovia in connection with such liens, on assets that were acquired in whole or in part with funds misappropriated from the 1031 Debtors. The Trustee asserts equitable interests (constructive trust and equitable liens) in assets acquired in whole or in part with funds misappropriated from the 1031 Debtors, as well as claims of unjust enrichment. The Trustee also asserts a breach of contract claim based upon Wachovia’s contractual relationship with NES.

H. On or about November 21, 2008, Wachovia filed a motion to dismiss the complaint in the Adversary Proceeding, which is pending.

I. The Court makes no findings on whether any of the claims asserted by the Trustee would result in the imposition of liability upon Wachovia, and Wachovia denies that it is liable to the Trustee or any other party for the matters asserted against it in the Adversary Proceeding.

J. The Parties dispute the extent of Wachovia’s obligations to the 1031 Debtors.

K. Without prejudging or commenting in any way upon any asserted liability of any person or entity, the Court finds that the Trustee has claimed that responsibility for the losses to or damages suffered by the 1031 Debtors could be spread among other parties, including, but not limited to, former owners, managers or employees of the 1031 Debtors, including Okun, prior owners of the 1031 Debtors, other lender(s), insurance broker(s) and professionals such as other attorneys and accountants retained by the 1031 Debtors, the IPofA Debtors and Okun.

L. Wachovia is only willing to pay the Settlement Amount and the other consideration being provided by it in exchange for finality as to claims brought by the Trustee. The Court finds that Wachovia and the Trustee have agreed to this

Settlement in good faith and that Wachovia is paying a fair share of the potential damages for which it could be liable.

Sound Business Judgment and Reasonableness

- M. The Trustee, in all capacities in which he has executed the Agreement, has demonstrated good, sufficient and sound business purposes and justifications for the relief requested in the Motion and the approval of the transactions contemplated thereby. The settlement and compromise with Wachovia embodied in the Agreement is consistent with the reasonable range of litigation outcomes if Debtors were to litigate the matters resolved pursuant to this Order. The Agreement was negotiated in good faith and the consideration and payments to be made thereunder, including without limitation, the release of the claims asserted in the Adversary Proceeding are found to be made for reasonably equivalent value and for fair consideration by and among the Parties.
- N. The Trustee has demonstrated that the probability of success for the Trustee and the 1031 Debtors in litigation over the matters resolved by the Agreement, is uncertain; that the litigation of the matters resolved by the Agreement would be complex and costly to the 1031 Debtors' Estates; that the entry into the Agreement is consistent with the reasonable range of potential litigation outcomes; and that entry into the Agreement is in the best interests of the 1031 Debtors, their Estates and their creditors.

For all of the foregoing reasons and after due deliberation, IT IS ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is granted.
2. The Trustee, in all capacities in which he has executed this Agreement, is authorized and directed to enter into the Agreement and undertake all acts as are necessary to consummate the transactions contemplated by the Agreement in accordance with its terms, and to execute and deliver all documents as may be required to effectuate the transactions contemplated by the Agreement, subject only to the conditions specified herein and in the Agreement.
3. For the reasons set forth herein and on the record at the Hearing, all objections to the Motion and the relief requested therein and/or granted in this Order that have not been withdrawn, waived, or settled, and all reservations of rights included in such objections, are overruled on the merits.
4. Pursuant to Bankruptcy Rule 9019(a), the settlement and mutual release of claims as set forth in the Agreement are hereby approved as of the Execution Date of the Agreement. This Order shall be effective and enforceable immediately upon entry and its provisions shall be self-executing and shall not be stayed under Bankruptcy Rule 6004(g).

5. For purposes of this section, (a) the term “Defendant” includes any party now or hereafter named as a defendant in any action brought by the Trustee, or any party who settles with the Trustee without being named in a complaint and (2) the term “Plaintiff” means the Trustee.

Each of the non-settling Defendants (“Non-Settling Defendants”) is hereby permanently barred, enjoined, and restrained from commencing, prosecuting or asserting any claim for indemnity or contribution against Wachovia (or any other claim against Wachovia where the injury to the Non-Settling Defendant is the Non-Settling Defendant’s liability to the Plaintiff or costs and fees in connection with asserted liability to the Plaintiff), arising out of the claims or allegations asserted by the Plaintiff, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims or third-party claims, in the Class Litigation, in the Bankruptcy Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the “Barred Claims of Non-Settling Defendants”).

Wachovia is hereby permanently barred, enjoined, and restrained from commencing, prosecuting or asserting any claim for indemnity or contribution against any person arising out of the claims or allegations by the Plaintiff, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the Class Litigation, in the Bankruptcy Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere, except that, to the extent that Okun asserts any Claim against Wachovia (all of which Claims the Trustee has resolved in the Settlement Agreement), it may respond with any defenses, offsets, recoupments, cross-claims, third-party claims or counterclaims against Okun (collectively, the “Barred Claims of Wachovia”).

The recovery of the Plaintiff, if any, on their respective asserted and assertable claims against any Non-Settling Defendants shall be reduced by the amount of the Wachovia equitable and proportionate share of any joint and several liability, as will be determined later by the Court in the allocation of recoverable costs and damages incurred by that Plaintiff.

7. This Court shall retain jurisdiction to interpret and enforce the provisions of this Order and the Agreement in all respects, and to adjudicate, if necessary, any and all disputes arising under or relating in any way to, or affecting, any of the transactions contemplated under the Agreement.

It is so ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Exhibit 2.1

All Creditors of the 1031 Debtors are permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting or asserting any direct or derivative Claim against Wachovia, arising out of or relating to the Litigation Claims, the operation or business of the 1031 Debtors, any Entities owned or controlled by Okun, or Okun, whether based on a theory of constructive trust, equitable lien or fraudulent conveyance, or otherwise, whether arising under state, Federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in this Court, in any Federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere.

Exhibit 2.2

All Exchangers are permanently BARRED, ENJOINED and RESTRAINED from commencing, prosecuting or asserting any direct or derivative Claim against Wachovia, arising out of or relating to the Litigation Claims, the operation or business of the 1031 Debtors, any Entities owned or controlled by Okun, or Okun, whether based on a theory of constructive trust, equitable lien or fraudulent conveyance, or otherwise, whether arising under state, Federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in this Court, in any Federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere.

Exhibit 3

For purposes of this section, (1) the term “Defendant” includes any party now or hereafter named as a defendant in the Class Litigation or any party who settles with the Putative Class without being named in a complaint and (2) the term “Plaintiff” includes the plaintiffs in the Class Litigation.

Each of the non-settling Defendants (“Non-Settling Defendants”) is hereby permanently barred, enjoined, and restrained from commencing, prosecuting or asserting any claim for indemnity or contribution against Wachovia (or any other claim against Wachovia where the injury to the Non-Settling Defendant is the Non-Settling Defendant’s liability to the Plaintiff or costs and fees in connection with asserted liability to the Plaintiff), arising out of the claims or allegations asserted by the Plaintiff, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the Class Litigation, in the Bankruptcy Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere (collectively, the “Barred Claims of Non-Settling Defendants”).

Wachovia is hereby permanently barred, enjoined, and restrained from commencing, prosecuting or asserting any claim for indemnity or contribution against any person arising out of the claims or allegations by the Plaintiff, whether arising under state, federal or foreign law as claims, cross-claims, counterclaims, or third-party claims, in the Class Litigation, in the Bankruptcy Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States, Canada or elsewhere, except that, to the extent that Okun asserts any Claim against Wachovia (all of which Claims the Trustee has resolved in the Settlement Agreement), it may respond with any defenses, offsets, recoupments, cross-claims, third-party claims or counterclaims against Okun (collectively, the “Barred Claims of Wachovia”).

The recovery of the Plaintiff, if any, on their respective asserted and assertable claims against any Non-Settling Defendants shall be reduced by the amount of the Wachovia equitable and proportionate share of any joint and several liability, as will be determined later by the Court in the allocation of recoverable costs and damages incurred by that Plaintiff.

The Court finds that the Agreement was entered into in good faith.

Exhibit 4

The Trustee, Wachovia and the Putative Class, in consideration of the payment of the sum of \$45 million by Wachovia, have resolved all of their differences, claims and potential claims, subject to approval by the Bankruptcy Court and the Class Action Court.