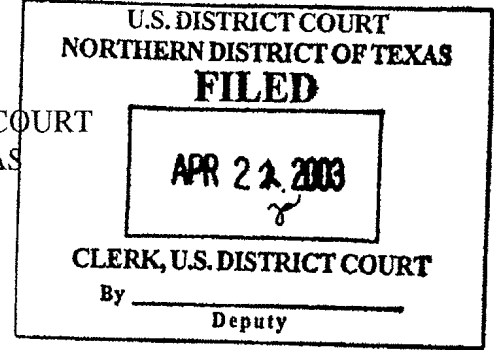


ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



SECURITIES AND EXCHANGE  
COMMISSION

Plaintiff,

VS.

FUNDING RESOURCE GROUP  
a/k/a FRG TRUST, ET AL.

Defendants.

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NO. 3-98-CV-2689-M

**FINDINGS AND RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE JUDGE**

Michael J. Quilling, as Receiver for Hammersmith Trust and related entities, has filed a motion to approve a compromise and settlement agreement with David Johnson in Case No. 00-2098-TU, *styled Granite Holdings, et al. v. Johnson*, currently pending in the United States District Court for the Western District of Tennessee ("Johnson Litigation"). Pursuant to this settlement, Johnson, an attorney and former trustee of the Hammersmith Trust, has agreed to pay the Receiver \$600,000 in exchange for a release of all claims against him and his law firm. By this motion, the Receiver seeks court approval of the settlement and authority to pay: (1) \$11,156.00 in attorney's fees and \$3,134.31 in expenses to the law firm of Quilling, Selander, Cummiskey & Lownds, P.C.; (2) \$34,851.55 in attorney's fees and \$2,046.54 in expenses to the law firm of Borod & Kramer; (3) \$29,225.00 in expert witness fees to Professor Harold Levinson; and (4) \$58,591.35 to various Hammersmith investors for attorney's fees paid to Borod & Kramer before the Receiver assumed control of the Johnson Litigation. The balance of the settlement

proceeds will be paid to the Hammersmith Trust Estate for eventual distribution to investors on a *pro rata* basis.

The Receiver was ordered to post a copy of this motion on his website with instructions to all interested parties that any objections must be filed by April 4, 2003. No objections have been received by the Receiver or the court. A hearing was held on April 11, 2003. The Receiver notified all interested parties of this hearing by posting notice on his website. No one appeared at the hearing or otherwise objected to the motion. The Securities and Exchange Commission, through its regional counsel, has consented to the relief sought.

The magistrate judge finds that the proposed settlement is in the best interest of the Hammersmith Trust Estate and should be approved. However, the attorney's fees and most of the expenses requested by the Receiver and his local counsel should be denied. By order dated April 13, 2001, the court tentatively approved a litigation budget of \$108,675.00 for this case.<sup>1</sup> The budget was approved, in large part, based on the Receiver's good faith belief that he realistically expected to recover at least \$1 million, and perhaps as much as \$5 million, as a result of this lawsuit. As recently as February 3, 2003, the Receiver advised the court that an anticipated recovery of \$750,000 was "very realistic." (Rec. Ltr., 2/3/03). To date, Borod & Kramer has been paid \$85,725.15 in legal fees and expenses related to the Johnson Litigation.<sup>2</sup> Another

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<sup>1</sup> The \$108,675.00 budget was submitted by Borod & Kramer. In addition, the Quilling firm submitted a litigation budget in the amount of \$54,600.00. The court declined to prospectively approve that part of the budget, noting that certain items contained therein appeared to be excessive. *See* ORDER, 4/13/01. Instead of approving the Receiver's budget, the court indicated that it would continue to monitor fees and expenses and authorize periodic payments as appropriate. *Id.*

<sup>2</sup> This sum includes \$58,591.35 paid to Borod & Kramer by certain Hammersmith investors between November 25, 1999 and October 6, 2000. During that time, Borod & Kramer incurred \$66,103.59 in fees and \$2,968.31 in expenses, for a total of \$69,071.90. The investors still owe the firm \$10,480.55. (Rec. Mot. at 4, ¶ 7 & Exh. A).

\$31,851.88 has been paid to the Quilling firm. (See Rec. Mot. at 4, n.1). If the current fee application is approved in its entirety, the total amount of legal fees and expenses paid in this case will be \$197,990.43-- approximately 33% of the settlement amount and far in excess of the court-approved litigation budget. Only \$460,995.25, or 76% of the settlement amount, will be available for distribution to investors.

In their current fee application, the Receiver seeks \$14,290.31 for legal services performed and costs incurred in the Johnson Litigation for the period of September 1, 2002 through March 6, 2003. Borod & Kramer seeks \$36,868.09 for legal services performed and costs incurred for the period of August 1, 2002 through February 21, 2003. Most of the entries contained in the accompanying billing statements are for telephone conferences, meetings, and document review and preparation. It is not clear from these statements whether the Receiver and his local counsel exercised proper billing judgment in writing off unproductive, excessive, or redundant hours.<sup>3</sup> Moreover, the total amount of legal fees incurred in this case must be examined in light of the limited degree of success achieved. See *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 574, 121 L.Ed.2d 494 (1992) (degree of success obtained by prevailing party is the most critical factor in determining reasonableness of fee award). Both the Receiver and Borod & Kramer realistically believed that they would recover at least \$1 million as a result of prosecuting their lawsuit against David Johnson. Ultimately, the case settled for \$600,000, or 60% of the pretrial estimate provided by counsel. While the inherent uncertainties of litigation make it difficult to accurately predict a settlement range prior to final disposition, and the settlement in this case appears to be

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<sup>3</sup> At the hearing, the Receiver testified that he did not keep records of time actually spent on the case, only time that was eventually billed. Borod & Kramer estimates that it wrote-off 50 hours before its billing statements were prepared, but has not submitted any documentation to that effect.

reasonable under the circumstances, the court will not approve a fee application that unfairly compensates the lawyers at the expense of their clients.

In order to reach an equitable result, the magistrate judge determines that the total amount of legal fees and expenses should not exceed the 60% of the \$163,275.00 requested by the Receiver and his local counsel in their proposed litigation budget, or \$97,965.00. Because Borod & Kramer and the Quilling firm have already been paid \$117,577.03 in fees and expenses in connection with the Johnson Litigation,<sup>4</sup> no further payments should be authorized except for: (1) the reimbursement of \$376.55 in out-of-pocket expenses incurred by Borod & Kramer and \$1,516.39 in out-of-pocket expenses incurred by the Quilling firm,<sup>5</sup> and (2) the payment of \$29,225.00 in expert witness fees to Professor Harold Levinson.<sup>6</sup> The Receiver should also be authorized to reimburse the Hammersmith Trust Investor Group \$58,591.35 for legal fees and expenses previously paid to Borod & Kramer.

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<sup>4</sup> The court would note that the Receiver has been paid nearly \$1 million in fees and expenses in other matters related to the Hammersmith Trust Estate, and Borod & Kramer has been paid \$38,461.88 for legal services performed and expenses incurred in another lawsuit, *Quilling v. Talley, et al.*, No. 00-3041-G/BRE. (See Rec. Ltr., 2/3/03, Attch.).

<sup>5</sup> These out-of-pocket expenses consist of: (1) \$226.55 in lodging expenses for an attorney from Borod & Kramer to attend the deposition of Dee Raibourn in Dallas; (2) \$737.45 in travel and \$150.00 in lodging expenses for Mike Quilling to attend the mediation in Memphis; and (3) \$778.94 for two deposition transcripts. The remaining expense items, for which compensation is not allowed, consist mainly of long distance telephone charges, in-house photocopies, postage, and other overhead items.

<sup>6</sup> The Receiver previously submitted an invoice from Professor Levinson in the amount of \$14,000.00 for expert witness fees. By order dated July 19, 2002, the court held that it "is unable to approve such a large expenditure without reviewing the expert witness report and a more detailed invoice documenting the time spent by Levinson on a daily basis for each task." ORDER, 7/19/02 at 2. The Receiver has now obtained a more detailed invoice from Professor Levinson and provided the court with a copy of his expert report in the underlying case. It is now clear that the services rendered by Professor Levinson, a nationally known expert in the field of legal ethics and professional responsibility, were instrumental in achieving a favorable settlement of the Johnson Litigation.

## RECOMMENDATION

For these reasons, the Receiver's motion to approve compromise settlement agreement and allow payment of fees should be granted in part and denied in part. The motion should be granted with respect to the \$600,000 settlement with David Johnson in Case No. 00-2098-TU, styled *Granite Holdings, et al. v. Johnson*, currently pending in the United States District Court for the Western District of Tennessee. This settlement should be approved and the Receiver should be authorized to execute all documents necessary to conclude the litigation. The settlement proceeds should be paid the Hammersmith Trust Estate for eventual distribution to investors on a *pro rata* basis.

The motion to allow payment of attorney's fees and expenses should be granted in part and denied in part. The Receiver should be authorized to pay:

1. the law firm of Borod & Kramer \$376.55 and the law firm of Quilling, Selander, Cummiskey & Lownds, P.C. \$1,516.39 for out-of-pocket expenses incurred in connection with the Johnson Litigation;
2. Professor Harold Levinson \$29,225.00 in expert witness fees; and
3. the Hammersmith Trust Investor Group \$58,591.35 for legal fees and expenses previously paid to Borod & Kramer.

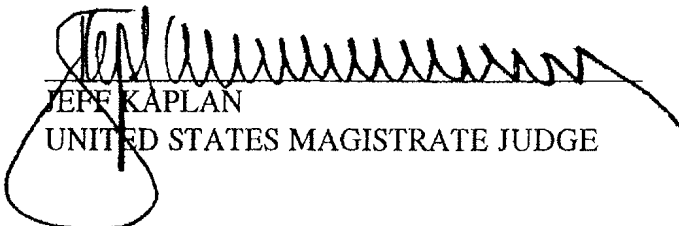
In all other respects, the motion to allow payment of attorney's fees and expenses should be denied.

The Receiver is ordered to post a copy of this report and recommendation on his website, [www.secreceiver.com](http://www.secreceiver.com). Any claimant or interested party may file written objections to this recommendation by May 6, 2003. The failure to file written objections shall bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are

accepted or adopted by the district court, except upon grounds of plain error or manifest injustice.

*See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: April 22, 2003.



JEFF KAPLAN  
UNITED STATES MAGISTRATE JUDGE