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

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	§	
V.	§	CIVIL ACTION NO. 3-98CV2689-m
FUNDING RESOURCES GROUP a/k/a FRG TRUST, ET AL., Defendants.	§	

EVIDENTIARY HEARING AND
ORAL ARGUMENT REQUESTED

RECEIVER'S OBJECTIONS TO APRIL 22, 2003 FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

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TO THE HONORABLE BARBARA M. G. LYNN UNITED STATES DISTRICT JUDGE:

Pursuant to 28 U.S.C.§ 636(b) and FED. R. CIV. P. 72(b), Michael J. Quilling, as Receiver for Hammersmith Trust and related entities (the "Receiver"), files his objections to the Findings and Recommendation of the Magistrate Judge ("Recommendation") entered on April 22, 2003 in the above-styled case, and in support of such objections would respectfully show the Court as follows:

I. STANDARD OF REVIEW

The standards for reviewing a magistrate judge's recommendations are set forth in 28 U.S.C. § 636(b) and FED. R. CIV. P. 72. Any party may challenge a magistrate judge's recommendations by filing written objections with the district judge within ten days after being served. *Id.* The district judge must make a *de novo* determination of those portions of the magistrate judge's recommendation to which objections have been filed. *Id.* The district judge may accept, reject, or

modify, in whole or in part, the magistrate judge's recommendations or recommit the matter to the magistrate judge with instructions. *Id.*

A magistrate judge's recommendation should be accorded "no deference" by a district judge who reviews the issues *de novo*. *McGill v. Goff*, 17 F.3d 729, 732 (5th Cir. 1994). Instead, "*de novo*" review means that the district judge should examine the entire record and make an independent analysis of the law. *Alazan-Apache Resident Ass'n v. San Antonio Housing Auth.*, 885 F. Supp. 949, 951 (W.D. Tex. 1995).

II. RECEIVER'S OBJECTIONS TO THE RECOMMENDATION

On March 7, 2003, the Receiver filed a Motion to Approve Compromise and Settlement Agreement and Allow Payment of Fees (David Johnson Litigation) (Docket No. 954). After a hearing conducted on April 11, 2003, the magistrate judge found that the proposed settlement is in the best interest of the Hammersmith Trust Receivership Estate and recommended that the settlement be approved. The magistrate judge also found and recommended that all of the requested attorneys fees and most of the expenses should be denied. The Receiver objects to the latter Recommendation because it is clearly erroneous and contrary to law.

As alleged support/justification for his Recommendation, the magistrate judge offered the following observations:

- The fees and expenses exceed the tentative litigation budget;
- The settlement amount is less than the amount originally projected to be recovered;
- One cannot tell from billing statements if the Receiver and counsel exercised proper "billing judgment;"
- The $600,000 settlement is only a "limited degree of success;"
- The fees and expenses unfairly compensate the lawyers at the expense of the client;

- An equitable result requires limiting fees to 60% of the budget because (1) the Receiver and his counsel have already been paid fees in other cases; and (2) the expenses are overhead items.

As discussed below, none of those observations, even if true (which they are not), singularly or collectively, justify the Recommendation of the magistrate judge on the issue of fees and expenses to the Receiver and his counsel.

III. PROCEDURAL HISTORY OF THE MATTER

In order to better illustrate why the Recommendation is clearly erroneous and contrary to law, the Receiver believes it helpful to state the procedural history of this massive receivership case insofar as it relates to the David Johnson litigation in particular.[1] The important points are as follows:

- By Order dated July 23, 1999 the Court appointed Michael J. Quilling to serve as receiver for Hammersmith Trust and a number of related entities ("Receiver Order") (Docket No. 283).

- The Receiver Order provided in pertinent part:

> 15. The Temporary Receiver be and hereby is authorized to employ such employees, accountants and attorneys as may be necessary and proper for the collection, preservation, maintenance and operation of the Receivership Assets . . . .
>
> * * *
>
> 17. The Temporary Receiver be and hereby is authorized to defend, compromise or adjust such actions or proceedings in state or federal courts now pending and hereinafter instituted, as may in his discretion be advisable or proper for the protection of the Receivership Assets or proceeds therefrom, and with the proper permission of this Court and notice to the parties, to institute, prosecute, compromise or adjust such actions or proceedings in state

[1] The Receiver has ordered a transcript of the April 11, 2003 hearing before the magistrate judge and will deliver a copy to this Court to complete the record for determination of the Receiver's objections to the Recommendation.

or federal court as may in his judgment be necessary or proper for the collection, preservation and maintenance of the Receivership Assets.

* * *

19. The Temporary Receiver shall seek and obtain the approval of this Court prior to disbursement of professional fees and expenses to the Temporary Receiver or his counsel and/or accountants, by presentation of a written application and after consultation with the Commission. . . .

- On February 4, 2000 a group of defrauded Hammersmith Trust investors instituted suit in Federal District Court in Memphis, Tennessee against the trustee of Hammersmith Trust, Memphis attorney David Johnson, same being Cause No. 00-2098-TU, styled *Granite Holdings, et al. v. David Johnson* ("Johnson Litigation"). Memphis attorney, Bruce Kramer, licensed in 1969, of Borod & Kramer, P.C., was counsel for the plaintiffs.

- On February 18, 2000, a Notice of Filing of the Johnson Litigation was filed in the SEC Proceeding (Docket No. 392). The Notice of Filing had as attachments the Complaint and related documents filed against Johnson. As more particularly set forth in the Complaint attached to the Notice, the Hammersmith Investors sued Johnson for breach of contract, fraudulent representation, negligent misrepresentation and RICO violations.

- On October 31, 2000, the Receiver filed a Motion to Intervene in the Johnson Litigation to assert causes of action which the Receiver believed he owned and controlled independent of the causes of action asserted by the Hammersmith Investors, most notably claims for legal malpractice. In order to achieve cost efficiencies, the Receiver retained as his counsel the same counsel who was representing the Hammersmith Investors in the Johnson Litigation, namely Bruce Kramer of the Borod & Kramer Law Firm in Memphis, Tennessee. On November 15, 2000, the Memphis Court issued an Order granting the Receiver's Motion to Intervene.

- Prior to filing the Motion to Intervene, the Receiver met with representatives of the Hammersmith Investors regarding coordination of efforts in the Johnson Litigation and how to make the effort as cost-efficient as possible. It was agreed that since the most likely viable source of recovery would be the legal malpractice insurance maintained by Johnson, and since those causes of action were owned by the Receiver, that the Receiver would pay the legal fees and expenses of Borod & Kramer on a go-forward basis, subject to approval by this Court.

- On March 8, 2001,the magistrate judge issued an Order requiring the Receiver and his counsel to prepare a proposed litigation budget (Docket No. 581).

- On April 5, 2001, the Receiver and his counsel filed his Budget for the Johnson Litigation (Docket No. 621).

- As stated in the Budget, the Receiver **estimated** that his fees and expenses from April 1, 2001 forward would be $54,600.00. The Receiver also **estimated** that fees and expenses of his counsel from April 1, 2001 forward would be $108,675.00.

- On April 16, 2001, the magistrate judge issued an Order (Docket No. 648) in which he "tentatively" approved the Budget as to Borod & Kramer and withheld approval of the Budget as to the Receiver, opting instead to "continue to monitor the fees and expenses incurred by the Receiver and authorize periodic payments as appropriate."

- As stated in the Budget, the Receiver's counsel, based upon facts then believed to be true, estimated the recovery in the Johnson Litigation to be $3-5 million.[2]

- Consistent with procedures established by the magistrate judge regarding quarterly fee applications under the Budget (Docket No. 648), the Receiver and his counsel filed interim fee applications. A total of six interim applications were filed (Docket Nos. 710, 770, 794, 845, 895 and 918). In each instance, the magistrate judge issued an Order Setting Hearing giving interested parties an opportunity to object (Docket Nos. 716, 771, 797, 859, 902 and 921). No one ever filed an objection to any of the fees or expenses. In each instance the magistrate judge issued an Order approving all of the requested fees and expenses (Docket Nos. 738, 786, 816, 881, 908 and 930).[3]

- Pursuant to the six interim fee applications and each of the Orders approving the fees and expenses, from April 1, 2001 to present (prior to the fees requested and denied as part of the Motion to Approve Compromise and Settlement), the Receiver and his law firm were paid a total of $27,162.33, and his counsel, Borod & Kramer, was paid $41,715.54.

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[2] The Receiver's Budget mistakenly includes a recovery estimate relating to another case and should be disregarded.

[3] In Docket Order 908, the magistrate judge disallowed an invoice from an expert without prejudice.

IV. ARGUMENT AND AUTHORITIES

A. The fees and expenses do not exceed the Budget.

The magistrate judge's finding is clearly erroneous because it ignores the express language in the Budget submitted, which states in pertinent part:

> [T]his budget **excludes** fees and expenses which have already been approved and paid to the Receiver and also **excludes** all fees and expenses for the time period from December 1, 2001 through March 31, 2001. In other words, this budget only includes estimated expenses and costs on a go-forward basis beginning April 1, 2001. (Docket No. 621)

(Emphasis in original.) The magistrate judge states that the Receiver and his counsel have already been paid $117,577.03 pursuant to the proposed Budget[4] and since that amount exceeds the magistrate judge's arbitrary limit of 60% of the Budget ($97,965.00) they should be paid no more. The magistrate judge's statement is simply wrong. The six interim fee applications submitted after the Budget was submitted and tentatively approved, clearly establish that the Receiver has only been paid $27,162.33 and Borod & Kramer has only been paid $41,715.54 for a total of $68,877.87. Accordingly, even if the 60% arbitrary percentage is somehow correct (which it is not), the Receiver and his counsel are still entitled to collectively receive $23,087.13 under the Budget.

B. The Budget was only a good faith estimate.

As expressly stated in the Budget submitted by the Receiver and his counsel, the Budget was nothing more than a good faith estimate as to what the complicated litigation was expected to cost based on information then believed to be true by the Receiver and his counsel. As the Court is well aware, litigation and its corresponding costs is not static nor is it an exact science. Things can, will and do change as the litigation progresses. Neither the Receiver nor his counsel are clairvoyant. For

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[4] Of course, since the Budget was never approved as to the Receiver, arguably the Receiver has never even been operating under the Budget.

example, after the Budget was submitted, most of the important fact witnesses were indicted, convicted and incarcerated, all of which complicated the discovery process and increased the litigation costs. In addition, defense counsel insisted on deposing many people who the Receiver and his counsel did not think were necessary. Even though motions to quash were filed, this also added to the litigation costs. The Receiver and his counsel should not be penalized for their lack of clairvoyance, yet this is precisely what the magistrate judge has done.

At no time whatsoever prior to making his Recommendation did the magistrate judge indicate or order that the good faith estimate budget was a hard cap or limit that could not be exceeded. In fact, it was only "tentatively" approved as to Borod & Kramer and not at all as to the Receiver. At no time did the magistrate judge indicate that the parties should file an amended budget if it was close to being exceeded.[5] To attempt to now impose the Budget as a hard cap is tantamount to imposing a contract for legal services after the fact. This is clearly erroneous and contrary to law.

C. <u>The original settlement projection is not the issue</u>.

In the Budget, the Receiver's counsel estimated that the recovery in the case would be $3-5 million or stated another way, between 60%-100% of the face value of the policies. The estimate was based upon the belief at that time that Johnson had $5 million of malpractice insurance — $1 million of primary coverage and $4 million of excess coverage. This belief was founded on incomplete documents obtained prior to the filing of the lawsuit from incomplete records of a criminal scam. During discovery it was determined that the excess coverage had never been actually bound and would not provide a source of recovery.

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[5] As noted above, it still has not been exceeded.

In a February 3, 2003 letter to the magistrate judge which was requested by him, the Receiver stated that he thought it was realistic to recover $1 million or the policy limits. If this case were to go to trial, the Receiver and his counsel are still confident as to liability but the cost of getting to trial is very high, especially given the fact that defense counsel had over 20 depositions scheduled around the world. As the Court is aware, attorney's fees are generally not recoverable in legal negligence cases. In short, the "squeeze is not worth the juice" which is why, after a lengthy mediation the Receiver agreed to accept the mediator's proposal for a lesser amount of $600,000.00. Even so, the $600,000.00 is 60% of the face amount of the policy which is completely consistent with the projection set forth when it was believed that there was $5 million of coverage.

In any event, the prior good faith estimates are not the issue. As discussed in more detail below, the *Johnson* factors[6] must be applied against the actual result achieved, to-wit, a $600,000.00 settlement. The magistrate acknowledges that the total fees and expenses — pre-Receiver intervention, pre-Budget and post-Budget approximate only 33% of the recovery. Every plaintiff contingency fee attorney in this district will confirm that a 33% contingency fee is perfectly reasonable and, in fact, is less than the normal fee. *See also Continental Illinois Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992)(recognizing that contingent fees regularly exceed 33% of the recovery); *Allison v. Fire Ins. Exch.*, 93 S.W.3d 227, 263 (Tex. App.–Austin 2002, no pet.)(upholding as reasonable a contingent fee of 35% of the first $8 million recovered and 40% of any recovery in excess of $8 million); *Goodyear Tire and Rubber Co. v. Portilla*, 836 S.W.2d 664, 671 (Tex. App.–Corpus Christi 1992) *aff'd* 879 S.W.2d 47 (1994)(upholding a 40% contingent fee). Although

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[6] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds, Blanchard v. Bergeron*, 489 U.S. 87 (1989)(recognizing factors to consider when evaluating whether an award of attorneys' fees was reasonable).

the Johnson Litigation is not now nor has it ever been a contingency fee case, even under that standard the fees and expenses requested are appropriate.

D. The billing statements reveal that the Receiver and counsel exercised proper "billing judgment."

This erroneous observation by the magistrate judge is mystifying to the Receiver. The fee statements submitted as part of the Motion to Approve Compromise and Settlement are identical in format and level of detail as all the rest of the fee statements presented by the Receiver. For the last two years covering six interim fee applications, the magistrate judge has had no problem interpreting and gauging the fee statements and determining, without exception, the propriety of the billing judgment of the Receiver and his counsel. To say that he cannot do so now is dumbfounding to the Receiver.

The Order initially issued by the magistrate judge as to the Budget (Docket No. 648) states in pertinent part:

> [T]he application must be supported by detailed records documenting the time spent, services performed, and expenses incurred in connection with this matter. The hourly rate for each attorney or legal assistant who performs the service shall be listed for each entry.

This is precisely what the Receiver and his counsel did. This is precisely what the Receiver and his counsel have done in the past without criticism. Nonetheless, in his Recommendation, the magistrate judge states:

> 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.

A review of the statements, however, belies this observation. The time entries are clear. Nothing in them is unproductive, excessive or redundant. Most of the time entries are by a single attorney.

Each entry is clear and is sufficiently detailed for the Court to determine what was done even taking into account the need to be somewhat vague because of the need to protect attorney/client privileges since the fee applications are required to be posted on the Receiver's website for opposing counsel to see. Neither the Order referenced above nor case law requires anything further. *In re Lawler*, 807 F.2d 1207, 1212 (5th Cir. 1987); *First Colonial Corp. of Am. v. Baddock*, 544 F.2d 1291, 1299-1300 (5th Cir. 1977); *In re Blackwood Assoc., L.P.*, 165 B.R.108, 111-12 (Bankr. E.D.N.Y. 1994). The magistrate judge's findings are clearly erroneous.

The magistrate judge, in his footnote number 3, misstates what was said by the Receiver at the hearing. What the Receiver said is that he did not write off time before submission of the bills to the Court because he only inputs the time initially if it is properly billable. He does not input time which is unproductive, excessive or redundant. To make the Receiver prove a negative is an impossible task. Likewise, the Receiver's counsel stated he *did* write off time but does not retain his "pre-bills." The April 16, 2001 Order referenced above does not require pre-bills to be submitted. The magistrate judge's finding is clearly erroneous.

E. <u>The $600,000 settlement is more than a "limited degree of success."</u>

This observation of the magistrate judge can be countered with the equally subjective comment that "beauty is in the eye of the beholder." The Receiver and his counsel believe the settlement is a very good result given the circumstances of this case. The magistrate judge found the settlement reasonable and approved the deal.

Trial of the case would have been a challenging task. Johnson was indicted and tried with all the other operators of the Hammersmith Trust scam, but unlike the rest of them he was acquitted. Many of the witnesses at trial would be convicted felons who would have to appear by videotape

deposition, if at all. Many of the victims are not exactly sympathetic. They got into the scam to earn 480% to 800% interest on their money through offshore entities they established to avoid paying income taxes.

The insurance company defending the action did so under a reservation of rights and hired able and aggressive lawyers who had tens and tens of thousands of dollars of discovery left to do if the case had not settled at mediation. The magistrate judge had already ceased quarterly fee applications by virtue of an in-court statement he made at the time of the hearing on the sixth fee application, so the Receiver and his counsel were relegated to an involuntary contingency fee arrangement — and apparently not even that. Do the work but don't get paid. It is very hard to litigate under those circumstances, especially when opposing counsel knows you are not getting paid since they regularly monitor the Receiver's website and see the magistrate judge's orders.

After an all day mediation at which the Receiver refused to budge below $750,000 he conveyed his intentions to go to the airport to return to Dallas. The mediator requested that both sides consider *his* proposal which turned out to be $600,000 and the case settled. Had the case not settled, the parties would still be litigating and the plaintiffs' lawyer and the Receiver would still be incurring fees for which they apparently could never expect to be paid.

As it turned out, there was only $1 million of insurance, and there is no guarantee that the insurance company would cover the claim. At the mediation, Johnson submitted verbal proof that he could not respond to the damages personally and that the only real source of recovery would be the malpractice policy. A lawsuit to determine insurance coverage would surely have followed conclusion of a trial verdict in favor of the Receiver. Settling for $600,000 *now* was a good result.

F. The fees and expenses did not unfairly compensate the lawyers at the expense of the client.

In essence, the client in this litigation is the Receiver. The beneficiary of the settlement is the receivership estate. The other plaintiffs will not directly receive the proceeds of the settlement. Instead, they will share, to the extent their claims are allowed, *pro rata* with all other claimants. At last count, the total amount of claims against the estate was in excess of $43 million. Significantly, none of the other plaintiffs objected to a single dollar of the requested fees and expenses even though they were each served with a copy of the Motion to Approve Compromise and Settlement and were given the opportunity to do so.

Although not stated, the laudable motivation behind the magistrate judge's denial of the fees seems to be to increase the amount to be paid investors at the end of the day. However, denial of approximately $50,000.00 of total fees and expenses will not change the dividend paid to each claimant by even one hundredth of one percent. Fifty thousand dollars spread over $43 million of claims will simply not make a difference.[7]

Instead, it is the lawyers who are being treated unfairly. They did the work and they did it well. They achieved a good result. As discussed above, even under a contingency fee standard (which has no application to this case) the fees are only about one-third of the total recovery including all of the fees paid by the other plaintiffs before the Receiver ever intervened. The magistrate judge's findings to the contrary are clearly erroneous.

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[7] $50,000 divided by $43 million = 0.00116279%. Even if the allowed claims are reduced by more than half to $20 million, the result is the same — $50,000 divided by $20 million = .0025%.

G. Equity does not require limiting fees and expenses.

1. Fees paid in other cases is irrelevant.

Although it is true that the Receiver and his counsel have been paid fees in other cases, it is completely irrelevant. None of those fees were for work done in the Johnson Litigation. Those fees were earned and paid after submitting fee applications, without objection and after entry of orders approving the fees. This "factor" is neither expressly mentioned nor subsumed within the *Johnson* factors. The magistrate judge's findings are clearly erroneous.

2. None of the expenses are overhead items.

What has previously been a proper and reimbursable expense item has now become an overhead item. In the Motion to Approve Compromise and Settlement, the Receiver requested reimbursement of expenses of $3,134.31. The categories and amounts are as follows:

Long distance telephone	$6.15
Courier deliveries	$6.50
Photocopies	$44.20
Telecopies	$16.00
Deposition transcripts	$778.94
Mediator's fee	$1,543.07
Travel costs	$737.45

Of the foregoing expenses, the magistrate judge recommended allowing only the $737.45 of travel expenses, arbitrarily labeling the remainder of the expenses overhead items. Such a finding is clearly erroneous. Every law firm in Dallas, both big and small, charges their clients for all of the categories of expenses set forth above and these expenses are routinely awarded by courts. Indeed, they were

routinely awarded by the magistrate judge in the six interim fee applications. Surely a mediator's fee is not overhead and is properly chargeable to a client. An expense is deemed necessary when it is reasonably required to accomplish the task for which the professional is employed. *Max Rouse & Sons, Inc. v. Speciality Plywood, Inc. (In re Specialty Plywood, Inc.)*, 160 B.R. 627, 632 (B.A.P. 9th Cir. 1993). Clearly, the foregoing expenses meet the test and the Receiver is entitled to reimbursement of the expenses. It is error not to allow proper expenses. *Continental Illinois Sec. Litig.*, 962 F.2d at 570.

Likewise, in the Motion to Approve Compromise and Settlement, Borod & Kramer requested reimbursement of expenses of $2,046.54. The categories and amounts are as follows:

Federal Express	$63.25
Photocopies	$181.69
Postage	$13.91
Telecopies	$27.00
Meeting/deposition room charge	$93.04
Deposition transcripts	$208.75
Westlaw	$550.85
Lodging in Dallas	$226.55
Air fare to Dallas	$531.50
Receiver lodging in Memphis	$150.00

In addition, at the time of the hearing on the Motion to Approve Compromise and Settlement, Mr. Kramer verbally requested reimbursement of his travel expenses to attend the hearing which were:

Air fare	$547.50
Lodging	$136.85
Taxis	$90.00

He did not seek reimbursement of his travel time or time to attend the hearing. Of the foregoing expenses, the magistrate judge recommended allowing only the $226.55 lodging charge in Dallas and the $150.00 lodging charge in Memphis, again labeling the remainder of the expenses overhead items. The foregoing expense items are charged to clients by all firms and the magistrate judge has routinely allowed them in the prior six fee applications. If deposition transcript costs and air fare are awarded to the Receiver, it makes no sense to deny it to his counsel. Perhaps this was simply an oversight by the magistrate judge, but in any event it is clearly erroneous.

3. Arbitrary reductions in fees is reversible error.

It is error for the magistrate judge to arbitrarily slash the fees and expenses sought by the Receiver and his counsel. Although the Receiver has been unable to find a case which addresses the precise issue before this Court, other courts have commented on the practice of slashing. For example, in *Continental Illinois Sec. Litig.*, the Seventh Circuit commented on the district court's reduction of fees to class counsel:

> He may have been right in some ethical or philosophical sense of "value" but it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order.

Id. at 568. The Court further remarked:

> A judge is not permitted to destroy substantial entitlements to attorneys' fees on the basis of his inarticulable and unsubstantiated dissatisfaction with the lawyers' efforts to economize on their time and expenses.

Id. at 570. In this instance, however, this is exactly what the magistrate judge has done. It is reversible error to do so.

H. Judicial interests require that the fees and expenses be allowed.

In its role as protector of the investing public, the SEC regularly files lawsuits against fraudulent operators and requests the appointment of a receiver. Once appointed, the receiver is an officer of the court. The receiver is typically ordered to undertake actions even though there may not be funds on hand in the receivership estate initially to pay the receiver. In those instances, the receiver acts in blind faith that once funds are generated the receiver will be paid.

Refusing to pay the receiver once those actions are undertaken, where the time spent is reasonable and necessary and the result is satisfactory, will seriously undermine the ability of the SEC and the court to find competent receivers to serve. Moreover, if the receiver cannot then hire competent counsel to assist him, because even though the work is done and done well, the counsel will not be paid, that will effectively eliminate the ability of a receiver to find counsel. Surely this is not the intended result, but this is exactly what will occur if the magistrate judge's Recommendation is approved. Under the approach espoused by the magistrate judge the Receiver and his counsel become guarantors of success conscripted to contingency fee compensation — and then not even that.

I. The proper legal standard for awarding attorney's fees and expenses.

The calculation of a reasonable attorney's fee in federal courts within the Fifth Circuit involves a well established process. "First, the court is to calculate a 'lodestar' fee by multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers." *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998). The court is then to consider whether the lodestar figure should be adjusted upward or downward depending on the circumstances of the case. *Id.*

In making a lodestar adjustment, the court should look to twelve factors, known as the "*Johnson* factors" after *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *overruled on other grounds, Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Migis*, 135 F.3d at 1047. The factors are: (1) the time and labor required for the litigation; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee [for similar work in the community]; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* The court should pay "special heed" to factors 1, 5, 8 and 9. *Id.*

The lodestar amount is presumed to be a reasonable fee and should be modified only in exceptional circumstances. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). The fees and expenses of the Receiver and his counsel are calculated strictly by the lodestar method. The *Johnson* factors are discussed separately below. The factors do not warrant any downward adjustment.

1. Time and labor required.

The fees and expenses of the Receiver which were denied span more than seven months, during which more than forty-six hours of attorney time were expended. The fees and expenses of Borod & Kramer span seven months, during which more than ninety hours of attorney time was expended.[8] The Receiver respectfully submits that all of the costs incurred and services performed

[8] This does not include the time expended represented by the balance ($10,480.55) owed to Borod & Kramer by the other plaintiffs.

in these cases are compensable and represent actual and necessary services performed in properly representing the interests of the receivership estate.

2. The novelty and difficulty of the questions.

The questions involved in the lawsuit were difficult and complex in some respects, and the discovery was unusually complicated and burdensome. As discussed above, many of the witnesses were incarcerated and many were located out of state and out of the country. The case was very document intensive. The peculiar combined role of Johnson as trustee and attorney for Hammersmith Trust made the legal standard by which his conduct should be judged to become blurred and more difficult to prove than in a normal legal malpractice case. Indeed, it cost $29,225.00 for the expert witness report in the case because of the complexity of the issues.

3. The skill requisite to perform the legal service properly.

It was necessary to engage skilled and experienced trial attorneys to successfully pursue the lawsuit against Johnson. The insurance company hired competent senior counsel. This case could not have been handled by a junior associate. The Receiver respectfully submits that he and his counsel had the level of skill and experience necessary to effectively pursue and ultimately settle the lawsuit.

4. The preclusion of other employment by the attorney due to acceptance of the case.

Neither the Receiver nor his counsel have declined any representation solely because of their service in this case.

5. The customary fee for similar work in the community.

The hourly rates charged by the Receiver and his counsel in these cases are commensurate with, if not below, the rates charged and collected in other federal lawsuits in the Northern District

of Texas and in the Western District of Tennessee. During the period covered by the denied fees, the following attorneys performed legal services for the Receiver:

a. Michael J. Quilling, at an hourly rate of $275.00. Mr. Quilling was admitted to the Texas Bar in 1982, and has been engaged in the full time practice of law at all times since his admission. He is board certified in civil trial law and business bankruptcy law by the Texas Board of Legal Specialization. He is one of the most experienced SEC receivers in the United States and his practice is national in scope. He is a regular panelist at seminars conducted by the SEC for its personnel. He authored the chapter "Receiverships" in Texas Foreclosure Law & Practice, W. Mike Baggett, 1984. The SEC regularly submits his name as receiver in large complex cases. Although not requested in this case, Mr. Quilling's hourly rate is now $350.00.

b. D. Dee Raibourn, at an hourly rate of $170.00. Mr. Raibourn was admitted to the Texas Bar in 1998, and has been engaged in the full time practice of law at all times since his admission.

c. Bruce Kramer, at an hourly rate of $295.00. Mr. Kramer was admitted to the Tennessee Bar in 1969, his practice is national in scope and he has been engaged in the full time practice of law since his admission.

d. Scott Kramer, at an hourly rate of $135.00. Mr. Kramer was admitted to the Tennessee Bar in 1996 and has been engaged in the full time practice of law since his admission.

Other than the rate of Mr. Quilling, these rates are the standard hourly rates charged by the Receiver and his counsel in other cases.

6. Whether the fee is fixed or contingent.

Although a contingent fee arrangement is a factor to be considered in whether to adjust the lodestar figure, it does not replace the lodestar amount. In other words, a reasonable fee is not limited to the amount provided in the contingent fee agreement. *Blanchard v. Bergeron*, 489 U.S. 87, 92 (1989). Here there was never a contingent fee agreement. The Receiver and his counsel were employed by the receivership estate on an hourly basis and their hourly rates have been routinely approved by the magistrate judge.

7. Time limitations imposed by the client or the circumstances.

The Johnson Litigation required substantial amounts of time and effort, but the deadlines and scheduling have not been unusual for cases of this type.

8. The amount involved and the result obtained.

The Receiver respectfully submits that the results obtained in this case were very favorable, especially in light of the insurance policy limit of $1 million, coverage questions and the prospect of expensive, protracted litigation if no settlement were reached. Including the fees paid by the other plaintiffs before the Receiver intervened, the total lodestar figure for all costs and attorney's fees in this case is $197,990.43, which is approximately 33% of the amount recovered. That ratio is certainly within the range of reasonableness for this type of case and well within this Court's discretion. *Cf. Migis*, 135 F.3d at 1048 (fees 6½ times the amount of damages were excessive). The Supreme Court has rejected a strict proportionality test based on a mechanical comparison of the amount of damages to the amount of attorney's fees. *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

9. The experience, reputation, and ability of the attorneys.

The matters relevant to this factor are discussed above in connection with the third and fifth factors.

10. The undesirability of the case.

The Johnson Litigation was not initially undesirable. However, to a degree it became so when the magistrate ceased allowing quarterly fee applications and to the extent no further compensation is allowed, the litigation is completely undesirable. Neither the Receiver nor his counsel would have accepted the representation under the current circumstances of not being paid for a job well done.

11. The nature and length of the professional representation with the client.

The Receiver's counsel did not represent the Receiver prior to being retained in the Johnson Litigation.

12. Awards in similar cases.

The attorney's fees and expenses sought in these cases are consistent with, or less than, awards in this district for cases of similar size and complexity. Even though the case was not a contingency fee case, an award equal to one-third of the recovery is a fair fee consistent with prevailing practices and established case law.

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that the Court review the foregoing issues *de novo*, reject the Recommendation on those issues, enter judgment in favor of the Receiver on those issues, and grant the Receiver such other and further relief, general or special, at law or in equity, to which he may be justly entitled.

Respectfully submitted,

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BY: _____

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2003, a true and correct copy of the foregoing instrument was served via first class mail, postage prepaid, on the following:

Robert B. Brunig
Securities & Exchange Commission
801 Cherry Street, 19th Floor
Fort Worth, Texas 76102

Bruce Kramer
245 Wagner Place
Suite 350
Memphis, TN 38103

_____
Michael J. Quilling / Kenneth A. Hill