UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN ACCOUNT NUMBER 000669829075 in THE BANK OF MM ACME BANQUE DE COMMERCE, INC., AT NATIONSBANK, N.A., CONSISTING OF $18,756,420.97, MORE OR LESS.	C.A. NO. 3:98mc96-McK
GEORGE AND DOLORES ROLLAR, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants. RICHARD VASQUEZ, Intervener.	C.A. NO. 3:01CV205-McK

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION OF GEORGE AND DOLORES ROLLAR FOR AWARD OF ATTORNEYS' FEES AND COSTS

I. Summary of the Facts and the Argument.[1]

George and Dolores Rollar (the "Rollars") seek reimbursement under the common fund doctrine of a portion of their attorneys' fees incurred in this matter (the "Lawsuit"), which was undertaken at considerable personal expense to the Rollars and which has benefited all of the hundreds of victims of a multinational Ponzi scheme by causing (or, at the very least, considerably accelerating) government action to return the seized

[1] This Memorandum is filed contemporaneously with the Affidavit of Rodney E. Alexander in Support of Motion of George and Dolores Rollar for Award of Attorneys' Fees and Costs (hereafter cited as "Alexander Aff. II, ¶__, Ex. __"), which is incorporated by reference.

proceeds (hereafter the "Seized Funds") of the Ponzi scheme to the victims, including the Rollars. As of August 30, 2002, the Rollars had spent over $290,000 for professional fees and expenses in connection with the prosecution of the Lawsuit, of which no less than $148,276.57 directly benefited all of the potential claimants. *See* Alexander Aff. II, Ex. 1 (Description of Professional Services rendered and Expenses incurred for the period ended August 31, 2002); however, if the Court, in its discretion, approves the payment of the fees requested herein, it will reduce the ultimate payout to each claimant by less than .72%. *See* Tables 1 and 2 contained in the Appendix.

Although there is no question that the Rollars have benefited from the filing of the Lawsuit (as a direct result of its filing they have finally received return of a substantial portion of their "investment"), so have many other victims of the scheme who have not had to pay the substantial legal fees the Rollars had to pay. The Rollars, through the Lawsuit which they personally funded, have conferred benefits on the other victims of the Ponzi scheme by providing the impetus to the government to agree to a procedure whereby all of the victims could assert a claim for reimbursement from the Seized Funds. The implementation of that procedure has resulted in the ongoing return to the hundreds of victims of their "investments" based on the equitable distribution method approved by the Court, and it would be inequitable to require the Rollars to bear the full burden of the Lawsuit when hundreds of other victims have so plainly benefited from its filing and prosecution. Therefore, the Rollars move the Court to invoke its equitable powers to reimburse them by payment from the Seized Funds of $148,276.57 for attorneys' fees and costs they expended in prosecution of the Lawsuit. A summary of the fees and

expenses for which the Rollars seek reimbursement is attached to the Alexander Aff. II as Exhibit 1.

II. Factual Background.

As the Court is by now well aware, in early December 1998, the government seized over $18 million of the proceeds of an international Ponzi scheme from a NationsBank account in the name of M.M. A.C.M.C Banque De Commerce, Inc. The Rollars were among the many victims of the fraudulent scheme, having "invested" $12.5 million with the perpetrators. After the government seized the Seized Funds and formally notified the Rollars (some eight months later) in July 1999 of their seizure, the Rollars documented for the government their claim to $12.5 million of the Seized Funds. Alexander Aff. II, ¶¶ 3-4. After repeated assurances by the government to the Rollars' counsel (from fall 2000 to January 2001) that a process would soon be in place to return the Seized Funds to the victims, by May 2001 the government had not implemented any such procedure.[2]

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[2] In the fall of 2000, a government representative informed the Rollars' present counsel that the government believed that a substantial portion of the Seized Funds in the NationsBank account could be traced directly to the Rollars. That government representative also advised the Rollars' counsel that the government intended to initiate judicial proceedings (described as "an interpleader action") to request the court to distribute the Seized Funds to their rightful owners, and that such an action would be commenced by the end of the calendar year 2000. By January 2001, the government had not initiated any judicial proceedings in which the Rollars (or any of the other victims) would have the right to seek the return of their property. Instead, upon inquiry from the Rollars' counsel, the government advised that it was considering a transfer of the investigation from the U.S. Attorney's Office to the SEC. In early February 2001, the Rollars' counsel was advised that responsibility for the investigation relating to the Seized Funds had been transferred to the SEC. Between February and April 2001, upon inquiries from the Rollars' counsel, the SEC advised counsel that it was in the process of initiating an investigation of the fraud perpetrated against the Rollars and others, but that it had not determined whether it had jurisdiction over the matter and, consequently, did not know whether or when it would initiate any civil or administrative proceeding in connection with the Seized Funds. The SEC also advised the Rollars' counsel that if it decided that it lacked jurisdiction to initiate an enforcement action, it would transfer the investigation back to the United States Attorney. Alexander Aff. II, ¶ 5-7. The Rollars therefore believed that the government was not much closer to returning their portion of the Seized Funds to them than it was in when they were seized.

The Rollars filed the Lawsuit in May 2001, nearly two and one-half years after the seizure, because the government, contrary to its assurances, had not instituted any process by which the Seized Funds could be returned to their rightful owners. Shortly after the Rollars filed suit, Richard Vasquez moved to intervene, claiming that he too had been a victim of the Gilliland/Mohr Ponzi scheme and that he also had a right to possession of a substantial portion of the Seized Funds. As it turned out, there were many additional victims of the Ponzi scheme with potential claims to a portion of the Seized Funds. *Id.* ¶ 7.

Although the Rollars brought suit on their own behalf, their interests were predominantly aligned with the other claimants to the Seized Funds. After several preliminary motions concerning the claims in the case, the government ultimately filed a Motion to Dismiss. After the government's Motion to Dismiss was filed, the parties attended a status conference on August 31, 2001 at which the Rollars, Vasquez and the government reached an agreement with the Court's assistance whereby a special master or receiver would be appointed to locate potential victims of the fraudulent scheme and to begin the accounting and distribution process.[3] *Id.* ¶ 8.

The Lawsuit was the catalyst in the implementation of the procedure for the return of the Seized Funds to the victims of the Ponzi Scheme and the Rollars' counsel have been very involved in all stages of the litigation and were solely responsible for the research and drafting that went into the filing of the Complaint. *Id.* ¶ 11. Counsel for the

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[3] On October 11, 2001, the Court issued its Consent Order regarding the appointment of a receiver. Thereafter, on October 29, 2001, the Court issued an Order Appointing Receiver pursuant to which Michael J. Quilling ("Quilling") was appointed to serve as Receiver in this case. Alexander Aff. II, ¶9. After Quilling was appointed, the parties negotiated regarding an equitable method of returning the Seized Funds to their rightful owners. After a hearing on the Receiver's Amended Motion to Establish Distribution Procedure, on October 11, 2002, the Court entered an order approving that procedure and the receiver, upon court approval of each distribution, has started making interim distributions to the victims of the Ponzi scheme whose claims he has verified. Alexander Aff. II, ¶10.

Rollars was also instrumental in the brokering of the agreement which led to the appointment of the Receiver and the ongoing disbursement of the Seized Funds to their rightful owners. *Id.* ¶¶ 9-10. Moreover, counsel for the Rollars took a leading role in defeating a claim to the Seized Funds by August Christian W. Mohr, one of the principal architects of the fraudulent scheme.[4]

III. Argument and Authorities.

A. The Common Fund Doctrine

In *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 59 S.Ct. 777 (1939), plaintiff had deposited certain funds pursuant to a trust agreement in an account with Ticonic National Bank ("Ticonic"). As required by law, Ticonic secured the deposit with certain bonds in its trust department. Ticonic's assets were transferred to another bank, which also assumed Ticonic's liabilities. The transferee bank was later placed in receivership, and plaintiff sued seeking the imposition of a lien in the amount of her trust account on the bonds. *Ticonic,* 307 U.S. at 162-63. The Supreme Court noted that because plaintiff was successful in her lawsuit, the application of the doctrine of *stare decisis* meant that other depositors similarly situated would be able to impress the bonds with a lien in the amount of their trust deposits. *Id.* at 166. Plaintiff sought reimbursement of her attorneys' fees and costs incurred in establishing her claim. As the Supreme Court phrased it:

> Petitioner alleged that, by vindicating her claim to a lien on the proceeds of the earmarked bonds to the amount of her trust funds, she had established as a matter of law the right to recovery in relation to fourteen trusts in situations like her own; that she had prosecuted the litigation solely at her own expense; that although the total assets of the bank were not sufficient to satisfy the unsecured creditors, the proceeds of the bonds

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[4] The Rollars have already been reimbursed for the legal services provided by their counsel in defeating Mohr's claim to the Seized Funds by an Order of the Court dated August 12, 2002, and do not seek reimbursement for those services here. However, the services provided by the Rollars' counsel in defeating Mohr's claim are illustrative of the leading role taken by them in the prosecution of this litigation.

> were more than sufficient to discharge all trust obligations; and she therefore prayed the court for reasonable counsel fees and litigation expenses to be paid out of the proceeds of the bonds.

Id. at 163.

In ruling that the district court had the authority to award plaintiff her attorneys' fees and costs, Justice Frankfurter wrote that the "[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts." Justice Frankfurter continued:

> To be sure, the usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest while in others his litigation results in a fund for a group though he did not profess to be their representative. The present case presents a variant of the latter situation. In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of *stare decisis*, the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds.
>
> That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

Id. at 165-66 (footnotes omitted).[5]

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[5] In *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240 (1975), the Supreme Court reaffirmed the viability of the so-called common fund doctrine and noted that it has "consistently followed"

In 1970, in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392, 90 S.Ct. 616 (1970), the Supreme Court reaffirmed the power of the federal courts to award attorneys' fees under the common fund doctrine and noted the expansion of the doctrine since *Ticonic* to include the authority of the federal courts to award attorneys' fees in cases where no fund was created, but where the efforts of plaintiffs created a benefit to a class of similarly situated people. *Mills*, 396 U.S. at 390-393.

In *Mills*, certain stockholders sued to set aside a merger based on a claim that the proxy statement sent out to solicit votes in favor of the merger was misleading and in violation of the securities laws. *Id.* at 393. As Justice Harlan wrote after discussing the holding of *Ticonic*:

> Other cases have departed further from the traditional metes and bounds of the doctrine [enunciated in *Ticonic*], to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. This development has been most pronounced, in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor.

Id. at 393-394.

Justice Harlan expressed the Court's view that nothing in its earlier cases precluded an award of attorneys' fees under the common fund doctrine even in cases where the litigation did not bring a fund *per se* into the court. *Id.* at 394. Justice Harlan

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"the rule [that] the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, [may] recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit." *Alyeska*, 421 U.S. at 257 (citing, among other cases, *Ticonic, supra*).

noted that even the Court's earliest cases did not limit the authority of the court to award fees to cases where they could be paid from a fund:

> Even in the original 'fund' case in this Court, it was recognized that the power of equity to award fees was not restricted to the court's ability to provide reimbursement from the fund itself: 'It would be very hard on (the successful plaintiff) to turn him away without any allowance * * *. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.'

Id. at 393, n.17 (*citing Trustees v. Greenough*, 105 U.S. 527 (1882)). While expounding on the equitable basis for the award of fees in a common benefit case, Justice Harlan noted that "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.* at 392.

Two years after the Supreme Court rendered its opinion in *Mills*, the Fourth Circuit evidenced its willingness to expand the application of the common benefit doctrine in its opinion in *Brewer v. School Board of City of Norfolk*, 456 F.2d 943 (4th Cir. 1972). In *Brewer*, plaintiffs filed suit and were successful on appeal in obtaining an order requiring the school system to provide free transportation to students forced to attend distant schools as the result of a desegregation order. Plaintiffs requested an award of attorneys' fees even though their efforts had not resulted in the creation of a fund.

In directing the district court to award fees and expenses to plaintiffs, the Fourth Circuit noted the "oft repeated" federal rule that attorneys' fees typically are not recoverable in the absence of statutory or contractual authorization, but also noted that the federal courts have historically recognized exceptions to the general rule, the most

frequent exception being when ". . . a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself." *Brewer*, 456 F.2d at 948. The *Brewer* court recognized that the award of fees in that case was not a strict application of the common fund doctrine because no fund was created as a result of the litigation. Nevertheless, the court noted:

> There is, however, a unique feature of this case, involving at least a quasi-application of the 'common fund' doctrine. It relates to the special relief granted by this decision and denied by the District Court. The plaintiffs have by this appeal secured for the students of this school system an additional right, a right of direct pecuniary benefit for all students assigned to schools without their neighborhood, a right not given them under the plan approved by the District Court. It is true the right is not represented by a 'common fund' and has not resulted in a monetary recovery, against which attorney's fees may be charged but, so far as the students affected are concerned, 'the effect * * * is the same as though a fund were created.'

Id. at 951. The court specifically recognized that "it is only fair that he who creates or conserves a common fund or property should be reimbursed for his reasonable expenses, including attorneys' fees, for protecting the common fund for others having a similar interest with him in that fund. . . ."[6] *Id.* at 948.

As the above cases make clear, a federal court has the authority to award attorneys' fees under the common fund or common benefit doctrine in a wide range of factual settings. The primary factor to be considered is whether the prosecution of a case by a plaintiff has resulted in a benefit to persons situated similarly to the plaintiff. If so, then equity dictates that the expenses of procuring that benefit should be born proportionately by all of the beneficiaries. In *Allen v. Lloyd's of London*, 975 F.Supp.

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[6] In *Brewer*, the Fourth Circuit awarded fees in spite of the disagreement by Judge Winter on the attorneys' fee award. Judge Winter argued that *Ticonic* "gave little support to the majority's result" because in that case "there was a fund and the fund was more than sufficient to pay all claims, [thus], . . . recovery on the claim would not be diminished by the allowance." *Brewer*, 456 F.2d at 952 (J. Winter concurring specially). The Fourth Circuit, therefore, apparently rejected a rule that would allow an award of fees only in those circumstances when a fee award would not diminish the recovery of others to the fund.

802 (E.D.Va.1997), the United States District Court for the Eastern District of Virginia noted that under *Mills, supra*, an award of attorneys' fees is appropriate when, through plaintiffs' action: "(1) a substantial fund or benefit has been produced by the efforts of the plaintiffs; (2) the benefit has been conferred upon an ascertainable class; and (3) the court's jurisdiction over the benefit allows the court to spread the costs of procuring the benefit among the entire class of beneficiaries." *Allen*, 975 F.Supp. at 806 (citing *Mills*, 396 U.S. at 393-94). The *Allen* court also noted that:

> Whether or not a . . . plaintiff deserves an attorney's fee award is a factual determination that rests squarely within the district court's discretion. This determination is fact specific, and is inherently a balancing of interests. In making this determination, the trial court should appraise the need for and potential benefits derived from the attorney's services, based on the judge's personal observation of counsel's performance and his intimate familiarity with the case.

Allen, 975 F.Supp. at 807 (*citing Rodonich v. Senyshyn*, 52 F.3d 28, 33 (2nd Cir.1995)).

B. Because the Lawsuit conferred a substantial benefit on an ascertainable class, the Court should exercise its discretion to award the Rollars their attorneys' fees and expenses incurred in obtaining that benefit for the class.

1. Equity dictates that the Rollars be reimbursed for their attorneys' fees and expenses incurred in obtaining the benefit for the class.

This case presents the classic factual setting, almost on all fours with the facts of *Ticonic*, in which a party is entitled to reimbursement for his attorneys' fees and expenses under the common fund doctrine. Through the Lawsuit, the Rollars brought a fund (the Seized Proceeds) into the Court and had a procedure implemented whereby victims to the Ponzi scheme could lay claim to property that was rightfully theirs.[7] The Rollars have

[7] This case presents an even more compelling case for the application of the common fund doctrine than did *Ticonic*. It does not appear from reading *Ticonic* that a fund was actually brought under the jurisdiction of the court. Rather, the plaintiff's lawsuit made it easier for other plaintiffs to pursue litigation against the bank. By contrast, in this case the Court has assumed jurisdiction over the entirety of the Seized

incurred nearly $300,000 in attorneys' fees and expenses to accomplish that result. *See* Alexander Aff. II, n.1.[8] As a result of the Rollars' efforts, hundreds of other victims have simply to follow the claims procedure approved by the Court to establish their claims. The Fourth Circuit's language in *Brewer* could have been written for this case—it is only fair that the Rollars, the ones who created or conserved the Seized Funds (a common fund) should be reimbursed for their reasonable expenses, including attorneys' fees, for protecting the Seized Funds for others having a similar interest with them in those funds. *Brewer*, 456 F.2d at 948. Even examining this case in light of the more technical "checklist" set forth in *Allen, supra,* it is plain that the Rollars meet the requirements for reimbursement of their fees and expenses. *See Allen*, 975 F.Supp. at 806.

2. The Lawsuit produced a substantial fund and a substantial benefit to persons other than the Rollars.

As set forth in the Alexander Affidavit (and as is demonstrated from documents in the Court's file, including the Seizure Warrant and its supporting affidavit), the government seized the Seized Funds in early December 1998. Thereafter, during the course of the next two years, the government failed to initiate any proceedings, civil or otherwise, in which the victims of the Ponzi scheme could obtain return to them of their portion of the Seized Funds. Because the government failed to initiate any proceedings the goal of which was the return of the Seized Funds to the victims of the Ponzi scheme, the Rollars filed the Lawsuit in May 2001 seeking return to them of the portion of the

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Funds. Moreover, in *Ticonic*, it appears that the other claimants still had to file a lawsuit and retain counsel to recover against the bonds because the rule of *stare decisis* would only have issue preclusive effect in a litigation setting. In this case, claimants do not need to retain counsel. All they have to do is fill out the claim form approved by the Court and submit it to the receiver. The receiver then reviews the claim, and if it is meritorious, proffers the claim to the Court for approval and payment.

[8] To be clear, the Rollars have incurred attorneys' fees and costs in excess of the amount for which they seek reimbursement. The Rollars seek reimbursement for only those fees and expenses they incurred that benefited all of the claimants by bringing the Seized Funds under the jurisdiction of the Court and by establishing the process for their distribution.

Seized Funds traceable to them. After the Lawsuit was filed, the government, rather than interpleading the Seized Funds, filed a motion to dismiss the Lawsuit. Thereafter, during a conference in chambers, the government and counsel for the Rollars and Vasquez agreed in principal, among other things, to the Court's assuming jurisdiction over the Seized Funds and to the appointment of a special master or receiver to perform a tracing and to provide notice to all potential claimants to the Seized Funds.[9] Thereafter, by agreement of the parties, on October 11, 2001, the Court entered a Consent Order regarding the appointment of a receiver; and on October 29, 2001, the Court issued an Order Appointing Receiver. Shortly thereafter, the Court approved a process for the distribution of the Seized Funds to the victims of the Ponzi scheme.

As the Supreme Court noted in *Ticonic* "[t]hat the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant. . ." fees and expenses. 307 U.S. at 166. In the present case, it does not matter that the Rollars did not purport to sue on behalf of a class because the Lawsuit ultimately benefited a similarly situated class.

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[9] In some cases, parties who have retained independent counsel have objected to having their recovery diminished to pay another parties' counsel. *See, e.g., Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977). *Vincent* involved multiparty, multidistrict litigation over an air crash disaster in which the district court had appointed lead counsel. The Ninth Circuit discussed the "independent representation" exception to the common fund doctrine, which sometimes can reduce or bar reimbursement of attorneys' fees to a litigant from the common fund because other parties have incurred the expense of independent representation. The Ninth Circuit noted an exception to the independent representation exception when the contributions of the original or lead attorneys are unequal to the other attorneys. As the Ninth Circuit put it, "[t]he purpose of this exception is of course identical to the purpose of the broader common fund doctrine itself: avoidance of unjust enrichment, or as it has been referred to in this litigation, 'coattailing.'" *Vincent*, 557 F.2d at 772. Although the facts of *Vincent* are not directly on point to this case, the "coattailing" exception is directly applicable. Although Vasquez retained separate counsel, his counsel merely intervened in the case by means of a Complaint that was, in most substantive respects, merely a duplicate of the Rollars' Complaint. Even Vasquez cannot argue that his efforts in pursuing the Seized Funds nearly approached the effort of the Rollars through their counsel.

With respect to the "creation of the fund," certainly, the Lawsuit resulted in the *de facto* "creation" of a common fund because, as a direct result of the Lawsuit, the Seized Funds were placed under the Court's jurisdiction and made available to the victims for them finally to seek and receive reimbursement. Similarly, in *Ticonic*, plaintiff's suit did not "create" the bonds that were made available for other claimants; rather, through plaintiff's suit, the precedent was established whereby those bonds were available to later claimants.

With respect to the benefit conferred on other claimants, in addition to the benefit they have received from the Court's assuming jurisdiction over the Seized Funds, at the very least, all of the victims of the Ponzi scheme have benefited from the substantial acceleration of the return to them of their property—a process that, again, was the direct result of the Lawsuit.[10] Had the Rollars not filed the Lawsuit, it is likely that the process of returning the Seized Funds to their rightful owners would have been delayed for additional months or years as the United States Attorneys' office and the SEC played jurisdictional "hot potato" with the Seized Funds. *See* Alexander Aff. II, ¶6.

3. The benefit from the Lawsuit has been conferred upon an ascertainable class—the victims of the Ponzi scheme.

In this case, the class of beneficiaries is readily ascertainable—the victims of the Ponzi scheme whose claims are being processed and many of whom are now receiving interim distributions from the Seized Funds.

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[10] As the Court may recall, in response to a direct question from the Court during the August 31, 2001 status conference, the government's attorney took the position that, inasmuch as the government had seized the Seized Funds pursuant to a facially valid Seizure Warrant, the government believed that it was within its rights to retain the Seized Funds indefinitely before instituting a procedure for the return of the Seized Funds.

4. The Court's jurisdiction over the Seized Funds allows the court to spread the costs of procuring the benefit among the entire class of beneficiaries.

That the Court has jurisdiction over the Seized Funds cannot be questioned. The receiver is operating under the authority of an Order issued from the Court, and the Court must approve all requests for payments to claimants out of the Seized Funds. Likewise, the Court has the authority to spread the costs of the litigation among the entire class (including the Rollars) by reimbursing the Rollars out of the Seized Funds.

5. The impact on each of the claimants will be minimal if the Court awards the Rollars the fees and expenses they seek.

The payment of the Rollars' fees and expenses would be made directly from the Seized Funds, thus reducing the amount available to be distributed to claimants by the amount of the fees and expenses awarded.[11] However, as set forth in Tables 1 and 2 in the attached Appendix, if the Court awards the Rollars the fees and expenses they seek, the impact on each claimant will be minimal—resulting in less than a .72% reduction in the amount each claimant will ultimately receive. Moreover, paying the fees and expenses from the Seized Funds will result in each claimant bearing a proportional share of the attorneys' fees rather than the Rollars bearing the entire burden; however, because the Rollars have the largest stake in the Seized Funds, they will still bear the largest

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[11] The receiver has taken a relatively conservative approach to distributions by making "interim distributions" to claimants of amounts less than 100% of the amount they likely will ultimately be entitled to receive. For example, as set forth in the Receiver's Unopposed Motion to Establish Tax Liability Reserve and Brief in Support (attached to the Appendix as Exhibit A), as of September 3, 2002, there had been a total of $20,872,601 available to pay claims. *See* Appendix, Table 1. The total claims identified by the receiver are $29,414,900; thus, when the receivership is finally wound up and a final accounting is rendered, each claimant should receive approximately 70.1% of his or her "investment" less the expenses of the receivership. However, the receiver is making interim distributions to approved claimants of only 57.59% of his or her "investment." *See* Ex. 1 to Receiver's Unopposed Amended Motion to Establish Distribution Procedures and for Evidentiary Hearing (attached to the Appendix as Ex. A). By this procedure, the receiver is retaining funds sufficient to cover the costs of administration, potential future claims to the Seized Funds by unknown claimants and to cover any potential tax liability of the receivership estate. The Rollars anticipate that payment of their attorneys' fees would be made from the funds the receiver has held back to cover potential future claims and the costs of administration.

portion of the fees and expenses under such a scenario, but not the entire burden for work that clearly benefited all claimants.

C. Conclusion.

Judge Haynesworth's summary in *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965), of the rationale for the common fund doctrine is a forceful summary of why the Court should exercise its discretion in this case to reimburse the Rollars from the Seized Funds for their attorney's fees and expenses incurred in the Lawsuit:

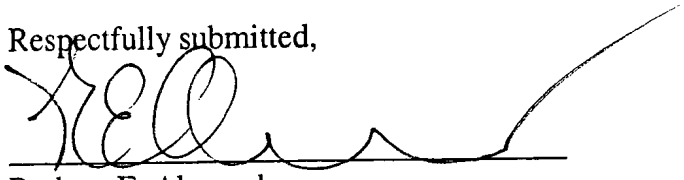
> [The common fund doctrine] is founded upon the principle that when one who, while establishing his own claim, also establishes the means by which others may collect their claims, a chancellor in equity may award counsel fees to the trailblazer out of the property made available for the satisfaction of all claims. The principle is applied so that the one who led in hewing the path to victory is not left saddled with extensive attorney's fees, which need not be incurred by his more timid fellows who held back until the fruits of the pioneer's success were laid before them.

Gibbs, 346 F.2d at 945.

For the foregoing reasons, the Rollars request that the Court order that the Rollars be reimbursed in the amount of $148,276.57 for their attorneys' fees and expenses incurred in the Lawsuit that benefited all of the victims of the Gilliland/Mohr Ponzi scam and that such payment be made from the Seized Funds, thus resulting in a proportionate reduction in payment to all successful claimants.

This the 14th day of October, 2003

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFFS GEORGE AND DOLORES ROLLAR

APPENDIX
TABLES

Impact of Payment of Rollars' Attorneys' Fee Claim

(Data as of September 3, 2002)

Principal available to pay claims and expenses		
Principal Transferred to Receiver on September 3, 2002		$16,565,958.91
Payments out of principal before June 3, 2002		
Interim payment of principal to George and Dolores Rollar		$1,250,000.00
Interim payment of principal to Richard Vasquez		$389,987.50
Receiver's Fees (2/2/2002 Order)		$71,916.77
Receiver's Fees (5/10/2002 Order)		$72,877.21
Receiver's Fees (8/16/2002 Order)		$50,288.94
Attorneys' Fees (8/21/2002 Order)	+	$54,839.25
Total Principal (adjusted to account for previous payments)	=	$18,455,868.58
Interest accrued through September 3, 2002	+	$2,416,732.19
Total funds available for distribution	=	**$20,872,600.77**
Rollars' claim for fees	-	**-$148,276.57**
Total available for distribution after payment of fee claim	=	**$20,724,324.20**
Percentage impact on each claim		**-.72%**

Table 1[1]

Percentage reduction of amount each claimant will receive as a function of funds available for payment

[1] The data in Tables 1 and 2 is for illustrative purposes only and is drawn from the Receiver's Unopposed Motion to Establish Tax Liability Reserve and Brief in Support, which is attached hereto as Ex. A. The Court's Order granting the Receiver's motion is attached as Ex. B. The amounts for "Principal" and "Interest" are taken from paragraph 2 of that Motion. The expenses of the receivership are those that were approved by the Court before September 3, 2002. September 3, 2002 is the date the Seized Funds were transferred from the United States Marshall's Service to the Receiver. *See* Ex. A. The Rollars use that date for their calculation purposes because that is the last date on which there is a firm number for assets in the receivership in the record. Since that date, claims have been paid from and interest has accrued on the Seized Funds, making the precise amount of funds available at any given moment difficult to determine. The actual effect on claimants if the Court awards the Rollars their attorneys' fees will very likely be less than the calculations set forth herein because the Receiver has invested the Seized Funds that have not been distributed in interest bearing accounts. Because of the accrual of interest, there will be more money with which to pay claims after September 3, 2002; thus, the percentage of the Rollars' fee claim as a function of the funds available to pay claims will actually be less than as calculated on September 3, 2002.

TABLES
(Continued)

Total of Seized Funds as of September 3, 2002	$20,872,601	$20,724,324	Total Seized Funds after payment of the fees claim
Total of all known claims	$29,414,900	$29,414,900	Total of all known claims
Percent available to pay claims and expenses	**70.96%**	**70.46%**	Percent available to pay claims and expenses

Table 2
Percentage reduction of amount each claimant will receive as a function of total known claims.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN ACCOUNT NUMBER 000669829075 in THE BANK OF MM ACMC BANQUE DE COMMERCE, INC., AT NATIONSBANK, N.A., CONSISTING OF $18,756,420.97, MORE OR LESS.	C.A. NO. 3:98mc96-McK
GEORGE AND DOLORES ROLLAR, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	C.A. NO. 3:01CV205-McK
RICHARD VASQUEZ, Intervener.	**(CASES CONSOLIDATED)**

RECEIVER'S UNOPPOSED MOTION TO ESTABLISH TAX LIABILITY RESERVE AND BRIEF IN SUPPORT

TO THE HONORABLE H. BRENT MCKNIGHT, UNITED STATES MAGISTRATE JUDGE:

COMES NOW, Michael J. Quilling ("Receiver"), and files this his Motion to Establish Tax Liability Reserve and Brief in Support and in support of such would respectfully show unto the Court as follows:

1. On October 11, 2001 the Court issued its Consent Order regarding the appointment of a receiver in these proceedings. Thereafter, on October 29, 2001 the Court issued its Order Appointing Receiver pursuant to which Michael J. Quilling was specifically appointed to serve as receiver in this case.

EXHIBIT A

2. In connection with performing his duties, on August 7, 2002 the Receiver filed his Unopposed Motion to Convey Seized Funds to Receiver which was granted by Order of this Court dated August 12, 2002. Pursuant to the Order, on September 3, 2002 the United States Marshals Service transferred $18,982,691.10 to the Receiver. The voucher sent to the Receiver along with the funds indicated that of such amount $16,565,958.91 constituted the balance of the account or "principal" and $2,416,732.19 represented interest which had accrued with respect to the funds while they were in the possession of the U.S. Marshals Service. A true and correct copy of the voucher is attached hereto as Exhibit "1" and is incorporated herein by reference for all purposes.

3. Applicable law, as discussed in more detail below, provides that a Receiver can be subjected to personal liability for any tax owed to the United States government under certain circumstances. Applicable law also indicates that where the tax liability is not known, as is the case here, that one of the options available to the Receiver is to establish a reserve for the potential tax liability. Accordingly, the Receiver seeks authority from this Court to establish a tax liability reserve in the amount of $1.7 million dollars. Attached hereto as Exhibit "2" and incorporated herein for reference for all purposes is a schedule which sets forth how the reserve is calculated. This reserve is being requested as a contingency only and is not an admission by the Receiver that tax is owed or the amount of such tax.

Argument and Authorities

4. Title 31 of the United States Code Annotated (the "Federal Debt Priority Statute") provides that the claims of the United States government should be paid first when a person indebted to the government is insolvent, and (1) the debtor without enough property to pay all debts makes a voluntary assignment of property, (2) the property of the debtor, if absent, is attached, or (3) an act of bankruptcy is committed. 31 U.S.C.A. § 3713. Furthermore, the U.S. Court of Appeals for the

Fourth Circuit has found that appointment of a receiver triggers the application of the federal insolvency statute under the former § 192 of Title 31 granting such priority to debts owed to the U.S. *U.S. v. Clover Spinning Mills Company*, 373 F.2d 274, 276-277 (4th Cir. 1966).

The Federal Debt Priority Statute also provides that the representative of a person or estate paying any part of a debt of the person or estate before paying a claim of the government is liable to the extent of payment for unpaid claims of the government. 31 U.S.C.A. § 3713(b). The Supreme Court of the U.S. has imposed this personal liability on a fiduciary who pays other creditors before satisfying a debt owed to the United States. *See generally King v. U.S.*, 379 U.S. 329, 85 S.Ct. 427, 13 L.Ed.2d 315 (1964). Additionally, a United States District Court in Maryland has specifically held that there is personal liability on the part of a receiver when the receiver fails to observe and disregards U.S. debt priority. *U.S. v. Sachs*, 217 F. Supp. 545, 545-547 (D. Md. 1963). *See also U.S. v. Crocker*, 313 F.2d 946 (9th Cir. 1963) (holding generally that a receiver appointed by federal or state court who takes possession and control of assets of an insolvent debtor is subject to personal liability if he knowingly disregards the priority to satisfy obligations of the U.S.); *Kirk v. Kirk*, 243 Cal. App .2d 580, 52 Cal. Rptr. 725, (Cal. Dist. Ct. App. 1966) (receiver is personally liable if he does not give priority to tax liens of the U.S.); *U.S. v. Burczyk*, 389 F. Supp. 782 (D. Wis. 1975) (receiver appointed by state court could be held liable in action in federal district court to hold receiver personally answerable for his failure as receiver to give priority to the government's claims).

More recently, the U.S. Court of Appeals for the Second Circuit has held that a receiver, as a fiduciary, can incur personal liability under the Federal Debt Priority Statute. *S.E.C. v. Credit Bancorp, Ltd.*, 297 F.3d 127 (2nd Cir. 2001). The Court states, however, that a receiver has a number of options to prevent assessment of such personal liability. 297 F.3d at 139-141. First, the receiver has the option of paying the taxes immediately and seeking a refund thereafter. *Id.* at 139-140.

Further, the receiver can request an administrative determination of the liability by applying for a private letter ruling. *Id.* Additionally, because the receiver is a fiduciary, he is entitled to a notice of deficiency before any assessment is made and can challenge such notice in the Tax Court. *Id.* Finally, the receiver can set up a reserve for taxes. *Id.* The Court emphasized that setting funds aside as a reserve is the common approach, which would "doubtless be approved by the court." *Id.*

The function of a receivership is to preserve property. *Metropolitan Trust Co. of City of New York*, 162 F. 170 (C.C.E.D.N.C. 1908). Accordingly, the receiver should not incur expenses beyond what is essential to the preservation of the property. *Cowdrey v. Galveston R. Co.*, 93 U.S. 352, 23 L.Ed. 950 (1876). Therefore, in order to prevent personal liability under the Federal Debt Priority Statute, the receiver should take the approach that bears the least financial burden on the property in his care. Given the resources and expertise that would be needed in either paying the taxes and later seeking a refund, seeking a private letter ruling, or challenging a deficiency in Tax Court, the best approach to ensure the priority of U.S. taxes is for the receiver to set aside a reserve for taxes. This approach allows the receiver to ensure that any tax liability is paid as a priority without expending the higher cost of other alternatives.

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that upon final hearing and consideration of this Motion that the Court allow him to establish a tax liability reserve in the amount of $1.7 million dollars and for such other and further relief, general or special, at law or in equity, to which the Receiver may show himself justly entitled.

Respectfully submitted,

QUILLING, SELANDER, CUMMISKEY &
LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201-4240
(214) 871-2100 (Telephone)
(214) 871-2111 (Facsimile)

By: _____
Michael J. Quilling
State Bar No. 16432300

ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2002 a true and correct copy of the foregoing document was served facsimile, on:

William A. Brafford
Assistant United States Attorney
United States Attorney's Office for
the Western District of North Carolina
227 West Trade Street, Suite 1700
Charlotte, NC 28202
Facsimile: (704) 344-6629

Rodney E. Alexander
Mayer, Brown & Platt
100 N. Tryon Street, Suite 2400
Charlotte, NC 28202
Facsimile: (704) 377-2033

Jennifer Leong
Kilpatrick Stockton LLP
3500 One First Union Center
301 South College Street
Charlotte, NC 28202-6001
Facsimile: (704) 371-8298

This Motion will also be posted on the Receiver's website, www.secreceiver.com, immediately after filing.

_____
Michael J. Quilling

Standard Form 1034
Revised October 1962
Department of the Treasury
1 TFM 4-2000
HSP-1.2

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

VOUCHER NO

U.S. DEPARTMENT, BUREAU, OR ESTABLISHMENT AND LOCATION

U.S. Marshals Service
P.O. Box 710
Asheville, NC 28802

DATE VOUCHER PREPARED: September 3, 2002

CONTRACT NUMBER AND DATE

REQUISITION NUMBER AND DATE

SCHEDULE NO

PAID BY

PAYEE'S NAME AND ADDRESS:
Michael J. Quilling
QUILLING, SELANDER, CUMMISKEY & LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, TX 75201

DATE INVOICE RECEIVED

DISCOUNT TERMS

PAYEE'S ACCOUNT NUMBER

GOVERNMENT B/L NUMBER

SHIPPED FROM | TO | WEIGHT

NUMBER AND DATE OF ORDER	DATE OF DELIVERY OR SERVICE	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)	QUANTITY	UNIT PRICE COST	UNIT PRICE PER	AMOUNT (*)
		Pursuant to the CONSENT ORDER AUTHORIZING TRANSFER OF FUNDS TO RECEIVER, filed 08/12/02 in case #3:01CV205, USMS is paying the balance of the account ($16,565,958.91), plus interest ($2,416,732.19) to the above referenced Court Appointed Receiver.				$16,565,958.91 (balance of account) + $2,416,732.19 (interest)
					TOTAL	$18,982,691.10

(Use continuation sheet(s) if necessary) (Payee must NOT use the space below)

PAYMENT:
- ☐ PROVISIONAL
- ☐ COMPLETE
- ☐ PARTIAL
- ☐ FINAL
- ☐ PROGRESS
- ☐ ADVANCE

APPROVED FOR =$

EXCHANGE RATE -$1.00

BY

TITLE

DIFFERENCES

Amount verified; correct for

(Signature or initials)

Pursuant to authority vested in me, I certify that this voucher is correct and proper for payment.

9/3/02 (Date)

(Authorized Certifying Officer)

Acting Chief Deputy US Marshal (Title)

ACCOUNTING CLASSIFICATION

15X6874 -- $16,565,958.91
1525042 O/C 4401 -- $2,416,732.19
case #3:01CV205 / CATS #99-FBI-003280

PAID BY

CHECK NUMBER 93146 ON ACCOUNT OF U.S. TREASURY

DATE 9/3/02

CASH $

CHECK NUMBER

ON (Name of bank)

PAYEE

PER

TITLE

[redacted]

When stated in foreign currency, insert name of currency.

The ability to certify and authority to approve are conferred on one person, and alternate only is necessary; otherwise the accounting officer will sign in the space provided. When the official who signs a voucher is designated in the name of a company or corporation, the name of the person writing the company or corporate name, as well as the capacity in which he acts, must appear, for example: "John Doe Company, per John Smith, Secretary", or "Treasurer", as the case may be.

NSN 7540-00-634-4209

Previous edition usable

PRIVACY ACT STATEMENT

The information requested on this form is required under the provisions of 31 U.S.C. 82b and 82c, for the purpose of disbursing Federal money. The information requested is to identify the particular vendor and the amounts to be paid. Failure to furnish this information will delay or prevent payment.

** TOTAL PAGE.02 **

Tax Reserve Calculation
(Not an admission that tax is owed or the amount)

Principal Seized:	
Original Seizure (12/04/1998)	$18,823,635.73
Additional Seizure (05/09/1999)	$32,134.98
Total Amount Seized	$18,855,770.71
Transfers To Receiver During 2001	$1,350,000.00
Transfers To Receiver During 2002	$19,427,485.08
Interest Accrued on the Funds Held In the Seized Assets Deposit Fund Distributed to Receiver in 2002 (from 12/98 through distribution to Receiver)	$2,416,732.19
Tax Rate on Receiver Interest Income	38.60%
Tax On Interest Income	$932,858.63 *
Interest due on Unpaid Tax Earned from 1998 through 2001 at Estimated 10% per annum.	$767,141.37 **
Total Estimated Reserve Required	$1,700,000.00

* Amount could be reduced by expenses of administration of the receivership, and other deductible expenses if paid during 2002.

** Amount is estimation only. Actual interest will be calculated based on when the taxability of the interest income earned is determined through negotiations with the IRS.

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN ACCOUNT NUMBER 000669829075 in THE BANK OF MM ACMC BANQUE DE COMMERCE, INC., AT NATIONSBANK, N.A., CONSISTING OF $18,756,420.97, MORE OR LESS.	C.A. NO. 3:98mc96-McK
GEORGE AND DOLORES ROLLAR, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	C.A. NO. 3:01CV205-McK
RICHARD VASQUEZ, Intervener.	(CASES CONSOLIDATED)

ORDER ESTABLISHING TAX LIABILITY RESERVE

On this day came on for consideration the Receiver's Unopposed Motion to Establish Tax Liability Reserve at which time parties in interest appeared before the Court to present evidence and argument. The Court, being familiar with the pleadings and papers on file herein, and having carefully considered the evidence and argument presented, was of the opinion, and so found that the motion should be granted. Accordingly,

IT IS ORDERED that the Receiver is hereby authorized to establish a tax liability reserve in the amount of $1.7 million dollars so as to not delay distributions to other allowed claims while the tax liability is being negotiated.

SO ORDERED this _____ day of October, 2002.

Honorable H. Brent McKnight
United States Magistrate Judge

QUILLING, SELANDER, CUMMISKEY & LOWNDS, P.C.
2001 BRYAN STREET, SUITE 1800
DALLAS, TX 75201-4240
Telephone - (214) 871-2100
Telefax - (214) 871-2111

FAX TRANSMITTAL

TO: Rodney E. Alexander

FAX NO: 704.377.2033

FROM: Michael J. Quilling

DATE: October 4, 2002

CLIENT MATTER NO.: 911.0300

NUMBER OF PAGES INCLUDING COVER PAGE: 9

IF YOU DO NOT RECEIVE ALL MATERIALS BEING TRANSMITTED, PLEASE CALL LISA AT (214) 871-2100.

COMMENTS:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN ACCOUNT NUMBER 000669829075 in THE BANK OF MM ACMC BANQUE DE COMMERCE, INC., AT NATIONSBANK, N.A., CONSISTING OF $18,756,420.97, MORE OR LESS.	C.A. NO. 3:98mc96-McK
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IT IS ORDERED that the Receiver is hereby authorized to establish a tax liability reserve in the amount of $1.7 million dollars so as to not delay distributions to other allowed claims while the tax liability is being negotiated.

SO ORDERED this 10 day of October, 2002.

H. Brent McKnight

Honorable H. Brent McKnight
United States Magistrate Judge

rlb

United States District Court
for the
Western District of North Carolina
October 15, 2002

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:01-cv-00205

True and correct copies of the attached were mailed by the clerk to the following:

Rodney E. Alexander, Esq.
Mayer, Brown, Rowe & Maw
Bank of America Corporate Center
214 North Tryon St., Suite 3800
Charlotte, NC 28202

Eric H. Cottrell, Esq.
Mayer, Brown, Rowe & Maw
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cc:

Judge	( )
Magistrate Judge	( )
U.S. Marshal	( )
Probation	( )
U.S. Attorney	( )
Atty. for Deft.	( )
Defendant	( )
Warden	( )
Bureau of Prisons	( )
Court Reporter	( )
Courtroom Deputy	( )
Orig-Security	( )
Bankruptcy Clerk's Ofc.	( )
Other_____	( )

Date: 10-15-02

Frank G. Johns, Clerk

By: R J Braxton
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION OF GEORGE AND DOLORES ROLLAR FOR AWARD OF ATTORNEYS' FEES AND COSTS** was served by depositing a copy of same in the U.S. Mail, postage prepaid and addressed as follows:

William A. Brafford
Assistant United States Attorney
United States Attorney's Office for
the Western District of North Carolina
227 West Trade Street, Suite 1700
Charlotte, NC 28202

Jennifer Leong
Kilpatrick Stockton LLP
214 North Tryon Street, Suite 2500
Charlotte, NC 28202-2381

Michael J. Quilling
Quilling, Selander, Cummiskey & Lownds
2001 Bryan Street, Suite 1800
Dallas, TX 75201

This the 14th day of October, 2003.

Rodney E. Alexander

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN ACCOUNT NUMBER 000669829075 in THE BANK OF MM ACME BANQUE DE COMMERCE, INC., AT NATIONSBANK, N.A., CONSISTING OF $18,756,420.97, MORE OR LESS.	C.A. NO. 3:98mc96-McK
GEORGE AND DOLORES ROLLAR, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	C.A. NO. 3:01CV205-McK
RICHARD VASQUEZ, Intervener.	**(CASES CONSOLIDATED)**
STATE OF NORTH CAROLINA MECKLENBURG COUNTY	

AFFIDAVIT OF RODNEY E. ALEXANDER IN SUPPORT OF MOTION OF GEORGE AND DOLORES ROLLAR FOR AWARD OF ATTORNEYS' FEES AND COSTS

Being first duly sworn, Rodney E. Alexander, who, upon his oath, deposes and says:

1. I am over 21 years of age, and I have personal knowledge of the matters set forth herein.

2. I am submitting this affidavit in support of the claim of George and Dolores Rollar (the "Rollars") to be reimbursed for the attorneys' fees and expenses they incurred in connection with this litigation but which benefited all of the victims of the Gilliland/Mohr Ponzi

scam. A copy of Mayer, Brown, Rowe & Maw's ("MBR&M") itemized statement of fees and expenses for which reimbursement is sought, in the total amount of $148,276.57, is attached hereto as Exhibit 1.[1]

Background

3. MBR&M represents the Rollars in this case, which the Rollars initiated against the United States and others claiming a right to possession of a substantial portion of more than $18 million that the FBI seized from a NationsBank account in the name of M.M. A.C.M.C Banque De Commerce, Inc. ("BDC") in December 1998 (the "Seized Funds").

4. The Rollars, the victims of an international Ponzi scheme perpetrated by August Mohr ("Mohr") and Frederick Gilliland ("Gilliland"), believed that they could directly trace their $12.5 million investment in the Ponzi scheme to the Seized Funds and thus were entitled to have their "investment" returned to them.

5. In the fall of 2000, a government representative informed the Rollars' present counsel that the government believed that a substantial portion of the Seized Funds in the NationsBank account could be traced directly to the Rollars. That government representative also advised the Rollars' counsel that the government intended to initiate judicial proceedings (described as "an interpleader action") to request the court to distribute the Seized Funds to their rightful owners, and that such an action would be commenced by the end of the calendar year 2000.

6. By January of 2001, the government had not initiated any judicial proceedings in which the Rollars (or any of the other victims) would have the right to seek the return of their

[1] As of August 31, 2002, the Rollars had incurred legal fees and expenses in connection with this matter totaling $290,367.08. *See* Exhibit 2, which contains true and accurate copies of MBR&M's statements of fees and expenses billed to the Rollars from February 1, 2001 through August 31, 2002. The Rollars are seeking to recover only the portion of those fees and expenses that benefited all of the victims of the Ponzi scheme, in the amount of $148,276.57.

property. Instead, upon inquiry from the Rollars' counsel, the government advised that it was considering a transfer of the investigation from the U.S. Attorney's Office to the SEC. In early February 2001, the Rollars' counsel was advised that responsibility for the investigation relating to the Seized Funds had been transferred to the SEC. Between February and April 2001, upon inquiries from the Rollars' counsel, the SEC advised counsel that it was in the process of initiating an investigation of the fraud perpetrated against the Rollars and others, but that it had not determined whether it had jurisdiction over the matter and, consequently, did not know whether or when it would initiate any civil or administrative proceeding in connection with the Seized Funds. The SEC also advised the Rollars' counsel that if it decided that it lacked jurisdiction to initiate an enforcement action, it would transfer the investigation back to the United States Attorney.

7. By May 2001, the government had still not initiated any proceeding in which the Rollars (or other victims) could make a claim, so the Rollars filed suit against the government on May 1, 2001. Shortly after the Rollars filed suit, Richard Vasquez moved to intervene, claiming that he too had been a victim of the Gilliland/Mohr Ponzi scheme and that he also had a right to possession of a substantial portion of the Seized Funds. As it turned out, there were many additional victims of the Gilliland/Mohr Ponzi scheme with potential claims to a portion of the Seized Funds.

8. After several preliminary motions concerning the claims in the case, the government ultimately filed a Motion to Dismiss. After the government's motion to dismiss was filed, the parties attended a pretrial conference at which the Rollars, Vasquez and the government reached an agreement with the Court's assistance whereby a special master or receiver would be

appointed to locate potential victims of the fraudulent scheme and begin the accounting and distribution process.

9. On October 11, 2001, the Court issued its Consent Order regarding the appointment of a receiver. Thereafter, on October 29, 2001, the Court issued an Order Appointing Receiver pursuant to which Michael J. Quilling was appointed to serve as Receiver in this case.

10. After Mr. Quilling was appointed, the parties negotiated and agreed upon an equitable method of returning the Seized Funds to their rightful owners. The Court has entered an order approving that procedure, and the receiver has started making interim distributions, after Court approval, to the victims of the Ponzi scheme whose claims have been verified.

The fees and expenses requested are reasonable.

11. In *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978), the Fourth Circuit adopted the twelve factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for determining the reasonableness of an award of attorney's fees. Those factors as applied to the services MBR&M rendered in this case are addressed below.

(a) The Time and Labor Required. The fee request is limited to those fees and expenses that the Rollars incurred that benefited all of the victims of the Ponzi scheme. That work took place between January 1, 2001 and August 31, 2002. During that time, and as detailed on Exhibit 1, MBR&M attorneys expended 488 hours of attorney time performing, among other tasks, negotiations with the U.S. Attorney's office and representatives of the SEC, legal research, drafting correspondence, and drafting and filing various pleadings and memoranda, including the original and amended complaints.

The MBR&M attorneys endeavored to avoid duplication of efforts. For example, in the early stages of the case I undertook the factual investigation and early negotiations with the

government. Once it became obvious that a lawsuit would be necessary to provoke government action, I consulted with MBR&M attorneys in Washington D.C. (one of whom is a former Assistant U.S. Attorney) with expertise in forfeitures and motions for return of property to minimize the research hours that would be necessary in this case. As reflected on the time records, those attorneys took the lead in drafting the original Complaint. Once the lawsuit was filed, I took the lead in attempting to move it forward by negotiating with the government's lawyers and the SEC and drafting necessary motions and correspondence.

(b) The Novelty and Difficulty of the Questions. The entire case presented novel and complex issues of law. As an example, the government seized the Seized Funds but never initiated forfeiture proceedings. Even though the government never initiated forfeiture proceedings, it took the position in early filings with the Court that, inasmuch as the Seized Funds were seized pursuant to the authority of 18 U.S.C. § 981 (civil forfeiture), Rule 41(e) of the Federal Rules of Criminal Procedure did not apply. Essentially, the government argued that once it seized the money, it could hold it indefinitely without instituting forfeiture proceedings and the innocent victims of the Ponzi scheme had no mechanism available to them to force the government to act. A significant amount of attorney time was devoted to ensuring that claims being made against the government under this novel fact setting were sustainable.

(c) The Skill Requisite to Perform the Service. I believe that the issues presented in the case required the services of attorneys possessing considerable experience in sophisticated civil litigation coupled with experience in criminal law and asset forfeiture issues. I have considerable experience in civil litigation and criminal law. Moreover, members of MBR&M with whom I consulted have considerable and unique experience in asset seizure and forfeiture issues.

(d) The Preclusion of Other Employment Due to Acceptance of the Case. Neither the undersigned nor MBR&M have declined any representation solely because of the services they rendered in connection with this case.

(e) The Customary Fee. The hourly rates sought herein are commensurate with the rates charged by other practitioners of similar experience levels in large firms with a presence in the Western District of North Carolina. The following lawyers at MBR&M have performed legal services in connection with the prosecution of the claims in this case: Rodney Alexander, licensed in North Carolina in 1996 and in Texas in 1988 ($350 per hour (January, 2001 through June, 2001) and $375 per hour (July, 2001 through June 2002)); Mary Mandeville, licensed in North Carolina in 1988 ($375 per hour); Eric Cottrell licensed in North Carolina in 1995 ($185 per hour (January, 2001 through June 2001) and $220 per hour (July, 2001 through June, 2002)); Lee H. Rubin, licensed in the District of Columbia in 1991 and California in 1989 ($340 per hour); David A. J. Goldfine, licensed in Pennsylvania in 1997 and the District of Columbia in 1998 ($250 per hour) (the rates listed are those that were in effect when the services were rendered).

(f) Whether the Fee is Fixed or Contingent. MBR&M's fees are fixed. A law firm that had taken the case on a contingent fee and had represented all of the claimants would have been entitled to as much as forty percent or more of the gross recovery. Based on the receiver's calculations, the gross amount to be paid out to victims will be in excess of $20,000,000. A 40% contingency fee would have resulted in payments to attorneys in excess of $8,000,000. By contrast, the fees and expenses sought for the work reflected on Exhibit 1 total $148,276.57.

(g) Time Limitations Imposed by the Client or Other Circumstances. There were no unusual time limitations affecting the work performed.

(h) The Amount Involved and the Results Obtained. The amount involved for all of the potential claimants is now over $20 million (the Seized Funds have been accruing interest since 1998). As a result of MBR&M's efforts on behalf of the Rollars, the government, after nearly two years of inaction, agreed to deliver the Seized Funds to the Court so that the distribution process could begin.

(i) The Experience, Reputation, and Ability of the Attorneys. MBR&M is one of the ten largest firms in the world, with over 1300 attorneys in the United States and Europe. The reputation of MBR&M's attorneys is recognized and respected internationally and in North Carolina.

I acted as lead counsel on the case for the Rollars. I am a partner at MBR&M, and I obtained my juris doctor degree *cum laude* from the University of Houston in 1988. I was admitted to the State Bar of Texas in 1988 and practiced law in Houston, Texas from 1988 through part of 1997. I was admitted to practice law in the State of North Carolina in 1996 and have been practicing law in North Carolina since that time. I am currently admitted to practice law in North Carolina and am in good standing. I have practiced both civil and criminal law. My current practice is focused primarily on complex commercial litigation, as was my practice in Houston, Texas from 1988 through 1997. I was an assistant district attorney in Mecklenburg County from 1998 through May 2000. During that time, I practiced exclusively criminal law.

During my fourteen years of practice, I have tried approximately forty jury trials, both civil and criminal. I have experience in all aspects of civil litigation, including discovery, motion practice, hearings and appeals in both state and federal courts.

Lee Rubin is a partner at MBR&M who obtained his juris doctor degree from Stanford Law School in 1988. He has been admitted to practice in Washington, D.C. since 1991. Mr.

Rubin has past experience as an Assistant United States Attorney and as an attorney with United States Department of Justice, Civil Rights Division, Criminal Section and Voting Section.

Mary Mandeville is a partner at MBR&M who obtained her juris doctor degree with honors from Duke University. She has been admitted to practice in North Carolina since 1988 and has extensive experience in all aspects of commercial litigation.

Eric Cottrell is a senior associate who obtained his juris doctor with honors from the University of North Carolina at Chapel Hill. Mr. Cottrell, who was admitted to practice in North Carolina in 1995, has extensive criminal and civil litigation experience.

David Goldfine is a former associate at MBR&M who obtained his juris doctor from the University of Pennsylvania. Mr. Goldfine, who was admitted to practice in Pennsylvania in 1997 and in the District of Columbia in 1998, completed two judicial clerkships following law school and has significant civil litigation experience.

The abilities of the attorneys is probably best judged by the Court through its evaluation of the work product at issue.

(j) The Undesirability of the Case. Nothing about this case made it undesirable to undertake the representation.

(k) The Nature and Length of the Professional Relationship with the Client. MBR&M does not represent all of the claimants and thus has not made any adjustment to its rates for the nature or length of the relationship.

(l) Awards in Similar Cases. While the facts of this case are unique, the legal work performed was similar to that required in any complex, commercial litigation matter. I believe that the fees and expenses requested for the work reflected on Exhibit 1 are reasonable based on the results obtained. The fees are commensurate with the fees charged for similar work in

complex commercial cases. The expenses were primarily copy costs, filing fees, long distance telephone expenses and electronic research charges. There were also expenses incurred for hand delivery and overnight delivery fees, all of which were reasonable.

FURTHER AFFIANT SAYETH NOT.

RODNEY E. ALEXANDER

Subscribed and sworn to before me
on this 14th day of October, 2003.

NOTARY PUBLIC

My commission expires: March 23, 2008

SEAL