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By ECF

The Honorable Martin Glenn
United States Bankruptcy Judge
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, New York 10004

Re: In re 1031 Tax Group, LLC, et al., Case No. 07-B-11448 (MG); Gerald A. McHale v. Wachovia Bank National Association, et al., Adv. Pro. No 08-01604 (MG)

Dear Judge Glenn:

We represent defendants Wachovia Bank National Association, Wachovia Exchange Services, Inc., Wachovia Capital Markets, LLC, Wachovia Financial Services, Inc., and Wachovia Mortgage Corporation (collectively, "Wachovia" or "Defendants") in the above-referenced adversary proceeding. We write in response to the letter sent by counsel for the Trustee to Your Honor on February 2, 2009 (the "Veit Letter") regarding a discovery dispute between the parties regarding the Trustee's Document Requests 5 and 6. Wachovia has objected and continues to object to Requests 5 and 6 because the documents and information they seek are not "reasonably calculated to lead to the discovery of admissible evidence" (*see* F.R.C.P. 26(b)(1)) as, among other things, Wachovia never acted as a QI with respect to any of the 1031 Debtors or other Okun entities, and customer/QI relationships are governed by individualized contracts, not blanket policies and procedures.[1]

As an initial matter, it is important to note that Wachovia agreed to produce, and has produced, all documents (some of which may also be responsive to Requests 5 and 6) that relate in any way to its business dealings with Edward Okun, the 1031 Debtors, or other entities Okun owned or controlled. However, as it is undisputed that Wachovia never acted as a QI for any of the Okun-related entities, it has objected to Requests 5 and 6 to the extent they require production of documents regarding Wachovia's actual or potential business dealings with *other* persons or entities, as such documents are

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[1] The present dispute between the parties regarding Requests 5 and 6 should be viewed against the backdrop of Wachovia's extensive efforts to comply with the Trustee's Document Requests. On April 21, 2008, counsel for the Trustee served a Bankruptcy Rule 2004 request (the "2004 Request") on Wachovia, which contained 38 separate requests for documents. Requests 5 and 6 addressed in the Trustee's February 2, 2009 letter are the only requests with regard to which there remains a dispute between the parties. Indeed, in response to the Trustee's 2004 Request, Wachovia has produced 77,476 pages of documents, which it collected from over 25 custodians located in at least 5 different offices of the bank.

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simply not reasonably calculated to lead to the discovery of admissible evidence. Indeed, a bank's role when acting *as* a QI clearly differs from its role when acting as a depositary bank *for* a QI.

As conceded by the Trustee himself, the duties and obligations between a QI and its customer are typically set forth in an agreement between them (an "Exchange Agreement"), the terms of which frequently differ from customer to customer. *See* Trustee's Complaint (the "Complaint"), at ¶ 28. Indeed, contrary to the Trustee's suggestion, there are no blanket "proper policies and procedures" for QIs to follow with each of their customers. Rather, as the Trustee himself alleges, the "proper policies and procedures" for a QI to follow are governed by the relevant Exchange Agreement. At no point does the Trustee allege that Wachovia was party to, or even in possession of, a copy of any of the Exchange Agreements between the 1031 Debtors and their customers. Indeed, this is not surprising, as the Trustee likewise at no point alleges that Wachovia acted as a QI with respect to any of the 1031 Debtors or their customers; at most the Trustee merely alleges that Wachovia served as depositary for certain of their accounts.[2] Wachovia thus was neither a party to, bound by, nor had knowledge of any of the terms of, any of the Exchange Agreements which governed the relationships between the 1031 Debtors and their customers. Wachovia's protocols and procedures relating to its function as a QI with respect to *other* customers – not any of the 1031 Debtors – pursuant to the terms of *other* Exchange Agreements, the terms of which likely differ from those to which the 1031 Debtors were party, are thus simply not relevant.

What is more, the Trustee's request for production of the protocols and procedures of other (*i.e.* non-1031 Debtor) Wachovia customers, where *they* function as a QI, pursuant to Exchange Agreements to which neither any of the 1031 Debtors, nor Wachovia, are parties, likewise calls for the production of documents and information which are not reasonably calculated to lead to the discovery of admissible evidence, not to mention which are confidential to those customers.

For similar reasons, the Trustee's request for all documents concerning Wachovia's marketing of its QI services – not just to Okun or the 1031 Debtors, but to *any* party – likewise requests the production of documents and information not reasonably calculated to lead to the discovery of admissible evidence. As noted, the terms of the relationship between a QI and its customer are governed by the specific terms of the relevant Exchange Agreement – not any purported marketing materials. Thus, how Wachovia may have marketed its QI services – not to the 1031 Debtors themselves, but to *other* parties – is thus similarly irrelevant. Further, as noted in Wachovia's briefs on its motion to dismiss, any purported "red flags" which Wachovia's marketing materials allegedly may uncover (Veit Letter at 2) are irrelevant as a matter of law, as *actual* knowledge of wrongdoing is the relevant standard on the claims herein, not constructive knowledge based on red flags. *See* Wachovia's Moving Brief at 19-23 and Reply Brief at 4-5.[3]

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[2] Pursuant to an Agency Agreement dated July 18, 2005, Wachovia did act as agent with respect to one of the 1031 Debtors, NES. Complaint, ¶ 47. As discussed in Wachovia's memorandum of law in support of its motion to dismiss the Complaint in this matter (at 37-39), Wachovia's obligations under the Agency Agreement were quite limited and ministerial, and it did not act as a QI in connection with or for NES.

[3] Requests 5 and 6 are also objectionable on the additional and further ground that they seek information which is proprietary and confidential. Development of protocols, procedures, marketing information, and other such proprietary

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We look forward to the opportunity to address these matters with Your Honor at the hearing tomorrow morning.

Respectfully submitted,

Danielle J. Marlow

cc: Jacqueline G. Veit, Esq.
Counsel for the Trustee
(by email)

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materials require extensive time and effort. Should Wachovia be required to disclose such materials, its market competitors will likely gain an unfair competitive advantage. Thus, if disclosure is required, Wachovia respectfully requests that prior to such disclosure, appropriate confidentiality protections be put in place.