

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

THE 1031 TAX GROUP, LLC, et al.,  
Debtors.

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

Plaintiffs,

-v-

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

Defendants.

Chapter 11

Case No. 07-B-11448 (MG)  
Jointly Administered

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

**CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER**

The Court hereby enters this Confidentiality Stipulation and Protective Order to facilitate discovery in the above-referenced action.

**1. PURPOSES AND LIMITATIONS**

Disclosure and discovery activity in this action and in certain class action litigations may involve production of confidential, proprietary, private consumer or other private information for

which special protection from public disclosure and from use for any purpose other than prosecuting this litigation and the Class Action Litigations would be warranted and consistent with the public policy of the United States as well as of the state of New York. This Order is not intended to foreclose any party's right to make a valid objection to any discovery request(s) on privacy, trade secrets or confidentiality grounds.

## 2. **DEFINITIONS**

2.1 **"Confidential" Information or Items**: for purposes of this Order, Confidential Information or Items means information (regardless of how generated, stored, or maintained) or tangible things that a Party or non-party in good faith believes contains confidential, proprietary, trade secret and/or otherwise private information, and that is not otherwise in the public domain.

2.2 **Class Action Litigations**: any class action litigation brought against any of the defendants (alone or among others) by exchangers of the Debtors<sup>1</sup>, including without limitation *Hunter, et al. v. Okun, et al.* (U.S.D.C., N.D. Cal. Case No. 5:07-CV-02795-JW) (the "Hunter Case"), *Quirk Infiniti, Inc. v. Wachovia Bank, National Association* (U.S.D.C., D. Mass. Case No. 1:08-CV-12060-JLT) (the "Quirk Case"), and any multi-district litigation with the proposed classes in these cases.

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<sup>1</sup> "Debtors" herein refers to the debtors in the above-captioned bankruptcy cases, including The 1031 Tax Group, LLC, a Delaware entity; 1031 Advance 132 LLC; 1031 Advance, Inc.; 1031 TG Oak Harbor LLC; AEC Exchange Company, LLC; Atlantic Exchange Company, Inc.; Atlantic Exchange Company LLC, a Massachusetts entity; Investment Exchange Group, LLC, a Colorado entity; National Exchange Accommodators, LLC; National Exchange Services QI, Ltd., a Texas entity; NRC 1031, LLC; Real Estate Exchange Services, Inc., a Florida entity; Rutherford Investment LLC; Security 1031 Services, LLC, a New York entity operating in Connecticut; and Shamrock Holdings Group, LLC.

2.3 Designating Party: a Party or non-party that designates information or items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

2.4 Disclosure or Discovery Material: all items or information, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, or tangible things) that are exchanged, produced or generated in disclosures or responses to discovery in this matter.

2.5 Expert: a person with specialized knowledge or experience in a matter pertinent to this action or the Class Action Litigations who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action and who is not a current employee of a Party or of a competitor of a Party and who, at the time of retention, is not anticipated to become an employee of a Party or a Party’s competitor. This definition includes a professional jury or trial consultant retained in connection with this litigation.

2.6 In-House Counsel: attorneys who are current employees of a Party.

2.7 Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.

2.8 Party: any party to this action or the Class Action Litigations, including all of its current officers, directors, employees, consultants, retained experts, and outside counsel (and their support staff).

2.9 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

2.10 Protected Material: any Disclosure or Discovery Material that is designated as “CONFIDENTIAL.”

2.11 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

### **3. SCOPE**

The protections conferred by this Confidentiality Stipulation and Protective Order cover not only Protected Material (as defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by parties or counsel to or in court or in other settings that might reveal Protected Material. All notes, memoranda, reports, and other written communications that reveal or discuss information contained in Protected Materials shall be given the same protections under this Protective Order as though they were designated as Protected Material.

### **4. DURATION**

Even after the termination of this litigation, the confidentiality obligations imposed by this Protective Order shall remain in effect unless and until a Designating Party agrees otherwise in writing or a court order otherwise directs.

### **5. DESIGNATING PROTECTED MATERIAL**

5.1 Manner and Timing of Designations. Except as otherwise provided in this Confidentiality Stipulation and Protective Order, or as otherwise stipulated or ordered, material

that qualifies for protection under this Confidentiality Stipulation and Protective Order must be clearly so designated before the material is disclosed or produced.

Designation in conformity with this Confidentiality Stipulation and Protective Order requires:

(a) For information in documentary form (apart from transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the legend “CONFIDENTIAL” on the outside cover or first page of each document or thing. The Producing Party may also designate information for confidential treatment by affixing the appropriate label on each page that contains Protected Material.

A Party or non-party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed “CONFIDENTIAL” even though not physically marked as such at the time of inspection. After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Protective Order, and before producing the specified documents, the Producing Party must affix the appropriate label on the outside cover or first page of each document or thing. The Producing Party may also designate information for confidential treatment by affixing the appropriate label on each page that contains Protected Material.

(b) For testimony given in deposition or in other pretrial or trial proceedings, that the Party or non-party identify on the record, before the close of the deposition, hearing, or

other proceeding, any portions of the testimony that qualify as “CONFIDENTIAL.” When it is impractical to identify separately each portion of testimony that is entitled to protection, and when it appears that substantial portions of the testimony may qualify for protection, a Party or non-party may invoke on the record (before the deposition or proceeding is concluded) a right to have up to 20 days following receipt of the transcript to identify the specific portions of the testimony as to which protection is sought. Only those portions of the testimony that are appropriately designated for protection within the 20 days shall be covered by the provisions of this Confidentiality Stipulation and Protective Order. Transcript pages containing Protected Material must be separately bound by the court reporter, who must affix to the top of each such page the legend “CONFIDENTIAL,” as instructed by the Designating Party.

(c) For information produced in some form other than documentary, and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the appropriate legend. If that matter is stored or recorded electronically (including information databases, images, or programs stored on computers, discs, networks or backup tapes) and a legend cannot be affixed upon it, the Designating Party may designate such material as “CONFIDENTIAL” by cover letter identifying the Protected Material. Parties other than the Producing Party shall also have the right to designate such materials for confidential treatment in accordance with this Protective Order by written notice. If only portions of the information or item warrant protection, the Designating Party, to the extent practicable, shall identify the protected portions.

5.2 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items as “CONFIDENTIAL” does not waive the Designating Party’s right to secure protection under this Protective Order for such material. If material is

appropriately designated as “CONFIDENTIAL” after the material was initially produced, the Receiving Party, on timely notification of the designation, must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Protective Order.

5.3 Inadvertent Production of Privileged Material: If the Producing Party contends that it has inadvertently produced material that it alleges is protected by the attorney-client privilege, the work product doctrine, and/or any other privilege or is otherwise immune to discovery (the “Subject Material”), that party shall notify the Receiving Party of the inadvertent production. Promptly upon notification, the Receiving Party shall return, sequester, or destroy all copies of the Subject Material identified in the notice, and may not use or disclose the information until the claim of privilege or work product is resolved. If the Receiving Party disclosed the information before being notified, it must take reasonable steps to retrieve it, but shall have no liability for the use or disclosure of such materials by another person. By complying with the requirements of this section, the Receiving Party shall not waive or prejudice any challenge it may have to the alleged privileged status of the Subject Material, nor shall it waive or prejudice any challenge it may have to the Producing Party’s claim of inadvertent production. If, after undertaking an appropriate meet-and-confer process, the parties are unable to resolve any dispute they have concerning the Subject Material, the Receiving Party may file a motion with the Court under seal for a determination of the claim. The Producing Party must preserve the information until the claim is resolved.

## **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

6.1 Meet and Confer. A Party that elects to initiate a challenge to a Designating Party’s confidentiality designation must do so in good faith and must begin the process by

conferring directly with counsel for the Designating Party. In conferring, the challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first.

6.2 Judicial Intervention. A Party that elects to press a challenge to a confidentiality designation after considering the justification offered by the Designating Party may file and serve a motion that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements imposed in the preceding paragraph and that sets forth with specificity the justification for the confidentiality designation that was given by the Designating Party in the meet and confer dialogue. The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Until the court rules on the challenge, all parties shall continue to afford the material in question the protection to which it is entitled under the Producing Party's designation.

## 7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a non-party in connection with this action or the Class Action Litigations for prosecuting, defending, or attempting to settle those litigations. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in

this Protective Order. When the litigation and the Class Action Litigations have terminated, a Receiving Party must comply with the provisions of Section 12, below.

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Confidentiality Stipulation and Protective Order.

7.2 Disclosure of “CONFIDENTIAL” Information: Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated CONFIDENTIAL only to:

(a) The Receiving Party’s Outside Counsel of record in this action, as well as employees of said Outside Counsel to whom it is reasonably necessary to disclose the information for this litigation or the Class Action Litigations;

(b) Counsel in the Class Action Litigations, as well as employees of said counsel to whom it is reasonably necessary to disclose the information for this litigation or the Class Action Litigations;

(c) The Receiving Party and its or their officers, directors, and employees (including In-House Counsel) to whom disclosure is reasonably necessary for this litigation or the Class Action Litigations;

(d) Experts (as defined in this Confidentiality Stipulation and Protective Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation or the Class Action Litigations, provided that he or she is not permitted to retain custody of any

copy of the Confidential Information unless such person(s) signs the “Acknowledgement and Agreement to Be Bound by Protective Order” (Exhibit 1);

(e) The Court and its personnel;

(f) Court reporters, their staffs, and Professional Vendors to whom disclosure is reasonably necessary for this litigation or the Class Action Litigations;

(g) Any person reflected as an author, addressee or recipient of the materials being disclosed; and

(h) any witness or potential witness not included in subpart (g) above, provided that he or she is not permitted to retain custody of any copy of the Confidential Information, unless such person(s) signs the “Acknowledgement and Agreement to Be Bound by Protective Order” (Exhibit 1).

In making any of the aforementioned disclosures permitted by subparagraphs (a) through (h), the Receiving Party shall inform the recipient of the Confidential nature of the material or information and the existence of this agreement and require, if possible, and otherwise request, the recipient to keep it confidential. Notwithstanding anything to the contrary in the foregoing paragraphs, any Party may use without restriction hereunder, irrespective of whether such Discovery Material has been designated as Confidential (i) its own documents or information, provided such documents or information was not solely obtained from others who had previously designated them as confidential; and (ii) documents or information obtained from publicly available sources.

7.3 Maintenance of Signed Agreements. The Outside Counsel for the Receiving Party wishing to disclose Protected Materials shall maintain the original signed “Acknowledgement and Agreement(s) to Be Bound by Protective Order,” and produce it upon request of the Designating Party

7.4 Disclosure Not Otherwise Authorized. In the event that Outside Counsel representing any Party in this action believes that it is necessary to disclose Protected Materials to an individual or entity to whom disclosure is not permitted by this Confidentiality Stipulation and Protective Order, such Outside Counsel shall make a written request (delivered by hand, electronic mail or facsimile in accordance with the terms hereof) to Outside Counsel for the Designating Party identifying the individual to whom it is desired to make such disclosure and the specific Protected Materials involved. Within five business days of the request, Outside Counsel for the Designating Party may object to such disclosure by delivering by hand, electronic mail, or fax a written objection to Outside Counsel serving the disclosure letter. Failure to so object constitutes consent to such disclosure. In the event that a Designating Party objects to such disclosure, such Protected Materials shall not be disclosed to any individual other than those to whom disclosure is permitted by the provisions of this Protective Order until such dispute has been resolved by agreement of the parties or by order of the Court.

## **8. CONFORMITY WITH OTHER ACTIONS**

If a court in another action enters an Order concerning or relating in any way to information, material or documents that have been designated, or are subject to designation, as Protected Material under the terms of this Order, or if such court has or implements a rule inconsistent with this Confidentiality Stipulation and Protective Order relative to such

information, material or documents, then to the extent that compliance with this Confidentiality Stipulation and Protective Order does not violate such rule or order of the court having jurisdiction over the other action, the Parties to this action shall comply with this Confidentiality Stipulation and Protective Order. To the extent that the rule or order of the court having jurisdiction over the other action conflicts, directly or indirectly, with the terms of this Confidentiality Stipulation and Protective Order, the Part(ies) subject to the jurisdiction of the court in the other action shall promptly notify the other Parties hereto of the conflicting rule or order to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the conflicting rule or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that other court of its confidential material. Nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

**9. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED**

If a Receiving Party is served with a discovery request, subpoena or an order issued in any litigation that would compel disclosure under terms inconsistent with this Confidentiality Stipulation and Protective Order of any Protected Material designated in this action pursuant to the provisions of this Confidentiality Stipulation and Protective Order, the Receiving Party must so notify the Designating Party, in writing (by hand delivery, electronic mail or facsimile) at least ten business days prior to producing such documents, or immediately if the Receiving Party is provided with fewer than ten business days to respond. Such notification must include a copy of the discovery request, subpoena or court order. Prior to producing any Protected Material in response to a discovery request, subpoena or an order, the Receiving Party also must inform in writing the party who served the discovery request or subpoena or caused the order to issue in

the other litigation that some or all the material covered by the discovery request, subpoena or order is Protected Material covered by this Confidentiality Stipulation and Protective Order, and deliver a copy of this Confidentiality Stipulation and Protective Order to such party. The purpose of imposing these duties is to alert the interested parties to the existence of this Confidentiality Stipulation and Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the discovery request, subpoena or order issued. The Designating Party shall bear the burdens and the expenses of seeking protection in that court of its confidential material and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

**10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Confidentiality Stipulation and Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Confidentiality Stipulation and Protective Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit 1.

**11. FILING PROTECTED MATERIAL**

Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action

or the Class Action Litigations any Protected Material. A Party may file Protected Material with the Court under seal by following the appropriate Federal and local rules, including filing paper copies of all “CONFIDENTIAL” material directly with the Court rather than filing it electronically.

## **12. FINAL DISPOSITION**

Unless otherwise ordered or agreed in writing by the Producing Party, within sixty days after the final termination of this action (*i.e.*, a court order terminating this action and from which no appeal is taken), each Receiving Party must destroy or return all Protected Material to the Producing Party. As used in this paragraph, “all Protected Material” includes all copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of the Protected Material. Whether the Protected Material is destroyed or returned, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) within the sixty day deadline which confirms that all the Protected Material was destroyed or returned and that affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected Material. Notwithstanding this provision, Outside and In-House Counsel to the Parties are entitled to retain archival copies and are not required to return copies of all pleadings, motion papers, transcripts, legal memoranda, correspondence, attorney-client communications or attorney work product, even if such materials contain Protected Material, provided that such Counsel take appropriate steps to prevent the disclosure in a manner contrary to this Confidentiality Stipulation and Protective Order of such Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (“DURATION”), above.

**13. MISCELLANEOUS**

13.1 Right to Further Relief. Nothing in this Confidentiality Stipulation and Protective Order abridges the right of any person to seek its modification by the Court in the future.

13.2 Right to Assert Other Objections. This Confidentiality Stipulation and Protective Order does not impact any party's rights it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Confidentiality Stipulation and Protective Order. Similarly, each Party's rights to object on any ground to use in evidence any of the material covered by this Confidentiality Stipulation and Protective Order are not limited by this Confidentiality Stipulation and Protective Order.

Dated: New York, New York  
March \_\_, 2009

GOLENBOCK EISEMAN  
ASSOR BELL & PESKOE LLP

REED SMITH LLP

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*Counsel for the Plaintiff Trustee*

*Counsel for Defendants*

SO ORDERED: **March 23, 2009**

/s/ Martin Glenn  
U.S. Bankruptcy Judge Martin Glenn

Agreed To:

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**EXHIBIT 1**

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND BY CONFIDENTIALITY  
STIPULATION AND PROTECTIVE ORDER

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_  
\_\_\_\_\_, [print or type full address], declare under penalty of perjury that I have read in its  
entirety and understand the Confidentiality Stipulation and Protective Order that was issued by  
the United States Bankruptcy Court for the Southern District of New York on \_\_\_\_\_  
\_\_\_\_\_, 2009 in the case of *McHale v. Wachovia Bank, National Association, et al.*, Ad. Pro.  
No. 08-01604 (MG).

I agree to comply with and to be bound by all the terms of this Confidentiality Stipulation  
and Protective Order and I understand and acknowledge that failure to so comply could expose  
me to sanctions and punishment in the nature of contempt. I agree that I will not disclose in any  
manner any information or item that is subject to this Confidentiality Stipulation and Protective  
Order to any person or entity except in strict compliance with the provisions of this  
Confidentiality Stipulation and Protective Order.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_