

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35994 (KRH)
. .
. .
LANDAMERICA FINANCIAL . 701 East Broad Street
GROUP, INC., . Richmond, VA 23219
. .
Debtor. . February 23, 2009
. 10:04 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY COURT JUDGE

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By: STEVE MILO, ESQ.

1 THE CLERK: In the matter of LandAmerica Financial
2 Group, Incorporated, hearings on Items 1 through 22 as set out
3 on debtor's amended agenda.

4 MR. MADDOCK: Good morning, Your Honor. John Maddock
5 on behalf of the debtors. With me today at counsel table are
6 Rachel Strickland and Larry Kamin from Willkie Farr and Richard
7 Blair, also from McGuire Woods. Your Honor, on Thursday the
8 debtors filed a proposed agenda in accordance with the case
9 management order entered in these cases and yesterday afternoon
10 filed an amended agenda to catch up on filing since Thursday
11 and any changes. We're happy to proceed in the order of the
12 proposed agenda or any other manner that you would like.

13 THE COURT: The Court prefer that you just proceed
14 with the amended agenda.

15 MR. MADDOCK: Your Honor, the first group of matters
16 are the uncontested matters. Item 1 is the debtors' motion to
17 extend time in which the debtors may file notices of removal.
18 As Your Honor knows, Rule 9027(a), notices must be filed on or
19 before 90 days after the petition date. That ninetieth day is
20 tomorrow, the 24th of February. The debtors are requesting an
21 extension of time to file notices of removal to June 24th of
22 2009, which is 120 day extension. Similar relief has been
23 granted in other cases in this district. No objections have
24 been filed, and for those reasons we'd ask that the motion be
25 granted.

1 THE COURT: It will be granted.

2 MR. MADDOCK: Thank you, Your Honor. Your Honor,
3 Item Number 2 is the debtors' motion to reject various real
4 estate leases. The motion concerns five leases for office
5 space. Following the sale of the underwriting companies to
6 Fidelity the debtors are streamlining the process. They've
7 vacated these premises. They have -- my understanding in
8 talking to the debtors is that they have removed all of their
9 property from these locations. To the extent there's anything
10 left it's inconsequential and would cost more to move it than
11 its value.

12 So we're also requesting authority to abandon any
13 property. Again, I don't believe that there's anything there,
14 but in the event that there is. And the proposed order that we
15 included with the motion states that the landlords will have 30
16 days from entry of the order or until April 6th, which is the
17 proposed bar date that you'll hear about later, to file lease
18 rejection claims. Your Honor, no objections have been filed
19 and we'd ask the Court to grant the relief requested in regard
20 to three of the five leases.

21 With respect to the Portland, Oregon lease since
22 filing the motion we've learned that although employees have
23 been removed from that premises there is some IT equipment and
24 data lines that are still being used by Fidelity. They've
25 asked that we not reject that lease at this time. They're in

1 the process of getting a new data line put in place so that
2 won't be necessary. So we'd ask for authority to withdraw the
3 motion as to the Portland, Oregon lease.

4 THE COURT: Is Fidelity compensating the debtor for
5 the use of the facility?

6 MR. MADDOCK: Your Honor, that's been discussed under
7 the Transition Services Agreement and would be governed -- I
8 know those discussions are ongoing. I don't know the result.
9 But I do -- I believe we have an obligation to -- under the
10 Transition Services Agreement to keep the premises in place
11 until they can replace this line.

12 THE COURT: All right, the motion will be granted.

13 MR. MADDOCK: Okay. Your Honor, in regard to the
14 location at Wayne, Pennsylvania, we've provided notice of the
15 motion to reject to EOP-Two Devon Square Limited Partnership.
16 We have since learned that the lease was assigned from EOP to
17 an entity called Keystone Property Group. We provided notice
18 of the motion last Thursday to Keystone. They've retained
19 counsel and they've asked for a two week continuance based on
20 the short notice they were provided.

21 I think under the circumstances we would agree that
22 they should have a little more notice to consider the motion.
23 Because the debtors have vacated the premises though we'd ask
24 if we could get a date sooner than the March 19th Omnibus
25 hearing and we'd ask if possible if you had any time during the

1 week of March 9th to hear the motion with respect to that
2 single lease.

3 THE COURT: We could do that at the end of the
4 regular docket on Wednesday, on the 1th.

5 MR. MADDOCK: March 11th?

6 THE COURT: Yes. We'll set that down at eleven.

7 MR. MADDOCK: Okay. Thank you, Your Honor.

8 THE COURT: Currently that's the Chapter 13 Trustee's
9 conference that week so we don't have a docket that week, so
10 actually I could do any day that week so -- except Friday.

11 MR. MADDOCK: Is the 9th available?

12 THE COURT: The 9th is available.

13 MR. MADDOCK: Okay. Thank you, Your Honor.

14 THE COURT: And do you prefer morning or afternoon?

15 MR. MADDOCK: Morning is fine.

16 THE COURT: Ten o'clock?

17 MR. MADDOCK: Certainly. Your Honor, the next motion
18 is a joint motion to approve a settlement agreement with Health
19 Care REIT, and Mr. Kamin from Willkie Farr will address that.

20 MR. KAMIN: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. KAMIN: Larry Kamin on behalf of the debtor. I'm
23 pleased to say that we have a settlement in one of the five
24 lead cases, and I'm here today to present that joint motion on
25 behalf of not just the debtor, but of HCN, Health Care REIT --

1 I'll refer to them as HCN; both committees, all of whom support
2 this settlement. The settlement has been presented to the
3 Court. Your Honor, this was agreed upon late last week. We
4 filed the motion on Thursday and we filed an agenda for this
5 hearing today which we believe provided notice to the
6 individuals involved, whoever may have wanted to object. We
7 have not gotten any objections to that, and I'd like to present
8 the motion to Your Honor.

9 Under the terms of the settlement, which Your Honor
10 has, LES authorizes the escrow agent, which is Centennial Bank,
11 to release the proceeds of the two escrow accounts to HCN. The
12 order requires that that be done within 48 hours or within two
13 days, and the debtor has endeavored to use its best efforts to
14 try to obtain the release of those funds within 24 hours. Time
15 is really of the essence in this matter and that was really
16 critical to getting this done, was the ability to get it done,
17 and I'll get into that a little bit later. Within 24 hours of
18 HCN's receipt of these funds they will remit to the debtor the
19 sum of \$2 million. The approximate proceeds that they will be
20 receiving in the first instance is something in excess of \$137
21 million. Full releases are exchanged. The releases on -- that
22 HCN is giving release to the debtor as well as LFG, also
23 release both committees and release all of the officers,
24 directors and employees of the companies, as well. Their
25 action will be deemed dismissed with prejudice. HCN agrees

1 after the completion of the transactions to withdraw its motion
2 for administrative expenses which is on today, but the parties
3 have agreed to continue that.

4 And finally, and certainly importantly from the
5 debtors' standpoint the order provides that the \$2 million
6 received by LES is the property of the LES estate and is
7 available for the payment of LES administrative expenses
8 without restriction. But, Your Honor, LES believes that this
9 settlement is fair, equitable and in the best interest of the
10 estate and the other parties will speak to that as well, but I
11 think we're all unanimous on that. As Your Honor has seen
12 before the issues that the Court should look at are probability
13 of success, the complexity of the litigation and the interest
14 of the creditors, at least as applicable here.

15 One of the key -- one of the reasons we're able to
16 settle this case, Judge, is that the parties have undergone
17 very thorough discovery now of the transactions in this case.
18 There were depositions of the people on both sides of the
19 transaction, documents were of course exchanged, so everyone
20 understands the complete flow of funds, route. Everyone
21 understands how the transaction was entered into and there's
22 been complete testimony on the parties' intentions in
23 connection with this transaction.

24 As Your Honor also knows, because I've stood up here
25 and said it before, this is one of the more difficult cases

1 from the debtors' standpoint, and we are very pleased that in
2 light of the issues involved and of the debtors' lack of full
3 control of this money -- put it that way -- we were able to
4 reach a settlement that is beneficial, I think, to everyone.
5 We do believe that under this circumstances getting \$2 million
6 of payment is a very good settlement for the debtor. Obviously
7 the parties had to take into account the risks of litigation,
8 the expenses that were going to be incurred going on and simply
9 the uncertainty of the outcome.

10 There are two matters I wanted to address beyond
11 simply the factors leading to why this settlement ought to be
12 approved. One is the extreme haste, if I will, with which this
13 order has been presented, and haste is the wrong word. Your
14 Honor did permit these settlements to go forward on two days
15 notice. And as I mentioned, these negotiations began last
16 week. And from the outset I think as Your Honor may also
17 recall from earlier proceedings, HCN, their critical interest
18 has been in the presentation of this matter to the public.
19 They're a public company. They have shareholders, they have
20 analysts and they have been concerned from the very start about
21 how the delay in this proceeding and the uncertainty regarding
22 such a large sum might affect their stock price and the general
23 appreciation in the market of HCN in their ongoing business.

24 They have, I understand, an earnings call on
25 Wednesday. They were insistent that if a deal was going to be

1 done it had to be done in time for them to be able to announce
2 that at the earnings call, or at least to be able to discuss
3 it. And that was a condition to the settlement and so we have
4 honored that and the parties are working very, very hard to get
5 a full record before the Court to get the motion in. I think
6 it's -- we filed the motion, we filed the stipulation and that
7 is what we want approved, Judge. The form of the order that we
8 submitted has been renegotiated and we have another form of
9 that order that provides exactly what I discussed. Again,
10 nothing more than the stipulation, just there's a little more
11 clarity and it fills in some of the details in the order that
12 have been in the stipulation. That's the first issue I wanted
13 to address.

14 The other issue I wanted to address was, what does
15 this mean for the protocol? I think this is good news for the
16 protocol. I believe that we have several other escrow cases.
17 There may not be more than three, Judge, but the debtor and the
18 committee are going to devote their attention now or some
19 attention to a review of the facts of those cases. And we
20 anticipate that efforts will be made to reach out to the other
21 escrow holders to try to reach settlements.

22 THE COURT: All right, very good. Thank you, Mr.
23 Kamin.

24 MR. KAMIN: Thank you.

25 THE COURT: Mr. Gibbs.

1 MR. GIBBS: Good morning, Your Honor. Chuck Gibbs.
2 With me is my partner Keefe Bernstein from Akin Gump, counsel
3 for the LES committee along with my co-counsel Lynn Tavener.
4 We are part of the movants in the joint motion to approve this
5 settlement under 9019(d). Committee wholeheartedly endorses
6 and supports the entry of an order approving this settlement.
7 We were integrally involved in the negotiation of the
8 settlement. Clearly, we'll characterize those negotiations as
9 being vigorous, at arm's length and in good faith. This
10 settlement is a material improvement over the settlement that
11 the debtor originally came to court a couple of months ago
12 under which they were going to resolve the claims of HCN where
13 HCN would get the money in the escrow account in exchange for
14 releases, so the estate is \$2 million enriched by this proposed
15 settlement. We don't think it has -- I agree with Mr. Kamin
16 that the settlement does not negatively affect the protocol and
17 in fact I think it positively affects the protocol.

18 The substance of HCN's claims have nothing to do with
19 the issues of whether or not a trust relationship exists
20 between the debtor and HCN. Their claims were that under
21 California law money in a third party escrow account is not
22 property of the estate. It's a singular issue different from
23 the issues, frankly, in front of the Court on the other four
24 test cases. So, we don't think that this settlement has
25 precedential value at all with respect to the issues before the

1 Court that you'll hear either in summary judgment or a trial on
2 th merits. We think it is a reasoned settlement given the law
3 and our evaluation of it, the best settlement that we think the
4 estate could hope for, and we think the estate will be
5 significantly better off if the Court approves it and we would
6 ask Your Honor to do so.

7 THE COURT: Thank you.

8 MR. SABIN: Good morning, Your Honor. Jeffrey Sabin
9 from Bingham McCutchen on behalf of the LFG Committee. We too
10 support in full this relief that's requested today. We hope
11 that you find cause so that this can close literally
12 momentarily after you enter an order, as time is of the
13 essence, as represented by Mr. Kamin, in terms of getting this
14 transaction done. But, for your consideration and but for a
15 finding of cause, we may not have this settlement. Clearly the
16 benefits of the settlement, not only to the LES Estate but to
17 the LFG estate, have been noted on the record. I don't need to
18 highlight those.

19 I just wish to highlight one other thing that has not
20 been covered but has just been referred to by Mr. Gibbs, and
21 that is in the order and in the stipulation we are asking the
22 Court to make clear that this settlement in no way, shape or
23 form is to be admitted as evidence in any other proceeding or
24 any other test case, whether it's in escrow, a segregated or
25 anything else, and shall not be interpreted one way or another

1 to create any kind of res judicata effect. Thank you, Your
2 Honor.

3 THE COURT: All right, thank you, Mr. Sabin. Mr.
4 Bernstein.

5 MR. BERNSTEIN: Your Honor, good morning. Michael
6 Bernstein of Arnold & Porter on behalf of Health Care REIT. We
7 join obviously in asking the Court --

8 THE COURT: I thought you were going to oppose this
9 or something.

10 MR. BERNSTEIN: I like a good fight when I can get
11 one, but not this morning.

12 UNIDENTIFIED SPEAKER: He doesn't think the estate is
13 getting enough.

14 MR. BERNSTEIN: But, not this morning. I just want
15 to touch on one issue here very briefly which is the timing
16 issue, and frankly ask for an accommodation from the Court.
17 And that is, as Mr. Kamin described, and I guess everybody has
18 now described, from Health Care REIT's perspective what was
19 driving this settlement was really not our perception of risk
20 on the merits here, it was simply timing. We think that the
21 discovery has shown that what we've represented from the outset
22 was absolutely true without qualification and that this is not
23 property of the estate and that we're entitled to these funds,
24 but timing is important to us. And the committee and the
25 debtors were skillful in their negotiation and they recognized

1 that timing was important to us and so we're paying \$2 million
2 essentially for timing here.

3 And so with that having been said, we have people in
4 our office in Washington and at Centennial Bank's counsel in
5 California and in other places standing by with -- near fax
6 machines and so forth so that all the faxes and the money can
7 be wired and the order can be wired and the instructions and
8 then the dollars and then our dollars back within 24 hours.
9 And if Your Honor approves the motion I'm wondering if there's
10 some -- what the fastest way that we could get an order signed
11 by the Court is because Centennial Bank isn't going to do
12 anything without an order.

13 THE COURT: All right, thank you.

14 MR. BERNSTEIN: Thank you, Your Honor.

15 THE COURT: Anything further?

16 MR. BERNSTEIN: No, Your Honor. Thank you.

17 THE COURT: All right. Does any other party wish to
18 be heard in connection with the proposed settlement?

19 (No audible response).

20 THE COURT: All right, the Court is --

21 THE COURT: Mr. Geller.

22 MR. GELLER: I'm sorry, Your Honor. Jay Geller on
23 behalf of -- proposed counsel to Matthew Luxenberg. Your
24 Honor, we take no position on the settlement, at all. However,
25 I am somewhat concerned by the comments that were just made by

1 counsel on what now is proposed to being added to the
2 stipulation about the lack of any res judicata or precedential
3 effect or anything of the sort. The settlement is what it is.
4 The parties may have their reasons for settling. It may be
5 timing, it may be because California Law says that this isn't
6 property of the estate. I have no idea of all the motivations
7 that the parties had, but the fact of the settlement and the
8 terms of the settlement are of public record and I just don't
9 want any suggestion that a party can't make arguments from the
10 fact of the settlement, the amount of the settlement and what
11 that says in all the other cases. Everybody is free to say no,
12 it doesn't have that effect. But, I don't want there to be
13 some sort of finding that there's a -- some sort of, you know,
14 silencing requirement that no one can ever discuss that this
15 ever happened or what it shows. And I'll address this a little
16 bit later in some of my other comments if I have that
17 opportunity. But, I just don't think that that's appropriate
18 at this point. The negotiations may be subject to Rule 408 of
19 the Federal Rules of Evidence, but the fact of the settlement,
20 I don't think is. Thank you, Your Honor.

21 THE COURT: All right, thank you.

22 MR. KAMIN: Your Honor, I just wanted to clarify,
23 there's nothing in the order with respect to the effect of the
24 settlement.

25 THE COURT: What I heard you say is one way or the

1 other it wouldn't be binding and that's I think the same thing
2 Mr. Geller is saying.

3 MR. KAMIN: Do you -- I'm sorry, Your Honor, if I
4 wasn't clear. There's nothing in the order on that. There is
5 something in the stipulation. I didn't mean to suggest
6 otherwise.

7 THE COURT: All right, thank you. Mr. Sabin.

8 MR. SABIN: Yes, just to clarify, Your Honor. The
9 order in fact approves the stipulation and there is express
10 language in Paragraph 11 of the stipulation in accordance with
11 what I outlined, which would be the notice of res judicata
12 effect. That was bargained for by the committee in terms of
13 its consent, and it is in Paragraph 11 of the proposed
14 stipulation itself which would be approved by the order. I'm
15 happy to hand it up for your consideration if you'd like.

16 THE COURT: Well, just so that I'm clear on that
17 point, Mr. Sabin, as I understand when we say it has no res
18 judicata effect that's not to say that parties can't refer to
19 it and argue one way or the other whatever they want it to say.

20 MR. SABIN: I will read it into the record and I'm
21 happy to hand it up so you have the proposed language in front
22 of you, Your Honor.

23 THE COURT: All right, why don't you hand it up and
24 let me take a look at it.

25 MR. SABIN: Surely.

1 (Pause)

2 THE COURT: All right, the Court has seen this. Has
3 Mr. Geller seen this language?

4 MR. GELLER: No, I have not, Your Honor.

5 THE COURT: I think it's relevant to your statements
6 so I think you ought to take a look at it.

7 MR. GELLER: Your Honor, I didn't know if you wanted
8 me to take the time right at this moment or pass this and go on
9 to some other things. I just -- I don't want to hold everyone
10 up, but I also think that we were certainly not a party to
11 these negotiations and I don't think there should be a gag
12 order on the other parties to this case or anyone else as to a
13 publicly entered settlement. If the committee or anyone else
14 doesn't want to be able to say anything about it that's fine,
15 but I don't think it should bind all of the interested parties
16 in this case. I'll be happy to take a look at it, but again I
17 --

18 THE COURT: I would like you to take a look at it now
19 because I would like to proceed with this.

20 MR. GELLER: Okay.

21 (Pause)

22 MR. GELLER: Well, Your Honor, the language -- and I
23 realize other people don't have this -- but this settlement
24 agreement is based upon the specific facts and it goes on and
25 says that the settlement agreement is not to be admitted as

1 evidence in any other proceeding. I don't have a problem with
2 that, but this notion about and shall not be used or
3 interpreted as indicative of any legal conclusions relating to
4 the issues arising in or related to the adversary proceeding
5 -- (a) I'm not exactly sure what that means, but I also don't
6 know, for example, Your Honor, the fact that they settled \$137
7 million case when they came into court on day one and said it's
8 property of the estate and then tried to settle for zero and
9 now are settling for \$2 million, to suggest that we cannot
10 argue that that says something about what the debtor perceives
11 about the strength of its case or the committee does.

12 They can certainly argue no, no, no, Judge, it had nothing
13 to do with that because here are all these different issues
14 that don't relate. But the notion that we're gagged and can't
15 make that argument I think is just improper and I don't think
16 it's warranted.

17 THE COURT: All right, thank you. Any other party
18 wish to be heard?

19 (No audible response).

20 THE COURT: All right. The Court is going to approve
21 the Settlement Agreement. I think that it's in the best
22 interest of the bankruptcy estate and all of the parties and
23 that it was the result of good faith arms length negotiation.
24 The Court will approve the order and the language in the
25 stipulation that was drawn to the Court's attention. Mr.

1 Bernstein, how quickly can you get an order sent to the Court's
2 inbox for entry?

3 MR. BERNSTEIN: I mean, I have a hard copy with me,
4 but I can call my office and I assume I can get it done within
5 a half-an-hour or maybe within five minutes.

6 THE COURT: All right, well if you send it to me I'll
7 take a look at it and maybe we can even take a recess and, you
8 know, as soon as I've been advised that it's in my inbox and I
9 can go enter that so that you can get things going.

10 MR. BERNSTEIN: Thank you, Your Honor. I appreciate
11 it very much, Your Honor. I'll go make the call right now and
12 see if I can get it done now.

13 THE COURT: All right.

14 MR. BERNSTEIN: Your Honor, I understand that there's
15 a physical signed order that we could pass up, but the
16 committee actually has the electronic version. I think the
17 Court is asking for the electronic version, is that correct?

18 THE COURT: The electronic version is what the Court
19 prefers. If you have a laptop computer with you there are
20 terminals in the conference room. You can hook up.

21 MR. BERNSTEIN: That would presume I know how to do
22 that. If I can be excused.

23 THE COURT: All right, you may be excused.

24 MR. BERNSTEIN: Your Honor, with respect to Item
25 Number 16 I just want to make sure that it's clear so that if

1 we're not here -

2 THE COURT: That's being continued.

3 MR. BERNSTEIN: That's being continued.

4 THE COURT: I understand.

5 MR. BERNSTEIN: Thank you, Your Honor.

6 THE COURT: Thank you.

7 (Pause)

8 MR. SABIN: May I proceed, Your Honor?

9 THE COURT: Yes, you may.

10 MR. SABIN: Next matter on the Agenda I think is the
11 committee of the parent creditors' motion for various
12 procedures under Section 1102(b), so as to have the committee
13 in compliance. There has been proper notice, there have been
14 no objections, no responses, and so I will be very brief and
15 indicate that the proposed order and the procedures are
16 consistent with this Court's entry of an order in Circuit City
17 and dates back to the Revco case where these procedures were
18 first set up in connection with the amendments to the
19 Bankruptcy Code. And those procedures in short order, Your
20 Honor, set up mechanisms for the dissemination of confidential
21 information if our creditor bodies call and say I would like
22 confidential information that otherwise has been delivered to
23 the committee by the debtors. It also has procedures for a
24 website to be set up. BMC Group, which has done this before,
25 will be assisting. And it has also in the order a mechanism

1 such that our monthly fee applications and quarterly
2 applications will include a special line item for the costs
3 associated with that website. And for all those reasons, Your
4 Honor, we ask that you would approve the proposed order in the
5 form that we submitted.

6 THE COURT: All right, thank you. Any party wish to
7 be heard in connection with this motion?

8 (No audible response).

9 THE COURT: All right. I've reviewed the motion and
10 the procedures and they are entirely consistent with the
11 Court's past practices and the Court will grant your motion.

12 MR. SABIN: Thank you, very much, Your Honor. The
13 next one is the committee's application to retain its financial
14 advisor Alvarez & Marsal. As I understand it that order is now
15 in chambers. The requisite consent from the U.S. Trustee's
16 Office has been obtained. There are no objections and so once
17 again we would simply ask that you would approve the
18 committee's retention of Alvarez as it's financial advisors.

19 THE COURT: Any party wish to be heard on this
20 motion?

21 (No audible response).

22 THE COURT: All right. That motion is granted, as
23 well, Mr. Sabin.

24 MR. SABIN: Thank you again. I'm going to turn the
25 podium back I think to Ms. Strickland.

1 MS. STRICKLAND: Good morning, Your Honor. The next
2 motion on the Agenda relates to the ability of the debtors to
3 sell the stock that it received from Fidelity National
4 Financial in connection with the sale that closed on December
5 22nd. There are no objections to this motion. The form of
6 proposed order has been revised and I just wanted to alert Your
7 Honor to one specific provision, and I can hand up a black-line
8 if Your Honor hasn't seen it.

9 THE COURT: I have not seen the blackline.

10 MS. STRICKLAND: Paragraph 4. And I have other
11 copies if anyone wants to see it. This is in Paragraph 4 and
12 it simply relates to the authority that the debtor has to take
13 all actions, execute documents, expend funds that are necessary
14 to carry out the provisions of the order, and the specific in
15 here relates to the retention potentially of a broker and
16 noting that that broker should be mutually acceptable to the
17 debtor and the LFG Committee. Certainly while the estate has
18 specifically reserved its right to come back to Your Honor and
19 notwithstanding any party's objection, including the LFG
20 Committee's, seek the ability to be able to sell the stock,
21 this order simply gives the estate the flexibility with the LFG
22 Committee's consent to sell the stock sort of, you know, a
23 standing authorization, if you will.

24 We understand that the LFG Committee has taken a
25 number of steps to figure out when the right time is, at what

1 price, through what mechanism is appropriate. They have a
2 protocol set up. They have a subcommittee of their committee
3 designed to assist with making that decision. And while it is
4 the business judgment of the estate when and how the stock
5 should be sold certainly that -- the fact that the LFG
6 unsecured creditors are the beneficiaries of that the LFG's
7 Committee's decision or thought process and recommendation is
8 probably the most important factor in forming the estate's
9 business judgment, and as such it is our current intention
10 absent something else occurring, which we do not anticipate, to
11 have the Creditors Committee guide our hand, if you will, on
12 that and tell us when it is they'd like to sell, on what terms,
13 what broker they'd like to use and so on and so forth. So on
14 that basis we ask that our Honor enter the order.

15 THE COURT: All right, thank you. Any party wish to
16 be heard in connection with this motion? Mr. Sabin.

17 MR. SABIN: Jeff Sabin from Bingham McCutchen on
18 behalf of the Committee. I very much want to thank the debtor
19 and Ms. Strickland for working our way through. This is an
20 authorization. This is not, to make it clear, a decision at
21 this point by the debtors with or without the consent of the
22 committee to sell any portion of that Fidelity stock at this
23 point. What it is is a mechanism so that at the right time
24 with the consent of the committee we could set up procedures to
25 sell some or all of that stock in a manner that maximizes the

1 value of that stock. And those procedures means that we will
2 not be coming back to court, by way of example, to retain, if
3 that's the way to do it, a broker.

4 And that as we understand it the debtor, consistent
5 with how it's been operating, consistent with its
6 representations to us, will be seeking our consent in terms of
7 the terms and conditions under which that broker is retained
8 and we don't have to come back to you. Same with when is the
9 right time to sell, whether you sell some, whether you sell
10 all, and there are a host of issues associated with that
11 decision. And therefore, at this point we submit that it is
12 within this purview to approve and authorize these procedures
13 without any further hearings. And of course, if the stock is
14 sold it will show up in the monthly operating reports in terms
15 of public disclosure thereof. Thank you, Your Honor.

16 THE COURT: Thank you. Mr. Gibbs.

17 MR. GIBBS: Not on this matter, but as a matter of
18 housekeeping I've just been advised by my office that the order
19 has been uploaded. The hard copy has been signed by all
20 counsel if Your Honor wants that, too.

21 THE COURT: The case administrator will need to
22 actually then put it into the system so that I can
23 electronically sign it and as soon as I get word that that's
24 done we'll take a brief recess and I'll go do that and come
25 back. So I'm waiting for that right now. With regard to the

1 order for authorizing the debtor to sell the stock the Court
2 will grant that motion.

3 MS. STRICKLAND: Thank you, Your Honor.

4 MR. SABIN: Thank you, Your Honor.

5 MR. MADDOCK: Your Honor, next item is Number 7 under
6 continued or adjourned matters. This is the debtors' motion
7 for a preliminary injunction staying the prosecution of a state
8 court proceeding in Wisconsin. The motion requests a stay with
9 respect to a lawsuit filed by Daniel and Sue Thelin (phonetic)
10 and the Femright Commercial Rentals, LLC (phonetic) in
11 Wisconsin State Court. The defendants in that action are Hans
12 Veit (phonetic), a former employee of Lawyers Title, and
13 Stephanie Robeson (phonetic), a former vice president of
14 LandAmerica Exchange Services.

15 The Thelin's are parties to a commingled exchange
16 agreement, approximately \$300,000 being held. They seek
17 rescision of their exchange agreement, allege fraud on the part
18 of Mr. Veit and Ms. Robeson. As Your Honor can surmise the
19 claims are similar to those in the other adversary proceedings
20 that have been filed and but for the fact that they didn't name
21 LES as a defendant the action would clearly be subject to the
22 protocol and be stayed in this court.

23 After filing the motion for the preliminary
24 injunction the Thelin's have agreed to a 90 day standstill of
25 the Wisconsin State Court action. Accordingly we request that

1 the Court continue this matter until the March 19th Omnibus
2 hearing date. We hope to use that time to further discuss the
3 matter with the Thelin's counsel and whether that action should
4 proceed.

5 THE COURT: All right, thank you. The matter will be
6 continued to March 19th.

7 MR. MADDOCK: Thank you, Your Honor. Your Honor, the
8 first of the contested matters is the debtors' motion for an
9 order to establish a bar date for filing pre-petition claims.
10 In the motion, Your Honor, the debtors request that a series of
11 bar dates be approved. First is that the Court establish April
12 6th, 2009 as the bar date for filing pre-petition claims in the
13 debtors' cases. Second, Your Honor, a proposed bar date for
14 governmental units to file claims of May 26th, 2009. That's
15 consistent with 502(b)(9), 180 days after the petition date.
16 Lastly, that lease and contract rejection claims be filed 20
17 days after an entry of an order approving the rejection of the
18 lease or the contract. Claims are to be filed with Epic
19 Bankruptcy Solutions, the debtor's court approved claims agent,
20 at addresses provided in the notice to be sent out.

21 Your Honor, in regard to notice attached as Exhibit C
22 to the motion is a proposed bar date notice. The debtors
23 propose to mail the notice of the bar date to all known
24 creditors, parties in interest and anyone entitled to notice
25 under the case management order and would provide that notice

1 within five days of entry of an order by this Court approving
2 that notice. Notice will also be sent to all State Attorney
3 Generals in states where the debtors conduct or formerly
4 conducted business, the PBGC, the EPA, SEC, FBI and applicable
5 state agencies.

6 A proof of claim form will be included as the Court
7 would expect. For those creditors whose claims have been
8 scheduled they'll receive an individualized proof of claim form
9 indicating the scheduled amount which debtor is applicable. We
10 also propose to provide notice by publication. There's a form
11 of publication notice attached as Exhibit D. We propose that
12 notice will be published in the Wall Street Journal and the
13 Richmond Times Dispatch at least 20 days prior to the general
14 bar date.

15 Your Honor, one point I would like to make. There is
16 a request for exclude parties who don't have to file a claim.
17 There's a reference to intercompany claims. I just want to
18 state on the record to be clear that that would include non-
19 debtors as well as the two debtors. There was one limited
20 objection filed K&L Property Holdings has filed a limited
21 objection. K&L, as the Court may recall, is a 1031 exchange
22 claimant. They do not object to the relief in general or the
23 establishment of a bar date, but argue that there should be an
24 exception for 1031 claimants. K&L argues that 1031 claimants
25 should not have to file claims until the Court has ruled on the

1 property of the estate issue in the five lead cases.

2 Your Honor, we would ask you to overrule the
3 objection. We don't believe there is any harm to 1031
4 claimants having to file claims on or before the bar date like
5 other creditors are required to. Unlike some other creditors,
6 perhaps many if not most of the 1031 claimants have spent more
7 time analyzing and formulating their claims than other
8 creditors. It certainly is evidence by the over 70 adversary
9 proceedings that have already been filed. And we don't believe
10 the claim process will be significantly impacted by whichever
11 way the Court may rule on the property of the estate issue.

12 If the exchange funds are determined not to be
13 property of the estate they'll simply -- they'll have a claim
14 against the trust funds in that case, and that would certainly
15 have to be taken into account to any objection the debtor might
16 file to a claim. Your Honor, on the other hand if the Court
17 rules that the exchange funds are property of the estate the
18 1031 claimants will simply hold a general unsecured claim
19 against the estate for the amount of those funds and any other
20 damages they may have asserted. And certainly if to the extent
21 a claimant has filed an adversary proceeding they're one of the
22 70 plus. The claim -- any objection to the claim could be
23 resolved as part of the resolution of the adversary proceeding.

24 Your Honor, having separate deadlines and a separate
25 process for the 1031 claimants is unnecessary. It would be a

1 burden to the estate. It would require separate mailings,
2 claim forms, notices. And simply put, Your Honor, I think any
3 perceived benefit of a separate or later process would be
4 outweighed by the costs, time and effort that it would take to
5 administer it. So, Your Honor, for those reasons we'd ask that
6 you overrule the objection and grant the motion to establish a
7 bar date.

8 THE COURT: All right, thank you, Mr. Maddock. Mr.
9 Buffenstein, you wish to be heard on your objection?

10 MR. BUFFENSTEIN: Good morning, Your Honor. Alan
11 Buffenstein for K&L Property Holdings Limited Partnership,
12 MacFarlane Family Trust and Elliot E. Scott Trust. Your Honor,
13 as Mr. Maddock has stated, we have filed an objection, a
14 limited objection, and it concerns me that the debtor is
15 concerned that there'd be additional language added to this
16 order that would simply clarify for all purposes that any of
17 the 1031 exchanges would not be prejudiced by this order. And
18 with the addition of that language to the order I see no harm.
19 When I first read the motion the first thing that popped into
20 my suspicious mind was that this was a potential trap for the
21 unwary who may file a proof of claim as a creditor.

22 But since the test cases, which may or may not be
23 controlling in this case, that remains to be seen, have not
24 been determined it seems that there would be no harm in adding
25 a simple provision to the order that in the event they file a

1 proof of claim that it would be without prejudice to their
2 right to establish that the exchange funds are trust funds and
3 that the exchangers have a claim to those funds. And the
4 debtor certainly has a list of all the exchangers and has the
5 amounts to which each of the exchangers would be entitled.

6 THE COURT: Well but the only prejudice you're
7 worried about that I perceive at all is this potential trap for
8 the unwary, that somehow you're prejudiced by filing a proof of
9 claim.

10 MR. BUFFENSTEIN: Well, if we -- if there's --

11 THE COURT: I mean, M. Maddock makes a very good
12 point. I mean, if the Court determines that they are trust
13 funds, everything in the commingled account, we still have to
14 then work out a way of filing claims against those amounts and
15 figure out how to distribute those amounts, so we're going to
16 have to have a claim, you know, made against it. And I think
17 this would be better to get the process going to that we can
18 get down the road on that and not delay distributing these
19 funds any more than we have to.

20 MR. BUFFENSTEIN: I'm not asking that the process be
21 delayed at all, Your Honor. It would not be delayed. 1031
22 exchangers would be free to file their proofs of claim. There
23 have been assertions made throughout since the beginning of
24 this case that the funds that are held by the debtor are
25 property of the LES Estate, and I'm simply asking that some

1 words be added to that order that would conclusively state that
2 any filing of a proof of claim does not mean -

3 THE COURT: Would not prejudice the exchanger on
4 that.

5 MR. BUFFENSTEIN: Right, from participating at a
6 later date in the claim for the exchange funds --

7 THE COURT: Well let me ask --

8 MR. BUFFENSTEIN: -- and not be deemed a creditor,
9 perhaps.

10 THE COURT: Well, let me ask what you're --
11 understand what you're asking. You're not saying exchangers
12 don't have to file a proof of claim. You're just saying that
13 you want to make sure that there's no prejudicial effect as a
14 result of filing that claim.

15 MR. BUFFENSTEIN: That is correct.

16 THE COURT: Okay, I understand your position. Thank
17 you. All right. Ms. Strickland.

18 MS. STRICKLAND: Your Honor, I think he makes a valid
19 point and we certainly are fine stipulating the fact that
20 because someone files a proof of claim they are not being
21 deemed to acknowledge that they are a creditor of the estate if
22 they are otherwise have a position that the property is not
23 property of the estate. That was not our intention and we're
24 not looking to create any sort of trap. But, we do want the
25 procedural mechanism of parties filing the claim so that we can

1 track who is claiming to be owed what.

2 THE COURT: Okay. And can we add that language to
3 the order that you submit --

4 MS. STRICKLAND: Absolutely.

5 THE COURT: -- so that everybody is comfortable with
6 that and we know that that's case.

7 MS. STRICKLAND: Yes, Your Honor. That was not our
8 intent.

9 THE COURT: All right, thank you. Mr. Sabin.

10 MR. SABIN: Good morning again, Your Honor. Jeff
11 Sabin from Bingham McCutchen on behalf of the LFG Committee. I
12 rise not to object, but to seek clarifications in connection
13 wit the final form of order. I think as you heard a reference
14 to what intercompany claims would be excluded. I understand
15 that we're dealing with Paragraph 17 of the motion itself
16 Subsection (e) which otherwise as currently drafted would
17 exclude only claims of any debtor against another debtor. And
18 as I understand from counsel's remarks that is not going to be
19 expanded so as to not mandate a bar date and not set a bar date
20 with respect to claims that non-debtor affiliates might also
21 have against any of the debtors in this case. And I just
22 wondered for clarification whether non-debtor affiliates is
23 intended to be only wholly owned affiliates or wholly owned and
24 controlled because there are a number of less than wholly owned
25 affiliates and there are a number of non-controlled affiliates

1 in terms of that definition. And perhaps after these questions
2 we can clarify for the record what the debtor intends by way of
3 that exclusion.

4 Secondly by way of a clarification,. I note, Your
5 Honor, that there is a proposed date for governmental units to
6 file claims and that's May 26th. And I rise again only in the
7 context of making sure that I understand another section inside
8 the proposed order, which is section 12. Section 12 is the
9 section that otherwise says as part of this order that if there
10 is after entry of your order a change to the debtors' schedules
11 that there will be another 30 day period in effect to change
12 your mind and amend your claim. And I assume that for
13 clarification if the schedules were changed before the May 26th
14 governmental unit date, by way of example, that the
15 governmental unit would not have the advantage of another 30
16 days, if you will.

17 And I rise only because our initial review of the
18 schedules before LFG filed in this case would suggest to us
19 that there are claims of governmental units that are disputed
20 that haven't been listed as disputed in the schedules, and so I
21 wouldn't want that technical change of the debtor filing an
22 amendment to the schedules to list as disputed a governmental
23 unit claim to in essence add to the bar date of May 26th. And
24 with those clarifications, Your Honor, the Committee otherwise
25 supports the relief requested. Thank you.

1 THE COURT: All right, thank you, Mr. Sabin. Mr.
2 Gibbs.

3 MR. GIBBS: The LES Committee would join in the
4 concerns expressed by counsel for the LFG Committee. We would
5 like those clarifications incorporated in any order Your Honor
6 enters. We do oppose the request to expand the exclusion to
7 include non-debtor affiliates of any kind. We know what the
8 debtor filed in the way of its schedules and statement of
9 affairs for the LES case and listed the claims of the parent
10 that the parent asserts in this case, but we are unaware of
11 what claims might exist by other related parties in court or
12 out of court and we don't understand the reason why a bar date
13 shouldn't apply to those non-debtor affiliates whether
14 controlled or wholly owned. In evaluating this case we need to
15 know what claims are out there by other related parties and we
16 don't understand any reason for expanding the scope of the
17 exclusion to include those non-debtor related parties.

18 We also would agree to what I understand to be the
19 language that might fix the concern expressed by counsel for
20 the limited objector. I really think they're wanting to make
21 sure that the order that's entered doesn't act as -- if they
22 filed a claim timely that it doesn't act as an admission
23 against interest, and I think that may be the appropriate way
24 to address it in the language of the order.

25 THE COURT: All right, thank you. All right, Mr.

1 Maddock, do you wish to give us some clarification on the two
2 points raised by Mr. Sabin?

3 MR. MADDOCK: Your Honor, in regard to the first
4 point about the non-debtor affiliates, we would propose the
5 affiliates that are being discussed be wholly owned or
6 controlled with the -

7 THE COURT: Wholly owned or controlled.

8 MR. MADDOCK: -- or controlled with the idea being to
9 try to reduce the overhead because we're talking about the same
10 individuals and entities having to prepare them. In regard to
11 the second point about the schedules being amended in the 30
12 day period, certainly it would be the later of. If they're
13 amended and the applicable bar date hasn't run they would have
14 until the bar date. If the 30 days would run afterwards they
15 would have the 30 days.

16 THE COURT: All right, thank you.

17 MR. MADDOCK: And we we'll be glad to settle the
18 order on both committees prior to submission.

19 THE COURT: All right, very good. Thank you. All
20 right. The Court is going to grant the motion with the
21 understanding that we're going to have clarifying language
22 that's without prejudice to the positions of the exchangers,
23 and that the exclusion will apply only to controlled and wholly
24 owned affiliates and not to any other affiliates, and that the
25 language in Paragraph 12 will refer to the later of, the bar

1 date or the 30 days.

2 MR. MADDOCK: Thank you, Your Honor.

3 THE COURT: All right.

4 MR. MADDOCK: Your Honor, the next item is Number 9.

5 This is -

6 THE COURT: Excuse me just one minute.

7 MR. MADDOCK: Sure. Your Honor, the next mater is
8 LandAmerica 1031 Exchange Services' application to retain Zolfo
9 Cooper and Jonathan Mitchell as chief restructuring officer. I
10 think as Your Honor is aware, Mr. Mitchell is serving as CRO of
11 LFG, the parent company, and Zolfo Cooper has been retained in
12 that case to assist Mr. Mitchell in carrying out those duties.
13 The order approving Zolfo Cooper's retention in the LFG case
14 made clear that to the extent there were to be services
15 provided to LES that a separate application had to be filed,
16 and that's what you have before you today. And to effectuate
17 that, Your Honor, on January 8th the debtors entered into an
18 amendment to the underlying agreement between Zolfo Cooper, Mr.
19 Mitchell and LFG to provide services to LES and to have Mr.
20 Mitchell serve as CRO t the LES estate.

21 Pursuant to the agreement Mr. Mitchell will serve as
22 CRO, Zolfo Cooper will provide services necessary to
23 administer the estate. Because LES as you know is not
24 operating since the petition date, it's more of an
25 administrative function, they participated and assisted LES in

1 preparing their monthly operating reports, for example. Your
2 Honor, under the agreement Zolfo Cooper will be compensated in
3 the same manner and on the same terms as they are compensated
4 for services they provide to LFG and Zolfo Cooper will submit a
5 separate monthly invoice for services performed for LES
6 separate and distinct from LFG.

7 Your Honor, there were two objections filed. Both
8 committees filed an objection on the ground that the debtors'
9 bankruptcy estates should not be jointly and severally liable
10 for services provided to the respective estates. The debtors
11 agree with that contention and wish to make clear that each
12 estate will be liable for only those services provided to that
13 estate. The LES Committee also objected to the extent Zolfo
14 Cooper was to receive a contingency fee as provided in the
15 underlying agreement for the sale of LFG assets it was not
16 intended that Zolfo Cooper would receive a contingency for
17 services provided to LES. We've discussed this matter with
18 counsel to the LES Committee and agree that for any services
19 provided to LES Zolfo Cooper would simply be compensated based
20 on their hourly rates. Based on the need for these services
21 and the hopeful resolution of the committee objections we would
22 request that the application be approved.

23 THE COURT: All right, thank you, Mr. Maddock. Mr.
24 Gibbs, you wish to be heard?

25 MR. GIBBS: Just to confirm, Your Honor, that with

1 those changes that counsel for the debtor just annunciated on
2 the record we no longer oppose the application.

3 THE COURT: All right, thank you. Mr. Sabin.

4 MR. SABIN: Your Honor, given the representations
5 that there will no longer be any joint and several liability of
6 the estates the committee has no problems with the proposed
7 amended form of order approving this. Thank you.

8 THE COURT: All right, thank you. All right,
9 Mr. Maddock, your motion will be granted.

10 MS. STRICKLAND: Your Honor, the next mater on the
11 Agenda is the debtors' motion to modify the order authorizing
12 cash management with respect to the LES Estate. This may be
13 the most lengthy matter on the Agenda, so I don't know whether
14 or not there was going to be -

15 THE COURT: Why don't we take a five minute break
16 because I want to check on the status of Mr. Bernstein's order.

17 (Recess)

18 THE COURT: Before we begin, Mr. Bernstein, I've
19 signed your order so it's been entered.

20 MR. BERNSTEIN: Thank you, very much, Your Honor.
21 May we be excused?

22 THE COURT: You may be excused.

23 MR. BERNSTEIN: Thank you.

24 MS. STRICKLAND: Your Honor, resuming with the motion
25 to modify the LES cash management order. Obviously a lot of

1 pleadings were filed in opposition. I'll set the table and
2 then I'll sit down and allow the objectors to say what they
3 will and then I'll respond. It's clear that people are
4 understandably upset. The state of the economy is abysmal,
5 people all over whether they are affiliated with LandAmerica at
6 any point in time have lost a lot of money. That doesn't mean
7 that when you write a pleading and say that money has been
8 stolen or that things are criminal or this is horrible and
9 horrendous, it doesn't make it true. There have been and there
10 will be a lot of debates in this case over what is and is not
11 an administrative benefit to the estate, but Chapter 11s don't
12 run themselves and we've got in the LES case this protocol on
13 litigation associated with it and the plaintiffs want discovery
14 and that requires not just lawyers, but vendors and parties who
15 are not ethically or contractually obligated to perform absent
16 payment.

17 Beyond that litigation and the protocol the LES
18 Estate has the need to take steps to mitigate losses and also
19 to realize what could be substantial value through the
20 assertion and prosecution of substantial claims against third
21 parties that belong to these estates. This can't be done for
22 free and the committee and the LES stakeholders are anxious for
23 those efforts to get underway.

24 The order that has been proposed has three basic
25 components. The first is that to the extent it deals with

1 professionals that it be subject to customary disgorgement.
2 The objectors have noted that this imposes an additional burden
3 and that now in addition to the suits that are already underway
4 they're going to have to sue for disgorgement. That is not
5 what this decretal paragraph contemplates. In the same way
6 that all of our fees have to be allowed pursuant to an order of
7 Your Honor and the fee requests and compensation procedures, if
8 there is no money at the end of the day and this case is
9 administratively insolvent we don't get paid and any amount
10 that we've been given has to come back. And that's not for an
11 LES litigant or any other third party to have to bring.
12 There's no burden. That's just a formulation that already
13 exists. This is merely for point of clarification.

14 Except for the professional fees where that overlay
15 already, notwithstanding this form of proposed order exists,
16 these are parties that are either going to do business with LES
17 or they're not. They do not have the same requirement that
18 those of us sitting at these tables have. And if we say to
19 them, Look, this is an issue that parties are disputing as to
20 whether or not this is property of the estate, this is property
21 that's held in trust or this is property of a third party, so
22 we'll let you know, we're not going to have an estate to
23 administer. And that is to the detriment not just of the
24 estate and its creditors who are not taxpayers, but it's also
25 for the taxpayers.

1 In addition to just figuring out the limited pie and
2 who's going to get what and whose it is, there are assets of
3 this estate that are outside the money that is being fought
4 about before Your Honor day in and day out. There are
5 substantial claims. If we as one party suggested just convert
6 this case or if we, you know, behave as if this is not a
7 Chapter 11 where there could be meaningful recoveries here it
8 will be a fait accompli.

9 There is a reservation of rights proposed in
10 Paragraph 7 of the order that does deal with the issue that we
11 were speaking of earlier today as to reserving all rights on
12 the characterization of funds. But, I think that this order
13 has to just deal with the practical reality of having an entity
14 in Chapter 11 where things just are not free.

15 So, with that I think there is a basis both under
16 363. I think there's a basis under 105. We have heard
17 suggestions that, you know, it's not fair. LFG should pay for
18 this. I have no idea what authority is being asserted for
19 that, but I can't find any of think of any. There have been
20 arguments made that we're taking it all out on the commingleds
21 and that the segregateds should bear the burden. I think to
22 the extent that we get to the resolution of all of the matters
23 dealing with the protocol and the test cases, whatever it is
24 that is deemed to be property of the estate certainly can bear
25 their pro rata share of whatever expenses there are to

1 administer this estate.

2 It's notable that when we were dealing with the
3 application to retain Zolfo Cooper, both committees took the
4 position that they wanted to be absolutely sure that neither
5 estate was paying for the other estate's administrative
6 burdens. And, yet when it comes to this, that is exactly the
7 argument that the LES committee seems to be making.

8 So, I think, yes, it is not without a shadow of a
9 doubt that home runs could be hit against the estate in every
10 single action. We don't think that's even remotely probable,
11 but that's for Your Honor to assess at the appropriate time.
12 But, I think that we do need to deal with the practical
13 realities here and we do need a modification of this relief in
14 order to ensure that value can be preserved for everyone
15 including parties who are claiming that the assets at issue are
16 not the property of the estate.

17 THE COURT: All right. Thank you. Who wants to go
18 first, Mr. Sabin?

19 MR. SABIN: Your Honor, in many ways I find myself
20 sort of on the outside of this particular fight as our
21 committee obviously has unencumbered assets from which to look
22 to to administer its estate. I'd like to try to address what I
23 think are a host of related issues on this agenda together
24 with, at least, two orders that have already been entered. So,
25 let me first identify the various motions and the prior orders.

1 I think the motions include, without limitation, not only the
2 debtors' motion to modify cash management, but the various
3 motions seeking 503(b) determination for today from the test
4 plaintiffs and/or motions to retain, in essence, lead counsel
5 for the Group A class.

6 So, all of those are related and they're related to
7 two prior orders, an order of this case and the LES matter
8 entered on, I believe, it was November 28th which is the
9 original cash management order and an order establishing
10 interim fee procedures which, in short, basically requires the
11 debtors' professionals and the committee professionals at both
12 levels on a monthly basis to give to each other and to the U.S.
13 Trustee their, in essence, short form fee applications subject
14 to quarterly look/see by this Court and otherwise do provide
15 for, I believe, if there are no objections, 85 percent of
16 actual time, 100 percent of expenses.

17 I break it down because I think that parties are not
18 similarly situated given the history of the various motions
19 beginning with the protocol motion in your order and the
20 various hearings including January 12th and January 19th in
21 terms of 503(b). I believe that the debtors' professionals --
22 including without limitations Zolfo now, and the 1031
23 committee, are very different in terms of their involvement and
24 their looking, than the test case plaintiffs which effectively,
25 at least, one or more have already asked for and/or been

1 granted 503(b) status subject to filing appropriate
2 applications for this Court's consideration.

3 The first thing I want to point out is that some of
4 these 503(b) motions on for today go a step further. They, in
5 essence, ask for payment now and for treatment now under the
6 interim fee procedures order itself. And, so the first thing I
7 would like to point out is that I do not think that is
8 appropriate. I have never seen a 503(b) applicant be paid in
9 advance of the determination of the application itself which is
10 almost always after the work is done as opposed to pay as you
11 go.

12 So, from our understanding the expenses already, if
13 this Court were to approve what is being asked for, is that the
14 \$2 million which is now the only true unencumbered asset of
15 this estate from this morning's settlement with Healthcare
16 Management, is not going to be enough to cover the debtors'
17 professionals under 1031, the 1031 committee and its experts
18 and financial advisors and the 503(b). And, so for all of
19 those reasons, Your Honor, if this Court were to consider that
20 it is appropriate, notwithstanding the continuation of the test
21 cases, to fund debtors' expenses or 1031 expenses and/or the
22 503(b) expenses in advance we support this motion. And we
23 would also suggest that if the concern is that it should not
24 simply be the commingled funds that should be the source of
25 payment subject to this Court's review of applications, then

1 perhaps we should do it pro rata based upon the dollars in the
2 various categories.

3 So, by way of example, if you have dollars in escrow,
4 dollars in segregated and dollars in commingled, you would in
5 essence -- not just use commingled, but you would use all of
6 those categories as a funding mechanism if, indeed, pay as you
7 go is something that you think is proper for both debtors'
8 professionals, 1031 committee and 503(b).

9 Secondarily, Your Honor, in no way, shape or form
10 should the LFG estate be burdened with any obligation either to
11 lend money to 1031 or to be jointly and severally liable for
12 the expenses that in essence are running up at the 1031 level.
13 There is nothing in the record that indicates to the contrary.
14 Indeed, the original November 28th order does not permit
15 funding from LFG to LES other than for payment of miscellaneous
16 vendors in the ordinary course and documented by an inter-
17 company payable and repaid, at least, monthly and sometimes
18 more frequently. And that's language I'm paraphrasing from the
19 November 28th order.

20 And so, unless, of course, we have some kind of
21 finding of fact, which I don't understand how it could exist
22 while the test court issues on whose property is it is around,
23 there has no -- there has not been any establishment and will
24 not be as part of Phase 1 about liability of LFG to 1031. And,
25 indeed, it's just the contrary. The schedules filed by the

1 1031 debtor, indeed recognize a 60 some odd million dollar
2 claim that the LFG case -- LFG estate has against 1031. So,
3 from our perspective, Your Honor, the most important thing is
4 to protect the LFG estate itself and in no way, shape or form
5 should the relief in any way, directly or indirectly, obligate
6 the estate for the expenses that are running up.

7 Secondarily, we do support the debtors' motion
8 whether it's commingled funds or whether it's all of the funds
9 being used, at least at a minimum, to take care of the estate's
10 professionals who otherwise are charged in this Chapter 11 of
11 doing their duty, which they are doing in the test cases, which
12 would be the beneficiaries of that would be the debtors'
13 professionals and the 1031 committees.

14 As for the 503(b) plaintiffs, I defer obviously to
15 you in terms of what you had in mind on January 12th and
16 January 19th. But, I think the essence of it was just like any
17 other 503(b) applicant, we know that, Judge, we're going to be
18 a test case litigant. We know that we're going to have
19 expenses. What we would like to know is that we will have an
20 administrative claim at the end of this test case process and
21 that the only issue will be when you read our application
22 what's the right amount and that makes sense because at that
23 point in time they will have won or not won in whole or in part
24 as to what is or is not an asset of the 1031 case. Thank you,
25 Your Honor.

1 THE COURT: Thank you, Mr. Sabin.

2 MR. GIBBS: Good morning, Your Honor, Chuck Gibbs
3 again on behalf of the LES committee. We filed an objection to
4 this debtors -- to the debtors' motion to modify the cash
5 management order. Our papers lay out the concerns that the
6 Committee -- my committee has and the objections that we have
7 to the request. As a threshold matter we think that to the
8 extent any cash management order should be modified, it should
9 be the cash management order that was entered on November 28 in
10 the LFG case which Mr. Sabin just summarized for the Court,
11 modified to clarify that LFG can continue to advance monies as
12 they always did pre-petition and as they're specifically
13 authorized to do during the course of this case, but expanded
14 to permit LFG to advance to LES those funds necessary to fund
15 the administrative expenses being incurred by the LES estate
16 whether professional or third party vendor and they would
17 expressly have an administrative claim in the LES case to
18 secure and to insure repayment of those advances. That's the
19 only modification that the LES committee thinks is appropriate,
20 not the modification of the necessarily the LES cash management
21 order, but, in fact, the cash management order entered in the
22 LFG case.

23 We think that Your Honor was comfortable with and
24 contemplated a continuation of the interchange and the
25 interplay between these companies and in a manner consistent

1 with what -- how they did their business pre-petition. That's
2 specifically what the LFG asked for in its cash management
3 motion. So, that's the Committee's first desire is that Your
4 Honor modify the LFG cash management order to specifically
5 authorize LFG to advance monies to LES on an administrative
6 priority basis or a secured basis, if necessary, to cover the
7 administrative expenses being incurred, at least, until the
8 Court has determined some of the threshold issues regarding
9 ownership of that property listed by LES on its assets and
10 statement of affairs and schedules.

11 The debtor, we believe on an absolute -- the debtor
12 being LES -- on a worst case basis is going to have
13 substantial -- currently illiquid, but substantial assets from
14 which to pay administrative expenses similar to the kind that I
15 think the Court should order LFG to incur and that those assets
16 are causes of action against the sellers of the auction --

17 THE COURT: Are you saying I should order them to
18 incur those expenses or authorize them to make the payments?

19 MR. GIBBS: The latter, Your Honor. It was loose
20 language. Thank you. I would ask you to enter an order
21 authorizing them to incur expenses by -- that would be
22 represented by advances of cash to LES and to fund those those
23 expenses that are being incurred on an ordinary course basis
24 such as the electronic vendor that is providing all of the
25 discovery to all of the plaintiffs and to the committee -- the

1 committees and the five test cases. But, there are causes of
2 action which LES holds, we believe, against the sellers of the
3 auction rate securities that haven't been commenced yet that we
4 think have enormous value.

5 To Your Honor -- to the extent Your Honor determines
6 that trust relationships exist we don't conceive of any legal
7 basis upon which the commingled or segregated customers could
8 assert that those causes of action are owned by LES in trust
9 for the benefit of those customers. Similarly, we think the
10 claims against directors and officers for malfeasance and
11 against the insurance policies that are owned by these debtors
12 are also assets that are not going to be the subject of any
13 determination by the Court even on a best-case basis if you
14 looked at it from the -- through the prism of the customers,
15 would be property of any trust.

16 Thirdly, we think there are third parties that would
17 be culpable for either negligence or more overt actions that
18 allowed what we believed to be a Ponzi scheme to have existed
19 for several months before the commencement of these cases where
20 assets -- where customers' money were used to fund other
21 customers' 1031 exchanges. And those kinds of causes of
22 action, we believe, exist even on a -- even if you looked at
23 the customers' claims of trust in a most beneficial light they
24 wouldn't extend to those kinds of assets, so we think there's
25 adequate assurance that the LFG estate would be repaid the

1 advances that would -- might be necessary to pay their third
2 party expenses as well as their professional fees in accordance
3 with the fee procedures order until at least Your Honor has
4 ruled on the question of ownership of the remaining assets of
5 the debtors' estate. We are highly confident Your Honor's
6 going to rule that those funds, whether they be in a segregated
7 accounts or in the so-called commingled accounts, belong to the
8 estate, but it at least would provide a mechanism to allow LES
9 to fund its expenses between now and then.

10 Alternatively, Your Honor, if you -- if the Court is
11 not inclined to modify the cash management order entered in the
12 LFG case, we think that Your Honor should clearly provide that
13 any funds that are advanced from the LES estate to pay
14 professionals are clearly subject to disgorgement and I think
15 counsel for the debtor clarified that on the record. And I
16 think Your Honor would certainly intend that any interim fees
17 we get are clearly subject to any final order anyway and that
18 will probably obviate the concern of my committee on that
19 issue.

20 And lastly, as we pointed out in our papers, we see
21 no basis for invading only those funds which are characterized
22 as commingled estate funds for the payment of any fees as
23 requested in the debtors' motion. At the very least they
24 should be -- the funding of those expenses, if Your Honor may
25 authorize, should come pro rata from all of the assets that the

1 debtor has claimed to be theirs. By my calculation there will
2 be 137 million that will be transferred out of the Centennial
3 account here in a matter of hours or by -- within 48 hours at
4 least to HCN. That will leave by the debtors' statements
5 roughly 90 million of what they assert to be funds held in
6 segregated accounts as well as roughly \$46 million in treasury
7 bills and part of that are face value \$201 million of auction
8 rate securities.

9 And I leave that the Court -- leave it to the Court
10 to figure out what an appropriate pro rata allocation might be
11 amongst those various pots of assets that the debtor has listed
12 on its schedules, but to only look to the commingled customers
13 I think is inequitable and inappropriate.

14 THE COURT: Thank you.

15 MR. MAXWELL: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. MAXWELL: Rich Maxwell on behalf of the
18 Unofficial Ad Hoc Committee of Commingled Exchangers. Your
19 Honor, we as a group represent numerous commingled exchangers
20 who are listed on our objection.

21 Your Honor, this motion is premature. What it seeks
22 to do is to defeat the protocol that the Court had set up to
23 determine whether these assets monies that were deposited were
24 property of the estate or the trust fund. And they seek to
25 subvert that process and have the Court in advance determine

1 that they're entitled to these funds. It more premature now,
2 Your Honor, because there is already a \$2 million fund that
3 they can access to pay these expenses.

4 Your Honor, I think it's inappropriate to do that
5 because we were here on the first omnibus date and at that time
6 every counsel for every exchanger said these are trust funds.
7 These are trust funds. And the Court used, and I think
8 everybody in the court knew, the effect of the determination of
9 whether those funds were trust funds or the property of the
10 estate. If they're trust funds they're not available to pay
11 the professionals and everybody understood that.

12 We then move on to, Your Honor, to --

13 THE COURT: Why does that necessarily follow? I
14 mean, let's say that the Court was to rule that everything is
15 a -- or held in trust in this case. We still have to figure
16 out a mechanism to get the monies back to the parties. We know
17 that there's going to be shortfall, so there's going to have to
18 be some sort of pro rata way of doing that. We're going to
19 have to come up with a mechanism and aren't we going to need
20 professionals to figure out how we're going to do all of that
21 one way or the other?

22 MR. MAXWELL: Well, first, Your Honor, I'm not
23 convinced that there will be a shortfall. As Mr. Gibbs --

24 THE COURT: That would be wonderful.

25 MR. MAXWELL: Well, I don't have a crystal ball, Your

1 Honor, and I don't meant to be clever on this, but there's
2 obviously actions that need to be brought against the persons
3 or entities that sold the auction rate securities. And in this
4 case, Your Honor, it only takes about a 70 percent recovery on
5 the auction rate securities for all the exchange -- for all the
6 commingled exchangers and, in fact, all the exchangers to be
7 made whole. So, between the those actions, between other
8 actions that Mr. Gibbs had talked about I maintain hope that
9 there will be a resolution and I think it's important to focus
10 on that global resolution in this matter.

11 Now, Your Honor, going to your point about if there
12 are not sufficient funds to do that, I don't disagree with the
13 Court. However, I think that at that point which what the
14 Court is really looking at is a common trust fund analysis and
15 were those funds -- were the imposition of those expenses, did
16 they result in the generation of the common trust fund? And I
17 think that's a different analysis than professional fees in a
18 Chapter 11 case.

19 Now, I'm not so sure that the development of this
20 protocol and the litigation of all these issues which resulted
21 from the debtors taking its position in day one that these are
22 all property of the estate as opposed to coming in and taking
23 the position, yes, these are trust funds and we need to find a
24 way to do that so we don't have to engage in all this
25 litigation. I'm not so sure that those fees and expenses would

1 qualify under that theory that yet -- remains yet to be
2 determined, but those are my thoughts, Your Honor.

3 Your Honor will also know that we came in here -- the
4 protocol started as a result of the 9019 motion to pay back all
5 the segregated money. The commingleds objected and we had this
6 protocol. Now, Your Honor, it appears that what they want to
7 do is get back to that same situation and charge only the
8 commingled holders of this money, not LFG, not the segregated,
9 not anybody else, as Mr. Gibbs detailed to the Court, that, we
10 believe, is inappropriate. If the Court were to do it then
11 everyone who gets the benefit, be it LFG, the segregated or the
12 commingleds, in fact, that is a benefit, ought to pay for that.

13 Also, Your Honor, this idea of disgorgement, in the
14 objection I analogized that the commingleds deposited their
15 money with LES. We're having to chase it now. If there is to
16 be disgorgement we're going to have to chase it again if the
17 Court determines it and the harm to the commingled holders at
18 this time in ordering that these monies be taken, is
19 disproportionate to the short delay until the Court determines
20 whether these funds are property of the estate or not. We're
21 talking about trials in April and we're end of February now.

22 Your Honor, there is also in the motion a threat that
23 if these fees aren't paid that they're going to have to convert
24 the case to Chapter 7. Well, we know they now have \$2 million
25 that they didn't know at the time they filed the motion. But,

1 we believe that that threat is no more than puffery and, in
2 fact, if they brought a motion to convert the case the
3 commingled exchangers would hardly support that motion.

4 Your Honor, finally, the case law -- when we get to
5 case law, the case law that they cite has no support for their
6 position. I looked at the cases. They deal with whether you
7 can have a sale of all the assets of a business under 363 as
8 opposed to a plan of reorganization. There's nothing in there
9 that says that you can take money that, at least, arguably at
10 this time belongs to the commingleds and pay it to someone else
11 to finance the operation of the estate.

12 Also, Your Honor, their 105 case has nothing to do
13 with that and I've cited the Court something that I think the
14 Court already knows is you can't use 105 to justify any action
15 that you want in the case. So, Your Honor, for those reasons
16 we think it's premature at this time. Maybe after if the Court
17 discerns if it's not property of the estate -- I'm sorry, that
18 it is property of the estate then it's appropriate to bring
19 that motion.

20 We also think that if the Court is inclined to grant
21 the motion at that time, which I hope it does not do that, it
22 should require that the money be paid first from the \$2 million
23 that it has and then after that from LFG. And if that's not
24 sufficient then from segregated and commingleds pro rata.
25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. WOLFE: Good afternoon, Your Honor, Craig Wolfe,
3 Kelley, Drye and Warren, on behalf of Millard Refrigerated
4 Services and 12 other parties and five adversaries. The group
5 of clients that we represent are 1031 exchangers that are put
6 into the segregated category. We've done our very best to stay
7 out of this dispute. However, it's been squarely implicated
8 today by the -- both committees actually suggesting that if the
9 relief is granted that the funds in the commingled accounts as
10 well as the segregated accounts be tapped to pay the
11 professional fees. We strenuously object to that.

12 Your Honor, those funds in the segregated accounts
13 are sitting in accounts "for the benefit of our clients" and I
14 think to order or to authorized the debtor to start using those
15 funds would be completely improper because it would presume
16 that they are property of the estate. And I don't want to
17 repeat all of the arguments that you've already heard, but I
18 think this is getting very much the cart before the horse.
19 It's presuming that they are property of the estate and I
20 believe it's wholly inappropriate.

21 I also want to focus the Court on how this would be
22 done if we were in a different type of case, for example, a
23 Chapter 7. Happens all of the time when there are no proceeds
24 to litigate causes of action the Chapter 7 Trustee finds
25 counsel to do things on a contingency fee. And then if there

1 are avoidance actions, for example, they settle a few out, they
2 fund their war chest and they continue. That's the way it's
3 done.

4 And here what we're assuming is that we can take
5 money from, for example, these avoidance action defendants to
6 fund the Trustees' case against them. Just simply doesn't make
7 sense in our view, so we would strongly oppose any sort of
8 order that would permit any tapping of the funds that are in
9 segregated accounts. Thank you, Your Honor.

10 THE COURT: What about just the ordinary expenses,
11 that second category that Ms. Strickland mentioned because we
12 seemed to be focusing on professional fees, but just, you know,
13 the third party vendors that the estate has to deal with just
14 to keep this estate afloat long enough so that, you know, if we
15 go the way that you suggest is going to be the ruling and such
16 we can make sure that things are still, you know, propped up?

17 MR. WOLFE: Yes, I understand, Your Honor. And I
18 think it raises a good question and when I discussed the
19 Chapter 7 model that I just stated I'm not sure that that model
20 can't be used here in the context of this Chapter 11.

21 For example, I think it's actually operating. I
22 think what the debtors have done and the committees have done
23 is right. I think they've started at the very top of the list
24 where they probably have the greatest likelihood of success on
25 the merits and they've assessed that action, the HCN matter

1 that was just settled today, and they settled it out quickly
2 and they funded their war chest. I think they now have \$2
3 million to pay those types of expenses.

4 With respect to professionals which I think are going
5 to be far and away the greatest expense in this case, I think
6 that they're going to have to wait or we're going to have to
7 convert this case to a Chapter 7. But, in any case I think
8 it's inappropriate to presume the conclusion that they're going
9 to win on the property of the estate issue.

10 THE COURT: All right. Thank you.

11 MR. SAVENKO: Good morning, Your Honor, Troy Savenko
12 also on behalf of a number of segregated account holders in
13 this case and I would note first of all just join in the
14 comments raised by Mr. Wolfe on behalf of similarly situated
15 clients and claimants in this case. But, secondly and more
16 importantly that my understanding is, is that this motion that
17 the segregated claimants would share pro rata -- and this is
18 technically only been raised to this Court and the response
19 filed to the original motion like Mr. Wolfe stated. My clients
20 were not particularly concerned with the original motion raised
21 by the debtor, but now that the issue has been put before the
22 Court today I would just like to note that technically, you
23 know, we do not have a procedure or a motion before the Court
24 specifically requesting that we tap into those funds that the
25 segregated account holders have. And, so to the extent that

1 the Court is inclined to address that issue I would ask for the
2 opportunity to properly address the matter.

3 THE COURT: All right. Thank you.

4 MR. WOLFE: Thank you.

5 THE COURT: Any other party wish to be heard?

6 MR. GELLER: Good morning, again, Your Honor, Jay
7 Geller on behalf of a number of commingled exchangers and
8 proposed counsel for the test case plaintiff, Luxenberg.
9 Judge, I'm just struck -- I'll be brief. I'm struck by a
10 number of the comments. You hear the LFG Committee stand up
11 and say we support this as long as it doesn't come out of LFG.
12 And then you hear the segregated account holders say we didn't
13 have any problems with this motion as long as it was coming out
14 of the commingleds. And then you have the commingleds who are
15 standing up and saying well, this shouldn't happen at all
16 because we think it's our money and not for the estate to use.

17 I don't envy Your Honor. I think this is a difficult
18 situation. I understand that Chapter 11, you know, you want to
19 see it run and run smoothly and have parties, both
20 professionals and third party vendors, who are not stuck with
21 these expenses. But, I just would like to point out one fact
22 which is we did not create this situation. We mean the
23 commingleds, generally, okay. We did not take the steps to buy
24 auction rate securities and have them become a liquid when we
25 thought that our money was being held. We did not choose to

1 file Chapter 11. We did not retain all the professionals who
2 knew about the risks and knew about the arguments that were
3 being raised.

4 I am sensitive. I, frankly, respect immensely the
5 argument and the objection that was made by the LES Committee
6 because obviously they would like to see their counsel paid and
7 yet they're standing up and saying it's not the right time.
8 It's not appropriate. It's premature. Everybody understood
9 the situation. There's two million more dollars --

10 THE COURT: I thought he said that the other estate
11 should pay it.

12 (Laughter)

13 MR. GELLER: Well, right. Your Honor, I left that
14 one out. Yes, they're saying LFG should pay it. Everybody's
15 saying take it from somebody else. Don't take it from me. And
16 what I come back to is maybe what you're hearing is it's not
17 the right time. It's -- it is premature. It's not ripe yet.

18 The other thing that I would like to say, Your Honor,
19 I didn't know exactly when I was going to raise this point, but
20 it seems as though maybe now is the right time and I -- it's
21 not a matter that's before the Court today, but it was raised
22 implicitly by the HCN settlement that Your Honor has now
23 approved. And that is this, exchangers are saying it's our
24 money, it's not the debtors' money. That's the gist of this
25 case. The debtor has taken the position and it's moved. It's

1 been a bit of a moving target. Day one they said it's all
2 about our money. Settlement motion they say, well, the
3 segregateds and the escrows are not our money and then they
4 backed off that or -- and now HCN has been one settlement.

5 Parties are litigating. There are I don't know how
6 many lawyers are in this room today, how many lawyers have been
7 attending these depositions? It does seem to me that when you
8 look at where this is ultimately going to come out there are
9 very few creditors at these cases other than exchangers. So,
10 if exchangers win they're going to take all of the property
11 that currently exists.

12 Mr. Gibbs raised the question well, could anyone
13 assert arguments to causes of actions and proceeds as causes of
14 action? Leaving that aside, but the money that's there today,
15 the exchangers are -- if they win they take it all. And if the
16 debtors win it's property of the estate and except, perhaps,
17 for the LFG parent claim it's all going to go to the same
18 exchangers. They're really no other creditors here and when
19 you have a scenario like that, I am watching and I'm one of the
20 attorneys who's proposed to be counsel for a test case
21 wondering why are we spending this kind of money litigating
22 when the ultimate recipients are going to be the same?

23 And my point to get to it, Your Honor, is, I wonder
24 whether it's time -- everybody's very busy litigating and their
25 focus is there, whether Your Honor ought to consider under Rule

1 16 in the Federal Rules of Civil Procedure, sending the parties
2 to a mediator, perhaps another Judge in this jurisdiction who
3 is willing to undertake it very soon, not waiting two or three
4 months until all of the money has been expended, but to send
5 the parties with representatives, the test case commingled
6 folks perhaps would be the right people for them. There's a
7 test case for the escrow that's now been settled, but there are
8 other escrow folks and the segregateds, to send them in and try
9 to get this settled because we're burning through money that's
10 ultimately going to wind up going to the same parties anyway.

11 Other than that I just -- I have to concur that it's
12 just premature to hand out money as much as I realize it
13 creates problems I just think that it is trying to go and
14 disgorge from these third party vendors is going to be very,
15 very difficult. Who knows whether they'll be solvent when the
16 time comes. I think you're potentially giving away other
17 peoples property at this point if you do that. So, I would
18 concur on the objections that have been made to date. Thank
19 you.

20 THE COURT: Thank you, Mr. Geller, and it has crossed
21 the Court's mind about some sort of a mediation or settlement
22 conference. In fact, I've spoken to one of the other Judges in
23 this district about his availability and willingness to take
24 that on, but I don't know that that's before me today.

25 MR. GELLER: Well, it -- I don't -- and I'm not sure

1 exactly. I guess there could be a motion to compel, but I also
2 believe that under Rule 16 Your Honor has the authority to
3 conduct these pretrial scheduling orders and to direct the
4 parties sua sponte. I don't think there has to be something
5 before you and as I sit here and think about all we're doing is
6 spending the money that's basically going to go to the same
7 people anyway, I really think that that has some merit to it.
8 Thank you, Your Honor.

9 THE COURT: All right. Thank you, sir. You wish to
10 be heard?

11 MR. MILO: Your Honor, Steve Milo from the law firm
12 of Wharton, Aldhizer and Weaver, we represent Circle K Stores.
13 Circle K has four exchanges with the debtor, four -- roughly
14 \$4.7 million. We have started an adversary proceeding. We are
15 not a test case. We are not members of the ad hoc unofficial
16 committee, but share in all the views that are being voiced
17 here in objection to the debtors' request to change the cash
18 management system.

19 The only reason I rise, Your Honor, is because there
20 are a lot of different interests, segregated, ad hoc, non-ad
21 hoc. We just rise, Your Honor, to tell you that as a pure
22 segregated -- I mean, I'm sorry, unsegregated non-ad hoc,
23 non-committee creditor, we, too, join in the opposition for the
24 debtors' request for relief.

25 THE COURT: All right. Thank you.

1 MR. MILO: Thank you.

2 THE COURT: Mr. Hopper?

3 MR. HOPPER: Good morning, Judge. For the record,
4 David Hopper on behalf of Charles Lumber Company. Charles
5 Lumber Company is too a non-segregated individual exchanger in
6 this matter. We support the objections that have been raised.
7 It is as a number of people have said, at least, premature and
8 in essence what you've being asked to do is to take money that
9 may not be part of the debtors' estate and we assert strongly
10 is not part of the debtors' estate and give it away to somebody
11 else. I thought it was interesting that counsel for the
12 debtors made note that although there had been suggestion that
13 LFG should somehow be required to fund this litigation and to
14 fund the LES expenses, that she could find no authority
15 whatsoever for that proposition.

16 Well, Judge, they cited no authority for the
17 proposition that you can take money belonging to the exchangers
18 and fund the litigation. All they have cited is 363 sale cases
19 and the 105 motion case and the Court, with all due respect,
20 has no more authority to take money that does not belong to the
21 estate and give it to another party then to order us to pass
22 the hat in this room and fund the litigation.

23 THE COURT: But, don't we have to come up with a
24 mechanism to be able to fund this process, you know, when we
25 call a Chapter 11 case or whatever it is? If you are right and

1 it's still trust fund, we have to have a vehicle that will
2 allow us to go through exactly what Mr. Geller was saying, the
3 same kind of process that will allow the monies to be
4 distributed whether we call it a plan, whether we call it
5 something else. We're going to have to come up with a vehicle.

6 MR. HOPPER: Part of that I agree with. The other
7 part though is that what we're here being asked to do is to
8 fund the litigation against us to keep the money out of our
9 hands. That's different than saying well, we know that this is
10 all our money, but there's not enough of it because they're out
11 of trust. Now, we must come up with the mechanism for
12 distributing it.

13 THE COURT: Well, that may be ultimately where we get
14 it.

15 MR. HOPPER: Well, but the expenses that are being
16 asked to be paid now and what's before you is ongoing
17 litigation. You've heard them say they want to pay the
18 professionals to assist them in the litigation and document
19 production and so forth. Those are all things that are
20 designed to say we get to keep the money that we stole. And I
21 know they don't like that word, but --

22 THE COURT: That's not what's going on. I mean, the
23 point is trying to pay for the expense of being able to get to
24 some sort of point where it can be resolved --

25 MR. HOPPER: Well, what you --

1 THE COURT: -- and we're trying to do it as quickly
2 as possible.

3 MR. HOPPER: What you have is the debtor saying this
4 is our money. We want to hold on to it and you have the people
5 over here from whom they got it saying --

6 THE COURT: The debtor only wants to disburse this
7 money. They just don't know who to give it do.

8 MR. HOPPER: Well, that's not what they've said.
9 They speak in terms of, you know, hitting a home run and, you
10 know, how much of this they can keep and that's the way they're
11 arguing this and that's the way they postured it.

12 THE COURT: Who are they keeping it for?

13 MR. HOPPER: Well, that's what I don't know --

14 THE COURT: Well, I mean --

15 MR. HOPPER: -- other than the huge inter-company
16 receivable. That's the problem. They're keeping it for what
17 purpose, I don't know. I agree. I think the thing should be
18 in Chapter 7 because --

19 THE COURT: Well, we'd still have to fund it. I
20 mean, there's -

21 MR. HOPPER: You would still have to fund it, but
22 here's the thing. If you have litigants outside of bankruptcy
23 who say this is my money and on the other hand, no, this is my
24 money. And they're arguing and they're arguing and they can't
25 agree and they don't have the money to defend their position.

1 Well, then guess what, they lose. You don't have the other
2 side pay your expenses to maintain your point -- your position
3 in the litigation and if this debtor can't fund the litigation
4 against it, then it ought to lose.

5 THE COURT: What does that mean? I mean, we still
6 have to figure out how, you know, who does the money belong --

7 MR. HOPPER: Okay.

8 THE COURT: -- to and how are we going to distribute
9 it and how can we do that in an expeditious fashion?

10 MR. HOPPER: Okay. Assume --

11 THE COURT: And how do we fund that?

12 MR. HOPPER: Assume for a moment that they lose and
13 it is not property of the estate, clearly. Then you have the
14 money sitting in these accounts and there has to be a certain
15 amount of pricing done to determine whether or not it's going
16 to be a pro rata or whatever.

17 THE COURT: Who's going to pay for that? Who's going
18 to pay for the accountants?

19 MR. HOPPER: At that point, at that point, the people
20 with the stake in the money whose money it is can decide how to
21 fund it and how to pay for it. The exchangers can hire
22 professionals and do that part of it, but they're -- it is much
23 different to say at the point we are now we're going to fight
24 and we're going to pay for the other side to try to keep this
25 money in the estate. It would be much different -- and, in

1 fact, and in a Chapter 7 the expenses would be much less I
2 would submit. And if that were the only issue then it could be
3 dealt with more expeditiously.

4 THE COURT: Why would it be less expense in a Chapter
5 7? I don't understand that, at all.

6 MR. HOPPER: Well, I don't think the room would be
7 quite as full, but be that as it may, just like any other case
8 if the State does not have the funds, if it is insolvent it
9 should be in a Chapter 7. And if what we're being asked to do
10 is to fund a pay for with our own money a mechanism for
11 divvying it up amongst ourselves, that's something that's a lot
12 more palatable to these exchangers than the notion of you want
13 to take my money and pay lawyers and other people to keep it
14 out of my hands.

15 THE COURT: Well, and I understand your position on
16 that, but obviously one of the things we're trying to figure
17 out in this case is whether you're correct or not. And that's
18 something, again, we have to be able to fund.

19 MR. HOPPER: Well, but we shouldn't have to fund
20 that. Now, it's simply premature as a number of people said.
21 You're going to make determinations in these test cases as to
22 that issue and it would seem to me that you could get to that
23 determination for another \$2 million and then cross the bridge
24 of what do we do then. And for those reasons we would ask the
25 motion be denied.

1 THE COURT: All right. Thank you. Any other party
2 wish to be heard, Mr. Van Arsdale?

3 MR. VAN ARSDALE: Robert Van Arsdale for the U.S.
4 Trustee, Your Honor, this probably is as difficult as
5 situations get in terms of what this Court should do at this
6 particular juncture. You have people in the courtroom who have
7 done yeoman's work for -- to try to come to a resolution of
8 some topics and legal ideas that have proven illusive even
9 though they seem simple on their face. You have people that
10 say that's my money. And somebody says no that's really mine.

11 The suggestion was made that this would be cheaper if
12 we were in a Chapter 7. I don't think it would make any
13 difference at all, and probably in my experience, could get
14 more expensive if we were in a Chapter 7 and had one more layer
15 of administrative costs involved. And one of the things that
16 my office has been looking at very carefully is whether we
17 should have an examiner in this case or not. Right now the
18 Creditors' Committee has employed a team of people who are
19 looking through the books and records and right now we're
20 satisfied that the work that they're doing is good enough so
21 that we would have some sense if something else was going wrong
22 with this case because that's the other thing that we have to
23 worry about whether there's something else that could go wrong.

24 I do think people who work on these cases deserve to
25 be paid. The people who represent LES at this point, they

1 didn't create the problem anymore than the people who were
2 exchangers and gave them money. They just didn't. They're
3 trying to solve the problem. People that work on the committee
4 are trying to solve the problem.

5 I think there should be sort of an in between place
6 that everybody could get to. We do have \$2 million that will
7 soon be in this estate that could help defray these expenses
8 and charges that have been placed against the estate. And to
9 the best of my recollection from the 341 meeting that we had
10 that's the only clear money that's in this estate. The
11 testimony from the principal of the debtor was that all the
12 money that they had came from exchangers at the time of the 341
13 meeting.

14 So, this is it. This \$2 million is it. I think if
15 we judicially use that money and everybody understand that for
16 right now they can't get 100 percent of what they need. I
17 mean, at this level after the charges that have been incurred
18 even with \$2 million, we're administratively insolvent. But,
19 that would give us some time to get further into the process to
20 hopefully make the determination necessary without dipping into
21 further funds for sometime, and that would be my suggestion to
22 the Court.

23 THE COURT: Mr. Van Arsdale, what -- could the Court
24 fashion some other type of relief, for instance? What -- could
25 the Court to the extent that monies are used on a pro rata

1 basis to fund expenses give a lien to the -- if the Court was
2 ultimately to determine that it was not property of the estate,
3 give a lien to those people to the extent that a portion was
4 used on these causes of action and other things that Mr. Gibbs
5 was talking about?

6 MR. VAN ARSDALE: I think that could be crafted in
7 some way. The other thing that's possible, we could give both
8 sides of the counsel table a bundle of the auction rate
9 securities. They'd be able to have those and hold and know
10 that they were safe somehow because it was theirs or not. But,
11 yes, Your Honor, I do believe that that is -- what the Court
12 has suggested is something that's certainly within the Court's
13 power. Sometimes when cases come up that really they are
14 fairly unique, you need to come up with unique solutions to the
15 problems presented.

16 But, in general, I must agree with Mr. Geller. And I
17 think it's something that when this case first came in, our
18 office and other people looked at it and knew that if it wasn't
19 handled creatively that what was going to happen is it was
20 going to be opening up the drain at the bottom of the pool and
21 eventually the pool would be empty. And that's what we see
22 happening right now and we hope that with some creativity on
23 all parties' parts that we can not let that happen.

24 THE COURT: Thank you. Any other party wish to be
25 heard? Ms. Strickland, you -- oh, I'm sorry.

1 MR. HALL: Your Honor, briefly, Jerry Hall for two
2 family trusts. And, Your Honor, all I wanted to do, given the
3 length of the hearing on this motion already and the fact that
4 it's all ground that's been well covered, is just add one quick
5 point for emphasis which is this is really the Court's
6 opportunity to impose discipline and to impose discipline on
7 the way in which the litigation -- even this motion is probably
8 an example of the number of opposers and the varying viewpoints
9 that have been raised. And we would ask, of course, that the
10 Court deny the motion, but to the extent that the Court's
11 inclinations are otherwise, and I appreciate the Court's
12 concern for how to fund what is inevitably going to be funded
13 at any point which is the distribution of the money whoever's
14 it is, however it gets distributed, the Court take the
15 opportunity to tighten the screws as is appropriate. It's, you
16 know, it's the entire economy. Those vendors don't have, I
17 presume, a lot of other opportunities, you know, for example to
18 be doing work with this kind of volume and this kind of
19 magnitude whether or not they get paid right away, whether or
20 not they get paid on a percentage basis I'm sure they're going
21 to stick around.

22 THE COURT: Thank you.

23 MR. WOLFE: Your Honor, Craig Wolfe, Kelley, Drye and
24 Warren for Millard and a few others. One final point on this,
25 if the Court is inclined to grant the motion we would ask the

1 Court that it permit the debtor to use the commingled funds
2 prior to using the segregated. I don't think anyone in the
3 court --

4 THE COURT: That was Mr. Geller's point, exactly.

5 (Laughter)

6 MR. WOLFE: Well, what -- it was and the point I'm
7 making is that, Number one, there isn't a motion on file with
8 respect to the segregateds. It came out in oral argument. It
9 came out in the oppositions to the motions and statements in
10 response to the motion, so that's one reason. The second
11 reason is I don't think anybody in this courtroom can deny that
12 they're -- that the five categories or, at least, three
13 categories, the escrow, the segregated and the commingleds,
14 fall within different likelihoods of success. I think
15 commingled is at the bottom. And if we lose at the segregated
16 level and our funds are determined to be property of the estate
17 they're going to be sitting there and there can be an
18 adjustment at that point in time.

19 What we don't want to have happen is this -- us
20 prevail on the segregateds and then have those funds diminished
21 so the exchanges can't take place. So, I think that what I'm
22 asking doesn't prejudice the commingleds. But, what it does is
23 it sets up for an orderly exit out of this case. If I'm right
24 and these settle out in the hierarchy of the likelihood of
25 success then we can do that. It facilitates that and it leaves

1 -- you know, we can resolve it all kind of at the last piece
2 which would be the commingleds. Thank you, Your Honor.

3 THE COURT: All right. Thank you.

4 MR. SABIN: Your Honor, Jeff Sabin on behalf of the
5 Committee. I rise only to address two or three questions and
6 some issues raised by the objectors. One, if this Court were
7 to entertain considering liening up causes of action or
8 potential causes of action at 1031 whether in any way, shape or
9 form for professionals or otherwise I think it would require a
10 motion under Section 364, inappropriate notice.

11 Point Number 2, the Committee would have no problem,
12 in essence, deferring the use of assets which, as I recall, the
13 schedules themselves for 1031 take the position that the
14 cash, that the marketable securities and the RSs are property
15 of the estate. And let's not forget where we started from
16 which, is the debtor takes a position they are property of the
17 estate.

18 The emergency motion on November 28th tied up the
19 assets to try to continue a status quo, if you will, on 60 some
20 odd actions. And, so I think that when you try to wrestle with
21 the difficult issues that you've heard the pros and cons and
22 otherwise to and fro on, let's not forget the timetable set up
23 by your protocol order. Discovery is now over other than
24 expert discovery. That was February 20th.

25 Number 2, that to the extent parties want to file

1 summary judgments, and I believe some will be forthcoming,
2 those are now potentially before you within less than a week.

3 Number 3, trial, assuming we need to go to trial,
4 would be a little more than a month away in April. And, so I
5 would suggest to you that when we really think through the
6 timing issues that have been raised by the objectors, perhaps
7 the most equitable resolution of the issue would be to use the
8 \$2 million, at least, to deal with those vendor issues as
9 opposed to the professionals, and hopefully the various
10 parties' papers make may very well lead to the kinds of
11 settlements like healthcare and/or change in positions so that
12 we can have a little more clarity when you next have to address
13 the issue. But, in the meantime, at least, the vendors who are
14 supporting this Chapter 11 can get paid from the only
15 unencumbered assets which are the \$2 million. Thank you, Your
16 Honor.

17 THE COURT: Thank you. Ms. Strickland, before
18 anybody else gets up why don't you --

19 MS. STRICKLAND: I will apologize in advance because
20 I'm trying to answer everyone's points. I'm not sure that this
21 will be the most organized presentation, but I hope that it
22 will be comprehensive.

23 Mr. Maxwell made the argument that I think
24 highlighted the quandary. He said that he and others that are
25 similarly situated had their sights on two things, the

1 litigation and distribution of the known assets that everyone's
2 been fighting about, as well as the pursuit of litigation of
3 additional assets which Mr. Maxwell and we think may be so
4 valuable as to eliminate the shortfall. So, I would disagree
5 that this is not necessarily a case where we're talking about a
6 pool of water and this is just a matter of opening the drain
7 and letting it all run out. This is something where to the
8 extent we can make lemonade out of lemons. We'd like the
9 ability to do so.

10 I agree with a lot that has been said with a lot of
11 parties in opposition. Unfortunately, they may be right, but
12 they're making the exact same identical arguments. To say that
13 we are seeking to use somebody else's money to litigate against
14 them is the identical argument, I believe, that was made by
15 parties who were seeking payment under 503(b) who are
16 litigating against the estate and then saying they are
17 benefitting the estate through that litigation. So, I'm not
18 going to pretend that I don't see the circularity of lots of
19 arguments including potentially my own, but they're on all
20 sides and the practical issues that Your Honor recognized still
21 exists. These things cannot be done for free.

22 How I wish they could also be done for \$2 million.
23 Of course, we will use the \$2 million that no one is fighting
24 over first. That goes without say. We're not picking on
25 anyone. We understand that everybody wants to say I have no

1 problem with this relief as long as it comes from that guy. I
2 think, you know, it's great that Mr. Sabin has so much to say
3 on this because it has nothing to do with the LFG estate and I
4 think his sole purpose --

5 THE COURT: At least he hopes not.

6 (Laughter)

7 MS. STRICKLAND: -- for being here was to clarify
8 that very point.

9 We do agree with Mr. Wolfe that there is a hierarchy
10 in terms of probability of outcomes. There is a reason why HCN
11 was settled. Those assets were held in escrow. That's a
12 different situation. When you go back to before any of this
13 occurred there was a difference in the way that the LES estate
14 treated the money. The money that is now referred to in this
15 courtroom as the commingled funds was used by LES, it's money
16 to operate that estate. The money which is now referred to as
17 the segregated money, sat in a bank account.

18 So, when people talk about continuing the ordinary
19 course, whatever that means in this very extraordinary
20 situation, the position that we've taken is not inconsistent.
21 I believe that we are all showing a lot of discipline and I
22 think that was somewhat of an unnecessary gratuitous comment,
23 but I understand the frustration from whence it came. We have
24 no need right now to set up an elaborate pro rata system for
25 litigation that's going to come out.

1 The thing that I do happen to believe is premature is
2 figuring out whether or not other than the so-called commingled
3 funds, which have always been used as property of the estate,
4 and I understand the property of the estate is an open issue
5 for some purposes, but the continued use of that to sustain LES
6 is something that when and if other scenarios dealing with
7 commingleds are -- or I'm sorry, segregateds or escrows are
8 ever determined to be property of the estate there can
9 absolutely be a reallocation. We are not making a motion today
10 to figure out some elaborate system of if this than that will
11 allocate this way or that way and there are three pots of cash
12 and we can allocate various ways. There's no need to cause
13 more headaches than we all already have. Our motion stands as
14 it was made and I don't think that we have a notice issue with
15 respect to that.

16 In terms of liening up causes of action, we're
17 certainly not opposed to that although I question whether or
18 not that's really necessary. Because as Your Honor pointed out
19 when we bring these actions and we recover money everyone has
20 said we know what the known universe of claimants are. We
21 aren't going to be paying, you know, bonuses to Willkie Farr
22 Gallagher with that money, it's going to go back to the parties
23 who have claims in the case. Whether or not they have a lien
24 on it or not, the exact same thing is going to come about. So
25 I don't know whether that extra layer, although it may make

1 people feel more comfortable that they had that secured word or
2 that lien word attached to it, I'm not sure that it really is a
3 distinction with a difference.

4 The counsel for Luxemburg said, you know, gee, it's
5 going to be really difficult to disgorge from third party
6 vendors. To be clear, there are separate provisions in the
7 order. We are not proposing to disgorge from third party
8 vendors, we don't think we have the ability with an order that
9 reserves any right against those parties to continue to operate
10 the estate. We don't think that is practical. We don't think
11 that's in the best interest of any stakeholder, so I wanted to
12 just make sure that that was clear.

13 With respect to Mr. Van Arsdale's comments, there's a
14 reason why the \$2 million for better or for worse isn't going
15 to cut it here. I mean, we have Velco Cooper as a chief
16 restructuring officer who is effectively acting as the CEO of
17 the debtors. We have forensic accountants that are there at
18 the behest of the committees. We have third parties who have
19 no historical relationship with this company as well as
20 management where, you know, people have made a lot of baseless
21 allegations and people have said words today like Ponzi Scheme
22 and, you know, someone put a very creative line I'll have to
23 remember for another case of, you know, this is the people
24 killing their parents and then complaining that they're an
25 orphan. These are all things that, you know, in tough times

1 make for interesting reading. But there have been no facts
2 that have shown that anyone has done anything wrong anymore
3 than the state of the news when we turn it on every single day
4 that this country is in dire straits. And other than Mr.
5 Madoff and a few others, it's not thought to be this big
6 criminal conspiracy. It's just the way things have gone
7 unfortunately.

8 So I think we need to have our eye on the ball, that
9 we all need to do as much as we can as quickly as possibly --
10 possibly, and -- as quickly as possible, and as efficiently as
11 possible to figure out who owns what, get out of these Chapter
12 11 cases with as much restored to their rightful place as
13 possible, whether it is through, as we believe, payment of
14 claims against the LES estate, or whether it's as some other --
15 others believe, return of property in certain limited
16 situations where that may be warranted.

17 But we just can't -- we can't do it for free. It has
18 to be paid for. It has to be paid by someone, and to say that
19 the exchangers can decide whether to use their money when the
20 appropriate time comes, which ones? Are the commingleds going
21 to decide or the segregateds going to decide, or the escrowed,
22 the ad hoc, the non-ad hoc?

23 Just today we heard some people say they would
24 support the conversion of the case. Some people say they don't
25 think the cases should be converted and they would oppose that.

1 To think that these parties who are claiming this is all their
2 money are going to come in and say, oh, no problem, you know,
3 we'll fund this in a way that we think makes sense, is also not
4 -- not particularly persuasive.

5 So we -- we understand that this is a difficult
6 situation. We haven't heard anyone here allege that anyone is
7 doing something wrong, inefficiently, delaying things. We're
8 all just doing the best we can to put our heads together and
9 solve this problem.

10 All of our fees are subject to review. People can
11 look over our shoulder, as they do all day long, and that's
12 fine. But to think that we can all just put this off for
13 another day and that the Chapter 11 is going to take care of
14 itself and be free, is just unfortunately not the case. So we
15 -- we ask that Your Honor consider our motion in that context.

16 THE COURT: All right. Thank you. The Court is
17 going to grant the motion, and allow the operating expenses to
18 be paid out of the monies held by -- first the 2 million and
19 then thereafter out of the other monies that are held in the
20 debtor's accounts.

21 The -- to the extent that the Court ultimately might
22 rule that the commingled monies are property -- are not
23 property of the estate, but are held in trust, the Court will
24 grant a lien to those exchangers, to the extent of any causes
25 of action that the debtor might -- that the debtor has and

1 might ultimately recover in the case, so that they would be
2 made whole from that.

3 But I think that in the short term we need to find a
4 way to finance this Chapter 11 going forward. And I agree with
5 Ms. Strickland. I think everybody in this room is working
6 very, very hard to solve a problem that collectively we share,
7 and we've got to get to the bottom of it.

8 And I know everybody's going fast and furious and
9 we're going to try to get there, you know, as soon as we
10 possibly can. So that's the Court's ruling. Any questions
11 with regard to the Court's ruling? Yes, Mr. Wolfe?

12 MR. WOLFE: Yes. Craig Wolfe, Kelley, Drye and
13 Warren. One question. You're granting the order as submitted
14 by the debtors, meaning pertaining only to commingled?

15 THE COURT: That's right.

16 MR. WOLFE: Very good. Thank you, Your Honor.

17 THE COURT: Ms. Strickland, what's your pleasure? Do
18 you wish to plow through all of this now, or do you want to
19 take a break and come back or what --

20 MS. STRICKLAND: It's completely up to you, Your
21 Honor. I -- my -- there's one that's listed on here as matter
22 11 that I think is related enough that we should --

23 THE COURT: All right.

24 MS. STRICKLAND: -- we should deal with that. Sorry
25 -- or 12 is the same, but -- Lingerfelt. So you want to go

1 with 12 and then we'll --

2 MR. GIBBS: I don't care.

3 MS. STRICKLAND: Let's do it like that just to stay
4 in order. Your Honor, the next motion is to employ David
5 Lingerfelt as a consultant to the LES estate. There were,
6 again, some objections filed to this application. The basic
7 gist of this is that there are -- there is the need to have
8 someone facilitate closing out exchanges that Your Honor
9 approves, like the HCN.

10 There is also another subsidiary of LES called
11 Building Exchange Company that does reverse exchanges of a non-
12 debtor that does not implicate LES, other than to the extent
13 that if those reverse exchanges are not facilitated, LES then
14 has potentially additional claims asserted against it. And we
15 certainly don't need anymore of those.

16 He is being paid on an hourly basis. Although there
17 is contemplated to be a six-month term to the agreement, it can
18 be terminated at any time. Mr. Lingerfelt had been deposed in
19 connection with the 1031 litigation. I know that the LES
20 committee had wanted an opportunity just to review that.

21 One of the things that was of note during that is
22 that Mr. Lingerfelt is not and was never in a position of
23 determining what types of investments the company would make.
24 And you know, it's difficult enough to recruit someone to come
25 back and work for a debtor on an hourly basis when there's no

1 prospect of long-term employment.

2 I would submit that it's much more difficult after
3 people file motions without any basis or facts, citing that
4 person as an alleged criminal. So it's a wonder he's willing
5 to actually continue to do the services that he's been --
6 agreed to provide at the -- to the estate, but we do believe
7 that it is a prudent act for the debtor to retain this
8 individual. It is supported by business judgment. It is not
9 prejudicial to any party and we ask that the motion be granted.

10 THE COURT: All right. Thank you.

11 MR. GIBBS: Your Honor, the LES committee had
12 initially filed an objection to this application. We did
13 participate in and in fact took to that position, I believe,
14 with Mr. Lingerfelt in connection with ongoing discovery. We
15 understand more fully the benefits that we think he can provide
16 to the debtor's estate in this interim basis.

17 We understand that the term of this is six months,
18 terminable by either party, and don't know the extent of the
19 weekly commitment, but on balance the committee is of the
20 opinion that the additional expenditure that's being sought to
21 employ this consultant is likely money well spent.

22 And we certainly don't find a reason to challenge the
23 debtor's business judgment on this, and so for that reason
24 after further discussions with the debtor and the information
25 gathered from the deposition, we have -- we're here to withdraw

1 our opposition.

2 THE COURT: All right. Thank you, Mr. Gibbs. Mr.
3 Sabin.

4 MR. SABIN: Your Honor, on behalf of the parent
5 committee, we likewise now withdraw our opposition, especially
6 in light of your immediately prior ruling that it will be only
7 assets of the 1031 that in essence will be used to fund the
8 compensation that otherwise would go to Mr. Lingerfelt.

9 THE COURT: Thank you.

10 MR. SABIN: Thank you.

11 THE COURT: Mr. Hopper.

12 MR. HOPPER: David Hopper, on behalf of Charles
13 Lumber Company. Judge, we filed an objection to this
14 application. I'll note that the agenda that was put up on
15 Friday had the application with drawn. It's back on now. We
16 object very strongly to this.

17 Counsel for the debtor made allusion to baseless
18 allegations being made, but we laid out in our motion -- in our
19 opposition --

20 THE COURT: I've read your opposition.

21 MR. HOPPER: -- everything about it. His name is on
22 something that is a materially false representation made to my
23 client about the existence of those funds, and I cannot tell
24 you how strongly my client felt about the notion that that
25 individual would be paid to associate and continue working for

1 this debtor, and that there was an application pending to pay
2 him with my client's money, essentially, without disgorgement
3 at the end of the case, which is -- Your Honor has now ruled
4 on.

5 The debtor's counsel herself said in her final
6 comments on the previous motion that the money in this
7 so-called commingled account was used prior to the institution
8 of the bankruptcy case to fund the debtor's operations. That
9 in itself is an admission of embezzlement, because my client's
10 agreement -- I won't speak to anybody else's because there are
11 a bunch of different kinds of agreements -- but my client's
12 agreement says that money will be held at Sun Trust Bank and
13 used only to facilitate the exchange.

14 So if what she said is true, they have themselves
15 admitted to criminal activity. And as I say in the motion and
16 in the opposition, Mr. Lingerfelt himself made a specific,
17 untrue representation that my client relied on in signing a
18 contract for a piece of replacement property.

19 We see no reason to employ that individual in this
20 case. If they need help closing exchanges, there are plenty of
21 people out there that know how to close exchanges that aren't
22 tainted in the way he is.

23 THE COURT: Thank you. Anybody else wish to be
24 heard? Ms. Strickland, you wish to reply?

25 MS. STRICKLAND: Your Honor, the letter that is

1 attached to the Charles Lumber objection says that, "We are
2 currently holding unrestricted funds in the amount of
3 \$466,000," period. That's the sentence that I believe he's
4 referring to.

5 Money is money. So the fact that they had
6 unrestricted funds that were being held of \$466,000 is neither
7 here nor there. I do not believe that there is a material
8 disagreement as to the manner in which LES operated its
9 exchange business where money came in, money was commingled and
10 when it's commingled one dollar looks just like another dollar.

11 So I think this is a form piece of correspondence and
12 there's going to be a whole lot of litigation later on down the
13 road, and I see no reason to get into the merits of that. But
14 I don't think that there's anything in particular about this
15 form letter that implicates anybody.

16 I don't think there's been any admission. We have
17 been completely forthcoming, as has our client, about what did
18 and did not occur. And whether or not people want to
19 characterize that later on down the road is expressly
20 preserved, but I don't think that that has any bearing on
21 whether or not we pay a consultant who is not a lawyer for --
22 you know -- who's not acting as a lawyer, who is not making
23 investment decisions, has never made investment decisions, and
24 whether or not he can be paid \$120 an hour to facilitate the
25 estate.

1 The thing that the counsel for Charles Lumber just
2 noted, that it was withdrawn and then it was resubmitted, is
3 because we believe that this retention is absolutely beneficial
4 to the LES estate. And the LES committee filed a placeholder
5 objection because they wanted just an opportunity to review the
6 deposition and some other things, and we said, look, this is
7 for your estate; this is to benefit LES.

8 If LES's stakeholders don't want this, okay. We can
9 spend more money on somebody else. An outside professional or
10 somebody who has no familiarity with this business can do it,
11 undoubtedly for more money, but we don't think that makes
12 sense. Take an opportunity. Look it over. If you get
13 comfortable, we'll pursue this. If you as the committee are
14 not comfortable, we will not pursue this.

15 The committee got itself comfortable, based on our
16 discussions, and we likewise have been and remain comfortable
17 that this is in the best interests of the estate, and we ask
18 that Your Honor approve the application.

19 THE COURT: The only question the Court has is, is
20 this Mr. Lingerfelt likely to become so embroiled in the
21 litigation that's going on that he won't be able to perform the
22 -- or will compromise his consulting function that you foresee
23 him doing for the estate?

24 MS. STRICKLAND: No. I don't think so at all, Your
25 Honor. He primarily was deposed to just simply describe the

1 way in which the business was operated from a factual matter.
2 It's my understanding from Mr. Kamin and other colleagues of
3 mine that he will not have in any way a central role in the
4 litigation, and is purely intended --

5 MR. KAMIN: Yeah, I --

6 MS. STRICKLAND: -- you want to speak first?

7 MR. KAMIN: -- I just want to -- I just want to
8 correct something. Mr. Lingerfelt was identified as one of the
9 participants in the HCN transaction. He was one of the people
10 involved on behalf of LES in that transaction. That's why he
11 was presented by the company, and he was not -- I mean -- he
12 was deposed, incidentally, on what he knows about the company.
13 But he was not put forth as a 30(b)(6) witness on any of the
14 general business activities of the company.

15 THE COURT: All right. Very good. That satisfies
16 the Court. Okay. I'm going to grant your motion. Mr. Hopper,
17 your objection is overruled.

18 MS. STRICKLAND: It makes sense to do number 12, Your
19 Honor. If the Court wants to break --

20 MR. GIBBS: Your Honor, the next matter on the
21 amended agenda is number 12, which is the motion of the LES
22 committee to modify the prior order regarding maintenance of
23 existing accounts, et cetera. We drew no opposition to the
24 motion, that I'm aware of.

25 We got two responses, one from the LFG committee and

1 one from the debtor, saying that they supported the motion, but
2 asked that it be broadened. In the debtor's situation, they
3 asked that the motion -- that the order, if Your Honor was
4 inclined to grant it, be broadened to require the transfer of
5 funds that are currently at Centennial Bank into an authorized
6 depository in this district.

7 And the LFG committee's response indicated that they,
8 too, did not oppose the relief requested, but ask that any
9 order Your Honor might consider entering be broadened to
10 include those funds that LES -- that LFG is holding in Citibank
11 as a result of the sale of its underwriting subsidiaries to
12 Fidelity that the Court approved earlier in this case.

13 We have obviously no opposition to those requested
14 additions to the relief which we requested. We have worked
15 with and discussed this relief with the U.S. Trustee's Office.
16 The debtor also in its response did say that they thought that
17 the two days that we had asked for in the proposed order be
18 expanded to 30 days, and we have no opposition to that
19 additional change.

20 So we believe for the reasons more fully described
21 and put on the record at the prior hearing with respect to
22 Millard's motion, pursuant to which the Court ordered the
23 transfer of the funds from Citibank that were in the segregated
24 accounts, held and identified as for the benefit of Mr. Wolfe's
25 clients, that the relief which we've asked for, which consists

1 of the transfer of the remaining funds held by the debtors in
2 Citibank, as further modified and expanded by the committee and
3 the debtor in their responses, be entered.

4 THE COURT: All right. Thank you, Mr. Gibbs. Any
5 other party wish to be heard?

6 MS. STRICKLAND: Your Honor, mostly just a
7 clarification. In addition to Citibank and Centennial, we also
8 have two accounts at the Private Bank of California, an account
9 at Frost Bank. So all of those accounts that are not on the
10 U.S. Trustee approved list of depositories we want the ability
11 to transition in the same way. I think you did mention the 30-
12 day so that --

13 MR. GIBBS: That was my error. I did mean to mention
14 that we had no opposition to their additional requests, and I
15 think it was Frost and I've forgotten the name of the third
16 bank, that we're fine with all -- the order, if Your Honor's so
17 inclined to include an order instructing and authorizing the
18 transfer of those funds, too.

19 THE COURT: All right. Thank you. Mr. Savenko.

20 MR. SAVENKO: Your Honor, I'll be brief. I just --
21 the addition of Centennial and Frost Bank, I do know that
22 certain of my clients -- I think I -- my -- the Frost Bank
23 account, it belongs to one of my clients, and the Centennial
24 bank accounts, I do have a couple of clients there, as well.

25 In light of this just being raised ad the very end

1 here, I'd just reserve rights on behalf of those clients. I
2 assume they wouldn't have any objection to the relief,
3 considering what's going on, but I haven't had a chance to
4 address that with them specifically. I've only addressed the
5 Citibank account holders.

6 THE COURT: All right. Thank you. Mr. Sabin.

7 MR. SABIN: I rise only to understand the procedural
8 posture with which this motion is brought. The way we had read
9 it, and the committee did not file any objection or joinder to
10 support, was that as a technical matter we're talking about the
11 cash management at the parent level, even though it's brought
12 by the 1031 committee.

13 I don't think there's any dispute that proceeds that
14 we're talking about from the Fidelity sale are at the parent
15 level, and so I would think that what we should do is probably,
16 to the extent there is any issue, make sure that the record is
17 clear when we enter the order that the order would be entered
18 on the LFG estate in terms of modification to cash management,
19 and that we only ask that, just like the 1031 committee be
20 consulted, our committee be consulted in terms of movement of
21 the money to another financial institution. Thank you, Your
22 Honor.

23 THE COURT: Ms. Strickland.

24 MS. STRICKLAND: Your Honor, I don't believe there's
25 any nexus -- that there's any need to modify the LFG cash

1 management order. The LFG cash management order says that we
2 can open up new bank accounts in the ordinary course. We're
3 talking about if we've got a bank account at Centennial that's
4 holding \$50, opening up a brand new account at an approved
5 institution by the U.S. Trustee and putting that \$50 from one
6 account to the next.

7 But we will, because I think there are a variety of
8 just housekeeping matters that we've been dealing with over the
9 last 24 hours and this morning, make sure that the committees
10 and the debtors agree on a form of order and submit that. But
11 I don't think it'll be controversial, but I don't think we need
12 a modification of the LFG cash management order. I think it
13 already provides for what we need.

14 THE COURT: Okay. Thank you. Mr. Van Arsdale.

15 MR. VAN ARSDALE: Robert Van Arsdale for the U.S.
16 Trustee, Your Honor. The only thing that I would add is it
17 would be very helpful to my office if as soon as everybody
18 decided which bank or banks and the amounts that are to go
19 there --

20 THE COURT: I'm just comforted to know that there are
21 still banks on your list.

22 MR. VAN ARSDALE: Well, there are banks on my list,
23 but I must say when I woke up this morning and turned on the
24 TV, Citibank was full -- you know -- was just front and center
25 about what was going to happen to it. So I think we need to do

1 this as quickly as possible.

2 We do have banks on the list, but we're going to be
3 moving some rather massive amounts of money, and the banks to
4 which they are moved are going to have to come up with
5 collateral to pledge to us to make sure that's where we get the
6 insurance that this is going to happen safely. So the sooner I
7 know that, the sooner we can work through with the banks and
8 tell them how much is coming.

9 THE COURT: All right. Thank you. Mr. Wolfe.

10 MR. WOLFE: Craig Wolfe, Kelley, Drye and Warren. I
11 do not appreciate that this motion appears to affect some of
12 our clients. When I read it I -- you know -- it seemed to be
13 fairly narrow, and it seems to be growing. We've got a couple
14 of clients that are at Citi Smith Barney, and I think we also
15 have those that are at the Private Bank of California. So it
16 does look like we are affected. When we sought -- am I correct
17 about that, by the way?

18 MS. STRICKLAND: It replicates the motion you made
19 originally --

20 MR. WOLFE: Yeah.

21 MS. STRICKLAND: -- other clients. So I was waiting
22 to see what's coming next.

23 (Laughter)

24 MR. WOLFE: The issue --

25 THE COURT: To the extent that it involves your

1 client's funds and we're putting it into an account in a bank
2 here, it's going to be fully collateralized pursuant to the
3 guidelines of the U.S. Trustee --

4 MR. WOLFE: We --

5 THE COURT: -- aren't your clients better off?

6 MR. WOLFE: We -- yes, we would be. And the point
7 I'm making is that when we sought the relief that we sought, we
8 had additional items in there that -- where our clients
9 directed the debtor or instructed the debtor, I think is the
10 word that we used, to move it into a particular account that
11 was on the U.S. Trustee's list, and a specific kind of account
12 that was under the federal -- FDIC Transaction Account
13 Guarantee Program.

14 And I noticed that there was slightly different
15 language used in the debtor's motion. All that I would ask --
16 I'm okay with this generally -- is that maybe that the debtors
17 can consult with us if it does impact our clients.

18 THE COURT: All right. Thank you. Let me hear from
19 Mr. Van Arsdale.

20 MR. VAN ARSDALE: Your Honor, there is an enhanced
21 program that applies to certain accounts, but in order -- and
22 what they do, until the end of 2009 the FDIC is insuring
23 accounts up to 100 percent, but it's only for non-interest
24 bearing accounts.

25 So in order to qualify for that program you have to

1 put your money in a place where it's going to be in the dead
2 zone forever. Rather than do that, we think it's wiser to put
3 it in interest bearing accounts that are collateralized and we
4 don't have to worry about qualifying for that particular
5 portion of the FDIC program, and we also don't have to worry
6 about what happens at the end of December 31, 2009, when that
7 program expires.

8 THE COURT: All right. Thank you.

9 MR. WOLFE: Your Honor, Craig Wolfe, Kelley, Drye and
10 Warren, again. We did considerable research on this and our
11 findings suggest something different than what we just heard.
12 We understand that there are accounts out there that are
13 invested in U.S. Treasuries that are earning extremely low
14 interest rates.

15 There's also what is called a NOW account that does
16 qualify under the FDIC Transaction Account Guarantee Program
17 that actually pays a nominal amount of interest, but yet still
18 qualifies. And so our clients would want to preserve the right
19 to keep their funds in an interest earning account that is
20 fully insured, and we believe that there is a way to do that.

21 THE COURT: All right. Thank you.

22 MR. WOLFE: Thank you.

23 MS. STRICKLAND: Your Honor, we are happy to serve
24 the form of order on the parties that notify us that they want
25 to see it. However, we reserve the right, if parties want to

1 negotiate the order for 15 of the 30 days, to take a little bit
2 longer. We need to do this quickly.

3 Everyone wants to do it safely and securely, and we
4 will endeavor to do it in a way that keeps everyone's funds in
5 as much of the form that they were prior to the movement, and
6 as securely as possible and seek the discretion with the
7 committees, and of course, the office of the U.S. Trustee to do
8 so.

9 THE COURT: Okay. The Court's going to grant your
10 motion. I would encourage you to circulate the form of the
11 order, and if -- Mr. Wolfe, if you were concerned about
12 treatment or if any other party with specific funds would file
13 a motion on an emergency basis and the Court will entertain
14 your motion.

15 All right. I was going to suggest that we take a
16 half-hour recess just to get a bite to eat or something like
17 that, and then come back, unless you think we ought to just
18 plow through this.

19 MR. KAMIN: That was going to be my suggestion, Your
20 Honor.

21 THE COURT: Okay. Well, good. We'll stand in
22 recess, then.

23 THE CLERK: All rise. Court is now in recess.

24 (Recess at 12:44 p.m., until 1:34 p.m.)

25 (Call to Order of the Court)

1 THE CLERK: All rise. Court is now in session.
2 Please be seated and come to order.

3 THE COURT: Mr. Kamin.

4 MR. KAMIN: Good afternoon, Your Honor. Larry Kamin,
5 on behalf of the debtor. The next five agenda items consist,
6 first of all, of agenda item number 13. That's the application
7 -- the amended application to employ counsel by the lead case
8 on the Type A commingled, Mr. Luxenberg, and that's a
9 standalone proposition.

10 They've already been given a right to fees pursuant
11 to 503 -- 503(b)(3). The next four matters are applications by
12 the remaining four lead plaintiffs to allow administrative
13 expenses pursuant to 503(b)(3). There's number 15, which is
14 the application of Mr. Finkelstein's counsel.

15 Number 16 is the healthcare -- is the HCN
16 application. We know that one has been continued.

17 THE COURT: Continued. We're going to continue that.

18 MR. KAMIN: Number 17 is the motion on behalf of
19 Millard Refrigeration, and while that was not formally noticed
20 for hearing, Mr. Wolfe would like to be heard on it, and we
21 have no objection. We think that should be heard today, as
22 well; and I think I've left one out.

23 I must have left out number 14, which was the motion
24 by Frontier Pepper Ferry. My suggestion is this. My
25 suggestion is that we hear item number 13, as well as the

1 objections. After that, with respect to the other three
2 motions that are noticed for today, my suggestion would be that
3 each plaintiff would come up and present his motion, and then
4 there would be a unified response.

5 Both the debtor and the committee submitted an
6 omnibus response to all three motions. They really involve
7 essentially the same issue. So I think that would be most
8 efficient.

9 THE COURT: All right. I think that's a good way to
10 proceed with that.

11 MR. TERRY: Good afternoon, Your Honor.

12 THE COURT: Good afternoon, Mr. Terry.

13 MR. TERRY: Roy Terry, of Durette Bradshaw,
14 appearing on behalf of the firms who filed -- under item number
15 13 -- have filed an application to be employed as counsel for
16 the Type A commingled test case plaintiff, Dr. Luxenberg. Your
17 Honor, first, if I could review the pleadings that have been
18 filed, they really are listed in the amended agenda that was --
19 has been presented today.

20 We filed our application. We then filed an amended
21 application. I'll speak to that in just a moment. There's
22 been an objection by the debtor, a joinder by the committee,
23 and then we filed a reply; and I presume the Court's had an
24 opportunity to look at all those at this point.

25 THE COURT: Yes.

1 MR. TERRY: All right. Thank you. While I am the
2 one at bat here to speak to the application, I would point out
3 that Mr. Ebel's here from Sands Anderson, and as the Court has
4 already seen and heard, Mr. Geller is here, on behalf of his
5 current firm.

6 The reason for the amended application is that since
7 we filed the initial application, Mr. Geller has joined with
8 the firm of Bernstein, Shore, Sawyer and Nelson, in Portland,
9 Maine, and is now the co-head of the bankruptcy practice group
10 for that firm; and so we simply wanted to reflect that change.
11 I'll mention that his -- the other co-head of that practice
12 group is the incoming president of the ABI. So I think he's
13 joined a good firm up there in Portland.

14 I would next like to review briefly the time line in
15 the case as it pertains to our application. First of all, the
16 Court entered its protocol order on January 16. We then
17 appeared on behalf of the ad hoc committee seeking 503(b)
18 status for this test case on January 21, and the Court orally
19 granted out motion on that date with order to follow.

20 Dr. Luxenberg was identified as a Type A commingled
21 plaintiff on January 23 and agreed to serve in that capacity.
22 A complaint was filed on his behalf on January 25, and then a
23 stipulation of multiple parties, including the debtor and the
24 committee, to Dr. Luxenberg being the Type A plaintiff, was
25 entered by this Court, presented and entered by this Court on

1 February 2.

2 That stipulation imposed a deadline for written
3 discovery to be issued on February 4, and so we were off and
4 running at that point. In deciding how to staff the case,
5 within the ad hoc committee we took a look at the firms that,
6 first of all, were available to provide resources, and then
7 secondly, the personnel that were available within those firms
8 to address the tasks that had to be done.

9 Sands Anderson was an obvious choice, first of all,
10 because Dr. Luxenberg was their client. To handle the factual
11 side of preparation, and by factual I mean the written
12 discovery and the depositions, it was decided that we would
13 create a trial team combined from Sands Anderson and Durette
14 Bradshaw.

15 We did so because of the physical proximity of those
16 two firms, the fact that both firms have attorneys experienced
17 both in bankruptcy and commercial litigation and the fact that
18 the lawyers know each other and also were already familiar with
19 the case, so that there would be little, if any, education time
20 required to get up and running, which under the protocol
21 schedule, really, there was none allowed.

22 And we feel that the result has been a good one.
23 Since we got into the case on behalf of Dr. Luxenberg, over
24 70,000 documents have been reviewed. Depositions have been
25 conducted and the Court will know that we have not come before

1 you to seek any sort of extension of time to get up and running
2 in this test case. It has gone very smoothly.

3 We are also asking for the approval of Mr. Geller as
4 counsel selected by Dr. Luxenberg, as well. Whereas, Sands
5 Anderson and Durette Bradshaw are involved in the factual side
6 of the case, Mr. Geller is involved on the legal side from the
7 standpoint of research and legal analysis, as we prepare for
8 trial on issues such as summary judgment.

9 We feel that this has proven to be an effective team,
10 which has allowed us to jump in and go forward, really without
11 a ripple. Judge, the three firms that have been selected are
12 smaller in comparison to all of the firms that are representing
13 the debtor and the committees.

14 In choosing these firms we were also aware that the
15 hourly rates of the attorneys who would be involved are lower.
16 The objections which have been filed really go to
17 reasonableness in terms of our three firms and the lawyers
18 involved. And perhaps that would be an appropriate objection
19 had we come before you with the seven or eight firms that you
20 mentioned would be a worst case scenario at the time that we
21 were here on our 503(b) motion.

22 But in the current framework of the attorneys
23 involved, we just -- we feel that a reasonableness objection is
24 really not timely, that rather, that can be addressed by the
25 Court and by the parties at the time that a fee application is

1 filed, if that sort of thing is warranted at that time if we
2 have proven not to be efficient; though, I suggest in fact that
3 we have been.

4 THE COURT: Well, if I recall, the way that it came
5 up, Mr. Gibbs raised the objection, I believe by phone that
6 day, that he was concerned that there would be multiple
7 parties and such and how we were going to control that. And I
8 said I would do it through the application process. So I think
9 this is an appropriate time to address these kinds of issues.

10 MR. TERRY: All right. Thank you, Your Honor. In
11 terms of the fact that we have identified 12 attorneys who
12 would be involved in the case or feasibly could be involved in
13 the case, I would suggest first that we have given more
14 specific info as to the attorneys that might be involved, and
15 as to their hourly rates, really, than I've seen in the other
16 applications that were submitted on behalf of the other parties
17 who have applied to this Court.

18 I would also respond that the issue is not so -- not
19 one of how many attorneys are involved, but how they're used,
20 and that comes back to what will be demonstrated I think
21 eventually in our fee application. We would disagree that this
22 is a modest case, as the debtor suggested.

23 It is certainly not modest for Dr. Luxenberg, and
24 it's not modest because it is a test case and it has an
25 important precedent or it could have an important precedent-

1 setting value for all of the adversaries that are brought here
2 on behalf of the commingled exchangers.

3 Also, after the debtor has participated in bringing
4 the protocols which have been entered by this Court, I think
5 it's also improper to blur the distinction between the A and
6 the B cases. The A case is its own case and stands alone and
7 needs to be prosecuted as such.

8 And so for all of these reasons, Your Honor, we would
9 ask the Court to approve the amended application which has been
10 submitted.

11 THE COURT: Well, let me ask.

12 MR. TERRY: Yes.

13 THE COURT: Why do you need three law firms? I mean,
14 with regard to everybody, you know, else, we've gotten, you
15 know, local counsel and we've got out of state counsel, and in
16 this case we've got out of state counsel and two local
17 counsels. And I would like you to elaborate on why that is
18 necessary.

19 MR. TERRY: Yes, sir. Well, first of all, in terms
20 of out of state counsel, Mr. Geller, his involvement at the
21 time it began was as a solo practitioner. And so what was
22 envisioned was that his role would -- because of his being
23 removed from us in Maine, but also because he was solo, he
24 would only be able to contribute so much at that point.

25 So yes, he is out of state counsel, but with limited

1 resources, certainly, especially at the time of the initial
2 application. In terms of going forward with the two local
3 firms, again, each of these firms, Sands Anderson and Durette
4 Bradshaw, are far smaller and have far less resources than the
5 firms that we're up against, the mega firms that are involved
6 on behalf of the debtor and the two committees.

7 And we were also two weeks behind the protocol order
8 at the time that the Court made its ruling in terms of our
9 having 503(b) status and Dr. Luxenberg being identified. So
10 there was a need to jump in and make up ground, catch up, and
11 frankly, to look at a huge mass of documents being produced in
12 order to begin to field the depositions starting the next week;
13 I mean, literally, the next week.

14 Depositions have gone on simultaneously. Depositions
15 have gone on out of state, and simply in order to be able to
16 get it done, we needed to have enough bodies. And the way we
17 viewed it, it's not so much the constraint of what firm pays
18 your paycheck, but rather, who are the lawyers and are they
19 competent and are they available; can they devote the time to
20 it, and that's the way we approached it, Your Honor.

21 Again, we're -- you know -- we're a block apart.
22 It's not like it was difficult for us to get together and
23 coordinate efforts and create a seamless trial team, which I
24 believe that we have and will be demonstrated when the fee
25 application is ultimately filed.

1 THE COURT: What do you anticipate the legal fees to
2 be to Dr. Luxenberg?

3 MR. TERRY: I have not pulled the work in process
4 yet, Your Honor, because what we're going to do is put the
5 three together into a -- the bills of the three firms together
6 into a unified bill. And under the protocol we'd be -- we'll
7 be presenting that to all the parties and then, you know,
8 periodically it will come in as a fee application. I believe
9 that's what the protocol provides for.

10 So at the end of this month we'll be in a position to
11 gather everyone's time and create this -- the unified bill,
12 which our firm is used to doing in IP litigation. And so we
13 will be -- we will be assisting in that task, and at that point
14 I will be able to advise the Court where we are.

15 Right now, I'm not sure. But certainly, we are no
16 different, and I would suggest that we're -- our fees are
17 actually going to be less on behalf of Dr. Luxenberg than the
18 corresponding fees on behalf of the other parties that we're
19 dealing with in these -- in this test case, simply because the
20 rates are so much less, if nothing else.

21 And we are staffing reasonably; no more than two
22 attorneys at a deposition, for example, and in many instances,
23 only one attorney. In some instances we'll have a partner and
24 an associate, depending on who's being deposed. But I think
25 we're making prudent decisions in terms of conserving resources

1 in those instances.

2 THE COURT: All right. Thank you.

3 MR. TERRY: Yes, sir.

4 MR. KAMIN: Thank you, Your Honor. Larry Kamin, on
5 behalf of the debtor. We object to this application. We
6 object for the reason that so many people expressed concerned
7 about this morning, which is the conservation of resources of
8 this estate.

9 That was a concern raised by Mr. Gibbs in connection
10 with the hearing back on the 21st. It was a concern that was
11 acknowledged by Your Honor, who said you expect to have two
12 firms. If there were seven or eight you could deal with it at
13 this time. You did not say how many lawyers you expected to be
14 working on the matter.

15 I should say that the new application doesn't list 12
16 lawyers. It lists 15 lawyers. I think there are three
17 additional lawyers from Mr. Geller's new firm. So there are 15
18 lawyers at three firms who are now likely to be working on
19 this. I can tell you, there was a lot in their responsive
20 papers about the mega firms that he's up against, and I don't
21 know whether Willkie fits that -- fits that description.

22 I do know that I have seven people, including myself,
23 that are working on this litigation, working on the 1031
24 litigation, and we're working on five litigations and it's been
25 those same seven people for about two months now. There's

1 another point I wanted to mention, Your Honor, and I just think
2 it bears some notice here.

3 The idea with the test cases was to get some
4 representative group of cases that would be litigating the case
5 and pressing the issues and facts which were common to a lot of
6 other claimants in the same position. But of course, the
7 individual plaintiffs are free to -- in fact, I think they're
8 required to -- put forth any facts that favor their particular
9 plaintiff and they're particular circumstance.

10 In one of the depositions last week the Luxenberg
11 lawyers spent a fair amount of time with one of the LES
12 witnesses, pursuing the theory related to the fact that the
13 Luxenberg money came in on the Thursday before the Monday in
14 which LES stopped doing business.

15 So because of that there were fewer movements, if you
16 will, of the Luxenberg money, and I think -- and I don't know,
17 obviously; we'll see this in their papers -- but they seem to
18 be pursuing some theory that either the money was de facto
19 segregated, or at least that could be traced.

20 I don't know if either of those theories are going to
21 amount to much at the end of the day, but I do know if they do,
22 they will favor about four or five other claimants, only those
23 individuals who had money put into LES at or about that time.
24 So while we certainly all hope that these lead cases will be
25 beneficial to a large group and will inform a large group of

1 other similarly situated plaintiffs, we can't be assured of
2 that.

3 And the whole notion about making this a substantial
4 contribution or deciding in advance that it's a substantial
5 contribution is I think implicated by that. Now, here, Your
6 Honor's already ruled in this case and obviously, we accept
7 that ruling.

8 But it is something to think about before we
9 authorize five law firms and 15 -- three law firms and 15
10 lawyers to go and prosecute the case, which may wind up to be
11 not something of tremendous value to all of those other cases.
12 That's all.

13 THE COURT: One of the things that I would like you
14 to address, and Mr. Terry raised, who said one of the things
15 they did was had to hit the ground running very, very quickly
16 because -- and that was the Court's concern, obviously, at that
17 time, that we didn't -- I didn't want to derail the timetable
18 that we had set up, which was very aggressive and that they
19 needed to staff up as they did in order to be able to meet that
20 timetable, and that they haven't asked for any continuances and
21 that they've been able to do it. Can you speak to that?

22 MR. KAMIN: Well, they certainly did and they deserve
23 a lot of credit for that. I don't know how many people were
24 involved in that exercise, Your Honor. Again, we're spending a
25 little bit of time talking about how complex is the case. They

1 had to -- they had to deal with their documents and they had to
2 deal with debtor's documents that related principally to their
3 exchange.

4 They also had -- we had I guess five depositions of
5 LES witnesses, and they certainly attended and they asked very
6 good questions. There were either one or two people attending
7 all of those depositions. I -- to my mind, this was not a case
8 involving 15 lawyers, and I don't think it required 15 lawyers.

9 I don't think you can coordinate that many lawyers.
10 I think that that work had to be done. All of us have been
11 working kind of nonstop on this, Judge. And as I said, we've
12 been working nonstop with our from Willkie, and I don't know
13 how many have been there at the other -- at the other firms.

14 But I don't think that it required the efforts of the
15 kind of forces that they suggest now. And certainly, from this
16 time going forward I would not expect them to need -- whatever
17 additional work they needed at the beginning to catch up, I
18 wouldn't think that would persist from this time onwards.

19 The discovery in their case is actually ending
20 tomorrow, and then we're on the same schedule in terms of
21 putting summary judgment motions in and thereafter going to
22 trial.

23 THE COURT: All right. Thank you.

24 MR. GIBBS: Your Honor, the LES committee joined in
25 the objection filed by the debtor to this application to employ

1 three law firms on behalf of the test case A plaintiff, Dr.
2 Luxenberg, and I adopt the positions that Mr. Kamin -- I got it
3 right this time on the record -- advocated on behalf of the
4 debtor.

5 I can tell the Court that our firm, through this
6 entire case since we were retained, has had nine attorneys
7 billing time on the whole case, not just the five -- I'm not
8 talking about the litigation. I'm talking about the entire
9 case, two partners, myself and Mr. Bernstein, with the
10 exception of a little bit of time charged by my tax partner
11 just to give us -- to try to teach us a little bit about 1031
12 law.

13 And that's the way we staff not only the litigation
14 that's gone on a very fast track and for which we've played,
15 frankly, I think a lead role in most of the discovery and in
16 the depositions. So much has been made in the characterization
17 of mega firms against the poor little guys, but the reality is
18 we've staffed this as leanly as we think we can in the interest
19 of conservation of this debtor's estate, and we've been able to
20 move forward on a time frame that was rapid with that kind of
21 staffing.

22 And the Court specifically addressed counsel for the
23 movants in asking why two local firms. The first, in the
24 opening comments that movant made, they indicated that they
25 thought both local firms needed to be retained on behalf of Dr.

1 Luxenberg because they were close by and they knew each other.
2 Those were the positions or the reasons that he stated.

3 And then he indicated in response to the Court's
4 question, it's because they're small firms compared to mega
5 firms and they were two weeks behind, and that it really
6 shouldn't matter who pays the paycheck, that there was really a
7 trial team.

8 I think that -- I think that misses the point. The
9 point is that every other party in this case has been
10 essentially representing their constituencies or their clients
11 with either one set of law -- one set of lawyers from one law
12 firm, or two in the case where lead counsel was from out of
13 state.

14 Here, you've got a very able counsel who will be, as
15 I understand it, leading the charge on the legal issues and the
16 potential summary judgment issues, Mr. Geller, who now has also
17 the benefit of a larger group with him, and they've chosen to
18 retain two Richmond firms to represent one doctor on one case.

19 And it was for that exact reason that I raised the
20 question at the last hearing, and I think that their
21 application, unfortunately, proved my fears and they're well
22 founded, and I don't think that there's a need that's been
23 shown for the retention of three law firms to represent their
24 interests.

25 THE COURT: All right. Thank you. Mr. Sabin.

1 MR. SABIN: Good afternoon, Your Honor. Jeff Sabin,
2 from Bingham McCutchen. We did not file an objection or a
3 joinder one way or the other, and that was because we weren't
4 sure how you were going to come out on the motion to modify
5 cash management.

6 We have two concerns. Especially now that you have
7 approved the healthcare we -- the parent is the largest single
8 creditor of the 1031 estate, and as such, our understanding of
9 your prior rulings is that you have in essence said, you can
10 have 503(b) protection, but what I haven't said -- the way I
11 read your order -- is that you have a right on an "now" basis
12 to seek to get at what you have now, although also allowed,
13 which is the use of the \$2 million from healthcare, and/or the
14 commingled funds on an interim basis under the order approving
15 interim fee procedures. And as I indicated earlier --

16 THE COURT: I haven't approved any interim fee
17 procedures with regard to the 503(b) claims.

18 MR. SABIN: That's what -- that's our point, Your
19 Honor.

20 THE COURT: Okay.

21 MR. SABIN: Because the way I read this motion and
22 the way I read the 503(b)s is that when you read the affidavits
23 of the individuals, not only did they want to get employed, but
24 they also want you as part of their retention application to go
25 a step further and say, yes, we have 503(b), but we want the

1 right to be covered under the interim procedures order and be
2 paid the same way as debtor's professionals and committee
3 professionals on an interim basis before you ever get to
4 consider their 503(b) application. It is that part that we are
5 objecting to, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. SABIN: Thank you.

8 MR. MAXWELL: Good afternoon again, Your Honor.

9 Richard Maxwell, this time, Your Honor, on behalf of the
10 commingled exchange holders that I represent. Your Honor,
11 briefly, I think from the commingled exchange holders, the
12 counsel fees and the counsel being retained is a good value for
13 the exchange holders.

14 The purpose was to make it a fair fight between the
15 parties, and I know both firms involved. I know Mr. Geller. I
16 think the issue is not how many attorneys were listed on an
17 application, but what work is done, and the Court can review
18 that later on.

19 So Your Honor, from the perspective of people whose
20 money it is that was paid into this company that is going to be
21 used to pay this, I feel that this is a good use of that money
22 and I would support the application.

23 THE COURT: All right. Thank you. Anybody else wish
24 to be heard? Mr. Terry?

25 MR. TERRY: Yes. Your Honor, as I had indicated

1 earlier, in our application what we tried to do was name
2 everyone that would work on the file or could work on the file.
3 And so the Court has the names and the hourly rates of those
4 individuals, which is a step further than what I've seen in the
5 other applications.

6 We don't want to be punished for making such
7 disclosure. The reality is, all those people aren't working
8 full-time on this case, but rather, everyone's efforts at
9 different times are used to cover all the things that have
10 needed to be done up to this point.

11 I would agree once discovery's done that things are
12 going to settle down. And so the involvement of that many
13 people is not going to be necessary in the case going forward.
14 The -- with regard to the LFG's committee's comments, I'm going
15 to refer to the Court's order of February 4 with respect to the
16 finding that the Type A plan, if would be a lead case with 503
17 status, the order states that, "Subject to review and allowance
18 by the Court for reasonableness in the same manner and pursuant
19 to the same procedures as other professionals in the LES case."
20 So I think the procedure is established for looking at what we
21 seek to bill as we go forward.

22 THE COURT: All right. Thank you.

23 MR. EBEL: May it please the Court, Your Honor, Tom
24 Ebel, from Sands, Anderson, Marks and Miller, one of the
25 applicants, and Mr. Terry has stated our position, but I just

1 want to address a couple of things. First of all, there's the
2 implication here somehow that -- that this -- that putting this
3 number of lawyers in the application and our approaches somehow
4 would be excessive.

5 And as someone that's on the ground working,
6 monitoring this on a daily basis I can assure you that that is
7 not the case, and that was no one's intention. The intention
8 was to have enough resources to be able to go forward with some
9 very significant litigation that's on a fast track where we had
10 to play catch-up.

11 And we were trying -- we're being punished I think
12 here for being -- you know -- for fully disclosing to the Court
13 the people that we were making available to try to do this, and
14 to -- and for listing people who might work on it. I assure
15 you, as Mr. Terry said, these people are not all working on it
16 all every day.

17 But I know enough to know that you cannot catch up in
18 a case like this of this significance with as much as been
19 going on with depositions in different places on different
20 days, and motions being filed daily, without having a team of
21 people to be able to divide them up and send them out. And --

22 THE COURT: Are you caught up at this point?

23 MR. EBEL: I believe that we are, you know,
24 substantially caught up. I think we are where we need to be,
25 but there was a very risk at the time that this started that we

1 were dealing with -- not to call them mega firms, but very good
2 firms who already had people dedicated to this. We didn't know
3 this was --

4 THE COURT: I realize that you -- you say mega firms
5 -- but the reality of it is, to put together a litigation team
6 and that there is a finite number of people, then, working on
7 the matter.

8 MR. EBEL: I understand that, but the distinction I'm
9 trying to make, Your Honor, is we -- they were able to -- they
10 were retained in this case and were able to put together a
11 team, and that's a team that -- I don't know exactly how much
12 time they're spending each day on it and I don't want to -- you
13 know -- I don't want to speculate.

14 But we -- this was not something that any of these
15 firms knew that we were going to have to do until it was
16 approved. So we represented to the Court that this is a team,
17 a really two -- you know -- small to mid-size law firms and one
18 attorney from out of state who is very knowledgeable about
19 these matters, and we wanted to give the test case here the
20 best possible representation.

21 But my first point is that no one's trying to be
22 excessive here. We're just trying to be sure we represented to
23 the Court that we have the resources to go forward with this
24 case, and as we --

25 THE COURT: You didn't think that Sands Anderson had

1 the resources to go forward with this case?

2 MR. EBEL: I did -- I specifically Durette Bradshaw
3 to be involved because we -- our people are very busy and we
4 have -- you know -- we've take none lawyer, you know, offline
5 of everything else, but it took a couple of weeks to get him
6 offline from everything else.

7 And he's, you know, primarily working the case and
8 we've had a few other people, but I didn't have -- I wasn't in
9 a position where our firm had people sitting around with
10 nothing to do, that all of a sudden we could just jump in on a
11 very, very fast track.

12 So I think it was an effort to be sure that we could
13 do the -- a good job in a short period of time in a very
14 important piece of litigation, and it's not that anyone's
15 trying to, you know, provide excessive services to -- in this
16 case.

17 THE COURT: Okay. Now, that you're caught up how to
18 you propose to staff the litigation going forward from this
19 point?

20 MR. EBEL: Well, it's --

21 THE COURT: How many people do you need?

22 MR. EBEL: -- well, it's my understanding -- I
23 mean -- we have -- I believe we have someone, one of our
24 lawyers in California today trying to take a deposition out
25 there. But other than that, we have assigned the summary

1 judgment motion responsibility to Mr. Geller.

2 So I'd very much like to keep him involved, because
3 otherwise, we would have to shift gears. I would have to
4 really sit down with one -- because of everything happening
5 today, I'd have to sit down with the litigation team and see
6 what else needs to be done.

7 But it's my understanding most of the discovery has
8 been completed and we're now moving like everyone else into the
9 summary judgment phase, so.

10 THE COURT: Well, Mr. Gibbs makes the point that he's
11 got nine people total working on this, the whole case, and Mr.
12 Kamin makes the point that he's got seven people working on
13 this litigation. Do you need more than nine people to be
14 working on this case?

15 MR. EBEL: Your Honor, I think, as I said before,
16 we're -- if you look at the applications for those
17 professionals, those attorneys, I don't -- I think one of them,
18 I can't remember which one, listed some people specifically who
19 was going -- who were going to be working on the case.

20 But the rest of them didn't list them. We just
21 listed the people that we thought were qualified and eligible.
22 We are not in any way trying to say we need 15 people.

23 THE COURT: Well, that's why I'm trying to get an --

24 MR. EBEL: So I don't think we need --

25 THE COURT: -- how many people do you need?

1 MR. EBEL: Well, I think I'd prefer to consult with
2 my co-counsel on that, but I don't think we need -- I mean,
3 there may be people who do small pieces of it at different
4 times, but I don't think we need more than, you know, that
5 number that you're suggesting.

6 But I would certainly like to consult with them to
7 be sure, but I think that no one is suggesting that there are
8 going to be 15 lawyers working full-time, round the clock on
9 this case. That's what I think is getting lost here. We just
10 listed the people that we thought were qualified and eligible
11 and knowledgeable to work on this case.

12 It was not -- and it's something the other
13 applications didn't do. So I would hate that we would be
14 punished for trying to fully disclose, you know, who was going
15 to be working on the case. And I am sure that, you know, that
16 as things -- you know -- as we get caught up and as things get
17 more streamlined that there'll be less lawyers.

18 None of us -- believe me -- I can tell you there's
19 plenty going on in our shop and we're not trying to find work
20 for people.

21 THE COURT: All right. Thank you. Mr. Kamin,
22 anything further?

23 MR. KAMIN: No, Your Honor.

24 THE COURT: All right. The Court is going to grant
25 the application to employ, subject to conditions, and that is

1 that from this point forward I would expect no more than nine
2 people would be working on the -- on this litigation, and
3 that's not to penalize whatever you had to do in order to get
4 up to speed, to get where you are today.

5 I was very much concerned when I granted the 503(b)
6 motion, that the train was leaving the station and the Type A
7 case was going to be left behind. And I applaud counsel
8 getting up to speed quickly in the case and not having filed
9 motions for continuances or anything else.

10 So whatever's been done till today is fine, but going
11 forward you'll be limited to nine counsel. Any question about
12 the Court -- oh, and then with regard to the application of the
13 interim procedures order, I did not intend for the interim
14 procedures order to apply to this litigation or the 503 status.

15 What I had intended was that you would know at the
16 front end that I had made a determination that it was necessary
17 for the estate and that you've, you know, passed that hurdle.
18 You still need to file a fee application at the end of the day,
19 which the Court will approve, you know, and parties can object
20 if they think the fees are unreasonable for whatever reason.

21 MR. TERRY: Thank you, Your Honor.

22 THE COURT: All right. And Mr. Terry, you'll submit
23 an order?

24 MR. TERRY: Yes, Your Honor, we will.

25 THE COURT: Thank you. Okay. That brings us to the

1 motion to allow Frontier Pepper. Do we want to hear these next
2 ones together? Is that what your suggestion was, Mr. Kamin?

3 MR. KAMIN: Yes, Your Honor, hear the movants
4 together and then hear the objectors together.

5 THE COURT: Okay. And then with regard to the
6 healthcare rate, what date are we continuing that to?

7 MR. KAMIN: I assume the next omnibus hearing.

8 THE COURT: Okay. So it'll just be continued to the
9 next omnibus hearing.

10 MR. KAMIN: My guess is they will be filing a motion
11 to withdraw very shortly, Your Honor.

12 THE COURT: I'm hoping.

13 (Laughter)

14 THE COURT: Okay. So next, we'll hear from the
15 movants in items number 14, 15 and 17.

16 MR. FUNK: Good afternoon, Your Honor.

17 THE COURT: Afternoon.

18 MR. FUNK: Kevin Funk, with the law firm of Cantor
19 Arkema, on behalf of Howard Finkelstein and Frontier Pepper's
20 Ferry. Your Honor, we're here on our application for treatment
21 as an administrative expense under 503(b). As much as the
22 debtor and the LES committee and the LFG committee want to
23 relitigate the issues that were brought before the Court by the
24 ad hoc committee on its 503(b) motion, that's not why we're
25 here today.

1 The issue before the Court today is whether or not
2 the Court will grant equal treatment to similarly situated
3 parties, and that's all Howard Finkelstein and Frontier
4 Pepper's Ferry are asking for. The objections simply try to
5 relitigate the issues the Court has already decided with
6 respect to Dr. Luxenberg, and unsuccessfully attempt to
7 distinguish us from Dr. Luxenberg.

8 But before -- and I will rebut those. But before I
9 get to those I just want to take the Court back how we got
10 where we are today. If the Court will remember, when
11 LandAmerica initially filed Chapter 11 back in November, it's
12 CFO filed an affidavit, Bill Evans filed an affidavit.

13 And in the footnote on page 10 of that affidavit he
14 said, "LES expects that there may be competing claims against
15 and disputes regarding the exchange funds, including whether
16 such funds constitute property of the estate. LES intends to
17 seek a determination from the Court as to the appropriate
18 characterization of such funds."

19 So it has been understood by all parties, including
20 the debtor, that this issue would need to be resolved. This
21 was a key issue in the case from day one, as the debtor
22 explained. This is not something that the exchangers brought
23 to the Court. This is not something they dragged the debtor or
24 the committees into.

25 The debtor knew that it needed to resolve this issue.

1 Now, they came here in December, the debtor, seeking to
2 disburse all the segregated funds. That was on the 9019
3 motion. And as I recall, the Court at that time said this was
4 a case crying out for a test case.

5 And you sent the parties away to come up with a
6 protocol, as it became known. And in the motion that asked the
7 Court to approve the protocol the debtor said, "By this motion,
8 LES and the committee seek approval of an order substantially
9 in the form annexed hereto as Exhibit A, that implements a
10 process that will lead to the resolution of the lead cases and
11 avoid uncoordinated and lengthy litigation by different parties
12 over the same issues."

13 The debtor went on to say to the Court that,
14 "litigation of the lead cases will advance the resolution of
15 the adversary proceedings in that the discovery and motions
16 practice contemplated by the adversary proceedings procedures
17 order will establish fact patterns and legal rulings pursuant
18 to which the remaining adversary proceedings can be resolved."

19 Now, Your Honor, this Court entered a protocol that
20 designated these individual plaintiffs as the lead cases. And
21 the order said, and I quote, "Because they provide a
22 representative sampling of the adversary proceedings filed to
23 date with respect to the terms and conditions of the exchange
24 agreements."

25 Your Honor, it was the debtor who brought this --

1 this protocol on at the Court's own urging. We are here --
2 Howard Finkelstein and Frontier Pepper's Ferry are here because
3 the Court noted a need for such a protocol and the debtor and
4 the committees responded.

5 We have not brought these parties unwillingly into
6 this litigation. And because of that we are moving the case
7 forward. We are serve -- our clients are serving a purpose
8 that everyone has acknowledged needs to be served, and because
9 of that, that constitutes a substantial contribution under
10 503(b).

11 And the Court recognized that when it awarded that
12 status to Dr. Luxenberg. And we are simply asking that the
13 Court provide the same treatment to Howard Finkelstein and
14 Frontier Pepper's Ferry, both of which are doing the same thing
15 in providing the benefit that will avoid duplication down the
16 road.

17 Now, the objections that have been filed to Frontier
18 Pepper's Ferry and Howard Finkelstein's motion fall into
19 essentially two categories. One, they want to relitigate the
20 issues that were brought by the ad hoc committee, and they want
21 to distinguish us. And I'll address their -- the points of
22 their objection.

23 The debtor and the committees argue that this motion
24 that I am arguing here is premature, that you cannot have a
25 determination as to 503(b) as to the substantial contribution

1 until the end of the case, at which point you can look back and
2 decide whether there was a substantial contribution.

3 THE COURT: That's normally where it's done, right?

4 MR. FUNK: It is -- that is normally where it's done.

5 And this is not -- but this was not a normal case, and there's
6 no prohibition on a determination being made at the outset,
7 because the Court always -- as the Court just noted in the last
8 hearing -- always has the ability to go behind and look for
9 reasonableness.

10 So all we're asking is that we get the same treatment
11 that Dr. Luxenberg has been entitled to. The Court has already
12 ruled that a determination can be made on the front end. Now,
13 the debtor also argues that our motion would violate the
14 American rule of apportionment of attorneys' fees.

15 Well, that's the -- to say -- to argue that mis-
16 states the American rule. The American rule is that party's
17 bear their own attorneys' fees, absent a contractual or
18 statutory provision. And 503 is exactly the kind of statutory
19 provision that is contemplated by the American rule. So the --
20 Mr. Finkelstein's and Frontier's motion does not violate the
21 American rule.

22 The debtor argues that the Court cannot determine if
23 the movants will have a direct, positive affect on the estate
24 or whether they will be duplicative of services rendered by
25 others. Your Honor, the Court has already ruled that this is a

1 benefit to the estate. This protocol is a benefit to the
2 estate.

3 The debtor and the committees, which both came to you
4 with this protocol said, this will benefit the estate. Mr.
5 Terry mentioned that we've reviewed over 70,000 pages of
6 documents in the last few weeks. Those are documents, all of
7 which will not have to be reviewed again.

8 We've done countless hours of depositions, much of
9 which won't have to be repeated, all in order to move this case
10 forward and benefit the entire body of 450 exchangers. Your
11 Honor, the debtor argues that the movants will not increase the
12 size of the estate, and therefore, cannot qualify for 503(b),
13 and I would just direct the Court to the Celotex case that we
14 cited in our motion, and that was a case the 11th Circuit took
15 up, a very similar case.

16 It was an asbestos case where a claimant's attorney
17 asked for administrative expense status. And in that case the
18 Court acknowledged that the debtor -- that the claimant was
19 taking a position adverse to the debtor. And they said that
20 the SNR -- and that was the claimant -- had an adverse interest
21 to the debtor, but they also noted that direct -- that the
22 claimant's work avoided an expensive, time-consuming
23 confirmation battle, and developed a nearly consensual,
24 confirmable plan of reorganization.

25 Well, Judge, this protocol, I think we would all

1 acknowledge, is hopefully going to work towards a plan that we
2 can rely on the decisions in the lead cases that will provide a
3 basis for a plan of reorganization, or a distribution. That's
4 exact -- and the Court held that the claimant in Celotex,
5 although they were an attorney for a claimant adverse to the
6 debtor, was benefitting the estate under 503(b) because they
7 were working towards that, just as Howard Finkelstein and Dr.
8 Luxenberg are working towards that.

9 The movants argue -- the objections suggest that the
10 movants do not have standing in this case, because our position
11 is that we're not creditors of the estate. That is our
12 property held in trust. That's a cute argument, Judge, but the
13 plain language of the Bankruptcy Code's definition of creditor
14 suggests we are creditors under the definition of the
15 Bankruptcy Code.

16 A creditor is anybody with a claim. A claim is
17 anyone with -- a claim is a right to payment. As the Court
18 noted earlier this morning in setting the claims bar date, the
19 Court said the parties will still need to make a claim, even if
20 the Court determines that it's their property being held in
21 trust. So we are among the class that can make an application
22 under 503(b).

23 Finally, Judge, the object -- the debtor argues that
24 the creditors are pursuing their self-interests. They don't
25 really explain that. The fact of the matter is, being a lead

1 test case plaintiff does not move you to the front of the line
2 in order to get money.

3 Our clients, Howard Finkelstein and Frontier Pepper's
4 Ferry, will not get paid any earlier because they've chosen to
5 be a test case plaintiff. They chose to agree to be a test
6 case plaintiff, because somebody had to do it, somebody had to
7 move this ball forward so we can get to a plan of distribution.

8 They do not explain how the -- Howard Finkelstein and
9 Frontier Pepper's Ferry are somehow pursuing their own self-
10 interests. And again, in Celotex the Court noted that you
11 don't have to be in court as a matter of charity. You can have
12 some -- you can have some benefit enure to you as a result of
13 your actions, but that can also be a substantial contribution
14 to the estate under 503(b).

15 So Judge, all of these objections were either ruled
16 on by the Court with respect to Dr. Luxenberg, or are an
17 unsuccessful attempt to distinguish us from that. The fact of
18 the matter is, both of my clients are providing a substantial
19 benefit to the estate, and we are trying to move this case.

20 We have worked tirelessly for the last month in order
21 to do that. At the end of this, all of the 450 exchangers will
22 benefit in not having to repeat all of the work we've been
23 doing for the last month. So I would ask the Court to award
24 Howard Finkelstein's and Frontier Pepper's Ferry's motion for
25 treatment as an administrative expense in the same manner in

1 which it is done for Dr. Luxenberg. I will happy [sic] to
2 answer any questions.

3 THE COURT: Thank you.

4 MR. WOLFE: Your Honor, Craig Wolfe, Kelley, Drye and
5 Warren, on behalf of Millard Refrigerated Services, Inc.
6 Millard is one of the test case plaintiffs, representing the
7 class of segregated plaintiffs. I don't want to repeat many of
8 the arguments that were just stated.

9 So instead, I'll jump into some subtle differences
10 and talk about some factual distinctions that pertain to
11 Millard that may not pertain to others that I do think should
12 be considered in rendering decision on this. But first, I want
13 to talk about what we're asking for, because I think we're
14 asking for something a little bit narrower than what my
15 colleagues are asking for.

16 Millard is seeking solely today a finding that
17 serving as a test case plaintiff is a -- would be a substantial
18 contribution to the estate. And why I think that's important
19 is for a couple of reasons. Number one, I think it's important
20 to let the committees in this case know and let the debtors in
21 this case know that that's a -- that could happen, that we
22 could be awarded attorneys' fees.

23 I think that helps, as I said earlier this morning,
24 help everybody assess where this case is going and what it's
25 going to cost. So all that we're asking for today is for the

1 Court to do something similar to what it's already done, and
2 that is, rule that by serving as a test case plaintiff it's
3 benefitting the estate.

4 Now, some of the reasons that -- I agree with some of
5 the other statements were made, just made with respect to the
6 benefit that the estate will receive, but one of the things
7 that I would like to point out is that it's very possible that
8 Millard will be able to complete its exchange if we can get a
9 result in this case, if we can get a ruling or a settlement or
10 something by -- so we can close by April 20th or April 21st.
11 It's one of the two days.

12 That's going to be difficult to do, but it is still
13 possible to do. If we can get a resolution in the segregated
14 test cases I think we can still preserve some of those
15 exchanges. The estate will benefit because it will then not be
16 subject to damages claims as a result of that.

17 And I should point out that Millard has damages
18 claims not only against LES as the counter-party to the
19 exchange agreement, but also LFG, because LFG has contractually
20 indemnified Millard in connection with the responsibilities
21 that LES has to Millard.

22 So it will mitigate or eliminate, hopefully, claims
23 against the estate, or could possibly. Also, it would increase
24 the likelihood that competition for DNO funds would be
25 eliminated. So I thin there are three benefits. It would

1 eliminate claims, or hopefully mitigate claims against LES,
2 LFG, and hopefully, reduce the amount of competition for the
3 DNO insurance proceeds.

4 With respect to standing, we agree with the points
5 that were made. I will also add that under any circumstances
6 Millard is going to be a creditor. It suffered damages in this
7 case. I think even if the exchanges are completed by the 20th,
8 some sort of claim for damages will exist against either the
9 parent or LES or both.

10 And so I think that the standing issue is a red
11 herring. Certainly, we're a creditor in that regard, but maybe
12 if, for example, the property of the estate ruling comes
13 against us, of course, we would have a -- we would be a
14 creditor in that regard, as well.

15 As far as the issue of a prospective determination of
16 substantial contribution, I think the Court's already done
17 that. It's granted the protocol. It's ruled on the Class A --
18 or the Type A. So I think it's clear that the Court can rule
19 on that narrow issue.

20 What I don't think the Court can do, at least in
21 connection with us, I don't think the Court can say that we're
22 entitled to \$500,000 worth of fees today. I think that we
23 would have to file an application and we would have to make our
24 case that those fees were actual, necessary and perhaps
25 reasonable.

1 So I believe that the narrow relief that we're
2 seeking is completely justified on a prospective basis. And I
3 can also say that it's not entirely prospective. We've been
4 working hard for the last several weeks trying to get this to
5 work, and fees have accrued.

6 The argument of turning the American rule on its
7 head, I will point the Court to December 16th when the debtor
8 had a 9019 motion seeking to enter into settlement agreements
9 with clients such as mine, the segregated holders, and the
10 committee opposed the debtor, vehemently opposed the debtor.

11 The debtor is going to pay the committee's fees for
12 doing that. So I don't think that the American rule should be
13 so rigidly applied. I would also like to point out a couple of
14 unique factual issues that I think illustrate to the Court the
15 importance of ruling this the way that we request.

16 Millard is part of a group of plaintiffs represented
17 by our firm, a total of 13 different parties. When this group
18 was established, it was established for the purposes of
19 creating economies of scale, to get similarly situated
20 plaintiffs together to litigate common issues, kind of what
21 we're talking about today.

22 The problem is, on the 16th the Court encouraged the
23 parties to enter a protocol, and also encouraged the parties to
24 discuss with us what the protocol might involve. That didn't
25 happen. The latter didn't happen. Instead, Millard agreed to

1 be a test case plaintiff in a information vacuum. We didn't
2 know what the protocol was going to say.

3 Once we got it we objected to it, because the
4 protocol is unclear as to what the preclusive effect or the
5 precedential value of the protocol will be. As a result, there
6 has been some dissension within our group of clients: should
7 they continue to share in the expense of the test case.

8 And I will tell you, Your Honor, some of them have
9 backed out of that fee sharing. They're not all of them. I am
10 happy to say that some are contributing and they do see the
11 importance of doing this test case. But the point I'm trying
12 to make is that it has significantly impacted Millard.

13 And Millard didn't know that that was going to happen
14 when it volunteered to be a test case, and it has been
15 significantly impacted by the failure of the other parties to
16 share as though -- the way that they had said they would share
17 if we got the protocol that we wanted to see.

18 So Your Honor, we do think that the Court has a basis
19 to approve our motion. And I do want to point out, again, our
20 motion we're seeking limited relief, just a finding today, that
21 serving as test case plaintiff would be a substantial
22 contribution, with an application to follow at the appropriate
23 time. Thank you, Your Honor.

24 THE COURT: Of course, the source of the funding for
25 your 503(b) claim would be the commingled funds, as opposed to

1 the segregated funds.

2 MR. WOLFE: Well, I guess it depends on the outcome
3 and the timing of our application. We are not proposing to
4 file an application seeking employment through the interim
5 compensation procedures, for example. We're not proposing to
6 do that. We are very hopeful that we're going to resolve, you
7 know, the class of segregated plaintiffs in short order.

8 In fact, we are going to be filing a summary judgment
9 motion quickly. If everything goes well, hopefully, we will
10 have an answer within the next eight weeks, and if that's the
11 case we would apply then, and we're going to know the answer
12 then.

13 And so, you know, if in fact we win as we think we
14 will, then perhaps we would be seeking whatever resources are
15 available, whether they're the commingleds, because there's
16 been a determination as to whether they're property of the
17 estate, or whatever resources are available through settlements
18 or whatever.

19 THE COURT: All right. Thank you, Mr. Wolfe.

20 MR. WOLFE: Thank you, Your Honor.

21 THE COURT: Don't we have one other movant, or is
22 that --

23 MR. KAMIN: Mr. Fund represented --

24 THE COURT: -- both of those.

25 MR. KAMIN: -- two different parties and spoke on two

1 different motions.

2 THE COURT: Very good. Thank you.

3 MR. KAMIN: Larry Kamin, on behalf of the debtors.

4 We object to the motions, Your Honor. You had a hearing on
5 January 21st, and at that hearing, again, I think Your Honor
6 also expressed some concern that if you granted that motion
7 more might follow.

8 That concern proved out. I think it was within two
9 days of that hearing the motions that we're addressing today
10 were filed. We have -- we oppose the motions today for some of
11 the same reasons that we oppose the earlier motion, but we have
12 new ones, as well, Your Honor.

13 First of all, we do have -- believe that in part this
14 motion -- the motions they're hearing today have already been
15 decided. The motion that was made on an emergency basis and
16 heard by the Court on the 21st was a motion for 503(b) status
17 with respect to all of the commingled cases.

18 It was brought by the committee, but it sought to
19 declare 503(b) status for each of the other three commingled
20 cases. In fact, there was some discussion about that and I
21 think you questioned the -- some of the lawyers about that. I
22 do have cites if you'd like.

23 And at the end of the day the only relief that was
24 granted was the relief with respect to the Luxenberg Type A
25 case. The Type B cases were not addressed in your order, and

1 those are the ones that are before you today.

2 The other thing, Your Honor, and I think the thing
3 that's critically different between what happened several weeks
4 ago, almost a month ago, and what happened -- what's going on
5 today is there was a reason that you had for giving the 503(b)
6 status to the commingled A and not to the commingled B at the
7 time, which was that we were faced with a situation where the
8 parties have developed a protocol under which five different
9 classes of plaintiffs were identified, which would serve to
10 represent virtually all of the claimants in the case, and we
11 were -- we had a situation where one of those classes was not
12 going to be represented.

13 We could not find someone. The committee could not
14 find someone. There had been a good deal of effort expended to
15 try to find someone in the Type A situation. And for that
16 process to work and for the protocol to not kind of fail as a
17 problem from the very outset, it was necessary to incentivize
18 some plaintiff to come forward.

19 And in fact, that worked, because within two days of
20 Your Honor's order Luxenberg came forward and was prepared to
21 be the Type A plaintiff in the lead case. So incentivization
22 was required for any of the parties that you've heard earlier
23 today. Millard, for example, was litigating this case.

24 Shortly after the bankruptcy petition was filed,
25 Millard was here in December, as I recall. I think they

1 brought a motion for summary -- motion for equitable relief, if
2 I'm not mistaken, way back in December, and have been
3 vigorously litigating ever since.

4 They certainly didn't -- don't need to be
5 incentivized by any 503(b) order. Finkelstein, at the hearing
6 on the 16th was when we identified the fifth type of lead case,
7 which would be a case where part of the consideration was a
8 note in addition to cash.

9 As that hearing ended Mr. Finkelstein's lawyer came
10 to me and asked if they could be a lead plaintiff in that case.
11 They did not need any incentivization either. Finkelstein, I
12 should say, also back in December filed a motion for summary
13 judgment. They have been actively pursuing their litigation
14 and their interest, their self-interest in this matter, and I
15 don't mean that in a derogatory sense.

16 They've been -- they have been pursuing that self-
17 interest from the very beginning. They have not needed any
18 special incentive. Frontier Pepper signed on the next day
19 after that hearing or maybe two days later, agreeing to be a
20 lead case.

21 Now, we have cited law, I think it's the Summit case,
22 where the Court said that an applicant acting primarily to
23 serve its own interest would have acted -- absent an
24 expectation of reimbursement, would not be entitled generally
25 to a 503(b)(3) award.

1 Clearly, these individuals were acting without any
2 expectation of reimbursement from the estate. They were acting
3 for their own interests. Now, Mr. Wolfe talked about Millard
4 or Millerd [sic] -- is how I think it's pronounced -- he's
5 pursuing an exchange that may be done by April.

6 Of course, he was very -- to be that test plaintiff,
7 because that test plaintiff, that lead case may get a ruling
8 that will enable that transaction to close. That's not true
9 for other plaintiffs who may be in similar situations. I mean,
10 they may be able or may not be able, but they're not
11 controlling the game and the ruling at the end will not be
12 about their particular case. Whereas, Mr. Wolfe is expecting
13 that for himself.

14 Mr. Wolfe and Mr. Finkelstein and Frontier Pepper's
15 have been acting for their own interests from the beginning and
16 without any expectation of payment. Now, the 503(b)(3), we've
17 discussed it before and we do believe that it should be only
18 invoked when a contribution, a substantial contribution can be
19 assessed, or should I say, when whatever has been done by the
20 individual has been completed and the Court can determine
21 whether a substantial contribution to the estate was made.

22 That's certainly the conventional way that 503(b)
23 works. It can work differently in extraordinary circumstances,
24 and I'll get to that. But that is the way it ought to work;
25 you were to look back to see, was that a substantial

1 contribution or not.

2 Second of all, there's some confusion about the
3 American rule. The American rule is that a plaintiff bears its
4 own expenses in a litigation. That's the rule that we've lived
5 with for a couple hundred years now, and it really has nothing
6 to do whether a committee can be reimbursed under the
7 Bankruptcy Code for its activities in connection with a case.

8 That has nothing to do with the American rule. Here,
9 we're talking about a simple case, plaintiff against defendant.
10 In Bankruptcy Court it's an adversary proceeding. Everywhere
11 else, it's just a lawsuit, and that is not a case where
12 typically -- and it really takes extraordinary circumstances
13 and usually a statute under which the plaintiff can claim to
14 get reimbursed for his expenses or her expenses at the end of a
15 -- of a lawsuit.

16 But it is usually, again, at the end of a lawsuit,
17 and that really brings me to the -- I think the crux of the
18 matter. 503(b) suggests a procedure where a party can come
19 into the Court after the contributions have been made and ask
20 for legal fees.

21 There's nothing that we're saying here today that
22 suggests we will -- suggests that they are not entitled to a
23 substantial contribution claim at the time that it is made. At
24 that point we'll all be able to look towards the -- look at the
25 contributions and decide in the light of what happened and what

1 they did and how it affected the estate, as to whether a case
2 of substantial contribution has been made.

3 You already decided that those factors and that the
4 usual procedures were outweighed by the necessity of providing
5 a representative type for the -- representative plaintiff for
6 the Type A cases. And in fact, I think your ruling was that
7 there was a substantial contribution to be made by having a
8 Class A plaintiff represented in the case.

9 While we disagreed with that, Your Honor, it's clear
10 that it was an extraordinary situation, that the protocol was
11 in danger of not -- of falling apart before it began and that
12 without incentives that we could find no representative to
13 assert those claims and press that kind of argument.

14 Extraordinary circumstances may justify extraordinary
15 measures like the 503(b) ruling last time. That's not the case
16 with the plaintiffs here. There's nothing extraordinary about
17 the situation. They are plaintiffs who are prosecuting their
18 cases and they're fully able to make a claim for substantial
19 contribution at the appropriate time. Thank you.

20 THE COURT: Thank you.

21 MR. SABIN: Good afternoon, again, Your Honor. Jeff
22 Sabin, with Bingham McCutchen, on behalf of the LFG committee.
23 First, I assume and hope that the assumption is right, that
24 your ruling in connection with the motion to employ counsel for
25 the test case A has become law of the case, so that with

1 respect to these 502(b) motions or those particular motions
2 that seek as part of their relief an ability not only to have a
3 503(b) contribution, but to be paid under the interim
4 compensation procedures order that your ruling would be the
5 same with respect to all of those motions.

6 THE COURT: It would.

7 MR. SABIN: Okay. Proceeding from that, Your Honor,
8 I do note that the history recited by Mr. Kamin is not -- is
9 almost complete by way of applicable history for these motions,
10 and that is, indeed, this motion started out with the debtor
11 trying through its motion to find a solution for 60 some odd
12 adversary proceedings.

13 The thing that I will note is that the protocol
14 motion itself was heard on January 12th, and at that hearing in
15 connection with the original motion, which sought four test
16 cases, we found that there was a fifth case. And the fifth
17 case, if you recall, had to do with cash and notes being put
18 up.

19 And so at that point we had solved four out of the
20 five categories and were missing one particular test case. And
21 that was the state of affairs as I recall it, and as I read the
22 record at the end of the day on January 12th. On January 16th
23 this Court actually entered the order with respect to those
24 hearings, and we were still searching for that fifth case.

25 While we were searching we had two things happen. We

1 had the Gluckstern case be filed, which could have been a test
2 case A, and we had a motion filed. And the motion was by the
3 ad hoc committee of commingled exchangers who were then seeking
4 alternative relief. That's the piece that I think is important
5 to recall that hasn't been recited yet by Mr. Kamin.

6 And the relief they wanted in the first instance was
7 they wanted official status as an official, additional
8 committee in the 1031 cases. And if I recall right, you denied
9 that piece of their relief, and in the alternative you said,
10 I'm going to in essence try to find a solution so that we can
11 get to an agreed upon, consensual protocol order with all five
12 categories fixed.

13 And it was in that context -- okay -- in that context
14 that the test case five was given substantial contribution
15 effectively decision by you, subject to the application. And
16 if I recall, the committees were deciding with the debtor which
17 of the two cases, Gluckstern or Luxenberg, were going to go
18 forward to become the fifth case.

19 I think that part of the argument is judicial
20 estoppel. It wasn't until two days later that the other four
21 groups show up after participating in all of this history and
22 say, me, too, me, too, me, too; I like the result that the
23 Court gave on January 19th with respect to that piece of the ad
24 hoc committee motion that granted 503(b) status.

25 I submit, Your Honor, that as a court of equity that

1 is not the right thing to do. They had participated. They had
2 teed up their motions. They had asked for relief. They were
3 the beneficiaries of that, and I second it -- excuse me -- I
4 supplement it by reference to their actual exchange agreements.

5 None of those agreements contain provision that
6 otherwise would give contractually 503(b) status to any of
7 those groups that are now moving for that relief. And in fact,
8 those agreements say just the opposite, which is those
9 agreements contemplate that disputes could arise, even with
10 respect to third parties, as they have, over whose money, okay,
11 and whose rights to ownership of that money, okay, and/or
12 heiresses, otherwise could get litigated.

13 And those agreements go on to say that you're not
14 entitled to legal fees in connection with it. So it would be
15 extraordinary relief for this Court to now grant, after the
16 fact, 503(b) status for people who could have thought about it
17 when they otherwise commenced it, or at a minimum, in
18 connection with their responses to the motion by the ad hoc
19 committee. And for all of those reasons, Your Honor, we think
20 it would be inappropriate to grant them 503(b) status today.
21 Thank you.

22 THE COURT: All right. Thank you, Mr. Sabin.

23 MR. GIBBS: As is often the case when I go behind two
24 parties that are similarly aligned, anything I say will be
25 gilding the lily. They've adequately addressed the concerns

1 with the motions before the Court that my committee had, and
2 for the same reasons that the debtor's counsel and the LFG's
3 committee's counsel heard you to deny the request, we would
4 also.

5 We think that in fact, contrary to what counsel for
6 the two commingled test cases indicated, and when he said this,
7 we're trying to relitigate the issue, in essence, I believe
8 they are. The issue that they are seeking is a ruling
9 different than what your Court would -- Your Honor found when
10 it denied the request of the ad hoc committee to give all of
11 the commingled exchange test cases 503(b) status, and instead
12 only granted 503(b) status to the Type A test case.

13 And Your Honor ruled that the substantial
14 contribution was the ability to have a Type A test case.
15 Again, for the reasons that were articulated by my colleagues,
16 that's not the case here. These four -- well, now, three test
17 case plaintiffs were already on board.

18 They had signed onto the protocol. They're not
19 precluded from coming at the proper time after their work is
20 completed, and after their expenses have been incurred, in
21 seeking a 503(b) status under the theory that their efforts
22 caused a substantial or made a substantial contribution to the
23 case.

24 503(b) (3) and 503(b) (4) speak in the past tense, and
25 what they're asking for is extraordinary, prospective findings

1 for which there's no basis here today.

2 THE COURT: Thank you, Mr. Gibbs. Anything further,
3 Mr. Wolfe?

4 MR. WOLFE: Yes, Your Honor. I just want to clarify
5 a couple of points. Number one, I do want to make clear that
6 Millard was here on the first day of the case. That's
7 perfectly clear and Millard was advocating on behalf of itself.
8 But I do want to point out that things have changed as a result
9 of this protocol.

10 As I had mentioned, Millard was a part of a big group
11 that is no longer contributing in the way that it was, and
12 that's a result of a protocol that doesn't deal with the
13 preclusive effect issues. So I want to point that out. The
14 other issue is that Mr. Kamin had suggested that Millard is
15 different and is vigorously prosecuting the test case because
16 it's one of the few that has an exchange pending.

17 I want to make that clear that that's not true. We
18 have the Chino -- all of our California clients, for example,
19 have extensions by virtue of the California wildfires. They
20 were precedentially declared a disaster zone and therefore
21 qualified for a 1031 extension.

22 The next point I want to make, I don't think there's
23 a real distinction between the alternative relief, as Mr. Sabin
24 had mentioned. I think that any one of the groups of the five
25 could seek a committee today and seek this in the alternative,

1 but I do think that it was appropriate, once the Test A ruling
2 came down, that parties put their motions in immediately.

3 Otherwise, they might be argued to have waived the
4 right to do that, and that's why we got our papers in quickly.
5 In fact, we were criticized in the first round of oppositions
6 for not raising our hand sooner. So now, we're getting
7 criticized for raising our hand too late -- or excuse me -- too
8 early.

9 And then the last point I want to make is that
10 Millard was not a party to any of the litigation with respect
11 to the ad hoc committee's request to appoint a Test A, and so
12 it should not be affected by any sort of preclusion or judicial
13 estoppel, anything of that nature. Thank you, Your Honor.

14 THE COURT: All right. Thank you, Mr. Wolfe. Mr.
15 Funk.

16 MR. FUNK: Briefly, I just want to address some of
17 the points that were raised on the objections. Every -- all of
18 the parties have stressed that the reason the Court awarded
19 administrative expense status to the Type A client was because
20 there was no volunteer to come forward.

21 The problem with that logic is that underlying that
22 is the Court's acknowledgment that the protocol itself was a
23 benefit to the estate. That was implicit in the Court's
24 ruling. So now, the Court has decided the protocol benefits
25 the estate.

1 The question now is whether or not the Court is going
2 to allow one party to the protocol, one lead plaintiff, to draw
3 down the assets while funding their portion of the protocol,
4 while leaving other people, other parties to the protocol to
5 fund their own expense.

6 So the fact that there was a volunteer for the other
7 categories, but not for the Type A, does not provide a
8 distinction on which this Court can rely in denying
9 administrative expense status to the Type B. Now, Mr. Gibbs
10 said that we're not really prejudiced because the Court can
11 always come in at the end upon a motion by Mr. Finkelstein or
12 Mr. -- Frontier Pepper's Ferry and apply for an administrative
13 expense, and that's true.

14 But the problem with that is the Court will
15 inevitably be applying a different standard. If we come in, in
16 three, six months and ask for an administrative expense status
17 the Court will apply a hindsight view to whether or not Howard
18 Finkelstein or Frontier Pepper's Ferry can be administrative
19 expense status claimants. Whereas, the Court will have applied
20 a prospective view to Dr. Luxenberg.

21 So that isn't an equal -- that's not putting them on
22 an equal status, even though we can come in at the end and do
23 it. It needs to both be prospective, subject to the Court's
24 overview for reasonable, actual and necessary expenses. Now,
25 Mr. Kamin's stressed the fact that we were all here -- Howard

1 Finkelstein and Frontier Pepper's Ferry were here before we
2 knew we would get any -- we could get any administrative
3 expense status, that we were pursuing our own claims.

4 And that's true, but nobody has described what
5 benefit -- and I raise this in my initial opening -- nobody has
6 described what benefit Frontier Pepper's Ferry and Howard
7 Finkelstein are getting from this. They pursued their rights
8 because they knew somebody had to move this ball down the
9 court.

10 Somebody had to bring resolution to these claims.
11 They took it up, but they are doing so in a way that is going
12 to benefit the entire body of exchange creditors. And Mr.
13 Kamin cited the Summit case. Well, the Summit case dealt with
14 applicants who act primarily to serve their own interest.

15 They haven't even shown what any interest we have and
16 somehow how we're going to benefit our own. And in any event,
17 there's a dispute amongst the circuits, and I haven't found
18 where it's been resolved in the Fourth Circuit, as to whether
19 or not the Court can even look to the intent of the parties.

20 In the Celotex case that I referenced earlier the
21 Court said that, "Whether the efforts of the applicant resulted
22 in an actual and demonstrable benefit" -- okay. I'm sorry.
23 "The degree of benefit conferred or contribution made is not
24 diminished by selfish or shrewd motivations.

25 So the 11th Circuit has said, you don't look to what

1 may be hidden motivations of the claimant. The question is
2 whether or not we have provided substantial benefit. But I
3 believe that regardless of which view the Court takes, whether
4 it can consider the motivations of the claimant or cannot, as
5 the 11th Circuit held, I would argue that nobody has pointed
6 out how we are primarily serving our own benefit. I have
7 nothing further, Your Honor.

8 THE COURT: All right. Thank you. All right. The
9 Court has considered the motions and is going to deny all three
10 of them. The -- and I think that there's -- the substantial
11 contribution comes at the end of the case or at the end of the
12 matter, not at the beginning.

13 And the Court's rationale in granting the 503(b)
14 status to the Type A cases was that we needed to get
15 representation under the protocol for that class of creditor
16 and -- or exchanger, and that we needed to do it very, very
17 quickly, because we wanted to be on a very fast time frame, and
18 I didn't want to be left behind and then derail the whole
19 protocol process.

20 And so the substantial contribution that I found was
21 being made there was somebody stepping up to the plate to
22 represent that class, and that's exactly why I did that and for
23 no other reason. Now, that's not to say that the other
24 claimants will not be making substantial contributions.

25 They may very well, and I'm not foreclosing the

1 possibility of coming in at a later date and making the claim
2 at that time. And Mr. Funk is exactly right. There will be a
3 different status then. We will be looking at it, then, in
4 hindsight, as this is supposed to be done in most cases.

5 And we will not be looking just at the reasonability
6 and necessity of the fees, but also, you know, whether or not
7 there was a substantial contribution that was made to the case,
8 given the parties and all of the case law that interprets that.

9 And I just think there is -- there's a huge
10 distinction between benefit to the estate and a substantial
11 contribution to the estate, and that'll be the standard that we
12 apply at that time. Any question about the Court's ruling?
13 All right. Mr. Kamin, I'd ask you to prepare the order on
14 that, please.

15 MR. KAMIN: Very well, Your Honor.

16 MS. STRICKLAND: Your Honor, if it's not too
17 disruptive, we would like to take 30 seconds to switch teams,
18 and some of us are going to head to the airport if that's all
19 right with Your Honor.

20 THE COURT: Okay. Well, why don't we make just a
21 five-minute recess, then.

22 MS. STRICKLAND: Thank you, Your Honor.

23 THE CLERK: All rise. Court is now in recess.

24 (Recess at 2:54 p.m., until 3:01 p.m.)

25 THE CLERK: All rise. Court is now in session.

1 Please be seated and come to order.

2 MR. MADDOCK: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. MADDOCK: John Maddock, on behalf of the debtors.
5 Your Honor, items 18, 19, 20 and 21 are four motions to incur
6 debt. These are very similar to what the Court has seen in the
7 past. In regard to number 18, this is Fifth Third Bank's
8 motion to authorize the debtor to incur debt.

9 We have -- the debtors did file a limited objection
10 in an effort to make this look like the previous agreements
11 that had been approved. Those changes have been agreed to and
12 we have talked to Vorys, Sater, and in particular Reginald
13 Jackson of that firm, and he's agreed to make the changes.

14 I'm happy to walk through the exchange agreement with
15 the Court, but the objection has been resolved. They're not
16 here today, but they've asked me to put that on the record.

17 THE COURT: So it's going to be the same as what I've
18 approved in the past?

19 MR. MADDOCK: Yes, it is, Your Honor.

20 THE COURT: All right. Does any party wish to be
21 heard in connection with Fifth Third Bank's motion? All right.
22 Then that motion as amended will be granted.

23 MR. MADDOCK: Your Honor, items 19 through 21 were
24 filed by the Cantor Arkema law firm. I'll let Mr. Funk --

25 THE COURT: All right.

1 MR. MADDOCK: -- address those.

2 MR. FUNK: Good afternoon, Your Honor. Kevin Funk,
3 with Cantor Arkema. On behalf of James Clark, Frontier
4 Pepper's Ferry and Leon Docken (phonetic), Your Honor, we've
5 spoke with Mr. Maddock earlier today and we have resolved the
6 disputes with the order.

7 We have a redline that -- and which we're going to
8 adopt all of their changes to bring it into sort of conformance
9 with what the Court has already awarded, so.

10 THE COURT: All right. Very good. Thank you.

11 MR. MADDOCK: We would --

12 THE COURT: Does any party wish to be heard in
13 connection with items 19, 20 or 21?

14 MR. MATSON: Good afternoon, Your Honor. Bruce
15 Matson, here on behalf of the LFG committee. We were going to
16 support the debtor's limited objection. Provided the orders
17 are as represented, we won't have any objection to the motions.
18 Thank you.

19 THE COURT: All right. Thank you. All right. Those
20 matters, then, will be granted.

21 MR. MADDOCK: Your Honor, the last item on the docket
22 is item number 22. This is a pretrial conference in a
23 adversarial proceeding, RamQuest Software, Inc. versus LFG.
24 Mr. Savenko is here on behalf of RamQuest.

25 THE COURT: All right. What is this about?

1 MR. SAVENKO: Your Honor, by way of introduction,
2 I'll just allow the Court a -- my partner, Tom Junker, is
3 actually handling things here and recently admitted for the
4 Court. So I'm going to allow him to address it. He's more
5 familiar with the intimate details of the case and will advise
6 the Court as to what it's about and what we need to do from a
7 trial perspective.

8 THE COURT: And his name again, please?

9 MR. SAVENKO: Tom Junker.

10 THE COURT: Okay. Thank you. Mr. Junker, welcome.

11 MR. JUNKER: Good afternoon, Your Honor. Tom Junker,
12 for RamQuest, the plaintiff in this adversary proceeding. This
13 is a case we filed. We filed an amended complaint 10 days ago
14 and I understand an answer will be served today. Four claims,
15 declaratory relief, breach of contract, copyright infringement
16 and injunctive relief. That's a new claim we added in our most
17 recent first amended complaint.

18 This concerns the use or, really, the misuse by LFG
19 of RamQuest software, the RamQuest license to LFG for use in
20 its title operations, and we believe that it's being misused in
21 breach of the license agreement, violating our copyrights and
22 that's basically the nature of the case. We're going to be
23 seeking injunctive relief, as I mentioned.

24 THE COURT: Okay. And how long do you think it's
25 going to take us to try this case?

1 MR. JUNKER: I don't think it'd take longer than
2 three days, Your Honor. It's a fairly straightforward case,
3 both on liability and I think eventually on damages, as well.

4 THE COURT: And how much discovery's going to be
5 needed?

6 MR. JUNKER: I don't think we need that much, Your
7 Honor. I'd like to have a trial date three months from now, if
8 we could.

9 THE COURT: Okay. Mr. Maddock --

10 MR. MADDOCK: Your Honor --

11 THE COURT: -- do you agree with it -- with all that?

12 MR. MADDOCK: Well, we certainly dispute the factual
13 allegations in the complaint, but as far as three days, I don't
14 know that it would take that long, perhaps two. In regard to
15 three months, I would object to that, Your Honor, and ask for
16 more time.

17 In the complaint there's an allegation that over 50
18 entities are unauthorized users of the RamQuest software. So
19 regardless of how difficult the issues are, there is
20 significant volume there. Where we are today, as you just
21 heard, the answer is due today.

22 So we've just really gotten started on this. We
23 would ask that the trial not be held -- that it be about six
24 months out to conduct the discovery that's going to be
25 necessary.

1 THE COURT: All right. Very good. All right. The
2 Court can give you September 14, 15 and 17. Does that work?

3 MR. JUNKER: Yes, Your Honor.

4 MR. MADDOCK: Yes, Your Honor.

5 THE COURT: Okay. Is there any reason not just to
6 use the Court's regular pretrial order?

7 MR. MADDOCK: No. That's fine, Your Honor.

8 MR. JUNKER: That's fine with us, Your Honor.

9 THE COURT: Okay. So that order will then be issued
10 in the next day or two.

11 MR. JUNKER: Thank you, Your Honor.

12 THE COURT: Is there any other matter that we need to
13 take up this afternoon?

14 MR. MADDOCK: Your Honor, there's one additional
15 matter that Mr. Wolfe will address regarding scheduling on the
16 Millard calendar lead case.

17 THE COURT: All right.

18 MR. WOLFE: Yeah. Craig Wolfe, again, Kelley, Drye
19 and Warren, for the record. Your Honor, February 20th has come
20 and gone. That was the first date that we could file summary
21 judgment motions. And we're prepared. We're ready to go. The
22 only thing that we're waiting on is I believe one or more
23 transcripts to come in. But we're just hours away from being
24 ready, we believe.

25 With that said, we've talked to the committees, we've

1 talked to the debtor and what we would like to do is put the
2 matter on for hearing in the first week of April. And the
3 reasoning behind that is to give -- you know -- assuming we're
4 going to be filing, say, by -- between Wednesday and Friday of
5 this week.

6 That would give the other side or the other parties
7 three weeks to object, which is consistent with the protocol.
8 Then there would be one week for reply and then one week
9 between the reply and the hearing date for everybody to
10 prepare. So we would love to have a hearing date on, say,
11 either the 1st, 2nd or 3rd of April, if that's available, or
12 first available after that.

13 THE COURT: I don't have the 1st, 2nd or 3rd
14 available. Matter of fact, those first -- can we do the 7th?
15 You're not going to be here.

16 (Court and clerk confer)

17 THE COURT: Okay. I can give you the 7th.

18 MR. WOLFE: The 7th; okay, Tuesday the 7th. Okay,
19 Your Honor, that would be fine. And then again, three -- what
20 we're looking for are three weeks on objections, one week for
21 reply and then the 7th. So we would just work backwards from
22 those dates, if that's okay.

23 THE COURT: That's fine.

24 MR. WOLFE: Okay.

25 THE COURT: All right. Are you going to actually

1 submit a scheduling order on this or just have it on the record
2 for what we've done?

3 MR. WOLFE: I don't -- I think it's okay on the
4 record, if everybody else is okay.

5 THE COURT: Okay.

6 MR. MATSON: I think that's fine. I missed the time.
7 Was it at 10:00 a.m., two o'clock?

8 THE COURT: Oh, it'll be in the morning, 10:00 a.m.

9 MR. MATSON: 10:00 a.m. I think we're probably -- my
10 guess, Your Honor -- Bruce Matson, for the record -- my guess
11 is we'll need a couple of hours. I would expect there'll be
12 two or three hours of argument, I'm afraid. But I just -- just
13 say that for scheduling purposes if --

14 THE COURT: Well, I don't have anything else
15 scheduled that day in court. So you'll still have plenty of
16 time to get that done.

17 MR. MATSON: Okay.

18 THE COURT: Mr. Gibbs.

19 MR. GIBBS: I think it was clear from Mr. Wolfe's
20 comments, but just to make sure for my satisfaction. We -- any
21 motions for summary judgment in the Millard case would be set
22 for that time. We intend to file our own motion for summary
23 judgment, and will be filing it within the same time frame as
24 Mr. Wolfe just indicated. So I don't think that's --

25 THE COURT: In this case.

1 MR. GIBBS: Yes. And I --

2 THE COURT: Right. So we'll have cross-motions for
3 summary judgment. Okay.

4 MR. GIBBS: Exactly, yeah, and I don't think that
5 will change the amount of time we're going to need to argue,
6 because it's the same issues looked at from both sides of the
7 mirror.

8 THE COURT: I would prefer to have it done that way.

9 MR. GIBBS: Okay.

10 THE COURT: All right. Anything further on that?
11 Okay. Any other business we need to take up this afternoon,
12 Mr. Maddock?

13 MR. MADDOCK: No, sir.

14 THE COURT: All right. Very good.

15 THE CLERK: All rise. Court is now in recess.

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CERTIFICATE

We, LORI AULETTA, AMY RENTNER and ELIZABETH REID-GRIGSBY, a certified electronic transcribers, certify that the foregoing is a correct transcript, to the best of the transcribers' ability, from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Lori Auletta

February 25, 2009

Lori Auletta

/s/ Amy Rentner

Amy Rentner

/s/ Elizabeth Reid-Grigsby

Elizabeth Reid-Grigsby

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