

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. . December 16, 2008  
. . . . . 5:14 p.m.

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

APPEARANCES:

For the Debtor: McGuire Woods LLP  
By: DION W. HAYES, ESQ.  
One James Center, 901 E. Cary St.  
Richmond, VA 23219  
  
For Embarq Logistics, Kilpatrick Stockton LLP  
Inc.: By: MARK D. TAYLOR, ESQ.  
607 14th Street, N.W., Suite 100  
Washington, DC 20005  
  
For David Ash, Arboleda Corporation, and DeBaca Land and Cattle, LLC: By: TROY SAVENKO, ESQ.  
2134 W. Laburnum Ave.  
Richmond, VA

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(609) 586-2311 Fax No. (609) 587-3599

Appearances (Cont'd):

For Haddon Square  
Partners, LLC:

Leach Travell Britt PC  
By: STEPHEN LEACH, ESQ.  
8270 Greensboro Drive  
McLean, VA 22102

For Arbor Oaks I  
and Arbor Oaks II:

Mercer Trigiani LLP  
By: PHILIP C. BAXA, ESQ.  
16 S. 2nd Street  
Richmond, VA 23219

For Kyoungae Kim  
Trust:

Cohen & Associates P.C.  
By: JEFFREY COHEN, ESQ.  
1600 Stout Street, Suite 1710  
Denver, CO 80202

For Four Claimants:

Woods Rogers PLC  
By: RICHARD C. MAXWELL, ESQ.  
Wachovia Tower, Suite 1400  
10 South Jefferson Street  
Roanoke, VA 24038

For 135 Street Corp.  
et al.:

Sands Anderson Marks & Miller, PC  
By: C. THOMAS EBEL, ESQ.  
Wytestone Plaza  
801 East Main Street, Suite 1800  
Richmond, VA 23218

For Charles Lumber  
Company:

Cook, Heyward, Lee, Hopper & Feehan,  
P.C.  
By: DAVID D. HOPPER, ESQ.  
Innsbrook Center, 4551 Cox Road  
Suite 210  
Glenn Allen, VA 32060

For Millmar Holdings  
and Others:

Cantor Arkema, P.C.  
By: KEVIN J. FUNK, ESQ.  
Bank of America Center  
1111 East Main Street, 16th Floor  
Richmond, VA 23218

For Sonya Revero,  
et al.:

Ballon, Stoll, Bader & Nadler, P.C.  
By: DWIGHT YELLEN, ESQ.  
505 Main Street  
Hackensack, NJ 07601

Appearances (Cont'd):

For ROHO Investments  
Ltd.:

By: DOUGLASS SCOTT, ESQ.

For Porete Realty:

By: ELIZABETH GUNN, ESQ.  
1 James Center, 901 E. Cary Street  
Richmond, VA

For H. Chris Christy:

By: BRIAN BOWEN, ESQ.  
Little Rock, Arkansas

For Porete Realty  
Corp.:

Durette Bradshaw, PLC  
By: ROY M. TERRY, JR., ESQ.  
Main Street Centre, 600 East Main St.  
20th Floor  
Richmond, VA

For Tim Meserve:

By: LT. CO. TIM MESERVE

For Health Care  
REIT:

By: RANDY MILLER, ESQ.

For LES Creditors'  
Committee:

Akin Gump Strauss Hauer & Feld LLP  
By: CHARLES GIBBS, ESQ.  
1700 Pacific Avenue, Suite 4100  
Dallas, TX 75201

For K&L Property  
Holdings:

McCandlish Holton, PC  
By: ALAN S. BUFFENSTEIN, ESQ.  
1111 East Main Street, Suite 1500  
Richmond, VA 23218

Appearances (Cont'd):

For : Kelley, Drye & Warren LLP  
By: CRAIG WOLFE, ESQ.  
200 Kimball Drive  
Parsippany, NJ 07054

1 THE CLERK: Attention. Please be seated.

2 THE COURT: Mr. Hayes, yes -- I just wanted to  
3 address an issue that -- our court reporter had an issue, and  
4 she has to leave. We will be relying upon the Court's FTR Gold  
5 recording system, which is a system that we are actually moving  
6 to and we'll be implementing on a permanent basis in lieu of  
7 having court reporters in the courtroom. It's a fully  
8 transcribe-capable system and such, but I just want to put that  
9 on the record and let everybody know that we'll be relying on  
10 that system going forward this evening. If that presents an  
11 issue for anybody, then I'd like to get that out of the way. I  
12 can't imagine there will, but it's a fully-automated back-up  
13 system that we've been employing.

14 MR. HAYES: Okay. Thank you, Judge. That's fine  
15 with the debtors.

16 THE COURT: Okay. Does the committee have an issue  
17 with that?

18 UNIDENTIFIED ATTORNEY: No, Your Honor.

19 THE COURT: Okay. Thank you. Proceed, then.

20 MR. TAYLOR: Thank you, Your Honor. Mark Taylor,  
21 Kilpatrick Stockton, on behalf of Embarq Logistics. Let me  
22 first express my pleasure to appear before you, Your Honor.

23 I stand today in support of the motion. I'm tempted  
24 to digress into the specific facts governing my client's  
25 situation, but understand that they're not before the Court.

1 But let me, not to be facetious, note that in the argument  
2 before the Court today, both the legal argument and factual  
3 argument, a number of issues have been raised that are relevant  
4 to the Court's determination, what governing law might be, what  
5 are the relevant dates, the 45-day, 180-day, the closing date,  
6 issues about is there -- was there co-mingling, is there a  
7 separate escrow holder?

8           With respect to my client, again, I'm not going to  
9 lay out all the facts other than to note, very similarly  
10 situated to Mr. Miller's client, separate escrow holder,  
11 Centennial Bank. From the facts and evidence before the Court,  
12 the declaration of Mr. Ramos, you can see Embarq Logistics, its  
13 exchange agreement, June 3rd, 180 days expired December 1. So,  
14 we are beyond the period under 3B of the agreement under which  
15 the debtor has an exclusive right to hold those funds, and  
16 those funds revert to the client.

17           Although I think, as a matter of law and fact, that  
18 these funds are no longer, if they ever were, at this stage in  
19 the game having a termination date that expired, but they're no  
20 longer in claim or equitable beneficial any right whatsoever  
21 for the debtor to hold these funds. I'm not going to make that  
22 argument today. But I think what the Court should have seen  
23 today is that there is a need for a procedure. That procedure  
24 has to be very quick, because not only of implications for this  
25 case, but beyond this case, but also that the issues that are

1 going to be relevant and important for that procedure are  
2 issues that can be determined very quickly. Again, is there a  
3 separate escrow holder? Where is that money? What are the  
4 relevant dates? What's the governing law? Again, I think  
5 those issues can be resolved quickly.

6 We support the debtor's motion. We think that it  
7 sets forth a very -- a balanced procedure which allows the  
8 committee, allows parties in interest to review the relevant  
9 information, but also allows for a quick resolution. That's  
10 all I have. Thank you, Your Honor.

11 MR. SAVENKO: Good evening, Your Honor. Troy Savenko  
12 here on behalf of three different clients that fall under the  
13 segregated category, David Ash as trustee for the David Ash  
14 Trust dated January 10, 2008, Arboleda (phonetic) Corporation,  
15 and DeBaca (phonetic) Land and Cattle, LLC.

16 Your Honor, my clients all support the proposed  
17 relief in the 9019 motion subject to a couple of concerns that  
18 were raised in pleadings filed with the Court, most of which  
19 have been addressed already, so I won't waste the Court's time  
20 in going into those again.

21 One point I'd like to raise, though, that has not  
22 been addressed, or at least not to my satisfaction, is that  
23 there are, of course -- you know, we've heard about the 45-day  
24 significance, the 180-day significance, that there are damages  
25 that occur if you miss a closing date, and so in the context of

1 the procedures that are being thrown around by the committee  
2 right now, I think some concern has to be given to the closing  
3 date, or pending closing date for a client, and in particular,  
4 for instance, David Ash, one of my clients, has a closing date  
5 coming up on December 31st. Assuming these procedures would go  
6 forward as proposed in the order that was circulated late last  
7 night, there would be a 17-day gap, even if those procedures  
8 were approved. And that doesn't get it done by December 31st.  
9 So, what I would actually request of the Court, in concern for  
10 my clients in particular, but I think it would be to the  
11 benefit of all that in this situation, is that to the extent  
12 we're going to have some sort of procedure in place, that we  
13 keep in mind in some way, shape, or form, the concerns of these  
14 folks that may have closing dates, or dates that fall within  
15 whatever time constraints are out there.

16           Beyond that, Your Honor, again, I'd just support the  
17 relief requested. I think, you know, we can rely on -- refer  
18 to the law cited by the learned counsel before me.

19           THE COURT: Thank you.

20           MR. LEACH: Good evening, Your Honor. Stephen Leach  
21 of the Leach Travell Britt law firm, Tyson's Corner, Virginia.  
22 I'm here on behalf of Haddon Square Partners LLC, which is a  
23 party to one of the segregated account exchange agreements.  
24 And if Your Honor is of a mind to recognize that party with the  
25 narrowest issue of the day, I suspect I'm clearly in the

1 running. My client adopts and agrees with all of the erudite  
2 and thoughtful arguments that have been raised in favor of the  
3 debtor's motion. Our concern is merely the language, the text  
4 of the release that the debtor has proposed. We have two  
5 simple points. One is that the release agreement itself, if  
6 you read it carefully, would have the debtor release the funds  
7 in the accounts -- not release it, but it does not release its  
8 claim to those funds. And secondly, the proposed release, of  
9 course, has the customer providing a complete, comprehensive  
10 release of the debtor, but there is no corresponding release of  
11 the customer. We think that it's appropriate if the customers,  
12 as a condition of getting their money back, are required to  
13 provide a complete, comprehensive release of the debtor. And  
14 we don't necessarily disagree with that, but we want a release  
15 back from the debtor so that it is a true, mutual release.

16 THE COURT: There's nothing that would prohibit you  
17 from negotiating something like that on your own and then just  
18 coming in on your own motion and asking the Court to approve  
19 that other than the overall -- the procedure that the debtor  
20 has proposed.

21 MR. LEACH: That's certainly true, Your Honor, but it  
22 was our understanding that the idea behind -- in part, the idea  
23 behind the debtor's motion is to set up a standardized protocol  
24 --

25 THE COURT: All right.

1 MR. LEACH: We would ask that that protocol include  
2 mutual releases of the customers and the debtor if -- as a --  
3 if -- we think it's inappropriate that the customer -- I mean,  
4 if the Court finds that these are, in fact, trusts, it's  
5 inappropriate to require the debtor or the customer to fully  
6 release the debtor in order to get its trust funds back, and  
7 not obtain a release itself.

8 THE COURT: All right. And I think that's one of the  
9 things that has sort of gotten lost in all of this, is that the  
10 Court is really not making a determination today about whether  
11 this is a trust, or not a trust, or anything else. What the  
12 Court is doing today in this motion is deciding just very  
13 simply whether or not in the exercise of the debtor's business  
14 judgment it should approve this procedure for settling claims  
15 against the estate.

16 MR. LEACH: Very well, Your Honor.

17 THE COURT: Okay. Thank you.

18 MR. LEACH: Thank you.

19 MR. BAXA: Good evening, Your Honor. Phil Baxa from  
20 Mercer Trigiani, representing Arbor Oaks I and Arbor Oaks II.  
21 We are a -- they are segregated account holders. We have  
22 motions that are pending later on in the docket today. We  
23 support the arguments that have been made by the prior speakers  
24 here for the reasons they indicated. We also have, in filing  
25 our pleadings, we attached the documents that set forth the

1 basis for our claim, including the exchange agreements and the  
2 documents that relate to the accounts that were set up.

3 Your Honor, just -- the only point I wanted to make  
4 is my clients have closing dates on two pieces of property set  
5 for December 30th and December 31st, and I just wanted to speak  
6 to the urgency of our doing procedures -- adopting procedures  
7 that are going to address these in a timely basis.

8 THE COURT: Thank you. Any other party wish to speak  
9 in favor of the motion? All right. Any party wish to speak  
10 against the motion?

11 MR. COHEN: Thank you, Your Honor. Jeffrey Cohen on  
12 behalf of the Kyoungae Kim Trust. A pool of exchange, Your  
13 Honor. And we don't -- we believe that the debtor's motion  
14 really doesn't go far enough and draws an artificial  
15 distinction between segregated accounts, and I put quotes on  
16 that distinction, versus pooled, or what the debtor uses co-  
17 mingled accounts. Your Honor, I've been involved in the 1031  
18 Exchange case in the Southern District of New York, Bankruptcy  
19 Judge Glenn, now for a year-and-a-half, and we dealt with the  
20 exact same questions. With regard to segregated accounts,  
21 pooled accounts, trusts, express trusts, constructive trusts  
22 and resulting trusts.

23 First, from the exchanger's prospective, both in that  
24 case and in this, the exchanger's position is exactly against  
25 the position argued by Mr. Gibbs, who represents the committee

1 for LES. All of the exchangers -- it's in their interest to be  
2 beneficial owners of an express trust, whether that be pooled  
3 or segregated. It benefits them not to be unsecured claim  
4 holders waiting at the end of the line when all the  
5 administrative claims are paid, and some other claims in other  
6 proceedings are winding down. And, in fact, the position of  
7 the exchangers was completely adverse in that case to the  
8 position of the unsecured creditors as unsecured creditors.

9           Suffice it to say, though, that when we got into the  
10 mechanics of the tracing and we looked at what happened at the  
11 1031 exchange level, in other words, the QI (sic), how did it  
12 treat its funds when it came in after a deal closed? And we  
13 found repeatedly that often times before the money was placed  
14 in a truly segregated account with a name on it, for the  
15 benefit of, at a specific bank, the same exact mechanics, we  
16 saw, and I think we'd see in this case, except for perhaps one  
17 or two exceptions, that the money went into a pooled money  
18 market account first, and then after it went from the pooled  
19 money market account the debtor then put it into a segregated  
20 account with a specific name on that.

21           Now, the way we dealt with that in that case is  
22 twofold. One, with regard to exchange rules that we need to  
23 close their -- the exchange quickly and to trace their funds,  
24 they made separate 9019 motions, and perhaps from time to time  
25 the notice requirements were lessened, as the case may be. And

1 then we looked at the specific tracing of their funds to see  
2 whether, in fact, they can identify a truly segregated account,  
3 and if so, in one of the hearings, then that agreement was  
4 approved under 9019 and the funds were given out relatively  
5 quickly so that the deal could or could not close, as the case  
6 may be.

7           But what we did find is that both the non-segregated  
8 and allegedly segregated accounts really came from the same  
9 source, and it was a distinction without a difference, and only  
10 a name, and one of many indicia that one would look at to  
11 determine whether there was an express trust. So, that was  
12 dealing with the exchangers, that really they'd be able to be  
13 closed quickly under Bankruptcy Rule 9019, looking at fact-  
14 specific cases like you heard immediately prior to this  
15 presentation, Your Honor.

16           I think there are fact-specific cases, and I think  
17 the Court should consider them quickly if, indeed, they can  
18 make out that their funds never made it through any pooled or  
19 quote, unquote, money market. There what the Court did is  
20 there was one adversary, and the Court ordered the debtor to  
21 send out a notice of a right of intervention under FRCP 24,  
22 which is then incorporated under 7024, so that you could opt  
23 in, not into a class, but as a plaintiff in a -- made into a  
24 declaratory judgment action to determine whether there was  
25 express trust, constructive trust, or resulting trust, because

1 those are the three choices essentially you had. The law  
2 applied in New York was that of Colorado for various reasons.  
3 The law in Virginia, however, as I reviewed it, is really not  
4 all that much different, and it's referred to by the Fourth  
5 Circuit in the Dameron case.

6 But, Your Honor, the point being, the important point  
7 being, is that there was no distinction between segregated and  
8 pooled accounts as to the ultimate question of whether there  
9 was truly an express trust. That was just one of many indicia  
10 to determine the intent of the parties in entering into the  
11 transaction to determine whether, in fact, it should be  
12 considered an express trust. And there's an important point  
13 here, and that's because if -- and we don't know this -- this  
14 did arise in the New York case, where the amounts in question  
15 were insufficient to cover the claims of the alleged beneficial  
16 holders of the trust, or the exchangers for short, and under  
17 state law, the tracing requirements and the distribution  
18 requirements would give each of the exchangers a real -- not a  
19 real property, a personal property interest, but a real  
20 interest, in monies that may go out to other exchangers, hence  
21 my opposition to the exact structure that the debtor proposes  
22 tonight, because if monies leave the estate -- and I'll use the  
23 estate in quotes, again, because we don't believe it's property  
24 of the estate, but if money leaves and goes to segregated  
25 account holders and there is not enough money left over to pay

1 the people who are not afforded the opportunity to take part in  
2 that procedure that the debtor has proposed, then it's likely  
3 that monies have gone out that could otherwise be recovered or  
4 would be distributed differently under state tracing law.

5           For instance, there is a formula in the United States  
6 District Court in the District of Colorado which some states  
7 follow called In Re Ryan, a 1964 case, and in that case what  
8 happens is that the corpus of the liens is insufficient to  
9 cover the claims against the lease. So, there's a complicated  
10 chronology that must be followed, which the Courts followed, to  
11 determine who gets what percentage of what. And until you know  
12 that number, if you give people who are clearly -- or  
13 questionably segregated 100 percent of their funds, then you  
14 may be inequitably distributing the corpus of the trust. I  
15 know that sounds somewhat convoluted and complicated, but  
16 that's the problem we were facing, and I feel that it may be a  
17 problem in this case since we have ill-liquid ARS's (sic),  
18 which probably have a market value -- and there is a secondary  
19 market for ARS's, substantially below the face value which  
20 would bring the value of the whole corpus, assuming there is a  
21 trust, way below the amount of claims against it and then  
22 trigger off an analysis of distribution that would be thwarted  
23 by giving segregated account holders a hundred percent.

24           So, what I propose is that the debtor open up this  
25 procedure and not keep it to just, as the debtor lists in the

1 affidavit that's been submitted or affirmation to be submitted,  
2 open it up for exchangers, because they're all really in  
3 similar situations, in fact. They all have dates by which  
4 they've got to close, they all face tax penalties if they don't  
5 close by these dates, and there are those who have greater  
6 claims against the estate if the dates are not met. And it  
7 sounds like a lot, but in fact I think we were dealing with  
8 something in the order of 70 exchangers in New York. Here we  
9 would be dealing with 450.

10           But what I'm suggesting is that we open up the  
11 procedure so that all exchangers be able to prove up their  
12 trust, and if they can they'll get paid. The issue, however,  
13 would be complicated if the amount of the funds that's liquid,  
14 or that market value of those funds or those instruments is  
15 less than the amount of the total claims against those funds.  
16 That we don't know yet. But that's -- the fact that we don't  
17 know it argues against and is a fatal defect, and is  
18 dispositive on the motion that the debtor has now presented to  
19 the Court, because without this Court knowing that for sure  
20 there are more funds, liquid funds in the potential trust  
21 corpus, then it cannot decide whether to break off the  
22 segregated account holders and give them a hundred percent of  
23 their funds without looking to see whether they were truly  
24 segregated and not subject to other exchanger claims under  
25 various tracing rules.

1           So, it's a little complicated, Your Honor. I think  
2 it's important to have a streamlined procedure. And Bankruptcy  
3 Judge Glenn, who is still handling the case, actually, was very  
4 sensitive to those dates, and moved the adversary trial within  
5 four months of the petition date, so we had distribution to  
6 exchangers within four months of the petition. It helped some,  
7 it didn't help everybody. Certainly you can't -- you can't  
8 design a procedure that helps everybody, Your Honor.

9           What's interesting from the Court is with regard to  
10 the trust issue our documents are very simple, almost word for  
11 word, on the LandAmerica case. We settled. And we -- the  
12 estate took the position that the funds that the exchangers had  
13 on hand as of the petition date, the estate took the position  
14 they were property of the estate similar to Mr. Gibbs's  
15 argument tonight. I took the position on behalf of the  
16 exchangers that they were not property of the estate, and we  
17 litigated that vigorously, as you might expect, and came to a  
18 resolution that was then put out on a 9019 motion. That may be  
19 too cumbersome for some people, and it was in New York, and  
20 those people made separate 9019 motions on an emergency basis  
21 if they needed their funds out quickly, and they can show that  
22 their funds would have a de minimus effect on any tracing  
23 requirements or any distribution assuming the corpus was less  
24 than the claims against it. That's how we handled it in New  
25 York. It wasn't perfect. I'm not claiming it wasn't -- it was

1 -- it just -- it was one way. It's not the only way.

2 Another way would be, I think, expanding the debtor's  
3 process so that all exchangers could participate. In fact,  
4 that's the only way to handle the debtor's motion because just  
5 because there is a name on an account at Citibank that says FDO  
6 doesn't necessarily, and it didn't necessarily mean that in New  
7 York either, that those were truly segregated funds because  
8 you'd have to trace them directly into that account from the  
9 exchangers' wire transfer, and that just didn't happen in the  
10 1031 case. Usually the wire forms at the closings -- when the  
11 real estate deal closes wire instructions are given to the  
12 closer to wire the funds to a specific account. And it is --  
13 if you took a look at the wire transfer forms in each of these  
14 exchangers -- it doesn't sound as difficult as -- it really  
15 wasn't as difficult as it sounds, and that wire account will  
16 tell you where the funds initially went, and then after it went  
17 there they usually were transferred to these allegedly  
18 segregated accounts, Your Honor.

19 So, let's not trample on everyone's rights. I mean,  
20 we want to get this resolved speedily, and I feel it's  
21 important for everybody. We want to reduce the claims against  
22 the estate. There's no question about there. I think there  
23 was a good point raised by an attorney from Kelley Drye with  
24 regard to administrative claims if you wait too long. I think  
25 there's an issue there, as well, on the one hand. But on the

1 other hand, we're able to provide on a web site all of the  
2 accounting information relatively quickly. Huron was our chief  
3 restructuring company. I remember Mr. Lukenda from New York  
4 was the chief restructuring officer. And it was relatively --  
5 I don't want to say easy -- but it certainly was obvious as to  
6 how the account was structured and where the money went, and  
7 that was available fairly quickly. I don't know why we don't  
8 have it attached to the motion that was filed in this case by  
9 the debtor. They should know that, and they should know where  
10 these accounts were kept, and whether and how the money from  
11 each individual closing, all 450 of them, where it went. That  
12 should be readily available.

13           With that information, and allowing all of the  
14 exchangers to participate, and not making the artificial  
15 distinction because it really is artificial, Your Honor,  
16 between segregated and pooled, or segregated and co-mingled, I  
17 think we should be able to design some sort of streamline  
18 procedure. But again, we've got accounting information that  
19 should be readily available in this case, we have a going  
20 concern, we have a board of directors, we've got a chief  
21 restructuring officer, and if we take that information, along  
22 with the information -- or at least wiping out the distinction,  
23 I think we'll be able to adjust a speedy result, Your Honor.  
24 Thank you.

25           THE COURT: Thank you, Mr. Cohen.

1 MR. MAXWELL: Good evening, Judge Huennekens. Rich  
2 Maxwell. Your Honor, I represent four people that deposited  
3 money into LandAmerica exchange, and they range from 700,000 to  
4 1.3 million. I know with the 700,000 it was all their business  
5 money from the sale of real estate that they were going to  
6 invest in something else, and they have nothing else. That's  
7 just to say, Your Honor, that all of the problems complained  
8 about by the segregated holders are exactly applicable to  
9 people who are called co-mingled, and the damages that those  
10 people are suffering are exactly the same as the damages that  
11 my clients are suffering, and they're --

12 THE COURT: So, what are you asking me to do, then?  
13 Not approve the motion, or do something different?

14 MR. MAXWELL: I'm asking -- excuse me, Your Honor --  
15 I'm asking you not to approve the motion, but I think the  
16 person that preceded me at the podium made my argument for me,  
17 that it ought to be opened up to all of them, because I don't  
18 think there's a distinction between any of them. And unlike  
19 Mr. Gibbs, I believe that when you look at the Virginia case  
20 law it's all trust money. So, I think it's necessary to do it  
21 in an expedient fashion, but I think it needs to be opened up  
22 to all.

23 THE COURT: All right. Thank you.

24 MR. EBEL: Good evening, Your Honor. Tom Ebel. I am  
25 counsel for, and bear with me, several claimants, 135 Street

1 Corporation, CDC Rural, CDC Glendale, Furley (phonetic)  
2 Lodging, LLC, Matthew P. Luxenburg, (phonetic), Freen  
3 (phonetic) LLC, RFL Properties, Sumina (phonetic) Hospitality  
4 Group formerly known as Sahara Enterprises, the Ziegler  
5 (phonetic) Family Trust, also, Frontier Pepper's (phonetic),  
6 Fairey (phonetic), LLC, and Bernadette and Benjamin Iello  
7 (phonetic), all of whom are, we believe, in the category of co-  
8 mingled creditors. And I'd like to reiterate what Mr. Maxwell  
9 says. I've talked with these people over the course of the  
10 week or so and their damages are real. The dollars for them  
11 are significant.

12           And I'd urge this Court to resist the temptation to  
13 approve tonight a settlement with what I would call the big  
14 guys. They have lots of dollars. They maybe have a zero or  
15 two more behind them, but they are situated in the same place  
16 as these -- as our clients are, these so-called co-mingled  
17 creditors.

18           And I would submit to the Court it is far too early  
19 in this case to make this decision. We don't have any  
20 schedules. We don't have any statements of affairs. This --  
21 to allow for the settlement motion to go forward would allow  
22 the -- liquid assets of this debtor to be distributed, leaving  
23 the remaining co-mingled creditors with only assets that are of  
24 questionable value and are ill-liquid.

25           I would submit to you that the debtor is trying to

1 avoid the consequences of filing bankruptcy. They have a  
2 problem. They have a serious problem. They cannot file any of  
3 the standard procedures of schedules, statements of affairs, a  
4 plan, a disclosure statement. This is, you know, a radically  
5 fast track. And I do want to say, Your Honor, I think this  
6 case calls for a fast track, but it calls for a fast track with  
7 the facts. This Court does not have the facts tonight. This  
8 Court does not know how much money is in the pot. And to let  
9 \$227 million go out of the pot before we know what the pot is  
10 is grossly not equitable to all of the taxpayers involved in  
11 this case.

12           Your Honor, with all due respect to the debtor, and  
13 the rapidity with which they filed things last week on behalf  
14 of one of their clients, we asked for a list of the segregated  
15 creditors and we were told that we -- just to tell us who your  
16 clients are. We get it today, but that should be easy enough  
17 for them to produce. So, again, it seems way too early and  
18 there's not enough information.

19           I do not think that the debtor has met the 9019 test  
20 which we've cited in our objection, which is the settlement has  
21 got to be fair and equitable to all of the claimants or  
22 creditors in the case. It's grossly unfair to prefer one small  
23 group of creditors a few weeks into the case and to the  
24 discrimination of the rest of the creditors and to the rest of  
25 us until we can get that information.

1           And I want to reiterate what a couple of the others  
2 have said. The damages that are suffered by the co-mingled  
3 claimants are identical, identical to those suffered by the  
4 segregated claimants. There is no reason to go forward with  
5 this motion and fast track this settlement, because everybody  
6 else is being hurt just the same as they are. Everyone else  
7 does not have their money. Everyone else is facing the  
8 deadlines. Everyone else is facing the possibility of having  
9 to pay tax and not have the money. And a significant group of  
10 them are some of whom for which we've filed adversary  
11 proceedings, are facing rigorous closing deadlines that are  
12 approaching, just like the segregated creditors.

13           And, Your Honor, I would then submit to you that --  
14 and this was argued, I think, very capably by an earlier  
15 counsel for a segregated creditor, all of these people, all of  
16 these claimants, all of these taxpayers bargained for the same  
17 thing. It was an exchange under 231 of the IRS Code, and the  
18 agreements are, in their operational provisions identical, or  
19 close to identical.

20           And what I would submit is that LoanAmerica Exchange  
21 Service was a fiduciary for all of these people. We talked  
22 about co-mingled, and segregated. There was never any  
23 intention that any of these funds would be used for anything  
24 but the facilitation of these 1031 exchange transactions for  
25 these people, not to be used for their operational expenses or

1 anything else. They were holding them for one specific  
2 purpose, which is the same purpose that every single creditor  
3 in this case entered into an agreement with the debtor for.  
4 They all had the same purpose.

5           The debtor does, in its promotional materials, it was  
6 attached to our objection, does say that these funds are held  
7 in trust, and on the November 10th, 2008 10-Q statement stated  
8 that the funds were held by AES, and I quote, for the benefit  
9 of our customers, and are therefore not included as our assets  
10 in the accompanied consolidated balance sheet. However,  
11 LandAmerica remains obligated for the return and the  
12 availability of the proceeds and any earnings from their  
13 temporary investment. They never thought it was their money,  
14 both in the promotional materials that they've submitted and  
15 the 10-Q that they filed. I don't believe they should now, if  
16 they're in bankruptcy, should be able to later change their  
17 position with respect to that.

18           Presumably, I think this tracing issue is also very  
19 important in that presumably we'll find not only could you  
20 trace the segregated funds through the co-mingled account, but  
21 I assume they were keeping specific track in the interest being  
22 owned by each of the co-mingled creditors because they were  
23 obligated to do that. There was a sense of segregation with  
24 respect to those funds. In their response filed last night, to  
25 me, Your Honor, it was a bit troubling that the debtor wants --

1 says they want to release the fund to the segregated creditors,  
2 and then they say, and I'll quote, that the -- well, the debtor  
3 says that, so, from that point it would be a case-by-case,  
4 fact-intensive process, so they -- (indiscernible) everybody  
5 else in this Court to have to do it on a case-by-case  
6 adversarial proceeding, and I think the case does cry out for  
7 global setoff procedures that would allow all the claimants to  
8 be dealt with fairly and equitably, with all of the facts and  
9 all of the information before the Court.

10           Finally, Your Honor, just a couple of points. The  
11 real only difference between these segregated and co-mingled  
12 agreements were how the funds were to be invested, and I think  
13 the Court needs to hear evidence on that. These people were  
14 really just bargaining -- probably bargaining for a higher  
15 interest rate. The reason we have the big guys here, and the  
16 reason they had segregated accounts very well may be they just  
17 had a lot of money and they wanted to get a little bit higher  
18 interest rate. I do not think that changes the nature of the  
19 agreement which they had to give possession, dominion and  
20 control to qualify the intermediary, in order to comply with  
21 the provisions of Section 1031 of the Code.

22           THE COURT: Does your plan have the option to invest  
23 in a segregated account?

24           MR. MAXWELL: What I would say to that, Your Honor,  
25 is that most people were wholly unaware of it. I mean, most

1 people who engaged -- when standard, regular 1031 exchange  
2 claimant who was just your regular taxpayer would contact one  
3 of these companies, or talk to their lawyer, or talk to their  
4 title company, and say I want to do a 1031 exchange,  
5 (indiscernible) use LandAmerica, you can use Wachovia, you can  
6 use somebody else, and then you just -- and promotional  
7 material says that I'm going to hold your money in trust. I  
8 think the Court has to pay -- I would encourage the Court to  
9 pay attention to that, because, you know, you say, well, gosh,  
10 I'm going to give them my money, they're going to hold it in  
11 trust. How can it be any better than that? But, sure, I would  
12 say the relegating of \$500,000 million claimant, which is a lot  
13 of money, they, in the ordinary course, would expect that these  
14 funds, and they do say -- the language is interesting -- they  
15 said, well, the funds -- it leads you to believe that you're  
16 protected because it says the funds will be deposited in an  
17 account with Sun Trust Bank. It's not like I'm just turning it  
18 over to them.

19           And some of the co-mingled agreements, and I can --  
20 we can provide these to the Court through this process, they  
21 actually said it would be deposited in Sun Trust Bank and it  
22 will receive a particular interest rate. So, it's not just --  
23 there's all different gradations of these agreements. So, I  
24 think some people said, well, I'm familiar with LandAmerica,  
25 and I'm going to do my 1031 exchange, and I might pay them the

1 800, or the 1,000, or 1,250, and, gosh, I would like to get a  
2 higher interest rate, what can you get for me, and they would  
3 bargain for that. Other people may not have been  
4 sophisticated. Not all the people we've talked to, and not  
5 everyone is, you know, as sophisticated. I don't know if the  
6 Bankruptcy Court -- I encourage the Court not to -- just  
7 because someone sort of knew about the existence of the escrow,  
8 or the existence of segregated funds, necessarily should they  
9 be treated more beneficially when all of the funds were  
10 expected to be trust funds. And so, I think most people did  
11 not do that. Again, I would submit this was done just for  
12 investment purposes, and it was not for any reason to really  
13 intend to segregate it. But we don't know. I'm speculating.  
14 Everyone is speculating, because we don't really have enough  
15 information, we haven't had a chance to investigate all of  
16 that.

17 I would just -- also, Your Honor, as I've said, there  
18 are people who have the potential for significant damages and  
19 I'm sympathetic -- I'm extremely sympathetic with Health Care  
20 REIT and their counsel, but if you listen very carefully, all  
21 they've said to this Court is I want my money. I just want my  
22 money. They don't necessarily have a closing. It sounded --  
23 what I heard was 76 million of it, time has already run. So,  
24 if we're just talking about I want my money, then we need to  
25 deny this procedure and come up with a procedure that treats

1 everybody equitably, that examines whether or not the --  
2 whether these -- whether LandAmerica exchanged really as a  
3 fiduciary, and whether those really were trust funds. But I --  
4 and for those reasons I'd ask that you deny this motion.

5 THE COURT: All right. Thank you.

6 MR. HOPPER: Good evening, Judge Huennekens. David  
7 Hopper, for the record, on behalf of Charles Lumber Company.  
8 Charles Lumber Company is an S Corporation, two members who has  
9 approximately \$1.2 million in trust with the debtor. And I say  
10 in trust because their agreement is different than the  
11 exemplars that have been shown to you this evening and  
12 discussed so heavily. There are several different versions of  
13 an agreement floating around, and my client's agreement says  
14 that the money will be held in a Sun Trust account. There is  
15 no exculpatory language allowing them to do something different  
16 with it. There is no suggestion anywhere in the agreement that  
17 they can do anything with it other than hold it in that account  
18 and pay my client the interest and report the interest on my  
19 client's taxes.

20 THE COURT: So, you're suggesting that you're in a  
21 segregated account?

22 MR. HOPPER: I'm suggesting that I am in a segregated  
23 account, and I think that the --

24 THE COURT: Are you on the list?

25 MR. HOPPER: I am not on the list, and I think the

1 reason I'm not on the list is that the debtor, if I heard the  
2 debtor's explanation correctly, they've defined what's a  
3 segregated account by those matters on which they are  
4 apparently not out of trust. The money should be in the Sun  
5 Trust account, but they have said all the cash that they have  
6 goes to these 50 or so people and the identified counsel  
7 attached to the exhibit. And the original motion that was  
8 filed, which would describe my client's situation perfectly,  
9 and the original motion said that some but not all of the  
10 accounts were tied to an individual taxpayer number. That's  
11 really the only difference here. Now they are redefining what  
12 is a segregated account to simply those individuals for whom  
13 they have cash on hand in an account right now. And the points  
14 that were made earlier about tracing go directly to this  
15 situation because that money in the Sun Trust account went  
16 somewhere. We don't know whether it wound up in one of these  
17 defined now segregated accounts, or somewhere else. But we  
18 know from the debtor's representations here today for the first  
19 time that they are out of trust in their situation.

20 That being the case, I join in the earlier comments  
21 of Mr. Cohen that this is an inappropriate procedure to limit  
22 to those people without doing the sort of tracing that would  
23 have to be done in order to determine what happened to my  
24 client's money.

25 THE COURT: All right. Thank you.

1 MR. FUNK: Good evening, Your Honor. Kevin Funk with  
2 the law firm of Cantor Arkema, on behalf of Millmar Holdings.  
3 Your Honor, Cantor Arkema also represents approximately a dozen  
4 other taxpayers who have these alleged co-mingled accounts.  
5 Your Honor, I'm not going to reiterate what has already been  
6 said, by the three individuals before me, who said it better  
7 than I could, so I'll just address distinct just two points,  
8 which are the facts and the law cited by the debtor to create  
9 this distinction. And I will say that we agree that there is  
10 no distinction between these so-called segregated accounts and  
11 the co-mingled accounts. We agree that they are all trust  
12 property because that's what all of the people -- all of the  
13 taxpayers who contracted with LES meant for it to be.

14 The debtor's counsel cited to three or four  
15 provisions in the respective co-mingled and segregated exchange  
16 agreements, and they cited the differences between them. Every  
17 one of these differences really boils down to one issue, the  
18 investment protocol and how the income off of those investments  
19 would be handled. That's the only difference. There is no  
20 facts cited which goes to the intention of the parties. And  
21 what we've heard today here about trusts, whether it be an  
22 express trust or a resulting trust, (indiscernible) to the  
23 intentions of the parties. A resulting trust is where the  
24 Court imposes it and where the parties may not have known of  
25 the requirements but really intended there to be a trust. The

1 --

2 THE COURT: I'm not being asked to find whether this  
3 is a trust today, or whether it is property of the estate. I'm  
4 being asked to decide whether the procedure that's been set  
5 forth by the debtor to resolve claims against the estate is a  
6 reasonable exercise of the debtor's business judgment, aren't  
7 I?

8 MR. FUNK: Yes, Your Honor. But the basis for doing  
9 so is that there are trust property, and we think that  
10 everything is a trust, and therefore it's not fair and  
11 equitable to the estate if they are really using the grounds  
12 for that that we think applies to us, as well. And so, as a  
13 matter of law it can't be fair and equitable if their ground  
14 for treating the segregated account holders better than us, it  
15 applies to us equally. So, I think that it does implicate --  
16 this trust argument does implicate what you really have to  
17 decide here tonight, and that is is there a distinction between  
18 these? Because if there is not, what they're asking for is not  
19 fair and equitable to the estate.

20 THE COURT: How is it not fair and equitable?  
21 Because if I grant the authority to settle with the segregated  
22 accounts, that doesn't conclude the ability to segregate -- to  
23 approval of similar procedure with the co-mingled accounts.  
24 And as I understand it, the real only difference is if there  
25 are ill-liquid assets held in the -- in the co-mingled

1 accounts, whereas there are liquid assets in the segregated  
2 accounts.

3 MR. FUNK: Correct, Your Honor. It doesn't preclude  
4 them from coming and asking for that procedure after the fact,  
5 but at that point I think we are not going to have a real  
6 practical remedy, very possibly, because these people who are  
7 similarly situated, and we all agree here, one thing we can all  
8 agree, is that what the Court needs to do, what the Code  
9 requires is to treat similarly situated creditors, parties,  
10 similarly. At least we agree if there is no distinction  
11 between these and then the Court authorizes half of this estate  
12 to disappear, then you're really inhibiting the remaining  
13 parties, these co-mingled creditors, from having a real remedy.  
14 I mean, in theory yes, they can come back to you and ask for  
15 that, but they will have their remedy severely limited, and  
16 that's why we consider that there is no distinction between  
17 these two parties.

18 THE COURT: And you're saying because -- your rights  
19 are being limited because you've lost some sort of claim  
20 against the money that's being held in segregated accounts?

21 MR. FUNK: I think that is a possibility, but we --  
22 we need to look at it, and whether or not they all need to be  
23 lumped in, because if the monies went through the -- even if  
24 the segregated funds went through the co-mingled account and  
25 then out, I don't think that they can be treated this -- this

1 wall between them. I don't think that can necessarily be  
2 respected. So, that's something the Court will need to look  
3 at. And it was something that will be unavailable to the  
4 account holders of the co-mingled, and it will be unavailable  
5 for the Court to consider if that money is then gone. And it  
6 shouldn't be gone if there is no distinction between these  
7 parties, and that is our position, that there is no  
8 distinction, because the facts they cite, these discrepancies  
9 in the agreements go to the investment protocol. It doesn't  
10 limit a parties' intention, which is what Virginia's law says  
11 we look to in trusts when we're determining whether it's an  
12 express trust, whether the Court should impose a resulting  
13 trust.

14           Furthermore, besides the terms of the agreement, the  
15 law cited by the debtors is distinguishable. The case of --  
16 the Siegel v. Boston case, that is the case where the Court did  
17 impose a trust, that it's trust property. Now, the debtors  
18 would say well, that's evidence that only segregated funds can  
19 be treated as trust property, but if you read that case that's  
20 not what Siegel stands for at all. Seigel looked at the  
21 various factors in the exchange agreement, the terms. The  
22 Siegel Court looked through a laundry list of factors, whether  
23 the debtor would carry the proceeds on the books as a credit to  
24 the purchase of the replacement property, that they looked to  
25 the fact that the debtor would hold the proceeds of the old

1 property while the taxpayer looked for a replacement property,  
2 that the taxpayer would have to identify a replacement property  
3 within 45 days and complete the transaction within 180 days.  
4 All of those factors that the Court in Siegel looked to and  
5 found important in deciding that there was a trust, that those  
6 properties were trust property, are present here for both the  
7 segregated and the co-mingled accounts. So, I would argue that  
8 Siegel, yes, stands for the proposition that the Court should  
9 impose the trust, but it should impose the trust for both  
10 classes of people.

11           The fact of the matter is the Court is, if you look  
12 to the Siegel case, the Court put very little emphasis, and it  
13 was merely in passing that they noted that the funds were held  
14 in a segregated account. And so, I don't think that  
15 Siegel stands at all for the proposition that there should be a  
16 distinction, but rather this Court needs to come up with a  
17 unified global procedure for deciding how to deal with both  
18 classes. I won't go into how that should be done because the  
19 people before me did that far better than I could. But I would  
20 just -- I make these points to show that there -- and stress  
21 that there is no need for a distinction, and we would ask that  
22 the Court deny the motion.

23           THE COURT: Thank you.

24           MR. FUNK: Thank you.

25           MR. YELLEN: Good evening, Your Honor. My name is

1 Dwight Yellen. I represent Sonya Revero (phonetic) Limited  
2 Partners, Buckstream Limited Partners, Goldmine Limited  
3 Partners, all in they have about \$8 million of claims. Be very  
4 clear, I'm going to oppose the motion, because you keep asking  
5 that, and no one ever tells you -- I'm going to join Mr. Gibbs  
6 and Mr. Cohen in their objection and the objection of the  
7 people that preceded me. They were very, very eloquent. And  
8 you asked one counsel, well, did you have an opportunity to  
9 have a segregated account? And I don't know that my client  
10 did. I have a question, and it's only going to be found out  
11 when these counsel perform the appropriate discovery is why are  
12 there segregated accounts, and why did they only take place in  
13 the past month or two? The only exception -- (indiscernible)  
14 Embarq, who's over here somewhere, and they're an outlier,  
15 their segregated account was set up in June. But all the  
16 others were set up very recently, and it sort of smacks of some  
17 kind of somebody whispering in the ear and saying you'd better  
18 get your funds segregated, smacks of some kind of inside  
19 information being conveyed to certain people to protect valued  
20 customers, etcetera, etcetera, and we'll only know when  
21 appropriate discovery is undertaken. And as Mr. Cohen  
22 described, the marking of the appropriate funds and tracing  
23 them. That's it. I'm brief.

24 THE COURT: Thank you.

25 MR. YELLEN: Thank you.

1 MR. SCOTT: Good evening, Your Honor. Douglass Scott  
2 for ROHO Investments. ROHO is out of Dallas, Texas. On  
3 September 22nd, 2008 they deposited about \$900,000 with LES to  
4 conduct one of these exchanges. I'm not going to talk about  
5 the particulars of ROHO's claim. I'm not going to talk about  
6 the adversary proceeding that we're preparing, and I'm not  
7 going to say anything about segregated accounts or co-mingled  
8 accounts except to note that half the battle here seems to be  
9 to apply your language the way you want it to these kinds of  
10 accounts.

11 I believe, with other counsel who have spoken here,  
12 that there may not be any difference between them, they may  
13 just be accounts. But what I'd really like to address here,  
14 Your Honor, is a point that you brought up in a colloquy just a  
15 few moments ago, which is about what you're here to decide. I  
16 would suggest that you are really not here to decide a 9019  
17 motion because I don't think the motion is proper. I think the  
18 9019 motion contemplates a specific controversy that's going to  
19 be brought before the Court for approval, and that is then  
20 supported by evidence. And this is a bankruptcy lawyer saying  
21 something about evidence. I just don't think it's been done.

22 The real bottom of the problem I have with this was  
23 mentioned by committee counsel earlier, and it's Rule 7001,  
24 Subparagraph 2, and that is an adversary proceeding is, "a  
25 proceeding to determine an interest in property." And I think

1 that's exactly what the debtor is asking you to do here.  
2 They're asking you to distinguish between one type of property,  
3 and calling it a trust, an express trust, and a whole another  
4 bunch of these accounts and calling that property as  
5 undetermined, or undeterminable, all of those cases having to  
6 be litigated. It may not be the rule in other districts or  
7 other circuits, but in the time I've been practicing before  
8 this Court, 7001 Subparagraph (2) has been enforced  
9 consistently by the Judges to say that I can't bring a motion  
10 to determine what an interest in property is. I think that's  
11 the rule here, and I think that should continue to be the rule.  
12 Thank you.

13 THE COURT: Thank you.

14 MS. GUNN: Good evening, Your Honor. Elizabeth Gunn.  
15 With me tonight is co-counsel Brian Bowen from the law firm of  
16 (indiscernible), Little Rock, Arkansas. There is a pro hac  
17 motion pending, or it hasn't been entered. I'd ask that he be  
18 able to address the Court tonight.

19 THE COURT: He may.

20 MS. GUNN: Thank you.

21 MR. BOWEN: Good evening, Your Honor. My name is  
22 Brian Bowen. I represent H. Chris Christy in the matter.  
23 Previous counsel had eloquently made the argument that this  
24 motion should be denied. Mr. Christy also supports that  
25 motion. We also have filed a response asking -- pleading, and

1 consistently in the alternative, which I know that you're not  
2 going to address today, that you determine that his agreement  
3 is actually a segregated exchange agreement. Much like the  
4 gentleman that represented the lumber company, his agreement  
5 directed LES to deposit the funds in Sun Trust Bank only, and  
6 also identify his taxpayer I.D. number. So, we would like the  
7 opportunity for you to at least consider that his agreement is  
8 a segregated exchange agreement rather than going -- having --  
9 issuing the order today.

10 THE COURT: All right. Thank you.

11 MR. BOWEN: Thank you.

12 MR. TERRY: Good evening, Your Honor. Roy Terry,  
13 appearing on behalf of Porete Realty, on behalf of whom we've  
14 filed an objection in the case. Porete Investment is just shy  
15 of three-and-a-half million dollars, or the funds that it has  
16 placed with LES. Like most firms we've received other calls.  
17 We now also represent approximately a dozen exchangers, all of  
18 whom fall under the co-mingled camp. One of them placed her  
19 funds with LES six days before the bankruptcy filing. Perhaps  
20 she can trace her money. And the arguments that have been made  
21 would indicate that these parties are on more of a legal and  
22 factual equal footing than the motion would imply. And if they  
23 are, in fact, on a legal and factual equal footing, then I  
24 don't see the basis for bringing the motion as it stands  
25 because I believe the motion would result in something other

1 than a pro rata distribution among these exchangers. I don't  
2 believe that would be something fair and equitable for this  
3 Court to do. Thank you.

4 THE COURT: Thank you.

5 MR. MESERVE: Sir, Lieutenant Colonel Tim Meserve,  
6 United States Air Force. I have a question. My wife and I own  
7 Meserve Properties, LLC. She is also in the Air Force,  
8 currently in Iraq. Am I allowed to represent myself, or do I  
9 have to have someone represent me?

10 THE COURT: The Rules of Court require you to have  
11 counsel to represent you since it's an LLC, to represent your  
12 interests. I would assume, though, that what you would tell me  
13 is very similar to what other counsel have expressed this  
14 evening --

15 MR. MESERVE: Yes, sir, it --

16 THE COURT: -- who have come before you.

17 MR. MESERVE: Yes, Your Honor, with the exception  
18 that I didn't receive notice, being on military orders, until  
19 Friday. And I was never given the option to segregate.

20 THE COURT: All right. Thank you, sir.

21 MR. MESERVE: Thank you.

22 THE COURT: Mr. Meserve, I recommend that you do get  
23 counsel, sir.

24 MR. MESERVE: Yes, sir.

25 THE COURT: All right. Mr. Kamin, for a simple

1 motion you have certainly opened up a can of worms. Do you  
2 wish to reply to any of that?

3 MR. KAMIN: Your Honor, it's getting late, so I'll  
4 try to be brief. Judge, it's apparent that the real dispute  
5 here is between, on the one side the co-mingled account holders  
6 and on the other the segregated exchange account holders.

7 The debtor tried to use its best judgment in its  
8 review of the law, in its analysis of the law, to reach a  
9 judgment about what it should do, or the right thing to do was.  
10 And we determined, on the basis of the case law, merely on the  
11 basis of the case law, without an extensive look at the  
12 individual facts of each case which will be -- which everyone  
13 wants to avoid, it sounds like, that the case law did  
14 distinguish very strongly between segregated accounts, and  
15 there's the Siegel case, as some people have pointed out,  
16 there's the Nationwide case also on those lines. There is a  
17 reverse 1031 case named DeGroot (phonetic), the In Re Exchanged  
18 Titles, Inc., I think someone may have cited it already, 159  
19 B.R. 303. Those cases talk about the fact that the very act  
20 of the segregation and the contract which bespeaks of that  
21 intention to segregate is what makes the property either trust  
22 property, or in other cases simply not the property of the  
23 debtor. And there are various theories to get there, and  
24 that's how these cases get there. And they're basically  
25 summary judgment cases. I realize we're in an earlier stage

1 than that.

2 But it's a key distinction in these cases, whereas  
3 other cases, and I'll -- there's Taxel, T-a-x-e-l against Vaca,  
4 and that's 132 B.R. 424, which holds, among others, that co-  
5 mingled funds, when they're co-mingled, they become estate  
6 property. And even if the agreement, as Nationwide suggests,  
7 even if the usual agreement was to segregate, but then the  
8 properties become co-mingled, well, it's property of the  
9 estate, and then all the creditors have an interest in the  
10 distribution of that property that remains within the -- in the  
11 account of the debtor itself.

12 THE COURT: Do we have a factual issue, though, that  
13 perhaps by the way of the money came into the segregated  
14 accounts that at some point in time it was co-mingled, and then  
15 it went through, and some counsel have raised that as an issue?

16 MR. KAMIN: Well, they have raised it in issue, I  
17 understand that, Your Honor, and the cases that we have cited  
18 with respect to segregated accounts don't raise that as an  
19 issue, and whether the money came in for a millisecond, or a  
20 day, or two days, into a general account before it went into  
21 the segregated account, or whether it went directly into the  
22 segregated account itself is not at least a part of the cases  
23 that we cited or that we saw. And I don't know that it makes a  
24 difference. The -- what's key from our standpoint is the  
25 contractual undertaking, which, as we say, bespeaks an

1 intention to hold this for the benefit of the segregated  
2 exchange holder, and hold it specifically and in a segregated  
3 manner for that person's benefit, and the fact that there was  
4 segregation as opposed to what we said was segregated but  
5 meanwhile it's co-mingled, in which case it really is a  
6 different story. So, those were two factors that seemed most  
7 important to us.

8           We think this is a really a legal judgment, these  
9 really aren't facts that are applicable at least to our sense  
10 that these cases should be settled on this basis. We also -- I  
11 think most of the objections were there is no difference  
12 between the two. Well, I think the cases recognize that there  
13 is. There was an objection about the nature of the release.  
14 You know, this is a release -- I think it's important for the  
15 debtor not to release the individuals who gave them this money.  
16 If there are related proceedings -- there is no reason to. I  
17 should say that.

18           THE COURT: And they're not going to negotiate the  
19 form of a release.

20           MR. KAMIN: Okay. And so, again, we do support -- we  
21 continue to support the settlement that we've outlined. It is  
22 a very, very difficult process, and for the other -- the co-  
23 mingled accounts, as well. It becomes very, very difficult to  
24 try to look at these on an individual case basis.

25           THE COURT: What concerns the Court is that we've had

1 -- there are a number of factual issues raised by a number of  
2 people today in various different contexts, and I think Mr.  
3 Gibbs started out with all of the stuff that we don't know, and  
4 the facts that we don't have. And the concern being that we  
5 don't really have a motion to approve the compromise and  
6 settlement today before me where I can have facts and I can  
7 decide, yes, this is in the exercise of business judgment of  
8 the debtor. But what I've got is a procedure to sort of  
9 streamline all of that so that you can exercise it on a case-  
10 by-case basis as you see fit without coming back to the Court,  
11 and without presenting that evidence and such, and that's a  
12 concern that the Court has.

13           This case is crying out, though, for a procedure that  
14 is streamlined, and get it done, and so I think that you've  
15 gone a long, long way to getting that, to trying to do that.  
16 So, I applaud you. I just don't know that the Court can grant  
17 the motion in its current form, given that I don't have  
18 evidence, and I can't apply the factors that I traditionally  
19 apply in looking at a settlement.

20           If we were settling, you know, Mr. Bernstein's case,  
21 we could put on the evidence and say, okay, this is what we  
22 would do, and then I could analyze it and say yes, this makes  
23 sense, we should settle it. But without that I don't know just  
24 through this procedure, in the face of the opposition from the  
25 committee and the others that we've heard today, that it would

1 be appropriate.

2 MR. KAMIN: Well, I guess I can make a couple of  
3 suggestions. If the Court is uncomfortable with this  
4 procedure, and I hear the Court on that, we can certainly  
5 attempt to work with the committee to try to come up with some  
6 procedure, some manner of addressing the ultimately 400 cases.

7 THE COURT: I think that would be appropriate. What  
8 the Court had in mind, at least initially, was to say that, you  
9 know, I would approve the procedure subject to an agreement of  
10 the committee. Now, what I've heard today is that the  
11 committee is so far away that that may be meaningless, but I've  
12 allowed them to intervene in each of the adversary proceedings,  
13 and that's something that I will continue to do because, as  
14 I've said, originally I think that they do represent different  
15 interests, and I think that's clear tonight, too. But that  
16 would be one way of doing it, where they would necessarily  
17 interject themselves in the process and could be part of the  
18 negotiation and resolution of the case, and then a releasing  
19 procedure like this would work. In the alternative, you know,  
20 some sort of procedure where we would handle individual case-  
21 by-case basis, because we've got a number of them that, you  
22 know, are critical for your inferences on an expedited basis  
23 and two days' notice of an actual 9019 motion. You know, we  
24 would have evidence, and I'd be able to consider them on a  
25 case-by-case basis.

1 But I'm not suggesting that's the only thing. Those  
2 are the two that come to mind to the Court.

3 MR. KAMIN: Yes. And I understand that. And let me  
4 just give some thoughts about that. First of all, the idea  
5 that we'll handle one case maybe that really does need handling  
6 on an expedited basis probably makes some sense. It makes some  
7 sense certainly for that particular claimant. I think one of  
8 the problems that we have is being deluged with all these other  
9 cases. And it would be useful at least to -- if we're going to  
10 have a model where we take on a couple of cases and then reach  
11 some resolutions, and then if Your Honor has to hear the case  
12 or hear the legal issues, those could be resolved on a fairly  
13 quick basis. But to have to engage all discovery that all of  
14 the cases are seeking now or about to seek also puts the kind  
15 of burden on us that I think is -- is wasteful to estate  
16 assets, honestly.

17 THE COURT: You've got seven cases that have been  
18 filed right now that are segregated accounts in adversary  
19 proceedings.

20 MR. KAMIN: Yes, Your Honor. But, in fact, some of  
21 them are not emergency cases. Some of them are cases where,  
22 for example, it fails to identify a property within the 45  
23 days. That means they're entitled to their money back under  
24 the agreement, but there's no pressing need for it, there's no  
25 additional damages. The money is actually sitting there. It's

1 earning interest. There's no need to race headlong to resolve  
2 that one. The other cases -- but I think there are several in  
3 that category. Another case where, for example, 180 days has  
4 elapsed and there has been no closing, another instance where  
5 it doesn't matter, the money is sitting there, there's no need  
6 for expedition. There could be one or two of those, if there  
7 are one or two of those, that -- where there is a closing. And  
8 if the closing -- if the money is not passed at the closing  
9 there are additional damages. But yet if it's not three days  
10 from now -- if it's three days from now I don't think we can do  
11 it, either. This does -- this will take, if we're going to go  
12 that route, it will certainly involve some discovery, I  
13 presume, and a more detailed and thorough briefing of some of  
14 those issues for Your Honor, unless of course we can reach a  
15 resolution with the claimant and with the creditors' committee,  
16 which I'm not precluding that that will happen. But that would  
17 be my thought about it, Your Honor.

18           There's something about staving off (indiscernible)  
19 litigations while we go ahead on some procedures, and that's  
20 why I suggested talking it out with the creditors' committee  
21 and seeing if we can come up with something on a fairly  
22 expedited basis that will work towards resolving some of these  
23 issues.

24           And on the one hand we heard that all these are the  
25 same. On the other hand we heard the Ravey (phonetic) case has

1 its own facts, and each -- we can't go down both roads. But a  
2 -- certainly a trial case or two may be useful for at least  
3 setting down some -- deciding some of the issues if it comes to  
4 that.

5 But unfortunately, with all that we're really going  
6 to be pushing out certainly into the next month, and I -- that  
7 will create some additional damages. There may be no other way  
8 around it, but we can't do it in three days.

9 THE COURT: All right. You know, I understand  
10 exactly what you're saying, that if we did have the test case  
11 and used that on a fairly expedited basis to try to get some  
12 resolution on some of the issues, and such, that may -- and we  
13 could do it either by the Court having to decide the issues if  
14 the parties can't agree, or by resolving the issues in the  
15 context of a settlement of that case, then that would obviously  
16 flow through the rest of the cases, that would help get  
17 everything done, and then maybe a procedure like this, you  
18 know, is appropriate.

19 MR. KAMIN: I don't disagree with that, Your Honor.  
20 That's an approach. Picking the case, the kind of schedule  
21 we'd be on, the kind of discovery that would be required, is  
22 all -- these are all the details that some would say the devil  
23 is in. So, we want to move forward. As I said, our principal  
24 objectives is do right by the claimants to the extent that we  
25 can at this point, and to reserve the resources of the debtor.

1 THE COURT: Do you have a proposal that you -- as far  
2 as how you want to proceed at this point? Or is it something  
3 you want to consult with the committee and get back to the  
4 Court?

5 MR. KAMIN: I think that's probably best. Obviously  
6 Your Honor is not prepared to grant the motion, so, let's --  
7 can we suspend the motion?

8 THE COURT: I would grant the motion if you had the  
9 consent of the committee. In other words, if Mr. Gibbs will  
10 consent to the order, then from that standpoint the procedure  
11 would be approved. But it would require his endorsement.

12 MR. KAMIN: That resolution is not going to be  
13 reached in the next half an hour, so --

14 THE COURT: I understand that. I fully believe that  
15 that would be as far as the Court would be willing to go today  
16 with regard to the motion, and that's without prejudice to you  
17 renewing it and bringing it back in some other form, something  
18 along those lines.

19 MR. KAMIN: Sure. And in the meanwhile I'll work  
20 with Mr. Gibbs, and we'll try to see if we can get somewhere on  
21 this.

22 THE COURT: Some procedure that will allow us to  
23 expedite this in, you know, some sort of a way that we can  
24 resolve all of these issues.

25 MR. KAMIN: I guess my only concern, and this is with

1 complete respect to Mr. Gibbs, but he represents only the, as I  
2 understand it, the committee members who are only the co-  
3 mingled account holders. So, there is nothing that causes him  
4 to want to expedite procedures for the others. I don't know  
5 quite how to resolve that. I will try. I will see what we can  
6 do, but we may have to involve some of the -- several of the  
7 account holders who have brought adversary proceedings into the  
8 fold to work that out.

9 THE COURT: Well, obviously you can discuss it with  
10 them, and -- I would think that many of them who spoke today  
11 would be the ones that you would want to have be on these test  
12 cases that we can (indiscernible), such as Mr. Wolfe, Mr  
13 Buffenstein, and some of the others here in the Court. Also,  
14 Mr. Gibbs has a fiduciary duty to all creditors in the case,  
15 and of course Mr. Gibbs is aware of that, as well. And I'm  
16 sure that he wants to find a procedure that will --

17 MR. KAMIN: I didn't mean to suggest that --

18 THE COURT: No. Thank you. So, with that, then, the  
19 Court will grant the motion subject to the approval of the --  
20 the endorsement on any order settling the case endorsed by the  
21 unsecured creditors' committee.

22 MR. KAMIN: Thank you, Your Honor. Your Honor, and  
23 maybe I can work this out with Mr. Gibbs to try to do something  
24 to stay the adversarial proceedings for some period of time  
25 while this goes forward. Again, assuming that we will have a

1 procedure that -- that works to -- essentially to set a  
2 template for what goes on, so that we don't have to be doing 12  
3 cases at the same time. Maybe I should make this into a formal  
4 motion, but I think we would like to probably stay those  
5 proceedings until the next hearing, at which point we can -- we  
6 can revisit the issue. Remember, these are all claims for  
7 damages, ultimately. There's nothing beyond damages. There is  
8 a -- we don't have to answer these complaints (indiscernible)  
9 are coming in for 30 days, and we really don't do that until  
10 some time in January. But we have a lot of motions, and motion  
11 practice to try to expedite everything.

12 THE COURT: One of the things that has been raised is  
13 schedules and such in the case, and other than the monies that  
14 the debtor is holding, does the debtor have significant assets  
15 that would be subject to damage claims?

16 MR. KAMIN: I don't believe it does, Your Honor.

17 THE COURT: So, that's going to be rendered moot.  
18 You may (indiscernible) to make a lot of noise about that, but  
19 the bottom line is you've got to find an equitable way of  
20 getting him his money back to him.

21 MR. KAMIN: Exactly, Your Honor. As far as I know,  
22 essentially we're talking about a fund. It may be -- you're  
23 talking about a fund that the debtor has -- in addition to the  
24 segregated accounts there's a fund. That's its assets, and its  
25 assets should be returned to the claimants. (Indiscernible) it

1 over, we just have to figure out what the equitable way is to  
2 do that.

3 THE COURT: Very good.

4 MR. MILLER: Your Honor, may I?

5 THE COURT: You may. You're the one that's going to  
6 be stayed.

7 (Laughter)

8 MR. MILLER: Perhaps I should sit down, then.

9 THE COURT: Okay.

10 MR. MILLER: On behalf of the Health Care REIT, you  
11 had granted our motion for emergency hearing, and we had our  
12 witnesses flown in from out of town, and we're ready to go on  
13 our temporary restraining order. I recognize that it's late in  
14 the evening, but we're ready to put on our evidence, and I  
15 should just say that we -- from our perspective --  
16 (indiscernible) million dollars that we're trying to avoid a  
17 significant problem, that if there's uncertainty about  
18 retrieval of that money that my client does face irreparable  
19 harm. And I think that what the witnesses and evidence that we  
20 intended to put on, it is a pretty quick proceeding. I mean,  
21 it's a matter of authenticating the separate escrow agreement  
22 that we had with our escrow holder, Centennial Bank, and laying  
23 out those facts. And the Court granted our motion, set the TRO  
24 hearing for today, so we're ready to go forward however you  
25 want to proceed.

1 THE COURT: Thank you.

2 MR. KAMIN: Shall I speak to that? Or --

3 THE COURT: Yes, you may.

4 MR. KAMIN: Again, I believe that Health Care REIT is  
5 in that situation where they just -- they want their money  
6 back, but there's no pressing transaction. In fact, I think in  
7 one case the 45 days had elapsed. I think they have two funds,  
8 if I'm not mistaken. In one case the 45 days has elapsed, in  
9 the other case the 180 days has elapsed. So, in each case the  
10 money is sitting in escrow. There's no harm that can come to  
11 it. Our principal opposition to a TRO in this instance is  
12 there's no cause for equitable relief. There is simply no  
13 basis for getting equitable relief when all you want is money.  
14 And they haven't cited any cases to that, that go to that  
15 issue, and there's no reason we should be knocking ourselves  
16 out when it's a simple case of money. And in their case it's  
17 even less of a critical issue because the money is sitting  
18 somewhere earning interest, the money that they claim. We're  
19 happy to go ahead with their case. And it was, again, we want  
20 to settle the case, and their case is probably a good one.  
21 That also may be a case that we can settle a little more  
22 quickly because it is an escrow account. As far as I know -- I  
23 can't be certain -- but I think that's the only client that had  
24 a true escrow -- is an escrow agent. So, I may be able to talk  
25 to the committee about that, and resolve that particular

1 problem earlier rather than later. But in any event, a hearing  
2 now as to determine whether they're entitled or not entitled,  
3 without a basis -- without any discovery and without any -- a  
4 chance to really brief these issues, it's just unfair to  
5 everyone. So, I oppose any injunctive relief at this point by  
6 any of the adversary proceeding plaintiffs.

7 THE COURT: Thank you. Mr. Gibbs?

8 MR. GIBBS: Two points, Your Honor. We filed last  
9 night a motion to dismiss the complaint that's also the subject  
10 of the emergency motion for mandatory preliminary injunction  
11 where they're asking not for an order continuing to segregate  
12 their funds, but an order determining that they get their  
13 money, and compelling the debtor to give them the money. We  
14 asked for a dismissal of it for failure to state -- for failure  
15 to join a necessary party under 12(b)(7) pursuant to Rule 19.  
16 They claim the distinction that they have that puts them to the  
17 front of the line is that they have a separate escrow agreement  
18 with a separate escrow agent, Centennial Bank, and they haven't  
19 -- who holds the money, and they haven't named them as a  
20 defendant, so I don't know how they can get the relief they  
21 ask, ordering the debtor to give them money which they're  
22 saying the debtor doesn't have, it's in the possession of an  
23 escrow agent.

24 The record that they filed in the form of a  
25 declaration contained unsigned escrow -- unsigned exchange

1 agreements. I don't know how they can get extraordinary relief  
2 when they haven't even given the Court a signed copy of an  
3 agreement they say is binding on themselves. Lastly, there's  
4 no evidence in the record that they submitted to support their  
5 emergency motion that would in any way be dispositive of where  
6 the money came from that went into the escrow account, and  
7 that's going to be a critical issue as to whether or not from  
8 the sale of their properties in some cases six months ago, did  
9 the money first go either to the parent, or did it go to this  
10 debtor, in a co-mingled account, and then separately out to  
11 Centennial Bank for the establishment of the escrow account?  
12 They have no evidence of that. They had one photocopy of a  
13 bank statement that shows a bank balance.

14           And so, I think there's no need to have the hearing  
15 today to seek extraordinary relief, but to the extent Your  
16 Honor wants to hear testimony, we're prepared to cross examine  
17 the witnesses.

18           THE COURT: Mr. Gibbs, do you think that if the Court  
19 was to give time to you and Mr. Kamin to get together to come  
20 up with a procedure for resolving these issues on an expedited  
21 basis that that would be beneficial?

22           MR. GIBBS: Absolutely.

23           THE COURT: Okay. Thank you.

24           MR. WOLFE: Your Honor, one small point on this. My  
25 client -- again, for the record, Craig Wolfe, Kelley, Drye &

1 Warren. My clients are willing to enter into the settlement  
2 agreements immediately, and we are tee'd up for the emergency  
3 hearings, or the expedited hearings today. We would be more  
4 than happy to convert those over to 9019 hearings and discuss  
5 the facts that are already in the record. We can show, through  
6 documentary evidence, that money at closing transferred right  
7 into those Citibank accounts. We can put that evidence on  
8 tonight, and we believe that we can satisfy the debtor's burden  
9 under 9019 and have this approved right away and stave off  
10 these damages claims. Again, I want to remind the Court --

11 THE COURT: I don't have a 9019 motion before me.  
12 That's the problem. I had a motion to approve a procedure  
13 which the debtor could enter into settlement agreements. And  
14 that was one of the things that I had suggested by way of  
15 alternative was that perhaps an actual 9019 motion on an  
16 expedited basis, but that would have to be with the debtor's  
17 consent, and then if anybody wanted to oppose, it would have to  
18 be on notice, and we'd have to have evidence, and then go  
19 forward that way. It's been suggested in the alternative to  
20 that that some sort of a global procedure where we can have  
21 some test case, perhaps yours, or one of the others can go  
22 forward, and try and resolve some of these issues, and then  
23 allow that to streamline it. And I'm not talking about putting  
24 a trial on six months from now, but Mr. Kamin's arguments are  
25 well taken that, you know, if he's having to defend 20 cases,

1 and answer 20 things in discovery, then that gets to be  
2 problematic, whereas -- because all of these cases are going to  
3 sort of fall into a pattern, so if we have one or two  
4 plaintiffs going forward, we'll resolve some of the issues  
5 legally based on some of the facts, and that will help solve  
6 the cases.

7 MR. WOLFE: Understood, Your Honor. And I just want  
8 to make clear that we have a deadline of December 21st, and a  
9 closing by the end of the year. We're ready with all of our --  
10 all of our papers, all of our documents, and we're ready to  
11 show them to you, and we're ready to get into the settlement  
12 agreement.

13 THE COURT: All right.

14 MR. WOLFE: Thank you.

15 THE COURT: Thank you, Mr. Wolfe.

16 MR. MILLER: May I just respond?

17 THE COURT: Yes.

18 MR. MILLER: Briefly, Your Honor. So, the Court does  
19 have our motion before it seeking emergency declaratory  
20 judgment and relief. And we think that there was a point made  
21 that maybe we're the only ones that have this sort of separate  
22 escrow holder issue, so when you're looking at those four  
23 factors for a preliminary injunction, the likelihood of  
24 success, irreparable harm, harm to the debtor, and public  
25 interest, when we're looking at those four factors the

1 likelihood of success may be unique, and extraordinarily  
2 strong, and overwhelming to the analysis such that the question  
3 of whether pure money could ever constitute irreparable harm.  
4 And we have cited cases in which \$137 million could be  
5 devastating to a public-traded company when there is analysts  
6 (indiscernible), and there's evidence of that.

7           But in any event, we're ready with our witnesses, and  
8 one option for the Court is to take the evidence. We could do  
9 it very efficiently, and if you're inclined to do this, we  
10 would ask you to grant the emergency declaratory judgment  
11 relief, and then people could file objections, or something.  
12 You could delay the effectiveness of that. But it is a motion  
13 that you set for hearing, and it's teed up and ready to go, and  
14 the witness is ready to go. We can do it quickly, and then you  
15 could just simply -- and maybe we could be the test for some of  
16 the issues of -- on the contracts -- that are before the Court.

17           THE COURT: What you're really asking me in the  
18 motion is to decide the ultimate issue of the adversary  
19 proceeding on a very short expedited basis without any  
20 discovery. Normally when I enter a TRO, or a preliminary  
21 injunction it's to preserve the status quo so that it can  
22 proceed to trial and we can resolve the issues. Now, you just  
23 seem to have just sort of streamlined the whole procedure and  
24 straight to trial now tonight.

25           MR. MILLER: It's like My Cousin Vinny. We want to

1 skip everything ahead of time and --

2 THE COURT: Exactly.

3 MR. MILLER: -- and go right to the ultimate  
4 conclusion. I guess that because of the unique nature of our  
5 contracts and the simplicity with which we think we can put the  
6 evidence on, and the opportunity that has been afforded and  
7 those depositions, that we're ready to go, and we have  
8 documents that have already been submitted, and it's pending  
9 before the Court for weeks that everybody could look at. So,  
10 all I'm saying is is that it's not a cumbersome thing, and you  
11 can simply hear it, and then -- you may think that the  
12 likelihood of success is so strong that you could issue the  
13 declaratory judgment. So --

14 THE COURT: There is still a level of coming down on  
15 you -- I think I've already granted the relief that you're  
16 entitled to, and that's the point I tried to make last time, is  
17 that I've frozen the accounts. Nobody can move the money or do  
18 anything with it, so you're protected. And so, when we go to  
19 trial, and if you prevail at trial, then you know that the  
20 money is there.

21 Now, of course, we can't do much about the time it  
22 takes us to actually try the case, but that's just the nature  
23 of legal proceedings. People are entitled to discovery,  
24 they're entitled to, you know, prepare their case, and the  
25 other side have their witnesses, and such. And so, of course,

1 I'm not going to decide the ultimate issue on such a  
2 preliminary basis.

3 MR. MILLER: All right. Well, then, let me just ask  
4 for some sort of a schedule. Assuming that we can't -- it  
5 sounds like there might be issues in achieving settlement if  
6 Mr. Gibbs has a veto over that, and so, we would just simply  
7 ask, in light of the unique nature of our contracts and --

8 THE COURT: (Indiscernible) at the table.

9 MR. MILLER: Yes.

10 THE COURT: Okay.

11 MR. MILLER: Well -- he can look at -- he can look at  
12 it, but I think I've had enough conversations with Mr. Gibbs to  
13 know that he's concerned enough about this that he's filing  
14 motions for indispensable party, which we're, by the way,  
15 prepared to address and show that that case -- the single case  
16 they've cited is a complete unique animal.

17 THE COURT: I'm confident that you are.

18 MR. MILLER: But in any event --

19 (Laughter)

20 MR. MILLER: -- but in any event, we would simply  
21 then request that, some kind of -- we can have some kind of a  
22 merits hearing on as quick a basis as the Court thinks is  
23 proper under the circumstances.

24 THE COURT: I'd be prepared to set down a -- whatever  
25 -- what these adversary cases decide to be, whether it be your

1 case and Mr. Wolfe together, or some other party, on a fast  
2 track. We can have that moved very quickly. I would like,  
3 though, to have you and Mr. Wolfe talk with Mr. Kamin and Mr.  
4 Gibbs about setting up some sort of procedure -- protocol for  
5 handling your cases and how we can get it done on a quick  
6 basis, whether it be under a 9019 actual motion, or whether it  
7 be, you know, trying some of these issues and the Court having  
8 to decide, you know, the issues that we've been talking about  
9 on that. We can do that, you know, early next year, to get  
10 that resolved, and next we'll have the discovery so people can  
11 get things done. But that's how I'd like to proceed.

12           So, today what the Court is going to do is carry the  
13 adversary proceedings over to the next omnibus date with the  
14 understanding that the parties are going to get together and  
15 come up and fashion some sort of a procedure for the Court to  
16 consider. In the meantime, you don't have to wait until the  
17 next omnibus date to present that to the Court. I'd rather see  
18 it, quite frankly, before year's end, if that's possible, but  
19 certainly early January. I would like to see something as far  
20 as how you can resolve these cases, and the -- there is  
21 precedence of this, and Mr. Cohen made good points when he  
22 addressed the Court, and Judge Glenn has been through this and  
23 adopted procedures in his Court, and so maybe we can do some of  
24 the same things that Judge Glenn did. I don't know. It may  
25 not be appropriate in this case because I know that there were

1 other issues that were certainly present in that case that, you  
2 know, may complicate it, that may not be present here, and we  
3 may have more just legal issues that need to be decided. But  
4 in any event I would like to see that procedure in place, and  
5 try to get that accomplished. I think that resolves all of the  
6 items we had on the --

7 UNIDENTIFIED ATTORNEY: Can I ask one quick question,  
8 Your Honor?

9 THE COURT: Yes.

10 UNIDENTIFIED ATTORNEY: In connection with the  
11 procedures you've just discussed, would the Court view  
12 favorably a process if it were agreed upon by the parties that  
13 would involve a form of ADR?

14 THE COURT: Of course.

15 UNIDENTIFIED ATTORNEY: Okay.

16 THE COURT: The Court will -- would be happy to agree  
17 to anything to try to resolve these kinds of issues, and  
18 depending on how you want to do it, if you want to get one of  
19 the other Judges to conduct the ADR, that would be something  
20 that we could do, too. Or, you may want to get, you know, a  
21 professional mediator or something like that.

22 UNIDENTIFIED ATTORNEY: Thank you, Judge.

23 THE COURT: We have one other motion that is up --  
24 Mr. Buffenstein has a motion on behalf of K&L Property  
25 Holdings, a motion for an expedited hearing on (indiscernible)

1 authorize the debtor to incur debt and complete certain 1031  
2 exchanges. Mr. Buffenstein, how does this differ from what  
3 we've been talking about this evening?

4 MR. BUFFENSTEIN: It is, as they say in Monty Python,  
5 something completely different.

6 (Laughter)

7 MR. BUFFENSTEIN: Your Honor, I am Alan Buffenstein,  
8 with the firm of McCandlish, Holton. I'm the attorney for K&L  
9 Property Holdings. K&L has filed a motion asking the Court to  
10 authorize LandAmerica 1031 Exchange Services to what is really  
11 a very simple transaction which is intended to prevent K&L from  
12 incurring substantial damages while at the same time reducing,  
13 if not obviating claims against the debtor. K&L entered into  
14 two exchange agreements with LandAmerica 1031 Exchange, LES,  
15 whereby K&L sold two properties and had the proceeds of those  
16 sales totaling in excess of \$639,000 deposited with  
17 LandAmerica, and as a qualified intermediary. I assume by now  
18 you understand what a 1031 exchange is, so -- K&L has  
19 identified the properties for each transaction and has actually  
20 entered into contracts for the purchase of those properties,  
21 and is ready to close those -- the purchase of the exchange  
22 properties, and if the exchanges are not allowed to go forward  
23 within the 180-day period, K&L will, as will others, suffer  
24 substantial damages, including adverse tax consequences, loss  
25 of deposits, breach of contract and related damages. And we've

1 calculated those damages to be in excess of a million dollars,  
2 a million two. Those damages could very well be administrative  
3 claims, as well, but we're not here tonight to resolve that.  
4 In one instance the contract must close by December 31, and  
5 another one by mid-January. And each of those dates is the  
6 last day of the 180-day period.

7           The relief we are requesting is, in fact, a loan.  
8 However, it will not be a recourse to the debtor in any  
9 fashion. K&L has arranged for the funds to be available to, in  
10 effect, lend to the debtor the funds necessary to purchase the  
11 exchange properties. The loan will be, in effect, a non-  
12 recourse loan. If it is determined at some later date that the  
13 funds to which K&L is entitled are trust funds, whatever that  
14 share of those trust funds would be K&L will take in  
15 satisfaction of the debt, the loan that is being made to the  
16 debtor. If it is determined at a later date that they're not  
17 trust funds, then K&L stands to receive whatever distribution,  
18 if any, that the creditors will receive.

19           The way this will work is that if the Court grants  
20 the motion the funds will be made available and deposited with  
21 the escrow agent in California, that has already been  
22 established. It won't even pass through the debtor's bank  
23 account. And they will be used to go directly for the purchase  
24 of the properties. That will allow K&L to escape the adverse  
25 tax consequences for properties which have very low, if non-

1 existent tax basis at this point in time, so the tax  
2 consequences will be deferred. As I said, the proceeds will  
3 not pass through the LES bank account.

4 I've talked briefly with counsel for the debtor, Mr.  
5 Shalhoub. I've also talked briefly with Mr. Gibbs. This is  
6 what I would call a win-win situation for both parties. I have  
7 a representative of K&L here to testify if necessary as to the  
8 extent of damages, to introduce the exchange agreements into  
9 evidence, and we are prepared to go forward if that is  
10 necessary.

11 So, we're asking that this motion be entered allowing  
12 the debtor to, in effect, makes these loans under the terms set  
13 out in the notes, which clearly specifies that the repayment  
14 will only come if and when K&L is entitled to a distribution or  
15 trust funds, however it comes, with no further recourse to the  
16 debtor. And I believe that under Rule 4001(c)(2), that an  
17 interim order must come first so that we can at least go  
18 through the process for one of the transactions to be followed  
19 by final order in 15 days.

20 THE COURT: All right. Thank you, Mr. Buffenstein.

21 MR. BUFFENSTEIN: And like I said, I can present  
22 evidence if necessary.

23 MR. KAMIN: I have not yet spoken with Mr. Gibbs  
24 about this, but from the debtor's standpoint this is a fairly  
25 creative solution, I think, to --

1 THE COURT: That's what it appears to me, too.

2 MR. KAMIN: Yes. And it doesn't seem to effect the  
3 assets of the debtor. The money would be coming in and going  
4 out, and the claim -- whatever claim K&L Properties has, that  
5 loan would be settled on the basis of how the claim is  
6 ultimately resolved. So, we have no objections. Obviously  
7 we'd have to work out an acceptable order.

8 THE COURT: Right. I would require the order  
9 (indiscernible).

10 MR. KAMIN: Yes. Yes. And maybe Mr. Gibbs has some  
11 other thoughts.

12 MR. GIBBS: Good evening, Your Honor. We were handed  
13 a revised of the pleading while we were in Court today, and we  
14 did get a copy of it.

15 THE COURT: Because we're recording this, just  
16 identify yourself once again. I apologize.

17 MR. GIBBS: I'm sorry. Chuck Gibbs with Akin Gump,  
18 proposed counsel for the creditors' committee of the LES  
19 subsidiary. Two issues. One, it's my understanding that 364  
20 only permits the debtor or trustee to borrow money and co-debt  
21 as opposed to a party in interest asking for an order loaning  
22 money to the debtor. To the extent I understand debtor's  
23 counsel to be saying they're adopting it, I'm not going to  
24 stand here and argue form over substance. My concern is that I  
25 would like somebody from the debtor to tell the Court and the

1 creditors' committee that they have sufficiently researched  
2 this issue to determine that there won't be any penalties to  
3 the estate from the IRS, but if they deem this to be a sham  
4 transaction my understanding of the requirements of 1031 are  
5 pretty technical, and it requires the reinvestment of the  
6 taxpayer's funds from the sale of exchanged property into the  
7 replacement properties. I understand what the movant would  
8 like to do. It would like to loan money of its -- that belongs  
9 to it to this debtor on what's essentially a non-recourse  
10 basis, and get only what recovery they would otherwise get in  
11 this case if there's money available to them. But -- and then  
12 have the debtor use those funds to consummate a 1031 deferred  
13 gain like kind exchange. I'm not a tax lawyer. I mean, I  
14 probably proved that just by my references to 1031 at today's  
15 hearing. But I think it's the debtor's business judgment that  
16 it's in their best interest and the estate's best interest to  
17 borrow this money under these terms, and I think a relevant  
18 issue is whether or not there's a risk of liability to the  
19 estate by agreeing to enter into this transaction with this  
20 taxpayer. The taxpayer's tax consequences are the taxpayer's  
21 problems, and they're ably represented by counsel, but for the  
22 debtor to get authority to borrow money even on an interim  
23 basis, especially if they take the money and consummate a  
24 transaction on less than 15 days' notice before they've advised  
25 -- they have already looked into it and they're comfortable. I

1 just -- the committee certainly hasn't.

2 THE COURT: All right. Thank you.

3 MR. BUFFENSTEIN: Your Honor?

4 THE COURT: Mr. Buffenstein?

5 MR. BUFFENSTEIN: The risk is on K&L that, you know,  
6 it may not work like we think it will, and it should --

7 THE COURT: I assumed you'd have some sort of a hold  
8 harmless (indiscernible) --

9 MR. BUFFENSTEIN: Well, we've already agreed that we  
10 would pay them the costs, but I see no problem here. We've  
11 researched it pretty well.

12 THE COURT: As long as the debtor is in agreement  
13 with the form of the order, and such, the Court will approve  
14 this transaction. I think it's a creative solution to the  
15 problem that everyone in this room shares. And so -- and I'll  
16 leave it up to Mr. Kamin and Mr. Buffenstein to negotiate that.  
17 I would suggest that you share, obviously, a full draft of the  
18 order with Mr. Gibbs (indiscernible). Now, is there anything  
19 further that we need to take up this evening? All right. I  
20 thank you all.

21 THE CLERK: All rise. This Court is now adjourned.

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**C E R T I F I C A T I O N**

I, TAMMY DeRISI, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter to the best of my ability.

/s/ Tammy DeRisi  
TAMMY DeRISI  
J&J COURT TRANSCRIBERS, INC.

Date: December 22, 2008

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