

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. . January 12, 2009
. 10:09 a.m.

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

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1 THE CLERK: In the Matter of LandAmerica Financial
2 Group, Incorporated, Case Number 08-35994, hearing on items 1
3 through 31 on debtor's proposed agenda.

4 THE COURT: Good morning, Mr. Maddock.

5 MR. MADDOCK: Good morning, Your Honor. John Maddock
6 on behalf of the debtors.

7 Also with me at counsel table today, Your Honor, are
8 Richard Blair from McGuire Woods, and Lawrence Kamin and
9 Elizabeth Bower from the Willkie Farr law firm.

10 In regard to Mr. Kamin and Ms. Bower, we have
11 submitted or filed a pro hac motion and an order -- proposed
12 order has been submitted.

13 THE COURT: All right. Thank you.

14 MR. MADDOCK: As Your Honor knows, there are numerous
15 matters on today's docket. In accordance with the case
16 management order entered in these cases, we filed a proposed
17 agenda last Thursday and then a revised proposed agenda
18 yesterday afternoon approximately 1:00.

19 Since that time, Your Honor, as you probably are well
20 aware, there have been additional pleadings filed, most, if not
21 all, concern the joint protocol motion, which you'll hear about
22 today, so those do not appear on the revised agenda due to the
23 timing of their filing.

24 Your Honor, we're prepared to proceed in the order of
25 the agenda, starting with the uncontested matters or in any

1 other manner the Court would like.

2 THE COURT: I'd prefer you go in the order of the
3 agenda.

4 MR. MADDOCK: Okay. Yes, sir.

5 Your Honor, the first of the uncontested matters is
6 the motion to incur debt filed by Mr. Buffenstein on behalf of
7 Getty Realty Corp.

8 THE COURT: All right. Mr. Buffenstein?

9 MR. BUFFENSTEIN: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. BUFFENSTEIN: Allan Buffenstein for Getty Realty
12 Corporation.

13 Your Honor, Getty has filed a motion asking that
14 LandAmerica 1031 Exchange Services to complete what is in
15 essence a simple transaction. It will prevent Getty from
16 incurring substantial damages while at the same time reducing,
17 if not obviating, claims against the debtor, LandAmerica 1031.

18 Getty's subsidiary and affiliate entered into several
19 exchange agreements with -- I'll call LES, whereby Getty sold
20 properties, which are known as the relinquished properties, and
21 had the proceeds of those sales deposited with LES. Those
22 proceeds were in excess of a million three, and they were to be
23 held until such time as Getty could identify and acquire
24 properties to be exchanged for the relinquished properties.

25 As Your Honor has been reminded several times during

1 these hearings, under Section 1031 of the Internal Revenue
2 Code, Getty has a limited period of time after having sold the
3 relinquished properties to identify and purchase exchange
4 properties, and that time is fast approaching for Getty.

5 Getty has identified the exchange properties and is
6 ready to close. And Getty is requesting that in, in effect, a
7 -- to make a loan to the debtor, LES, which would -- the
8 proceeds of which would be used to purchase the exchange
9 properties, the funds under 1031 would not go directly into a
10 LES bank account, but would go into the escrow agent's account,
11 would be dispersed, and the proceeds would be paid to the
12 sellers of the exchange properties. So, in summary, Getty is
13 going to loan to LES the necessary funds to complete the
14 exchange transactions.

15 The order that will eventually be presented to the
16 Court, which has been agreed upon, proved by the counsel for
17 the creditors' committee as well counsel for LES, will identify
18 actually three -- four separate notes and two of Getty's
19 subsidiaries on whose behalf the motion was filed -- subsidiary
20 and affiliate, excuse me, and the terms of repayment are
21 contained in the promissory notes. In essence, the terms of
22 repayment will be whatever it is eventually determined that
23 Getty's (sic) will receive out of this case; whether it be
24 trust funds, whether it be as a creditor, we don't know yet.
25 We know those motions are before the Court today.

1 So on behalf of Getty, I ask that the motion be
2 approved.

3 THE COURT: All right. Thank you.

4 Does any party wish to speak on this motion?

5 Mr. Gibbs?

6 MR. GIBBS: Morning, Your Honor. Chuck Gibbs with
7 Akin Gump Strauss Hauer & Feld. With me is Lynn Tavenner of
8 Tavenner & Beran, counsel -- proposed counsel for the LES
9 unsecured creditors' committee.

10 We had negotiated, I just wanted the Court to be
11 aware, specific addition to the original proposed order. The
12 original proposed order tracked their motion, which said that
13 if the -- "if the Getty exchange funds or the exchange funds of
14 customers similarly situated to Getty are determined to be
15 property of the debtor's estate." We were uncomfortable with
16 that vagueness of "similarly situated" type of customers and so
17 there is an insertion in the modified proposed order which says
18 "which Getty, LES, and the LES committee agree are similarly
19 situated."

20 I just wanted the Court to be aware of that one
21 change. Otherwise we support the entry of the order.

22 THE COURT: Thank you, Mr. Gibbs.

23 MR. SABIN: Good morning, Your Honor.

24 THE COURT: Good morning.

25 MR. SABIN: Jeffrey Sabin from Bingham McCutchen on

1 behalf of the official creditors' committee of LandAmerica
2 Financial Group.

3 We received this late on January 5. Our position is
4 solely to state on the record that it appears that the only
5 thing involved affects any assets, if there are assets, of the
6 exchange company of 1031, but I would ask on the record for
7 counsel for the movant to make clear that indeed he's asserting
8 no rights and no claims against the estate of the parent.

9 Thank you, Your Honor.

10 THE COURT: Anybody else wish to be heard in
11 connection with the motion?

12 Mr. Maddock?

13 MR. MADDOCK: Your Honor, this motion is similar to
14 the K&L Property's motion, which you've granted previously, and
15 Mr. Buffenstein is correct that we did work with Mr.
16 Buffenstein and the committee -- the LES committee to come up
17 with the terms of the proposed order and the promissory notes
18 that are attached thereto.

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

20 Mr. Buffenstein?

21 MR. BUFFENSTEIN: Your Honor, I'm not sure what was
22 just requested, but I think the motion and the order are clear
23 as to what the position of Getty is or it should be. I'm not
24 sure that you were asking for any change or any admission of
25 anything, but I just --

1 THE COURT: There's nothing in your motion that
2 asserts a claim against the parent I think is the --

3 MR. BUFFENSTEIN: There's nothing in the motion that
4 asserts a claim against anything other than LES --

5 THE COURT: All right. Very good.

6 MR. BUFFENSTEIN: -- 1031 exchange.

7 Your Honor, one final matter on a totally unrelated
8 -- on K&L, the -- it's not on the docket this morning. It was
9 supposed to be on the docket. The K&L order that was entered
10 was a temporary order and it was scheduled for final entry this
11 morning, and I simply ask that the Court enter, upon
12 submission, a final order in the K&L matter.

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

14 MR. MADDOCK: Your Honor, in regard to K&L, we would
15 just ask that we see the proposed order --

16 THE COURT: Yeah, I would --

17 MR. MADDOCK: -- before submitted.

18 THE COURT: I'll approve the K&L order -- final
19 order, but I would like to have endorsement of debtor's counsel
20 on that order, Mr. Buffenstein, and the Court will also approve
21 the Getty transaction.

22 MR. MADDOCK: Your Honor, the next several matters
23 are applications filed by the LES committee.

24 THE COURT: All right.

25 MR. GIBBS: Good morning again, Your Honor. For the

1 record, Chuck Gibbs, along with Lynn Tavenner, proposed counsel
2 for the LES creditors' committee.

3 The next item on the agenda for today is matter two,
4 the application to employ Protiviti. Notice was served as
5 reflected in the notice on file, which I believe is Docket
6 Number 525, and no objections have been filed. We think that
7 the request is within the guidelines and within the local rules
8 and appropriate in this case. We would ask that Your Honor
9 approve the application to employ Protiviti.

10 If Your Honor has specific questions with respect to
11 the application, we have a representative of Protiviti here
12 and/or I can answer the questions.

13 THE COURT: Does anybody wish to speak to this
14 motion?

15 Okay, the motion -- the application to employ
16 Protiviti will be approved.

17 MR. GIBBS: Thank you, Judge.

18 The next is Docket Number 3, the application of the
19 LES creditors' committee to employ my firm, Akin Gump Strauss
20 Hauer & Feld. The same notice, Docket Number 525, was served
21 on all parties indicated on the certificate on December 31st.
22 No objections have been filed. It's supported by my affidavit
23 and the accompanying exhibits, and we would ask Your Honor to
24 approve that application.

25 THE COURT: Any party wish to be heard on this

1 application?

2 Okay, the application will be approved, Mr. Gibbs.

3 MR. GIBBS: Similarly, Your Honor, number four is the
4 application of the committee to employ The Garden City Group as
5 communication agent for the committee. Same notice document
6 was served on the same parties, Docket Number 525. No
7 objections to this motion and we think it's entirely
8 appropriate and cost effective.

9 We've engaged them to provide communications to the
10 creditors' which are sorely needed in this case. We've
11 established a website in anticipation -- or they have in
12 anticipation of being employed by the Court. That website is
13 now up and functional and notice of how to get on that website,
14 into which we are downloading summaries of what's happened and
15 the positions of the committee so that parties can stay aware
16 of what's happening in this case.

17 THE COURT: All right. Any party wish to be heard on
18 the application to employ Garden City?

19 That application will be approved.

20 MR. GIBBS: Number five, Your Honor, is the
21 application to employ Tavenner & Beran as co-counsel for the
22 creditors' committee and LES. Same notice was sent; same
23 certificate indicates the parties that received it; no
24 objections were filed. Court's well aware of their
25 qualifications and capabilities. We'd ask Your Honor to

1 approve that application.

2 THE COURT: Any party wish to be heard on the
3 application to employ Tavenner & Beran?

4 That application will also be approved.

5 MR. GIBBS: The last one of the committee, Your
6 Honor, is number six, which is the motion to authorize
7 requirement to provide access to confidential or privileged
8 information which we filed on behalf of the committee. It's
9 similar to what Your Honor entered in the Circuit City case.
10 We think it's appropriate. It's been a fairly common practice
11 in complex cases since the changes to 1102(b)(3) in the -- in
12 BAPCPA, and under 107 also we think the relief requested is
13 appropriate. No objections were filed.

14 THE COURT: Any party wish to be heard on this
15 motion?

16 Mr. Maddock?

17 MR. MADDOCK: Your Honor, not an objection, but just
18 to state on the record, prior to the December 16th hearing on
19 the 9019 motion that the debtors filed, the debtors had
20 provided information to the LES committee leading up to the
21 hearing on that motion and the parties in conjunction with the
22 production of those documents entered into a protective order.
23 That protective order was entered by the Court on January 8th,
24 last week.

25 We would just ask -- again, not an objection, but

1 that that protective order is in place and that --

2 THE COURT: Yeah, I don't see anything in this motion
3 that interferes or any way impacts the protective order that's
4 been entered. I think this is to protect the committee, as I
5 understand, in the dissemination of information.

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

7 MR. GIBBS: And we concur that there's nothing
8 inconsistent and in fact, we'll knowledge on the record that
9 the information they're giving us pursuant to the protective
10 order would be, as defined, confidential information with
11 respect to relief requested in this motion.

12 THE COURT: Very good.

13 MR. GIBBS: Thank you.

14 THE COURT: So with that, the Court will approve the
15 motion.

16 MR. GIBBS: I believe other than the joint motion,
17 which I think the debtor will take the lead on that the
18 committee joined with respect to establishment of a protocol,
19 those are the committee's motions today.

20 THE COURT: All right. Thank you.

21 MR. GIBBS: Thank you, Judge.

22 MR. MADDOCK: Your Honor, the next matter is the
23 debtor's application to employ Sandler O'Neill & Partners, L.P.
24 as financial advisors. The debtors request authority to retain
25 Sandler O'Neill to assist the debtors with the sale of an

1 indirect subsidiary called Centennial Bank.

2 Sandler O'Neill, as set forth in the application, is
3 one of the leading M&A advisors in the financial and banking
4 industry and as discussed in detail in the application, Sandler
5 O'Neill will provide traditional financial advisory services to
6 the debtors concerning the sale of Centennial Bank.

7 Also as set forth in the application, the debtors had
8 hired Sandler O'Neill pre-petition for the very purpose of
9 examining a transaction for Centennial Bank to maximize the
10 value of those assets. Accordingly, Sandler O'Neill is already
11 familiar with the assets values and the market.

12 As set forth in the application, the compensation
13 that is proposed is twofold. One is a transaction fee, which
14 is one percent of the aggregate purchase price up to \$100
15 million and then .75 percent -- of a percent of any portion of
16 the aggregate purchase price that exceeds \$100 million.
17 Sandler O'Neill would also be reimbursed for their reasonable
18 expenses.

19 Notice of the application was provided in accordance
20 with the case management order, including notice to the U.S.
21 Trustee and both committees. There are no objections to the
22 retention itself of Sandler O'Neill or the compensation to be
23 paid.

24 The LFG committee, however, Your Honor, did file a
25 limited objection. In its objection, the committee request

1 that any order granting the application require that the sale
2 proceeds generated by a sale of Centennial Bank be paid
3 directly to LFG.

4 By way of background, Your Honor, LFG owns Centennial
5 Bank indirectly. LFG owns 100 percent of the stock of an
6 entity known as Orange County Bank Corp. Orange County Bank
7 Corp., in turn, owns 100 percent of the stock of Centennial
8 Bank.

9 Right now, Your Honor, what is contemplated is a
10 transaction that would involved the sale of LFG's stock in
11 Orange County, so the stock in the holding company would be
12 sold. If the transaction were to take place in that form, then
13 the proceeds would indeed be paid directly to LFG in exchange
14 for its stock.

15 However, Your Honor, at this point, we don't have an
16 offer. We don't have a proposed transaction. We're not sure
17 what form a transaction may take place. We don't believe it's
18 appropriate to include language in an order approving the
19 application of Sandler which may tie the hands of Sandler and
20 the debtors in trying to maximize the value of Centennial Bank
21 in a transaction of any form that may come along to be
22 considered.

23 Second, Your Honor, the disposition of sale proceeds
24 is certainly more germane to the sale process itself. If a
25 sale transaction is proposed, it would be noticed and the

1 committee would certainly have an opportunity to object if it
2 was not satisfied with the proposed use or disposition of the
3 sale proceeds.

4 Lastly, Your Honor, the debtors certainly intend to
5 keep the committee informed as to the debtor's efforts in the
6 sale of Centennial Bank. In fact, there's a meeting with the
7 committee tomorrow for that very purpose.

8 We, therefore, would request, Your Honor, that the
9 application be granted, but not include the language requested
10 by the committee.

11 THE COURT: All right. Thank you, Mr. Maddock.

12 MR. PERKINS: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. PERKINS: Chris Perkins of LeClair Ryan on behalf
15 of the official committee of unsecured creditors' for the LFG
16 entity.

17 Judge, as Mr. Maddock described for you, the
18 committee did file a limited response to the application to
19 retain Sandler O'Neill and has adequately described the
20 objection such that it is. We're not in any way trying to tie
21 the hands of Sandler O'Neill in its attempt to sell this asset.
22 We certainly recognize the value that Sandler O'Neill brings to
23 the potential sale and we certainly recognize that in the event
24 of a sale and a sale motion, that this issue would come to the
25 forefront at that time.

1 But we raise the issue now for the Court. If the
2 debtor's the one that's going to be retaining Sandler O'Neill,
3 the proceeds from any such sale ought to come to LFG. And so
4 we flag that issue at the time now so the Judge -- the Court is
5 aware of it. When a sale motion comes on, it'll certainly
6 become important, but we don't think it's unimportant to bring
7 it up at this stage such that it's the debtor that's seeking to
8 retain Sandler O'Neill -- seeking to pay Sandler O'Neill, then
9 those proceeds should certainly come to benefit the estate.

10 THE COURT: Little foreshadowing, shall we say.

11 MR. PERKINS: Yes, sir.

12 THE COURT: All right. The Court will approve the
13 application, but I will certainly look for your objection if
14 the proceeds are going anywhere other than to the debtor.

15 MR. PERKINS: Thank you, Your Honor.

16 MR. KAMIN: Good morning, Your Honor. Larry Kamin on
17 behalf of the debtor.

18 THE COURT: Mr. Kamin.

19 MR. KAMIN: I thought my motion for pro hac admission
20 was previously approved, but -- that it hasn't renewed, I
21 suppose.

22 THE COURT: I thought it had to --

23 MR. KAMIN: Yeah, I --

24 THE COURT: -- approved also, but --

25 MR. KAMIN: -- I do. Good.

1 THE COURT: -- in any event --

2 MR. KAMIN: I feel --

3 THE COURT: -- welcome back.

4 MR. KAMIN: Thank you. I feel at home.

5 I'm here on the -- I think it's fair to say the rest
6 of the agenda. The first two matters that are up on the agenda
7 are the -- well, the ones I want to address immediately, and
8 that's the debtor's motion for an expedited hearing on its
9 motion to establish protocols to resolve some of these cases
10 and the motion itself -- that is, the joint motion of both the
11 debtor's and the creditors' committee, the LES creditors'
12 committee -- for an order establishing protocols in order to
13 try to resolve some of the litigation that's outstanding and
14 that's soon to be coming against LES.

15 This motion was filed on last Wednesday, I believe,
16 which is the reason that we needed the motion for expedited
17 treatment. I'll handle both motions, if I can, at the same
18 time.

19 First, let me address the issue with respect to the
20 motion for expedited treatment. Of course when we were here --
21 we were here some number of weeks after this bankruptcy
22 commenced, Judge, to try to settle and resolve some of these
23 cases, and we were before you on December 16th with the
24 debtor's idea about how to resolve at least a large portion of
25 the cases.

1 And at that time, I think I got the sense from the
2 Court that you were sympathetic with the idea of trying to
3 resolve these things as quickly and efficiently as we could,
4 but you wanted to be sure that there was the participation of
5 the creditors' committee in that process.

6 At that point, we start -- we began to work with the
7 creditors' committee. As you know, Your Honor, we were --the
8 next week or so was consumed with other matters relating to the
9 sales hearing. But in any event, we did begin negotiations
10 with the creditors' committee soon after that.

11 It is true that the holidays intervened. In any
12 event, we did negotiate through those holidays and we
13 eventually reached agreement with them as soon as the New
14 Year's weekend was over. We filed the motion as soon as we
15 responsibly could and agreed on almost all of the points in
16 there.

17 For the people who are -- who have been concerned
18 that the debtor's been doing nothing during this period, I did
19 want to assure them that that's not the case; that irrespective
20 of the actions -- of the negotiations, one of the matters that
21 we're obviously going to have to face head on is discovery, and
22 the debtors have been working throughout the holidays, and
23 continue to, on collecting documents, sorting them, and making
24 sure that they're in place for production of any litigations
25 that are going to go forward. We haven't simply been drinking

1 our holiday egg-nogs and waiting for this to occur.

2 So with that, I'd like to go ahead with the motion
3 for the order permitting those protocols to go forward, and if
4 they can be combined and people can address, if they wish to
5 address, the pride of going forward on this quick a basis, they
6 can, but if I can address that motion with the protocols --

7 THE COURT: You may proceed.

8 MR. KAMIN: Thank you.

9 Our idea when we came to the Court in December was
10 that -- and when I say "our" here, I'm talking about the
11 debtors. Idea was that the segregated cases could probably
12 resolve more quickly than some of the other cases that were out
13 there. And we -- our proposal at that time was made with
14 respect the segregated cases.

15 When we began to work with the committee and after
16 that session that we had in court, we thought we should try to
17 expand the effort here to deal with as large a number of the
18 cases as we possibly could, at least in theory. So we didn't
19 feel like our resources should be devoted solely to one type of
20 case or another type of case.

21 As we discussed very tentatively the last time we
22 were in court on this, the thought was let's get some test
23 cases. Let's try to select test cases from categories that
24 seem to be common among with the potential claimants and let's
25 go forward with those cases on as quick a basis as lawyers can

1 reasonably be expected to work on complicated litigation.

2 And through that process of working through those
3 cases, there will inevitably arise issues that will have to
4 come to the Court for decision, there will inevitably arise
5 patterns of how LES conducted these various transactions that
6 will be applicable to many, many other cases, and that in light
7 of the rulings, potential settlements of these cases plus the
8 discovery that comes to light, it will be possible to have
9 templates for settlements or for resolutions of these matters
10 which other plaintiffs will be very comfortable in adopting for
11 their own cases.

12 There was never any idea that anyone would be forced
13 to settle anything. There was certainly never idea that --
14 never any idea that whatever ruling is made in a particular
15 case would bind someone who's not participating. I don't think
16 federal law permits that.

17 But the idea was let's resolve these cases as -- on a
18 fast basis in a transparent manner so that people see what's
19 going on, they see the rulings, and they make -- can make
20 decisions about whether to go forward with their own case,
21 whether to try to resolve the case on some other basis, or just
22 simply to come forward to try negotiate some other deal or to
23 say why their facts are very different. So that provided the
24 principal idea for going forward with the protocols, and I
25 think that is basely what the protocols do.

1 What we did is we established four test cases, and I
2 want to discuss that and a potential modification as well. I
3 think as Your Honor knows, because we've been through this
4 before, there are several different categories of cases out
5 there.

6 One case -- one category would involve escrowed
7 funds. These are specifically noted to be escrow agreements
8 where money went into an escrow agent and that escrow agent
9 continues to hold the money. That escrow agent is subject to
10 the instructions by LES, but that does differentiate it from
11 other situations where LES has a more direct control over the
12 money.

13 There are at least four escrow cases. I think there
14 may be more. What makes them worthy of their own category is
15 the escrow cases involve at least \$150 million of total face
16 value of claims.

17 And to go back over that to give some perspective on
18 that, there are approximately \$227 million worth of
19 segregated/escrow claims at face value. As I say, something
20 like 150, and I can't be sure of that, but in that
21 neighborhood, would be the escrowed funds and then there are
22 approximately \$80 million worth of other segregated exchange
23 accounts. And we've been through that before. That's the case
24 where the contracts themselves indicate that money will be set
25 aside in bank accounts associated with individual taxpayer's

1 names and they were in fact set aside.

2 So the first category is the escrowed funds. The
3 second category, as I mentioned, is the segregated accounts.
4 There are something on the order of 40 or so segregated
5 exchange account agreements out there which fall into this
6 category.

7 The next category, and it's certainly the largest
8 category in terms of the number of claimants, would be the
9 commingled accounts. We've looked through the commingled
10 account exchange agreements, Judge, and there are not all
11 identical, but very broadly speaking there are two types. And
12 they don't differ in much, but they differ in enough of a way
13 that we thought it might be useful as long as we're doing --
14 handling test cases to separate them out. And in the papers, I
15 think we characterize them as category A and category B, and
16 I'll just briefly describe the differences there. And as I
17 say, the differences may be minor and they may not be, but
18 there's difference, and it is in how it is described in those
19 agreements that the money will be invested.

20 In the what we've called the category A commingled
21 accounts, it -- the applicable language states that LES will
22 receive all account -- all funds in an LES account at SunTrust
23 Bank. It's pretty explicit about that. In the category B
24 cases, it simply says that the money will be deposited at
25 SunTrust and that interest will be guaranteed on that to the

1 individual taxpayer customer. There may be a difference there,
2 there may not be a difference there, but there are a
3 significant number of exchange agreements in both categories,
4 so we thought it would be fair to litigate each one of those
5 cases to the extent that there is going to be a claim somewhere
6 that they lead to different results.

7 So those are the four categories that we set up, and
8 we -- as I say, we were working on a very expedited basis to
9 try to get all this done. We believe that we have test cases
10 in at least three of the categories. The fourth category, we
11 thought we had someone, but that someone has decided not to
12 participate anymore.

13 We have the Millard case, which is the segregated
14 case. We have Health Care REIT, which is one of the -- it's
15 the largest single escrow case. Then we have a case, Frontier
16 Pepper -- I call it Frontier Pepper, I think the name is a
17 little bit longer. But Frontier Pepper I believe is in
18 category B of the commingled accounts. And we had put before
19 Your Honor an order which said that the Aiello case would be
20 the test case in connection with the other commingled cases. I
21 understand the Aiello plaintiff has now declined to be a test
22 case, so we'll look for another one.

23 Before I go on, I want to address something about the
24 possibility of another test case that I discussed this morning
25 with counsel for the creditors' committee -- the LES creditors'

1 committee and to which I don't think there is an objection.

2 There are three matters on today's calendar -- I
3 think they're number 12, 13, and 14, if I'm not mistaken --
4 which relate to situations of this following sort. It's where
5 the money that was originally obtained for the relinquished
6 property was not all cash, so that money was not simply taken
7 and given to LES for safekeeping.

8 Instead, the money for the relinquished -- or the
9 consideration, I should say, for the relinquished property
10 consisted of cash as well as a note. In such a case, the note
11 was made payable in most cases to LES as the qualified
12 intermediary for the particular purse -- or I should say seller
13 in that case.

14 There are, as I say, three matters on the docket.
15 One was filed almost immediately when this case was filed for,
16 I believe, a turnover. There is another matter now for a
17 turnover and there is yet another matter in which a complaint
18 was filed, the Finkelstein matter, where they at the same time
19 basically moved for a motion for summary judgment. That is on
20 today as well.

21 We have objections to dealing with all of those
22 today, but we have consulted with the client. There may be --
23 it appears to us that there are more than simply these three
24 cases in which the consideration consisted both of cash and of
25 this note. And the notes are -- again, they're worded in a

1 particular way where there may be different legal effects to
2 that particular arrangement than there would be simply in the
3 case where the money comes over and is put into a commingled
4 account. I believe all these cases are commingled accounts
5 rather than segregated accounts. In any event, with respect to
6 the note, things may be different because of the defacto
7 segregation, in effect, of that note.

8 So -- and I -- I'll be honest with Your Honor, I've
9 not spoken to any of the -- those three individuals. They're
10 probably all here today.

11 But the way I would propose to deal with those cases,
12 since I think they do raise new issues, is to add another test
13 case so that we would have five test cases and I'm happy to
14 talk with those. I have no preconceived notion of which one of
15 those would be best and -- or actually whether they'd be
16 willing to do it, but they are -- they seem to be willing to
17 litigate, so I don't see why they wouldn't agree to litigate
18 their cases to a conclusion at this time.

19 Okay. So that's the -- those are the test case and
20 now I want to get into the protocols.

21 Now -- excuse me. Before I get into the protocols, I
22 think that the objective of the debtors is very clear from the
23 last time we were here. Our objective is, firstly and
24 primarily and overriding everything else, is to minimize the
25 expense to the estate so there's more to distribute to these

1 claimants, period. We cannot do that if we have to litigate
2 dozens of cases.

3 I say dozens and I'm being -- I'm really understating
4 things. As of today -- well, I shouldn't say as of today. As
5 of Friday, 60 cases had been filed. More may have come in over
6 the weekend. And they're coming in at a probably almost
7 predicable rate of several a week. That may increase after
8 today's hearing or not, I don't know.

9 So we have 60 cases already. We have the potential,
10 as Your Honor knows since there are 450 contracts out there, of
11 some number approaching 450. We can't handle them -- I mean,
12 it's not feasible and it's not sensible to try to handle those
13 cases on a case-by-case basis. Just really can't be done as a
14 practical mater.

15 Our original objective was also to try to the extent
16 that we could to avoid the accrual of additional damages. I'm
17 still hopeful that we can do that. I'm still hopeful that we
18 can resolve these cases in a way that will allow some of these
19 transactions to go forward in one or another and not saddle the
20 individual defendants with additional claims. Again, that's
21 also helpful to the estate because it reduces the total amount
22 of claims and presumably makes more available for everyone
23 else.

24 To the extent we can't do that, we cannot satisfy
25 everyone in this room. We can't come close. We really are

1 trying to do the best we can. The debtors don't have a genuine
2 claim to this asset other than as debtor's property, but it
3 will ultimately distribute it to the claimants in this room and
4 we're certainly not indifferent to that. That has to be done
5 correctly. It has to be done properly under law. But we want
6 to see to that and we want to see that it be done to maximize
7 those benefits.

8 The protocol. There are objections to the protocol.
9 We received quite a number of objections. I stopped counting
10 and unfortunately quite a number came in yesterday, so I've
11 read most of them, but maybe not even all of them. And they
12 are really across the board. Certainly many of them think
13 we're not going fast enough. There are several that I think
14 believe we're going too fast. So let me tell you what we
15 negotiated with the creditors' committee what we think is
16 appropriate and then I'll try to deal generically with some of
17 the objections that came in.

18 The protocol, first of all, will require that all
19 records regarding any of these individual test cases, and it's
20 documents related to these test cases, would be supplied one
21 week from today. It also would require that many records
22 related generally to the flow of funds would also be required a
23 week from today, and the debtor would make as much disclosure
24 of that as is practical under the circumstances, which will be
25 fairly substantial, I should tell Your Honor.

1 In addition, records underlying some of the materials
2 that were submitted in connection with the motion with respect
3 to the numbers of accounts and type of accounts will also be
4 supplied, all of that, one week from today.

5 The protocol also provides that all written discovery
6 will be submitted one week from today. The answers will be
7 submitted one week from today.

8 The written discovery. It is required under the
9 protocols that all the written discovery will be responded to
10 10 days after the written discovery is received. And by this,
11 I'm talking about we have obviously notices -- request for
12 admissions. We have interrogatories. We have document
13 requests. There are some limitations as to the extent of that
14 because obviously we can't do the impossible in 10 days, and
15 therefore, we request the number of interrogatories, for
16 example, be limited.

17 And since litigation is very difficult to predict, I
18 -- again, I can't guarantee, Your Honor, that all this can be
19 done. This is aspirational.

20 One of the things that I mentioned, Judge, was the
21 work that's been done to try to collect the documents up to
22 date. Well, some fair amount of work has been done to try to
23 collect electronic documents as well, but the debtors were very
24 big companies, so there are a lot of materials. And the
25 collection of electronic material can be complicated and can be

1 time consuming.

2 We're going to do the best we possibly can and the
3 narrower the requests are for electronic discovery, the more
4 easy it is to be able to come up with something in a reasonable
5 period of time. The broader they are, it becomes -- I won't
6 say literally impossible -- becomes unfeasible.

7 So we're hoping that everyone recognizes that these
8 deadlines are -- we're trying as hard as we can to meet these
9 deadlines. We are very hopeful that we can meet these
10 deadlines. That why we propose them.

11 And it also requires then that -- and remember I'm
12 talking about basically everything being on the table in terms
13 of what discovery wants one week from today. Claimants will
14 have much of the basic discovery that they'll need. Ten days
15 after that, the written discovery we responded to, and 30 days
16 after that initial date -- that is, one week from today -- all
17 discovery would be concluded, all factual discovery would be
18 concluded in these cases.

19 That means all the depositions, all third-party
20 discovery to the extent there is third-party discovery. It
21 means any follow-up document requests. It means everything
22 done 30 days from next week.

23 That takes us to February 20th. And at that point
24 the protocol provides there really one of two routes that can
25 be taken at that point.

1 First of all, if there is a need for expert
2 discovery, there is a three-week period set aside for expert
3 discovery. And that's not -- that's all expert discovery.
4 That's the initial disclosure of the expert. That's the
5 rebuttal expert. That's the deposition of the expert. That's
6 everything in three weeks.

7 However, the protocol also contemplates that if the
8 parties do not need expert discovery, and right now I can't
9 judge that one way or the other, summary judgment motions could
10 be made immediately. That would be at the conclusion of
11 discovery on February 20th.

12 So again, summary judgment motions will be made then.
13 There is a schedule for those summary judgment briefs to be --
14 all the filings in that to be done in -- I think it's about 30
15 days. All the briefing, all the deposition excerpts, all the
16 documents, all the exhibits, all the declarations would be
17 completed within a 30-day period and be before Your Honor. In
18 that case, it would be by March 20th ready for decision.

19 So that's the protocol. Thereafter, if cases are not
20 decided in that time frame, we prepare to have the trials go
21 forward in early April. I believe that there would be a --
22 we've suggested pretrial conference that first week in April
23 and the trial starting the second week in April. I think that
24 may contemplate a situation where there is expert discovery. I
25 think that could be moved up in -- depending upon the

1 individual case.

2 I also think that it's important to note here that we
3 have provided in the protocol that any of these deadlines can
4 be moved up -- that is, shortened -- to the extent that time is
5 not required, and that provides another way in order to get
6 these things done.

7 And as an example, I don't want to be definitive
8 about any of this because I don't know the cases well enough
9 yet. But certainly if someone says okay, the deposition period
10 has begun, I only have one person I want to depose, and if you,
11 debtor, only have one person or two people, let's do that next
12 week and then let's close discovery.

13 Or if someone said, I really don't -- I don't have
14 interrogatories, I don't -- you know, I'll relieve you of that
15 burden. Let's move straight to this phase.

16 Now, obviously if LES believes or the committee
17 believes well, no, we need some additional discovery, that'll
18 be dependent on how quickly it can be furnished. But we're
19 certainly ready to work with these parties on the five test
20 cases that I'm talking about in order to expedite things to the
21 extent that it is feasible.

22 So -- and there's specific provision for that in the
23 protocol that these times can be shortened. There is no
24 provision for any of the times to be lengthened. Obviously if
25 they have to be lengthened, we would have to come to Your Honor

1 to get that done. And as I say, we hope that can be avoided.

2 That's the protocol and we're here to ask you to
3 adopt that protocol here today. Before people get up and start
4 giving their objections, let me anticipate them just so
5 everyone in the room can speak to what I'm saying, I suppose,
6 and Your Honor can be aware of where we are on these things.

7 There are -- to some extent, I'll deal with these
8 generically, though the first one I did want to deal with was
9 the LFG creditors' committee, which lodged an objection.

10 Essentially, I think the LFG committee, and they can
11 obviously speak to this, but they were concerned that there are
12 cases among the 60 that have been filed that entail claims
13 against LFG itself and they wanted to be sure that their rights
14 in those cases were not implicated in what we're doing here
15 today.

16 First of all, the test cases that we have do not
17 involve claims against LFG. So I don't think that's an
18 important issue and I don't see how it could have an impact on
19 LFG either, for that matter, since they're not a party.

20 And, however, it's unquestionably the fact that LFG
21 may have an interest in the resolution of these cases in light
22 of the claims that are pending out there against LFG. So I
23 suggested this morning to the counsel for the LFG creditors'
24 committee that they -- that we would not oppose a motion by
25 them to intervene in these cases so that they could participate

1 and it very clearly would be without prejudice to any of their
2 rights. That is, they could intervene for purposes of
3 attending the depositions and the like, but they would not be
4 affected by any collateral estoppel issues or anything of that
5 -- they would not be a party for anything other than their
6 ability to be present during the litigations and to make sure
7 that their interests are being -- are not being ignored.

8 And to the extent they're affected, they would have
9 some right to participate. But it would certainly not involve
10 them as a party such that there would be any collateral
11 estoppel effect. That would be my proposal to them and I think
12 that's okay with them. They'll speak to whether that resolves
13 their objection or not, but I don't -- we don't want to exclude
14 them from the process certainly under these kinds of
15 circumstances.

16 All right, let me talk about some of the objections
17 that we have heard generally. Timing. Some of the objections
18 that you're going to hear are from individuals who --

19 (Unidentified speakers on telephone.)

20 MR. KAMIN: As I say, some of the objectors believe
21 that these matters can be resolved much more quickly than we
22 propose to resolve them.

23 In particular, there are objections from a number of
24 claimants. I believe they're represented by Kelley Drye. I
25 may be wrong about -- but Chino Group and some of the other

1 groups.

2 They suggested a schedule, if I read that right, that
3 would require all documents in the case to be produced
4 tomorrow, or maybe it's all documents that are -- all documents
5 requested have to be done by I think today or tomorrow and then
6 everything has to be produced two days later, and I think the
7 experts or discovery is -- starts next Monday and it's finished
8 on Thursday and -- it's a schedule that's wildly unworkable.

9 I understand their desire to get on with this. I
10 think we're trying to do everything that's realistically
11 possible to move that on in a way that's orderly that is not
12 completely helter-skelter.

13 There are legal issues here that obviously have to be
14 looked into. We can't do that overnight, Judge. I mean, we've
15 done some of it already, but, you know, we have -- there's
16 hundreds of millions of dollars at issue here. This is going
17 to have to be a thorough exploration of these legal issues and
18 as a thorough a factual examination of these issues as is
19 warranted by the amount involved and the number of claimants.
20 We can't do this in three days or in six days or in 12 days.
21 So we have proposed a schedule that, in our view and in the
22 view of the committee, is as prompt as our resources will
23 presently permit.

24 I also to those who think we're going too fast --
25 again, we simply have to move forward on this. There's no

1 reason to delay this because people want a better grasp of all
2 the general issues or because a resolution of one case may
3 somehow impact them in a few weeks in a way that they're not
4 prepared for.

5 We really want to go forward with this and the -- and
6 I emphasize that the process is really not designed to force
7 anything down anyone's throat. The process is designed to --
8 again, litigate these cases out in the open in a way that
9 people can see how the issues are decided, how they develop,
10 and make their own judgments about how their cases fall into
11 that.

12 One of the other kinds of objections that we have is
13 an objection that there are really no procedures for following
14 up. That is, we don't have a template for proceeding after
15 these four cases are resolved. And since we're involving
16 obviously a lot of cases and we're requesting that a stay be
17 entered with respect to those cases, there is some concern
18 about that.

19 I think we actually found it impossible to come up
20 with a procedure for handling the 400 cases that come after
21 this one. It's impossible in part because we can't judge how
22 these cases are going to go. We really can't prejudge how
23 these things are going to turn out.

24 It may be the case that all the segregated cases
25 decided by -- or the segregated cases are decided in a summary

1 judgment that really resolves all those issues. We don't have
2 to plan now for discovery with respect to segregated or escrow
3 case issues. We couldn't. It would be presuming one way or
4 the other how those things might be turning out.

5 UNIDENTIFIED SPEAKER: Everybody put their phones on
6 mute.

7 MR. KAMIN: It is --

8 THE COURT: Excuse me just one moment.

9 MR. KAMIN: Sure.

10 THE COURT: Would all the parties that are on the
11 phone, please set your telephone to mute. We're getting some
12 feedback in the courtroom. Thank you.

13 I'm sorry for the interruption.

14 MR. KAMIN: Yeah. So as I -- I don't want to repeat
15 myself here, but again the idea was let's transparently
16 litigate these cases and see then where these things are going.

17 You know, nothing's preventing people from coming in
18 and approaching us on their individual cases to be handled.
19 For example, like some of the cases, the case you heard earlier
20 today, there may be alternative ways to handle these things to
21 -- in order to provide some comfort to some of the claimants
22 here. And, you know, we do believe that in a matter of some
23 number of weeks, really a couple of months, we'll really have a
24 pretty clear handle on where these cases should be winding up.

25 Another set of objection relates to staying the

1 actions. There are people who don't want the action stayed. I
2 think I've already dealt with this. We have 60 cases. Answers
3 would be due on all of them. We'd have to deal with
4 amendments. We'd have to deal with discovery. Many of these
5 cases are very similar to each other. And yet they have
6 different counsel, they're going to have different issues in
7 terms of deadlines, and all the rest.

8 I think I've -- and it's clear from our standpoint
9 it's administratively completely unfeasible to try to litigate
10 60 cases. And that's what there are now. By next week there
11 may be 70 and as we go on.

12 There are a couple of variations on this theme. One
13 is there are some objectors who suggested that we are seeking
14 to prohibit the filing of new lawsuits. That is not at all
15 what this order contemplates. No one is stayed from filing an
16 adversary proceeding. So let's take that off the board. If
17 you want to file, go ahead. What we're doing is staying the
18 activity in connection with those adversarial proceedings.

19 The other variation on this question of the stay and
20 a number of -- a couple of objectors I think suggested that
21 well, third-party discovery could go forward. And that's
22 another one we do not contemplate that third-party discovery
23 should be going forward during this period of time.

24 Third-party discovery, I assume -- I may mean
25 different things to different people. I think some of the

1 objectors suggested bank records could be sought by individual
2 subpoena. I think others may be talking about third-party
3 discovery with respect to individual former employees of LES or
4 who knows who; other people involved in the transaction. There
5 could be a lot of potential third-party discovery. We don't
6 think it's necessary, and there -- two things that weigh
7 against that kind of exception here.

8 First of all, again we're talking about a lot of case
9 and even a simple subpoena to a bank involves -- from the
10 standpoint of LES, it involves issues with respect to the scope
11 of the subpoena, whether more is being requested in that
12 subpoena than that plaintiff would be entitled to, including
13 other potential records of LES that are not involved in the
14 proceeding. It involves confidentiality issues that might have
15 to be negotiated with each individual claimant as they go
16 forward. And I'll come back to the 60 cases that exist now.
17 This becomes really an administrative nightmare.

18 On the other hand, the question is what is gained by
19 allowing that to go forward? What I've heard from some as
20 well, if we can get the bank records now, then as soon as the
21 stay is lifted with respect to these cases, hey, we'll be ready
22 to litigate right away.

23 I think that you should be able to get a third-party
24 subpoena out and documents produced in two weeks. Again,
25 assuming there aren't any problems. I don't see how that kind

1 of delay of these cases that we would otherwise request be
2 stayed is going to in any way impact the actual litigation of
3 those cases, because of course, that can go on while the other
4 discovery's going to be going on in that individual case. They
5 don't get any particular advantage from getting that third-
6 party discovery now at a tremendous administrative cost to the
7 debtor. So again, I would request that the stays of the
8 existing adversarial proceedings be complete in that respect.

9 There are also another set of objections that relate
10 to limiting the proceedings in some way or another so that
11 these test cases would be limited to general threshold issues.
12 For example, whether it's property of the estate or not. And
13 that proposal suggests setting aside all other causes of action
14 that may be in the various complaints, all other issues to be
15 determined on a case-by-case basis presumably at some time in
16 the future.

17 The problem with that approach is it doesn't resolve
18 anything. It simply delays the resolution of these cases
19 because whatever -- however these cases are -- if there are
20 certain threshold issues, there are going to be plaintiffs who
21 are going to come in and say, but hold on. My case is
22 different because of this fact, other fact, and the other fact.
23 We really don't get very far.

24 Whereas, when we can litigate these various state law
25 claims, for example, and the individual facts that may relate

1 to them, there's going to be sufficient similarity in what we
2 are litigating to the other cases out there that we will not
3 only resolve cases, but be in a position to have other case --
4 similarly situated cases resolved.

5 Whereas, setting aside all factual issues and all
6 issues unrelated to whether it's property of the debtor doesn't
7 actually end any case, or at least I fear it may not end any
8 case. So again, we think that the four test cases ought to be
9 litigated in their entirety at this point.

10 There is another set of -- I think this may be the
11 last one I have a general generic discussion about. After
12 that, we'll hear if there are others that I've missed.

13 But some of the objections relate to the question of
14 intervention. I think there were some individual claimants who
15 suggested that they should be permitted to intervene, and I
16 know -- I think it was yesterday a pleading came in -- or an
17 objection, I should say, came in from an entity called the
18 Unofficial Ad Hoc Committee of Commingled Exchanges that spoke
19 to a desire to intervene fully in these cases.

20 I suppose -- that unofficial committee raises
21 questions of its own. It appears to be composed of, as it
22 suggests, solely individuals with commingled exchange
23 agreements, which is coincidentally the composition of the
24 creditors' committee as well. I think they may have different
25 legal views on whether it's property of the estate or not

1 property of the estate, but beyond that, I don't -- well, I
2 don't need to say anything more about that committee, but I do
3 want to say something about the pleading, which is the question
4 of intervention.

5 The intervention that's requested is they and anyone
6 else who wants -- anyone whose -- in fact, any counsel who's
7 filed notice of appearance doesn't -- I don't think it matters
8 whether you've filed an adversary proceeding or not -- all they
9 be able to intervene in full in these proceedings.

10 Now, I think what that means is that to the extent
11 they intervene, they can file discovery requests, they can
12 participate in depositions, they could seek third party
13 discovery, and we -- you know, you would have a situation where
14 you'd presumably have a deposition and you'd have -- I don't
15 know how many lawyers might want to ask questions in that
16 deposition.

17 But it becomes -- again, it's a question of how
18 unwieldy is this going to become. We're certain prepared, as
19 we've said, to have the parties who are most interested in
20 these proceedings, the official committees, intervene and
21 participate. We think that protects the interests of the
22 various parties.

23 We also believe that the protocol provides for access
24 to all the discovery materials by any of these people who have
25 filed adversary proceedings so long as they file -- so long as

1 they agree to confidentiality in respect to that discovery.

2 We've also agreed that any one of them can file
3 amicus briefs in connection with either the pretrial
4 proceedings or summary judgment proceedings.

5 As I said, we want them to know what's going on, we
6 want them to have some ability to have their voice heard in
7 this, and that's the way we've done it, as opposed to full
8 intervention, which brings this whole thing to a grinding halt.

9 So that's what I have to say in support of the
10 motion, and I assume that the creditors' committee will go next
11 and then you'll hear objections. Thank you.

12 THE COURT: Okay. Thank you very much.

13 MR. KAMIN: Any questions, I'm obviously happy to
14 answer them.

15 THE COURT: Thank you.

16 Let me hear from the committee.

17 MR. GIBBS: Judge, I think Mr. Kamin on behalf of the
18 debtors very fully and also clearly set out the reasons why the
19 committee joined in this motion, the reasons why the committee
20 supports the entry of an order approving this joint motion.

21 We think the protocol that we have negotiated in good
22 faith and with some significant effort over the holidays as
23 rapidly as we could addresses the Court's concerns and creates
24 a vehicle that we think is workable, we think it is
25 expeditious, and we think it will be a significant key to

1 unlocking what could be a significant morass that this case can
2 fall into in the absence of procedures like this.

3 I don't have much to add at all in the way of support
4 for the motion beyond the comments of debtor's counsel. I
5 wholeheartedly endorse him and I would ask the Court to try to
6 put into its frame of reference the various objections that we
7 have received on this motion and had it been noticed for longer
8 period, we would have probably gotten several more objections
9 that would have even broadened the horizon and broadened the
10 scope of the problems that each individual party might raise,
11 but it points out the conundrum that we're in.

12 Some do want us to go faster. Some do want us to go
13 slower. Some want one case. Some want us to have four or more
14 Rule 23 class actions that parties could either opt into or be
15 part of. Some would like these rulings to be collateral --
16 service collateral estoppel, others want to make sure that
17 they're not.

18 What we think what we have arrived at is a way for
19 the Court to rule on the fundamental issues of what property
20 listed on the debtor's schedules that were filed on New Year's
21 Eve, what constitutes property of the estate under 541, and
22 what, if any, of the property listed on the debtor's schedules
23 belongs to other parties under some trust theory, whether it's
24 the Court's finding that an express trust exists, whether the
25 Court finds that a constructive trust exists, or whether the

1 Court finds that a resulting trust exists. And if so, under
2 what circumstances does the Court find that such a
3 determination is appropriate.

4 There are several scenarios I think that the Court
5 will find itself with and the Court could rule on when it hears
6 these test cases. As I said, the Court could decide that all
7 the property listed by the debtor on its schedules is property
8 of the estate under 541 and that nothing is held in trust. And
9 that would include the monies in the escrow accounts, that
10 would include the money in the so-called segregated accounts,
11 and that would include any other monies that aren't so
12 designated. And that would be by the debtor's schedules
13 approximately 10 and a half million in cash in various
14 accounts, approximately \$46 million of Treasury bills in
15 various accounts in various forms, and also approximately 200
16 million of face value of auction rate securities.

17 The Court could decide that all of that is property
18 of the estate, all the causes of action the debtor listed or
19 may otherwise possess is also property of the estate, as well
20 as the money in the so-called segregated accounts or -- and/or
21 the escrow accounts.

22 Conversely, the Court could rule that none of those
23 things listed on the debtor's schedule belong to the debtor;
24 that it all belongs in trust for the benefit of the customers
25 that signed exchange agreements under what you believe to be

1 applicable law governing that decision, or you might find some
2 hybrid.

3 You might find that the money in the segregated
4 account, because it says it's for the benefit of customer X,
5 assuming it wasn't commingled, belongs to those segregated
6 customers and doesn't have to be split up with any other
7 customers of the debtor. You might find to the contrary. You
8 might find that that's a distinction without a difference and
9 those monies need to be part of a general trust race if you
10 find that a trust relationship exists.

11 You might find that monies in the possession of the
12 debtor -- I'm sorry. You might find that money and -- or other
13 assets that were in the possession of the debtor prior to any
14 of these accounts being entered into with any of the current
15 customers of the debtor belong to the debtor and are not
16 property of the estate. There are a host of fact-determinative
17 and legal-determinative results you could conclude that's going
18 to depend -- that's going to determine whether or not money
19 exists to pay other creditors in this case and these procedures
20 we think will allow you to make those threshold decisions.

21 The one concern that I've seen in the objections that
22 I'm --

23 (Recorded message on telephone conference.)

24 MR. GIBBS: -- I agree with and that I think that the
25 Court should clarify, if Your Honor's inclined to --

1 (Recorded message on telephone conference.)

2 THE COURT: Excuse me, Mr. Gibbs.

3 Would the parties on the phone please set your phones
4 to mute. We're still having feedback in the courtroom.

5 (Recorded message on telephone conference.)

6 THE COURT: Please set your phones to mute. Thank
7 you.

8 I'm sorry, Mr. Gibbs, for the interruption.

9 MR. GIBBS: The one concern that was raised in the
10 objections that have been coming in that the committee is very
11 concerned about is that none of these test cases allow an
12 individual to get a leg up in a distribution of monies that are
13 in the possession of the debtor. And the specific example I
14 think relates to the commingled account customers.

15 If the Court were to rule, for example, that the
16 monies in the segregated accounts belong to those identified
17 segregated account customers because you think the applicable
18 law is that a trust relationship exists, you believe that no
19 commingling exists to the extent you find that to be a relevant
20 fact, and you say that money belongs to those customers, and
21 you conversely say that certain -- that the test cases for the
22 commingled account customers had a trust relationship with the
23 debtor and that there is some yet to be determined trust race
24 that they would be the beneficiary of, I think it's
25 inappropriate and I'm sure that the commingled account

1 customers share my concern that those one or two plaintiffs, if
2 the Court were to rule that a trust relationship exists, get to
3 get paid what they put into the debtor and the others who have
4 been stayed would end up with a lower return.

5 So there's a concern that if you find that certain of
6 the debtor's money doesn't belong to the debtor, that it's not
7 541 estate, that your decision in doing that not allow,
8 depending on the Court's rulings, any of these lead plaintiffs
9 to get to the assets first. And I'll put that out because I'm
10 at a loss as to how to draft a solution to that concern, but we
11 share that with the -- those objectors who raise that issue.

12 But other than that, we would endorse the joint
13 motion on the arguments made by debtor's counsel. We would
14 have liked this to have been able to negotiate a somewhat
15 faster procedure, but it's not our assets and it's not our
16 records that are going to be produced, so our burden was much
17 easier than the debtor and we arrived at what we think is a
18 reasonable and fair compromise.

19 THE COURT: All right. Thank you.

20 Mr. Sabin?

21 MR. SABIN: Thank you, Your Honor. Good morning
22 again. Jeffrey Sabin from Bingham McCutchen on behalf of the
23 official creditors' committee of LandAmerica Financial Group.

24 Your Honor, bear with me if you can, because it's not
25 so easy as referring to the debtor and whose money is it.

1 There are different debtors here, there are different creditor
2 groups here.

3 So I'll start out with a minimum, at least reminding
4 myself as my committee members do, that creditors of
5 LandAmerica Financial Corp. believe they have a significant
6 stake in this protocol and they believe so based on what they
7 don't know yet. And that is, whether it's test case one or
8 test case two or test case three or test case four. From what
9 they've seen already of the 61 actions, at least 11 of them
10 name LandAmerica Financial Group, number one.

11 Number two, what they have seen already from the
12 public filings is that these debtors, be they LandAmerica
13 Financial Group or the 1031 entity, have not yet declared under
14 their filed schedules their own view as to who owns the money
15 and effectively have said, jump all, we know that people want
16 to fight about it.

17 And so maybe that's the best thing they can do under
18 those schedules and that's maybe the position they want to
19 take, but at least for now that leads my committee to say thank
20 you very much for the offer, but we may very well want to
21 intervene as a full party in each of these test cases if this
22 Court is inclined to go with a protocol so as to have a full
23 seat at the table in connection with discovery, in connection
24 with depositions, in connection with receipt of documents, in
25 connection with the trial of the matters, and/or the settlement

1 of the matters.

2 THE COURT: And then be bound by whatever the result
3 is --

4 MR. SABIN: That is correct. If --

5 THE COURT: -- so there would be --

6 MR. SABIN: Absolutely.

7 THE COURT: -- a collateral estoppel attempt?

8 MR. SABIN: Absolutely, if we were to choose that.

9 I also note that at least one of the actions we think
10 improperly tees up in the context of a declaratory judgment
11 that LAFG, the parent, should be liable for all claims of 1031
12 customers. We do not believe that is proper and we do not
13 believe that any of the protocol cases should address that
14 issue until such time as someone wants to bring either a motion
15 for substantive consolidation or properly asserts, if they can,
16 that LandAmerica Financial Group has guaranteed any and all of
17 such claims.

18 I note already based on the record and the
19 committee's activity in these cases, for which we thank the
20 debtor in supplying information, that it will not be so easy,
21 as much as I applaud the efforts of the debtor and the 1031
22 committee to try to structure a protocol, because of the
23 following additional scenarios in addition to those you have
24 heard.

25 Let's just take the discovery side. Any and all of

1 the issues as between and among LandAmerica Financial Group,
2 1031, and customers, whether it's customer A in the box of the
3 escrow, or customer B in the segregated account, or in either
4 of commingled or commingled A or B, will want to know, and this
5 Court or any trier of fact is going to want to know exactly
6 what is the history of the agreement and what is the history of
7 the money.

8 That will involve, we think, on a reasonable basis at
9 least the following: Significant third-party documentation,
10 whether it's from banks who are involved, whether it's in wire
11 transfers or checks so as to permit the financial experts to
12 actually look at the tracing of funds; in whose name was the
13 account; what was the taxpayer ID; what was the movement of
14 money; what was the understanding regardless of whose name was
15 on the exchange agreement or on the escrow agreement.

16 Number two, it may very well involve, as we read some
17 of these papers, current or former personnel of 1031 or of
18 LAFG, or for that matter, based on the records in connection
19 with the underwriter sale, it may have been that many of the
20 employees may have actually been employees of the underwriters.
21 The stock of which has now been sold.

22 But that may lead, Your Honor, to testimony that
23 otherwise suggests to plaintiffs, whether it's in the test
24 cases or not, that they need to supplement the relief they're
25 requesting, because it may very well be that such testimony

1 says there's been violation of my rights by others. And so
2 that even if I find out in the discovery that perhaps I might
3 lose my 541 arguments, I might be entitled to another claim and
4 I'm going to have to amend my test case, if you will. I see
5 that as a possibility going forward.

6 All that leads to, Your Honor, is that I wish I could
7 dream up a better protocol. I'm not sure I can. I've
8 discussed with counsel for the debtors the possibility of Rule
9 23 and it may be very difficult to do.

10 I've discussed the possibility that the debtors take
11 a position with respect to each of these exchange agreements
12 and treat it in a motion process, if you will, as a motion to
13 deal with the executory contract. I'm not sure that works
14 either.

15 On the other hand, I am happy to go back with the
16 committee, and we are meeting on many different issues with the
17 company tomorrow, so as to otherwise try to resolve our
18 objection in a manner that does three things:

19 One, gives us a right by a certain date to intervene
20 as a full party, and as you said, to be bound so that if you
21 want the benefits of that, take the burdens of it. The
22 benefits obviously being participation in discovery,
23 participation at trial. As to that, I believe it is also fair
24 that the proposed stipulation on confidentiality that has been
25 negotiated between the 1031 creditors' committee and the 1031

1 debtor is something that, if we were to choose, we would have
2 to live with.

3 In addition, those rights would include, besides
4 discovery and documents and trial, obviously as a full player
5 if we choose to intervene as a party for settlement purposes.

6 If we do not choose to do that, and I think we need
7 to choose by a date certain given the timetable and the
8 importance of going forward, then I believe that the proposal
9 that Mr. Kamin made about participating not as a player but
10 basically as an interested party, I would just want clarified.

11 And I think what that means is you have a right,
12 creditor's committee of the parent, to receive the information,
13 to sit at the table during discovery, but not in essence to ask
14 questions and not to make motions and not to otherwise appear
15 at trial. You may, you know, be permitted as an amicus to file
16 pleadings in support one way or another.

17 But if I understand their proposal, if we were to do
18 those kinds of things, it would be without any collateral
19 estoppel or res judicata effect. And of course, if there were
20 a settlement in that context, then I would hope as part of
21 that, any settlement before it were fully documented and even
22 before brought to this Court, at least the committee would have
23 some kind of say in connection with prior notice and attempt to
24 convey their views to the settling parties, but of course
25 subject to the 9019 rules, in any event.

1 And lastly, Your Honor, is that I would hope that
2 none of these test cases under this protocol, whether there's
3 four of them, three of them or five of them, would in any way,
4 unless modified, dispose of the issue raised by at least one to
5 date, which is, is LFG -- is LandAmerica Financial Group liable
6 for the claims of customers of 1031, whether by way of
7 guarantee, which has not been asserted, or by way of
8 substantive consolidation, which also has not been asserted.

9 If we were to -- able to resolve those, one of the
10 constructs and with the last piece also, Your Honor, I believe
11 that the committee's limited objection would be resolved.

12 Thank you.

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

14 MR. WOLFE: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. WOLFE: Craig Wolfe with Kelley Drye & Warren on
17 behalf of 13 parties in five adversary proceedings. For the
18 record, our clients are: Millard Refrigerated Services, Inc.;
19 LubExpress Land Company, Inc.; LubExpress Operating Company,
20 Inc.; Chino Spectrum Center, LLC; Chino Wings, LLC; Westminster
21 Peak, LP; Westminster Summit, LP; NMC Summit, LLC; Tower Summit
22 Colorado, LLC; Lisa, Michael, Barbara, and Ralph Dobson.

23 Your Honor, from the protocol that was presented to
24 the Court, we had many questions. Some of them have been
25 answered today by both the committee and the debtor's counsel,

1 and actually the discussion by debtor's counsel and the
2 committee's counsel has raised additional issues now that we've
3 had some of these blanks filled in.

4 Backing up a little bit, we have two motions on file
5 today in the context of this limited objection. One is a
6 motion to expedite consideration of our cross-motion that
7 presents an alternative protocol. In essence, our alternative
8 protocol moves up the deadlines in order to prevent substantial
9 damages to our clients that we think can be easily avoided, and
10 I'll explain why.

11 I think, like the debtors, it's appropriate to just
12 roll this together and move the motion to expedite together
13 with our cross-motion together with this objection, so I'd like
14 to proceed.

15 THE COURT: You may.

16 MR. WOLFE: Very good.

17 Your Honor, our clients' position is that a month has
18 passed and we are no closer to being able to resolve our
19 clients' claims -- that arose out of complaints that filed in
20 the first few days of this case.

21 We also believe that the procedure is nothing more
22 than a basic scheduling order, and we're surprised that it took
23 a month to get here.

24 We're also very surprised that we weren't involved in
25 the process. We went back into the transcript and we saw where

1 the Court suggested to the debtor and the committee that I
2 become involved in the development of this protocol along with
3 Mr. Miller that represents Health Care REIT.

4 On numerous occasions, we reached out to both the
5 committee and the debtor and we were not involved in that
6 process. We learned about the scheduling order or the proposed
7 protocol just hours before it was filed.

8 And I'll explain some of the things that we did that
9 I think are relevant, and I'll talk about why I think we can
10 get this done quicker, at least with respect to the
11 segregateds, and I think that's a good transition into talking
12 about the fundamental flaw of this protocol.

13 I heard the debtor stand up here and the committee
14 stand up here and talk about how complex this is and how we
15 have to go through extensive discovery to get to the bottom of
16 this. One of the problems with that is that they're looking at
17 the predicament that the commingleds are in when analyzing the
18 segregateds. The segregateds are very simple.

19 We have two cases here that are proposed as test
20 cases; one is our client, Millard Refrigerated, and the one is
21 Health Care REIT. I can speak from our experience here we have
22 already propounded third-party subpoenas and we've received
23 documents back from the bank. That's done.

24 And that pile of documents is less than two inches
25 thick. That document will -- or that set of documents will

1 show the flow of funds from the closing of the relinquished
2 properties into the segregated accounts and will show that that
3 money did not go through the SunTrust commingled accounts.

4 This is not complex. This is a single issue, in our
5 view, of whether or not the money in the segregated accounts or
6 in the escrow accounts, for that matter, were ever commingled
7 with the commingleds, whether there was a continuous traceable
8 flow of funds, and whether those funds are property of the
9 estate or not, period.

10 We think that is the only issue that needs to be
11 resolved. The other issues can be saved for the proof of claim
12 process, whether LFG is subject to claims.

13 And I want to be clear for the record it's our view
14 that not only the debtor has breached its fiduciary duty to our
15 clients and is subject to claims -- damages claims that cannot
16 be limited by way of the exculpation provisions, as I stated on
17 the 16th before this Court, and I think that there are also
18 claims against the parent. I do think that those exist, but I
19 don't think they need to be resolved pursuant to the litigation
20 that would be dealt with under this protocol. Those can be
21 dealt with an alternative process.

22 What's critical today is that we get these funds
23 released so these exchanges can be preserved. If we don't,
24 there are going to be substantial claims against the estate.
25 And that's relevant because what is going to happen is we're

1 going to need to assert those claims against the estate and if
2 the money that's in the commingled accounts is deemed to be not
3 property of the estate, there's going to be no money to pay
4 them.

5 But, if the money that is in the commingled accounts
6 is property of the estate, as Mr. Gibbs suggests, then we're
7 going to be competing with those commingleds and diminishing
8 their distribution. So it's critical. It's not only critical
9 to segregateds, it's critical to commingleds.

10 So we submit, Your Honor, that we need to do a triage
11 here. We need to look at what is time sensitive. Forget the
12 commingleds for now. Let's look at the segregateds. Let's
13 look at those particular claims that we can resolve simply
14 through an expedited discovery process, most of the documents
15 have already been produced, and let's move on and get this
16 resolved.

17 In our view, we believe that once we show the
18 documents that we received on Friday from the banks to the
19 committee and the debtor, that there will be no triable issues
20 of fact and this can be resolved by summary judgment.

21 We believe that the debtor's April 23rd first trial
22 date is unacceptable. The exchanges will be lost by then.

23 For example, LubExpress, we have our client in the
24 courtroom today. LubExpress and our Chino clients, which were
25 referenced earlier, have to have their exchanges completed by

1 early April. So they're done. They will be lost before we
2 even get to our first trial.

3 THE COURT: One of the things Mr. Kamin said, Mr.
4 Wolfe, was that, you know, these dates in the protocol are
5 outside limits and that there's nothing in the protocol that
6 would prevent parties from accelerating any of these time
7 frames. For instance, if, as you say, discovery doesn't need
8 to be done and I heard Mr. Kamin say that -- you know, let's
9 say there was only one witness that needed to be deposed, then
10 we could accelerate these dates and move the dates up.

11 So I mean, aren't we just saying that this is a worst
12 case scenario under the protocol, but we have the opportunity
13 if the case turns out as you suggest that it could be
14 accelerated?

15 MR. WOLFE: Your Honor, I am very hopeful that that
16 would be the case. However, past practice in this case
17 suggests that that will not be the case. It's taken a month to
18 get where we're at. We could have been done by now if they
19 would have looked at us as the initial test case as I stood
20 before the Court and requested. I --

21 THE COURT: But a lot's gone on in that month and in
22 fairness to the debtor, I mean I tried a case, a full case for
23 the parent in this corporation in that time and it was during
24 the holidays and everything else. I mean, I don't see this
25 debtor sitting on its hands in this case.

1 MR. WOLFE: I understand, Your Honor, but we looked
2 at the transcript. You asked the debtor and the committee to
3 consult with us. They didn't. We could have built into this
4 protocol an expedited fast-track procedure.

5 I'm concerned that if the Court enters this protocol
6 today, the debtor is going to start analyzing commingleds,
7 forget about the segregateds, and we're going to be -- have our
8 exchanges blown. We need to be moved ahead, is really the
9 message that I'm sending. We are out of time. And to treat
10 the commingleds and the segregated as though they're the same
11 makes no sense, and I'm afraid that we've lost a month trying
12 to get there.

13 Your Honor, we -- in our alternative protocol that we
14 presented sets forth a set of dates and they were kind of
15 scoffed at by the debtor in presentation. But I will tell you
16 we have the documents. We have provided already, on December
17 24th, a summary of all of our facts. We've provided all of our
18 documents. We received documents from the bank on Friday. We
19 can turn those over. We're ready to go.

20 And we would like -- you know, we would prefer for
21 this Court to carve all of our clients out of the protocol and
22 allow us to proceed. But to the extent that the Court is going
23 to enter a protocol, we would ask the Court that you either
24 enter the protocol that we have proposed or at least allow us
25 to negotiate quickly today an alternative protocol that

1 provides for our client, Millard, to go forward quicker and
2 that provides for a summary judgment mechanism for all our
3 other clients.

4 So in other words, once we get a resolution of the
5 Millard matter, we can move forward on just the narrow issue of
6 property estate by summary judgment on our others.

7 The idea, Your Honor, is to try to preserve these
8 exchanges. I can't emphasize enough that we are up against
9 critical deadlines. We're going to lose these exchanges.

10 We've got severe tax penalties that arise as of March
11 15th with no money to pay those as a result of any blown
12 exchanges. We have lost business opportunities, lost tax
13 benefits, and the like.

14 And as I said, we're going to be asserting claims not
15 only against the debtor's estate for breach of fiduciary duty,
16 but the LFG and perhaps others. We're hopeful to invoke D&O
17 coverage to the extent we can. We compete with the commingleds
18 on those claims, but those can be resolved later. Let's deal
19 with property of the estate today.

20 THE COURT: Is one of your cases one of the test
21 cases?

22 MR. WOLFE: It is, Millard Refrigerated.

23 THE COURT: So that'll be the second one of the
24 original four?

25 MR. WOLFE: Yeah, I believe it was -- I think it was

1 number one. Any case, it's one of the top two. Yeah.

2 THE COURT: Okay. Very good.

3 MR. WOLFE: Yeah.

4 THE COURT: Thank you.

5 MR. WOLFE: Thank you.

6 THE COURT: Mr. Bernstein?

7 MR. BERNSTEIN: Good morning, Your Honor.

8 As the Court will recall, we have --

9 THE COURT: I need to have you state your name on the
10 record though, if you would be please.

11 MR. BERNSTEIN: I apologize, Your Honor.

12 THE COURT: That's okay.

13 MR. BERNSTEIN: Michael Bernstein of Arnold & Porter
14 on behalf of Health Care REIT.

15 THE COURT: Thank you, sir.

16 MR. BERNSTEIN: So as Your Honor will recall, we have
17 two exchange agreements and we have a corresponding escrow
18 agreement for each of our exchange agreements. So we're in the
19 most favorable of the four categories from a claimant's
20 perspective that the debtor identified. That is, because we're
21 -- two of them are commingled, those categories, and we're not
22 commingled. And then two are segregated. One has an escrow
23 agreement and one category doesn't, and we have an escrow
24 agreement.

25 THE COURT: And you're one of the test cases?

1 MR. BERNSTEIN: And we are one of the test cases,
2 correct. Correct, Your Honor.

3 So we're unusual -- not absolutely unique, but
4 unusual in that respect because there are relatively few who
5 actually have separate escrow accounts, which means, by the
6 way, that LES never possessed our dollars. They went into an
7 escrow account, they're possessed by an escrow agent,
8 Centennial Bank, which is not a debtor, and they've always been
9 possessed by Centennial Bank. And the only thing LES has to do
10 outside of bankruptcy or in bankruptcy is sign the disbursement
11 instruction.

12 Our agreements say that when we're entitled to our
13 money back, which we are for both of our accounts, that we send
14 the form to LES saying we want our money back, and then they
15 sign the form, and then they send it to Centennial Bank and
16 Centennial Bank gives us back our money.

17 We sent those disbursement instructions before the
18 bankruptcy was filed. Shortly before, but before. They didn't
19 sign the forms and then they filed bankruptcy. And so that's
20 kind of where we are.

21 Now, we're also unique in that we're enormous in this
22 situation. There are -- the debtor said that there are a total
23 of \$227 million at issue here among the 450 claimants. We're
24 137 million. So -- and as I'll discuss in a minute, that has
25 implications. It's not just a kind of a fact. It has

1 implications for the consequences of delay; the public
2 perceptions and so forth.

3 But anyway, it's a fact and with respect to the
4 segregateds, I believe that -- or the escrowed segregateds, the
5 debtor said that there's 150 million among all of them and
6 we're 137 million, so -- so we're particularly concerned here.

7 As Your Honor will recall, we filed the motion for --
8 we filed an adversary complaint early on and a motion for a
9 temporary restraining order, and that was set by Your Honor on
10 December 9th. And we came here and the debtor asked us shortly
11 before that hearing if we would please agree to continue that
12 hearing until the next omnibus motion that we were not thrilled
13 with because we're very concerned, as Your Honor knows, about
14 the passage or delay, but -- anyway, wanting to work with the
15 debtor, we reached a three-part agreement which was put on the
16 record.

17 First was that -- and the agreement was as follows:

18 First, that if Your Honor on the 16th approved the
19 debtor's Rule 9019 protocol, that the debtor would in fact
20 promptly thereafter implement that settlement with us. That of
21 course didn't happen.

22 Second, and this is important, if Your Honor did not
23 approve that protocol on the 16th as proposed by the debtor but
24 expressed a willingness to consider individual 9019 settlements
25 with individual creditors, that the debtor then would seek to

1 implement promptly that same settlement with us; that
2 settlement being that we give a release and they give us back
3 our money, or they cause the escrow agent to give us back our
4 money.

5 And third was a minor modification to the release
6 that was agreed on the record.

7 And so on that basis we agreed to put over our TRO,
8 and on the 16th, of course, things played out where Your Honor
9 didn't approve things exactly as the debtor had proposed them,
10 but told the debtor to go talk to the creditors' committee and
11 come up with something and -- and now we have something, but
12 it's obviously quite different than what the debtors had
13 initially proposed.

14 So we think given where we are now that the debtors
15 ought to live by the agreement that they reached with us on the
16 record, which is to propose and implement a Rule 9019
17 settlement with us on the simple basis that we give them the
18 negotiated release and that they cause the escrow agent to give
19 us back our funds.

20 And we think there are two reasons they should do
21 that. The first reason is they promised to do it on the record
22 and in exchange for our agreeing to continue our hearing off of
23 the 9th. And I'm not quite sure what it means if they -- we
24 reach an agreement on the record and we honor our part of that
25 agreement by consenting to the deferral of our hearing and then

1 -- and they go forward with what they promised to go forward
2 with.

3 THE COURT: Well, of course, it's subject to my
4 approval.

5 MR. BERNSTEIN: Absolutely. Absolutely, but I
6 believe that -- yes, absolutely it's subject to your
7 approval --

8 THE COURT: And I think the debtor was willing to go
9 forward with that, but I allowed the creditors' committee to
10 intervene in the action because I found that they represent an
11 interest that was I found to be different than the debtor's
12 interest, and so I think that's why we got here. I certainly
13 don't think that the debtor is trying to not live up to its
14 agreements or to renege on a representation or anything of that
15 sort. I think I threw that log jam in the way of the debtor.

16 MR. BERNSTEIN: Well, to the extent that it sounded
17 like I was accusing anybody of acting in bad faith, I'm not
18 accusing that at all, and I know the debtor and several of
19 their lawyers and I have no interest in accusing them of bad
20 faith or anything of the sort. I think it's just that they
21 agreed to do something and we did our part and now they should
22 do their part.

23 And I understand that the creditors' committee is
24 going to be heard and ultimately that Your Honor makes a
25 decision on the 9019 motion. I'm just saying that I think that

1 the debtor can readily satisfy the standard under Rule 9019
2 with respect to our transaction given the simple facts and the
3 law here. And I think that's the quickest way to resolve our
4 situation.

5 And I understand we're only one of many. On the
6 other hand, we're \$137 million and they agreed that if Your
7 Honor was willing to consider 9019 settlements, which Your
8 Honor said the Court was willing to consider them, that they
9 would propose one promptly with us, and we agreed on what the
10 terms are, and I think they ought to tee it up pursuant to
11 their agreement and see if it meets the standard under Rule
12 9019. I think it will, but Your Honor will decide.

13 THE COURT: The protocol that's been suggested
14 provides specifically that they can settle cases and tee up
15 9019 motions.

16 MR. BERNSTEIN: Indeed, it gives them the option to
17 do so --

18 THE COURT: Right.

19 MR. BERNSTEIN: -- implicitly gives them the option
20 not to, and I guess what I'm saying is with respect to our
21 case, they ought to do it because they --

22 THE COURT: Yeah.

23 MR. BERNSTEIN: -- agreed to. I think -- and I --
24 you know, I would respectfully ask Your Honor to instruct them
25 to do that pursuant to their agreement, subject to people being

1 heard on whether the settlement satisfies the 9019 structure or
2 not.

3 The other reason I think they ought to do this is I
4 think our case really is quite simple.

5 Can I -- Your Honor, can I get a cup of water here?

6 THE COURT: Oh, most certainly.

7 MR. BERNSTEIN: I apologize.

8 THE COURT: That's why we have cups there.

9 MR. BERNSTEIN: I'll steal the committee's water.

10 Thank you. I apologize.

11 (Counsel confer.)

12 MR. BERNSTEIN: I'm also obviously not very good at
13 that.

14 THE COURT: They didn't teach that in law school.

15 MR. BERNSTEIN: No, I'm not very good at that.

16 Thank you. I'm recovering from something a little
17 here and --

18 (Counsel confer.)

19 MR. BERNSTEIN: Mr. Sabin I think wants to take part
20 of my \$137 million for the water, but I'm not going to let him
21 do it.

22 The -- so the other reason they ought to do this is
23 our case really is quite straightforward where the funds have
24 never been in the debtor -- they've never been held by the
25 debtor. They're held in escrow. They've always been held in

1 escrow. The holder of the funds is a non-debtor.

2 We're also governed by California law here under our
3 agreements. I'm not sure, by the way, ultimately that this
4 would different -- it would make a difference because the
5 Dameron case is pretty strong interpreting Virginia law, but
6 we're governed by the Segal case that specifically raises this
7 issue of segregated escrow funds in the context of a 1031
8 exchange company.

9 If we had tried to write a case -- make up a case
10 with -- that was more supportive of our position, I don't think
11 we'd be able to do it. And the debtor side of this case, and
12 the debtor acknowledged that under these circumstances that I
13 think the words they used is very likely that the Court would
14 rule that it is not property of the estate.

15 So I think the facts here -- the documents are not
16 voluminous. We've, by the way, also already served our
17 discovery. Both our third-party discovery and our discovery to
18 the debtor and the committee, which was quite limited, fell
19 within the scope of the protocol of limited number of
20 interrogatories and admissions and so forth. And we did that
21 just because we thought that if we're coming here and urging
22 speed, we kind of ought to do our part by getting things out
23 the door and keeping them narrow and focused, and that's what
24 we've done.

25 There aren't many documents here. The facts are

1 simple. The law is simple enough that I feel like all the
2 parties are kind of falling all over each other to cite the
3 same four or five cases, because there's really a limited body
4 of case law here, and I think it's -- in our situation, it's
5 quite clear. And teeing this up under the 9019 mechanism will
6 just be the most efficient and quickest way to get this
7 resolved, which I think is in everybody's interest and the
8 least expensive.

9 And the committees are talking and I believe them
10 that they want to, you know, conserve resources here and do
11 things as efficiently as possible. And under a case where the
12 facts are very simple and the law is very simple and the issue
13 is straightforward, to go through three or four months of
14 discovery and briefing and pleadings and so forth is not a good
15 use of the estate's resources and it's not a good use of our
16 resources.

17 And that gets to my last issue, which is the harm
18 here, because, you know, somebody could say, well, okay, you'd
19 like this resolved in February, so it'll get resolved in April.
20 That's litigation. It takes time. But we really are suffering
21 very, very substantial harm here and that's why we're focused
22 so much on the timing issue here. So -- and others have
23 different kind of harm they're suffering also. I understand
24 that.

25 We're a publicly-traded company, a publicly-traded

1 real estate investment trust, and the delay particularly given
2 the \$137 million at issue -- and I think that kind of sets us
3 apart here, just the magnitude of the dollars changes the
4 impact. The delay causes great uncertainty in the financial
5 community and great uncertainty in the industry, particularly
6 given the amount that we have at stake.

7 It unfortunately creates questions among those who
8 might invest in our company or do business with us. It affects
9 judgments that people make about our financial strength, and
10 the longer this goes on, the more there's a perception of
11 uncertainty and the greater impact that has on us and our
12 shareholders as a public company.

13 And there's ultimately -- you know, we can make
14 threats and so forth -- ultimately, we probably do not have an
15 effective remedy. The reality is I'm not waving any rights to
16 bring claims against people. All those claims are reserved.
17 But is it -- in the real world, as this delay goes on and we
18 suffer this reputational damage and this damage to our ability
19 to consummate transactions and do business with people and
20 concerns in the investor community -- in the real world, we
21 probably don't have any effective remedy for that.

22 Now I want to say that I think all this reputational
23 issues and public concern is very unfair, because I'm quite
24 confident that we're right on the merits here and that
25 ultimately we will get every dollar of the \$137 million back.

1 And so to the extent that anybody thinks that Health Care REIT
2 is damaged or weak as a result of this or that they shouldn't
3 do business with Health Care REIT or invest in Health Care
4 REIT, I submit that they're absolutely wrong and that the
5 reputational issues are totally unfair.

6 But, especially given the state of the economy these
7 days and the state of the capital markets, perception is
8 important. And as time goes on, the public perception is that
9 there's more risk, even though the law and the facts don't
10 change at all.

11 And so I'm very concerned and my client is very
12 concerned that if this drags out until April -- and under the
13 protocol it could be April, it could potentially be later than
14 April by the time the issues are decided --

15 THE COURT: But it could also accelerate.

16 MR. BERNSTEIN: It could.

17 THE COURT: Yeah.

18 MR. BERNSTEIN: And I'll get to that in a minute
19 because I have a -- yes, absolutely it could. And I think
20 that's probably the way to deal with this.

21 The -- you know, I -- the concern is that at the end
22 we win, but the patient is not feeling so well by then. You
23 know what I'm saying? The damage has kind of been done and we
24 get our \$137 million, but the damage has been done.

25 The other thing is we're losing real money on \$137

1 million. This is sitting in an escrow account earning less
2 than one percent return. We typically, on our deployed
3 capital, invest more -- earn a return of more than nine percent
4 on our capital.

5 Well, you know, I'm not so good at math, but --
6 especially just kind of on the spot here, but it's a lot of
7 money times \$137 million. And again, I'm not sure where we get
8 made whole here. I just don't think there's a practical way
9 for us to get made whole here.

10 So under the circumstances, we hope and -- we hope
11 that the debtor will propose a 9019 settlement with us very
12 promptly on the terms that we agreed to pursuant to their
13 agreement and we note that, as Your Honor noted, their protocol
14 permits that. And we would ask -- because we had a specific
15 agreement on the record, we would ask Your Honor to instruct
16 them to tee that up, because they agreed to tee it up and they
17 should do what they agreed to. And then Your Honor will decide
18 whether it meets the 9019 standard or not, and that doesn't do
19 any violence to the proposed protocol because it's permitted
20 under the protocol.

21 But if they're not going to do that or if Your Honor
22 doesn't approve the 9019 settlement because the standard isn't
23 satisfied, although as I said we think it would be, we would
24 ask that the schedule be expedited. Your Honor noted that they
25 have the ability to expedite the schedule with respect to us.

1 I think there's good reason for doing that given the amount at
2 stake and given the simplicity of the issues, but the concern I
3 have is that they have the ability under the protocol not to do
4 so.

5 And I don't know if they're -- I'm not one of these
6 who says they've been wasting the last month. I wish they had
7 consulted with us in the development of the protocol. I think
8 they should have. As Mr. Wolfe pointed out, Your Honor
9 instructed them to do so and -- but anyway, they didn't.

10 But I certainly don't think anybody's been wasting
11 the last month. I mean, people have been working hard. They
12 have other things to do. As Your Honor pointed out, this isn't
13 the only contested matter in this case.

14 But I am concerned that if Your Honor doesn't
15 instruct them to expedite this, at least with respect to either
16 our case or the escrow cases taken as a whole maybe, but we're
17 the only test case in the escrow case, so I guess that's the
18 same thing, that it won't get expedited and the damages will be
19 very, very substantial and it's unfair to us in a case to drag
20 it out.

21 Now I don't know -- Mr. Wolfe has a proposed protocol
22 that he filed and everybody can come up with their own dates,
23 of course, and, you know, we'd be willing to live with Mr.
24 Wolfe's dates. They're quite fast, but that would be okay with
25 us. We were prepared to try this on a TRO basis, which by the

1 way, we don't think is all that -- you know, you have a couple
2 inches of documents and six or seven cases. It's not -- this
3 isn't so complicated. With respect to the segregated escrow
4 people, I think it's quite simple.

5 So I think you could try it on Mr. Wolfe's schedule.
6 I really do. But if that's not going to happen, I would urge
7 the Court either with respect to us, but the truth is I think
8 it can be done with respect to all the segregated claimants --
9 after all, there's only two of them in the test case mechanism
10 -- to revise the schedule in what I regard is a fairly modest
11 way. And that is to provide for -- and I won't go through all
12 the inter-dates unless somebody wants me to.

13 I did mark up their -- I only did it last night after
14 I'd seen everybody else's proposal. I did actually mark up
15 their protocol to change some dates that I thought would be
16 workable. It's not -- apologies to Mr. Wolfe. It's not as
17 fast as Mr. Wolfe's proposed schedule here.

18 But the bottom line of this is that summary judgement
19 motions would be teed up so that they could be decided by mid-
20 February. Of course, that's -- Your Honor has to be willing to
21 proceed on that schedule and I understand this isn't the only
22 case before this Court either. So -- but it would propose that
23 summary judgment motions could be filed in a way so that they
24 could be decided by mid-February and then that there would be a
25 trial date in early March. And I'm thinking in our case, you

1 know, definitely not more than a day for trial. Certainly not
2 more. I think if we all stipulated to facts, it could be a
3 half a day.

4 But I think this would allow enough time for
5 briefing. It wouldn't say, you know, get all your documents
6 out tomorrow and file your summary judgment motion two days
7 later and have a hearing the next day, much as, you know, that
8 might suit our purposes. It would give enough time for an
9 expedited briefing of issues that after all have really already
10 been briefed. I don't think anybody's going to come up with
11 any new cases here.

12 You know, we filed our motion for TRO. Other parties
13 -- Mr. Wolfe filed briefs. Other parties have filed briefs.
14 The committee has filed briefs. The debtor has filed briefs.
15 We all know what the law is. I think we could come up with a
16 schedule that would have a summary judgment hearing in mid-
17 February with the briefing kind of tied, you know, so Your
18 Honor had the briefs before then --

19 THE COURT: What I heard Mr. Kamin say was that, you
20 know, all discovery cutoff was going to be February 20 and
21 then, then we were going to deal with experts. But if as you
22 say in your case there's no experts, he was offering at that
23 point that you could proceed to summary judgment by that time.
24 So it looks like under the protocol's been suggested that the
25 timing is fairly similar to what you're suggesting.

1 MR. BERNSTEIN: It's -- yeah --

2 THE COURT: Unless we get into it and we find out
3 there is a need to get this -- and that's in -- you know, in
4 any kind of litigation and I appreciate what you're saying that
5 it's very simple, you got a simple case and everything, but
6 sometimes all of a sudden an inconvenient fact shows up or
7 something like that and it becomes a little bit more
8 complicated. And so the protocol sort of says okay, this is at
9 least realistic on the long term, but you're always
10 accelerating it much along the lines that you're suggesting.

11 MR. BERNSTEIN: Yeah. The concern I have is just the
12 optionality in the protocol the way it's written, because
13 there's one thing in terms of kind of what the document says
14 and I -- you know, we can modify the document. It wouldn't be
15 surgery to modify this -- major surgery to modify this
16 document.

17 What I would like to do is propose that something be
18 in here that provides that the summary judgment briefing will
19 be happen by some day in February so that a hearing could
20 happen in mid-February, and most important for us because, as
21 Your Honor points out, I don't think we're going to need a
22 trial, but maybe it turns out I'm wrong. And if we do need a
23 trial, to have a trial date in early March.

24 And the reason I say this is if this -- I talked
25 about the harm that we're -- really have already suffered and

1 are continuing to suffer. If this is not decided finally in a
2 way that we actually get our money back by the end of the
3 fiscal quarter and this goes into another reporting cycle, the
4 harm is going to be much more severe even than it is already
5 and that's what I'm desperate to avoid.

6 And so what I'm trying to do here is balance -- look
7 I'm an advocate. I'm not -- you know, I'm balancing as best I
8 can, because I know Your Honor wants a procedure that is quick
9 enough that it enables people to reasonably make their cases,
10 reasonably make the points, and file briefs and so forth.

11 On the other hand, I'm trying to balance that against
12 my -- in my mind against the fact that Your Honor said at the
13 last hearing that this should be resolved very quickly on an
14 expedited basis and what I know about our situation, which is
15 that with \$137 million tied up, we're suffering very
16 substantial harm. And if this goes past -- even at trial, if
17 this issue is not decided so that we can get our money back,
18 assuming we prevail, before the end of the fiscal quarter,
19 we're going to suffer very, very substantial, irreparable, and
20 in our case given the simplicity really unnecessary terms --
21 really unnecessary harm here.

22 And I think it's -- these can be reconciled, but I
23 don't think that the protocol without any changes does it
24 because there's too much optionality and it provides for trial
25 starting in April. So I think what it needs to provide is a --

1 is the summary judgment briefing on the schedule that Your
2 Honor just referred to and the trial date -- in the event that
3 a summary judgment is not granted to one party or the other,
4 such that there's a need for a trial, a very expedited trial,
5 at least for the two of us in the segregated in early March.

6 And we could mark up -- I proposed a bunch of interim
7 dates. I don't think I'll bore Your Honor with them, unless
8 you want to see my markup. But I'm confident that if Your
9 Honor said that summary judgment briefing in the segregated
10 cases needs to happen so that there can be a hearing on
11 February X, say February 15th or somewhere around there, and
12 that if the case needed to go to trial, the segregated cases,
13 that they would go to trial within the first week or two of
14 March. And if Your Honor instructed the parties to modify the
15 protocol accordingly, I'm sure we could go in a room for a few
16 minutes and get it done, and that would be very, very important
17 to our client in limiting the harm.

18 The debtor said the reason they proposed the 9019
19 mechanism to begin with was to limit collateral harm and
20 collateral damage and consequences. As I said, we strongly
21 believe that they ought to move forward with the 9019 mechanism
22 with us as they promised and as permitted by the protocol.

23 But if they're not going to do that or if there's any
24 uncertainty about whether they'll do that or not, then we would
25 ask Your Honor to instruct summary judgment briefing so that

1 there could be a decision by the 15th and a trial in early
2 March so that there's no doubt at all that this gets resolved
3 in the first quarter of this year.

4 THE COURT: All right. Thank you.

5 MR. BERNSTEIN: Thank you, Your Honor.

6 MR. GIBBS: Your Honor, may I respond to one specific
7 piece of --

8 THE COURT: Go ahead, Mr. Gibbs.

9 MR. GIBBS: To the extent that Your Honor is inclined
10 to grant the portion of the request counsel for Health Care
11 REIT just made, which is to compel the debtor to file and bring
12 on a 9019 motion, I just want the Court to know that there are
13 two interveners. Both committees have been allowed to
14 intervene in the adversary proceeding that they would be
15 attempting to settle under 9019.

16 And we've done no discovery, so we're going to need
17 to take the deposition of the witnesses of the plaintiff,
18 Health Care REIT, as well as the appropriate witnesses of the
19 debtor because we think the parties' intent is a relevant issue
20 that the Court's going to need to decide in connection with a
21 9019 motion, so --

22 THE COURT: Well, the only way there can be a
23 settlement is if all parties agree and I've allowed you to
24 intervene as a party --

25 MR. GIBBS: Right.

1 THE COURT: -- and the parent committee has also
2 asked to intervene in the case and if they are, they would be a
3 party and so you would need to have four parties agree.

4 MR. GIBBS: Right.

5 THE COURT: And so I don't know that it's in the
6 debtor's hands. That's one of the reasons I allowed you to
7 intervene in the case.

8 MR. GIBBS: That was our position.

9 THE COURT: So I don't know what my ordering the
10 debtor to bring a motion on would do because I don't think the
11 debtor has the ability at this point to unilaterally settle the
12 matter. But --

13 MR. GIBBS: We agree.

14 THE COURT: Mr. Bernstein, if you want to address
15 that, you may.

16 MR. BERNSTEIN: No, I hear you on that and that's why
17 I -- you know, Your Honor, candidly, that's why I presented two
18 alternatives. I have my view of what they agreed to and what
19 should proceed, but I think there's another way to resolve this
20 in a way that is workable.

21 I did want to mention two things. One with respect
22 to counsel's comment about the deposition, because I just want
23 the Court to be aware that we made our witness available for
24 deposition --

25 THE COURT: I read your papers.

1 MR. BERNSTEIN: Okay. All right, so we're not trying
2 to -- the point is we're not trying to stop anybody from taking
3 depositions. We showed up and the committee didn't show up.

4 There's other -- one other committee-related issue
5 that I'll just take two seconds on because it's -- if we're
6 going to be a test case, it needs to get resolved somehow so
7 that we don't delay things. And that is the committee has
8 moved -- one of the committees moved to dismiss our adversary
9 proceeding on the basis that we didn't sue the bank, which is
10 they claim an indispensable party.

11 We don't think that's required for the reasons stated
12 in our brief and my colleague, Mr. DePalma's prepared to argue
13 the issue. I don't think it's very time consuming to argue it.

14 But the main point is that whether we're right about
15 that or wrong, everybody has to know the answer to that,
16 because we certainly don't want our case to be delayed. If we
17 need to sue the bank, which we don't believe we do, then we
18 will just go ahead and join them tomorrow. But we don't want
19 it to delay our test case.

20 So I just put that on the table. It's the -- the
21 motion is briefed and I think it's in everybody's collective
22 interest to get it resolved one way or the other.

23 THE COURT: All right. Thank you.

24 MR. BERNSTEIN: Thank you, Your Honor.

25 MR. EBEL: Good morning, Your Honor.

1 THE COURT: Mr. Ebel.

2 MR. EBEL: Tom Ebel, local counsel for CDC Rural, LP
3 and CDC Glendale, LP. I would move for the admission pro hac
4 vice of Joseph A. Friedman of the firm of Kane Russell Coleman
5 and Logan in Dallas, Texas. He's a member in good standing of
6 the Bar of Texas. He's admitted to practice in the United
7 States District Court for the Northern, Southern, Eastern, and
8 Western Districts of Texas, which incorporates their Bankruptcy
9 Court and the United Court of Appeals for the Fifth Circuit.
10 He has been practicing bankruptcy law for 18 years and I would
11 move for his admission. The motion is -- and order have been
12 filed with the Court.

13 THE COURT: All right. Thank you, Mr. Ebel. That
14 motion will be granted.

15 MR. EBEL: Thank you.

16 THE COURT: Welcome to the court, Mr. Friedman.

17 MR. FRIEDMAN: Thank you, Your Honor. As mentioned,
18 we represent CDC Rural and CDC Glendale. We tried to file our
19 objection on Friday to give the Court at least a chance to look
20 at what we had to say over the weekend --

21 THE COURT: I read it.

22 MR. FRIEDMAN: -- and I would like to just point out
23 a few things. One of the things that was pointed out to me was
24 I think the committee is almost making our argument. And that
25 is that the threshold issue here is a property of the estate

1 issue and the need to exclude all of the other litigants from
2 participating in that by staying their adversary proceeding
3 rather than allowing them to make their arguments about what is
4 and isn't property of the estate is in our view one of the
5 fundamental flaws of the procedure.

6 THE COURT: But you do get to participate because
7 they have a procedure in there that allows you to file amicus
8 brief so that your arguments can be heard.

9 MR. FRIEDMAN: But our case is stayed and we are
10 commingled creditors who do not have the same type of agreement
11 as either commingled A or commingle B, because we have language
12 in other provisions of our agreement that require our funds to
13 be specifically deposited in a bank account of a federally
14 insured institution. It doesn't say it goes to SunBank, but it
15 does say that that's where it's supposed to go in a separate
16 section of the agreement.

17 And it's the stay concept that is our argument
18 against these procedures. If the Court were to take the
19 adversaries that are on file and that may be joined and take up
20 the legal issues on a consolidated basis, then all parties
21 would remain on equal footing.

22 If the -- if one client gets a trust fund established
23 and the rest of us are behind that, we're going to lose our
24 ability to the same trust funds. The committee raised that
25 issue, but they didn't answer it. They just said, Judge, we

1 saw that and we agree it's an issue, but there's no answer.

2 And our answer to that is that all the parties on
3 equal footing address the legal issue that is the elephant in
4 the room, and that is whether at all these agreements allow the
5 debtor to assert that the funds that they have received are
6 property of estate. That fundamental issue will affect all
7 litigants; segregated, commingled, commingle A, B or my client,
8 commingled whatever they are because their -- like I said,
9 their agreement doesn't match up with the categories.

10 I'd also point out, and this was an objection raised
11 by another party, is that the debtors are selecting and the
12 committee are selecting the test cases and with all due respect
13 to counsel, both the committee and the debtor have an interest
14 in the funds being declared property of the estate. That's
15 their job and they're picking the litigants in which they get
16 to have that issue teed up in front of the Court.

17 My client, each of their adversary proceedings are
18 for approximately twice as much as either of the two test cases
19 that were selected for the commingled. My understanding is the
20 two commingled cases are in the 800,000-dollar range. One of
21 my clients lost 1.6 million, one of my clients lost 1.8 million
22 in this deal.

23 So they're picking smaller cases. You know, my
24 client's willing to be a test case if it needs to be under its
25 agreement, which as we pointed out has all kinds of unique

1 features --

2 THE COURT: I think they're searching for one right
3 now, if I heard Mr. Kamin correctly.

4 MR. FRIEDMAN: Well, and -- but we don't fit the
5 category that they designated as the one that they would have
6 as a test case. And that's -- you know, we'd be happy to be a
7 test case. We just don't want to be classified the way they've
8 classified them because our agreement isn't what they've
9 classified as a test case.

10 But we are happy to be a test case if that's
11 available. But otherwise we believe that the way the Court
12 should approach the issue is by legal issues where all parties
13 can be heard and they can be heard -- I mean, I think the
14 segregated account folks are raising the same legal issue that
15 we would want to raise and that is, isn't it or isn't it
16 property of the estate.

17 We're not convinced that the nature of the
18 arrangement by escrow agreement or by designated bank account
19 changes the fundamental fact that these funds were not property
20 of the debtor's estate. They were deposited with the debtor
21 with a specific purpose and with a limited right of the debtor
22 to simply sign papers and direct those funds to the purchase of
23 the property that we designated. And we think that issue
24 should be teed up for everybody to file their briefs,
25 notwithstanding the fact that it may be 60 briefs that are

1 going to boil down to, as everybody said, a few cases and
2 inform the Court about the fundamental legal issue that is
3 going to move the rest of this matter forward.

4 THE COURT: Thank you, sir.

5 MR. FRIEDMAN: Thank you, Your Honor.

6 THE COURT: Morning, Mr. Terry.

7 MR. TERRY: Good morning, Your Honor. Roy Terry of
8 Durette Bradshaw, appearing on behalf of the ad hoc committee
9 of commingled exchangers.

10 Your Honor, we filed a pleading in that regard last
11 evening. Has the Court had opportunity to see it?

12 THE COURT: I did not read your pleading, no.

13 MR. TERRY: All right. Thank you, Your Honor. I
14 know that the Court will do so and so I'm not going to go line
15 by line in terms of speaking about it. But to make a few
16 observations, first of all, Your Honor, we have joined with us
17 numerous counsel to the pleading as those participating in the
18 ad hoc committee.

19 Those counsel whose names have been added are those
20 who gave expressed consent for that as of the time that we
21 filed the pleading. There have been other counsel -- other
22 firms who participated in our deliberations, but who have not
23 yet given that consent and we think that as time goes on we'll
24 be adding additional counsel to this ad hoc group.

25 THE COURT: How does the makeup of the ad hoc differ

1 from the official committee in this case?

2 MR. TERRY: Well, and the official committee is --
3 does consist of commingled exchangers. We do understand that
4 to be the case. But the official committee has its fiduciary
5 duties to all creditors, and we're not yet clear who all those
6 are. We know that LFG has a claim in this case that's
7 significant. We know there are prospective tax claims. We
8 know that PBGC, I think, is out there as well. So -- and some
9 trade debt. So we're --

10 THE COURT: So you come without the fiduciary
11 baggage.

12 MR. TERRY: That require looking at all of the
13 claims, exactly that. And in coming forward, I want to make
14 clear that we are not meaning it to be a criticism of the
15 committee. In fact, Mr. Gibbs participated in a call with a
16 number of us last Thursday and we've scheduled to do so again
17 this week. It's simply recognition that we come from a
18 different place and a different perspective, particularly with
19 regard to what constitutes property of the estate here on the
20 commingled side.

21 Your Honor, when you have opportunity to look at our
22 objection, what underlies it is, among other things, a
23 realization that on the commingled side we're talking about two
24 test cases out of 400 potential adversaries. And I do agree
25 that more adversaries are going to be filed as clients sign up,

1 et cetera. So two out of 400 is a pretty small sampling and it
2 puts quite a burden on those plaintiffs and it puts quite a
3 burden on plaintiff's counsel to carry the load, you know, all
4 coming out of the pocket of their particular clients.

5 There is -- as has already been commented, there's a
6 real question about what commonality is going to come out of
7 the test cases, how applicable are they going to be to everyone
8 else, and I think that's particularly true on the commingled
9 side where you've got 400 parties and 400 different fact
10 situations against which to apply the law of the case as it is
11 developed. And so we feel that one way to get at this would be
12 intervention by the ad hoc committee.

13 Now, as the Court's already observed, there's --
14 withing the protocols now is a procedure for amicus briefs and
15 some sharing of information for those parties that sign on to
16 the Court's protective order. And I appreciate that, but there
17 could well be a need to go beyond that in terms of some
18 affirmative discovery to get information that's going to be
19 more broadly applicable to the other exchangers cases.

20 We feel that allowing such intervention would allow
21 us to get more out of the test cases and also allow us to use
22 -- to better use the time frame that is set forth in the
23 protocols so that when that time frame is done, we'll have
24 something that's more usable for all of the exchangers and not
25 just the test cases.

1 By coming forward and suggesting that we do this as
2 an ad hoc committee, in essence we're proposing that it be one
3 voice and not many voices thus participating or intervening
4 which we feel will be less burdensome to all of the parties
5 involved and should not create an atmosphere of chaos in those
6 cases.

7 Your Honor, another point that I'll make and then
8 I'll step aside in favor of Mr. Maxwell who's also
9 participating in the ad hoc committee, with respect to --

10 THE COURT: I thought you said it was one voice.

11 (Laughter.)

12 MR. TERRY: We almost speak as one, Your Honor, so --
13 with respect to settlements and 9019 motions, the protocols
14 right now propose two days notice. What happens if one of
15 these test cases does settle, as could well happen,
16 particularly on the commingled side? What's the effect of that
17 going to be to the other -- to the remaining exchangers within
18 the body of 400?

19 And you'll find within our objection that we've
20 proposed that the notice period be more than two days for that
21 very reason so that not only so that we can react to a
22 particular proposed settlement, but also so that we can figure
23 out what that's going to be. Do we immediately tee up another
24 test case? Who's that going to be? You know, what's the
25 implication for everyone else in that. So we've tried to

1 target out objections, Your Honor, not to impede but rather to
2 assist the process here.

3 THE COURT: All right. Thank you, Mr. Terry.

4 MR. MAXWELL: Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. MAXWELL: Rich Maxwell on behalf of various
7 commingled exchange holders.

8 Your Honor, I'll be brief. Just a couple of
9 additional points. We think that -- we agree with Mr. Gibbs
10 that no party should be able to take an advantage of being a
11 lead case and get a leg up on anybody else.

12 We also think that non-lead parties should have the
13 ability to come back before the Court and modify the provisions
14 of this agreement or procedure which stays them based on
15 appropriate facts. I don't think they should be prohibited
16 from doing that right out of the box. So we think that the
17 procedure ought to provide that other providers, other than the
18 committee and the debtor, ought to be able to ask the Court to
19 change these procedures.

20 THE COURT: All right. Thank you.

21 MR. MAXWELL: Other than that I support what Mr.
22 Terry's asked Court to do.

23 THE COURT: Thank you, Mr. Maxwell.

24 MR. MAXWELL: Thank you, Your Honor.

25 MR. HOPPER: May it please the Court. David Hopper

1 on behalf of Charles Lumber Company. Charles Lumber is a 1.3
2 million-dollar exchanger whose agreement does not fit into any
3 of the patterns in the test cases and we oppose the protocols
4 as they now stand.

5 In listening to comments of the other counsel, and in
6 particular the creditors' committee, the central issue it seems
7 to me is that the so-called commingled funds we believe are
8 still trust funds. The problem is the debtor is out of trust
9 and this highlights the problem inherent in resolving any of
10 the test cases and giving them, as the fear is, a leg up on
11 disbursement of those funds.

12 We have more people with trust fund claims to those
13 monies on deposit, setting aside the segregated funds for a
14 moment, than there are funds on hand. And any resolution of
15 those that does not take into account all of the other ones,
16 will be inherently unfair. If we're out of trust, then it
17 seems to me that everybody who is in the same boat has to
18 divide that up equally and the protocols don't make provision
19 for that.

20 With regard to the segregated funds, so-called, and I
21 heard the comments of counsel saying that he's looked at the
22 two inches of records and there's clear tracing and there's no
23 commingling or no migration of funds over. With all due
24 respect, we haven't seen any of those things and our money went
25 somewhere. It either went into segregated accounts, so-called,

1 or it went into the debtor's coffers or it went into auction
2 rate securities.

3 And in the case of most of the people involved that
4 I've seen, it was late enough in the game that it probably
5 didn't go into auction rate securities. That would leave one
6 other possibility that the money went out to close deals and
7 exchanges where the funds had been frozen because they were
8 poorly invested, in essence turning this into a Ponzi scheme.

9 Now we don't know any of that, but we do know that
10 without that tracing you couldn't properly litigate to
11 conclusion or settle even the segregated funds cases. There
12 has to be an accounting for that. And it seems to me that the
13 committee, the debtor, and the segregated funds plaintiffs
14 might reach a different conclusion as to the appropriateness or
15 the legitimacy of that tracing exercise and there needs to be
16 someone looking over their shoulder and litigating the issue of
17 how those funds are traced.

18 For those reasons, we object to the protocols as set
19 forth and would ask that the Court revisit the issue --

20 THE COURT: Well, what do you suggest?

21 MR. HOPPER: Well --

22 THE COURT: Another month of delay?

23 MR. HOPPER: No. No. No.

24 THE COURT: Well then Mr. Wolfe would be very upset.

25 MR. HOPPER: It seems to me that the thing to do --

1 (Laughter.)

2 MR. HOPPER: The thing to do is to litigate the legal
3 issue, the central issue of whether the funds are property of
4 the estate, set aside the particularities, set aside the
5 claims, set aside the things that would result in a final
6 resolution of the test cases, certainly not allow settlement of
7 a test case on two days notice, because that in itself if the
8 tracing exercises haven't been done would be sure to garner an
9 objection and it would not be a reasonable time period on which
10 you could resolve that issue.

11 So seems to me the thing to do is to set -- is to
12 have a legal determination in which anybody can file a brief,
13 can participate in the argument about whether these funds are
14 property of the estate.

15 THE COURT: Thank you, Mr. Hopper.

16 MR. PAGE: Good afternoon, Your Honor. Ronald Page
17 of Cantor Arkema, local counsel for Howard Finkelstein.

18 I moved, Your Honor, to admit Frederick Stevens pro
19 hac vice to this court. He is a member in good standing of the
20 state courts of New York and Massachusetts. He's also been
21 admitted to practice in the Eastern District of New York and
22 the Southern District of New York, and a motion has previously
23 been filed with the Court.

24 THE COURT: All right. Thank you.

25 Welcome to the court, Mr. Stevens. That motion will

1 be granted.

2 MR. STEVENS: Thank you very much, Your Honor. Fred
3 Stevens of Fox Rothschild, counsel to depositor, Howard
4 Finkelstein.

5 Your Honor, we filed shortly after the filing of the
6 protocol motion a limited objection. I'd first just like to
7 state that in many respects, we're complimentary of the efforts
8 by the debtors and the committee. We recognize how difficult
9 it is to work within a situation like this and come up with a
10 procedure to resolve these many, many matters. It's also
11 impossible to make everyone happy. I think it's probably
12 impossible to make half the people happy. Everyone's going to
13 be unhappy for one reason or another. But generally, we are
14 appreciative and complimentary the efforts that have been paid
15 by the debtors and the committee in coming up with this.

16 That said, we do echo some of the frustrations by the
17 previous objectors in difficulty opening a dialogue with the
18 debtors and the committee on both substantive matter and
19 procedural matters for these adversary proceedings. We did
20 send a letter to debtor's counsel and committee's counsel on
21 December 19th, requesting to be included in discussions on the
22 protocol and also requesting I think an important dialogue
23 regarding the substance of our case. That letter was not
24 responded to.

25 We understand everyone's busy. I'm offering these

1 comments only because I think it's important to encourage free
2 communication here. I think it is going to ultimately make the
3 process a much better one for everybody if we know that we can
4 have an open dialogue and it also helps people on my side of
5 the table keep the angst level down with some very, very
6 anxious clients. You know, our client in particular has a
7 significant amount of his net worth tied up in this and it's,
8 you know, difficult, and that difficulty is par for the course.
9 But I think that it can be allayed if we just keep
10 communicating free flowing and that we do everything we can to
11 encourage that.

12 As I said before, our objection was a limited one.
13 Our client has approximately \$1.5 million in cash on deposit in
14 a commingled account. With respect to that cash and that
15 aspect of our action, we are fine with the protocol. May have
16 criticisms, may have issues. Set it aside. We'll live with
17 it. And we can let the protocol stand as suggested.

18 The other aspect of our client's consideration is a
19 2.1 million-dollar note that is issued by the purchaser of the
20 exchange property. This we believe is very unique and for the
21 first time this morning we did hear the debtor's counsel
22 acknowledge the uniqueness of the situation.

23 THE COURT: Then perhaps there should be a fifth
24 category --

25 MR. STEVENS: Indeed.

1 THE COURT: -- fifth test case.

2 MR. STEVENS: Indeed, Your Honor, and if Your Honor
3 were to consider the protocol motion and add that lead case, we
4 would certainly want to be that lead case and we would be
5 supportive of that. But, we don't even think that we need to
6 get there. We have -- it's, I believe, last on the calendar --
7 a motion for summary judgment solely with respect to our note,
8 and I don't want to hijack Your Honor's calendar and argue that
9 summary judgment motion. I'm hoping I have an opportunity to
10 later, but I need to just mention a couple key points because I
11 think it'll help and they're relevant to this limited
12 objection.

13 We think that our case is quite simple and can be
14 resolved very simply.

15 THE COURT: All these cases are simple. I will give
16 you that.

17 (Laughter.)

18 MR. STEVENS: Point taken, Your Honor. Point taken.

19 The note -- as debtor's counsel stated, the note in
20 this case and maybe two others is written and issued to LES in
21 its capacity as qualified intermediary for Howard Finkelstein,
22 the mortgagee. We think it's little more than a ministerial
23 act to require the assignment of this note to Mr. Finkelstein.
24 Mr. Finkelstein is designated on the face of that note as the
25 mortgagee. LES is a little more than a servicing agent, and

1 now a servicing agent that's unable to service the note, which
2 is held for Mr. Finkelstein as is clearly stated on the face
3 that note.

4 We also think that the exchange agreement creates an
5 express trust with respect -- and again, we think it creates
6 one with respect to all the property, but solely with respect
7 to this purchase money note and mortgage.

8 One key element of the argument to the extent we've
9 heard argument from the other side on why the exchange
10 agreement doesn't necessarily create an express trust is that
11 the debtor under the -- most of these exchange agreements, I
12 know we are supposed to have exclusive use of the funds for the
13 duration. There are no funds with respect to the purchase
14 money note and mortgage.

15 In fact, the very latest date under the exchange
16 agreement that the debtor could nominally hold this purchase
17 money note and mortgage is January 16th. The purchase money
18 note and mortgage doesn't come due until January 30th. So
19 there was absolutely no way under any circumstances that the
20 debtor was ever going to have possession control of any funds
21 with respect to the purchase money note and mortgage.

22 We also have -- as has everybody as Your Honor duly
23 noted, we have some significant exigencies with respect to the
24 purchase money note and mortgage. It comes due January 30th.
25 There's going to be -- assuming that the issuer can pay that

1 purchase money note and mortgage, they're going to want in
2 satisfaction issued. There's ambiguity with regards to who can
3 issue that satisfaction. We say we can. LES may say that it
4 can. Who can issue that if we don't resolve these issues now.
5 That's going to create a cloud on title which maybe an issue
6 for that part, sir.

7 More important -- as importantly, the purchase money
8 note and mortgage, the issuer may have trouble paying it off.
9 We may have to renegotiate or someone may have to renegotiate
10 it. Somebody may have to refinance it. Somebody may have to
11 commence a foreclosure action and move towards exercising the
12 enforcement rights under the purchase money note and mortgage.
13 Who can do that. These are issues that we think need to be
14 resolved very quickly and can indeed be resolved very quickly
15 on summary judgment.

16 With that said, our limited objection to the protocol
17 motion is that we believe the Court can and should hear a
18 motion for summary judgment and at the very least add us as a
19 lead case so that we can have that heard in the context of a
20 lead case because we don't believe, and it appears the debtor
21 agrees, that we are adequately covered by the lead cases that
22 are proposed in the protocol order as is currently proposed.

23 THE COURT: Thank you very much, Mr. Stevens.

24 MR. STEVENS: Thank you, Your Honor.

25 MR. PAGE: Ronald Page again, Your Honor, on behalf

1 of a number of commingled exchangers, but in particular,
2 Frontier Peppers Ferry LLC, which is one of the lead cases.

3 Frontier Pepper, they approve this joint motion that
4 has been put forth by the debtor and counsel for the unsecured
5 creditors' committee of LES and they applaud the effort of both
6 parties in coming forward with this.

7 Frontier Peppers' basis of that approval is that this
8 protocol timely deals with all exchangers. It's an
9 equalitarian treatment of both segregated and commingled
10 exchangers such that, unlike Mr. Wolfe who wishes for us to
11 forget about the commingled exchangers, this protocol deals
12 with both parties in an even fashion and in an even timeline.

13 Additionally, we feel that all of the exchangers have
14 a couple of issues in coming, being that both want a
15 determination of the funds as being property of the bankruptcy
16 estate and all have this damages that continue to accrue on a
17 daily basis such that haste, unfortunately, is a component of
18 his process. While the protocol put forth is not perfect in
19 any way, shape or form, nonetheless, Frontier Pepper believes
20 that it is an excellent way to begin this process. Thank you.

21 THE COURT: Thank you, Mr. Page.

22 MR. LONAS: Your Honor, may it please the Court.
23 Dewayne Lonas with the law firm of Moran Brown -- Richmond law
24 firm Moran Brown. I'm here today on behalf of Griffin
25 Industries, Inc. We filed an objection yesterday.

1 I'm also here though to move for the pro hac vice
2 admission of Jay Geller. Mr. Geller's with me today. He is a
3 member in good standing of the Bars of States of Illinois and
4 the State of Maine. He has a national bankruptcy practice
5 which has caused to be admitted in courts nationwide on
6 bankruptcy issues, and I would move for his admission today.

7 THE COURT: All right. Thank you. That motion will
8 be granted.

9 Welcome to the court, Mr. Geller.

10 MR. GELLER: Thank you, Your Honor. Jay Geller again
11 on behalf of Griffin Industries and a number of other clients
12 that have retained myself and Mr. Lonas in the last few days.
13 We have not filed appearances and I did not include them on our
14 objection, Your Honor, but we do have a host of other clients
15 that have authorized me to represent that they support our
16 position.

17 Your Honor, I'm not a biblical scholar, but I believe
18 there's something in there about the last shall be first. I
19 believe that we were actually the only party to object to the
20 expedited hearing motion. And those were heard on a
21 consolidated basis. I thought that we might actually be first.

22 I also want to echo something that Mr. Stevens just
23 said, which is that I don't envy the position of the Court. I
24 think that this is a very difficult problem and I also have
25 heard every single person get up here and say it's really

1 simple. So maybe your position isn't that bad. I don't agree.
2 I think it's actually quite difficult.

3 As Mr. Stevens said, I also appreciate the efforts of
4 debtor's counsel and the committee counsel in coming forward
5 with the protocol. When you are representing a debtor in a
6 situation like this and a committee, you want to try to come up
7 with solutions. I don't think anybody is out here trying to
8 make life more difficult for people, and I think that debtor's
9 counsel has done a good job of coming in here and saying look,
10 we are not tainted by what went before us, we are people who
11 are trying to do right by all these parties, whether they turn
12 out to be creditors or they turn out to be trust beneficiaries.

13 And it's difficult to please everybody. So I do
14 commend them for this protocol. It's a way to get the process
15 moving. It's not necessarily the be all and end all. I think
16 that is truly for Your Honor to decide if there are
17 modifications that need to be made.

18 The person right before me, Mr. Page, supported the
19 protocol, because he thought that there was an equalitarian
20 approach to things. Your Honor, I guess I'm going to take the
21 diametrically opposed position and again reflects the
22 difficulty that you encounter.

23 Griffin Industries has filed an objection. As I say,
24 other folks I think that we represent have authorized us to
25 support that. And the objection is multi fold. I don't know

1 if Your Honor has an opportunity to read it. It was filed
2 yesterday?

3 THE COURT: Yes.

4 MR. GELLER: You did. Okay. And then I'll shorten
5 my remarks, Your Honor, but as I understand it, and I was one
6 of the folks, by the way, Your Honor, who was on the phone for
7 the December 16 hearing and I was going crazy because that
8 beeping, while it may have been loud in the courtroom, I can
9 assure you it prevented everyone on the phone from hearing
10 about every third word. And then of course Your Honor got
11 frustrated justifiably and decided you had to turn it off and
12 so I missed the entire second half of that hearing.

13 THE COURT: Well, I apologize --

14 MR. GELLER: No.

15 THE COURT: -- to you for that, but it was --

16 MR. GELLER: Your apology is not necessary, Your
17 Honor. I'm frustrated with whoever it was who was on the
18 phone, but it happens.

19 The matter that was up before the Court was a motion
20 to settle with the segregated exchange agreement folks, and as
21 I understand -- I was not here on the first day of the case,
22 but the debtors initially came in and argued that all of these
23 funds are property of the estate and then in the intervening
24 couple of weeks, decided that with respect to the segregated
25 exchange agreement folks, they were going to take a different

1 position and try to settle. And Your Honor basically, as I
2 understand it -- and I was not here and I did not read the
3 transcript of that multi-hour hearing after I was cut off, but
4 as I understand it, Your Honor said, I'm going to approve this
5 settlement with the exchange agreement folks provided that the
6 committee gets on board.

7 Sounds to me like what happened over the last few
8 weeks is that the committee wasn't actually able to get on
9 board with settling and rather than come up with settlements,
10 came up with a protocol. But what happened is that the
11 protocol grew in scope and it grew to include all of the
12 commingled folks. And that is now coming before the Court on
13 two business days notice.

14 Now, with respect to segregated folks, they've had
15 lengthy notice. It may well be that this protocol with
16 whatever modifications Your Honor decides to impose or that you
17 instruct the parties to attempt to agree on some different
18 dates, it may be that with respect to the segregated folks and
19 the escrowed folks that that protocol makes some sense. The
20 debtor has basically said we believe that we ought to settle
21 and the question is whether the committees can get comfortable
22 with that.

23 I think it's a different story for the commingled
24 people, and I think it's a different story for a number of
25 reasons: A, they haven't had the adequate notice; B, we really

1 don't know who the parties are yet. I think we've now heard
2 that at least one of the commingled plaintiffs, the lead case
3 plaintiffs is unwilling to serve in that capacity.

4 They have been selected and I think that one of the
5 counsel who was up before actually quoted from our objection
6 saying that the debtor and the creditors' committee who are
7 opposed to the finding of a trust or at least ostensibly
8 opposed want to maximize the property of the estate have self-
9 selected who the plaintiffs ought to be. I don't think that's
10 appropriate. I think that the parties -- the commingled
11 exchangers ought to determine the parties that ought to be the
12 test cases if there are test cases at all, and I'll get to that
13 in a moment.

14 It is unclear as we stand here today, particularly on
15 two days notice, whether the lead case plaintiffs, the
16 commingled lead case plaintiffs have the incentive, financial
17 and otherwise, to litigate this.

18 I mean, if you think about it, Your Honor, my friend
19 Michael Bernstein, who I'm hoping to meet in person, I know him
20 well from over the phone in a number of different cases, has
21 \$137 million at stake. Many of the segregated exchangers have
22 the greatest amounts of money at stake. There's big numbers
23 there.

24 I can tell you I've been speaking to these people for
25 the past four weeks, Judge. The exchangers who are owed

1 \$98,000, the exchangers who are owed \$130,000, these people are
2 not worried -- and I don't mean to belittle Mr. Bernstein's
3 client's damages, but they're not talking about reputational
4 damage and lost interest. These people are evicted from homes
5 that have been sold and don't have any place to go to, and I
6 think it's easy to lose sight of the human cost of what's going
7 on here in this case.

8 The 400 commingled exchangers, many of whom are
9 individuals who have lost their life savings and who are
10 distraught -- I can't tell you the number of calls I've got
11 from people who were crying on the phone, telling me their
12 story.

13 So what I have said in here, Your Honor, is that at
14 this point in time, I would love it, absolutely love it if I
15 thought that with respect to the commingled exchangers that we
16 could resolve these cases in time for them to complete their
17 transactions, avoid the damages, avoid the tax ramifications.
18 But I think that many of them have already lost their earnest
19 money deposits on the new properties that they were going to
20 purchase. I think the likelihood of resolving these issues
21 prior to the time that the 180 days runs out for these folks is
22 slim at best.

23 We've heard that there's not enough money to make
24 them whole and a lot of these commingled exchangers don't have
25 just additional funds they'll say, well, we'll supplement,

1 we'll go fund the difference and complete these exchanges. I
2 don't think it's feasible to avoid the damages that these
3 people have suffered and are going to suffer.

4 And so what it comes down to is do we do it fast or
5 do we do it right, and knowing who the plaintiffs are, knowing
6 that they have the wherewithal to litigate these things fully
7 -- let's face it, Your Honor, we're -- we have some of the
8 finest law firms in the country that are representing the
9 debtor and the committees here. They are being paid from the
10 bankruptcy estate.

11 All of these test case plaintiffs are going to be
12 asked to fund individually. That is one of the bases for the
13 objection and the one that I'll conclude with. No one has
14 mentioned it yet, but Your Honor may be aware of that and the
15 ad hoc committee filed a motion yesterday. In addition to
16 their objection to the protocol, a motion to appoint an
17 official committee of commingled exchangers.

18 We have an ad hoc committee and that may function and
19 function reasonably well, but it's not a fair fight. It's not
20 a fair fight because all these people have already lost so much
21 and they keep calling me up and saying I've lost all my money,
22 I can't afford counsel, what can I do? They have a very, very
23 different position than the other parties in this case. You've
24 heard today a number of arguments made that well, even the
25 segregated folks, once they get their monies and they think

1 they will get their monies, they are going to have damage
2 claims. They may have claims against the parent, they may have
3 additional claims against LES.

4 The commingled folks, even if they prevail on their
5 trust fund argument and wind up getting some portion of their
6 money back, they've lost earnest money, they've -- they're
7 going to suffer tax consequences, they will have damages
8 claims.

9 The unsecured creditors committee that counsel
10 represents may do a wonderful job of representing those folks,
11 but it is antithetical to the position of a creditors'
12 committee to argue that the property of these folks is not
13 property of the estate, and I don't think that counsel has been
14 able to make that argument and he's in a very difficult
15 position. I feel for Mr. Gibbs because he's got five
16 commingled exchangers that are comprise the committee and yet
17 it would be inappropriate for a creditors' committee to take
18 the position that these monies are not property of the estate
19 because there may well be lots of other regular old unsecured
20 creditors who would be -- who would suffer detriment by that
21 argument.

22 So, Your Honor, even though it's not before the Court
23 today, one of the bases for the objection that I filed on
24 behalf of Griffin is that there has now been a motion to
25 appoint a commingled exchange committee. I believe that as to

1 the commingle exchanges -- the segregated folks and the escrow
2 folks, Your Honor, I'm not speaking to that aspect of the
3 protocol.

4 But as to the commingled aspect, I believe that that
5 aspect of the protocol ought to be considered in conjunction
6 with a motion to appoint an official commingled exchange
7 committee so that that committee can have the input on who
8 ought to be test plaintiffs, do there need to be test
9 plaintiffs, can there be legal briefing on the trust issue
10 whether or not this is property of the estate, does there have
11 to be factual investigation first; those are all issues that I
12 think a body that represents commingled exchangers and is paid
13 from the estate so that they can have adequate representation,
14 they ought to decide that protocol, they not -- ought not have
15 it be foisted upon them.

16 Thank you, Your Honor.

17 THE COURT: Thank you very much, Mr. Geller.

18 MR. GELLER: I wasn't last, Your Honor. I apologize.

19 MR. TAYLOR: Good afternoon, Your Honor. Mark Taylor
20 of Kilpatrick Stockton, representing Embarq Logistics. Just to
21 refresh the Court's recollection with respect to my client, we
22 would be in what the debtor has described as the escrow
23 category.

24 We appeared before the Court at the December 16th
25 hearing. We had filed an initial response to the Rule 9019

1 motion, in effect, agreeing that a procedure was appropriate to
2 settle the escrow and the segregated cases.

3 In our response, we laid out the facts which we
4 thought clarified why, as an escrow claimant, our money was not
5 property of the estate. We attached the governing documents.

6 In our objection which we filed yesterday, we again
7 laid out the facts and attached the documents. But let me
8 reiterate what some of those facts are for the Court.

9 We entered into the exchange agreement in June of
10 '08, approximately \$13 million. Our documents -- our exchange
11 agreement was uniquely and separately negotiated, so it's
12 probably different than any other exchange agreement that the
13 debtor has. It's governed by California law. We have a
14 third-party escrow agreement with Centennial Bank. We have
15 documents that confirm that none of the funds flowed through an
16 LES account.

17 Further, our agreement terminated, depending on how
18 you reckon the dates, either December 1 or December 12, but
19 we're terminated.

20 At the December 16th hearing, the Court heard 30
21 objections. There's probably close to that today or responses.
22 And if you gleaned anything, it's that a streamline and
23 expedited process is really essential. Whether it's the
24 smaller commingled or whether it's the larger segregated,
25 timing is everything here. That's why we're disappointed and

1 now we're objecting to the proposed procedure.

2 We're disappointed because after waiting a month, we
3 effectively have a scheduling order, and it's a scheduling
4 order for four lead cases and really, you know, while it is
5 true that we have an opportunity to provide amicus and comment,
6 it really leaves us with, you know, the sinking feeling that
7 after those lead cases are resolved, what happens then? You
8 know, do we start the process of litigating after waiting four
9 months?

10 Again, that's part of the disappointment and
11 objection. And not to be flip about it, but we think the
12 procedure needs a procedure to fix it. Specifically with
13 respect to the escrow certainly and perhaps with the segregated
14 also. We say that because in many instances the facts are
15 straightforward. They don't need 47 days of discovery to glean
16 what the documents say.

17 Mr. Gibbs when he spoke December 16th eloquently and
18 cogently, as he always does, identified the issues whether
19 there is a third-party escrow, what are the relevant dates,
20 what are the governing law, whether the money flowed through
21 the debtor's accounts. The issue for the Court to decide
22 property of the estate, again, it can be decided in many cases
23 on the documents without the need for a significant amount of
24 discovery. And so --

25 THE COURT: But the protocol provides, as I've said a

1 couple of other times, that these dates can be accelerated so
2 that if we don't have to do discovery, then the time can be
3 moved up.

4 MR. TAYLOR: I heard that from the debtor and again,
5 I don't want to suggest that any litigator would, you know,
6 take the opportunity to speed the process. And again, I say
7 that somewhat flip, but I would find it remarkable given the
8 pressures of the case if we don't find ourselves with parties
9 trying to extend deadlines rather than compress deadlines. I
10 think it's nice, but I don't think it's realistic under the
11 circumstances.

12 And again, our concern is we're not a lead case. In
13 fact, we asked the debtor -- I had a conversation with debtor's
14 counsel, Mr. Kamin, on the 23rd, suggesting that we be a lead
15 case and the concern about our client is that we're so far over
16 here on the continuum in terms of being away from that line
17 where property of the estate exists that he didn't think that
18 we would provide enough guidance to the larger body. I mean,
19 that was my understanding of the conversations.

20 So I think our issues are straightforward, can be
21 resolved on the documents, but after the procedure is resolved,
22 where are we left? We're effectively -- you know, have to file
23 an adversary. We could do it now, but we're going to be
24 stayed, you know, if the Court enters this and then what?

25 So my view, and again not to -- trying to be

1 constructive here. I think with respect to the escrow
2 accounts, perhaps overall escrow and exchange, an expedited
3 process that really goes to the issue of has the money flowed
4 through a debtor account, at some point the Court has got to
5 look at the case law or will look at it and say, you know, in a
6 situation where the money has not flowed through a debtor
7 account, there's really no argument that this is property of
8 the estate, and that's an issue that, you know, whether we have
9 47 days of discovery or not, I think can be decided quickly and
10 ultimately will have to be decided.

11 And so our proposal would be to, at least with
12 respect to the escrow and segregated, to compress the time
13 frame.

14 THE COURT: All right. Thank you.

15 MR. TAYLOR: Thank you, Your Honor.

16 MR. SAVENKO: Good afternoon, Your Honor.

17 THE COURT: Good afternoon.

18 MR. SAVENKO: Troy Savenko here on behalf of multiple
19 segregated clients. I've actually filed two pleadings in
20 response to the joint motion. One of which is actually joinder
21 to the joint cross-motion filed by Chino Spectrum, et al., Mr.
22 Wolfe's clients. With regard to that joinder, the clients are
23 stated on the record with the pleading on file. I won't waste
24 the Court's time with that this morning.

25 But the point that I will have with regard to all my

1 clients, the other response that I filed was not only an
2 objection to the protocol, but as a fallback position a joinder
3 to the joint motion, and that pleading was filed on behalf of
4 David Ash, who is the trustee of David Ash Trust. And the
5 reason to treat those separately is that there are some issues
6 particular to Mr. Ash that I felt I would address with the
7 Court separately.

8 So with regard to all claimants, again, with regard
9 to everything you've heard today, the first point I think that
10 needs to be made is with -- and again, I think especially with
11 segregated fund claimants, there was an expectation back in
12 December with the motion proposed by the debtor that we would
13 see a settlement procedure or an order that would allow for the
14 settlement of the claims.

15 And it almost seems that what's been lost here in the
16 process is that settlement with the segregated claimants, given
17 what the debtor has conceded with regard to that relationship
18 and the arguments that would be set forth as entitlement to the
19 trust funds, what's lost in that conversation is the claims
20 against the estate that would have been waived under the
21 release that was proposed and the value of those claims.

22 With respect to Mr. Ash, for instance, he had three
23 properties identified and has already lost one of those
24 transactions, is in jeopardy of losing two more over the next
25 few days, and possibly depending on the Court's ruling, even

1 today.

2 So these claims only continue to mount against the
3 estate without a settlement procedure in place and I
4 understand, you know, the exchanges that we've had in the court
5 today with regard to the simplicity of the cases. Obviously, I
6 would throw my support behind the notion that in fact there
7 really is one issue with regard to the segregated claims and
8 that's an issue that could be easily resolved in a very timely
9 fashion. And you've -- and the Court has pointed out that with
10 respect to that, there is flexibility that things could happen
11 on a quicker basis. The problem is that that's only with
12 respect to the lead cases.

13 What we don't know as we sit here right now is what
14 happens to everybody that's not a lead case and how -- what's
15 the effect of that lead cases on my clients' ability to
16 prosecute their own claims. And so with respect to --

17 THE COURT: You don't think that once the Court was
18 to reach a resolution in Mr. Bernstein's case or Mr. Wolfe's
19 case that then that wouldn't be instructive as far as how you
20 would proceed with your case and how the debtor might handle,
21 you know, those kinds of issues going forward?

22 MR. SAVENKO: Your Honor, I recognize that would
23 ideally be the way it proceeds and I would have all the
24 confidence that the Court would at least encourage that.

25 What concerns me here with what happened back in

1 December and what's happening before us today, incorporating
2 some of the things you've heard, is -- you know, first of all,
3 I think the initial intent was that this would deal with the
4 segregated claims only. We've gone a month now and now we have
5 a protocol to address all the claims.

6 That's fine. I think that it needed to be addressed
7 nevertheless, but the concern is the committee and the debtor
8 have a purpose to keep the money of the segregated claimants
9 into the estate and the committee especially, you know, keeping
10 that as property of the bankruptcy estate and as a process
11 plays out that would -- let's put it this way: The cost of
12 proceeding against this -- proceeding against the estate to get
13 the money out could be prohibitive.

14 And of course, once we get to resolution of the lead
15 cases -- getting back to Your Honor's question, once we get to
16 resolution of lead cases, then there is further incentive to
17 continue the delay to try to at least -- to try to force the
18 hand of some of these litigants as they go forward, essentially
19 saying, you know, wait till we get there, let's see what
20 happens, and then we'll tell you how it affects you and how you
21 can proceed with your case.

22 I can rest assured as we sit here, I believe all --
23 with all my clients under the -- if the procedure plays out --
24 if the protocol plays out the way it's designed -- and I know
25 this is the case with Mr. Ash. If the protocol plays out

1 according to the existing time frame, there's in essence -- you
2 know, at that point there's no saving the situation, there's no
3 saving the transactions, the 1031 exchange.

4 And with respect to Mr. Ash, you know, as has been
5 stated with other claimants that are up here, I mean, we're not
6 talking about a large corporation with, you know, issues that
7 the Health Care REIT, for instance, has stated. You know,
8 these -- there are individuals here that have perhaps their
9 entire financial stake at risk and even if there's some sort of
10 middle ground achieved along the way in Mr. Ash's case, there
11 are problems with credit ratings and so forth. His ability to
12 recover from this will be in jeopardy.

13 And again, that's why I tied that back to the what
14 was the initial purpose of the 9019 motion, and that was to
15 settle claims of segregated claimants so that they could at
16 least get their money out and move and waive claims against the
17 debtor's estates that has value to the debtor's estates as
18 well.

19 So recognizing that you'd like to have a solution put
20 before you, obviously, my clients at least for the record would
21 like to state they'd like the ability to proceed and prosecute
22 their own claims on a timely basis without the restrictions of
23 the protocol. If the Court's not inclined to go that
24 direction, then my clients would certainly join with Mr. Wolfe
25 in the joint objection that advanced a quicker protocol for

1 segregated claimants so that at least those issues could be
2 resolved in a more timely fashion and perhaps save everybody a
3 little bit of cost in the process.

4 THE COURT: Thank you.

5 MR. SAVENKO: Thank you, Your Honor.

6 MR. BAXA: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MR. BAXA: Phil Baxa for Arbor Oaks I and Arbor Oaks
9 II, which has been designated as a segregated creditor -- a
10 exchanger.

11 Our claims are very similar and our position is
12 similar to the Millard case, which is one of the test cases
13 that Mr. Wolfe spoke about. We have filed an adversary
14 proceeding. We have filed a motion for temporary restraining
15 order, which was set for hearing last month on the 16th and has
16 been continued over to today.

17 Your Honor, I'm conscious that to call these cases
18 easy or simple is really a misnomer and is -- although the
19 cases cannot be described as easy or simple, the body of facts
20 that resolve the segregated exchangers matters are fairly
21 defined. And in fact, the debtor has in large part already
22 collected that information. They filed their schedules of
23 assets and liabilities in which they identify theoretically all
24 of the accounts that the debtor has money in, including the
25 accounts of the segregated exchangers.

1 So if those documents have been filed and that's
2 going to be based on bank accounts that are already available
3 to the debtor, if you review those bank accounts, they're going
4 to show the tracing which is the essential issue that everybody
5 has talked about today. I mean, I don't really believe that
6 there are any serious facts in dispute when you get down to it
7 with the segregated exchangers. The money went somewhere.
8 Where did the money go. Trace the money.

9 In that sense, Your Honor, I believe that Mr. Wolfe
10 is accurate when he says that there is a faster protocol that
11 can be observed for the segregated accounts than for the other
12 commingled exchangers.

13 Your Honor, we have filed on behalf of Arbor Oaks I
14 and Arbor Oaks II documents that support and join in the
15 pleadings of Mr. Wolfe. We support and agree with his
16 arguments and we ask that a more expedited time frame be set
17 for resolution of the segregated accounts.

18 THE COURT: Thank you, Mr. Baxa.

19 This -- the line that just won't end, huh?

20 (Laughter.)

21 MR. EBEL: I hope that I am the last and -- but, Your
22 Honor, I'll be very brief. I don't intend to say anything that
23 has previously been said. Tom Ebel, counsel for a number of
24 the commingled creditors.

25 I would just ask the Court to consider -- I know

1 we've heard a lot from the segregated creditors about moving
2 forward very quickly and I clearly represent commingled
3 creditors. And I ask the Court to consider the issue that if
4 you decide that all of the funds in this case are trust funds,
5 that I think you have to wrestle with, you know, whether or not
6 some expedited hearings for segregated creditors in which they
7 get their money first is really whether that's appropriate or
8 whether you need to decide both segregated and commingled at
9 the same time because you -- the fundamental premise of
10 bankruptcy is similarly situated creditors get treated the
11 same.

12 And so I think we have to be very careful not to let
13 money go out of this estate until this Court has decided
14 whether all of these funds are trust funds or not, and I
15 frankly, be very candid, think that is a very likely result. I
16 think when you hear the evidence, you hear the intent of the
17 parties, it is very likely that all of these funds will be
18 trust funds and that's what we're all wrestling with, then what
19 happens. And that's a very difficult thing to decide.

20 So the --

21 THE COURT: I'm keenly aware of that.

22 MR. EBEL: Okay, I just wanted to be --

23 (Laughter.)

24 MR. EBEL: I do not envy the position that the
25 Court's in. I echo what Mr. Geller said, this is a very

1 difficult case. The newspaper yesterday, I believe, said it's
2 unprecedented. There are -- there is some precedent, but I
3 think a company like this being in this situation with this
4 many people is very difficult.

5 That underscores the difficulty of, I think,
6 commingled creditors being lead cases and that if everyone's
7 going to be treated similarly at the end -- you know, and I
8 think we will find the right cases to do that, but the dilemma
9 they have is do I have enough money at stake to carry the ball
10 for everybody and dealing with amicus brief and, you know, two
11 creditors' committees and that's -- you're asking one or two
12 commingled creditors who don't have \$137 million at stake to
13 carry that ball and I think that's a difficulty in this
14 procedure I think can probably be overcome, but I'd ask the
15 Court's patience on that.

16 Finally, I would like to -- two other brief points --
17 say that while we have been able to very vigorously and quickly
18 respond to the joint motion on two days notice, I would just
19 like to submit to this Court that two days notice is really not
20 a fair due process, particularly for those of us who represent
21 several commingled creditors. You need to communicate with
22 them, you have to get a hold of their agreement, what category
23 they -- are they in, how much do they have at stake, have
24 conversations with them as to how -- you know, would they want
25 to carry this ball, and that's just not enough time to deal

1 with it. So no one said that, but I hope in the future we will
2 have more time to deal with this.

3 Finally, I would hope, Your Honor, that we all -- and
4 I know the Court is fully aware of this. There's a limited
5 amount of assets to go around and I would hope that nothing's
6 been said here would prejudice the debtor from going forward
7 and moving forward with a plan within a 120-day period and
8 perhaps even, you know, if some of these issues can get
9 resolved reducing that.

10 The one thing that's going to happen here is this is
11 not a debtor in possession that is operating and generating
12 much income and there is a limited pot, and I would -- you
13 know, I support to some extent these protocols to the extent
14 that we can get these issues resolved and we can find out what
15 the auction rate securities are worth and we can get these
16 funds distributed.

17 But I don't want anything that's been said here at
18 least on behalf our client to in any way prejudice our position
19 to take the position that a plan should be formulated within
20 120 days or sooner. Thank you.

21 THE COURT: Thank you, Mr. Ebel.

22 UNIDENTIFIED SPEAKER: You'll be quick?

23 MR. SABIN: Very quick.

24 Your Honor, I rise again, Jeff Sabin for the official
25 committee, to respond to three things.

1 THE COURT: You decide you didn't want to intervene
2 after all you heard all this --

3 MR. SABIN: No, no, no, we --

4 (Laughter.)

5 MR. SABIN: I actually went rummaging through and we
6 found out that as to the Health Care adversary proceeding, you
7 actually entered an order on December 11th. So the official
8 creditors' committee at the parent level is an intervener party
9 at that particular test case.

10 So I rise also to clarify two other points of
11 concern. One --

12 THE COURT: Thank you. I'd forgotten that.

13 MR. SABIN: So had I and that's why we checked the
14 record, but you had. So as to my comments, they now relate to
15 the other three or more test cases, if there are.

16 As to the motion that we got a copy of this morning,
17 I'm not sure when it was filed, from ad hoc committee of
18 commingled claimants, I note the irony that if they win, who
19 they're representing. And so the real issue here is if the
20 Court is not hearing that motion today, and I don't know how
21 you are hearing it --

22 THE COURT: It's not before me today.

23 MR. SABIN: The issue then for you to consider in the
24 context of both the expedited motion for the procedures itself
25 and then the procedures motion is who is that ad hoc committee.

1 I do not see a Bankruptcy Rule 2019 statement filed and I hear
2 that they are requesting intervener status.

3 So I would just submit as to that comment, Your
4 Honor, that before you consider granting their request to
5 modify what the debtor has proposed in connection with the
6 processes, that they need to disclose, if you will, all the
7 things they have to disclose under 2019 if they're going to
8 want to intervene, including without limitation on whose behalf
9 they're intervening, who will be bound just like the committee
10 if we choose to intervene, and in addition, the governance of
11 that group so we understand who is involved.

12 And lastly, Your Honor, as to the point as to whether
13 you should consider limiting the test cases to just the 541
14 issue, I would support not doing that for any number of
15 reasons, including the following: One, there are different
16 agreements amongst the four cases; different exchange
17 agreements, different escrow agreements, different other
18 arrangements; two, there will likely be different facts
19 associated with it, including the possibility of third-party
20 testimony and parol evidence; and three, as I read the
21 agreements, they are governed by different state law.

22 Finally, Your Honor, I do note one thing and although
23 we certainly support expediting all this, whether it's by the
24 protocol procedures modified as requested by the committee
25 and/or obviously as defined by this Court, I do note two things

1 that exist in almost every single form of exchange agreement we
2 have read.

3 One, the parties to the exchange agreements
4 contemplated that there could be disagreements and that there
5 are provisions which I'll paraphrase. The provisions reads in
6 essence, should any dispute with respect to the exchange funds
7 arise, in essence, the 1031 debtor is authorized and directed
8 by the contracting customer, be it escrowed, be it segregated,
9 be it commingle to retain possession without liability while
10 the dispute is settled by the mutual agreement or by the
11 parties, lower case "p", concerned or by final order of a court
12 of competent jurisdiction.

13 In addition, almost everyone of these -- in fact,
14 everyone I've read has another provision in it in which the
15 1031 debtor is not to be liable for damages that may arise from
16 these kinds of disputes unless indeed there was willful
17 misconduct, gross negligence or fraud.

18 So I just ask this Court to consider the implication
19 of those two kinds of provisions as you try to wrestle with
20 this very difficult problem of a protocol. Thank you, Your
21 Honor.

22 THE COURT: Thanks, Mr. Sabin.

23 Mr. Kamin?

24 MR. KAMIN: Pardon me. I'm going to try to be brief,
25 but there are a lot of objections, so I do want to respond to

1 most of them. And since I've written them down in seriatim,
2 that's how I'll treat them.

3 Mr. Sabin was the first one to stand up and I think
4 the first concern that he raised was the importance of
5 receiving documentation re the tracing the funds. And he
6 talked about third-party documentation, but it is part of the
7 intention and it's worked into the protocol that the debtors
8 will be producing materials relating to flow of funds not just
9 on those individual cases, but generally by and large for large
10 groups of individuals and specifically Centennial Bank where
11 the alias accounts were held, so that information will be out
12 there.

13 THE COURT: As I understand the protocol, any
14 counsel, even if they're not part of the test case, can if
15 they're willing to bear the expense receive copies of discovery
16 that is done in the cases.

17 MR. KAMIN: So long as they're willing to sign onto
18 the confidentiality order, yes.

19 THE COURT: Confidentiality agreement, right.

20 MR. KAMIN: That's correct.

21 The second point that he made was perhaps a
22 misunderstanding on my part. We discussed briefly this morning
23 the committee -- the LFG committee's position with respect to
24 intervention and I perhaps misunderstood him to indicate that
25 while he would like to intervene, he might not want to accept

1 the liability, if you will, or the collateral estoppel effect
2 of that.

3 It's fine with me either way. We don't have a
4 problem whether they want to intervene in full as parties with
5 a full right to participant in every aspect of these
6 proceedings or if they want to take a more limited role, we
7 don't care, we can work it out with them.

8 THE COURT: And just so -- what is the date that you
9 would think would be appropriate by which the committee would
10 have to make that decision?

11 MR. KAMIN: Well, we intend to start out with
12 discovery, so that'll be done next -- I mean, a lot of stuff
13 will be produced next week. I'd like to get the answer within
14 a week or so. I --

15 THE COURT: I would think one week would be
16 sufficient --

17 MR. KAMIN: Yeah.

18 THE COURT: -- as far as that's concerned.

19 MR. KAMIN: Sure.

20 MR. SABIN: I think that's reasonable, Your Honor.

21 THE COURT: All right.

22 MR. KAMIN: Okay, the next speaker was Mr. Wolfe. I
23 think Your Honor noticed that after a number of the speakers
24 made their objections known, not only was every case simple,
25 but every case should go immediately. Everyone should hop to

1 the front of the line and then of course have a very shortened
2 procedure.

3 You know, there are certainly kinds of cases where
4 lawyers devote -- sort of drop everything, devote everything
5 they possibly can to one particular case, and try to resolve it
6 not even as fast -- I should say never as I've seen it as fast
7 as Mr. Wolfe proposes. But, you know, everyone can't be first
8 and the debtor has a responsibility to a lot of different
9 claimants here, a lot of different plaintiffs, and as I've said
10 before, we're really trying to develop this as best we can on
11 behalf of everyone's interest.

12 THE COURT: Did I hear you correctly to say that at
13 the -- as of February 20th, that would be the discovery cutoff
14 and that unless there was expert discovery needed to be done,
15 summary judgment motions could be filed at that time?

16 MR. KAMIN: That's correct, Your Honor. And that
17 really gets to Mr. Bernstein who spoke on behalf of Health
18 Care --

19 THE COURT: That would also address perhaps something
20 -- you know, some of the concerns Mr. Wolfe had is that if
21 summary judgment motions could be filed by the 20th, that that
22 would certain expedite the process.

23 MR. KAMIN: That's correct. And Mr. Bernstein, again
24 on behalf of Health Care, made two arguments. I want to
25 address one as well, the first one. The second one was can't

1 we move everything up to the schedule he suggested. It's
2 essentially a 30-day move-up. Not much is gained, as far as
3 our position goes. We have a lot of stuff to do during that
4 period of time.

5 The other thing he mentioned and I did want to
6 address it because I just want the Court to understand where
7 we're coming from on this. Mr. Bernstein, or his clients at
8 least, came before the Court early on at a time when the debtor
9 had advised that it was preparing this 9019 and it would like
10 to settle cases in connection with the 9019 motions. It also
11 advised that if it could not do that, then it would go ahead
12 and on the basis of the normal 9019 procedures and try to reach
13 a settlement with that person.

14 Well, we came into court and it turned out we did
15 neither. We neither got a 9019 general settlement of a lot of
16 cases, nor did we get the direction go ahead settle the
17 individuals cases. We were directed to reach a protocol that
18 would really help everyone. That's what we did. I don't think
19 we're going back on our representation at the time.

20 THE COURT: No, I take full responsibility for that
21 and I think I tried to make that clear to Mr. Bernstein.

22 MR. KAMIN: Okay. Mr. Friedman then spoke on behalf
23 of CDC Rural and he voiced a concern that others have voiced as
24 well, which is the question of whether the person who has their
25 case decided first gets some sort of leg up and gets money when

1 everyone else is sort of left holding a much smaller bad.

2 We -- I -- on behalf of the debtor, I really can't
3 imagine it occurring that way. It is not how I can imagine we
4 can fulfill our fiduciary responsibilities to the creditors,
5 nor do I see anyone -- perhaps an individual plaintiff may take
6 that position.

7 I don't see how it works out that way, Judge, so I
8 don't think that's a realistic concern. Certainly, I know the
9 committees would feel exactly the same way. There is no
10 intention here to allow people to move to the head of the line
11 in terms of collecting from the debtor on the basis of their
12 cases being resolved earlier.

13 That wouldn't happen in a normal case, anyway. I
14 mean, you'd have to -- you know, in a normal case, you'd stand
15 in line with other creditors for whenever money gets paid out
16 and the fact that a case is decided one time or another should
17 not entitle you to greater distribution. So I don't see that
18 as a realistic issue and we're certainly -- I'm telling you
19 right now it's not something that we would -- that we
20 contemplate at all.

21 The --

22 THE COURT: And that also goes though to Mr. Ebel who
23 spoke last his point that what if the Court were to find that
24 all of the funds were -- that are being held are trust funds,
25 then can -- if you find that, can you differentiate between

1 segregated and commingled, or does there have to be some sort
2 of pro rata distribution in that circumstance.

3 MR. KAMIN: I think in -- I think there's likely to
4 be pro rata distribution questions with respect to -- certainly
5 with respect to the amount that right now is in LES accounts.
6 I don't -- there's no doubt about that and I don't know on what
7 theory someone gets to come in and say on the basis of one
8 account that's held by the debtor, I am entitled above all
9 similar situated creditors to get more of that account than
10 anyone else. So I don't think of it as a genuine concern.

11 We had a couple people speak on behalf of the ad hoc
12 committee, and I think their basic -- I think the thrust of
13 their position was they would like a seat at the table. Right
14 now I don't have position on that one way or the other. I
15 think there are already lots of seats at the table and my
16 suggestion would be that they work with the committee to try to
17 make sure that their clients are adequately represented in some
18 way and if that is an irresolvable problem that we come back to
19 that.

20 THE COURT: The Court is not fond of ad hoc
21 committees. You know, I've seen them in other large cases,
22 they become unwieldy, and for the very reason that Mr. Terry
23 confessed is there is no fiduciary obligation that attaches to
24 their function. And -- but the concern that I was hearing, and
25 I heard it from a number of other people, and that is, with

1 regard to the lead cases that are the commingled funds, are
2 there appropriate incentives in place -- in other words, are
3 they are going to be able to carry the ball for everybody
4 that's going to be situated, you know, from a financial
5 standpoint.

6 You know, they keep -- kept referring to Mr.
7 Bernstein's client having, you know, certainly the deep pocket
8 that could afford to litigate, but perhaps, you know, are we
9 selecting some that cannot and have you properly vetted that to
10 make sure that we do have really interested people that can
11 advance the ball for everybody?

12 MR. KAMIN: I'll be frank with you, Judge, I have
13 not. Our principal concern in suggesting the commingled cases
14 -- and I'll tell you how we went about it in mind set just to
15 make sure everyone understands this wasn't the -- the fix
16 wasn't in any way or the other.

17 Ninety percent of the cases or 90 percent of the
18 contracts or so involve Virginia law. So we wanted to exclude
19 cases that did not involve Virginia law.

20 Another aspect of it, as I mentioned, there are two
21 principal kinds of contracts. There may be others here and
22 there. But we wanted to be sure to get the two principal ones.

23 Second of all, we looked at counsel who had been most
24 active in making pleadings and essentially chose it that way.
25 We did not use a financial litmus test and then ultimately we

1 approached those counsel as to whether they would be
2 interested.

3 As I -- as you mentioned, we have a slot open and we
4 can certainly be much more careful about vetted that. Now I
5 think it was Mr. Friedman who suggested on behalf CDC Rural and
6 that they have a fair amount of stake and that they would be
7 willing to be a test case. The two problems with that is first
8 of all, that is governed by Arizona law. And second of all, as
9 he admitted, the exchange agreement is neither a category A nor
10 category B is yet another wrinkle to it. So --

11 THE COURT: It's that fifth category that you
12 suggested needed to perhaps be included as a test case.

13 MR. KAMIN: Yes, but the fifth category was also --
14 the fifth category was the case involving the notes.

15 THE COURT: Right.

16 MR. KAMIN: And that -- we're certainly happy to have
17 that, but we had -- remember there's the escrow case, there's
18 the segregated case, both of whom are -- both plaintiffs which
19 are very eager to go forward, as you heard. Then we have two
20 commingled cases and category A and category B, and then we
21 have that fifth area and I understand that Mr. Finkelstein's --
22 is prepared to be that test case, which is great. So those are
23 the five prepared to go ahead with.

24 Of the two commingleds, one dropped out. That is, we
25 thought we had an agreement on Iserit's (phonetic) part to go

1 forward and they declined. So we do -- we need a new
2 commingles and I'm happy to work with the committee and hope
3 the committee would work with the committee of -- with the ad
4 hoc -- with the lawyers for those other individuals and come up
5 with an adequate representative. I have no reason to think
6 that the Frontier Pepper plaintiff, who's here before the
7 Court, is not sufficiently motivated or sufficiently able to
8 act as a capable representative, in a sense, of that kind of
9 situation.

10 Let's see. Beyond that, Mr. Hopper complained about
11 the -- or objected to, I should say, the two-day notice
12 provision in the agreement. That comes, Your Honor, out of
13 something that you said and I -- but I -- let me get it in
14 context the last time we were here. What you said was that why
15 don't we work out a deal where there is some protocol and if
16 things have to be settled, we can settle it on two-day notice.
17 So we took that in there.

18 What we believe and I think what we were all thinking
19 about the time that that occurred is someone has a closing in
20 three days and we can settle the case and avoid expenses, we
21 don't have to worry about the normal settlement notice period.
22 We would not anticipate trying to settle cases that don't need
23 that kind of quick resolution on two days. That was just to
24 allow us if the circumstance require it to get as quick a
25 settlement as we can, again for the principal purpose of

1 avoiding future damages.

2 Someone else complained about the short notice for
3 this proceeding and all I can say is I apologize for that. It
4 should have been longer. It would have been longer -- I mean,
5 if we could have afforded a longer period. Everyone was in a
6 hurry to get this thing done. We did what we could.

7 Let's see. Yeah, Mr. Geller, on behalf of his
8 client, Griffin I think it was, wants to separate out the
9 commingled group and deal with them separately. And he also
10 questioned about whether, you know, picking the cases, and I
11 think that may have been what Your Honor was referring to where
12 the picking the case -- the test cases was appropriate under
13 the circumstances.

14 We'll try to get that other test cases to be as
15 representative as we can and with enough help from other -- the
16 committee and other -- or other counsel so that that will be a
17 representative one.

18 In terms of slowing this down, I don't see how the
19 process overall is helped by stopping the commingled cases in
20 their place right now and working out some other agreement for
21 them. I don't see how the process is hurt by allowing two of
22 those cases to go forward. Remember, the other cases are not
23 going forward. Other discussion can certainly occur with
24 respect to those kinds of cases and how they might be resolved
25 ultimately and what plans there are perhaps for the securities

1 that are -- form the bulk of the asset that might be able to
2 pay for these things.

3 I don't want to preclude discussions with people
4 about what's going to happen here, and I don't also want to
5 preclude some way for them, considering that many of them do
6 have small amounts at issue, to find a different way if they
7 think that's really best to try to resolve these over time. I
8 don't want to shove anything down anyone's throat in terms
9 let's do it now, let's do it now.

10 But nothing is hurt by having those cases that we've
11 identified as test cases or that we'd like to go forward on a
12 basis that hopefully will bring issues to Your Honor's
13 attention and issue brought up by competent counsel with
14 incentive to do it correctly so that you can look at them. I
15 don't think that hurts the process in any way.

16 I think that is essentially addresses pretty much
17 what I heard from everyone. So again, I would ask that the
18 Court adopt the order for the protocols. Thank you.

19 THE COURT: All right. Thank you.

20 Mr. Gibbs.

21 MR. GIBBS: I'm encouraged by what I've heard from
22 counsel for the debtor. I know that disputes will arise
23 through the process of whatever procedure the Court implements,
24 but his description of the benefits of this process and the why
25 -- and then why we think it should be implemented comport

1 exactly with the committee's, for all the reasons he stated and
2 I won't reiterate them.

3 I will answer any questions the Court might have with
4 respect to objections that were raised and the ability of my
5 constituency to take positions that might impact appropriately
6 the Court's resolution of the disputes. I think that this
7 committee that I represent that is comprised of five commingled
8 customers or so-called commingled customers can adequately
9 protect the interests of the creditors in this estate and our
10 job is to maximize the estate and treat similarly situated
11 creditors in according with the Code similarly, but it's only
12 with respect to disposition of what the Court determines to be
13 property of the estate.

14 And we're vitally interested in determining what
15 facts exist with respect to the property that's listed on the
16 debtor's schedules and whether or not commingling occurred with
17 respect to any of those funds, when those funds were acquired,
18 and what the basis of the parties' claims of trust are, as well
19 as what the parties' intent -- the parties' -- each of the
20 parties' intent was when they entered into agreements with this
21 debtor and what the debtor's intent was, because I think those
22 are relevant factual inquiries the Court's going to want to
23 hear about before making its ultimate decisions on the
24 questions of law.

25 So we would ask Your Honor to approve the motion. I

1 think that Mr. Kamin's responses to the objections comport with
2 our situation. I will bring to the Court's attention the
3 objection of the ad hoc committee that was filed last night, as
4 well as this motion by the ad hoc committee to be granted
5 official status gives the official -- current official
6 committee concern.

7 The primary movant, Mr. Terry, and party signatory to
8 the pleading, represents the chairman of my committee. And so
9 I've either got to come to the court and ask my committee chair
10 to resign because his counsel is seeking to form a separate
11 committee and also seeking on the basis that their interests
12 are not aligned with the committee or their firm wouldn't be a
13 qualified counsel for any proposed official committee and yet
14 they're seeking the official status to be given to an ad hoc
15 group, so -- and you said -- you heard arguments that the
16 benefit of that ad hoc committee would be that we could speak
17 as one voice, but four of the ad hoc group were here and all
18 spoke today.

19 I think it's going to be duplicative. To the extent
20 the Court is inclined to allow the intervention of an ad hoc
21 group, it would only be after compliance with the disclosure
22 requirements as to who they represent and only with the caveat
23 that there is in fact one lawyer added to the table. This
24 table's pretty full quickly already.

25 THE COURT: Thank you, Mr. Gibbs.

1 I assume you want to respond on Mr. Terry's behalf?

2 MS. GUNN: I would like to -- Elizabeth Gunn on
3 behalf of -- from Durette Bradshaw.

4 While we have been consulting with the chair of the
5 official committee, no paperwork and no money has been signed.
6 And actually, the papers that were filed last night do not list
7 him as one of our current clients and -- and so we do
8 understand there's a conflict there and are very aware of that
9 issue, but have at this point no official relationship.
10 Although we have had telephone conversations and have consulted
11 with Mr. Giacomo, we have never formally formalized that and
12 recognized that issue with Mr. Gibbs.

13 THE COURT: All right. Thank you.

14 Mr. Bernstein, are you going to start the same line?
15 I mean --

16 MR. BERNSTEIN: No, I'm -- I was reluctant to get up,
17 but this will take less than a minute. Just when counsel for
18 the debtor mentioned that our proposed move up of the schedule
19 was only 30 days or something approximately like that and
20 that's basically true and that's because we'd like to go a lot
21 faster than we're proceeding, but we understand that there's a
22 balancing here.

23 But the 30 days is very important to us, because the
24 30 days gets the resolution into Q1 '09, which is a big
25 difference, and I think it does make sense for me to hand up

1 for -- I have a copy for the debtor here and for the committee
2 -- the markup that we did.

3 We just took the debtor's order -- the
4 debtor/committee's order and changed some dates so you could
5 see exactly what the dates would be that would lead to a trial
6 on March 11th that would -- as counsel says, yeah, it would
7 only be a 30-day so it's not doing violence to the process
8 here, it's not making everybody respond in two days and do
9 discovery the next day, and so forth.

10 It's moving expeditiously, but it does get the
11 resolution and it doesn't change the summary judgment dates as
12 we heard them today. It just makes them mandatory rather than
13 optional. But it does get a trial and a resolution into Q1
14 '09, which I think is very important at least for my client and
15 I'd like the Court to consider --

16 THE COURT: If I allow summary judgment motions under
17 the current protocol be filed by February 20, doesn't that
18 resolve you issue?

19 MR. BERNSTEIN: It does assuming that our case is
20 resolved in summary judgment and I believe strongly that --

21 THE COURT: So that means that it have be no facts in
22 dispute. I mean, and that --

23 MR. BERNSTEIN: Right.

24 THE COURT: -- that's where we get up what I said
25 before if there's some inconvenient fact that shows up, then

1 perhaps we can't do it that way. But, you know, taking you at
2 what you say, the case is simple, straightforward, and should
3 be able be done that way, then that would give you the avenue
4 to have this done on that kind of a timetable.

5 MR. BERNSTEIN: It would if my position is right, but
6 as Your Honor pointed out, maybe there's some fact -- maybe
7 it's an hour trial, but maybe there's some fact and Your Honor
8 denies motion for summary judgment. In that case, I don't see
9 any reason, particularly given what they've said today about
10 the summary judgment motions being filed so that they can be
11 resolved in February, of having trial start at the end of
12 April, especially if we need a four-hour trial.

13 And that's essentially what this done; it changes
14 interim dates, but the interim dates are changed only to
15 facilitate that happening, only so that if a trial is necessary
16 -- and we're not talking about 60 trials or 450 trials, we're
17 talking about, you know, a maximum of four and that's if
18 nothing is resolved in summary judgment and mine is the most
19 money and I'm saying it'll be a half a day to a day, and that
20 could be a couple hours.

21 And the main point of this -- there were two points.
22 One is taken care of by the statement of counsel and mine just
23 reflects that here where the summary judgement motions would be
24 resolved in February. I left the date blank because I assumed
25 there'd be a hearing and I'm not --

1 THE COURT: 20th.

2 MR. BERNSTEIN: -- not that presumptuous to put in a
3 hearing.

4 And then the other dates were changed only to the
5 extent necessary to enable the first trial to occur on March
6 11th, 2009, which I arbitrarily made up, but it gives you an
7 idea of what we're thinking of.

8 It is about a 30-day move up, but it gets the cases
9 resolved -- there's a lot of pressure from a lot of parties,
10 both folks like us and you heard about the people who have
11 personal need for the cash, and there's different kinds of
12 exigency, but they're all exigency.

13 And this wouldn't move it up to, you know, discovery
14 today and expert witnesses tomorrow and trial the next day, but
15 it would get it resolved in Q1 '09 I think without doing too
16 much violence. And I would ask the Court to consider our, I
17 would say, modest but important modification to the protocol.

18 THE COURT: Will I be able to resolve your case
19 without resolving the commingled cases?

20 MR. BERNSTEIN: Yeah, absolutely. I wouldn't see why
21 not.

22 THE COURT: What if I find that all of the monies are
23 being held in trust, yours as well as the monies in the
24 commingled accounts?

25 MR. BERNSTEIN: Well, I think in our case that may

1 get into a division between the kinds of -- potentially the
2 kinds of segregated cases because keep in mind we're --

3 THE COURT: Some trusts are better than other trusts?

4 MR. BERNSTEIN: Well, no, because we don't say that
5 it's simply a trust, we say it never was property of the
6 estate. It's not held by the debtor in trust for us.

7 THE COURT: What if I find it's in trust and none of
8 the property's property of the estate and it's being held by
9 the debtor for all of these investors?

10 MR. BERNSTEIN: I guess what I would say about our
11 case is that it wouldn't be held in trust by the debtor for us,
12 it would simply be as if it were our property that we had
13 always held --

14 THE COURT: But wouldn't the commingled people be
15 saying the same thing if I rule that way?

16 MR. BERNSTEIN: No, I think they would say it's a
17 trust. I think they would say it's at trust, an actual or a
18 constructive trust. What I would say is because this money was
19 never in the debtor's hands, it was never property of the
20 debtor. It's as if it were in bank account. The only reason
21 we don't have our money -- literally the only reason we don't
22 have our money today is what's the most ministerial of acts
23 which is signing the form required by the escrow agreement.

24 So I would say that there's a difference even between
25 ours and other segregates, and that's why I think the debtor

1 had it right. If you're going down the road of test cases, I
2 think that's why the debtor had it right to separate the escrow
3 test cases from the segregated test cases.

4 I do think you can hold that our property simply --
5 it's not the debtor holding it in trust for us. It's simply
6 not the debtor's at all. Just it's the bank just won't release
7 the money until the debtor signs the form. That doesn't make
8 it the debtor's property or the debtor holding it in trust for
9 us, it just means they have to sign the form.

10 Which by the way is why we didn't -- I alluded
11 earlier to the fact that we didn't sue the bank, but the reason
12 we didn't sue the bank is there's no indication that the bank
13 ever -- I mean, there are legal technical reasons, but the
14 practical reason we didn't sue them is there's no indication
15 that we needed any relief from the bank. The bank hasn't --

16 THE COURT: They're just the custodian.

17 MR. BERNSTEIN: They haven't refused to do anything.
18 It's just they don't have the form yet. Which by the way, I
19 still do need that issue resolved at the time the Court finds
20 appropriate so that -- what I'm afraid of is that, you know,
21 we'll go down the road of being a test case on the protocol and
22 then we'll have to add the bank 30 days from now and then that
23 will slow things down. If I have to add the -- I don't think I
24 have to add the bank, but if I do have to add the bank because
25 I'm wrong on the law, I'd rather know that now so I can sue

1 them.

2 THE COURT: All right. Very good.

3 MR. BERNSTEIN: Would it be appropriate for me to
4 hand up my markup?

5 THE COURT: The Court certainly receive it.

6 MR. BERNSTEIN: Thank you, Your Honor.

7 THE COURT: Uh-huh.

8 MR. BERNSTEIN: That's all I've done is crossed out a
9 few dates and written in some -- typed in some alternatives in
10 bubbles.

11 THE COURT: All right. Thank you.

12 MR. BERNSTEIN: Thank you, Your Honor.

13 THE COURT: Uh-huh.

14 MR. WOLFE: Your Honor, Craig Wolfe, Kelley Drye &
15 Warren. I have three dates. I think that we can come off of
16 our proposed schedule a little bit and concede. We're -- we
17 don't need experts and assuming that we don't need experts, I'm
18 assuming also that the debtor won't need them. We would be
19 able to move on a bit of a fast track process. We would just
20 like to have the protocol provide for that instead of leaving
21 it in the option of the debtor and the committee. So we would
22 be ready to do summary judgment motions on February 20th.

23 Second, we would like to then be able to go to trial
24 early March, only if needed. And then we would like to add the
25 third concept that was in our protocol and that is with respect

1 to the non-test cases, protocol doesn't deal with that.
2 Assuming that the non-test cases can be resolved based upon the
3 ruling in the test cases and that, let's say, happened after
4 summary judgment on February 20th or at the latest the early
5 March trial, we would like to go immediately into summary
6 judgments with the non-test cases similarly situated based on
7 the ruling of the test case and have that heard by the end of
8 March.

9 And we think that that would at least preserve, at
10 least with respect to our clients, their exchanges and that
11 would mitigate damages against the estate. We would hope that
12 the committees would support that.

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

14 MR. KAMIN: Again, Your Honor, I don't object to the
15 protocol making clear that summary judgments can be -- motions
16 can be made as of the close of discovery without the need for
17 expert discovery on February 20th. I can't now commit that the
18 committee will not have an expert, that we will not have an
19 expert. I don't know one way or the other.

20 THE COURT: And I understand that.

21 MR. KAMIN: Thanks.

22 MR. FRIEDMAN: Your Honor, Joseph Friedman again for
23 CD Rural and CD Glendale. The debtor has acknowledged that my
24 clients' cases don't fit in the test pattern, so staying my
25 clients' case when it's not going to fit the test pattern I

1 think is inappropriate. Again, we're willing to concede to be
2 a test case. We may be the test case of non-Virginia law, but
3 we're willing to be that test case.

4 THE COURT: Thank you, sir.

5 All right, the --

6 MR. GIBBS: Just one comment just for the record,
7 Judge. We have been authorized to retain today Protiviti.
8 It's our intent to use Protiviti to do forensic accounting on
9 the debtor's records and we fully expect to offer their expert
10 testimony at any trial or any 9019 settlement. So the Court
11 needs to be aware of that and we very well may need some expert
12 to talk about the rules regarding 1031, because while we think
13 we know the code, that's the Bankruptcy Code, there are other
14 people who think the code is the Internal Revenue Code, you may
15 need to hear from those kinds of folks.

16 THE COURT: Thank you, Mr. Gibbs.

17 The Court applauds counsel for the committee and the
18 debtor for coming up with the protocol. The Court at the last
19 hearing did strongly suggest that that's what the Court wanted
20 to see. We need to have a procedure in a place that would
21 resolve these issues expeditiously and I've heard, as
22 predicted, some people saying we're going too fast and others
23 saying we're going not fast enough.

24 But I think the one thing that jumps out at me about
25 the protocol is that it's realistic. And, you know, all of us

1 that have tried cases know, you know, all the things that come
2 up in the middle of litigation and I think that this is a very
3 aggressive plan as far as getting these cases resolved. So the
4 Court is going to approve the -- grant the motion and approve
5 the protocol with one change, and that be that there -- it be
6 clearly set forth that motion for summary judgment can be filed
7 as of February 20.

8 Now that being said, if there's a fact that's in
9 dispute or if there's discovery ongoing regarding experts or
10 something, maybe that can't be done, but people have the right
11 to file if they don't think there is a fact in dispute by
12 February 20 to get that issue resolved.

13 And then obviously, I'm going to -- I'm not going to
14 put any of these accelerated dates into the order, but what I
15 heard Mr. Kamin say was that if we didn't have, you know, other
16 issues at that point we needed to -- we were ready to try a
17 case in March that we could -- as long as it fit on the Court's
18 calendar, then we could go ahead and schedule those trials
19 earlier than what we have here, but we'll do that as the
20 situation arises and is appropriate.

21 The one thing that the Court would like to see is
22 make sure that the -- whoever the entity representing the other
23 category of commingled funds is, you know, properly invested in
24 the process and capable of handling that test case, you know,
25 for the others representative of that particular investment

1 class.

2 And the Court is going to keep the two-day notice for
3 approving compromises. I understand Mr. Hopper's concern, but
4 that provision I thought addressed what I did say last time
5 that if there are appropriate settlements that need to be
6 brought to the attention of the Court that they can be brought
7 expeditiously if there's some reason to do that and I think we
8 can accomplish that through this order.

9 Obviously, if we're going to be compromising one of
10 the test cases, I would anticipate everyone would get much
11 longer notice of that, unless there was some sort of an
12 emergency that arose.

13 Mr. Kamin, is there anything else that's left open
14 that I have not addressed with regard -- oh, the committee can
15 intervene -- decide to intervene. You have the right to
16 intervene and you can decide whether to do that or not in the
17 three cases or four possibly for which you have not intervened
18 at this point one week from today.

19 MR. KAMIN: I don't think there's anything further,
20 Your Honor. We would also propose to revise the order to
21 reflect that there will be fifth test case in the additional
22 note category --

23 THE COURT: That'll be fine. The Court will approve
24 that as well. I'll also grant your motion for an expedited
25 hearing. I guess --

1 (Laughter.)

2 MR. KAMIN: Thank you, Your Honor. Thank you.

3 MR. SABIN: Your Honor, to the extent that the
4 committee does not choose to intervene fully in some or all of
5 the three, four or five test cases, just so the record is clear
6 and we understand it and I don't think the order needs to be
7 modified, it means that the committee or anybody else can
8 participate in these cases, these test cases. And by
9 participation, I mean attending the depositions or receiving
10 various discovery subject to the appropriate confidentiality
11 but not affirmatively asking questions, and otherwise they can
12 participate in connection with the motion process by
13 effectively being an amicus.

14 THE COURT: That's correct.

15 MR. SABIN: And if they do so, they will do so
16 without res judicata or collateral estoppel effect.

17 The last thing we had asked, and I think that the
18 debtor's counsel indicated they had no problem, is that none of
19 these test cases, as I understand it, currently or in the
20 future are going to, in essence, tee up motions for substantive
21 consolidation or otherwise seek to hold LAFG liable as part of
22 this test case without, in essence, prejudicing one way or
23 another either the defense thereto or bringing it in
24 appropriate place, but these test cases is not the place to
25 bring those kinds of actions.

1 THE COURT: Exactly, and I meant to rule on that as
2 well, but that's Court's understanding.

3 MR. SABIN: Thank you, Your Honor.

4 MR. KAMIN: There is one more thing, Your Honor. I'm
5 sorry. It's a clarification. The order does provide that the
6 adversary proceedings will be stayed. There were two matters
7 that are on the calendar that involve these same issues, but
8 they weren't brought as adversary proceedings. That's the
9 Stone matter and the Kendall Square. Those are both turnover
10 matters, and I would simply get Your Honor's ruling at this
11 point that they are stayed as well. They are not cases.

12 And I suppose there are other people who could
13 instead of bringing cases might well bring motions to turnover.
14 Maybe there's an expedited way to deal with that, but I want to
15 give everyone notice we will seek to have them stayed as soon
16 as they're made as long as they involve these very same issues.

17 THE COURT: It is the intention of the Court to stay
18 all of the other adversary proceedings until the test cases can
19 be resolved, because I think that once we resolve the tests
20 cases, then the other cases will fall into, you know, a very
21 similar pattern and they can all be, you know, resolved on
22 settlement or some other basis.

23 MR. KAMIN: Yeah, and the only thing I'm mentioning
24 is that these are not adversary proceedings.

25 THE COURT: The turnover motions.

1 MR. KAMIN: The Kendall Square is not an adversary
2 proceeding, so it's not technically stayed by the order and
3 there's nothing right now in the order that prevent the next
4 person from bringing another motion to turn over proceeds. And
5 maybe we'll have some language -- probably the better way to
6 address that is insert some language in the order that would
7 address the staying of other actions in order to recovery 1031
8 funds.

9 THE COURT: I think if you have something along those
10 lines, that'd be appropriate.

11 MR. KAMIN: Very good, and is it clear, Your Honor,
12 for --

13 THE COURT: That they're stayed.

14 MR. KAMIN: That the others are stayed right now?

15 THE COURT: Yes.

16 MR. KAMIN: Yes. Thank you.

17 THE COURT: Mr. Maxwell.

18 MR. MAXWELL: Yes, Your Honor. I represent Kendall
19 Square and the other people who brought a motion for turnover
20 today. And is it my understanding that the Court is staying
21 that turnover motion without hearing it?

22 THE COURT: You can argue it, but I'm --

23 MR. MAXWELL: You're going to --

24 THE COURT: -- you know what I'm going to do.

25 MR. MAXWELL: Then I don't --

1 THE COURT: I want to bring this all in a proper
2 procedural -- organized process and I don't want to do it on an
3 ad hoc basis. And I trust that the -- I mean, I've read your
4 papers. I know what your argument is.

5 MR. MAXWELL: Right.

6 THE COURT: And so I'm well aware of the position
7 that you're taking in that regard and it is the intention of
8 the Court to stay that and similar kinds of actions until we
9 can have these test cases go forward.

10 MR. MAXWELL: Thank you, Your Honor.

11 THE COURT: You're welcome.

12 MR. WOLFE: Your Honor, one point of clarification.
13 Craig Wolfe, Kelley Drye & Warren. There was a question as to
14 what would be addressed in the test case and of course we
15 represent Millard, one of the first test cases. We do believe
16 that there are other claims that have not been asserted in the
17 complaint. Substantive consolidation might very well be one of
18 those.

19 And so the question would be are we proceeding with
20 just the issue -- and I really think there are two issue; one
21 is whether the segregated funds are property of the estate and
22 then secondly, what would be the effect of that vis-a-vis the
23 commingled. Would they be a separate trust, separately treated
24 or would they be outside property of the estate but within a
25 group with the commingleds. I think those issues must be

1 resolved in this fast-track litigation.

2 We've made the -- taken the position that we don't
3 think that any other issues, such as Subcon and other claims
4 against, you know, the parent, the debtor, really should be
5 addressed here because we -- I think that that will slow the
6 process down --

7 THE COURT: I do too, so I don't think that you need
8 to bring those. They shouldn't be part of it. That was what I
9 was addressing Mr. Sabin. But by the same token, it's without
10 prejudice to you, your client to be able to bring those kinds
11 of claims in an appropriate time if you need to.

12 MR. WOLFE: Very good. That's what I wanted to
13 clarify. Thank you, Your Honor.

14 THE COURT: All right. Thank you.
15 Mr. Bernstein.

16 MR. BERNSTEIN: Judge, I just want the Court's
17 guidance on what the best way is to get this issue of whether I
18 have to sue the bank resolved. Should I --

19 THE COURT: Is there a motion before me right --

20 MR. BERNSTEIN: Yeah, there's a motion to dismiss --
21 the reason I'm raising this is there's a motion to dismiss our
22 adversary proceeding on the basis that we failed to sue the
23 bank and I can just -- ordinarily, I would just deal with that
24 in the ordinary course, but now we're under this expedited
25 protocol and I don't want that to slow down the protocol, so I

1 can notice it up for a hearing or --

2 THE COURT: Mr. Gibbs, do you want to address that
3 now or can we -- do we need to set it for a special time?

4 MR. GIBBS: Your Honor, we filed the motion to
5 dismiss 12(b) and I forget -- it's not (6), but it's -- I've
6 forgotten the subpart of 12(b) that we sought --

7 THE COURT: I'm familiar with the motion.

8 MR. GIBBS: -- dismissal for failure to join a
9 necessary party. The plaintiff has responded and filed his
10 papers. We chose not to file a reply to their response. I
11 think the Court can rule on our objection and their reply and
12 decide whether their complaint needs to be dismissed or whether
13 they need to be ordered to add a -- what you would consider to
14 be a necessary third party.

15 THE COURT: All right. Thank you.

16 Mr. Sabin.

17 MR. SABIN: Your Honor, not to blind side Mr.
18 Bernstein, since we have intervene, but I note that it is
19 highly likely that we're going to take a position similar to
20 the 1031 committee, especially since as I read the complaint.
21 This -- it would have this Court otherwise adjudicate rights
22 under two different documents. One is the exchange agreement,
23 which is only between the 1031 debtor and Mr. Bernstein's
24 client, but then that document itself in various provisions
25 says it is subject to an escrow agreement. That escrow

1 agreement involves Centennial Bank. So I'm not sure how it is
2 that Centennial Bank is not an indispensable party.

3 THE COURT: All right.

4 Mr. Bernstein, I will look at those papers this
5 afternoon and I will issue a decision tomorrow. I'd just like
6 to read them once again.

7 MR. BERNSTEIN: Thank you very much, Your Honor. I
8 appreciate --

9 THE COURT: Okay.

10 Is there any other business then that we -- I think
11 we've disposed with the other items on the calendar with
12 staying all of the proceedings. Is there anything else we need
13 to take up this afternoon?

14 MR. KAMIN: Should take care of everything, Your
15 Honor. We're done.

16 THE COURT: All right. Well again, I commend counsel
17 for putting this together and good luck with getting these
18 things resolved.

19 THE CLERK: All rise. The court is now adjourned.

20 (Proceedings adjourned at 1:45 p.m.)

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

I, TRACY A. GEGENHEIMER, 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, and to the best of my ability.

/s/ Tracy A. Gegenheimer DATE: January 19, 2009
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