

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 21, 2009  
. . . . . 2:07 p.m.

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

APPEARANCES:

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1 COURTROOM DEPUTY: All rise. The United States  
2 Bankruptcy Court for the Eastern District of Virginia is now in  
3 session, the Honorable Kevin R. Huennekens presiding. Please  
4 be seated and come to order.

5 COURT CLERK: In the matter of Land America Financial  
6 Group, Incorporated, Case Number 08-35994, hearing on motion  
7 for expedited hearing on motion to appoint official committee  
8 of LES commingled exchange participants.

9 MR. GELLER: Good afternoon, Your Honor.

10 THE COURT: Good afternoon.

11 MR. GELLER: Jay Geller on behalf of the Ad Hoc  
12 Committee of Commingled Exchangers. Your Honor, the Ad Hoc  
13 Committee has authorized me to speak on its behalf today and  
14 I'm honored to do so and I thank Your Honor. You admitted me  
15 Pro Hoc at the last hearing.

16 THE COURT: I recall.

17 MR. GELLER: There are a number of other attorneys in  
18 court today that are here on behalf of Commingle Exchangers who  
19 are part of the Ad Hoc Committee. I'm not going to ask them to  
20 introduce themselves, but at some point in time, Your Honor, if  
21 you would like to hear from them they are available. But we  
22 did think that it would be appropriate to designate one person  
23 to carry the ball for purposes of the hearing today.

24 Your Honor, I guess I'd like to start with the motion  
25 for expedited hearing since I don't know whether you will,

1 ultimately, get to the merits of the motion.

2 THE COURT: I want to take that up first because  
3 we've had an objection to the expedited nature of this hearing.  
4 I know that Mr. Gibbs is -- was unable to be here today and he  
5 wanted to participate and he may be able to join us by phone  
6 later on or he may not depending on his schedule. He's in  
7 California today.

8 MR. GIBBS: Your Honor, this is Chuck Gibbs and I  
9 apologize for interrupting. I just wanted the Court to know I  
10 am on. We, actually, finished the speaker program that I was a  
11 part of on time which is a rarity and, so I got off today as of  
12 about five minutes ago and got to my room to dial in. So, my  
13 potential unavailability shouldn't affect the Court's decision  
14 on whether it wants to go forward -- grant the expedited relief  
15 and go forward with this motion on the merits today.

16 THE COURT: Are you withdrawing your objection then  
17 to the expedited nature of having this hearing today then, Mr.  
18 Gibbs?

19 MR. GIBBS: Yes, I think maybe both the LES  
20 Committee, the LFG Committee and the Debtor have all filed  
21 responses. Hopefully, the Court's had a chance to see them and  
22 assuming the LFG Committee and the Debtor are prepared to go  
23 forward and deal with the motion on the merits. I don't want  
24 our objection to be the reason to have everybody dress up and  
25 come back another time.

1 THE COURT: All right. Very good. The Court, just  
2 for everybody's information, has read all of the papers and, so  
3 I'm familiar with the responses as well as the motion. Is any  
4 other party object to the motion for expedited hearing being  
5 conducted today?

6 MR. GREER: Your Honor, this is David Greer. I  
7 represent the Barry Gluckstern and Sharon Trusts. We filed a  
8 joinder to the objection which would continue this until  
9 tomorrow. I do have two of my counsel on the phone with us  
10 today. I don't want to inconvenience the greater number of  
11 people. We would prefer to have more time to address these  
12 issues, but if the Court's so inclined we could go forward  
13 today. I have Larry Gabriel from California and Jason Swag  
14 from New York. We'll have pro hoc motions sent in on them  
15 shortly. They're here on the phone with me today.

16 THE COURT: All right. Thank you, Mr. Greer. Is any  
17 other party wish to be heard on -- in connection with the  
18 motion for expedited hearing? All right, Mr. Geller, the Court  
19 will grant your motion for expedited hearing and we will  
20 conduct the hearing then today. I think it is important to get  
21 this resolved because I don't want to hold up the protocol in  
22 the timetable that we set for trying the test cases. So, I  
23 think it's important that we get these issues resolved and,  
24 there being no objection, I'll grant your motion, so you may  
25 proceed on the motion.

1 MR. GELLER: Thank you, Your Honor, I appreciate  
2 that. Your Honor, just by way of very brief background and you  
3 have read all the papers, so I will not repeat everything  
4 that's in the papers on either side for that matter.

5 As you're aware the day before, I guess, it was  
6 January 11th, the day before the January 12th hearing on the  
7 protocol motion the Ad Hoc Committee filed an objection to the  
8 motion -- the protocol motion. I, on behalf of one of my  
9 clients, Griffin Industries, actually filed an objection to the  
10 expedited hearing. That motion went with very short notice,  
11 particularly, with respect to the Commingled Exchangers. And  
12 also on that Sunday before the January 11th date, the Ad Hoc  
13 Committee filed a motion to appoint an official committee of  
14 Commingled Exchangers.

15 What you have before you in the motion for shortened  
16 notice was on an amended motion and that amended motion tried  
17 to take into account the changes that had occurred as a result  
18 of your ruling on January 12th, namely, that there was this  
19 protocol that Your Honor had approved with test cases to be  
20 heard on an expedited basis. And, so we perceive that there  
21 are two different possibilities, not necessarily mutually  
22 exclusive, but we did phrase them in the alternative in the  
23 amended motion that we filed on Martin Luther King Day and as  
24 for the expedited hearing on.

25 With that by as way of background, Your Honor, I

1 think I'm just going to jump right in and, again, to try to  
2 save some time given what you have seen and I think the LFG  
3 Committee, the LES Committee and the Debtor all filed written  
4 responses. We have filed our motion.

5 I don't believe there's really any dispute regarding  
6 the law. I mean, we found the same cases as to what are the  
7 standards for appointing another committee in a particular  
8 case. Many of the cases deal with equity committees and the  
9 Courts tend to go through a fairly detailed analysis, but I  
10 think it's fair to say that with respect to equity committees  
11 Courts tend to look at is equity out of the money, number one.  
12 And if equity is out of the money and unsecureds are unlikely  
13 to recover in full, does the Unsecured Creditors' Committee  
14 adequately represent the interest of equity? Are they trying  
15 to maximize the value of the estate and if so doesn't that  
16 really encompass the interest of equity? So, absent some  
17 showing of a fairly severe conflict those cases say no equity  
18 committee.

19 A little more interesting when you have a request for  
20 another committee and typically, again, these other cases that  
21 are cited all deal with another Unsecured Creditors'  
22 Committee -- another creditor body, that is, landlords for  
23 example saying, We need our own committee. That's interesting.  
24 I think, Mr. Gibbs is probably familiar with this and we see  
25 multiple committees in many large cases around the country.

1 Even some that start to get closer to this case than many of  
2 the cases that were cited in the objections.

3           For example, you'll often see -- you'll occasionally  
4 see mechanic lien committees whereby a group of mechanic liens  
5 who are similarly situated rather than having to each one go  
6 out and hire counsel or come up with some multiple  
7 representation approach which can be very difficult from a  
8 number of perspectives, picking someone, cost sharing, even  
9 ethical considerations about who funds litigation. A committee  
10 is formed and in those instances if you think about it, Your  
11 Honor, the mechanic's lien claim it's if they're successful on  
12 the validity of their mechanic's lien claims remove property  
13 that would otherwise be available to go to other Creditors.

14           So, the cases that have been cited while they lay out  
15 the standard -- and by standards I mean that it's an unusual  
16 form of relief. I think, some of the cases talked about it  
17 being an extraordinary form of relief in order to have another  
18 committee appointed. I think that the adequacy of  
19 representation is analyzed by Courts on a case-by-case basis  
20 based on upon the facts and circumstances of each case.

21           We don't disagree that cost to the estate is a  
22 significant factor in what the Court should consider in  
23 determining whether to appoint another committee. What we --  
24 where the disagreement comes is the application of the law to  
25 the facts, not on the law because it's the Commingled

1 Exchangers' position that this is an unusual case.

2           Now, I hesitate to say that because, frankly, the  
3 cases that I've been doing for the last 24 years almost every  
4 single one -- particularly some of the larger ones with some  
5 really complex issues, they all have their unique features.  
6 But, in this instance unlike all the other cases that were  
7 cited by the parties, we have a group that is asking Your Honor  
8 to appoint an official committee and as, I think, the parties  
9 have pointed out that the effect if that committee were to  
10 prevail on its position would be to remove property from the  
11 estate. We acknowledge that. It's unusual.

12           But, the question is for -- in purposes of  
13 administering the bankruptcy estate, is it an appropriate  
14 remedy nonetheless? And we think it is. And the reason we  
15 think it is goes to the heart of the nature of the Creditors'  
16 Committee and the role that they're playing.

17           Your Honor, I could cite you many, many cases, but  
18 just to pick out a couple and -- a couple of fairly well known.  
19 I'll pick out one that's well known to me because there's a  
20 case from the First Circuit called In Re: SPM Manufacturing  
21 Corporation much better known for what it authorized which was  
22 bypassing classes of creditors and having a secured creditor  
23 give a portion of its distribution to unsecured creditors and  
24 the court -- First Circuit said, it's their money to do with as  
25 they want.

1 But, during the course of its opinion the Court  
2 stated -- and I'm quoting, "While the Creditors' Committee and  
3 its members must act in accordance with the provisions of the  
4 bankruptcy code and with proper regard for the bankruptcy court  
5 the committee is a fiduciary for those whom it represents not  
6 for the Debtor or the estate generally. Thus, the Committee's  
7 fiduciary duty as such runs to the parties or class it  
8 represents." And the -- it's 984 F2d 1305 and let's see if I  
9 can find you a specific page cite, Your Honor. I'm having  
10 difficulty. I don't have the right form. I'll hand it up to  
11 your clerk later so I don't waste the Court's time now. And as  
12 I say I could give you a multitude of cases that talk about the  
13 fiduciary role of a Creditors' Committee and that it represents  
14 the unsecured creditors generally.

15 Now, here we have five commingled exchangers who are  
16 on the committee and, so when you look at the cases and you  
17 look at the request for an additional committee and a Court  
18 will say, well, there's two landlords out of the seven members  
19 of the committee. That's adequate representation. Here we're  
20 five for five. There's no denying that fact, but I also think  
21 that the facts, what has transpired in the case, there's no  
22 denying those either.

23 Mr. Gibbs has stood up here on more than one occasion  
24 now in court and said that the Unsecured Creditors' Committee  
25 comprised of five commingled exchangers takes the position that

1 none of the property that the Debtor is holding is held in  
2 trust and it's property of the estate. They have filed  
3 answers to numerous adversary proceedings where the first  
4 affirmative defense states that explicitly, that these funds  
5 are not held in trust, they are property of the estate.

6           So, in some manner -- and hats off to Mr. Gibbs and  
7 to the committee members because they're apparently taking  
8 their fiduciary duty to all general unsecured creditors very  
9 seriously to the extend of, perhaps, taking a position adverse  
10 to the majority of the commingled exchangers. But, I think it  
11 is fair to say as we stand here before you today, that if there  
12 are, in fact, I think the Debtor has estimated 400 commingled  
13 exchangers, that if the committee has voted unanimously to take  
14 the positions it's taken, then there are 395 other commingled  
15 exchangers who take the position that this property is held in  
16 trust and if the committee voted by a majority, then there are  
17 perhaps 396 or 397 commingled exchangers that take that view.

18           So, we don't believe that in those circumstances --  
19 in these circumstances the Unsecured Creditors' Committee is  
20 adequately representing the interests of the commingled  
21 exchangers. In fact, it's taking a position diametrically  
22 opposed to their interests. If we win I understand the  
23 argument that, well, we're going to be taking property out of  
24 the estate. But, the Debtors and the LES Committee came to  
25 this court with a protocol and said, we understand this is an

1 issue. It needs to be resolved. Here's the way to do it  
2 efficiently, test cases.

3 On one side you have LES, LFG, the LES Committee  
4 represented by three law firms of many, many hundreds of  
5 lawyers each. And here you have test case plaintiff  
6 represented by one law firm and maybe co-counsel or local  
7 counsel, maybe there are some large firms. There are certainly  
8 many more smaller firms.

9 One of the reasons that -- speaking for myself that I  
10 was opposed to the idea of the protocol is because as Your  
11 Honor is well aware there can be different kinds of trusts in  
12 bankruptcy. There could be constructive trusts. There can be  
13 express trusts. I think we're dealing with an express trust  
14 here.

15 One of the issues that often comes up in these cases  
16 is tracing. I don't know enough about the facts as I stand  
17 here today about whether any individual plaintiff, including  
18 any test case plaintiff, can trace. But, my understanding, and  
19 again, it's based on a very preliminary understanding of the  
20 facts, is that the monies that this Debtor holds were funds  
21 that were provided by 1031 Exchangers. Period.

22 Now, maybe those were converted to auction rate  
23 securities and then maybe some auction rate securities were  
24 transferred to the parent in exchange for cash, but in essence  
25 the core, the race, while it may have changed form is all

1 traceable to 1031 Exchanger funds. And, so on an  
2 individualized basis, I don't know yet whether there is tracing  
3 that can be proven. But, as a group, I think that the group  
4 can argue that the Debtor is holding these funds in trust for  
5 Exchangers. And the outcome of that is very, very significant  
6 because we have heard in their objection that the LFG Committee  
7 claims that it may be the largest single Creditor of this  
8 estate.

9           Well, if those funds are available for everyone  
10 there's the potential for dilution. And I know they're going  
11 to be arguments about whether that's a valid claim, whether it  
12 ought to be subordinated and so forth. But, if there's a trust  
13 fund established those funds are going to be basically held off  
14 to the side and available only for Exchangers. And in my vies  
15 there is a very strong argument that a committee representing  
16 these Exchangers can make the argument that leaving aside we  
17 may have to deal with who's -- who among the Exchangers are  
18 entitled to the specific funds as a group? Those funds are  
19 held in trust.

20           That is the reason why the Ad Hoc committee believes  
21 that it's the first request for relief, that the Committee, the  
22 appointment of a committee to represent the interests of all  
23 the similarly situated individuals and entities whose interest  
24 are not being represented by the committee, but, in fact, are  
25 being opposed each step of the way by the committee. That's

1 why we believe that a Committee is the correct result. We  
2 understand that there will be costs, but, Your Honor, I submit  
3 that you have lawyers coming and they would -- I represent a  
4 half dozen or a dozen and Mr. Terry represents ten or 15 and  
5 Mr. Page represents 30 and there are all these expenses being  
6 borne by Creditors. You understood quite well on January 12th,  
7 I mean, the parade of lawyers that were getting up and feeling  
8 that they needed to have their voices heard. I'm not  
9 suggesting that they won't be a party in interest and couldn't  
10 be heard, but we do know that when you have an Unsecured  
11 Creditors' Committee you have a committee counsel and it's  
12 fairly rare unless there's a claim objection or a particular  
13 matter specific to the creditor that you hear from a parade of  
14 counsel for unsecured creditors.

15 I think that's the benefit that will be derived here,  
16 as well. And I know that there were some suggestion in the  
17 objections about well, what will -- might the Committee  
18 intervene in the adversaries? I can represent to Your Honor  
19 that if I were representing that committee, the answer is, yes,  
20 we would because I think that there are positions that can be  
21 espoused by a committee on behalf of the group as a whole as  
22 opposed to just the individual test case plaintiffs who may  
23 want to go at this from an individualized basis.

24 So, I understand the additional costs, but I also  
25 understand that ease of administration is something that the

1 court is concerned about having parties adequately represented  
2 in the bankruptcy court, having their voices heard should be  
3 something that the court is concerned about and I think Your  
4 Honor expressed that concern at the last hearing on January  
5 12th.

6           So, that's the first request for relief. As I said,  
7 I don't think they're mutually exclusive, but particularly if  
8 the court is disinclined to appoint a committee we have  
9 proposed an alternative and that is that the test case  
10 plaintiff's fees should be allowed as administrative expenses  
11 under 503(b) (3) and/or 503(b) (4).

12           THE COURT: We can't go for all the test cases or  
13 just the one that you would be involved in?

14           MR. GELLER: Again, there was some question about  
15 that. I'm glad Your Honor asked. I know what my view is as to  
16 fairness. I can't speak for segregated or escrowed exchangers.  
17 I don't represent any of them. They all have their own  
18 counsel. There are attorney/client relationships there. As to  
19 the commingled exchangers, I can't conceive of a rational basis  
20 to distinguish one from the other. I think imposing the burden  
21 on whether it would be someone who represents three or six or  
22 like Mr. Page, perhaps 30, to have those creditors bear the  
23 expense for all creditors is to me just not fair and I can't  
24 tell you that Commingle Type A should have its fees paid, but  
25 Commingle Type B and the note case shouldn't. I just can't

1 think of a way to rationalize that distinction.

2           Now, there's an expedited basis -- expedited  
3 schedule. I think there is a limit to how much is going to be  
4 spent on these things. I would expect coordination among  
5 counsel. I don't think that Your Honor would want and would  
6 compensate counsel for tripping over one another and submitting  
7 identical briefs on the same issue and spending countless hours  
8 researching the same things. There would be some cooperation,  
9 I would hope, if I had anything to say about it. But, again,  
10 that sort of goes back to the benefit of a committee that the  
11 Committee, I think, could file briefs that on these issues for  
12 the commingled creditors in each one of the cases if there are  
13 any distinctions to be drawn.

14           Going back to the test case plaintiff issue, again, I  
15 understand what the bankruptcy code says that typically these  
16 considerations, a motion for substantial contributions to the  
17 case, are made after the fact. I get it. But, the facts here  
18 are that as to the Commingled Type A plaintiff -- and Your  
19 Honor approved a protocol that provided for that type of  
20 plaintiff, we can't find anyone. I mean, Aiello (phonetic),  
21 the first person that was designated by the Debtor and the  
22 Creditors' Committee, has declined. All the other parties who  
23 have been approached have declined. I wouldn't say all the  
24 other parties. The list that was provided to us of the  
25 Commingled Type A are only those where adversaries had been

1 filed.

2           There may well be a host of others out there, but --  
3 I need to digress for a moment if I could, Your Honor, just to  
4 explain a bit of the status. I read Paragraph 8 of the motion  
5 for the protocol which drew the distinction -- the purported  
6 distinction anyway, between Commingle Type A and Commingle Type  
7 B and I didn't get it. And I can point Your Honor to the  
8 language if you'd like, but -- and it might be actually helpful  
9 to do that if I could just grab that motion, Your Honor. I  
10 actually have that here. I don't know if you have that in  
11 front of you, Your Honor.

12           THE COURT: I don't have that motion.

13           MR. GELLER: Okay. Well, the first form, this is  
14 Commingle Type A, "Generally involves the wire transfer  
15 exchange funds to a generally LES account at Sun Trust Bank and  
16 the relevant exchange agreement provides that taxpayer will  
17 receive interest on the exchange funds at a certain rate of  
18 interest after the monies are received following LES's receipt  
19 of funds via wire transfer to the LES account in Richmond,  
20 Virginia that it maintains at Sun Trust Bank for the purpose of  
21 collecting taxpayer exchange funds." I read that and then I  
22 went down.

23           "Type B provides that LES will deposit the exchange  
24 funds in an account maintained at Sun Trust Bank in Richmond,  
25 Virginia and will receive interest on the exchange funds at

1 some rate from the first day after receipt of those funds." I  
2 must have read those sentences a dozen times and I'm looking  
3 and I'm saying, well, Type A has a language that says for the  
4 purpose of collecting taxpayer exchange funds at the -- after  
5 the language about after the funds come into Sun Trust and Type  
6 B does not. That was a language differentiation that I could  
7 draw just from looking at it.

8           What jumped out at me as more significant was that in  
9 Type A, taxpayer will receive interest on the exchange funds,  
10 whereas, Type B said LES will deposit the exchange funds in an  
11 account maintained at Sun Trust Bank in Richmond, Virginia and  
12 will receive interest on the exchange funds. It sounds like  
13 LES gets the interest under Type B.

14           So, I immediately pull out all the exchange  
15 agreements from my clients and what do they say? Well, they  
16 track the Type B language for the first part of the sentence.  
17 They all -- I think, four or five or five out of the six of  
18 mine say, "LES will deposit the exchange funds in an account  
19 maintained at Sun Trust Bank in Richmond, Virginia." So,  
20 classic Type B and then it says, "and taxpayer will be  
21 guaranteed to receive interest on the exchange funds." It  
22 shoots right back to Type A.

23           So, we've -- I called and had a discussion with  
24 committee counsel. Can you tell me what was the basis for your  
25 distinction, was it a language issue, was it who gets the

1 interest? And I was referred to the litigators at Akin Gump  
2 who can -- who said to us, well, originally they were looking  
3 at that for the purpose of collecting taxpayer's exchange funds  
4 language, but when we drew the -- them to -- we noted the  
5 distinction and who gets the interest, the committee seeing it  
6 inclined -- well, you're right, that could be a distinction,  
7 too. If you have someone that you contend with respect to that  
8 distinction could be a Type A, let us know and we'll look at  
9 that. The Debtor -- we identified one of those and the Debtor  
10 has said, No, that's not what we meant in the Type A.

11 So, there are the group that we've had identified to  
12 date by the Debtor and the Committee who are Type A. None of  
13 those people are willing to serve and I think the reason is  
14 fairly self-evident. They're going to have to undertake all  
15 the discovery, whatever depositions are required. I understand  
16 that we've been told, oh, there aren't that many documents.  
17 Your Honor, I have not been involved in a matter involving wire  
18 transfers of funds and the like where the electronic discovery  
19 is not incredibly burdensome. I mean, just what used to be a  
20 couple hundred thousand documents now is millions of documents  
21 and, virtually, every significant piece of litigation in which  
22 I'm involved.

23 Moreover, I think appropriately, Your Honor ruled  
24 we're going to decide the issues, but I'm not letting the test  
25 case plaintiffs get a leg up on anyone. So, you can have the

1 privilege of being the one to incur all the expense and argue  
2 your positions to the Court, maybe win, maybe lose. If you  
3 lose, that's too bad and that may have a presidential effect on  
4 all the other cases. But if you win you don't get anything  
5 really out of it because I may rule the same way in all the  
6 other cases and then you're all going to be similarly situated  
7 and share what is the reason for any of these people to incur  
8 the expense.

9 I can't speak to Mr. Page and his group. Maybe the  
10 fact that he had 30 people led them to all agree to share. I  
11 don't know what arrangement he made. I don't know how he  
12 resolved some of the ethical concerns that I have when you're  
13 dealing with people whose agreements differ a little bit, when  
14 their intent may differ, when the testimony may differ between  
15 people. There are some real concerns that I have about  
16 representing a group like that in one of these test cases.

17 So, we've made this alternative request and we  
18 understand that typically there's a retroactive review of  
19 whether there has been benefit to the estate. But, in this  
20 instance, the Debtors and the Committee came to the court and  
21 said here's our protocol. And I can quote the language where  
22 they say, This is going to benefit the estate. This is going  
23 to streamline the process. We're going to get determinations  
24 of the critical issues that are going to help resolve all the  
25 other cases. This is going to help the administration of this

1 estate.

2 Now, that we're saying, you know what? You're  
3 getting paid. The Debtor, the LFG Committee, the LES Committee  
4 are all going to be paid for moving this case along. How about  
5 us too? How about the test case plaintiffs? And, sort of, No,  
6 we don't want to dilute the estate anymore. We're all going to  
7 get paid, but you can't. I think that's just fundamentally  
8 unfair given their own statements about that these -- this  
9 protocol will benefit the estate. So --

10 THE COURT: You think that if I approve the fees for  
11 the test case plaintiffs that we would be able to find somebody  
12 in Category A that would be willing to go forward and carry the  
13 mantel for that type of trust?

14 MR. GELLER: I am quite confident that we will. Now,  
15 again, this question about what's the distinction between A and  
16 B? I know --

17 THE COURT: All right. So, we'll put that aside.

18 MR. GELLER: Yes, putting that aside, yes. I'm  
19 highly confident that we will find people who would be willing  
20 to be the test case.

21 Your Honor, again, we tried to be very forthright in  
22 our motion. Nobody is asking the Court to issue a blank check  
23 to test case plaintiff's counsel that's great, we're going to  
24 get paid from the estate. First of all, I think everyone  
25 understands that if there is victory on the part of the

1 exchangers this estate might not have a lot in it other than  
2 causes of action that might be pursued to recover monies. So,  
3 there is some risk there, but I don't believe that people go  
4 into this and see dollar signs in their eyes. I mean, I think  
5 what they go into it with is a sense, okay, I can represent my  
6 client adequately, I can do my job thoroughly. I can enlist  
7 the support of some of the local people if need be, if I don't  
8 have the staff to do the discovery and participate in the  
9 depositions with everyone else.

10           And, so what we've said is, yes, admittedly unusual  
11 to give, sort of, advanced recognition of benefit to the estate  
12 by serving as the test case plaintiff. But, we would submit  
13 that the attorneys would have to come in on an application just  
14 like the Debtors, just like the Committees to say, Your Honor,  
15 here's what we did. Here's why we did what we did. We think  
16 it was reasonable the hours that were expended. And Your Honor  
17 will have an opportunity and the other parties will have an  
18 opportunity to review that, critique it to the extent you deem  
19 appropriate. It will have it be allowed.

20           But, without that advance approval, you're basically  
21 saying to the law office of Jay Geller or any of the other  
22 attorney firms here take this on. Your clients are telling you  
23 they can't afford to pay you, so you're basically taking a  
24 contingent fee. At least on a contingent fee case you might  
25 get 33 percent or 25 percent, but here, it's purely contingent

1 and if you win for your clients, maybe you can make a common  
2 fund argument that you benefitted everybody and you can  
3 recover. But, there almost -- you have to go back to your  
4 clients and say I need you to somehow guarantee my fees in case  
5 there's no substantial contribution found.

6 It's just incredibly difficult, and so, I'm going to  
7 conclude, Your Honor, in the following way.

8 THE COURT: Before you do that --

9 MR. GELLER: Please.

10 THE COURT: -- let me ask one last -- and this goes  
11 back to an earlier question. If I was to approve that request,  
12 am I going to hear Mr. Bernstein, you know, coming back here  
13 and Mr. Wolf coming back saying, wait a second, you know, we  
14 should be able to have out attorney's fees paid from the  
15 estate, as well.

16 MR. GELLER: I don't know. I don't know. Maybe they  
17 will make that argument. Again, part of the reason that I've  
18 stayed away from getting into the segregated and escrowed  
19 account folks has to do with the way this case has run up until  
20 now. I mean, on day one, Debtor's counsel walked into court  
21 and said, None of these are trust funds. All of this is  
22 property of the estate. On day ten they came into court with a  
23 settlement motion and said, the segregated account holders, I  
24 don't even know whether that included the escrowed or not,  
25 it's not our property or at least we're willing to settle in

1 exchange for release by conceding that it's not our property  
2 and getting it out of the estate. I was not privy to what  
3 happened after the December 16th hearing and why those matters  
4 were not settled. All I know is that the next thing I knew  
5 there was a protocol proposed to actually litigate these things  
6 that I understood were going to be settled.

7           So, I don't know whether those folks are going to  
8 come and say, we made a substantial contribution because we  
9 resolved all the segregated cases. And I won't espouse a  
10 position on that and whether that's proper or not. I just know  
11 that for the commingled folks where they tend to be much  
12 smaller in amount many, many more individuals who really can't  
13 afford counsel, I think -- I'm not sure legally there's a valid  
14 distinction, but I do know that Mr. Bernstein from Arnold and  
15 Porter representing the \$137 million at stake, they clearly can  
16 afford to retain counsel and represent their interests whether  
17 that's a fair distinction, I don't know.

18           Your Honor, as I started to say, I'm going to  
19 conclude. I know that in the last few years I've seen a  
20 growing tendency, and I've seen it in my one -- the time I was  
21 here in court for people to, sort of, preempt the opponent's --  
22 the objector's arguments. I'd rather let them argue and  
23 reserve my right to respond to those arguments. I'm just  
24 presenting the position. I think it's -- we've thought about  
25 it a great deal. We've tried to come up with something that's

1 fair. I continue to believe that the Committee approach allows  
2 one party in an official capacity that can intervene and state  
3 the position of commingled exchangers in each of the commingled  
4 cases avoid the redundancy, manage the case is a better  
5 solution and also allows some arguments that might be made  
6 collectively to be made more effectively than might be able to  
7 be made by an individual test plaintiff.

8 But, if for the reasons stated in the objections or  
9 other reasons that Your Honor has, if you're not inclined to do  
10 that, I think that given the protocol that the Debtor and the  
11 Committee have proposed and gotten Your Honor to approve with  
12 the benefits that they have told you, will inure to the estate  
13 as a result of that. I think it just levels the playing field  
14 for test case plaintiffs to be compensated from the estate and  
15 not have to do that on their own nickel.

16 THE COURT: Before you sit down, one final question.  
17 If I grant the motion to appoint the official committee, how  
18 does that solve the problem of getting a test case plaintiff  
19 for Category A?

20 MR. GELLER: Your Honor, that's one of the reasons I  
21 said earlier I'm not sure that they're mutually exclusive. I  
22 do, however, think that if there was a committee that was going  
23 to be briefing critical issues, that was going to be  
24 participating in discovery, could share that discovery, again,  
25 with the cooperation that I envision, I think that the test

1 case plaintiffs' workload would be diminished dramatically in  
2 their cases. I think that they would spend a lot less money  
3 and you'd find more willingness for those test case plaintiffs  
4 to serve in that capacity when a significant portion of the  
5 laboring oar is going to be undertaken by the Committee.

6 THE COURT: So, then you think that one of your  
7 committee members would step up to the plate in that instance  
8 and go forward?

9 MR. GELLER: I do. I do think in that instance where  
10 they knew that a lot of the work is going to be done by the  
11 Committee, I think that you would find other Type A plaintiffs  
12 who would step up to the plate.

13 THE COURT: All right. Thank you, very much.

14 MR. GELLER: Thank you, Your Honor.

15 THE COURT: Let me hear from counsel for the Debtor.

16 MS. BOWER: Thank you, Your Honor. Elizabeth Bower  
17 of Willkie, Farr and Gallagher. You previously granted my  
18 motion for admission Pro Hoc.

19 THE COURT: Yes.

20 MS. BOWER: Good afternoon.

21 THE COURT: Good afternoon.

22 MS. BOWER: Your Honor, as was clear to the Debtor  
23 upon reading the motion of the Ad Hoc Committee for either the  
24 appointment as an official committee or the 503(b)(3)  
25 application in the alternative, it was clear to us and has

1 become more clear today with Mr. Geller's presentation that the  
2 Ad Hoc committee is seeking a subsidy from the Debtor of these  
3 adversary proceedings.

4           As set forth in our objection, the Ad Hoc Committee  
5 is seeking -- purporting to represent customers of LES who are  
6 parties to commingled exchange agreements. That happens to be  
7 the same constitution of the official LES Committee and as Your  
8 Honor is well aware the LES Committee has, since its  
9 appointment, actively participated in both the bankruptcy case  
10 and in the adversary proceedings by virtue of intervention that  
11 they have requested and Your Honor has granted in each of the  
12 adversary proceedings, not only the lead cases. And to the  
13 extent that there is any doubt about their fiduciary  
14 obligation, which I represent I don't believe that there is on  
15 behalf of the LES Committee, Your Honor has stated on several  
16 occasions, and the LES Committee has acknowledged that they do,  
17 in fact, owe and are representing the interests of all of its  
18 members.

19           And so, Your Honor, it's our position that the basis  
20 for the appointment of an additional committee under a Section  
21 1102(a)(2) is just not -- is not present in these  
22 circumstances. The question of whether or not an additional  
23 committee is necessary to adequately represent creditors, goes  
24 to whether or not creditors have a voice on the committee. And  
25 as Your Honor is, again, well aware, the Committee is comprised

1 of the exact representatives that the Ad Hoc Committee is  
2 seeking to represent and therefore, their voice, not only is it  
3 a strong voice, it is the only voice on the committee. And we  
4 -- it is our position that any work or efforts undertaken by  
5 the Ad Hoc Committee would simply be duplicative of the work  
6 undertaken by the LES Committee and would impose a significant  
7 burden on LES's estate.

8           Mr. Geller discussed several cases involving the  
9 appointments of additional committees that he represented,  
10 involved committees form to avoid individuals from retaining  
11 their own counsel or efforts to pull resources and I present --  
12 I submit to you, Your Honor, that many of the adversary  
13 proceedings at issue in this case were filed prior to the  
14 appointment of the official LES Committee. Many have come in  
15 clearly since the appoint of the LES Committee including  
16 several that have come in since the Ad Hoc Committee initially  
17 submitted its motion to Your Honor for official status.

18           This is not a circumstance where individuals are  
19 seeking to avoid the retention of their own individual counsel.  
20 These customers have already retained their own counsel who  
21 have filed lawsuits on their behalf that they seek --  
22 presumably sought to prosecute in this bankruptcy matter  
23 through -- by virtue of the adversary proceeding process prior  
24 to Your Honor's entry of the protocol order.

25           Mr. Geller also mentioned that the -- it is Ad Hoc

1 Committee's position that as a committee they may be more  
2 effectively -- they may be more effective in presenting group  
3 arguments such as the exchange funds are held in trust on  
4 behalf of the LES Committees and I've sat in the courtroom for  
5 several hearing now in this bankruptcy case and it is  
6 abundantly clear to me, at least, that each of the plaintiffs  
7 in each of the adversary proceedings, more specifically in the  
8 lead cases that have already been designated, are presenting  
9 that precise argument, that the exchange funds are held in  
10 trust on their behalf.

11           So, you know, to the extent that there is a concern  
12 that that position will not be adequately litigated I submit  
13 that each of the plaintiffs will, in their own interest,  
14 adequately litigate that argument.

15           THE COURT: But you suggest in the papers that you  
16 filed that you've had difficulty finding somebody in Category A  
17 to step up to the plate and carry the mantle for that group of  
18 similarly situated parties?

19           MS. BOWER: Yes, we have, Your Honor. And at -- the  
20 Ad Hoc Committee was quite forthright in their papers and,  
21 again, this afternoon in court that it is their belief that the  
22 concern with respect to those plaintiffs has to do with me  
23 incurring excessive costs. You know, it -- while we're not  
24 unsympathetic to that position, again, these plaintiffs did  
25 file adversary proceedings. And as any plaintiff in any

1 litigation in this country, they are -- you know, part of the  
2 benefits of bringing a lawsuit in which they may be successful  
3 is the burden of prosecuting that litigation.

4 THE COURT: And I realize that, but then I went and  
5 entered that protocol order which changed the landscape at that  
6 point and now, you know, we've got all of the plaintiffs who  
7 are similarly situated looking and saying well, wait a second,  
8 I'd be better off if the other person carried the mantle and  
9 then I didn't have to bear the expense of that going on, but I  
10 can reap the benefit because -- get the benefit of all the  
11 discovery that's done, get the benefit of the, you know, the  
12 precedent that might be set or whatever, and be able to resolve  
13 their claims for very little while the person who went forward  
14 beared -- would bear the disproportionate amount of the  
15 expense.

16 MS. BOWER: Yes, Your Honor. However, the protocol  
17 order was entered as a way of handling or managing these  
18 literally dozens of adversary proceedings that have been filed  
19 to date. I think the number is --

20 THE COURT: And I'm commending you on that. I think  
21 it's a very good procedure. I don't -- I'm not -- I think it  
22 was a very well crafted and such -- I'm just saying that in  
23 this one particular situation that, you know, we do have a  
24 problem and we don't have somebody representing the parties in  
25 Category A.

1 MS. BOWER: And that, obviously -- we believed as the  
2 Debtor, that it was important to include a Type A commingled  
3 case in the protocol when we were working with the Committee to  
4 establish the protocol and trying to provide representative  
5 cases. It was our intent at that time to be as inclusive as  
6 possible within reason. And we noticed in reviewing the  
7 exchange agreements in adversary proceedings that have been  
8 filed to date that there was this distinction in the language  
9 between Type A and Type B and, therefore, we thought, you know,  
10 it would just be beneficial, to the extent that we can, to  
11 include both.

12 As the AD Hoc Committee acknowledged in their  
13 opposition to that protocol the distinctions between those two  
14 agreements are not so great that they likely would result in  
15 different legal analyses. In other words, they admitted in  
16 opposition to the protocol that the commingled exchangers, as  
17 they've used that description, have agreements that are  
18 substantially similar from a legal standpoint. And while it  
19 was our hope that we could proceed with the Type A and Type B  
20 commingled case, we now obviously with the entry of the  
21 protocol order, have the additional commingled case with the  
22 note as part of the consideration, we do not believe it does  
23 substantial violence to the protocol to proceed without a Type  
24 A case at this stage.

25 And the reason for that is we suspect that Your

1 Honor's determination of 541, whether or not the exchange funds  
2 are property of the estate, will not hinge on the slight  
3 variation in language between those two agreements, and believe  
4 that the language in the Type B agreement is sufficiently broad  
5 such that if Your Honor were to determine that the exchange  
6 funds are, in fact, property of the estate, it would subsume  
7 the exchange funds pursuant to agreements and fit under the  
8 Type A category.

9           And with respect to the distinction between type A  
10 and Type B, Mr. Geller expressed some frustration in not  
11 understanding, at least, initially, what the distinction was  
12 between Type A and Type B. And I would submit to Your Honor  
13 that that distinction was made in connection with our motion.  
14 It was noticed and heard. Multiple parties -- an upwards of  
15 ten parties objected to that motion. Not one of them raised as  
16 a concern any potential ambiguity between Type A and Type B at  
17 that point. We have only heard that concern in recent days in  
18 trying to find a suitable Type A case and it certainly was not  
19 the Debtors' intent to obscure that distinction or in any way  
20 conceal what we believe to be the distinction at issue between  
21 Type A and Type B and would have been more than happy to  
22 address any concerns that any party may have had at that time  
23 and continue to do so today, including -- I had some email  
24 correspondence with Mr. Geller yesterday on this precise point.

25           And so, Your Honor, it is our position that the

1 granting official status to the Ad Hoc Committee would be  
2 duplicative of the existing committee. As we started to  
3 discuss the alternative relief which is a 503(b)(3)  
4 application, we think is improper at this stage. It is  
5 premature. The Ad Hoc Committee is seeking a prospective  
6 determination that they will have, in fact, provided a  
7 substantial contribution to the estate before lifting a pen.  
8 And we think that 503(b)(3) provides a mechanism by which  
9 parties who believe that they have provided substantial  
10 contribution to the estate may file a motion that would apply  
11 to the Ad Hoc Committee or any individual Creditor including  
12 any candidate for a Type A case.

13           Should they believe at the conclusion of the  
14 litigation that they have, in fact, filed substantial  
15 contribution to the estate they could make a motion at that  
16 time after notice of which parties could state their positions  
17 and it would be fully litigated on a full record. And we  
18 believe that that is the proper mechanism to proceed with an  
19 application such as what the Committee has presented to you.

20           THE COURT: Well, Mr. Geller was saying that they  
21 would proceed that way, file an application and such just like  
22 any other counsel representing a Debtor or a Committee in the  
23 case and so, the Court would have an opportunity to review the  
24 fees and such at that time.

25           MS. BOWER: Yes, Your Honor, but that review would be

1 limited to a review for reasonableness. What they're asking  
2 for today is a determination that they provided a substantial  
3 contribution. Therefore, the question of whether or not they  
4 did, in fact, provide substantial contribution would have  
5 already been decided at the end of the case.

6 THE COURT: Well, couldn't the substantial  
7 contribution be that we would have somebody representing  
8 Category A parties?

9 MS. BOWER: Yeah, I think at this point I think it's  
10 improper to prejudge either in favor or against whether or not  
11 a party -- a lead case plaintiff would provide substantially  
12 contribution. I would also submit that --

13 THE COURT: Well, I'm suggesting maybe the  
14 substantial contribution would be the fact that we have that  
15 Category being represented so that we can get all of the rest  
16 of the cases then resolved based on that test case being able  
17 to go forward.

18 MS. BOWER: Your Honor, I'm, again, hesitant to  
19 suggest that we believe that would provide substantial  
20 contribution for the reason I stated earlier which is we  
21 believe that the language of Type B would adequately cover the  
22 Type A cases in the event that the Court were to decide that  
23 the property is the asset of the estate.

24 I would also add, Your Honor, that the benefit to the  
25 estate that is derived from the protocol comes from the virtue

1 of 60 plus adversary proceedings being filed and, therefore,  
2 the benefit to the estate is in terms of not having to defend  
3 against multiple cases at the same time which I do believe Your  
4 Honor is aware of, rather than adding some additional benefit  
5 to the estate. I mean, had these adversary proceedings not  
6 been filed and had we been dealing with just five cases there  
7 would be no benefit at issue to be discussing.

8           So, I think that we see no reason and we don't -- we  
9 see no reason to take certain of these test case plaintiffs, as  
10 Mr. Geller represented. He could only speak on behalf of the  
11 commingled exchangers. We see no reason to take certain of  
12 these plaintiffs outside of the realm of the normal bankruptcy  
13 rules and procedures. These are adversary proceedings that  
14 were filed on behalf of individual clients who retained  
15 individual counsel and they presumably were prepared to proceed  
16 with our case and should they elect to be a test case are  
17 entitled to proceed with their case.

18           The discovery at issue in these test cases, there has  
19 been some discussion that it will be somewhat more burdensome  
20 as a test case plaintiff and I, quite frankly, disagree with  
21 that characterization to the extent that the discovery  
22 occurring in each of these test cases will be limited to the  
23 test relief case. The discovery that will be undertaken or  
24 that we have, at least, seen so far, is similar to the  
25 discovery that would occur had the case proceeded in its

1 ordinary course.

2           To the extent that there is or is not electronic  
3 discovery is also something that was raised at the January 12th  
4 hearing where we -- where the Debtor, quite frankly, stated to  
5 the extent of any plaintiff is seeking electronic discovery  
6 that could impact the protocol. So, I would -- I'm not certain  
7 that the possibility of electronic discovery should be a factor  
8 that goes into the Court's consideration whether or not fees  
9 under 503(b)(3) are appropriate at this stage of the  
10 litigation. Again, the discovery that is contemplated and that  
11 we have seen thus far in the other four lead cases that have  
12 been going forward is the normal discovery that you would see  
13 in any adversary proceeding if filed.

14           Your Honor also asked the question of how the  
15 appointment of the Ad Hoc Committee promotes the selection of  
16 the Type A test case. And I understood Mr. Geller to say that  
17 he believed -- and I presume that that is based on  
18 conversations that he has had as a member of the Ad Hoc  
19 Committee, that it will, in fact, promote the selection of the  
20 test case because someone will step forward with the  
21 understanding or expectation that the Ad Hoc Committee may help  
22 out. And, Your Honor, I would -- I anticipate that should we  
23 proceed with that route, whether the Ad Hoc Committee wants to  
24 represent all of their clients, would clearly undermine the  
25 purpose of the protocol. But, to the extent that one of the

1 Type A cases would be elected as the test case I suspect that  
2 we will have competing motions over the next few days between  
3 those test case plaintiffs as to who it is should proceed and  
4 with or without a statement from the Ad Hoc Committee as to who  
5 they think is the best candidate.

6           So, I'm not optimistic that the selection of -- that  
7 the official status of an Ad Hoc Committee would really promote  
8 the selection of a Type A case. And as I suggested earlier,  
9 I'm not sure that the selection of a Type A case is necessary  
10 to meet the goals and objectives of the protocol as Your Honor  
11 has already entered.

12           Your Honor, I have nothing further at this time. If  
13 you have any questions or concerns I'd be happy to address  
14 them.

15           THE COURT: Thank you, very much. Mr. Matson?

16           MR. MATSON: Good afternoon, Your Honor.

17           THE COURT: Good afternoon.

18           MR. MATSON: Bruce Matson here as counsel for the  
19 official committee of unsecured creditors for the Land America  
20 Financial Group case. Your Honor, I'll try not to go over some  
21 of the same arguments. I think there are some observations  
22 that are really important to make in this case and one is a bit  
23 of a standing point of curiosity which is, if you read the  
24 motion that's before Your Honor, the Committee is a Committee  
25 of attorneys and it doesn't say they're moving on behalf of

1 their clients. So, I point that out because I'm a bit confused  
2 by the motion as it relates to that. It seems to me that the  
3 Creditors -- the exchangers may have standing, but I don't know  
4 how you confer standing upon yourself by a lawyers getting  
5 together. So, I think it's an issue that movants need to  
6 address.

7 But, I think more importantly is the substantive  
8 issue here. And I think it's important that we look at, sort  
9 of what's the starting point for the analysis here? We jumped  
10 into this argument about the benefit of the Committee, but they  
11 have a significant burden. If we look at the starting point it  
12 should be where do their -- are their -- from what do their  
13 rights -- from where do they come?

14 We've got contractual issues and we've got the  
15 bankruptcy code and I think the both of those answer all of the  
16 questions that are before Your Honor today. First of all,  
17 these parties all signed an exchange agreement and we've talked  
18 about the difference between A and B a lot this afternoon. And  
19 I think I'll say what the Debtor is sort of unwilling to say.  
20 There is really no difference between A and B for 99 percent of  
21 the issues that Your Honor may have to decide. Even Mr. Geller  
22 acknowledged that there doesn't appear to be much difference.  
23 There may be a difference as it relates to the entitlement to  
24 interest. There may be an interest.

25 THE COURT: But, we've already approved a protocol

1 that says that we need to have this category represented going  
2 forward and we did that by consent. You certainly were a part  
3 of putting together the protocol and we thought that it was a  
4 good idea then. I certainly thought it was a good idea and it  
5 seems to be a pretty good idea right now, but we don't have  
6 that category being represented. And now we're saying, Well,  
7 we don't really need that category.

8           And I just got to tell you that concerns me that  
9 we're just going to dismiss that category. I think that if it  
10 was good then, it's good now.

11           MR. MATSON: Well, I think what the parties, and I  
12 won't speak for the Debtor or for the LES Committee, but I will  
13 speak for LFG Committee, I think what they all are telling you  
14 and will tell you is would it have been better to have another  
15 lead case perhaps? Did the Debtor identify a distinction  
16 without a difference? Maybe. And what Mr. Geller really never  
17 addressed, the one note I wrote down as he was arguing, the  
18 only real note I wrote down was, he never explained to Your  
19 Honor why the current lead cases, particularly the existing  
20 commingled exchanger will not adequately address the issues his  
21 clients apparently have. He never addressed that.

22           And the reason I think he didn't address it because  
23 he also acknowledged during his argument, that there is  
24 essentially no difference. He was, in fact, confused. And  
25 maybe we're all confused and I don't blame the Debtor to say,

1 you know, well, maybe we suggested a category we really don't  
2 need. Is there a distinction? Maybe a minute distinction, the  
3 distinction as it relates to the entitlement with interest.

4 My point about that, Your Honor, is that if we go  
5 forward, and we need to go forward, but if we go forward  
6 without an A substantially all, if not all the issues will be  
7 resolved for the A players. But, if they're not resolved on  
8 this one issue about interest entitlement it would be very easy  
9 for the A claimants to try to distinguish that issue in their  
10 particular case at the particular time.

11 But, I believe the whole purpose of framework -- of  
12 test cases is to provide some feedback for the court to make  
13 some ruling on some critical issues that will allow most, if  
14 not all the parties to resolve the balance of the cases based  
15 on those rulings. And if we have one very insignificant issue  
16 outstanding I believe all of these attorneys and all their  
17 clients can present to Your Honor on that very narrow issue  
18 why, perhaps, based on whatever rulings you do make, that that  
19 makes a difference in their case.

20 So, the starting point is, they knew when they signed  
21 the exchange agreement, that a dispute might arise. If we,  
22 actually, look at the agreement it shows that they could be in  
23 this situation and it shows that they're not entitled to fees  
24 in the event of that dispute. The bankruptcy code also gives  
25 them a process, a procedure, if they want to participate and if

1 they want to get paid. They have the ability to move for  
2 intervention in these cases. And if they provide -- if they  
3 provide a substantial contribution, then Your Honor can  
4 determine that it was a substantial contribution and you can  
5 determine at that point in time.

6 My point is the contracts establish a starting point.  
7 The bankruptcy code establishes process and a procedure, so  
8 they have to climb this mountain to show why it is in that  
9 context they're entitled to this unique, significant relief.

10 And the standard for the committee, of course, as  
11 Your Honor knows, is whether the current setup assures adequate  
12 representation. And I think that, and I'm not going to belabor  
13 these points because they've been well made by the debtor, the  
14 LES Committee is the same parties, the same type of parties are  
15 represented on that, consist of that committee. The committee  
16 consists of those parties.

17 As I said, the current commingled exchanger is  
18 actively participating and will represent their interests. The  
19 protocol order allows certain types of participation in terms  
20 of access to information amicus. So, they have to show why  
21 there isn't this adequate representation.

22 But I think the remarkable --

23 THE COURT: Well, isn't it important that the Court  
24 would then be reading one brief as opposed to 400 amicus briefs  
25 if there was a committee in place to represent their interests?

1 MR. MATSON: Well, I think it would help Your Honor,  
2 but you'll get that brief from the commingled participant now  
3 and there's nothing about assigning this committee that will  
4 eliminate the fact that all the parties who aren't being bound,  
5 are going to be having the right to file these amicus. So, I  
6 don't think that there's a huge advantage for Your Honor. I  
7 think there are parties in these lead cases and if we had come  
8 up with a protocol at four instead of five lead cases, I don't  
9 think it would be any different than today other than we have  
10 this kind of elephant in the room because there's this --

11 THE COURT: Category A, but it's not represented.

12 MR. MATSON: Category A that isn't filled. But I  
13 think it's a distinction without a difference. But let's look  
14 at what in terms of asking for a committee, let's look at what  
15 this committee and I'm assuming they're speaking for their  
16 clients, what the creditors are asking this Court to do, and I  
17 was trying to think of an analogy, maybe we could look at a  
18 group of consignors, people who consign goods, jewelry or  
19 Panasonic televisions to a debtor to be resold. Well,  
20 consignors want their goods back and what they're doing is  
21 tantamount to consignors asking Your Honor for a committee to  
22 pay for the legal costs of taking assets out of the estate.

23 These parties are one of two things. They are either  
24 creditors, which I think they are, and if they are creditors,  
25 they are well represented by the Creditors' Committees in these

1 cases, certainly the LES Committee.

2 If they're not a creditor and, Your Honor, I think  
3 that they're standing before you and they're acknowledging that  
4 they're not a creditor. They're taking the position they're  
5 not a creditor. Which, one, raises the question of whether  
6 there's any statutory authority to appoint an additional  
7 committee because the statute talks about additional committees  
8 of creditors and/or equity security holders.

9 So, what they're really telling you, Your Honor, is I  
10 want the estate to pay for the costs of me taking assets out of  
11 the estate. They want the estate to pay the costs of  
12 determining that they're not creditors, that these funds at  
13 issue are, in fact, theirs.

14 THE COURT: It sounds a lot like the argument we used  
15 to have when I was representing secured lenders and we were  
16 doing our cash collateral orders and they wanted to have a  
17 carve out and we said yeah, but you can't sue me.

18 MR. MATSON: I understand, Your Honor. I think this  
19 is a little bit different. I think it's being very unusual to  
20 give a party the right to have the estate pay to remove an  
21 asset from the estate and I think that's a very critical issue  
22 to keep in mind.

23 And, finally, Your Honor, by giving them either  
24 503(b) status or committee status, and because they're  
25 attempting to do whatever they can to harm the estate, let's

1 think about that. They really are. Their intention is to harm  
2 the estate. Their intention is to do anything and everything  
3 possible to make sure the exchange funds at issue are delivered  
4 to them and not to the estate for the benefit of all creditors.

5           So, not only does it appear that we have the cart  
6 before the horse, but there's no incentive on them to limit the  
7 aggressiveness, the wild theories that might be promoted, to  
8 try to achieve that aim. And certainly the estate shouldn't  
9 have to pay for that.

10           And, finally, as the debtor made a good point of  
11 saying, they filed an adversary proceeding and now they don't  
12 want to proceed. They actually don't want to go forward with  
13 an action they filed. And there's 40, at a minimum, there's at  
14 a minimum 40 of these, if you read the papers. I think we  
15 counted up 40 and it says including, it's not limited to, it  
16 says including. And why is it that 40 exchangers cannot  
17 figure out a way to select one and pool the costs to move these  
18 issues forward.

19           So, Your Honor, for all of these reasons, it does not  
20 appear appropriate, either based on the rights that exist under  
21 the contract these parties signed, under the framework set  
22 forth in the bankruptcy code, it does not appear appropriate to  
23 prejudge substantial contribution or to create a committee for  
24 a class of parties whose sole objective is to remove assets  
25 from the estate. So, on behalf of the committee for the

1 LandAmerica Financial Group, we would ask that Your Honor deny  
2 the motion in its entirety. Thank you.

3 THE COURT: Thank you, Mr. Matson. Mr. Gibbs.

4 MR. GIBBS: Yes, Your Honor.

5 THE COURT: Do you wish to be heard on behalf of the  
6 LES Committee?

7 MR. GIBBS: I would, Your Honor, if the Court is  
8 willing to let me appear by phone, even though we have able  
9 counsel present in the courtroom, but if the Court is willing,  
10 I would like to speak to it.

11 THE COURT: It was scheduled on such short notice,  
12 you may certainly participate. If you wish for your counsel  
13 here in the courtroom to handle it, that's fine too.

14 MR. GIBBS: Well, let me, if I could, go ahead and  
15 jump into the breach and try to add my comments and perspective  
16 to those you've heard from the debtor and from counsel for the  
17 parent, LFG. Counsel for the committee to the parent. And  
18 I'll try not to repeat too much of -- very much of what was  
19 said from them, as reasons why you should deny the motion.

20 Let me take it in inverse order. The motion is to  
21 appoint an official committee or, in the alternative, to allow  
22 commingled test case plaintiffs' professional fees and expenses  
23 as admin expenses under 503(b)(3) and (b)(4). And let me take  
24 the second piece of this alternative relief first if the Court  
25 would permit.

1           They're asking for a prior grant of administrative  
2 priority status under 503(b)(4), yet to be incurred expenses  
3 and the predicate as our papers point out and those that were  
4 filed by the debtor and the committee for the parent point out,  
5 the statute is real clear that the administrative priority  
6 status under 503(b) is granted for actual expenses incurred  
7 that offer a substantial contribution and they're asking for an  
8 advisory ruling from the Court today that what someone is yet  
9 to do is, in fact, a benefit, a substantial contribution to the  
10 estate and should be afforded 503(b) administrative status and  
11 the payment out of the case ultimately and said that -- and the  
12 comments from counsel for the movant indicated that they would  
13 be subject to the same constraints as anybody making a fee  
14 application, but as debtor's counsel pointed out, at that point  
15 in time the Court would be looking at and opining as to the  
16 reasonableness of the expenses incurred, not to the issue of  
17 substantial contribution because that would have been  
18 judicially determined in an advisory way at the time you rule  
19 on this motion today.

20           So, I don't think it is legally appropriate, it's not  
21 in accordance with 503(b) mandates. The movant supplied the  
22 Court with no authority for what they've asked for because we  
23 would submit that no authority exists for what they've asked  
24 for, which is, in essence, an advisory ruling that someone yet  
25 to be named, to do work yet to be done, for a plaintiff yet to

1 be determined, gets administrative priority status, subject  
2 only to the Court's finding of reasonableness that it would  
3 apply to the other professionals employed in the estate, by the  
4 estate or in this case.

5           So, I think that the administrative expense status  
6 portion of their alternative pleading must fail because they  
7 have failed to sustain their burden of supplying the Court with  
8 authority for the relief that they've requested.

9           The motion further on that second alternative relief  
10 is very unclear. They say in the pleading title, they want  
11 administrative priority status for allowed commingled test case  
12 plaintiffs' professional fees and paragraph 20 and 21 and 22 of  
13 their pleading are a little but unclear but it seems from the  
14 comments that Mr. Geller made, that they're really asking for  
15 not only the professional fees of lawyers yet to be hired by a  
16 yet to be determined Type A commingled case, should be given  
17 that status, but also the fees and expenses incurred by the  
18 counsel for the designated Type B commingled case, as well as  
19 the fees and expenses of the professionals employed by the note  
20 case that was added as an amendment to the protocol, and yet  
21 the counsel for the movant was vague in response to the Court's  
22 question about whether this motion would, in fact, open the  
23 door for the counsel for the escrow plaintiffs as well as  
24 counsel for the named lead plaintiff that is a so called  
25 segregated account customer, to make a similar request.

1 I don't know how the Court draws a distinction  
2 between any of those -- any of the counsel for the designated  
3 lead cases. And so, in essence, this motion if Your Honor is  
4 to consider it, really should be considered as an advisory  
5 ruling that all of the counsel for all of the lead plaintiffs  
6 get to be reimbursed, based on a reasonableness standard out of  
7 the estate which is tantamount to the Court saying that anybody  
8 who wants to sue the debtor, to say that money the debtor is  
9 holding doesn't belong to the debtor, gets paid for their  
10 effort and gets reimbursed for their effort and I just don't  
11 think it's right, let alone unsupported, by any authority cited  
12 to the Court by the movant.

13 I'll remind the Court that the lead plaintiff that  
14 has a claim for 130 something million dollars that's the lead  
15 escrow plaintiff, is not the only party that has a contract  
16 with the debtor, that also provides funds to be held by a third  
17 party escrow. There are four to five, maybe six, we're not  
18 sure of the exact number, but they're there in a representative  
19 capacity for that group.

20 The designated lead plaintiff of the segregated  
21 customers is there on behalf of 49, approximately 49 other  
22 segregated account customers, making arguments that may be  
23 dispositive of, or at least illuminative of the rights of those  
24 other groups.

25 The lawyers representing the lead note case are

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1 making arguments similar to those that would be advocated by at  
2 least 11 or 12 other customers, who have rights, that are  
3 asserting rights to a note held by the debtor. It represents  
4 part of the purchase price paid by the purchaser of the  
5 exchange property and the Type B plaintiff is there on behalf  
6 of some substantial percentage of the 400 or so other  
7 commingled customers.

8           So, I'm not sure how you say you can grant  
9 administrative priority status subject to reasonableness for  
10 the yet to be determined Type A or how you cut it off at the  
11 commingled group and not, in fact, have it be a carte blanche  
12 effort by the opposing parties whose primary claim is that  
13 nothing that the debtor lists on its schedules of assets and  
14 statement of affairs belongs to the debtor, to get paid out of  
15 the debtor's estate.

16           So, for that reason, the committee in the LES case  
17 opposes the alternative relief.

18           What I think is illuminating also, Judge, is when you  
19 asked counsel for the movant, if I granted your request to  
20 appoint an official committee what would happen with respect to  
21 the ability to get a Type A test case, and even though their  
22 pleading is couched in the alternative, Mr. Geller said, well,  
23 it shows why, really, our relief isn't mutually exclusive and  
24 what I think they're really asking for is, they want a  
25 committee and they'd like to have the expenses of the lead case

1 reimbursed out of the estate, because I think what's really at  
2 play here is a group of lawyers representing a group of parties  
3 who claim that everything owned by the debtor isn't owned by  
4 the debtor, but owned by their clients and similarly situated  
5 people.

6           They're asking for a seat at the table and to be paid  
7 for their efforts on behalf of that group of constituents. And  
8 I don't think they're asking for alternative relief and they  
9 magically think that a Type A plaintiff will appear if the  
10 committee is granted.

11           I would submit to the Court that I think the reason  
12 why a Type A lead plaintiff hasn't appeared is because the  
13 lawyers representing or speaking for this ad hoc group, I  
14 think, really, frankly, and I won't want to use -- I don't mean  
15 the term pejoratively but just descriptively, have hijacked the  
16 process. I think if the Court denies the motion today, we'll  
17 find a Type A plaintiff. They're waiting to see if the Court  
18 is going to let them get paid for the fees that they incur in  
19 bringing the case.

20           The debtor accurately pointed out and we did in our  
21 papers, each of these plaintiffs represented by the group of ad  
22 hoc attorneys, all filed adversary proceedings. We assume, at  
23 least, I know that it's my practice, if I file an adversary  
24 proceeding and my client has authorized me to, then I'm going  
25 to prosecute that adversary proceeding. The protocol that we

1 negotiated and that the Court approved, I think, streamlines  
2 the process, it's going to reduce the cost of any of the lead  
3 plaintiffs and the amount of money they'd have to spend, had  
4 this protocol not been put in place.

5           So, I don't think that the specter of proceeding  
6 under the protocol as a lead case is adding to the burden of  
7 any of the plaintiffs who have sought relief from this Court  
8 and asked for declaratory rulings that the money in the  
9 possession of the debtor doesn't belong to the debtor, but it  
10 belongs, instead, in trust for their clients. I think, if  
11 anything, it reduces their burden and we'll find one.

12           I also think that if we can't find one, that's not a  
13 fatal flaw. The debtor -- we negotiated the protocol, we'll  
14 live with their protocol, it was our desire on behalf of the  
15 LES Committee to come to the Court with a protocol that was as  
16 inclusive as possible and brought through a reasonable number  
17 of test cases, as many common fact patterns that would help the  
18 Court make decisions to sort of unbreak the log jam.

19           We relied on the debtor's strong held beliefs that  
20 there was a reason to have two types of commingled lead  
21 plaintiffs, because of the language differential. I also  
22 share, however, Mr. Matson's perspective and that is that if we  
23 don't have a Type A, this Court, in deciding the facts before  
24 it on the remaining test cases, is going to, I think, come to  
25 decisions that will allow all of the parties in this case to

1 understand whether or not there's going to be assets in the  
2 estate available for disbursal to creditors, or whether all of  
3 the assets or some of the assets in the estate leave the estate  
4 and go somewhere else, to be decided by some other court, as to  
5 ownership rights amongst the group of trust claimants.

6           So, for those reasons, the second piece of the  
7 motion, I think, should be denied.

8           The first request which is that there be another  
9 official committee appointed, I think, should similarly fail.  
10 It's their burden, it is an extraordinarily high burden as  
11 pointed out by the cases in our papers. We think they've  
12 wholly failed to sustain that burden. It's clear. I think  
13 deference should be given to the U.S. Trustee's Office. The  
14 U.S. Trustee's Office appointed an official committee made up  
15 of five so called commingle exchange customers.

16           Now, Mr. Geller says that those five are the only  
17 five out of 400 that don't take the position that his clients  
18 take. I'm not sure I'd jump to that conclusion. And there may  
19 be a substantial number of reasons why this committee,  
20 comprised of five commingled customers takes the positions that  
21 it does. Clearly, and the arguments I've made in prior  
22 hearings, and in the pleadings we filed in our intervention on  
23 these pending adversaries, we have taken the position that the  
24 assets listed by the debtor on its schedules and statement of  
25 affairs belong to the debtors and should be distributed to the

1 creditors of the debtor in accordance with the priority schemes  
2 established under the code.

3           And, it's based upon the facts in evidence that we  
4 saw with respect to each of the adversary proceedings that have  
5 been commenced, as well as the arguments made by the debtor in  
6 its original 9019 motion. Mr. Geller says he thinks an express  
7 trust exists. Our positions have been that based on what we  
8 had seen, without any discovery, you've got exchange agreements  
9 that never mention anywhere the property is being held in  
10 trust.

11           In fact, those agreements are replete with contrary  
12 positions, that the exchangers give up any and all right,  
13 title, control, et cetera, et cetera, over the funds held by  
14 the debtor. If anything, it couldn't be clearer that there  
15 expressly was an acknowledgment that no trust relationship  
16 exists. But if the Court after hearing the facts decides that  
17 under applicable law governing an exchange agreement, that it  
18 imposes a trust, either decides maybe that an express trust  
19 exists or that it imposes one under applicable state law, that  
20 has to be after the development of evidence that was not  
21 available on any of the motions or the exhibits attached to any  
22 of the complaints, rather, and for that reason the committee  
23 clearly took the position that the relief requested should fail  
24 and while we intervened, so that a record could be developed  
25 and evidence could be brought forth to determine, and I think

1 critical issues of the parties' intent, whether commingling  
2 existed, whether tracing could occur, all of the factors that  
3 the Court is likely to rule and decide are relevant in deciding  
4 whether or not to impose a trust on any or all of the assets  
5 listed by the debtor on its schedules and statement of affairs.

6 I haven't heard that the U.S. Trustee is supporting  
7 the relief requested on this emergency motion by the ad hoc  
8 group and in the absence of the U.S. Trustee believing that a  
9 second committee needs to be formed because the existing  
10 official committee is inadequately -- or is incapable of  
11 representing the interests of that group of constituents, I  
12 think the Court should give deference to the absence of that  
13 endorsement, and as I said, the case law that we've cited, I  
14 think, clearly demonstrates that a burden exists and that the  
15 movant has failed to sustain the burden.

16 What they have argued today is that in a First  
17 Circuit case, where the court ruled on whether or not  
18 contributions from one class of creditors could be made under a  
19 plan to a group that might otherwise be out of the money, the  
20 court -- and cited the Court today to language from that First  
21 Circuit opinion, I don't think is, at all, dispositive of the  
22 issue and certainly doesn't sustain their burden.

23 Similarly, they mention without naming cases,  
24 situations where there's been a committee of mechanic and  
25 materialman lien creditors formed and tried to make the

1 argument that in that circumstance that committee is  
2 essentially arguing that assets should be removed from the  
3 estate.

4 Well, I don't think that's an accurate representation  
5 of what the positions are of any additional committees that  
6 might have been formed in additional large cases, I'm aware of  
7 the Sem Group case in Delaware, where there was a special  
8 committee appointed by the judge in that case, consisting of  
9 mechanic and materialman lien creditors, who had rights under  
10 applicable state laws regarding the priority of their lien  
11 claims, vis-a-vis the secured lenders in the case and the court  
12 granted them official status. Nowhere are they saying that  
13 anything listed on the debtor's schedules doesn't belong to the  
14 debtor, which is a fundamental difference from the position  
15 that this ad hoc group is taking and a fundamental difference  
16 from, I think, what any court has used as a basis for  
17 appointing official committee status.

18 So, for those reasons, Judge, although well  
19 intentioned, I think that the motion should be denied because  
20 the movant has failed to sustain its burden on either  
21 alternative relief. I think that my committee comprised of  
22 customers just like those that are represented by the various  
23 lawyers that comprise the ad hoc group, can adequately  
24 represent the interests of all creditors in this case.

25 And one other, I guess, point before I close, that

1 the Court should not be unmindful of it, I think I just used a  
2 double negative, is the situation that exists here where each  
3 and every one of the lawyers that have been advocating for this  
4 relief as part of the ad hoc group, I think would all be  
5 disqualified from representing a committee of their  
6 constituents should they be hired. They've all filed adversary  
7 proceedings on behalf of multiple plaintiffs, taking the  
8 position that monies in possession of the debtor don't belong  
9 to the debtor.

10 For the Court to give any committee to be formed the  
11 ability to choose one of the ad hoc counsel to be their  
12 lawyers, they'd have to be able to be disinterested, and not  
13 represent an interest adverse to the estate and I think they'd  
14 all be disqualified. So, we face the very practical reality of  
15 going out and finding yet another firm who's got to do what my  
16 firm has been doing for a month, and that's drinking well from  
17 -- or drinking water from a fire hydrant, trying to catch up  
18 and keep up, and with the pace that the Court has approved for  
19 the determination of the test cases, there would be no  
20 effective representation provided because none of the lawyers  
21 representing any of these parties, I don't think, could be  
22 qualified to represent that to be formed committee.

23 So, for practical reasons, as well as very sound  
24 legal reasons, I think the motion should be denied.

25 THE COURT: Mr. Gibbs, do you think that your

1 committee can provide adequate representation of the members of  
2 this ad hoc group that are seeking the formation of their own  
3 committee?

4 MR. GIBBS: I think that we can certainly represent  
5 their interests to the extent they claim to be creditors in  
6 this case. To the extent that they represent that they are the  
7 owner of assets in the possession of the debtor's estate, I  
8 don't believe it's my ethical obligation to protect those  
9 rights and those claims, but to the extent they assert that  
10 notwithstanding releases that they've signed or gave and the  
11 agreements that they signed with the debtor that they  
12 nevertheless have damage claims that they should be able to  
13 assert in this case and that they have no basis for security or  
14 any asset they can look to as security for those claims, then  
15 they are my constituency.

16 But to the extent that the Court determines that a  
17 trust relationship existed between the debtor and any or all of  
18 the 450 customers, and depending on what the Court determines  
19 would be the legal basis for that ruling, that's going to  
20 clarify who my constituency is and what assets I have an  
21 ethical obligation to see are disposed pursuant to the code.

22 THE COURT: All right, thank you. Let me hear from  
23 the Office of the U.S. Trustee.

24 MR. VAN ARSDALE: Robert Van Arsdale for the U.S.  
25 Trustee.

1           Your Honor, this case, obviously, has many problems.  
2 Every time we turn one rock over and all the little bugs run  
3 out and then we find another rock and it really has been like  
4 that since I first started getting phone calls about this case,  
5 which were some of the saddest that I've ever gotten of  
6 people's life savings having been -- they've sold their  
7 business, they invested, they were going to do something down  
8 the road, they turned it over to 1031 Group, a million and a  
9 half bucks, that really represented 40 years of their life, and  
10 they're at risk not only -- I call it the trifecta, they're at  
11 risk for the \$1.4 million, they're at risk for, maybe being on  
12 the hook to buy property that now they can't buy, and on top of  
13 that Uncle is going to come in and want to assess them taxes on  
14 money that they thought was going to be tax free. So, that's  
15 three ways.

16           I feel sympathy for them. I have felt sympathy for  
17 them from the day that they first started calling me. I have  
18 discussed with at least two of the gentlemen sitting at the  
19 table, whether we would form a second committee to represent  
20 the people in the commingled group. And after extensive  
21 discussions with my U.S. Trustee on more than one occasion and  
22 several reconsideration of the discussions that we had before  
23 we decided not. A lot, because of the positions that were  
24 expressed by Mr. Gibbs, a lot because when we first set up the  
25 committee, it turned out that all five of the people on the

1 committee are, in fact, commingled exchangers.

2           They had a hard time because they had to then realize  
3 that their fiduciary responsibilities extended to people that  
4 weren't similarly situated from them, that they were -- you  
5 know they had to represent and speak on behalf of all of the  
6 unsecured creditors in the case. Mr. Gibbs did an excellent  
7 job of educating them concerning this. These are not people  
8 that had served on committees before, this was not a role that  
9 they aspired to, but one that was, in fact, thrust upon them  
10 and having gotten to that point, I think they really have done  
11 an excellent job of doing what an Unsecured Creditors'  
12 Committee must do, and that is to try to represent all the  
13 unsecured creditors, even if they're not exactly like you.

14           So, we decided that we would not. I did have a  
15 couple of phone calls with Mr. Geller, wherein he stated that  
16 he was -- we've had good conversations about this case, because  
17 it is -- it twists and turns and there is no lack of pain on  
18 anybody's part in this case. But, at the end of it, I had to  
19 tell him that we weren't going to form a committee. He  
20 understood, he said, well, then I think I'll file a motion, I  
21 said well, go ahead.

22           THE COURT: Now, was that decision based on the  
23 administrative burden that it would put on the estate as far as  
24 costs and just procedure, or was it based on the fact that you  
25 thought that their voice was adequately being heard and they

1 were given adequate representation by the present committee?

2 MR. VAN ARSDALE: Both of those cites. There's a  
3 cost feature and there's a cost feature that I think has to --  
4 probably rises to an even higher level because I believe at  
5 some point we're going to need another layer of administration  
6 on this case. I haven't -- we haven't decided what we were  
7 going to file at this point, but either given what's happened  
8 here, given the allegations made that we're going to need an  
9 examiner, we're going to need a trustee, we're going to need  
10 something, in order to fully vent what has happened in this  
11 particular -- in the nine --

12 THE COURT: That was going to be my next question.

13 MR. VAN ARSDALE: Yeah. So, I think that level of  
14 cost is going to be incurred at some point unless I lose badly  
15 and maybe I will. I hope not.

16 And there is -- it's a strange thing, but there's  
17 also a question of, you have the Unsecured Creditors'  
18 Committee, you have it represented by able counsel and as far  
19 as I can tell, the real problem with the commingled ad hoc  
20 committee, with what counsel -- that the opinion of what should  
21 be done with these people is different. That's really what the  
22 problem is here.

23 And I don't think it's part of the estate or it's a  
24 burden of the estate to pay for every legal opinion, or the  
25 expression of every legal opinion that may, in fact, befit a

1 particular situation.

2           There is a second relief that the ad hoc committee  
3 has asked for, and I will say that I would be more inclined to  
4 favor that, obviously, that would be cheaper, I mean there  
5 would just be the cost of basically doing a lawsuit rather than  
6 doing a whole committee and all the things that are expected of  
7 a committee, and perhaps there could be some sort of qualifying  
8 language in an order that indicated that they would be given  
9 the 503(b) unless something happened, you know, unless the  
10 Court decided, like you do in Trig 27 and you have the  
11 improvident, in light of things that were not -- what is it,  
12 anticipatable -- whatever that means, at the time of the  
13 employment.

14           But even then I think Mr. Gibbs is probably more  
15 correct than not, I'm not sure -- I think you would have to  
16 couple all that with some kind of 105 authority of the Court  
17 because I don't think 503 gets you there by itself.

18           THE COURT: I couldn't find the fact that having  
19 Category A test case plaintiffs represented is a substantial  
20 contribution to this case.

21           MR. VAN ARSDALE: I think you could. I think that  
22 was a good point, Your Honor. It is different than what is  
23 normally done, but I think --

24           THE COURT: I realize that, but this is a different  
25 case.

1 MR. VAN ARSDALE: -- that once you have approved, you  
2 know, we have now an approved five category way of dealing with  
3 these cases, and nobody has stepped up to the plate on Category  
4 A, I think that's -- I don't think that the statute itself  
5 precludes that as being part of a decision under that statute.  
6 I still think you would boost it with 105.

7 THE COURT: All right, thank you.

8 MR. VAN ARSDALE: Yes, sir.

9 THE COURT: All right, Mr. Geller, you wish to  
10 respond to all that?

11 MR. GELLER: I do, Your Honor. Your Honor, I think  
12 if there's one thing that I can conclude from everything that  
13 I've heard, at least with respect to all the people that argued  
14 and, perhaps, with everyone in this courtroom, we're all Type  
15 A. Probably not exchangers, but we're all Type A.

16 The other comment that I'd like to -- I'm going to go  
17 back and try to respond to some of the points that were made,  
18 but as Your Honor has proven in the couple of hearings that  
19 I've attended, sort of go to the heart of the issue with some  
20 of your questions and at the end of Mr. Gibbs argument you  
21 said, do you think that the existing Creditors' Committee can  
22 provide adequate representation of the exchangers who are  
23 represented by the ad hoc committee and with his usual candor,  
24 Mr. Gibbs said, yes, to the extent they're unsecured creditors,  
25 no to the extent they're arguing that they have a trust.

1           That's the conflict, that's why this existing  
2 committee given the position that the commingled exchangers are  
3 advocating, that this committee cannot represent them. So,  
4 that's to me really the bottom line.

5           Your Honor, I think I'll just run through some, I'm  
6 not going to try to address every point that was made, but I  
7 think that there were some -- a couple of main points that I  
8 want to address.

9           One of the things that's been suggested is, well,  
10 look, these plaintiffs filed these lawsuits and, you know, that  
11 meant that they were ready to advocate these things fully and  
12 prosecute them and litigate.

13           Your Honor, I actually was co-counsel on one lawsuit  
14 that's been filed and have since been terminated by that  
15 client. So, I'm not representing anyone who has filed an  
16 adversary proceeding. I never filed an appearance on behalf of  
17 that person, I'm listed on the signature block, I probably will  
18 file a withdraw just to be precautionary.

19           But the notion that these plaintiffs filed these  
20 lawsuits and were ready to dive in and pursue it, I think  
21 really misses the boat. I will tell you that for the complaint  
22 that I filed, I fully expected when we filed that, that there  
23 was going to be some order brought to the chaos. I did not  
24 expect that there were going to be 60 or 300 or 400 adversary  
25 proceedings that were going to go forward, but rather, that

1 there was going to be a procedure that would be adopted to  
2 streamline the process.

3           So, there's a very big difference between filing an  
4 adversary and litigating it through trial and to fruition and  
5 I'm not suggesting that by filing, you know, we could always  
6 dismiss voluntarily, I mean that's something, too, but I'm not  
7 suggesting that people didn't have faith in their positions,  
8 but just that it's not as though we all anticipated that we  
9 were going to be trying 400 cases.

10           The second main point that I'd like to make is, the  
11 argument that the relief that we sought, either a committee or  
12 test case, plaintiff being paid from the estate, or both, and  
13 before I forget, the point that Mr. Gibbs made about, well, if  
14 you appoint a committee, we'd want test case plaintiffs paid as  
15 well. I was not necessarily suggesting that. When you asked  
16 that toward the end of my original presentation, you asked if  
17 the committee were appointed, did I think we'd be able to get a  
18 test case, Type A and my answer, I hope, I'm just clarifying  
19 this, Your Honor, was not compensated by the estate, my answer  
20 was saying, I think if we had a test case A plaintiff who knew  
21 that there was committee that was going to be taking some of  
22 the lead in the discovery and the briefing of the key issues,  
23 that you could probably find a test case A without compensating  
24 them from the estate. So, I just wanted to make sure that's  
25 clear.

1 But the point that I was getting to, I think what we  
2 just saw in terms of the things that were filed today and the  
3 arguments that were made, in some sense, make our case. You  
4 had competent counsel, you know three strikes, three swings at  
5 the ball and that is going to be precisely what happens in  
6 every single test case. You're going to have the debtor,  
7 you're going to have the LES Committee, you're going to have  
8 the LFG Committee represented by very large law firms who are  
9 going to have people making arguments, people doing discovery,  
10 people combing through documents and turning over every rock  
11 and talk about finding, you know, all the little ants that are  
12 crawling under there, I mean, versus test case plaintiff who is  
13 here doing that battle on their own. It is -- I don't care who  
14 it is, it's not a fair fight. And particularly when it's going  
15 to impact another 435 people. I just -- or 445 people.

16 A couple of things sort of took my breath away. The  
17 debtor and the LES Committee come to this court and propose a  
18 protocol that's opposed by many people, and argue forcefully  
19 and there were some good aspects. I mean, I thought it was  
20 premature with respect to the commingled folks. I didn't think  
21 we had had time, I was concerned about identifying test case  
22 plaintiffs who would be willing to do it and had the  
23 wherewithal to do it. I was concerned particularly about  
24 timing, not necessarily the protocol in and of itself, but how  
25 you were going to compensate test case plaintiffs'

1 professionals and the response is, forget our protocol, we  
2 don't really need Type A.

3           We just had this expedited hearing on the protocol,  
4 it's been approved, an order has been entered, people are  
5 serving discovery under this protocol, but now we can't find a  
6 Type A, it really doesn't matter and the suggestion was, that  
7 I don't think there's a distinction that's meaningful. That's  
8 not what I said, Your Honor. What I said is, I didn't  
9 understand the basis for the distinction they were drawing and  
10 I saw at least two things. One of them was this language that  
11 might have significance about whether the exchange account was  
12 being, you know, held for exchanger funds or the bank account  
13 was, you know, holding exchanger funds and the other one was,  
14 the other very obvious issue about who was earning interest and  
15 I didn't know what the basis was for the distinction. If the  
16 basis was the interest, then I'd have four or five clients who  
17 could serve as test case A. And some of the other lawyers who  
18 have approached the debtor and the committee and I have  
19 somebody who is test case A, if that's your distinction.

20           What we've heard come back from the debtor is, that's  
21 not the distinction we were drawing under Type A, we were  
22 drawing the distinction based on this account holding exchanger  
23 funds.

24           So, the notion that all of a sudden they're going to  
25 modify the protocol without notice, a motion, an opportunity to

1 be heard, a discussion about whether it's important to have  
2 that Type A case, I just think is procedurally improper, it  
3 doesn't provide due process and it sort of undercuts what the  
4 Court did which was bring some order to the process. So, that,  
5 I just don't think, is an appropriate answer to the arguments  
6 that we've raised.

7           There was a suggestion that somehow the attorneys  
8 here are not -- are somehow acting on their own behalf and not  
9 on their clients. I think and I hope that we were clear in our  
10 motion that the Ad Hoc Committee, made up of a list of 20 or 30  
11 commingled exchangers by their counsel. You see I'm here with  
12 direction from my client. I assure you I'm not a freelancer  
13 who is trying to weasel into this big case. I mean, as a  
14 matter of fact, Your Honor, I don't mean to sound altruistic  
15 but I had people calling me wanting to retain me and I kept  
16 saying, wait, wait, it wasn't really until after Your Honor  
17 ruled on the protocol motion that I actually agreed to accept  
18 more clients than the original one or two that had contacted  
19 Mr. Lonas and myself, so I said, I don't think individual  
20 representation makes sense here. I think there ought to be a  
21 committee and then after the test case issue came up I said we  
22 need to figure out how this is going to play out, but I think  
23 you should have some representation as this process plays out.

24           So, we are -- I'm acting on behalf of clients, I got  
25 authority. As a matter of fact, I wasn't willing to come down

1 here and volunteer to argue this motion until my clients  
2 authorized me to do so.

3 Mr. Matson said something that, again, kind of made  
4 me gasp a little bit. I think the language he used is that  
5 these commingled exchangers are trying to harm the estate. No  
6 incentive to limit their aggressiveness or their wild theories.

7 You know, my mother, God rest her soul, would have  
8 said that that's just a height of hutzpa. I mean, trying to  
9 harm this estate? These people who have lost their life  
10 savings and are saying, the testimony will be, Your Honor, I  
11 understood that there were certain technical things in an  
12 exchange agreement in order to comply with 1031, that debtor  
13 had to sort of have exclusive control, but I thought I was  
14 giving my money to LES to hold in an account and then to make  
15 available to me to close the second half of the exchange  
16 process and that that money was going to be sitting there and  
17 available for me and they were acting basically as a trustee  
18 for my money until I accomplished, I identified a property and  
19 was ready to close. That's what the testimony is going to be  
20 and these people have lost everything, many of them, and the  
21 notion that we're trying to harm the estate, because we're  
22 actually going to argue the theory that we believe in  
23 vehemently, that my clients, one after another after another  
24 will testify to, that's just -- and with wild theories.

25 I mean I think that the issues are fairly narrow,

1 what we're going to be talking about here, and I don't think  
2 they're wild. So, again, the similar thing about the lawyers  
3 hijacking the process, and that's why we don't have a Type A.  
4 I think Your Honor identified it very clearly. I mean people  
5 are saying why should I do this.

6           Again, I can't answer for Mr. Page and why his  
7 clients, maybe just because he had so many, but I don't have 30  
8 who are willing to each fund it and I won't go into all the  
9 details, Your Honor, but I will tell you that under the  
10 multiple representation rules and the notion that if you have  
11 test plaintiff and have other clients funding that, who are  
12 your duties to and there might be distinctions between the  
13 exchange agreement and the facts. Let's just put it this way.  
14 I'm still drafting a retention agreement to deal with my five  
15 clients. I cannot begin to explain how difficult it is. Talk  
16 about, well, if one of you becomes a test plaintiff, would I  
17 have to withdraw from representing all the others, but then all  
18 the others would still agree to fund the test case because how  
19 can -- I can't let you dictate the people, the others who are  
20 no the test case plaintiff, what my strategy is, what the  
21 arguments are. I need to have an attorney/client privilege with  
22 that test case plaintiff. It's just replete with problems.

23           Mr. Gibbs argued a couple of times that there ought  
24 to be deference given to the United States Trustee's decision.  
25 Your Honor, I could cite you a number of cases, I'll limit it

1 to one. But there's a case, In re National RV Holdings, Inc.,  
2 390 B.R. 690 (Bankr. C.D. Cal.) and other folks have made the  
3 argument that Mr. Gibbs made, which is that there should be  
4 deference shown to the U.S. Trustee's decision about whether to  
5 appoint a committee, and every case that I've read, including  
6 this one says, "The issue of adequate representation" -- and  
7 I'm quoting -- "is one which is ultimately entrusted to the  
8 courts to decide upon an application made by a party in  
9 interest. This issue is determined on a de novo basis after  
10 the administrative task of appointing committees is performed  
11 by the United States Trustee. An abuse of discretion standard  
12 does not apply with respect to the United States Trustee's  
13 initial exercise of discretion because the concept of adequate  
14 representation is a legal issue which must be resolved  
15 judicially". And, it even goes on to say that you don't even  
16 have to make a request to the U.S. Trustee.

17 Now, as Mr. Van Arsdale, and it's nice to meet you in  
18 person, we have had some good conversations and I requested  
19 that the U.S. Trustee's Office agree to appoint a commingled  
20 exchanger committee. I argued to the best of my ability to  
21 persuade him. I was unable to do that. I spoke with him when  
22 we were preparing to file the request for alternative relief,  
23 and while he did not tell me he would support it, he made clear  
24 to me that that was more palatable to him because of its  
25 limited scope. For reasons that I won't repeat, Your Honor,

1 I'm not so sure that that really resolves all the issues and is  
2 the appropriate answer, but I think he accurately characterized  
3 our conversation as being good and open and so, while I respect  
4 immensely his ultimate determination not to agree to appoint a  
5 committee, I told Mr. Van Arsdale that with all due respect, I  
6 hoped he wouldn't be offended if we made the request  
7 notwithstanding his decision and he was very understanding that  
8 we might have to do that.

9           So, in conclusion, Your Honor, for the reasons I  
10 stated previously, I won't reargue them, I think that the  
11 committee is the right approach, I think you will get a test  
12 case Type A plaintiff if a committee is appointed and can carry  
13 a significant portion of the water for the commingled  
14 plaintiffs.

15           The alternative form of relief is a lot better than  
16 nothing. I think you will get a Type A plaintiff to go forward.  
17 I think it's necessary to level the playing field, and let me  
18 just make sure that I have not forgotten -- I do have a lot of  
19 other attorneys who I'm speaking on behalf of, so I don't want  
20 to leave their -- I'm sorry, I said I was close to done, but I  
21 just wanted to add in a couple other things, so I don't leave  
22 them out.

23           Number one, we're not asking that the Ad Hoc  
24 Committee become the official committee. What we are asking is  
25 that Your Honor direct the U.S. Trustee to appoint a committee

1 of commingled exchangers, the U.S. Trustee would then select  
2 people, solicit people to serve, appoint, and that that  
3 committee would then retain counsel, just like with an  
4 unsecured creditors'. We're not asking to become that.

5 I think that the other ones -- I think I've covered  
6 the other points, either directly or at least tangentially. So  
7 with that, Your Honor, I think that your suggestion with  
8 respect to Part B, that the debtor and the LES Committee  
9 propose protocols, said it would benefit the estate, said that  
10 having test cases would benefit the estate, getting a situation  
11 constructed that will allow there to be a Type A plaintiff is  
12 benefit to the estate. I think it's been basically  
13 acknowledged and admitted and argued in support of the  
14 protocol, I don't know if it rises to the level of judicial  
15 estoppel but I think it's darn close, and then reserving just  
16 like with anybody else who is making a contribution, the  
17 reasonableness of those hours, I think that that is a more than  
18 sufficient rationale to grant the relief that we requested in  
19 the alternative. Thank you.

20 THE COURT: All right, thank you, Mr. Geller. All  
21 right. I think that it is a very, very close issue with regard  
22 to the appointment of a committee in this case. I'm very  
23 concerned that the commingled parties may not have adequate  
24 representation given the legal theories that they wish to  
25 espouse and while I do agree wholeheartedly that that decision

1 to appoint a committee lies with this Court and that there's no  
2 abuse of discretion standard involved. The Court feels that it  
3 will defer to the judgment of the Office of the U.S. Trustee  
4 and not order the appointment of a committee.

5 I think that now that I say that, that's without  
6 prejudice to being able to bring back a similar motion if  
7 changes in the case warrant bringing back an appropriate  
8 motion, and it's certainly without prejudice to the U.S.  
9 Trustee changing his mind and appointing a committee if he  
10 thinks that's appropriate, but the Court is going to, for the  
11 time being, defer to the U.S. Trustee in that regard.

12 With regard to the alternative relief, the Court is  
13 going to grant that. I do think that there is a substantial  
14 contribution to be made by having a Class A plaintiff  
15 represented in this case. The Court did approve the protocol,  
16 I don't think that we can just now say Class B is substantially  
17 similar to Class A and just forget Class A. I think what we  
18 did we did and we need to go forward with all the classes  
19 represented and that this will facilitate that class being  
20 represented. This litigation is going at a very fast speed and  
21 we need to get that class up and running so that it stays on  
22 track with the rest of the litigation because they're all  
23 joined at the hip. We can't solve any of the problems until  
24 we've solved all five of the cases. So, we need to have them  
25 on the same track.

1           So, I will make the finding under Section 503(b) that  
2 there's substantial contribution to be made and under Section  
3 105 as was suggested by Mr. Van Arsdale as well, and provide  
4 that counsel representing Class A would be compensated from the  
5 bankruptcy estate the same as other professionals.

6           I would want to have an application filed with the  
7 Court approving the employment at the front end, just like  
8 other professionals and then the Court at the end, would be  
9 subject to a formal fee application being filed, just like any  
10 other professional. The time entries will have to be kept in  
11 accordance with the U.S. Trustee's guidelines for professionals  
12 in bankruptcy cases.

13           The question that the Court still has is how that  
14 plaintiff is going to be selected and the way that I would like  
15 that to occur is with the Official Committee of LES Creditors',  
16 the debtor coordinating with Mr. Geller on the appropriate  
17 plaintiff to be that Category A plaintiff going forward so that  
18 we can get that party selected.

19           And, I would like to see that done sooner rather than  
20 later, just because of the need to move these adversary  
21 proceedings and the test cases along.

22           Mr. Geller, I'm going to ask you to please prepare  
23 the order in connection with the Court's ruling. Is there any  
24 question regarding the Court's ruling?

25           MR. GIBBS: Your Honor, this is Chuck Gibbs.

1 THE COURT: Yes, Mr. Gibbs.

2 MR. GIBBS: By way of clarification, in the  
3 conversations that I had with counsel for -- various of the  
4 lawyers representing the Ad Hoc Group, prior to today's  
5 hearing, and exploring what this alternative relief which Your  
6 Honor has granted, I asked the question whether or not if  
7 there's a Type A test case, would they be represented by a law  
8 firm or something else and the response, and I'll ask Mr.  
9 Geller either to clarify or confirm, was that they weren't sure  
10 but it would likely be a team of law firms representing the  
11 Type A plaintiff.

12 THE COURT: That's why, Mr. Gibbs, I required that  
13 there be an application at the front end, submitted to me for  
14 approval of employment and the Court will look at that. I  
15 anticipate it will be probably more than one law firm, it'd be  
16 two, be local counsel plus an out of state counsel, is what I  
17 would anticipate. If there are seven or eight law firms, you  
18 know, that are applying, the Court is not going to approve that  
19 but I can take care of that at the application process at the  
20 front end, so we won't have that problem going forward.

21 MR. GIBBS: Thank you, Judge.

22 THE COURT: All right. Any other questions, Mr.  
23 Matson?

24 MR. MATSON: Thank you, Your Honor. Just  
25 anticipating a potential issue and that is, if we have multiple

1 volunteers, we need to get this party in place and moving and  
2 it strikes me that it's not clear. I think the debtor had the  
3 discretion with the LES Committee to choose the test cases and  
4 I'm just concerned that we may be back here, if there's six  
5 volunteers now to be the test case and I wonder if the Court  
6 might give us some guidance on that.

7 THE COURT: Yes. And that's why I wanted to set a  
8 process up where you could, Mr. Geller, be the point man to  
9 communicate with. The debtor certainly can still have some  
10 discretion to make the appointment. If for some reason, you  
11 know, Mr. Geller doesn't think that the person that's been  
12 selected is adequately representative of the group, then he can  
13 be heard to object if that may be, but I think that it would be  
14 a cooperative process, what I hope would be, but ultimately be  
15 the debtor's call.

16 MR. MATSON: Thank you, Your Honor.

17 THE COURT: All right. Mr. Page?

18 MR. PAGE: Your Honor, Ronald Page for Frontier  
19 Peppers Ferry, LLC and Howard Finkelstein. I just want to  
20 clarify that this treatment is only to be extended to the Type  
21 A commingled parties and not the other commingled parties which  
22 my firm represents as lead counsel for Frontier Peppers Ferry  
23 and co-counsel for Mr. Finkelstein.

24 THE COURT: The Court's ruling was confined to  
25 Category A. If you file a appropriate motion, the Court will

1 consider it, but for the time being, it's confined to Category  
2 A.

3 MR. PAGE: Thank you, Your Honor.

4 THE COURT: Any other questions? All right, thank  
5 you very much.

6 COURT CLERK: All rise. This court is now adjourned.

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

We, AMY RENTNER and ELAINE HOWELL, court approved transcribers, 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 our ability.

/s/ Amy Rentner

AMY RENTNER

/s/ Elaine Howell

Date: January 23, 2009

ELAINE HOWELL

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