

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35994 (KRH)
. .
. .
LANDAMERICA FINANCIAL .
GROUP, INC., . 701 East Broad Street
. Richmond, VA 23219
. .
Debtor. . January 27, 2009
. 2:05 p.m.

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

APPEARANCES:

For the Debtor: Kelley Drye & Warren, LLP
By: CRAIG WOLFE, ESQ.
101 Park Avenue
New York, NY 10178

Willkie Farr & Gallagher LLP
By: LAWRENCE O. KAMIN, ESQ.
787 Seventh Avenue
New York, NY 10019

McGuireWoods, LLP
By: JOHN H. MADDOCK III, ESQ.
One James Center, 901 East Cary Street
Richmond, VA 23219-4030

Proceedings recorded by electronic sound recording, transcript
produced by transcription service

J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@optonline.net

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

APPEARANCES (Cont'd.):

For the LES Unsecured
Creditors' Committee:

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

Tavener & Beran, PLC
By: LYNN LEWIS TAVENNER, ESQ.
20 North Eighth Street, Second Floor
Richmond, VA 23219

For the Ad Hoc
Committee of
Commingled Exchangers:

Durette Bradshaw, PLC
By: JAY GELLER, ESQ.
(Telephonic Appearance)
Main Street Centre, 20th Floor
600 East Main Street
Richmond, VA 23219

For Frontier Peppers
Ferry LLC:

Cantor Arkema, P.C.
By: RONALD A. PAGE, JR., ESQ.
BRUCE ARKEMA, ESQ.
Bank of America Center
1111 East Main Street
P.O. Box 561
Richmond, VA 23218

For the Office of the
U.S. Trustee:

Office of the U.S. Trustee
By: ROBERT B. VAN ARSDALE, ESQ.
701 East Broad St., Suite 4304
Richmond, VA 23219

For the LFG Creditors
Committee:

Bingham McCutchen, LLP
By: JEFFREY S. SABIN, ESQ.
399 Park Avenue
New York, NY 10022-4689

For Health Care REIT:

Arnold & Porter, LLP
By: RANDALL K. MILLER, ESQ.
1600 Tysons Boulevard, Suite 900
McLean, VA 22102-4690

For Dr. Luxenberg:

Sands Anderson Marks & Miller, PC
By: WILLIAM ASHLEY BURGESS, ESQ.
Wytestone Plaza
801 East Main Street, Suite 1800
P.O. Box 1998
Richmond, VA 23218-1998

1 THE CLERK: In the matter of LandAmerica Financial
2 Group, Incorporated, Case Number 08-35994, hearing on Items 4
3 through 7, as set out on today's docket.

4 MR. WOLFE: Good afternoon, Your Honor. Craig Wolfe,
5 Kelley, Drye & Warren. We have a couple of things on today. I
6 think we're going to start with the motion of Millard
7 Refrigerated Services, Inc. for modification of the original
8 cash management order that was entered in the LES case and to
9 remind the Court, apparently, there are two cash management
10 orders, one in the parents case and one in the subsidiaries
11 case, and this only pertains to the subsidiary, LES.

12 And the issue is really simple, and I won't spend a
13 lot of the Court's time on it, but it's really designed to
14 enable the debtor to move the funds that are sitting at
15 Citibank over to a substitute bank in a similar type of account
16 and similarly situated. And what I mean by that, it would be
17 an account at an alternative bank that would be on the U.S.
18 Trustee for this District's approved list of depositories. It
19 would be an account that would either be invested or holding
20 U.S. treasuries, or it would be an account that would be
21 subject to the federal government's new FDIC transaction
22 account guarantee program.

23 And the idea, of course, is to put the money -- take
24 the money out of Citibank and put it into a safer account for
25 reasons we've been hearing in the news, and the argument is a

1 very simple one. Citibank, it's well known that they're in
2 distress. I think it's uncertain as to what will happen to
3 them, but in any case, there's a lot of money that is sitting
4 currently in those accounts, and it wouldn't be either but for
5 this bankruptcy case. We're talking about approximately \$40
6 million that's sitting in those accounts in the name of
7 LandAmerica 1031 Exchange Services as qualified intermediary
8 for the benefit of the movants. And the movants in this case
9 are the -- is Millard, and then the others are Lube Express,
10 the two Lube Express entities, and the two Chino entities. The
11 remainder of our clients have funds in other banks, and we're
12 only talking about Citibank today.

13 We submit, Your Honor, it's appropriate. It's
14 probably more along the lines of the U.S. Trustee's guidelines
15 than where the money is at currently and more consistent with
16 Section 345 of the Code, and we would ask the Court that you
17 would approve the order slightly as modified. I've been in
18 discussions both with debtor's counsel and I believe also the
19 Committee's counsel, and there's one other provision that we
20 would like to put in there. That in the fees that are
21 associated with the transfer of the funds, such as wire
22 transfer fees, any fee associated with opening an account, that
23 would be borne by the account itself.

24 And then one other point I should put on the record.
25 That this would be completely without prejudice to the parties

1 litigation positions in the case, which, in my view, should be
2 frozen as of the position date.

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

4 MR. WOLFE: Thank you, Your Honor.

5 THE COURT: Let me hear from the debtor.

6 MR. MADDOCK: Good afternoon, Your Honor. John
7 Maddock on behalf of the debtors and in particular, LandAmerica
8 1031 Exchange Services. Your Honor, we have no opposition to
9 the motion. I did speak to Mr. Wolfe about the fee issue, and
10 he agreed to include that in any proposed order, so we have no
11 objection.

12 THE COURT: Are there other funds of LES or for
13 clients other than the clients that are parties to this motion
14 that are on deposit at Citi Corp.?

15 MR. MADDOCK: I believe there are, Your Honor. We've
16 not --

17 THE COURT: Will this order be broad enough to cover
18 all funds on deposit there?

19 MR. MADDOCK: No, Your Honor, just Mr. Wolfe's
20 clients. Our position would be if someone were to follow Mr.
21 Wolfe, we would address perhaps a global resolution at that
22 time, but currently it's just Mr. Wolfe's clients.

23 THE COURT: What are the -- what is the dollar amount
24 of the remaining funds that would be left at Citi Corp.

25 MR. MADDOCK: I don't know, Your Honor.

1 THE COURT: All right. Let me hear from the Office
2 of the U.S. Trustee.

3 MR. VAN ARSDALE: Robert Van Arsdale for the U.S.
4 Trustee. Your Honor, as soon as I -- as soon as we saw the
5 motion that had been filed, the one thing I did -- I got a call
6 actually from Mr. Matson or an e-mail that simply said could
7 this be taken care of by collateralizing these accounts. We
8 have started the process of trying to do just that.

9 And to follow from what the Court was asking before
10 concerning the other accounts that are in Citibank, to the best
11 of our research right now, accounts related to LES and various
12 exchanges total around \$138 million rather than \$40 million.
13 There's also been some -- while not directly related to LES,
14 one of those is also a LandAmerica account which is in Smith
15 Barney slash Citibank for \$100 million in and of itself, which
16 is some sort of securities account.

17 So there is some difficulty involved with this. I
18 won't mislead the Court at this point concerning that, and the
19 difficulty is whether Citibank, in fact, has enough collateral
20 that could be pledged to make them want to participate in the
21 usual collateral agreement that we have, and we are talking to
22 them about that right now. It's not as easy as it used to be,
23 and these are some pretty big numbers.

24 The other thing that I would bring to the Court's
25 attention is if we start moving these great amounts of money

1 into other financial institutions, they too will have some
2 difficulty coming up with enough pledgeable assets to cover the
3 115 percent that is required to be part of the system that the
4 U.S. Trustee sets up for the security of the accounts in
5 exactly the situation that's been brought before the Court
6 today. So in these uncertain times, part of the uncertainty is
7 also whether the banks actually have the wherewithal to provide
8 collateral for this, and I'm not certain, in general, that
9 moving the accounts is the right solution, because I don't know
10 of a bank that's strong enough right now to make a whole lot of
11 difference about whether it's that bank or Citibank or Bank of
12 America or anything else. But we are trying to work through
13 that now, and I think that probably by the end of the week we
14 should have a resolution of whether that is either going to
15 work or not work and whether the bank would be willing to sign
16 off and participate in the memorandum of understanding that we
17 normally get.

18 THE COURT: All right, so it's correct then that Citi
19 is not on your -- the U.S. Trustee's approved list.

20 MR. VAN ARSDALE: It is not, Your Honor. We have --
21 it's not on the Region 4's list, and we have contacted almost
22 everybody on the eastern half of the United States to see if
23 anybody has a -- had recent history with Citibank in terms of
24 making collateral arrangements, and the closest we have is
25 there was a case in Alexandria five years ago. So they have

1 done it before, but it makes it more difficult, because there's
2 nobody in current Citibank management that, you know, is
3 familiar with this process.

4 THE COURT: All right. And then as far as what
5 you're proposing to do with regard to the monies other than the
6 movants is to try get Citi to collateralize those accounts
7 rather than move those accounts to other institutions.

8 MR. VAN ARSDALE: To collateralize all of it, so that
9 everybody would be in the same situation, rather than have it
10 be based on who happened to move this Court for a special order
11 about their funds.

12 THE COURT: All right, and then banks that are
13 approved in Region 4, which Mr. Wolfe is directing his motion
14 for these monies to be moved, will they be able to
15 collateralize the accounts, or is there some question about
16 that?

17 MR. VAN ARSDALE: Your Honor, I don't -- they
18 currently have collateral accounts, but in general, what we're
19 normally talking about is something less than \$5 million worth
20 of collateral in a case like this that is a quantum leap up to
21 \$138 million or even the \$40 million that Mr. Wolfe is talking
22 about.

23 THE COURT: Because they've got to come up with that
24 extra 15 percent.

25 MR. VAN ARSDALE: They -- yes, and I mean it's -- I

1 mean it's real collateral, and they really have to have it, or
2 if they don't have it, they have to buy it. So that could be a
3 difficulty given these times and these amounts of money.

4 THE COURT: All right. Thank you.

5 MR. VAN ARSDALE: Yes, sir.

6 THE COURT: Mr. Wolfe.

7 MR. WOLFE: Yes, Your Honor, I think I can clarify a
8 couple of points. Number one, we're talking about just the
9 movants that we're representing, and that 40 million only, so
10 that's --

11 THE COURT: I understand, but I had questions about
12 the others.

13 MR. WOLFE: Sure. We're also talking about moving
14 the money to one of -- one single bank -- identifiable bank on
15 the list of the approved depositories, J.P. Morgan Chase, so
16 it's a big one. And we -- I think all of the movants have
17 opted in the last 24 hours to move the money into a FDIC fully
18 insured transaction account, guaranteed program-type account,
19 so it would be fully insured by federal government.

20 And we also incidentally learned that those accounts
21 do -- it's approved to pay a nominal interest rate, and they
22 actually pay a higher interest rate than treasuries today, and
23 that's partly why the movants have opted to go into that
24 account. It should be fully safe, and that it's fully insured
25 by the federal government.

1 THE COURT: All right. Thank you.

2 MR. WOLFE: Thank you.

3 THE COURT: Mr. Gibbs.

4 MR. GIBBS: Good afternoon, Your Honor. Chuck Gibbs
5 with Akin Gump along with Lynn Tavenner, co-counsel for the LES
6 Committee. We had supported the motion. The concern the
7 Committee has that the grounds which were asserted for hearing
8 this on an expedited relief was the imminent potential
9 shakiness of the institution that was holding the movant's cash
10 and coupled with the fact that it wasn't an authorized
11 depository. Knowing that the debtor has substantial additional
12 money the Committee believes belongs to LES and is not being
13 held by LES in trust for other creditors or other parties in
14 interest gives us the same concern, especially based on the
15 allegations that the debtor I guess agreed to, that there is
16 imminent concern regarding the viability of the holder of the
17 money.

18 So the Committee will likely file in short order a
19 pleading asking Your Honor to deal with the remainder of the
20 funds, at least so that something's on the docket, working with
21 the U.S. Trustee to make sure that we're not just borrowing
22 from one set of problems to give to another set of problems,
23 but at least we'll have something procedural on the Court's
24 docket to carry forward quickly.

25 THE COURT: All right. Thank you. All right. The

1 Court is going to approve or grant the motion. Mr. Wolfe,
2 please submit an order to that effect. And the Court is
3 concerned about the other monies and Mr. Gibbs and would
4 welcome an appropriate motion and would encourage you to work
5 with the Office of the U.S. Trustee to get, you know, all of
6 these accounts collateralized, so that, you know, we can make
7 sure that the monies are safe given these uncertain times.

8 All right. We'll take up matter Number 5 then. Is
9 there a preferred order to go in with regard to the rest -- the
10 remaining matters on the docket?

11 MR. KAMIN: We're fine with the order that's in the
12 schedule, Your Honor.

13 THE COURT: All right. Thank you. All right, so
14 we'll take up matter Number 5.

15 MR. PAGE: Good afternoon, Your Honor. Ronald Page
16 on behalf of Frontier Peppers Ferry, LLC and Howard
17 Finkelstein. We have today both the motion to expedite
18 regarding the underlying joint motion of the previously
19 mentioned parties to bifurcate the trials, that is the lead
20 cases. And I don't believe there's been any objection filed to
21 the motion to expedite.

22 THE COURT: Is there any party that wishes to speak
23 in opposition to the motion to expedite?

24 (No verbal response)

25 THE COURT: Okay. That motion will be granted.

1 MR. PAGE: Your Honor, this motion comes pursuant to
2 Rule 7042(b). There has come to our attention that there is
3 not a consensus as to how we are to move forward as to the
4 order establishing the scheduling protocol at the adversary
5 proceeding that was entered by yourself in this court on
6 January 16th as that protocol did not limit the scope of the
7 lead cases.

8 Your Honor, my clients are seeking bifurcation and
9 believe it is warranted for at least three reasons. One, it
10 furthers the purposes of the protocols to sponsor swift
11 resolution of the legal disputes common to the numerous
12 exchangers. Second, many of the issues related to damages are
13 dependent on first an initial determination of this Court as to
14 the issues of liability. And, third, the issues of damage are
15 largely individual and such are difficult to then be made to
16 apply across a large class of cases to the joint motion to
17 bifurcate or filed one -- a joinder motion by the LES
18 Committee. And that motion is well taken, and we do believe
19 that liability should include a determination of all issues
20 related to the ownership of the exchange funds, be that
21 including some issues of damages. That is entirely
22 understandable.

23 Now, as to the response of the LFG Committee, that
24 seeks to limit the issues to be tried by the lead cases simply
25 to the 541 issues as to what constitutes property of the

1 estate. Now, basically, they're -- them wanting to limit the
2 issues of recovery to 541 issues, specifically for my clients,
3 that would be arguments regarding express trust and resulting
4 trust. Now, absent exploration of the issues of breach of
5 contract, fraud, and other intentional torts, it's our opinion
6 that the intent of the protocol is being undone by simply
7 limiting it to the 541 issues.

8 Now, I believe that the LFG Committee is attempting
9 to return us to a determination of the issues only relevant to
10 the surrogated exchangers and the escrow exchangers, and this
11 is basically taking us back to the 9019 motion of mid-December.
12 Now, while we've gotten well beyond that, this response is
13 going to relegate the commingled exchangers to a second set of
14 proceedings after these initial 541 issues have been
15 determined, and it is the opinion of both Frontier Peppers
16 Ferry and Howard Finkelstein that that was simply not the
17 intent of the protocol, and that the bifurcation should be
18 liability, and that would then include, of course, any issues
19 that the LES Committee is concerned with, and that is primarily
20 as to -- what did I say, LFG or LES?

21 UNIDENTIFIED ATTORNEY: You said LES. I think you
22 meant LFG.

23 MR. PAGE: Actually, we do take the concerns of and
24 the joinder motion of the LES Committee, and that we do believe
25 the liability should also include a determination of all issues

1 related to the ownership of the exchange funds. Thank you.

2 THE COURT: Just so I understand what you're saying,
3 what is different between issues relating to ownership of
4 exchanges funds and whether it's property of the estate under
5 Section 541?

6 MR. PAGE: Well, the ownership of the exchange funds
7 is also going to involve certain other determinations
8 specifically when it comes to the issues of constructive trust.
9 Constructive trust is going to be an argument that is going to
10 then get into this fraud analysis, which then implicates the
11 ownership of the exchange funds.

12 THE COURT: So you want not just to -- an express
13 through a resulting trust but constructive as well.

14 MR. PAGE: At the very least. And also we want to
15 explore the breach of contract and the intentional torts. As
16 -- absent a determination as to those issues, we're going to be
17 left with a large set of open issues which the Court will have
18 a wonderful opportunity to address in these lead cases, and we
19 believe the Court should take that opportunity.

20 THE COURT: All right. Thank you. I understand.
21 Let me hear from the debtor.

22 MR. KAMIN: Good afternoon, Your Honor. Larry Kamin
23 on behalf of the debtors. With respect to the initial
24 bifurcation motion that came in, we have no opposition to that.
25 We think it makes sense to keep damages at a later stage of

1 this and to litigate the principal issues now.

2 The issue that was raised by the LFG Committee was
3 raised, at least to me, this morning, so I'm addressing it with
4 all of about an hour and a half's notice. There is certainly
5 some merit to reducing these cases to the question of the
6 ownership, especially now that we're in knee deep, not yet hip
7 deep. I think that would come next week. These are very
8 difficult cases to try to litigate, five at once in a matter of
9 weeks. We're relatively buried as things are. We're doing our
10 best.

11 We expect a very substantial document production on
12 Thursday, as promised, however, it is likely that we will not
13 be able to produce everything that was asked for, simply
14 because of the shear magnitude of materials that we're looking
15 through. We can take care of the paper record very quickly,
16 and we're going to be able to get a fair amount of e-mails, but
17 certainly not all the e-mails that are being requested. It's
18 not really physically possible. We have something like 20
19 people going over these e-mails, and I suppose with another 100
20 or 200 we could do it, but it's just impractical. So at this
21 point I'm for anything that will limit the issues to be tried.

22 Let me talk about the question of the ownership of
23 the property. That is clearly the most important aspect of
24 this whole exercise, and we, I think, undertook this with the
25 expectation that there might be different results based upon

1 these different categories, if you will, of exchange contracts.

2 We didn't really think about litigating each fraud
3 case as an individual fraud case. What Person A, who left LES
4 three months ago or something, said to Person B, who's one of
5 the lawyers for one of the other 400 contracts at issue, was
6 not something really contemplated doing as part of a larger
7 proceeding, as part of a model case, if you will, because it
8 doesn't get us very far.

9 The other thing about these individual claims --
10 individual causes of action apart from the property causes of
11 action is if the plaintiffs are successful in proving their
12 conversion case or their fraud case, they have an unsecured
13 claim against the estate. That's what they have. They have
14 that contract as well. It doesn't really get to the heart of
15 what we all think is important, is the money the estate's
16 money, or is it someone else's money. Once it's -- if we reach
17 that determination, and we see what the estate's money consists
18 of, well, then we can have little cases, if people want, about
19 how much their individual conversion claim is worth or fraud
20 claim is worth if there is any fraud.

21 So I guess that what this boils down to is we don't
22 really have any objection to limiting these cases at this point
23 to the ownership issue -- I guess it's 541 -- in terms of who
24 -- of whether the funds -- and right now we have a big body of
25 funds that represents the commingled funds that's sitting in

1 that bank account that I now think we're thinking about
2 changing. And if we determine who owns that, then individual
3 cases can go forward. We can work out some method of hopefully
4 resolving the disposition of all that.

5 The key issues will be, of course, in connection with
6 the other cases, the segregated cases and the escrow cases. If
7 they are part of the pot, that's, obviously, a critical
8 determination. Critical certainly for the commingled, for
9 everyone for that matter. Those cases, as we're litigating
10 them, I don't think they involve any claims outside of the 541
11 claims. We're talking about the Millard case and the Health
12 Care REIT, which we call HCM, because I think that's their
13 stock symbol. HCM and the Millard cases are relatively
14 straightforward, and I think one has two causes of action, one
15 maybe has three, and they're really just focused on the
16 question of ownership. So I'm coming along in these last hour
17 and a half or two hours to agree with the LFG Committee on
18 that.

19 THE COURT: Address, if you would, the concern that
20 was raised about wanting to be able to litigate the issue of
21 constructive trust in addition to express and resulting trust.

22 MR. KAMIN: That's probably the hardest issue there.
23 I think --

24 THE COURT: Because then they'd have to get into the
25 fraud or conversion type of issues, which you're suggesting

1 should be put off to another day.

2 MR. KAMIN: Well, certainly, individual fraud issues
3 I think should be put off to another day. In terms of
4 constructive trust, I actually don't know, Your Honor, whether
5 that -- well, I suppose maybe it's a constructive trust -- is a
6 constructive trust as opposed to simply a tort for which you
7 have a remedy of damages. That may well have to be litigated,
8 but again it would not be in connection with any of the
9 individual expressions that one person said to another person.
10 I mean it could be, but you might want to reserve that for some
11 later determination.

12 I'm not sure how helpful it is to have a
13 determination in a particular case that because one of the LES
14 sales agents said something to one of these plaintiffs that
15 turned out to be wrong, that that individual now has a claim --
16 has a valid constructive trust claim. That also doesn't do
17 much to speed the proceedings or to set a pattern for the
18 others. So I'm simply not -- I'm not sure that it solves the
19 problem to allow that claim to be litigated as well, because
20 that may be different for different people.

21 THE COURT: All right. Thank you.

22 MR. GIBBS: Your Honor, the LES Committee had joined
23 -- had filed a joinder to the motion of Mr. Finkelstein and
24 Frontier Peppers Ferry, and that we agree that there should be
25 no expenditure of time and resources in determining the level

1 of damages asserted by any of the test cases. Our goal in
2 entering into the protocol, negotiating it, presenting it to
3 the Court, and we think the Court agreed with that goal, was to
4 try to simplify the process whereby the Court could decide
5 whether -- whether or not the assets listed on the debtor's
6 schedules and statement of affairs belong to the estate for
7 disbursal pursuant to the order of priority and contained in
8 the Bankruptcy Code, or whether they're -- merely legal title
9 was held in the equitable ownership of those -- any of those
10 assets are held in trust for the benefit of third parties.

11 What I'm concerned about -- and I'm not certain I
12 understand exactly where the debtor is, and I understand
13 they're kind of formulating their response to the LFG's
14 Committee's position on the fly, because they just got the
15 opposition papers, as did we. My concern is it appears that
16 the LFG Committee would like Your Honor to only decide the
17 issues of contract, of whether a trust exists pursuant to
18 contract, and whether or not funds can be traced.

19 My fervent hope is that we don't spend 90 days doing
20 discovery, filing summary judgment papers, and/or trying these
21 five cases and have the Court decide that under one theory the
22 property belongs to the estate and isn't in trust for the
23 benefit of any one of 450 creditors, but that there are a
24 couple of other theories that we haven't been able to bring to
25 the Court. And I don't have a clearly articulated roadmap as

1 to what you should tell us we can and cannot try, but that's my
2 concern.

3 And my concern with the LFG's position is we're going
4 to get here and decide whether or not you can even look at
5 parole evidence, and you're going to only look at these
6 agreements, and decide whether or not under applicable law,
7 under theories of express trust, a trust relationship exists
8 and for whom and with respect to what and not get into the
9 issues of whether under applicable law and say Virginia law, if
10 that's what you're to look to, trust relationships exist under
11 any other theory that might involve an examination of the
12 parties' intent or the parties' actions. And within that
13 rubric we break down, and I wanted the Court to know that our
14 desire in bifurcating was clear, at least when we looked at the
15 first motion that was brought on today, and we joined in trying
16 to hold back any effort to -- by any of the plaintiffs to
17 assert damage claims. But into what we can -- what the
18 plaintiffs should be required to bring to the Court in order to
19 establish their argument that assets held by the debtor belong
20 to them that might be dispositive of the other 60 adversaries
21 and the other 400 parties' claimants, I think that we need some
22 direction.

23 THE COURT: All right. Thank you, Mr. Gibbs.

24 MR. SABIN: Good afternoon, Your Honor. Jeffrey
25 Sabin from Bingham McCutchen on behalf of the LFG Unsecured

1 Creditors Committee. Your Honor, we did file an objection to
2 the emergency motion not to limit the time, but we did so in
3 the time that was given. So, with all due respect to my
4 colleagues from the debtor and the LES Committee, we think we
5 filed it in a timely fashion, as this Court hadn't even decided
6 whether or not it was going to have a hearing today on the
7 substance.

8 THE COURT: And I understand that we're all working
9 under tight deadlines and such.

10 MR. SABIN: So we did our best as to that. I need to
11 go back to examine the record, but I'm going to give you my
12 summary position first, and then I'd like to you through it, so
13 at least you see where our thinking is from.

14 Our summary position is there should be some kind of
15 bifurcation. Damages should be in essence off. The essence of
16 our position, which I hope to otherwise convince you of, is
17 that to try to think through what would be entailed in this
18 Court deciding the so-called conversion claims, the so-called
19 constructive trust claims, involves necessarily directors,
20 officers, former directors, officers, other parties, who
21 otherwise might very well in discovery, in depositions, say
22 things that otherwise lead you to conclude that a constructive
23 trust should be imposed with respect to some or all of the cash
24 or ARS, and at the same time lead exactly to what I otherwise
25 was arguing to you was to be not adjudicated as part of these

1 proceedings, because I stood here, okay, on January 12th and,
2 as the record does show, was very concerned that effectively
3 these proceedings, these test cases, would do effectively just
4 that. And that the Committee wanted to have, and you did grant
5 us the option, of in essence standing by the wayside and be an
6 amicus and not be bound or being an intervener and have full
7 party rights.

8 So from our perspective, I'd like to take you through
9 what I think would be involved in the fraud determinations and
10 discovery, and why is it that I would limit Phase 1, okay, to
11 simply contract interpretation, interpretation of express trust
12 as a matter of law, and tracing. And I don't think that
13 returns us to simply dealing with escrow cases and segregated
14 cases, because I think in order to understand the law of
15 constructive trust or conversion or whatever they want to call
16 it, whether it's Virginia law, California law, or otherwise, I
17 think they're still going to have to involve themselves in
18 tracing.

19 But in order to understand and potentially approve
20 the fraud component, I'm not sure whose fraud they're talking
21 about, especially the way the pleadings are set up. And that
22 fraud could be LES. That fraud could be LFG. That fraud could
23 be directors and officers off on a frolic and detour as a
24 matter of law, depending on how you determine it. And if we're
25 going to go that route, then having relied upon the protocol

1 order, which otherwise we did our best collectively to try to
2 think through, including this Court, we, the Committee would
3 likely then want to come back and ask to and plead various
4 parties if this Court were now going to adjudicate the issues
5 of fact that may as a matter of law lead to conclusions of
6 fraud, which are indeed plead in some of these test cases.

7 So let's start out with the latest of the test cases,
8 which is proposed to be the fifth case called Luxenberg. For
9 the record, the Committee reserves its rights as set forth in
10 the protocol order, because it was never consulted or even
11 asked whether it would agree that this case would be the final
12 test case that we were all searching for in the commingled
13 category, but among the allegations include allegations that go
14 right to the heart of LFG and go right to the heart of fraud.
15 In fact, they deal with statements that would otherwise involve
16 this Court in adjudicating what was meant by 10Qs filed by LFG.
17 In fact, it's quoted in Paragraph 24 of the Luxenberg
18 complaint.

19 The 10Q statement also provided that, "The lifetime
20 exchange funds are held by us for the benefit of our customers
21 and are, therefore, not included as our assets in the
22 accompanying consolidated balance sheet. However, LES remains
23 obligated for the return and availability of proceeds and any
24 earnings from the temporary investment." Those allegations are
25 repeated as necessary allegations in various claims for relief

1 including, without limitation, a claim for relief for actual or
2 constructive fraud.

3 And so in trying to think through what it is that
4 this Court would necessarily potentially involve itself with in
5 terms of trying to adjudicate the particular claim or claims of
6 the five test cases or at least some of them which had in them
7 causes of action for fraud and/or constructive fraud that
8 otherwise are necessary to potentially, as they allege it, a
9 constructive trust on some or all of the frozen assets, it
10 necessary, okay, might lead this Court to conclusions that
11 otherwise would very much involve directors and officers,
12 potential aiders and abettors, third parties in connection with
13 these transactions and/or statements that were made by LFG,
14 whether it's publicly in SEC filings or otherwise.

15 Now, we are mindful that time is of the essence. We
16 are mindful that there are now other cases brought against non-
17 debtors. There is a case brought that effectively challenges
18 1031(x) or omissions as fraud on behalf of a punitive class in
19 California. I would expect that the debtor may come to you and
20 seek 105 relief to stay that action as against directors and
21 officers. There's a case that was just recently brought, an
22 adversary case, effectively again punitive class action, which
23 has in it two kinds of relief, again relief that effectively
24 says, just like the other 61 cases, we need your rulings on
25 whose property is it but also suing directors and officers for

1 breach of duty for fraud, et cetera.

2 When we understand that, Your Honor, we also
3 understand that there are a host of claims that could arise
4 from the facts that may get adduced in connection with this
5 Court if this Court were to determine that as part of this
6 process, it necessarily needs to look at and must look at the
7 fraud allegations. Whether it was fraud to invest in ARSs,
8 whether it was fraud to take money without telling them and put
9 it in a commingled account, whose fraud was it? Who did that?
10 Where was that decision made? Was that decision made at LFG?
11 Was that decision made at a board? Was it even a decision that
12 was made by any corporate entity? All of those are likely to
13 come out in discovery, and, therefore, to be presented to you
14 in connection with your determination, if this motion were
15 granted on that, and we think that could have the exact effect
16 that we thought, when I stood before you on January 12th, it
17 was not your intention to adjudicate.

18 So for all of those reasons, Your Honor, we would
19 urge this Court to limit Phase 1 to, in essence, the
20 determinations of express trust, contract interpretation, but
21 not conversion or fraud that otherwise could have the effect
22 that, at least I thought when I stood before you and listened
23 in return, that it was not your intention to otherwise
24 adjudicate at this point in time. Thank you, Your Honor.

25 THE COURT: Let me -- a followup question. You said

1 contract interpretation, express trust, resulting trust, but
2 you had said earlier in your statements that you thought it
3 also ought to include tracing.

4 MR. SABIN: Yes, I did.

5 THE COURT: Okay.

6 MR. SABIN: And that's because, Your Honor, as I
7 understand the law, if you can't trace, even if you could prove
8 fraud, you may not be entitled to relief of a constructive
9 trust. And so I thought that part of the work -- and I'm not
10 to say that we're limiting discovery, because I believe there
11 is great benefit into having all this discovery now, and if the
12 plaintiffs through discovery find out that they have real
13 fraud, hopefully, they can bring that to the Court's attention
14 by another motion and expedited, if need be, et cetera.

15 But I have no intention to argue to any of the
16 parties involved, whether it's the plaintiffs, the LES
17 Committee, or the debtors, that the discovery itself should be
18 limited. What I'm saying is that the process by which under
19 the protocol you adjudicate, Round 1 should be limited, so that
20 the information gathering is had now, but the adjudication is
21 done in parts. I also think as a Court of equity, Your Honor,
22 it may very well lead to one of the things we haven't talked
23 about which really underscored, I thought the very original
24 motion. Maybe as the facts come out the parties get together
25 and settle, and we never have to get to adjudications. And I

1 think as -- sitting as a Court of equity, I understand the
2 potential arguments for time lost, and we have to come back and
3 do it again, but the countervailing force is I'm not seeking to
4 stop the scope of discovery. The discovery can be complete,
5 okay, but the argument would be limit Round 1 in terms of the
6 adjudication.

7 THE COURT: All right. And then, if you would, just
8 -- and I think you may have just touched on Mr. Gibbs' concern
9 that, you know, we'd come and we'd have these Phase 1, as you
10 call it, and I come to a possible decision that I don't have
11 enough. I could adjudicate under another theory, and I haven't
12 looked at that theory, that it would not be property of the
13 estate. And what happens then?

14 MR. SABIN: Well, I -- at this -- at that point,
15 okay, I'm assuming under technical procedural rules we now have
16 five -- we have four test cases. Let's assume five if our
17 Committee consents to Luxenberg. All right? We have four of
18 those test cases already plead and already answered. And let's
19 assume the fifth were in the same position when your
20 hypothetical now before me. I think it's easy. The parties
21 first talk to one another, and if not, the plaintiffs come in
22 and say I'd like to amend my complaint. Okay?

23 And as I understand the procedural rules, you have
24 discretion to allow them to amend their complaint after the
25 answers have been otherwise interposed. And that would be --

1 hopefully, we can get to that point, and, hopefully, if the
2 discovery was such and all the parties were otherwise trying to
3 work to that goal of efficiency and economy, they talk to one
4 another and say, hey, look, guys, this is what we found in
5 discovery. We think it adds this. We didn't plead it. Okay?
6 We're going to get relief. Okay? Let's bring it, and,
7 hopefully, we come to a consensual resolution that says, yes,
8 no one thought of that. We'll tee it up. Assuming the Judge
9 says okay, we'll add that to the complaint.

10 THE COURT: All right. Thank you.

11 MR. SABIN: Thank you, Your Honor.

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

13 MR. MILLER: Your Honor, I'm on the phone. I don't
14 know if it's appropriate. It's Randy Miller for Health Care
15 REIT.

16 THE COURT: Mr. Miller.

17 MR. MILLER: Yes. May I be heard, sir?

18 THE COURT: Yes, you may.

19 MR. MILLER: Yes, it's Randy Miller for Health Care
20 REIT. I had a couple -- we would oppose the motion to
21 bifurcate. A couple quick points.

22 The first is Health Care REIT doesn't have any claim
23 for damages. We simply are seeking a declaration of ownership.
24 And so I don't know to what extent the motion would apply to
25 Health Care REIT. In other words, I would think that if the

1 Court were to conclude that the \$137 million that are not held
2 by the debtor, by the way, but are held by Centennial Bank as
3 escrow holders, so LES doesn't have it -- if the Court
4 determines that those funds are not property of the estate,
5 then we just want a declaration and injunctive relief to return
6 our property, and there's no damages.

7 So I'm -- I guess to the extent that I -- my
8 assumption is correct, that the motion would not apply to the
9 Health Care REIT case, then I guess I don't have any position.
10 But to the extent that there's a -- an attempt here to say that
11 if the Court were to determine that those funds are property of
12 the -- property of Health Care REIT, but we can't get it for
13 some reason, you know, then we would have several reasons to
14 oppose that.

15 And first I should say as primary matter, we think,
16 you know, any motion that bifurcates is way too late. I mean w
17 had a detailed protocol, and we had negotiations and drafts
18 back and forth, and this should've been filed six weeks ago.
19 And why it's filed now on an emergency motion, it's unclear to
20 us. You know, it's just somebody just came up with the idea
21 late, and we agreed -- we entered into this protocol and agreed
22 to serve as a lead case under the protocol. We didn't think
23 that there was going to be -- that we would have a
24 determination that the funds that are held separately, in a
25 separate escrow, by a separate party is our property, and we

1 somehow can't get it, because there's a bifurcation. We don't
2 think that that's fair, and we don't think that it should've --
3 we think that it -- to the extent that the Court wished to
4 consider it, it would've been at least as to Health Care REIT.
5 You know, something that would've been brought up way earlier.

6 And we did think in the case -- we were very careful,
7 you know, that we just tried to avoid becoming entangled in
8 this proceeding and not raise claims for damages or fraud or,
9 you know, interest that we're losing and that kind of thing.
10 We just wanted a declaration that our money is our money, and
11 that we could just extricate ourselves from this proceeding.
12 And, you know, currently, there's no claim for damages, because
13 we, you know, have agreed to the protocol.

14 If the protocol becomes scuttled because of delay or
15 attempts to roadblock it or break it into pieces, and so that,
16 you know, it's much longer, then, eventually, we will have
17 claim for consequential and other money damages. We're trying
18 to avoid that, and we think that in our case that summary
19 judgment is going to be clear that there's no argument that his
20 is anyone's property other than Health Care REIT's, because we
21 have -- took the additional step of setting up this separate
22 escrow holder -- the Centennial Bank as a separate escrow
23 holder under a separate document, which under California law
24 allows to establish. And so we went ahead and took that extra
25 step, and we think it's going to be a right for adjudication

1 and summary judgment, and that that summary judgment decision
2 should include our request for declaratory judgment and
3 injunctive relief.

4 And so to the extent that the motion to bifurcate
5 doesn't apply to us, you know, we take no position. But to the
6 extent that it stands in the way of us getting equitable return
7 of our property, we do oppose it.

8 THE COURT: All right. Thank you, Mr. Miller. Does
9 any other party wish to speak to the --

10 MR. GELLER: Geller here. If I might be heard? I'm
11 also on the phone. I apologize.

12 THE COURT: Well, before you respond, I think we have
13 another. Do approach.

14 MR. BURGESS: Good afternoon, Your Honor. Ashley
15 Burgess on behalf of Dr. Luxenberg, which has been identified
16 as the potential fifth case.

17 THE COURT: Okay.

18 MR. BURGESS: The problem -- one problem I have is
19 I'm not sure we're properly before the Court right now, because
20 no order has been entered officially deeming us the fifth case,
21 and, obviously, there's some concern on behalf of the LFG
22 Committee that maybe they're going to object to our case. I'm
23 not sure if they stated an official position to that.

24 But to the extent that this issue completely impacts
25 our case, assuming we would become the fifth case, I think it's

1 important for us to at least state what our position is. Our
2 position is that this is a fundamental change in what the
3 original idea of the protocol order was. The original idea of
4 the protocol order -- keep in mind that protocol order was
5 entered when four out of the five adversary proceedings had
6 already been filed, so everyone knew what those adversary
7 proceedings pled as far as cause of action goes -- causes of
8 action go.

9 The fundamental idea of that was to send those five
10 test cases forward on an expedited schedule, so that the Court
11 would rule on those, thinking that that would dispense with the
12 majority or give clear guidance to a majority of the claims.
13 And I think that was certainly a good system. And when Dr.
14 Luxenberg signed up as the fifth test case, believe me --
15 believe you me, he understood it to be that all claims would go
16 forward.

17 We don't take a position on the issue of bifurcation
18 as to whether a -- the trial should only be as to liability or
19 damages. We weren't planning on bringing that type of motion.
20 But we do take a position that if we're going to go forward
21 with the trial on liability only, it has to be to all the
22 causes of action. If there are issues as to constructive
23 fraud, those need to be dealt with in the test case, because
24 they will provide guidance to all of the similarly situated
25 litigants.

1 Now, the LFG Committee's counsel stated that one of
2 the issues that should be looked at is tracing. Well, tracing
3 counsel claims is a fundamental element of constructive trust.
4 So are we going to go half way down the constructive trust road
5 and then stop and then come back maybe for a Phase 2? Where
6 does Phase 1 end? All these are fundamental changes from what
7 the original protocol order stated and what, I believe, it
8 contemplated.

9 We would submit that to the extent that Dr. Luxenberg
10 is the fifth case, and we are properly before the Court, we
11 would oppose the limitations that have been suggested here
12 today.

13 THE COURT: All right. Thank you, sir. Any other --
14 Mr. Wolfe.

15 MR. WOLFE: Yes, Your Honor. Quickly. Last time we
16 were before the Court I brought that issue, at least as it
17 pertained to the segregated test cases, before the Court and
18 sought clarification as to how the protocol affected the
19 segregated test case. And I said it was our understanding that
20 it would apply to the issue of whether the segregated funds
21 were property of the estate, what I call the declaratory relief
22 part of this. And then secondly, how that -- assuming that
23 they were not property of the estate, how that would relate
24 vis-a-vis the commingleds and the others, what I call the
25 injunctive claim, and that is whether the money can be

1 released.

2 It's my understanding this motion to bifurcate
3 shouldn't impact that, and it's our belief that -- and if it
4 does, again, we oppose it. We think that it's very simple.
5 Those two issues should apply to the segregated test cases
6 only. Those should be the issues that go before -- at the test
7 case phase.

8 THE COURT: And that's what I was hearing Mr. Miller
9 say as well.

10 MR. WOLFE: That's right.

11 THE COURT: And I think that, you know, it is -- the
12 first question is is it property of the estate, and then the
13 second one is, well, wait a second, what if all of the monies
14 are held in trust, then what do we do, and we've got to figure
15 out what the protocol is then?

16 MR. WOLFE: That's right.

17 THE COURT: Okay.

18 MR. WOLFE: Thank you, Your Honor.

19 THE COURT: Thank you. All right. Now, Mr. -- is
20 there anybody else on the phone that wishes to be heard?

21 MR. GELLER: Jay Geller here. I was actually --
22 didn't know -- who spoke prior to Mr. Wolfe just now? I didn't
23 hear the appearance.

24 MR. MILLER: Yes, that was Randy Miller for Health
25 Care --

1 THE COURT: Mr. Luxenberg's counsel --

2 MR. BURGESS: Ashley Burgess --

3 MR. MILLER: -- Mr. Burgess.

4 MR. BURGESS: -- from Sands Anderson.

5 MR. GELLER: Okay. Mr. Burgess. All right. Then,
6 Your Honor, I didn't know whether anyone was there on behalf of
7 Mr. Luxenberg, and since Mr. Burgess has addressed the Court,
8 then I don't need to. Thank you.

9 THE COURT: All right. Thank you, Mr. Geller. All
10 right. Anybody else on the phone need to address the Court?

11 (No verbal response)

12 THE COURT: All right. Mr. Page, you can respond to
13 all of that.

14 MR. PAGE: Your Honor, Ron Page again of Cantor
15 Arkema for Frontier and Finkelstein. As to Mr. Miller's
16 concerns and Mr. Wolfe's concerns on behalf of Health Care REIT
17 and Millard Refrigeration, we look at this proceeding as Phase
18 1 not occurring at the trial of these cases but at the summary
19 judgment level, such that, hopefully, the Court can adjudicate
20 the issues of contract law, of express trust, and potentially
21 of tracing such that then this bifurcation would in no way,
22 shape, or form specifically affect Health Care REIT and might
23 not even affect Millard Refrigeration. And that then we would
24 be in to address the more complicated issues that my clients
25 believe are implicated in these lead cases at the actual

1 trials. And we are hoping that the only issues that would be
2 adjudicated would be of general applicability. Any specific
3 claims as to this representative of LES spoke to my
4 representative, and the substance of that conversation, as it
5 would pertain to fraud, we think would be best dealt with in a
6 later proceeding, as it is not something that can be applicable
7 across the class.

8 THE COURT: So, okay, when you say general
9 applicability, then what you're saying -- let's go and parse
10 that a bit, so I can understand. What Mr. Sabin was saying was
11 that we wanted to adjudicate tracing, contract interpretation,
12 express trust, resulting trust, as far as liability is
13 concerned. And those seem to me to be what would be generally
14 applicable to all the parties with regard to -- across the
15 board. And are you then agreeing with that as far as an
16 approach?

17 MR. PAGE: We also think that there are some issues
18 implicated as far as constructive trust and also breach of
19 contract.

20 THE COURT: But how could constructive trust have a
21 general applicability, because isn't that a remedy that the
22 Court would be able to fashion in certain situations? I mean
23 it's a legal fiction, if you will, but it's a remedy as opposed
24 to, you know, something that we would, you know, actually try.
25 So as a remedy, I think of it as the damage component.

1 MR. PAGE: We have thought of it in -- and this is
2 just posing a possibility of facts emerged that LES engaged in
3 behavior such that they were found to have lulled their
4 customers into a false sense of security, and that could then
5 be generalized or applied across parties based on documentation
6 provided by the debtor, which, of course, is not forthcoming at
7 this point or which -- excuse me -- which we have not received
8 but have requested at this point. And, in addition, we believe
9 that the breach of contract count well might be applicable
10 across party lines based upon the failure of LES to be able to
11 consummate the 1031 Exchange agreements.

12 THE COURT: Okay. Thank you. Does anybody else wish
13 to respond? Mr. Burgess.

14 MR. BURGESS: Your Honor, I only feel compelled to
15 request that any relief that's granted here today not apply to
16 Dr. Luxenberg's case, because we're not properly before the
17 Court, because an order hasn't been entered officially
18 designating that as the fifth test case. So I wanted to just
19 put that on the record for the Court's notice.

20 THE COURT: Well, but you'll be advised that, you
21 know, if Dr. Luxenberg is the test case, then whatever we
22 decide today will apply to that case. If he's not, then it
23 won't. So to the extent you wish to raise other issues, then
24 you need to raise them now if you intend to go forward on that
25 capacity.

1 MR. BURGESS: Your Honor, at the risk of reiterating,
2 I think the point is is that all of the causes of action will
3 provide guidance if the rules on all causes of action that have
4 been asserted at the liability phase. They will all apply
5 guidance to the majority of the claimants, and it's important
6 for the Court to rule on all causes of action to the extent
7 that those causes of action apply to everybody. The Court has
8 seen all the adversary complaints that have been filed. They
9 are very, very similar.

10 If we have a Phase 1, are we going to amend the order
11 and say Phase 1 will occur until March 31st and then leave it
12 open for Phase 2? How is this all going to work? Will there
13 be a Phase 3? Will we really get anywhere? And I think that's
14 the point that possibly the LES Committee is raising as well.
15 Are we really going to achieve the purposes and the goals of
16 the Court, the debtor, the Committee when it entered into this
17 adversary proceeding protocol order? Thank you.

18 THE COURT: Well, it's the Court's hope that we'll
19 get to Phase 1 and be done with it. But, Mr. Gibbs, can -- I'd
20 like to address your concerns once again as far as -- because
21 you think that we should -- it should be broader than the four
22 items that Mr. Sabin had addressed. And if we get into issues
23 of constructive fraud, isn't that a damage issue, and isn't
24 that what we're trying to avoid with regard to the bifurcation
25 of these cases?

1 MR. GIBBS: I was pondering Your Honor's reaction to
2 that issue, and on reflection I think I'm comfortable with the
3 constraints I guess, if you will, articulated by Mr. Sabin,
4 because -- and I think the Court's right. The issues of legal
5 fiction to create a remedy really may be on an individual basis
6 and may not be able to be -- to serve as any real guidance for
7 the entire group. So to the extent the Court makes decisions
8 on the issue of whether under the contracts and the parties'
9 dealings there is an express trust and whether or not monies
10 can or can't be traced and when they were acquired and when the
11 assets that are on the debtor's schedules were required for
12 purposes -- the dates these claims arose, I think that's going
13 to give the parties sufficient guidance.

14 With respect to Dr. Luxenberg's counsel's issue, to
15 the extent that they agree to be a Test A case on what they
16 thought to be a protocol, and if Your Honor modifies it or
17 clarifies it today, and that causes them concern, we're fine
18 with finding another Test A case.

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

21 (No verbal response)

22 THE COURT: All right. The Court thinks that the
23 motion to bifurcate does make good sense, and so with regard to
24 Phase 1, it should be with regard to matters of general
25 applicability, and those items would be, as Mr. Sabin had

1 listed them, issues relating to tracing, contract
2 interpretation, express trust, and resulting trust in
3 connection with the liability phase there. And then,
4 hopefully, we can get that resolved, and that will lead to the
5 resolution of everything else.

6 But with regard to personal actions that go beyond
7 that, you know, as far as developing a remedy for constructive
8 trust or something, that would be a damage phase, and we'll
9 take that up at a later time. Have I mis-spoken?

10 MR. GIBBS: No, Your Honor never mis-speaks. Can I
11 ask for a clarification?

12 THE COURT: Certainly.

13 MR. GIBBS: Mr. Sabin had indicated, and it certainly
14 would be my hope and understanding, that there is no limitation
15 that the lawyers tried to impose on the discovery that's going
16 forward on an expedited basis. I'd hate for the lawyers to try
17 to argue whether or not the question at the deposition is going
18 to lead to evidence that is relative to the issues you just
19 articulated. We'd rather go ahead and have the discovery and
20 then save for the trial or the summary judgment the issues the
21 Court to determine.

22 THE COURT: Well, thank you for that clarification.
23 I'd actually written that down, and I just failed to mention
24 it. But discovery should not be limited by the bifurcation.

25 MR. GELLER: Your Honor, Jay Geller on the phone. If

1 I may be heard now actually? I apologize.

2 THE COURT: All right, Mr. Geller.

3 MR. GELLER: And it's really with respect to the last
4 couple of comments that have been made. Your Honor, I fully
5 understand the desire of the Court and, frankly, of the parties
6 not to get into individualized issues that really won't have a
7 broader application and move the other 445 cases along. That
8 makes perfect sense to me.

9 I am concerned, however, that the constructive trust
10 issue, while it may be in the nature of a remedy, there are
11 certain things that have to be established in terms of
12 achieving that remedy or may need to be established. There may
13 need to be showings of fraud. There may need to be tracing
14 either individually or collectively.

15 And to the extent that Your Honor believes that those
16 issues should wait, there may well be a question, which I think
17 is contrary to the goal of the protocol, about whether the
18 rulings in the test cases really establish any -- or dictate
19 the outcome in any significant way for the other cases if a lot
20 of those issues are left. And I'm thinking about, for
21 example, representations that were made on the internet about
22 how monies were going to be held and how safe they were and so
23 forth. Those really are individualized to some degree, but
24 there is broad application.

25 But specifically, Your Honor, I think what troubles

1 me more is this suggestion that the parties and the test case
2 plaintiffs are going to go forward under an extremely expedited
3 schedule which the protocol envisioned, and those plaintiffs
4 are not going to be permitted to make the case, for example,
5 for fraud and why a constructive trust should be imposed. But
6 that with respect to later on down the road, the discovery
7 cutoffs may apply, and even though we've all gone at breakneck
8 speed, we're going to be barred from seeking full -- more
9 fulsome discovery on issues which are not going to be litigated
10 in this breakneck speed pace, in any event.

11 So I just wanted to bring up this issue about how we
12 go forward with such an abbreviated discovery schedule when a
13 chunk of the claims that may be brought are not going to be
14 tried on that schedule. It's a concern that I have that I
15 wanted to at least bring to the floor before we signed off,
16 Your Honor.

17 THE COURT: Thank you, Mr. Geller.

18 MR. KAMIN: Larry Kamin on behalf of the debtor. Let
19 me try to address Mr. Geller's concerns plus raise my own. We
20 have -- let me get to the point. To the extent that there are
21 claims that are not tried as part of this first phase, I don't
22 think that the plaintiffs could be precluded from seeking
23 further discovery.

24 THE COURT: Oh, no, it's without prejudice.

25 MR. KAMIN: Yes.

1 THE COURT: We've said that from the beginning.

2 MR. KAMIN: Yes. But the other thing I wanted to get
3 to is the suggestion that discovery should now go forward, you
4 know, full boar as it had. And, obviously, we're producing
5 documents, and we're going to do the best we can on that, and
6 we're not going to -- I'm not going to start withholding that
7 stuff, not certainly stuff that we found.

8 On the other hand, we have five different cases, and
9 in at least two of them that have come forward they had two
10 individuals from LES who did the actual sales presentation or
11 where the -- created the paperwork. Of the two we've heard of,
12 that's four individuals, and none of them are with LES anymore.
13 If you -- if you just continue out, that's ten depositions of
14 people who aren't with LES, or eight -- there may be eight.
15 Maybe one still is. We also have three or four depositions of
16 individuals who are at LES and who could testify as to these
17 broad issues of the movement of money and tracing. That's
18 something that we have people, and we're expecting to produce
19 them there with the company, and there won't be any issue about
20 that.

21 But we do start to get into these individualized
22 depositions. Now, they could go forward, too, although it
23 seems like not a lot of what they say is going to be
24 particularly useful in this first phase. There are also I know
25 subpoenas of the banks, and I don't know whether there is an

1 intention to take depositions of people at the banks or not or
2 just settle for the depositions, but a lot of us have subpoenas
3 out to the banks or about to get them. So we have a period of
4 a few weeks where we have to depose, you know, quite a number
5 of plaintiffs and quite a number of people from LES, and then
6 these individuals, many of whom, I assume, are going to have to
7 be subpoenaed, the former LES people. Some may well cooperate.
8 Some may not.

9 But I'm trying to compute how all this goes together.
10 We have three depositions going on at the same time or four,
11 and I just think it may be sensible to defer some of the
12 depositions of the individual transactions that -- the
13 transaction history, in particular -- transaction, if that's
14 not going to be a subject that's litigated and decided in this
15 first phase.

16 THE COURT: All right.

17 MR. KAMIN: Maybe I can work that out with the
18 parties. I don't know, but it's -- it's going to be quite a
19 circus of depositions.

20 THE COURT: Well, what the Court would prefer is not
21 to do anything to stop any of the discovery that we already
22 agreed on from going forward. If there comes a circumstance
23 where, you know, within the time permits, or there's some other
24 reason that we need to give relief from the schedule that we've
25 adopted, then, you know, I could certainly take that up at the

1 time, and you can file a motion, and I'll hear you on that on a
2 very expedited basis. But I don't want to do anything at --
3 with regard to this motion that would impact the discovery
4 that's going on at this point. Thank you, Mr. Kamin. Mr.
5 Sabin.

6 MR. SABIN: Your Honor, I raise for one last issue,
7 and it's a related issue and clarification on the protocol, as
8 long as in essence that's what we're doing. I did mention
9 another case. It was the Barry Gluckstern versus the LES
10 Company, the LFG Company, and then two individuals -- actually,
11 three individuals, Dieter Chandler, William Evans, and
12 Christine Belichick. And I raise it in the context of time is
13 of the essence and Paragraph 2 of the protocol order, because
14 my reading of this complaint says two things. It clearly -- a
15 piece of it clearly falls within the protocol, and since it's
16 not a test case, that piece of it is stayed. So to the extent
17 it seeks any of the relief that the test cases seek, which is
18 effectively 541 determinations, that's stayed.

19 But there's a component part which is not otherwise
20 clear to me that seeks breach of fiduciary duty and damages and
21 things of that nature against individuals and/or the
22 corporations. And I just don't know whether we should come to
23 you for a clarification or otherwise at this point -- and I
24 know that counsel for Gluckstern may not be in court and may
25 not be on the phone, and I may -- it may not be proper even to

1 ask you in essence to give some clarification to your own
2 order, but time is of the essence, since the action is out
3 there.

4 THE COURT: Is this the punitive class action --

5 MR. SABIN: Yes, it is.

6 THE COURT: -- that was filed in this court?

7 MR. SABIN: In this court.

8 THE COURT: In this court. Because I know that the
9 order that I had entered has been filed in connection with that
10 case, and the summons that was issued told all parties not to
11 file an answer at this time until --

12 MR. SABIN: Fine that's -- we didn't know that.

13 That's not intervening, so for the record, then at this point
14 that case is stayed in full.

15 THE COURT: That has been stayed.

16 MR. SABIN: Thank you, Your Honor.

17 THE COURT: All right. Any other -- any further
18 clarification as far as what we need to do with regard to this
19 matter?

20 (No verbal response)

21 THE COURT: All right. Mr. Ross -- Mr. Page, rather,
22 if you would prepare the order, please, on that, and circulate
23 that prior to submitting for the other parties' comments. All
24 right. That takes us up to item Number 6 is it?

25 MR. ARKEMA: Your Honor, I might suggest that 6 and 7

1 be heard together.

2 THE COURT: Yes, let's hear 6 and 7 together.

3 MR. ARKEMA: Your Honor, I'm Bruce Arkema, and I'm
4 here on behalf of Mr. Finkelstein and Frontier Peppers Ferry on
5 both of their motions for an expedited hearing to allow them
6 professional fees and expenses as administrative expenses. I
7 don't think anybody's objected to the expedited hearing
8 request, that motion.

9 THE COURT: Does any party object to hearing this
10 matter on an expedited basis?

11 MR. KAMIN: Yes, Your Honor, I object.

12 THE COURT: Mr. Kamin.

13 MR. SABIN: And for the record, when Mr. Kamin is
14 done, the Committee would like to be heard, also, Your Honor.

15 THE COURT: All right.

16 MR. SABIN: Thank you.

17 MR. KAMIN: Yes, Your Honor, we do oppose an
18 expedited hearing in this matter. If simply no reason for us
19 to be all stopped dead in our litigation tracks on the
20 substance of this, they have to come forward today to decide
21 this particular motion. Counsel in these cases have been
22 litigating these cases now for a couple of months, and they saw
23 no need to ask this Court for any kind of help with their legal
24 fees or make any suggestion to you or anyone else, as far as I
25 know, that they were entitled to legal fees or should have

1 them. They've been playing on their own dime up until today,
2 and I don't see why this -- the question about whether they
3 will ultimately get fees or not has to be decided on, what was
4 it, several days' notice.

5 Normally, I think these cases under 503(b)(4) are
6 heard after the work is done and after -- at a point where the
7 Court can judge whether substantial contribution has been made.
8 And I understand the Court departed from that with respect to
9 the case that we needed to have to complete the protocol. But
10 there's certainly no reason to do that here, and beyond that,
11 there's no reason to do it on such short notice. They were
12 litigating in the case full steam. They have all the document
13 requests, all the discovery requests. They had -- Finkelstein
14 earlier made a motion for summary judgment.

15 The lawyers obviously litigating without any thought
16 to being paid, and I don't know why that should affect what
17 they're doing over the next couple of weeks, whether they're
18 going to get paid or not, and we just shouldn't be rushed into
19 court like this on a motion where there's no -- it doesn't
20 matter to the litigation of the cases, Your Honor, whether
21 lawyers or paid by the estate or by their clients. That really
22 doesn't matter, and I don't know why we, therefore, have to
23 have such a short time to think about this. And, of course,
24 I'll address the merits as well, if that is heard today. But
25 as far as expedited, I don't think there's any need. I don't

1 think we need to move an issue -- any need to move more quickly
2 on this than a normal motion practice.

3 THE COURT: Thank you. Mr. Sabin.

4 MR. SABIN: More often than not I find in cases I
5 agree with my colleague, Mr. Kamin, so I'll adopt all of those
6 statements and go two or three more.

7 First and foremost, as this Court will remember, you
8 held a hearing. I was not here personally. I did participate
9 by phone. To my knowledge, having checked just before I
10 entered the courtroom, there still is no order entered with
11 respect to this Court's ruling for a 503(b) substantial
12 contribution to the Commingled 8 counsel, and yet what we now
13 have is three me, toos, me, toos, me, toos. So I'm not sure
14 how we go forward on an expedited basis when we don't even know
15 what me, too means, because we haven't even seen the order.
16 And, in fact, we have requested from counsel a copy of the
17 proposed order and still haven't received one.

18 I think that's because of the next issues that,
19 otherwise, I think need to be addressed, if this Court wants,
20 in connection with the following related motions, two cash
21 management orders that this Court early in this case, before
22 the LandAmerica Committee was actually filed, entered, one cash
23 management order in connection with the LES case, one with the
24 parent case. In the LES case, in Paragraph 13 of that order
25 entered on the docket on November 28th, language was express.

1 That basically says as we still are here today, that any and
2 all funds, cash, ARSs, anything else that the LES debtor has is
3 to be frozen and not touched. That's order number one.

4 Order number two is the cash management order in the
5 parent estate, which in Footnote 4 could be read to permit
6 ordinary course vendor payments to be made by the parent on
7 account of ordinary course vendor obligations for the LES
8 debtor. We do not know whether the parent has availed itself
9 of and/or made any payments, but if it did, it was supposed to
10 in essence not only account for it but supposed to get back,
11 whether it's an administrative claim or otherwise, and, of
12 course, later in time -- I guess those were both in November.
13 Later in time we all have developed the test cases, the
14 protocol, and perhaps with 20/20 hindsight it is time, if this
15 Court is inclined in connection with the order it had already
16 entered or said it would enter, okay, with respect to
17 Commingled A, and/or, okay, if this Court would proceed with it
18 today or otherwise with the me, too motions, to concurrently
19 consider unfreezing a portion of the cash, if this Court wants
20 to, that is held by LES to cover those expenses as opposed to
21 using cash that clearly is of the parent. Especially since I
22 understood from my prior participation that if it was a
23 substantial contribution, it is at the LES level not at the
24 parent level.

25 And for all of those reasons, we think moving forward

1 today is premature, and when we do move forward, I think we
2 should not only move forward with respect to whether it's
3 proper with respect to the three motions for seeking 503(b),
4 and I adopt all of Mr. Kamin's arguments as to that, but, in
5 addition, the Committee would move forward by appropriate
6 relief otherwise to open up and unfreeze funds, so that those
7 payments can be made. And those payments include, Your Honor,
8 just so the record is also clear, any 503(b) in connection with
9 the test cases but also expenses of the debtor's, whether it's
10 the Zolfo people -- and there's a motion not to be heard today
11 but I think at the next omnibus hearing -- the debtor's
12 professionals, professional's for the LES Committee would all,
13 in my view -- in my proposal would otherwise come from the
14 funds to be unfrozen if this Court were to consider it. Thank
15 you.

16 THE COURT: Thank you, Mr. Sabin. Any other party
17 wish to speak in opposition to the motion for an expedited
18 hearing?

19 MR. GIBBS: Chuck Gibbs, co-counsel for the LES
20 Committee. Mr. Sabin's a skilled advocate. This case is
21 complicated enough. We've now started to argue two or three
22 matters that aren't even on the docket for which there's no
23 pending motion. I'd like to kind of stick to the issues,
24 although the essence of what he's arguing is please free up
25 some money to pay professional expenses in the LES case, which

1 would --

2 THE COURT: And you wish to speak against that.

3 MR. GIBBS: No, I'm not. I would just like to wait
4 until something's set to be heard and then rise and speak at
5 that point in time, similar to the class -- punitive class
6 action suit that's before Your Honor. But we would, for the
7 reasons articulated by debtor's counsel and in the first part
8 of Mr. Sabin's argument -- Mr. Sabin -- oppose expedited
9 relief.

10 We filed an objection to the motions on -- the
11 substantive motions themselves, because in prior matters Your
12 Honor's told us to be ready to argue the merits, and we thought
13 we -- it would best serve for the Committee to be ready to
14 oppose it on the merits, but we don't see a reason to bring it
15 on an expedited basis. The motion for expedited hearing that's
16 also set in addition to their substantive request is completely
17 bereft of reasons why and justification for an emergency
18 setting and short notice for a hearing on their request to be
19 prospectively granted, a ruling that they're making a
20 substantial contribution to the estate.

21 And for the reasons the debtor's counsel articulated,
22 they are vigorously and have been advocating on behalf of their
23 clients as has Mr. Wolfe on behalf of his client, which is also
24 a me, too motion set to be heard today. And if they want to
25 bring 503(b) motions for substantial contribution, then they

1 know how to do that, and Your Honor certainly can take them up
2 once there has been expenses incurred and a contribution
3 demonstrated that isn't duplicative of other parties' efforts,
4 which is another element that they must show under 503(b). So
5 we don't see a basis for hearing it on expedited relief. If
6 Your Honor is intent on going forward, I'd like to reserve some
7 time to oppose their substantive request.

8 THE COURT: All right. Thank you. Any other party
9 wish to be heard?

10 MR. WOLFE: Your Honor, Craig Wolfe, Kelley, Drye,
11 and Warren, on behalf of Millard Refrigerated. To clarify the
12 record, Millard did file a substantial contribution
13 application, however, Millard purposely did not put it on for
14 hearing today. We agree that this is not extraordinary relief,
15 but it's relief that should be given careful consideration, and
16 it should be afforded an opportunity to be fully briefed. And
17 so we don't believe that this should necessarily go forward
18 today.

19 However, there were some things said, you know, in
20 connection with this motion to expedite that we would be
21 prepared to argue to the contrary, and that is why Millard, for
22 example -- some complexities in its relationship with the other
23 plaintiffs that I think make it very similar to the Type A
24 plaintiff situation that are probably just not readily apparent
25 to the parties here. We would be prepared to argue those, but

1 we again don't believe necessarily that today's hearing is the
2 right place for that.

3 THE COURT: All right. Thank you.

4 MR. WOLFE: Thank you, Your Honor.

5 THE COURT: Any other party wish to speak in
6 opposition?

7 MR. KAMIN: I don't -- we have been advised by Health
8 Care REIT -- and I think their counsel's on the phone -- that
9 they intend to file a motion to the same effect. It's not yet
10 filed, but again it would probably make sense for all these
11 motions to be heard in the ordinary course, the Millard
12 Refrigeration one along these others that were made today.

13 THE COURT: All right. Thank you. Mr. Arkema.

14 MR. ARKEMA: Well, Your Honor, I don't know how to
15 address all of the issues that Mr. Sabin brought up, because
16 they don't really deal with what I'm here for today but --

17 THE COURT: Well, tell me what the emergency is.

18 MR. ARKEMA: There is no emergency other than, Your
19 Honor, we're on a fast track. We need to give a accounting
20 expert a retainer of \$20,000 to start going through all of
21 this. We've got to raise the money from clients, and we need
22 to know I guess going into it whether or not we're even in the
23 ball game as the Type As are. And I think you heard that on an
24 expedited basis, and nobody objected to it at that point, and
25 you at the conclusion of that clarified that you would

1 entertain the same type of motion from the other classes if it
2 was properly brought before you. So we brought the same --

3 THE COURT: Well, I said -- I think I said, you know,
4 I would only entertain if it was brought before me by
5 appropriate motion.

6 MR. ARKEMA: And so we brought the same type of
7 motion that was before you the last time that you did grant,
8 and nobody objected then, and all the objections had been
9 filed. If counsel needs another week or so to reflect on what
10 they filed, their objections that they filed to my motion, so
11 they can argue it better, I mean I don't have a problem waiting
12 another week to come back and argue in front of you then,
13 but --

14 THE COURT: You think it makes sense to have all of
15 these similar motions heard at the same time?

16 MR. ARKEMA: Well, if they're -- but I think they're
17 suggesting to you that we wait until everything's done and then
18 come back, and I would think that the test case plaintiffs
19 would like to know whether or not we're even in the ball park
20 with the Type As. The Type As now enjoy sort of the comfort of
21 knowing they can come in and apply. They just have to prove
22 what they did. We want the same thing. I'm not here today
23 saying that at the end of the day you won't look at the bill
24 and make an adjudication of what's fair and what's not fair
25 based on the rules of Celotex and all the other cases that

1 apply to substantial contribution. All we're saying is the
2 Court -- and I would think that's all you said in the Type A
3 case, is that you can apply, and I will consider your
4 application at the time, and we just did not want to be put in
5 the position where Type A has got certain relief, and we're
6 still waiting to determine whether our same plaintiffs get the
7 same relief.

8 THE COURT: The administrative procedures order that
9 was entered in this case says that you can bring on your motion
10 at any of the omnibus dates that we set on 20 days' notice.
11 But then it also has a provision in there that says we can --
12 any party in need of emergency relief can bring on a motion on
13 an expedited basis. I don't see that we have an emergency in
14 this case, and so I'm going to deny your motion for an
15 expedited hearing, and that's not to say you have to wait until
16 the end of the case. You can --

17 MR. ARKEMA: No. No. We'll wait for the --

18 THE COURT: On proper notice, you can bring it on any
19 omnibus date that we have scheduled in this case.

20 MR. ARKEMA: Yes, sir.

21 THE COURT: Okay?

22 MR. ARKEMA: Okay.

23 THE COURT: Mr. Kamin, if you would prepare the order
24 on denying the motion for expedited hearing.

25 MR. KAMIN: Very well, Your Honor.

1 THE COURT: All right. Is there any other matter
2 that we need to take up this afternoon?

3 MR. GELLER: If I could just inform Your Honor and
4 the parties of one fact that's been mentioned a couple of times
5 during the hearing?

6 THE COURT: Is this Mr. Geller?

7 MR. GELLER: Yes, it is, Your Honor.

8 THE COURT: Okay. And I'm sorry. What is it that
9 you --

10 MR. GELLER: I just wanted to inform Your Honor as
11 well as the parties there, there's been a reference I think or
12 several references to the order that you entered with respect
13 to the Ad Hoc Committee's motion with respect to the fees and
14 expenses of the Type A plaintiffs.

15 THE COURT: Yes.

16 MR. GELLER: And I apologize to Your Honor and to the
17 parties -- the other parties that we are somewhat tardy in
18 circulating that. We actually I think will be circulating it
19 this afternoon. But when we left court last Wednesday -- and I
20 flew back very late Wednesday night, so it was really not until
21 Thursday that it could be addressed -- we were focusing very
22 much on trying to identify a Type A plaintiff. Luxenberg was
23 identified. He had not filed a complaint yet. We worked very
24 hard through the weekend to file that complaint. And so we
25 were just simply more focused on trying to catch up and get

1 that done. I think Your Honor's order was fairly clear. I
2 hope there won't be major problems with the order. So again, I
3 take responsibility along with the other folks who were
4 representing the Ad Hoc Committee, but just were trying to
5 prioritize, and we will get that circulated very -- hopefully
6 today.

7 THE COURT: All right. Thank you, Mr. Geller. All
8 right. We stand adjourned.

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

10 * * * * *

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

12 I, PATRICIA C. REPKO, court approved transcriber,
13 certify that the foregoing is a correct transcript from the
14 official electronic sound recording of the proceedings in the
15 above-entitled matter, and to the best of my ability.

16

17 /s/ Patricia C. Repko
18 PATRICIA C. REPKO
19 J&J COURT TRANSCRIBERS, INC.

DATE: January 29, 2009