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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

08-CV-7104 (DC)

STEVEN BYERS, et al.,
Defendants.

-----x

New York, N.Y.
May 21, 2009
10:11 a.m.

Before:

HON. DENNY CHIN,

District Judge

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1 (In open court)
2 THE COURT: All right. First, there's an issue raised
3 with respect to Mr. Costa. Yes?
4 MR. COSTA: Good morning, your Honor. Keith Costa.
5 MR. GAGION: No, a different Mr. Costa.
6 THE COURT: Okay. Lawrence Costa. I didn't realize
7 there was more than one Costa. There was an issue raised with
8 respect to Lawrence Costa and there is a disagreement as to
9 whether he should be required to reveal certain information,
10 and I guess -- Ms. Kaufman?
11 MS. KAUFMAN: Yes, your Honor, I'm here.
12 THE COURT: Okay. Here's my feelings on this. I
13 certainly did not intend to require anyone to violate law, so
14 if it would indeed be a violation of Namibian law for Mr. Costa
15 to disclose this, then that was not my intent. I don't know
16 that it would be a violation. I don't know if that's disputed.
17 But it seems to me with that little bit of guidance, I would

18 ask the lawyers to try to work it out. In other words, if
 19 there's a disagreement as to whether it would be a violation of
 20 Namibian law, I'm going to have to decide it. And so what I
 21 would do is, I'm going to give you a briefing schedule, the
 22 receiver can move to compel. However, it seems to me you ought
 23 to have some discussions first. It shouldn't rise to the level
 24 of a formal motion. But if need be, I will decide it.

25 How much time do you want? Give yourselves a little
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1 bit of time after a discussion.

2 MS. KAUFMAN: It's the receiver's motion, Judge. How
 3 much time do you want to make your motion?

4 MR. COLEMAN: Your Honor, let me introduce -- Tim
 5 Coleman, the receiver. Let me introduce my counsel Leo Gagon.

6 THE COURT: Yes, all right.

7 MR. GAGON: Two weeks, your Honor?

8 THE COURT: That's fine. So the motion to compel, two
 9 weeks from today. Two weeks to respond?

10 MS. KAUFMAN: Yes, that's fine, Judge.

11 THE COURT: Two weeks. Two weeks. One week for
 12 reply.

13 MR. GAGON: That's fine, your Honor.

14 MS. KAUFMAN: Thank you, Judge.

15 THE COURT: Okay. Thank you.

16 Okay. Next, the proposed planned distribution.

17 Mr. Coleman, are you going to speak or one of --

18 MR. COLEMAN: Yes, your Honor. If I may, I'd like to
 19 take just a few minutes to make some overall remarks about the
 20 features of the proposed plan.

21 THE COURT: Yes. And when you do that, one thing I
 22 was a little unsure of that I'd like a little description of
 23 is, many of the objections to the pro rata method of doing this
 24 I think are based on the particular type of creditor, investor,
 25 and I'm not really sure what the different types of investors

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1 were. I mean, I know broadly there are some secured creditors,
 2 there are some unsecured creditors; I know broadly that there
 3 are these commodities funds; I know that there are certainly
 4 real estate investments. And it's hard to evaluate the
 5 fairness of it without knowing what the different categories
 6 are. So that would be helpful to me. And I don't know where
 7 we are in terms of the overall big picture, how close are we,
 8 do we have an idea of whether it's going to be a nickel on the
 9 dollar or 50 cents on the dollar? I mean, I think it would
 10 help if there was some indication. Okay.

11 MR. COLEMAN: Thank you, your Honor. I thought I
 12 would start from the podium for the benefit of the Court's
 13 guests.

14 THE COURT: Yes.

15 MR. COLEMAN: I'll start with the two issues that the
 16 Court raised. There are certainly several categories of
 17 victims. The vast majority of the victims are equity
 18 investors. Those individuals purchased securities from
 19 WexTrust and the securities were for the most part preferred
 20 membership interests in limited liability corporations. The
 21 nature of those interests is an equity investment. It is not a
 22 secured investment. It is an ownership interest as opposed to

23 a debt security. There is a small category of investors who
 24 purchased securities known as guaranteed depository rights and
 25 a couple of other variations on that, and those investors also
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1 purchased securities. They are arguably more akin to bonds in
 2 that they are debt securities as opposed to equity securities.
 3 Then there are unsecured creditors, and the unsecured creditors
 4 include vendors, landlords and other third parties who provided
 5 goods or services to WexTrust and are owed money on account of
 6 those goods or services. Finally, there are the secured
 7 creditors, the mortgage lenders and other parties who loaned
 8 money to WexTrust entities or affiliates on a secured basis.
 9 Now as we've touched on in earlier proceedings, some of those
 10 creditors are likely to be undersecured in the sense that the
 11 value of the collateral is less than the amount of the
 12 liability, and in those circumstances, the party will have both
 13 a secured claim and an unsecured claim. So there will be a
 14 secured claim against the value of the collateral and an
 15 unsecured claim for the deficiency, which is a claim against
 16 the WexTrust entity or affiliate and therefore against the
 17 estate. So those are the general categories of victims. And
 18 again, the vast majority of them are the preferred memberships,
 19 membership purchasers who are equity investors. So if this
 20 were a corporation as opposed to a limited liability company,
 21 those people would be analogous to common stockholders.

22 I'll stop there for a second and see if the Court has
 23 any questions about the categories.

24 THE COURT: No, that's fine. Thank you.

25 MR. COLEMAN: On the second question, how close are
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1 we, the answer is, I don't know. And the reason I don't know
 2 is, that much depends on the real estate market. The
 3 receivership estate has somewhere between 15 and \$20 million in
 4 cash on hand. We have a portfolio of commercial real estate
 5 with a book value somewhere in the neighborhood of
 6 \$250 million. There are very substantial secured claims
 7 against that real estate, approximately \$200 million, so the
 8 net equity on a book value basis is less than \$50 million. And
 9 those numbers are set out in the most recent interim report
 10 that we filed last week. Now of course the book value is a
 11 very different thing than the current market value, especially
 12 in the current circumstances of the commercial real estate
 13 market. We are in the process of marketing the real estate
 14 which are -- as the Court knows, we have already sold a number
 15 of pieces of real estate. Our experience has been fairly
 16 consistent with our valuation analysis, so we do believe that
 17 there is substantial value in the real estate portfolio, but we
 18 won't know until it's sold, and I expect that process, a rough
 19 estimate would be somewhere between six months and eighteen
 20 months, to sell all of the real estate.

21 THE COURT: And the plan is to sell it all.

22 MR. COLEMAN: Correct, your Honor. And let me pause
 23 on that issue for a moment. On January 15th, I submitted a
 24 plan of management for the real estate assets, and part of the
 25 plan was the plan for management of the commercial real estate
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1 portfolio of WexTrust Equity Properties. It's important to
2 keep in mind in this case that the original business plan was
3 to purchase parcels of real estate and ultimately to sell them.
4 This is a real estate company that is in the business of
5 buying, selling and developing real estate. So the investors'
6 expectations from the outset were that the properties would
7 ultimately be sold. In some cases we proposed to alter the
8 business plan based on the current circumstances, and including
9 the fact that this was a Ponzi scheme and including the current
10 economic circumstances, we have altered the business plan to
11 sell the properties more quickly than was originally intended.
12 But what I have tried to do is to make the plan of management
13 for the assets in this estate as close as reasonably possible
14 to what the investors signed up for when they purchased
15 securities.

16 THE COURT: In terms of the issue of commingling of
17 assets, I gather there are lots of these LLCs, and were some of
18 them intended for specific pieces of real estate?

19 MR. COLEMAN: The vast majority of them were
20 single-purpose real estate entities, or single-asset real
21 estate entities that were formed for the express purpose of
22 purchasing a particular real estate asset.

23 THE COURT: And so if someone bought an interest in a
24 particular LLC that was going to buy a particular real estate,
25 a particular piece of real estate, now some of these investors

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1 are saying, why should we be lumped in with everybody else, and
2 maybe you can address that. And also, I'm unclear on, you
3 know, the nature of the Ponzi scheme. I mean, there were
4 properties that were actually bought, and so I'm not quite sure
5 how the fraud worked.

6 MR. COLEMAN: Very well, your Honor. I'd like to,
7 with the Court's permission, touch on those issues and then,
8 after I finish my overall remarks, ask my colleague Mark Radke
9 to address the commingling point in greater detail.

10 THE COURT: Yes, that would be fine.

11 MR. COLEMAN: Yes, that is correct. The vast majority
12 of the entities were single-asset real estate entities that
13 were formed for the express purpose of purchasing and operating
14 a particular piece of real estate, whether it be a hotel, a
15 commercial office building or a residential subdivision. It is
16 true that the money contributed by some of the investors was
17 actually used to purchase a particular property. It's
18 important to keep in mind that the securities purchasers do not
19 have a legal ownership interest in a property; they have an
20 ownership interest in the form of an equity security issued by
21 the LLC. The LLC in turn has an ownership interest in the
22 property, so the victims are in all --

23 THE COURT: They don't own the real estate directly,
24 they own a piece of the LLC.

25 MR. COLEMAN: Exactly, one step removed from the
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1 ownership. It is also the case that in some cases -- and a
2 good example is the GSA investment -- the money that was paid
3 for the securities was not used to buy any real estate, and in

4 fact, the principal allegation in the criminal indictment in
 5 this case is that the GSA investment was fictitious in that
 6 WexTrust never purchased the property. The money was simply
 7 taken from the victims on the false pretense that it would be
 8 used to purchase a building in which the Government Services
 9 Administration was the principal tenant. That money was
 10 actually used for other unauthorized purposes. So those
 11 victims, to go back to the commingling issue, would not be able
 12 to trace the money that they paid to any identifiable asset.

13 On the other hand, there are victims whose money could
 14 be traced -- Depending on the nature of the tracing analysis or
 15 tracing fiction that one uses, there are victims whose money
 16 could be traced to a particular bank account that was used to
 17 fund the purchase of a particular piece of real estate.

18 I want to go back to one of the questions that the
 19 Court --

20 THE COURT: And some of those victims are saying, our
 21 money did go to buy a particular piece of property, that
 22 particular piece of property is still here, why should we get
 23 lumped in with some of these other investors whose money didn't
 24 go to buy real estate.

25 MR. COLEMAN: Exactly so.

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1 THE COURT: Yes.

2 MR. COLEMAN: So if I may, I'll come back to that --

3 THE COURT: All right.

4 MR. COLEMAN: -- after a couple of other comments.

5 The Court asked where we are and whether the return is going to
 6 be 5 cents on the dollar, 50 cents on the dollar or something
 7 else. Again, the answer is, I don't know, but my best judgment
 8 and prediction is it will be somewhere between 5 cents and 50
 9 cents on the dollar, and that's probably as precise as I can
 10 get with the information I have today without going into pure
 11 speculation.

12 THE COURT: Okay.

13 MR. COLEMAN: If I may, I'd like to start by
 14 recognizing and thanking two categories of people. One is the
 15 victims. A large number of victims have submitted written
 16 statements to me and to the Court, whether in support of the
 17 proposed plan or in opposition. A large number of victims have
 18 participated in a series of town hall meetings that we have had
 19 to discuss the proposed plan of distribution, and I think it's
 20 important for me to tell the Court that the participation of
 21 the victim communities in this process has added a great deal
 22 of value in clarifying and identifying some of the issues that
 23 are before the Court today.

24 I'd also like to thank the SEC. My counsel and I have
 25 worked closely with the SEC staff since almost the outset of

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1 this case to develop a proposal for a fair distribution in this
 2 very difficult and very complicated case.

3 So with that, I'd like to call the Court's attention
 4 to three fundamental concerns that I have sought to respect in
 5 developing this plan, and those concerns are equality,
 6 expedition and inclusiveness.

7 I'll start with equality. As the Court noted, the
 8 proposed plan calls for a pro rata distribution. That is not

9 the only option. It would be well within your Honor's
 10 discretion to choose a different method of distribution. For
 11 example, the Court could impose one or more constructive trusts
 12 under state law. It would be within the Court's discretion to
 13 propose -- to impose a single constructive trust over the
 14 entire receivership estate for the benefit of the investors,
 15 and in that way, the Court could -- and there is precedent for
 16 this -- the Court could subordinate the claims of the
 17 creditors, including the secured creditors, and that would
 18 dramatically increase the return for the securities investors.

19 Another option would be for the Court to impose a
 20 series of constructive trusts, going back to the issue of
 21 commingling and tracing, there's precedent under state and
 22 federal law for the Court to impose a constructive trust for
 23 the benefit of a particular victim over assets that can be
 24 traced to that individual victim, and the result of that would
 25 be a greater payment to that victim whose asset can be traced

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1 and less money to go around for all the other victims.

2 Now there are other options, and they've been
 3 discussed in the papers. I won't go through all of them. And
 4 again, the Court has a great deal of discretion. For the same
 5 reasons, I would submit that it is beyond dispute that the
 6 Court has discretion to approve the plan that has been
 7 proposed.

8 THE COURT: Yes. I think the cases clearly say the
 9 preferred way is pro rata distribution and I think, you know, I
 10 would hear what the objectors have to say. I mean, I don't
 11 think you need to sell me on that. I think the caselaw, Second
 12 Circuit caselaw makes it clear that that's the preferred
 13 method, and I can hear from people who oppose that and see what
 14 they say.

15 MR. COLEMAN: Very well, your Honor. Let me move to
 16 the second concern, which is expedition.

17 This case has been pending for over nine months. And
 18 I suspect for many of the victims in this case, that has been
 19 an eternity. In many cases of this type, it can take several
 20 years for a plan of distribution to be developed and approved,
 21 if in fact there are any assets left to approve. I have
 22 targeted and the SEC has targeted a great deal of effort and
 23 resources to expediting the process of proposing a plan of
 24 distribution in this case for a number of reasons. One reason
 25 is the issue of the cost of managing the estate. Many of the

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1 cases, as the Court referred to, the other Second Circuit cases
 2 and other district court cases in Ponzi schemes, involved
 3 estates that have primarily financial assets, whether they're
 4 broker-dealers, commodities pools, viatical settlements or
 5 other assets. The WexTrust assets are very different.
 6 Managing a multistate portfolio of commercial and residential
 7 real estate is complicated. It is expensive. Many of the
 8 assets are cash flow negative so that simply retaining them is
 9 draining money out of the estate every day. The amount of
 10 professional attention from attorneys and accountants, as the
 11 Court is well aware, has required me to incur substantial
 12 professional expenses to manage these properties, and because
 13 of that ongoing cash trading, I've focused my efforts on trying

14 to stabilize these properties and monetize them as soon as
15 possible.

16 THE COURT: I know also I've authorized you to walk
17 away from some of these properties. It was clear that it
18 didn't make sense.

19 MR. COLEMAN: And that brings me to my second point on
20 expedition, your Honor. In many ways the timing of this case
21 could not have been worse. Had the fraud been detected sooner,
22 it may have been possible to recover a greater amount of value
23 for the victims before the real estate market collapsed. It
24 may have been possible to secure financing for some of the
25 development projects before the credit markets collapsed. Now

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1 I recognize that there are indications that the economy is
2 improving. The stock market has increased by about 2,000
3 points since it hit its historic low a couple of months ago.
4 But I'm no economist, and even most of the world's top
5 economists all agree that the economy and the real estate
6 market are going to get worse before they get better. So
7 because of that current uncertainty and risk, there is an
8 ongoing danger that the value of the assets in the estate will
9 continue to decline. So for that reason I have considered it
10 critical to move forward with a proposed plan of distribution
11 as soon as possible to avoid continuing to expose the estate to
12 that risk.

13 And the third reason for my focus on expedition is the
14 very compelling circumstances of some of the victims here.
15 Many of them have been left in very severe financial distress,
16 and I'd like to just mention a couple of examples. I heard
17 from one investor in Israel who told me that recently his wife
18 was killed in a terrorist bombing. The family had a life
19 insurance policy, and the husband was using the proceeds of
20 that policy to raise his three young sons. The proceeds were
21 invested in WexTrust Securities, and the family was relying on
22 the income from those investments to generate income for the
23 care and schooling of the children. Of course there is no
24 income, and the husband cannot even get any principal back.
25 Many of the victims, particularly in the Norfolk area, took out

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1 second mortgages on their homes at the urging of a corrupt
2 mortgage broker who was secretly bribed by WexTrust to bring
3 securities purchasers. Many of those people have told us that
4 they are in danger of losing their homes because they can't
5 make the mortgage payments.

6 Because of this type of compelling need, your Honor, I
7 considered it important to recommend to the Court to allow me
8 to begin distributing money as soon as possible, and so what I
9 have proposed is that the Court approve a plan of distribution
10 and that we would implement that as soon as possible and
11 distribute as much as possible of the cash in the estate to the
12 victims so that at least we can get some dollars flowing to
13 those people who are most in need.

14 The third fundamental concern that I've focused on --

15 THE COURT: On that point, is the concept to give all
16 victims something soon, or is the concept for you to make a
17 judgment and to give to those victims you deem most in need?

18 MR. COLEMAN: The former, your Honor.

19 THE COURT: The former.
 20 MR. COLEMAN: So that -- and that really brings me to
 21 my third point, which is inclusiveness.
 22 THE COURT: Okay.
 23 MR. COLEMAN: If the Court approves the proposed plan,
 24 the vast majority of victims will receive at least a partial
 25 return of their funds. Under some of the other alternatives --
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1 THE COURT: Meaning what? Do you have an idea of what
 2 that would be now?
 3 MR. COLEMAN: Amount of money?
 4 THE COURT: Yes. Is that a nickel on the dollar right
 5 now?
 6 MR. COLEMAN: A nickel or less, and my expectation --
 7 THE COURT: How much less?
 8 MR. COLEMAN: I can't give a number, your Honor.
 9 THE COURT: It can't go much below a nickel.
 10 MR. COLEMAN: Right. I can't give a number because we
 11 have not yet verified the amount of all the investments. I am
 12 advised by my accountants and real estate consultants that I
 13 need to retain at least \$10 million in the estate as a equity
 14 cushion to provide for the ongoing management of the estate, so
 15 my expectation would be to distribute the excess of that amount
 16 that's available immediately. And so the vast majority of
 17 victims would get something. I can't give a dollar amount.
 18 Under some of the other alternatives, many or most of
 19 the victims would get nothing. For example, one alternative
 20 that's discussed in the briefing is what's known as the high
 21 water method, which is a calculation of distribution that takes
 22 into account prior repayments of interest and principal to
 23 victims. Under that method, approximately 45 percent of the
 24 victims would get nothing. And in my judgment and in
 25 consultation with the SEC, it was our view that it would be
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1 more equitable to adopt or to propose a plan that provides for
 2 the largest number of people possible to get some return. So
 3 the plan will not make any of the investors whole. If there is
 4 a way to resolve this case that will do that, that will make a
 5 substantial number of victims happy, I have not discovered it.
 6 But we do believe that in this case the most equitable plan for
 7 the largest number of people would be the proposal that we've
 8 made.
 9 THE COURT: Do you have an estimate of what the
 10 overall amount in question is that was invested?
 11 MR. COLEMAN: The overall amount --
 12 THE COURT: I've heard different things, and I don't
 13 know if you have a better idea today.
 14 MR. COLEMAN: The overall amount of cash that was
 15 actually sent to WexTrust to purchase securities was in the
 16 neighborhood of \$250 million. Beyond that it becomes
 17 complicated in that many of the investors received cash
 18 distributions. Other investors elected to forgo cash
 19 distributions and instead to have their distribution
 20 reinvested. So one could consider that to be an additional
 21 investment or one could consider that to be simply an illusory
 22 payment. If we include the reinvestments, then we're talking
 23 about approximately \$313 million.

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THE COURT: Okay. Thank you.
MR. COLEMAN: So, your Honor, unless the Court has
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other specific questions for me, I'll sit down and perhaps I'll let the victims speak.

THE COURT: You'll let Mr. Radke speak first or the victims? What's your preference?

MR. COLEMAN: Your Honor, what I'd recommend is that we've made our arguments in response to the written objections in our papers, so rather than repeating those, I would suggest that Mr. Radke respond to the oral presentations of the victims.

10

THE COURT: All right. That's fine.

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Now are there victims in the audience who would like to be heard now? If so, raise your hand and let me see what we're talking about, counsel included.

14
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16

Okay. All right. We can see there are a lot of people who want to be heard. I'll give you a chance to speak now. Keep it as concise as possible.

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Why don't we start with counsel at the table. Just come up, state your name and then tell me who you represent, if you're counsel for someone else.

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MR. MARDER: Thank you, your Honor. My name is Alan Marder. I'm with the firm of Meyer, Suozzi, English & Klein. We represent Nashville Warehouse Partners, LLC and Southeast Warehouse Partners, LLC. Nashville Warehouse Partners, LLC owns a 65 percent LLC interest in an entity called Myatt Holdings, LLC, which owns a warehouse in Nashville, Tennessee.

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Southeast Warehouse Partners, LLC owns a 65 percent LLC interest in BaxTech Holdings, LLC. BaxTech owns two warehouses, one in Birmingham, Alabama and one in Memphis, Tennessee. Both of the BaxTech warehouses have already been sold, one before the receiver was appointed and one since the receiver's been appointed, and I believe the receiver's holding the proceeds from the sale of the property that sold on his watch.

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THE COURT: And just to give a little bit of guidance so we can move on, I don't need all the details of the investments. I'm not making any rulings on any particular investment. What I am interested in are any objections to the receiver's proposed plan and what your objections are.

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MR. MARDER: Actually, I think our objection is not so much to the receiver's plan. Our objection is to the fact that our investment was not at all part of this Ponzi scheme. It was an isolated investment. Our client purchased the 65 percent interest in these two LLCs pursuant to a private transaction that was negotiated by counsel. There was no purchase of WexTrust Securities. There was no involvement of WexTrust Securities. In both of our cases, the only money that was used to purchase these properties came from our client. No money, or perhaps a hundred dollars, came from a WexTrust entity. In one case, in the Myatt case, we put up \$1.6 million that was paid into the Lawyers Title Insurance Company escrow

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1 account, and that money was taken and paid to a bridge loan
 2 lender. So the money never went to WexTrust.
 3 In the case of Southeast, we invested \$3,350,000.
 4 Again, the money was placed in escrow with Lawyers Title
 5 Insurance Company and then it was paid immediately to the
 6 seller of the property. So we didn't buy securities in
 7 WexTrust Capital. Our client never received a private purchase
 8 memorandum. Our client never received a securities offering.
 9 Our client had no dealings with Mr. Byers or Mr. Shereshevsky
 10 or WexTrust Capital. In fact, our client knew an individual
 11 named Michael Gormley for 20 years. They were friends for 20
 12 years. Mr. Gormley approached them about these two
 13 investments --
 14 THE COURT: The money went into what?
 15 MR. MARDER: The money went into Lawyers Title
 16 Insurance Company, which is a title company, and that was
 17 used --
 18 THE COURT: But it looks like 1.6 million in one case,
 19 3.3 million in the other.
 20 MR. MARDER: That's correct.
 21 THE COURT: Those monies went into what? Were they
 22 invested in LLCs?
 23 MR. MARDER: No. They went into a title insurance
 24 company's escrow account, and in one case it was used to pay
 25 off a bridge loan that was used for the purchase of a property,
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1 and in the other case it was used to pay the seller of the
 2 property. The money never went into WexTrust Capital. These
 3 entities --
 4 THE COURT: I understand that. I'm trying to find out
 5 where the money went.
 6 MR. MARDER: In one case it went first to a title
 7 company and then to the seller, and in the other case first to
 8 the title company and then to pay off a bridge loan to an
 9 unrelated party.
 10 THE COURT: What you're really saying is, your client
 11 really wasn't involved in the fraud at all.
 12 MR. MARDER: That's correct, your Honor.
 13 THE COURT: I guess the problem is, in essence, you're
 14 a creditor or investor. I guess you fall into a category of
 15 investor or creditor in transactions that you believe are
 16 unrelated to the subject of the receivership --
 17 MR. MARDER: That's correct.
 18 THE COURT: -- is really what you're saying.
 19 MR. MARDER: That's correct, your Honor. And if you
 20 look at the, you know, the standards that the receiver has
 21 relied on, the Bancorp case, you know, one issue is, obviously
 22 one prong of the test --
 23 THE COURT: It seems to me that this is really not an
 24 objection to the plan.
 25 MR. MARDER: That's correct.
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1 THE COURT: There needs to be a mechanism to decide
 2 whether a particular creditor is really part of this or not.
 3 MR. MARDER: Right. Our view is that, you know, we've
 4 put in documentary evidence, which we believe establishes there

5 were no commingling. These two entities had their own bank
6 accounts. Our client received monthly accounting statements --
7 THE COURT: I'm not going to rule, obviously, on
8 whether your clients are right or wrong. I understand the
9 issue, and I think we need a mechanism, we have to come up with
10 a mechanism to decide these types of objections. Or it's not
11 really an objection, even. It's more that you're not part of
12 this receivership dispute.

13 MR. MARDER: I think that's correct, your Honor. I
14 think, to the extent there's an objection to the plan, it's
15 that the plan is overbroad and it seems -- tries to bring into
16 it anything that any WexTrust affiliate had an ownership
17 interest in.

18 THE COURT: What would you suggest as a mechanism for
19 resolving this dispute?

20 MR. MARDER: I think that there should be a procedure
21 that a party who does not believe his asset or LLC interest
22 should be part of the pool of receivership assets to be able to
23 bring a proceeding that the trust -- the receiver -- I'm sorry,
24 I keep thinking I'm in bankruptcy court -- that the receiver
25 should have to come forth with evidence to show that this

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1 property was part of the Ponzi scheme and should be part of the
2 receiver's estate.

3 THE COURT: Well, what do you suggest the procedure
4 should be? That's what I mean.

5 MR. MARDER: I mean, I'm sure we could work it out
6 with the receiver.

7 THE COURT: Well, I don't know how many others there
8 are. In part it depends on the volume of such objections.

9 MR. MARDER: In my opinion, that a party that does not
10 believe that his asset or his interest in the asset should be
11 part of the receiver's estate, he should give some kind of
12 notice to the receiver, maybe 30 days from your order, that he
13 doesn't believe that his asset or interest should be part of
14 the receiver's estate. The receiver would have a period of
15 time, 30 days, say, to either agree with the objector or to
16 oppose the objector and at that point have some type of
17 expedited discovery, maybe 60 days, and bring it to your Honor
18 if the parties can't work it out.

19 THE COURT: And it depends in part on how many such
20 parties there are, but thank you.

21 MR. MARDER: And I also think that, you know, this
22 would be something that would lend itself to mediation, so
23 maybe that could be worked into the procedure also.

24 THE COURT: All right. Thank you.

25 MR. MARDER: Thank you, your Honor.

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1 THE COURT: Thank you.

2 MS. GRAY: Your Honor, hi. I'm Elizabeth Gray from
3 Willkie Farr & Gallagher. I'm here today representing Gerald
4 Jaffe. He is an 85-year-old investor who, like many people
5 here today, is the victim of the WexTrust fraud. Mr. Jaffe
6 stands to lose most of the \$8 million that he invested in these
7 entities. But I am here today to talk to you about one
8 particular investment he made. It's \$1.5 million that he
9 invested in the WexTrade Diversified Futures Fund. Mr. Jaffe

10 believed, with good reason, that his investment in the futures
 11 fund should be treated differently from the other investments
 12 that were made in WexTrust entities because the funds were
 13 positioned differently. Mr. Jaffe bases his understanding on
 14 his own personal experience. He, during the course of his
 15 investments, received account statements that indicated how
 16 much money he had in these accounts, indicated what types of
 17 investments were made, and he received account statements as
 18 well as periodic updates, and when the funds in those accounts
 19 were frozen pursuant to the Court's order, the money appeared
 20 to be consistent with all of the information he had received
 21 along the way.

22 We respect all the diligent work that the receiver has
 23 done in this very difficult case, but we think that there is
 24 still more to do before the Court approves the distribution
 25 plan. And in particular, we are seeking access to two types of

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1 information. The futures funds were held by an independent
 2 entity called NAV Consulting. We are seeking access to NAV
 3 Consulting's records. The information that we have thus far is
 4 limited, and we would like to be able to verify what Mr. Jaffe
 5 believes is the case, that the money that was invested in these
 6 future funds stayed there and was not commingled with other
 7 WexTrust investments. Now in the receiver's report there is a
 8 reference to two commingling that occurred during the course of
 9 the investment. But beyond that all of the commingling
 10 occurred prior to the breaking of escrow, and we think that
 11 differentiates this investment from other investments that were
 12 made in real estate.

13 The other request that we are making is to have access
 14 to the full Deloitte report here so that we can understand more
 15 clearly the commingling arguments, and we would request that we
 16 have the ability to review all of this information before the
 17 Court makes the final judgment. To the extent that these funds
 18 are fairly segregated, were properly invested, we believe
 19 Mr. Jaffe should have the benefit of his bargain with respect
 20 to his futures investments.

21 THE COURT: I think the receiver would argue, even
 22 assuming it's true that for this particular fund there was no
 23 commingling, when you look at the big picture, it should be
 24 included anyway. If you start pulling out different pieces,
 25 then it just dramatically changes the whole thing. I mean, in

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1 other words, I understand that you want access to the records.
 2 I don't know if there's an objection to that. But even
 3 assuming the records prove up what you're saying, I mean, in
 4 other words, I'm prepared to assume, for purposes of the
 5 argument, that for this particular futures fund there was no
 6 commingling. How do you respond to that, that even assuming
 7 there was no commingling as to this 1.5, you know, what about
 8 the other 6.5? You know, he's in a position there where a pro
 9 rata might benefit him.

10 MS. GRAY: It might, and that is an interesting point.
 11 I think part of this is very personal. He feels that he should
 12 have the benefit of the bargain. He's an 85-year-old man who
 13 said, you know, this is what I intended to do, I tracked the
 14 investments, if there is information that you can get me, I

15 would like to know whether in fact --
 16 THE COURT: Wait a minute. Is there an objection to
 17 providing access to the NAV Consulting records and the full
 18 Deloitte report?
 19 MR. RADKE: Your Honor, Mark Radke for the receiver.
 20 THE COURT: Yes.
 21 MR. RADKE: In principle there is no objection, but
 22 unfortunately, as we've tried to make clear in the papers, the
 23 work that Deloitte did was not comprehensive. There was a cost
 24 benefit factor here where we traced some things, didn't trace
 25 everything, and the reason being that to do it on an
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1 investor-by-investor basis, in other words, to trace the
 2 particulars for Mr. Jaffe, would be very expensive, and at the
 3 end of the day, as your Honor observed, it might not, in
 4 theory, make any difference. Even assuming that there was no
 5 commingling, that you have that 1.5, that you can see it from
 6 the time in to the time out, we, I think, have established
 7 enough commingling occurred in general with respect to those
 8 WexTrust commodity funds, and that was in particular
 9 substantiated by the recent complaint filed by the NFA, the SRO
 10 for commodities, just this week, that also alleged, you know,
 11 commingling. So we would treat all of the money in the
 12 commodities pools no differently than the money left in all the
 13 other LLCs.
 14 THE COURT: I understand. But I think Mr. Jaffe
 15 should have the right to see the NAV Consulting record, and if
 16 Deloitte did tracing for him, he should get to see that part.
 17 MR. RADKE: Certainly. We can make the work
 18 available.
 19 THE COURT: And if Deloitte did not, I'm not saying
 20 Deloitte should go do it now. I'm not saying that. If
 21 Deloitte did it for Mr. Jaffe, Mr. Jaffe I think is entitled to
 22 see it.
 23 MR. RADKE: Okay.
 24 THE COURT: All right. Thank you.
 25 MS. GRAY: Thank you, your Honor.
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1 THE COURT: In the back. Just come on up if you want
 2 to be heard, or...
 3 MR. KAY: Good morning, your Honor. My name is Harris
 4 Kay. I'm a partner at Henderson Lyman in Chicago, Illinois.
 5 I'm a member of the New York bar as well and a member of the
 6 bar of this court. As the Court knows or may recall --
 7 THE COURT: That's a good point, actually. If you're
 8 a lawyer and you're purporting to speak on someone else's
 9 behalf, you should be a member of the bar of this court, or if
 10 not, then you should ask for permission to speak.
 11 Are you a member of the bar of this court?
 12 MR. KAY: I am, your Honor. I was actually sworn in
 13 recently for this very purpose.
 14 I will also be brief. I represent a large group of
 15 the commodity pool investors, as indicated in recent
 16 correspondence to the Court. I'm happy to make that list if
 17 you'd like for the record. But in general, our opposition,
 18 much like Ms. Gray's, stems from the fact that the distribution
 19 plan that the receiver has proposed does not take into account

20 the unique position of the commodity pool investors. During
 21 Mr. Coleman's presentation, he grouped the various WexTrust
 22 victims into a couple of different categories, including equity
 23 holders, essentially bondholders, secured and unsecured
 24 creditors, and I believe that that speaks to the problem here.
 25 There is more to it than that, particularly with regard to the
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1 WexTrade investors. WexTrade investors did not participate in
 2 the real estate scheme that the receiver has found in which a
 3 vast majority of the alleged commingling occurred. Rather,
 4 they invested in commodity pools, which are operated under a
 5 different body of law, under the auspices of different
 6 organizations, and were not an investment in a real estate
 7 entity or even any entity owned by WexTrust. WexTrade
 8 commodity pools were managed by WexTrade Commodity Managers,
 9 which was a subsidiary of a WexTrust entity. That's the
 10 linchpin that the receiver has used to bring it within the
 11 ambit of the receivership, and we submit that that is not
 12 appropriate and that any plan that doesn't take into account
 13 the unique position of the commodity pool investors is
 14 inherently unfair.

15 The way that a commodity pool works is that a number
 16 of investors pool their money and grant limited authority to
 17 the commodity manager to use their money as margin or security
 18 for commodity investments, futures investments and the like.
 19 And that's what happened here. The WexTrade Commodity Managers
 20 made investments in futures and commodities and, as Ms. Gray
 21 said, prepared account statements for its customers, sent those
 22 account statements to them, used an independent consultant to
 23 value the fund and prepare constant updates with respect to
 24 that fund. Now the receiver --

25 THE COURT: Excuse me. Those trades were actually
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1 made, investments were actually made?
 2 MR. KAY: As far as I know. My hands are a bit tied
 3 because, like Ms. Gray, I don't have access to those records.
 4 But now the receiver has used a couple of instances of what he
 5 has deemed commingling and sort of concluded that that is
 6 commingling to bring this into the ambit of the receivership.
 7 There were some loans, and I guess the parties disagree about
 8 the characterization of the pre-escrow break in loans between
 9 WexTrade funds and WexTrust entity. And then after that I
 10 don't think there's any dispute that certain investors may have
 11 used proceeds of WexTrust investments to invest in the
 12 commodity pools. Again, no dispute about that, but I would
 13 submit to the Court that that is a -- that is a far cry from
 14 the kind of commingling that occurred in connection with
 15 WexTrust. The commingling that we understand occurred with
 16 WexTrust is that some investments were made, everybody thought
 17 they were investing in something, but really many were not.
 18 Money was going into a common pool, moved around from place to
 19 place in order to satisfy other investors; in other words, a
 20 Ponzi scheme. It's not what happened with the commodity pool.
 21 The commodity pool, the money stayed where it was supposed to
 22 stay and was used for the purposes that it was intended to be
 23 used for.

24 It was also held under the auspices of other statutory

25 authority that we have cited, and I won't go into that. But I
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1 will say that commodity law provides that the assets of the
2 commodity pool, meaning the assets of the WexTrade investors,
3 must be kept separate from that of the pool operator, which is
4 WexTrade Commodity Managers. They're not allowed to commingle
5 those, and I believe the receiver has alleged that they were
6 commingled, and I would submit that if there is evidence of
7 that, then the Court should act to enforce the law and respect
8 the law and do what should have been done, which is to show
9 that the -- that the money should remain -- should be
10 considered not commingled if it in fact was. We have set
11 forth, as I said -- I'm sorry? Were you about to speak? I
12 didn't mean to --

13 THE COURT: No, I was just thinking, if the money was
14 commingled, it's hard for me to undo it.

15 MR. KAY: Well, it's not, your Honor, I would submit.

16 THE COURT: I mean, it very well might mean taking
17 money away from other victims, and that's...

18 MR. KAY: Well, your Honor, I believe that given --

19 THE COURT: What's really happening is,
20 understandably, different victims want to go first. I
21 understand that.

22 MR. KAY: That's correct, and as we submitted in our
23 papers, we have grounds, because our investment was different,
24 and equitably we should be treated differently.

25 THE COURT: A lot of investors are telling me their
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1 investment was different.

2 MR. KAY: I understand that. And clearly --

3 THE COURT: All right. Finish up.

4 MR. KAY: Okay. Well, your Honor, if I could briefly
5 just mention the NFA allegation. First, I would say that
6 Mr. Radke cited his grounds for an indication that somehow the
7 commodity pool did something wrong. First, I would just note
8 that they are allegations; and second, I would encourage the
9 Court to read the complaint itself in which the accusations
10 primarily stem to the management of the commodity pools. There
11 were the loans that we talked about, but also there are
12 allegations of interpool mingling, so certainly if those
13 allegations are proved true, it might very well be appropriate
14 that the Court orders the pooling of all the assets in the pool
15 on a pro rata distribution within the pool but not, I don't
16 believe -- and I would submit that there is nothing in the
17 complaint itself that would indicate that there should be a --
18 that anything brings the assets of the pool within the ambit of
19 the WexTrade -- WexTrust receivership. I'm sorry.

20 THE COURT: Thank you.

21 MR. KAY: Thank you.

22 MR. COSTA: Good morning, your Honor. Keith Costa,
23 Akerman Senterfitt, 335 Madison Avenue, New York, New York.

24 Your Honor, without further ado, I'd like to introduce
25 to you -- I am local counsel -- lead counsel, Mr. Randal

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1 Mashburn. We submitted a pro hac vice application for
 2 Mr. Mashburn to be admitted on that basis. The fee was paid
 3 and filed yesterday. He's a member in good standing of the
 4 Middle District of Tennessee.

5 THE COURT: All right. That's fine.

6 MR. COSTA: Thank you.

7 THE COURT: Mr. Mashburn?

8 MR. MASHBURN: Thank you, your Honor. Randal Mashburn
 9 from Nashville, Tennessee. I represent Regions Bank, and we
 10 actually are in a unique position because we may be the only
 11 ones here that are not asking to be treated differently, we're
 12 asking to be treated the same. For some reason the receiver
 13 has concluded that the unsecured or undersecured portion of the
 14 secured creditors claim should be paid nothing and should be
 15 treated differently. Despite the idea that is raised of
 16 equality and inclusiveness, he wants to treat the deficiency
 17 claims unequally and to actually not include them.

18 I won't go into great detail about the debt but just
 19 over -- a quick overview is, there was about \$70 million of
 20 debt to, I believe it was nine different entities,
 21 WexTrust-related affiliates of one type or another. It fell
 22 into basically two categories. About half of the debt was tied
 23 to two hotels that turned out to be way underwater in terms of
 24 value versus debt and another 18 properties, warehouses, office
 25 buildings and other types of properties that, generally

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1 speaking, collectively, is probably well secured and will
 2 produce some value for the receivership. In round numbers,
 3 it's purely an estimate at this point based on book values and
 4 some appraisals and so forth, but it could be something in the
 5 range of \$10 million deficiency on the two hotels and up to
 6 \$10 million of excess value on the other 18 properties. What
 7 the receiver has proposed in the plan is that Regions Bank and
 8 other creditors in that position would not get the benefit of
 9 any equity that may exist in the properties but the deficiency
 10 would not even share on a pro rata basis. And there was one
 11 objection I believe filed in which there was an overall
 12 objection to even being in the receivership situation as
 13 opposed to bankruptcy because of the differences. We're not
 14 really objecting to the process being carried out through this
 15 receivership in district court. We're objecting to the result
 16 being so dramatically different from what would occur if this
 17 were in a bankruptcy setting. One of the examples given in the
 18 response by the receiver of how this would work is, \$1 million
 19 gets paid in and \$200,000 gets received, and there's an
 20 \$800,000 claim. Well, under the proposal, the reverse would be
 21 true. If there was 800,000 received, there would be a \$200,000
 22 claim. There's no distinction as to whether someone got a good
 23 return or a bad return; it's just a net loss. And yet that net
 24 loss process is not being applied to secured creditors.
 25 Clearly we know we're going to have a net loss. This isn't a

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1 hypothetical situation. The receiver has already filed papers
 2 stating -- in relinquishing the interest in the hotels, stating
 3 that the debt is substantially higher than the value of the
 4 property. And what's so disturbing about this is that totally
 5 turns around the way it would normally work in any other

6 setting. Normally debt comes ahead of equity.
 7 Mr. Coleman correctly stated that the vast majority of
 8 these parties, as he said, had an ownership interest, and he
 9 said it was analogous to having -- to being a shareholder. And
 10 yet what he basically says is he wants to take that equity
 11 interest and put it ahead of the debt interest. In fact, in a
 12 bankruptcy setting, the equity interest would be subordinated
 13 to the debt interest. We're not actually even arguing that we
 14 should come ahead; we're simply saying that that deficiency,
 15 that net loss that the bank incurs should be treated pro rata
 16 with the rest of the parties.

17 And from the -- one other point I want to make is
 18 simply that there's a lot of discussion about the victims, and
 19 there's no question there's a lot of victims here, but bear in
 20 mind that the shareholders of Regions Bank made an investment
 21 on the theory that the normal rules of law would apply and that
 22 debt instruments get paid ahead of equity interest, and the
 23 shareholders of Regions Bank are equally victims if the stock
 24 ends up being diminished because of a major loss and, you know,
 25 those shareholders are individuals with 401(k)'s and --

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1 THE COURT: To the extent that the security is
 2 sufficient, the banks are getting a hundred cents on the
 3 dollar, to the extent that the securities --

4 MR. MASHBURN: We know that that's not going to be the
 5 case.

6 THE COURT: I know that, but I'm saying to the extent
 7 there is some equity there, they're covered in a sense they're
 8 better off than others.

9 MR. MASHBURN: But they're --

10 THE COURT: I understand your point. I understand
 11 your point.

12 MR. MASHBURN: Okay.

13 THE COURT: Thank you.

14 MR. MASHBURN: Thank you.

15 MR. SOLOMON: Good morning, your Honor.

16 THE COURT: Good morning.

17 MR. SOLOMON: Joshua Solomon from Sullivan &
 18 Worcester, and I'm admitted pro hac vice in this case, your
 19 Honor. I represent G & H Partners, which, in light of your
 20 Honor's first question to Mr. Coleman, without going into the
 21 details of G & H's investment, I should say it's both an equity
 22 investor in a particular LLC but also an unsecured creditor in
 23 the form of a settlement creditor as a result of an earlier
 24 securities fraud case that G & H brought against WexTrust
 25 before this action started. And as far as we know, we may be

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1 the only settlement creditor at issue here. We haven't learned
 2 of any others.

3 Your Honor, before getting into G & H's objection,
 4 with the Court's permission, I'd like to take up just one
 5 housekeeping matter, which is, our understanding is that the
 6 receiver was distributing claim statements to equity holders by
 7 May 15th and that he was planning on doing that even though
 8 these proceedings were going forward, in the interest of
 9 keeping things moving. And it would be helpful if at some
 10 point during these proceedings we might learn whether that's

11 happeni ng, because at least for --
 12 THE COURT: Has that happened?
 13 MR. RADKE: It is in process, yes, your Honor.
 14 MR. SOLOMON: Okay. We haven't received one, so I
 15 guess we can take that up individually with the receiver.
 16 THE COURT: It's in process, so you'll get it soon.
 17 MR. SOLOMON: Okay. Thank you.
 18 THE COURT: It's in the mail.
 19 MR. SOLOMON: G & H has objected on a few grounds, and
 20 there's one in particular that I'd like to focus on. And that
 21 is the proposed plan's treatment of unsecured creditors as
 22 exactly the same as equity holders. The receiver's plan and
 23 his response, actually, never gets into why this is fair, why
 24 this is equitable. And in insolvency proceedings generally, as
 25 counsel right before me mentioned, creditors generally take

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1 priority over equity holders. And this rule itself is a result
 2 of some fairly strong equitable principles, including the fact
 3 that creditors rely on the equity cushion when they enter into
 4 the transaction, they cap their upside in exchange for less
 5 risk, as compared to equity holders, who have at the outset
 6 unlimited potential upside but greater risk. Given this
 7 general preference and equities behind it, we believe that
 8 there should be some onus on the receiver to come forward with
 9 some explanation to the Court for why treating unsecured
 10 creditors exactly the same as equity holders is equitable and
 11 fair, and we don't believe we've seen that yet.
 12 To be clear, your Honor, we are not suggesting that
 13 the Court necessarily impose a rigid rule, as might be the case
 14 in a bankruptcy proceeding, that all unsecured creditors should
 15 be paid completely before any equity holders take anything. We
 16 recognize this is a court of equity and that the Court has
 17 equitable discretion to vary from rules. But the receiver's
 18 distribution plan seems to ignore the equitable principles
 19 behind that rule, and we suggest, your Honor, that the receiver
 20 should at least have a process for assessing particular
 21 unsecured claims to determine whether, based on those general
 22 equities and maybe even particular circumstances of particular
 23 unsecured creditors, there should be some -- some priority.
 24 Instead, the receiver seems to be replacing one fairly rigid
 25 rule -- unsecured creditors come first and equity only after

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1 they're paid -- with another rigid rule -- all unsecured
 2 creditors are treated the same as equity. And we suggest, your
 3 Honor, that there should be a bit more flexibility, that the
 4 receiver's underestimating a bit this Court -- the extent to
 5 which this Court should feel bound to specific rules. We
 6 understand and can appreciate and agree that there need to be
 7 guiding principles and there needs to be a clear process that's
 8 transparent and that has overarching principles, but there also
 9 needs to be some flexibility. As the receiver has noted
 10 repeatedly in its papers, the ultimate objective here is to
 11 reach an equitable result, and our position is that more
 12 flexibility than the receiver's offering is required to achieve
 13 that.
 14 A good example, your Honor, of the type of rigid rule
 15 that likely will not work to produce -- to produce fairness and

16 equity here is something that was raised just in the receiver's
 17 opposition. The Court hasn't had an opportunity to receive any
 18 argument on this yet because it just appeared for the first
 19 time, and that is the treatment of rollover distributions, and
 20 Mr. Coleman alluded to this in his opening remarks. The idea
 21 that, under the receiver's plan, that if an investor put in an
 22 investment and then got cash out, that cash would be deducted
 23 from the initial investment when calculating the investor's
 24 share. In contrast, if a distribution took the form of a
 25 rollover, of a new investment, the receiver is treating that

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1 rolled over distribution as if it were out-of-pocket cash loss
 2 to the investor, which of course it's not. In fact, given the
 3 nature of a -- of a Ponzi scheme, it's quite possible that some
 4 of these rolled over distributions were not real to begin with,
 5 were not real investment gains. And so treating them as the
 6 same as out-of-pocket losses is a mistake, we would suggest.
 7 Again, that's not something that has been argued to the Court
 8 yet and you haven't received any objections based on that
 9 because it just appeared in the receiver's response, and we'd
 10 be happy to follow it up with additional briefing if the Court
 11 were interested in that.

12 THE COURT: I think if you want to submit something,
 13 you're welcome to.

14 MR. SOLOMON: Thank you, your Honor.

15 The final point, your Honor, that I'd like to make --
 16 and this was one of the grounds for the objection we
 17 submitted -- is that there seems to be no process for recouping
 18 potential estate administration payments that were made in the
 19 course of this receivership. The fear that I think many
 20 investors are concerned about here is that the only people who
 21 will -- who will take any significant amounts from the estate
 22 will be the people administering the estate, that the
 23 administration fees are going to dwarf the actual amount
 24 distributed, and we suggest, your Honor, that there should be
 25 some type of process built into the distribution plan that

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1 allows the Court to go back and recoup fees that were paid if
 2 that turns out to be the case.

3 Thank you, your Honor.

4 THE COURT: Thank you. How many people want to be
 5 heard who haven't?

6 I count ten hands. Let's take a short recess. I'm
 7 going to have my deputy do a sign-up sheet so that we have some
 8 order to this. All right. We're going to take a short break.
 9 We'll resume in about ten minutes. And Mr. Tam will start the
 10 sign-up sheets. Those who want to be heard come forward and
 11 sign up.

12 THE CLERK: All rise.

13 (Recess)

14 (In open court)

15 THE COURT: All right. I now have a list. Next we'll
 16 hear from Martin Siegel.

17 MR. SIEGEL: Good morning, your Honor.

18 THE COURT: Good morning.

19 MR. SIEGEL: Martin Siegel from Brown Rudnick. I am a
 20 member of the bar of this court.

21 THE COURT: Yes.
 22 MR. SIEGEL: I represent the ad hoc International
 23 Consortium of WexTrust Creditors. You'll recall we were here
 24 earlier in the case --
 25 THE COURT: Yes.
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1 MR. SIEGEL: -- seeking leave to file a bankruptcy,
 2 involuntary bankruptcy proceeding. Along with this ad hoc
 3 committee, together we represent more than a hundred -- between
 4 the committee and the consortium, we represent more than a
 5 hundred creditors of WexTrust.
 6 We filed an appeal from your Honor's order. The
 7 appeal has been fully briefed now as of this week. Argument is
 8 scheduled for I think the third week in June. And we believe,
 9 in light of the pendency of the appeal, that jurisdiction over
 10 this matter rests in the Second Circuit, and because the appeal
 11 is moving along quite rapidly and may have an effect on whether
 12 there will be a bankruptcy trustee who will implement --
 13 THE COURT: By that you mean you think the
 14 receivership should come to a halt? I'm not quite --
 15 MR. SIEGEL: No, your Honor, we're not suggesting
 16 that, and we have not moved for a stay, but what we are
 17 suggesting is, while you're sorting out some of these issues
 18 and some of these objections, that you not enter a final order
 19 regarding the plan of distribution until the appeal is heard.
 20 We think that --
 21 THE COURT: Is it your position that I don't have
 22 jurisdiction to approve the proposed plan, is that what you're
 23 saying, or are you just saying it would be wiser that I refrain
 24 from doing so?
 25 MR. SIEGEL: I think it's both. We think jurisdiction
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1 rests in the Second Circuit and --
 2 THE COURT: Well, if you think I've been divested of
 3 jurisdiction, you should provide some authority that says that,
 4 because if I don't have jurisdiction, then, you know, I'd like
 5 to know that. So if you have authority that would suggest that
 6 I do not have jurisdiction over this pending application by the
 7 receiver, it seems to me you ought to bring it to my attention.
 8 MR. SIEGEL: We will do so, your Honor.
 9 THE COURT: Okay.
 10 MR. SIEGEL: Could we have a couple weeks? Two weeks?
 11 THE COURT: One week.
 12 MR. SIEGEL: Okay. Thank you, your Honor.
 13 THE COURT: I've got to make some decisions here,
 14 so...
 15 MR. SIEGEL: Okay. We will do so.
 16 THE COURT: Thank you.
 17 MR. SIEGEL: Thank you.
 18 THE COURT: Kevin McKeown.
 19 MR. McKEOWN: Good morning, your Honor. Yes, Kevin
 20 McKeown.
 21 Your Honor, I am not an attorney. I am co-chairman of
 22 Integrity in the Courts. A quick background, your Honor.
 23 Integrity in the Courts is a national association organized to
 24 focus ethical and legal issues related to the administration of
 25 justice nationwide.

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1 THE COURT: Do you have any interest in WexTrust or do
2 you have any investment, do you have any financial stake in
3 this?
4 MR. McKEOWN: No, I do not, your Honor. However, it
5 was my understanding that your Honor was gracious enough to
6 allow the public to speak. There are three specific issues
7 that a lot of our members have brought about pertaining to
8 WexTrust --
9 THE COURT: Are you a lawyer?
10 MR. McKEOWN: No, I am not, your Honor.
11 THE COURT: No, I'm not here to listen to general
12 commentary by members of the public on the administration of
13 justice or the judicial system.
14 MR. McKEOWN: There are three specific issues, your
15 Honor.
16 THE COURT: You may not speak. Thank you.
17 MR. McKEOWN: Thank you, your Honor.
18 THE COURT: Sorry, but I want to hear from victims.
19 MR. McKEOWN: Thank you, your Honor.
20 THE COURT: Charles Sullivan.
21 MR. SULLIVAN: Yes, your Honor. Good morning. Your
22 Honor, I am an attorney. I'm an attorney with the firm Bond
23 Schoeneck & King, and I've been admitted pro hac vice by this
24 court to appear in this matter.
25 THE COURT: All right.

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1 MR. SULLIVAN: Your Honor, my firm is counsel for TCF
2 National Bank. TCF is an objector, and by way of background,
3 your Honor, TCF National Bank is a secured creditor. It's a
4 national banking association located in Milwaukee that has a
5 mortgage lien against property owned by Peoria Office Holdings,
6 LLC. That is an entity that is controlled by Mr. Coleman as
7 receiver pursuant to this Court's orders appointing Mr. Coleman
8 as receiver dated August 11 and September 11, 2008.
9 TCF's loan to Peoria Office Holdings, LLC is secured
10 by a mortgage on an office building, a multiuse office building
11 located in Peoria, Illinois, as well as a security interest in
12 leases and rents derived from that building and certain funds
13 that were established pursuant to loan agreements.
14 The terms of this Court's preliminary injunction order
15 of October 24 specifically applied to my client's collateral,
16 including the real property. The loan to TCF, which is in
17 excess of \$11 million, is guaranteed by WexTrust Equity
18 Partners, LLC, WexTrust Capital, LLC, Steven Byers and Matthew
19 Gurvey, who as I understand, your Honor, is a former employee
20 of WexTrust entities.
21 Your Honor, although in TCF's objection -- I want to
22 make clear that TCF has not raised a specific objection to the
23 pro rata distribution of payments or proceeds to members of the
24 investor class or even the unsecured creditor class, subject,
25 of course, to the appropriate priority of those claims, as was

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1 identified by prior counsel that appeared before you this

2 morning, your Honor. And I also would like to point out that
 3 although TCF is a secured creditor, I respectfully submit to
 4 you that there is no evidence in the record before this Court
 5 to demonstrate that TCF is a fully secured creditor. The
 6 receiver has taken the position in pleadings filed with the
 7 Court that TCF is oversecured. However, your Honor, TCF does
 8 not concede that it's oversecured and in fact is very concerned
 9 that it may not be oversecured and that it may have a
 10 significant deficiency claim in view of the current real estate
 11 market as well as the depressing effect of value of this
 12 proceeding on the real property that's subject to TCF's
 13 mortgage.

14 THE COURT: What is the specific objection?

15 MR. SULLIVAN: Yes. Your Honor, TCF opposes the plan
 16 proposed by the receiver because it is fundamentally unfair and
 17 would set in motion a liquidation proceeding of the type that
 18 the Second Circuit Court of Appeals has stated very clearly
 19 that equity receivership should not undertake.

20 Your Honor, TCF takes the position that the plan of
 21 distribution, proposed plan of distribution is fundamentally
 22 unfair for three principal reasons. Number one, it purports to
 23 strip TCF and similarly situated secured creditors of their
 24 contractual rights of recourse against entities other than the
 25 primary obligor. The receiver has cited absolutely no

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1 authority that would suggest that it is the proper exercise of
 2 this Court's equitable power to strip TCF of those contract
 3 rights. Instead, the receiver states, at page 36 of his
 4 response, only that, "In an effort to balance the equities, the
 5 Receiver has proposed that the Court restrict any deficiency
 6 claims of these secured creditors to ensure that they can only
 7 be recouped against the property-specific entities. And the
 8 only authority cited for the receiver's ability to do this is
 9 SEC v. Wang. That case is cited for the proposition that the
 10 Court can approve any plan as long as it is fair and
 11 reasonable. However, as noted by the Wang court in that
 12 opinion, Wang involved a consent decree of disgorgement. The
 13 primary purpose of disgorgement is not to compensate investors,
 14 as in the present case, but to ensure that those guilty of
 15 securities fraud are not unjustly enriched. So therefore, it's
 16 TCF's position that it's not fair to strip away its contract
 17 rights without any legal justification for doing that. And
 18 there are -- there's no allegation in the record that would
 19 support such an act, such as an allegation, your Honor, that
 20 the TCF guarantees were procured through fraud or other
 21 wrongdoing.

22 It's also not fair in view of the fact that other
 23 secured creditors whose property was either sold or abandoned,
 24 pursuant to prior order of this Court, had the opportunity to
 25 voluntarily relinquish those deficiency claims, your Honor, as

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1 part of a negotiated settlement. Presumably, your Honor, those
 2 secured creditors had the opportunity to gain some benefit of
 3 that bargain, some consideration given by the receiver in
 4 exchange for those releases. That's not proposed to the
 5 secured creditors who exist at this point and haven't had the
 6 opportunity to have those discussions with the receiver.

7 The proposed plan is also fundamentally unfair, your
 8 Honor, to secured creditors because it sets in motion a sale
 9 process that, with respect to the real property, that is devoid
 10 of the protections that would be available to a secured lender
 11 under Section 363 of the Bankruptcy Code. Specifically, your
 12 Honor, Section 363 of the Bankruptcy Code sets forth a clear
 13 set of rules and expectations that govern sales of assets
 14 outside the ordinary course of business, few of which are
 15 contained in the Court's amended order dated September 11th,
 16 2008, that authorizes the receiver to use, lease, sell and
 17 convert into money all assets of the WexTrust entities, either
 18 in public or private sales, at the receiver's discretion,
 19 subject only to the limitation that sales of assets valued at
 20 \$750,000 or more must be effectuated upon approval of the Court
 21 on four business days' notice. Your Honor, in contrast,
 22 Section 363(f) of the Bankruptcy Code would authorize a trustee
 23 in bankruptcy, such as an 1104 operating trustee --

24 THE COURT: Haven't we been through this before? I
 25 mean, you're raising issues that I ruled on and apparently are
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1 now the subject of the appeal.

2 MR. SULLIVAN: Your Honor, I believe that these issues
 3 are fresh in this context. In view of the Second Circuit's
 4 decisions in the cases cited in our brief, your Honor, these
 5 matters, the appropriateness of bankruptcy tends to ripen at
 6 some point during the context of an equity receivership. That
 7 has been made very clear in the American Board of Trade case,
 8 your Honor.

9 THE COURT: You're renewing your argument that the
 10 case should go into bankruptcy.

11 MR. SULLIVAN: Your Honor, for the record, this is my
 12 first appearance, opportunity to argue in this case.

13 THE COURT: You're renewing the argument that others
 14 have made earlier that this case should be resolved in
 15 bankruptcy.

16 MR. SULLIVAN: Yes, your Honor, and specifically the
 17 reason I think that that's appropriate is, in the American
 18 Board of Trade case, the Court of Appeals specifically declined
 19 to initiate or require the district court to initiate
 20 bankruptcy proceedings because at that point in the process the
 21 plan of liquidation in that case had been substantially
 22 consummated, your Honor, and so I believe that the
 23 circumstances of this case presently, with the presentation of
 24 the proposed plan of distribution, bring this issue to the fore
 25 again and must be considered by the Court.

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1 THE COURT: All right. Thank you.

2 MR. SULLIVAN: Your Honor, returning to the --

3 THE COURT: Let's finish up. I've got several more
 4 people.

5 MR. SULLIVAN: Yes, understood, your Honor.

6 Your Honor, one other aspect of the bankruptcy sales
 7 which are not present in the present case is that private sales
 8 are generally disfavored in bankruptcy in favor of public
 9 auction supervised by the bankruptcy court, with open and
 10 transparent and competitive bidding. Your Honor, TCF and other
 11 secured creditors are very concerned that the sale process,

12 which is not part of an approved plan of this Court -- the
 13 receiver's plan dated January 15 for real property management
 14 is not approved by order of this Court -- setting forth a sale
 15 procedure that does not afford the basic protections of 363.

16 Your Honor, we have cited caselaw in our brief which
 17 says that it's inappropriate, even outside of the bankruptcy
 18 context, to pick and choose among the rules in bankruptcy.
 19 It's an all-or-nothing approach. And that is cited in our
 20 brief.

21 Your Honor, turning specifically to the American Board
 22 of Trade case, TCF has asserted in its objection, your Honor,
 23 that the receiver lacks the present authority under orders
 24 issued by your Honor to proceed with presenting a plan of
 25 distribution requesting approval of it. Therefore, your Honor,

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1 it is our position that this Court would have to expand the
 2 scope of the receiver's authority to do that at this point. We
 3 believe that would be inappropriate for the reasons set forth
 4 in the SEC v. American Board of Trade case cited in our brief.
 5 This proposed plan of distribution is truly a plan of
 6 liquidation, your Honor, because it contemplates that the
 7 receiver will liquidate substantially all of the defendants'
 8 assets and distribute the proceeds to holders of claims. In
 9 addition to liquidating the defendants' assets, the plan puts
 10 in place a proposed claim solicitation and verification
 11 process, it puts in place a priority scheme for treatment of
 12 claims, and it allows the receiver to retain a reserve from the
 13 distribution process for payment of professionals, which in
 14 fact, your Honor, creates a separate class of claims that would
 15 be treated in a bankruptcy as administrative claims. The plan
 16 also sets forth the claims objection and disallowance
 17 procedure, and it sets a claims priority. This is exactly the
 18 type of plan --

19 THE COURT: What are your objections? Tell me what
 20 your objections are.

21 MR. SULLIVAN: This is exactly the type of plan that
 22 was sternly criticized by the Second Circuit Court of Appeals
 23 as noted in paragraph 26 of our objection.

24 In his response the receiver relies heavily on the
 25 circuit court's opinion in SEC v. Credit Bancorp, and in fact

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1 that's really the exclusive authority cited by the receiver in
 2 response to our arguments. Your Honor, first, although Credit
 3 Bancorp does stand for the proposition that a pro rata
 4 distribution to similarly situated victims --

5 THE COURT: What do you suggest as an alternative?

6 MR. SULLIVAN: Your Honor, we -- as an alternative,
 7 it's TCF's position, if the rights afforded to secured
 8 creditors like TCF are not going to be made akin to those that
 9 would be experienced in bankruptcy proceedings, we believe that
 10 the only alternative for this Court would be to direct the
 11 receiver to commence an involuntary proceeding -- I'm sorry, a
 12 voluntary proceeding in bankruptcy at this time for the
 13 WexTrust entities. The bankruptcy court is far better situated
 14 administratively to handle the procedures and practices,
 15 particularly claims objections.

16 THE COURT: I understand. You think this should be

17 made into a bankruptcy. What else do you want to tell me?
 18 MR. SULLIVAN: Your Honor, I do want to, if I may,
 19 distinguish the Credit Bancorp case on two grounds. That case
 20 does stand for the proposition that a pro rata distribution is
 21 a fair and equitable distribution, but it does not offer a
 22 sound justification for continuing on this course with this
 23 plan of distribution. The reason for that is that this plan of
 24 distribution, something that was not present in the Credit
 25 Bancorp case, purports to affect and alter the legal rights of
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1 plaintiffs that are holding different types of claims. As is
 2 discussed earlier in record, the claims of unsecured creditors
 3 and investors are included together, they're in effect lumped
 4 together, which is a basis to distinguish it.

5 Also, the decision of the district court below in the
 6 Credit Bancorp case, approving the pro rata plan of
 7 distribution in that case, reveals just how limited its
 8 holdings should be construed. In fact, the Court was very
 9 cognizant of the limitations of an equity receivership --

10 THE COURT: No, stop. You're taking too long. Too
 11 long. Next, please. Thank you.

12 MS. KAUFMAN? Beth Kaufman.

13 MS. KAUFMAN: Good morning again, your Honor.

14 THE COURT: Good morning.

15 MS. KAUFMAN: Beth Kaufman, Schoeman, Updike &
 16 Kaufman, New York, for Larry Costa, and I am a member of this
 17 court.

18 Your Honor, I am here for Mr. Costa individually. He
 19 is also a member of the commodity pool investors. You've heard
 20 their objections to the plan already. Mr. Costa is either the
 21 largest or the second largest individual investor in the
 22 WexTrust entities, and he has also made a personal loan to Diva
 23 in an effort to keep the African mining operation operational.
 24 And he is, as conceded by the receiver in his December 1st,
 25 2008 declaration to the Court, a victim of this fraud.

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1 Mr. Costa had no plan to lodge an objection to the
 2 plan of distribution beyond the position he has taken with the
 3 commodity pool investors. He was comfortable with the pro rata
 4 distribution plan because he felt it would treat all investors,
 5 him included, the same. That was his position until
 6 April 23rd, 2009, when he was informed that there had been a
 7 meeting in Chesapeake, Virginia of investors attended by the
 8 receiver at which the receiver presented an update to
 9 investors. The formal update presented by the receiver
 10 included a PowerPoint presentation which referred to Mr. Costa
 11 only as a party with whom there had been litigation, the
 12 previous proceeding before your Honor. There was a reference
 13 in the PowerPoint presentation to the general plan to
 14 disqualify certain claims and claimants, which is part of the
 15 plan of distribution, but no elaboration on it. Mr. Costa was
 16 informed that following that formal presentation, in an
 17 informal gathering of the investors, the receiver told those
 18 investors that he intended to disqualify Mr. Costa's interest
 19 entirely. If in fact that was said, it would be a wholly
 20 inappropriate thing for the receiver to say, apart from whether
 21 it's wrong as is, but to informally say to a group of investors

22 what the receiver intends to do and not present that to this
 23 Court in this plan of distribution would be inappropriate.
 24 Mr. Costa is not an employee, he is not a marketer or
 25 solicitor; he did not participate in any fraud. Mr. Costa

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1 therefore filed an objection to the plan to the extent that
 2 plan allows the receiver to obtain approval of the plan from
 3 this Court and therefore proceed with the approval of this
 4 Court to go on to some next proceeding to disqualify claimants,
 5 including Mr. Costa. No procedure is specified, no individuals
 6 are specified by name as to who Mr. Coleman intends to seek to
 7 disqualify. We were particularly troubled by the fact that
 8 there was a response to the objections filed by the receiver on
 9 May 11th, and he did not respond at all to Mr. Costa's
 10 objection. He didn't address the objection at all. He did not
 11 deny the statement to the informal group of investors, and he
 12 does not address the process by which this will be addressed
 13 for Mr. Costa and anyone else who he deems to have unclean
 14 hands or participated in a fraud.

15 I raised this with Mr. Gagon after our argument
 16 earlier this morning on the issue of Mr. Costa meeting with the
 17 receiver, and Mr. Gagon directed me to Mr. Radke, who I
 18 approached on the break, introduced myself, and Mr. Radke said
 19 no, he couldn't talk to me. So we have gotten nothing from the
 20 receiver, either formally or informally, in response to this
 21 objection. This may be a not-very-disguised effort to add
 22 value to the receivership estate, because Mr. Costa is the
 23 largest or second largest investor. If so --

24 THE COURT: I mean, I think I don't have a problem
 25 with the concept of disqualifying certain people who might have

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1 played a hand or engaged in any inequitable conduct, but of
 2 course there would have to be a process of some kind, there
 3 would have to be an opportunity for any such individuals to
 4 respond and object.

5 MS. KAUFMAN: We agree, Judge. However, if there is
 6 an intention on the receiver's part at this moment or on
 7 April 23rd, 2009, or at the time he filed the plan of
 8 distribution, to exclude anyone in particular, why is that not
 9 in the plan? We are entitled to know that if the receiver
 10 intends to do that. He has not disclosed it. He has not
 11 disclosed either way in response to our objection. If he has
 12 that intention, just let's bring it out into the open and let's
 13 address how we're going to proceed from here.

14 THE COURT: All right. I think the question is when,
 15 whether it's done now or at some point, but it should be done.
 16 I don't disagree with that.

17 MS. KAUFMAN: I would just like it done at the
 18 earliest possible opportunity.

19 THE COURT: Fair enough. Thank you.

20 Timothy Holmes.

21 MR. HOLMES: Your Honor, my name is Timothy Holmes.
 22 I'm an investor in WexTrade Diversified Futures Fund I. I am
 23 not an attorney, and I ask permission to speak before this
 24 Court.

25 THE COURT: It's fine for you to speak in terms of
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1 your own investment. Yes.

2 MR. HOLMES: Okay. First, I object to the plan of
3 distribution. My investment was made directly from my personal
4 account and placed directly into WexTrade Diversified Futures
5 Fund, in the name of the fund.

6 As I previously advised the Court, I am speaking for
7 15 other investors who invested directly into the Wdff after
8 March 31st, 2008. My letter to the Court also listed those
9 people on the letter. And that was before.

10 THE COURT: All right.

11 MR. HOLMES: In the case of our investment in Wdff,
12 the funds are separately identifiable as our assets. What the
13 receiver proposes is an unprecedented confiscation of funds,
14 clearly identifiable as belonging to individual nonWexTrust
15 investors. The receiver's unprecedented action will result in
16 unaffiliated investors covering the losses of WexTrust
17 investors.

18 The receiver has only cited court cases in which the
19 assets were clearly commingled and in which it was not possible
20 to separately identify the assets not affected by wrongdoing.

21 My position can be demonstrated by examining three
22 issues surrounding the facts of our investment in Wdff. First,
23 we invested directly into WexTrade Diversified Futures Fund I
24 commodity pool, and we're not associated in any way with
25 WexTrust. The improper conduct occurred at WexTrust and in
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1 WexTrust's placement and use of assets. Our assets were never
2 in WexTrust. Our assets only resided in our individual capital
3 accounts in WexTrade Diversified Futures Fund. WexTrust is a
4 separate entity from WexTrade Diversified Futures Fund.

5 And in addition, WexTrust Commodity Managers is also a
6 separate legal entity from WexTrade Diversified Futures Fund.
7 Our funds were never handled by WexTrust, our capital accounts
8 were intact and accounted to us individually when the assets of
9 Wdff were frozen.

10 The receiver proposes an unprecedented use of intact,
11 separate funds in separate capital accounts of unaffiliated
12 investors in an independent legal entity to cover the losses of
13 WexTrade investors.

14 Second, the receiver's proposition that the funds are
15 inextricably commingled or even commingled is a desperate
16 argument. The receiver repeatedly ignores the transparent
17 characteristics of exchange traded futures accounts held at
18 futures commission merchants, including omnibus trading
19 accounts. As a previous owner of a firm having a large omnibus
20 account, I know that all investors who invested directly in
21 WexTrust Diversified -- WexTrade Diversified Futures Fund
22 established capital accounts that are separate from all other
23 investors. These capital accounts are visible, have a clearly
24 calculated value that is determined on a daily basis for each
25 and every capital account. The receiver's unprecedented action

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1 will take clearly identifiable assets of commodity pool
2 investors, in which no wrongdoing has occurred and with no

3 connection to WexTrust, and use it to settle a WexTrust
4 receivership. This is an unprecedented action.

5 Third, as to investors who invested directly into the
6 pool, the receiver has not established one fact to show how we
7 have tainted assets and why we should be liable to WexTrust
8 investors. On page 26 of response to objections, the receiver
9 states that its basis for control of assets and its basis to
10 bring claims are based on the assets being commingled and/or
11 misappropriated. Our assets are not commingled; our assets are
12 not misappropriated. The receiver claims that the presence of
13 tainted funds in the individual capital accounts that belonged
14 to investors from WexTrust commingled all the capital accounts
15 of all of the commodity pool investors, including ours, who
16 were never associated with WexTrust, if the Court were to
17 consistently apply the receiver's hypothesis that every bank
18 that held WexTrust assets is commingled with WexTrust.

19 Additionally, if the escrow account controlled by
20 WexTrust were placed in a large public investment fund, the
21 receiver's theory implies that the fund, the whole fund, now
22 belongs in the WexTrust receivership. Both of these examples
23 demonstrate the overreaching of the receiver in this matter.

24 In conclusion, we, the direct investors in WexTrade
25 Diversified Futures Fund, have nothing to do with what happened

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1 at WexTrust. Our funds were accounted for and identifiable as
2 ours. Our funds were not commingled or misappropriated. The
3 receiver has taken the unprecedented action of using
4 identifiable investor assets to pay unrelated parties.

5 I respectfully ask the Court to due equity. As a
6 receiver has acknowledged, the final decision does not rest
7 with Tim Coleman or Dewey & LeBoeuf as the receiver, but with
8 this Court. Judge Chin, thank you for your consideration.

9 THE COURT: Thank you.

10 Next is Martin Malek.

11 MR. MALEK: I'm an investor. I'm not an attorney.

12 THE COURT: All right.

13 MR. MALEK: Your Honor, I sincerely hope that this
14 opportunity to respond to the receiver's distribution plan is
15 not a mere formality but is a genuine opportunity --

16 THE COURT: Hold on a second. Slow down, and keep
17 your voice up.

18 MR. MALEK: I'm sorry. I sincerely hope that this
19 opportunity to respond to the receiver's distribution plan is
20 not a mere formality but is a genuine opportunity to have your
21 Honor's ear in formulating the decision for the distribution.
22 Your Honor has heard from the WexTrade commodities pool already
23 on why the pro rata distribution plan would be unjust. I would
24 like to add a few significant points.

25 I, Martin Malek, invested in an up-and-running

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1 certified, regulated commodity pool. A quick time line of this
2 commodity pool is as follows: For a few months prior to August
3 of 2007, WexTrust raised money to begin a commodity fund.
4 Close to \$8 million was raised during this time. And an audit
5 established that approximately \$1.8 million had been
6 transferred out of the escrow account for this fund prior to
7 trading and later returned. How your Honor decides to look at

8 that \$1.8 million that was being held by WexTrust for WexTrade
 9 is one issue. But what should be of no issue is what happens
 10 in the next stage of this fund. The fund began trading in
 11 August of 2007, and \$10 million is invested by 51 investors
 12 directly into an up-and-running certified and regulated
 13 commodity fund over the next year, which by law must be a
 14 separate entity, totally unaffiliated with WexTrust. In fact,
 15 it is for this very reason my personal check was made out
 16 directly to WexTrade Diversified Futures Fund I, LLC.

17 Now what could be the receiver's claim on those
 18 \$10 million by 51 investors placed into an up-and-running
 19 commodity fund after August of 2007? As your Honor has heard
 20 and will continue to hear, all of their claims are of the non
 21 sequitur nature and never truly deal with the core issues.
 22 Here is one of their main arguments. It is unprecedented but,
 23 if upheld, would have long-term ramifications. According to an
 24 audit by Deloitte & Touche, seven WexTrust investors asked that
 25 their money in a WexTrust holding fund be transferred to this

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1 up-and-running commodity pool. Now because Shereshevsky and
 2 Byers were running a Ponzi scheme, much of that money was not
 3 indeed in the individual accounts. So they took other monies
 4 and opened up individual accounts in the commodity fund for
 5 these investors. They could have just as easily gathered up
 6 this money and sent a check to Fidelity to open an account in
 7 the Fidelity Magellan Mutual Fund. Being that WexTrade by law
 8 is a separate entity from WexTrust, there is no difference
 9 between the Magellan Fund and the WexTrade commodity fund in
 10 regard -- in regard to WexTrust.

11 Now these seven investors accounts are documented and
 12 traceable to the penny, and if the receiver has a claim on
 13 these monies, they could be easily removed from the
 14 \$17.5 million sitting frozen and waiting for the judge's
 15 decision. If somehow this logic of the receiver was to be
 16 affirmed by your Honor, then we would have a new solution for
 17 all investors who have been part of a fraud. For example, if
 18 one of the Bernie Madoff investors would have taken his profits
 19 a year ago before the revelations and taken those fake returns
 20 and invested them in let's say the Magellan Fund, according to
 21 the receiver, the entire Magellan Fund, over \$20 billion, would
 22 be tainted, and the entire funds would become part of the
 23 Madoff relief fund. This would be an excellent strategy for
 24 Mr. Irving Picard. Your Honor, of course, would never allow
 25 that. The only claim would be on that individual investor's

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1 Madoff money in the Magellan Fund being carved out, and that
 2 money would be placed into the Madoff relief fund. But every
 3 other investor in the Magellan Fund would be untouched and
 4 their accounts would only reflect their individual statements.
 5 As a matter of fact, commodities funds have stricter tracking
 6 guidelines in place than mutual funds, so this certainly would
 7 be true of this commodity fund, which was being tracked and
 8 audited by third-party companies. The same would be true if
 9 there were infractions found within the Magellan Fund. That is
 10 not a recipe for sweeping the money into the Madoff victim
 11 relief fund -- into the Madoff victim relief pool.

Now I know we are only a few million dollars and not

13 as exciting as some of those big numbers, but every dollar
 14 deserves to be treated by the law, and besides the dollar
 15 amount being different than the Madoff investors, there is no
 16 SIPC protection which gives security victims up to \$500,000 of
 17 insurance. There is nothing similar set up for commodity
 18 investors, so our compensation is only in your Honor's hands.

19 Another more important issue would be the major
 20 ramifications that would take place if your Honor is to put his
 21 stamp on this pro rata distribution plan. There was an
 22 interesting recording from a May 1st phone call placed on a
 23 commodity blog between a frustrated commodity pool operator,
 24 unaffiliated with WexTrust or WexTrade, and John Warren, an
 25 attorney from Dewey & LeBoeuf who has been working on this

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1 case. The CPO who has a commodity fund, and there are other
 2 divisions in this firm, some who invest in real estate, tells
 3 Mr. Warren that a few of his top clients have pulled out of his
 4 fund after reading that a receiver is taking 90 percent of
 5 investors' money in a regulated commodity pool because of a
 6 Ponzi scheme that took place in an unrelated real estate
 7 division and now many of his investors fear they could be
 8 sucked in if something goes wrong with the real estate
 9 division. Mr. Warren apologizes and says that this is an
 10 unintended consequence and in reality will be made clear -- and
 11 in reality it will be made clear that the WexTrade commodity
 12 fund was one of the many shell companies being run. This is
 13 also the same disregard Tim Coleman has had toward the
 14 commodity fund, and I quote from an April 23rd, 2009 town
 15 hall meeting in Virginia. In talking to all investors,
 16 including commodity investors, Tim Coleman states, "These were
 17 simply shell companies. They did not keep separate books and
 18 records." End of quote from Tim Coleman about all the
 19 entities. First of all, that is quite insulting. Before
 20 investing, I tracked the funds for two months, April of '08 and
 21 May of '08, and did my due diligence, speaking with NAV
 22 Consulting before investing on June 1st. The commodity fund
 23 was real. The trades were real, by well-established CTAs,
 24 commodity trade advisers, and our money, all \$17.5 million
 25 sitting frozen, is real. There are numerous books and records

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1 that document every trade and every dollar, as I have spoken
 2 with Nav Gupto of the NAV Consulting firm, who tracked these
 3 trades. Besides that, besides that, the larger issue from this
 4 ruling is the ramifications to all segregated divisions which
 5 share a parent. If one unaffiliated division came under the
 6 power of an all-encompassing powerful receiver, the other
 7 divisions could be dragged in, according to this. I myself got
 8 numerous calls after being quoted in a Wall Street Journal
 9 article from worried investors in differing funds.

10 For your Honor's information, the commodity investors
 11 as a whole offered the receiver early on to remove the
 12 questionable funds from the pool as the receiver has shown they
 13 are easily identifiable to the penny, and we will give up the
 14 claim on the \$1.8 million that was taken from the escrow fund
 15 and returned, and we will take about a 15 percent hit on our
 16 investment after all questionable monies -- all questionable
 17 monies only totaling 15 percent are removed. But the receiver

18 has ignored us. In the first few months of this process the
 19 receiver was communicating with us, but that was before the
 20 realization that the \$87 million they thought they had in real
 21 estate, a quote from Tim Coleman at a town hall meeting with
 22 investors early on, clearly was quickly sinking till this
 23 latest town hall meeting a few weeks ago in Virginia, when they
 24 told investors that they might be disappointed with the amounts
 25 they might eventually recover because real estate has

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1 plummeted. Interesting. Real estate investors might be
 2 disappointed while commodity investors are in shock that they
 3 would be affected by the sinking real estate market.

4 Another disappointing development is that the
 5 commodities fund is being called upon to fund massive legal
 6 fees that are mainly real estate related. Now it was
 7 commendable for Tim Coleman to lower his fee from \$850 per hour
 8 to \$250, but the average hourly rate for all the Dewey &
 9 LeBoeuf professionals below Mr. Coleman came to \$478 an hour,
 10 according to the receiver's application for payments, and they
 11 are billing for the majority of the work. I hope your Honor
 12 agrees with me that it is disgraceful for these fees, which are
 13 almost all real estate related, to be paid for by our commodity
 14 funds because we are one of the only sources of cash since the
 15 money is whole because there was no Ponzi scheme within our
 16 separate funds.

17 I apologize to the Court and don't mean to show
 18 disrespect for Tim Coleman, an attorney held in high regard and
 19 has been very charismatic throughout this process, but I am
 20 sure, Judge Chin, you would not want us to just stand by while
 21 we are being walked all over and every wall of protection we
 22 legally deserve has been torn down. In the end, a pro rata
 23 distribution plan that will amount to 10 cents on the dollar,
 24 maybe, while our money sits whole in separate identifiable
 25 accounts, would be unacceptable and unjust.

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1 I would understand if, myself being an investor, your
 2 Honor feels I have a bias. But what has reassured me and what
 3 your Honor should hear for himself are the words of Richard
 4 Wagner, the deputy director of the enforcement division at the
 5 CFTC, who has been at the CFTC for 32 years. After I sent dire
 6 e-mails to CFTC employees, he responded by calling and telling
 7 me he has gone through the entire case and finds the pro rata
 8 distribution plan to be extremely disturbing and probably
 9 unlawful. After many conversations with my father-in-law, Ben
 10 Maizes, and myself, he told us that he is working hard to get
 11 someone from the OGC, Office of General Counsel, to speak up on
 12 Thursday, meaning today. After prodding them and getting
 13 brushed off and getting the feel from them that it would be
 14 politically incorrect to speak up against an SEC-appointed
 15 receiver, he offered them that he himself would come to New
 16 York and give up a day of his personal vacation to speak up at
 17 the hearing. I pleaded with him to please come. But he told
 18 me, since he is from the enforcement division, he cannot go
 19 unless given special permission, or asked by the judge to
 20 appear, which he told me was a hint to mention, in case Judge
 21 Chin is not prepared to reverse this pro rata distribution
 22 plan. These are clear words from an expert of 32 years in the

23 governmental agency of CFTC willing to testify. He has seen
 24 all the documentation from the NFA, including these latest
 25 charges brought just this week, which he feels are immaterial,
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1 immaterial to the case at hand, and read through the receiver's
 2 response to our objections and still believes that this
 3 distribution plan is unjust. In the least, if you feel that we
 4 have not provided sufficient evidence for reversal, I ask that
 5 you call on Richard Wagner, deputy director of the CFTC
 6 enforcement division, to testify in front of you in order to
 7 clear away the fog the receiver has created and turned away
 8 from the core issues of the fact that 51 investors and
 9 \$10 million were invested in an up-and-running certified and
 10 regulated commodity fund, with separate identifiable accounts,
 11 were not part of the escrow money that sat in WexTrust and in
 12 no way were affected from the seven accounts transferred from a
 13 separate entity named WexTrust.

14 I would like to conclude by letting your Honor know
 15 that I have Richard Wagner's contact information at the CFTC
 16 with me and can pass it on to your Honor's assistant. Now
 17 Richard Wagner, unlike myself, who might be considered biased
 18 because I'm an investor, or Tim Coleman because he has 1,400
 19 real estate investors hoping to recover some of the money and
 20 is responsible to his firm for the fees, Richard Wagner cannot
 21 be accused of any bias. In fact, he was one of the few people
 22 I have met on this difficult travel who is not constrained by
 23 what is politically correct but believes that the law should be
 24 upheld.

25 THE COURT: Thank you. Samuel Krieger.
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1 MR. KRIEGER: Good morning, your Honor. My name is
 2 Samuel Krieger of Krieger & Krieger, LLP. I'm a member of the
 3 bar of this court. We represent M.Y.H. Investments and certain
 4 other similarly situated offshore investors in the WexTrade
 5 Diversified Offshore Fund. On April 26 M.Y.H. submitted to the
 6 Court and to the receiver a written response to the proposed
 7 plan. I'd just like to amplify those comments.

8 I'd like to start with one comment, which I think has
 9 not been addressed today, and then I'll go to some of those. I
 10 believe that the receiver, while in this plan and his responses
 11 says that he can fairly represent the interests of the
 12 investors, cannot fairly represent the interests of the
 13 investors in the commodities funds. The receiver stated to the
 14 Court this morning that he had approximately \$18 million of
 15 cash available. I believe I have that number correctly. Of
 16 that cash, the majority is the cash from the liquidation of the
 17 commodities funds. So what is happening over here in this
 18 case, by seeking to make a credible showing of some
 19 distribution to investors, albeit minor, he's doing that to the
 20 detriment of the commodities funds investors who, as has been
 21 elaborated over here, and I'm sure will be elaborated, can show
 22 that there was no commingling, and he's taking their funds and
 23 now, to some extent, trying to play Robin Hood and distributing
 24 their funds to the --

25 THE COURT: I think at least three of the speakers
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1 have now addressed the commodities funds. So I don't think you
2 need to repeat what was said with respect to the commodities
3 funds. The points have been well made. I understand them.

4 MR. KRIEGER: I'd just like to address one certain
5 objection, one point in the commodities funds.

6 THE COURT: Go ahead.

7 MR. KRIEGER: The receiver makes much of the argument
8 that certain of the investors in the commodities funds were
9 also invested in other WexTrade offerings and therefore a pro
10 rata distribution would be more equitable. I think that that
11 argument is specious and has no legal basis. As well as the
12 fact the receiver is blaming the victims. It's an argument
13 that has no relevance at all.

14 Thank you, your Honor.

15 THE COURT: Thank you. Pessi Rothschild.

16 MS. ROTHSCHILD: Your Honor, thank you very much for
17 giving us the opportunity to be heard today. We greatly
18 appreciate it.

19 I am not a lawyer. I'm a mother of five children, an
20 unfortunate investor, close to half a million dollars. This
21 money wasn't just handed me on a silver platter. Thank god I
22 was a CPA before I moved to Israel and earned many of that --
23 much of that money and God favored us with having some good
24 investments before this disaster occurred.

25 I'm here today to plead my case alone without legal

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1 representation. This pains me greatly. I would have liked to
2 be represented by attorneys, perhaps even Mr. Coleman on my
3 side alone, with five strong attorneys on my side. I can't
4 afford even a basic attorney. And certainly that even more so
5 makes me appreciative of this opportunity to be heard. Perhaps
6 as a side note, if there was a way that the judge could set
7 aside some funds for the victims or -- to hire attorneys to
8 represent them properly, with proper backing on the legal end,
9 or more such time to be heard on a one-to-one basis and not be
10 judged every word, if it has authority or not, we would greatly
11 appreciate that.

12 We placed our confidence in the receiver for nine
13 months. We waited very patiently, and now we feel betrayed. I
14 hope Mr. Coleman and his attorneys don't take this personally.
15 I respect the receiver very much on a professional level and
16 believe he and his attorneys are doing his job. We're just
17 victims, and we take it on a much more personal level.

18 I invested in three investments. One was the
19 very-well-spoken-about futures fund; one is another investment
20 called Hammond Industrial, which is quite profitable and has
21 equity; and the third one is the Phoenix Crown Plaza Hotel,
22 which unfortunately, due to the US fallout in the real estate
23 market, is now relinquished. What I could say about --

24 THE COURT: What was the second one?

25 MS. ROTHSCHILD: Hammond Industrial, which is, I

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1 believe, where businesses are renting space and quite
2 profitable.

3 THE COURT: All right. Thank you. Go ahead.

4 MS. ROTHSCHILD: Okay. What's common about these
 5 three investments, even though one of them is Phoenix, which
 6 does not -- well, will not exist, does not exist at this point,
 7 is that regardless of the Ponzi scheme, all three purposes of
 8 what we invested in were carried out by the people who
 9 perpetrated the crime. From our point of view, in the big
 10 picture, we're not affected by the Ponzi scheme. We invested
 11 money to commodities futures fund. That money was carried out
 12 and was invested well, and until the fraud was detected and the
 13 receiver froze the assets, the money was there, and it's still
 14 there. We invested in Hammond Industrial, and the money -- the
 15 property was purchased, and it's doing well. It was a good
 16 investment and it still is a good investment. We invested in
 17 the Phoenix hotel. Unfortunately, it did not do well. No one
 18 could have anticipated what would happen to the United States
 19 at this time. But the money was -- the hotel was purchased,
 20 and unfortunately, I will lose the money in that investment,
 21 but that's expected, like me and many other Americans or
 22 international investors. At this point, though, we feel
 23 betrayed because we've put our confidence in the receiver and
 24 his staff, and it seems like we're -- if you put everything
 25 aside and all hands down, we will suffer more from the

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1 receiver's actions and any distribution plan than had this
 2 fraud never been detected. We always joke amongst ourselves,
 3 my husband and I, had the fraud never been detected by the SEC,
 4 we possibly could have had more money at the end of the day
 5 than all nine months later when millions of investors' money
 6 and different monies were used to get to the bottom of this
 7 case.

8 And just a few months back, Mr. Bienenstock of Dewey &
 9 LeBoeuf, at a town hall meeting spoke about how they were
 10 considering rolling out a distribution plan in early 2009, and
 11 it was mentioned that perhaps different considerations would be
 12 factored in to the full distribution plan, including
 13 profitability of each individual investment and the extent of
 14 commingling. Now here we are about a half year later, the
 15 proposed distribution plan was delayed for about a quarter of a
 16 year, which I understand these things can happen, but when
 17 we're talking about getting 5 cents on the dollar and the fees
 18 are about a million dollars a month, I mean, that's -- it's
 19 very painful. And, to take -- to take the cake, not one factor
 20 is considered. Now we feel -- that might be the easiest way
 21 out or it might seem that it helps the victims, and if it
 22 really indeed helps all the victims, I would say go for it. I
 23 have my own brother who invested in something that, in
 24 addition, he would do better perhaps if the pure pro rata
 25 distribution would be done, but even he feels that this

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1 wouldn't be fair. Perhaps every investor, at the end of the
 2 day, according to this plan, we're not even sure if we're
 3 getting 5 cents on the dollar. I'm too nervous now to do the
 4 math. But if every investor is going to come out getting 500
 5 to a thousand dollars, that's not going to save anyone from
 6 foreclosing on their home. That's not going to help me have
 7 heat this winter, this upcoming winter. That's not going to
 8 make any major change in anyone's life. It might make us all

9 feel good, but in the big picture, we lost big time. And all
10 of this is going to be at the expense of the profitable
11 investments.

12 Now the proposed distribution plan, I'm not sure why,
13 from three months back, when the town hall meeting was made,
14 what changed so drastically that not one factor was considered.
15 There were risks -- there certainly were risk factors involved.
16 We specifically tried to invest in three different areas so we
17 would not fall into a mess like this. Unfortunately, now,
18 because of the fraud, all the LLCs are disregarded, and risk
19 factors were being grouped with people who were investing in
20 diamond mines. How can that be compared to someone who
21 invested in a solid real estate property that did prove, in a
22 very turbulent time, to do well.

23 The receiver claims that all -- that the only fair way
24 is to do a pro rata distribution. It could be that a pro rata
25 distribution could be made, but it certainly could be refined

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1 to include risk factors, profitability factors, how much --
2 just like any professional in sales, if some person brings in
3 more money or does his job better, will be rewarded or gets
4 some kind of bonus, there has to be some kind of bonus for the
5 commodities funds which represents the majority of the cash at
6 this point.

7 And if equality is equity, don't we need to include
8 all past investors? Why do we not at least pay for all the
9 history of WexTrust? Perhaps there are people who still have
10 money. And if they're not included, it's certainly not
11 equality because they just got out at the right time. We,
12 unfortunately, didn't.

13 The receivership we believe was set up to protect the
14 rights of investors, and I do see that the judge is very
15 conscious and trying to help the investors, yet under the
16 proposed plan we feel we will suffer heavy losses, not as a
17 result of the fraud but as a result of the distribution plan.
18 If we take a step back and we say, here we are nine months
19 later, what real value was added to the investors and we
20 really -- I understand that Mr. Coleman does not have a dollar
21 amount that he could give us at this point, but I beg the
22 judge, before he agrees to anything, to really see the numbers
23 we're talking about, and if it makes sense that an investor who
24 could have gotten back the majority of the money should be
25 sacrificed than an investor who might get back a thousand

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1 dollars or \$500, I'm -- we're all willing to give back
2 percentages of our money. We feel horrible for the GSA people.
3 We feel horrible for anyone involved. We know the pain that
4 we're going through. And we're hoping that some kind of joint
5 effort could be made in terms of figuring out a distribution
6 plan that could be really fair to each person.

7 And just as a victim, we've had an extremely hard
8 time. I've been blessed. I've been able to be home with my
9 children. My husband is a student. This was money that was
10 going to keep us going for, with God's help, a long time,
11 without a salary. In Israel -- that's where I live -- this
12 year has been an extremely difficult one. We were not able to
13 have proper heat this winter as a result of this. I'm

14 unemployed. I cannot find employment.
 15 We really appreciate that the judge is so concerned,
 16 and we understand that any reasonable plan can be approved if
 17 it finds favor in the judge's eyes. We did express all our
 18 objections in a letter. I have a copy here, rather than
 19 repeating it all again, that I believe was forwarded and read
 20 to the judge.
 21 THE COURT: I have it somewhere, yes.
 22 MS. ROTHSCHILD: Okay. If the judge would like an
 23 additional copy, he can --
 24 THE COURT: I have a copy. Thank you. I appreciate
 25 your comments.

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1 MS. ROTHSCHILD: I really thank you for all your
 2 efforts and hope that at the end of the day, all the investors
 3 can somehow have a happy ending to this horrible story.
 4 THE COURT: I think that's unlikely. I think it's
 5 unlikely that there will be a happy ending. I mean, of course
 6 we'll try to make it as least unhappy as we can.
 7 Thank you.
 8 MS. ROTHSCHILD: Thank you.
 9 THE COURT: David Hartheimer.
 10 MR. HARTHEIMER: Yes, your Honor. Good afternoon. My
 11 name's David Hartheimer. I'm with Mazzeo Song & Bradham, and
 12 we represent the Space Park AIM Partnership and the Space Park
 13 ISSB Partnership.
 14 We, like the first objection that was brought before
 15 your Honor, represent investors who invested in a single-asset
 16 real estate entity that is unrelated to the subject of the
 17 receivership, namely, the Ponzi scheme. We submitted an
 18 objection which went through the facts of our specific
 19 objection, and I could repeat it here before your Honor, but I
 20 think it would be better to be brief.
 21 We too would like an opportunity to address the
 22 receiver, to show the receiver that there was -- that we were
 23 not part of a Ponzi scheme, that there was no commingling of
 24 the assets from our investment with the other investments, and
 25 believe that we shouldn't be part of this plan of distribution.

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1 If your Honor would like me to go through the specific facts --
 2 THE COURT: No, I have that. But I think it's a fair
 3 question, it's the same question, and that is, what procedure
 4 could be put into place and what opportunity should there be
 5 for a creditor or an investor who feels that he or it really
 6 was not involved in any way in the scheme and ought not to be
 7 part of it, so...
 8 MR. HARTHEIMER: Yes, and I think if we're given an
 9 opportunity, we will show that our funds were not commingled,
 10 they are not only identifiable, they're segregated, and even
 11 today they're segregated in a separate account, so we would
 12 just like that opportunity.
 13 THE COURT: This is the argument not unlike what the
 14 commodities funds people are saying as well. It's not that
 15 different from what the commodities funds people are saying.
 16 MR. HARTHEIMER: Yes, your Honor.
 17 THE COURT: Okay. Thank you.
 18 MR. HARTHEIMER: Thank you.

19 THE COURT: And finally, Andrew Campbell.
 20 MR. CAMPBELL: Thank you, your Honor. I will try and
 21 be brief.
 22 My name is Andrew Campbell. I'm not an attorney. I'm
 23 a hapless investor in the commodity funds. I invested a
 24 hundred thousand dollars in the commodities funds just 35 days
 25 before the funds were seized, and froze. My investors -- my
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1 investment was fully present and accounted for. So I was not a
 2 victim of the Ponzi scheme. No money was stolen from me. I
 3 am, however, a victim of the receiver.
 4 I'm distressed at what I believe to be misleading
 5 statements by the receiver in his opening remarks. He styled
 6 all the objectors as having equity stakes in LLCs. That is not
 7 the case. The commodity fund investors shared a specific pool
 8 of the commodities funds, and those commodities funds were
 9 invested correctly, according to the instructions that we gave,
 10 and when the funds -- the assets were frozen, those investments
 11 were liquidated and fully accounted for. There were no thefts
 12 within the commodity pool. I purchased a share of the
 13 commodities pool. My personal funds were present and accounted
 14 for.

15 I think it's outrageous that after spending what
 16 appears to be in excess of \$10 million so far, the receiver is
 17 unable to estimate, within an order of magnitude, the value of
 18 the assets that are likely to be distributed. From our own
 19 back-of-the-envelope calculations, it looks to be somewhere
 20 between 15 and 20 cents to the dollar.

21 In the receiver's opposition, or response to our
 22 opposition to the plan, on page 20, he states, "Equitable
 23 principles dictate that all those from whom the money was
 24 misappropriated should be treated equally." And we absolutely
 25 agree with that. The flaw, however, is that there was no money
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1 misappropriated from the commodity pool.
 2 My request, your Honor, is that the process be
 3 formalized so as to say which investments are properly part of
 4 the receivership and which are not, and also, to have the
 5 receiver be required to release the fruits of the research into
 6 the accounting of the commodity pools so we can understand
 7 fully what that -- what that research, for which we have paid,
 8 I should add, revealed.

9 Thank you, your Honor.

10 THE COURT: Thank you.

11 All right. I'll hear from either Mr. Coleman or
 12 Mr. Radke. Or the SEC.

13 MR. JACOBSON: Neal Jacobson on behalf of the SEC.
 14 I'd like to make one statement on behalf of the SEC.

15 First of all, I'd like to say that we completely
 16 support the receiver's plan. We understand this is a very
 17 difficult circumstance for all the victims, and we've heard
 18 from many of them today, and notwithstanding the suffering that
 19 everyone has had, we do believe that this is the most equitable
 20 plan under the circumstances.

21 I just want to touch on one legal point which was
 22 raised by several of the secured creditors and other creditors
 23 who -- unsecured creditors who felt they shouldn't be treated

24 the same as equity. I just want to touch on that one point.
 25 We believe that the Court obviously has the discretion to
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1 approve the plan as is, where it disallows deficiency claims
 2 and treats unsecured claims on par with claims based on equity
 3 interests. We did cite in our papers supporting the plan the
 4 Unsecured Creditors Committee v. WorldCom case, which dealt
 5 with a distribution plan proposed by the Securities & Exchange
 6 Commission under the fair and reasonable standard, which is the
 7 same standard applicable here, where the plan specifically
 8 excluded completely any creditors who had already received a
 9 36 percent distribution from the WorldCom bankruptcy case. And
 10 there the Second Circuit upheld the plan as being fair and
 11 reasonable, even though it excluded those creditors, under the
 12 rationale that the entity had a discretion and it was fair to
 13 first allocate the funds in its possession to people who had
 14 not received any compensation. And the Court there noted,
 15 again specifically, that the SEC was not bound by bankruptcy
 16 priorities. So we believe that that case in and of itself
 17 fully supports approving the plan here.

18 In addition, in the case Anderson v. Stephens, which
 19 is cited in the receiver's proposed plan at footnote 19 for a
 20 different purpose -- this is a Fourth Circuit case and the
 21 citation is 875 F.2d 76 (4th Cir. 1989) -- the case there dealt
 22 with something different, but in the opinion itself, in
 23 footnote 6, the Court references the distribution plan at
 24 issue, and in that distribution plan unsecured creditors were
 25 in fact subordinated to all other investors and to the United
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1 States government as well. So although the decision didn't
 2 address that specific issue, it's clear from that decision that
 3 there was another plan that did that. Yes.

4 THE COURT: With respect to the suggestion that the
 5 CFTC would take a different position, I thought I read
 6 somewhere that the CFTC did not object. But I'm not sure
 7 what --

8 MR. JACOBSON: That was not in our papers. We have
 9 not had any -- I'm not aware, I personally am not --

10 THE COURT: I'm asking whether the SEC has had any
 11 specific conversations with the CFTC or Richard Wagner or
 12 anyone there.

13 MR. JACOBSON: We have not.

14 THE COURT: Okay.

15 MR. JACOBSON: Perhaps --

16 MR. RADKE: Your Honor, we have, not with Mr. Wagner
 17 but with the CFTC, as well as the NFA, keeping them advised of
 18 this. They've not formally entered any position, and I was
 19 surprised by the statements about Mr. Wagner.

20 THE COURT: Well, I'll ask the SEC just to let the
 21 CFTC know that if it wishes to express any views, it is welcome
 22 to and I will listen.

23 MR. JACOBSON: We will do so, your Honor.

24 THE COURT: Thank you.

25 Next? Mr. Malek, it's okay. If the CFTC wants to
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1 weigh in, it can. In fact, Mr. Malek, you can contact
2 Mr. Wagner and tell him that if he wants to express his views,
3 he can submit them to me in writing and I will certainly
4 consider them. All right?

5 MR. MALEK: Yes, your Honor.

6 MR. RADKE: Your Honor, I will be brief -- I'm sorry,
7 your Honor. I'll try to be brief.

8 Several of the investors you've heard from today in
9 the commodities funds have raised issues as to whether or not
10 their particular investment entity was related or not related
11 to WexTrust, and I just want to remind the Court that the
12 WexTrust affiliates listed in Exhibit A in the SEC's motions on
13 August 11th, you know, do include those entities. It is not
14 obvious, the names are somewhat different, but Mr. Byers and,
15 on an undisclosed basis, Mr. Shereshevsky, the principal
16 defendants and also the primary fraudsters here, were involved
17 in those commodity funds. We've done an extensive amount of
18 work -- I know some of this has been presented other times,
19 some of it's now on appeal, but -- to show the Court that
20 WexTrust commodity investors were in fact, unfortunately, part
21 of the overall scheme. And we feel very strongly that the
22 equities are to treat them as part of the overall solution. We
23 would suggest, just --

24 THE COURT: What I'm hearing is that most of the cash
25 that's available is from the commodities funds. Is that true,
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first of all?

1 MR. RADKE: Yes.

2 THE COURT: And I guess it was Mr. Hartheimer,
3 Hartheimer?
4

5 MR. HARTHEIMER: Hartheimer, your Honor.

6 THE COURT: He put his money in 45 days before the
7 funds were seized?

8 MR. HARTHEIMER: That wasn't me.

9 MR. KAY: I believe that was Mr. Campbell.

10 THE COURT: I'm sorry. It was Mr. Campbell. Sorry,
11 Mr. Campbell. It's a good example.

12 MR. RADKE: Exactly. And your Honor, we have
13 victims -- we have victims in some of the real estate
14 investments that put them -- their money in mere days before
15 the receivership was appointed. And all I would underscore is,
16 the fortuity of which monies were stolen, which monies were
17 commingled, which monies might be able to be traced, really
18 shakes out on a very individual basis, but we feel there's
19 strong precedent for treating them all similarly, and the
20 expense to try to differentiate is pretty significant.

21 THE COURT: Well, how were the commodities fund part
22 of the overall scheme? How were they part of the fraud?

23 MR. RADKE: Well, in one respect --

24 THE COURT: Mr. Campbell, you can be seated. It's
25 okay. I'm just using you as an example.

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1 MR. RADKE: In one respect it was simply another part
2 of the lure for investors to be taken into the larger scheme,
3 just as there were investments in diamond mines, just as there
4 were investments in various property vehicles, the commodity

5 funds were promoted by WexTrust Capital, by the head
6 organization, with marketing materials that looked very similar
7 to marketing materials used for these other types of
8 investments, as just another way in which investors could be
9 attracted in. Now unfortunately, I mean, the investor was
10 absolutely right in thinking, I'm investing in something that's
11 investment commodities, but unfortunately, once the money came
12 in the door, there was extensive commingling, there was
13 extensive abuse, there was extensive use of these monies to do,
14 you know, other things.

15 THE COURT: Is there evidence of commingling of the
16 commodities funds with other funds?

17 MR. RADKE: Yes, your Honor.

18 THE COURT: Give me some examples.

19 MR. RADKE: There was use of commodities funds money,
20 for example, to close on property investments when the property
21 investments fell short. There was use of commodities funds
22 money to take into the general, what we call the linchpin
23 account and pay for operating expenses of noncommodities, you
24 know, activities, and vice versa. There was use of
25 noncommodity funds investor monies flowing into commodities.

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1 And between --

2 THE COURT: There was reference to the 1.8 million.
3 Putting aside the 1.8 million, with respect to the rest of it,
4 was there similar money in and out, back and forth?

5 MR. RADKE: I think it would be fair to say, your
6 Honor, on an overall basis the amount of commingling between
7 and among the commodity funds was probably less than what
8 occurred in some other investment vehicles. The unfortunate
9 people, for example, that invested in GSA or some of these GER
10 funds, a hundred percent of their money was looted. On the
11 commodities fund basis, I mean, if you use a rough number of,
12 you know, maybe, you know, \$12 million in the domestic funds
13 and maybe \$2 million or so we have evidence of commingling,
14 obviously the percentages are lower. But the principle remains
15 the same. These were all monies contributed, unfortunately, to
16 a centrally organized scheme and commingled to an extent
17 that -- and again, your Honor has equity to do different
18 versions of distribution, but our view would be the
19 distribution that would be fairest would be the straight pro
20 rata among all investors because the circumstances of each
21 individual investment, while it varies, really amounts to the
22 same thing. They're all victims of this unfortunate Ponzi
23 scheme.

24 THE COURT: Okay.

25 MR. RADKE: I would also just, you know, point out,

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1 with respect to the secured creditors -- and we've heard from a
2 number of secured creditors, and the real issue there is,
3 you've got a security interest in the property. As the
4 property gets sold, we're able to satisfy a large portion of
5 the loans. In the case of your TCF, for example, that's the
6 Peoria office park, at this moment the loan's not in default,
7 and it looks like it's possible that they might be entirely
8 satisfied. But what we're arguing about here, debating,
9 perhaps, is that deficiency, and the deficiency, the treatment

10 of the deficiency again, in our view, looking at it from an
 11 equitable standpoint, is to not give them, the same secured
 12 creditors the same priority for that deficiency that they had
 13 with respect to the property that was sold so they get a lot of
 14 return on whatever the value is the property sold, but they
 15 have to contribute something to the cost of their being
 16 victims, just like the investors aren't getting back a hundred
 17 percent on their dollars.

18 THE COURT: I would be rewriting their contractual
 19 rights --

20 MR. RADKE: Correct.

21 THE COURT: -- correct? And the receiver's arguing
 22 that I have the ability to do that.

23 MR. RADKE: That's correct.

24 THE COURT: Okay.

25 MR. RADKE: And that's -- and that's, in large part,
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1 your Honor, due to the fact that in these cases where you're in
 2 equity, you know, there has to be some determination of what,
 3 you know -- in order to get the most included in the remedy, to
 4 get the most dollars out to the victims, of what's the fairest.
 5 In the secured creditors instance, you know, other procedures
 6 might take out a great deal of the remaining money for, you
 7 know, equity victims.

8 And the final point I'd just touch on with respect to
 9 the individuals that came in, with respect to some of the
 10 investments that they had made in the -- I'm talking about
 11 Nashville now and Space Park. These are investors who came in
 12 and put money in to an affiliate of WexTrust along with
 13 WexTrust money, and we believe that we can show these are
 14 commingled. We haven't to date had a chance to look at each
 15 and every claim, but we do have a process, your Honor, and
 16 we've suggested the process would include a claims verification
 17 process, which would include apportioned time where claimants
 18 would be able to have specific facts, specific discussions with
 19 the receiver, and then to the extent we wouldn't be able to
 20 resolve something, do a summary proceeding and bring it in
 21 front of you, but we would hope to expedite that through a
 22 claims process, which has not yet occurred. So we don't have a
 23 lot of the detailed facts which we've heard in some instances
 24 today and had a chance to sort those out.

25 THE COURT: You envision a process for that.

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1 MR. RADKE: Absolutely.

2 THE COURT: What about Mr. Lawrence Costa's question?
 3 Is he one of the individuals the receiver will disqualify? And
 4 in general, what do you think is the timing here on that?

5 MR. RADKE: Again, on the disqualification, a small
 6 number of people that were specifically involved in the fraud,
 7 a small number of people that, on a hierarchical basis, based
 8 on the Basic Energy case we've put in, as percentages who
 9 received monies as finders or received money as brokers -- and
 10 that is not Mr. Costa but that would include former employees
 11 of WexTrust Securities that have received money for their work
 12 but they are also investors, we got a schedule that we
 13 suggested would take into account what they received and make a
 14 deduction based on that, because really, the money they

15 received was coming out of fraud. But the logic with respect
16 to Mr. Costa, with respect to principal persons, we don't have
17 the information yet. We were discussing at the very beginning
18 today trying to get information from Mr. Costa with respect to
19 some of the activities in Africa, and I think some of the
20 activities in Africa have caused us concern. But we don't have
21 the facts yet. We will come back, when we did have the
22 facts --

23 THE COURT: Any decision on Mr. Costa yet?
24 MR. RADKE: What was that?
25 THE COURT: Have you made a decision on Mr. Costa yet?
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1 MR. RADKE: No.
2 THE COURT: And you need further information.
3 MR. RADKE: We need further information, which is part
4 of what we're seeking.
5 MR. MARDER: Your Honor -- Are you done?
6 THE COURT: I'm not envisioning another round.
7 MR. MARDER: It's really a note of clarification.
8 THE COURT: No. If I let you speak, I'm going to have
9 to let every other person speak again.
10 MR. MARDER: It's literally one second of
11 clarification.
12 THE COURT: No.
13 MR. MARDER: Thank you, your Honor.
14 THE COURT: No. Anybody else who wants to say
15 anything else, want anything else known to me, should submit a
16 letter to me within a week, okay? There were some open items,
17 including whether I have jurisdiction. Anybody who wants to
18 respond to anything, supplement anything, within a week, with
19 copies to all of the appropriate people.
20 And I am reserving decision.
21 I'll ask the receiver to order the transcript. Okay?
22 MR. RADKE: Thank you, your Honor.
23 THE COURT: Thank you very much.
24 THE CLERK: All rise.

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