UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

- against -

STEVEN BYERS, JOSEPH SHERESHEVSKY, WEXTRUST CAPITAL, LLC, WEXTRUST EQUITY PARTNERS, LLC, WEXTRUST DEVELOPMENT GROUP, LLC, WEXTRUST SECURITIES, LLC, and AXELA HOSPITALITY, LLC,

Defendants,

- and -

ELKA SHERESHEVSKY,

Relief Defendant.

08 Civ. 7104 (DC)

ECF Case

RESPONSE TO SUPPLEMENTAL OBJECTIONS TO THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION

TIMOTHY J. COLEMAN
Receiver for Wextrust Entities

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June 5, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Timothy J. Coleman, Receiver for the Defendant Wextrust Entities ("Receiver"), respectfully submits this Supplemental Response to Objections to the Receiver's Proposed Plan of Distribution for the Defendant Wextrust Entities and all entities they control or in which they have an ownership interest (collectively, the "Wextrust Entities and Affiliates").

PRELIMINARY STATEMENT

On March 27, 2009, the Receiver filed a proposed plan of distribution ("Receiver's Plan") (Dkt. No. 243). The Receiver's Plan proposes a *pro rata* distribution of estate assets, based on findings that Wextrust engaged in systemic and pervasive commingling of victim funds, and that victims were similarly situated with respect to their relationships with Wextrust. The Receiver solicited comments, questions, and advice on the proposed plan from all interested parties after providing a copy to all known investors who had provided contact information.

During the six weeks following the filing of the Receiver's Plan, more than 100 Wextrust victims – both investors and creditors – submitted written statements supporting or objecting to the Receiver's Plan. The Receiver also held town hall meetings in Jerusalem, Israel and Norfolk, Virginia on April 2, 2009 and April 23, 2009, respectively, to answer questions related to the Receiver Plan. In addition, on May 11, 2009, the Receiver submitted a Response to Objections to the Receiver's Proposed Plan of Distribution ("Receiver's Response") (Dkt. No. 304). On the same day, the Securities and Exchange Commission ("SEC") filed a Statement in Support of Receiver's Proposed Plan of Distribution and Joinder in Receiver's Response to Objections to Proposed Plan of Distribution ("SEC's Joinder") (Dkt. No. 315). The SEC's Joinder supported and adopted the Receiver's position with respect to the equitable principles and administrative procedures outlined in the Receiver's Plan. On May 21, 2009, the Court held a hearing in which it invited all interested parties to this action to attend and be heard regarding the Receiver's Plan.

During the hearing, the Court heard from the Receiver and his counsel, counsel for the SEC, and 16 individual victims or their counsel.

At the conclusion of the hearing, the Court permitted those in attendance to supplement their objections by May 28, 2009. (May 22, 2009 Hearing Tr. ("Hearing Tr."), 91:17-18.)[1] Eight interested parties submitted supplemental objections to the Receiver's Plan. On the whole, the supplemental objections proffer the same or similar arguments embodied in the interested parties' prior objections and oral arguments. As these arguments have already been addressed in the Receiver's Plan, the Receiver's Response, or elsewhere in the record, only non-cumulative, non-duplicative objections have been addressed in detail below.

DISCUSSION

I. This Court Has Jurisdiction to Order a Plan of Distribution in this Case

The International Ad-Hoc Committee of Wextrust Creditors and the International Consortium of Wextrust Creditors (collectively, the "Creditors Committees") contend that, as a result of their appeal of this Court's Memorandum Decision of December 17, 2008 (Dkt. No. 148) ("Creditors Committees Decision"), the Court has been divested of jurisdiction to approve a plan of distribution in this case.

By way of background, in the Creditors Committees Decision, the Court ruled on the Creditors Committees' motion to modify the Court's October 24, 2008 preliminary injunction order (Dkt. No. 65). The Court granted in part and denied in part the relief requested by the Creditors Committees. First, the Court found that, pursuant to its *in rem* jurisdiction and its equitable discretion to administer the assets subject to the Amended Order Appointing

[1] A copy of the hearing transcript has been attached as Ex. A to the Declaration of John K. Warren in Support of Response to Supplemental Objections to the Receiver's Proposed Plan of Distribution ("Warren Decl."), filed concurrently herewith. A copy of the transcript is also publicly available on the Receiver's webpage. *See* http://www.wextrustreceiver.com/documents/court_papers/May21Hearing.pdf (last visited June 5, 2009).

Temporary Receiver ("Receiver Order") (Dkt. No. 36), it had the authority to preliminarily enjoin non-parties from filing involuntary bankruptcy petitions against the Wextrust Entities and Affiliates. Second, based on the size and complexity of the Wextrust enterprise, the Court held that it would undermine the effectiveness – and indeed the very purpose – of the receivership for the District Court to permit such filings. Finally, the Court modified the Receiver Order to permit any party or non-party – including the Creditors Committees – to apply to the Court on three days' notice for an order seeking permission to file an involuntary bankruptcy petition upon a showing that such a petition is appropriate and would benefit the receivership estate. To date, no such application has been made by the Creditors Committees or any other party.

The Creditors Committees assert that this Court has no jurisdiction to rule on the Receiver's Plan because their appeal from the Court's order on their motion to modify the Receiver Order is pending in the Second Circuit.[2] Although the Creditors Committees cite several cases for the general proposition that the filing of an appeal divests the district court of jurisdiction, they omit controlling authority that directly contradicts their position.[3]

As stated above, the Creditors Committees moved for a modification of the Receiver Order to amend the preliminary injunction and lift the prohibition against the filing of involuntary bankruptcy petitions. The Court granted that motion in part and denied it in part. The grant or denial of a preliminary injunction is appealable under 28 U.S.C. § 1292(a) (2007), as is the grant or denial of a motion to amend a preliminary injunction. *See* 19 Moore's Federal Practice § 203.10 (Matthew Bender 3d ed. 2004). With respect to the district court's jurisdiction,

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[2] The Receiver Order was specifically incorporated by reference as Exhibit D to the Court's October 24, 2008 Order on Consent Imposing Preliminary Injunction (Dkt. No. 65).

[3] The Creditors Committees' omission of adverse controlling precedent is troubling. *See Knipe v. Skinner*, 19 F.3d 72, 75 (2d Cir. 1994) ("An attorney's good faith belief in his or her argument must be supported by an objectively reasonable inquiry into its viability.").

the Second Circuit has stated expressly that: "[a]lthough the filing of a notice of appeal ordinarily divests the district court of jurisdiction over issues decided in the order being appealed, jurisdiction is retained where, as here, the appeal is from an order granting or denying a preliminary injunction." *Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996) (citing *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) (holding district court retains jurisdiction over case where order appealed from does not dispose of entire action and finding that an order granting or denying a preliminary injunction "does not prevent the district court from proceeding on the merits")).

In failing to note this exception to the general rule that the filing of a notice of appeal divests the district court of jurisdiction, the Creditors Committees flatly ignore black letter law. As one well-known commentator has stated:

> An appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is pending. According to Rule 62(a) there is no automatic stay of the judgment in an injunction suit pending an interlocutory appeal. Indeed, Rule 62(c) specifically provides that the district court may "suspend, modify, restore, or grant an injunction during the pendency of the appeal." Accordingly, the district court retains jurisdiction to enforce its prior order and the case may proceed to a trial on the merits. The only restriction on the trial court's power occurs if the appellate court enters an order staying the lower court until the appeal has been completed.

Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2962 (quoting Fed. R. Civ. P. 62) (citations omitted).

Courts in this District routinely proceed to the merits of a case during the pendency of interlocutory appeals such as the one at issue here. For example, courts rule on dispositive motions and conduct pretrial proceedings without awaiting the outcome of such appeals. *See, e.g., John Gil Const., Inc. v. Riverso*, 99 F. Supp. 2d 345, 350 n.7 (S.D.N.Y. 2000) (dismissing complaint during pendency of appeal from denial of preliminary injunction); *Holmes v. NBC/GE*,

168 F.R.D. 481, 482 (S.D.N.Y. 1996) (district court conducted pretrial conferences and discovery during pendency of appeal from denial of preliminary injunction). Thus, the Creditors Committees' claim that this Court lacks jurisdiction is meritless.

In the alternative, the Creditors Committees argue that the Court should refrain from ruling on the Receiver's Plan "as a matter of fairness." They predict that the Second Circuit "could" hear oral argument on their appeal "soon," and represent that they will seek an expedited decision. However, they fail to disclose that their motion for an expedited briefing schedule was denied by the Second Circuit, after they waited until the eleventh hour to file a notice of appeal, and did not seek expedition until the briefing schedule was already set.[4] The Creditors Committees argument that "[a]ny minimal delay" would not be prejudicial ignores the fact that an interim distribution could be postponed by months, to the detriment of Wextrust victims who face desperate economic circumstances as a result of the alleged fraud in this case. Consequently, the Creditors Committees' objection should be overruled.

Moreover, the issue currently on appeal is whether the Creditors Committees possess the abstract right to file involuntary bankruptcy petitions without notice; yet, they have not stated whether or when they would exercise such a right, and for which Wextrust Entities or Affiliates. The notion then that they would be prejudiced if this Court were to approve a plan of distribution is particularly puzzling in light of the fact that the Creditors Committees consist of individuals and entities who invested in shares of limited liability companies. As the Receiver's Plan proposes to equitably subordinate the deficiency claims of secured creditors (*see* Receiver's

[4] The International Ad-Hoc Committee of Wextrust Creditors' motion to expedite the appeal was denied on February 11, 2009. The International Consortium of Wextrust Creditors' motion to expedite the appeal was subsequently denied as moot on February 19, 2009. (*See* Ex. B to Warren Decl.) The Creditors Committees waited 4 weeks to file their initial notice of appeal and 7 weeks to file their amended notice of appeal. (*See* Dkt. Nos. 170, 183.)

Response at 29-31), the Creditors Committees' members would fare significantly better under the Receiver's Plan than they would under the Bankruptcy Code.

II. The Commodity Fund Victims are Similarly Situated to the Other Wextrust Victims and the Wextrust Commodity Funds Were Part and Parcel of the Ponzi Scheme

The issue of whether the victims who purchased securities issued by four Wextrust Affiliates that were involved in commodities speculation (collectively, the "Wextrust Commodity Funds") are part of the larger Wextrust fraud has been briefed exhaustively on several prior occasions.[5] Most recently, on pages 13-28 of the Receiver's Response, the Receiver demonstrated that the objections of those victims (the "Commodity Fund Victims") are wholly unsupported by the factual record, applicable case law, and the balance of the equities in this case.

The new documents and information requested by, and provided to, the Commodity Fund Victims do not change this analysis. Specifically, at the request of one of the Commodity Fund Victims, Gerald Jaffe, counsel for the Receiver provided the monthly statements that NAV Consulting Inc. ("NAV Consulting") had prepared for Wextrust Affiliate Wextrade Commodity Managers LLC ("WCM"). By way of background, WCM hired NAV Consulting to serve as the Net Asset Value Calculation Agent for, and to provide accounting services to, the Wextrust Commodity Funds. (Warren Decl. ¶ 4.) The primary focus of NAV Consulting's work was to: (1) ensure that each of the four Wextrust Commodity Funds maintained the appropriate, proportional, contribution to the Master Fund;[6] (2) prepare daily reports assessing the risk posed by each Commodity Trading Advisor's ("CTA") trades; and (3) prepare daily and monthly

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[5] *See* Receiver's Response at 13-28; Receiver's Memorandum of Law in Opposition to the Proposed Intervening Defendants' Motion to Intervene ("Commodity Opposition") (Dkt. No. 154); Sordillo Declaration in Support of Commodity Opposition (Dkt. No. 158).

[6] Unless provided otherwise, all capitalized terms herein are to be ascribed the same meanings as the defined terms in the Receiver's Plan or the Receiver's Response.

reports tracking the movement of money in the Master Fund as well as the gains, losses, income, and expenses of each Fund. (*Id.* ¶ 5.) NAV Consulting's monthly reports (which the Receiver provided to Mr. Jaffe) included cash flow statements, balance sheets, equity schedules, and individual investor account statements. (*Id.* ¶ 6.) The equity schedules provide a detailed accounting, on a monthly, quarterly, and yearly basis, of each investor's gains and losses as well as the expenses they owed to WCM. (*Id.* ¶ 7.) The individual account statements show each investor's account balance, any additions or redemptions in the account, and the rate of return. (*Id.* ¶ 8.)

In order to prepare these materials, NAV Consulting had access to daily broker statements and trading position information from the CTAs as well as the bank accounts for the Wextrust Commodity Funds and the Master Fund. (*Id.* ¶ 9.) But, contrary to Mr. Jaffe's counsel's assertion during the May 21, 2009 hearing, NAV Consulting did not "hold" investors' funds. (Hearing Tr. 26:1-2.)

Furthermore, NAV Consulting had no responsibility for analyzing – and did not analyze – cash inflows and outflows to and from bank accounts for the Wextrust Commodity Funds or the escrow accounts in which Wextrust held money before the Wextrust Commodity Funds began trading. (*Id.* ¶ 10.) In other words, NAV Consulting's monthly analysis of each investor's holdings in the Wextrust Commodity Funds did not take into account where each investor's contribution originally came from (*i.e.*, whether Wextrust had transferred money into the Wextrust Commodity Funds from a previously commingled and unrelated Wextrust account or investment). Accordingly, NAV Consulting's records provide no evidence – one way or the other – as to whether money in the Wextrust Commodity Funds was commingled with money

from other Wextrust investments or properly segregated in accordance with CFTC and NFA regulations.

Nonetheless, the Commodity Fund Victims continue to contend that there is "no indication the [Wextrust Commodity Funds] were part of the Ponzi scheme," that the pervasive and unauthorized commingled identified by the Receiver and the National Futures Association was merely a series of "loans," and that the Commodity Fund Victims' funds were "accounted for" on the date the Receiver was appointed.[7] These arguments are belied by the facts. As the Receiver has demonstrated, the Commodity Fund Victims were subjected to the same pattern of fraud as other investors, their money was neither "segregated" nor "accounted for," and the defrauders had control over the Wextrust Commodity Funds just as they did other Wextrust investments. For this reason, the Court correctly concluded on January 30, 2009 that the Commodity Fund Victims' position is "no different from that of the other creditors and victims in this case." (Mem. Decision at 2) (Dkt No. 181.) Not only were the management and the operations of the Wextrust Commodity Funds inextricably intertwined with the larger Wextrust scheme, but the Wextrust Commodity Funds were similarly marketed, pervasively commingled, and looted in the same manner and pattern as the other, unrelated Wextrust Entities and Affiliates.

III. The Receiver's Plan Outlines a Defined Claims Process Whereby the Court May Employ Summary Proceedings to Adjudicate and Subordinate Claims of Creditors

As the Court suggested at the hearing on May 21st, a procedure should be put in place to afford victims the opportunity to dispute the Receiver's calculation of their claims amounts and/or provide evidence that their claims ought to be considered separately from those of other

[7] *See* Supplemental Objection Letter from Harris L. Kay, counsel to certain Commodity Fund Victims, to the Court dated May 28, 2009.

parties. (*See* Hearing Tr., 79:3-7.) The Receiver respectfully submits that the Receiver's Plan provides such a mechanism.

In order to ease the burden on victims in approving or disputing the Receiver's calculation of their claims, the Receiver is extending all deadlines by filing herewith a second amended notice of motion. Upon approval by the Court, the proposed order attached thereto would set the following dates and processes for the adjudication of the claims of investors and creditors:

Claims of Investors

June 30, 2009:	Investors must object to their statement amounts by this date; any investors who did not receive statements must submit all new claims to the Receiver by this date.
August 7, 2009:	The Receiver will attempt to resolve all disputes by this date. The Receiver will request a hearing to resolve any remaining disputes.

Claims of Creditors

June 30, 2009:	By this date, all creditors – whether secured, unsecured, liquidated, unliquidated, or government – **MUST** submit detailed, dated, and complete invoices to the Receiver at the following email address: WexTrustInvoice@dl.com .
July 7, 2009:	The Receiver will post a spreadsheet of all unpaid, unsecured claims of creditors on his website under the tab "Information for Creditors." Creditors will then be given the opportunity to review and dispute their claims amounts.
August 7, 2009:	The Receiver will endeavor to resolve disputes with unsecured creditors by this date. The Receiver will request a hearing on any unresolved claims.

As detailed in the Receiver's Plan, and as the Court acknowledged at the hearing on May 21, Second Circuit case law makes it clear that the preferred approach in structuring plans of distribution in SEC receivership actions involving Ponzi schemes is a *pro rata* distribution of

estate assets. (Receiver's Plan at 4-16; Hearing Tr., 13:8-14.) The Court, however, has broad discretion to fashion any plan of distribution that is fair and reasonable, and is not bound by any specific rule or formula. *See SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991).

In implementing a plan of distribution, the district court's use of summary proceedings to allow, disallow, and subordinate the claims of interested parties has been approved as an appropriate and efficient adjudication mechanism, so long as potential claimants are afforded an opportunity to be heard and present claims. *SEC v. Elliott*, 953 F.2d 1560, 1567 (11th Cir. 1992) ("[A] district court does not generally abuse its discretion if its summary procedures permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts."); *McFarland v. Winnebago South, Inc.*, 863 F. Supp. 1025, 1034 (W.D. Mo. 1994) ("[T]he receivership court has the power to use summary procedures in allowing, disallowing, and subordinating claims of creditors, so long as creditors have fair notice and a reasonable opportunity to respond."); *FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. 1992) ("[a] district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration."); 13 Moore's Federal Practice (3d ed.) § 66.06[4][b] ("The powers of the courts include the allowance, disallowance, and subordination of the claims of creditors."). Indeed, the use of these summary proceedings "promotes judicial efficiency and reduces litigation costs to the receivership, thereby preserving receivership assets for the benefit of [claimants]." *Bernstein*, 786 F. Supp. at 177 (internal citations omitted).

Accordingly, the supplemental objections filed by the Commodity Fund Victims, Space Park AIM Partnership, Space Park ISSB Partnership, Nashville Warehouse Partners, and Southeast Warehouse Partners contending that a claims process needs to be established to allow

the Court to determine whether they should properly be included within the receivership estate overlook the procedure already outlined and provided for by the Receiver's Plan.

IV. This Court has Inherent Equitable Authority to Subordinate Claims of Creditors

Regions Bank and TCF National Bank argue that the Court is not empowered to disallow their potential deficiency claims as secured creditors.[8] This proposition is inaccurate for several reasons. First, as discussed in the preceding section, this Court has the equitable authority to employ summary proceedings to allow, disallow, and subordinate the claims of creditors – including secured creditors – as long as those parties are provided notice and an opportunity to be heard. Accordingly, notwithstanding these objections, this Court has inherent equitable authority to both (1) approve a plan of distribution in this matter and (2) employ summary procedures to reprioritize or subordinate claims of creditors upon notice and a hearing to such parties in order to realize a just and equitable result. As the Court is exercising its equity jurisdiction, its ability to employ such summary proceedings to adjudicate these claims while respecting rights of due process is not constrained by the Bankruptcy Code or New York State's corporate statutes.[9] The simple yet sad reality is that receivership claims are far in excess of currently available funds, and thus the Court must make hard choices to reach the most equitable result under these difficult circumstances. *See Worldcom*, 467 F.3d at 84 (finding that "when

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[8] TCF contends that the Receiver was mistaken in arguing that there was no default on the property and that it is adequately secured. Two days before the May 21 hearing, TCF issued a notice of default on the Peoria Property dated May 19, 2009. A copy was not provided to the Receiver or his counsel in time for the hearing. It is important to note, however, that TCF does not allege a monetary default – the Receiver has been paying debt service since the inception of the receivership. Instead, it alleges a covenant default – the appointment of a receiver over the Peoria property. Counsel for the Receiver has since attempted to make contact with TCF, but it has not responded.

[9] *See Anderson v. Stephens*, 875 F.2d 76, 79 n. 6 (4th Cir. 1989) (setting forth a distribution scheme of estate assets in which tax claims and claims of third party creditors were paid after those of defrauded investors); *cf Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 84-85 (2d Cir. 2006) (upholding SEC's proposed distribution plan that excluded certain creditors in favor of other creditors and shareholders who received substantially less, and noting that the SEC was not required to follow the Bankruptcy Code's priority scheme when proposing a plan of distribution).

funds are limited, hard choices must be made" and in such a circumstance, the Court may permissibly adhere to the principle that "the most grievously injured claimants should receive the greatest share" of any recovery).

Regions Bank argues that the Receiver has not fully explained his rationale regarding his proposed treatment of the claims of secured creditors vis-à-vis other victims. On the contrary, the Receiver has been very clear on this point. The Receiver respectfully submits that the Court should exercise its inherent equitable discretion with respect to the treatment of secured claimants because, unlike common shareholders who make investments and must accept their risks, the equity investors in this case have been defrauded and victimized. Although the defrauded investors still took on a certain degree of risk in making their original investments, so too did the secured creditors in this case by making high-risk real estate loans to the Wextrust Entities and Affiliates. These secured lenders were sophisticated financial institutions who had the benefit of more information and bargaining power than the individual investors. They were therefore in a better position to notice clear red flags such as the unrealistic returns promised to many investors. In addition, they are in a much better position to absorb losses than individual defrauded investors in this case, particularly in light of their access to funding under the federal government's Troubled Asset Relief Program ("TARP").[10]

Here, the Receiver is not proposing to strip Regions Bank, TCF National Bank, or any other secured creditors of their rights to bring one or more deficiency claims against the particular entity to which they loaned funds. Indeed, these parties would like this Court to believe that secured parties had the right to bring deficiency claims against all Wextrust Entities

[10] Indeed, according to a report prepared by the United States Department of the Treasury to Congress, as of December 31, 2008, TCF Financial Corporation had accepted $361 million in TARP funds and Regions Financial Corporation had accepted $3.5 billion in TARP funds. (Ex. C to Warren Decl. at 8.)

and Affiliates as a conglomerate in the first place, which is not so. Instead, the Receiver is simply requesting that the Court exercise its discretion in not extending that right to secured creditors for the reasons already articulated. Namely, by virtue of their security interests, secured creditors are entitled to payment out of the proceeds of sales of collateral and thus secured creditors will likely recover a significantly higher percentage of their losses in a more expedited fashion than investors and unsecured creditors. In order to balance the equities and mitigate the disparity between the treatment of secured creditors and other victims, the Receiver's Plan thus proposes that the Court subordinate the remaining deficiency claims of these creditors to those of the other victims – who have not yet received any form of remuneration. Contrary to TCF National Bank's assertion, this is not an abrogation of contract rights, but rather an exercise of this Court's inherent equitable authority to allow, disallow, and subordinate the claims of creditors in this action.[11] Accordingly, these objections should also be overruled.

V. Treatment of Cash Distributions and Reinvestments

In its supplemental objection, G&H Partners AG ("G&H") takes issue with the Receiver and the SEC's proposed treatment of investors' cash distributions and reinvestments for the purpose of calculating their *pro rata* shares. The Receiver and the SEC's rationale for adopting this approach is set forth in detail on pages 9-12 of the Receiver's Plan. The Receiver and the SEC's proposed formula seeks to strike a balance between the interests of investors who received the majority of their prior distributions in cash and those who received no distributions or chose to reinvest their distributions in other Wextrust investments. However, this Court has broad

[11] TCF's citation of *SEC v. Haligiannis*, 1:04-cv-06488, 2009 U.S. Dist. LEXIS 11503 (S.D.N.Y. Feb. 11, 2009) is thus inapposite. In that case, the court noted, in *dicta*, that the court would not abrogate property rights in evaluating the validity of various judicial liens that had been placed on a personal residence. The Court's exercise of its equitable jurisdiction to allow, disallow, and subordinate the claims of unsecured creditors in this action is not similarly limited.

discretion to fashion any plan of distribution that is fair and reasonable, and is not bound by any specific rule or formula – much less the Receiver or the SEC's recommendation. Although the Receiver respectfully submits that the net investor approach as outlined in the Receiver's Response is the most equitable and practical approach in this case, the Receiver stands ready to implement any plan of distribution that the Court may order.

CONCLUSION

Based on the foregoing, and the evidence and arguments set forth in the Receiver's Plan and the Receiver's Response, none of the supplemental objections identifies any facts or authorities that would preclude the Court from approving the Receiver's Plan. The Receiver respectfully submits that the overwhelming weight of the evidence and authority supports the principles and procedures outlined in the Receiver's Plan. Accordingly, the Receiver respectfully requests that the Court approve the Receiver's Plan in all respects.

Dated: Washington, D.C.
June 5, 2009

Respectfully submitted,

TIMOTHY J. COLEMAN
Receiver for Wextrust Entities

s/ Mark S. Radke

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Attorneys for the Receiver

Of Counsel:
John K. Warren

CERTIFICATE OF SERVICE

The undersigned, an attorney, states that I am one of the attorneys for Timothy J. Coleman, Receiver, in this matter and do hereby certify that on **June 5, 2009** I directed the service of a true and correct copy of the foregoing **Response to Supplemental Objections to the Receiver's Proposed Plan of Distribution, the Second Amended Notice of Motion for an Order Approving the Receiver's Proposed Plan of Distribution, and the accompanying Declaration of John K. Warren with Exhibits** upon the following individuals in the manner indicated below:

Via First Class Mail

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s/ Mark S. Radke

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, - against - STEVEN BYERS, JOSEPH SHERESHEVSKY, WEXTRUST CAPITAL, LLC, WEXTRUST EQUITY PARTNERS, LLC, WEXTRUST DEVELOPMENT GROUP, LLC, WEXTRUST SECURITIES, LLC, and AXELA HOSPITALITY, LLC, Defendants, - and - ELKA SHERESHEVSKY, Relief Defendant.	No. 08 Civ. 7104 (DC) ECF Case

SECOND AMENDED NOTICE OF MOTION FOR AN ORDER APPROVING THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION

TO: THE COURT, COUNSEL OF RECORD, AND ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that upon the annexed declaration of Mark S. Radke, affirmed and filed on March 27, 2009, and upon the exhibits attached thereto, the accompanying Receiver's Proposed Plan of Distribution (collectively, the "Moving Papers"), and the pleadings herein, Timothy J. Coleman, Receiver for the Wextrust Entities and Affiliates ("Receiver"), by his undersigned counsel, moved this Court on May 21, 2009 before the Honorable Denny Chin at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, Courtroom 11A, New York, New York, for the entry of an order approving the Receiver's Proposed Plan of

Distribution ("Receiver's Plan") pursuant to 15 U.S.C. § 77v(a), 15 U.S.C. § 78aa, and the Court's equitable jurisdiction.

PLEASE TAKE FURTHER NOTICE that by this second amended motion, the Receiver seeks the entry of an order (the "Proposed Order"), substantially in the form annexed hereto as Exhibit A, approving the Receiver's Plan, establishing procedures, fixing deadlines, and approving the form and manner of notice to interested parties relating to the Receiver's Plan.

PLEASE TAKE FURTHER NOTICE that responses or objections, if any, to the Receiver's Plan were due on **April 27, 2009** (the "Objection Deadline"), and responses by the Receiver and the SEC to timely filed objections to the Receiver's Plan were filed on **May 11, 2009**.

PLEASE TAKE FURTHER NOTICE that individual claims letters have been sent to all investors for whom the Receiver had contact information.

PLEASE TAKE FURTHER NOTICE that this motion seeks to extend the deadlines for (1) approving or disputing the amounts listed in the investor claims letters by investors and (2) approving or disputing claims amounts by creditors.

Dated: June 5, 2009

s/ Mark S. Radke
Mark S. Radke, *pro hac vice*
Dewey & LeBoeuf LLP
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Attorneys for the Receiver

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, - against - STEVEN BYERS, JOSEPH SHERESHEVSKY, WEXTRUST CAPITAL, LLC, WEXTRUST EQUITY PARTNERS, LLC, WEXTRUST DEVELOPMENT GROUP, LLC, WEXTRUST SECURITIES, LLC, and AXELA HOSPITALITY, LLC, Defendants, - and - ELKA SHERESHEVSKY, Relief Defendant.	No. 08 Civ. 7104 (DC) ECF Case

[PROPOSED] ORDER APPROVING THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION

On the motion of Timothy J. Coleman, duly appointed Receiver herein (the "Receiver"), for an order approving the Receiver's Proposed Plan of Distribution ("Receiver's Plan"), and it appearing that the relief requested is in the best interests of the receivership estate and interested parties, and that adequate notice as set forth in the Notice of Motion has been given and that no further notice is necessary, and after due deliberation, and good and sufficient cause,

WHEREFORE, that pursuant to the Amended Order Appointing Temporary Receiver ("Receiver Order"), the Receiver has identified and marshaled assets for the contemplated distribution to claimants of the receivership estate, and the Receiver's Plan identifies the known

classes of claimants of the receivership estate and contains legal support and an outline for the distribution of the receivership estate to such claimants;

WHEREFORE, upon (a) approval of the Receiver's Plan and (b) approval of the Receiver's future motion seeking approval for a partial cash distribution according to the principles outlined in the Receiver's Plan, the Receiver will be in a position to commence making distributions to claimants;

NOW THEREFORE

IT IS HEREBY ORDERED, that the Receiver's motion is granted in all respects and objections, if any, are overruled to the extent such objections have not been previously withdrawn, waived, or settled, and it is

FURTHER ORDERED, that, pursuant to the Court's equitable discretion to approve a proposed plan of distribution in this case, the claims procedures and *pro rata* distribution set forth in the Receiver's Plan are approved in their entirety, and it is

FURTHER ORDERED, that upon entry of this Order, both investors and unsecured creditors that assert a claim against the receivership estate that arose prior to the date of entry of this Order, who disagree with the amount of their claim as determined pursuant to the Receiver's Plan and made known to the claimant, must timely respond or object to the Receiver's determination of their claim by the dates set forth below or be forever barred, estopped, and enjoined from asserting a claim against the receivership estate different than that determined by the Receiver:

Claims of Investors

June 30, 2009:	Investors must object to their statement amounts by this date; Any investors who did not receive statements must submit all new claims to the Receiver by this date.
August 7, 2009:	The Receiver will attempt to resolve all disputes by this date. The Receiver will request a hearing to resolve any remaining disputes.

Claims of Creditors

June 30, 2009:	By this date, all creditors – whether secured, unsecured, liquidated, unliquidated, or government – **MUST** submit detailed, dated, and complete invoices to the Receiver at the following email address: WexTrustInvoice@dl.com .
July 7, 2009:	The Receiver will post a spreadsheet of all unpaid, unsecured claims of creditors on his website under the tab "Information for Creditors." Creditors will then be given the opportunity to review and dispute their claims amounts.
August 7, 2009:	The Receiver will endeavor to resolve disputes with unsecured creditors by this date. The Receiver will request a hearing on any unresolved claims.

FURTHER ORDERED, that the failure to timely assert such an objection shall mean that, except as expressly provided for under the Receiver's Plan for such investor or creditor, the receivership estate shall be forever discharged from any other indebtedness or liability with respect to such claim, and such alleged claimant shall not be permitted to receive any distribution except to the extent expressly provided for under the Receiver's Plan.

SO ORDERED

Dated: _____
New York, New York

_____
Hon. Denny Chin
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, - against - STEVEN BYERS, JOSEPH SHERESHEVSKY, WEXTRUST CAPITAL, LLC, WEXTRUST EQUITY PARTNERS, LLC, WEXTRUST DEVELOPMENT GROUP, LLC, WEXTRUST SECURITIES, LLC, and AXELA HOSPITALITY, LLC, Defendants, - and - ELKA SHERESHEVSKY, Relief Defendant.	No. 08 Civ. 7104 (DC) ECF Case

DECLARATION OF JOHN K. WARREN IN SUPPORT OF RESPONSE TO SUPPLEMENTAL OBJECTIONS TO THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION

I, John K. Warren, under penalty of perjury declare as follows:

1. I am an attorney admitted to practice in the District of Columbia and the Commonwealth of Virginia and admitted *pro hac vice* in this matter.

2. I am an associate at the law firm of Dewey & LeBoeuf LLP, legal advisors to Timothy J. Coleman, the Receiver ("Receiver") of Wextrust Capital, LLC; Wextrust Equity Partners, LLC; Wextrust Development Group, LLC; Wextrust Securities, LLC; and Axela Hospitality, Inc. (collectively "Wextrust") in the above-captioned matter. I am resident in the Washington, D.C. office.

3. Together with my colleagues, Vincent Schmeltz III and Nancy Riley, I have examined internal documents from the Wextrust Entities and Affiliates regarding the relationship between Wextrust Affiliate Wextrade Commodity Managers LLC ("WCM") and NAV Consulting Inc. ("NAV Consulting").

4. WCM hired NAV Consulting to serve as the Net Asset Value Calculation Agent for, and to provide accounting services to, the Wextrust Commodity Funds.[1]

5. The primary focus of NAV Consulting's work was to: (1) ensure that each of the four Wextrust Commodity funds maintained the appropriate, proportional, contribution to the Master Fund; (2) prepare daily reports assessing the risk posed by each Commodity Trading Advisor's ("CTA") trades; and (3) prepare daily and monthly reports tracking the movement of money in the Master Fund as well as the gains, losses, income, and expenses of each Fund.

6. NAV Consulting's monthly reports included cash flow statements, balance sheets, equity schedules, and individual investor account statements.

7. The equity schedules provide a detailed accounting, on a monthly, quarterly, and yearly basis, of each investor's gains and losses as well as the expenses they owed to WCM.

8. The individual account statements show each investor's account balance, any additions or redemptions in the account, and the rate of return. However, NAV Consulting did not "hold" investors' funds.

9. In order to prepare these materials, NAV Consulting had access to daily broker statements and trading position information from the CTAs as well as the bank accounts for the Wextrust Commodity Funds and the Master Fund.

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[1] Unless otherwise provided, all capitalized terms herein are to be ascribed the same meanings as the defined terms in the Response to Supplemental Objections to the Receiver's Proposed Plan of Distribution, filed concurrently herewith.

10. NAV Consulting had no responsibility for analyzing – and did not analyze – cash inflows and outflows to and from bank accounts for the Wextrust Commodity Funds or the escrow accounts in which Wextrust held money before the Funds began trading.

11. Attached hereto as **Exhibit A** is a true and correct copy of a hearing transcript before this Court in the above-captioned case dated May 21, 2009.

12. Attached hereto as **Exhibit B** is a true and correct copy of a Motion Information Statement from the United States Court of Appeals for the Second Circuit denying the International Consortium of Wextrust Creditors' Motion for Expedited Appeal in a related appeal in this case styled as *SEC v. Byers*, 09-0234-cv (L), 09-0284-cv (Con) (2d Cir.).

13. Attached hereto as **Exhibit C** is a true and correct copy of a document entitled "United States Department of the Treasury Section 105(a) Trouble Asset Relief Program Report to Congress for the Period December 1, 2008 to December 31, 2008. The document was obtained from the United States Department of the Treasury's webpage at the following link: http://www.ustreas.gov/press/releases/reports/0010508105_a_report.pdf.

Dated: June 5, 2009

Respectfully Submitted,

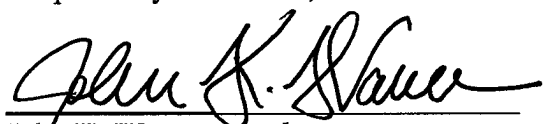

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EXHIBIT A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

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

APPEARANCES

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DANIELLE SALLAH, ESQ.
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SAMUEL KRIEGER, ESQ.

ALSO PRESENT: KEVIN McKEOWN
TIMOTHY HOLMES
MARTIN MALEK
PESSI ROTHSCHILD
ANDREW CAMPBELL

(In open court)

THE COURT: All right. First, there's an issue raised with respect to Mr. Costa. Yes?

MR. COSTA: Good morning, your Honor. Keith Costa.

MR. GAGION: No, a different Mr. Costa.

THE COURT: Okay. Lawrence Costa. I didn't realize there was more than one Costa. There was an issue raised with respect to Lawrence Costa and there is a disagreement as to whether he should be required to reveal certain information, and I guess -- Ms. Kaufman?

MS. KAUFMAN: Yes, your Honor, I'm here.

THE COURT: Okay. Here's my feelings on this. I certainly did not intend to require anyone to violate law, so if it would indeed be a violation of Namibian law for Mr. Costa to disclose this, then that was not my intent. I don't know that it would be a violation. I don't know if that's disputed. But it seems to me with that little bit of guidance, I would

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

How much time do you want? Give yourselves a little

bit of time after a discussion.

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

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

THE COURT: Yes, all right.

MR. GAGION: Two weeks, your Honor?

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

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

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

MR. GAGION: That's fine, your Honor.

MS. KAUFMAN: Thank you, Judge.

THE COURT: Okay. Thank you.

Okay. Next, the proposed planned distribution. Mr. Coleman, are you going to speak or one of --

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

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

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

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

THE COURT: Yes.

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

a debt security. There is a small category of investors who purchased securities known as guaranteed depository rights and a couple of other variations on that, and those investors also

purchased securities. They are arguably more akin to bonds in that they are debt securities as opposed to equity securities. Then there are unsecured creditors, and the unsecured creditors include vendors, landlords and other third parties who provided goods or services to WexTrust and are owed money on account of those goods or services. Finally, there are the secured creditors, the mortgage lenders and other parties who loaned money to WexTrust entities or affiliates on a secured basis. Now as we've touched on in earlier proceedings, some of those creditors are likely to be undersecured in the sense that the value of the collateral is less than the amount of the liability, and in those circumstances, the party will have both a secured claim and an unsecured claim. So there will be a secured claim against the value of the collateral and an unsecured claim for the deficiency, which is a claim against the WexTrust entity or affiliate and therefore against the estate. So those are the general categories of victims. And again, the vast majority of them are the preferred memberships, membership purchasers who are equity investors. So if this were a corporation as opposed to a limited liability company, those people would be analogous to common stockholders.

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

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

MR. COLEMAN: On the second question, how close are

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

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

MR. COLEMAN: Correct, your Honor. And let me pause on that issue for a moment. On January 15th, I submitted a plan of management for the real estate assets, and part of the plan was the plan for management of the commercial real estate

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portfolio of WexTrust Equity Properties. It's important to keep in mind in this case that the original business plan was to purchase parcels of real estate and ultimately to sell them. This is a real estate company that is in the business of buying, selling and developing real estate. So the investors' expectations from the outset were that the properties would ultimately be sold. In some cases we proposed to alter the business plan based on the current circumstances, and including the fact that this was a Ponzi scheme and including the current economic circumstances, we have altered the business plan to sell the properties more quickly than was originally intended. But what I have tried to do is to make the plan of management for the assets in this estate as close as reasonably possible to what the investors signed up for when they purchased securities.

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

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

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

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

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

THE COURT: Yes, that would be fine.

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

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

MR. COLEMAN: Exactly, one step removed from the

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ownership. It is also the case that in some cases -- and a good example is the GSA investment -- the money that was paid for the securities was not used to buy any real estate, and in

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

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

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

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

MR. COLEMAN: Exactly so.

THE COURT: Yes.

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

THE COURT: All right.

MR. COLEMAN: -- after a couple of other comments. The Court asked where we are and whether the return is going to be 5 cents on the dollar, 50 cents on the dollar or something else. Again, the answer is, I don't know, but my best judgment and prediction is it will be somewhere between 5 cents and 50 cents on the dollar, and that's probably as precise as I can get with the information I have today without going into pure speculation.

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COLEMAN: The former, your Honor.

THE COURT: The former.
MR. COLEMAN: So that -- and that really brings me to my third point, which is inclusiveness.
THE COURT: Okay.
MR. COLEMAN: If the Court approves the proposed plan, the vast majority of victims will receive at least a partial return of their funds. Under some of the other alternatives --

THE COURT: Meaning what? Do you have an idea of what that would be now?
MR. COLEMAN: Amount of money?
THE COURT: Yes. Is that a nickel on the dollar right now?
MR. COLEMAN: A nickel or less, and my expectation --
THE COURT: How much less?
MR. COLEMAN: I can't give a number, your Honor.
THE COURT: It can't go much below a nickel.
MR. COLEMAN: Right. I can't give a number because we have not yet verified the amount of all the investments. I am advised by my accountants and real estate consultants that I need to retain at least $10 million in the estate as a equity cushion to provide for the ongoing management of the estate, so my expectation would be to distribute the excess of that amount that's available immediately. And so the vast majority of victims would get something. I can't give a dollar amount.
Under some of the other alternatives, many or most of the victims would get nothing. For example, one alternative that's discussed in the briefing is what's known as the high water method, which is a calculation of distribution that takes into account prior repayments of interest and principal to victims. Under that method, approximately 45 percent of the victims would get nothing. And in my judgment and in consultation with the SEC, it was our view that it would be

more equitable to adopt or to propose a plan that provides for the largest number of people possible to get some return. So the plan will not make any of the investors whole. If there is a way to resolve this case that will do that, that will make a substantial number of victims happy, I have not discovered it. But we do believe that in this case the most equitable plan for the largest number of people would be the proposal that we've made.
THE COURT: Do you have an estimate of what the overall amount in question is that was invested?
MR. COLEMAN: The overall amount --
THE COURT: I've heard different things, and I don't know if you have a better idea today.
MR. COLEMAN: The overall amount of cash that was actually sent to WexTrust to purchase securities was in the neighborhood of $250 million. Beyond that it becomes complicated in that many of the investors received cash distributions. Other investors elected to forgo cash distributions and instead to have their distribution reinvested. So one could consider that to be an additional investment or one could consider that to be simply an illusory payment. If we include the reinvestments, then we're talking about approximately $313 million.

THE COURT: Okay. Thank you.
MR. COLEMAN: So, your Honor, unless the Court has

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

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.
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.
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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account, and that money was taken and paid to a bridge loan lender. So the money never went to WexTrust.

In the case of Southeast, we invested $3,350,000. Again, the money was placed in escrow with Lawyers Title Insurance Company and then it was paid immediately to the seller of the property. So we didn't buy securities in WexTrust Capital. Our client never received a private purchase memorandum. Our client never received a securities offering. Our client had no dealings with Mr. Byers or Mr. Shereshevsky or WexTrust Capital. In fact, our client knew an individual named Michael Gormley for 20 years. They were friends for 20 years. Mr. Gormley approached them about these two investments --

THE COURT: The money went into what?

MR. MARDER: The money went into Lawyers Title Insurance Company, which is a title company, and that was used --

THE COURT: But it looks like 1.6 million in one case, 3.3 million in the other.

MR. MARDER: That's correct.

THE COURT: Those monies went into what? Were they invested in LLCs?

MR. MARDER: No. They went into a title insurance company's escrow account, and in one case it was used to pay off a bridge loan that was used for the purchase of a property,

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and in the other case it was used to pay the seller of the property. The money never went into WexTrust Capital. These entities --

THE COURT: I understand that. I'm trying to find out where the money went.

MR. MARDER: In one case it went first to a title company and then to the seller, and in the other case first to the title company and then to pay off a bridge loan to an unrelated party.

THE COURT: What you're really saying is, your client really wasn't involved in the fraud at all.

MR. MARDER: That's correct, your Honor.

THE COURT: I guess the problem is, in essence, you're a creditor or investor. I guess you fall into a category of investor or creditor in transactions that you believe are unrelated to the subject of the receivership --

MR. MARDER: That's correct.

THE COURT: -- is really what you're saying.

MR. MARDER: That's correct, your Honor. And if you look at the, you know, the standards that the receiver has relied on, the Bancorp case, you know, one issue is, obviously one prong of the test --

THE COURT: It seems to me that this is really not an objection to the plan.

MR. MARDER: That's correct.

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THE COURT: There needs to be a mechanism to decide whether a particular creditor is really part of this or not.

MR. MARDER: Right. Our view is that, you know, we've put in documentary evidence, which we believe establishes there

were no commingling. These two entities had their own bank accounts. Our client received monthly accounting statements --

THE COURT: I'm not going to rule, obviously, on whether your clients are right or wrong. I understand the issue, and I think we need a mechanism, we have to come up with a mechanism to decide these types of objections. Or it's not really an objection, even. It's more that you're not part of this receivership dispute.

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

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

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

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

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

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

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

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

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

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

THE COURT: All right. Thank you.

MR. MARDER: Thank you, your Honor.

THE COURT: Thank you.

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

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

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

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

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

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

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

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

would like to know whether in fact --
THE COURT: Wait a minute. Is there an objection to providing access to the NAV Consulting records and the full Deloitte report?
MR. RADKE: Your Honor, Mark Radke for the receiver.
THE COURT: Yes.
MR. RADKE: In principle there is no objection, but unfortunately, as we've tried to make clear in the papers, the work that Deloitte did was not comprehensive. There was a cost benefit factor here where we traced some things, didn't trace everything, and the reason being that to do it on an

investor-by-investor basis, in other words, to trace the particulars for Mr. Jaffe, would be very expensive, and at the end of the day, as your Honor observed, it might not, in theory, make any difference. Even assuming that there was no commingling, that you have that 1.5, that you can see it from the time in to the time out, we, I think, have established enough commingling occurred in general with respect to those WexTrust commodity funds, and that was in particular substantiated by the recent complaint filed by the NFA, the SRO for commodities, just this week, that also alleged, you know, commingling. So we would treat all of the money in the commodities pools no differently than the money left in all the other LLCs.
THE COURT: I understand. But I think Mr. Jaffe should have the right to see the NAV Consulting record, and if Deloitte did tracing for him, he should get to see that part.
MR. RADKE: Certainly. We can make the work available.
THE COURT: And if Deloitte did not, I'm not saying Deloitte should go do it now. I'm not saying that. If Deloitte did it for Mr. Jaffe, Mr. Jaffe I think is entitled to see it.
MR. RADKE: Okay.
THE COURT: All right. Thank you.
MS. GRAY: Thank you, your Honor.

THE COURT: In the back. Just come on up if you want to be heard, or...
MR. KAY: Good morning, your Honor. My name is Harris Kay. I'm a partner at Henderson Lyman in Chicago, Illinois. I'm a member of the New York bar as well and a member of the bar of this court. As the Court knows or may recall --
THE COURT: That's a good point, actually. If you're a lawyer and you're purporting to speak on someone else's behalf, you should be a member of the bar of this court, or if not, then you should ask for permission to speak.
Are you a member of the bar of this court?
MR. KAY: I am, your Honor. I was actually sworn in recently for this very purpose.
I will also be brief. I represent a large group of the commodity pool investors, as indicated in recent correspondence to the Court. I'm happy to make that list if you'd like for the record. But in general, our opposition, much like Ms. Gray's, stems from the fact that the distribution plan that the receiver has proposed does not take into account

the unique position of the commodity pool investors. During Mr. Coleman's presentation, he grouped the various WexTrust victims into a couple of different categories, including equity holders, essentially bondholders, secured and unsecured creditors, and I believe that that speaks to the problem here. There is more to it than that, particularly with regard to the

WexTrade investors. WexTrade investors did not participate in the real estate scheme that the receiver has found in which a vast majority of the alleged commingling occurred. Rather, they invested in commodity pools, which are operated under a different body of law, under the auspices of different organizations, and were not an investment in a real estate entity or even any entity owned by WexTrust. WexTrade commodity pools were managed by WexTrade Commodity Managers, which was a subsidiary of a WexTrust entity. That's the linchpin that the receiver has used to bring it within the ambit of the receivership, and we submit that that is not appropriate and that any plan that doesn't take into account the unique position of the commodity pool investors is inherently unfair.

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

THE COURT: Excuse me. Those trades were actually

made, investments were actually made?

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

It was also held under the auspices of other statutory

authority that we have cited, and I won't go into that. But I

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

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

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

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

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

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

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

THE COURT: A lot of investors are telling me their

investment was different.

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

THE COURT: All right. Finish up.

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

THE COURT: Thank you.

MR. KAY: Thank you.

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

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

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

THE COURT: All right. That's fine.

MR. COSTA: Thank you.

THE COURT: Mr. Mashburn?

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

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

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

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

setting. Normally debt comes ahead of equity.
Mr. Coleman correctly stated that the vast majority of these parties, as he said, had an ownership interest, and he said it was analogous to having -- to being a shareholder. And yet what he basically says is he wants to take that equity interest and put it ahead of the debt interest. In fact, in a bankruptcy setting, the equity interest would be subordinated to the debt interest. We're not actually even arguing that we should come ahead; we're simply saying that that deficiency, that net loss that the bank incurs should be treated pro rata with the rest of the parties.
And from the -- one other point I want to make is simply that there's a lot of discussion about the victims, and there's no question there's a lot of victims here, but bear in mind that the shareholders of Regions Bank made an investment on the theory that the normal rules of law would apply and that debt instruments get paid ahead of equity interest, and the shareholders of Regions Bank are equally victims if the stock ends up being diminished because of a major loss and, you know, those shareholders are individuals with 401(k)'s and --

THE COURT: To the extent that the security is sufficient, the banks are getting a hundred cents on the dollar, to the extent that the securities --
MR. MASHBURN: We know that that's not going to be the case.
THE COURT: I know that, but I'm saying to the extent there is some equity there, they're covered in a sense they're better off than others.
MR. MASHBURN: But they're --
THE COURT: I understand your point. I understand your point.
MR. MASHBURN: Okay.
THE COURT: Thank you.
MR. MASHBURN: Thank you.
MR. SOLOMON: Good morning, your Honor.
THE COURT: Good morning.
MR. SOLOMON: Joshua Solomon from Sullivan & Worcester, and I'm admitted pro hac vice in this case, your Honor. I represent G & H Partners, which, in light of your Honor's first question to Mr. Coleman, without going into the details of G & H's investment, I should say it's both an equity investor in a particular LLC but also an unsecured creditor in the form of a settlement creditor as a result of an earlier securities fraud case that G & H brought against WexTrust before this action started. And as far as we know, we may be

the only settlement creditor at issue here. We haven't learned of any others.
Your Honor, before getting into G & H's objection, with the Court's permission, I'd like to take up just one housekeeping matter, which is, our understanding is that the receiver was distributing claim statements to equity holders by May 15th and that he was planning on doing that even though these proceedings were going forward, in the interest of keeping things moving. And it would be helpful if at some point during these proceedings we might learn whether that's

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

priority over equity holders. And this rule itself is a result of some fairly strong equitable principles, including the fact that creditors rely on the equity cushion when they enter into the transaction, they cap their upside in exchange for less risk, as compared to equity holders, who have at the outset unlimited potential upside but greater risk. Given this general preference and equities behind it, we believe that there should be some onus on the receiver to come forward with some explanation to the Court for why treating unsecured creditors exactly the same as equity holders is equitable and fair, and we don't believe we've seen that yet.

To be clear, your Honor, we are not suggesting that the Court necessarily impose a rigid rule, as might be the case in a bankruptcy proceeding, that all unsecured creditors should be paid completely before any equity holders take anything. We recognize this is a court of equity and that the Court has equitable discretion to vary from rules. But the receiver's distribution plan seems to ignore the equitable principles behind that rule, and we suggest, your Honor, that the receiver should at least have a process for assessing particular unsecured claims to determine whether, based on those general equities and maybe even particular circumstances of particular unsecured creditors, there should be some -- some priority. Instead, the receiver seems to be replacing one fairly rigid rule -- unsecured creditors come first and equity only after

they're paid -- with another rigid rule -- all unsecured creditors are treated the same as equity. And we suggest, your Honor, that there should be a bit more flexibility, that the receiver's underestimating a bit this Court -- the extent to which this Court should feel bound to specific rules. We understand and can appreciate and agree that there need to be guiding principles and there needs to be a clear process that's transparent and that has overarching principles, but there also needs to be some flexibility. As the receiver has noted repeatedly in its papers, the ultimate objective here is to reach an equitable result, and our position is that more flexibility than the receiver's offering is required to achieve that.

A good example, your Honor, of the type of rigid rule that likely will not work to produce -- to produce fairness and

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

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

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

MR. SOLOMON: Thank you, your Honor.

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

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

Thank you, your Honor.

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

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

THE CLERK: All rise.

(Recess)

(In open court)

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

MR. SIEGEL: Good morning, your Honor.

THE COURT: Good morning.

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

THE COURT: Yes.
MR. SIEGEL: I represent the ad hoc International Consortium of WexTrust Creditors. You'll recall we were here earlier in the case --
THE COURT: Yes.

MR. SIEGEL: -- seeking leave to file a bankruptcy, involuntary bankruptcy proceeding. Along with this ad hoc committee, together we represent more than a hundred -- between the committee and the consortium, we represent more than a hundred creditors of WexTrust.
We filed an appeal from your Honor's order. The appeal has been fully briefed now as of this week. Argument is scheduled for I think the third week in June. And we believe, in light of the pendency of the appeal, that jurisdiction over this matter rests in the Second Circuit, and because the appeal is moving along quite rapidly and may have an effect on whether there will be a bankruptcy trustee who will implement --
THE COURT: By that you mean you think the receivership should come to a halt? I'm not quite --
MR. SIEGEL: No, your Honor, we're not suggesting that, and we have not moved for a stay, but what we are suggesting is, while you're sorting out some of these issues and some of these objections, that you not enter a final order regarding the plan of distribution until the appeal is heard. We think that --
THE COURT: Is it your position that I don't have jurisdiction to approve the proposed plan, is that what you're saying, or are you just saying it would be wiser that I refrain from doing so?
MR. SIEGEL: I think it's both. We think jurisdiction

rests in the Second Circuit and --
THE COURT: Well, if you think I've been divested of jurisdiction, you should provide some authority that says that, because if I don't have jurisdiction, then, you know, I'd like to know that. So if you have authority that would suggest that I do not have jurisdiction over this pending application by the receiver, it seems to me you ought to bring it to my attention.
MR. SIEGEL: We will do so, your Honor.
THE COURT: Okay.
MR. SIEGEL: Could we have a couple weeks? Two weeks?
THE COURT: One week.
MR. SIEGEL: Okay. Thank you, your Honor.
THE COURT: I've got to make some decisions here, so...
MR. SIEGEL: Okay. We will do so.
THE COURT: Thank you.
MR. SIEGEL: Thank you.
THE COURT: Kevin McKeown.
MR. McKEOWN: Good morning, your Honor. Yes, Kevin McKeown.
Your Honor, I am not an attorney. I am co-chairman of Integrity in the Courts. A quick background, your Honor. Integrity in the Courts is a national association organized to focus ethical and legal issues related to the administration of justice nationwide.

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THE COURT: Do you have any interest in WexTrust or do you have any investment, do you have any financial stake in this?

MR. McKEOWN: No, I do not, your Honor. However, it was my understanding that your Honor was gracious enough to allow the public to speak. There are three specific issues that a lot of our members have brought about pertaining to WexTrust --

THE COURT: Are you a lawyer?

MR. McKEOWN: No, I am not, your Honor.

THE COURT: No, I'm not here to listen to general commentary by members of the public on the administration of justice or the judicial system.

MR. McKEOWN: There are three specific issues, your Honor.

THE COURT: You may not speak. Thank you.

MR. McKEOWN: Thank you, your Honor.

THE COURT: Sorry, but I want to hear from victims.

MR. McKEOWN: Thank you, your Honor.

THE COURT: Charles Sullivan.

MR. SULLIVAN: Yes, your Honor. Good morning. Your Honor, I am an attorney. I'm an attorney with the firm Bond Schoeneck & King, and I've been admitted pro hac vice by this court to appear in this matter.

THE COURT: All right.

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♀ 46

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MR. SULLIVAN: Your Honor, my firm is counsel for TCF National Bank. TCF is an objector, and by way of background, your Honor, TCF National Bank is a secured creditor. It's a national banking association located in Milwaukee that has a mortgage lien against property owned by Peoria Office Holdings, LLC. That is an entity that is controlled by Mr. Coleman as receiver pursuant to this Court's orders appointing Mr. Coleman as receiver dated August 11 and September 11, 2008.

TCF's loan to Peoria Office Holdings, LLC is secured by a mortgage on an office building, a multiuse office building located in Peoria, Illinois, as well as a security interest in leases and rents derived from that building and certain funds that were established pursuant to loan agreements.

The terms of this Court's preliminary injunction order of October 24 specifically applied to my client's collateral, including the real property. The loan to TCF, which is in excess of $11 million, is guaranteed by WexTrust Equity Partners, LLC, WexTrust Capital, LLC, Steven Byers and Matthew Gurvey, who as I understand, your Honor, is a former employee of WexTrust entities.

Your Honor, although in TCF's objection -- I want to make clear that TCF has not raised a specific objection to the pro rata distribution of payments or proceeds to members of the investor class or even the unsecured creditor class, subject, of course, to the appropriate priority of those claims, as was

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♀ 47

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identified by prior counsel that appeared before you this

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

THE COURT: What is the specific objection?

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

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

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

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

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

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

THE COURT: Haven't we been through this before? I mean, you're raising issues that I ruled on and apparently are

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now the subject of the appeal.

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

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

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

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

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

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THE COURT: All right. Thank you.

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

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

MR. SULLIVAN: Yes, understood, your Honor.

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

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

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

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

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

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

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

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

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

THE COURT: What do you suggest as an alternative?

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

THE COURT: I understand. You think this should be

made into a bankruptcy. What else do you want to tell me?
MR. SULLIVAN: Your Honor, I do want to, if I may, distinguish the Credit Bancorp case on two grounds. That case does stand for the proposition that a pro rata distribution is a fair and equitable distribution, but it does not offer a sound justification for continuing on this course with this plan of distribution. The reason for that is that this plan of distribution, something that was not present in the Credit Bancorp case, purports to affect and alter the legal rights of

plaintiffs that are holding different types of claims. As is discussed earlier in record, the claims of unsecured creditors and investors are included together, they're in effect lumped together, which is a basis to distinguish it.
Also, the decision of the district court below in the Credit Bancorp case, approving the pro rata plan of distribution in that case, reveals just how limited its holdings should be construed. In fact, the Court was very cognizant of the limitations of an equity receivership --
THE COURT: No, stop. You're taking too long. Too long. Next, please. Thank you.
Ms. Kaufman? Beth Kaufman.
MS. KAUFMAN: Good morning again, your Honor.
THE COURT: Good morning.
MS. KAUFMAN: Beth Kaufman, Schoeman, Updike & Kaufman, New York, for Larry Costa, and I am a member of this court.
Your Honor, I am here for Mr. Costa individually. He is also a member of the commodity pool investors. You've heard their objections to the plan already. Mr. Costa is either the largest or the second largest individual investor in the WexTrust entities, and he has also made a personal loan to Diva in an effort to keep the African mining operation operational. And he is, as conceded by the receiver in his December 1st, 2008 declaration to the Court, a victim of this fraud.

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

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

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

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

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

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

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

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

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

THE COURT: Fair enough. Thank you.

Timothy Holmes.

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

THE COURT: It's fine for you to speak in terms of

♀ 58

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your own investment. Yes.

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

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

THE COURT: All right.

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

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

My position can be demonstrated by examining three issues surrounding the facts of our investment in WDFF. First, we invested directly into WexTrade Diversified Futures Fund I commodity pool, and we're not associated in any way with WexTrust. The improper conduct occurred at WexTrust and in

♀ 59

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WexTrust's placement and use of assets. Our assets were never in WexTrust. Our assets only resided in our individual capital accounts in WexTrade Diversified Futures Fund. WexTrust is a separate entity from WexTrade Diversified Futures Fund.

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

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

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

♀ 60

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

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

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

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

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

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

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

THE COURT: Thank you.

Next is Martin Malek.

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

governmental agency of CFTC willing to testify. He has seen all the documentation from the NFA, including these latest charges brought just this week, which he feels are immaterial,

immaterial to the case at hand, and read through the receiver's response to our objections and still believes that this distribution plan is unjust. In the least, if you feel that we have not provided sufficient evidence for reversal, I ask that you call on Richard Wagner, deputy director of the CFTC enforcement division, to testify in front of you in order to clear away the fog the receiver has created and turned away from the core issues of the fact that 51 investors and $10 million were invested in an up-and-running certified and regulated commodity fund, with separate identifiable accounts, were not part of the escrow money that sat in WexTrust and in no way were affected from the seven accounts transferred from a separate entity named WexTrust.

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

THE COURT: Thank you. Samuel Krieger.

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

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

THE COURT: I think at least three of the speakers

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have now addressed the commodities funds. So I don't think you need to repeat what was said with respect to the commodities funds. The points have been well made. I understand them.

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

THE COURT: Go ahead.

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

Thank you, your Honor.

THE COURT: Thank you. Pessi Rothschild.

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

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

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

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

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

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

THE COURT: What was the second one?

MS. ROTHSCHILD: Hammond Industrial, which is, I

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believe, where businesses are renting space and quite profitable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: And finally, Andrew Campbell.

MR. CAMPBELL: Thank you, your Honor. I will try and be brief.

My name is Andrew Campbell. I'm not an attorney. I'm a hapless investor in the commodity funds. I invested a hundred thousand dollars in the commodities funds just 35 days before the funds were seized, and froze. My investors -- my

investment was fully present and accounted for. So I was not a victim of the Ponzi scheme. No money was stolen from me. I am, however, a victim of the receiver.

I'm distressed at what I believe to be misleading statements by the receiver in his opening remarks. He styled all the objectors as having equity stakes in LLCs. That is not the case. The commodity fund investors shared a specific pool of the commodities funds, and those commodities funds were invested correctly, according to the instructions that we gave, and when the funds -- the assets were frozen, those investments were liquidated and fully accounted for. There were no thefts within the commodity pool. I purchased a share of the commodities pool. My personal funds were present and accounted for.

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

In the receiver's opposition, or response to our opposition to the plan, on page 20, he states, "Equitable principles dictate that all those from whom the money was misappropriated should be treated equally." And we absolutely agree with that. The flaw, however, is that there was no money

misappropriated from the commodity pool.

My request, your Honor, is that the process be formalized so as to say which investments are properly part of the receivership and which are not, and also, to have the receiver be required to release the fruits of the research into the accounting of the commodity pools so we can understand fully what that -- what that research, for which we have paid, I should add, revealed.

Thank you, your Honor.

THE COURT: Thank you.

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

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

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

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

the same as equity. I just want to touch on that one point. We believe that the Court obviously has the discretion to

approve the plan as is, where it disallows deficiency claims and treats unsecured claims on par with claims based on equity interests. We did cite in our papers supporting the plan the Unsecured Creditors Committee v. WorldCom case, which dealt with a distribution plan proposed by the Securities & Exchange Commission under the fair and reasonable standard, which is the same standard applicable here, where the plan specifically excluded completely any creditors who had already received a 36 percent distribution from the WorldCom bankruptcy case. And there the Second Circuit upheld the plan as being fair and reasonable, even though it excluded those creditors, under the rationale that the entity had a discretion and it was fair to first allocate the funds in its possession to people who had not received any compensation. And the Court there noted, again specifically, that the SEC was not bound by bankruptcy priorities. So we believe that that case in and of itself fully supports approving the plan here.

In addition, in the case Anderson v. Stephens, which is cited in the receiver's proposed plan at footnote 19 for a different purpose -- this is a Fourth Circuit case and the citation is 875 F.2d 76 (4th Cir. 1989) -- the case there dealt with something different, but in the opinion itself, in footnote 6, the Court references the distribution plan at issue, and in that distribution plan unsecured creditors were in fact subordinated to all other investors and to the United

States government as well. So although the decision didn't address that specific issue, it's clear from that decision that there was another plan that did that. Yes.

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

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

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

MR. JACOBSON: We have not.

THE COURT: Okay.

MR. JACOBSON: Perhaps --

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

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

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

THE COURT: Thank you.

Next? Mr. Malek, it's okay. If the CFTC wants to

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weigh in, it can. In fact, Mr. Malek, you can contact Mr. Wagner and tell him that if he wants to express his views, he can submit them to me in writing and I will certainly consider them. All right?

MR. MALEK: Yes, your Honor.

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

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

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

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first of all?

MR. RADKE: Yes.

THE COURT: And I guess it was Mr. Hartheim, Hartheimer?

MR. HARTHEIMER: Hartheimer, your Honor.

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

MR. HARTHEIMER: That wasn't me.

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

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

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

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

MR. RADKE: Well, in one respect --

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

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

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

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

MR. RADKE: Yes, your Honor.

THE COURT: Give me some examples.

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

And between --

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

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

THE COURT: Okay.

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

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

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

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

MR. RADKE: Correct.

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

MR. RADKE: That's correct.

THE COURT: Okay.

MR. RADKE: And that's -- and that's, in large part,

your Honor, due to the fact that in these cases where you're in equity, you know, there has to be some determination of what, you know -- in order to get the most included in the remedy, to get the most dollars out to the victims, of what's the fairest. In the secured creditors instance, you know, other procedures might take out a great deal of the remaining money for, you know, equity victims.

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

THE COURT: You envision a process for that.

MR. RADKE: Absolutely.

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

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

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

THE COURT: Any decision on Mr. Costa yet?

MR. RADKE: What was that?

THE COURT: Have you made a decision on Mr. Costa yet?

MR. RADKE: No.

THE COURT: And you need further information.

MR. RADKE: We need further information, which is part of what we're seeking.

MR. MARDER: Your Honor -- Are you done?

THE COURT: I'm not envisioning another round.

MR. MARDER: It's really a note of clarification.

THE COURT: No. If I let you speak, I'm going to have to let every other person speak again.

MR. MARDER: It's literally one second of clarification.

THE COURT: No.

MR. MARDER: Thank you, your Honor.

THE COURT: No. Anybody else who wants to say anything else, want anything else known to me, should submit a letter to me within a week, okay? There were some open items, including whether I have jurisdiction. Anybody who wants to respond to anything, supplement anything, within a week, with copies to all of the appropriate people.

And I am reserving decision.

I'll ask the receiver to order the transcript. Okay?

MR. RADKE: Thank you, your Honor.

THE COURT: Thank you very much.

THE CLERK: All rise.

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EXHIBIT B

UNITED STATES COURT OF APPEALSFOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 09-0234-cv (L), 09-0284-cv (Con)

Caption [use short title]

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,
v.
STEVEN BYERS, et al.,
Defendants.

Motion for: Expedited Appeal

Set forth below precise, complete statement of relief sought:
Appellant requests this Court to expedite its appeal.

MOVING PARTY: International Consortium of Wextrust Creditors
☐ Plaintiff ☐ Defendant
X Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Securities and Exchange Commission

MOVING ATTORNEY:
[name of attorney, with firm, address, phone number and e-mail]
Martin S. Siegel
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7 Times Square
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(212) 209-4800
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OPPOSING ATTORNEY [Name]:
[name of attorney, with firm, address, phone number and e-mail]
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U.S. Securities and Exchange Commission
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vasilescu@sec.gov

Court-Judge/Agency appealed from: United States District Court for the Southern District of New York-The Honorable Denny Chin

Please check appropriate boxes:

Has **consent** of opposing counsel:
A. been sought? ☐ Yes X No
B. been obtained? ☐ Yes X No

Has service been effected? X Yes ☐ No
[Attach proof of service]

Is **oral argument** requested? X Yes ☐ No
(requests for oral argument will not necessarily be granted)

Has **argument** date of appeal been set? ☐ Yes X No
If yes, enter date:_____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL
Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes X No

Requested return date and explanation of emergency:

Signature of Moving Attorney: Martin S. Siegel Date: February 10, 2009

ORDER

IT IS HEREBY ORDERED that the motion is DENIED as moot in light of order dated February 11, 2009 which denied International Ad-Hoc Committee of Wextrust Creditors' motion to expedite the appeal.

UNITED STATES COURT OF APPEALS
FILED
FEB 19 2009
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
by Judy Pisnanont
Judy Pisnanont, Motions Staff Attorney

2/19/09
Date

EXHIBIT C

UNITED STATES DEPARTMENT OF THE TREASURY
SECTION 105(a) TROUBLED ASSET RELIEF PROGRAM
REPORT TO CONGRESS
FOR THE PERIOD
DECEMBER 1, 2008 TO DECEMBER 31, 2008

I. OVERVIEW

The current financial crisis is one of the most serious and challenging in recent history. In response, Treasury has acted quickly and creatively to implement several programs under the Troubled Asset Relief Program (TARP) with the following three critical objectives: one, to stabilize financial markets and reduce systemic risk; two, to support the housing market by avoiding preventable foreclosures and supporting mortgage finance; and three, to protect taxpayers. While there is no single action the Federal Government can take to end the financial market turmoil and the economic downturn, Treasury has focused on developing the most effective combination of tools to further stabilize the financial system and speed the process of economic recovery.

During this reporting period, Treasury continued to make significant investments in United States financial institutions through the Capital Purchase Program (CPP). These investments have improved the capitalization of these institutions, which is essential to improving the flow of credit to businesses and consumers and boosting the confidence of depositors, investors, and counterparties alike. With higher capital levels and restored confidence, banks can continue to play their vital role as lenders in our communities, a necessary requisite for economic recovery and a return to prosperity. As of December 31, 2008, Treasury has invested $177.5 billion in United States financial institutions through the CPP, providing support to small and large financial institutions, as well as Community Development Financial Institutions, in over 40 states and Puerto Rico. Treasury has committed an additional $10 billion with a deferred settlement date.

In December, Treasury also moved swiftly and thoughtfully to support auto makers and auto financing companies through the newly established Automotive Industry Financing Program (AIFP). On December 29, Treasury agreed to loan up to $1 billion to General Motors (GM) to assist the company in supporting the reorganization as a bank holding company of GMAC LLC (GMAC), a financing company that supports GM. Treasury also invested $5 billion directly in GMAC pursuant to its reorganization as a bank holding company. On December 31, 2008, Treasury loaned an additional $4 billion to GM and committed to an additional loan of $5.4 billion in January 2009, with an additional loan of $4 billion possible in February. Under each of these arrangements, the company has agreed to rigorous restrictions on executive privileges and compensation and other terms designed to protect the taxpayer. These steps will facilitate the restructuring of the domestic auto industry and prevent disorderly bankruptcies during a time of economic difficulty.

Treasury also made a significant investment in Citigroup on December 31, 2008, purchasing $20 billion in preferred stock and warrants. Treasury announced its plans to make this investment in

November 2008. The investment is part of a new Targeted Investment Program (TIP), which is designed to preserve confidence in financial institutions and foster financial market stability, thereby strengthening the economy, protecting American jobs, savings, and retirement security. Treasury will consider financial institutions for participation in the TIP on a case-by-case basis, based on criteria in the TIP program guidelines.

In addition to making these investments, Treasury transmitted a report to Congress on an insurance program, known as the Asset Guarantee Program, as required by section 102 of the Emergency Economic Stabilization Act of 2008 (EESA). This program provides guarantees for assets held by systemically significant financial institutions that face a high risk of losing market confidence due in large part to a portfolio of distressed or illiquid assets. This program will be applied with extreme discretion in order to improve market confidence in the systemically significant institution and in financial markets broadly. Treasury does not anticipate making the program widely available.

At the same time that TARP programs are being designed and executed, Treasury is continuing to build the Office of Financial Stability, focusing on hiring a highly-qualified staff, implementing a comprehensive process for monitoring contractors, and establishing a strong compliance program. Treasury also has robust controls in place to ensure that the use of TARP funds under section 115 of the EESA does not exceed the current limit of $350 billion. Treasury has made significant progress since the TARP was launched in October, and many challenges lie ahead. We will continue to remain vigilant, ready to respond and to manage unpredictable events as they occur, with economic recovery as the first priority.

II. REPORTING REQUIREMENTS

This is Treasury's second *Section 105(a) Troubled Asset Relief Program Report to Congress* (TARP Report) required by EESA. Treasury transmitted its first TARP Report to Congress on December 5, 2008, covering activities through November 30, 2008. This TARP Report covers the next 30-day period, as well as activities occurring on December 31, 2008, and addresses the following three areas required by EESA section 105(a):

- An overview of actions taken by the Secretary, including the considerations required by section 103 and the efforts under section 109.
- The actual obligation and expenditure of the funds provided for administrative expenses by section 118.
- A detailed financial statement with respect to the exercise of authority, including:
  1. all agreements made or renewed;
  2. all insurance contracts entered into pursuant to section 102;
  3. all transactions occurring during the initial 60-day period, including the types of parties involved;
  4. the nature of the assets purchased;
  5. all projected costs and liabilities;
  6. operating expenses, including compensation for financial agents;
  7. the valuation or pricing method used for each transaction; and
  8. a description of the vehicles established to exercise such authority.

III. INDIVIDUAL PROGRAMS AND INITIATIVES

The Capital Purchase Program

Under the voluntary Capital Purchase Program (CPP), the Treasury is purchasing senior preferred shares from qualified financial institutions. In accordance with the considerations of the EESA, a broad spectrum of institutions is eligible for the program: U.S. controlled banks, savings associations, and certain bank and savings and loan holding companies. To protect the interests of the taxpayer, only viable institutions are accepted into the program. A recommendation on acceptance is received from the institution's primary federal regulator or, in some cases, from a council of representatives from each federal regulator. The Treasury is responsible for final approval.

The minimum subscription amount is 1 percent of the institution's risk-weighted assets; the maximum subscription amount is 3 percent of risk-weighted assets (up to a maximum of $25 billion). Standardized terms have been developed for institutions that are organized as publicly traded and privately held institutions; terms applicable to S corporations and mutual organizations are still under consideration. The standardized terms impose restrictions on executive compensation and corporate governance and include provisions (such as the issuance of warrants) that will enable the taxpayer to benefit from the future appreciation of the firm.

Between December 1, 2008 and December 31, 2008, Treasury purchased $26.1 billion in senior preferred shares from 162 financial institutions under the CPP. Since the launch of the CPP in October 2008 through December 31, 2008, Treasury has invested a total of $177.5 billion in senior preferred shares in 214 financial institutions in over 40 states and Puerto Rico, and committed to purchase another $10 billion from an additional institution with a deferred settlement date.

Complete details about the Capital Purchase Program are available on the Treasury website at: http://www.treas.gov/initiatives/eesa/.

The Automotive Industry Financing Program

The objective of the Automotive Industry Financing Program (AIFP) is to prevent a significant disruption of the American automotive industry, which would pose a systemic risk to financial market stability and have a negative effect on the economy of the United States. The program requires participating institutions to implement plans that will achieve long-term viability. Participating institutions must also adhere to rigorous executive compensation standards and other measures to protect the taxpayer's interests, including limits on the institution's expenditures and other corporate governance requirements. Guidelines for the AIFP are published on Treasury's website.

On December 19, 2008, Treasury announced a plan to make emergency loans available from the TARP to General Motors Corporation (GM) and Chrysler LLC (Chrysler) to assist the domestic auto industry in becoming financially viable. This step was taken to stave off a disorderly bankruptcy of one or more auto companies and prevent significant disruption to the already fragile economy. Treasury will carry out these transactions under the newly established AIFP.

Treasury closed on its agreement with GM on December 31, 2008, and its agreement with Chrysler on January 2. Under the GM agreement, Treasury will provide GM with up to a total of $13.4 billion in short-term financing from the TARP. Treasury funded $4 billion of this loan immediately, and committed to fund an additional $5.4 billon on January 16, 2009. Treasury will provide an additional $4 billion on February 17, 2009, subject to GM meeting certain conditions and funds being available to Treasury to purchase troubled assets under section 115(a) of the EESA. To protect taxpayers, the agreement requires GM to use these funds to become financially viable and includes other binding terms. The Chrysler agreement is outside the reporting period and will be discussed in the next report under section 105(a) of EESA.

On December 29, 2008, Treasury also purchased $5 billion of senior preferred equity with an 8% annual distribution right from GMAC LLC (GMAC) through the AIFP. Under the agreement, GMAC issued warrants to Treasury in the form of additional preferred equity in an amount equal to 5% of the preferred stock purchase; these warrants were exercised at closing of the investment transaction for additional preferred equity with a 9% annual distribution right. Additionally, Treasury agreed to lend up to $1 billion of TARP funds to GM so that GM can participate in a rights offering by GMAC in support of GMAC's reorganization as a bank holding company. The loan will be secured by collateral including certain GMAC equity interests owned by GM and those being acquired by GM in the rights offering, and it will be exchangeable at any time, at Treasury's option, for the GMAC equity interests being acquired by GM in the rights offering. The ultimate level of funding under this facility will depend upon the level of current investor participation in GMAC's rights offering. Under these agreements, both GMAC and GM must comply with enhanced restrictions on executive compensation.

The Targeted Investment Program

The Targeted Investment Program (TIP) is designed to prevent a loss of confidence in financial institutions that could result in significant market disruptions, threatening the financial strength of similarly situated financial institutions, impairing broader financial markets, and undermining the overall economy. Institutions will be considered for this program on a case-by-case basis, based on a number of factors described in the program guidelines. These factors include the threats posed by destabilization of the institution, the risks caused by a loss of confidence in the institution, and the institution's importance to the nation's economy. Program guidelines for the TIP were published on Treasury's web site on January 2, as required by section 101(d) of the EESA.

Treasury completed the first transaction under the TIP on December 31, 2008, when it invested $20 billion in Citigroup perpetual preferred stock and warrants. Under the agreement with Citigroup, Treasury will receive an 8% annual dividend, payable quarterly. As part of this agreement, Citigroup must implement rigorous executive compensation standards and other restrictions on corporate expenditures. The transaction represents Treasury's second investment in Citigroup; in October 2008, Treasury also invested $25 billion in the company through the CPP.

The Asset Guarantee Program

On December 31, 2008, Treasury transmitted to Congress a report that describes the Asset Guarantee Program (AGP) established under section 102 of the EESA. This program provides guarantees for assets held by systemically significant financial institutions that face a risk of losing market confidence due in large part to a portfolio of distressed or illiquid assets. The AGP will be applied with extreme discretion in order to improve market confidence in the systemically significant institution and in financial markets broadly. Treasury does not anticipate that the program will be made widely available, and notes that the EESA requires that premiums under section 102 be set to ensure that taxpayers are fully protected

Treasury is exploring use of the AGP to address the guarantee provisions of the non-binding agreement with Citigroup Inc. announced on November 23, 2008, and described in Treasury's 105(a) Report to Congress dated December 5, 2008.

The insurance program report to Congress is available on Treasury's website.

Other Initiatives:

Term Asset-Backed Securities Loan Facility

The Treasury will provide $20 billion from the TARP to support the Federal Reserve's $200 billion Term Asset-Backed Securities Loan Facility (TALF). This facility will help market participants meet the credit needs of households and small businesses by supporting the issuance of asset-backed securities (ABS) collateralized by student loans, auto loans, credit card loans, and loans guaranteed by the Small Business Administration. The TALF is expected to begin operation early in 2009.

Credit market stresses led to a steep decline in the issuance of ABS for these types of loans in the third quarter of 2008, and the market essentially came to a halt in October. At the same time, higher risk premiums drove interest rate spreads on AAA-rated tranches of ABS to levels well outside the range of historical experience. The purpose of the TALF is to increase credit availability by stimulating the issuance of consumer and small business ABS at more normal interest rate spreads.

On December 19, 2008, the Federal Reserve released revised terms and conditions and questions and answers detailing operational aspects of the TALF. Under the revised terms and conditions, the Federal Reserve will lend on a non-recourse basis to holders of certain AAA-rated ABS fully secured by newly and recently originated consumer and small business loans. TALF loans will have a term of three years and will be fully secured by eligible collateral. Haircuts (a percentage reduction used for collateral valuation) will be determined based on the riskiness of each type of eligible collateral and the maturity of the eligible collateral pledged to the Federal Reserve. The haircuts will provide additional protection to taxpayers by protecting the Federal Government from loss. Treasury will provide $20 billion of credit protection to the Federal Reserve in connection with the TALF. The sponsor of the eligible ABS must agree to comply with the same executive compensation restrictions required for participants in the CPP.

IV. TARP ADMINISTRATIVE EXPENSES

United States Department of Treasury
Office of Financial Stability

Report of Administrative Obligations and Expenditures

			For Period Ending December 31, 2008		For Period Ending January 31, 2009	
	Budget Object Class	Budget Object Class Title	Obligations	Expenditures	Projected Obligations	Projected Expenditures
PERSONNEL SERVICES	1100 & 1200	PERSONNEL COMPENSATION & BENEFITS	$713,928	$713,928	$1,193,000	$1,193,000
		PERSONNEL SERVICES Total:	**$713,928**	**$713,928**	**$1,193,000**	**$1,193,000**
NON-PERSONNEL SERVICES	2100	TRAVEL & TRANSPORTATION OF PERSONS	12,993	6,725	17,000	12,000
	2200	TRANSPORTATION OF THINGS				
	2300	RENTS, COMMUNICATIONS, UTILITIES & MISC CHARGES	87,642	87,642	738,000	153,000
	2400	PRINTING & REPRODUCTION	7,227	7,227	8,000	8,000
	2500	OTHER SERVICES	4,730,497	3,040,209	24,417,000	4,980,000
	2600	SUPPLIES AND MATERIALS	4,964	4,784	130,000	130,000
	3100	EQUIPMENT	20,844	20,844	50,000	50,000
		NON-PERSONNEL SERVICES Total:	**$4,864,167**	**$3,167,431**	**$25,360,000**	**$5,333,000**
		GRAND TOTAL:	**$5,578,095**	**$3,881,359**	**$26,553,000**	**$6,526,000**

Notes: The statutorily required reporting date results in OFS estimating amounts prior to the Department of Treasury's accounting records closing on January 6, 2008. The December 31, 2008 period ending obligation amount is smaller than the November 30, 2008 period ending amount due to a recategorization of detailee salaries from BOC 2500 to 1100 & 1200 and BOC 2500 programmatic operating obligations that were shown as BOC 2500 administrative obligations.

V. DETAILED FINANCIAL STATEMENTS

U.S. Treasury Department
Office of Financial Stability

Troubled Asset Relief Program

Agreements Under TARP [Section 105(a)(3)(A)]

For Period Ending December 31, 2008

Date Approved or Renewed	Type of Transaction	Vendor	Purpose
10/10/2008	BPA	Simpson, Thacher & Bartlett	Legal Services
10/11/2008	BPA	EnnisKnupp	Investment and Advisory Services
10/14/2008	Financial Agent	Bank of New York Mellon	Custodian and Cash Mangement
10/16/2008	BPA	PricewaterhouseCoopers	Internal Control Services
10/18/2008	BPA	Ernst & Young	Accounting Services
10/23/2008	IAA	GSA - Turner Consulting	Archiving Services
10/29/2008	BPA	Hughes Hubbard & Reed	Legal Services
10/29/2008	BPA	Squire Sanders & Dempsey	Legal Services
10/31/2008	Contract	Lindholm & Associates*	Human Resources Services
11/7/2008	BPA	Thacher Proffitt & Wood	Legal Services
11/14/2008	IAA	Securities and Exchange Commission	Detailees
12/3/2008	IAA	Trade and Tax Bureau - Treasury	IT Services
12/5/2008	Procurement	Washington Post	Vacancy Announcement
12/5/2008	IAA	Department of Housing and Urban Development	Detailees
12/10/2008	BPA	Thacher Proffitt & Wood	Legal Services
12/18/2008	BPA	Kirkland and Elllis, LLP	Legal Services

* Small or Women-, or Minority-Owned Small Business

Office of Financial Stability

Troubled Asset Relief Program

Description of Vehicles Established [Section 105(a)(3((F)]

For Period Ending December 31, 2008

Date	Vehicle	Description
	None	

VI. TRANSACTIONS REPORT – CAPITAL PURCHASE PROGRAM

U.S. Treasury Department
Office of Financial Stability

Troubled Asset Relief Program

Transactions Report

For Period Ending December 31, 2008

CAPITAL PURCHASE PROGRAM

		Seller						
	Date	Name of Institution	City	State	Transaction Type	Description	Price Paid	Pricing Mechanism
	10/28/2008	Bank of America Corporation	Charlotte	NC	Purchase	Preferred Stock w/Warrants	$15,000,000,000	Par
	10/28/2008	Bank of New York Mellon Corporation	New York	NY	Purchase	Preferred Stock w/Warrants	$3,000,000,000	Par
	10/28/2008	Citigroup Inc.	New York	NY	Purchase	Preferred Stock w/Warrants	$25,000,000,000	Par
	10/28/2008	The Goldman Sachs Group, Inc.	New York	NY	Purchase	Preferred Stock w/Warrants	$10,000,000,000	Par
	10/28/2008	JPMorgan Chase & Co.	New York	NY	Purchase	Preferred Stock w/Warrants	$25,000,000,000	Par
	10/28/2008	Morgan Stanley	New York	NY	Purchase	Preferred Stock w/Warrants	$10,000,000,000	Par
	10/28/2008	State Street Corporation	Boston	MA	Purchase	Preferred Stock w/Warrants	$2,000,000,000	Par
	10/28/2008	Wells Fargo & Company	San Francisco	CA	Purchase	Preferred Stock w/Warrants	$25,000,000,000	Par
1/	10/28/2008	Merrill Lynch & Co., Inc.	New York	NY	Purchase	Preferred Stock w/Warrants	$10,000,000,000	Par
	11/14/2008	Bank of Commerce Holdings	Redding	CA	Purchase	Preferred Stock w/Warrants	$17,000,000	Par
	11/14/2008	1st FS Corporation	Hendersonville	NC	Purchase	Preferred Stock w/Warrants	$16,369,000	Par
	11/14/2008	UCBH Holdings, Inc.	San Francisco	CA	Purchase	Preferred Stock w/Warrants	$298,737,000	Par
	11/14/2008	Northern Trust Corporation	Chicago	IL	Purchase	Preferred Stock w/Warrants	$1,576,000,000	Par
	11/14/2008	SunTrust Banks, Inc.	Atlanta	GA	Purchase	Preferred Stock w/Warrants	$3,500,000,000	Par
	11/14/2008	Broadway Financial Corporation	Los Angeles	CA	Purchase	Preferred Stock w/Warrants	$9,000,000	Par
	11/14/2008	Washington Federal Inc.	Seattle	WA	Purchase	Preferred Stock w/Warrants	$200,000,000	Par
	11/14/2008	BB&T Corp.	Winston-Salem	NC	Purchase	Preferred Stock w/Warrants	$3,133,640,000	Par
	11/14/2008	Provident Bancshares Corp.	Baltimore	MD	Purchase	Preferred Stock w/Warrants	$151,500,000	Par
	11/14/2008	Umpqua Holdings Corp.	Portland	OR	Purchase	Preferred Stock w/Warrants	$214,181,000	Par
	11/14/2008	Comerica Inc.	Dallas	TX	Purchase	Preferred Stock w/Warrants	$2,250,000,000	Par
	11/14/2008	Regions Financial Corp.	Birmingham	AL	Purchase	Preferred Stock w/Warrants	$3,500,000,000	Par
	11/14/2008	Capital One Financial Corporation	McLean	VA	Purchase	Preferred Stock w/Warrants	$3,555,199,000	Par
	11/14/2008	First Horizon National Corporation	Memphis	TN	Purchase	Preferred Stock w/Warrants	$866,540,000	Par
	11/14/2008	Huntington Bancshares	Columbus	OH	Purchase	Preferred Stock w/Warrants	$1,398,071,000	Par
	11/14/2008	KeyCorp	Cleveland	OH	Purchase	Preferred Stock w/Warrants	$2,500,000,000	Par
	11/14/2008	Valley National Bancorp	Wayne	NJ	Purchase	Preferred Stock w/Warrants	$300,000,000	Par
	11/14/2008	Zions Bancorporation	Salt Lake City	UT	Purchase	Preferred Stock w/Warrants	$1,400,000,000	Par
	11/14/2008	Marshall & Ilsley Corporation	Milwaukee	WI	Purchase	Preferred Stock w/Warrants	$1,715,000,000	Par
	11/14/2008	U.S. Bancorp	Minneapolis	MN	Purchase	Preferred Stock w/Warrants	$6,599,000,000	Par
	11/14/2008	TCF Financial Corporation	Wayzata	MN	Purchase	Preferred Stock w/Warrants	$361,172,000	Par
	11/21/2008	First Niagara Financial Group	Lockport	NY	Purchase	Preferred Stock w/Warrants	$184,011,000	Par
	11/21/2008	HF Financial Corp.	Sioux Falls	SD	Purchase	Preferred Stock w/Warrants	$25,000,000	Par
	11/21/2008	Centerstate Banks of Florida Inc.	Davenport	FL	Purchase	Preferred Stock w/Warrants	$27,875,000	Par
	11/21/2008	City National Corporation	Beverly Hills	CA	Purchase	Preferred Stock w/Warrants	$400,000,000	Par
	11/21/2008	First Community Bankshares Inc.	Bluefield	VA	Purchase	Preferred Stock w/Warrants	$41,500,000	Par
	11/21/2008	Western Alliance Bancorporation	Las Vegas	NV	Purchase	Preferred Stock w/Warrants	$140,000,000	Par
	11/21/2008	Webster Financial Corporation	Waterbury	CT	Purchase	Preferred Stock w/Warrants	$400,000,000	Par
	11/21/2008	Pacific Capital Bancorp	Santa Barbara	CA	Purchase	Preferred Stock w/Warrants	$180,634,000	Par
	11/21/2008	Heritage Commerce Corp.	San Jose	CA	Purchase	Preferred Stock w/Warrants	$40,000,000	Par
	11/21/2008	Ameris Bancorp	Moultrie	GA	Purchase	Preferred Stock w/Warrants	$52,000,000	Par
	11/21/2008	Porter Bancorp Inc.	Louisville	KY	Purchase	Preferred Stock w/Warrants	$35,000,000	Par
	11/21/2008	Banner Corporation	Walla Walla	WA	Purchase	Preferred Stock w/Warrants	$124,000,000	Par
	11/21/2008	Cascade Financial Corporation	Everett	WA	Purchase	Preferred Stock w/Warrants	$38,970,000	Par
	11/21/2008	Columbia Banking System, Inc.	Tacoma	WA	Purchase	Preferred Stock w/Warrants	$76,898,000	Par
	11/21/2008	Heritage Financial Corporation	Olympia	WA	Purchase	Preferred Stock w/Warrants	$24,000,000	Par
	11/21/2008	First PacTrust Bancorp, Inc.	Chula Vista	CA	Purchase	Preferred Stock w/Warrants	$19,300,000	Par
	11/21/2008	Severn Bancorp, Inc.	Annapolis	MD	Purchase	Preferred Stock w/Warrants	$23,393,000	Par
	11/21/2008	Boston Private Financial Holdings, Inc.	Boston	MA	Purchase	Preferred Stock w/Warrants	$154,000,000	Par
	11/21/2008	Associated Banc-Corp	Green Bay	WI	Purchase	Preferred Stock w/Warrants	$525,000,000	Par
	11/21/2008	Trustmark Corporation	Jackson	MS	Purchase	Preferred Stock w/Warrants	$215,000,000	Par
	11/21/2008	First Community Corporation	Lexington	SC	Purchase	Preferred Stock w/Warrants	$11,350,000	Par
	11/21/2008	Taylor Capital Group	Rosemont	IL	Purchase	Preferred Stock w/Warrants	$104,823,000	Par
	11/21/2008	Nara Bancorp, Inc.	Los Angeles	CA	Purchase	Preferred Stock w/Warrants	$67,000,000	Par
	12/5/2008	Midwest Banc Holdings, Inc.	Melrose Park	IL	Purchase	Preferred Stock w/Warrants	$84,784,000	Par
	12/5/2008	MB Financial Inc.	Chicago	IL	Purchase	Preferred Stock w/Warrants	$196,000,000	Par
	12/5/2008	First Midwest Bancorp, Inc.	Itasca	IL	Purchase	Preferred Stock w/Warrants	$193,000,000	Par
	12/5/2008	United Community Banks, Inc.	Blairsville	GA	Purchase	Preferred Stock w/Warrants	$180,000,000	Par
	12/5/2008	Wesbanco Bank Inc.	Wheeling	WV	Purchase	Preferred Stock w/Warrants	$75,000,000	Par
	12/5/2008	Encore Bancshares Inc.	Houston	TX	Purchase	Preferred Stock w/Warrants	$34,000,000	Par
	12/5/2008	Manhattan Bancorp	El Segundo	CA	Purchase	Preferred Stock w/Warrants	$1,700,000	Par
	12/5/2008	Iberiabank Corporation	Lafayette	LA	Purchase	Preferred Stock w/Warrants	$90,000,000	Par
	12/5/2008	Eagle Bancorp, Inc.	Bethesda	MD	Purchase	Preferred Stock w/Warrants	$38,235,000	Par
	12/5/2008	Sandy Spring Bancorp, Inc.	Olney	MD	Purchase	Preferred Stock w/Warrants	$83,094,000	Par
	12/5/2008	Coastal Banking Company, Inc.	Fernandina Beach	FL	Purchase	Preferred Stock w/Warrants	$9,950,000	Par
	12/5/2008	East West Bancorp	Pasadena	CA	Purchase	Preferred Stock w/Warrants	$306,546,000	Par
	12/5/2008	South Financial Group, Inc.	Greenville	SC	Purchase	Preferred Stock w/Warrants	$347,000,000	Par
	12/5/2008	Great Southern Bancorp	Springfield	MO	Purchase	Preferred Stock w/Warrants	$58,000,000	Par

12/5/2008	Cathay General Bancorp	Los Angeles	CA	Purchase	Preferred Stock w/Warrants	$258,000,000	Par
12/5/2008	Southern Community Financial Corp.	Winston-Salem	NC	Purchase	Preferred Stock w/Warrants	$42,750,000	Par
12/5/2008	CVB Financial Corp	Ontario	CA	Purchase	Preferred Stock w/Warrants	$130,000,000	Par
12/5/2008	First Defiance Financial Corp.	Defiance	OH	Purchase	Preferred Stock w/Warrants	$37,000,000	Par
12/5/2008	First Financial Holdings Inc.	Charleston	SC	Purchase	Preferred Stock w/Warrants	$65,000,000	Par
12/5/2008	Superior Bancorp Inc.	Birmingham	AL	Purchase	Preferred Stock w/Warrants	$69,000,000	Par
12/5/2008	Southwest Bancorp, Inc.	Stillwater	OK	Purchase	Preferred Stock w/Warrants	$70,000,000	Par
12/5/2008	Popular, Inc.	San Juan	PR	Purchase	Preferred Stock w/Warrants	$935,000,000	Par
12/5/2008	Blue Valley Ban Corp	Overland Park	KS	Purchase	Preferred Stock w/Warrants	$21,750,000	Par
12/5/2008	Central Federal Corporation	Fairlawn	OH	Purchase	Preferred Stock w/Warrants	$7,225,000	Par
12/5/2008	Bank of Marin Bancorp	Novato	CA	Purchase	Preferred Stock w/Warrants	$28,000,000	Par
12/5/2008	Bank of North Carolina	Thomasville	NC	Purchase	Preferred Stock w/Warrants	$31,260,000	Par
12/5/2008	Central Bancorp, Inc.	Somerville	MA	Purchase	Preferred Stock w/Warrants	$10,000,000	Par
12/5/2008	Southern Missouri Bancorp, Inc.	Poplar Bluff	MO	Purchase	Preferred Stock w/Warrants	$9,550,000	Par
12/5/2008	State Bancorp, Inc.	Jericho	NY	Purchase	Preferred Stock w/Warrants	$36,842,000	Par
12/5/2008	TIB Financial Corp	Naples	FL	Purchase	Preferred Stock w/Warrants	$37,000,000	Par
12/5/2008	Unity Bancorp, Inc.	Clinton	NJ	Purchase	Preferred Stock w/Warrants	$20,649,000	Par
12/5/2008	Old Line Bancshares, Inc.	Bowie	MD	Purchase	Preferred Stock w/Warrants	$7,000,000	Par
12/5/2008	FPB Bancorp, Inc.	Port St. Lucie	FL	Purchase	Preferred Stock w/Warrants	$5,800,000	Par
12/5/2008	Sterling Financial Corporation	Spokane	WA	Purchase	Preferred Stock w/Warrants	$303,000,000	Par
12/5/2008	Oak Valley Bancorp	Oakdale	CA	Purchase	Preferred Stock w/Warrants	$13,500,000	Par
12/12/2008	Old National Bancorp	Evansville	IN	Purchase	Preferred Stock w/Warrants	$100,000,000	Par
12/12/2008	Capital Bank Corporation	Raliegh	NC	Purchase	Preferred Stock w/Warrants	$41,279,000	Par
12/12/2008	Pacific International Bancorp	Seattle	WA	Purchase	Preferred Stock w/Warrants	$6,500,000	Par
12/12/2008	SVB Financial Group	Santa Clara	CA	Purchase	Preferred Stock w/Warrants	$235,000,000	Par
12/12/2008	LNB Bancorp Inc.	Lorain	OH	Purchase	Preferred Stock w/Warrants	$25,223,000	Par
12/12/2008	Wilmington Trust Corporation	Wilmington	DE	Purchase	Preferred Stock w/Warrants	$330,000,000	Par
12/12/2008	Susquehanna Bancshares, Inc	Lititz	PA	Purchase	Preferred Stock w/Warrants	$300,000,000	Par
12/12/2008	Signature Bank	New York	NY	Purchase	Preferred Stock w/Warrants	$120,000,000	Par
12/12/2008	HopFed Bancorp	Hopkinsville	KY	Purchase	Preferred Stock w/Warrants	$18,400,000	Par
12/12/2008	Citizens Republic Bancorp, Inc.	Flint	MI	Purchase	Preferred Stock w/Warrants	$300,000,000	Par
12/12/2008	Indiana Community Bancorp	Columbus	IN	Purchase	Preferred Stock w/Warrants	$21,500,000	Par
12/12/2008	Bank of the Ozarks, Inc.	Little Rock	AR	Purchase	Preferred Stock w/Warrants	$75,000,000	Par
12/12/2008	Center Financial Corporation	Los Angeles	CA	Purchase	Preferred Stock w/Warrants	$55,000,000	Par
12/12/2008	NewBridge Bancorp	Greensboro	NC	Purchase	Preferred Stock w/Warrants	$52,372,000	Par
12/12/2008	Sterling Bancshares, Inc.	Houston	TX	Purchase	Preferred Stock w/Warrants	$125,198,000	Par
12/12/2008	The Bancorp, Inc.	Wilmington	DE	Purchase	Preferred Stock w/Warrants	$45,220,000	Par
12/12/2008	TowneBank	Portsmouth	VA	Purchase	Preferred Stock w/Warrants	$76,458,000	Par
12/12/2008	Wilshire Bancorp, Inc.	Los Angeles	CA	Purchase	Preferred Stock w/Warrants	$62,158,000	Par
12/12/2008	Valley Financial Corporation	Roanoke	VA	Purchase	Preferred Stock w/Warrants	$16,019,000	Par
12/12/2008	Independent Bank Corporation	Ionia	MI	Purchase	Preferred Stock w/Warrants	$72,000,000	Par
12/12/2008	Pinnacle Financial Partners, Inc.	Nashville	TN	Purchase	Preferred Stock w/Warrants	$95,000,000	Par
12/12/2008	First Litchfield Financial Corporation	Litchfield	CT	Purchase	Preferred Stock w/Warrants	$10,000,000	Par
12/12/2008	National Penn Bancshares, Inc.	Boyertown	PA	Purchase	Preferred Stock w/Warrants	$150,000,000	Par
12/12/2008	Northeast Bancorp	Lewiston	ME	Purchase	Preferred Stock w/Warrants	$4,227,000	Par
12/12/2008	Citizens South Banking Corporation	Gastonia	NC	Purchase	Preferred Stock w/Warrants	$20,500,000	Par
12/12/2008	Virginia Commerce Bancorp	Arlington	VA	Purchase	Preferred Stock w/Warrants	$71,000,000	Par
12/12/2008	Fidelity Bancorp, Inc.	Pittsburgh	PA	Purchase	Preferred Stock w/Warrants	$7,000,000	Par
12/12/2008	LSB Corporation	North Andover	MA	Purchase	Preferred Stock w/Warrants	$15,000,000	Par
12/19/2008	Intermountain Community Bancorp	Sandpoint	ID	Purchase	Preferred Stock w/Warrants	$27,000,000	Par
12/19/2008	Community West Bancshares	Goleta	CA	Purchase	Preferred Stock w/Warrants	$15,600,000	Par
12/19/2008	Synovus Financial Corp.	Columbus	GA	Purchase	Preferred Stock w/Warrants	$967,870,000	Par
12/19/2008	Tennessee Commerce Bancorp, Inc.	Franklin	TN	Purchase	Preferred Stock w/Warrants	$30,000,000	Par
12/19/2008	Community Bankers Trust Corporation	Glen Allen	VA	Purchase	Preferred Stock w/Warrants	$17,680,000	Par
12/19/2008	BancTrust Financial Group, Inc.	Mobile	AL	Purchase	Preferred Stock w/Warrants	$50,000,000	Par
12/19/2008	Enterprise Financial Services Corp.	St. Louis	MO	Purchase	Preferred Stock w/Warrants	$35,000,000	Par
12/19/2008	Mid Penn Bancorp, Inc.	Millersburg	PA	Purchase	Preferred Stock w/Warrants	$10,000,000	Par
12/19/2008	Summit State Bank	Santa Rosa	CA	Purchase	Preferred Stock w/Warrants	$8,500,000	Par
12/19/2008	VIST Financial Corp.	Wyomissing	PA	Purchase	Preferred Stock w/Warrants	$25,000,000	Par
12/19/2008	Wainwright Bank & Trust Company	Boston	MA	Purchase	Preferred Stock w/Warrants	$22,000,000	Par
12/19/2008	Whitney Holding Corporation	New Orleans	LA	Purchase	Preferred Stock w/Warrants	$300,000,000	Par
12/19/2008	The Connecticut Bank and Trust Company	Hartford	CT	Purchase	Preferred Stock w/Warrants	$5,448,000	Par
12/19/2008	CoBiz Financial Inc.	Denver	CO	Purchase	Preferred Stock w/Warrants	$64,450,000	Par
12/19/2008	Santa Lucia Bancorp	Atascadero	CA	Purchase	Preferred Stock w/Warrants	$4,000,000	Par
12/19/2008	Seacoast Banking Corporation of Florida	Stuart	FL	Purchase	Preferred Stock w/Warrants	$50,000,000	Par
12/19/2008	Horizon Bancorp	Michigan City	IN	Purchase	Preferred Stock w/Warrants	$25,000,000	Par
12/19/2008	Fidelity Southern Corporation	Atlanta	GA	Purchase	Preferred Stock w/Warrants	$48,200,000	Par
12/19/2008	Community Financial Corporation	Staunton	VA	Purchase	Preferred Stock w/Warrants	$12,643,000	Par
12/19/2008	Berkshire Hills Bancorp, Inc.	Pittsfield	MA	Purchase	Preferred Stock w/Warrants	$40,000,000	Par
12/19/2008	First California Financial Group, Inc	Westlake Village	CA	Purchase	Preferred Stock w/Warrants	$25,000,000	Par
12/19/2008	AmeriServ Financial, Inc	Johnstown	PA	Purchase	Preferred Stock w/Warrants	$21,000,000	Par
12/19/2008	Security Federal Corporation	Aiken	SC	Purchase	Preferred Stock w/Warrants	$18,000,000	Par
12/19/2008	Wintrust Financial Corporation	Lake Forest	IL	Purchase	Preferred Stock w/Warrants	$250,000,000	Par
12/19/2008	Flushing Financial Corporation	Lake Success	NY	Purchase	Preferred Stock w/Warrants	$70,000,000	Par
12/19/2008	Monarch Financial Holdings, Inc.	Chesapeake	VA	Purchase	Preferred Stock w/Warrants	$14,700,000	Par
12/19/2008	StellarOne Corporation	Charlottesville	VA	Purchase	Preferred Stock w/Warrants	$30,000,000	Par
12/19/2008	Union Bankshares Corporation	Bowling Green	VA	Purchase	Preferred Stock w/Warrants	$59,000,000	Par
12/19/2008	Tidelands Bancshares, Inc	Mt. Pleasant	SC	Purchase	Preferred Stock w/Warrants	$14,448,000	Par
12/19/2008	Bancorp Rhode Island, Inc.	Providence	RI	Purchase	Preferred Stock w/Warrants	$30,000,000	Par
12/19/2008	Hawthorn Bancshares, Inc.	Lee's Summit	MO	Purchase	Preferred Stock w/Warrants	$30,255,000	Par
12/19/2008	The Elmira Savings Bank, FSB	Elmira	NY	Purchase	Preferred Stock w/Warrants	$9,090,000	Par
12/19/2008	Alliance Financial Corporation	Syracuse	NY	Purchase	Preferred Stock w/Warrants	$26,918,000	Par
12/19/2008	Heartland Financial USA, Inc.	Dubuque	IA	Purchase	Preferred Stock w/Warrants	$81,698,000	Par
12/19/2008	Citizens First Corporation	Bowling Green	KY	Purchase	Preferred Stock w/Warrants	$8,779,000	Par
2/ 12/19/2008	FFW Corporation	Wabash	IN	Purchase	Preferred Stock w/ Exercised Warrants	$7,289,000	Par
2/ 12/19/2008	Plains Capital Corporation	Dallas	TX	Purchase	Preferred Stock w/ Exercised Warrants	$87,631,000	Par
2/ 12/19/2008	Tri-County Financial Corporation	Waldorf	MD	Purchase	Preferred Stock w/ Exercised Warrants	$15,540,000	Par
3/ 12/19/2008	OneUnited Bank	Boston	MA	Purchase	Preferred Stock	$12,063,000	Par
2/ 12/19/2008	Patriot Bancshares, Inc.	Houston	TX	Purchase	Preferred Stock w/ Exercised Warrants	$26,038,000	Par
2/ 12/19/2008	Pacific City Finacial Corporation	Los Angeles	CA	Purchase	Preferred Stock w/ Exercised Warrants	$16,200,000	Par
2/ 12/19/2008	Marquette National Corporation	Chicago	IL	Purchase	Preferred Stock w/ Exercised Warrants	$35,500,000	Par
2/ 12/19/2008	Exchange Bank	Santa Rosa	CA	Purchase	Preferred Stock w/ Exercised Warrants	$43,000,000	Par
2/ 12/19/2008	Monadnock Bancorp, Inc.	Peterborough	NH	Purchase	Preferred Stock w/ Exercised Warrants	$1,834,000	Par
2/ 12/19/2008	Bridgeview Bancorp, Inc.	Bridgeview	IL	Purchase	Preferred Stock w/ Exercised Warrants	$38,000,000	Par
2/ 12/19/2008	Fidelity Financial Corporation	Wichita	KS	Purchase	Preferred Stock w/ Exercised Warrants	$36,282,000	Par

2/	12/19/2008	Bridgeview Bancorp, Inc.	Bridgeview	IL	Purchase	Preferred Stock w/ Exercised Warrants	$38,000,000	Par
2/	12/19/2008	Fidelity Financial Corporation	Wichita	KS	Purchase	Preferred Stock w/ Exercised Warrants	$36,282,000	Par
2/	12/19/2008	Patapsco Bancorp, Inc.	Dundalk	MD	Purchase	Preferred Stock w/ Exercised Warrants	$6,000,000	Par
2/	12/19/2008	NCAL Bancorp	Los Angeles	CA	Purchase	Preferred Stock w/ Exercised Warrants	$10,000,000	Par
2/	12/19/2008	FCB Bancorp, Inc.	Louisville	KY	Purchase	Preferred Stock w/ Exercised Warrants	$9,294,000	Par
	12/23/2008	First Financial Bancorp	Cincinnati	OH	Purchase	Preferred Stock w/ Warrants	$80,000,000	Par
	12/23/2008	Bridge Capital Holdings	San Jose	CA	Purchase	Preferred Stock w/ Warrants	$23,864,000	Par
	12/23/2008	International Bancshares Corporation	Laredo	TX	Purchase	Preferred Stock w/ Warrants	$216,000,000	Par
	12/23/2008	First Sound Bank	Seattle	WA	Purchase	Preferred Stock w/ Warrants	$7,400,000	Par
	12/23/2008	M&T Bank Corporation	Buffalo	NY	Purchase	Preferred Stock w/ Warrants	$600,000,000	Par
	12/23/2008	Emclaire Financial Corp.	Emlenton	PA	Purchase	Preferred Stock w/ Warrants	$7,500,000	Par
	12/23/2008	Park National Corporation	Newark	OH	Purchase	Preferred Stock w/ Warrants	$100,000,000	Par
	12/23/2008	Green Bankshares, Inc.	Greeneville	TN	Purchase	Preferred Stock w/ Warrants	$72,278,000	Par
	12/23/2008	Cecil Bancorp, Inc.	Elkton	MD	Purchase	Preferred Stock w/ Warrants	$11,560,000	Par
	12/23/2008	Financial Institutions, Inc.	Warsaw	NY	Purchase	Preferred Stock w/ Warrants	$37,515,000	Par
	12/23/2008	Fulton Financial Corporation	Lancaster	PA	Purchase	Preferred Stock w/ Warrants	$376,500,000	Par
	12/23/2008	United Bancorporation of Alabama, Inc.	Atmore	AL	Purchase	Preferred Stock w/ Warrants	$10,300,000	Par
	12/23/2008	MutualFirst Financial, Inc.	Muncie	IN	Purchase	Preferred Stock w/ Warrants	$32,382,000	Par
	12/23/2008	BCSB Bancorp, Inc.	Baltimore	MD	Purchase	Preferred Stock w/ Warrants	$10,800,000	Par
	12/23/2008	HMN Financial, Inc.	Rochester	MN	Purchase	Preferred Stock w/ Warrants	$26,000,000	Par
	12/23/2008	First Community Bank Corporation of America	Pinellas Park	FL	Purchase	Preferred Stock w/ Warrants	$10,685,000	Par
	12/23/2008	Sterling Bancorp	New York	NY	Purchase	Preferred Stock w/ Warrants	$42,000,000	Par
	12/23/2008	Intervest Bancshares Corporation	New York	NY	Purchase	Preferred Stock w/ Warrants	$25,000,000	Par
	12/23/2008	Peoples Bancorp of North Carolina, Inc.	Newton	NC	Purchase	Preferred Stock w/ Warrants	$25,054,000	Par
	12/23/2008	Parkvale Financial Corporation	Monroeville	PA	Purchase	Preferred Stock w/ Warrants	$31,762,000	Par
	12/23/2008	Timberland Bancorp, Inc.	Hoquiam	WA	Purchase	Preferred Stock w/ Warrants	$16,641,000	Par
	12/23/2008	1st Constitution Bancorp	Cranbury	NJ	Purchase	Preferred Stock w/ Warrants	$12,000,000	Par
	12/23/2008	Central Jersey Bancorp	Oakhurst	NJ	Purchase	Preferred Stock w/ Warrants	$11,300,000	Par
2/	12 /23/2008	Western Illinois Bancshares Inc.	Monmouth	IL	Purchase	Preferred Stock w/ Exercised Warrants	$6,855,000	Par
2/	12 /23/2008	Saigon National Bank	Westminster	CA	Purchase	Preferred Stock w/ Exercised Warrants	$1,549,000	Par
2/	12 /23/2008	Capital Pacific Bancorp	Portland	OR	Purchase	Preferred Stock w/ Exercised Warrants	$4,000,000	Par
2/	12 /23/2008	Uwharrie Capital Corp	Albemarle	NC	Purchase	Preferred Stock w/ Exercised Warrants	$10,000,000	Par
3/	12/23/2008	Mission Valley Bancorp	Sun Valley	CA	Purchase	Preferred Stock	$5,500,000	Par
2/	12 /23/2008	The Little Bank, Incorporated	Kinston	NC	Purchase	Preferred Stock w/ Exercised Warrants	$7,500,000	Par
2/	12 /23/2008	Pacific Commerce Bank	Los Angeles	CA	Purchase	Preferred Stock w/ Exercised Warrants	$4,060,000	Par
2/	12 /23/2008	Citizens Community Bank	South Hill	VA	Purchase	Preferred Stock w/ Exercised Warrants	$3,000,000	Par
2/	12 /23/2008	Seacoast Commerce Bank	Chula Vista	CA	Purchase	Preferred Stock w/ Exercised Warrants	$1,800,000	Par
2/	12 /23/2008	TCNB Financial Corp.	Dayton	OH	Purchase	Preferred Stock w/ Exercised Warrants	$2,000,000	Par
2/	12 /23/2008	Leader Bancorp, Inc.	Arlington	MA	Purchase	Preferred Stock w/ Exercised Warrants	$5,830,000	Par
2/	12 /23/2008	Nicolet Bankshares, Inc.	Green Bay	WI	Purchase	Preferred Stock w/ Exercised Warrants	$14,964,000	Par
2/	12 /23/2008	Magna Bank	Memphis	TN	Purchase	Preferred Stock w/ Exercised Warrants	$13,795,000	Par
2/	12 /23/2008	Western Community Bancshares, Inc.	Palm Desert	CA	Purchase	Preferred Stock w/ Exercised Warrants	$7,290,000	Par
2/	12 /23/2008	Community Investors Bancorp, Inc.	Bucyrus	OH	Purchase	Preferred Stock w/ Exercised Warrants	$2,600,000	Par
2/	12 /23/2008	Capital Bancorp, Inc.	Rockville	MD	Purchase	Preferred Stock w/ Exercised Warrants	$4,700,000	Par
2/	12 /23/2008	Cache Valley Banking Company	Logan	UT	Purchase	Preferred Stock w/ Exercised Warrants	$4,767,000	Par
2/	12 /23/2008	Citizens Bancorp	Nevada City	CA	Purchase	Preferred Stock w/ Exercised Warrants	$10,400,000	Par
2/	12 /23/2008	Tennessee Valley Financial Holdings, Inc.	Oak Ridge	TN	Purchase	Preferred Stock w/ Exercised Warrants	$3,000,000	Par
2/	12 /23/2008	Pacific Coast Bankers' Bancshares	San Francisco	CA	Purchase	Preferred Stock w/ Exercised Warrants	$11,600,000	Par
	12/31/2008	SunTrust Banks, Inc.	Atlanta	GA	Purchase	Preferred Stock w/ Warrants	$1,350,000,000	Par
	12/31/2008	The PNC Financial Services Group Inc.	Pittsburgh	PA	Purchase	Preferred Stock w/ Warrants	$7,579,200,000	Par
	12/31/2008	Fifth Third Bancorp	Cincinnati	OH	Purchase	Preferred Stock w/ Warrants	$3,408,000,000	Par
	12/31/2008	Hampton Roads Bankshares, Inc.	Norfolk	VA	Purchase	Preferred Stock w/ Warrants	$80,347,000	Par
	12/31/2008	CIT Group Inc.	New York	NY	Purchase	Preferred Stock w/ Warrants	$2,330,000,000	Par
	12/31/2008	West Bancorporation, Inc.	West Des Moines	IA	Purchase	Preferred Stock w/ Warrants	$36,000,000	Par
2/	12 /31/2008	First Banks, Inc.	Clayton	MO	Purchase	Preferred Stock w/ Exercised Warrants	295,400,000	Par
						TOTAL	$187,539,500,000	

1/ Settlement deferred pending merger.
2/ Privately-held qualified financial institution; Treasury received a warrant to purchase additional shares of preferred stock, which it exercised immediately.
3/ To promote community development financial institutions (CDFIs), Treasury did not require warrants as part of its investment.

VII. TRANSACTION REPORT – SYSTEMICALLY SIGNIFICANT FAILING INSTITUTIONS

SYSTEMICALLY SIGNIFICANT FAILING INSTITUTIONS

	Seller						
Date	Name of Institution	City	State	Transaction Type	Description	Price Paid	Pricing Mechanism
11/25/2008	AIG	New York	NY	Purchase	Preferred Stock w/ Warrants	$40,000,000,000	Par

VIII. TRANSACTION REPORT – AUTOMOTIVE INDUSTRY FINANCING PROGRAM

AUTOMOTIVE INDUSTRY FINANCING PROGRAM

Date	Seller			Transaction Type	Description	Amount	Pricing Mechanism
	Name of Institution	City	State				
12/29/2008	GMAC LLC	Detroit	MI	Purchase	Preferred Stock w/ Exercised Warrants	$5,000,000,000	Liquidation Preference
1/ 12/29/2008	General Motors Corporation	Detroit	MI	Purchase	Debt Obligation	$1,000,000,000	N/A
2/ 12/31/2008	General Motors Corporation	Detroit	MI	Purchase	Debt Obligation w/ Warrants	$9,400,000,000	N/A
					TOTAL	$15,400,000,000	

1/ Treasury committed to lend General Motors Corporation up to $1,000,000,000. The ultimate level of funding will depend upon the level of current investor participation in GMAC LLC's rights offering. Once determined, the Amount will be updated to reflect the final funding level.

2/ The Amount includes $4,000,000,000 funded on December 31, 2008, and $5,400,000,000 to be funded on January 16, 2009; it does not include an additional loan of $4,000,000,000, which is contingent on Treasury's authority under section 115(a) of EESA.

IX. TRANSACTION REPORT – TARGETED INVESTMENT PROGRAM

TARGETED INVESTMENT PROGRAM

	Seller						
Date	Name of Institution	City	State	Transaction Type	Description	Price Paid	Pricing Mechanism
12/31/20008	Citigroup	New York	NY	Purchase	Preferred Stock w/ Warrants	$20,000,000,000	Par

X. PROJECTED COSTS AND LIABILITIES

U.S. Treasury Department
Office of Financial Stability

Troubled Asset Relief Program

Projected Costs and Liabilities [Section 105(a)(3((E)]

For Period Ending December 31, 2008

Type of Expense/Liability	Amount
None	

U.S. Treasury Department
Office of Financial Stability

Troubled Asset Relief Program

Programmatic Operating Expenses [Section 105(a)(3)(F)]

For Period Ending December 31, 2008

Type of Expense	Amount
Compensation for financial agents and legal firms	$7,757,662

U.S. Treasury Department
Office of Financial Stability

Troubled Asset Relief Program

Insurance Contracts [Section 105(a)(3((B)]

For Period Ending December 31, 2008

Name	Amount
None	

Notes: Treasury interprets this reporting requirement as applicable to costs and liabilities related to insurance contracts entered into under the provisions of section 102 of the EESA. No such contracts have been entered into to date.