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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 07-11448

Adv. Case No. 07-01710

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In the Matter of:

THE 1031 TAX GROUP, LLC,

Debtor.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

October 22, 2007

2:01 p.m.

**B E F O R E:**

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

**MOTION to Approve Stipulation of Settlement**

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**Transcribed By: Esther Accardi**

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## P R O C E E D I N G S

1  
2 THE COURT: Please be seated. We're here on number  
3 07-11448, The 1031 Tax Group, it's debtors' Rule 9019 motion to  
4 approve stipulation of settlement with Colorado Capital Bank.  
5 Counsel, please make your appearances. I guess everybody has  
6 made their appearances before, I apologize for that. Mr.  
7 Sacks?

8 MR. SACKS: Ira Sacks from Dreier for the debtors.  
9 Your Honor, I have a proffer of testimony that Mr. Lukenda  
10 would give. Rather than actually reading it into the record I  
11 do have copies for the Court and other counsel present if Your  
12 Honor would prefer.

13 THE COURT: Well, we have people on the phone so I  
14 think for purposes of the record you should read it.

15 MR. SACKS: That's fine, Your Honor. I think it's  
16 worthwhile to briefly describe what the settlement is. I think  
17 that everybody who has participated in this case knows the  
18 nature of the litigation that's gone on throughout this case  
19 between Colorado Capital Bank and the debtors.

20 The stipulation of settlement that we're here on  
21 today fully resolves all of those issues. Without  
22 characterizing in detail the stipulation of settlement it  
23 settles the estimation hearing and the CCB claims by providing  
24 a 850,000 dollar allotted attorneys' fees claim and  
25 establishing a 400,000 dollar reserve. The attorneys' fees

1 claim that's allowed is satisfied by 300,000 dollars basically  
2 in waiving the marketing services fee from CCB, a payment once  
3 this order is final and not subject to a state pending appeal,  
4 a payment of 225,000 dollars to CCB immediately, and then the  
5 establishment of a 325,000 dollar segregated account which will  
6 likely, given the status of the case, be paid to CCB on January  
7 31, 2008. The reserve that's established of 400,000 dollars is  
8 to secure basically defense and expenses and judgments in  
9 connection with defending actions actually commenced by 1031  
10 exchangers arising out of suits against Colorado Capital,  
11 arising out of 1031 exchange agreements. And that reserve  
12 stays in place for two years from the entry of a final approval  
13 order. Both with respect to this 9019 and the prior global  
14 settlement agreement.

15 There are other provisions governing and conditions  
16 relating to Colorado Capital Bank's activities in the event of  
17 a plan. I think that everybody has copies of that so I'm not  
18 going to go into that in detail.

19 If called to testify, Mr. Lukenda is here, Mr.  
20 Lukenda would testify as follows in support of the settlement.  
21 That he is managing director at year round consulting and the  
22 chief restructuring officer for each of the debtors and  
23 debtors-in-possession and that he's held that position from  
24 just prior to the petition date. That he was aware prior to  
25 the petition date of a dispute between one or more of the

1 debtors in Colorado Capital Bank and that he authorized  
2 debtors' counsel to file the debtors' motion for order  
3 confirming the applicability of the automatic stay on May 15,  
4 2007. But he does believe that the funds formally maintained  
5 in the names of certain of the plaintiff in the accounts of CCB  
6 belong to the plaintiffs estate and that they should be turned  
7 over by CCB.

8 Mr. Lukenda would also testify that he authorized  
9 debtors' counsel to commence the adversary proceeding 07-1710  
10 which sought among other relief a declaration that the funds  
11 constituted property of the estate in the addition to the  
12 assertion of claims against CCB as described in that complaint.

13 Mr. Lukenda would also testify that CCB owes IXG at  
14 least 310,000 dollars pursuant to the marketing service  
15 agreement dated December 1, 2006 and entered into between IXG  
16 and CCB.

17 Mr. Lukenda would testify that CCB has filed fifteen  
18 proofs of claims one in connection with each of the debtors  
19 consecutively numbered 584 through 599 and then all of them  
20 including the addendum attached thereto is substantively  
21 identical. And then predicated on the alleged indemnification  
22 set up on recoupment rights based on various agreements between  
23 the debtors and CCB. And that CCB has also asserted the  
24 counter claim for -- counter claims for setoff and recoupment  
25 in the adversary proceeding.

1           CCB, Mr. Lukenda would testify, seeks indemnification  
2 for the fees and expenses in as occurred in connection with the  
3 action it started in district court in Denver Colorado. The  
4 amounts it incurred or to be incurred protecting it's legal  
5 rights and interests in the debtors' general bankruptcy cases.  
6 Amounts incurred or to be incurred defending itself against  
7 plaintiffs direct claims against it in the adversary  
8 proceeding. Amounts incurred or to be incurred defending  
9 against perspective claims against CCB by exchangers and  
10 potential future liability to exchangers. CCB's alleged setoff  
11 and recoupment rights were preserved subject to the rights of  
12 the debtors to object against all funds pursuant to the terms  
13 of the transfer order that Your Honor entered on July 30, 2007  
14 transferring the funds from CCB to the segregated account at JP  
15 Morgan Chase.

16           Mr. Lukenda believes he would testify that the  
17 claims, the CCB claims as reflected in the CCB opposition to  
18 the debtors' estimation motion are overstayed and particularly  
19 in light of the releases provided in the global settlement  
20 agreement.

21           Nevertheless, Mr. Lukenda would also testify that he  
22 believes that the settlement agreement with CCB is in the best  
23 interest of the plaintiffs, the other debtors and their  
24 estates, creditors and parties-in-interest based on the  
25 documentation produced by CCB in certain deposition testimony

1 taken in connection with the adversary proceeding. For the  
2 following reasons: CCB would have vigorously sought to meet  
3 its burden in connection with the estimation hearing and there  
4 were some costs associated with proceeding in the estimation  
5 hearing were significant. Although, the applicability of  
6 reaching the agreements remained at issue the scope of the  
7 indemnification provisions in the agreement were very broad.  
8 Plaintiffs on their side were unlikely to obtain the  
9 cooperation of any of its formal employees who had first hand  
10 knowledge of the intent of the parties to fulfill those  
11 agreements. Consequently, in the event that the agreements  
12 were deemed applicable plaintiffs face a substantial risk that  
13 CCB would be entitled to indemnification for most if not all of  
14 the attorneys' fees it has incurred to date.

15 In addition, the scope of the indemnification  
16 provisions contained in the agreement Mr. Lukenda would testify  
17 may have resulted in plaintiffs' estates being obligated to  
18 indemnify CCB, but the attorneys' fees incurred by CCB in  
19 defending the adversary proceeding itself.

20 Likewise, Mr. Lukenda would testify that plaintiffs  
21 could not ignore the increased likelihood of exchangers  
22 commencing actions against CCB based upon contemplated 1031  
23 exchangers involving any of the plaintiffs in the even that  
24 recoveries to creditors in the debtors' cases are inadequate  
25 and/or the process of obtaining such recoveries is overly

1 protracted. Accordingly, a lower number for CCB's attorneys'  
2 fees and costs may have been established at the estimation  
3 hearing, there was a substantial risk of a reserve far in  
4 excess of 400,000 dollars. Thus, the net cost of the  
5 settlement between 550,000 dollars and 950,000 dollars cost to  
6 the estates is far below the outcome risk by going forward with  
7 the estimation proceeding, at which CCB would have sought a  
8 minimum of 850,000 dollars in fees and costs and a seven  
9 million dollar reserve. As a result, in addition to  
10 eliminating the costs and risks involved in resolving  
11 plaintiffs' disputes with CCB at the estimation hearing  
12 plaintiffs also avoid the risk that the CCB claims would be  
13 estimated at an amount which would have precluded the debtors  
14 from accessing any of the funds at this time when very little  
15 cash is available to the debtors.

16 Moreover, approval of a settlement reduces the amount  
17 of the CCB claims against the estates. This is particularly  
18 true since the reserve, and will revert back to the estates, in  
19 the even that CCB does not incur any fees, costs or damages in  
20 connection with any action commenced by exchangers. And to the  
21 extent that such actions are in fact commenced the estates  
22 indemnity obligation is capped at 400,000 dollars.

23 With respect to the release of the plaintiffs' claims  
24 against CCB, CCB's liability, Mr. Lukenda would testify, on  
25 those claims is far from absolute. For example, CCB's

1 liability on plaintiffs' claims was largely if not solely  
2 predicated on CCB's pre-petition refusal to honor wire  
3 instructions and denying plaintiffs' on-line access to account  
4 information. Although plaintiffs have asserted that such  
5 refusal and denial were unreasonable subsequent to their  
6 commencement of the adversary proceeding plaintiffs were  
7 provided with certain documentation which may support CCB's  
8 view of their -- the basis for their refusal. Moreover,  
9 plaintiffs could not ignore the fact that the individual making  
10 the request for the funds to be wired has been alleged in  
11 testimony to have made statements to former IXG employees and  
12 CCB which may seriously call into question the credibility of  
13 that individual.

14           Although in discovery in the adversary proceeding Mr.  
15 Lukenda would testify may have provided evidence supporting  
16 plaintiffs' claims the cost of conducting such discovery,  
17 including multiple trips to Colorado and other states to depose  
18 non-party witnesses would have been staggering. In addition,  
19 since the time of the commencement of the adversary proceeding  
20 plaintiffs have become aware of additional facts and  
21 circumstances which may make plaintiffs' ability to meet their  
22 burdens in connection with the claims alleged against CCB more  
23 difficult. The event such discovery fails to prove plaintiffs'  
24 claims the estates would be saddled with their own attorneys'  
25 fees and costs and potentially with the attorneys' fees and

1 costs incurred by CCB, not only in connection with such  
2 discovery but all other fees and costs recently incurred in  
3 connection with the adversary proceeding.

4 In light of the above, Mr. Lukenda would testify that  
5 he believes that the settlement represents a reasonable  
6 resolution of the parties disputes and meets the standards for  
7 approval of settlements in this circuit and this Court and that  
8 plaintiffs'' concessions represents a fair and beneficial  
9 outcome to plaintiffs and their estates and would provide more  
10 of many reasonable benefit to plaintiffs under the  
11 circumstances.

12 Mr. Lukenda would also testify that the settlement  
13 agreement is in the best interests of all creditors by virtue  
14 of, among other things, the elimination of the risks associated  
15 with both the estimation proceeding and the adversary --  
16 estimation hearing and the adversary proceeding while at the  
17 same time freeing up significant funds for the debtors' cases.

18 In short, Mr. Lukenda would testify that the  
19 settlement certainly exceed the lowest level of reasonable and  
20 standards of what's in the case law.

21 In response to the motion, Your Honor, we have  
22 receive one -- what I'll say is label the rejection.

23 THE COURT: Before you go on, you're completed with  
24 the proffer?

25 MR. SACKS: I have completed the proffer, Your Honor.

1 THE COURT: Is there anyone who wishes to cross-  
2 examine Mr. Lukenda on the subject of the proffer?

3 MR. MILLS: I'll take the opportunity to cross  
4 examine the witness.

5 THE COURT: And who are you, sir?

6 MR. MILLS: My name is Richard Mills. I'm with  
7 McElroy Deutsch Mulvaney & Carpenter, attorneys on behalf of  
8 the insurance company limited objectors CNA, Chubb and  
9 Hartford.

10 THE COURT: First I'd like to -- before I would  
11 permit you to cross examine Mr. Lukenda I would like for you to  
12 explain to me why your objection, which I have reviewed, is  
13 relevant to the issues that the Court must consider in deciding  
14 whether to approve the settlement. Please make your appearance  
15 again.

16 MR. MILLS: Our limited objection --

17 THE COURT: Just make your appearance, please.

18 MR. MILLS: Richard Mills, McElroy Deutsch Mulvaney &  
19 Carpenter, counsel for the objectors, CAN, Chubb and Hartford.

20 THE COURT: Go ahead.

21 MR. MILLS: Our objection is a limited objection not  
22 directed to the settlement per se but to the disposition of  
23 funds which are to be left as a reserve and then placed into  
24 the general funds of the debtor.

25 THE COURT: Why is that relevant to the proceeding

1 before the Court today?

2 MR. MILLS: The settlement is based on an  
3 understanding that the parties are going to be able to proceed  
4 with their claims in the bankruptcy. That is to say the  
5 exchangers would be able to proceed with those claims.

6 THE COURT: This settlement approves a settlement  
7 between the debtors and Colorado Capital Bank with respect to  
8 the claims in the adversary proceeding and in the estimation  
9 proceeding. It does not deal with the issue of what happens to  
10 the funds that come back to the debtors.

11 MR. MILLS: There is a provision in the settlement  
12 however which says that the funds that go to the debtors would  
13 be used for the general aberration of the debtors. These are  
14 trust funds which were -- which were held --

15 THE COURT: That's your position.

16 MR. MILLS: That is our position.

17 THE COURT: The issue of the character or  
18 characterization of the funds was resolved in a settlement  
19 approved by the Court on October 15th and an order entered on  
20 October 18th. That's not an issue before the Court today, is  
21 it?

22 MR. MILLS: I think it should be, Your Honor.

23 THE COURT: Well, don't tell me it should be tell me  
24 why it is. You did not object to the settlement with the  
25 settling exchangers. That hearing occurred on October 15, I

1 rendered a bench decision during the hearing and the order was  
2 entered by the Court on October 18. That settlement which you  
3 did not -- your clients did not object to resolved the issue of  
4 the funds that would be returned to the debtors' estates were  
5 property of the debtors' estate subject to the claim of  
6 Colorado Capital Bank which has been resolved in the settlement  
7 before the Court today. Why should I even hear you?

8 MR. MILLS: Well, to one limited extent Colorado  
9 Capital Bank is asserting a claim to those returned funds. To  
10 the extend that there are --

11 THE COURT: They're not. They've settled their claim  
12 with respect to the remaining funds. Why do you have any  
13 standing to dispute funds that Colorado Capital Bank will get  
14 to keep as a result of this settlement?

15 MR. MILLS: Well, because of the --

16 THE COURT: I didn't see that in your objection. You  
17 were objecting to the funds that were coming back to the  
18 debtors' estate not to what the amount that Colorado Capital  
19 Bank was getting to keep under the settlement.

20 MR. MILLS: That is correct. I was attempting to  
21 address the question that you just asked. Our objection again  
22 is limited to placing these debtors on notice that the  
23 disposition of funds which were held for exchangers will  
24 trigger certain provisions of their insurance coverage. And to  
25 the extent that they or any of the exchangers are going to seek

1 to recover and under that insurance coverage they do have duty  
2 under the insurance policies to preserve and protect the  
3 segregation rights of their insurer. And so funds which were  
4 once held by exchangers as to which exchangers will assert a  
5 claim in the future we anticipate against the debtors if those  
6 funds are dissipated through the general operation of the  
7 bankrupt that's not going to be a taking within the conception  
8 of the insurance coverage.

9 THE COURT: I understand the position you're  
10 attempting to state now but I don't see how it bears any  
11 relationship to the issues that are before the Court on this  
12 settlement. On your -- and I did -- the debtors yesterday  
13 filed a motion for leave to file a reply brief with the reply  
14 brief attached and I read that as well. I don't understand why  
15 the issues you're raising about the use of the funds by the  
16 debtors once they get it back is pertinent to the issues before  
17 the Court and whether to approve the settlement with CCB.

18 MR. MILLS: Well, I think it's key to that settlement  
19 that these funds are funds that should be recognized as being  
20 held for the benefit of exchangers. And so if we're going to  
21 dissipate those funds that has consequences. And I guess we  
22 want to be on the record that those consequences -- not guess I  
23 know we want to be on record that those consequences may very  
24 well impair rights to insurance coverage in the future.

25 THE COURT: You agree that rights to insurance

1 coverage are not an issue on this settlement?

2 MR. MILLS: To the extent that they would be  
3 impaired -- to the extent that they will be impaired I think  
4 that they are an issue. But if the Court is going to take  
5 action which permits the debtor to take this money out of  
6 segregated accounts that -- under the policies of insurance  
7 that will remove those funds from coverage. And so to the  
8 extent that this settlement permits that it voids or vitiates  
9 the insurance coverage that may be available for similar claims  
10 in the future. So to that extent I think it is.

11 THE COURT: So what is it that you wish to cross  
12 examine Mr. Lukenda about?

13 MR. MILLS: The only issue that I have for Mr.  
14 Lukenda was his understanding that the funds belonged to and  
15 were funds of the estate. That would be the only issue that I  
16 would --

17 THE COURT: I ruled on that in interim order on  
18 October 18th. You did not -- you received notice of that  
19 settlement, correct?

20 MR. MILLS: We did not, but it was on the docket so I  
21 guess we're deemed to have.

22 THE COURT: You made an appearance -- you previously  
23 made an appearance in the case, correct?

24 MR. MILLS: We appeared the first on the 19th, Your  
25 Honor, in the bankruptcy proceeding.

1 THE COURT: Well, I'm going to let Mr. Sacks address  
2 the issue of whether Mr. Mills' clients received notice.

3 MR. SACKS: Ira Sacks for the debtors. As we pointed  
4 out in the exhibit attached to our motion for leave to file a  
5 reply the insurers -- at least the insurers that were  
6 identified because I'm a little confused by exactly which  
7 insurers are at issue. The limited objection we receive was on  
8 behalf of Continental Casualty Federal Insurance in Twin City.  
9 That's what we addressed in the proposed reply. And in  
10 document number 435 in the adversary proceeding at pages 15,  
11 22, and 71 all three of those entities received notice of the  
12 global settlement.

13 THE COURT: Thank you, Mr. Sacks. Mr. Mills, do you  
14 dispute that?

15 MR. MILLS: No. I will not --

16 THE COURT: Your clients received notice of the  
17 proposed settlement and of the hearing that took place on  
18 October 15th, correct?

19 MR. MILLS: That would appear to be the case, Your  
20 Honor.

21 THE COURT: And you didn't file an objection with  
22 respect to the issues raised by the settlement, correct?

23 MR. MILLS: At that point, no, Your Honor. And we  
24 don't object to the settlement per se.

25 THE COURT: Well, it was -- the order entered October

1 18th that resolved the issue of whether the funds were property  
2 of the debtor estate, not this settlement today. It was the  
3 settlement -- the order entered on October 18th as to which  
4 your clients did not object and you did not appear at the  
5 hearing on October 15 and object to the settlement on the basis  
6 you're claiming now.

7 MR. MILLS: We did not appear on October 15th.

8 THE COURT: What is it you want -- I still -- what  
9 issues relevant to approval of this settlement today do you  
10 wish to examine Mr. Lukenda?

11 MR. MILLS: It would only be with respect to the --  
12 to the disposition of the funds. And if Your Honor's ruling is  
13 that those funds are part of the estate then that cross  
14 examination I guess would be -- at least for record purposes  
15 and not for convincing of the parties.

16 THE COURT: What do you mean for record purposes?

17 MR. MILLS: Well, to determine --

18 THE COURT: The Court rule -- the Court entered an  
19 order on October 18th. It resolved the issue of whether the  
20 funds were property of the debtor estate. What is it that you  
21 wish to examine Mr. Lukenda about beyond what's already  
22 contained in the October 18th order?

23 MR. MILLS: The examination would be with respect to  
24 his understanding of the source and providence of those funds.  
25 Where did those funds come from, did those funds come from the

1 operating accounts of the 1031 exchangers or were those  
2 exchange funds that were placed into trust accounts by  
3 individual exchangers for 1031, that would be the scope of the  
4 exam.

5 THE COURT: All right. Mr. Mills, I'm overruling  
6 your objection. The grounds for your objection are not proper,  
7 they're not issued that are pending before the Court today.  
8 Thank you. All right. That being the only objection I don't  
9 think there's any cross examination of Mr. Lukenda. But Mr.  
10 Hamilton, did you wish to examine?

11 MR. HAMILTON: Not to examine but I would like to  
12 respond to the proffer.

13 THE COURT: Okay. Go ahead, Mr. Hamilton.

14 MR. HAMILTON: Your Honor, Robert Hamilton of Jones  
15 Day on behalf of Colorado Capital Bank. We certainly support  
16 the relief that the debtors seek in this motion to approve the  
17 settlement. With respect to the proffer of Mr. Lukenda's  
18 testimony I do not seek the opportunity to cross examine Mr.  
19 Lukenda. I would state for the record that CCB disputes two  
20 things that were set forth in the proffer, the assertion that  
21 Mr. Lukenda believes that CCB owes the debtors 310,000 dollars  
22 for a marketing fee. We believe that figure is incorrect. We  
23 also believe that testimony would be inadmissible to the extent  
24 it offers a legal conclusion. The only other portion of the  
25 proffer that we would oppose, we don't agree with is the

1 assertion towards the end, in paragraph 22 of the draft it  
2 wasn't circulated, that there was a pre-petition refusal by CCB  
3 to honor a wiring instruction. CCB contends that there was no  
4 pre-petition refusal to honor any specific wire instruction.  
5 Other than those two clarifications we support everything  
6 that's in the debtors' motion. And with respect to Mr.  
7 Lukenda's proffer we would support that admission into evidence  
8 as well.

9 THE COURT: Thank you, Mr. Hamilton.

10 MR. HAMILTON: I would ask Your Honor, just for  
11 clarification purposes I know you overruled the insurers'  
12 objection but I listened very carefully to the interchange  
13 between the Court and counsel and it wasn't clear to me whether  
14 or not the objection you have overruled was an objection to the  
15 use of 550,000 dollars of the funds to pay -- are to resolve  
16 CCB's claim or not. It wasn't clear to me if the insurers are  
17 objecting that 550,000 payment.

18 THE COURT: I didn't see that in the written  
19 objections.

20 MR. HAMILTON: It's in all new heading but not in  
21 their written objection. And I would just like to be state for  
22 the record whether or not their objection that you overruled is  
23 an objection to the 550,000 dollar payment to CCB?

24 THE COURT: Mr. Mills?

25 MR. MILLS: Richard Mills, McElroy Deutsch for the

1 objectors. The objection is to the use of funds for any  
2 purpose other than to return those funds to exchangers. So to  
3 the extent that that includes the 550,000 dollars paid the CCB,  
4 yes, it's included.

5 THE COURT: Show me where that is in your objection.

6 MR. MILLS: As I understand it it was in the --

7 THE COURT: Show me where?

8 MR. MILLS: The objection, Your Honor --

9 THE COURT: I have it in front of me.

10 MR. MILLS: Is paragraph 3. I misstated, the amount  
11 that's objected to is the 7,614,472 dollars. To clarify the  
12 objection is not to the fees for CCB.

13 THE COURT: Your objection begins back on -- you have  
14 a preliminary statement but the actual objection, Mr. Mills,  
15 begins on page 6, the insurers' limited objection to the  
16 stipulation. Show me where in your limited objection. Other  
17 than the fact you're reserving your rights to your insurance --  
18 your clients' policy coverage I don't really see what it is  
19 you're objecting to. You have recitations that precede it  
20 about various facts but your actual objection begins at the  
21 bottom of page 6 beginning with paragraph 17.

22 MR. MILLS: Well, all I can say is that makes the  
23 argument with reference to the policy provisions -- in  
24 paragraph 21 we have "information and belief the funds  
25 maintained in the segregated account are not property of the

1 debtors." That would be the entire fourteen million less the  
2 amount that we're not objecting to.

3 THE COURT: And the amount you're not objecting to is  
4 what, the money that's going back to CCB -- or what's remaining  
5 to CCB, correct?

6 MR. MILLS: To CCB.

7 THE COURT: All right. Thank you. Mr. Hamilton,  
8 does that satisfy you?

9 MR. HAMILTON: Yes, Your Honor. Thank you.

10 THE COURT: Any one for the committee, creditors'  
11 committee, wish to be heard?

12 MS. CYGANOWSKI: Melanie Cyganowski, Greenberg  
13 Traurig, counsel for the unsecured creditors' committee. Your  
14 Honor, as reflected in our papers the committee supports the  
15 resolution that was achieved here. Indeed one of the mainstays  
16 that led the committee to support the resolution with the  
17 exchangers within the same litigation was that this resolution  
18 might also be achieved so we endorse it wholeheartedly.

19 THE COURT: Thank you, Ms. Cyganowksi.

20 MS. CYGANOWSKI: All right.

21 THE COURT: All right. Anybody else wish to be  
22 heard?

23 MR. SACKS: Just briefly in response to Mr.  
24 Hamilton's objection to portions of the proffer. It is correct  
25 that we calculated the market servicing fees differently than

1 they did and if I didn't make it clear the reference to a pre-  
2 petition refusal to honor the wire transfer request was merely  
3 to explain what our claims were in the adversary proceeding and  
4 not to assert them as fact.

5 THE COURT: And I understood that the parties  
6 disputed whether there was a refusal or whether the refusal was  
7 proper. And also disputed whether any amount was due in the  
8 market servicing agreement. So it was certainly the Court's  
9 understanding that those were disputed issues.

10 MR. SACKS: Thank you, Your Honor.

11 THE COURT: The Court is ready to rule. I'm going to  
12 render a bench decision approving the settlement with CCB.  
13 This matter is before the Court in a motion filed by the  
14 debtors seeking approval of a 9019 stipulation of settlement  
15 between the debtors and Colorado Capital Bank, which I'll refer  
16 to as CCB, resolving the adversary proceeding, number 07-1710,  
17 also resolving the estimation proceeding -- estimation motion.

18 The debtors filed the motion for approval on October  
19 15, 2007, it's ECF document number 473. After a review of the  
20 record the Court is convinced the settlement should be approved  
21 because it is above the lowest point in the range of  
22 reasonableness and is fair and equitable and in the best  
23 interest of the estates.

24 This matter came before the Court initially on the  
25 motion of plaintiffs, Investment Exchange Group, LLC, National

1 Exchange Services QI Limited, Rutherford Investment, LLC and  
2 Shamrock Holdings Group, LLC., dated September 10, 2007, the  
3 estimation motion is ECF document number 391. The entry of an  
4 order (1) authorizing the debtors to use, transfer or encumber  
5 the debtors' funds as defined in the estimation motion, and (2)  
6 estimating the CCB claim as defined in the estimation motion.

7 The defendant Colorado Capital Bank filed an  
8 objection to the estimation motion that was dated September 17,  
9 2007, ECF document 409. The Court conducted a telephonic  
10 hearing on September 20, 2007 during which, among other things,  
11 the Court directed that an evidentiary hearing be held in  
12 connection with the estimation motion and authorized the  
13 plaintiffs and CCB to conduct limited discovery for the purpose  
14 of the estimation hearing. The Court then entered pre-trial  
15 order number 10 on October 1, 2007, ECF document 436, which  
16 among other things scheduled the estimation hearing to be held  
17 on October 15, 2007. The parties then advised the Court on  
18 October 11, 2007 that they reached an agreement in principal to  
19 settle both the estimation motion and the claims asserted by  
20 the parties in the adversary proceeding. They were both the  
21 claims by the plaintiffs, the debtors and also there were  
22 counterclaims filed by CCB.

23 The background of these cases has been set forth in  
24 prior opinions of this Court and will not be repeated here.  
25 The dispute resoled in the settlement relates to funds

1 deposited in accounts opened by the plaintiffs and maintained  
2 at Colorado Capital Bank. The debtors originally filed the  
3 adversary proceeding making several claims seeking damages,  
4 released and a finding by the Court that the underlying funds  
5 were not subject to CCB claims. In order to expedite the  
6 proceedings the debtor filed a motion under Section 502(c) to  
7 estimate the claims as held against CCB, CCB claim -- actually  
8 estimate the claims of CCB against the debtors. The debtors  
9 sought to have those claims estimated at zero.

10 CCB alleged that the estimated claims should be in  
11 the millions to recognize the current and potential future  
12 litigation costs of CCB in protecting its interest in relation  
13 to the accounts and defending against the exchangers' suits.  
14 While the action between CCB and the debtors was pending the  
15 debtors reached several settlements with exchange participants  
16 who provided funds to the debtors that were deposited in CCB.  
17 The exchange participants contended that the funds belonged to  
18 them on express, constructive and resulting trust theories.  
19 The debtors contended that the funds were property of the  
20 debtor estates. Each of these settlements with exchange  
21 participants were presented to and approved by the Court at  
22 Rule 9019 motions. Each of these settlements included release  
23 by a settling exchange participants of claims against CCB. The  
24 most recent settlement with exchange participants was approved  
25 by the Court in an order entered on October 18, 2007, its ECF

1 document number 754. Following the rendering of a bench  
2 decision approving the settlement it was read into the record  
3 on October 15, 2007.

4 Additional filings relating to this motion have  
5 included a statement by the unsecured creditors' committee in  
6 support of the settlement, ECF document 771. And a limited  
7 objection by Continental Casualty Company, Federal Insurance  
8 Company and Twin City Fire Insurance Company, ECF document 770.  
9 The objection is limited in scope addressing only a particular  
10 provision of the stipulation related to the funds remaining  
11 from the CCB accounts after the settlement. The objection  
12 states that if the funds were used for something other than  
13 disbursements to the exchangers that may constitute a failure  
14 to mitigate claims against the insurers. The insurers allege  
15 that this failure to mitigate the claims would serve as a  
16 defense to insurance coverage in the event of a covered loss --  
17 in the event a covered loss is established under the "crime  
18 pact" policies, See ECF document 770.

19 Yesterday on October 21, 2007 the debtors filed a  
20 motion for leave to file a reply brief to the insurers'  
21 objection, it's ECF document 791. The reply brief was attached  
22 to the motion. The motion to file the reply brief was granted.  
23 The insurers' objection is overruled. The objection does not  
24 contest the terms of the proposed settlement rather it stakes  
25 out a position of unrelated issues not presently before the

1 Court concerning the use of the funds that were previously  
2 determined to be the property of the debtors' estates pursuant  
3 to the terms of the settlement approved by the Court on October  
4 18, 2007, See ECF 754. The insurers did not object to the  
5 approval of the prior settlement. Mr. Sacks pointed to the  
6 service list for the motion approving that prior settlement  
7 that included these three insurers.

8 The Court refers the parties to the settlement  
9 agreement for its full terms. In summary once approved the  
10 settlement becomes final. CCB will have an allowed secure  
11 claim against the debtor for 850,000 dollars for its attorneys'  
12 fees incurred to date. 300,000 of that amount will be deemed  
13 satisfied by the debtors' claim against CCB for alleged breach  
14 of the marketing services agreement. 225,000 will be paid to  
15 CCB from the funds in question which were released as property  
16 of the debtors' estate pursuant to the settlement with  
17 exchangers approved in the October 18th order. The remaining  
18 325,000 dollars will remain an allowed secured claim against  
19 the debtors' estates secured by funds deposited in a segregated  
20 interest bearing account. This allowed secured claim will be  
21 paid with earned interest on the earlier of the effective date  
22 of a plan or January 31, 2008. In addition, the debtors will  
23 create a 400,000 dollar reserve relating to any fees and  
24 expense reasonably incurred by CCB in relation to any action  
25 commenced by an exchanger arising out of or in connection with

1 a 1031 exchange agreement or to satisfy a judgment entered  
2 against CCB in such case. The reserve will be in a segregated  
3 interest-bearing account which would be available to CCB for  
4 the above type expenses upon approval of the Court unless the  
5 debtors confirm a plan with a channeling injunction and/or  
6 releases in favor of CCB. If the confirmed plan contains a  
7 channeling injunction for two years after the date of approval  
8 of the settlement any amounts remaining in the reserve account  
9 will revert back to the debtors.

10 Bankruptcy Rule 9019 provides the Court authority to  
11 "approve a compromise or settlement." Approval of the  
12 settlement under Bankruptcy Rule 9019 requires a determination  
13 by the Court as to whether the settlement is fair, equitable  
14 and in the best interests of the estate. See *In re Drexel*  
15 *Burnham Lambert Group Inc.*, 134 B.R. 493 at 496 (Bankr.  
16 S.D.N.Y. 1991). The Court's responsibility is "to canvass the  
17 issues and see whether the settlement falls below the lowest  
18 point in the range of reasonableness," at page 497.

19 Applying the factors for approval of settlement set  
20 forth in *In re Iridium Operating LLC*, 478 F.3d 452 at 462, (2d  
21 Cir. 2007). The Court is convinced that the settlement is  
22 above the lowest point in the range of reasonableness and is  
23 fair and equitable and in the best interest of the estate.  
24 With respect to the first two factors for Rule 9019 approval  
25 (1) the balance between the litigation's likelihood of success

1 and the settlement's future benefits, and (2), the changes that  
2 the litigation would be complex and protracted. The Court  
3 concludes that given the complex issues involving both  
4 bankruptcy and contract law the outcome of the litigation was  
5 uncertain. In the absence of this settlement there would be a  
6 significant drain on the estate's assets in the pending complex  
7 and lengthy litigation with CCB. The settlement's are  
8 substantial, mainly the reduction of claims against the  
9 debtors' estates and the elimination of the need for costly  
10 litigation and delay. The third factor asked the Court to  
11 evaluate whether the settlement is in the interest of the  
12 creditors. The fourth factor looks to what extent other  
13 parties-in-interest support the settlement. Here, the  
14 creditors' committee supports the settlement and the objection  
15 from the insurers does not allege that the underlying agreement  
16 is below the lowest point in the range of reasonableness or  
17 that it is not fair and equitable.

18 As already mentioned the objection is to the debtors'  
19 possible future use of the remaining funds which is not an  
20 issue -- not at issue before the Court currently.

21 This stipulation while recognizing the funds as  
22 property of the estate does not require the funds to be applied  
23 in any particular purpose or manner. And as such the Court  
24 will not reject the settlement that is otherwise beneficial to  
25 the creditors based on speculation.

1           With respect to the fifth factor counsel on both  
2 sides are competent and experienced. With respect to the sixth  
3 factor the parties negotiated the settlement in good faith and  
4 at arms length, no evidence points to the contrary.

5           For all of these reasons the settlement is  
6 approved. Mr. Sacks, do we have a disk with a proposed order?

7           MR. SACKS: We do.

8           THE COURT: If you'd give it to Mr. Heinrichs. All  
9 right. Anything else today?

10          MR. SACKS: No, Your Honor.

11          MR. HAMILTON: If I can ask, just for the record, I  
12 think it's obvious from the Court's opinion that you put in the  
13 record that -- make it clear on the record that the record of  
14 this motion includes all the proceedings in the adversary  
15 proceedings.

16          THE COURT: Yes, it does, Mr. Hamilton. Absolutely.  
17 All right. We concluded this matter. I would like to have the  
18 brief chambers conference which we'll do in Judge Gonzalez's  
19 conference room. I would like Mr. Sacks, Ms. Cyganowski, Mr.  
20 Velez-Rivera, Mr. Friedman, I think you represent a group of  
21 creditors. The purpose of the bench conference is to discuss  
22 the proceedings tomorrow.

23          MR. SACKS: May I bring Mr. Fox as well?

24          THE COURT: You may certainly do that. All right.  
25 So we're adjourned. And you can come around and go into Judge

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Gonzalez's conference room.

(Proceedings concluded at 2:42 p.m.)

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RULINGS

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