UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

BARBARA C. LAWRENCE	CASE NO. 97-11258
Debtor	Chapter 11

APPEARANCES:

JOHN W. BAILEY & ASSOCIATES, P.C. Attorneys for Movants Pine West Plaza 2, Suite 202 Washington Avenue Extension Albany, New York 12205	JOHN W. BAILEY, ESQ. Of Counsel
HARVEY & MUMFORD Attorneys for Respondents 20 Corporate Woods Blvd. Albany, NY 12207	BRIAN F. MUMFORD, ESQ. Of Counsel
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FEDER, KASZOVITZ, ISAACSON, WEBER, SKALA, BASS & RHINE, LLP Attorneys for Texas Commissioner of Insurance as Receiver of United Republic Insurance Company International Plaza 750 Lexington Avenue New York, NY 10022-1200	JONATHAN HONIG, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court has under consideration a motion filed on April 21, 2005, on behalf of Peter Barton, et al. ("Respondents")[1] pursuant to Rule 37 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), applicable to the matter herein pursuant to Rule 9014(c) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). Respondents request that the Court compel Barbara C. Lawrence, Lawrence Group, Inc. ("LGI"), Lawrence United Corp. Insurance Agency of Southern California, Inc., A.W. Lawrence and Company, Lawrence Agency Corp., Lawrence United Corporation, Lawrence Health Care Administrative Services, Inc. ("Debtors"), Global Insurance Company ("Global") and Senate Insurance Company ("Senate") (collectively referred to as the "Movants") to respond to Respondents' Amended First Set of Document Requests and Respondents' Amended First Set of Interrogatories. Respondents also request that the Court impose sanctions for the Movants' refusal to respond to the discovery requests. On May 17, 2005, the Movants filed their Memorandum of Law in Support of Cross-Motion for Sanctions pursuant to 28 U.S.C. § 1927 and/or to Compel Responses and Movants' Opposition to Respondents' Motion.

Both motions were heard by the Court on May 31, 2005, at the Court's regular motion term in Syracuse, New York. Following oral argument, the matter was submitted for decision

[1] Respondents are comprised of certain individuals, as well as the corporate entities of Mechanical Technology, Inc. ("MTI") and First Albany Companies, Inc. ("First Albany"). The latter two are represented by the law firm of Milbank, Tweed, Hadley & McCloy, LLP. The individual respondents are represented by the law firms of Boies Schiller & Flexner LLP and Harvey and Mumford.

by the Court.[2]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(N) and (O).

FACTS

As it did in its Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, dated September 19, 2003 ("September 2003 Decision"), the Court will assume familiarity with the facts as set forth by the United States Court of Appeals for the Second Circuit in *Lawrence v. Wink (In re Lawrence)*, 293 F.3d 615 (2d Cir. 2002). Of relevance to the motions now before the Court, and by way of some background information, it notes the following:

On June 23, 1997, the Debtors filed a motion pursuant to § 363 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Code"), seeking Court approval of the sale of 820,909 shares of stock in MTI for the price of $2.25 per share. On August 5, 1997, United States Bankruptcy

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[2] An issue was raised at the hearing on May 31, 2005, concerning the role of Jonathan Honig, Esq. ("Honig"), who represents the Texas Commissioner of Insurance, as Receiver of United Republic Insurance Company ("URIC") in this matter. The Court indicated that it would have to determine whether the matter "should properly continue to be litigated in this court or whether it should be litigated by URIC, as apparently the assignee of the claim, in some other forum." *See* Transcript of May 31, 2005, hearing ("Tr.") (Docket No. 978) at 18. At the request of the Court, Honig provided it with a copy of an Order signed by the Hon. Robert E. Littlefield, Jr. on February 22, 1999, approving a Settlement Agreement, dated October 1998 (Docket No. 977), which allegedly provided for URIC's participation in these proceedings.

Judge John J. Connelly signed an Order approving the sale of the stock under the terms of a Stock Purchase Agreement, executed on July 25, 1997. On September 9, 1998, the Debtors commenced seven adversary proceedings against the Respondents, alleging that they had fraudulently concealed certain information that should have been disclosed to the Movants during the sale negotiations. The Respondents filed a motion seeking dismissal of the adversary proceedings, which was denied by Judge Connelly on April 1, 1999. On appeal by the Movants, United States District Court Judge David Hurd reversed Judge Connelly's ruling and dismissed the adversary proceedings. The Second Circuit Court of Appeals, on appeal by the Movants, held that Judge Hurd had abused his discretion by declining to recharacterize the claims set forth in the adversary proceedings ("First Albany Claims") as motions pursuant to Fed.R.Civ.P. 60(b). Ultimately, the Second Circuit vacated the judgment of the District Court and remanded the matter back to it for consideration of the Movants' allegations of fraud pursuant to Fed.R.Civ.P. 60(b)(3). By decision, dated September 20, 2002, Judge Hurd remanded the matter back to this Court.

On October 18, 2002, the Movants filed a motion pursuant to Fed.R.Civ.P. 60(b)(3) and requested that they be allowed discovery in connection with that motion. After hearing oral argument and allowing the parties an opportunity to file memoranda of law, the Court issued its September 2003 Decision in which it indicated that "[a] critical issue concerns what information any of the Respondents who were "insiders" of MTI had that was not available to Movants and which they failed to disclose and whether any of that information was material to the price and subsequent increase in the trading of the stock, such that it should have been disclosed to the Movants before the Stock Purchase Agreement was executed [on July 25, 1997]." *See* September 2003 Decision at 16.

On or about February 9, 2005, Movants served the Respondents with "Combined Discovery Demands" containing eighty-nine (89) requests for documents. *See* Exhibit B, attached to Declaration of John W. Bailey, Esq. ("Bailey"), sworn to May 16, 2005 (Docket No. 967). On or about February 25, 2005, Movants also served Respondents with twenty-four (24) interrogatories. *See id.* at Exhibit C. On or about March 14, 2005 and March 30, 2005, Respondents served their Responses and Objections to Movants' requests based primarily on their belief that the requests were beyond the scope of the limited discovery allowed by the Court in its September 2003 Decision.

Also on March 14, 2005, the Respondents served Movants with five (5) requests for documents, as well as their own set of twenty-four (24) interrogatories. *Id.* at Exhibits D and E. By letter, dated April 13, 2005, the Movants indicated that they would not respond to any of the Respondents' discovery demands based on their position that the Court's September 2003 Decision granted only the Movants the right to seek additional discovery. *Id.* at Exhibit J. In support of this position, the Movants point out that prior to the issuance of the September 2003 Decision, the Respondents had taken the position that there was no need for any type of additional discovery.

Subsequent to the hearing held on May 31, 2005, by letter dated July 7, 2005, the Movants indicated that they were withdrawing demand numbers 20, 34, 41, 47, 49, 51 and 63 and limiting demand numbers 36 and 45 to "non-public material only." Movants also reiterated their view that demand numbers 16, 18, 19, 39, 64, 65, 69 and 70 and interrogatories 14 and 24 were legitimate in that they were

> geared toward discovering what information came into the hands of George

> McNamee,[3] and whether non-public information was communicated to and through him. Furthermore, documents and information in the possession of MTI are relevant to the very core of the inquiry permitted by the Court.

See May 31, 2005 Letter at page 2, ¶ 4.

On December 14, 2005, the Court was made aware that the parties were conducting depositions of certain individuals. On February 2, 2006, the Court requested that the parties advise it "if any discovery disputes, raised in the motions argued before the Court on May 31, 2005, still remain." By letter, dated February 6, 2006, Bailey responded on behalf of the Movants that the above-referenced dispute still existed and that "the critical issue . . . is the total failure by Respondents to produce MTI documents. These are vital to the proceedings since a crucial issue is the inside information possessed by First Albany." On February 7, 2007, Douglas W. Henkin, Esq. ("Henkin") replied to Bailey's letter on behalf of the Respondents by asserting that "[t]his Court did not authorize any discovery of MTI. MTI was neither involved in or a party to the MTI Shares Sale and was not a party to the Amended Sale Order." On or about February 10, 2006, Bailey responded by asserting that MTI "is most certainly a proper party," pointing out that Henkin has always represented that he is acting as counsel for MTI in this matter.

Bailey, in his letter of February 10, 2006, takes the position that "much of what occurred after July 25, 1997 [the date the Stock Purchase Agreement was executed for the purchase of 820,909 shares of MTI for $2.25 per share] was shaped and driven by events prior to that date." As pointed out by Bailey, this Court, in a telephone call on December 14, 2005, in the course of a deposition of David Wood ("Wood"), stated that "if you develop a basis for a showing in your

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[3] McNamee was Chairman of the Board of MTI and of First Albany at the time the Stock Purchase Agreement was executed.

line of questioning that it relates to events that occurred prior to the July date, though the conversation was had thereafter, then I think it's a permissible question."

By letter, dated March 28, 2006, Bailey now requests that the Court direct the Respondents, in "particular MTI," to produce certain documentation requested on behalf of the Movants. On March 30, 2006, Henkin reiterated that because MTI "was not a purchaser or seller, was not a party to the MTI Shares Sale Agreement, and did not participate in the MTI Shares Sale at all [and] was not 'involved in the negotiation process' . . ." it should not be the subject of discovery.

DISCUSSION

Discovery Issues - Movants' Requests for Discovery

"[T]here is no question that the scope of discovery is always within the control and discretion of the trial court." *In re Wyatt, Inc.*, 168 B.R. 520, 523 (Bankr. D. Conn. 1994). In its September 2003 Decision the Court agreed to allow the Movants limited discovery, which was not intended, however, as a "fishing expedition." The issue for discovery was a very narrow one, namely what non-public information the Respondents who negotiated the price possessed prior to July 25, 1997 that should have been disclosed to the Movants.

In issuing the September 2003 Decision, the Court made reference to an exhibit attached to the Movants' Supplemental Memorandum, filed April 25, 2003, entitled "General Areas of Inquiry Upon Discovery." *See* Exhibit E, attached to Declaration of Kylie Davidson, Esq., dated May 25, 2005 (Docket No. 975). The Court indicated that it would "allow discovery in

connection with the second 'General Inquiry,' which focuses on how First Albany formed an opinion about the Stock up until the date that the Stock Purchase Agreement was executed." September 2003 Decision at 17.

The second "General Inquiry" included questions regarding whether there was a team in charge of assessing the value of MTI and who was involved in making the decision to invest in MTI. Specifically, there was a question regarding whether some entity had acted as a placement agent and organized the group of potential investors. Another question concerned whether there was a separate sales team in charge of contacting potential investors. In addition, there were questions concerning the role of each of the Respondents and who initiated the deal and approved it. There was also a question about how First Albany had picked the investors to be contacted.

The Court also allowed inquiry concerning the knowledge that George McNamee had prior to the execution of the Stock Purchase Agreement in his role as Chairman of the Board of MTI and First Albany, regarding the development of the fuel cell technology and the tests that were being performed. Proposed questions included, "How did he acquire this knowledge? What information was he provided and by whom? When was he provided the information? Who kept him informed of developments in this area?"

The Court declined to allow inquiry about "[h]ow did sensitive information about the progress of the fuel cell project leak from the Plug Power group" ("First Inquiry") or about "[h]ow the purchasers made the decision to purchase," ("Third Inquiry"). The First Inquiry included requests for the identity of the engineers and scientists involved in the project or other employees or consultants. It also requested documentation concerning the flow of information,

e.g. who reported to whom. Another area of that particular inquiry involved the process by which Plug Power reported back to MTI and Detroit Edison Energy and requested copies of correspondence or minutes of meetings relating to Plug Power or the fuel cell tests. Finally, there was a request for confidentiality policies and agreements in place for the engineers and scientists.

The Third Inquiry, which the Court declined to allow, included questions about what information potential investors had about the company and who contacted them. The identities of third parties, agents, consultants who took part in the decision whether or not to purchase. There was also a request for the production of documents relating to the creation of trusts and any investment policies and guidelines in existence. In addition, there was a question concerning what the investors knew about the research and development of the fuel cell project and a request for transcripts of board meetings and a list of attendees. Finally, there was also a question concerning the proportion of each purchaser's investments in MTI stock before and after the purchase.

The main focus of inquiry obviously was to be on what was known by the parties at the time they negotiated the purchase price for the stock. At the hearing on May 31, 2005, Henkin represented to the Court that the Respondents had identified the people involved in the negotiations as part of the responses to interrogatories and that those individuals were available for depositions by the Debtors' attorney. Indeed, in Respondents' Response, in the section identified as "General Objections," they state that only Alan P. Goldberg, George C. McNamee, Stephen P. Wink and David Wood (all First Albany personnel) were involved in the negotiation process for the sale of the stock.

A review of the 89 items sought by the Movants demonstrates discovery encompassing

far more than the limited discovery to which the Court agreed and includes items that were contained in the First Inquiry and the Third Inquiry that the Court specifically disallowed. For instance, Movants ask for "any and all" correspondence between MTI and Arthur D. Little Laboratories; between MTI and the U.S. Department of Energy; between MTI and Los Alamos National Laboratory (#77-80). They also ask for the personal and professional calendars and schedules of each of the Respondents for the three years prior to July 25, 1997 (#84); copies of the personal and professional resumes and curriculum vitae of each Respondent (#85); a list of memberships in any and all clubs, professional, social and/or service organizations for each Respondent for the three years prior to July 25, 1997 (#86); any and all documents regarding the social and business relationships of the Respondents for that same three year period (#87); all documents relating to any and all presentations to the Bankruptcy Court regarding the transactions at issue (#88) and all documents relating in any way to the delay in identifying the purchasers in the transactions at issue to the Bankruptcy Court. (#89).

Request #50 asks for copies of all documents that each of the Respondents received from First Albany, MTI, Plug Power and/or Detroit Edison, "including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports and correspondence." There is no indication or limitation as to time period.

There are a number of inquiries concerning potential investors - how they were approached, how it was determined that they be approached, and why they ultimately decided either to invest or not to invest. These inquiries do not appear relevant to the issue at hand, namely, what those involved in the negotiations knew when the price was determined and the Stock Purchase Agreement was executed on July 25, 1997. Indeed, in connection with the sale

of the MTI shares, the ultimate investors were not identified until September 26, 1997, ostensibly because the solicitation process was still ongoing. Thus, some of the Respondents arguably were not involved in the negotiation process. Indeed, Respondents' counsel has indicated, as noted previously, that only four of the Respondents, all alleged to be First Albany personnel, were involved in the negotiation process. However, the Court also recognizes the possibility that some of the other individual respondents/investors may have had non-public information concerning MTI and its fuel cell technology that they made available to those negotiating the sale.

Upon review of the recent correspondence, as well as the Court's prior Memorandum-Decision and Order of September 19, 2003, it concludes that the Movants are entitled to limited discovery from MTI. Despite Bailey's assertion that MTI was not a party to the negotiations leading up to the execution of the Stock Purchase Agreement, it was identified as a "respondent" in connection with the motion filed by the Movants on October 18, 2002, pursuant to Rule 60(b)(3) of the Fed.R.Civ.P. and has been represented by Henkin throughout these proceedings.

It is obvious to the Court that "non-public information" could have been provided by MTI to First Albany and/or the individual "respondents" who ultimately purchased the shares. It is also realistic to think that the individual respondents might no longer have in their possession information concerning the status of MTI's fuel cell technology provided to them arguably as "insiders" of MTI. The Court concludes that the Movants are entitled to receive copies of those documents/correspondence provided by MTI to First Albany and/or the individual respondents prior to July 25, 1997, in connection with its development of the fuel cell technology.

With respect to the specific document requests and interrogatories of the Movants, the Court makes the following determinations:

Combined Discovery Demands

1-16	Not allowed
17	Allowed
18-19	Not allowed
20	Withdrawn
21-27	Allowed
28-31	Allowed only as to George McNamee and only up until the July 25, 1997 transaction
32-33	Allowed up until the July 25, 1997 transaction
34	Withdrawn
35	Allowed only insofar as the entities were involved in the July 25, 1997 transaction
36	Limited to non-public documentation, etc.
37	Allowed
38-40	Not allowed
41	Withdrawn
42-44	Allowed
45	Limited to recordings, notes of telephone calls or conversations regarding non-public information , etc.
46	Not allowed
47	Withdrawn
48	Not allowed
49	Withdrawn
50	Allowed up until the July 25, 1997 transaction
51	Withdrawn
52	Allowed
53	Allowed
54	Allowed insofar as they are in the possession of the Respondents, exclusive of MTI
55-56	Allowed
57	Not allowed
58	Allowed
59	Not allowed
60	Allowed only as to First Albany
61-62	Not allowed
63	Withdrawn
64-65	Not allowed
66-67	Allowed
68-89	Not allowed

Interrogatories

1-7	Limited to First Albany
8	Not allowed
9	Allowed
10	Not allowed
11-13	Allowed
14-24	Not allowed

Discovery Issues - Respondents' Request for Discovery

Movants take the position that they were the only ones granted discovery with which to meet their burden pursuant to Fed.R.Civ.P. 60(b)(3) of establishing fraud by clear and convincing evidence. Movants take the position that the Respondents should not be allowed discovery. The Court has found no case that has allowed the responding party to conduct discovery post-judgment. *See, e.g. Catskill Development, LLC v. Park Place Entertainment Corp.*, 286 F.Supp.2d 309 (S.D.N.Y. 2003), *judgment reinstated*, 345 F.Supp.2d 360 (S.D.N.Y. 2004), *vacated and remanded,* 169 Fed.Appx. 658 (2d Cir. 2006) and *United States ex rel. Peters*, 826 F.Supp. 1153 (N.D. Ill. 1993). The cases emphasize the restrictive nature of any discovery rights, and that discovery is to be conducted on an expedited basis and limited to discrete issues. *Catskill Development*, 286 F.Supp.2d at 321; *Park Place*, 826 F.Supp. at 1154.

The Court has reviewed the document requests submitted by the Respondents in this case, which focus on information that the Movants had prior to the execution of the Stock Purchase Agreement. Because the Movants' allegations are based on non-public information that the Respondents might have had in their possession which should have been made available to the Movants prior to July 25, 1997, it seems reasonable that the Respondents be provided with any information the Movants might have had at the time. This is particularly true given the fact that

Albert Lawrence had ties to LGI, as well as to MTI.[4] Respondents should have an opportunity to defend themselves to the extent that any alleged non-public information was already in the Movants' possession prior to July 25, 1997. Since the Movants maintain that the negotiations of the sale of the stock in MTI were not conducted on an "even playing field," as it were, the Court believes it appropriate to know if the Movants already had any of the same non-public information themselves. Accordingly, the Court will allow Respondents' Request No. 4 and 5 with the caveat that the non-public information/documents requested be limited to that in the possession of the Movants prior to July 25, 1997. The Court will not require that the Movants respond to any of the interrogatories requested by the Respondents, however.

With respect to the parties' requests for sanctions, the Court finds none warranted at this juncture of the proceedings. The positions taken were obviously intended to protect a variety of interests, and the Court does not find any evidence that they were intended to delay a resolution of the motion pursuant to Code § 60(b)(3), although obviously that has been the result. Based on recent correspondence with the parties, it is also clear that they have proceeded in good faith with the depositions of certain individuals while awaiting the Court's determination. Accordingly, the Court will enter a Scheduling Order under separate cover in the hopes of expediting this matter.

The Role of Jonathan Honig, Esq. ("Honig") to participate in this Matter

As noted previously, at the hearing on May 31, 2005, an issue was raised concerning the role of Honig, who represents the Texas Commissioner of Insurance as Receiver of URIC.

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[4] In its September 2003 Decision the Court noted that at one time Albert Lawrence controlled both the Debtors and MTI. *See* September 2003 Decision at 10-11. He was also a majority shareholder, owner, operator, and Chairman of the Board of LGI.

Before addressing this issue, the Court must consider a Settlement Agreement approved by United States Bankruptcy Judge Robert E. Littlefield, Jr. on February 22, 1999.

Background of Settlement Agreement approved by Order of Judge Littlefield on February 22, 1999 (Docket Nos. 398,411 and 977):

According to the Settlement Agreement, dated October 1998, prior to January 1, 1994, Global, URIC and Senate purchased shares of MTI. *See* "Recitals" set forth in the Settlement Agreement at 1. In 1996 LGI purchased those shares for $.90 per share and then in February 1997 Global, an affiliate of the Debtors, but not a Debtor, repurchased the shares from LGI that it had previously sold.[5] *Id.* LGI filed its petition on February 28, 1997. The Agency Debtors (which it appears did not include LGI or Barbara Lawrence) claimed an interest in the shares held by LGI, as well as those held by Global. *Id.* at 2. In turn, Barbara Lawrence notified LGI and Global that she claimed an interest in some of the shares. *Id.* LGI and Barbara Lawrence subsequently decided to sell the LGI shares to First Albany for $2.25 per share. Global also agreed to sell its shares to First Albany for $2.25 per share. The sale, as noted above, was ultimately consummated on September 26, 1997. In the interim, on September 18, 1997, LGI commenced an adversary proceeding (Adv. Pro. 97-91449) seeking a declaration of clear title to the sale proceeds and an adjudication that Global's repurchase in February 1997 had been a fraudulent transfer that was avoidable. *Id.* at 3. Barbara Lawrence also asserted an interest in

[5] Apparently, there was some dispute concerning the ownership of the shares in Global's possession. *See Lawrence*, 293 F.3d at 618. In connection with the sale in 1997, it was agreed that the shares would be conveyed to First Albany and any ownership disputes would be resolved at a later date. *Id.*

the proceeds, as did the "Agency Debtors." The Settlement Agreement settled that adversary proceeding.

The Settlement Agreement provides that "the parties hereto are desirous of settling all claims relating to the Sold MTI Shares, including all claims that were set forth or that could have been set forth in the Adversary Proceeding, and of cooperating in the evaluation and potential prosecution of claims against First Albany." *See* Settlement Agreement at 4. In addition, it provides that "[e]ach of the parties hereto assigns, grants and conveys all their respective First Albany Claims to Global, without recourse, and Global, or its parent corporation, United Republic, or Senate, as designated by United Republic (the 'Global Group'), may proceed to prosecute the First Albany Claims either in its own name alone or in the names of all parties hereto (the 'Global Option.')." *Id.* at 5.

Global or the "Global Group" agreed to be responsible for all attorney's fees and expenses in connection with the litigation, and the distribution of any proceeds were set forth in the Settlement Agreement as follows:

a. First, to pay all costs and expenses of litigation, including any contingent attorneys' fees;

b. The remainder (the "Residual") shall be distributed in the following percentages:

Global, Senate and the Global Group	64%
LGI	19%
Agency Debtors	14% (to be allocated among those debtors)
Barbara C. Lawrence	3%

Id. at 6.

Global or the Global Group were also given the option to prosecute, settle, discontinue

or abandon the First Albany Claims. All parties agreed to fully cooperate with Global in the prosecution or settlement of the First Albany Claims. If Global were to abandon or discontinue the prosecution of the First Albany Claims, then LGI has the ability to exercise the option to do so and its share of any proceeds would increase to 64%. In the event that neither Global/"Global Group" nor LGI opted to prosecute the First Albany Claims, then "each party in the First Albany Litigation may pursue their respective claims interposed in the pleadings . . . ." *Id.* at 7.

The Settlement Agreement also sets forth several conditions precedent, the first being the entry of a final order approving it. As noted above, Judge Littlefield signed an Order approving the Settlement Agreement on February 22, 1999.[6] The other conditions precedent included the written approval of the Georgia Department of Insurance for Global to participate in the Settlement Agreement, the written approval of the Arizona Department of Insurance for Senate to participate, and the written approval of the Texas Department of Insurance Liquidation Oversight Division for United Republic to participate. *Id.* at 8. The Settlement Agreement also provides that "[i]f any of the foregoing conditions fail, then this Settlement Agreement shall be void and of no force or effect." *Id.*

On May 3, 2006, the Court sent a letter to Norma Petrosewicz, Esq., ("Petrosewicz"), Special Deputy Receiver for URIC, inquiring about the conditions precedent in the Settlement Agreement requiring the written approval of the three insurance entities referenced above. By letter, dated May 7, 2006, she responded that she had been in touch with the insurance departments in an effort to obtain the information requested. On or about May 16, 2006, the

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[6] On January 21, 1999, Judge Littlefield signed an Order recusing himself from the then-pending adversary proceeding (Adv. Pro. 97-91449). On February 22, 1999, however, he entered an Order which allowed him to hear and decide the motion to approve the settlement.

Court received a letter from Bailey referring to Petrosewicz as his "client" and attaching what he represented to be "documentary evidence of the approval of the 1998 Settlement Agreement by the Departments of Insurance of the states of Arizona, Georgia and Texas." (Docket No. 991).

By letter, dated May 26, 2006, Henkin, apparently not taking issue with the approvals of the State Insurance Departments, reiterated concerns expressed at the May 31, 2005 hearing[7] about Honig's role in these proceedings, particularly given Bailey's reference to Petrosewicz as his "client." Henkin raised the issue of whether Honig needed to be appointed pursuant to Code § 327 and Fed.R.Bankr.P. 2014. Bailey responded that the Court previously had addressed the issue of whether a § 327 appointment of Honig was required in the context of a deposition of Wood, which was conducted on December 14, 2005. According to the transcript of that deposition, when questioned by Henkin, Honig indicated that he did not represent any of the Debtors. December 14th Transcript ("Tr.") at 8. In response, Henkin raised the issue of Honig's standing to conduct the deposition. *Id.* at 9-10.

At the time of the deposition, the Court indicated that "[i]f you're seeking compensation from the bankruptcy estate for your services in any portion, then you need to be appointed under

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[7] At the hearing on May 31, 2005, it was pointed out to the Court that there was no evidence that Honig had been retained by the Debtors to represent them. Specifically, there had been no application filed pursuant to Code § 327 and Fed.R.Bankr.P. 2014. May 31st Tr. at 15. Honig argued that URIC was assigned to litigate this matter pursuant to Judge Littlefield's Order of February 22, 1999, approving the Settlement Agreement. *Id.* at 15-16. Henkin expressed surprise given that URIC was not even included in the caption as a named movant. *Id.* at 16. Honig responded that the motion originally filed in this matter, or rather the original adversary proceedings, had been filed prior to the execution of the Settlement Agreement. *Id.* at 17. Honig further explained that under the terms of the Settlement Agreement the Debtors have a contingent interest in the ultimate outcome of the motion.

Section 327 of Title 11. If you are pursuing these claims solely on behalf of a private client who is going to pay the compensation for your services, then I don't think there's any requirement for a 327 appointment." *Id.* at 11.

The Settlement Agreement makes it clear that the parties intended to cooperate in the "evaluation and potential prosecution of claims against First Albany." Settlement Agreement at 4. As noted above, the Settlement Agreement set forth the allocation for any proceeds from the successful prosecution of the claims against the Respondents. Settlements in bankruptcy cases are viewed with favor by the courts. *See Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994) (citations omitted). Whether to approve a settlement is a matter of the Court's discretion. *See In re Ashford Hotels, Ltd.*, 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998); *In re Rinsat, Ltd.*, 224 B.R. 685, 688 (Bankr. N.D. Ind. 1997). In applying its discretion, the Court should approve the settlement if it is determined to be "right and equitable under the circumstances and the law, and dictated by the reason and conscience of the judge to a just result." *Ashford Hotels*, 226 B.R. at 802, quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931). By approving the Settlement Agreement, Judge Littlefield had to have concluded that it was in the best interests of the estates, whether the claims were prosecuted by URIC or LGI and the other related debtor entities. Clearly, the Settlement Agreement contemplated that URIC would be represented in any litigation it opted to pursue against the Respondents. Accordingly, the Court finds that Honig, who has indicated that he does not represent any of the Debtors, is entitled to participate in the litigation herein on behalf of URIC, and as long as his attorney's fees are being paid by URIC and not from the Debtors' estates, he need not seek authorization from this Court pursuant to Code § 327. The fees incurred on behalf of the Debtors will, of course, be subject to close

scrutiny by the Court so as to avoid having the estates incur unnecessary costs in connection with the litigation, with consideration being given to the maximum potential recovery to which the estates would be entitled under the terms of the Settlement Agreement.[8] Indeed, it is the possibility of a recovery by the estates, as well as the fact that the sale at issue was approved by this Court, which leads it to conclude that the proceedings should be allowed to continue in this Court.

Based on the foregoing, it is hereby

ORDERED that the Respondents' motion seeking to compel discovery from the Movants is granted to the extent discussed herein; it is further

ORDERED that the Movants' cross-motion seeking to compel responses from the Respondents is granted to the extent discussed herein; and it is finally

ORDERED that the motions of both the Movants and the Respondents seeking the imposition of sanctions, respectively, is denied.

Dated at Utica, New York

this day of 2006

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[8] The Court would be remiss if it did not caution Debtors' counsel about dual representation of both the Debtors and URIC/Petrosewicz. If the Court is going to allow Honig to participate in this matter, then it would not seem necessary or appropriate for Bailey to assume such a role.