

1 UNITED STATES BANKRUPTCY COURT  
2 SOUTHERN DISTRICT OF FLORIDA  
3 WEST PALM BEACH DIVISION

4 CASE NO. 08-25571-BKC-EPK

5 IN RE:

6 PAUL BUXTON and MARILYN BUXTON,  
7 et al.,  
8 Debtors.

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11 ORAL RULING RE:MOTION TO DETERMINE ALLOWED AMOUNT OF  
12 CLAIM OF CASE HOLDING COMPANY, INC. PURSUANT TO 11 USC  
13 SECTION 502(b) (230) and MOTION TO APPOINT TRUSTEE  
14 FILED BY CREDITOR CASE HOLDING COMPANY, INC. (254) and  
15 CONFIRMATION OF PLAN

16 December 30, 2009

17 The above-styled cause came on for hearing  
18 before the HONORABLE ERIK P. KIMBALL, one of the  
19 Judges of the United States Bankruptcy Court, in and  
20 for the Southern District of Florida, at 1515 North  
21 Flagler Drive, West Palm Beach, Palm Beach County,  
22 Florida on Wednesday, December 30, 2009, commencing at  
23 or about 1:30 p.m., and the following proceedings were  
24 had:

25 Reported by: Anna M. Meagher

APPEARANCES :

KEVIN C. GLEASON, P.A., by  
KEVIN C. GLEASON, ESQUIRE

VIA TELEPHONE :

ROSEN & WINIG, P.A., by  
ERIC A. ROSEN, ESQUIRE  
on behalf of Debtors.

GARY J. ROTELLA & ASSOCIATES, P.A., by  
GARY J. ROTELLA, ESQUIRE

LAW OFFICES OF BRAD CULVERHOUSE, by  
BRAD CULVERHOUSE, ESQUIRE  
on behalf of Mr. Young.

DEREK PARFONTE, ESQUIRE  
on behalf of SunTrust Bank.

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1 (Thereupon, the Court contacts a conference  
2 call already in progress.)

3 THE COURT: Good afternoon. This is Judge  
4 Kimball at the Bankruptcy Court in West Palm Beach.  
5 Who do I have on the telephone?

6 MR. ROSEN: Thank you, your Honor. Eric  
7 Rosen is here, and Paul and Marilyn Buxton are here as  
8 well.

9 THE COURT: Good afternoon to all.

10 Mr. Gleason is here in the courtroom.

11 MR. PARFONTE: Derek --

12 UNIDENTIFIED SPEAKER: Your Honor --

13 MR. PARFONTE: Derek Parfonde (phonetic) on  
14 behalf of SunTrust Bank, your Honor.

15 THE COURT: Good afternoon, Mr. Parfonde.

16 MR. CULVERHOUSE: And Brad Culverhouse, your  
17 Honor, representing Mr. Young.

18 THE COURT: Mr. Culverhouse --

19 MR. ROTELLA: Your Honor --

20 THE COURT: -- good afternoon.

21 MR. ROTELLA: -- can you hear me?

22 THE COURT: Yes.

23 MR. ROTELLA: This is Gary Rotella, your  
24 Honor.

25 THE COURT: Good afternoon, Mr. Rotella.

1 MR. ROTELLA: Thank you, sir.

2 UNIDENTIFIED SPEAKER: (Inaudible name) is  
3 here as well, your Honor.

4 THE COURT: Good afternoon.

5 I think we have -- is there anybody else on  
6 the telephone?

7 UNIDENTIFIED SPEAKER: The Buxtons are here.  
8 Good afternoon, your Honor.

9 THE COURT: Good afternoon.

10 All right. We are here in the jointly  
11 administered cases of Marilyn and Paul Buxton and the  
12 Buxton Funeral Home, Inc. I have a ruling on three  
13 matters which have been pending. The first is  
14 Confirmation of the Debtors' First Amended Joint  
15 Combined Disclosure Statement and Plan of  
16 Reorganization. That's Docket Entry 256. The second  
17 is the Debtors' Motion to Determine Allowed Amount of  
18 Claim of Case Holding Company, Inc. Pursuant to 11 USC  
19 Section 502(b). That's Docket Entry 230. And,  
20 lastly, Case Holding Company, Inc.'s Motion for  
21 Appointment of a Trustee. That's Docket Entry 254.

22 You should all make yourselves as comfortable  
23 as possible, because I have quite a bit to say in  
24 connection with the ruling today. I know a number of  
25 you are on the phone. I know, Mr. Rosen, that you are

1 on vacation, so thank you for taking part from far  
2 away.

3 I will enter separate orders on each of these  
4 matters, incorporating the findings of fact and  
5 conclusions of law I will make on the record today.  
6 If you wish to have a complete printed set of my  
7 findings and conclusions, you will need to order a  
8 transcript of today's hearing. Because these matters  
9 are somewhat inter-related, you will need to refer to  
10 the entire record of today's hearing for each of the  
11 matters I am ruling on.

12 If any of you on the phone can't hear me,  
13 please make sure you speak up, all right.

14 The Court has jurisdiction over this case and  
15 each of the matters addressed in this ruling under 28  
16 USC sections 157 and 1334(b). Each of the matters  
17 under consideration is a core proceeding under 28 USC  
18 Section 157(b).

19 In addition to findings of fact made in the  
20 course of my analysis of relevant legal issues, which  
21 I will address shortly, I make the following common  
22 findings of fact from the record presented at  
23 evidentiary hearings on November 20 and November 24,  
24 2009.

25 The corporate debtor, Buxton Funeral Home,

1 Inc., is owned by Paul and Marilyn Buxton. They are  
2 its only shareholders. Mr. and Mrs. Buxton, either  
3 individually or through the Buxton Living Trust, own  
4 the real property and the majority of the personal  
5 property of these jointly administered estates. This  
6 includes all real and much of the personal property in  
7 Okeechobee, Florida used by Buxton Funeral Home, Inc.  
8 to operate a funeral home.

9 As I have previously ruled in this case, all  
10 assets of the Buxton Living Trust are held for the  
11 sole beneficial interest of Mr. and Mrs. Buxton and  
12 are treated as their personal assets for purposes of  
13 their individual Chapter 11 cases. From the record in  
14 these jointly administered cases, it does not appear  
15 that the corporate debtor, Buxton Funeral Home, Inc.,  
16 has substantial hard assets. It is primarily a  
17 corporate shell used to run the funeral home business.

18 Mr. and Mrs. Buxton have operated the Buxton  
19 Funeral Home in Okeechobee since 1979. In 2004 two  
20 hurricanes hit Okeechobee, substantially destroying  
21 the funeral home building. From September 2004 to  
22 August 2007, the funeral home was operated out of  
23 three modular trailers.

24 In March 2006, Mr. and Mrs. Buxton, in their  
25 individual capacities, and on behalf of the Buxton

1 Living Trust, obtained a loan from SunTrust Bank for  
2 the purpose of rebuilding the funeral home. As  
3 security for the loan, Mr. and Mrs. Buxton and the  
4 Buxton Living Trust granted a first priority mortgage  
5 lien on their real property in Okeechobee and all  
6 related personal property. Thus, SunTrust has a lien  
7 on substantially all assets in these jointly  
8 administered cases to secure and an allowed claim in  
9 the amount of \$2,174,000, plus interest and costs as  
10 yet undetermined.

11 In December 2006, Mr. and Mrs. Buxton and  
12 Buxton Funeral Home, Inc. borrowed \$600,000 from Case  
13 Holding Company, Inc. on an unsecured basis. The Case  
14 Holding loan required monthly payments of interest at  
15 12 percent per annum, meaning \$6,000 per month, with  
16 the entire principal and outstanding interest due on  
17 June 5, 2007. The debtors missed the second and third  
18 monthly payments on February 5 and March 5, 2007.  
19 They made up those payments with a lump sum of \$18,000  
20 paid on March 27, 2007, comprising \$12,000 for the two  
21 missed payments and \$6,000 advance payment due in  
22 April of 2007. The debtors continued to make monthly  
23 interest payments through May 2008 for a total of  
24 \$96,000 in interest payments.

25 Case Holding filed a claim in the amount of

1 \$794,217.75. This includes the original \$600,000 in  
2 principal, which the debtors do not contest,  
3 \$168,778.38 of interest at a default rate of 24  
4 percent calculated from the first missed monthly  
5 payment in February 2007, and late charges of \$31,380  
6 going back the same period.

7 In short, Case Holding treats the initial  
8 missed payment in February 2007 as triggering both  
9 default interest and late charges from that date. I  
10 note that Case Holding never applied the default rate  
11 or any late charges to this loan in its own records  
12 and that the first time default interest and late  
13 charges appeared in any record between Case Holding  
14 and the debtors was in Case Holding's proof of claim.  
15 John Coniglio, an accountant who testified on behalf  
16 of Case Holding, confirmed that it was he that  
17 instituted the default rate and late charges used to  
18 calculate the claim filed by Case Holding.

19 The debtors argue that they and Case Holding  
20 agreed to modify the terms of repayment to allow for  
21 monthly payments of interest at the original contract  
22 rate without a specific maturity date, which I take to  
23 mean that the debtors believe the obligation became a  
24 demand obligation. The debtors argue that this  
25 revised arrangement is confirmed by the course of

1 dealing between the parties for over a year, during  
2 which the debtors made monthly payments of \$6,000, and  
3 Case Holding did not claim, attempt to collect, or  
4 even account for default interest or late charges.  
5 The debtors also argue that Case Holding waived any  
6 right to claim default interest or late charges going  
7 back to February 2007. In any case, the debtors  
8 concede that they made no payments to case Holding  
9 after May 2008. The debtors do not appear to  
10 challenge the accrual of default interest and late  
11 charges after the May 2008 payment. Note that these  
12 cases were filed October 19, 2009. As Case Holding  
13 has an unsecured claim, it would not be entitled to  
14 accrual of interest after the petition date.

15 The debtors were not able to pay SunTrust's  
16 construction loan when it matured, and the loan went  
17 into default. Prior to the commencement of these  
18 cases, SunTrust filed a state court action to  
19 foreclose on the debtors' real and personal property.

20 On October 19, 2008, Mr. and Mrs. Buxton, the  
21 Buxton Living Trust, and Buxton Funeral Home, Inc.  
22 filed voluntary Chapter 11 petitions. Their cases are  
23 jointly administered but not substantively  
24 consolidated.

25 On December 11, 2008, by an order dismissing

1 Chapter 11 case of Buxton Living Trust, which is at  
2 Docket Entry 69, I dismissed the Chapter 11 case of  
3 Buxton Living Trust. I found that the Buxton Living  
4 Trust was not a business trust, and, therefore, was  
5 not authorized to be a debtor under 11 USC Section  
6 109. Apparently believing that the dismissal of the  
7 trust case eliminated the automatic stay as to the  
8 Buxton Funeral Home property, SunTrust rejuvenated its  
9 foreclosure action in state court.

10 In January 2009, Mr. and Mrs. Buxton and  
11 Buxton Funeral Home, Inc. filed an adversary  
12 proceeding against SunTrust seeking injunctive relief  
13 in the form of a stay of action against property of  
14 the Buxton Living Trust. I granted that relief and  
15 have continued the effectiveness of the stay as to the  
16 Buxton Living Trust by entry of separate orders. The  
17 most recent order continues the stay subject to  
18 further order of the Court, and thus has no specific  
19 termination date. In ruling on that matter, I  
20 specifically found that the automatic stay in effect  
21 in Mr. and Mrs. Buxton's individual Chapter 11 case  
22 also prevented action against property of the Buxton  
23 Living Trust, as such property was really their  
24 property.

25 On March 27, 2009, the debtors filed their

1 Debtors' Plan of Reorganization pursuant to Section  
2 1121(a) of the Bankruptcy Code. This is Docket Entry  
3 129. For sake of clarity, I call this the March Plan.  
4 On April 3, 2009, the debtors filed the Debtors'  
5 Motion to Waive Requirement of Filing Disclosure  
6 Statement and to Authorize Debtors to Solicit  
7 Acceptances to Plan. This is Docket Entry 130.

8 At the hearing on this motion, the Court  
9 instructed the debtors to implement certain changes to  
10 the March Plan to satisfy the requirements of Section  
11 1125(a) regarding disclosure. Accordingly, on May 5,  
12 2009, the debtors submitted the Debtors' Combined  
13 Disclosure Statement and Plan of Reorganization  
14 Pursuant to Sections 1121(a) and 1125 of the  
15 Bankruptcy Code. This was filed at Docket Entry 137.  
16 I call this the May Plan. Note that the May Plan was  
17 filed more than a month after the debtors requested  
18 approval of a unitary plan and disclosure statement,  
19 and it was served on all parties in interest,  
20 including Case Holding.

21 On May 13, 2009, I entered an Order Granting  
22 in Part Debtors' Motion to Waive Requirement of Filing  
23 Disclosure Statement and to Authorize Debtors to  
24 Solicit Acceptances to Plan, Approving Disclosure  
25 Statement, Setting Hearing on Confirmation of Plan,

1 Setting Hearing on Fee Applications, Setting Various  
2 Deadlines, and Describing Plan Proponent's  
3 Obligations. This is Docket Entry 141. This  
4 scheduling order set a confirmation hearing on July  
5 23, 2009.

6 On July 9, 2009, Case Holding Company, Inc.  
7 filed Case Holding Company Inc.'s Motion to Allow  
8 Claim for Voting Purposes, which is Docket Entry 163,  
9 Case Holding Company, Inc.'s Response to Objection to  
10 Claim, Docket Entry 164, a Ballot Rejecting Plan,  
11 Docket Entry 165, and Case Holding Company, Inc.'s  
12 Objection to Confirmation of First Amended Plan,  
13 Docket No. 137. This combined document is filed at  
14 Docket Entry 166. Case Holding Company's claim was  
15 allowed for voting purposes at \$600,000 pursuant to  
16 Docket Entry 173.

17 On July 13, 2009, the debtors filed the  
18 Debtors' First Amendment to Combined Disclosure  
19 Statement and Plan of Reorganization to Clarify  
20 Treatment of SunTrust Bank's Claims. This is filed at  
21 Docket Entry 170. This amendment affected only the  
22 treatment of SunTrust's claim under the May Plan.

23 On July 17, 2009, Case filed its Supplement  
24 to Case Holding Company, Inc.'s Objection to  
25 Confirmation of Plan as Amended at Docket Entry 174.

1           On that same day, Case also filed Case  
2 Holding Company, Inc.'s Objection to Claim of  
3 SunTrust, Docket Entry 175, to which SunTrust filed a  
4 response, Docket Entry 177, and a supplemental  
5 response, Docket Entry 183. SunTrust later amended  
6 its filed claim in this case, and Case Holding's  
7 objections were overruled by agreement by Docket Entry  
8 276. SunTrust's claim is allowed in the amount of  
9 \$2,174,000, plus interest and costs in amounts yet to  
10 be determined.

11           The confirmation hearing on the May Plan, as  
12 amended in July, was continued to September 30, 2009.  
13 At the hearing on September 30, 2009, at the debtors'  
14 request, I once again continued the confirmation  
15 hearing. The order granted the request to continue  
16 and scheduled a confirmation hearing on November 20,  
17 2009 and set discovery and filing deadlines related to  
18 Case Holding's claim, as well as the debtors' May plan  
19 as amended. This is done at Docket Entry 223.

20           On October 23, 2009, the debtors filed their  
21 Debtors' Motion to Determine Allowed Amount of Claim  
22 of Case Holding Company Inc. pursuant to 11 USC  
23 Section 502(b). This is, in effect, a formal  
24 objection to Case Holding's claim in this case. The  
25 objection is necessary in spite of the temporary

1 allowance of Case Holding's claim for voting purposes  
2 because certain of Case Holding's objections to  
3 confirmation depend on it holding an allowed unsecured  
4 claim in this case.

5 The debtors do not challenge the principal  
6 amount claimed by Case Holding, which is \$600,000.  
7 They challenge the default interest and late charges,  
8 including in Case Holding's filed claim. This motion  
9 was also set for hearing on November 20, 2009 to  
10 coincide with the continued hearing on confirmation of  
11 the May Plan as amended. On November 16, 2009, the  
12 debtors filed their First Amended Plan, Docket Entry  
13 256, the plan that is under consideration today. For  
14 the sake of clarity, I am calling this the November  
15 Plan.

16 On November 18, 2009, Case Holding filed its  
17 Case Holding Company, Inc.'s Objection to Confirmation  
18 of Debtors' First Amended Joint Combined Disclosure  
19 Statement and Plan of Reorganization, at Docket Entry  
20 268. On November 24, 2009, after the first day of the  
21 evidentiary hearing in this matter, but before the  
22 second day, Case Holding filed its Memorandum of  
23 Record Facts and Applicable Law in Opposition to  
24 Confirmation of the Debtors' First Amended Plan. This  
25 is Docket Entry 275.

1 Case Holding's memorandum is a comprehensive  
2 summary of its objections to confirmation, subsuming  
3 all of its prior filed objections and presenting Case  
4 Holding's arguments in light of the provisions of the  
5 November Plan and presentation of the first  
6 evidentiary hearing on confirmation. I found the  
7 memorandum to be a helpful presentation of Case  
8 Holding's various positions in preparing today's  
9 ruling.

10 I note that on December 28, 2009, case  
11 Holding filed a Supplemental Objection to  
12 Confirmation, well after the close of evidence and  
13 while I was deliberating on matters addressed today.  
14 Case Holding's supplemental objection is not timely  
15 and is stricken.

16 On November 16, 2009 Case Holding filed Case  
17 Holding Company, Inc.'s Motion for Appointment of  
18 Trustee at Docket Entry 254. Assuming the November  
19 plan is not confirmed, Case Holding requests  
20 appointment of a Chapter 11 trustee to operate the  
21 debtors' funeral home business and, apparently, the  
22 individual debtors' personal affairs in Chapter 11.

23 On November 24, 2009, the second day of  
24 evidentiary hearing on confirmation of the November  
25 plan, the debtors made an ore tenus modification to

1 the November Plan. The debtors modified the plan to  
2 provide that the initial distribution to Class 5,  
3 Unsecured Creditors, will be \$168,000, rather than  
4 \$133,816.11. All other distributions under the  
5 November Plan remain unchanged.

6 I first considered confirmation of the  
7 debtors' November Plan as modified during the hearing  
8 on November 24, 2009. After this point in my ruling,  
9 all references to the November Plan should be taken to  
10 mean that plan as amended by the debtors' ore tenus  
11 motion during the confirmation hearing, which  
12 increased the initial distribution to unsecured  
13 creditors to \$168,000.

14 Section 1129 addresses all requirements for  
15 confirmation of a Chapter 11 plan. I will address in  
16 turn each of the provisions of Section 1129 applicable  
17 in this case in light of the objections presented by  
18 Case Holding.

19 1129(a)(1) requires, "The plan complies with  
20 the applicable provisions of this title." This  
21 subsection of Section 1129 focuses on the provisions  
22 of the plan itself and not the actions of the plan  
23 proponent. Case Holding raises a number of objections  
24 under this provision.

25 Seacoast National Bank filed a proof of claim

1 in the amount of \$21,214.92 showing a lien on a  
2 vehicle allegedly worth \$32,000. The interest rate  
3 shown on the proof of claim is 7.155 percent. This is  
4 Claim No. 2. The debtors' schedules reflect a  
5 slightly smaller claim and the same collateral value.  
6 The collateral is a hearse. Case Holding notes that  
7 under the November plan Seacoast National Bank is  
8 treated as part of the class of unsecured creditors,  
9 allegedly in violation of 11 USC Section 1122(a). The  
10 debtors' ballot tabulation, filed at Docket Entry 266,  
11 shows Seacoast receiving a distribution as an  
12 unsecured creditor under the November Plan. Seacoast  
13 did not object to treatment as an unsecured creditor  
14 in this case. Seacoast could have insisted that its  
15 collateral, the hearse, be valued and that it be paid  
16 the present value of its secured claim, meaning with  
17 interest, and that only any unsecured deficiency claim  
18 be treated with unsecured creditors. It did not do  
19 so. If any portion of Seacoast's claim had been  
20 treated as secured under the November Plan, Seacoast  
21 might have received a larger recovery in this case.  
22 Seacoast did not object to the plan, and thus it is  
23 treated as provided under the plan.

24 This treatment likely is to the benefit of  
25 unsecured creditors in the case, generally. It is odd

1 that Case Holding would challenge the debtors not  
2 classifying Seacoast in a separate, secured class, as  
3 this could only have meant less funds available to pay  
4 unsecured creditors, such as Case Holding. To the  
5 extent the plan provides for treatment of Seacoast's  
6 claim as an unsecured claim, that claim is properly  
7 classified in Class 5 with the other unsecured claims,  
8 and there is no violation of Section 1122(a).

9 Case alleges that the plan lumps together  
10 creditors of the three debtors and that this is  
11 improper because the cases are not substantively  
12 consolidated. This is an incorrect characterization  
13 of the debtors' joint plan. While the debtors have,  
14 for various reasons, including cost containment, filed  
15 a joint plan and have elected to present parallel  
16 treatment to their creditors, the effect of the joint  
17 plan on each of their estates is separate. I have  
18 analyzed each debtors' plan independently for  
19 confirmation purposes. I note that if the three  
20 debtors had filed independent plans and sent them to  
21 essentially the same creditor body, there would have  
22 been a great deal of confusion. This is why joint  
23 plans, such as the one under consideration, are the  
24 norm in jointly administered cases.

25 Case alleges that the debtors paid certain

1 unsecured creditors more than is to be paid under the  
2 plan unsecured creditors generally. Case points to  
3 Charles Theophilos, that's T-H-E-O-P-H-I-L-O-S, MD,  
4 Blue Cross Blue Shield of Florida, and Aurora Casket.  
5 The first two parties, Dr. Theophilos and Blue Cross  
6 Blue Shield, were paid as part of a settlement  
7 agreement approved by order of this Court on March 3,  
8 2009, at Docket Entry 122, after notice to creditors,  
9 including Case Holding. There was nothing improper  
10 about the payments approved as part of that  
11 settlement, and the order approving the settlement was  
12 not stayed or appealed.

13 Pointing to certain testimony of Mr. Buxton  
14 in a deposition transcript admitted at trial, Case  
15 argues that Aurora Casket was paid post-petition for  
16 what Case refers to as inventory received by the  
17 debtors prepetition. This is contrary to Mr. Buxton's  
18 actual testimony, where he states that the casket or  
19 caskets in question were consigned, and thus not  
20 traditional inventory. There was no evidence offered  
21 to contradict Mr. Buxton's testimony. Even if the  
22 casket or caskets were not properly consigned to the  
23 debtors, SunTrust likely would have a perfected lien  
24 on them, and any payment to Aurora would only be to  
25 SunTrust's detriment. In any case, none of this

1 supports an objection under Section 1129(a)(1), as  
2 argued by Case in its memorandum, as these payments  
3 were not made pursuant to the plan. They were made  
4 either pursuant to order of this Court or were regular  
5 payments to a consignor in the ordinary course of  
6 business.

7 Case argues that administrative claimants are  
8 improperly classified in violation of Section  
9 1123(a)(1) and that this is objectionable under  
10 1129(a)(1). It is true that Section 1123(a)(1)  
11 specifically excludes from classification claims under  
12 507(a)(2). Section 507(a)(2) provides the priority for  
13 claims that are administrative expenses. The debtors  
14 separate classification of administrative expenses is  
15 not fatal to confirmation. The debtors' plan treats  
16 administrative expenses consistent with the other  
17 requirements of Section 1129. Section 4 of the plan  
18 specifically states that the classification is not for  
19 voting purposes.

20 The primary purpose for excluding  
21 classification of certain types of claims, like  
22 administrative expenses, is to eliminate such classes  
23 from the cramdown analysis. A debtor could draft a  
24 plan that impairs a class of claims described in  
25 Section 1123(a)(1) and then try to use that class to

1 effectuate cramdown under 1129(b). Congress carved  
2 out certain types of claims, including administrative  
3 claims, from the classification scheme so that they  
4 could not be used in this way. But here the debtors  
5 treat administrative claims otherwise as provided  
6 under Section 1129, and they are not attempting to  
7 rely on this class for voting or cramdown. There is  
8 no harm in the separate classification of  
9 administrative claims in this case, and no violation  
10 of Section 1129(a)(1) results.

11 I note that a number of Case Holding's  
12 objections to confirmation are like this one, so much  
13 chaff thrown in with the wheat. I am not confused by  
14 a smoke screen, and a lot of Case Holding's memo in  
15 opposition to confirmation amounted to such. This  
16 approach to litigation adds only expense and time to  
17 the process and lends nothing to the result. In the  
18 end, it detracts from the valid points raised. It is  
19 disrespectful to the Court as a waste of time.

20 Case Holding argues that the plan improperly  
21 combines the equity interests of the corporate debtor,  
22 Buxton Funeral Home Inc., in the same class as the  
23 individual debtors' residual interests in property of  
24 their separate estate, effectively substantively  
25 consolidating the cases. To the contrary, Section 4.5

1 of the November Plan, including Footnote 12, makes it  
2 clear that the Buxtons are offering new value in  
3 exchange for retaining their interest in the corporate  
4 debtor, and that they do not believe any contribution  
5 is necessary for them to retain their residual  
6 interest, as case calls it, in their own personal  
7 property, in light of Section 1129(b)(2)(B)(ii) and  
8 recent case law. The treatment provided is not  
9 interdependent and does not result in a de facto  
10 substantive consolidation. I will address the  
11 requirements of the absolute priority rule in more  
12 detail shortly.

13 Section 10 of the November Plan provides that  
14 only the debtors may object to claims and that  
15 objections will be filed within 30 days after the  
16 effective date of the plan. The plan also states that  
17 the debtors do not intend to file any additional  
18 objections. Case argues that these provisions  
19 improperly limit the right of parties in interest to  
20 object to claims and that this violates Section 502(a)  
21 and thus Section 1129(a)(1).

22 Section 502(a) provides that a party in  
23 interest may object to a claim. Indeed, Case Holding  
24 previously objected to SunTrust's claim in this case,  
25 and that objection was settled by an amendment to

1 SunTrust's claim. Chapter 11 plans routinely limit  
2 future claims objections to those brought by the  
3 debtor-in-possession or a liquidating trustee, for  
4 example. The purpose behind this provision is to  
5 focus the objection process on one party so that  
6 reasonable claims analyses may be made in a cohesive  
7 manner. In this case, the plan provision appears  
8 aimed at completing the claims objection process as  
9 quickly as possible so that distributions may be made  
10 in a controlled manner.

11 A plan, when confirmed, has the effect of a  
12 contract among the debtor in possession and parties in  
13 interest and is binding in the same way a contract is  
14 binding. It is presumed that the debtor-in-possession  
15 will act consistent with its fiduciary duty in  
16 exercising the right to object to claims. To the  
17 extent that there is a claim that a debtor has failed  
18 to object to for inappropriate reasons, and parties in  
19 interest point that out to the Court, there could be a  
20 material concern. But here Case Holding points to no  
21 particular claim that causes it concern, only that the  
22 plan places claims objections in the hands of the  
23 debtor. The provisions in question appear reasonable  
24 under the circumstances. There is no reason these  
25 provision may not be included in a confirmed plan.

1           Pointing to a deposition transcript of the  
2 individual debtors admitted at trial, Case Holding  
3 alleges that the debtors paid post-petition interest  
4 to select creditors, giving them more favorable  
5 treatment than other similarly situated creditors, and  
6 without disclosing this preferential treatment in  
7 their disclosure statement. Case points to several  
8 questions in the deposition transcript and the  
9 debtor's responses. It is impossible to tell from the  
10 transcript whether the interest paid was for  
11 prepetition charges, as Case Holding seems to imply,  
12 or from a current charge as the deponent states, which  
13 I take to mean a post-petition charge on the account  
14 for which the debtor has paid interest. There is no  
15 evidence as to whether such a payment was in the  
16 ordinary course of business for these debtors. There  
17 is no evidence as to the amount of any such interest.  
18 From the evidence offered I cannot tell if it was  
19 material. In light of the scant and inclusive nature  
20 of the evidence, I decline to find that there was any  
21 material violation by the debtors of any requirement  
22 imposed on them. I note that this objection more  
23 squarely falls under 1129(1)(2) rather than (a)(1) as  
24 argued, but in any case it is overruled.

25           Section 1129(a)(2) requires that the

1 proponent of the plan must comply with the applicable  
2 provisions of this title.

3           There are two possible interpretation of this  
4 provision focusing on the meaning of the word  
5 "applicable." Some courts interpret applicable to  
6 mean any provision of Title 11 applicable to the  
7 particular debtor. I decline to follow that line of  
8 reasoning. I believe subsection (a)(2) is present in  
9 Section 1129 to implement the confirmation related  
10 provisions of the Code, such as Section 1125, and  
11 potentially other provisions of the Code that are so  
12 material to the reorganization process that a  
13 violation would taint the entire confirmation. I  
14 interpret the word "applicable" to mean applicable to  
15 the confirmation of the plan at issue the Court.

16           Case Holding argues that there was  
17 insufficient notice of the time fixed for filing  
18 objections and the hearing to consider approval of  
19 Docket Entry 130, the Debtors' Motion for an Order  
20 Approving the March Plan as Sufficient Disclosure  
21 under Section 1125, thus doing away with the need for  
22 a separate disclosure statement. Case Holding cites  
23 Bankruptcy Rule 2002(b), which requires 25 days  
24 notice. Taking into account the simplicity of the  
25 claim structure in these jointly administered cases,

1 and the lack of objection from any party in interest,  
2 including Case Holding, I set the initial hearing on  
3 Docket Entry 130 on less than 25 days, as I am  
4 empowered to do under Bankruptcy Rule 9006(c)(1). In  
5 the end, I asked the debtors to make changes to the  
6 March Plan to include certain matters normally  
7 addressed in a Chapter 11 disclosure statement, and  
8 the debtor filed the May Plan, which is the plan that  
9 was sent to creditors for voting purposes. From the  
10 time of filing docket Entry 130 to my approval of the  
11 May Plan, there was well more than 25 days in the end,  
12 and Case Holding and other parties in interest had an  
13 opportunity to participate in the process.

14           The fact that Section 1125(f) specifically  
15 addresses the possibility of a unitary plan and  
16 disclosure statement in the context of small business  
17 cases does not preclude the approval of a unitary  
18 document in non-small business cases. Bankruptcy  
19 courts have on many occasions approved unitary  
20 documents where the circumstances of the case support  
21 such an approach. The approval of the unitary  
22 document on shortened notice, at least with regard to  
23 the initial hearing, was permitted under prevailing  
24 law and does not raise a concern under 1129(a)(2).

25           Case Holding argues that the November Plan

1 bears so little resemblance to its predecessors that a  
2 full hearing on the adequacy of disclosure is  
3 required. Section 1127 provides that the proponent of  
4 a plan may modify the plan at any time prior to  
5 confirmation and that the modification must comply  
6 with sections 1122 and 1123 and the proponent must  
7 comply with Section 1125, the disclosure provision.  
8 Previously cast votes apply to the modified plan in  
9 most circumstances under Section 1127(d). Case  
10 Holding argues that the November Plan is sufficiently  
11 different from the May Plan, which was sent out for  
12 voting, that there was not sufficient disclosure under  
13 Section 1125.

14 Decisions construing the disclosure  
15 requirements resulting from modification of a plan  
16 under Section 1127 consistently focus on whether the  
17 treatment of creditors, and the inherent risk of  
18 payment represented by the plan as modified, is  
19 sufficiently different in a negative manner such that  
20 the creditors voting on the prior version of the plan  
21 would have wanted to know of the prospective change in  
22 treatment.

23 The Court must ask the question, does the  
24 modified plan reduce the amount to be received by  
25 creditors or increase the likelihood that they will

1 not receive the amount they would have received under  
2 the prior plan. If the answer is yes, then disclosure  
3 was not adequate and a modified plan cannot be  
4 confirmed without additional disclosure and a second  
5 opportunity to vote. If the answer is no, then the  
6 Court may consider the votes already cast pursuant to  
7 Section 1127(c). Bankruptcy Rule 2002(a)(5), cited by  
8 Case Holding, applies only where additional  
9 solicitation is required, and none is required here.

10 Here, the May Plan, which was sent out for  
11 vote, provided for a lump sum payment of \$160,000 pro  
12 rata to holders of allowed unsecured claims. The  
13 November Plan, as modified during the confirmation  
14 hear, provides for an initial lump sum payment of  
15 \$168,000 pro rata to holders of allowed unsecured  
16 claims, plus the proceeds from the sale of certain  
17 assets, plus additional quarterly payments over a  
18 period of five years. The initial distribution of  
19 \$168,000 to unsecured creditors is to come from cash  
20 now held in an account maintained by the debtors'  
21 counsel. Looking only at the initial distribution,  
22 the amount to be paid on account of unsecured claims  
23 is greater than the amount stated in the plan that  
24 such creditors voted on. The payment is guaranteed as  
25 it is held in cash by the debtors' counsel. No

1 additional disclosure is necessary under those  
2 circumstances, and the modification satisfies Section  
3 1120 with regard to unsecured creditors.

4           It does not matter that the modification also  
5 affects SunTrust, as SunTrust supports confirmation of  
6 the November Plan. For this purpose, it also does not  
7 matter that the extra stream of quarterly payments to  
8 be made to unsecured creditors may be in doubt after  
9 the third year, because the debtors may be unable to  
10 refinance the SunTrust debt and SunTrust may  
11 foreclose. While this presents a risk of non-payment  
12 of amounts otherwise payable to unsecured creditors in  
13 the fourth and fifth years following the effective  
14 date, this does not present a disclosure issue because  
15 those creditors will already have received an amount  
16 greater than what they were promised under the plan  
17 they voted on. There is no need for detailed  
18 forecasts or projections to be provided to holders of  
19 unsecured claims as a disclosure issue, because they  
20 are promised a lump sum greater than the amount  
21 originally presented.

22           In summary on this issue, because the May  
23 Plan contained adequate information under Section  
24 1125, as I found by order entered at that time, and  
25 the November Plan as modified during the confirmation

1 hearing provides for greater payment to holders of  
2 unsecured claims, there is no need for additional  
3 disclosure or solicitation for the November Plan, and  
4 the debtors may rely on previously cast votes under  
5 Section 1127(c).

6 Case Holding seems to argue that the Court  
7 must approve the November Plan itself as containing  
8 adequate information. Perhaps Case Holding is  
9 confused by the dual nature of the May Plan and the  
10 modification represented by the November Plan. As is  
11 clear from my analysis, I focus on the May Plan for  
12 purposes of Section 1125, because it is the one that  
13 went out to creditors, and I look to the November Plan  
14 for treatment provisions that may impact whether  
15 additional solicitation or voting is required. It is  
16 not necessary that a plan modified under Section 1127  
17 always be sent out for new voting as in the case at  
18 hand.

19 Case Holding objects to the timeliness of the  
20 November Plan, pointing out that it was filed only  
21 days prior to the beginning of the confirmation  
22 hearing. This is a red herring. Section 1127 allows  
23 for the modification of a plan prior to confirmation  
24 at will. Such modifications are often made during the  
25 confirmation hearing, ore tenus. Indeed, an

1 additional modification was made during the  
2 confirmation hearing in this case. Unless the plan as  
3 modified raises a disclosure issue, there is no  
4 requirement for notice of the modification prior to  
5 the hearing. Case Holding's reliance on Section  
6 1125(f)(3)(B) is misplaced as that section addresses  
7 conditionally approved disclosure statements, a  
8 circumstance not present in this case.

9 Pointing to Mr. and Mrs. Buxton's deposition  
10 transcript, Case Holding argues that there is a  
11 potential tax refund that was deferred to future tax  
12 years and that should have been disclosed to  
13 creditors. From the deposition transcript, it is  
14 impossible to tell whether this is a material issue.  
15 No additional evidence was developed at trial on this  
16 concern. From the scant suggestion of a possible tax  
17 refund, I am unwilling to find a violation of Section  
18 1125, and thus Section 1129(a)(2).

19 Case Holding argues that the plan does not  
20 indicate what efforts have been made to identify  
21 avoidable transfers and points to a particular payment  
22 to Aurora Casket as a potential avoidance action in  
23 this case. From Mr. Buxton's unrebutted deposition  
24 testimony, it appears that Aurora Casket had a  
25 consignment arrangement with the debtors, thus

1 limiting the possibility that a payment to Aurora  
2 prior to the commencement of this case is avoidable.  
3 From the information provided by Case Holding, it is  
4 not possible to determine whether this is a material  
5 disclosure issue, and I am unwilling to find a  
6 violation of Section 1125, and thus Section  
7 1129(a)(2).

8 Pointing to another disclosure issue, Case  
9 Holding argues that the plan does not address in any  
10 way the existence, effect, or treatment of the  
11 debtors' pre-need contracts. In addition, the debtors  
12 failed to schedule these contracts or the bank  
13 accounts held by the debtors containing payments from  
14 pre-need contract purchasers.

15 Pre-need contract are agreements with parties  
16 who have chosen to prepay for funeral services. These  
17 contracts are governed by Florida Statutes Chapter 497  
18 in detail. Information about the debtors' pre-need  
19 contracts can be found in Exhibit U to the deposition  
20 transcript of Mr. and Mrs. Buxton from a deposition  
21 taken on November 9, 2009. This deposition transcript  
22 and all of its exhibits were admitted at trial in this  
23 matter.

24 Under Florida Statutes Section 497.457, "all  
25 funds paid pursuant to a preneed contract by a

1 purchaser to a preneed licensee shall be the sole  
2 property of, and within the full dominion and control  
3 of, said preneed licensee." The same provision  
4 states: "Subject to the provisions of this chapter,  
5 the relationship between the purchaser of a preneed  
6 contract and a preneed licensee shall be deemed for  
7 all purposes as a debtor-creditor relationship."

8 Buxton Funeral Home, Inc., the corporate  
9 debtor here, is the pre-need licensee. Unless  
10 accepted under a separate trust agreement where the  
11 purchasing individual is the beneficiary, authorized  
12 under Section 497.464, the individual buying the  
13 funeral services has no specific property interest in  
14 funds paid to Buxton Funeral Home for such services.  
15 It does not appear that the debtors have any specific  
16 trust agreements with individuals under Section  
17 497.464, although there may be a few contracts entered  
18 into prior to the effective date of the current  
19 statute that fall under this provision.

20 From amounts received under a pre-need  
21 contract, Florida Statutes Section 497.458 requires  
22 that Buxton Funeral Home, Inc. "deposit an amount at  
23 least equal to the sum of 70 percent of the purchase  
24 price collected for all services sold and facilities  
25 rented; 100 percent of the purchase price collected

1 for all cash advance items sold; and 30 percent of the  
2 purchase price collected or 110 percent of the  
3 wholesale cost, whichever is greater, for each item of  
4 merchandise sold" into a trust established under an  
5 agreement with a trust company or bank with trust  
6 powers. The beneficiary of such a trust is the  
7 licensee, meaning Buxton Funeral Home, Inc.  
8 in this case, and not the individual buying the  
9 services and goods from Buxton.

10 Section 497.458(1)(g) provides: "The preneed  
11 contract purchaser shall have no interest whatsoever  
12 in, or power whatsoever over, funds deposited in trust  
13 pursuant to this section." Under Section  
14 497.458(1)(j), the trust fund is exempt from claims of  
15 Buxton's creditors other than the pre-need contract  
16 parties themselves. Under Section 497.458(3)(c), the  
17 trust may be a common trust for deposits relating to  
18 multiple pre-need contracts. Under Section 497.461,  
19 the pre-need licensee has the option of obtaining a  
20 surety bond or insurance policy in place of depositing  
21 funds in a trust account. The surety bond or  
22 insurance policy must cover a stated minimum of the  
23 amount of the subject contracts, typically 70 percent.

24 As is evident from the statutory scheme,  
25 whether the pre-need licensee elects to deposit funds

1 in trust or to obtain a surety bond or insurance, not  
2 all of the amount paid by individuals under pre-need  
3 contracts is covered by these mechanisms.

4 Section 497.459 addresses cancellation or  
5 default with regard to pre-need contracts. With  
6 certain limitations, the purchaser may cancel the  
7 contract within 30 days and receive a full refund.  
8 After 30 days, the purchaser may cancel the contract  
9 at will and receive a full refund for services,  
10 facilities, and the cash advance item portions of a  
11 pre-need contract, and a full refund with regard to  
12 merchandise the licensee cannot or does not deliver to  
13 the purchaser. If the licensee breaches the contract,  
14 the purchaser is entitled to a 100 percent refund.  
15 There are certain limitations for purchasers receiving  
16 public assistance.

17 Buxton Funeral Home, Inc. has 407 pre-need  
18 contracts with persons who have elected to prepay for  
19 funeral services. These agreements have an aggregate  
20 gross sales value of \$1,231,604.09. The trust fund  
21 maintained by Buxton Funeral Home, Inc. has an  
22 aggregate principal balance of \$283,588.05 and an  
23 interest balance of \$32,201.68. Buxton Funeral Home,  
24 Inc. has insurance policies covering pre-need  
25 contracts in the face amount of \$726,705.21.

1           It appears that a small portion of the  
2 debtors' pre-need contracts are cancelled each year.  
3 For example, Exhibit U to the deposition transcript of  
4 November 9, 2009 shows that five contracts were  
5 cancelled in the year ending June 30, 2009. In light  
6 of the debtors' bankruptcy proceeding, there may be an  
7 increased risk of cancellation of pre-need contracts.  
8 Under Florida Statutes, all of them are subject to  
9 cancellation at any time by the purchaser, with  
10 certain limited exceptions for contracts entered into  
11 by those receiving public assistance.

12           None of the pre-need contracts were offered  
13 into evidence. Based on the provisions of Florida  
14 Statutes Chapter 497 and prevailing Eleventh Circuit  
15 case law, particularly under the so-called functional  
16 approach that the Eleventh Circuit seems to favor, it  
17 is possible that all 407 contracts are executory  
18 contracts.

19           Both the debtor and Case Holding offered  
20 expert testimony addressing the pre-need contracts.  
21 Thomas Flynn testified at the request of the debtors,  
22 and John Coniglio testified at the request of Case  
23 Holding. Their testimony focused primarily on how the  
24 pre-need contracts should be taken into account in  
25 connection with the liquidation analysis in this case,

1 and I will address that issue separately in a few  
2 minutes. Mr. Flynn testified that the pre-need  
3 contracts were underfunded and represented a liability  
4 that detracted from the value of the business.

5 Mr. Coniglio testified that the debtors will realize  
6 some gross profit on each sale under existing pre-need  
7 contracts, and thus the contracts are assets of Buxton  
8 Funeral Home.

9 The pre-need contracts, the purchasers of  
10 such contracts, and the related trust accounts are not  
11 disclosed or addressed in any of the debtors'  
12 schedules or in the May or November plans in any way.  
13 Schedule G for each of the debtors shows no executory  
14 contracts. The trust accounts are not shown as assets  
15 on any Schedule B. Nor are the pre-need contracts to  
16 the extent they represent assets. The purchasers of  
17 the pre-need contracts are not scheduled as creditors  
18 in these cases on any Schedule E or F.

19 Under Florida Statutes, it is obvious that  
20 the purchasers have claims within the meaning of  
21 Bankruptcy Code Section 101 subsection (5). Based on  
22 the evidence presented, these claims are against the  
23 corporate debtor, and perhaps against the individuals  
24 as well. Mr. Flynn, the debtor's own expert,  
25 confirmed that the contracts represent contingent

1 liabilities. In closing argument, counsel for the  
2 debtors argued that the pre-need purchasers are not  
3 creditors, but this is contradicted by the specific  
4 provisions of Florida Statutes I addressed a few  
5 minutes ago.

6 It matters not that the claims are contingent  
7 as contingent claims are included in the definition  
8 under Section 101. Indeed, Section 502(c) allows for  
9 the estimation of contingent claims. Some or all of  
10 each of these contingent claims, up to the statutory  
11 maximum of \$2,425, are subject to priority treatment  
12 under Section 507(a)(7).

13 The plan before me does not describe the  
14 pre-need contracts or provide any treatment for the  
15 potential priority and unsecured claims arising  
16 therefrom. The plan has no provision at all regarding  
17 the assumption or rejection of executory contracts.  
18 Nor did the debtors schedule the accounts, aggregating  
19 more than \$280,000, that are held under Florida  
20 statute for their own benefit. These are assets of  
21 the estate that should have been scheduled in Schedule  
22 B at least in the corporate case.

23 The failure to address the pre-need contracts  
24 under the plan is fatal to confirmation for several  
25 reasons. First, the debtors failed to disclose the

1 existence of the pre-need contracts, related claims,  
2 and the trust accounts in their schedules. The  
3 schedules of Buxton Funeral Home, Inc. should have  
4 reflected the pre-need contracts in Schedule E for  
5 priority claims, Schedule F for non-priority claims,  
6 and potentially Schedule B for assets and Schedule G  
7 for executory contracts. The trust accounts should  
8 have been reflected in Schedule B for personal  
9 property. It is possible the contracts should have  
10 been scheduled in the individual debtors' case as  
11 well. As a result of these disclosure failures, it  
12 appears that holders of pre-need contracts have not  
13 ever been provided notice of these Chapter 11 cases.

14 Case Holding also points out that the debtors  
15 disclosed to the State of Florida the existence of a  
16 \$400,000 note receivable from the shareholders of  
17 Buxton Funeral Home, Inc. payable to that corporate  
18 entity. This can be found in Exhibit U to the  
19 November 9, 2009 deposition. Mr. and Mrs. Buxton are  
20 the only shareholders of the corporate entity. This  
21 obligation should have been reflected as an asset on  
22 the corporate debtor's Schedule B and a liability on  
23 the individual debtors' Schedule F. It was not.

24 Each of the foregoing is a violation of  
25 Section 521 of the Bankruptcy Code and Bankruptcy Rule

1 1007 of the most obvious kind. Although not  
2 specifically implicated in the confirmation provisions  
3 of the Bankruptcy Code, the failure to schedule  
4 claims, contracts, and significant assets,  
5 particularly of this magnitude in relation to the  
6 finances of the case at hand, is inherently material  
7 to the confirmation process, and requires denial of  
8 confirmation under Section 1129(a)(2).

9           Second, the failure to address the pre-need  
10 contracts, trust accounts, and related claims in the  
11 plan is a material disclosure concern. Here I am  
12 talking about the May Plan in its role as disclosure  
13 statement. Facts surrounding the pre-need contracts  
14 are material to voting on the plan because they affect  
15 the potential recovery by unsecured creditors in what  
16 is essentially a pot plan, and because the pre-need  
17 contracts should be taken into account in analyzing  
18 whether the debtors satisfy the best interest of  
19 creditors test under Section 1129(a)(7).

20           If the pre-need contract purchasers have  
21 significant priority or unsecured claims, this would  
22 affect the pro rata distribution to unsecured  
23 creditors. If the pre-need contracts constitute  
24 significant assets or liabilities in liquidation, this  
25 is material to determining whether the November Plan,

1 as modified during the confirmation hearing, provides  
2 more to creditors than they would receive in a  
3 liquidation. None of this is addressed in the May  
4 Plan, which was used to solicit votes in this matter,  
5 or even in the November Plan. This failure to provide  
6 adequate information on the pre-need contracts is a  
7 violation of Section 1125, and thus a violation of  
8 Section 1129(a)(2). This is a separate reason to deny  
9 confirmation.

10 Those of you who are waiting here, this is an  
11 aside for another matter, I'm ruling on something in a  
12 matter previously scheduled. I am going to be at  
13 least another half an hour, so please feel free to  
14 leave the courtroom if you'd like.

15 Third, the November Plan under consideration  
16 does not provide a class for the priority claims held  
17 by the pre-need contract purchasers. These are  
18 priority claims under Section 507(a)(7) that need to  
19 be classified under Section 1123(a)(1) and 1122(a).  
20 This is not a situation where the claimants may have  
21 just unsecured claims and thus would fall into the  
22 unsecured creditors' class only. It is apparent that  
23 they are priority claimants, they are required to be  
24 separately classified, and there is no such class.  
25 This is a violation of Section 1129(a)(1). I

1 addressed that provision previously, but I raise this  
2 particular violation here for sake of continuity.

3 This is another, separate reason to deny confirmation.

4 My ruling that the debtors failed to satisfy  
5 the requirements of sections 1129(a)(1) and (a)(2)  
6 requires denial of confirmation of the November Plan  
7 as modified. Nevertheless, I will address a number of  
8 other issues raised by Case Holding and the debtors in  
9 connection with confirmation. While most of the  
10 remaining confirmation objections raised by Case  
11 Holding are overruled, there are additional reasons to  
12 deny confirmation.

13 In its memo at Docket Entry 275, Case Holding  
14 argues that the plan provides for the retention of the  
15 Tampa condo in violation of the absolute priority rule  
16 in Section 1129(b)(2)(B). I address this here only  
17 because Case Holding addressed it under Section  
18 1129(a)(2). I note that under the November Plan, the  
19 Tampa condo is to be sold and the net proceeds  
20 distributed to unsecured creditors. I have already  
21 approved that sale. In addition, the Tampa condo was  
22 owned by the individual debtors, Mr. and Mrs. Buxton.

23 The recent amendments to Section  
24 1129(b)(2)(B)(ii) under BAPCPA make it clear that the  
25 absolute priority rule does not apply to individual

1 debtors. I refer you to In Re: Rodemeier, that's  
2 spelled R-O-D-E-M-E-I-E-R, at 374 BR 264, for a  
3 complete analysis on this issue. I believe counsel  
4 for Case Holding conceded this point during argument,  
5 noting that the Bankruptcy Code amendment effectively  
6 overruled Judge Hyman's Gossman decision.

7           The failure of Mr. and Mrs. Buxton to list  
8 their stock interest in the Buxton Funeral Home, Inc.  
9 and their interest in the Buxton Living Trust on their  
10 personal schedules was an oversight. Although not  
11 timely corrected after these were pointed out to them  
12 at their meeting of creditors, in light of the  
13 repeated disclosure of these facts in numerous  
14 documents filed in these jointly administered cases,  
15 during hearings, and in my own ruling dismissing the  
16 Chapter 11 case of Buxton Living Trust, these issues  
17 are not material to the confirmation analysis. The  
18 same goes for the contents of the Buxtons safe deposit  
19 box. Without evidence to convince me that these are  
20 significant non-disclosures, the wheat pennies and  
21 minor jewelry of sentimental value described at the  
22 Section 341 Meeting do not amount to a material  
23 non-disclosure sufficient to deny confirmation under  
24 Section 1129(a)(2). I note that counsel for the  
25 United States trustee did not express concern on these

1 matters as they often do.

2 Case Holding argues that the individual  
3 debtors failed to disclose certain prepetition income  
4 in their Statement of Financial Affairs. In answering  
5 Question 1 on their Statement of Financial Affairs,  
6 which asks for gross income figures for the two years  
7 prior to the year in which the case is filed, the  
8 individual debtors included net figures from the  
9 relevant federal tax returns. These tax returns were  
10 available to Case Holding and indeed to any party in  
11 interest who wished to request them under the  
12 Bankruptcy Rules. Case Holding, in fact, obtained  
13 copies of the relevant tax returns. This technical  
14 non-compliance does not appear to have been intended  
15 to mislead the Court or parties in interest and is not  
16 material to the confirmation process.

17 Case Holding argues that the debtors retained  
18 an accountant under Section 327(a) who was  
19 disqualified from representing the debtors because the  
20 accountant is a creditor with a scheduled claim of  
21 \$1,900 and thus is not disinterested. The existence  
22 of the unpaid prepetition fees of the accountant was  
23 not disclosed at the time her retention was proposed  
24 to the Court, nor did she waive the claim as is  
25 required and customary in order to obtain approval.

1 This is a violation of Section 327(a), but is more  
2 properly dealt with under Section 330 when the time  
3 comes to approve the accountant's fee. This is not  
4 the type of violation that may normally subject a plan  
5 to challenge under Section 1129(a)(2), as it is not  
6 inherently part of the confirmation process.

7 Section 9.1 of the November Plan includes a  
8 typical provision enjoining parties from pursuing the  
9 debtors and their estates, other than pursuant to the  
10 terms of the confirmed plan itself. This provision  
11 also covers the Buxton Living Trust and its assets.  
12 Case Holding objects to this injunction as it applies  
13 to the trust, arguing that this amounts to a  
14 third-party injunction that would require specific  
15 notice to creditors under Bankruptcy Rule 2002(c)(3).

16 More than a year ago I dismissed the Chapter  
17 11 case of the Buxton Living Trust on the ground that  
18 it could not be a debtor under Section 109. In doing  
19 so, I found that the Buxton Living Trust was formed by  
20 Mr. and Mrs. Buxton as settlors, that they are  
21 currently the only beneficiaries, the trust being  
22 essentially an estate planning tool, and that the  
23 trust is revocable by Mr. and Mrs. Buxton at any time.  
24 I ruled that all of the assets of the Buxton Living  
25 Trust are the assets of the individual debtors here

1 and are subject to the automatic stay in their  
2 personal Chapter 11 case. The Buxton Living Trust is  
3 the alter ego of Mr. and Mrs. Buxton. It holds all of  
4 their personal assets including their homestead.  
5 Indeed, under prevailing Florida law, the Buxtons  
6 would be able to protect their homestead in spite of  
7 it being placed in such a trust. In light of my prior  
8 ruling, it would be nonsensical if the confirmed plan  
9 in these cases did not protect assets in the trust as  
10 the trust holds substantially all of the assets to be  
11 used under the confirmed plan. Based on these facts  
12 and my prior ruling, I rule today that the injunction  
13 contained in Section 9.1 of the November Plan is not  
14 an "injunction against conduct not otherwise enjoined  
15 under the Code" as addressed in Bankruptcy Rule  
16 2002(b)(2) and thus is not subject to the special  
17 notice requirements of that rule.

18 Those of you who have just come into the  
19 courtroom for another 2:30 matter, I'm going to be  
20 ruling on the present matter until at least three. If  
21 you'd like to spend your time in the hallway, it's up  
22 to you.

23 Under Section 1129(a)(2), Case Holding argues  
24 that the debtors misrepresented the value of their  
25 interest in the funeral home. This is not a proper

1 argument to make under Section 1129(a)(2), as it is  
2 aimed more at the liquidation analysis necessary to  
3 meet the best interest of creditors test under  
4 subsection (a)(7). Even so, the objection makes no  
5 sense.

6 In the hypothetical Chapter 7 case that I am  
7 to analyze under 1129(a)(7), it is assumed that a  
8 Chapter 7 trustee has been appointed, and the Chapter  
9 7 trustee is liquidating the assets of the entity.  
10 Because a going concern sale is rare in Chapter 7, it  
11 is generally not appropriate to include a going  
12 concern value in a liquidation analysis. This is not  
13 one of the cases where the liquidation analysis should  
14 be based on a going concern.

15 Case Holding argued that there are potential  
16 purchasers of the business that would net enough to  
17 pay all creditors in this case, and even offered the  
18 testimony of one such potential purchaser. However,  
19 without at least a signed offer showing in detail how  
20 such sale would consummated and what conditions there  
21 may be to closing, along with a vetting of the  
22 potential purchaser's ability to close, it is  
23 inappropriate for me to conclude that a going concern  
24 valuation is required or even appropriate to the  
25 liquidation analysis in this case. A liquidation

1 analysis is just what it sounds like, an analysis of  
2 what would be paid to unsecured creditors if a Chapter  
3 7 trustee takes the assets, in a non-operating  
4 condition, and sells them in the manner typically done  
5 in a Chapter 7 liquidation case.

6 Still under Section 1129(a)(2), Case Holding  
7 argues that the debtors retained the Tampa condo  
8 during the case, making payments on it, and that this  
9 did not contribute to the efforts to maximize the  
10 return to unsecured creditors and thus was in  
11 violation of their fiduciary obligations. First, the  
12 Tampa condo was marketed over a period of time and was  
13 recently sold pursuant to order of this Court. The  
14 sale will net a small amount to the estate.

15 Second, I remind the parties that the  
16 standard for ordinary course activity during the case  
17 is the business judgment standard. It is up to the  
18 debtor-in-possession to determine what actions should  
19 be taken to maximize value to the estate. A  
20 debtor-in-possession has relatively wide latitude in  
21 effectuating its business judgment, subject to the  
22 limitations contained in the Code and Rules. I note  
23 also that if Case Holding was concerned about the  
24 Tampa condo, it could easily have taken action earlier  
25 in the case. Expenditures with regard to the Tampa

1 condo were disclosed in the monthly US trustee  
2 reports. The debtors' retention and maintenance of  
3 the Tampa condo until sold in this case was reasonable  
4 under the circumstances.

5 Pointing to the schedules filed by Mr. and  
6 Mrs. Buxton, at Docket Entry 47, Case Holding argues  
7 that they gave incomplete or erroneous answers on  
8 various issues, and that this amounts to a violation  
9 of certain Bankruptcy Code requirements, thereby  
10 implicating Section 1129(a)(2). The alleged failings  
11 of Mr. and Mrs. Buxton do not taint the confirmation  
12 process to the extent that they cause the plan to be  
13 unconfirmable under Section 1129(a)(2). The valuation  
14 given for the Tampa condo was higher than the eventual  
15 sale price of the condo. But the condo was sold more  
16 than a year later in a falling market.

17 Likewise, based on the evidence presented,  
18 the failure to list a small amount of cash on hand or  
19 deminimis personal property kept at the Tampa condo  
20 and in a safe deposit box does not amount to a  
21 substantial non-disclosure for confirmation purposes.  
22 The evidence does not support a conclusion that these  
23 non-disclosures were material or that they were  
24 intended to mislead the Court or parties in interest.

25 Mr. and Mrs. Buxton's failure to list their

1 equity interest in the Buxton Funeral Home, Inc.,  
2 while a technical non-disclosure because it was not  
3 included in the schedules, is not fatal to  
4 confirmation. The debtors made it clear to me and  
5 parties in interest, from the beginning of these  
6 cases, that Mr. and Mrs. Buxton are the only owners of  
7 Buxton Funeral Home, Inc.

8 Similarly, the failure to list their equity  
9 interest in Buxton Properties, LLC, a defunct entity,  
10 was not harmful, and the Buxtons disclosed their  
11 ownership as soon as they realized they had failed to  
12 do so. Likewise, while the Buxtons failed to list  
13 their interest in the Buxton Living Trust in Schedule  
14 B, the trust was listed as the source of the legal  
15 fees paid to debtors' counsel. The Buxton Living  
16 Trust filed a companion case. While I later dismissed  
17 that case, finding that the trust could not be a  
18 debtor under Section 109, from immediately after the  
19 petition date in this case, it was clear to me that  
20 the individual debtors were the settlors, trustees,  
21 and sole current beneficiaries of the trust. While  
22 Mr. and Mrs. Buxton failed to amend their schedules to  
23 reflect my ruling in connection with dismissal of the  
24 trust case, and other matters disclosed during the  
25 case, there is no evidence to support a finding that

1 this was part of an effort to deceive the Court or  
2 parties in interest such that it raises an issue under  
3 Section 1129(a)(2). This includes all of the other  
4 items listed in Paragraph 11 of Case Holding's memo,  
5 other than failures to disclose the pre-need contracts  
6 as I addressed previously to the extent they should  
7 have been reflected in the individual debtors'  
8 schedules.

9 It is important to note that Case Holding  
10 points to these non-disclosures, noted in Paragraph 11  
11 of its memo, as technical failures only. They do not  
12 allege that any of these matters have a material  
13 impact on confirmation or consummation of the plan  
14 before me, and I find that they do not. Many of these  
15 issues are matters of degree for which there is not  
16 sufficient evidence in the record to raise my level of  
17 alarm to the extent that I would need to deny  
18 confirmation under 1129(a)(2) as requested. Others  
19 were not subject to disclosure because they fell  
20 outside the time parameters of the disclosure  
21 requirements in the Statement of Financial Affairs.  
22 Others still are allegations with no citation to facts  
23 for support.

24 The same goes for the alleged non-disclosures  
25 of Buxton Funeral Home, Inc. noted at Paragraph 12 of

1 Case Holding's memo. The Aurora caskets were on  
2 consignment according to Mr. Buxton's uncontradicted  
3 testimony. The use of depreciated values for items  
4 B-28 and B-29 is not a material non-disclosure,  
5 particularly as the schedules clearly show that this  
6 was the valuation basis used. While the Buxton  
7 Funeral Home, Inc. did not schedule compensation paid  
8 to Mr. and Mrs. Buxton in the year prior to the  
9 filing, as required by Item 23 on the Statement of  
10 Financial Affairs, all of this information was  
11 reflected in the Buxton's personal schedules and tax  
12 returns and was made available to Case Holding. It  
13 was obvious to me from the filing of this case that  
14 Mr. and Mrs. Buxton were receiving salaries from the  
15 corporate debtor.

16 In Paragraph 12 of its memo, Case Holding  
17 rightly points out, however, that the complete failure  
18 to schedule the pre-need contracts, in any way in  
19 these cases, is a fatal violation of Section  
20 1129(a)(2), at least with regard to the corporate  
21 debtor, and thus fatal to confirmation of the plan as  
22 a whole.

23 Let me note that the various non-disclosures  
24 pointed out by Case Holding, to the extent they  
25 actually were non-disclosures in light of the time

1 requirements for the questions at issue and the  
2 evidence presented, were, in fact, non-disclosures and  
3 technical violations of Section 521. In considering  
4 these issues, I first determine, as I stated before,  
5 that Section 1129(a)(2) is intended to address those  
6 violations of other provisions of the Bankruptcy Code  
7 that are material to the confirmation process in such  
8 a manner that the failure of the plan proponent to  
9 comply will taint the confirmation process. This  
10 could be a single failure, such as a fatal disclosure  
11 error under Section 1125, or it could be present  
12 through a number of more minor violations of  
13 provisions of the Code coupled with evidence that  
14 could lead the Court to find that the  
15 debtor-in-possession was intentionally attempting to  
16 mislead the Court and parties in interest. With the  
17 exception of the complete failure to address the  
18 pre-need contracts, I do not find that the evidence  
19 here supports such a finding.

20 The Buxtons and their counsel have been up  
21 front with the Court from the start of these cases.  
22 The relationships among the individual debtors, the  
23 corporate debtor, and the trust were addressed early  
24 in the case. Mr. and Mrs. Buxton testified credibly  
25 in connection with the matters under consideration

1 today. I previously found their testimony credible in  
2 other evidentiary hearings, including the hearing on  
3 dismissal of the trust case. There has been nothing  
4 in their demeanor or behavior before the Court that  
5 has caused me to doubt their honesty or good  
6 intentions. While not fully presented in their  
7 schedules and Statement of Financial Affairs, I do not  
8 believe their technical non-disclosures were  
9 intentional.

10 Debtors' counsel was advised on several  
11 occasions by the US trustee and parties in interest  
12 that the schedules should be amended in light of  
13 information addressed openly in these cases. These  
14 non-disclosures appear to fall into the category of  
15 sloppy lawyering, and the client should not be  
16 punished for the shortcomings of counsel, so long as  
17 the matter does not create a material issue for the  
18 Court or parties in interest. Again, I note the one  
19 glaring exception with regard to the failure to  
20 schedule or disclose the pre-need contracts. This  
21 failure is not excusable.

22 Section 1129(a)(3) requires the plan to have  
23 been proposed in good faith and not by any means  
24 forbidden by law. My inquiry is to look to the plan  
25 itself and determine whether there is a reasonable

1 likelihood that the plan will achieve a result  
2 consistent with the objectives and purposes of the  
3 Bankruptcy Code. I point you to the often cited In  
4 Re: Madison Hotel Associates, which you can find at  
5 749 F.2nd, 410. It's a 1984 decision of the Seventh  
6 Circuit.

7 Case Holding argues that the debtors have not  
8 proposed the plan in good faith because they waited  
9 more than a year after filing the case to "come clean"  
10 with a revised plan paying creditors more than  
11 originally proposed, and that there are potential  
12 offers to buy Buxton Funeral Home that would pay all  
13 creditors in full. On the first point, Case Holding  
14 argues that if it had not negotiated with the debtors,  
15 the plan before the Court would not have provided the  
16 proposed distribution that it does, and that the  
17 debtors' failure to offer up the better proposal  
18 without prompting amounts to bad faith. This is a  
19 very weak argument. In many Chapter 11 cases, the  
20 plan as originally proposed is revised multiple times  
21 as a result of negotiation with parties in interest.  
22 To argue that the original plan was not proposed in  
23 good faith because negotiation made it more favorable  
24 for creditors is not reasonable.

25 Next, Case Holding argues that the debtors

1 have received offers for their business that would net  
2 sufficient funds to pay all creditors in full. Case  
3 Holding offered the testimony of Thomas Conway on this  
4 point. Mr. Conway is a competitor of the debtors.  
5 While Mr. Conway testified that he made proposals to  
6 the debtors aimed at either acquiring the debtors'  
7 funeral home business or effectuating a joint venture  
8 of some kind, there is no written offer or agreement  
9 that could be binding on Mr. Conway, nor any evidence  
10 that would support a conclusion that he could  
11 consummate such a purchase. Indeed, Mr. Conway  
12 testified that his offer was contingent on financing,  
13 which he had yet to obtain.

14 Mr. Conway testified that a plan filed by  
15 Case Holding in this case, on the first day of the  
16 confirmation hearing, at Docket Entry 269, reflects  
17 his offer for the funeral home business. I note that  
18 Case Holding's plan was not admitted into evidence in  
19 this matter. Even if I were to take Case Holding's  
20 plan into account in ruling on this matter, it would  
21 not support Case Holding's objection to confirmation.  
22 The Case Holding plan is not binding on any party at  
23 this point, including Mr. Conway, and it is doubtful  
24 that Case Holding's plan could be confirmed in its  
25 current form. It depends on Mr. and Mrs. Buxton,

1 either agreeing not to operate a funeral home business  
2 in a broad geographic area around the current Buxton  
3 Funeral Home, or pay all of their post-petition  
4 earnings to Case Holdings in payment of Case Holding's  
5 claim. While Section 1115 includes, in property of  
6 the estate of an individual Chapter 11 debtor, certain  
7 post-petition earnings, the Code does not require that  
8 all such amounts be paid to creditors.

9 To the contrary, Section 1129(a)(15) requires  
10 that an individual Chapter 11 debtor pay a portion,  
11 not all, of its post-confirmation earnings, not  
12 post-petition earnings, for the benefit of creditors.  
13 Amounts payable under Section 1129(a)(15) are nearly  
14 always much less than total post-petition income  
15 included in the estate under Section 1115 for two  
16 reasons. First, Section 1129(a)(15) requires payment  
17 of projected disposal income during the five-year  
18 period beginning on the date of the first payment due  
19 under the plan. This is post-confirmation projected  
20 disposable income. Income included in property of the  
21 estate under Section 1115 is as of the petition date.  
22 Here, as in many cases, more than a year has passed  
23 since the filing of the case. Second, while Section  
24 1115 defines property of the estate for individual  
25 Chapter 11 debtors for many purposes, it does not

1 require all post-petition income to be paid to  
2 creditors. Indeed, that section has no direct impact  
3 on the payment requirements under Section 1129.  
4 Instead, Congress carefully crafted 1129(a)(15) to  
5 require payment of projected disposable income, a  
6 figure that requires the Court to take into account  
7 the actual income and living expenses of the  
8 individual. In light of these concerns, the Case  
9 Holding plan is not confirmable on its face.

10 I note also that Case Holding's plan also  
11 raises a Thirteenth Amendment concern. When Congress  
12 fashioned Chapter 13, it did so in a manner to  
13 prohibit involuntary Chapter 13 cases. This was in  
14 part to avoid the possibility that a creditor could  
15 force an individual to devote five years of disposable  
16 income to creditors, potentially a form of force  
17 servitude. When the Chapter 13-like provisions of  
18 Section 1129(a)(15) were added to the Bankruptcy Code,  
19 Congress failed to address this same potential concern  
20 in the Chapter 11 context. Thus, it is theoretically  
21 possible for a Chapter 11 plan filed by a creditor to  
22 provide that an individual debtor pay his or her  
23 wages, above necessary expense, to creditors over a  
24 five-year period. This is the same type of  
25 involuntary servitude avoided in the Chapter 13

1 context. It is possible that such a plan not filed by  
2 the debtor himself or herself is unconstitutional.

3 Case Holding argued that the possibility that  
4 a debtor-in-possession could sell its business or  
5 assets and raise sufficient cash to pay all creditors  
6 means that any plan not paying all creditors in full  
7 is proposed in bad faith. This is a fallacious  
8 argument for several reasons. If a particular class  
9 of creditors votes against a plan, the debtor is not  
10 required to pay them in full. Section 1129(a)(7), the  
11 so-called best interest of creditors test, requires  
12 only that they be paid more than they would in a  
13 liquidation under Chapter 7, not that they be paid in  
14 full. Congress intentionally gave debtors-in-  
15 possession broad leeway in formulating their plans of  
16 reorganization. If the fact that a debtor could, I  
17 emphasize the word "could," sell its business or  
18 assets and raise more money than to be distributed  
19 under a plan meant that any such plan was proposed in  
20 bad faith and could not be confirmed, there would be a  
21 lot more failed confirmations in Chapter 11 cases.  
22 The Code provides for no such hurdle.

23 Here there is no evidence of a concrete offer  
24 that could be binding on the offeror. While  
25 Mr. Conway testified that the Case Holding plan

1 represented the primary business terms of his proposed  
2 acquisition of the Buxton Funeral Home, even if that  
3 plan were confirmable, Mr. Conway stated that his deal  
4 would require further negotiation. The details would  
5 need to be finalized. We all know that the proof is  
6 in the pudding, and a contract is not enforceable  
7 until it is finalized to the satisfaction of all  
8 parties. In the Bankruptcy Court, I often hear of  
9 potential offers. These statements typically come  
10 from the debtors, telling me that if they only have  
11 another month, after I've held off creditors for a  
12 year or so, that they will bring an offer that will  
13 make everyone happy. One of my colleagues here in  
14 Florida calls this terminal optimism. Here the news  
15 of a potential sale comes from a creditor. In any  
16 case, when the offers finally come, and they rarely  
17 do, they are far from what was expected or hoped for.  
18 The sale of assets through bankruptcy is a risky  
19 process that often results in heated negotiation with  
20 potential purchasers who realize their leverage. Here  
21 there is no concrete offer, just a statement of  
22 interest from a competitor. The fact that this  
23 competitor is interested in the debtors' business is,  
24 in Case Holding's estimation, sufficient for me to  
25 find that there could be a sale providing for a

1 distribution better than that provided in the November  
2 Plan as amended, and the failure to pursue that sale,  
3 says Case Holding, is lack of good faith on the  
4 debtors' part.

5 In this particular case, the opposite is  
6 true. SunTrust Bank, who everyone concedes has a  
7 perfected lien on nearly all assets in these jointly  
8 administered cases, requested relief from the  
9 automatic stay to foreclose on the funeral home assets  
10 nearly a year ago in January 2009. I denied that  
11 motion. When I dismissed the Buxton Family Trust  
12 case -- or it's the Buxton Living Trust case, SunTrust  
13 believed it was able to continue with the foreclosure  
14 on what it thought were solely assets of a non-debtor.  
15 I later ruled that the assets of the trust were all in  
16 reality assets of the individual debtors and that the  
17 stay in their case applied to prevent foreclosure. I  
18 also entered a separate injunction prohibiting  
19 SunTrust from proceeding with foreclosure.

20 At this point, SunTrust has been prohibited  
21 from moving forward with its remedies under state law  
22 for more than 14 months. It has not been paid in the  
23 meantime and has clearly incurred legal expenses.  
24 SunTrust negotiated with the debtors to amend the May  
25 Plan and to finalize the November Plan. This is

1 obvious from SunTrust's continued support of  
2 confirmation, its vote in favor of the November Plan,  
3 and its statements made in hearings before me. For  
4 the debtors to ditch this plan negotiated with their  
5 secured creditor to pursue what appears to be a  
6 pie-in-the-sky potential sale of assets that could  
7 take some additional time to consummate, likely over  
8 the objection of SunTrust, and they said so at the  
9 confirmation hearing, would have been suicidal from a  
10 bankruptcy perspective.

11 Case law supports my conclusion that the fact  
12 that there is the possibility of a sale as an  
13 alternative to a plan does not mean that the plan  
14 proponent lacks good faith. For example, I point you  
15 to In Re: Sherwood Square Associates, which you can  
16 find at 107 BR 872.

17 Mr. and Mrs. Buxton testified with apparent  
18 honesty in support of their plan. I have no reason to  
19 believe that the plan before the Court was not  
20 proposed in good faith. After substantial negotiation  
21 with their secured creditor, the debtors made an  
22 honest attempt to propose a plan that appears  
23 confirmable. The plan was proposed with the  
24 legitimate and honest purpose to reorganize and had a  
25 reasonable hope of success. It is thus sufficient to

1 satisfy the good faith requirement for confirmation.  
2 I point you to the Eleventh Circuit's discussion of  
3 this issue in McCormick v Banc One Leasing Corp, a  
4 1995 decision that you can find at 49 F.3d 1524. The  
5 debtors satisfied Section 1129(a)(3).

6 Case Holding objects to confirmation under  
7 Section 1129(a)(5), which in part requires that the  
8 proponent of a plan disclose insiders who will be  
9 employed by the reorganized debtor and the nature of  
10 their compensation. Matthew and Philip Buxton, the  
11 Buxtons' two sons, are employed by the funeral home.  
12 This fact is disclosed in Footnote 14 on Page 30 of  
13 the November Plan. Although that disclosure is in the  
14 context of addressing avoidance actions, it is stated  
15 in the present tense, describing each person's current  
16 salary. One may assume from their names that they are  
17 related to the debtors, but the relationship is not  
18 stated.

19 Note, however, that Section 1129(a)(5) is not  
20 included in Section 1125, regarding pre-solicitation  
21 disclosure, but is in the confirmation provision. The  
22 requirement of Section 1129(a)(5) is that the  
23 proponent disclose this information prior to  
24 confirmation, and the debtors have done so. During  
25 the confirmation hearing, it was made clear that the

1 individuals in question are Mr. and Mrs. Buxton's  
2 sons, and their responsibilities and salaries were  
3 disclosed. Section 1129(a)(5) is satisfied.

4 Case Holding argues that section 1129(a)(7)  
5 is not satisfied because Case Holding believes it  
6 would receive more in a Chapter 7 liquidation than the  
7 amount to be distributed under the plan.

8 The debtors' liquidation analysis is  
9 contained in a report prepared by Mr. Flynn, admitted  
10 as Exhibit 1. This was supported by Mr. Flynn's  
11 testimony at the confirmation hearing. I note that  
12 Mr. Flynn is an accountant with substantial experience  
13 in funeral home accounting and valuation. There was  
14 no objection to his expert testimony, and I have no  
15 question that he is an expert on the issues addressed  
16 in this matter.

17 Mr. Flynn established a liquidation value of  
18 \$118,854 in the aggregate for all the debtors. The  
19 tabulation is shown on Exhibit 2 to his report, which  
20 again is Exhibit 1 admitted in connection with  
21 confirmation of the November Plan. Mr. Flynn shows a  
22 value for the funeral home real estate at \$2.4  
23 million, while his report and the expert valuation  
24 testimony of Stephen Middleton suggests a range of  
25 value from 2.2 to 2.5 million. There is no

1 explanation for the use of the \$2.4 million number.

2 Then Mr. Flynn's analysis shows a related  
3 liability in the same amount, \$2.4 million, ostensibly  
4 representing SunTrust's claim. But SunTrust's allowed  
5 claim in the case is \$2,174,000, plus an amount of  
6 interest and costs not yet addressed. On the one  
7 hand, if I use the \$2.4 million and \$2.174 million  
8 figures, there is equity in the real estate of  
9 \$226,000. On the other hand, SunTrust, in its amended  
10 Claim No. 5, preserves its right to add interest and  
11 costs to its claim under Section 506. In the November  
12 Plan, the debtors concede that SunTrust's total claim  
13 is \$2,405,145.05 as of July 23, 2009. Thus, in a  
14 liquidation, SunTrust's claim likely would eat up the  
15 remaining value in its collateral, and this assumes  
16 the real property is indeed worth \$2.4 million to the  
17 estate in a Chapter 7 case, meaning that the trustee  
18 would sell it to a third-party bidder and receive cash  
19 in such amount. Under the circumstances of this case,  
20 it is reasonable to assume that the Chapter 7 trustee  
21 would abandon the real property to the secured  
22 creditor, thereby netting nothing for the estate and  
23 potentially leaving a deficiency claim.

24 Most of the time spent addressing the  
25 liquidation analysis at trial focused on the valuation

1 of the funeral home business, and most of the  
2 testimony in this area related to the treatment of the  
3 pre-need contracts. Mr. Lynch testified credibly that  
4 the pre-need contracts each represent a loss to the  
5 debtors and that they will be unable to achieve the  
6 same revenue they would receive as a result of a  
7 current customer paying cash for current services.  
8 Mr. Flynn testified, again credibly, that this would  
9 result in a substantial devaluation of the business in  
10 connection with any sale of the business as a going  
11 concern. Mr. Flynn has considerable experience in  
12 funeral home valuation.

13 Mr. Coniglio, who testified at the request of  
14 Case Holding, disagreed. Mr. Coniglio testified that  
15 the debtors could still achieve some net profit for  
16 each of the pre-need contracts. Mr. Coniglio appeared  
17 to testify honestly based on his personal beliefs.  
18 Mr. Coniglio confirmed that he had no experience in  
19 the funeral home business, however. Based on these  
20 facts, I believe Mr. Flynn's testimony better portrays  
21 the effect of the pre-need contracts on the valuation  
22 of the funeral home business in this case. Based on  
23 his testimony and report, I conclude the business  
24 itself has no value.

25 Mr. Flynn's report and testimony support a

1 finding that the amount that could be distributed to  
2 unsecured creditors in a Chapter 7 liquidation of all  
3 the debtors would be \$118,854. This is clearly less  
4 than the \$168,000 initial distribution to be made to  
5 unsecured creditors under the November Plan, as  
6 revised at the confirmation hearing, and thus Section  
7 1129(a)(7) is satisfied.

8 I note that the reliance by both parties on a  
9 going concern valuation for purposes of Section  
10 1129(a)(7) is misguided. Section 1129(a)(7) requires  
11 a hypothetical analysis of a Chapter 7 liquidation  
12 that in most cases will never take place. It assumes  
13 that the case is converted and a Chapter 7 trustee is  
14 appointed. As you all know, in a Chapter 7 case, it  
15 is presumed that a business such as the Buxton Funeral  
16 Home ceases to operate. The Chapter 7 trustee  
17 liquidates the assets and makes one or more  
18 distributions to creditors. It is relatively rare  
19 that a Chapter 7 trustee requests authority to operate  
20 a business, and then only for a very short period of  
21 time to facilitate a sale. Here, while there may be  
22 an interested purchaser, there is no contract. Also,  
23 the funeral home business requires licensed operators  
24 and specialized knowledge. It seems unlikely that a  
25 Chapter 7 trustee would attempt to continue to operate

1 the business. In this case, as in most Chapter 11  
2 cases, the liquidation analysis requires just that, an  
3 analysis of the liquidation value of all assets. As  
4 the business would not be operating, the value of its  
5 going concern is zero.

6 Because Class 5, the class of unsecured  
7 creditors, is impaired, and including Case Holding's  
8 vote did not vote to accept the plan, Section  
9 1129(a)(8) is not satisfied. Thus, it is necessary to  
10 do a cramdown analysis, and I will do so shortly.

11 Section 1129(a)(9) provides specific  
12 treatment for holders of priority claims under Section  
13 507(a)(7). These are claims for deposits up to \$2,425  
14 in connection with the purchase of services for the  
15 personal, family or household use of an individual  
16 that were not delivered or provided. The amounts paid  
17 by those entering into prepetition pre-need contracts  
18 represent such claims to the extent of the priority  
19 cap. As Case Holding points out, the November Plan  
20 does not provide for them and does not satisfy Section  
21 1129(a)(9). This is a separate reason to deny  
22 confirmation in the corporate debtor's case, and thus  
23 to deny confirmation of the joint plan.

24 The debtors satisfy Section 1129(a)(10),  
25 because SunTrust is impaired under the plan and has

1 voted to accept the plan.

2 Section 1129(a)(11) requires the debtor to  
3 prove that confirmation of the plan is not likely to  
4 be followed by the liquidation or the need for further  
5 financial reorganization of the debtor. This is  
6 called the feasibility test and generally requires the  
7 debtor to show that it can fully perform all material  
8 provisions under its own plan. The debtors' counsel  
9 has in his trust account sufficient funds to make  
10 initial distributions under the November Plan as  
11 amended at the hearing. To this extent, then, the  
12 plan is feasible.

13 The November Plan provides that SunTrust is  
14 to receive monthly payments of \$18,000 for three  
15 years, representing a 20-year amortization on a claim  
16 of \$2,405,145.05. At the end of the 36 months, the  
17 entire outstanding principal and unpaid interest are  
18 due in a balloon payment. Payments to Class 5  
19 unsecured creditors continue for two additional years  
20 following the balloon payment due date to SunTrust.

21 Mr. Flynn testified in general that the plan  
22 is feasible. He stated that the debtors had started  
23 to make changes to increase revenues and cut costs to  
24 meet their projected net income. Mr. Flynn testified  
25 that he assumed the debt that would replace SunTrust

1 three years after confirmation would have the same  
2 payment terms as those provided for SunTrust under the  
3 plan, meaning that it would be based on a 20-year  
4 amortization at the same interest rate. But Mr. Flynn  
5 did not address the likelihood of refinancing the  
6 SunTrust obligation in three years.

7 Case Holding argues that the debtors failed  
8 to satisfy Section 1129(a)(11) because the debtors  
9 offered no evidence to support a conclusion that the  
10 debtors would be able to refinance the SunTrust loan  
11 in 36 months. I note that this case has been pending  
12 for more than 14 months. Prior to filing this case,  
13 the debtors tried for a lengthy period to obtain  
14 permanent financing to take out SunTrust's  
15 construction loan and were unable to do so. This was  
16 the primary reason for filing these cases. We must  
17 assume that they continued to look for such  
18 replacement financing during the pendency of these  
19 cases, although there is no direct evidence on this  
20 issue. In any case, the debtors have not located  
21 replacement financing having had a very long period of  
22 time to do so. We all know that the market for credit  
23 in the United States is at a low not seen for at least  
24 20 years. Perhaps the credit market will improve in  
25 the next three years, but there is nothing in the

1 evidence from which I can conclude that these debtors  
2 are likely to obtain replacement financing in three  
3 years. That means that certain amounts payable to  
4 unsecured creditors under the plan, in years four and  
5 five, may remain unpaid, the debtors would default on  
6 their plan requirements, and Section 1129(a)(11) is  
7 not satisfied. This is an additional reason to deny  
8 confirmation of the November Plan as modified during  
9 the confirmation hearing.

10 Case Holding raises an objection under  
11 Section 1129(a)(12) on the grounds that the debtors'  
12 case could be closed early, upon substantial  
13 consummation, that the plan does not so provide, and  
14 that this would result in unnecessary fees payable to  
15 the US trustee. But Section 1129(a)(12) requires only  
16 that the plan provide for the payment of fees due to  
17 the United States trustee, and not that such fees be  
18 limited to the extent possible. The plan before the  
19 Court does provide for payment of such fees, and the  
20 objection is not well-founded.

21 Case Holding raises an objection under  
22 Section 1129(a)(15). This relatively new provision  
23 requires that the objecting party be the holder of an  
24 allowed unsecured claim. While the debtors objected  
25 to Case Holding's claim, that objection was set for

1 hearing along with the confirmation of the plan, and I  
2 will be addressing it shortly. As I allow Case  
3 Holding's unsecured claim in part, it has an allowed  
4 unsecured claim and thus standing to raise a concern  
5 under subsection (a)(15).

6 1129(a)(15) applies only in Chapter 11 cases  
7 where an individual is the debtor. It requires that  
8 if unsecured creditors are not paid the present value  
9 of their claims, the value of the property to be  
10 distributed under the plan cannot be less than the  
11 projected disposable income of the individual debtor  
12 as defined in Section 1325(b)(2) over the five-year  
13 period beginning on the date of the first payment  
14 after confirmation or a longer period if the plan  
15 provides for a longer payment period. The November  
16 Plan provides for a five-year payment period.

17 Subsection (a)(15) was added in the BAPCPA  
18 amendments in 2005. The principal effect of Section  
19 1129(a)(15) is to require individual Chapter 11  
20 debtors to use their projected disposable income to  
21 fund a plan in a manner parallel to but not identical  
22 to that required under Chapter 13. The  
23 cross-reference to Section 1325(b)(2) is telling.  
24 Congress chose to cross-reference only 1325(b)(2) and  
25 not also 1325(b)(3). In Chapter 13, where a debtor

1 has above median income, Section 1325(b)(3) requires  
2 that the expense side of the calculation of projected  
3 disposable income be determined according to data  
4 established by the Internal Revenue Service. As I  
5 have previously ruled in other matters, when such  
6 so-called National and Local Standards apply, I have  
7 no discretion with regard to the expense figures used  
8 to calculate projected disposable income. By limiting  
9 the cross-reference in Section 1129(a)(15) to Section  
10 1325(b)(2), Congress intended to require that I make a  
11 determination with regard to the amounts reasonably  
12 necessary to be expended for the maintenance or  
13 support of the individual debtors here. I am not  
14 limited to the IRS standards that would apply in a  
15 Chapter 13. For a cogent analysis of this issue, I  
16 point you, again, to the Rodemeier case at 374 BR 264.  
17 It is for this reason that Official Form 22B, which is  
18 the statement of current monthly income for individual  
19 debtors in Chapter 11, is different from Official Form  
20 22C, the for Chapter 13 debtors. The Chapter 11 form  
21 does not include any expense information.

22 On the income side, I follow the great  
23 majority of my colleagues in this district, excluding  
24 only Judge Olson I think, in ruling that the word  
25 "projected" in Section 1129(a)(15) means the same

1 thing it means in Section 1125(b)(1)(B). While I will  
2 generally start with the income information contained  
3 in Form 22, I can deviate from that information where  
4 the facts support a conclusion that the income to be  
5 generated by the debtor during the relevant period is  
6 likely to be lower or higher than presented in Form  
7 22.

8 In an attempt to satisfy Section 1129(a)(15),  
9 the debtors presented Mr. Flynn's testimony and  
10 Exhibits 1 and 3, which were admitted at trial.  
11 Exhibit 3 is a Form 22C filled out by Mr. and Mrs.  
12 Buxton. It does not matter that this is the Chapter 13  
13 form, as the Chapter 11 form, Form 22B, is  
14 substantially identical when it comes to the income  
15 side.

16 Exhibit 3 shows aggregate gross monthly  
17 income of \$11,217. Note this is a gross figure. If I  
18 subtract average monthly taxes shown on Exhibit 3 in  
19 the amount of \$1,911.51, the individual debtors net  
20 income on a monthly basis, after tax, would be  
21 \$9,305.49. Exhibit 1, Mr. Flynn's report, shows their  
22 average monthly receipts for payroll at \$7,185. As  
23 Mr. Flynn uses the term receipts, I assume this is net  
24 of taxes. The debtors' income from rental of a small  
25 office in Okeechobee appears to be reflected only as a

1 credit in Mr. Flynn's expense analysis on the second  
2 page of his report, and not included in the item  
3 called "Cash Receipts - Payroll" on the first page.  
4 This \$642 figure is shown as "F.H. Cottage Rental  
5 Income." If this is added to the payroll figure, the  
6 total income shown in Exhibit 1 is \$7,827. The  
7 difference between this amount and the amount shown in  
8 Exhibit 3, after tax, is \$1,478.49. This difference  
9 is not explained in the record.

10 Mr. Buxton testified -- excuse me.  
11 Mrs. Buxton testified that her gross salary is \$52,000  
12 per year. She testified that Mr. Buxton's gross  
13 salary is \$1,300 per week. This is \$67,600 annually.  
14 These figures add up to \$119,600 per year or \$9,966.66  
15 per month. Again, this is a gross figure. \$9,966 is  
16 materially smaller than the gross figure shown in  
17 Exhibit 3, \$11,217 per month.

18 All of this evidence was primary evidence  
19 offered by the debtors in support of confirmation. In  
20 light of the confusion presented in the debtors own  
21 evidence with regard to the income side of their  
22 projected disposable income, I look to the case law  
23 suggesting that I should start with the income  
24 reflected on Form 22. Thus, I take as the individual  
25 debtors' net income the monthly sum of \$9,305.49. I

1 reach this by starting with the \$11,217 shown on  
2 Exhibit 3 and subtracting the monthly tax expense of  
3 \$1,911.51. The tax expense is subtracted because  
4 Mr. Flynn's expense analysis does not include such  
5 taxes. I note that starting with the \$11,217 gross  
6 income figure, the highest such figure provided in the  
7 evidence, presents the most conservative analysis,  
8 that most likely to result in the highest projected  
9 disposable income.

10 From this I must subtract the monthly  
11 expenses necessary for the maintenance and support of  
12 the debtors. Mr. Flynn's report, Exhibit 1, shows  
13 monthly expenses totaling \$9,032. If I back out  
14 non-essential items, \$75 per month for gifts, \$877.25  
15 for the mortgage payment on the Tampa condo which was  
16 sold, \$350 for the HOA fee on the condo, and \$181 for  
17 vacation rental, the total monthly expenses are  
18 \$7,548.75. I obtained the condo mortgage payment and  
19 HOA figures from Exhibit 3, rather than Exhibit 1.  
20 This leaves projected disposable income of \$1,756.74  
21 per month. As the individual debtors propose to pay  
22 to creditors \$8,500 on a quarterly basis, which is  
23 \$2,833.33 per month, the individual debtors propose to  
24 pay more than their projected disposable income under  
25 the plan. Thus, even using the highest income figure

1 presented and deducting expenses that are no longer  
2 applicable or are not necessary for the maintenance of  
3 the debtors under 1325(b)(2), the debtors satisfied  
4 Section 1129(a)(15).

5 This brings us to the cramdown provisions of  
6 Section 1129(b). Again, as the debtors failed to  
7 satisfy Section 1129(a)(8), because Class 5 voted  
8 against the plan, the debtors have the burden of  
9 satisfying the cramdown requirements.

10 Case Holding appears to have conceded that  
11 the individual debtors are not subject to the absolute  
12 priority requirement in their personal Chapter 11 case  
13 in light of the amendments to Section  
14 1129(b)(2)(B)(ii) that address the individual debtors.  
15 If that is not the case, I rule that the absolute  
16 priority rule no longer applies to individual debtors,  
17 if it ever did. I point you to the Rodemeier case for  
18 a good analysis on this issue as well. It can be  
19 found at 374 BR 264.

20 Case Holding addresses the absolute priority  
21 rule in the Buxton Funeral Home corporate case,  
22 arguing that the individual debtors are retaining  
23 their stock interest in the corporate debtor when the  
24 unsecured creditors are not to be paid in full. The  
25 individual debtors argue that they are giving new

1 value for their stock interest. It is useful to keep  
2 in mind that we have two Chapter 11 cases before the  
3 Court. One is for the corporate debtor. Its  
4 shareholders also happen to be Chapter 11 debtors.

5 The individual debtors offer substantially  
6 all of their non-exempt assets consisting of cash and  
7 of other property to be sold and distributed to  
8 unsecured creditors. This is addressed in Section 6  
9 of the November Plan. Cash from the trust in the  
10 amount of \$64,703, the Tampa condo, or at this point  
11 its proceeds, the Manulife stock, and the motor home  
12 are all offered as new value under the plan. The  
13 estimated value of the non-cash assets is \$38,000 in  
14 the aggregate. While not presently all reduced to  
15 cash, there is no doubt that this is money's worth.

16 Case Holding argues that the individual  
17 debtors were already required to pay this amount to  
18 creditors to satisfy the best interest of creditors  
19 test under Section 1129(a)(7). But Section 1129(a)(7)  
20 is a hypothetical test. It requires analysis of the  
21 payments under a plan to ensure that unsecured  
22 creditors are no worse off than in a Chapter 7  
23 liquidation. It does not require any particular form  
24 of payment. It does not give the unsecured creditors  
25 any right to particular assets. It is just a

1 threshold test. Section 1129(a)(7) sets a minimum  
2 requirement for distribution to unsecured creditors.  
3 Section 1129(a)(5) requires that individual debtors  
4 devote their projected disposable income to payments  
5 under the plan. But there is nothing in Section 1129  
6 that requires individual debtors to pay all of their  
7 non-exempt assets to creditors. That would be a  
8 Chapter 7 liquidation. The Buxton's offer of the  
9 subject cash and assets to the payment of claims in  
10 these cases is not double counting and represents new  
11 value for purposes of the retention of their stock  
12 interest in the corporate debtor.

13 The next question is whether the new value  
14 offered, having a value of about \$102,703 according to  
15 the un rebutted evidence, is sufficient under the  
16 circumstances. As I previously noted, I found  
17 Mr. Flynn's testimony on valuation of the business to  
18 be credible and reliable. His opinion was that that  
19 the business had no value as a going concern in light  
20 of the substantial liabilities represented by pre-need  
21 contracts. As the Buxton Funeral Home, Inc. has no  
22 going concern value, its equity has a value of zero  
23 dollars. The new value represented by the personal  
24 non-exempt property tendered by Mr. and Mrs. Buxton is  
25 more than adequate under the circumstances.

1 I note that if Case Holding was truly  
2 concerned about this issue, it could have filed its  
3 own competing plan long ago, providing for a greater  
4 investment in exchange for the equity in the corporate  
5 debtor, and it did not do so. This approach, the new  
6 value concern, is specifically addressed in the Supreme  
7 Court's LaSalle decision. The exclusive period for  
8 the debtors to have obtained acceptance of a plan  
9 under Section 1121(c)(3) expired on May 27, 2009. The  
10 debtors never requested an extension. Any party in  
11 interest could have filed a plan after that date  
12 without further order of the Court. Instead, Case  
13 Holding elected to file a plan on November 20, 2009,  
14 the date of the first hearing on confirmation of the  
15 debtors' plan I am ruling on now.

16 Case Holding argues that the November Plan is  
17 not fair and equitable in that it "grants superior  
18 rights to SunTrust in the event of any future  
19 liquidation or reorganization in derogation of the  
20 rights of general unsecured creditors." In the  
21 November Plan, the debtors waive the right to contest  
22 relief from stay in favor of SunTrust in any future  
23 case. This plan provision represents only the  
24 debtors' agreement not to challenge SunTrust and does  
25 not limit the Court's power in any way. Under this

1 provision, in any future case the Bankruptcy Court  
2 would rule on whether to grant or deny relief. This  
3 provision does not cause the plan to violate Section  
4 1129(b). I note that I do not approve provisions in  
5 cash collateral order, plans, or otherwise providing  
6 for automatic relief from stay, but I often approve  
7 provisions where the debtor is agreeing not to  
8 challenge relief from stay. Obviously, other parties  
9 in interest have standing to do so, and I may deny  
10 relief even if there is no objection if the movant  
11 fails to satisfy the requirements of Section 362(d).

12 In sum, for the foregoing reasons I will deny  
13 confirmation of the November Plan as amended at the  
14 confirmation hearing.

15 The next matter I am going to address is the  
16 Debtor's Motion to Determine Allowed Amount of Claim  
17 of Case Holding Company, which is Docket Entry 230.

18 Based on the evidence presented, I rule that  
19 Case Holding waived the original payment provisions of  
20 its loan arrangement with the debtors and as a result  
21 is bound to accept payment of \$6,000 per month as  
22 interest on an ongoing basis until outright payment  
23 default. As a result of this waiver, the obligation  
24 became a demand obligation.

25 Florida law governs in this instance, as the

1 debtors are located in Florida and the transaction  
2 occurred in Florida. I point the parties to the  
3 decision in *Gilman v Butzloff*, the second name is  
4 B-U-T-Z-L-O-F-F, which you can find at 22 So.2d 263.  
5 This is a 1945 Florida Supreme Court decision  
6 regularly cited in Florida cases with regard to the  
7 standard for waiver of contractual rights. The rule  
8 in this case has been applied consistantly in cases  
9 involding loan obligations as well as other types of  
10 contracts.

11 Here, the uncontradicted testimony of  
12 Mr. Buxton is that Mr. Case agreed to allow the  
13 debtors to cure a lapse in payments with a lump sum  
14 payment, and to accept monthly payments of \$6,000 per  
15 month even after the original maturity date of the  
16 obligation. Case Holding accepted those payments and  
17 did not call a default, request default interest, or  
18 request late fees. Case Holding's own ledger shows it  
19 accepting the monthly payments made by the debtors,  
20 even when received after the grace period, as being  
21 timely and being applied to current interest at the  
22 original contract rate of 12 percent. This is Exhibit  
23 5 admitted in connection with Docket Entry 230.

24 But there is no evidence to support the  
25 conclusion that Case Holding waived every right under

1 its note, including the right to charge default  
2 interest and late charges when the debtors eventually  
3 stopped making payments. Monthly payments for July,  
4 August, and December 2007, and for February, March,  
5 and April 2008 were late. By this, I mean that the  
6 payments were made after the grace period provided  
7 under the note. But each of these payments was made  
8 within the established course of dealing between the  
9 debtors and Case Holding. Case Holding accepted these  
10 payments and credited them for the relevant months at  
11 the non-default interest rate. However, the payment  
12 for April 2008 was made in May, much later than had  
13 been the practice between the parties. It is unlikely  
14 Case Holding waived the right to payment within a  
15 reasonable time after the due date, and this payment  
16 was made more than a month after the grace period  
17 expired.

18           Consequently, I treat each month prior to  
19 April 2008 as having interest timely paid in the  
20 amount of \$6,000. I treat the April 2008 payment as  
21 being delinquent, resulting in default interest  
22 accruing at the rate of 24 percent from that date.  
23 There was no dispute that 24 percent was the  
24 applicable rate. While the note itself appears to  
25 require interest to be calculated on a daily basis, so

1 that accrued interest would be slightly different for  
2 months having 28, 30, and 31 days, the parties  
3 calculated the regular interest payment at \$6,000 per  
4 month, supporting a monthly calculation for full  
5 months. Interest was payable in arrears under the  
6 note. This is supported by the date of the note and  
7 the date of the first payment, which was a month  
8 later.

9 I rule that Case Holding is entitled to  
10 default interest for the due dates in April, May,  
11 June, July, August, September, and October 2008. At  
12 \$12,000 per month, that adds up to \$84,000. There is  
13 a credit of \$6,000 for the late payment of the April  
14 2008 interest, reducing the running balance to  
15 \$78,000. There were 19 days in October prior to the  
16 filing of this case. At a per diem of \$394.52, that  
17 adds up to an additional \$7,495.88. This brings the  
18 total to \$85,495.88. Under its note, Case Holding is  
19 also entitled to late fees equal to five percent of  
20 each payment not timely made. The debtors failed to  
21 make seven payments of \$12,000 consistent with the  
22 parties' practice. At \$600 per late fee, this adds up  
23 to \$4,200 in late fees. Thus, the aggregate  
24 prepetition default interest and late fees is  
25 \$89,695.88. I note that if the default interest had

1 been calculated based on actual number of days  
2 elapsed, the result would have been very close, the  
3 result I reach. In light of the foregoing, the  
4 objection to Case Holding's filed claim is overruled  
5 in part and sustained in part. In conclusion Case  
6 Holding has an allowed unsecured claim in the amount  
7 of \$689,695.88.

8 Case Holding Company, Inc.'s motion for  
9 Appointment of Trustee, Docket Entry 254.

10 Case Holding requests appointment of a  
11 Chapter 11 trustee in the individual and corporate  
12 cases under Section 1104(a). Case Holding points to  
13 Section 1104(a)(3), which incorporates Section 1112,  
14 and argues that because there is cause for dismissal  
15 or conversion under Section 1112(b)(4), there is also  
16 cause for appointment of a Chapter 11 trustee under  
17 Section 1104(a)(3).

18 Case Holding points to certain  
19 inconsistencies and omissions in the debtors'  
20 schedules that were addressed at the meeting of  
21 creditors held on November 20, 2008 and Case Holding  
22 alleges were not entirely addressed in later filed  
23 amendments. I addressed these same concerns a few  
24 minutes ago in connection with plan confirmation. In  
25 light of the analysis I set forth previously,

1 including the fact that the debtors have disclosed all  
2 of the relevant facts on various occasions during  
3 these cases, I do not find any of the alleged  
4 disclosure failures sufficient to warrant appointment  
5 of a Chapter 11 trustee in this case.

6           Whoever is on the telephone, having trouble  
7 coughing, you might want to put it on mute, because  
8 you're coming through loud and clear.

9           Case Holdings also points to the fact that  
10 certain of the debtors' monthly reports to the United  
11 States trustee were filed between six and 25 days  
12 late. While this is a violation of Section  
13 1112(b)(4)(H), and thus technically cause under  
14 Section 1104(a), I have discretion to take into  
15 account the materiality of such violations as they  
16 relate to the relatively act of appointing a Chapter  
17 11 trustee. I also have discretion to take into  
18 account all of the circumstances of the case period.  
19 Mr. and Mrs. Buxton have made a good faith effort to  
20 move forward with reorganization. They negotiated a  
21 substantially revised plan with SunTrust and Case  
22 Holding. They proposed the plan in good faith. They  
23 testified honestly and fulfilled their duties in good  
24 faith throughout the case. In light of all the  
25 circumstances, I do not find that the debtors tardy

1 reports to the United States trustee warrant  
2 appointment of a Chapter 11 trustee. I note that the  
3 US trustee in this district typically moves for relief  
4 under Section 1104 or 1112 when circumstance warrant,  
5 and I have not heard a request from the US trustee in  
6 this case.

7 Case Holding points to the debtors retention  
8 of an accountant who is also a creditor of the estate  
9 and who has not waived such claim in violation of  
10 Section 327. I previously addressed this issue in the  
11 context of confirmation. I do not believe the  
12 disclosure error was intentional. This matter is more  
13 appropriately address during the fee petition approval  
14 process.

15 Case Holding's motion for appointment of a  
16 Chapter 11 trustee states various historical facts  
17 relevant to these cases which do not appear to be  
18 relevant to the appointment of a Chapter 11 trustee.  
19 It also incorporates Case Holding's objections to  
20 confirmation and argues that the debtors' plan is not  
21 feasible. The purpose of making these arguments in  
22 this context is unclear. Objections to confirmation  
23 are just that, objections under Section 1129. Neither  
24 Section 1104, nor Section 1112(b) incorporate Section  
25 1129 and for good reason. The appropriate relief for

1 failure to confirm a plan is denial of confirmation.  
2 In general, denial of confirmation is not grounds for  
3 dismissal, conversion, or appointment of a trustee  
4 unless it is combined with substantial and continuing  
5 loss to or diminution of the estate or results in  
6 violation of an order of the Court. Such is not the  
7 case here.

8 Case Holding argues that the individual  
9 debtors claimed exemptions only available to those who  
10 have not claimed a homestead exemption but they intend  
11 to retain their homestead. The proper avenue for  
12 relief for such a complaint is an objection to  
13 exemptions and not appointment of a Chapter 11  
14 trustee. In a Chapter 11 case of an individual, the  
15 election of exemptions has little if any effect on  
16 distributions to creditors. It is not cause for  
17 appointment of a Chapter 11 trustee, unless it is part  
18 of a concerted attempt by a debtor to act contrary to  
19 the purposes of the Bankruptcy Code. There were no  
20 such facts presented in this case.

21 Case Holding argues that the individual  
22 debtors failed to sell assets that did not contribute  
23 to their reorganization. By this I assume they are  
24 referring to the Tampa condo. As I addressed more  
25 fully in connection with confirmation, the debtors are

1 entitled to exercise their business judgment in the  
2 maintenance and operation of their assets during these  
3 Chapter 11 cases. It is not expected that every  
4 business decision will be perfect in hindsight. There  
5 is nothing in the record to cause me to question the  
6 debtors' business judgment with regard to the Tampa  
7 condo. I note that it was marketed over a period of  
8 time and that I recently approved the sale of the  
9 condo.

10 Case Holding argues that the debtors failed  
11 to disclose to creditors that they are able to pay  
12 substantially more to creditors than their plan would  
13 provide. First, based on the evidence presented this  
14 is not accurate. The November Plan, in light of the  
15 evidence I have before me, is as about as close to the  
16 edge the debtors could go without making the plan  
17 infeasible because there would too great a risk of  
18 default. The evidence presented on the possibility of  
19 a sale was not persuasive. There is a substantial  
20 risk that such a sale would not come to fruition or  
21 would bring about a smaller distribution to creditors  
22 than Case Holding now believes would result. Second,  
23 this is ultimately a disclosure issue, more  
24 appropriately addressed under Section 1129 and 1125,  
25 as I have done earlier today. Under the circumstances

1 of this case, even if I assume the debtors had the  
2 financial ability to pay more than provided in the  
3 November Plan as amended, this would not be cause for  
4 appointment of a Chapter 11 trustee.

5 Case Holding makes one argument that clearly  
6 supports a finding of cause under Section 1112(b).  
7 Section 1112(b)(4)(F) provides that cause includes  
8 "unexcused failure to satisfy timely any filing or  
9 reporting requirement established by this title or by  
10 any rule applicable to a case under this title."

11 Section 521(a)(1) and Bankruptcy Rule 1007 require the  
12 debtors to file schedules of assets and liabilities,  
13 including lists of executory contracts, and statements  
14 of financial affairs.

15 As I pointed out in more detail earlier this  
16 afternoon, the corporate debtor, Buxton Funeral Home,  
17 Inc., completely failed to schedule its 407 pre-need  
18 contracts, the trust funds held as a result those  
19 contracts, and the claims held by pre-need purchasers.  
20 Under Florida law unless an independent trust was  
21 established, and this does not appear to be the case  
22 here, each holder of a pre-need contract has a  
23 priority deposit claim under Section 507(a)(7) and an  
24 unsecured claim. These claims should have been  
25 scheduled on the corporate debtor's Schedule E and F

1 respectively. In addition, these contracts possibly  
2 represent executory contracts under prevailing law and  
3 should have been listed on Schedule G. Any refunds  
4 made within the preference period should have been  
5 disclosed in Item 3 of the Statement of Financial  
6 Affairs. Each account established under Florida  
7 statutes to retain funds received on account of  
8 pre-need contracts should have been listed in Schedule  
9 B for the corporate debtor. It is obvious from the  
10 record that such accounts exist, but they are not  
11 disclosed anywhere. The pre-need contracts entered  
12 into represent a material portion of the business of  
13 the corporate debtor, but they completely absent from  
14 the official record in this case. Nor do I remember  
15 them ever being mentioned prior to the confirmation  
16 hearing. There is no valid excuse for this failure  
17 nor was any presented. It appears that the holders of  
18 pre-need contracts likely have no idea this case  
19 exists.

20 The complete failure to disclose pre-need  
21 contracts represents cause under Section 1112(b)(4)(F)  
22 in the case of Buxton Funeral Home, Inc. The  
23 individual debtors, Mr. and Mrs. Buxton, control  
24 Buxton Funeral Home, Inc. while the pre-need contracts  
25 most likely would not have been scheduled in their

1 individual case, Mr. and Mr. Buxton were responsible  
2 for the corporate debtor's actions. Their failure to  
3 take into account the pre-need contracts in their  
4 reorganization effort likewise represents cause under  
5 Section 1112(b) in their individual case. There are  
6 no unusual circumstances which would militate against  
7 granting relief under Section 1112(b) as provided  
8 under Section 1112(b)(1).

9 Case Holding asks the Court to appoint a  
10 Chapter 11 trustee under Section 1104(a)(3) based on  
11 cause found under Section 1112(b). Section 1104(a)(3)  
12 states that I should appoint a trustee "if grounds  
13 exist to convert or dismiss a case under Section 1112,  
14 but the court determines that the appointment of a  
15 trustee or an examiner is in the best interests of  
16 creditors of the estate." When such grounds exist,  
17 Section 1104(a)(3) gives me discretion to determine  
18 which relief is appropriate. The standard is best  
19 interest of creditors and the estate. This is the  
20 same standard applicable to determining whether a case  
21 should be dismissed or converted under Section  
22 1112(b)(1) when cause is found. Thus all three  
23 avenues of relief, dismissal, conversion, or  
24 appointment of a Chapter 11 trustee, are available to  
25 the Court as a result of my finding of cause.

1           The initial order scheduling the confirmation  
2 hearing in this case has language customary in this  
3 district providing that if the plan is not confirmed  
4 the Court may consider dismissal or conversion. There  
5 was adequate notice of the possibility of dismissal or  
6 conversion under Bankruptcy Rule 2002 to the extent  
7 applicable. The potential for dismissal or conversion  
8 is also implicated in Case Holding's motion for  
9 appointment of a Chapter 11 trustee as a result of the  
10 interplay between sections 1104 and 1112.

11           For the reasons I outlined earlier in  
12 connection with my ruling on confirmation of the  
13 November Plan, I have made it clear to the debtors and  
14 parties in interest that failure to confirm the  
15 November Plan likely constitutes cause for relief from  
16 stay in favor of SunTrust. There does not appear to  
17 be any impediment to SunTrust continuing its existing  
18 foreclosure action with regard to the funeral home  
19 property. I will enter an order, incorporating this  
20 ruling today, terminating the existing stay entered in  
21 the adversary proceeding brought by the debtors  
22 against SunTrust. Based on my ruling in connection  
23 with that adversary and in the dismissal of the Buxton  
24 Living Trust case, SunTrust would need to file an  
25 independent motion under Section 362(d) for

1 appropriate relief. I expect based on SunTrust's  
2 positions taken in this case, that motion will be  
3 filed shortly and, barring circumstances I cannot  
4 imagine at this point, there appears to be cause for  
5 relief from the stay. Of course I will consider such  
6 a motion if and when it is filed.

7 Case Holding asks the Court to appoint a  
8 Chapter 11 trustee so that it can pursue confirmation  
9 of its plan filed on November 20, 2009. The Case  
10 Holding plan is not confirmable in its current form  
11 for the reasons I addressed earlier, but of course  
12 Case Holding can modify its plan to address those  
13 concerns and in other ways consistent with the  
14 requirements of the Code.

15 Acknowledging that SunTrust will be actively  
16 pursuing foreclosure on the debtors' primary assets,  
17 Case Holding argues that it should be given the chance  
18 to try to get a disclosure statement approved, solicit  
19 votes, and get to confirmation. Case Holding would be  
20 in a race against SunTrust. Case Holding's plan  
21 provides for a sale of the debtors' assets. Should  
22 SunTrust complete foreclosure prior to a confirmation  
23 hearing on Case Holding's plan, such plan would not be  
24 feasible because the estate would have nothing to  
25 sell. Case Holding hopes to win that race. In the

1 meantime, Case Holding would like the Court to appoint  
2 a Chapter 11 trustee to maintain the status quo.

3 Even if Case Holding were to get to  
4 confirmation on its plan, SunTrust has made it clear  
5 that it will oppose the plan. Depending on the  
6 treatment proposed for SunTrust under the Case Holding  
7 plan, SunTrust may have a large enough deficiency  
8 claim to effect a veto in the unsecured creditor  
9 class. This happens often in cases such as this where  
10 there is a single, large secured creditor. Thus, it  
11 is possible that SunTrust's vote against the Case  
12 Holding plan could make it unconfirmable. As I  
13 addressed earlier, it is also possible that the  
14 potential sale of assets proposed by Case Holding  
15 never comes to fruition. In the meantime, parties in  
16 interest would be required to suffer further delay and  
17 incur additional expense for naught.

18 If a Chapter 11 trustee was appointed, the  
19 estate would incur substantial additional costs for  
20 the trustee and his or her counsel. This an  
21 unavoidable side effect of appointment of a trustee.  
22 The Chapter 11 trustee and counsel most likely would  
23 be new to the case and would need to expend  
24 considerable time and fees getting up to speed. It is  
25 appropriate to take this costs into account in ruling

1 on a trustee motion.

2 I rule that the facts and circumstances of  
3 these jointly administered cases warrant conversion of  
4 these cases to Chapter 7. These Chapter 11 cases have  
5 been pending for more than 14 months. Parties in  
6 interest have suffered considerable expense and delay  
7 to no avail. It is not appropriate to require the  
8 expenditure of estate assets and further delay to  
9 allow Case Holding to shoot for the moon. If there is  
10 indeed the possibility of a sale as a going concern,  
11 Case Holding may persuade the Chapter 7 trustee to  
12 seek to continue the debtors' business for a short  
13 period under Section 721 to facilitate the sale.

14 I strongly considered dismissal of these  
15 cases under Section 305(a) with a substantial  
16 prejudice period. Absent confirmation of the debtors'  
17 long-awaited plan, which confirmation I have denied,  
18 there appears to be no legal basis for denying relief  
19 from stay to SunTrust. SunTrust will move to  
20 foreclose on the very assets the debtors use to  
21 conduct business. In light of the protracted nature  
22 of these cases, the fact that the debtors have held  
23 SunTrust at bay for more than a year while chasing  
24 confirmation of their now failed plan, the low  
25 likelihood of success of the Case Holding plan, and

1 the cost attendant in appointing a Chapter 11 trustee,  
2 dismissal under Section 305(a) is well suited to the  
3 facts presented.

4           However, Section 305(a) allows me to consider  
5 the best interest of the debtors as well as creditors  
6 in determining whether to dismiss these cases. If I  
7 were to dismiss these cases, the individual debtors  
8 would obtain the discharge which they may obtain in  
9 Chapter 7. The creditors' interests are also served  
10 in Chapter 7 as opposed to dismissal. In Chapter 7,  
11 the creditors retain the possibility of the sale of  
12 the debtors' business as a going concern without the  
13 typically extended costs of a Chapter 11 trustee.

14 Thus, given the facts of these cases, I favor  
15 conversion under Section 1112(b) over dismissal under  
16 Section 305(a) or, alternatively, 1112(b).

17 Appointment of a Chapter 11 trustee is the least  
18 appropriate relief under the circumstances.

19           In light of the foregoing, I will enter an  
20 order converting each of these jointly administered  
21 cases to Chapter 7.

22           I strongly suggest that the debtors amend  
23 their schedules, Statement of Financial Affairs, and  
24 other appropriate disclosures to reduce the  
25 possibility of denial of discharge in their converted

1 cases.

2 As noted at the start, the Court will prepare  
3 brief orders on each of these matters.

4 Are there any questions?

5 Is everybody still on the telephone?

6 UNIDENTIFIED SPEAKER: Yes.

7 MR. ROTELLA: This is Gary Rotella. Yes,  
8 your Honor.

9 THE COURT: Great.

10 MR. CULVERHOUSE: This is brad Culverhouse.  
11 Yes, your Honor.

12 THE COURT: Great.

13 Mr. Gleason has just --

14 MR. ROSEN: This is Eric Rosen. I have no  
15 question.

16 THE COURT: Thank you.

17 Mr. Gleason just stood.

18 MR. GLEASON: Your Honor, in light of the  
19 level of detail, it's understandable that your Honor  
20 might have gotten a date or two confused. Your Honor  
21 stated very earlier on that the date of filing was in  
22 2009, and I'm sure you meant --

23 THE COURT: You mean the date of filing of  
24 the case?

25 MR. GLEASON: Yes, your Honor.

1 THE COURT: Clearly that was not a case.

2 MR. GLEASON: Yes, just since if it's  
3 transcribed, I just wanted to give the Court the  
4 opportunity to correct that.

5 Also your Honor noted the first objection by  
6 Case as being DE 137. That was the plan. Case's  
7 objection was DE 166.

8 THE COURT: All right. This is the initial  
9 objection, long ago?

10 MR. GLEASON: Yes, your Honor.

11 THE COURT: Okay. Great. And you, at that  
12 point, were objecting to a much earlier version of the  
13 plan.

14 MR. GLEASON: Yes, it's just that your Honor  
15 gave the numbers -- mixed DE numbers.

16 THE COURT: Very good. Thank you. I  
17 appreciate that.

18 Anything else, parties on the telephone?

19 UNIDENTIFIED SPEAKER: No, your Honor. Thank  
20 you so much.

21 THE COURT: Very good. Thank you all. Good  
22 afternoon.

23 Thank you for coming in person, Mr. Gleason.

24 MR. GLEASON: My pleasure, Judge. I didn't  
25 know I would be the only one --

1 THE COURT: I actually had -- my rule is that  
2 whoever sets up the phone call -- I just hung up on  
3 them -- whoever sets up the phone call is supposed to  
4 call the other parties, so he should have called you  
5 and let you know that you could take part by phone.

6 MR. GLEASON: Judge, even if he would have  
7 done that --

8 THE COURT: -- you would have come. That's  
9 fine.

10 MR. GLEASON: -- I wanted have come.

11 THE COURT: That's fine. I just hate --  
12 lawyers are busy now and I hate it when you have leave  
13 your office to sit here for an hour and a half, and  
14 now you have to drive back and forth.

15 MR. GLEASON: You have my undivided attention  
16 when I'm here. I'm not trying to multi-task.

17 THE COURT: Thank you. Happy New Year.

18  
19 (Whereupon, the hearing was concluded.)  
20  
21  
22  
23  
24  
25

CERTIFICATE

STATE OF FLORIDA:  
COUNTY OF PALM BEACH:

I, Anna M. Meagher, Shorthand Reporter and Notary Public for the State of Florida at Large, do hereby certify that the foregoing proceedings were taken before me, in the cause, at the time and place, and in the presence of the Court and counsel as stated in the caption hereto on Page 1 hereof; that the foregoing computer-assisted transcription, consisting of pages numbered 1 through 101, inclusive, is a true and accurate record of my Stenographic notes taken at said proceedings.

I further certify that I am not of counsel, I am not related to nor employed by any attorney in this case.

Dated this 7th day of January 2010.

My Commission Expires: Anna M. Meagher, Notary Public  
January 8, 2013 State of Florida at Large  
Commission #DD850418