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Attorneys for Debtors and Debtors in Possession

**IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE EASTERN DISTRICT OF VIRGINIA
 RICHMOND DIVISION**

-----	X	
In re	:	Chapter 11
	:	Case No. 08-35994
LandAmerica Financial Group, Inc., <u>et al.</u> ,	:	
	:	
Debtors.	:	Jointly Administered
-----	X	
Grunstead Family Limited Partnership,	:	
	:	
	:	
Plaintiff,	:	
	:	Adv. Pro. No. 09-03018-KRH
v.	:	
	:	
LandAmerica 1031 Exchange Services, Inc.,	:	
	:	
Defendant.	:	
-----	X	

**JOINT OBJECTION OF THE DEBTOR, THE LES COMMITTEE,
 AND THE LFG COMMITTEE TO PLAINTIFF’S NOTICE OF APPEAL**

Pursuant to Federal Rules of Bankruptcy Procedure 8003(a) and 8003(c),

LandAmerica 1031 Exchange Services, Inc. (“LES” or “Debtor”), the Official Committee of

Unsecured Creditors of LandAmerica 1031 Exchange Services, Inc. (the “LES Committee”), and the Official Committee of Unsecured Creditors of LandAmerica Financial Group, Inc. (the “LFG Committee” and together with the LES Committee, the “Committees”) respectfully submit this objection (the “Objection”) to the Notice of Appeal filed by Plaintiff Grunstead Family Limited Partnership (“Grunstead”).

PRELIMINARY STATEMENT

1. Grunstead improperly filed a Notice of Appeal on the basis that the Court’s order denying its motion to vacate or modify order establishing scheduling protocol for adversary proceedings without prejudice is a final order. The order is not final, however, because it does not resolve any, let alone all, of Plaintiff’s claims. Nor is the order appropriate for appeal as an interlocutory order or per the collateral order doctrine because the motion was denied without prejudice to the Plaintiff to renew its request for relief, if appropriate, upon completion of the protocol and mediation process.

BACKGROUND

2. On November 26, 2008 (the “Petition Date”), LES and LandAmerica Financial Group, Inc. (“LFG” collectively with LES, the “Debtors”) filed voluntary petitions in the Bankruptcy Court in the Eastern District of Virginia, Richmond Division, for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage their properties as debtors in possession pursuant to Bankruptcy Code sections 1107 and 1108. On December 3, 2008, the United States Trustee for the Eastern District of Virginia appointed the LES Committee and the LFG Committee.

3. Prior to the Petition Date, LES served as a qualified intermediary under Section 1031 of the Internal Revenue Code. Section 1031 allows for a deferral of capital gains tax from the sale of certain properties when exchanged for property of like-kind. Among other

requirements, in order to defer capital gains, the taxpayer must not actually or constructively receive cash consideration or other property from the sale of the Relinquished Property before the taxpayer receives the identified Replacement Property. (*See* Treas. Reg. § 1.1031(k)-1(f).) Taxpayers can satisfy this requirement, among other ways, by use of a qualified intermediary.

4. As a qualified intermediary, LES facilitated like-kind exchanges by receiving the net consideration from the sales of relinquished properties and providing funds necessary for the purchase of replacement properties, among other things, pursuant to agreements entered into by and between LES and each of its exchange customers (the “Exchange Agreements”).

5. During the course of its operations, LES entered into two primary types of Exchange Agreements: (a) agreements that include language contemplating that the applicable exchange funds would be placed in an account or sub-account associated with the relevant customer’s name (the “Segregated Exchange Agreements”); and (b) agreements that do not include this “segregation” language (the “Commingled Exchange Agreements”). Funds received by LES pursuant to the Commingled Exchange Agreements were deposited in or transferred to an operating account maintained by LES in its own name at SunTrust Bank, while funds received by LES pursuant to Segregated Exchange Agreements were transferred to separate bank accounts in the name of LES as “QI” for the respective exchange customer.

6. Accordingly, as of the Petition Date, LES maintained funds from approximately 450 customers pursuant to separate Exchange Agreements. The face amount of the funds transferred to LES associated with these outstanding Exchange Agreements was approximately \$268.1 million.

7. Within weeks of the Petition Date, the LES case was inundated with adversary proceedings brought by LES’s exchange customers asserting causes of action

including breach of contract and fraud, and seeking, among other things, compensatory and punitive damages and injunctive relief. To date, more than one hundred (100) adversary proceedings have been filed seeking a determination that the funds held by LES associated with Exchange Agreements are not property of the estate.

8. As a way to deal with the sheer number of adversary proceedings, LES and the LES Committee filed a Joint Motion for Order Establishing Protocol For Adversary Proceedings (“Protocol Motion”) seeking to establish a mechanism for the efficient administration of the dozens of adversary proceedings. The Protocol Motion was designed to establish an expedient and cost-effective framework for resolution of the core issue in the adversary proceedings, namely whether the funds held by LES pursuant to the Exchange Agreements are assets of its bankruptcy estate.

9. Approximately one week later, the Court entered its Order Establishing Scheduling Protocol for Adversary Proceedings (the “Protocol Order”) (Jt. Admin. Docket No. 574.) The Protocol Order provides that five adversary proceedings (the “Lead Cases”) will proceed on an expedited, test-case basis, and all other adversary proceedings will be stayed pending resolution of the Lead Case litigation. (*Id.*) The Lead Cases were selected based on the language of the parties’ exchange agreements, including cases designated as, in relevant part, Segregated and Commingled Lead Cases. Three Commingled Lead Cases were selected based on slight variations in contract language and the form of consideration received by LES pursuant to the Exchange Agreements. Of significance here, the exchange agreements of the Commingled Type B Case Plaintiffs, Frontier Pepper’s Ferry LLC and Howard Finkelstein, provide that “LES will deposit the exchange funds in an account maintained at SunTrust Bank in Richmond, Virginia.”

10. Immediately upon entry of the Protocol Order, the parties began an

intensive expedited discovery process. During the six week discovery period, the parties exchanged over one hundred thousand (100,000) pages of documents, and took over twenty depositions, including depositions of three separate experts.

11. On the same day the Court entered the Protocol Order, Grunstead initiated its adversary proceeding seeking, among other things, a determination that the exchange funds held by LES pursuant to its exchange agreement are not property of LES's bankruptcy estate. (Adv. Proc. Docket No. 1.) Grunstead's exchange agreement is a Commingled Type B agreement.

12. Two weeks later, Grunstead filed a motion to alter or amend the Protocol Order seeking to have its case be named an additional Lead Case on the grounds that its exchange agreement terminated by its terms prior to the Petition Date and thus it was not adequately represented by the Lead Cases (the "January Motion"). (Jt. Admin. Docket No. 803.) On February 12, 2009, the Court denied the January Motion, finding that an additional Lead Case "is not warranted" and that Grunstead's interests are adequately represented by the two Type B Commingled Lead Cases. (*See* Feb. 12, 2009 Order at 2 (Jt. Admin. Docket No. 895).)

13. Upon completion of fact and expert discovery, the commingled Lead Case plaintiffs, LES, and the Committees each filed cross-motions for partial summary judgment. After a hearing on the cross-motions, the Court denied the commingled Lead Case plaintiffs' motions and granted the motions of LES and the Committees (the "Partial Summary Judgment Order") holding that the funds held by LES pursuant to the commingled Lead Case plaintiffs' exchange agreements are property of LES's bankruptcy estate under Section 541 of the Bankruptcy Code. (*See* May 7, 2009 Order at 2.) Specifically, the Court found that the express terms of the exchange agreements resolved the question of ownership of the exchange funds. (*See* May 7, 2009 Mem. Op. at 24.) The Court held that under the terms of the exchange

agreements, the exchange funds became the property of LES at the time the funds were transferred to LES. (*Id.* at 16-17) (stating that in the exchange agreements, “Plaintiffs relinquished *any and all* interests in the property”) (emphasis in original). The Court further concluded that litigation of each of the adversary proceedings “threatens to consume the entire estate” and “would most certainly severely diminish the amount available for distribution to exchange customers.” (*See id.* at 25.)

14. In light of the Partial Summary Judgment Order, LES and the Committees requested the establishment of a two-step mediation (the “Mediation Protocol”) of certain inter-estate issues on the one hand and issues relating to a compromise plan of liquidation involving a global resolution of, among other things, the pending Lead Cases on the other hand. The Court granted the motion and an order memorializing the ruling was entered on May 21, 2009. (Jt. Admin. Docket No. 1480.) In addition to establishing a schedule for mediation, the Mediation Protocol stays the litigation of the Lead Cases pending further order of the Court. (*Id.*) The Mediation Protocol was completed on July 14, 2009.

15. Four days following the Court’s approval of the Mediation Protocol, Grunstead filed a second motion to vacate or modify the Protocol Order (“May Motion”) seeking the same relief on the same grounds as the January Motion. (Jt. Admin. Docket No. 1445; Adv. Proc. Docket No. 11). On June 23, 2009 the Court held a hearing on the May Motion, at the conclusion of which it denied the motion without prejudice. In doing so, the Court concluded that Grunstead failed to carry its burden to establish changed circumstances warranting reconsideration of the February 12, 2009 order. (June 23, 2009 Order). Significantly, the Court found that there is no prejudice to Grunstead nor violation of its due process rights by a “mere delay in the litigation of its claims.” On the other hand, the Court found that granting the May Motion would prejudice the Debtor by opening the door to further motions to vacate the Protocol

Order. An order memorializing the ruling was entered on June 29, 2009 (the “Reconsideration Order”). (Jt. Admin Docket. No. 1665; Adv. Proc. Docket No. 20.)

16. On July 9, 2009, Grunstead filed its Notice of Appeal of the Reconsideration Order (Jt. Admin. Docket No. 1694; Adv. Proc. Docket No. 22), which is the subject of the instant Objection.

OBJECTIONS

A. The Reconsideration Order Is Not a Final Order.

17. Grunstead bases its Notice of Appeal on provisions of the Bankruptcy Code permitting appeals, as of right, from a bankruptcy court’s “final judgments, orders, and decrees.” *See* 28 U.S.C. § 158(a). The Reconsideration Order, however, is not a final order because it did not adjudicate all of Grunstead’s claims.

18. The Reconsideration Order is merely a case management order in that the May Motion requested the Court lift the stay imposed by the Protocol Order and allow Grunstead to proceed with its litigation immediately, rather than after the completion of the Protocol process. In general, an order is not final unless it disposes of all parties and all claims in a case. *See Turshen v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987) (“In a bankruptcy case, if a particular adversary proceeding has been finally resolved, the outcome constitutes an appealable ‘final decision.’”). The Reconsideration Order does not adjudicate any of Grunstead’s claims and thus is not a final order from which Plaintiff may take an appeal as of right pursuant to 28 U.S.C. § 158(a).¹ Indeed, the Court made clear that it was not foreclosing any of Grunstead’s

¹ While not invoked by Grunstead, the Court should not certify the order as final under Bankruptcy Rule 7054, which incorporates Federal Rule of Civil Procedure 54(b). *See* Fed. R. Bankr. P. 7054 (“[T]he court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”). Certification under Rule 54(b) “is recognized as the exception rather than the norm.” *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1335 (4th Cir. 1993); *see also Legg v. KLLM, Inc.*, 205 F. App’x 164, 165 (4th Cir. 2006) (“Certification pursuant to Rule 54(b) is disfavored in this circuit.”). Considering the Reconsideration Order does not resolve any of Grunstead’s claims and given the entry of

claims, but rather was delaying the prosecution of the claims in the interest of case management and judicial economy.

B. Grunstead's Notice of Appeal is Improper.

19. The Reconsideration Order is, therefore, an interlocutory order. The appeal of such an interlocutory order is governed by Bankruptcy Rules 8001(b) and 8003. "An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) shall be taken by filing a notice of appeal . . . accompanied by a motion for leave to appeal prepared in accordance with Rule 8003" Fed. R. Bankr. P. 8001(b).

20. Grunstead filed a Notice of Appeal but failed to file a motion for leave to appeal. Consequently, Grunstead's Notice of Appeal is improper.

21. "If a required motion for leave to appeal is not filed, but a notice of appeal is timely filed, the district court or bankruptcy appellate panel may grant leave to appeal or direct that a motion for leave to appeal be filed. The district court or the bankruptcy appellate panel may also deny leave to appeal but in so doing shall consider the notice of appeal as a motion for leave to appeal." Fed. R. Bankr. P. 8003(c).

22. To the extent that the Court considers Plaintiff's Notice of Appeal as a motion for leave to appeal, LES and the Committees file this Objection pursuant to Bankruptcy Rule 8003(a) and assert that for the reasons set forth below, Plaintiff cannot meet the requirements for an interlocutory appeal of the Reconsideration Order.

the Mediation Protocol, with its stated goal of an expedited, comprehensive, and cost-effective resolution of the Lead Cases and consensual plan of liquidation for the LES bankruptcy case, Grunstead cannot show that there is "no just reason for delay;" hence, there is no basis for Rule 54(b) certification.

i. Grunstead cannot satisfy the requirements for an interlocutory appeal of the Reconsideration Order.

23. Interlocutory appeals are disfavored. *KPMG Peat Marwick, L.L.P. v. Estate of Nelco, Ltd.*, 250 B.R. 74, 78 (E.D. Va. 2000) (Appellant must demonstrate “*exceptional circumstances* justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.”) (emphasis added). Courts generally grant leave to appeal an interlocutory order only when: (1) the order involves a controlling question of law; (2) as to which there is a substantial ground for a difference of opinion; and (3) an immediate appeal would materially advance the termination of the litigation. *See id.* (citing *Atl. Textile Group, Inc. v. Neal*, 191 B.R. 652, 653 (E.D. Va. 1996)).

24. Here, none of those elements are met. The appeal does not involve a question of law, let alone a controlling one, without which there can be no basis for a substantial ground for a difference of opinion. Nor, would there be, as the Court’s ruling was clearly sensible under the circumstances. And, rather than materially advance the litigation, an appeal at this stage would impede the progress of the LES bankruptcy case.

25. First, the Fourth Circuit has recognized that “the kind of question best adapted to discretionary interlocutory review is a narrow question of *pure law* whose resolution will be *completely dispositive of the litigation*, either as a legal or practical matter, whichever way it goes.” *Fannin v. CSX Transp., Inc.*, No. 88-8120, 1989 WL 42583, at *5 (4th Cir. Apr. 26, 1989) (emphasis added). The Court’s ruling on the May Motion was not a narrow question of pure law independent of facts specific to Grunstead’s claims. Rather, in denying the May Motion without prejudice, the Court analyzed the facts of this case and considered any possible prejudice to Plaintiff. As such, the Reconsideration Order did not address a narrow question of pure law. *See Charlotte Commercial Group, Inc. v. Fleet Nat’l Bank (In re Charlotte*

Commercial Group, Inc.), No. 01-6044, 2003 WL 1790882, at *2 (M.D.N.C. Mar. 13, 2003) (where “the question of law presented in this appeal is grounded in the specific facts of the case, and cannot be divorced from [those] facts, it does not present a narrow question of pure law”) (internal quotations omitted). Moreover, an appeal of the Reconsideration Order will not be dispositive of Grunstead’s claims as it did not adjudicate any of Grunstead’s claims. Moreover, the Court denied the May Motion without prejudice, specifically contemplating that Grunstead may renew its request at the conclusion of the Protocol process and Mediation Protocol, if appropriate. (June 29, 2009 Order ¶ 1.)

26. Second, Grunstead cannot show that there is a substantial ground for a difference of opinion over a controlling question of law. *See KPMG*, 250 B.R. at 78. The May Motion addressed a procedural issue, the continuation of the stay of adversary proceedings pending completion of the Protocol process. The propriety of a stay of proceedings imposed for case management and administrative purposes is not a controlling question of law giving rise to a difference of opinion between courts (*see id.* at 82 (“[A]n interlocutory appeal will lie only if a difference of opinion exists *between courts* on a given controlling question of law, creating the need for an interlocutory appeal to resolve the split or clarify the law.”) (emphasis in original); *In re Charlotte Commercial Group, Inc.*, 2003 WL 1790882, at *3 (“The question, however, is not whether [appellant] thinks the Bankruptcy Court misapplied the law, but whether courts themselves disagree as to what the law is.”) (internal quotations omitted); it is, rather, a decision solely within the discretion of the bankruptcy court.

27. Finally, an interlocutory appeal of the Reconsideration Order is likely to hinder the bankruptcy proceeding rather than materially advance it. With the completion of the mediation, this case is moving toward plan filing and confirmation. Plaintiff’s appeal threatens to unravel this progress in that it seeks to start from scratch. The May Motion seeks to re-open

the Protocol Order so that there is a new Lead Case that has to be litigated in its entirety, including another round of discovery and motion practice. And, the request comes while the 100 other adversary proceedings, including the Lead Cases, are stayed in an effort to move the entire bankruptcy case toward a complete resolution. Litigation of the Grunstead case will delay, not advance, these proceedings.

ii. Grunstead cannot satisfy the requirements for an appeal under the collateral order doctrine.

28. Nor is an appeal of the Reconsideration Order warranted based on the common law collateral order doctrine. The collateral order doctrine provides that an order not otherwise final may be appealed as a matter of right if the order “[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). The conditions for a collateral order appeal are “stringent” and not intended to avert a “particular injustice.” See *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994).

29. The Court expressly denied Grunstead’s May Motion without prejudice and specifically retained jurisdiction to decide this or any related issues at a later time, stating that Grunstead may “file a motion seeking relief similar to that requested in the Motion upon completion of the process established under the Protocol Order and mediation protocol has run its course.” (See June 23, 2009 Order.) As the Order is subject to further revision by the Bankruptcy Court, it is not appropriate for appeal under the collateral order doctrine. See *Gold v. Guberman (In re Computer Learning Ctrs., Inc.)*, 407 F.3d 656, 662 (4th Cir. 2005) (finding that

an order that allows for any alteration prior to the closing of the bankruptcy case is not appropriate for consideration under the collateral order doctrine).

30. Moreover, the Reconsideration Order is not segregable from the merits of Grunstead's case, but rather hinges on the factual and legal similarities of this case to the other Commingled Type B Lead Cases. At the February 5, 2009 hearing on the January Motion, the Court soundly rejected Grunstead's proposition that it is distinctly different than the commingled Type B Lead Cases, stating: "I don't see that this claimant is substantially different from the other class B claimants." (*See* Feb. 5, 2009 Hr'g. Tr. at 37.) These very similarities formed the basis for the Court's ruling and thus Grunstead's appeal cannot be separated from issues central to its primary cause of action. *See Coopers & Lybrand*, 437 U.S. at 469 (finding that an appeal under the collateral order doctrine is not appropriate when the determination of issues involves considerations inextricable from the primary cause of action).

31. For these reasons, Grunstead is not entitled to an appeal under the collateral order doctrine.

WAIVER OF MEMORANDUM OF LAW

32. The legal authority supporting the relief requested by the Objection has been cited herein. Therefore, LES and the Committees respectfully request that the Court waive the requirement in Rule 9013-1(H)(2) of Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia that a response in opposition be accompanied by a memorandum of law.

CONCLUSION

WHEREFORE, for the reasons set forth above, LandAmerica 1031 Exchange Services, Inc., the Official Committee of Unsecured Creditors of LandAmerica 1031 Exchange

Services, Inc., and the Official Committee of Unsecured Creditors of LandAmerica Financial Group, Inc. respectfully request that the Court:

- (1) Sustain their objections to Plaintiff's Notice of Appeal;
- (2) Deny Plaintiff leave to appeal the Reconsideration Order;
- (3) Grant such other and further relief as may be just and proper.

Dated: Richmond, Virginia
July 20, 2009

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2009, I have caused the foregoing Joint Objection of the Debtor, the LES Committee, and the LFG Committee to Plaintiff's Notice of Appeal to be served via ECF and electronic mail on the following:

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