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Proposed Attorneys for the 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 |
| | : | |
| LandAmerica Financial Group, Inc., <u>et al.</u> , | : | Case No. 08-035994 (KRH) |
| | : | |
| Debtors. | : | Jointly Administered |
| -----X | | |
| LUBExpress Land Company, Inc., and | : | |
| LUBExpress Operating Company, Inc., | : | |
| | : | |
| Plaintiffs, | : | Adv. Proc. No. 08-03146 (KRH) |
| | : | |
| v. | : | |
| | : | |
| LandAmerica 1031 Exchange Services, Inc., | : | |
| | : | |
| Defendant. | : | |
| -----X | | |
| Millard Refrigerated Services, Inc., | : | |
| | : | |
| Plaintiff, | : | Adv. Proc. No. 08-03147 (KRH) |

| | | |
|---|---|-------------------------------|
| v. | : | |
| | : | |
| LandAmerica 1031 Exchange Services, Inc., | : | |
| | : | |
| Defendant. | : | |
| -----X | | |
| Arbor Oaks I, LLC, and Arbor Oaks II, | : | |
| LLC, | : | |
| | : | |
| Plaintiffs, | : | Adv. Proc. No. 08-03151 (KRH) |
| | : | |
| v. | : | |
| | : | |
| LandAmerica 1031 Exchange Services, Inc., | : | |
| | : | |
| Defendant. | : | |
| -----X | | |
| Chino Spectrum Center, LLC, a California | : | |
| limited liability company; and Chino Wings, | : | |
| LLC, a Delaware limited liability company, | : | |
| | : | |
| Plaintiffs, | : | Adv. Proc. No. 08-03152 (KRH) |
| | : | |
| v. | : | |
| | : | |
| LandAmerica 1031 Exchange Services, Inc., | : | |
| | : | |
| Defendant. | : | |
| -----X | | |
| Westminster Peak, L.P., Westminster | : | |
| Summit, L.P., NMC Summit, LLC and | : | |
| Tower Summit Colorado, LLC, | : | |
| | : | |
| Plaintiffs, | : | Adv. Proc. No. 08-03153 (KRH) |
| | : | |
| v. | : | |
| | : | |
| LandAmerica 1031 Exchange Services, Inc., | : | |
| | : | |
| Defendant. | : | |
| -----X | | |

**MEMORANDUM OF LANDAMERICA 1031 EXCHANGE SERVICES, INC.
IN OPPOSITION TO VARIOUS ADVERSARY PROCEEDING PLAINTIFFS'
MOTIONS SEEKING EMERGENCY INJUNCTIVE RELIEF**

1. Defendant LandAmerica 1031 Exchange Services, Inc. (“**LES**”), a debtor and debtor in possession in the above-captioned bankruptcy cases, submits this memorandum in opposition (the “**Omnibus Opposition**”) to the motions (the “**Motions**”) filed by plaintiffs Arbor Oaks I, LLC and Arbor Oaks II, LLC (collectively, “**Arbor Oaks**”), Westminster Peak L.P., Westminster Summit L.P., NMC Summit, LLC and Tower Summit Colorado, LLC (collectively, “**Westminster Peak**”), LUBExpress Land Company, Inc. and LUBExpress Operating Company, Inc. (collectively, “**LUBExpress**”), Millard Refrigerated Services, Inc. (“**Millard**”), and Chino Spectrum Center, LLC and Chino Wings, LLC (collectively, “**Chino**”) and together with **Arbor Oaks, Westminster Peak, LUBExpress and Millard**, the “**Movants**”) in various adversary proceedings¹ seeking temporary restraining orders or preliminary injunctions on an expedited basis,² and respectfully represents as follows:

PRELIMINARY STATEMENT

2. In an attempt to avoid protracted and piecemeal litigation over the parties’ respective rights to the Segregated Exchange Funds (as defined below) and in the interests of efficiency, judicial economy, and preserving assets of the debtor’s estates, LES moved for an order authorizing but not directing it to settle certain claims held or asserted by customers of LES who have Segregated Exchange Funds (defined below as the “**Settlement Procedures Motion**”). The claims that LES proposes to settle by way of the Settlement Procedures Motion are the precise claims held by each of the Movants and for which LES proposes to settle in the

¹ Given the similarity of arguments in support of and the relief requested, in the interest of brevity and efficiency LES submits this omnibus response in opposition to the Motions.

² In support of this Omnibus Opposition, LES incorporates by reference its Memorandum in Opposition to Motion of Plaintiff Health Care REIT, Inc. for Temporary Restraining Order and Preliminary Injunction, Adv. Proc. No. 08-03149 (KRH), dated Dec. 8, 2008 (Docket No. 12). Any consideration or resolution of the Motions should be done in connection with the motion by Heath Care REIT, Inc. similarly seeking emergency injunctive relief. See Health Care REIT, Inc. v. LandAmerica Exchange Servs. Inc., Adv. Proc. No. 08-03149 (KRH) (Docket No. 3).

Settlement Procedures Motion. The Movants are customers of LES whose exchange funds are held in segregated accounts pursuant to the terms of the parties' exchange agreements (defined below as the "**Segregated Exchange Funds**"). Indeed, the proposed settlement will essentially make the Movants whole, in exchange for a release, and will render moot the relief sought by Movants in the Motions. LES respectfully submits that the relief sought in the Motions is more properly addressed by the Settlement Procedures Motion.

3. In contrast to the orderly procedure proposed in the Settlement Procedures Motion, the Motions require the Court to undertake on an emergency basis a case-by-case analysis of the merits of six (6) adversary proceedings³ in their infancy. If the Court finds the proposed settlement agreement is not in the best interest of the Debtor's bankruptcy estate and denies the Settlement Procedures Motion, then the Movants' adversary proceedings, which require a determination of the ownership of the Exchange Funds, should be fully litigated like every other adversary proceeding similarly seeking a determination of whether the Segregated Exchange Funds are property of LES' estate.

4. In addition, the emergency injunctive relief requested in the Motions is neither appropriate nor warranted by the applicable legal standards. The Motions generally seek three forms of relief: (i) an order precluding LES from expending, transferring, commingling, adding to, or otherwise modifying the location, amount or characteristics of the exchange funds held by LES in its capacity as a qualified intermediary pursuant to the applicable Segregated Exchange Agreements; (ii) a declaration that the Segregated Exchange Funds are not property of LES' estate; and (iii) an order compelling LES to cause the transfer of the Segregated Exchange Funds pursuant to the terms of the applicable Segregated Exchange Agreements or, in the alternative, to

³ The six (6) adversary proceedings include the five (5) adversary proceedings filed by the Movants, and Health Care REIT v. LandAmerica 1031 Exchange Services, Inc. (In re LandAmerica Financial Group, Inc., et al.), Case No. 08-35994, Adv. Proc. No. 08-03149.

remit the Segregated Exchange Funds directly to the Movants or a substitute qualified intermediary of their choosing.⁴

5. As a preliminary matter, pursuant to the LES Cash Management Order (as defined below), LES is already prohibited from expending, transferring, commingling or otherwise modifying the locations or characteristics of any funds maintained in LES bank accounts as of the Petition Date (as defined below). The status quo is thus already preserved, and to the extent the Motions seek relief prohibiting LES from further using or moving these funds, the Motions are moot. More importantly, to the extent that movants seek equitable relief to obtain these funds, there is simply no basis for obtaining equitable relief in an action for monetary damages where temporary loss of use of funds can be remedied in due course by a money judgment. Finally, in the event that the Court denies the Settlement Procedures Motion, there is no basis for expedited procedures shortcutting the normal litigation path. To the extent the Court is uncertain about the parties' respective rights in the Segregated Exchange Funds, none of the Segregated Exchange Funds should be released without briefing and development of facts, if any, that the Court may view as pertinent.

⁴ Chino, LUBExpress, Millard, and Westminster Peak also request consolidation of the hearing on the Motions with a trial on the merits under Bankruptcy Rules 7065(a)(1) and (2) and Federal Rules of Civil Procedure Rule 65. This request should be denied for the same reasons their requests for emergency injunctive relief should be denied. There simply is no reason to expedite a final determination of the parties' respective rights to the Exchange Funds less than three (3) weeks after LES filed its bankruptcy petition, before LES has filed its schedules of assets and liabilities or statement of financial affairs, and prior to the expiration of LES' responsive pleading deadline in the underlying adversary proceedings. To the extent the Movants have an interest in the Exchange Funds, that interest is being preserved by operation of the LES Cash Management Order (as defined below). Furthermore, in the event the Court grants the Settlement Procedures Motion, a trial on the merits of the Movants' claims will be unnecessary as LES believes the parties will consensually resolve this matter without further involvement of the Court.

BACKGROUND

A. LES' BANKRUPTCY CASE

6. On November 26, 2008 (the “**Petition Date**”), LES filed a voluntary petition in this Court for relief under chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”). LES’ chapter 11 case is being jointly administered with its affiliated debtor, LandAmerica Financial Services Group, Inc. (“**LFG,**” and together with LES, the “**Debtors**”). LES continues to manage its properties as debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in LES’ chapter 11 case.

7. On November 28, 2008, the Court entered that certain Order Authorizing: (a) Maintenance and Continued Use of the Debtor’s Existing Bank Accounts and Business Forms; (b) A Waiver of Certain Operating Guidelines Relating to Bank Accounts; and (c) A Limited Waiver of, and an Extension of Time for the Debtor to Comply with, Section 345 of the Bankruptcy Code (the “**LES Cash Management Order**”). In relevant part, the LES Cash Management Order states that LES “shall not expend, transfer, commingle or otherwise modify the location or characteristics of any funds, securities or other property maintained in the Bank Accounts as of the Petition Date.” LES Cash Management Order at ¶ 13.

8. On December 3, 2008, the United States Trustee for the Eastern District of Virginia appointed an Official Committee of Unsecured Creditors in LES’ chapter 11 case (the “**Creditors’ Committee**”).

9. On December 5, 2008, LES filed a Motion for Order Pursuant to Section 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019 Establishing Procedures to Settle Claims Involving Segregated Exchange Funds (the “**Settlement Procedures Motion**”).

Pursuant to the Settlement Procedures Motion, LES seeks authority to settle claims concerning the Segregated Exchange Funds by paying such funds in full pursuant to the terms and conditions of the Segregated Exchange Agreements and to otherwise perform its obligations under the Segregated Exchange Agreements in the ordinary course of business in consideration of the applicable customer's execution of a full release by the Debtors' customer. The Settlement Procedures Motion is set to be heard by this Court on December 16, 2008.

B. THE ADVERSARY PROCEEDINGS

10. On November 29, 2008, LUBExpress filed a complaint against LES seeking declaratory and injunctive relief and claimed damages for alleged breach of contract, conversion, and intentional interference with contract. See Adv. Proc. No. 08-03146 (KRH). On December 10, 2008, LUBExpress filed the subject Motion.

11. On December 1, 2008, Millard filed a complaint against LES seeking declaratory and injunctive relief and claimed damages for alleged breach of contract, conversion, and intentional interference with contract. See Adv. Proc. No. 08-03147 (KRH). On December 10, 2008, Millard filed the subject Motion.

12. On December 8, 2008, Arbor Oaks filed its complaint against LES seeking declaratory and injunctive relief, specific performance, and claimed damages for breach of contract, conversion, and intentional interference with contract. See Adv. Proc. No. 08-03151 (KRH). At the same time, Arbor Oaks filed the subject Motion.

13. Also on December 8, 2008, Chino filed a complaint against LES seeking declaratory and injunctive relief and claimed damages for alleged breach of contract, conversion, and intentional interference with contract. See Adv. Proc. No. 08-03152 (KRH). On the same day, Chino filed the subject Motion.

14. Westminster Peak also filed its complaint against LES on December 8, 2008, seeking declaratory and injunctive relief and claimed damages for alleged breach of contract, conversion, and intentional interference with contract. See Adv. Proc. No. 08-03153 (KRH). On December 10, 2008, Westminster Peak filed the subject Motion.

C. LES' BUSINESS OPERATIONS

15. Prior to the Petition Date, LES operated as a “qualified intermediary” under Section 1.1031(k)-1(g)(4) of the Treasury Regulations and Section 1031 of the Internal Revenue Code (the “**Tax Code**”). By way of background, the Tax Code generally imposes taxes when property is sold or transferred and a gain is realized. Pursuant to Section 1031 of the Tax Code and the applicable Treasury Regulations, if a taxpayer adheres to certain guidelines, then all or a portion of the gains from the disposition of business or investment property can be deferred. To qualify for such tax deferral, the taxpayer must structure the transaction as an exchange of one property for another of “like kind.” This includes a requirement that the taxpayer receive the new “like kind” property within 180 days after the date on which the taxpayer transferred the relinquished property. Section 1031 exchanges typically are facilitated by a qualified intermediary, like LES.

16. Prior to the Petition Date, LES entered into agreements with its customers (the “**Exchange Agreements**”) whereby it acquired the net proceeds of the sales of relinquished properties (the “**Exchange Funds**”) in order to facilitate a like-kind exchange in accordance with requirements of the Tax Code. During the course of its operations, LES entered into two primary types of Exchange Agreements: (a) agreements that require LES to segregate the applicable Exchange Funds (the “**Segregated Exchange Agreements**”); and (b) agreements that do not require segregation (the “**Commingled Exchange Agreements**”).

17. Under both types of Exchange Agreements, LES takes sole and exclusive possession, dominion, control and use of all Exchange Funds, including interest, if any, earned on the Exchange Funds until the earlier of the consummation of a like-kind exchange or such other date or event as provided in the Exchange Agreement (as applicable, the “**Termination Date**”). On information and belief, all of the Exchange Agreements provide that a customer shall have *no right, title, or interest in or to the Exchange Funds or any earnings thereon* and that a customer shall have no right, power or option to demand, call for, receive, pledge, borrow or otherwise obtain the benefits of any Exchange Funds, including interest, if any, earned on the Exchange Funds except that the balance of Exchange Funds, if any, held by LES after applying such Exchange Funds in accordance with the Exchange Agreement shall be paid to the customer on the applicable Termination Date.⁵ On further information and belief, none of the Exchange Agreements contains language describing the Exchange Agreements as an express trust. To the contrary, the Exchange Agreements expressly disclaim any duties on the part of LES that are not expressly undertaken in the agreement.

18. Some of the Exchange Agreements, *i.e.*, the Segregated Exchange Agreements, however, contain provisions, either on their face or by way of escrow agreements executed contemporaneously therewith and incorporated therein, that arguably change the characterization of the party that maintains the “right, title, or interest” in or to the Exchange Funds. Among other things, these provisions require LES to segregate the applicable Exchange Funds (the “**Segregated Exchange Funds**”) and hold the Segregated Exchange Funds in a segregated bank account until the Termination Date. Moreover, unlike the Exchange Funds associated with the Commingled Exchange Agreements (the “**Commingled Exchange Funds**”), the Segregated

⁵ These restrictions are consistent with the requirements set forth in Treasury Regulations governing exchanges under Section 1031 of the Tax Code that include qualified intermediaries. See 26 C.F.R. § 1.1031(k)-1(g)(4) (2008).

Exchange Funds are maintained in separate bank accounts and, in most instances, associated with the name of the applicable customer and such customer's tax identification number.

19. As of the Petition Date, the Exchange Funds maintained by LES included funds acquired from approximately 450 customers pursuant to separate Exchange Agreements; approximately 50 related to Segregated Exchange Agreements, while the remaining approximately 400 related to Commingled Exchange Agreements. As of the Petition Date, approximately \$227.5 million in Segregated Exchange Funds were maintained in segregated LES accounts.

D. THE MOVANTS' EXCHANGE AGREEMENTS

20. Prior to the Petition Date, the Movants and LES executed several Segregated Exchange Agreements (the "**Movants' Exchange Agreements**").⁶

21. In each instance, the Movants' Exchange Agreements expressly provide that the Movants "shall have no right, title, or interest in or to the Exchange Funds or any earnings thereon." Movants' Exchange Agreements § 2(c); see also id. ("LES shall have sole and exclusive possession, dominion, control and use of all Exchange Funds, including interest earned on the Exchange Funds [until the occurrence of certain identified events].").⁷

22. The Movants' Exchange Agreements further provide that the Movants shall have "no right, power or option to demand, call for, receive, pledge, borrow or otherwise obtain the benefits of any of Exchange Funds, including interest earned on the Exchange Funds except that

⁶ The Movants attached as exhibits to the declarations in support of their respective motions Exchange Agreements with LES that they represent to be true and accurate copies of the parties' agreements. Due to the infancy of these proceedings, LES can neither confirm nor deny the accuracy of the agreements nor whether the agreements attached to the declarations represent all such agreements between the parties. For purposes of this Omnibus Opposition only, LES assumes that the agreements are as represented by the Movants.

⁷ Attached as Exhibit B to the Declaration of Ronald Ramos in Support of Debtor's Motion for Order Pursuant to Sections 105(a) and 363(b) of Bankruptcy Code and Bankruptcy Rule 9019 Establishing Procedures to Settle Claims Involving Segregated Exchange Funds is an example of the Movants' Exchange Agreements.

the balance of the Exchange Funds and interest held by LES after applying the same in accordance with this Exchange Agreements shall be paid to [the Movants] on the applicable Termination Date.” Id. § 2(c).

23. The Movants’ Exchange Agreements further provide that, “[e]xcept for damages, losses, or expenses caused by LES’ willful misconduct, gross negligence or fraud, [the Movants] shall indemnify, hold harmless, and defend LES from and against any and all actions, suits, claims, charges, costs, losses, damages, liabilities, expenses, including costs of investigation, court costs, and attorneys’ fees and disbursements that may be brought or imposed upon LES in connection with its action hereunder, including any litigation arising in connection with this Exchange Agreement or involving the subject matter hereof as and when incurred,” and that “[i]n no event shall LES be liable for special or consequential damages, whether or not apprised of the same.” Id. at § 6(e).⁸

24. The Movants’ Exchange Agreements contain no language indicating that the parties intended the Movants’ Exchange Agreements to create an express trust. To the contrary, the Movants’ Exchange Agreements expressly disclaim any duties on the part of LES that are not expressly undertaken in the agreement. See id. at § 6(c) (“LES has undertaken to perform only such duties as are expressly set forth herein, and no additional duties or obligations shall be implied hereunder or by operation of law or otherwise.”).

25. On the other hand, the Movants’ Exchange Agreements require strict segregation of the Exchange Funds, thereby preventing LES from using the funds, which provision may arguably change the characterization of the party that maintains the “right, title, or interest” in or to the Exchange Funds. In short, the ownership of the Exchange Funds is not without doubt.

⁸ The Segregated Exchange Agreements executed by the Westminster Peak Plaintiffs do not include an exclusion of special or consequential damages.

OBJECTION TO MOTIONS

A. *APPLICABLE STANDARDS*

26. Interim injunctive relief is intended and reserved for “the exceptional cases where that order is necessary to preserve the status quo.” Cathey v. Norfolk & W. Ry. Co., 228 F. 26, 29 (4th Cir. 1915) (citation omitted); see also Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980) (noting that “[p]reliminary injunctions are not to be granted automatically”) (citation omitted). Because interim injunctions “are extraordinary interlocutory remedies that are granted in limited circumstances and then only sparingly,” In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 526 (4th Cir. 2003), granting preliminary injunctive relief should be “the exception, not the rule.” Hennon v. Kirklands, Inc., 870 F. Supp. 118, 120 (W.D. Va. 1994) (citing *inter alia* Hughes Network Sys. v. Interdigital Commc’ns Corp., 17 F.3d 691, 693-94 (4th Cir. 1994)).

27. This Court may exercise its equitable power to issue injunctive relief only to the extent the Movants can satisfy the Blackwelder standard. See Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977). Under Blackwelder, the Court should consider: (1) the likelihood of irreparable harm to the Movants if the injunctive relief is denied; (2) the likelihood of harm to LES if the relief is granted; (3) the likelihood that the Movants will succeed on the merits of its underlying claims; and (4) the public interest. Id. at 195-96.

28. Should the court have any doubt as to the movant’s entitlement to interim injunctive relief, it should simply deny the request. See, e.g., Microstrategy Inc. v. Motorola, Inc., 245 F.3d 335, 340 (4th Cir. 2001) (holding that “[t]o doubt is to deny”) (citation omitted); Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc., 889 F.2d 524, 526 (4th Cir. 1989) (noting that a preliminary injunction is “to be granted only if the moving party clearly establishes entitlement to the relief sought”).

29. When, as here, the movant's request seeks mandatory injunctive relief -- i.e., an order that does not just preserve the status quo, but instead forces the non-movant to take certain affirmative acts (such as payment of the Exchange Funds) -- the movant's burden to prove each and every factor supporting its grant becomes that much more difficult, and the foregoing standards that much more "particularly exacting" and stringent. See, e.g., E. Tenn. Natural Gas Co. v. Clanton, 361 F.3d 808, 828 (4th Cir. 2004) (observing that mandatory injunctions can only issue "when the exigencies of the situation demand such relief") (citations omitted); Taylor v. Freeman, 34 F.3d 266, 270 n.2 (4th Cir. 1994) ("Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances."). Here, the Movants cannot meet this heavy burden.

B. THE MOVANTS ARE NOT ENTITLED TO INJUNCTIVE RELIEF.

1. The Movants Will Suffer No Irreparable Harm.

30. In the Motions, the Movants contend that they will suffer irreparable harm in the absence of injunctive relief primarily on the grounds that they may lose the tax benefit of the like-kind exchange contemplated by the Exchange Agreements if the Exchange Funds are unavailable and LES refuses to perform its obligations under the Segregated Exchange Agreements.⁹ Movants' claims are nothing more than dressed-up breach of contract claims, clearly remedial by money damages. In the event the Movants are unable to consummate a like-kind exchange, and, therefore, lose the desired tax benefit, such an injury is clearly a legal injury,

⁹ It is not even clear from the Motions whether all of the Movants intend to consummate a like-kind exchange. For example, Chino acknowledges in its Motion that the 45-day identification period expired without Chino identifying a potential replacement property. See Mot. of [Chino Plaintiffs] for a Preliminary Injunction and to Consolidate Hearing with the Trial on the Merits Pursuant to Fed. R. Bank. P. 7065(a)(1) and (2), dated Dec. 8, 2008, Adv. Proc. No. 09-03152 (KRH) (Docket No. 3) ("Chino Mot."), at ¶ 6. LES does not concede any of its rights, claims, or defenses to any customer claims relating to the Exchange Funds, but rather expressly preserves any and all rights, claims, or defenses it may have to such claims, including without limitation claims for consequential and other special damages. Any determination of the parties' respective rights to the Exchange Funds would require an evidentiary showing concerning, inter alia, the customers' compliance with identification and closing procedures on a case-by-case basis.

not an irreparable injury of the type injunctive relief can be exercised to prevent.¹⁰ Such injury can be remedied by a money judgment, if appropriate, and thus will not sustain a request for injunctive relief. See Sampson v. Murray, 415 U.S. 61, 90 (1974). Moreover, in light of the full disclaimers by LES under the Movants' Exchange Agreements regarding the potential tax consequences of transactions under such agreements, the failure of any transaction under the Movants' Exchange Agreements to qualify for certain tax benefits cannot constitute irreparable harm to Movants. The risk of potential adverse tax consequences was expressly assumed by Movants under the Exchange Agreements.

31. Nor is the injunctive relief necessary to maintain the status quo. The Movants' claimed irreparable harm is premised on the Exchange Funds becoming unavailable¹¹ because of something that LES might do with them. However, this Court previously ordered in its LES Cash Management Order that LES "shall not expend, transfer, commingle or otherwise modify the location or characteristics of any funds, securities or other property maintained in the Bank Accounts as of the Petition Date." This limitation applies to all of the Exchange Funds. Accordingly, LES has not expended, transferred, commingled, added to or otherwise modified any of the Exchange Funds, and, indeed, has no right to do so absent further order of Court. The status quo concerning the Exchange Funds is thus fully preserved by the existing LES Cash Management Order regardless of resolution of the Motions. Because the Exchange Funds held by LES pursuant to the Movants' Exchange Funds must be maintained undisturbed in segregated

¹⁰ Moreover, such injury may not be remediable even as a legal claim given the Movants' waiver of consequential damages in the Movants' Exchange Agreements. The Movants cannot claim as irreparable harm the very damages they expressly waived in the Exchange Agreements.

¹¹ As required by the Movants' Exchange Agreements, the Exchange Funds at issue are maintained in segregated bank accounts associated with the Movants' name and taxpayer identification number.

accounts regardless of the resolution of the Motions, the Movants cannot legitimately identify any supposedly irreparable harm that the relief granted in the Motions could prevent.

2. If the Court Denies the Settlement Procedures Motion Because of Uncertainty as to Ownership of the Segregated Exchange Funds, LES May Suffer Harm if the Motions Are Granted.

32. While the Movants will suffer no irreparable harm if the Motions are denied, LES faces potential harm if the Court denies the Settlement Procedures Motion. In the event ownership of the Segregated Exchange Funds needs to be litigated at all, it should be fully litigated along with all other claims to the Segregated Exchange Funds after briefing and the development of any pertinent facts. Granting the instant Motions will have the result of removing funds from the Debtor's possession and control when the Court may later determine that such funds should remain in the estate.

33. As mentioned above, it is LES' position that this issue need not be litigated in light of the Settlement Procedures Motion. Nevertheless, should the Settlement Procedures Motion be denied, LES faces the likely prospect of a deluge of individual adversary proceedings brought by LES customers seeking return of Exchange Funds under separate Segregated Exchange Agreements through emergency injunctive relief. Such a swell of litigation would significantly tax the resources of LES, its professionals, and this Court. Injunctive relief is clearly not the way to proceed in the event that the Settlement Procedures Motion is denied.

3. Likelihood of Success on the Merits.

34. As LES acknowledges in its Settlement Procedures Motion, a court could reasonably conclude that funds held by LES under Segregated Exchange Agreements are not property of LES' bankruptcy estate. Nevertheless, if the Court denies the Settlement Procedures Motion, that issue will need to be determined. Moreover, a likelihood of success alone does not qualify a plaintiff for equitable relief where a money judgment satisfies the claim.

4. The Public Interest Favors Denial of the Motion.

35. The Movants suggest that the public interest favors granting the Motions because it would uphold the section 1031 regulatory scheme and allow other LES customers to consummate their like-kind exchanges. Such an assertion is dubious given that the requested relief is limited to the Movants and not available more broadly, as the granting of the Settlement Procedures Motion would provide. Moreover, it is not clear from the Motions whether all of the Movants even intend to complete a transaction under section 1031 of the Tax Code. See, e.g., Chino Mot. at ¶ 6. Denial of the Motions will merely preserve the status quo in these adversary proceedings to allow the parties to address the substantive legal questions underlying the complaints within a more reasonable timeframe (or to resolve them consensually subject to the Settlement Procedures Motion).

36. In the event that the Settlement Procedures Motion is denied, it is paramount that the Motions be denied. Bankruptcy protection is designed to provide debtors with “breathing room” to resolve claims in an orderly and efficient manner. Should the resolution of these claims not be attainable through the Settlement Procedures Motion, opening the floodgates to a multitude of adversary proceedings and emergency requests for temporary relief will not serve the ends of the Bankruptcy Code.

5. To the Extent the Court Grants the Injunctive Relief -- Which It Should Not -- the Movants Are Required to Post a Bond Pursuant to Bankruptcy Rule 7065.

37. While LES believes preliminary injunctive relief is inappropriate in light of the lack of irreparable harm and the other factors described above, to the extent this Court grants preliminary injunctive relief, it may do so only upon the posting of a bond by Movants. Pursuant to Federal Rule of Civil Procedure 65(c), which is made applicable to these adversary proceedings by Federal Rule of Bankruptcy Procedure 7065, “[t]he court may issue a preliminary

injunction or a temporary restraining order only if the movant gives security in an amount the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). This bond requirement is reinforced by Federal Rule of Bankruptcy Procedure 7065, which states that “Rule 65 F.R. Civ. P. applies in adversary proceedings, except that a temporary restraining order or preliminary injunction may be issued on application of the debtor, trustee, or debtor in possession without compliance with Rule 65(c).” Fed. R. Bankr. P 7065. Given that the injunctive relief sought by Movants -- turnover of the Segregated Exchange Funds -- could be remedied only by return of such funds, LES requests that the Movants be required to post bonds in the full amount of the Segregated Exchange Funds before the Court grants any injunctive relief sought by the Movants.

CONCLUSION

WHEREFORE, LES respectfully requests that the Court enter an order denying the Motions and granting LES such other and further relief as may be just and proper.

Dated: Richmond, Virginia
December 15, 2008

/s/ John H. Maddock III
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