

Charles R. Gibbs (*pro hac vice pending*)  
 Sarah Link Schultz (*pro hac vice pending*)  
 AKIN GUMP STRAUSS HAUER & FELD LLP  
 1700 Pacific Avenue, Suite 4100  
 Dallas, Texas 75201  
 Telephone: 214.969.2800  
 Facsimile: 214.969.4343

Mary A. House (Virginia Bar No. 66613)  
 Jonathan L. Gold (D.C. Bar No. 452025)  
 AKIN GUMP STRAUSS HAUER & FELD LLP  
 1333 New Hampshire Avenue, N.W.  
 Washington, D.C. 20036  
 Telephone: 202.887.4000  
 Facsimile: 205.955.7827

-and-

Lynn Tavenner (Virginia Bar No. 30083)  
 Paula Beran (Virginia Bar No. 34679)  
 TAVENNER & BERAN, PLC  
 20 North Eighth Street, Second Floor  
 Richmond, VA 23219  
 Telephone: 804.783.8300  
 Facsimile: 804.783.0178

*Proposed Attorneys for The Official Committee of Unsecured Creditors*

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

.....	X	
	:	
In re:	:	Chapter 11
	:	
LandAmerica Financial Group, Inc., <u>et al.</u> ,	:	Case No. 08-35994 (KRH)
	:	
Debtors.	:	Jointly Administered
.....	X	
Health Care REIT, Inc.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Adv. Pro. No. 08-03149 (KRH)
	:	
LandAmerica 1031 Exchange Services, Inc.,	:	
	:	
Defendant.	:	
.....	X	

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LANDAMERICA  
1031 EXCHANGE SERVICES, INC.'S RULE 12(b)(7) MOTION TO DISMISS  
COMPLAINT OF HEALTH CARE REIT, INC.  
FOR FAILURE TO JOIN INDISPENSABLE PARTY**

The Official Committee of Unsecured Creditors of LandAmerica 1031 Exchange Services, Inc. (the "Committee") submits this Rule 12(b)(7) motion to dismiss the Complaint (the "Complaint") of Plaintiff Health Care REIT, Inc.'s ("Plaintiff") for failure to join Centennial Bank ("Centennial") as an indispensable party.

**FACTS**

1. On November 26, 2008, LandAmerica 1031 Exchange Services, Inc. (the "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code. On December 3, 2008, the United States Trustee appointed the Committee. Plaintiff filed the Complaint, along with a Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"), on December 4, 2008, and set it for a hearing on the Motion for December 16, 2008.

2. The Complaint and the Motion allege that non-party Centennial Bank holds over \$137 million (the "Funds") in escrow accounts for the benefit of Plaintiff and the Debtor, pursuant to two Exchange Agreements between Plaintiff and the Debtor and two Escrow Agreements<sup>1</sup> between Plaintiff, the Debtor, and Centennial. Plaintiff alleges that Centennial maintains the Funds in two segregated bank accounts, but Plaintiff relies on hearsay and incomplete evidence, and Plaintiff has not presented the court with evidence sufficient to trace the Funds from Plaintiff to the Debtor to Centennial.

---

<sup>1</sup> The Exchange Agreements and the Escrow Agreements are attached as Exhibits 1-4 to the Declaration of Michael A. Crabtree ("Crabtree Decl."), which is attached to the Complaint. The versions of the two Escrow Agreements attached to the Crabtree Declaration are not signed by Centennial.

3. Plaintiff filed the Complaint against the Debtor only, and in the Complaint and Motion, Plaintiff asks the Court, among other things, to order the Debtor to cause Centennial to release the Funds to Plaintiff.

#### **REQUEST FOR RELIEF AND AUTHORITY**

4. The Complaint must be dismissed (or abated) because Plaintiff has failed to join an indispensable party pursuant to Federal Rule 19. Pursuant to Federal Rule 12(b)(7), a court is authorized to dismiss a complaint for “failure to join a party under Rule 19.” Fed. R. Civ. P. 12(b)(7). Federal Rule 19, made applicable to this proceeding by Bankruptcy Rule 7019 provides in relevant part that all necessary parties to an action shall be joined if in the party’s absence complete relief cannot be accorded. Fed. R. Civ. P. 19(a). Specifically, Rule 19(a) provides that an absent party is “necessary” if either

- (A) in that person’s absence, the court cannot accord complete relief among the existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may:
  - (i) as a practical matter impair or impede the person’s ability to protect the interest; or
  - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. Pro. 19(a). This provision is deliberately disjunctive so that if any provision is satisfied, the absent party is a necessary party who should be joined if possible. *See id.* In this case, all of the alternative provisions of Rule 19(a) are satisfied.

5. **First**, pursuant to Rule 19(a)(1), the present parties will be denied complete relief if Centennial is not joined. Plaintiff essentially seeks a return of the Funds, which Plaintiff itself contends is maintained by Centennial in escrow accounts, pursuant to Escrow Agreements to

which Centennial is a party. Indeed, the status of the Funds, which is unclear from the hearsay and incomplete evidence presented by Plaintiff, is dependent upon Centennial's compliance with the terms of the Escrow Agreements. *See* Escrow Agreements at § 2.2 ("Escrow Holder shall invest the same in the Escrow Account, titled in the name of Escrow Holder, as escrow holder for LES and Taxpayer."). Further, the relief sought by Plaintiff both in the Complaint and in the Motion for immediate injunctive relief – a "return" of the Funds to Plaintiff – will require a disbursement of the Funds from the escrow accounts allegedly held by Centennial. *See id.* at § 3.1 ("Requests to disburse from the Escrow Account ... shall be by written request signed and to Escrow Holder by LES"); Complaint at p. 9 (asking the Court to order the Debtor to "cause Centennial Bank (the Escrow Holder) return the HCN Funds to HCN, pursuant to the Escrow Documents"). Centennial, as the Escrow Agent allegedly holding the Funds, is a necessary party, as the Debtor cannot "cause" Centennial to disburse the Funds to Plaintiff without Centennial's cooperation. *See Diamondback Timberlands, Inc. v. Morrison*, No. 5:06-CN-19, 2007 WL 1705684 at \*4 (M.D. Ga. June 12, 2007) (granting motion to dismiss for failure to join escrow agent, holding that "[a]n escrow agent involved in a disputed real estate transaction is an indispensable party in an action to recover earnest money paid to the escrow agent.").

6. **Second**, Centennial is a necessary party pursuant to Rule 19(a)(2)(i), which looks at whether the absent party can claim an interest in the litigation (independent of the named defendant's interest) such that a judgment in its absence will impede its ability to protect that interest. *See* Fed. R. Civ. P. 19 Advisory Committee Notes. The claims that Plaintiff has made go squarely to the Escrow Agreements between Plaintiff, the Debtor, and Centennial, and Centennial clearly has an interest in the interpretation of the Escrow Agreements. *See Ragan Henry Broadcast Group, Inc. v. Hughes*, No. Civ. A. 91-CV-6159, 1992 WL 151308, at \*2 (E.D.

Pa. June 19, 1992) (citations omitted) (recognizing general rule that where rights sued upon arise from a contract, “all parties thereto must be joined”).

7. *Third*, Rule 19(a)(2)(ii) also mandates finding Centennial is a necessary party. Under 19(a)(2)(ii), the court considers whether the current parties will be subject to “a substantial risk of incurring double, multiple, or otherwise inconsistent obligations” as a result of not joining the absent party. Fed. R. Civ. P. 19(a)(2)(ii). If the Court grants Plaintiff its requested relief and Centennial does not cooperate, either due to unwillingness or inability, the Debtor may be subject to liability for non-compliance with a Court order or judgment.

8. For all or any of these reasons, Centennial is a necessary and indispensable party to the Complaint, and the Court should dismiss the Complaint or, in the alternative, abate the case, including all hearings and motions, until Centennial can be joined.

#### **WAIVER OF MEMORANDUM OF LAW**

Pursuant to Local Rule 9013-1(G), and all applicable authority is set forth in this motion, the Committee requests a waiver of the requirement that all motions be accompanied by a separate written memorandum of law.

CONCLUSION

For the foregoing reasons, the Committee respectfully requests that the Court dismiss the Complaint, or, in the alternative, abate the case and all motions and hearings until Centennial can be joined as a party. The Court should also cancel to continue the hearing on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, which is set for December 16, 2008.

Dated this 15th day of December, 2008.

/s/ Mary A. House

Charles R. Gibbs (*pro hac vice pending*)  
Sarah Link Schultz (*pro hac vice pending*)  
AKIN GUMP STRAUSS HAUER & FELD LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, Texas 75201  
Telephone: 214.969.2800  
Facsimile: 214.969.4343

Mary A. House (Virginia Bar No. 66613)  
Jonathan L. Gold (D.C. Bar No. 452025)  
AKIN GUMP STRAUSS HAUER & FELD LLP  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
Telephone: 202.887.4000  
Facsimile: 205.955.7827

-and-

Lynn Tavenner (Virginia Bar No. 30083)  
Paula Beran (Virginia Bar No. 34679)  
TAVENNER & BERAN, PLC  
20 North Eighth Street, Second Floor  
Richmond, VA 23219  
Telephone: 804.783.8300  
Facsimile: 804.783.0178

*Proposed Attorneys for The Official Committee of  
Unsecured Creditors*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of December 2008, a true and correct copy of the foregoing Rule 12(b)(6) Motion to Dismiss Complaint of Health Care REIT, In. for Failure to Join Indispensable Party was served on all persons receiving electronic notice in these cases, including the following:

Rosa J. Evergreen  
Michael L. Bernstein  
Arnold & Porter LLP  
555 Twelfth Street, NW  
Washington, DC 20004  
rosa.evergreen@aporter.com  
michael.bernstein@aporter.com

-and-

Randall K. Miller  
Nicholas M. DePalma  
Arnold & Porter LLP  
Suite 900  
1600 Tysons Boulevard  
McLean, Virginia 22102  
randall.miller@aporter.com  
nicholas.depalma@aporter.com  
*Counsel for Health Care REIT, Inc.*

Robert B. Van Arsdale  
Office of the United States Trustee  
701 East Broad St. Suite 4304  
Richmond, Virginia 23219  
*Assistant United States Trustee*

Dion W. Hayes, Esq.  
John H. Maddock, III, Esq.  
McGuireWoods LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
*Counsel for the Debtors*

Paul V. Shalhoub, Esq.  
Rachel C. Strickland, Esq.  
WILLKIE FARR & GALLAGHER, LLP  
787 Seventh Avenue  
New York, New York 10019  
*Counsel for the Debtors*

/s/ Sarah Link Schultz

Charles R. Gibbs (*pro hac vice pending*)  
Sarah Link Schultz (*pro hac vice pending*)  
AKIN GUMP STRAUSS HAUER & FELD LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, Texas 75201  
Telephone: 214.969.2800  
Facsimile: 214.969.4343

Mary A. House (Virginia Bar No. 66613)  
Jonathan L. Gold (D.C. Bar No. 452025)  
AKIN GUMP STRAUSS HAUER & FELD LLP  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
Telephone: 202.887.4000  
Facsimile: 205.955.7827

-and-

Lynn Tavenner (Virginia Bar No. 30083)  
Paula S. Beran (Virginia Bar No. 34679)  
TAVENNER & BERAN, PLC  
20 North Eighth Street, Second Floor  
Richmond, VA 23219  
Telephone: 804.783.8300  
Facsimile: 804.783.0178

*Proposed Attorneys for The Official Committee of Unsecured Creditors  
of LandAmerica 1031 Exchange Services, Inc.*

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

-----	X	
In re:	:	Chapter 11
LandAmerica Financial Group, Inc., <u>et al.</u> ,	:	Case No. 08-35994 (KRH)
Debtors.	:	Jointly Administered
-----	X	
Health Care REIT, Inc.	:	
Plaintiff,	:	
v.	:	
LandAmerica Financial Group, Inc., <u>et al.</u> ,	:	Adv. Pro. No. 08-03149 (KRH)
Defendant.	:	
-----	X	

**ORDER GRANTING THE RULE 12(b)(7) MOTION TO DISMISS  
BY THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF  
LANDAMERICA 1031 EXCHANGE SERVICES, INC.**

This matter came before the Court on the motion (the "Motion") of the Official Committee of Unsecured Creditors for LandAmerica 1031 Exchange Services, Inc.'s (the "Committee") to dismiss the Complaint of Plaintiff Health Care REIT, Inc's ("Plaintiff") for failure to join an indispensable party, and the Court, having jurisdiction to consider the Motion, finding that sufficient notice of the Motion was given, and having considered the Motion and heard the arguments of counsel to the Committee, finds that the Motion should be granted. Unless otherwise stated herein, all capitalized terms shall have the meaning ascribed to them in the Motion.

It is hereby ORDERED, that the Motion is GRANTED;

It is hereby ORDERED, that Plaintiff's Complaint is dismissed for failure to join an indispensable party, without prejudice for refileing;

It is hereby ORDERED, that the requirements of Local Rule 9013-1(G) with respect to the filing of a separate memorandum of law are hereby waived; and

It is hereby ORDERED, that this Court shall retain jurisdiction of all matters arising under or related to the implementation of this Order.

Date: December \_\_\_\_\_, 2008

Entered:

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

/s/ Mary A. House

Charles R. Gibbs (*pro hac vice pending*)  
Sarah Link Schultz (*pro hac vice pending*)  
AKIN GUMP STRAUSS HAUER & FELD LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, Texas 75201  
Telephone: 214.969.2800  
Facsimile: 214.969.4343

Mary A. House (Virginia Bar No. 66613)  
Jonathan L. Gold (D.C. Bar No. 452025)  
AKIN GUMP STRAUSS HAUER & FELD LLP  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
Telephone: 202.887.4000  
Facsimile: 205.955.7827

-and-

Lynn Tavenner (Virginia Bar No. 30083)  
Paula S. Beran (Virginia Bar No. 34679)  
TAVENNER & BERAN, PLC  
20 North Eighth Street, Second Floor  
Richmond, VA 23219  
Telephone: 804.783.8300  
Facsimile: 804.783.0178

*Proposed Attorneys for The Official Committee of Unsecured Creditors  
of LandAmerica 1031 Exchange Services, Inc.*

**LOCAL BANKRUPTCY RULE 9022-1(C) CERTIFICATION**

Pursuant to Local Rule 9022-1(C), I hereby certified that the foregoing proposed order has been endorsed by or served upon all necessary parties.

/s/ Mary A. House  
Mary A. House