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

.....X
:
In re: : Chapter 11
:
LandAmerica Financial Group, Inc., et al., : Case No. 08-35994 (KRH)
:
Debtors. : Jointly Administered
.....X

**MEMORANDUM OF LAW OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF LANDAMERICA 1031 EXCHANGE
SERVICES, INC. (A) IN SUPPORT OF CONFIRMATION OF THE JOINT
CHAPTER 11 PLAN OF LANDAMERICA FINANCIAL GROUP, INC. AND ITS
AFFILIATED DEBTORS AND (B) IN RESPONSE TO OBJECTIONS THERETO**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
BACKGROUND	3
I. The Test Case Protocol	5
II. The Mediation Protocol	6
III. Voting Status	9
IV. Modifications to the Plan	9
ARGUMENT	9
I. The Debtors Satisfy the Burden of Proof Under Bankruptcy Code Section 1129	10
A. The Plan Complies With Bankruptcy Code Section 1129(a)(1)	11
1. The Plan Satisfies the Classification Requirements of Bankruptcy Code Section 1122	11
2. The Plan Satisfies the Mandatory Plan Requirements of Bankruptcy Code Section 1123	14
3. Discretionary Contents of the Plan	16
B. The Plan’s Proponents Have Complied Fully With the Applicable Provisions of the Bankruptcy Code (Section 1129(a)(2))	17
C. The Plan Has Been Proposed in Good Faith and Not By Any Means Forbidden by Law (Section 1129(a)(3))	19
D. The Plan Provides for Bankruptcy Court Approval of Certain Administrative Payments (Section 1129(a)(4))	20
E. The Trustees Have Been Disclosed and Their Appointment is Consistent With Public Policy (Section 1129(a)(5))	21
F. The Plan Does Not Require Governmental Regulatory Approval (Section 1129(a)(6))	22
G. The Plan is in the Best Interests of Creditors and Interest Holders (Section 1129(a)(7))	23
H. Acceptance of Impaired Classes (Section 1129(a)(8))	24
I. The Plan Complies With Statutorily Mandated Treatment of Administrative and Priority Tax Claims (Section 1129(a)(9))	26
J. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders (Section 1129(a)(10))	26
K. The Plan Is Feasible (Section 1129(a)(11))	27
L. The Plan Provides for the Payment of All Fees Under 28 U.S.C. § 1930 (Section 1129(a)(12))	28
M. The Plan Complies With Bankruptcy Code Section 1129(a)(13)	28
N. The Plan Satisfies the “Cram Down” Requirements	28
1. The Plan is Fair and Equitable With Respect to Impaired Classes That Have Not Voted to Accept the Plan	29
2. The Plan Does Not Unfairly Discriminate With Respect to Impaired Classes That Have Not Voted to Accept the Plan	30

II.	Responses To Objections	31
A.	The Plan’s Classification of Claims Complies With Bankruptcy Code Section 1122	32
B.	It is Appropriate to Authorize the Injunction Provided for in Section 14.4(b) of the Plan.....	34
1.	The Purpose of the Temporary Injunction Is to Maximize Recovery for All Creditors	35
2.	The Temporary Injunction Is Not Permanent	35
3.	The Temporary Injunction Does Not Violate Bankruptcy Code Section 524(e).....	36
4.	The Temporary Injunction Is a Proper Exercise of This Court’s Jurisdiction	37
C.	It is Appropriate to Authorize the Exculpation Provisions	39
1.	This Court Has Jurisdiction to Authorize Exculpation	40
2.	It is Proper to Exculpate the Members and Professionals of the Creditors’ Committees	41
D.	The Plan Properly Determines the Asserted Property Interests of Exchange Customers in Exchange Funds Pursuant to Bankruptcy Code Section 1141(c).....	43
E.	Section 14.4(a) Injunction Is Not a Discharge.....	48
F.	The Plan Does Not Violate Bankruptcy Code Section 1123(a)(4)	50
	CONCLUSION.....	51

TABLE OF AUTHORITIES

Page

CASES

<i>Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship</i> , 526 U.S. 434 (1999).....	23, 29
<i>Cen-Pen Corp. v. Hanson</i> , 58 F.3d 89 (4th Cir. 1995).....	47
<i>Crestar Bank v. Walker (In re Walker)</i> , 165 B.R. 994 (Bankr. E.D. Va. 1994)	19, 23
<i>Feld v. Zale Corp. (In re Zale Corp.)</i> , 62 F.3d 746 (5th Cir. 1995)	35
<i>Fin. Sec. Assurance, Inc. v. T-H New Orleans L.P. (In re T-H New Orleans L.P.)</i> , 116 F.3d 790 (5th Cir. 1997)	19
<i>Frontier Pepper's Ferry LLC v. LandAmerica 1031 Exchange Services, Inc.</i> , Adv. Proc. No. 08-03148 (Bankr. E.D. Va. 2008)	5, 6, 33
<i>Hanson v. First Bank of South Dakota, N.A.</i> , 828 F.2d 1310 (8th Cir. 1987).....	19
<i>HealthCare REIT, Inc. v. LandAmerica 1031 Exchange Services, Inc.</i> , Adv. Proc. No. 08-03149 (Bankr. E.D. Va. 2008).....	5
<i>Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enters., Ltd. II (In re Briscoe Enters., Ltd. II)</i> , 994 F.2d 1160 (5th Cir. 1993)	10
<i>Howard Finkelstein v. LandAmerica 1031 Exchange Services, Inc.</i> , Adv. Proc. No. 08-03171 (Bankr. E.D. Va. 2008)	5, 6, 33
<i>In re 11,111, Inc.</i> , 117 B.R. 471 (Bankr. D. Minn. 1990).....	14, 30
<i>In re Ahern Enters., Inc.</i> , 507 F.3d 817 (5th Cir. 2007)	44, 45, 47, 49
<i>In re Am. Props., Inc.</i> , 30 B.R. 239 (Bankr. D. Kan. 1983)	44
<i>In re AMF Bowling, Inc.</i> , Case No. 01-61299 (Bankr. E.D. Va. 2002).....	40
<i>In re AMF Bowling Worldwide, Inc.</i> , Case No. 01-61119 (Bankr. E.D. Va. 2002).....	40
<i>In re Arctic Enters., Inc.</i> , 68 B.R. 71 (D. Minn. 1986)	45
<i>In re Armstrong World Indus., Inc.</i> , 348 B.R. 136 (D. Del. 2006).....	40
<i>In re Atherogenics</i> , 2009 WL 2407418 (N.D. Ga. June 9, 2009).....	40

In re Avia Energy Dev., L.L.C., 2007 WL 2238039 (Bankr. N.D. Tex. Aug. 2, 2007)12

In re Azabu Bldgs. Co., 2007 WL 1964306 (Bankr. D. Haw. June 28, 2007).....12

In re Bally Total Fitness of Greater New York, Inc., 2007 WL 2779438 (Bankr. S.D.N.Y. Sept. 17, 2007).....12

In re BCP Mgmt., Inc., 320 B.R. 265 (Bankr. D. Del. 2005).....40

In re Baldwin, 307 B.R. 251 (M.D. Ala. 2004).....47, 48

In re Beta Int’l, Inc., 210 B.R. 279 (E.D. Mich. 1996).....47, 48

In re Boston Post Road Ltd. P’ship, 21 F.3d 477 (2d Cir. 1994).....29

In re Buttonwood Partners, Ltd., 111 B.R. 57 (Bankr. S.D.N.Y. 1990).....30, 31

In re Byrd Foods, Inc., 253 B.R. 196 (Bankr. E.D. Va. 2000)10

In re Carolina Tobacco Co., 360 B.R. 702 (D. Or. 2007).....12

In re Chateaugay Corp., 89 F.3d 942 (2d Cir. 1996)12, 13

In re Chrysler LLC, 576 F.3d 108 (2d Cir. 2009)46, 47

In re CIS Corp., 1997 WL 666265 (S.D.N.Y. Oct. 24, 1997).....45

In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723 (Bankr. S.D.N.Y. 1992).....12, 20, 51

In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992).....25

In re Eagle-Picher Indus., 203 B.R. 256 (Bankr. S.D. Ohio 1996)19

In re Eagle-Picher Indus., 172 F.3d 48 (6th Cir. 1988)19

In re Elsinore Shore Assocs., 91 B.R. 238 (Bankr. D.N.J. 1988).....22

In re Exide Techs., 303 B.R. 48 (Bankr. D. Del. 2003).....30

In re Federated Dep’t Stores, Inc., 1992 WL 605483 (Bankr. S.D. Ohio Jan. 10, 1992)49, 50

In re Firstline Corp., 2007 WL 269086 (Bankr. M.D. Ga. Jan. 25, 2007)40, 42

In re Granite Broad. Corp., 369 B.R. 120 (Bankr. S.D.N.Y. 2007).....30

In re Great Bay Hotel & Casino, Inc., 251 B.R. 213 (Bankr. D.N.J. 2000)14, 46

<i>In re Greystone III Joint Venture</i> , 948 F.2d 134 (5th Cir. 1992)	12, 33
<i>In re Harmony Holdings, LLC</i> , 393 B.R. 409 (Bankr. D.S.C. 2008).....	10
<i>In re Haws & Tingle, Ltd.</i> , 2006 WL 3253500 (Bankr. N.D. Tex. Nov. 6, 2006)	12
<i>In re Heilig-Meyers Co., et al.</i> , Case No. 00-34533 (Bankr. E.D. Va. 2005).....	40
<i>In re Heritage Org., L.L.C.</i> , 375 B.R. 230 (Bankr. N.D. Tex. 2007)	12
<i>In re Heron, Burchette, Ruckert & Rothwell</i> , 148 B.R. 660 (Bankr. D.C. 1992).....	50
<i>In re Holywell Corp.</i> , 913 F.2d 873 (11th Cir. 1990).....	13
<i>In re Integrated Disability Res., Inc.</i> , 2006 WL 3740967 (Bankr. N.D. Tex. Dec. 14, 2006)	12
<i>In re Johns-Manville Corp.</i> , 68 B.R. 618 (Bankr. S.D.N.Y. 1986).....	20, 30, 31
<i>In re Kaiser Aluminum Corp.</i> , 2006 WL 616243 (Bankr. D. Del. Feb. 6, 2006).....	12
<i>In re Leslie Fay Cos.</i> , 207 B.R. 764 (Bankr. S.D.N.Y. 1997)	19
<i>In re Linkous</i> , 990 F.2d 160 (4th Cir. 1993).....	48
<i>In re Master Mortgage Inv. Fund, Inc.</i> , 168 B.R. 930 (Bankr. W.D. Mo. 1994)	41
<i>In re Med. Select Mgmt.</i> , 2004 Bankr. LEXIS 2568 (Bankr. N.D. Tex. May 11, 2004)	51
<i>In re Mid-State Raceway, Inc.</i> , 343 B.R. 21 (Bankr. N.D.N.Y. 2006)	12
<i>In re Mirant Corp.</i> , 2007 WL 1258932 (Bankr. N.D. Tex. Apr. 27, 2007).....	11, 12
<i>In re PWS Holdings Co.</i> , 228 F.3d 224 (3d Cir. 2000)	40, 41
<i>In re Pa. Iron & Coal Co., Inc.</i> , 56 B.R. 492 (Bankr. S.D. Ohio 1985)	44
<i>In re Penrod</i> , 50 F.3d 459 (7th Cir. 1995).....	45, 46
<i>In re Refco, Inc.</i> , 336 B.R. 187 (Bankr. S.D.N.Y. 2006).....	41
<i>In re Reg'l Bldg. Sys., Inc.</i> , 251 B.R. 274 (Bankr. D. Md. 2000)	45
<i>In re Reg'l Bldg. Sys., Inc.</i> , 254 F.3d 528 (4th Cir. 2001).....	45, 47, 49
<i>In re Regatta Bay, LLC</i> , 406 B.R. 875 (Bankr. D. Ariz. 2009)	37, 38
<i>In re Rivera Echevarria</i> , 129 B.R. 11 (Bankr. D.P.R. 1991).....	31

<i>In re Schwarzmann</i> , 203 B.R. 919 (Bankr. E.D. Va. 1995).....	11
<i>In re Seatco, Inc.</i> , 257 B.R. 469 (Bankr. N.D. Tex. 2001).....	37
<i>In re Simmons</i> , 765 F.2d 547 (5th Cir. 1985).....	48
<i>In re Simon</i> , 2008 WL 2951974 (Bankr. D. Del. July 28, 2008)	10, 47
<i>In re Texaco, Inc.</i> , 84 B.R. 893 (Bankr. S.D.N.Y. 1988).....	18
<i>In re Whitehall Jewelers Holdings, Inc.</i> , 2008 WL 2951974, at *4-*7 (Bankr. D. Del. July 28, 2008)	46
<i>In re Worldcom, Inc.</i> , 382 B.R. 610 (Bankr. S.D.N.Y. 2008).....	44, 45, 47, 49
<i>In re Worldcom, Inc.</i> , 2003 WL 23861928 (Bankr. S.D.N.Y. Oct. 31, 2003)	18
<i>In re Zenith Elecs. Corp.</i> , 241 B.R. 92 (Bankr. D. Del 1999).....	29, 51
<i>John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs.</i> , 987 F.2d 154 (3d Cir. 1993)	29
<i>Kane v. Johns-Manville Corp.</i> , 843 F.2d 636 (2d Cir. 1988).....	11
<i>Liberty Nat'l Enters. v. Ambanc La Mesa L.P. (In re Ambanc La Mesa L.P.)</i> , 115 F.3d 650 (9th Cir. 1997).....	29
<i>Mac Panel Co. v. Virginia Panel Corp. (In re Mac Panel Co.)</i> , 2000 WL 33682394 (M.D.N.C. Feb. 24, 2000).....	41, 42
<i>Mac Panel Co. v. Virginia Panel Corp. (In re Mac Panel Co.)</i> , 2000 WL 33673784 (Bankr. M.D.N.C. Mar. 8, 2000).....	37, 38, 39
<i>Matthew B. Luxenberg, Trustee of the Matthew B. Luxenberg Revocable Family Trust v. LandAmerica 1031 Exchange Services, Inc.</i> , Adv. Proc. No. 09-03023 (Bankr. E.D. Va. 2009).....	5, 6, 33
<i>Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)</i> , 880 F.2d 694 (4th Cir. 1989)	37, 38, 40
<i>Mercury Capital Corp. v. Milford Conn. Assocs., L.P.</i> , 354 B.R. 1 (D. Conn. 2006).....	19
<i>Millard Refrigerated Services, Inc. v. LandAmerica 1031 Exchange Services, Inc.</i> , Adv Proc. No. 08-03147 (Bankr. E.D. Va. 2008)	5, 6
<i>Stuart, LLC v. First Mount Vernon Indus. Loan Ass'n (In re Peramco)</i> , 2001 WL 101463 (4th Cir. Feb. 7, 2001).....	37, 40

<i>Travelers Ins. Co. v. Bryson Props.</i> , XVIII (In re Bryson Props., XVIII), 961 F.2d 496 (4th Cir. 1992).....	12, 33
---	--------

STATUTES

11 U.S.C. § 524(e)	36
11 U.S.C. § 1122	11, 12, 13, 14, 32, 33, 34
11 U.S.C. § 1123(a)(1)	14
11 U.S.C. § 1123(a)(5)	15
11 U.S.C. § 1123(a)(6)	16
11 U.S.C. § 1123(a)(7)	16
11 U.S.C. § 1123(b)(1)	16
11 U.S.C. § 1123(b)(3)	16
11 U.S.C. § 1123(b)(5)	17
11 U.S.C. § 1126(c)	24
11 U.S.C. § 1126(d)	24, 25
11 U.S.C. § 1126(f)	23, 25
11 U.S.C. § 1126(g)	25
11 U.S.C. § 1129(a)(1)	11
11 U.S.C. § 1129(a)(2)	17, 18
11 U.S.C. § 1129(a)(3)	19
11 U.S.C. § 1129(a)(4)	20, 22
11 U.S.C. § 1129(a)(5)	22
11 U.S.C. § 1129(a)(6)	23
11 U.S.C. § 1129(a)(7)	23
11 U.S.C. § 1129(a)(8)	24
11 U.S.C. § 1129(a)(9)	26, 27
11 U.S.C. § 1129(a)(10)	27

11 U.S.C. § 1129(a)(11)	27
11 U.S.C. § 1129(a)(12)	28
11 U.S.C. § 1129(a)(13)	28
11 U.S.C. § 1129(b)(1)	28
11 U.S.C. § 1129(b)(2)	29
11 U.S.C. § 1141(c)	45, 46
11 U.S.C. § 1141(d)	49
28 U.S.C. § 1930	28
H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977)	18
S. Rep. No. 989, 95th Cong., 2d Sess. 126 (1978)	18, 25

SECONDARY SOURCES

7 Lawrence P. King et al., Collier on Bankruptcy ¶ 1103.05[4][b] (15th ed. rev. 2008)	42, 43
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The Official Committee of Unsecured Creditors (the “LES Committee”) of LandAmerica 1031 Exchange Services, Inc. (“LES”), by and through its undersigned counsel, hereby submits this memorandum of law (the “Memorandum”) in support of the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors (as the same may be subsequently modified and amended, the “Plan”) filed by LandAmerica Financial Group, Inc. (“LFG”) and certain of its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the “Debtors”).¹ In support of this Memorandum, the LES Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. In the approximately one year since the Debtors sought chapter 11 protection, through the focused efforts of all parties in interest, including the Debtors, the LES Committee, the Official Committee of Unsecured Creditors of LFG (the “LFG Committee,” and together with the LES Committee, the “Creditors’ Committees”) and those exchangers designated as “Test Case Plaintiffs,” scores of achievements all aimed toward the goal of proposing a confirmable, and preferably consensual, chapter 11 plan have been achieved. These accomplishments include, among others: (i) implementation of a protocol to expedite the resolution of numerous adversary proceedings regarding ownership of exchange funds held by LES; (ii) implementation of a protocol to resolve, through expedited discovery and mediation, claims by and between the LES and LFG estates and issues related to the structure of a proposed chapter 11 plan; (iii) settlement or other resolution of material claims, including those filed by

¹ The Debtors include (i) LandAmerica Financial Group, Inc. (“LFG”); (ii) LandAmerica 1031 Exchange Services, Inc. (“LES”); (iii) LandAmerica Assessment Corporation (“LAC”); (iv) LandAmerica Title Company (“LandAm Title”); (v) Southland Title Corporation; (vi) Southland Title of Orange County; (vii) Southland Title of San Diego (collectively, the “Southland Entities”); (viii) LandAmerica Credit Services,

the Internal Revenue Service (the “IRS”) and the Pension Benefit Guaranty Corporation (the “PBGC”); and (iv) the negotiation and finalization of a consensual chapter 11 plan.

2. The Plan is a liquidating chapter 11 plan, and with a few exceptions that do not impact the LES estate,² the Plan provides that all assets of the Debtors’ estates will be transferred to and controlled by separate liquidating trusts for each of the Debtors’ estates (with respect to the LES estate and the LFG estate, the “LES Trust” and the “LFG Trust,” respectively, and together, the “Trusts”). A trustee and one or more oversight committees (each, an “Oversight Committee”), appointed pursuant to the applicable liquidating trust agreement, will administer each Trust.³ The Plan divides responsibility for the litigation of various assets and causes of action belonging to the LES and LFG estates, and the distribution of any proceeds thereof, between the two Trusts. Most notably, the LFG Trust will have responsibility for and authority over litigation against the Debtors’ directors and officers and other pre-petition professionals, and the LES Trust will have responsibility for and authority over the liquidation of the auction rate securities (the “ARS”) and litigation relating to the ARS.⁴

3. In settlement of the myriad inter-estate claims and other issues and in recognition that both estates have claims against the Debtors’ directors, officers, and other pre-petition professionals and the sellers of the ARS, the Plan proposes a waterfall distribution of the proceeds of such litigation between the beneficiaries of the two Trusts. Further, with respect to

Inc. (“LandAm Credit”); (ix) Capital Title Group, Inc. (“CTG”); and (x) LandAmerica OneStop, Inc. (“OneStop”).

² All assets of the Debtors’ estates will be transferred to the Trusts with the exception of certain assets that will re-vest with LFG prior to being disposed of.

³ As the Plan is not premised on substantive consolidation, each subsidiary Debtor will have its own trust.

⁴ The Debtors have retained Jenner & Block, LLP (“Jenner”) as special litigation counsel to pursue this litigation. *See* Order Authorizing the Employment and Retention of Jenner & Block LLP as Special Counsel Nunc Pro Tunc to July 13, 2009 [Docket No. 1938]. The Plan and the LES Trust Agreement contemplate that Jenner will act as counsel to the LES Trust regarding the ARS litigation.

LES, the Plan proposes a distribution of the LES Trust assets among the various classes of Exchange Customers (as defined below). The Plan also provides for a temporary injunction prohibiting individual creditors and shareholders from asserting claims against the Debtors' directors and officers eligible to be satisfied by the Debtors' insurance policies and provides a mechanism for monetizing the ARS Litigation (as defined in the Plan). The Plan is the product of intense, complex and, at times, arduous negotiations among the Debtors, the Creditors' Committees and other parties in interest and satisfies all of the requirements for confirmation ("Confirmation") under Bankruptcy Code section 1129. As such, the LES Committee supports Confirmation of the Plan.

BACKGROUND

4. On November 26, 2008 (the "Petition Date"), LES and LFG each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").⁵ On November 28, 2008, this Court entered an order jointly administering the LES and LFG chapter 11 cases for procedural purposes only.⁶ Since the Petition Date, the Debtors have continued in possession of their property and have continued to operate their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee has been appointed in the Debtors' chapter 11 cases.

5. On December 3, 2008, the Office of the United States Trustee for the Eastern District of Virginia (the "U.S. Trustee") appointed the Creditors' Committees. On June 4, 2009,

⁵ On March 6, 2009, March 27, 2009, March 31, 2009, July 17, 2009, October 12, 2009 and November 4, 2009, the remaining Debtor entities also commenced voluntary chapter 11 cases in this Court.

⁶ Pursuant to orders of this Court dated March 11, 2009, April 8, 2009, April 9, 2009, July 22, 2009, October 26, 2009, and November 13, 2009, the chapter 11 cases of the Debtors are being jointly administered under case number 08-35994.

the U.S. Trustee appointed two (2) additional members to the LES Committee. The LES Committee currently consists of seven (7) members.⁷

6. Prior to the Petition Date, LES operated as a “qualified intermediary” pursuant to section 1.1031(k)-1(g)(4) of the Treasury Regulations and section 1031 of the Internal Revenue Code (the “Tax Code”). Pursuant to Tax Code section 1031 and the applicable Treasury Regulations, if a taxpayer complies with certain provisions and structures the transaction as an exchange of property for another of “like kind,” the taxpayer may qualify for a deferral of capital gains tax that would otherwise be assessed. In the ordinary course of its business, pre-petition LES entered into agreements (each, an “Exchange Agreement”) with its customers (each, an “Exchange Customer”) whereby it acquired the net proceeds of the sales of relinquished properties (the “Exchange Funds”)⁸ to facilitate like-kind exchanges in accordance with the requirements of the Tax Code. Since 2002, LES invested a portion of the Exchange Funds in investment grade securities rated A or stronger at the time of the investment, including ARS.⁹ In February 2008, the market for ARS froze and, as a result, LES has been unable to liquidate the ARS at any price near their par value. The illiquidity of the ARS was a significant contributing factor to LES’s chapter 11 filing.

⁷ The current members of the LES Committee are: Millmar Holdings, LLC; Endless Ocean, LLC; MB Venture, Ltd.; Amarillo Tower Limited; Petaluma Southpoint, LLC; Gregory D. Schultz; and The Mary and Fred Piro 1987 Trust.

⁸ In addition to cash proceeds, in some instances, LES accepted a note or similar debt instrument from the Exchange Customer as partial or full consideration for its like-kind exchange transaction.

⁹ On October 28, 2009, this Court approved the sale of two (2) tranches of the ARS held by LES to the issuer of such securities and procedures for marketing and selling the remaining tranches of ARS held by LES. *See Order: (A) Approving (I) The Sale of Certain Securities, and (II) The Marketing and Sale Process of Additional Securities; and (B) Granting Related Relief* [Docket No. 2387].

I. The Test Case Protocol

7. On the Petition Date, LES had approximately 450 Exchange Customers with open exchanges. In the weeks following the Petition Date, many Exchange Customers filed adversary proceedings against LES as a result of LES's failure to pay Exchange Funds or consummate property transactions under the terms of their Exchange Agreements. To date, more than one hundred such adversary proceedings have been filed.

8. To resolve these adversary proceedings in an efficient and cost-effective manner, LES and the LES Committee filed a joint motion¹⁰ to establish a protocol to resolve the common legal and factual issues involved in the adversary proceedings, including the core issue of whether the Exchange Funds held by LES pursuant to the Exchange Agreements were property of the LES bankruptcy estate.¹¹ On January 16, 2009, this Court approved the proposed protocol (the "Protocol Order"),¹² which provided that five adversary proceedings, which the parties believe provided a representative sampling of the types of adversary proceedings filed, would proceed on an expedited, test-case basis (the "Test Cases").¹³ Additionally, all adversary proceedings other than the Test Cases and all motions or other requests for relief directed to the disposition of Exchange Funds or concerning the parties' rights and obligations under Exchange Agreements were stayed pending the litigation of the Test Cases.

¹⁰ See Joint Motion of Debtor and LES Committee for Order Establishing Scheduling Protocol for Adversary Proceedings [Docket No. 574].

¹¹ This request was also supported by LFG and the LFG Committee.

¹² See Order Establishing Scheduling Protocol for Adversary Proceedings [Docket No. 689].

¹³ The Test Cases included (i) *HealthCare REIT, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03149; (ii) *Millard Refrigerated Services, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03147; (iii) *Frontier Pepper's Ferry LLC v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03148; (iv) *Howard Finkelstein v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03171; and (v) *Matthew B. Luxenberg, Trustee of the Matthew B. Luxenberg Revocable Family Trust v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 09-03023.

9. After an expedited discovery process, LES, the Creditors' Committees and the Test Case Plaintiffs each filed motions for partial summary judgment on the issue of whether the Exchange Funds were held by LES in express or resulting trust and thus excluded from the property of the LES estate.¹⁴ Following oral arguments, this Court entered orders on April 15, 2009¹⁵ and May 7, 2009¹⁶ holding that the Exchange Funds held by LES on the Petition Date were not excluded from property of the LES estate pursuant to Bankruptcy Code section 541.

II. The Mediation Protocol

10. On April 24, 2009, LES and LFG filed a motion¹⁷ seeking to establish a litigation protocol to resolve certain claims between the LES estate and the LFG estate (collectively, the "Inter-estate Issues"), including the treatment of certain intercompany transfers (the "Intercompany Transfers").¹⁸ Prior to the hearing on this request, the Debtors revised the

¹⁴ On February 10, 2009, this Court entered an order granting the joint motion of Finkelstein and Frontier Pepper's Ferry to bifurcate the Test Case litigation and to limit the initial phase of the litigation to issues of ownership of the Exchange Funds and other property held by LES in its capacity as qualified intermediary. The second phase of the Test Case litigation would resolve, among other things, any damage claims asserted against LES by Exchange Customers. *See Order Granting Joint Motion of Frontier Pepper's Ferry LLC and Howard Finkelstein to Bifurcate Trials* [Docket No. 879].

¹⁵ On April 15, 2009, this Court entered its partial summary judgment order and corresponding memorandum opinion in the segregated Test Case. *See Millard Refrigerated Services, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03147, Order [Docket No. 77] and Memorandum Opinion [Docket No. 76] (Apr. 15, 2009).

¹⁶ On May 7, 2009, this Court entered its omnibus partial summary judgment order and corresponding memorandum opinion in the commingled Test Cases. *See Frontier Pepper's Ferry LLC v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03148, Order [Docket No. 72] and Memorandum Opinion [Docket No. 71]; *Howard Finkelstein v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03171, Order [Docket No. 64] and Memorandum Opinion [Docket No. 63]; *Matthew B. Luxenberg, Trustee of the Matthew B. Luxenberg Revocable Family Trust v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 09-03023, Order [Docket No. 77] and Memorandum Opinion [Docket No. 76].

¹⁷ *See Motion for Order Pursuant to Sections 105(a) and 105(d) of the Bankruptcy Code, Establishing Litigation Protocol to Resolve Certain Inter-creditor Issues* [Docket No. 1320].

¹⁸ In the months leading up to its chapter 11 filing, LFG contributed approximately \$65 million in cash and caused its title companies to contribute approximately \$71 million in cash and marketable securities to LES in exchange for illiquid auction-rate securities held by LES so that LES could continue to operate and fund exchange transactions while LFG attempted to sell its assets and subsidiaries.

protocol¹⁹ to provide for the mediation of Inter-estate Issues (the “Mediation Protocol”). The Mediation Protocol provided for a two-stage mediation. First, the Inter-estate Issues would be mediated (the “Inter-estate Mediation”). Several weeks later, issues related to an LES plan of liquidation, including a global resolution of the pending Test Cases would be mediated (the “Plan Mediation,” and collectively with the Inter-estate Mediation, the “Mediations”). The Mediation Protocol also provided for a stay of the Test Cases to avoid related litigation expenses and to allow the Test Case parties to focus their efforts on the Mediations.

11. The Inter-estate Mediation was designed to address, among other things, (a) the validity, priority, characterization and allowance of LFG’s claim arising out of the Intercompany Transfers, (b) the extent to which the Intercompany Transfers may be avoided pursuant to chapter 5 of the Bankruptcy Code and applicable state law, and (c) each estate’s allocable share of liability for claims asserted by the IRS and the PBGC. The Plan Mediation was designed to address outstanding issues in the pending Test Cases and a structure for an LES plan of liquidation.

12. Counsel and representatives of each of the Debtors and the Creditors’ Committees participated in the Inter-estate Mediation in early July 2009. The Inter-estate Mediation resulted in a negotiated resolution for the treatment of the Inter-estate Issues, including the Intercompany Transfers, which was memorialized in a term sheet signed by representatives of the Creditors’ Committees (the “Inter-estate Term Sheet”). Counsel and representatives of LES, LFG, the Creditors’ Committees and each of the Test Case plaintiffs participated in the Plan Mediation in mid-July 2009. The Plan Mediation also resulted in a negotiated resolution memorialized in a

¹⁹ See Debtors’ Reply to Objection of the Unofficial Ad Hoc Committee of Commingled Exchangers to Motion for Order Pursuant to Sections 105(a) and 105(d) of the Bankruptcy Code, Establishing Litigation Protocol to Resolve Certain Inter-creditor Issues [Docket No. 1368].

term sheet (the “Plan Term Sheet,” and together with the Inter-estate Term Sheet, the “Term Sheets”). Together, the Term Sheets served as a general framework for the Plan.

13. On September 9, 2009, the Debtors filed initial drafts of the Plan and accompanying disclosure statement (the “Disclosure Statement”).²⁰ Subsequent to the filing of the initial drafts of the Plan and Disclosure Statement, the Debtors and the Creditors’ Committees engaged in constructive negotiations with one another and with various other parties in interest regarding potential Plan modifications. As a result of these negotiations, the Debtors subsequently amended their Plan and Disclosure Statement on October 2, 2009, October 12, 2009, October 13, 2009, and November 16, 2009.²¹ On October 14, 2009, this Court entered an order approving the adequacy of the Disclosure Statement and the procedures for soliciting votes on the Plan.²² The Plan and Disclosure Statement contain, among other things, compromises reached with various objecting parties in connection with the hearing to approve the adequacy of the Disclosure Statement.

²⁰ See Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 1992]; Disclosure Statement With Respect to the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 1991].

²¹ See Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2109]; Disclosure Statement With Respect to the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2110]; Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2185]; Disclosure Statement With Respect to the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2186]; Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2206]; Disclosure Statement With Respect to the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2207]. The Debtors further amended their Plan on October 24, 2009 and November 16, 2009. See Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2342] and Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2576].

²² See Omnibus Order: (A) Approving Disclosure Statement; (B) Fixing Voting Record Date; (C) Approving Solicitation Materials and Procedures for Distribution Thereof; (D) Approving Forms of Ballots and Establishing Procedures for Voting on Debtors’ Plan; (E) Scheduling Hearing and Establishing Notice and Objection Procedures in Respect of Confirmation of Debtors’ Plan; and (F) Granting Related Relief [Docket No. 2214].

14. The deadline to object to the Plan was November 10, 2009. A total of nineteen objections to the Plan were filed. The deadline for the Debtors' creditors to submit ballots to accept or reject the Plan was also November 10, 2009. Epiq Bankruptcy Solutions, LLC ("Epiq") has filed a report setting forth the Plan voting results ("Katchadurian Declaration").²³

III. Voting Status

15. Claims in Classes LES 1, LES 2, LFG 1, LFG 2, SD 1, and SD 2 are unimpaired and holders of such claims are deemed to accept the Plan and, therefore, are not entitled to vote to accept or reject the Plan.

16. Claims and interests in Classes LES 3, LES 4, LES 5, LES 6, LES 7, LFG 3, LFG 4, and SD 3 are impaired and each of these classes has voted to accept the Plan.

17. Holders of interests in Class LFG 6 will receive no distributions nor retain any property under the Plan on account of their claims, and accordingly are impaired and deemed to reject the Plan and, therefore, are not entitled to vote to accept or reject the Plan.

IV. Modifications to the Plan

18. To resolve a number of Plan objections, the Debtors have made, and the Creditors' Committees have consented to, certain non-material modifications to the Plan. As the Debtors and the Creditors' Committees continue to work toward resolution of objections, certain additional modifications may be referenced on the record during the confirmation hearing.

ARGUMENT

19. This memorandum is divided into two parts. In the first part, the LES Committee represents that the Plan, which is the product of extensive good-faith, arm's-length negotiations

²³ See Declaration of James Katchadurian of Epiq Bankruptcy Solutions, LLC With Respect to the Methodology for the Tabulation of, and Results of, Solicitation of Certain Classes on the Joint Chapter 11 Plan of LandAmerica Financial Group, Inc. and Its Affiliated Debtors [Docket No. 2580]

