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for LandAmerica 1031 Exchange
Services, Inc.

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

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In re	:	Chapter 11 Case
	:	
LandAmerica Financial Group, Inc., <u>et al.</u> ,	:	Case No. 08-035994 (KRH)
	:	
	:	
Debtors.	:	Jointly Administered
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**JOINT MOTION OF DEBTOR AND LES COMMITTEE FOR ORDER
ESTABLISHING SCHEDULING PROTOCOL FOR ADVERSARY PROCEEDINGS**

LandAmerica 1031 Exchange Services, Inc. (“**LES**” or the “**Debtor**”) and the Official Committee of Unsecured Creditors of LandAmerica 1031 Exchange Services, Inc. (the “**Committee**”) hereby move (the “**Motion**”) this Court for entry of an order, pursuant to sections 105(a) and 105(d) of title 11 of the United States Code (the “**Bankruptcy Code**”), establishing a scheduling protocol for the efficient management, administration, and adjudication of the adversary proceedings that have been commenced concerning the exchange funds held by the Debtor. In support of the Motion, LES and the Committee respectfully represent:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a) and 105(d) of the Bankruptcy Code.

BACKGROUND

2. On November 26, 2008 (the “**Petition Date**”), LES and LandAmerica Financial Group, Inc. (collectively with LES, the “**Debtors**”) filed voluntary petitions in this Court 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. No trustee or examiner has been appointed in these chapter 11 cases.

3. On December 3, 2008, the United States Trustee for the Eastern District of Virginia appointed an Official Committee of Unsecured Creditors in the case of (a) LandAmerica Financial Group, Inc. and (b) LandAmerica 1031 Exchange Services, Inc. (collectively, the “**Creditors’ Committees**”).

4. 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.

5. 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, upon information and belief, 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**”). 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 and other related documents.

6. Debtor believes that 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.

7. Contemporaneous to the execution of certain of the Segregated Exchange Agreements, LES executed escrow agreements stating that the relevant exchange funds were to be deposited into an escrow account maintained by an escrow holder (the “**Escrow Cases**”).

8. While all of the Commingled Exchange Agreements provide for the transfer of funds to a general LES bank account, the overwhelming majority of the Commingled Exchange Agreements involved in the adversary proceedings filed to date take two forms with respect to the “Investment of Exchange Funds” under Paragraph 3 of the Exchange Agreements. The first form generally involves the wire transfer of Exchange Funds to a general LES account at SunTrust Bank, and the relevant Exchange Agreement provides that “Taxpayer will receive interest on the Exchange Funds at . . . [accrual of interest at a certain rate] from the first business day following LES’ receipt of funds via wire transfer to the LES account in Richmond, Virginia that it maintains at SunTrust Bank for the purpose of collecting taxpayers’ exchange funds” (the “**Commingled Type A Cases**”). The second form generally involves the deposit by LES of Exchange Funds into a LES account at SunTrust Bank, and the relevant Exchange Agreement provides that “LES will deposit the Exchange Funds in an account maintained at SunTrust Bank in Richmond, Virginia and will receive interest on the Exchange Funds . . . [accrual of interest at a certain rate] from the first business day following LES’ receipt of funds via wire transfer at

Richmond, Virginia, or from three days after receipt in Richmond, Virginia if sent by check, to the day of withdrawal.” (the “**Commingled Type B Cases**”).

9. By motion dated December 5, 2008, the Debtor sought to establish procedures to settle disputes relating to the ownership of Exchange Funds under Segregated Exchange Agreements. Over 30 responses and objections were filed, including by the Committee.

10. On December 16, 2008, the Court held a hearing on Debtor’s Motion Pursuant to Sections 105(a) and 363(b) of Title 11 of the United States Code, and Rule 9019 of the Federal Rules of Bankruptcy Procedure Establishing Procedures to Settle Claims Involving Segregated Exchange Funds (the “**Procedures Hearing**”). At the Procedures Hearing, the Court indicated its inclination to grant the motion, subject to the agreement of the Committee, and directed LES and the Committee to develop a protocol for handling the adversary proceedings on an expedited test-case basis. The Court also expressed its intent to stay the remaining adversary proceedings pending resolution of the test cases.

RELIEF REQUESTED

11. By this Motion, LES and the Committee seek approval of an order, substantially in the form annexed hereto as Exhibit A, that implements a process that will lead to the resolution of the Lead Cases (as defined below) and avoid uncoordinated and lengthy litigation by different parties over the same issues.

12. Specifically, LES and the Committee seek entry of an order that approves the appointment of four (4) test cases (the “**Lead Cases**”), by which the common legal and factual issues involved in the adversary proceedings may be litigated, stays all adversary

proceedings other than the Lead Cases, and establishes deadlines for discovery and motion practice in the Lead Cases (the “**Adversary Proceedings Procedures Order**”).

13. The issues raised in the Adversary Proceedings Procedures Order were discussed at length during the Procedures Hearing. Moreover, there is an immediate need to establish appropriate procedures to deal with the multitude of adversary proceedings that have been commenced. The Court recognized this need at the Procedures Hearing and directed the Debtor and the Committee to develop an agreed process, hopefully by year end, if possible, or early January. The Debtor and the Committee now have agreed on an appropriate process. For these reasons, LES is simultaneously filing a motion for expedited hearing requesting that the Court hold a hearing on the Motion on January 12, 2009.

BASIS FOR RELIEF

14. Section 105(a) of the Bankruptcy Code provides, in relevant part: “The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Pursuant to section 105(a) of the Bankruptcy Code, the Court has expansive equitable powers to achieve fairness and justice in the reorganization process. *See, e.g., In re Momentum Manufacturing Corporation*, 25 F.3d 1132, 1136 (2nd Cir. 1994) (“[B]ankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.”); *In re Croton River Club, Inc.*, 52 F.3d 41 (2nd Cir. 1994) (holding that bankruptcy courts have broad equity power to manage affairs of debtors); *In re Chinichian*, 784 F.2d 1440, 1443 (9th Cir. 1986) (“Section 105 sets out the power of the bankruptcy court to fashion orders as necessary pursuant to the purposes of the Bankruptcy Code.”); *Bird v. Crown Convenience (In re NAFX, Inc.)*, 864 F.2d 588, 590 (8th Cir. 1988) (“The overriding consideration in bankruptcy . . . is that equitable principles govern”); *In re Cooper Properties liquidating Trust, Inc.*, 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986) (“[T]he

Bankruptcy Court is one of equity and as such it has a duty to protect whatever equities a debtor may have in property for the benefit of its creditors as long as that protection is implemented in a manner consistent with the bankruptcy laws.”).

15. Section 105(d) of the Bankruptcy Code states that:

The court, on its own motion or on the request of a party in interest, may hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; *and unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically*

11 U.S.C. § 105(d) (emphasis added).

16. During the Procedures Hearing, the Court indicated its interest in establishing a “procedure that is streamlined,” “some procedure that will allow us to expedite [these cases] in . . . some sort of a way that we can resolve all of these issues.” Hr’g Tr. (12/16/08; recorded by electronic sound recording) at 43, 48. The Court further requested the Debtor and the Committee to meet and confer to establish a protocol for handling the adversary proceedings on an expedited test-case basis. *See id.* at 59-61.

17. As a result of the meet and confer process, LES and the Committee propose that *Millard Refrigerated Services, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03147, *Frontier Pepper’s Ferry LLC v. LandAmerica Exchange Services, Inc.*, Adv. Proc. No. 08-03148, *HealthCare REIT, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03149, and *Aiello, et al. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03154 and serve as the Lead Cases in this matter.¹ LES and the Committee believe that these cases are a representative sampling of the adversary proceedings filed to date

¹ LES and the Committee requested the consent to serve as Lead Cases from counsel for each of the Lead Cases. To the extent a plaintiff in a Lead Case declines to be designated as a Lead Case, LES and the Committee will designate another similar situated adversary proceeding.

with respect to the terms and conditions of the parties' exchange agreements, use of the exchange funds, and applicable governing law. The *Millard Refrigerated* Action is representative of the Segregated Exchange Agreements; the *HealthCare REIT* Action is representative of the Escrow Cases; the *Aiello* Action is representative of the Commingled Type A Cases; and the *Frontier Pepper's Ferry* Action is representative of the Commingled Type B Cases.

18. Litigation of the Lead Cases will advance the resolution of the adversary proceedings in that the discovery and motions practice contemplated by the Adversary Proceedings Procedures Order will establish fact patterns and legal rulings pursuant to which the remaining adversary proceedings can be resolved, hopefully consensually and without the need for further litigation.

NOTICE

19. Notice of this Motion will be given to those parties entitled to receive notice under the Case Management Order, including counsel for each of the plaintiffs in the adversary proceedings, and all current customers of LES.

WAIVER OF MEMORANDUM OF LAW

20. Pursuant to Local Bankruptcy Rule 9013-1(G), and because all applicable authority is set forth in the Motion, LES and the Committee request that the requirement that all motions be accompanied by a separate memorandum of law be waived.

NO PRIOR REQUEST

21. No previous request for the relief sought herein has been made to this Court or any other court.

CONCLUSION

WHEREFORE, LES and the Committee respectfully request that the Court enter an order, substantially in the form annexed hereto, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: Richmond, Virginia
January 7, 2009

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

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

**ORDER ESTABLISHING SCHEDULING PROTOCOL
FOR ADVERSARY PROCEEDINGS**

The Joint Motion of LandAmerica 1031 Exchange Services, Inc. (the “**Debtor**”) and the Official Committee of Unsecured Creditors of LandAmerica 1031 Exchange Services, Inc. (the “**Committee**”) to Establish Scheduling Protocol for Adversary Proceedings is GRANTED.

IT IS ORDERED that the following schedule is established for adversary proceedings filed in the above-captioned cases:

1. *Millard Refrigerated Services, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03147, *Frontier Pepper's Ferry LLC v. LandAmerica Exchange Services, Inc.*, Adv. Proc. No. 08-03148, *HealthCare REIT, Inc. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03149, and *Aiello, et al. v. LandAmerica 1031 Exchange Services, Inc.*, Adv. Proc. No. 08-03154 shall serve as the lead adversary proceedings (the "**Lead Cases**") in this matter because they provide a representative sampling of the adversary proceedings filed to date with respect to the terms and conditions of the parties exchange agreements, use of the exchange funds, and applicable governing law.

2. All adversary proceedings filed in the above-captioned cases other than the Lead Cases are hereby stayed pending further order of this Court.

3. On or before January 19, 2009, the Plaintiffs in the Lead Cases, the Debtor, and the Committee (the "**Parties**") shall submit to the Court a proposed Agreed Protective Order or, if not agreed, a proposed Protective Order indicating where agreement could not be reached.

4. On or before January 19, 2009, Debtor shall answer or otherwise respond to the complaints in the Lead Cases.

5. On or before January 19, 2009, the Parties shall serve any written discovery to Parties, with responses due ten (10) days after the date of service. No Party shall serve more than ten (10) Interrogatories, including subparts, or twenty (20) Requests for Admission on another Party. Nothing herein shall prevent the Parties from serving discovery requests or responses prior to the filing of the Debtor's responsive pleading(s).

6. On or before January 19, 2009, Debtor shall produce (1) all books, records, and account and transaction detail (electronically and in native format where available) relating to all accounts holding customer funds of the Lead Plaintiffs at any time during the previous 12 months, any transactions impacting such accounts, or the tracing of funds into, out of, or among such accounts; (2) back-up documentation or data, if any, to the spreadsheets submitted as Exhibit A to the Declaration of Ronald Ramos in Support of Debtor's Motion for an Order Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019 Establishing Procedures to Settle Claims Involving Segregated Exchange Funds filed on December 15, 2008 (Exhibit 1, docket entry no. 334); and (3) readily available and identifiable general information describing the movement of exchange funds in or through all accounts holding exchange funds.

7. On or before February 20, 2009, all fact depositions and third party discovery to be completed.

8. In the event a Party intends to rely upon expert opinion(s), on or before February 20, 2009, the Party shall make the disclosure of expert testimony required by Rule 7026(a)(2) of the Federal Rules of Bankruptcy Procedure; or if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 7026(a)(2)(B) of the Federal Rules of Bankruptcy procedure, disclosures shall be made on or before fourteen (14) days after the disclosure made by the other party.

9. Where designated, all expert discovery and expert depositions to be completed on or before March 13, 2009.

10. On or before March 13, 2009, the Parties shall file all motions, including motions for summary judgment and motions objecting to the reliability of expert testimony. Responses to

motions for summary judgment shall be due on the later of twenty-one (21) days after the date of filing or the deadline for fact discovery set forth above. Responses to all other motions shall be due ten (10) days after the date of filing.

11. On or before ten (10) days prior the Trial Date (as defined below), counsel for each of the Parties shall file (a) a list of witnesses the Party intends to call at trial, (b) a list of proposed exhibits and the proposed exhibits, (c) motions in limine, and (d) a designation of witnesses whose testimony is expected to be presented by means of a deposition and a redacted transcript of the pertinent portions of the deposition testimony. Any other Party may file counter designations to the redacted portions designated of a deposition transcript they deem relevant on or before five (5) days prior to the Trial Date.

12. On or before seven (7) days prior to the Trial Date, counsel for each of the Parties shall file (a) any objections to proposed exhibits, (b) responses to motions in limine, (c) any objections to the use under Rule 7032(a) of the Federal Rules of Bankruptcy Procedure of a deposition so designated, and (d) a list of any rebuttal witnesses. Exhibits to which no timely objection has been made will stand as admitted into evidence.

13. The Pre-Trial Hearing for the Lead Cases shall take place on or about April 7, 2009, at which time the Court shall select the order of trial for the four Lead Cases.

14. The trial of the first of the Lead Cases shall commence on or before April 23, 2009 at 10:00 a.m. (the "**Trial Date**").

15. Plaintiffs in adversary proceedings filed in this case other than the Lead Cases shall not be allowed to intervene in the Lead Cases; provided that: (a) such plaintiffs shall be entitled to receive copies of documents and deposition testimony from the Lead Cases upon request and at their cost if they have agreed to be bound by the terms of the protective order

referenced above; and (b) such plaintiffs shall be authorized to file amicus briefs in connection with summary judgment motions or pre-trial proceedings in accordance with the deadlines set forth above.

16. Counsel to the Parties may by agreement continue discovery beyond the deadlines set forth herein, but shall not have the authority to continue motions, pretrial, or trial deadlines. The Parties may also agree to shorten the deadlines should the need for discovery in the particular case not warrant the length of time accorded.

17. Entry of this Order is without prejudice to Debtor's right to seek to settle any adversary proceeding under Rule 9019 of the Bankruptcy Rules, on motion and two-days' notice. *See Hr'g Tr. (12/16/08; recorded by electronic sound recording) at 44.*

18. The Court may modify this Order on motion of Debtor, Committee, or any Lead Plaintiff for cause shown.

19. The Clerk of Court is directed to enter this Order on the docket of each adversary proceeding commenced in this case.

Dated: January 7, 2009

KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY JUDGE

STIPULATED AND AGREED:

January 7, 2009

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