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*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
	:	
Debtors.	X	Jointly Administered
.....		
Howard Finkelstein,	:	
Plaintiff,	:	
v.	:	Adv. Proc. No. 08-03171
LandAmerica 1031 Exchange Services, Inc.,	:	
	:	
Defendant.	X	
.....		
Frontier Pepper's Ferry,	:	
Plaintiff,	:	
v.	:	Adv. Proc. No. 08-03148
LandAmerica 1031 Exchange Services, Inc.,	:	
	:	
Defendant.	X	
.....		
Matthew B. Luxenberg, Trustee of the Matthew B. Luxenberg Revocable Family Trust,	:	
Plaintiff,	:	
v.	:	Adv. Proc. No. 09-03023
LandAmerica 1031 Exchange Services, Inc.,	:	
	:	
Defendant.	X	
.....		

**REPLY IN SUPPORT OF THE OMNIBUS MOTION FOR PARTIAL SUMMARY
 JUDGMENT OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF LANDAMERICA 1031 EXCHANGE SERVICES, INC.**

The Official Committee of Unsecured Creditors (the “LES Committee”) of LandAmerica 1031 Exchange Services, Inc. (“LES”), by and through its counsel of record, respectfully submits this Reply in Support of its Omnibus Motion for Partial Summary Judgment (the “Motion”) against Frontier Pepper’s Ferry (“Frontier”), Howard Finkelstein (“Finkelstein”), and Matthew B. Luxenberg, Trustee of the Matthew B. Luxenberg Revocable Family Trust (“Luxenberg”) (collectively, the “Commingled Plaintiffs”).

A. The Exchange Funds Are Not Held Subject To An Express Trust

1. The unambiguous language of the Exchange Agreements proves that, as a matter of law, the parties did not, and did not intend to, create an express trust.

i. LES did not have fiduciary duties

2. The Commingled Plaintiffs do not dispute that a trust requires the existence of fiduciary duties in the trustee. Here, LES’s duties are limited to those expressly set out in the Exchange Agreements, which also state that “no additional duties or obligations shall be implied hereunder or by operation of law.” Exchange Agreements § 6(c). The Exchange Agreements do not expressly impose fiduciary duties. LES’s limited duties of accepting the exchange funds and future promises to then either (a) pay some amount of money to the exchangers, and/or (b) purchase replacement property, do not require that LES act as a fiduciary. Accordingly, LES had no fiduciary duties, and could not have been a trustee. Luxenberg’s and Frontier’s claims that Section 6(c) is ambiguous or doesn’t mean what it actually says are unavailing.

3. First, while admitting that the Exchange Agreement “is the source of LES’s duties and that additional duties cannot be imposed on LES” (Lux. Opp. p. 11), Luxenberg nonetheless argues that Section 6(c) “can be interpreted as imposing fiduciary duties, even if it does not expressly delineate those duties.” *Id.* The flaw in this logic is immediately recognizable: if the Exchange Agreements do not “expressly delineate” fiduciary duties, then fiduciary duties would

have to be “implied” or imposed “by operation of law”—both of which are disclaimed by Section 6(c). Luxenberg makes no reasonable attempt to explain how LES’s limited duties of accepting funds and then later paying the exchangers or purchasing replacement properties necessarily required LES to take on fiduciary duties. Nor does Luxenberg advance a principled reason for why fiduciary duties should be imposed in this commercial contract, contrary to black-letter Virginia law militating against such a finding. *W. Capital Partners, LLC v. Allegiance Title & Escrow, Inc.*, 520 F. Supp.2d 777, 782 (E.D. Va. 2007) (stating that a contract between commercial parties transacting at arm’s length generally does not create a fiduciary relationship under Virginia law).

4. Second, Luxenberg argues that LES’s role as an “intermediary” means that LES acted as Luxenberg’s agent, and is thus a fiduciary. *Id.* Luxenberg provides no support—factually or in case law—for its assertion that an “intermediary” acts as the agent for either of the parties on the opposite sides of the transaction.¹ Moreover, agency duties go beyond those expressly set forth in the Exchange Agreements, and thus would have to either be implied or imposed by operation of law, which is barred by Section 6(c).

5. Third, Frontier asserts that the disclaimer of duties (“fiduciary or otherwise”) in section 6(c) of the Exchange Agreements conflicts with Sections 2(b) and 5(b), which state that LES shall purchase replacement properties and transfer them to the exchanger. Frontier Opp. pp. 20-21. There is no conflict between these provisions: Sections 2(b) and 5(b) impose explicit contractual duties on LES, while section 6(c) disclaims extra-contractual and implied duties.

¹ Luxenberg cites BLACK’S LAW DICTIONARY for the statement that an intermediary “*may* be an agent,” but notably cannot quote anyone for the proposition that an intermediary *is* an agent. That a party *may* be something is far different from stating that the party *is* something. Similarly, Luxenberg cites the RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006), which states the black-letter principle that an “agent is a fiduciary.” But that Restatement

See, e.g., Balbir Brar Associates, Inc. v. Consolidated Trading Services Corp., No. 137795, 1996 WL 1065615, at *5 (Va. Cir. Ct. October 1, 1996) (recognizing distinction between contract and fiduciary duties).

ii. the Commingled Plaintiffs do not have beneficial or equitable interests

6. The Commingled Plaintiffs do not dispute that a trustee holds legal title to trust property while the beneficiary retains a beneficial or equitable interest. Here, the Commingled Plaintiffs acknowledged that they would have “no right, title, or interest in...or otherwise receive the benefit of” the exchange funds. Exchange Agreements § 2(c). This disclaimer conclusively establishes that the Commingled Plaintiffs cannot be trust beneficiaries, and that the parties did not create express trusts. Luxenberg’s and Frontier’s arguments for why this disclaimer does not mean what it says are unconvincing.

7. First, Frontier argues that “it is unclear whether ‘title’ indicates legal title, equitable title, or both.” Frontier Opp. p. 22. Luxenberg similarly argues that “[t]here is no ‘plain statement’ that Luxenberg lacked an equitable interest in the Exchange Funds.” Lux. Opp. pp. 8-9. They both agreed, however, that they had “**no** right, title, or **interest**” in the exchange funds. That must mean that they had no legal interest, equitable interest, or any other kind of interest. Certainly, Frontier and Luxenberg advance no reasonable alternative reading of Section 2(c), or explain how they could have “no right, title, or interest” and yet have a beneficial or equitable “interest.”

8. Second, Frontier and Luxenberg argue that Section 2(c) does not cover “equitable interests” because, they contend, the applicable Treasury regulations do not require the taxpayer to give up equitable interests in exchange property. *See* Frontier Opp. pp. 10-11; Lux. Opp. p. 9.

section does not state that an “intermediary is an agent,” as is implied by Luxenberg’s citation. *See* Lux. Opp. at p.

Even accepting the latter assertion as true, it cannot save Frontier or Luxenberg. Even if they *could* have retained an equitable interest and still maintained a valid 1031 exchange, they *did not* retain such an interest here.² Theoretically, the parties could have executed an exchange agreement wherein the exchanger retained a beneficial interest or used the qualified trust safe harbor, but they did not. The Commingled Plaintiffs cannot ask this Court to re-write the parties' written agreements.

9. Third, Luxenberg argues that Section 2(c)'s disclaimer of "right, title, or interest" is ambiguous because it conflicts with Section 3(a)'s statement that the Commingled Plaintiffs "will receive interest on the Exchange Funds." Lux. Opp. p. 7. Such an unthinkable, unreasonable interpretation of the word "interest" in Sections 2(c) and 3(a) cannot create an ambiguity. *See, e.g., Sheridan v. Nationwide Retirement Solutions, Inc.*, 2009 WL 465100, at *4 (4th Cir. Feb. 25, 2009) ("a contract is ambiguous if it is susceptible to two reasonable interpretations") (emphasis added). Obviously, the "interest" referred to in Section 3(a) is the payment a person receives from someone else who keeps their money, while the "interest" referred to in Section 2(c) is the share of or right in property. Reading Section 3(a) to mean that the exchangers were to receive a "beneficiary interest *on* the Exchange Funds" is nonsensical, both grammatically and in the context of the rest of Section 3(a), which discusses the interest "rate" to be paid.³

11.

² Frontier's reliance on *Degroot v. Exchanged Titles, Inc. (In re Exchanged Titles, Inc.)*, 159 B.R. 303 (Bankr. C.D. Cal. 1993) is misplaced. There, the court found a resulting trust where the property was transferred to a QI pursuant to an "escrow agreement" and where the exchangers "continued in control of the ... property, paid all financial obligations on the property," etc. *See id.* at 304, 306. There is no discussion of an exchanger disclaiming all right, title, and interest to the purported trust property, and nowhere did the court hold that an exchanger cannot disclaim equitable interest to exchange funds.

³ Luxenberg also discusses the part of Section 2(c) which states that "except that the balance of Exchange Funds, if any, held by LES...shall be paid to Taxpayer on the applicable Termination Date." Lux. Opp. p. 8. This

iii. LES had more than “bare legal title” to the exchange funds

10. The exchangers had “no right, title, or interest,” while LES, in stark contrast, had “sole and exclusive possession, dominion, control and use” of the exchange funds. This contract language cannot reasonably be construed to confer on LES only “bare legal title” while the exchangers maintained all other interests.

11. First, both Luxenberg and Frontier contend that LES’s use of the exchange funds was restricted to holding and applying them in accordance with the terms of the Exchange Agreements. *See* Lux. Opp. pp. 7, 16; Frontier Opp. p. 12. Even taking that assertion as true, just because LES was contractually limited to how it was to use the funds does not mean that LES only had “bare legal title” and that the exchangers necessarily had all other interests. In other words, limitations on LES’s use of the exchange funds do not somehow “undo” the exchanger’s disclaimer of right, title, and interest. Moreover, the Exchange Agreements authorize LES to deposit the funds in an LES-controlled commingled account, to invest the funds to generate earnings, and to profit from the “spread” between the actual earnings and the amount of interest promised in the agreements. Exchange Agreements §§ 2(c), 3(a). These permitted uses of the funds exceed the right to just “hold and apply” them, as Luxenberg and Frontier contend.

12. Second, Luxenberg argues that section 6(f) of the Exchange Agreements proves that LES did not really fully own the funds. Lux. Opp. pp. 16-17. Section 6(f) states that if there is a dispute over the ownership or right of possession of the funds, LES may retain possession of them without liability and shall have no duty to institute or defend any legal proceedings.

provision simply states that LES had a contractual duty to pay any balance due on the Termination Date. While the exchangers may have had a contractual right to that payment at some point in the future, that does not change the

Exchange Agreements § 6(f). This provision is merely a waiver of liability in the event that someone claims ownership of the exchange funds, and does not itself confer ownership to either LES or the exchanger. It says nothing about LES “interpleading” the funds and relinquishing ownership rights, nor is Section 6(f) limited to disputes with a third party, as Luxenberg contends. The provision does not conflict with or change any other provisions of the Exchange Agreements, such as Section 2(c).

13. Third, Luxenberg and Frontier argue that LES’s sole and exclusive ownership of the exchange funds was temporary and automatically expires or vests on the applicable termination dates. *See* Lux. Opp. p. 9-10; Frontier Opp. p. 9. However, the Exchange Agreements do not state that LES’s rights to the funds will expire or vest automatically, but rather state that LES had a contractual obligation to “make payments” to purchase replacement properties and to “pa[y]” any remaining funds. *See* Exchange Agreements §§ 2(b,c), 3(a). Its purported failure to make those payments makes the exchangers unsecured creditors just like any other creditor with a breach of contract claim. *See In re Nova Real Estate Investment Trust*, 23 B.R. 62, 66-67 (E.D. Va. 1982) (“The debtor-creditor relationship ... involves only the obligation to pay money; it endows the creditor with merely a personal claim against the debtor. Unless and until the creditor obtains a judgment and subjects the debtor’s property to the satisfaction of that judgment, the creditor has no legal or equitable interest in the property of his debtor.”) (emphasis added). In any event, whether LES’s sole and exclusive ownership was temporary or infinite is immaterial, as the determination of what constitutes property of the estate is measured as of

fact that the exchangers had no rights in the exchange funds themselves, as Section 2(c)’s disclaimer of all “right, title, or interest” to the funds makes clear.

“commencement of the case,” which occurred before any applicable termination date. *See* 11 U.S.C. § 541(a)(1).⁴

iv. the Court cannot consider extrinsic evidence

14. As the parties’ copious briefing has demonstrated, the parties cannot rely on extrinsic evidence to amend, modify, or alter the unambiguous meaning of the Exchange Agreements. Under Virginia law, a subsequent “agreement” could modify a written contract in certain limited circumstances. *See, e.g., Centex Constr. v. Acstar Ins. Co.*, 448 F. Supp. 2d 687, 712 (E.D. Va. 697) (stating that parol evidence rule does not bar resort to “subsequent parol agreements between the parties”). Here, however, there was no “agreement” between the parties subsequent to the Exchange Agreements’ execution. Subsequent representations—whether made from LES, LES’s parent LFG, or the exchangers—have no bearing on whether or not a trust was created. *See, e.g., Wu v. Tseng*, 459 F. Supp.2d 468, 480 (E.D. Va. 2006) (whether a trust is created is determined at the time of the property transfer). Thus, statements of legal conclusions by any LES representative any time subsequent to the Exchange Agreements’ executions to the effect that the funds was held in trust or that LES was a fiduciary doesn’t make those assertions true, and cannot alter or diminish the rights of other LES creditors.

B. The Exchange Funds Are Not Held Subject To A Resulting Trust

15. The Commingled Plaintiffs cannot prove by clear and convincing evidence that the parties intended to create a trust despite the Exchange Agreements not doing so.

⁴ None of the authorities Luxenberg cites changes this result. They hold that the automatic stay does not apply to rights or interests that automatically vest or expire post-petition—such as a lease that ends pursuant to its terms. *See* 11 U.S.C. § 362(b)(10) (addressing a lease “that has terminated by the expiration of the stated term”); *Gloria Mfg. Corp. v. Int’l Ladies’ Garment Workers’ Union*, 734 F.2d 1020, 1022 (4th Cir. 1984) (involving a contract that “expired on its own terms”); *In re Canney*, 284 F.3d 362, 369-70 (2d Cir. 2002) (involving a statutory equity of redemption right that automatically expired at a certain time); *In re Riodizio*, 204 B.R. 417, 421 (Bankr. S.D.N.Y. 1997) (discussing a contract that “expires” post-petition). They do hold that a contractual right to payment gives a party any legal or equitable rights in or interests to the debtor’s pre-petition property.

16. First, the Commingled Plaintiffs have cited no Virginia case wherein a court found a resulting trust in cash. Nor have they cited any Virginia case wherein a resulting trust was found outside the limited circumstance in which a person transferred title in real property to another without mention of whether it was intended as a gift, to be held in trust, or otherwise. Indeed, the best they can do is cite two cases (from 1895 and 1907) in which the courts failed to find, but did not completely foreclose, the possibility of imposing a resulting trust over personal property. *See, e.g.*, Lux. Opp. p. 19. Luxenberg advances no good reason for expanding the scope of resulting trusts. In the limited circumstance described above, a resulting trust is a fair result because someone has paid for real property but title was conveyed to another party for some reason not set out in any agreement. Here, in contrast, full right and title was vested with LES for the specified purpose of accomplishing a commercial transaction, and a resulting trust is unneeded to enforce the unspecified intent of the parties when such intent is explicitly spelled out in the written Exchange Agreements. *See In re Nova*, 23 B.R. at 68 (holding that where the Property Transfer Agreement at issue contained “an express declaration of the intent of the parties,” imposition of a resulting trust was precluded).

17. While extrinsic evidence may be considered as part of a resulting trust analysis where the parties’ intent is unclear as to whether or not a trust was intended to be established, courts cannot refer to extrinsic evidence to alter or contradict the clear intent of the parties as set forth in their unambiguous and fully-integrated agreements. Indeed, the facts at issue here are fundamentally different from those in cases involving resulting trusts, where the only agreement between the parties is a deed, will, or other title instrument that does not address whether the parties intended to transfer equitable title along with legal title, and parol evidence is needed to determine the actual intent of the parties. *See, e.g., Muth v. Gamble*, 219 S.E.2d 894, 896-97 (Va.

1975) (permitting parol evidence to determine whether a deed established a resulting trust by clear and convincing evidence). Further, any post-execution statements that purport to contradict the Exchange Agreements cannot alter the transaction that actually took place, as the intent necessary to create a resulting trust is measured at the time the transfer of property is made. *See id.* at 897 (“A resulting trust must accrue at the time legal title is taken.”).⁵

C. LES Was Not A “Mere Conduit” For The Exchange Funds

18. Frontier also asserts that the funds should be excluded from LES’s estate based on the theory that LES was a “mere conduit” for the funds under federal common law. This argument is nearly identical to that made by Luxenberg in its Motion for Partial Summary Judgment (but which Luxenberg did not raise in its Opposition to the LES Committee’s Motion). *See Lux. Mem.* pp. 37-42. [AP No. 09-03023, *filed under seal*]. The LES Committee hereby incorporates by reference its argument on the “mere conduit” theory found in its Opposition to Luxenberg’s MSJ. *See LESC Lux. Opp.* ¶¶ 26-35 [AP No. 09-03023, Dkt. No. 56]. As explained at length therein, Frontier cannot show that there is a significant federal interest warranting the application of federal common law and, regardless, LES’s “sole and exclusive” ownership of the exchange funds would not make it a “mere conduit” under federal common law.

D. Commingled Exchange Funds Cannot Be Traced

19. For further support of (a) why the Commingled Plaintiffs cannot, as a matter of law, directly trace their funds, (b) why the Commingled Plaintiffs cannot, as a matter of law,

⁵ To the extent that the Court does consider extrinsic evidence, Frontier’s purported “evidence” that it never intended to transfer equitable title to the exchange funds and never viewed the deposit of the funds as an investment are merely self-serving statements and are not evidence at all. *See Boone v. U.S. Attorney*, 2006 WL 1075010, at *3 (W.D. Va. Apr. 21, 2006) (“Boone may have had a subjective intent to the contrary, but it is the objective manifestation of intent, as shown by the words used in the agreement, that governs.”). Further, Frontier did not have to view its transfer of exchange property to LES as an investment in order to convey equitable interest in the sale proceeds to LES. Frontier may not view short-term deposits in its checking account as an investments either, but that does not mean the bank holds that money in a resulting trust.

trace their funds through a tracing fiction, and (c) why, in any event, the Court should not employ a tracing fiction in this context, the LES Committee incorporates its Opposition to Frontier's MSJ at ¶¶ 8-15 [AP No. 08-03148, Dkt. No. 59] and Opposition to Luxenberg's MSJ at ¶¶ 36-42.

E. Conclusion

20. For the foregoing reasons, the LES Committee respectfully requests that the Court grant partial summary judgment in its favor.

Dated: Richmond, Virginia
April 13, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April 2009, a true and correct copy of the foregoing Reply in Support of the Omnibus Motion for Partial Summary Judgment of the Official Committee of Unsecured Creditors of LandAmerica 1031 Exchange Services, Inc. has been served: (i) via United States mail, first class, postage prepaid; and (ii) via email on the parties listed below and on all parties receiving notification through the Court's ECF system.

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