

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35994 (KRH)  
. .  
. .  
LANDAMERICA FINANCIAL . 701 East Broad Street  
GROUP, INC., . Richmond, VA 23219  
. .  
Debtor. . December 23, 2008  
. . . . . 10:57 a.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE KEVIN R. HUENNEKENS  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 COURT CLERK: Item 146 Landamerica Financial Group,  
2 Incorporated hearing on a motion by Jeffrey Stone for expedited  
3 hearing on motion to substitute trustee.

4 MS. MCGAVIN: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MS. MCGAVIN: I'm Annemarie McGavin here on behalf of  
7 Jeffrey Stone. I'm here with my co-counsel Mary Caloway who  
8 was admitted pro hac vice yesterday and she will present the  
9 argument in support of the motion.

10 THE COURT: All right. Thank you.

11 MS. CALOWAY: Good morning, Your Honor.

12 THE COURT: Good morning. Welcome to the court.

13 MS. CALOWAY: Mary Caloway. Thank you very much.  
14 Mary Caloway, Buchanan, Ingersoll & Rooney on behalf of Jeffrey  
15 Stone as trustee of the March Family Trust dated as of March  
16 24th, 1993. Your Honor, set this time for hearing on Mr.  
17 Stone's motion for an expedited hearing on his emergency motion  
18 to compel substitution of LandAmerica Exchange 1031 Exchange  
19 Services on certain documents. And then if Your Honor grants  
20 the motion for an expedited hearing the order set forth that we  
21 would actually proceed to the motion itself today.

22 As an initial matter let me tell the Court that since  
23 the filing of the motion and since the setting of the hearing  
24 I've had a couple of conversations with counsel to the debtor  
25 and counsel to the 1031 committee. And based on those

1 conversations my understanding is that the debtors don't really  
2 oppose the relief requested in the motion subject to they would  
3 want to ensure that if any relief were granted there would be a  
4 disclaimer of any representation by them that there would be no  
5 adverse consequences pursuant to the 1031 tax laws. And my  
6 understanding is they would also want to preserve, I suppose,  
7 any language in the 1031 exchange -- or in the exchange  
8 agreement which would may or may not waive any damage claims  
9 that would exist under those agreements.

10 Now the 1031 committee probably not surprising to the  
11 Court based on past statements that they've made in this case  
12 does oppose the relief requested, and in fact, late yesterday  
13 they filed and served an objection to the motion. Now back to  
14 the motion for an expedited hearing. As the motion set forth  
15 Mr. Stone entered into an exchange agreement with LES in  
16 October, 2008. The relinquished property was sold to a Mr.  
17 Jang Dong Sun and that sale closed on November 17th. But the  
18 sale was structured a little differently I think than your  
19 typical 1031 sale in that the purchase price was essentially  
20 split in two. Half was paid in cash at closing, half was to be  
21 paid at a future date. A promissory note was given in  
22 connection with the second half of the purchase price. The  
23 promissory note was made payable to LES as qualified  
24 intermediary for Mr. Stone. That promissory note begins to  
25 accrue interest as of last week, December 17th, I believe was

1 the date. Copies of all those documents were attached to the  
2 motion to compel.

3           Now, Mr. Sun, the buyer obtained financing from San  
4 Diego National Bank to fund the payment of the second half of  
5 the purchase price. As we noted in our original motion to  
6 expedite the financing was originally scheduled to expire on  
7 December 20th. I've been informed by Mr. Sun, and he actually  
8 sent to me very late last night a declaration which I could put  
9 in, that San Diego National Bank having been informed of  
10 today's hearing has agreed to extend the funding deadline to  
11 January 6th so that in the event the motion were granted there  
12 would be time to get the paperwork completed.

13           January 6th is not all that far away, Your Honor, and  
14 for that reason I think the same rationale exists for an  
15 expedited consideration of the motion. There's no other  
16 hearing scheduled in this case before January 6th and all the  
17 parties are here. I think it makes the most sense to deal with  
18 the motion today. One last point on the expedited argument is  
19 that Mr. Sun is booked on a flight to China on January 9th.  
20 That flight was booked several months ago in anticipation that  
21 this sale was going to have been closed and obviously was done  
22 prior to learning about the bankruptcy filings of LandAmerica  
23 and LES.

24           And my understanding, and Mr. Stone has been informed  
25 as well by the broker that was handling the sale closing that

1 LES has ceased operating its exchange business. It's not in a  
2 position to accept the payment of the funds represented by the  
3 promissory note or complete the purchase of the property. As a  
4 result the sale of this property is in limbo and the parties  
5 including Mr. Stone, Mr. Sun continue to incur expenses, delay,  
6 cloud the title and essentially not knowing what's going to  
7 happen with this property.

8 That's essentially all I had on the motion to  
9 expedite, Your Honor. I don't know if you want to hear from  
10 parties on that or if you just want to talk about the motion.

11 THE COURT: Does any oppose the Court granting the  
12 expedited hearing this morning on this motion?

13 MS. TAVENNER: Good morning, Your Honor, Lynn  
14 Tavenner of the Law Firm of Tavenner & Beran proposed counsel  
15 to the 1031 Exchange Committee. Also on the phone today, Your  
16 Honor, is Ms. Sarah Shultz from the Law Firm of Akin, Gump. I  
17 did want to advise you of that as well.

18 THE COURT: Thank you.

19 MS. TAVENNER: With respect to the expedited nature  
20 of the motion we filed an objection to the substantive relief  
21 --

22 THE COURT: And I'll get to that in a minute if we  
23 proceed with the motion.

24 MS. TAVENNER: And we understand that and thought  
25 that Your Honor might actually agreed to hear the matter today

1 and have no objection to the making of the presentation, but we  
2 certainly object to the substantive relief requested.

3 THE COURT: All right. Thank you. All right, the  
4 motion for the expedited hearing then is granted and we will  
5 now hear your motion.

6 MS. CALOWAY: Thank you, Your Honor. Your Honor, the  
7 facts with respect to the motion are essentially the same as I  
8 went through with respect to the motion to expedite. But I did  
9 want to, I guess, address the committee objection because I  
10 think that's probably where --

11 THE COURT: Explain to me exactly though how the  
12 transaction is set up to work so I understand what is going to  
13 happen. Are there any funds that have to come out of the  
14 debtor in this case in order to make this transaction work?

15 MS. CALOWAY: No, Your Honor.

16 THE COURT: Okay. That's what I had understood. But  
17 explain to me how it works.

18 MS. CALOWAY: The sale of the relinquished property  
19 which closed in November the first half of the purchase price  
20 that was paid in cash went into LES at that time. Mr. Stone  
21 had already identified one replacement property. I think  
22 ultimately there's a total of four or five replacement  
23 properties. But they had already identified one replacement  
24 property. That sale actually closed before the bankruptcy  
25 filing. So the purchase price of the relinquished property

1 went into LES but then came back out all but \$45,000. We're  
2 not addressing the \$45,000 or seeking to have that \$45,000  
3 released from the estate as part of this motion.

4           And actually that leads sort of, I think, into what I  
5 wanted to say about the committee. Because the committee's  
6 objection as I understand it from both the pleading and from  
7 conversations is that they want to ensure that exchange  
8 customers do not take funds out of the estate. And I think  
9 what distinguishes this particular instance is that the funds  
10 aren't in the estate. They've not come in and if they came in  
11 it would be obviously detrimental to Mr. Stone, but it would be  
12 a completely different circumstance and I don't think we would  
13 be standing here today. The fact is the money hasn't come into  
14 the estate, it's clearly identifiable as relating to this sale  
15 and relatable to the subsequent purchase of the replacement  
16 properties. It's not a situation as the committee would argue  
17 that the relief requested here is no different from any other  
18 exchange customer. I think it's clearly very different. These  
19 funds are identifiable, traceable, they've never been  
20 commingled with anything because quite simply they've never  
21 come into the estate.

22           And now on -- I'm sorry, Your Honor, I got myself out  
23 of order here a little bit. And the simple fact that those  
24 funds have not come into the estate I think makes the  
25 committee's objection distinguishable and really not applicable

1 to Mr. Stone's situation. And the committee also argues that  
2 Mr. Stone would not be damaged if the motion's not granted.  
3 And I think they're right when they say in their objection that  
4 the outside deadline for Mr. Stone to complete the exchange and  
5 to bring in the replacement properties is May. The problem is  
6 that is all contingent upon the sale of the relinquished  
7 property actually closing to completion which obviously can't  
8 be done until the promissory note is paid, the deed of trust is  
9 released and then the other properties can be purchased.

10           Given today's economic climate I think it would be  
11 naive to expect that Mr. Sun's financing is easily replaceable.  
12 We know now it expires on January 6th. Whether or not he gets  
13 replacement funding between now and May is anyone's guess, but  
14 I think not the same as perhaps even a couple of years ago when  
15 obviously money was -- credit was easier to obtain. And like I  
16 said I think it would be naive to expect that such financing  
17 would be readily available to Mr. Sun.

18           In essence, Your Honor, what I would submit to you is  
19 that the facts of this transaction are sufficiently different  
20 from the other exchange situations and we recognize that. And  
21 while I said the motion doesn't affect the \$45,000 that would  
22 remain in the LES estate pending whatever ruling ultimately is  
23 issued by Your Honor. But because the funds represented by the  
24 promissory note have not come into the estate they're  
25 completely different and we think that there's more than ample

1 authority and certainly the equities weigh in favor of granting  
2 the motion.

3 And, Your Honor, other than the affidavit of Mr. --  
4 or declaration of Mr. Sun which I'm happy to hand up to Your  
5 Honor because I was not able to get it filed since I got it  
6 faxed to me this morning at the hotel.

7 THE COURT: I think it would be appropriate. Ms.  
8 Tavenner, have you seen the affidavit?

9 MS. TAVENNER: No, Your Honor, I haven't.

10 MS. CALOWAY: No one has seen it, Your Honor. I  
11 literally picked it up at 9:45 this morning.

12 THE COURT: Okay. I'd ask you to share it with  
13 counsel. Do you have an extra copy?

14 MS. CALOWAY: I do. If I could approach, Your Honor.

15 THE COURT: Thank you.

16 MS. CALOWAY: Your Honor, the clarity I think lost a  
17 little bit in the fax transmission, but it is legible and it is  
18 short. Essentially Mr. Sun declares with regard to the facts  
19 of the entry into the agreement, but in particular I would  
20 point the Court to Paragraphs 3 and 4 which deal with the  
21 financing which is that he obtained the financing to pay the  
22 balance of the purchase price from San Diego National Bank on  
23 December 8th. His financing from San Diego National Bank  
24 expires on January 6th.

25 THE COURT: All right. Very good. Any objection,

1 Ms. Tavenner?

2 MS. TAVENNER: Your Honor, I have no objection to the  
3 entry of the affidavit. I don't think it's dispositive of the  
4 issue at hand.

5 THE COURT: All right, very good. It'll be received  
6 as Exhibit Number 1.

7 MS. CALOWAY: Thank you, Your Honor. And unless Your  
8 Honor has further questions for me I'll cede the podium.

9 THE COURT: Okay, Ms. Caloway. Thank you. Let me  
10 hear from Mr. Maddock.

11 MR. MADDOCK: Good morning, Your Honor, John Maddock  
12 on behalf of the debtor LandAmerica 1031 Exchange Services,  
13 Inc. Your Honor, Ms. Caloway is correct, we did discuss this  
14 matter previously, and in general terms the debtor does not  
15 object to the relief requested. And I'd like to get into that  
16 in a moment. We have reviewed the applicable documents and  
17 particularly the note and the deed of trust and believe that  
18 the debtors' right to payment under the note and its rights  
19 under the deed of trust are analogous to the segregated funds  
20 that you've heard so much about already. And in fact, I think  
21 we agree with the LES committee in that regard that the  
22 situation here is at least analogous to the segregated funds.  
23 The question then becomes what to do with that situation.

24 THE COURT: Well, are there -- who's holding the  
25 funds?

1 MR. MADDOCK: Well, there are no --

2 THE COURT: I didn't understand. It looked to me  
3 like it was just a ministerial act that the debtor was being  
4 asked to do without any depletion of funds whatsoever from the  
5 estate.

6 MR. MADDOCK: Well, as far as cash is concerned, Your  
7 Honor, I think that's correct. As it exists right now there is  
8 a note. The note is payable to the debtor. But in particular  
9 it's payable to the debtor, but in the debtor's capacity as  
10 qualified intermediary for Jeffrey E. Stone, Trustee of the  
11 March Family Trust dated March 24th, '93. And similarly the  
12 deed of trust, the debtor is the beneficiary under the deed of  
13 trust but only in that capacity. So we don't have any -- there  
14 are no funds at issue, but I would -- I think we agree with the  
15 committee that the right to payment under the note is somewhat  
16 analogous to holding segregated funds.

17 THE COURT: And the debtor's the holder of the note.

18 MR. MADDOCK: That's right, Your Honor. It's payable  
19 to the debtor. And, Your Honor, in that context Your Honor is  
20 aware that we have filed the motion to settle with the holders  
21 of segregated funds and that that motion was granted subject to  
22 working out procedures with the committee. And we believe that  
23 in response to this motion the business judgment that was used  
24 in analyzing the segregated fund issue is analogous here which  
25 is why the debtor would consent to the relief requested on the

1 conditions that Ms. Caloway listed and that is that there's a  
2 total disclaimer by the debtor as to whether or not this is  
3 sufficient for tax deferment purposes under 1031. We have no  
4 idea and certainly wouldn't make any representation in that  
5 regard.

6           And second, Your Honor, that there would be no  
7 consequences to the debtor for agreeing to do this or the  
8 completion of the exchange. Your Honor, there is one in a  
9 footnote in the LES Committee objection there's a reference by  
10 the committee that the movant may be seeking a declaratory  
11 judgment that the right to payment under the note is not  
12 property of the debtor's bankruptcy estate. I don't see that  
13 in the movant's proposed order. I don't think that such a  
14 finding would be necessary to grant the motion. But if that  
15 were the case and they are seeking such a declaration we'd  
16 agree with the committee that determination should be made in  
17 accordance with the procedures that are going to be developed.  
18 And I also agree with the committee that it's most likely an  
19 adversary proceeding required under 7001 to make such a  
20 determination.

21           Your Honor, in light of all that the committee's --  
22 I'm sorry, the debtor's position is it would consent under the  
23 conditions I just described. I understand the committee's  
24 objection. Right now I'm not aware that there are other 1031  
25 customers in a similar situation. There may be some, I have

1 not heard that there is a wide spread number. But again, the  
2 debtor would -- although we don't oppose the motion we wouldn't  
3 be amenable to making this determination under the procedures  
4 that are yet to be developed as well.

5 THE COURT: All right, thank you, sir. Ms. Tavenner.

6 MS. TAVENNER: Good morning, again, Your Honor.

7 THE COURT: Good morning.

8 MS. TAVENNER: While the 1031 Exchange Committee  
9 appreciates the travel plans and the financing issues that the  
10 potential buyer has in this instance we believe that if Your  
11 Honor were to grant the relief that's requested today that you  
12 would in essence open the door up that you effectively shut  
13 last week by requiring the procedures to go forward in order to  
14 determine substantive rights under the various exchange  
15 agreements.

16 In essence, Your Honor, it is very possible that the  
17 note that Mr. Maddock referenced as well as the deed of trust  
18 which is referenced in the motion could very well belong to the  
19 LES estate. And to allow that to be removed today could cause  
20 damage to the estate. Not just in the amount reflective of the  
21 dollar amount in that note, \$210,735, but in addition, it could  
22 open the door for other similar requests which would sidestep  
23 the protocol process that we're trying to put in place so that  
24 you don't have to keep granting expedited hearings and looking  
25 at these matters on a case by case basis when in essence we

1 don't have the underlying facts to present to you for you to  
2 make a determination with respect to the substantive property  
3 rights of the debtor.

4 We appreciate the debtor's efforts to look at it and  
5 to give you what they believe are the legal ramifications of  
6 the various exchange agreements, but as Mr. Maddock said this  
7 probably is something that is more in line with what he called  
8 the segregated accounts which is something that is going to be  
9 determined in the protocol process.

10 Now, Your Honor, we do understand that this is  
11 something that's important to the movant and we did try to come  
12 up with some type of resolution. And even today we would agree  
13 to a process that would be something more in line to what Your  
14 Honor approved with regard to Mr. Buffenstein's client K&L  
15 Property.

16 THE COURT: And that's what I thought this was when  
17 it first came to me. Something more along those lines.

18 MS. TAVENNER: And I don't think it is. But to the  
19 extent that the buyer would be willing to fund the balance of  
20 the purchase price owed to the LES estate in exchange for a  
21 release of note and deed of trust to be held by the LES estate  
22 and then with the parties reserving their rights to address the  
23 underlying -- the legal rights of the note and deed of trust  
24 the committee would be agreeable to doing something like that.  
25 But to just agree that the motion could be granted today the

1 committee believes would just open that barn door again and  
2 would in effect be a substantive determination of property  
3 rights of the debtor which we believe would be detrimental and  
4 something that should be addressed in the protocol process.

5 THE COURT: All right, thank you. Ms. Caloway, you  
6 wish to respond?

7 MS. CALOWAY: Briefly, Your Honor. Your Honor, I'm  
8 not familiar actually with the process that was referenced by  
9 committee counsel just now and that is not actually something  
10 that I had discussed with her co-counsel. In my discussions  
11 with her co-counsel the only resolution that was put to me as  
12 acceptable to the committee was that they would agree that the  
13 debtor could accept the funds and issue the deed which  
14 obviously would put Mr. Stone in more circumstances than he  
15 stands in today which is why that solution was not explored any  
16 further. I don't know, because I'm not overly familiar with  
17 what was approved by the other claimant, whose name is escaping  
18 me, whether that would be a possibility. I simply don't know  
19 as I stand here today.

20 I disagree with the committee counsel's statement  
21 that granting this motion today would, I guess, put the Court  
22 in jeopardy of opening a door that they believe has been shut.  
23 Should the Court agree to grant the motion based on the  
24 particular facts of this case I think certainly an order could  
25 be crafted that would ensure that any door that is supposed to

1 be shut remains shut.

2 THE COURT: I don't know if it's a matter of shutting  
3 doors. I think we're trying to open doors and we just haven't  
4 gotten it open it yet, and we're trying to develop a protocol  
5 that will allow us to do that.

6 MS. CALOWAY: And my understanding, Your Honor, and I  
7 understand and certainly appreciate the difficulty for both the  
8 parties and the Court to come up with a protocol like that, but  
9 my guess is that such a protocol is going to take at least  
10 several months.

11 THE COURT: I hope not.

12 MS. CALOWAY: Certainly not before January 6th.

13 THE COURT: I can appreciate that.

14 MS. CALOWAY: Right. Other than that, Your Honor,  
15 I've heard debtor's counsel's comments as well. I don't really  
16 have any issue with those other than maybe I wouldn't go so far  
17 as to say I view these funds as being analogous to segregated  
18 funds. If push came to shove I probably would say they are  
19 more analogous to segregated funds than commingled funds,  
20 because we're in a position where obviously these funds haven't  
21 come into the estate at all so they haven't been mingled with  
22 anything so they're much more --

23 THE COURT: But the note has come into the estate and  
24 is held by the estate and the note is secured by a deed of  
25 trust so clearly whatever it is we ultimately decide it's

1 certainly a property that the estate now holds.

2 MS. CALOWAY: That they hold in name only.

3 THE COURT: Right.

4 MS. CALOWAY: Right.

5 THE COURT: And I understand those arguments. And  
6 those are the same ones that were made the other day. And we  
7 just haven't gotten to those arguments yet to try to fashion,  
8 because there are many, many facts and many parts that are  
9 still moving in this case that we need to resolve. The Court  
10 is very sympathetic to this -- your client as well as all of  
11 the other similarly situated entities and persons in this case,  
12 but I think we need to find a protocol that is fair to  
13 everybody so that we've got the same standard being applied to  
14 everyone. There was a procedure that I approved the other day,  
15 and you can talk with Ms. Tavenner about it. I see Mr.  
16 Buffenstein is in the courtroom. It was his client and he  
17 proposed a fairly imaginative way of allowing a sale to go  
18 forward. And the Court did approve that and it did not involve  
19 property coming out of the estate. But I'll leave that for you  
20 to discuss with them along those lines since I hear Ms.  
21 Tavenner, she wouldn't have an objection to approving something  
22 along those lines with you. And if something can be negotiated  
23 along those lines you don't need to come back here for another  
24 hearing, you can submit an order with Ms. Tavenner and Mr.  
25 Maddock's endorsement as well as yours and then the Court will

1 entertain that. But in the current form the motion is not  
2 going to be denied, but I'm going to set it over for the next  
3 omnibus hearing. So it'll stay on the Court's calendar. We  
4 have a lot of other similarly situated motions that are before  
5 the Court that day which is not to say I'm going to hear it  
6 that day, but once we -- what I hope to have is at least the  
7 outline of a protocol by that time and then we can start  
8 setting these matters down as appropriate at that point based  
9 on whatever, you know, the parties are able to come up with.

10 MS. CALOWAY: Thank you, Your Honor. I appreciate  
11 the hearing today.

12 THE COURT: You're welcome.

13 \* \* \* \* \*

14 **C E R T I F I C A T I O N**

15 I, KIMBERLY UPSHUR, court approved transcriber,  
16 certify that the foregoing is a correct transcript from the  
17 official electronic sound recording of the proceedings in the  
18 above-entitled matter, and to the best of my ability.

19  
20 /s/ Kimberly Upshur DATE: January 9, 2009  
21 KIMBERLY UPSHUR  
J&J COURT TRANSCRIBERS, INC.

22  
23  
24  
25