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

-----	x	
In re	:	Chapter 11
	:	Case No. 08-35994
LandAmerica Financial Group, Inc., <u>et al.</u> ,	:	
	:	
Debtors.	:	Jointly Administered
-----	x	
Frontier Pepper's Ferry, LLC,	:	
	:	
Plaintiff,	:	
	:	Adv. Pro. No. 08-03148
v.	:	
	:	
LandAmerica 1031 Exchange Services, Inc.,	:	
	:	
Defendant.	:	
-----	x	

**JOINT OBJECTION OF THE DEBTOR, THE LES COMMITTEE,
 AND THE LFG COMMITTEE TO PLAINTIFF'S NOTICE OF
APPEAL AND MOTION FOR LEAVE TO APPEAL**

Pursuant to Federal Rules of Bankruptcy Procedure 8003(a) and 8003(c), LandAmerica 1031 Exchange Services, Inc. (“LES” or “Debtor”), the Official Committee of Unsecured Creditors of LandAmerica 1031 Exchange Services, Inc. (the “LES Committee”), and the Official Committee of Unsecured Creditors of LandAmerica Financial Group, Inc. (the “LFG Committee” and together with the LES Committee, the “Committees”) respectfully submit this objection (the “Objection”) to the Notice of Appeal and Motion for Leave to Appeal filed by Plaintiff Frontier Pepper’s Ferry, LLC (“Frontier”).

PRELIMINARY STATEMENT

1. In violation of the stay imposed by the Mediation Protocol (as defined below), the Motion seeks the extraordinary relief of an interlocutory appeal of the Court’s order on cross-motions for *partial* summary judgment that held that the exchange funds associated with Frontier’s exchanges are property of LES’s bankruptcy estate and not held by LES in express or resulting trust. The Debtor and the Committees are at a loss as to why Frontier is seeking this relief at this stage of the proceedings. Indeed, the Motion comes just two days after the Court approved the Mediation Protocol, which establishes an expedited, comprehensive mediation schedule with the objective of achieving a global resolution of the Lead Cases (defined below) and a consensual plan of liquidation. The Motion is antithetical to the Mediation Protocol and should be denied on that basis.

2. Further, Frontier cannot satisfy any of the three requirements for obtaining leave to appeal an interlocutory order. The Court’s ruling that the exchange funds were not held by LES in trust was based on well-established law of trust and contract interpretation as applied to the facts and circumstances of this case. Moreover, the ruling did not address Frontier’s claim that, absent an express or resulting trust, the funds should be impressed with a constructive trust, or Frontier’s four other non-trust-based claims. Nor will an appeal of the Court’s summary

judgment ruling materially advance the litigation, which is currently stayed pending mediation that is scheduled to begin in a few weeks. For the foregoing reasons, the Motion should be denied.

BACKGROUND

3. On November 26, 2008, LES and LandAmerica Financial Group, Inc. (“LFG” and collectively with LES, the “Debtors”) filed voluntary petitions in the Bankruptcy Court in this District 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.

4. Frontier initiated the above-captioned proceeding by filing an adversary complaint on December 2, 2008. (Adv. Proc. Docket No. 1.) Frontier filed its Amended Complaint on December 31, 2008 and stated the following causes of action: (1) declaratory relief under section 541 of the Bankruptcy Code; (2) injunctive relief under section 105(a) of the Bankruptcy Code; (3) breach of contract; (4) conversion; (5) intentional interference with contract; (6) a judgment that the funds at issue were held by LES in an express trust for Frontier; (7) a judgment that the funds at issue were held by LES in a resulting trust for Frontier; (8) a judgment that the funds at issue were held by LES in a constructive trust for Frontier; and (9) fraud. (Adv. Proc. Docket No. 9.)

5. On December 3, 2008, the United States Trustee for the Eastern District of Virginia appointed the LES Committee and the LFG Committee.

6. On January 7, 2009, LES and the LES Committee filed the Joint Motion of Debtor and LES Committee for Order Establishing Scheduling Protocol for Adversary Proceedings (“Joint Motion”). (Jt. Admin. Docket No. 574.) On January 16, 2009, the Court granted the Joint Motion and entered the order (the “Protocol Order”) (Jt. Admin. Docket

No. 689) establishing that five adversary proceedings, including the adversary proceeding filed by Frontier, would serve as the lead proceedings (the “Lead Cases”) in the above-captioned matter.

7. On February 10, 2009, the Court entered an Order Granting Joint Motion of Frontier Pepper’s Ferry LLC and Howard Finkelstein to Bifurcate Trials (the “Bifurcation Order”). (Jt. Admin. Docket No. 879.) The Bifurcation Order limited the initial phase of litigation under the Protocol Order to the following issues: (1) the tracing of the Exchange Funds; (2) contractual interpretation of the Exchange Agreements; (3) the existence of an express trust between LES and the Lead Case plaintiffs; and (4) the existence of a resulting trust between LES and the Lead Case plaintiffs. (Bifurcation Order ¶ 3.)

8. Frontier filed a Motion for Partial Summary Judgment on March 16, 2009. LES, the LES Committee, and the LFG Committee filed cross motions for partial summary judgment in the Frontier adversary proceeding on March 16, 2009. The Court heard oral argument on the parties’ cross motions for partial summary judgment on April 16, 2009.

9. On May 7, 2009, the Court denied Frontier’s Motion for Partial Summary Judgment and granted the motions of LES and the Committees (the “Partial Summary Judgment Order”) to the extent that they sought “a determination that the Exchange Funds are not held by LES pursuant to a resulting trust or an express trust for the benefit of Plaintiff,” and, therefore, held that the funds are property of LES’s bankruptcy estate under Section 541 of the Bankruptcy Code. (See May 7, 2009 Order at 2 (Adv. Proc. Docket No. 72).) Consistent with the Protocol and Bifurcation Orders, the Court reserved ruling on whether the funds are held subject to a constructive trust. (See May 7, 2009 Memorandum Opinion at 4, 15 n.16, 25 n.20 (Adv. Proc. Docket No. 71).)

10. On April 24, 2009, LES and LFG filed a motion seeking to establish a litigation protocol to resolve certain inter-estate issues (“Inter-Estate Protocol Motion”). On May 4, 2009,¹ the Unofficial Ad Hoc Committee of Commingled Exchangers filed an objection to the Inter-Estate Protocol Motion on the grounds that the motion sought to exclude them from participating in the resolution of the inter-estate issues and that the resolution of the inter-estate issues is not necessarily a predicate to any plan in LES’s bankruptcy case. As a result of further discussions between and among LES, LFG, the Committees, and the United States Trustee, on May 8, 2009, LES and LFG submitted a revised protocol (the “Mediation Protocol”) providing for a two-step mediation of the inter-estate issues on the one hand (the “Inter-Estate Mediation”) and issues relating to a compromise plan of liquidation involving a global resolution of, among other things, the pending Lead Cases (the “LES Mediation”) on the other hand.

11. As described in the Mediation Protocol, the first step is designed to address the validity, priority, characterization or allowance of inter-estate transfers and, to the extent such transfers are claims, the extent to which such claims should be avoided under chapter 5 of the Bankruptcy Code. The resolution of these inter-estate disputes will have a material impact on the recoveries of LFG’s and LES’s creditors. The second step of the Mediation Protocol, the LES Mediation, is designed to serve as Phase II of the Lead Case litigation by addressing a structure for a plan of liquidation encompassing a global resolution of, among other things, all of the Lead Cases.

12. The Court held a hearing on the Mediation Protocol on May 14, 2009 and approved the Mediation Protocol as proposed by LES, LFG, and the Committees. An order granting the Mediation Protocol was entered May 21, 2009. (See May 21, 2009 Order (Jt.

¹ The Ad Hoc Committee initially filed its Objection on May 4, 2009 and filed a substantially similar Amended Objection on May 5, 2009. (See Jt. Admin. Docket Nos. 1344 and 1360, respectively.)

Admin. Docket No. 1480).) In addition to establishing a schedule for mediation, the Mediation Protocol stays the litigation of the Lead Cases pending further order of the Court. (Id.)

13. On May 18, 2009, Frontier filed a Notice of Appeal (Adv. Proc. Docket No. 77) and a Motion for Leave to Appeal (the “Motion”) (Adv. Proc. Docket No. 78), which are the subject of the instant Objection.

OBJECTIONS

14. Frontier seeks leave to appeal the Partial Summary Judgment Order -- an interlocutory order -- pursuant to 28 U.S.C. § 158(a)(3), which provides that “[t]he district courts of the United States shall have jurisdiction to hear appeals . . . with leave of the court, from other interlocutory orders and decrees” See 28 U.S.C. § 158(a)(3).

A. As an Initial Matter, the Motion Should Be Denied Because It Was Filed in Violation of the Mediation Protocol.

15. The Court’s order granting the Mediation Protocol expressly stays all Lead Cases “until further order of this Court.” (See May 21, 2009 Order ¶ 4 (Jt. Admin. Docket No. 1480).) The Order provides no exceptions to the stay and the Court did not previously grant Frontier leave to file the Motion or the Notice of Appeal. For this reason, the Motion should be denied.

16. The purpose of the stay was two-fold. First, the stay was intended to provide a breathing spell for all parties from the breakneck pace of the litigation under the Protocol Order in order to focus their efforts on a global resolution of the Lead Cases by way of the LES Mediation. In that regard, the stay was designed to eliminate the distraction of litigation so that the parties could concentrate on the Mediation Protocol, thereby increasing the likelihood that the mediation will be successful. Second, the stay was intended to alleviate the burden on the estate from the litigation expense associated with the Protocol Order. Contrary to these

stated goals, the Motion threatens to embroil the parties in costly and time-consuming appellate practice. For this additional reason, the Motion should be denied.

B. The Motion Should be Denied Because it Does Not Meet the Standard for an Interlocutory Appeal.

17. Interlocutory appeals are disfavored. KPMG Peat Marwick, L.L.P. v. Estate of Nelco, Ltd., 250 B.R. 74, 78 (E.D. Va. 2000) (appellant must demonstrate “*exceptional circumstances* justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.”) (emphasis added). Courts generally grant leave to appeal an interlocutory order only when: (1) the order involves a controlling question of law; (2) as to which there is a substantial ground for a difference of opinion; and (3) an immediate appeal would materially advance the termination of the litigation. See id. (citing Atl. Textile Group, Inc. v. Neal, 191 B.R. 652, 653 (E.D. Va. 1996)). An appellant must satisfy each element of the test set forth in KPMG to be afforded leave to appeal an interlocutory order. See id. at 79 (“[A]ll three elements must be satisfied in order to grant leave to appeal an interlocutory decision. If any one element is unsatisfied, leave to appeal cannot be granted.”) (internal citations omitted). Frontier cannot satisfy any of these elements.

i. The Partial Summary Judgment Order does not involve a controlling question of law.

18. Even if the Court considers the merits of Frontier’s Motion, it should be denied. Frontier’s contention that “the Court’s determination as to whether or not the Frontier Funds are property of LES’s bankruptcy estate is the controlling issue of the case” does not amount to the identification of a controlling question of law, as required under the KPMG standard set forth above. (See Mot. at 7-8.) The Fourth Circuit has recognized that “the kind of question best adapted to discretionary interlocutory review is a narrow question of *pure law* whose resolution will be *completely dispositive of the litigation*, either as a legal or practical

matter, whichever way it goes.” Fannin v. CSX Transp., Inc., No. 88-8120, 1989 WL 42583, at *5 (4th Cir. Apr. 26, 1989) (emphasis added).

19. The Court’s determination regarding property of the estate is not a narrow question of pure law. Rather, in holding that the exchange funds at issue are property of LES’s bankruptcy estate and are not held by LES in trust, the Court analyzed the facts of the case and considered the parties’ intent, as evidenced by the express terms of the Exchange Agreement that governed the transaction between Frontier and LES. As such, the Court’s determination of property of the estate was not a narrow question of pure law. See Charlotte Commercial Group, Inc. v. Fleet Nat’l Bank (In re Charlotte Commercial Group, Inc.), No. 01-6044, 2003 WL 1790882, at *2 (M.D.N.C. Mar. 13, 2003) (where “the question of law presented in this appeal is grounded in the specific facts of the case, and cannot be divorced from [those] facts, it does not present a narrow question of pure law”) (internal quotations omitted).

20. Frontier may not seek an interlocutory appeal of an order that determines questions of both fact and law. The Court expressly based its decision on the unambiguous language of the Exchange Agreement between LES and Frontier and the circumstances of this case. Consequently, the Partial Summary Judgment Order is not appropriate for interlocutory review. See generally Century Pac., Inc. v. Hilton Hotels Corp., 574 F. Supp. 2d 369, 372 (S.D.N.Y. 2008) (denying an interlocutory appeal of a summary judgment order where “the questions presented for interlocutory appeal by plaintiffs would require the Second Circuit to review this Court’s application of the law to the evidence adduced in the summary judgment motion. Under these circumstances, such questions do not present issues of pure law and therefore are not appropriate for interlocutory review.”); Arons v. Lalime, 3 F. Supp. 2d 328, 330 (W.D.N.Y. 1998) (a summary judgment ruling is “essentially a fact-based inquiry, making an interlocutory appeal inappropriate.”) (internal quotations omitted).

21. Moreover, an appeal of the Partial Summary Judgment Order will not be dispositive of the litigation between LES and Frontier. In its Amended Complaint, Frontier stated claims for breach of contract, conversion, intentional interference with contract, and fraud, in addition to its trust-based claims. These additional claims have not been litigated because they were outside the scope of the Court’s Bifurcation Order. (See Jt. Admin. Docket No. 879.) Nor has there been any consideration of Frontier’s constructive trust claim. (See Am. Compl. ¶¶ 74-83.) The Court specifically excluded the constructive trust analysis from the first phase of litigation on the grounds that constructive trusts are a remedy to be considered, if at all, in the damages phase of litigation. (See Hr’g Tr. 39:23-40:9, Jan. 27, 2009 (Jt. Admin. Docket No. 789) (“[W]ith regard to Phase I, it should be with regard to matters of general applicability, and those items would be . . . issues relating to tracing, contract interpretation, express trust, and resulting trust in connection with the liability phase there. . . . [A]s far as developing a remedy for constructive trust . . . that would be a damage phase, and we’ll take that up at a later time.”); see also May 7, 2009 Mem. Op. at 25 n.20 (Adv. Proc. Docket No. 71) (“The court notes that it has yet to address the claims that the Exchange Funds should be impressed with a constructive trust.”).)

22. Given the foregoing, Frontier has not presented a controlling question of law warranting an interlocutory appeal because it has not presented a narrow legal issue, the resolution of which would be dispositive of the litigation.

ii. There is no substantial ground for a difference of opinion with respect to the Partial Summary Judgment Order.

23. Frontier’s failure to satisfy the first element of the interlocutory appeal standard is fatal to its Motion. It also, however, cannot show that there is a substantial ground for a difference of opinion over a controlling issue of law, the second element of the standard. Frontier contends that an interlocutory appeal is warranted because “[t]he issue of whether

exchange funds held by a qualified intermediary are property of its bankruptcy estate is an issue of first impression in the Fourth Circuit.” (Mot. at 8.) Frontier’s focus is misplaced.

24. The legal issue resolved by the Partial Summary Judgment Order was not the generic question of the appropriate treatment of funds held by a debtor qualified intermediary, but rather whether the exchange funds held by LES pursuant to the agreement between LES and Frontier were held subject to an express or resulting trust. Resolution of this issue centered upon the interpretation of the express terms of the Exchange Agreement under general contract and trust law. Frontier has cited no authority suggesting any disagreement among courts regarding contract interpretation or Virginia trust law. Instead, Frontier contends that LES’s purported contradictory statements as to whether it holds the funds in trust satisfy the “substantial ground for a difference of opinion” element. (Mot. at 9.) Whether LES or the parties disagree over the status of the funds is immaterial to the Court’s inquiry; the question is whether there is a conflict in the applicable law to be resolved by the interlocutory appeal. See KPMG, 250 B.R. at 82 (“[A]n interlocutory appeal will lie only if a difference of opinion exists *between courts* on a given controlling question of law, creating the need for an interlocutory appeal to resolve the split or clarify the law.”) (emphasis in original); In re Charlotte Commercial Group, Inc., 2003 WL 1790882, at *3 (“The question, however, is not whether [appellant] thinks the Bankruptcy Court misapplied the law, but whether courts themselves disagree as to what the law is.”) (internal quotations omitted). No such circumstance exists here.

iii. An interlocutory appeal will not materially advance the termination of the litigation.

25. Contrary to Frontier’s contention, an interlocutory appeal, which re-opens the Court’s determination regarding property of the estate, is more likely to hinder the bankruptcy proceeding and the administration of the Debtor’s estate than to advance materially the proceedings. (Mot. at 9.) LES’s bankruptcy case need not be held hostage to Frontier’s

appeal. Indeed, the Debtor should be permitted to proceed with its case, including filing a plan, consistent with the Court's Partial Summary Judgment Order and the Mediation Protocol.

26. Frontier's Motion completely ignores the Mediation Protocol approved by the Court just two days prior. Frontier erroneously contends that an appeal at this stage is necessary to "bring closure to the [sic] LES's bankruptcy case as any plan of liquidation hinges on whether the exchange funds are property of LES's estate" and to avoid the second phase of litigation under the Protocol Order. (Mot. at 9-10.) The LES Mediation addresses these precise issues; indeed, the Mediation is entitled "Mediation Regarding Global Settlement of Lead Case Litigation and Plan of Liquidation" for LES. An interlocutory appeal at this stage diminishes the prospects for the success of the LES Mediation before it even begins as it will divert the parties' attention to the appeal and away from the mediation, and further entrench the parties in their respective positions.

WAIVER OF MEMORANDUM OF LAW

27. The legal authority supporting the relief requested by the Objection has been cited herein. Therefore, LES, the LES Committee, and the LFG Committee respectfully request that the Court waive the requirement in Rule 9013-1(H)(2) of Local Rules of the United States Bankruptcy Court for the Eastern District of Virginia that a response in opposition be accompanied by a memorandum of law.

CONCLUSION

WHEREFORE, for the reasons set forth above, LandAmerica 1031 Exchange Services, Inc., the Official Committee of Unsecured Creditors of LandAmerica 1031 Exchange Services, Inc., and the Official Committee of Unsecured Creditors of LandAmerica Financial Group, Inc. respectfully request that the Court:

- (1) Sustain their objections to Plaintiff's Notice of Appeal;

- (2) Deny Plaintiff's Motion for Leave to Appeal;
- (3) Not transmit Frontier's Notice of Appeal or any answers thereto to the district court before the hearing on its Motion for Leave to Appeal; and
- (4) Grant such other and further relief as may be just and proper.

Additionally, the district court should deny Frontier's Motion for Leave to Appeal the Partial Summary Judgment Order.

Dated: Richmond, Virginia
May 28, 2009

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2009, I have caused the foregoing Joint Objection of the Debtor, the LES Committee, and the LFG Committee to Plaintiff's Notice of Appeal and Motion for Leave to Appeal to be served via electronic mail on the following:

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