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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
Land America Financial Group, Inc. <u>et al.</u> ,	:
	: Case No. 08-35994 (KRH)
Debtors.	:
-----	: Jointly Administered
LAND AMERICA 1031 EXCHANGE SERVICES, INC.,	x
and LANDAMERICA FINANCIAL GROUP, INC.,	:
Plaintiffs,	:
	:
v.	: Adv. Proc. No. 09-03146 (KRH)
	:
ANGELA M. ARTHUR, AS TRUSTEE OF THE ARTHUR	:
DECLARATION OF TRUST, DATED DECEMBER 29,	:
1988; VIVIAN R. HAYS, LEAPIN EAGLE, LLC; DENISE	:
J. WILSON; GERALD R. TERRY; ANN T. ROBBINS;	:
JANE T. EVANS, on behalf of themselves individually and	:
on behalf of a class of others similarly situated,	:
Defendants.	:
-----	x

**MEMORANDUM OF LAW IN SUPPORT OF DEBTORS' MOTION
FOR A PRELIMINARY INJUNCTION STAYING THE
PROSECUTION OF CERTAIN NON-BANKRUPTCY COURT
PROCEEDINGS PURSUANT TO SECTIONS 362(a) AND 105(a)
OF THE BANKRUPTCY CODE AND 28 U.S.C. SECTION 1334**

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Movants LandAmerica Financial Group, Inc. (“LFG”) and LandAmerica 1031 Exchange Services, Inc. (“LES” and, together with LFG, the “Debtors”), both of which are debtors and debtors-in-possession in the above-captioned bankruptcy cases, on behalf of themselves and Theodore L. Chandler, Jr. (“Chandler”), the former Chairman, Chief Executive Officer, and Director of LFG, Christine R. Vlahcevic (“Vlahcevic”), a former Senior Vice President and Controller of LFG, G. William Evans (“Evans”), the Chief Financial Officer and Executive Vice President of LFG and Vice President and Director of LES, and Stephen Connor (“Connor” and together with Chandler, Vlahcevic, and Evans, the “Individual Defendants”), a Senior Vice President of LFG and Senior Vice President and Director of LES, submit this Memorandum of Law in support of their motion (the “Motion”) pursuant to sections 362(a) and 105(a) of title 11 of the United States Code (the “Bankruptcy Code”), 28 U.S.C. section 1334, and Rule 7065 of the Federal Rules of Bankruptcy Procedure, for the issuance and entry of a preliminary injunction, *inter alia*, staying, restraining, and enjoining plaintiffs the continued prosecution of a multidistrict putative class action litigation styled as In re: LandAmerica 1031 Exchange Services, Inc., Internal Revenue Service § 1031 Tax Deferred Exchange Litigation, pending before the United States District Court for the District of South Carolina, Anderson Division, Case No. MDL No. 2054 (the “MDL”) (comprising Angela M. Arthur, et al. v. SunTrust Banks, Inc. et al., Case No. 8:09-cv-1739 (D. S.C.) and Gerald R. Terry et al. v. SunTrust Banks, Inc. et al., Case No. 8:09-cv-415 (D. S.C.)).

PRELIMINARY STATEMENT

Through the Motion, the Debtors seek an order of this Court staying and enjoining the further prosecution of the MDL. The litigations underlying the MDL were filed outside of bankruptcy court in a transparent attempt to evade the automatic stay provisions of the Bankruptcy Code as well as the stay imposed by this Court’s Order Establishing Schedule

Protocol for Adversary Proceedings, dated January 16, 2009 (the “Protocol Order”), with specific reference to claims arising out of exchange agreements between LES and its customers. An injunction is needed to protect and preserve the property of the Debtors’ chapter 11 estates as well as to avoid prejudice to creditors and the harm to the Debtors’ estates that would inevitably result from the continued prosecution of the MDL.

Pursuant to well-established Fourth Circuit precedent, the MDL should be stayed because the Individual Defendants, while non-debtor defendants, are former officers and directors of LES and LFG. These individuals are so closely aligned with LES and LFG that any action against them is effectively an action against LES and LFG and any judgment or findings rendered against them will, in effect, be a judgment or a finding against LES and LFG.¹ The Individual Defendants may be entitled to indemnification from one or more of the Debtors for any actions taken in their capacity as officers of LES and LFG and, in that event, any judgment against them would necessarily be satisfied from the property of the Debtors’ estates. In addition, the Individual Defendants may be insureds under LFG’s Directors and Officers insurance policy (the rights and proceeds of which are property of LFG’s estate) and would (at a minimum) likely seek reimbursement of legal defense costs in connection with the defense of the MDL were it permitted to proceed.

For these and other reasons, discussed below, the Debtors respectfully submit that the Court can and should preliminarily enjoin further prosecution of the MDL in its entirety (as to all defendants) pursuant to sections 362 and 105 of the Bankruptcy Code, as well as 28 U.S.C.

¹ While the risks that parties in interest may seek to use adverse factual or legal findings against the Debtors based on some form of preclusion theory justify the imposition of a stay, in the event a stay is not imposed and the MDL is permitted to proceed (either in whole or in part), the Debtors reserve any and all rights they may have under applicable law to oppose any attempt by a future claimant to argue that any findings resulting from the non-stayed MDL should have any preclusive effect on the Debtors.

§ 1334, until after the effective date of a confirmed chapter 11 plan or until such time as the Court orders otherwise.

STATEMENT OF FACTS

A. Background Regarding the Debtors and These Bankruptcy Cases

On November 26, 2008 (the “Petition Date”), LFG and LES 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.

On December 3, 2008, the United States Trustee for the Eastern District of Virginia appointed an Official Committee of Unsecured Creditors in each of the LFG and LES cases (collectively, the “Creditors’ Committees”).

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.

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 the 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 took 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.

Debtors believe 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. Over 100 of these customers have already brought adversary proceedings in this Court regarding the Exchange Funds and it can reasonably be expected that other customers will continue to do so.

Due to the great number of suits and the need for the Court to deal with these claims in an orderly and efficient manner, LES sought to establish procedures to settle disputes relating to the ownership of Exchange Funds through the appointment of certain test cases (the “Lead Cases”), by which the common legal and factual issues involved in the adversary proceedings would be litigated and all adversary proceedings other than the Lead Cases would be stayed. After a hearing, the Debtors and the LES Official Committee of Unsecured Creditors

met and conferred and agreed to the designation of certain Lead Cases and a schedule for their resolution.²

On January 16, 2009, after objections to LES's and the Committee's joint motion to establish a scheduling protocol were made and heard, this Court entered the Protocol Order. Pursuant to the Protocol Order, "[a]ll adversary proceedings . . . other than the Lead Cases, all adversary proceedings filed in these cases subsequent to the entry of this Order, and all motions or other requests for relief . . . directed to the disposition of Exchange Funds . . . or concerning the parties' rights and obligations under any Exchange Agreement(s) . . . are hereby stayed pending further order of this Court." (Order at ¶ 2.)³

B. The MDL

On January 14, 2009, Angela M. Arthur, as Trustee of the Arthur Declaration of Trust, dated December 29, 1988, Vivian R. Hays, Leapin Eagle, LLC, and Denise J. Wilson, on behalf of themselves and others similarly situated, filed a complaint against Evans, Connor, and Suntrust Banks, Inc. ("SunTrust") in the United States District Court for the Southern District of California (the "California Action"). On February 11, 2009, Gerald R. Terry, Ann T. Robbins, and Jane T. Evans, on behalf of themselves and others similarly situated, filed a complaint against Chandler, Vlahcevic, Evans, Connor, and SunTrust in the Court of Common Pleas, Tenth Judicial Circuit, State of South Carolina (the "South Carolina Action"). On February 19, 2009, the South Carolina Action was removed to the District of South Carolina. On June 12, 2009, the United States Judicial Panel on Multidistrict Litigation ordered the California Action transferred

² A total of five Lead Case were ultimately designated.

³ The Protocol Order is annexed as Exhibit A to the Complaint for Injunctive Relief (the "Adversary Complaint").

to the District of South Carolina for coordination or consolidation of pretrial proceedings with the South Carolina Action.

The MDL Plaintiffs allege that the defendants “participated in and provided assistance to LES [which tactically was not named as a defendant in either the South Carolina Action or the California Action] in committing fraudulent acts, in converting exchange funds that were entrusted to it to its own use, and in breaching fiduciary duties owed to Plaintiffs and others similarly situated.” (South Carolina Action Compl. ¶ 1; see also California Action Compl. ¶ 1.)⁴ It is evident from the Complaints in the MDL that the transactions at issue in this case were effectuated pursuant to Commingled Exchange Agreements. But for the deliberate omission of LES as a named defendant, the claims raised in the MDL are therefore indistinguishable from those that have been raised in a number of other adversary proceedings filed in this Court by Commingled Exchangers which, subject to the terms of the Protocol Order, have been uniformly stayed. Indeed, each of the MDL plaintiffs has filed proofs of claim in the Bankruptcy Court to recover their Exchange Funds in bankruptcy.

As the Court knows, earlier this year LES (together with a number of parties in interest) participated in an expedited litigation of the Lead Cases including one or more involving Commingled Exchange Agreements such as the ones involved in the MDL. That litigation culminated in certain summary judgment rulings (including one referable to Commingled Exchange Agreements) from this Court resolving some, but not all of the issues raised in the Lead Cases and the corresponding stayed adversary proceedings.

Thereafter, LES, in consultation with the LES and LFG Committees and other interested parties, agreed to submit certain remaining issues raised in the Lead Cases and the

⁴ The complaints in the California Action and South Carolina Action are annexed as Exhibits B and C to the Adversary Complaint.

associated adversary proceedings to mediation. By order of this Court dated May 21, 2009 (the “Mediation Protocol Order”) and by agreement of the parties, that mediation is scheduled to commence on Monday, July 13, 2009 (the “Mediation”). It is the Debtors’ hope and expectation that the issues raised in the Lead Cases and the associated adversary proceedings can be resolved in connection with the Mediation, such that the claims of all Exchangers (including the purported class plaintiffs in the MDL) can be resolved on a global basis either through settlements submitted to and approved by this Court, or in a plan voted on and accepted by the affected Exchangers consistent with the requirements of the Bankruptcy Code. In the absence of such a settlement, claims of all Exchangers (Lead Case, Adversary Proceeding, and MDL Plaintiffs alike) should be adjudicated and resolved in and by this Court pursuant to the claims adjudication process provided for under the Bankruptcy Code, not in piecemeal litigation in numerous fora across the country. Were the MDL permitted to proceed, there is a substantial risk of inconsistent factual and/or legal findings that could be prejudicial to the Debtors (or other parties in interest) in connection with the adjudication of the remaining claims of Exchangers within the context of these bankruptcy proceedings.

C. The Debtors’ Obligations to Indemnify Directors, Officers, and Other Employees

Section Two of the Amended and Restated Bylaws of LES (the “Bylaws”) provide that the officers, directors, and employees of LES are indemnified to the fullest extent authorized by Maryland law, the state in which LES was incorporated.⁵ By way of example, the LES Bylaws state that “[t]he Company *shall, and hereby agrees to*, indemnify any person who is or was a party [to a litigation] . . . by reason of the fact that such person is or was a director, officer, or employee of the Company.” (LES Bylaws, Section 2) (emphasis added).

⁵ A true and correct copy of the LES Bylaws is annexed to the Adversary Complaint as Exhibit D.

Maryland Corporation Law allows a company to indemnify any person sued as a director, officer, employee, or agent of the company if the person did not act in bad faith. Md. Code Ann. § 2-418(b) (2008). Maryland law also permits the Debtors to advance indemnity payments prior to a final disposition of the main action under certain terms and circumstances. The officer, director, or employee is required to repay the applicable Debtor for such costs only “if it shall ultimately be determined that the standard of conduct has not been met.” Md. Code Ann. § 2-418(f).

Were the MDL to proceed, the Individual Defendants would likely claim indemnification rights under Maryland law, as well as under the LES governing documents, to be reimbursed for their legal defense costs as well as any liability imposed against them (subject to the bad faith limitation). Indeed, Defendants Chandler, Vlahcevic, and Evans have already submitted proofs of claim for an undetermined amount for any claims that each may have against LFG and its subsidiaries. Were the Debtors called on to provide such indemnification and advance cash to or for the benefit of the Individual Defendants, it would effectively result in a distribution of property of the Debtors’ estates to the purported Class Plaintiffs (who are otherwise unsecured creditors like many other Exchangers) outside of the distribution scheme provided under the Bankruptcy Code.

Equally troubling, in the event the MDL was permitted to proceed and resulted in a favorable outcome for the plaintiffs in the MDL, the recovery obtained (ostensibly against a non-debtor employee, but in reality against the Debtor) could differ materially from the recovery that other Exchange Agreement claimants obtain through the bankruptcy cases. A stay is therefore warranted not only to protect the Debtors and their estate property, but also to protect

the integrity of the bankruptcy process, which strives for fair and equitable distribution among similarly situated creditors.

D. The D&O Insurance Policies

LFG is party to an Officers and Directors insurance contract issued by the U.S. Specialty Insurance Company with an inception date of October 30, 2008 (the “LFG D&O Policy”).⁶ The LFG D&O Policy provides \$10 million of primary coverage⁷ for the benefit of LFG and its subsidiaries (including LES) as well as their respective officers and directors during the period October 30, 2008 through October 30, 2009. Among other things, the LFG D&O Policy provides for advancement of legal fees in connection with covered claims asserted against eligible directors and officers. (LFG D&O Policy at p. 7, (D)(2).) Pursuant to section 541(a) of the Bankruptcy Code, the LFG Insurance Policy and the coverage available thereunder are property of the LFG estate. See A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1001 (4th Cir.), cert. denied, 479 U.S. 876 (1986) (“insurance contracts have been said to be embraced in this statutory definition of property”).

The Individual Defendants have already retained counsel whose fees they have claimed are reimbursable under the LFG D&O Policy.⁸ Thus, the MDL proceeding (and its California and South Carolina antecedents) have already caused an erosion of the coverage otherwise available under the D&O Policy and a distribution of property of the estate outside of the distribution scheme provided under the Bankruptcy Code. In addition, the Individual Defendants might further assert claims under the LFG D&O Policy to provide coverage for any liability imposed against them in the MDL were it to proceed and result in a finding of liability

⁶ A true and correct copy of the LFG D&O Policy is annexed to the Adversary Complaint as Exhibit E.

⁷ LFG purchased excess coverage as well. The details of such coverage can be supplied to the Court to the extent it becomes necessary in connection with the adjudication of this Motion.

⁸ The primary D&O carrier has denied coverage. At present, the “Side A only” carriers are funding legal defense costs, subject to their right to seek reimbursement from the primary and excess D&O carriers.

on the part of any of the Individual Defendants (thus further potentially eroding coverage and resulting in additional distributions of property of the estate outside of the Bankruptcy Code).

ARGUMENT

I. THE ACTION SHOULD BE STAYED PURSUANT TO 11 U.S.C. § 362(a).

Section 362(a) of the Bankruptcy Code provides, in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, . . . operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other *action or proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(3) any act *to obtain possession of property* of the estate or of property from the estate or to exercise control over property of the estate. . . .

11 U.S.C. § 362(a)(1) and (3) (emphasis added).

Cognizant of the impediments of the automatic stay (and the existence of the stay imposed under the Protocol Order), the plaintiffs in the MDL are careful not to name LES or any other Debtor as a defendant. However, for the reasons shown below, the Debtors are the real party in interest in the MDL. Accordingly, the Debtors respectfully submit that the automatic stay enjoins prosecution of the MDL.

A. The MDL Should Be Stayed Pursuant to 11 U.S.C. § 362(a)(1).

Courts in this Circuit and elsewhere have consistently enjoined the prosecution of suits against non-debtor parties pursuant to section 362(a)(1) of the Bankruptcy Code where, as here, there is “such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will

in effect be a judgment or finding against the debtor.” See A.H. Robins Co., 788 F.2d at 999 (though complaint named officers and directors as defendants, debtor was the “real party defendant”); see also Lomas Fin. Corp. v. N. Trust Co. (In re Lomas Fin. Corp.), 117 B.R. 64 (S.D.N.Y. 1990) (affirming application of the stay to a suit against two officers of the debtor because, in part, the debtor’s corporate charter contained an indemnification clause obliging it to indemnify its officers and the non-debtor defendants’ alleged misrepresentations were made in their capacity as officers of the debtor); N. Star Contracting Corp. v. McSpedon (In re North Star Contracting Corp.), 125 B.R. 368 (S.D.N.Y. 1991) (same); Dunham v. Sportsstuff, Inc., 2008 U.S. Dist. LEXIS 4821, No. 3:07CV322-HEH (E.D. Va. Jan. 23, 2008) (relying on A.H. Robins to stay proceedings against non-debtor retailer who had obtained an indemnity agreement from debtor); Midkiff v. Lowe’s Home Ctrs., Inc., 2007 U.S. Dist. LEXIS 54717, No. 4:07CV00017 (W.D. Va. July 30, 2007) (same). Applying section 362(a)(1) to non-debtor defendants promotes the policies underlying the automatic stay where, as here, the Debtors and the Debtors’ estates are the true targets of the litigation, and continuation of litigation against non-Debtors is tantamount to continuing the MDL against the Debtors.

Here, for the several reasons set forth below, the Debtors (particularly LES) are the true targets of the claims asserted in the MDL and the automatic stay would be effectively nullified were the MDL permitted to proceed against the non-Debtor defendants. First, it is well recognized in this Circuit that the automatic stay extends to suits against non-debtor parties who are entitled to indemnification from the Debtors. Indeed, the Fourth Circuit wrote that “an illustration of such a situation [where the automatic stay applies to actions against a non-debtor] would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case.” A.H. Robins, 788 F.2d at

999; see also Amer. Film Technologies v. Taritero (In re Amer. Film Technologies, Inc.), 175 B.R. 847 (Bankr. D. Del. 1994). “To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute.” A.H. Robins, 788 F.2d at 999.

As previously discussed, under applicable Maryland law as well as the express provisions of the Debtors’ governing documents, the Individual Defendants may claim (and appear to have claimed) an entitlement to indemnification of both their defense costs and any liability imposed against them in the MDL. The plaintiffs’ allegations in the MDL against the Individual Defendants are based entirely on the performance of their duties as officers of LES. For instance, the South Carolina and California complaints allege no particular conduct by the Individual Defendants other than their role as officers and directors of LES (S.C. Compl. ¶ 74 (“Defendants Chandler, Vlahcevic, Evans, and Conner were officers and directors of LES while LES was misusing and misappropriating the trust funds of Plaintiffs”); Cal. Compl. ¶ 63 (Evans and Connor “were officers and directors of LES while LES acted as a defalcating corporate trustee.”) Based on these allegations, the Individual Defendants have been sued based on actions they took in their capacity as LES officers, thus opening the possibility that one or more of the Debtors may owe an indemnification obligation to them. That being so, it can scarcely be disputed that the MDL was artfully drafted for the sole purpose of evading the automatic stay so that plaintiffs could prosecute their action against the Debtors in a forum other than this Court.⁹

⁹ If the Individual Defendants were found not to have a direct indemnification claim against the Debtors, they may instead assert a claim against the Debtors based on the theory of respondeat superior pursuant to which an employer may be held liable for an employee’s wrongful acts committed within the scope of the employment. Various courts have recognized that an employer’s potential liability for the acts of its employees is a sufficient ground for extending the protection of the automatic stay to non-debtors. See E. Air Lines v. Rolleston, 111 B.R. 423, 434 (Bankr. S.D.N.Y. 1990) (extending protection of the automatic stay pursuant to section 105 of the Bankruptcy Code to non-debtor because of the risk of possible adverse findings against the debtor under theories of collateral estoppel and respondeat superior); McHale v. Alvarez (In re 1031 Tax Group, LLC), 397 B.R. 670, 685 (Bankr. S.D.N.Y. 2008) (risk of respondeat superior liability to debtors justified extension of the automatic stay pursuant to section 105 of the Bankruptcy Code).

Second, even apart from the indemnification obligations implicated by the claims against the Individual Defendants, it is clear from a review of the MDL complaints that one or more of the Debtors is the true target of the claims, thus directly implicating section 362(a)(1). The claims made in the MDL are nearly identical to the claims already made directly against LES by Commingled Exchangers in the numerous adversary proceedings already before this Court – all of which are the subject of (and subject to) the Protocol Order. Indeed, each of the plaintiffs in the two actions underlying the MDL have filed claims in the Bankruptcy Court for the funds that they also seek to recover against the Individual Defendants. For instance, the MDL plaintiffs seek to recover, pursuant to a variety of legal theories, the Exchange Funds provided to LES pursuant to an Exchange Agreement, together with certain consequential damages that allegedly resulted from LES’s failure to complete the exchange as a result of its bankruptcy filing. (See S.C. Compl. at p. 20 (Prayer for Relief), Cal. Compl. at p. 18-19 (Prayer for Relief).) Thus, notwithstanding the absence of LES as a named defendant in the MDL, what the Plaintiffs are seeking at bottom is to get their Exchange Funds back, and recover certain consequential damages, from LES. That very issue is the subject of the Protocol Order and the Mediation. If not resolved in the Mediation, this issue should be resolved – on a consistent basis as to all Exchangers – by this Court in accordance with the bankruptcy claims resolution process.

Further, entry of a stay is warranted to protect the Debtors from the dangers of potentially preclusive adverse findings from the MDL court that are inconsistent with those that this Court will render in connection with the Protocol Order. As recognized by the A.H. Robins Court, if the MDL proceeds ostensibly against non-debtor parties (such as the Individual Defendants), “either a binding judgment against the debtor will result or . . . inconsistent judgments will result, calling for the exercise of the court’s equitable powers.” A.H. Robins, 788

F.2d at 1008; see also Amer. Film Tech., 175 B.R. at 850 (“numerous bankruptcy courts have issued preliminary injunctions, on collateral estoppel grounds, staying the prosecution of actions against non-debtor defendants who were officers and/or directors of the debtor defendants”). Under these circumstances, the Debtors would have to consider intervening in the MDL to effectively protect their interests. See In re Lomas Corp., 117 B.R. at 67 (“it is not possible for the debtor to be a bystander to a suit which may have a \$20 million issue preclusion effect against it in favor of a pre-petition creditor”); Amer. Film Tech., 175 B.R. at 851 (“To avoid the collateral estoppel effect, [debtor] must participate in the defense of the state court case [requiring debtor] . . . to do precisely what the automatic stay is intended to excuse it from doing.”). And yet, LES has taken pains to set up and execute the procedures outlined in the Protocol Order and the Mediation Protocol Order so that legal and factual issues pertaining to the various classes of Exchange Agreements can be litigated or resolved in an orderly, consistent, and expeditious manner. Allowing the MDL to proceed (and placing the Debtors in a position where they will have no choice but to intervene and participate) defeats the purpose for having the Protocol Order and the Mediation Protocol Order in the first place.

Finally, continuation of the MDL should be enjoined in order to prevent the diversion of key personnel of the Debtors from important activities associated with these bankruptcy cases. Bankruptcy courts have applied the automatic stay to bar litigation against non-debtors where an identity of interests exists between the debtor and the non-debtor defendant such that “the litigation will directly affect the debtor and, more particularly, the debtor’s assets or its ability to pursue a successful plan of reorganization under Chapter 11.” See Gilman v. Continental Airlines, Inc. (In re Continental Airlines), 177 B.R. 475, 481 (D. Del. 1993) (enjoining the prosecution of actions against the debtor’s current and former officers and

directors); see also A.H. Robins, 788 F.2d at 1008; Dunham, 2008 U.S. Dist. LEXIS 4821, *8 (enforcing the stay as to debtor's indemnitee because, in part, debtor's "executives and employees will still be required to expend significant amounts of time testifying at deposition and trial which undermines the respite from litigation that § 362(a)(1) was intended to impose"); Amer. Film Tech., 175 B.R. at 850.

The factors animating this line of authority have equal application here where the Debtors have made strides to put in place a process (*i.e.*, the Protocol Order and the Mediation Protocol Order) for the orderly resolution on an expedited basis of common issues pertaining to the parties' rights under the Exchange Agreements. For that process to succeed, the Debtors (together with their legal advisors and the knowledgeable witnesses) will be required to stay focused on the demands of the expedited schedules set forth in those orders. Moreover, wholly apart from the resolution of claims of Exchangers, the Debtors' professionals, advisors, and the few remaining employees are equally tasked with brokering a resolution of substantial issues dividing the creditors of the LFG and LES estates. Finally, LFG is in the process of implementing an orderly wind-down and/or sale of its remaining assets and operations. Any distraction associated with the simultaneous defense of the MDL (aside from creating the dangers of preclusive inconsistent judgments) will impede the parties and this Court from effectively resolving the Lead Cases (and associated adversary proceedings) and maximizing value. Thus, by analogy, those cases holding that the automatic stay should be extended to bar prosecution of actions that threaten a debtor's ability to reorganize are fully applicable.

For all of the foregoing reasons, the Debtors respectfully submit that ample grounds exist to stay the MDL pursuant to § 362(a)(1).

B. The MDL Should Be Stayed Pursuant To § 362(a)(3).

The Bankruptcy Code explicitly provides that the automatic stay prohibits “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3) (2006). As the Fourth Circuit has stated, “[s]ubsection (a)(3) directs stays of any action, *whether against the debtor or third-parties*, to obtain possession or to exercise control over property of the debtor.” A.H. Robins, 788 F.2d at 1001 (emphasis in original). That is exactly what the MDL seeks to do.

The MDL seeks to recover Exchange Funds, which the Debtors contend are property of the estate. The plaintiffs simply cannot sue to recover them outside of Bankruptcy Court without violating the automatic stay. Indeed, the plaintiffs in the MDL entered into contracts with the Debtors, provided funds to the Debtors, and now seek to recover those very funds to be compensated for alleged losses on a variety of purported theories. Where, as here, plaintiffs’ claims seek relief directly from the Debtors’ property and also necessarily entail the risk that any damages (as well as any litigation costs) could be the subject of indemnity claims against the Debtors or the LFG D&O Insurance Policy, section 362(a)(3) requires that the automatic stay be enforced as to those claims. As the A.H. Robins Court held “actions ‘related to’ the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insured under the policy are to be stayed under section 362(a)(3).” Id. at 1001-1002.¹⁰

¹⁰ The same result would follow even in the absence of the LFG D&O Policy. See In Re Continental, 177 B.R. at 481 (“In the absence of insurance, [debtor] will be forced to shoulder these indemnity obligations itself, thereby directly impacting [debtor’s] assets.”)

II. THE ACTION SHOULD BE STAYED UNDER SECTION 105 IN ORDER TO ENSURE THAT ADMINISTRATION OF THE ESTATE IS NOT UNDERMINED.

The Fourth Circuit has recognized that, in addition to section 362(a), bankruptcy courts may enjoin suits pursuant to 11 U.S.C. § 105(a). “It has been repeatedly held that 11 U.S.C. § 105 which provides that the bankruptcy court ‘may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,’ ‘empowers the bankruptcy court to enjoin parties other than the bankrupt’ from commencing or continuing litigation.” A.H. Robins, 788 F.2d at 1002. Courts have held that a bankruptcy court “has authority under section 105 broader than the automatic stay provisions of [s]ection 362 and may use its equitable powers to assure the orderly conduct of the reorganization proceedings.” See In re Baldwin-United Corp. Litig., 765 F.2d 343, 348 (2d Cir. 1985) (emphasis added); In re Chateaugay Corp., 93 B.R. 26, 29 (S.D.N.Y. 1988) (bankruptcy court may enjoin an action pending in another jurisdiction to preserve its jurisdiction over the bankruptcy case); In re 1031 Tax Group, LLC, 397 B.R. at 683-85.

If for any reason, the MDL cannot be stayed pursuant to § 362(a), the “court will have ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case. A.H. Robins, 788 F.2d at 1003. Pursuant to § 105, the Court should exercise its authority to “protect the integrity of a bankrupt’s estate and the Bankruptcy Court’s custody thereof and to preserve to that Court the ability to exercise the authority delegated to it by Congress. Pursuant to the exercise of that authority the Court may issue or extend stays to enjoin a variety of proceedings [including discovery against the debtor or its officers and employees] which will have an adverse impact on the Debtor’s ability to formulate a Chapter 11 plan.” Id. (quoting Johns-Manville Corp., 26 B.R. 420, 425 (S.D.N.Y. 1983) (bracketed text in the original).

Moreover, “[s]ince injunctions in bankruptcy are authorized by statute, the usual equitable grounds for relief, such as irreparable damage, need not be shown.” See Am. Gen. Fin., Inc. v. Tippins (In re Tippins), 221 B.R. 11, 28 (Bankr. N.D. Ala. 1998) (quoting Balanoff v. Glazier (In re Steffan), 97 B.R. 741, 746 (Bankr. N.D.N.Y 1989)) (quotations omitted); see also Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 975 (9th Cir. 2005) (finding that the usual standard for preliminary injunctions did not apply because the “only requirement for the issuance of an injunction under section 105 of the Bankruptcy Code is that the remedy conform to the objectives of the Bankruptcy Code”). Indeed, this court must only “find that the [MDL] threatens to adversely affect the interests of the debtor or the reorganization effort[s].” Dalkon Shield Claimants Trust v. Reiser (In re A.H. Robins Co.), 972 F.2d 77, 82 (4th Cir. 1992).

An injunction staying the MDL is especially appropriate here given the Protocol Order, which established a comprehensive scheduling protocol for the expedited litigation of certain issues relating to the ownership of the Exchange Funds and the Mediation Protocol Order, which establishes a consensual procedure to foster a global resolution of all Exchanger claims. The MDL does not raise a novel set of factual or legal issues distinct from those already asserted and pending in the Lead Cases and the many other Adversary proceedings. Rather, it involves claims arising under Commingled Exchange Agreements which are adequately captured in the existing “commingled” Lead Cases.

The commencement of the MDL (which could and should have been commenced in the Bankruptcy Court and subjected to the stay under the Protocol Order) in other jurisdictions is a transparent attempt by these claimants to make an end-run around the Protocol Order and the automatic stay, and to have issues that are at the core of this Court’s jurisdiction determined by

other courts. See 28 U.S.C. §§ 157(b)(2)(A), (B), (E), (O) (“Core proceedings include, but are not limited to – (A) matters concerning the administration of the estate; (B) allowance or disallowance of claims against the estate . . . (E) orders to turn over property of the estate; . . . (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship . . .”). Plaintiffs in the MDL desire to have their claims relating to the Exchange Funds heard by courts other than this Court and independent of the schedule established by the Order, thus potentially wreaking havoc on the Debtors’ ability to proceed with a cohesive and consistent resolution of disputes concerning the ownership of Exchange Funds. Allowing the MDL to proceed is adverse to the Debtors’ interests and directly contravenes the Court’s intent in entering the Protocol Order and the Mediation Protocol Order. It is soundly within the Court’s discretion under section 105(a) to stay those proceedings to permit the Lead Cases to proceed in an orderly and manageable fashion.

III. IN ANY EVENT, THE COURT CAN ENJOIN THE ACTION PURSUANT TO 28 U.S.C. § 1334.

“Beyond these statutory powers under section 362 and section 105 to enjoin other actions whether against the debtor or third-parties and in whatsoever court, the bankruptcy court under its comprehensive jurisdiction as conferred by section 1334, 28 U.S.C., has the inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief to grant a stay.” A.H. Robins, 788 F.2d at 1003 (internal quotations omitted). “In exercising such power the court, however, must weigh competing interests and maintain an even balance and must justify the stay by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.” Id. (internal quotations omitted). For all of the reasons discussed in sections I and II above, this Court would be well within its discretion to

impose a stay of the MDL under 28 U.S.C. § 1334 in addition to sections 105(a) and 362(a) of the Bankruptcy Code.

For all the reasons articulated, there will be great harm to the Debtors if the MDL is permitted to proceed while, at the same time, the Debtors and countless other stakeholders are attempting to address and resolve Exchanger issues on a global basis within the confines of the Bankruptcy Cases. On the other hand, there is no harm or prejudice to the Plaintiffs in the MDL if the proceeding is stayed. The issues in that proceeding are fully represented by one or more of the Lead Cases pursuant to the Protocol Order and may well be resolved through mediation.

CONCLUSION

For the reasons set forth hereinabove and in the Complaint and Motion, the Debtors respectfully request that the Court enter a preliminary injunction pursuant to sections 362(a) and 105(a) of the Bankruptcy Code and 28 U.S.C. § 1334 enjoining the MDL Plaintiffs from further prosecuting the MDL or the underlying South Carolina Action and California Action until after the effective date of a confirmed chapter 11 plan or plans of reorganization, or until such time as the Court orders otherwise.

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Richmond, Virginia

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