

# **EXHIBIT 1**

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

<p>In re  LANDAMERICA FINANCIAL GROUP, INC., <u>et al.</u>,  Debtors.</p>	<p>Chapter 11  Case No. 08-35994 (KH)  Jointly Administered</p>
<p>MILLARD REFRIGERATED SERVICES, INC.,  Plaintiff, -v- LANDAMERICA 1031 EXCHANGE SERVICES, INC.,  Defendant.</p>	<p>Adv. Proc. No. _____</p>

**COMPLAINT**

Millard Refrigerated Services, Inc. (the "**Plaintiff**"), by and through its undersigned counsel, Kelley Drye & Warren LLP, submits this Complaint for declaratory judgment and other relief, and states the following in support of its Complaint.

**STATEMENT OF PARTIES AND NATURE OF ACTION**

1. The Plaintiff is a Georgia corporation with its principal places of business in Omaha, Nebraska. Concurrent with the filing of this Complaint, the Plaintiff has filed a Corporate Disclosure Statement under Bankruptcy Rule 7007.1.
2. The Defendant is LandAmerica 1031 Exchange Services, Inc. ("**LES**"), a Maryland Corporation. LES is a debtor with a chapter 11 case pending before the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division (the "**Bankruptcy Court**").
3. This is an adversary proceeding commenced pursuant to Rule 7001 *et seq.* of the Bankruptcy Rules and sections 105(a) and 541 of title 11 of the Bankruptcy Code for:
  - (a) a declaratory judgment that the Funds (*i.e.*, \$27,820,256.81 plus accrued and accruing interest, as further defined below) are the Plaintiff's property rather than property of LES's estate;
  - (b) a judgment (i) enjoining LES from expending, transferring, commingling, adding to, or otherwise modifying the location, amount or characteristics of the Funds and/or the Accounts (defined below), (ii) directing LES to make the Funds available on a timely basis for the Plaintiff's acquisition of replacement properties, or alternatively, and (iii) directing LES to turnover the Funds to the Plaintiff;
  - (c) a judgment against LES for damages resulting from its breach of contract;
  - (d) a judgment against LES for conversion of the Funds; and
  - (e) a judgment against LES for the recovery of damages for LES's intentional and improper interference with the performance of the Plaintiff's contractual obligations.

**JURISDICTION AND VENUE**

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b).

5. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. §§ 157(a) and 157(b) because it is related to and arises in or under the chapter 11 case of LES now pending in the Bankruptcy Court.

6. Venue of this proceeding in this Court is proper pursuant to 28 U.S.C. § 1409(a) because this is a proceeding relating to and arising under chapter 11 of the Bankruptcy Code and LES's chapter 11 case.

7. This adversary proceeding is commenced pursuant to sections 105 and 541 of the Bankruptcy Code and Bankruptcy Rules 7001 *et seq.*

#### **BACKGROUND**

8. On November 26, 2008 (the "**Petition Date**"), LES filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court

9. LES has continued in possession of its property and assets and has continued to operate and manage its businesses as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

10. As of the date hereof, no statutory committees have been appointed in the chapter 11 case and no request for the appointment of a trustee or examiner has been made.

#### **The Debtors' Businesses**

11. The Debtor was engaged in the business of serving as a "qualified intermediary" for deferred like kind property exchanges consummated under section 1031 of the Internal Revenue Code, 26 U.S.C. § 1031 ("**Section 1031**"). Section 1031 permits the seller of property to use the proceeds of the sale to purchase like kind property without paying capital gains tax on the proceeds of the sale. The seller has 45 days from the date of a sale of relinquished property to identify like kind replacement property and 180 days from the date of the sale to close on the purchase of the replacement property. To preserve the tax deferral, the seller cannot take title to

the proceeds, and must instead deposit the proceeds with a “qualified intermediary” until such time that the seller is ready to close on the replacement property.

**General Allegations**

12. The Plaintiff recently closed on the sale of certain properties (the “**Sales**”) and entered into three Exchange Agreements, dated October 21, 2008 (the “**Exchange Agreements**”) with LES to effectuate Section 1031 tax deferred exchanges on replacement properties. Copies of the Exchange Agreements are attached hereto as Exhibit A, B and C. Under the Exchange Agreements, the Plaintiff transferred \$27,820,256.81 to LES to be held in trust in Citibank Insured Money Market Accounts maintained at Citibank N.A., 244 Main Street, White Plains, New York, associated with the Plaintiff’s name and taxpayer identification number (XX-XXX3470 (as redacted)) (the “**Accounts**”). The \$27,820,256.81 in principal has accrued and continues to accrue interest (principal and interest, the “**Funds**”).

13. The Exchange Agreements are structured so that a closing of the sale of the relinquished properties would occur whereby the Plaintiff would assign the purchase agreements for the sale of the properties to LES and LES would transfer them to the buyer. The buyer would then transfer the purchase price to LES, which would hold the proceeds until the closing of the replacement properties within 180 days. At the replacement property closing, LES would transfer the proceeds of the first sale to the seller of the replacement properties for the purchase of such replacement properties. Such seller would then transfer title to the replacement properties to LES. Finally, LES would transfer title to the replacement properties to the Plaintiff. At no time would (or did) LES take beneficial ownership of the properties or the proceeds. Rather, it was to hold (and did hold) nominal title only for the purposes of effectuating a Section 1031 exchange.

14. On the Petition Date, counsel for LES stated on the record at the first day hearing that LES (i) does not intend to consummate the Section 1031 exchanges that are the subject of its executory exchange agreements, and (ii) believes that the funds it is holding in both segregated and commingled bank accounts constitute property of LES's estate. Further, the Court has entered an order prohibiting LES from, among other things, transferring funds from such bank accounts. These events constitute a breach of the Exchange Agreement.

15. The deadline for the Plaintiff to complete its 1031 tax exchange will expire in approximately five months. If the Funds are not turned over to the Plaintiff or if LES does not complete the exchanges on a timely basis in accordance with the Exchange Agreements, the Plaintiff will suffer damages from, among other things, (i) claims for potential breaches of its contracts with third parties, (ii) lost business opportunities, and (iii) the loss of the tax benefits of the Section 1031 exchanges.

#### **FIRST CLAIM FOR RELIEF**

##### **(Declaratory Relief under Section 541 of the Bankruptcy Code)**

16. The Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 15 above as though fully set forth herein.

17. An actual and substantial controversy exists regarding the parties' rights to the Funds. The Plaintiff contends that the Funds are its property and not that of LES's estate. LES contends that the Funds are its property.

18. LES is holding the Funds in trust for the Plaintiff. LES and the Plaintiff had the capacity and intent to enter trust agreements and the Exchange Agreements constitute such agreements. The relinquished properties first constituted the res of the trusts, which were then substituted by the Funds. The Funds are segregated in the Accounts and are clearly identifiable. LES is the trustee and the Plaintiff is the beneficiary of the trusts.

19. Under the Exchange Agreements, the Plaintiff and LES affirmatively agreed that the Funds would be held for the benefit of the Plaintiff. Section 6(b) of the Exchange Agreements states that “LES IS ENTERING THIS EXCHANGE AGREEMENT SOLELY FOR THE PURPOSE OF FACILITATING TAXPAYER’S EXCHANGE OF THE RELINQUISHED PROPERTY FOR THE REPLACEMENT PROPERTY.”

20. Section 6(c) of the Exchange Agreements states that “LES shall only be obligated to act as an intermediary in accordance with the terms and conditions of th[e] Exchange Agreement and shall not be bound by any other contract or agreement, whether or not LES has knowledge of any such contract or agreement or of its terms or conditions.”

21. Section 3(a) of the Exchange Agreements sets forth the requirement that LES hold the Funds in the Accounts associated with the Plaintiff’s name and taxpayer identification number.

22. Section 3(b) of the Exchange Agreements provides that the Plaintiff gets the benefit of the accrued interest and assumes the responsibility to pay any income tax on the interest.

23. Nothing in the Exchange Agreements confers to LES any beneficial interest in, or risks associated with ownership of, the properties or the Funds. Rather, the Exchange Agreements require LES to accept the relinquished properties, transfer them to the buyers, hold the proceeds for 180 days or less, accept title to the acquired properties, and then transfer them to the Plaintiff.

24. Section 7 provides that LES’s compensation for this trustee service is limited to a \$1,000 per agreement fee plus reimbursement of expenses. In contrast, the Funds exceed \$27 million.

25. By reason of the foregoing, the Plaintiff seeks a declaratory judgment under section 541 of the Bankruptcy Code that LES is holding the Funds in trust for the Plaintiff and are thus not property of LES's estate.

**SECOND CLAIM FOR RELIEF**

**(Injunctive Relief under Section 105(a) of the Bankruptcy Code)**

26. The Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 25 above as though fully set forth herein.

27. Section 105(a) of the Bankruptcy Code authorizes the court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." Section 541 of the Bankruptcy Code governs property of a debtor's estate.

28. Contrary to LES's contentions, the Funds are property of the Plaintiff.

29. This Court is the proper court to make any determination regarding allegations that all or any part of the Funds are the Plaintiff's property.

30. This Court is the proper court to make any determination regarding whether any party other than the Plaintiff has any superior right, title, or interest to all or any part of the Funds greater than those of the Plaintiff or other parties-in-interest in the chapter 11 case.

31. The Plaintiff will suffer irreparable harm if (i) LES expends, transfers, commingles, adds to, or otherwise modifies the location, amount or characteristics of the Funds and/or the Accounts, or (ii) the Funds are not made available on a timely basis to acquire replacement properties.

32. By reason of the foregoing, the Plaintiff seeks entry of an order (i) enjoining LES from expending, transferring, commingling, adding to, or otherwise modifying the location, amount or characteristics of the Funds and/or the Accounts, (ii) directing LES to make the Funds

available on a timely basis for the Plaintiff's acquisition of the replacement properties, or alternatively, (iii) directing LES to turnover the Funds to the Plaintiff.

**THIRD CLAIM FOR RELIEF**

**(Breach of Contract)**

33. The Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 32 above as though fully set forth herein.

34. Under the terms of the Exchange Agreements or other valid, binding and applicable agreement(s) between the Plaintiff and LES, and in accordance with applicable law, LES was and continues to be required to transfer the Funds to acquire replacement properties in accordance with the Plaintiff's instructions.

35. LES's refusal to honor the Plaintiff's instructions was and remains a violation of the Exchange Agreements or other valid, binding and applicable agreement(s) between the Plaintiff and LES and/or applicable law.

36. LES's acts and omissions constitute a breach of the Exchange Agreements or other valid, binding and applicable agreement(s) between the Plaintiff and LES and/or applicable law.

37. The Plaintiff has suffered and continue to suffer damages, including direct and consequential damages, as a result of LES's willful and wanton breach of the Exchange Agreements or other valid, binding and applicable agreement(s) between the Plaintiff and LES and/or applicable law.

38. Accordingly, the Plaintiff is entitled to judgment for all direct and consequential damages resulting from LES's breach of contract, plus interest, costs, and fees.

**FOURTH CLAIM FOR RELIEF**

**(Conversion)**

39. The Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 38 above as though fully set forth herein.

40. Pursuant to the terms of the Exchange Agreements or other valid, binding and applicable agreement(s) between the Plaintiff and LES, and in accordance with applicable law, LES is required to acquire the replacement properties identified by the Plaintiff in accordance with the Plaintiff's instructions. LES has stated that will not do so.

41. The Exchange Agreements or other valid, binding and applicable agreement(s) between the Plaintiff and LES and/or applicable law did not permit LES to refuse to honor requests of the Plaintiff regarding the replacement properties.

42. LES has wrongfully refused to honor its obligations under the Exchange Agreements.

43. The Plaintiff is suffering damages as a result of LES's willful and wanton conversion.

44. Accordingly, the Plaintiff is entitled to judgment equal to the amount of the Funds in the Accounts plus all direct and consequential damages from LES's conversion of the Funds, interest, costs, and fees.

**FIFTH CLAIM FOR RELIEF**

**(Intentional Interference With Contract)**

45. The Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 44 above as though fully set forth herein.

46. Consistent with the requirements of Section 1031, the Plaintiff is required to enter agreements with sellers of the replacement properties (the “Replacement Property Agreements”).

47. LES has knowledge of facts that should have led LES to inquire as to the existence of the Replacement Property Agreements.

48. LES’s refusal to return the Funds or complete its obligations under the Exchange Agreements constitutes intentional and improper interference with the Plaintiff’s performance under the Replacement Property Agreements.

49. The Plaintiff is suffering significant damages as a result of the intentional and improper actions LES is taking to interfere with the performance of the Replacement Property Agreements.

50. Accordingly, the Plaintiff is entitled to judgment in its favor for all direct and consequential damages resulting from LES’s actions, which amount to intentional and improper interference with the Plaintiff’s performance under the Replacement Property Agreements.

**WHEREFORE**, the Plaintiff respectfully requests the following:

- (1) On the First Claim For Relief, declaratory judgment that the Funds are the Plaintiff’s property rather than property of LES’s estate;
- (2) On the Second Claim for Relief, judgment (i) enjoining LES from expending, transferring, commingling, adding to, or otherwise modifying the location, amount or characteristics of the Funds and/or the Accounts, (ii) directing LES to make the Funds available on a timely basis for the Plaintiff’s acquisition of the replacement properties, or alternatively, (iii) directing LES to turnover the Funds to the Plaintiff;

(3) On the Third Claim For Relief, judgment against LES in an amount to be determined at trial for damages for LES's willful breach of contract, including interest, cost and fees;

(4) On the Fourth Claim For Relief, judgment against LES in an amount to be determined at trial for damages for conversion, including interest, costs and fees;

(5) On the Fifth Claim For Relief judgment against LES in an amount to be determined at trial for damages for intentional and improper interference with the performance of the Plaintiff's contractual obligations, including, but not limited to interest, costs and fees; and

(6) Such other relief as this Court deems just and proper under the circumstances.

Dated: December 1, 2008

Respectfully submitted,

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