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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

18 ANGELA M. ARTHUR, as Trustee of the
19 Arthur Declaration of Trust, dated
20 December 29, 1988; VIVIAN R. HAYS, an
21 individual; LEAPIN EAGLE, LLC, a
22 limited liability company; DENISE J.
23 WILSON, an individual; and all others
24 similarly situated,

25 Plaintiffs,

26 vs.

27 SUNTRUST BANK, INC., a Georgia
28 Corporation; G. WILLIAMS EVANS, an
individual; STEPHEN CONNOR, an
individual

Defendants.

Case No.: 09-CV-0054-BEN-AJB

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION TO DISMISS
OF G. WILLIAM EVANS**

Hearing Date: June 22, 2009
Time:

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1 ANGELA M. ARTHUR, as Trustee of the Arthur Declaration of Trust, dated December 29,
2 1988; VIVIAN R. HAYS, an individual; LEAPIN EAGLE, LLC, a limited liability company; DENISE
3 J. WILSON, an individual (collectively "Exchangers"), by counsel, do hereby oppose G. William
4 Evans's Motion to Dismiss the Complaint.

5 **FACTS AND PROCEDURAL HISTORY**

6 Plaintiffs incorporate herein the factual statement and procedural history contained in their
7 Memorandum of Points and Authorities in Opposition to Motion to Dismiss of Defendant SunTrust, and
8 the Declaration of Robert L. Brace dated June 8, 2009 filed in support of that Opposition, (hereinafter,
9 "Brace Decl.").

10 **LEGAL STANDARD**

11 A Rule 12(b) (6) motion tests the legal sufficiency of the claims asserted in the complaint.
12 *Neilson v. Union Bank of California, NA*, 290 F. Supp. 2d 1101(C.D.Ca 2001). A court may not dismiss
13 a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set
14 of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46
15 (1957). In deciding a motion to dismiss for failure to state a claim, the court must accept all factual
16 allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences
17 from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.
18 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995); *NL Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
19 Cir. 1986). Specific facts are not necessary; the complaint need only "give the defendant fair notice of
20 what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S.
21 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

22 **ARGUMENT**

23 **I. LES OWED FIDUCIARY DUTIES TO ITS EXCHANGE CLIENTS BASED ON ITS**
24 **RELATIONSHIP AS EITHER A TRUSTEE, AN UNLICENSED REAL ESTATE**
25 **BROKER, OR AN AGENT.**

26 As a preliminary matter, the existence of a fiduciary relationship is a question of fact for the jury.
27 *Allen Realty Corp. v. Holbert*, 227 Va. 441 (1984). The allegations of the Plaintiffs' Complaint,
28 including the terms contained in the Exchange Agreement attached to the Complaint as Exhibit 1, set

1 forth facts sufficient for a jury to find a fiduciary relationship between LES and Plaintiffs based on three
2 separate independent grounds, either as a trustee, or acting as an unlicensed real estate broker, or as a
3 common law agent.

4 **A. Trustee**

5 Plaintiffs incorporate the arguments set forth in Plaintiffs' Memorandum of Points and
6 Authorities filed in Opposition to the Motion to Dismiss of SunTrust.

7 **B. Broker**

8 Pertinent portions of the LES Exchange Agreement and interrelated closing documents clearly
9 bring LES within the statutory definition of an entity acting as a real estate broker under Virginia law.¹

10 Virginia Code §54.1-2100 defines "real estate broker" as follows:

11 'Real estate broker' means any person or business entity, including, but not limited to, a
12 partnership, association, corporation or limited liability company, who, *for compensation*
13 *or valuable consideration* (i) *sells or offers for sale, buys or offers to buy, or negotiates*
14 *the purchase or sale or exchange of real estate*, including units or interest in
15 condominiums, cooperative interest as defined in § 55-426, or time-shares in a time-share
16 program even though they may be deemed to be securities, or (ii) leases or offers to lease,
17 or rents or offers for rent, any real estate or the improvements thereon for others.
18 [Emphasis added.]

16 Virginia Code §54.1-2107 [emphasis added] states:

17 ***One act for compensation or valuable consideration of buying or selling real estate of***
18 ***or for another, or offering for another to buy or sell or exchange real estate***, or leasing,
19 or renting, or offering to rent real estate, except as specifically excepted in § 54.1-2103,
20 shall constitute the person, firm, partnership, copartnership, association or corporation,
21 performing, offering or attempting to perform any of the acts enumerated above, a real
22 estate broker or real estate salesperson.

21 In apparent recognition that these Code provisions cast a very broad net, the Virginia Legislature
22 codified in §54.1-2103 certain exceptions to the real estate broker definition; a Qualified Intermediary
23 (QI) is *not* exempted from the Virginia statutory scheme regulating real estate brokers.

24 It is clear from the LES-drafted Exchange Agreement that LES was acting as an unlicensed real
25 estate broker, as defined above. LES, by the Exchange Agreement, was paid not only to facilitate the

26 _____
27 ¹ The Exchange Agreement, ¶ 11, specifies that Virginia law governs. Brace Decl., Ex. 1.

1 like-kind exchanges, but actually to “buy” and “sell” the relinquished and replacement properties.

2 Critical provisions of the Exchange Agreement provide:

- 3 1. LES is to facilitate the like-kind exchange of real property. (Exchange Agreement, ¶
4 1(a)). Brace Decl., Ex. 1.
- 5 2. LES is *to acquire* from the exchange client the relinquished property. (Exchange
6 Agreement, ¶ 1(a)). Brace Decl., Ex. 1.
- 7 3. LES is *to acquire* the replacement property *in a purchase transaction*. (Exchange
8 Agreement, ¶ 1(a)). Brace Decl., Ex. 1.
- 9 4. LES is to make payments from the Exchange Funds *to acquire* the replacement property.
10 (Exchange Agreement, ¶ 2(b)). Brace Decl., Ex. 1.
- 11 5. LES is *to convey* the replacement property to the exchange client. (Exchange Agreement,
12 ¶ 1(a)). Brace Decl., Ex. 1.
- 13 6. LES is *assigned* the exchange client’s rights under *the sales contract* to sell the
14 relinquished property. Brace Decl., Ex. 1 at ¶1(b).
- 15 7. All of the transfers described “are part of an integrated, inter-dependent, mutual and
16 reciprocal plan intended to effectuate an exchange by taxpayer of like-kind real properties
17 pursuant to and in accordance with the Internal Revenue Code Section 1031 and to the
18 extent possible, state tax statutes.” Brace Decl., Ex. 1 at ¶ 1(d)).

16 The above Exchange Agreement requirements make it crystal clear that LES’s conduct falls
17 within the definition of a real estate broker under Virginia law, which imposes statutory fiduciary duties
18 on those who, “for compensation or valuable consideration,” engage in “buying or selling real estate of
19 or for another, or offering for another to buy or sell or exchange real estate.”

20 The Virginia broker statute imposes fiduciary duties regarding the holding and handling of funds
21 pursuant to §54.1-2108:

22 No licensee ² or any agent of the licensee shall divert or misuse any funds held in escrow
23 or otherwise held by him for another. . . .

24 By the specific language of the Exchange Agreements, LES was required to “hold and apply” the
25 Exchange Funds according to the Agreement and was to “make payments from the Exchange Funds to
26

27 _____
28 ² Section 54.1-2130 defines “licensee” to include all who fall within the definitions of real estate broker.

1 acquire the replacement property.” Section §54.1-2131, regarding brokers engaged by sellers, requires
2 among other things, that the broker:

- 3 • “Account in a timely manner for all money and property received by the licensee in
4 which the seller has or may have an interest”; and
- 5 • “Disclose to the seller material facts related to the property or concerning the transaction
6 of which the licensee has actual knowledge.”

7 Whether the actions of Evans as the CFO of LES in causing LES to solicit new clients’ funds
8 without disclosing that LES was technically insolvent, i.e. could not pay its obligations to close
9 exchanges, and to divert newly received Exchange Funds to purchase replacement properties for *prior*
10 Exchange clients in a textbook Ponzi scheme, constitutes “misuse” should not be resolved by the Court
11 on a 12(b)(6) motion. *See, In re San Diego Realty Exch., Inc.*, 132 B.R. 424, 429 (Bankr. S.D. Cal.
12 1991) (QIs who pay older exchanges with after-acquired funds when the trust is in a deficit operate a
13 Ponzi scheme.); *In re Nation-Wide Exch. Services, Inc.*, 291 B.R. 131, 149 n. 20.³

13 C. Agent

14 Virginia case law is very clear that a principal/agent relationship is a fiduciary relationship.
15 “Agency is a fiduciary relationship between two parties in which one party agrees to act on behalf of and
16 subject to the control of the other party.” *Banks v. Mario Indus.*, 274 Va. 438, 452-453 (2007). An agent
17 commonly represents the principal in the creation and performance of contracts with third parties.
18 *Acordia of Virginia Insurance Agency, Inc. v. Genito Glenn, L.P.*, 263 Va. 377 (2002).

19 Under Restatement (Second), *Agency* §13, “[a]n agent is a fiduciary with respect to matters
20 within the scope of his agency.” Section 1 of the Restatement states, “[a]gency is the fiduciary relation
21 which results from the manifestation of consent by one person to another that the other shall act on his
22 behalf and subject to his control, and consent by the other so to act.” Comment *a* of §1 states that “the
23 relation of agency is created as the result of conduct by two parties manifesting that one of them is
24 willing for the other to act for him subject to his control, and that the other consents so to act.”
25

26 ³ Noting that “[t]here is nothing to suggest that [the QI] set up the Debtor or his other like-kind exchange
27 intermediary-entities with the intent *ab initio* to carry on such a shell game. However, once he
28 mismanaged and converted the funds of some clients, and kept taking in the business and assets of
others, it quickly became that.”).

1 In this case, LES agreed to act for its exchange clients, as a QI on their behalf, to consummate
2 transfer of the relinquished property, to receive and hold the proceeds, to acquire the replacement
3 property with the proceeds, and then convey that property to the Plaintiffs. Paragraph 1(a) of the
4 Exchange Agreement specifies that LES is willing to act on behalf of the Plaintiffs to transfer the
5 Relinquished Property and to obtain Replacement Property. Brace Decl., Ex. 1. In ¶ 2(a), “LES agrees to
6 hold and apply the Exchange Funds” from the transfer of the Plaintiffs’ Relinquished Property. Brace
7 Decl., Ex. 1. Under paragraph ¶ 2(c), LES agrees to hold the Exchange Funds until certain dates and
8 directives of the Plaintiffs consistent with Internal Revenue Code §1031. LES agrees to act on the
9 Plaintiffs’ behalf, in ¶ 5(b), to acquire and transfer to the Plaintiffs Replacement Property as identified
10 and directed by the Plaintiffs. Brace Decl., Ex. 1. The Exchange Agreement ¶ 6(b), provides that “LES
11 IS ENTERING INTO THIS EXCHANGE AGREEMENT SOLELY FOR THE PURPOSE OF
12 FACILITATING *TAXPAYER’S* EXCHANGE OF THE RELINQUISHED PROPERTY FOR THE
13 REPLACEMENT PROPERTY.” Brace Decl., Ex. 1 . (Emphasis added). These are all actions of an
14 agent.

15 ***D. Impact of Treasury Regulations***

16 A review of the controlling Treasury Regulation confirms that LES was acting as the Plaintiffs’
17 broker/agent for the purpose of completing the exchange transactions. The issue raised by §1031 is how
18 much taxpayer dominion and control over exchange funds will constitute “other property or money
19 received” under §1031(b), which would be a recognizable, taxable, gain to the recipient. Treasury
20 Regulation §1.1031(k)-1(f)(1) states “if the taxpayer actually or constructively receives money or other
21 property,” the transaction constitutes a sale and not a deferred exchange. The case law and regulations
22 under the constructive receipt doctrine of I.R.C. §451 have established that receipt of funds by an agent
23 is receipt by a principal. *See Arnwine v. Commissioner*, 696 F.2d 1102, 1107 (5th Cir. 1983) (“receipt by
24 an agent is receipt by the principal”).

25 Treas. Reg. §1.1031(k)-1(f)(2) provides that the general rules of constructive receipt stated in
26 §§1.451-1(a) and 2(a) apply “*except* as provided in paragraph (g).” The ¶ (g) exception serves the
27 limited purpose of removing the general rule – that receipt by an agent is constructive receipt to the
28

1 taxpayer – from the application of §1031(k)-1(f)(1) when a Qualified Intermediary is receiving the
2 exchange funds under the safe harbor of ¶ (g)(4).

3 Treas. Reg. §1.1031(k)-1(g)(4) states that in a transfer of the relinquished property involving a
4 QI, the QI “is not considered the agent of the taxpayer *for the purposes of Section 1031(a)*. . . .” Also,
5 “[t]he determination of whether the taxpayer is in actual or constructive receipt of the money or property
6 . . . is made *as if* the QI is not the agent of the taxpayer.” *Id.* Under this regulation, at (g)(4)(iv)(B), the
7 IRS unequivocally declares that a QI can be the agent of its client when “acquiring and transferring the
8 relinquished property if the intermediary (either on its own behalf *or as the agent of any party to the*
9 *transaction*) enters into an agreement with a person other than the taxpayer for the transfer. . . .” This
10 same language is also found in (g)(4)(iv)(C) regarding the acquisition of the replacement property. In
11 addition, Treas. Reg. §1.1031(k)-1(g)(8) notes:

12 The exchange agreement entered into by B and C satisfied the requirements of paragraph
13 (g)(4)(iii)(B) of this section. . . . This result is reached for purposes of this section *regardless*
14 *of whether C was B's agent under state law* Thus, C was a qualified intermediary.

14 §1.1031(k)-1(g)(8), Ex. 4 sub-¶ (ii) (emphasis added).

15 An enactment must be interpreted, if possible, in a manner which gives meaning to every word.
16 *See, e.g., First Virginia Bank v. O'Leary*, 251 Va. 308 (1996); *Monument Assoc. v. Arlington County*
17 *Bd.*, 242 Va. 145, 149 (1991). The use of the words “as is,” “is not considered,” and “for the purpose of”
18 in Treas. Reg. §1.1031(k)-1(g)(4) are meaningless other than in recognition that the QI actually *is* the
19 agent of the exchange client.

20 The language of Treas. Reg. §1.1031(k)-1, thus, verifies that a QI is really acting as an agent in
21 these exchange transactions.

22 Also, Treas. Reg. §1.1031(k)-1(k)(2) directs that “the agent of the taxpayer at the time of the
23 transaction” is disqualified from serving as an intermediary. It also specifies certain relationships that
24 are treated as agents, including those of “real estate agent or broker.” The Regulation then provides an
25 exception from the agency disqualification by stating “[s]olely for purposes of this paragraph (k)(2),
26 performance of the following services will not be taken into account -- (i) Services for the taxpayer with
27 respect to exchanges of property intended to qualify for nonrecognition of gain or loss under section
28 1031”. §1.1031(k)-1(k)(2) and cl. (i). Paragraph (k)(2)(i) thus permits a QI to render broker services

1 limited to qualifying the exchange under §1031. Far from exonerating a QI and its accomplices,
2 ¶(k)(2)(i) recognizes that a broker is an agent of the taxpayer, invoking the common law and statutory
3 fiduciary duties explained above.

4 It is the clear intent of Treas. Reg. §1.1031(k)-1 to create a legal fiction whereby the agency
5 relationship between intermediary and exchange client is ignored strictly for the purpose of the avoiding
6 constructive receipt, which would defeat deferral of the capital gain. Consistent with this regulatory
7 structure, the limited purpose of this negation of agency is further recognized in Treas. Reg. §1.1031(k)-
8 1(n)(emphasis added):

9 *No inference with respect to actual or constructive receipt rules outside of section 1031*
10 *[26 USCS 1031]. The rules provided in this section relating to actual or constructive*
11 *receipt are intended to be rules for determining whether there is actual or constructive*
12 *receipt in the case or a deferred exchange. **No inference** is intended regarding the*
application of these rules for purposes of determining actual or constructive receipt exists
for any other purpose.

13 Thus, pursuant to Treas. Reg. §1.1031(k)-1(n), the negation of an agency relationship exists for
14 one purpose only, and that is determination of the tax consequences of the transaction. There is nothing
15 incompatible with the QI being an agent, broker or trustee for the purposes of fiduciary duties involving
16 safekeeping of exchange funds while being treated “as if” not an agent for the actual/constructive receipt
17 analysis. Therefore, Treas. Reg. §1.1031(k)-1(g)(4)(i) does not abrogate the principal-agent relationship
18 for purposes of determining fiduciary duties, but serves only to allow qualification of the exchange
19 under the constructive receipt rules of §1.1031(k)-1(f). The Treasury regulations, thus, do not shield a
20 QI from common law fiduciary duties. Under the principles of agency, §1031 QIs remain subject to the
21 fiduciary duty to reasonably safeguard client funds. See BLACK'S LAW DICTIONARY, 625 (6th ed.
22 1990) (status of fiduciary prohibits investing money of others in investments which are speculative or
23 otherwise imprudent).

24 **II. EVANS’S RELIANCE ON THE RULING OF BANKRUPTCY JUDGE HUENNEKENS** 25 **IS MISPLACED**

26 **A. *Res Judicata* and Collateral Estoppel are not Applicable.**

27 Evans argues at pages 8-10 of its Motion and SunTrust argues at pages 8 and 10 of its Motion
28 that this Court should adopt the bankruptcy court’s opinion in *Millard Refrigerated Services, Inc. v.*

1 *LandAmerica 1031 Exchange Services, Inc.*, Case No. 08-35994 (“*Millard*”) which held, based strictly
2 upon the language of the Exchange Agreement, that LES did not owe a fiduciary duty to one exchange
3 client whose Exchange Funds were deposited in a “segregated” account.⁴ Timely appeals have been
4 filed challenging the bankruptcy court’s rulings in both *Millard* and *Frontier*⁵.

5 While neither Evans nor SunTrust explicitly argue in their Motions that the bankruptcy court’s
6 Order in *Millard* is binding on this Court’s determination, they implicitly request this Court to adopt the
7 bankruptcy court’s Order rather than make its own independent determination as to whether LES owed
8 Plaintiffs a fiduciary duty. This Court should not adopt the bankruptcy court’s Orders in *Millard* and
9 *Frontier* for two reasons. First, under well-established Ninth Circuit law related to collateral estoppel
10 and *res judicata*, the *Millard* and *Frontier* opinions are not binding on Plaintiffs. Second, the bankruptcy
11 court’s legal interpretation of the Exchange Agreement in both *Millard* and *Frontier* was governed by
12 presumptions arising under the Bankruptcy Code and further was simply erroneous for the reasons set
13 forth below.

14 On January 16, 2009, the court in the LES bankruptcy entered its “Order Establishing Scheduling
15 Protocol for Adversary Proceedings” (“Protocol Order”), which in paragraph 16 specifically *prohibited*
16 other creditors, including Plaintiffs, from intervening in the “test” cases selected.⁶ The named Plaintiffs
17 in this action were not “parties” to either the *Millard* or *Frontier* test cases in the bankruptcy court.

18 The application of collateral estoppel (issue preclusion) and *res judicata* (claim preclusion) to
19 nonparties “runs up against the deep-rooted historic tradition that everyone should have his day in
20 court.” *Taylor v. Sturgell* 128 S. Ct. 1261, 2172 (2008) (citations omitted). None of the privity
21 exceptions cited in *Taylor* at pages 2172-2173 are applicable in this case. Recent attempts to broaden
22

23 ⁴ See Plaintiffs’ Request for Judicial Notice filed in support of this Opposition, dated June 8, 2009
24 (hereinafter, “RJN, Ex. ___”), Ex. 2. Subsequent to the filing of the motions to dismiss, on May 7, 2009
25 the bankruptcy court ruled in another adversary action that LES did not owe a fiduciary duty to three
26 exchange clients whose exchange funds were deposited into a “commingled” account. *Frontier Pepper’s*
Ferry, LLC v. LandAmerica Exchange Services, Inc., Adv. Proc. No. 08-03148 (“*Frontier*”). (RJN, Ex.
27 5.)

27 ⁵ Document Numbers 81 and 77, respectively. (RJN, Exs. 3 and 6.)

28 ⁶ Case 08-03161-KRH, Doc 8, Filed 01/16/09, Entered 01/20/09 09:18:53. (RJN, Ex. 7.)

1 these exceptions, most notably under the theory of “virtual representation” that was popular in several
2 Circuits -- including the Ninth Circuit for the last 25 years -- have been rejected by the Supreme Court
3 and deemed an unwarranted and unjustifiable departure from traditional privity analysis. *Taylor v.*
4 *Sturgell*, supra, at 2178 (2008)

5 The Ninth Circuit has stated that the principle that only parties to prior actions and parties in
6 privity with them may be barred from relitigating claims or issues in a subsequent action is “central to
7 the concepts of *res judicata* and collateral estoppel.” *Sandpiper Vill. Condo. Ass’n v. Louisiana-Pacific*
8 *Corp.* 428 F.3d 831, 849 (9th Cir. 2005).

9 **B. The Bankruptcy Court, in Deciding the Issues in Millard and Frontier, Failed To**
10 **Consider Extrinsic Evidence Which Was Admissible Under Virginia Law.**

11 The issue litigated in the bankruptcy proceeding was quite narrow, i.e. whether the exchange
12 funds remaining on deposit with LES were the property of the bankruptcy estate as defined in 11 U.S.C.
13 §541. For the purposes of that analysis the bankruptcy judge used the very broad definition of
14 “property” mandated by case law interpreting §541. *Millard*, at 12–13. The bankruptcy judge was also
15 compelled to apply a presumption that money held in a bank account in the name of a debtor is the
16 property of the bankruptcy estate. *See, e.g., In re Amdura Corp.*, 75 F.3d 1447, 1451 (10th Cir. 1996).

17 The sole argument presented in *Millard* to rebut the presumption applied by the bankruptcy
18 judge was that, pursuant to 11 U.S.C. §541 (d), the Exchange Funds were trust funds and that LES held
19 nothing more than bare legal title to the funds. The bankruptcy judge concluded that Millard had failed
20 to establish an express or resulting trust. *Millard*, at 21. However, Judge Huennekens, at page 18 of his
21 Opinion, erroneously held that the *Millard* plaintiffs could not rely on extrinsic evidence to explain
22 LES’s role as Qualified Intermediary.

23 On the contrary, however, §8.1-205 of the Virginia Code provides that an integrated contract
24 may be explained or supplemented by evidence of “usage of trade.” LES was a member of the
25 Federation of Exchanges (“FEA”), the primary industry trade group for qualified intermediaries.⁷ LES
26 specifically covenanted to execute the duties on Qualified Intermediary in the Exchange Agreements.

27 _____
28 ⁷ Brace Decl., ¶ Ex. 25, Connor Dep. 71:6.

1 The FEA’s Code of Ethics expressly provides that members serve as “fiduciaries” when holding clients
2 funds.⁸

3 Additionally, unlike the allegations in the *Millard* plaintiff’s adversary complaint, Plaintiffs’
4 Third Cause of Action alleges that LES fraudulently induced them to enter into the Exchange
5 Agreement, and failed to disclose that LES was insolvent and operating a Ponzi scheme at the time it
6 accepted their Exchange Funds. Virginia recognizes an exception to the parol evidence rule when a party
7 alleges he or she was induced by fraud to enter into a contract. (*Shevel’s Inc. v. Chesterfield*
8 *Southeastern Assoc. Inc.* (1984) 228 Va. 175, 183.) Because the *Millard* plaintiffs did not allege they
9 were fraudulently induced to enter into their Exchange Agreement, the bankruptcy court in making its
10 ruling did not consider the myriad pertinent admissible evidence under Virginia law demonstrating the
11 intent to form a trust and/or fiduciary relationship, as described more fully in Plaintiffs’ Opposition to
12 the SunTrust 12(b)(6) motion, incorporated herein by reference, including:

- 13 • The public SEC reports filed by LFG, parent company of LES, affirming that "**consistent**
14 **with industry practice**, these like-kind exchange funds are held by us for the benefit of
our customers.” Brace Decl., ¶ 19, 20, 21. (Emphasis added);
- 15 • The accounting practice of LFG to treat the Exchange Funds as assets of the Exchangers
16 on its consolidated balance sheets (Brace Decl., Exs. 19, 20, 21);
- 17 • The correspondence sent by LES to its banker, the Defendant herein SunTrust, verifying
18 that LES “holds these funds in escrow as a fiduciary until the funds (with the related
19 earnings) are returned to customers to complete the 1031 Exchange,” which again is
consistent with usage of trade and industry practice established by the FEA Code of
Ethics (Brace Decl., Ex. 11);
- 20 • The correspondence sent by LES to its banker SunTrust verifying that LES “is acting in a
21 fiduciary capacity, with the funds ultimately belonging to the retail client [exchanger],”
again consistent with usage of trade and industry practice (Brace Decl., Ex. 6);
- 22 • The correspondence sent by LES to its banker SunTrust verifying that an essential
23 function of the QI is to "hold in escrow" the proceeds from the sale, again consistent with
the FEA industry practices (Brace Decl., Ex. 6);
- 24 • Language in the Exchange Agreement requiring LES *to hold* the Exchange Funds and
25 use the Exchange Funds to purchase replacement property identified by Millard (Brace
Decl., Ex. 1);

27
28 ⁸ Brace Decl., ¶ Ex. 11.

- 1 • Section 6 language of the Exchange Agreements, that “the sole purpose of the Exchange Agreement” was to facilitate exchanges, which would have limited LES’s right to operate with regard to the Exchange Funds in such a way as to impede that “sole purpose” (Brace Decl., Ex. 1);
- 2
- 3
- 4 • Language of the Exchange Agreements verifying that the Exchange Funds will be in an FDIC-insured deposit account at SunTrust, a fraudulent inducement to enter into the contract (Brace Decl., Ex. 1);
- 5
- 6 • Language in the FEA Code of Ethics and Conduct, that “Exchange Accommodators recognize that the fiduciary nature of the industry imposes obligations beyond those of ordinary commerce” (Brace Decl., Ex. 11);
- 7
- 8 • Language in the FEA Code of Ethics and Conduct, noting that an Exchange Accommodator shall act in the best interest of its customers, and proceeds (Brace Decl., Ex. 11);
- 9
- 10 • Language in the FEA Code of Ethics and Conduct, noting that Exchange Accommodators are held to the “Prudent Investor Standard” and listing a series of duties, all of which LES violated by paying old Exchangers with new Exchangers’ funds (Brace Decl., Ex. 11);
- 11
- 12 • Language in LFG correspondence to Treasury Secretary Henry Paulson referring to LES’s function “as a fiduciary for Section 1031 exchanges” and “as a fiduciary to facilitate IRS Section 1031 real estate transactions” (Brace Decl., Ex 8);
- 13
- 14 • LES’s marketing brochures noting under the heading “Funds Held in Trust,” that “escrow and 1031 Exchange customers entrusted more than \$3.2 billion to LandAmerica as of December 31, 2007.” (Brace Decl., Ex 2);
- 15
- 16 • LES’s internet website, Exhibit 2 to the Complaint, which assured prospective clients that LES had no investments in “subprime mortgages” and clients were not “at risk from such investments” (Brace Decl., Ex. 2);

17 In addition, Judge Huennekens did not consider, because the issues were not before him, the
 18 following:

- 19 • The impact of the Virginia real estate broker statutes at Va. Code §§54.1-2100 *et seq.*;
- 20
- 21 • The impact of Virginia’s law of agency on the fiduciary duties owed by LES to Exchange clients;
- 22
- 23 • Authority from Restatement (Third)) *Trusts*, §5: “If property is transferred by one person to another and the transferee agrees to sell that property and to pay its proceeds or a certain amount of the proceeds to a third person, ordinarily a trust of the property is created. If, however, property is transferred by one person to another who agrees in consideration thereof to assume a personal liability to a third person[B1] , a contract for the benefit of the third person and not a trust is created.”
- 24
- 25

26 Finally, the *Millard* opinion is simply wrong because:

- 27 • Paragraph 6(f) of the Exchange Agreement provides that in the event of a dispute as to the “delivery or **ownership** or **right to possession** of any of the Exchange Funds” that LES is holding, LES is entitled to retain the funds until either the parties involved agree
- 28

1 to settle the dispute by a written agreement, or an order or judgment of a court of
2 competent jurisdiction is entered resolving the dispute. (Emphasis added.) The court in its
3 Opinions in both *Millard* and *Frontier* focused on the language in ¶2 (c) of the Exchange
4 Agreement that LES had sole and exclusive possession, dominion and control of the
5 Exchange Funds. (E.g. *Millard* Opinion at pp. 9, 17) If ¶2(c) gave LES unfettered rights
6 in the Exchange Funds ¶ 6(f) was completely unnecessary. The presence of ¶ 6(f) in the
7 Exchange Agreement creates an ambiguity as to the ownership of the Exchange Funds,
8 and is an implicit admission that LES is not entitled to “ownership” of those funds. This
9 ambiguity can only be resolved by the Court considering extrinsic evidence, including
10 LFG/LES’s denial of ownership in its SEC filings. Extrinsic evidence is admissible to
11 explain an ambiguity in a contract. *Cohan v. Thurston*, 223 Va. 523 (1982). The
12 bankruptcy court refused to consider extrinsic evidence in making its factual
13 determinations in both *Millard* and *Frontier*.

- 14 • The bankruptcy court relied on the phrase used in Treas. Reg. §1.1031(k)-1(g)(4)(I) --
15 “as if the QI is not the agent of the taxpayer” -- as suggesting intent of the IRS to treat
16 exchange funds as not those of taxpayer, and thereby ignored the “no inference”
17 requirement of §1.1031(k)-1(n). *Millard*, at 8;
- 18 • The bankruptcy court relied on the fact that the Exchange Agreement did not restrict the
19 ability of LES to pledge, encumber, borrow, or otherwise receive the benefits of the
20 Exchange Funds when the appropriate analysis would have focused on the fact that the
21 Exchange Agreement **did not** provide that LES could pledge, encumber, borrow the
22 Exchange Funds, only invest them. *Millard*, at 9-10, 14 n. 19;
- 23 • The bankruptcy court found that absent express trust language in the Exchange
24 Agreement, a trust had to be proven by other circumstances showing intent, but then the
25 Court excluded all extrinsic evidence;
- 26 • The bankruptcy court did not recognize that LES’s disclaimer of duties or obligations by
27 operation of law **could not** negate statutory duties imposed upon LES by the regulatory
28 statutes of the State of Virginia, its chosen forum;
- The bankruptcy court failed to consider the Exchange Agreement language establishing
that the **sole** purpose of the agreement was to facilitate the deferred exchange. (Exchange
Agreement ¶ 6(b)). The Court interpreted the exchangers’ grant to LES of possession,
dominion, control and use of the Exchange Funds and relinquishment of right, title and
interest unto LES as conveying something **more** than required for §1031 exchange
(*Millard*, at 6, n. 6), thus creating an ambiguity that mandated resort to extrinsic
evidence. *Millard*, at 16-17;
- The bankruptcy court wrongly concluded that LES’s disclaimer in the Exchange
Agreement of duties not set forth therein, effectively disclaimed any duty LES had to act
as a fiduciary. The Court’s reliance on *Metric Constructors, Inc. v. Bank of Tokyo-
Mitsubishi, Ltd.*, Case No. 99-2330, 2000 WL 1288317, *4 (4th Cir. Sept. 13, 2000) was
misplaced because the agreements in that case expressly disclaimed any relationship of
trust or fiduciary relationship;
- The bankruptcy court wrongly concluded that LES’s disclaimer in the Exchange
Agreement of duties not set forth therein, effectively disclaimed any duty LES had to act
as a fiduciary. The Court ignored that LES expressly assumed the duties to act as
Qualified Intermediary in accordance with the terms and conditions of the Agreement and

1 Plaintiffs assert that the role of Qualified Intermediary *is* a fiduciary role whether or not
2 there was a trust created;

- 3 • The bankruptcy court wrongly excluded extrinsic evidence concerning the relationship of
4 the parties because the term “intermediary” is undefined in the Treas. Reg. in terms of the
5 relationship created and, thus, ambiguous;
- 6 • The bankruptcy court wrongly concluded that the Exchange Agreement “plainly”
7 provided that the exchangers had no equitable interest in the Exchange Funds and that
8 LES owed them no fiduciary duty, when the Agreement says no such thing;
- 9 • The bankruptcy court wrongly concluded that the exchangers retained no equitable
10 interest in the Exchange Funds and thereby ignored language of the Exchange Agreement
11 that required LES to “hold and apply” the Exchange Funds per the terms of Agreement,
12 defined the Exchange Funds as the Compensation paid for the relinquished property less
13 certain deductions, and required LES to purchase the replacement property from the
14 Exchange Funds;
- 15 • The bankruptcy court wrongly concluded that the exchangers retained no equitable
16 interest in the Exchange Funds, and ignored the provision of the Exchange Agreement
17 stating that the exchanger shall have no right title or interest in the Exchange Funds
18 “except that the balance of the exchange funds shall be **held by** LES and after applying
19 such Exchange Funds in accordance with the Exchange Agreement shall be paid to
20 taxpayer on the applicable Termination Date”; Brace Decl., Ex. 1.
- 21 • The bankruptcy court wrongly concluded that the exchangers retained no equitable
22 interest in the Exchange Funds and thereby ignored language in the Exchange Agreement
23 that stated LES’s intent was to be a “qualified intermediary” within the meaning of
24 Section 1.1031(k) – 1(g)(4)(iii) and to remain in that role until all the Exchange Funds are
25 disbursed; Brace Decl., Ex. 1.
- 26 • The bankruptcy court wrongly concluded that the language of the Exchange Agreement
27 demonstrated that the parties intended their relationship to be one of obligor and obligee,
28 thereby ignoring applicable principals of agency and statutory requirements for real estate
brokers in Virginia, and the myriad public declarations of LES in its marketing materials,
public filings with the SEC, in communications with SunTrust and the federal
government, verifying its fiduciary duties and the Exchangers’ beneficial ownership of
the Exchange Funds;
- The bankruptcy court wrongly relied on authorities dealing with *prior or
contemporaneous parol* evidence to decline consideration of clear written statements of
intent by LES occurring before, during and after execution of the Exchange Agreements
at issue. *Millard*, at 18 (citing to *Robinette v. Robinette*);
- The bankruptcy court wrongly concluded that the language of the Exchange Agreements
precluded consideration of purported “subjective beliefs” of the parties, when, in fact, the
evidence offered was of unequivocal written statements and positions taken by LES,
including verification of its accounting practices in regulated SEC filings which verified
the Exchangers’ beneficial ownership of the Exchange Funds;
- The bankruptcy court wrongfully invoked the bankruptcy policy of ratable distribution in
applying the state law governing resulting trusts, when such policy may only be applied

1 in the context of constructive trusts. *Siegel v. Boston (In re Sale Guar. Corp.)*, 220 B.R.
2 660, 667 (Cal.1998), *aff'd* 199 F.3d 1375 (9th Cir. 2000).

- 3 • The bankruptcy court wrongfully refused to consider a resulting trust based on its
4 mistaken finding of an intent not to create an express trust. The Court erroneously used
5 this finding to negate the *equitable presumption* that exists under Virginia law that “one
6 who advances money for the purchase of real property is entitled to its benefits.” *Morris*
7 *v. Morris* 248 Va. 590, 593 (1994);
- 8 • The bankruptcy court wrongfully refused to consider a resulting trust based on its
9 mistaken finding of an intent not to create an express trust and ignored Virginia case law
10 which states that resulting trusts are found even when to do so “*contravenes the express*
11 *language of the written transaction documents.*” *1924 Leonard Rd., L.L.C. v. Van*
12 *Roekel*, 272 Va. 543, 552 (2006);
- 13 • The bankruptcy court ignored the presumption of intent mandated by Virginia case law
14 regarding resulting trusts: “A resulting trust is based upon a presumed intent or inference
15 of law deduced from the facts and circumstances.” *Gibbens v. Hardin*, 239 Va. 425
16 (1990); *Gifford v. Dennis*, 230 Va. 193, 198 (1985);
- 17 • The bankruptcy court ignored a basic precept of the Virginia law of resulting trusts that
18 recognizes that “one who advances the purchase money for real property is entitled to its
19 benefits.” *Gifford v. Dennis*, 230 Va. 193, 198 (1985);
- 20 • The bankruptcy court ignored the burden shifting rules under the Virginia law of
21 resulting trusts that recognizes that “after it has been shown that payment of all or a part
22 of the purchase price for property has been paid by one person and title thereto has been
23 placed in the name of another, the factor which will determine whether the title is to be
24 impressed with a trust in favor of the payor is the intention of the party providing the
25 purchase money. If no evidence of intention is available, then the presumed intention will
26 stand. . . .Once the payor proves payment of the purchase price, the burden of going
27 forward with the evidence shifts to the grantee under the deed.” *Gifford v. Dennis*, 230
28 Va. 193, 198-199 (1985).

19 **III. THE POLICY UNDERLYING THE BANKRUPTCY CODE PRESUMPTION THAT** 20 **FUNDS IN THE DEBTOR’S BANK ACCOUNTS BELONG TO THE DEBTOR’S** 21 **ESTATE DOES NOT APPLY IN THIS CASE**

22 The plaintiffs in *Millard* and *Frontier*, in their adversary complaints, argued that LES was acting
23 as a trustee in their efforts to recover their funds from LES’s bankruptcy estate⁹. In its Opinions in both
24 *Millard* and *Frontier* the bankruptcy court cited the proposition that deposits in a debtor’s bank account
25 are presumed to be property of the bankruptcy estate. (*Millard* Opinion at 12; *Frontier* Opinion at 13.)
26 The policy reason for the presumption that funds in a debtor’s bank account belong to the debtor is
27 discussed in *In re Bullion Reserve v. Bozek* 836 F.2d 1214, 1215 (9th Cir. 1988). The policy rationale is

28 ⁹ See RJN for copies of the Adversarial Complaints of the *Millard* and *Frontier Pepper* plaintiffs (RJN, Exs. 1 and 4, respectively).

1 that the funds transfer to one particular creditor claiming the funds would deprive the bankruptcy estate
2 of funds which could otherwise be used to satisfy the claims of all creditors on an equitable basis. Any
3 recovery by the *Millard* and *Frontier* plaintiffs from funds on deposit in LES' bank accounts would
4 necessarily have reduced the amount of funds available in the debtor's estate to pay the remaining
5 creditors.

6 However, the policy underlying the presumption does not apply in this case because Plaintiffs
7 are not seeking to recover funds from LES's bank accounts which would deplete the funds available to
8 pay all creditors. Instead, Plaintiffs are seeking to recover their lost Exchange Funds from the CFO of
9 LES, individually, and from SunTrust Bank based on its independent tortious conduct in aiding and
10 abetting LES's breach of fiduciary duty, conversion and fraud. If Plaintiffs recover their Exchange
11 Funds from Evans or SunTrust, they would not be eligible to recover those same Exchange Funds from
12 LES's estate and there will be more funds available in LES's estate to pay the remaining creditors.
13 Because Plaintiffs are not seeking funds from the debtor, this Court should not base its determination on
14 whether LES was acting as a fiduciary on the policy arguments articulated in *In re Bullion Reserve*. To
15 do so would thwart the policy that a defendant such as SunTrust is liable for its own independent
16 tortious conduct.

17 **IV. AN IMMEDIATE RIGHT TO POSSESSION IS NOT REQUIRED TO STATE A CLAIM**
18 **FOR CONVERSION IN THIS CASE**

19 Plaintiffs have also alleged in this case a conversion of their funds. The actions of Defendant
20 Evans in participating in that conversion by LES may also be a ground for stating a claim against him
21 based on breach of fiduciary duty. The conversion claim is properly alleged. Conversion does not in all
22 cases require an "immediate" right to possession. There are three legal exceptions to the "immediacy"
23 requirement:

- 24 (1) where the plaintiff has a special interest in the funds (*Util. Consumers' Action Network v.*
25 *Sprint Solutions, Inc.*, 2008 U.S. Dist. LEXIS 34159);
26 (2) where the plaintiff has relinquished possession of the funds to another for an express
27 purpose and the recipient puts the property to a use different from that for which it was
28 received (*National Bank of New Zealand, Ltd. v. Finn*, 81 Cal.App. 317, 345-7 (1927);
and,

1 (3) where a fiduciary relationship exists:

2 (a) because the recipient of the funds is “bound to return to the owner the identical
3 money” (*Watson v. Stockton Morris Plan Co.*, 34 Cal.App.2d 393, 403 (1939) or

4 (b) in an agency relationship where the agent has “knowledge of another’s right to
5 receive a specific amount of money” but applies that money “for his own use”
6 (*Fischer v. Machado*, 50 Cal.App. 4th 1069, 1072-4 (1996).

7 It will be a factual issue as to whether Plaintiffs had a “special interest” in their Exchange Funds
8 which triggers the first exception, which factual issue cannot be resolved on a motion to dismiss. The
9 fact that LES did in fact use Plaintiffs’ Exchange Funds for a purpose other than completing their own
10 exchanges, i.e. Plaintiffs’ Exchange Funds were used by LES and Evans to perpetuate a Ponzi scheme,
11 triggers the second exception. Here, even if the Court were to find that the funds were not held in a
12 trust, Defendant Evans cannot dispute that all of the elements of an agency relationship are met as
13 described above, which triggers the third exception. For the reasons set forth in this Opposition, whether
14 there was in fact an agency relationship is a factual issue that cannot be resolved on a motion to dismiss.

15 **V. DEFENDANT EVANS’ CONTACT WITH CALIFORNIA WARRANTS THE EXERCISE
16 OF PERSONAL JURISDICTION.**

17 To overcome a motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a
18 prima facie showing that personal jurisdiction exists as to the defendant challenging jurisdiction. *Data
19 Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). To make a prima
20 facie showing, the plaintiff needs only to demonstrate facts that if true would support jurisdiction over
21 the defendant. *Data Disc*, supra at 1285. Uncontroverted allegations in the complaint are deemed true.
22 *WNS, Inc. v. Farron*, 884 F.2d 200, 204 (5th Cir. 1989).

23 As the United States Supreme Court has recognized, a federal district court may exercise
24 personal jurisdiction to the same extent as a state court of the state in which the district court sits. *Omni
25 Capital Int’l Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 108 (1987). Since California courts extend
26 jurisdiction to the very limits of the federal Constitution, federal courts in California need only
27 determine whether the exercise of jurisdiction would comport with due process. See *Haisten v. Grass
28 Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986) Constitutional due
process concerns are satisfied when a nonresident defendant has “certain minimum contacts with the

1 forum such that the maintenance of the suit does not offend traditional notions of fair play and
2 substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

3 As a result, the Ninth Circuit has held that California’s long-arm statute may, consistent with
4 constitutional due process, allow assertion of personal jurisdiction over owners and officers of a
5 corporation if a court finds those officers to have sufficient minimum contacts with the forum state. See
6 *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 522 (9th Cir. 1989).

7 **A. Plaintiffs’ Complaint Satisfies the Test for Exercise of General Jurisdiction**

8 General jurisdiction over a nonresident defendant is found if a nonresident defendant's activities
9 in the forum are substantial, continuous and systematic. *Ado Finance, AG v. McDonnell Douglas Corp.*,
10 931 F. Supp. 711, 714-715 (D. Cal. 1996). Plaintiffs’ complaint has alleged:

11 LandAmerica 1031 Exchange Services, Inc. (“LES”) marketed to and did business with
12 Californians (including Plaintiff Angela M. Arthur as Trustee of the Arthur Declaration of Trust, dated
13 December 29, 1988) related to providing qualified intermediary services for California residents
14 engaging in the process of real estate exchanges pursuant to IRS Code §1031. (Complaint ¶ 3, 4.)

15 LES also maintained an internet website accessible to Californians in which LES described,
16 promoted and marketed its 1031 exchange services. (Complaint, Ex. 3.)

17 Evans was an officer and director of LES who directed the affairs of LES. (Complaint ¶ 10, 63.)
18 Evans filed both an original and second Affidavit in the LES bankruptcy proceedings.¹⁰ In his original
19 Affidavit, Evans admits that he is the Chief Financial Officer of LFG and Vice President of LES. In the
20 second Affidavit, Evans admits in ¶ 1 that he also is the president and chief financial officer of
21 LandAmerica Title Company, and has been a director of that company since 2007. In ¶ 7 of the second
22 Affidavit, Evans admits that LandAmerica Title was a licensed by the State of California Department of
23 Insurance, which provided escrow and other related products and survives to buyers and sellers of
24 residential and commercial properties in Southern California. One of the “related services” which were

25 _____
26 ¹⁰ *In Re: LandAmerica Financial Group*, U.S. Bankruptcy Court, Eastern District of Virginia, Case No.
27 08-35994, Document No. 12, dated November 26, 2008 (RJN, Ex. 8); *In Re: LandAmerica Title*, U.S.
28 Bankruptcy Court, Eastern District of Virginia, Case No. 09-31943, Document No. 4, dated March 27,
2009 (RJN, Ex. 9).

1 provided by LES in California was to serve as a qualified intermediary pursuant to IRC §1031. As
2 established by Exhibit “16” to the Declaration of Robert Brace dated June 8, 2009 filed in support of the
3 Opposition of SunTrust’s 12(b)(6) Motion, there are 94 residents of California who had Exchange
4 Agreements with LES at the date LES filed for bankruptcy protection.

5 Deposition testimony from three LES and LGF employees, Stephen Connor, Ronald Ramos and
6 Devon Jones confirm that Evans was deeply involved in the development and implementation of the
7 Ponzi scheme at LES.¹¹ Ramos was in charge of cash management and investment management for LES
8 and he answered to Evans. (Ramos Depo., p. 13, Foley Decl., Ex. B.) Connor was a Senior VP of both
9 LGF and LES. (Connor Depo., p. 9, Foley Decl., Ex. A) Jones was Assistant for LFG who was
10 responsible for cash management of LES. (Jones Depo., p. 15, Foley Decl., Ex. C.)

11 Ramos informed Evans of the “freeze” of LES ARS investments in February of 2008, and
12 thereafter kept Evans posted on the status of LES investments. (Ramos Depo., pp. 20, 144-145, Foley
13 Decl., Ex. B) Evans would have seen an Executive Summary as of June 17, 2008 showing a projected
14 cash shortfall at LES unless there was an increase in new exchangers. (Jones Depo., pp. 152-156, Foley
15 Decl., Ex. C.) Ramos had discussions with Evans involving liquidity problems at LES beginning in
16 August of 2007, and by October they discussed that LES’ continued operations were threatened by the
17 illiquidity problems. (Ramos Depo., pp. 32, 69, Foley Decl., Ex. B.) In response, Evans made the
18 decision in the 3rd and 4th Quarters of 2008 to have LFG transfer funds to LES to make “lulling”
19 payments to close exchanges for which there were not sufficient funds in LES because of the illiquid
20 ARS investments. (Jones Depo., p. 115, Foley Decl., Ex. C). The lulling payments fraudulently
21 concealed LES illiquidity from new exchangers, including the Plaintiffs, who entered into new
22 Exchange Agreements with LES. In October of 2008 Evans participated in discussions about LES
23 increasing illiquidity, and then Evans participated in making the decision to “change” the default policy
24 so that LES would as its “default” position deposit new clients’ funds into the comingled exchange
25 account to obtain funds needed to make continued lulling payments to conceal LES’s illiquidity and

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27 ¹¹ The portions of the depositions of Connor, Ramos and Jones quoted are attached as Exhibits “A”, “B”
28 and “C” respectively to the Declaration of Thomas G. Foley, Jr. dated June 8, 2009 filed in support of
Plaintiffs Opposition.

1 inability to close pending exchanges for which there were insufficient funds. (Ramos Depo., pp. 40-41,
2 Foley Decl., Ex. B; Connor Depo., pp. 57-62, 89-90, Foley Decl., Ex. A.) This testimony establishes
3 Evans's active involvement in LES's breaches of fiduciary duty alleged in the Complaint, which
4 allegations in paragraphs 1-50 of the Complaint are incorporated by reference in the Fourth Cause of
5 Action against Evans, and in paragraph 62 of the Complaint. Plaintiffs allege in paragraph 63 of the
6 Complaint that Evans "caused" LES to breach its fiduciary duties to Plaintiffs, specifically including
7 converting Plaintiffs' Exchange Funds. Corporate employees are liable to third persons injured by their
8 tortuous conduct. *Frances T. v. Village Green Owners Assn.* 42 Cal. 3d 490, 503-505 (1986).

9 These allegations easily meet and exceed the federal courts, including the Ninth Circuit's, test
10 for establishing general jurisdiction. The Ninth Circuit Court in *Ballard v. Savage*, 65 F.3d 1495, 1498
11 (9th Cir. 1995) approved the Third Circuit court's decision in *Provident Nat'l Bank v. California Fed.*
12 *Sav. & Loan*, 819 F.2d 434 (3d Cir. 1987), in which the *Provident National* court found general
13 jurisdiction over a California bank where the only meager connections to forum state, Pennsylvania,
14 were that: (1) .066 percent of its depositors were Pennsylvania residents; (2) .071 percent in outstanding
15 loans were traceable to Pennsylvania residents; (3) it maintained a "zero balance" account with Mellon
16 Bank in Pittsburgh to clear its California checks cashed in Pennsylvania; and (4) it may or may not have
17 purchased mortgages on the open market that were secured by real property in Pennsylvania. This
18 decision, approved by the Ninth Circuit, found those contacts sufficient to meet the substantial,
19 continuous and systematic test so as to impose general jurisdiction.

20 Here, the allegations are that Evans (1) "directed the affairs" of LES, and through it, (2)
21 promoted and marketed LES's services to Californians, and (3) actually conducted business with
22 California residents, including the Arthur Trust and other putative class members, in amounts that
23 exceeded eight figures. This undoubtedly constitutes grounds for exercise of general jurisdiction
24 because the contacts of Defendant Evans, through LES, were substantial, continuous and systematic so
25 as to permit exercise of general jurisdiction over them.

26 **B. Plaintiffs' Complaint Satisfies the Test For Exercise Of Specific Jurisdiction**

27 Even when a nonresident defendant's contacts are not sufficiently systematic and continuous for
28 a court to assert general jurisdiction, specific jurisdiction may apply. The Ninth Circuit uses the

1 following test to evaluate a defendant's contacts for purposes of determining whether specific
2 jurisdiction applies:

- 3 (1) The nonresident defendant must do some act or consummate some transaction with
4 the forum or perform some act by which he purposefully avails himself of the privilege of
5 conducting activities in the forum, thereby invoking the benefits and protections of its
6 laws. (2) The claim must be one which arises out of or results from the defendant's forum-
7 related activities. (3) Exercise of jurisdiction must be reasonable.

8 *Data Disc*, supra, at 1287. LandAmerica Title Company, of which Evans was president, operated as a
9 title company in California with the benefits and protections of the California Insurance Code. As
10 demonstrated below, Defendant Evans' contacts with California, through both LES and LandAmerica
11 Title, are sufficient for the Court to establish personal jurisdiction over him applying specific
12 jurisdiction. Plaintiffs' Complaint alleges:

13 (1) LES marketed to and did business with the Arthur Trust (a resident of California)
14 and entered into a contract with the Arthur Trust in California related to providing qualified
15 intermediary services pursuant to IRS Code §1031. (Complaint, ¶ 3, 4.)

16 (2) LES held money in trust belonging to Californians (including the Arthur Trust and
17 other putative class members) and the willfully breached its fiduciaries duties owed to Plaintiffs
18 and the putative class and converted their 1031 Exchange Funds deposited in trust by LES at
19 SunTrust. (Complaint, ¶ 8, 18-33.)

20 (3) Evans was an officer and director of LES who knowingly participated and aided
21 LES in the violation of its duties owed to Plaintiffs which included: (i) the unauthorized use of
22 Plaintiffs' Exchange Funds; (ii) misrepresenting to Plaintiffs what LES intended to do with their
23 Exchange Funds; (iii) not disclosing to Plaintiffs that their Exchange Funds were at risk because
24 LES was operating a Ponzi scheme; (iv) converting Plaintiffs' Exchange Funds; and (v)
25 embezzling Plaintiffs' Exchange Funds by obtaining said funds under false pretenses with the
26 intent to use in a manner or purpose other than that for which they were entrusted. (Complaint ¶
27 10, 63.)

28 These facts alone are sufficient to exercise specific jurisdiction over Defendant Evans. In *Calder*
v. Jones, the Supreme Court found that a defendants' "status as employees does not somehow insulate
them from jurisdiction." 465 U.S. 783,790 (1984). Using this premise, courts have found that owners
and officers of a corporation have sufficient minimum contacts with a forum state for it to maintain
personal jurisdiction when they purposely direct activities at the forum and cause financial harm to
others. See, e.g., *Davis*, 885 F.2d at 522 (9th Cir. 1989). *Davis* involved a suit by a defrauded buyer of a
defective tax shelter against a corporation, and its shareholders and officers, for fraud and unlawful
securities transactions. *Id.* at 516. The Ninth Circuit found that the forum state properly asserted

1 personal jurisdiction over the corporation’s shareholders and officers because the corporation had
2 purposely directed its activities concerning the defective tax product at individuals in the forum state
3 and because the defendants were owners and officers of the corporation. *Id.* at 522.

4 Like the defendants in *Davis*, this case involves allegations that Defendant Evans purposely
5 directed the activities of LES, at individuals in California, and caused financial harm to them and the
6 putative class. As demonstrated above, Plaintiffs have alleged that Evans purposely directed LES, of
7 which he was an officer, to enter into a Ponzi scheme with the intent to defraud Plaintiff Arthur Trust
8 and other putative class members who reside in California and breach the fiduciary duties owed to them.
9 As such, under *Davis*, Plaintiffs have alleged facts sufficient to make a prima facie showing that
10 Defendant Evans purposefully directed his activities at California, causing harm to the Plaintiffs and,
11 thus, exercise of personal jurisdiction over Defendant Evans is warranted.

12 **C. If the Court Finds That Plaintiffs’ Showing of *Prima Facie* Jurisdiction Is**
13 **Insufficient, Plaintiffs Alternatively Request Leave For Jurisdictional Discovery.**

14 If the Court disagrees that a sufficient showing has been made to invoke jurisdiction, given the
15 highly fact-specific nature of the personal jurisdiction inquiry, this Court is requested to grant leave for
16 Plaintiff to take jurisdictional discovery. Ninth Circuit case law specifies that, where “[f]urther
17 discovery on this issue might well demonstrate facts sufficient to constitute a basis for [personal]
18 jurisdiction,” the court can and should permit jurisdictional discovery before ruling on a defendant’s
19 motion to dismiss for lack of personal jurisdiction. *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198
20 F.R.D. 670, 673 (S.D. Cal. 2001). Courts are afforded a significant amount of leeway in deciding
21 whether parties may conduct discovery relating to jurisdictional issues while a motion to dismiss is
22 pending, and where pertinent facts bearing on the question of jurisdiction are in dispute, discovery
23 should be allowed. *Orchid.* at 672-673.

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1 **VI. CONCLUSION**

2 For the reasons set forth in both this Opposition and in Plaintiffs' Opposition to SunTrust's 12
3 (b)(6) motion, the Court is respectfully requested to deny Defendant Evans motion to dismiss.

4 Dated: June 8, 2009

HOLLISTER & BRACE, PC

FOLEY BEZEK BEHLE & CURTIS

6 By: ____/s_____

7 Thomas G. Foley, Jr.
8 Attorneys for Plaintiffs

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