

Leonard E. Starr, III (VSB # 9203)  
**LEONARD STARR, P.C.**  
P. O. Box 468  
119 West Williamsburg Road  
Sandston, Virginia 23150  
Telephone: (804) 737-5216

James R. Gilreath, SC Bar # 2133  
(Admitted *Pro Hac Vice*)  
William M. Hogan, SC Bar # 65272  
(Admitted *Pro Hac Vice*)  
**THE GILREATH LAW FIRM, P.A.**  
110 Lavinia Avenue (29601)  
Post Office Box 2147  
Greenville, South Carolina 29602  
Telephone: (864) 242-4727

-and-

Robert L. Brace, CBN. 122240  
(Admitted *Pro Hac Vice*)  
Michael P. Denver, CBN. 199279  
(Admitted *Pro Hac Vice*)  
**HOLLISTER & BRACE**  
P.O Box 630  
Santa Barbara, California 93102  
Telephone: (805) 963-6711

Charles W. Whetstone, Jr., SC Bar # 6059  
(Admitted *Pro Hac Vice*)  
Cheryl F. Perkins, SC Bar # 2078  
(Admitted *Pro Hac Vice*)  
**WHETSTONE MYERS PERKINS & YOUNG  
LLC**  
601 Devine Street (29201)  
Post Office Box 8086  
Columbia, South Carolina 29202  
Telephone: (803) 799-9400

*Attorneys for Defendants 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.*

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

In re:  
Land America Financial Group, Inc., et al.,  
  
Debtors.

LAND AMERICA 1031 EXCHANGE  
SERVICES, INC., and LANDAMERICA  
FINANCIAL GROUP, INC.,

Plaintiffs,

vs.

ANGELA M ARTHUR, AS TRUSTEE OF  
THE ARTHUR DECLARATION OF TRUST,

Chapter 11

Case No. 08-35994 (KRH)

Jointly Administered

Adv. Proc. No. 09-3146 (KRH)

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.

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

This adversary proceeding seeks as stated relief a “preliminary injunction” against further prosecution of the pending MDL class action against officers and directors of LES/LFG by injured commingled exchangers. The fact that no permanent injunction was sought is now explained by the contents of the proposed plan of reorganization and accompanying disclosure filed by the Debtors on September 9, 2009, which seeks an impermissible permanent injunction.

The plan of reorganization, if approved, would not only impose a permanent injunction that is unconscionably and illegally broad in scope, but would also mandate that unsecured creditors, including the wronged exchangers, must agree to the injunction of their direct claims against third parties in order to participate in any distribution of their own money under the plan. Given that the ultimate remedy sought by the Debtors is now clear, it is equally clear that this Court should not impose any stay, even a temporary one, in aid of Debtors’ pursuit of a remedy that cannot be sanctioned by any court following the law and precedent of the Fourth Circuit.

Debtors seek to fritter away the single best chance of triggering and actually *recovering* the Directors & Officers insurance (D&O coverage) proceeds, which would be through presenting the claims of the innocent exchangers who are not *in pari delicto* with the Debtors. Without a recovery under the policies, no money comes into the estate, no creditors’ claims are

reduced, and the rationale behind the exculpation clause for the post-petition professionals becomes clear. The temporary stay that is the subject of the pending motion should not issue for the reasons stated in the Defendants' prior objection and because:

- Continuing the MDL action against the officers and directors on behalf of the injured exchange victims promises the best chance that significant proceeds of the D&O policies will have a positive impact on the bankruptcy estates by reducing or eliminating claims;
- Injunctions of direct claims against non-debtors are warranted only in the type of "unusual situations" present in *A. H. Robins Co. vs. Piccinin*, 788 F.2d 994, 999 (4<sup>th</sup> Cir. 1986). See, *In re Southside Lawn & Garden/Suffolk Yard Guard*, 115 B.R. 79, 81 (E.D.Va. 1990) (emphasizing that mere indemnification claims against the debtor were not sufficient to warrant the injunctive relief that the *Robins* court made clear was "quite limited in application").
- This case presents no "unusual situation," within the meaning of *A. H. Robins*<sup>1</sup> because it does not involve "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," nor one "which would automatically result in indemnification liability." Debtors are not truly worried about indemnity claims of the officers and directors as is shown by Debtors' expressed intent to bring their own suits against them and to have the indemnity claims subordinated if found valid.
- The Section 362 stay is for the purpose of providing debtors a respite from protracted litigation.<sup>2</sup> The purpose for which the Debtors herein seek a stay is the exact opposition. The Debtors want to prevent the creditors from pursuing third party litigation in which Debtors have no involvement in favor of pursuing protracted litigation themselves, looking to spend millions of dollars of the cash they otherwise would have available to distribute.
- Debtors' contention that widespread decentralized litigation would result absent a temporary injunction (and the proposed permanent injunction) is disingenuous because litigation has already been consolidated in multi-district proceedings in the District Court in South Carolina.
- In order to present the type of "hardship" to the estate creating the irreparable harm envisioned in *A. H. Robins*,<sup>3</sup> the D&O insurance pool would need to be a

---

<sup>1</sup> *A. H. Robins Co. vs. Piccinin*, 788 F.2d at 999-1000.

<sup>2</sup> *A. H. Robins Co. vs. Piccinin*, 788 F.2d at 998.

<sup>3</sup> *A. H. Robins Co. vs. Piccinin*, 788 F.2d at 1008.

pool to which all LES and/or LFG creditors are entitled. This has not been shown. It is clear that the claims presented by the commingled exchangers in the MDL are strong, meritorious direct claims for direct injuries. On the other hand, while LES and LFG generally assert in the plan that they are investigating their own purported claims against their own officers and directors, the basis of these claims, the damages that would be alleged, and how proof of non-speculative damages might be accomplished is unknown. In order for the Debtors to show that exchange plaintiffs might secure “a preference in the distribution of the insurance pool,” the above matters would have to be addressed to the satisfaction of this Court.

- This Court 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.’ *A. H. Robins*.<sup>4</sup> In this case, the potential harm to the commingled exchangers in having their direct third party claims stayed and then permanently enjoined in favor of the imperfect claims of the Debtors does not provide the required balance.

The question is, what claims do LES/LFG intend to pursue against their own officers and directors? Will they sue their officers and directors for pursuing a Ponzi scheme when they have adamantly denied such a scheme in the Bankruptcy proceeding and in the press? Will they sue their officers and directors for misusing exchange funds when they have contended in this proceeding (successfully) that the funds were owned by LES to do with as it pleased? Will they sue their officers and directors for driving the company into deeper insolvency when they have contended repeatedly in this proceeding and in SEC filings that their deteriorating financial condition was due to the housing crisis, the downturn of the economy, the freeze on the auction rate securities, as well as other matters? Will they sue their officers and directors for wrongdoing in using exchange funds to purchase ARS while at the same time suing SunTrust and CitiGroup for duping the same wrongdoing officers and directors into purchasing ARS? Will LFG sue its officers and directors for wrongfully infusing equity into LES when the purpose was to use the money to make lulling payments to defer the need to file LFG’s bankruptcy.

---

<sup>4</sup> *A. H. Robins Co. vs. Piccinin*, 788 F.2d at 1003.

How will LES/LFG navigate through the conflicting representations and admissions now on record in declarations and memoranda filed in the Bankruptcy proceeding, in SEC filings, in hearing transcripts, and in the 30(b)(6) deposition already taken? How will the LES/LFG claims be impacted by the Exclusion provisions included in their primary D&O policy that allows imputation to the companies of the wrongdoing of the Chief Executive Officer, Chief Financial Officer and General Counsel (to include Michelle Gluck, who has directly acknowledged the fiduciary relationship between LES and its exchangers)?

Ultimately, whether or not this Court issues a stay or a temporary injunction as to the MDL proceedings against the officers and directors, the future viability of the claims will be determined by this Court's adherence to Fourth Circuit precedent regarding permanent injunctions against third party claims. A permanent injunction of the breathtaking breadth that Debtors seek in the plan, accompanied by the punitive consequences against injured exchangers, cannot issue for the following reasons:

- “[A] permanent injunction is a rare thing, indeed, and only upon a showing of exceptional circumstances in which the factors outlined above are present will this Court even entertain the possibility of a permanent injunction.” *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 936 (Bankr. W.D. Mo. 1994).
- “A release, **or permanent injunction**, contained in a confirmed plan, however, has the effect of a judgment -- a judgment against the claimant and in favor of the non-debtor, accomplished without due process. Neither the non-debtor, nor the claimant, have an opportunity to present their claims or defenses to the court for determination by way of an adversary proceeding, which is required under Bankruptcy Rule 7001.” *In re Digital Impact*, 223 B.R. 1, 13 (Bankr. N.D. Okla. 1998) (citations omitted). A permanent injunction prohibiting legal action against a non-debtor is a final adjudication of such anticipated legal action in favor of the non-debtor, and all jurisdictional and due process prerequisites for such a final adjudication must be satisfied. *Id.*
- Unlike other “channeling” injunction cases, and unlike *In re A.H. Robins (Menard-Sanford v. Mabey)*,<sup>5</sup> the proposed injunction is not pursued in a context

---

<sup>5</sup> 800 F.2d 694 (4<sup>th</sup> Cir. 1988).

whereby enjoining third party claims brings significant funds into the bankruptcy estate. There is absolutely no evidence that consideration will pass into the estate as a result of enjoining the direct third party claims of the unsecured creditors.

- Unlike other channeling injunction cases, and unlike *In re A.H. Robins*,<sup>6</sup> unsecured creditors impacted by the proposed injunction are not promised a full recovery from the estate. See, *MAC Panel Co. v. Virginia Panel Corp. (In re MAC Panel Co.)*, 2000 Bankr. LEXIS 1694, \*23 (Bankr. M.D.N.C. Mar. 8, 2000) (“A careful reading of [*Robins*] reflects that perhaps the most important consideration prompting their decision was that the nondebtors who were being enjoined could obtain full payment of their claims under the plan of reorganization.”).
- The “marshalling of assets” doctrine relied on by the *A. H. Robins* Court has no application when there is no promise of full payment from the bankruptcy fund. *In re A.H. Robins Co.*, 880 F.2d at 701.
- The unsecured creditors are not promised any sum certain in the plan because any recovery beyond the initial “Net Cash” distribution, which itself is unquantified, is subject to the significant litigation risks of the LES/LFG claims.<sup>7</sup> These are the claims of complicit wrongdoers which the proposed injunction mandates be pursued *in lieu of* the direct claims of the innocent exchangers.
- A requirement that creditors must accept what is in essence a third party release in order to receive a distribution under a plan cannot be countenanced because such a provision violates the “best interest test” by forcing non-accepting creditors to accept releases in order to obtain that to which they were already statutorily entitled pursuant to §1129(a)(7)(A)(ii). Under this section of the Code, each non-accepting creditor in a plan must get at least as much as it would get in a Chapter 7 case and here a full recovery should be mandated because creditors are forced to give up third party claims that have significant value and the potential to make up the bankruptcy shortfalls. *In re Conseco, Inc.*, 301 B.R. 525 (N.D. Ill. 2003).

---

<sup>6</sup> 800 F.2d at 701.

<sup>7</sup> The perils of assuming the litigation risks of the LES/LFG claims, while precluding the true victims’ direct claims, is made glaringly clear by the recent order issued by the Southern District of New York dismissing ARS claims made against Citigroup on virtually the same theories as those proposed in the plan. *In re Citigroup Auction Rate Secs. Litig.*, No. 08 Civ. 3095, 2009 U.S. Dist. LEXIS 83046 (S.D.N.Y. Sept. 11, 2009). The fact that the ARS litigation is the centerpiece of the proposed plan’s litigation strategy should give the creditors and this Court pause.

**CONCLUSION**

The purpose of bankruptcy is to pay creditors in an equitable fashion. That purpose is not served by eliminating viable direct causes of action which exist in favor of certain categories of creditors. The successful prosecution of such direct actions will benefit the estate by reducing the claims in bankruptcy filed by these creditors. In conclusion, for the reasons stated above, the above Debtors' Motion for a Stay should be denied.

Respectfully submitted,

Dated: September 15, 2009

/s/ James R. Gilreath  
James R. Gilreath, SC Bar No. 2133  
(Admitted *Pro Hac Vice*)  
William M. Hogan, SC Bar No. 65272  
(Admitted *Pro Hac Vice*)  
**THE GILREATH LAW FIRM, P.A.**  
110 Lavinia Avenue (29601)  
Post Office Box 2147  
Greenville, South Carolina 29602  
(864) 242-4727 Telephone  
(864) 232-4395 Facsimile  
[jim@gilreathlaw.com](mailto:jim@gilreathlaw.com)  
[bhogan@gilreathlaw.com](mailto:bhogan@gilreathlaw.com)

Leonard E. Starr, III (VSB # 9203)  
**LEONARD STARR, P.C.**  
P. O. Box 468  
119 West Williamsburg Road  
Sandston, Virginia 23150  
Telephone: (804) 737-5216  
Fax: (804) 737-8115  
[Lstarr@Starr-Law.com](mailto:Lstarr@Starr-Law.com)

-and-

Robert L. Brace, CBN. 122240  
(Admitted *Pro Hac Vice*)  
Michael P. Denver, CBN.199279  
(Admitted *Pro Hac Vice*)

**HOLLISTER & BRACE**

P.O Box 630  
Santa Barbara, California 93102  
(805) 963-6711 Telephone  
(805) 965-0329 Facsimile  
[rbrace@hbsb.com](mailto:rbrace@hbsb.com)  
[mpdenver@hbsb.com](mailto:mpdenver@hbsb.com)

Cheryl F. Perkins, SC Bar No. 2078  
(Admitted *Pro Hac Vice*)  
Charles W. Whetstone, Jr., SC Bar No. 6059  
(Admitted *Pro Hac Vice*)

**WHETSTONE MYERS PERKINS & YOUNG LLC**

601 Devine Street (29201)  
Post Office Box 8086  
Columbia, South Carolina 29202  
(803) 799-9400 Telephone  
(803) 799-2017 Facsimile  
[cwhetstone@attorneyssc.com](mailto:cwhetstone@attorneyssc.com)  
[cperkins@attorneyssc.com](mailto:cperkins@attorneyssc.com)

*Attorneys for Defendants 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.*

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and exact copy of the **SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEBTORS' MOTION FOR A PRELIMINARY INJUNCTION STAYING THE PROSECUTION OF CERTAIN NON-BANKRUPTCY COURT PROCEEDINGS PURSUANT TO §§362(a) AND 105(a) OF THE BANKRUPTCY CODE AND 28 U.S.C. §1334** was served by operation of the Court's electronic filing system to all parties entitled to receive electronic notice in this adversary proceeding on September 15, 2009 and by first class mail and facsimile to the following parties on September 15, 2009:

Terence K. McLaughlin  
WILLKIE FARR & GALLAGHER LLP  
787 Seventh Avenue  
New York, New York 10019  
Fax: (212) 728-8111

Dion W. Hayes  
John H. Maddock, III  
Richard F. Blair  
MCGUIREWOODS LLP  
One James Center  
901 East Cary Street  
Richmond, Virginia 23219  
Fax: (804) 775-1061

/s/ James R. Gilreath .