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

In re	:	Chapter 11
	:	
LandAmerica Financial Group, Inc., et al.	:	Case No. 08-35994 (KRH)
	:	
Debtors.	:	Jointly Administered

DEBTOR'S OMNIBUS RESPONSE TO OBJECTIONS TO DEBTOR'S MOTION FOR ORDER: (A) SCHEDULING EXPEDITED SALE HEARING TO CONSIDER APPROVAL OF SALE OF DEBTOR'S STOCK IN CERTAIN UNDERWRITING SUBSIDIARIES; (B) APPROVING RELATED STOCK PURCHASE AGREEMENT; (C) APPROVING FORM AND MANNER OF NOTICE OF SALE HEARING; AND (D) GRANTING RELATED RELIEF

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

LandAmerica Financial Group, Inc., the above-captioned debtor and debtor in possession ("**LFG**" or the "**Debtor**"), hereby submits this omnibus response (the "**Response**")

to the objections (collectively, the "**Objections**") filed by (i) the Official Committee of Unsecured Creditors of LFG (the "**LFG Committee**"), (ii) System Efficiency, (iii) Pearson Realty, (iv) Eastern Sierra Mobile Notary Service, (v) Covenant Title Services, Inc., (vi) The Kyoungae Kim Trust, (vii) Beau Street Associates, Limited Partnership, (viii) Stewart Information Services Corporation ("**Stewart**"), (ix) the Official Committee for 1031 Exchanges Services, Inc. (the "**LES Committee**"), (x) Old Republic International Corporation ("**Old Republic**"), (xi) SunTrust Bank, (xii) Roland Arthur, (xiii) Smart Title Solutions LLC, (xiv) RamQuest Software, (xv) Rosemary Bryant, and (xvi) Frontier Pepper's Ferry, LLC (collectively, the "**Objectors**") to the Debtor's Motion for order, pursuant to sections 105(a) and 363 of title 11 of the United States Code (the "**Bankruptcy Code**"), (a) scheduling an expedited hearing (the "**Sale Hearing**") to consider approval of the sale (the "**Sale**") of LFG's stock in Commonwealth Land Title Insurance Company ("**Commonwealth NE**") and Lawyers Title Insurance Corporation ("**Lawyers Title**," and, collectively with Commonwealth NE, the "**Underwriters**") to Fidelity National Title Insurance Company and Chicago Title Insurance Company (collectively, the "**Buyers**"), (b) approving the related stock purchase agreement (the "**SPA**"), (c) approving the form and manner of notice of the Sale and Sale Hearing, and (d) granting related relief (the "**Sale Motion**"). Responses to the Objections, to the extent not addressed herein, are set forth on Exhibit A annexed hereto. Furthermore, in support of the Sale Motion, the Debtor has submitted the declarations of Theodore L. Chandler, Jr. (the "**Chandler Declaration**") and G. William Evans (the "**Evans Declaration**"). The Chandler Declaration and the Evans Declaration are being filed contemporaneously. In support of the Response, the Debtor respectfully represents as follows:

<u>PRELIMINARY STATEMENT</u>

1. The Debtor does not have a choice. The Debtor must do everything within its control to sell the stock of its underwriting subsidiaries to the Buyers without delay. Several parties have questioned this premise and asked whether, if given the time, the Debtor could sell its principal assets to another party for more value. The answer to this question is no. There is no more value to be had. There is no more time.

2. The Debtor has been actively pursuing various strategic alternatives since September with the help of a qualified investment banker and other sophisticated advisors. While many parties expressed no interest in pursuing a transaction (at a time when the Debtor's assets were worth more than they are today), several signed non-disclosure agreements and conducted due diligence. Other than the Buyers, no meaningful offers emerged.

3. What has emerged are Form A applications (one from Old Republic and one from Stewart) to the Nebraska Department of Insurance ("**<u>NEDOI</u>**"). By their express terms, these applications (only the Stewart Form A application remains pending, as Old Republic withdrew its application on December 10, 2008) contemplate transactions that would provide the Debtor with significantly less consideration. Indeed, the Stewart application outlines consideration which is over $100 million dollars less than what has been proposed to be paid to the Debtor's estate by the Buyers.

4. Other than the submission of its Form A, Stewart has been extremely passive in pursuing a transaction with the Debtor. In fact, despite the fact that Stewart began conducting due diligence on the Debtor's assets in early October, the Debtor did not receive any proposed agreement reflecting the Stewart proposal until 9:08 p.m. on Sunday, December 14, 2008 (which the Debtor received from NEDOI and <u>not</u> Stewart).

5. The Debtor is at a complete loss as to why Stewart did not send it a draft agreement earlier, effectively making it impossible for the Court to consider it at the December 16, 2008 hearing, other than Stewart's gamesmanship to attempt to have the Sale Hearing adjourned and effectively kill the Revised SPA (which requires a closing by December 22, 2008). This Court should not countenance such a result, particularly one that results in more than $100 million dollars of less consideration to this estate, should refuse to consider any Stewart proposal, and should approve the Revised SPA at the Sale Hearing. The Debtor's business simply cannot afford the further delay that necessarily would be attendant to an adjournment of the hearing to provide appropriate notice of the Stewart proposal and the expiration of applicable HSR waiting periods.[1]

6. Although the "Fidelity deal" has been formally amended twice since it was originally announced on November 6, 2008 and there is less consideration available today than there was a month ago, it is still the best and only viable offer the Debtor has. The business has deteriorated postpetition, and if the Revised SPA (as defined below) is not consummated by December 22, 2008, the Debtors are unlikely to have any remaining underwriting assets of value left to sell.

7. The Revised SPA is subject to three conditions; it must be authorized by this Court, the Federal Trade Commission ("**FTC**") and NEDOI. As the Court is well aware, it must consider whether the Revised SPA is supported by the Debtor's sound business judgment

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[1] The waiting period for review of the Revised SPA with the Buyers under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "**HSR Act**") is set to expire at midnight on December 18, 2008. Absent a second request for information from the FTC prior to that time, the transaction contemplated by the Revised SPA could be consummated as soon as the other conditions to close were satisfied. To LFG's knowledge, Stewart has not taken the steps needed to make a filing under the HSR Act or even presented a draft filing to demonstrate its ability to move forward on an expedited basis. While a Stewart representative testified during the Form A hearing process held earlier today that Stewart had filed for early HSR termination, no such filing has been shared with or disclosed to LFG.

and whether it is designed to maximize the value of the estate. But for the other regulatory approvals that are required, the Debtor's burden in this regard would be relatively simple to establish. The assets were extensively marketed and the Revised SPA provides at least $100 million more in value to the estate than any other offer that has even been suggested.

8. According to NEDOI, it must consider how best to protect policyholders. Since an Order of Rehabilitation was entered on November 26, 2008, NEDOI has been working to decide whether the Underwriters should be sold as a going concern or whether, for the protection of policyholders, the Underwriters must cease operations and go into runoff mode. This decision is in NEDOI's sole discretion. Ms. Ann M. Frohman, the Director of NEDOI, has given indications to the LFG Committee (members and counsel) and the Debtor that because of the Underwriters' precarious economic situation, the next step would be for NEDOI to direct the Underwriters to stop writing new business and go into runoff. As only one transaction has been documented, filed and served, only one transaction can be approved by this Court on that timetable – Fidelity.

9. Notwithstanding this fact, the Debtor understands that NEDOI has approved the transactions proposed by the Buyers <u>and</u> Stewart. This approval, however, does not preclude NEDOI from exercising its power to put the Underwriters into runoff in the event that neither of these transactions is consummated in the near term. If the Underwriters are put into runoff, the Debtor is unlikely to realize any value for its underwriting subsidiaries.

10. Lastly, the FTC must review any proposed transaction. The goal of the FTC's review is to determine whether the proposed transaction may substantially reduce competition. On information and belief, the FTC needs to decide whether it prefers that the Underwriters be acquired by a competitor over allowing the assets to exit the market as a result

of a runoff. If the FTC prefers an acquisition by a competitor over runoff, then it needs to consider whether Stewart is a real and meaningful alternative to Fidelity that avoids runoff. If so, then the FTC also needs to determine whether it is indifferent as between Fidelity and Stewart or whether it favors one over the other. Accordingly, if a real and meaningful alternative is believed to exist, the FTC may issue a second request for information and/or fail to approve of the transaction embodied by the Revised SPA. As the Revised SPA may be terminated if not closed by December 22, 2008, this would be a distinction without a difference.

11. If, as the Debtor believes, however, a meaningful alternative does not exist, the FTC may allow the HSR waiting period to expire or terminate the HSR waiting period, which would permit the parties to close on the Revised SPA in time to avoid a runoff scenario. Only with the prompt expiration or termination of the HSR waiting period and the approval of this Court can the value of the Debtor's estate be maximized.

12. In the last week much has happened. Fidelity has notified the Debtor that it would no longer reinsure the Underwriters' policies as of December 28, 2008,[2] lenders have refused to accept the Underwriters' paper, and customers and employees have advised the Debtor's management that they would depart if certainty could not be guaranteed within days. Notably, one other thing has happened, the creditors whose recoveries are at risk have joined in supporting a transaction to the Buyers on an expedited timetable. They, like the Debtor, realize that no other party can consummate a meaningful transaction in time.

[2] Until today (when a representative of Stewart testified at a hearing before NEDOI that reinsurance might be made available), Stewart had repeatedly denied the Debtor's request for reinsurance arrangements. Absent this type of support, upon the termination of Fidelity's reinsurance arrangements, the Debtor anticipates a precipitous drop in lenders willing to accept the Underwriters' policies. This, among other factors, leads the Debtor to suspect that Stewart may not really seek to acquire the Underwriters and instead, merely seeks to be a spoiler for the Buyers.

STEWART'S PROPOSAL IS NOT A MEANINGFUL ALTERNATIVE

13. Even if the Debtor had an unlimited amount of time to close a transaction, the draft stock purchase agreement submitted by Stewart (the "**Draft Stewart SPA**") could not be consummated. The Draft Stewart SPA contains the following fatal defects:

i. **No Due Process**. Creditors have not been given notice of the **substantially reduced** (indeed, non-existent, as explained below) consideration proposed to be paid for the stock in the Underwriters. Under the Revised SPA with Fidelity, LFG will receive the following consideration: (a) approximately $182 million in cash, (b) a $50 million, five year note, (c) $50 million of common stock of the Buyers' parent, (d) in the event United Capital Title Insurance Company ("**United Capital**") is sold, cash in an amount equal to its statutory surplus as of the closing (estimated to be approximately $16 million as of September 30, 2008), and (e) the Buyers will assume approximately $35 million in employee obligations. In contrast, under the Draft Stewart SPA, LFG will "receive" only (a) $5 million in cash, (b) a $10 million, five year note, (c) $41 million of common stock of Stewart's parent, and (d) the "option" to purchase $88 million in face amount of auction rate securities from the Underwriters for $44 million in cash.

ii. **The Cash Balance Plan True-Up**. The Draft Stewart SPA, like the Revised SPA, provides that, in the event that the LandAmerica Cash Balance Plan is underfunded as of the closing, then LFG shall contribute to the plan from the net proceeds of the sale an amount equal to the underfunding. Mercer, Inc., on behalf of LFG, estimates that the amount of the underfunding obligation totals approximately $59 million as of October 31, 2008. The consideration proposed by Stewart is not sufficient to satisfy this requirement. In essence, assuming LFG otherwise had the cash necessary to fill the gap, LFG would be funding a portion of Stewart's proposed purchase and the bankruptcy estate would receive no consideration for the sale.

iii. **December 31, 2008 Closing Deadline**. The Draft Stewart SPA contains a closing deadline of December 31, 2008. Given that no notice has been given to creditors and, to LFG's knowledge, no HSR filing has been made by Stewart,[3] it is extremely unlikely -- indeed, likely impossible -- that a sale to Stewart could be noticed and consummated within this time-frame. Moreover, NEDOI previously informed the Debtor that it requires this Court's approval of any transaction on December 16, 2008.

iv. **Conditionality**. Try as Stewart might to lead this Court, NEDOI, the FTC and other parties in interest to the conclusion that it is ready, willing and able to close

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[3] A Stewart representative testified during the Form A hearing process held earlier today that Stewart had filed for early HSR termination. No such filing has been shared with or disclosed to LFG.

a transaction on the terms and within the timeframe it proposes, there simply is no binding agreement with Stewart. All the Debtor has is an email forwarded to it by NEDOI that contains **draft** agreements. Indeed, the email forwarded notes that Stewart has not even reviewed the related disclosure schedules, nor discussed them with the Debtor, and thus sets forth that there may be "some adjustments" once Stewart reviews them. Interestingly, no request was made of the Debtor to forward to Stewart the disclosure schedules until Stewart's counsel made such a request at 9:28 a.m. this morning. LFG produced the schedules within an hour of this request.

v. **Inability to Timely Deliver Southland and OneStop**. The Draft Stewart SPA requires the Debtor to transfer at the closing the assets of LandAmerica OneStop, Inc. ("**OneStop**") and Southland Title Corporation ("**Southland**"). While the Revised SPA with the Buyers contemplates the *potential* sale of these assets for *additional consideration*, the Revised SPA also contemplates the Debtor seeking further Bankruptcy Court approval for any sale of these assets. The Debtor therefore has provided no notice of the proposed sale of Southland and OneStop, and will not be able to sell them to Stewart without further notice and an opportunity to be heard.

14. In addition to those provisions that make it impossible for a transaction with Stewart to close, the Draft Stewart SPA leaves unanswered a host of additional issues and questions. For example:

i. **The ARS Option**. The Draft Stewart SPA contemplates as part of its purchase price the option for LFG to purchase $88 million in face amount of auction rate securities for $44 million. Where is LFG going to find $44 million for such a purchase (certainly not from the paltry $5 million in cash consideration proposed by Stewart)? And why would a liquidating chapter 11 debtor seek to purchase tens of millions of dollars of highly illiquid securities? This is consideration for a sale? It is not; indeed, it is nonsensical for Stewart to even have proposed it.

ii. **The Stewart Shares**. The Draft Stewart SPA also contemplates as part of its purchase price LFG's receipt of $41 million in *restricted* shares in Stewart's parent. Unlike the Revised SPA, however, there is no shelf registration to facilitate the sale and resale of these securities. Moreover, the Draft Stewart SPA provides for the deposit of these securities in an escrow. But no draft of an escrow agreement has been provided to evaluate when, or if, these securities ever will be available to LFG.

Based on these and other provisions, the Draft Stewart SPA simply is unworkable.

BACKGROUND

15. On November 26, 2008 (the "**Petition Date**"), LFG and its subsidiary,

LandAmerica 1031 Exchange Services, Inc. ("**LES**"), filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. LFG intends to continue in the possession of its properties and the management of its businesses pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Debtor's case. On December 3, 2008, the United States Trustee for the Eastern District of Virginia appointed the LFG Committee and the LES Committee.

A. Corporate Structure and Operations

16. LFG is a holding company that operates through its various regulated and unregulated subsidiaries (collectively, the "**Company**"). The Company's products and services facilitate the purchase, sale, transfer and financing of residential and commercial real estate. The Company has a broad-based customer group, which includes residential and commercial buyers and sellers, real estate agents and brokers, developers, attorneys, mortgage brokers and lenders, and title insurance agents. The Company operates through hundreds of offices and a network of thousands of active agents throughout the United States and also conducts business in Mexico, Canada, the Caribbean, Latin America, Europe, and Asia.

17. As of the Petition Date, the Company was the third largest title insurance underwriter in the United States. The Company issues title insurance policies primarily through the Underwriters. LFG also owns two other title insurance underwriters: Commonwealth Land Title Insurance Company of New Jersey ("**Commonwealth NJ**"); and United Capital. Finally, LFG also owns the stock of Southland, a California underwritten subsidiary. LFG's title insurance subsidiaries represent approximately 85% to 90% of the Company's annual revenue. See Chandler Declaration at ¶ 5; Evans Declaration at ¶ 3.

18. LFG's title insurance subsidiaries are subject to regulation by the

insurance authorities and enforcement of laws by other governmental authorities of the states in which they do business. State regulatory authorities impose underwriting limits on title insurers based primarily on levels of available reserves, capital and surplus. See Chandler Declaration at ¶ 6.

19. The title insurance business is closely related to the overall level of residential and commercial real estate activity, which generally is affected by the relative strength or weakness of the United States economy. In addition, title insurance volumes fluctuate based on changes in interest rates and the availability of mortgage financing. Periods of increasing interest rates and reduced mortgage financing availability usually have a downward effect on residential real estate activity. Commercial real estate volumes are less sensitive to changes in interest rates, but fluctuate based on local supply and demand conditions for space and mortgage financing availability. Conversely, title insurance claims tend to rise during periods of economic weakness. See Chandler Declaration at ¶ 7.

B. Events Leading to Chapter 11

20. As has been widely reported in the press, there has been a significant decline in mortgage financing in 2007 and 2008, which has adversely affected the Company's primary business activities and liquidity. Residential mortgage originations in the United States have declined markedly since 2006 and most industry commentators have predicted they are likely to continue to decline into next year. Housing values also have shown an unprecedented decline and the number of residential mortgages in foreclosure has reached record rates. These stresses in the real estate markets have reduced the Company's revenues since the fourth quarter of 2006. In addition, claims against the Company's title insurance policies have risen precipitously since 2006. See Affidavit of G. William Evans, sworn to on November 26, 2008

[Docket No. 12].

C. <u>Exploration of Strategic Alternatives</u>

21. In July 2008, the Debtor's Board of Directors (the "**<u>Board</u>**") retained JPMorgan Chase, Inc. ("**<u>JPMorgan</u>**") to assist the Company in exploring a transaction in the equity, debt, or convertible capital markets to assist the Company in addressing the growing strain on its financial well being. Chandler Declaration ¶ 10. The Company, with the guidance and advice of JPMorgan, eagerly explored a variety of liquidity solutions up through the time of LFG's chapter 11 filing, prevailing conditions in the marketplace dramatically limited the Company's ability to pursue any options other than a possible sale to, or combination with, a strategic partner. See Chandler Declaration at ¶ 10.

22. As described herein and in the Chandler Declaration, over the remainder of 2008, the Company executed a thorough and exhaustive process to explore strategic alternatives to address declining finances. That process, which culminated in the transaction with the Buyers that is currently before the Court, entailed numerous meetings of the Board and the Special Committee of the Board established to oversee the marketing process (the "**<u>Special Committee</u>**"). By way of example, during the two-month period from September 26 through November 26, 2008, there were approximately fourteen meetings and/or working sessions of the Board and approximately twenty-four meetings and/or working sessions of the Special Committee. Frequently during this time period, either or both of those governance bodies met multiple times. The marketing process also entailed countless hours of dedication by the Company's management and its professional advisors to explore all reasonable prospects for the Company. <u>See</u> Chandler Declaration at ¶ 12.

23. In recognition of significant deterioration in market conditions and resulting increased financial pressures on the Company, in early September 2008, at the direction of the Board and with advice from JPMorgan, the Company's management initiated discussions with Old Republic regarding a possible strategic combination between the two companies. These discussions did not mature into any serious or credible expression of interest by Old Republic and, at that time, did not progress even to the due diligence stage. See Chandler Declaration at ¶ 14.

24. Toward the end of September, at the direction of the Board and with advice from JPMorgan, management initiated discussions with one of the Company's major shareholders ("**Strategic Partner A**") regarding a possible sale, combination, or equity investment. Management identified Strategic Partner A as a possible strategic partner because of the existing shareholder relationship and because it had obtained regulatory clearance to increase its equity stake in the Company. Discussions between the Company and Strategic Partner A continued into October, during which time Strategic Partner A continued its due diligence. See Chandler Declaration at ¶ 15, 17.

25. Shortly after the Company initiated discussions with Strategic Partner A, the Company took two actions to ensure it was appropriately pursuing strategic alternatives. First, at a special Board meeting convened on September 26, 2008, the Board resolved to create the Special Committee and charged it with the evaluation of a possible transaction with Strategic Partner A as well as the exploration of other strategic alternatives. Second, at a meeting of the Special Committee that same day, the Special Committee retained the law firm of Wachtell, Lipton, Rosen & Katz to serve as Company counsel in connection with any strategic transaction

and formally appointed JPMorgan as investment banker to assist the Special Committee in meeting its mandate. See Chandler Declaration at ¶ 16.

26. At the recommendation of JPMorgan, in order to engender a competitive auction process, in early October, the Company authorized and directed JPMorgan to initiate contact with Stewart regarding a possible transaction with the Company. Stewart, which is based out of Houston, Texas, is the fourth largest title insurance company. Discussions with Strategic Partner A continued simultaneously. See Chandler Declaration at ¶ 18. By the middle of October, however, Strategic Partner A made clear that it had no serious interest in acquiring or merging with the Company and that its interest was limited to providing capital or liquidity to the Company. See Chandler Declaration at ¶ 19. Meanwhile, at that same time, discussions and due diligence continued between the Company and Stewart with substantial investment in time and resources by each company in the process. See Chandler Declaration at ¶ 20.

27. By late October 2008, as discussions with Stewart continued, management, the Board and the various professional advisors began to be concerned that Stewart was moving too slowly and was unlikely to provide a liquidity solution for the Company. The Company and its advisors concluded that the Company did not have the luxury of proceeding on the timetable that Stewart appeared to be contemplating. See Chandler Declaration at ¶ 21.

28. Accordingly, in an effort to broaden the Company's search for a possible strategic partner, in late October, the Company directed JPMorgan to initiate contact with the Buyers and another major insurance company ("**Strategic Partner B**") and further authorized JPMorgan to initiate contact with other insurance companies for whom a combination with the Company might have certain synergies as well as possible private equity investors. Unfortunately, with the exception of Strategic Partner B, Stewart and the Buyers, JPMorgan's

efforts did not produce any credible transactions or serious interest. Moreover, Strategic Partner B later made clear that it was not prepared to aggressively explore any possible transaction with the Company. See Chandler Declaration at ¶¶ 22-23.

29. In late October, Buyers, and in early November, Stewart, indicated their interest in pursuing a transaction with the Company. Stewart's interest was communicated in the form of a non-binding Letter of Intent calling for the parties to enter into an exclusivity period to further discuss a transaction. The Stewart Letter of Intent was highly conditional in that it provided for several significant closing conditions. First, the closing of any transaction between Stewart and the Company would be conditioned on Stewart's ability to consummate a $175 million equity offering. Second, the Letter of Intent made the closing of a transaction between Stewart and the Company contingent on Stewart's ability to secure a $250 million bank credit facility for the combined LFG-Stewart entity that would be formed as a result of the transaction. And finally, the proposal was conditioned on regulatory approval to swap $100 million in value of auction rate securities ("**ARS**") from LES for $100 million of liquid assets held by the Underwriters. See Chandler Declaration at ¶ 24.

30. These closing conditions and other terms indicated to the Company and its advisors that Stewart did not have the financial resources to consummate a transaction with the Company. Rather, Stewart needed to raise equity and obtain financing (each in a very challenging market environment) before it could be in a position to close on a transaction with the Company. See Chandler Declaration at ¶ 25.

31. In early November, the Buyers communicated their proposal by offering $128 million in common stock of Fidelity National Financial ("**FNF**"), the Buyers' ultimate corporate parent. Unlike the Stewart proposal, the Buyers' proposal did not contain financing

conditions. It was the assessment of the Company and its advisors that the Buyers had both the existing wherewithal and the desire to expeditiously consummate a transaction with the Company. For that reason, the Company and its advisors determined that the Buyers' proposal was superior to the Stewart Letter of Intent and the Board opted, in its judgment, to pursue the former rather than the latter. See Chandler Declaration at ¶ 26.

32. At all times during the ongoing negotiations between the Buyers and Stewart, the Company was also in regular communication with NEDOI to ensure that any transaction the Company might pursue would be acceptable to NEDOI. See Chandler Declaration at ¶ 27.

D. The Prior Merger Transaction

33. On November 6, 2008, the Company executed a merger agreement with the Buyers (the "**Prior Merger Agreement**"). Under the terms of the Prior Merger Agreement: (a) the Buyers would acquire the Company as a whole, including all of its assets and all of the associated liabilities, in exchange for 0.993 shares of FNF common stock for each share of the Company's stock issued and outstanding at the close of the merger; (b) FNF would provide the Company with a $30 million line of credit; and (c) NEDOI would consent to a swap of $60 million in liquid assets from the statutory surplus of the Underwriter Companies in exchange for approximately $75 million (par value) in ARS of LES. See Chandler Declaration at ¶ 28.

34. The Prior Merger Agreement provided for a two-week diligence and exclusivity period during which the Company was restrained from undertaking any negotiations with other potential suitors. During the week of November 17, 2008, as the Buyers' two-week diligence period was drawing to a close, NEDOI advised the Company that NEDOI would proceed expeditiously with either administrative supervision or rehabilitation of the Underwriters

if the Company's financial condition worsened or the Prior Merger Agreement was terminated. On November 21, 2008, however, FNF exercised a "diligence out" and terminated the Prior Merger Agreement in accordance with its terms. Among other reasons, FNF terminated the Prior Merger Agreement because of (a) its discomfort with the future prospects for the real estate market in general;[4] (b) its doubts as to the Company's ability to sell Centennial Bank; (c) concerns about the current realizable value of the ARS owned by the Company; and (d) its increasing discomfort with LFG's debt level. See Chandler Declaration at ¶¶ 29-32.

35. After the termination of the Prior Merger Agreement, LFG began active negotiations with the Buyers to determine if an alternative agreement could be reached that would be satisfactory to both parties. The Company also solicited interest from Stewart given its earlier expressed interest. At that time, however, Stewart was unable to raise the funds necessary to consummate a transaction on the timetable necessitated by the Company's financial situation. The Company nevertheless remained receptive at all times to any credible offer from Stewart or any other counterparty both prior to and after the execution of the SPA. See Chandler Declaration at ¶¶ 35-36.

36. On Monday, November 24, 2008, NEDOI filed a petition with the Court of Lancaster County, Nebraska to place the Underwriters in rehabilitation, which petition was sustained. See Chandler Declaration at ¶ 37.

E. The Stock Purchase Agreement

37. Despite the fragile and complicated negotiations (given the overlay of regulatory oversight), the parties ultimately were successful in reaching an agreement on the

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[4] Notably, the period from November 7 to November 21, 2008 was among the most volatile financial periods in history. Notwithstanding historic actions taken by the United States Congress to make available $700 billion in emergency funds, the credit markets refused to thaw; Citibank nearly failed as an institution, and the S&P 500 index fell to an 11-year low.

terms and condition of the SPA, which was executed on November 25, 2008 by LFG and the Buyers. Pursuant to the terms of the SPA, the Buyers agreed to acquire, among other things, the stock of the Underwriters from LFG in exchange for (a) cash consideration of approximately $298 million (representing the 9/30/08 book value of the combined statutory surplus of the two Underwriters); (b) the assumption of approximately $157 million in intercompany liabilities owing from LFG (on behalf of itself and certain of its direct and indirect subsidiaries) to the Underwriters (collectively, the "**Intercompany Receivable**");[5] and (c) the assumption of approximately $35 million in net deferred compensation and other employee related liabilities offset in part by the assumption of certain assets from LFG; and (d) at the Buyers' insistence, the Company's commitment, upon closing, to apply that portion of the purchase price necessary to eliminate any underfunding in the LandAmerica Cash Balance Plan (or alternatively for the Buyers to fund directly the payment of these underfunded plan obligations on behalf of LFG from the purchase price). See Chandler Declaration at ¶¶ 38-39.

38. The rationale for this assumption by the Buyers of certain employee related liabilities of the Debtor is that the Company has a number of largely non-divisible employee based plans and obligations and some designated assets at the LFG level (which is not an operating entity), yet many of the employees to whom the obligations are made, the majority of designated assets for those liabilities, and the revenue to support these obligations are in the Underwriters to be transferred to the Buyers. To avoid this mismatch, the Company requested and the Buyers agreed to relieve the Debtor of a net liability in the approximate amount of $35 million (as calculated in October). See Chandler Declaration at ¶ 40.

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[5] This Intercompany Receivable is among the "admitted assets", which make up the Underwriters' statutory surplus (i.e., excess assets that constitute the statutorily required reserves to cover the policies in force).

39. The SPA further provided that the Buyers' obligation to consummate the transaction was conditioned upon (a) the applicable regulatory authorities' agreement to continue to count the Intercompany Receivable as an "admitted asset" and (b) the form of assumption agreement, which would dictate how such Intercompany Receivable must be treated upon the close of the transaction, being mutually agreeable to the parties (the "**I/C Condition**"). In a proposal communicated by the Buyers to LFG and NEDOI, the Buyers agreed that they would assume the Intercompany Receivable upon the closing of the transaction and that their parent, FNF, would issue a note to the Underwriters which would mature and be paid in full in five years (the "**FNF Note**"). See Chandler Declaration at ¶ 41.

E. Subsequent Events

40. In early December 2008, NEDOI informed the Buyers and the Company that the Buyers' FNF Note proposal with regard to the Intercompany Receivable was not acceptable to NEDOI and would not be considered an admitted asset. Instead, in order to properly capitalize the Underwriters, NEDOI required the Buyers to satisfy the Intercompany Receivable, in cash, as of the closing of the transaction.

41. Upon hearing NEDOI's requirement, the Buyers informed the Company that, since NEDOI was requiring the Buyers to inject approximately $150 million of cash into the Underwriters at closing, the Company would need to accept a note with similar terms to the FNF Note in lieu of the intended $157 million in cash consideration. The Buyers informed the Company that they would seek to terminate the agreement pursuant to the I/C Condition if the Company did not agree to amend the SPA in this regard. This amendment, while a change in the form of currency to be received by LFG, did not alter the Buyers' obligation to pay approximately $298 million in total purchase consideration, now comprised of approximately

$141 million in cash and a $157 million five-year unsecured note. See Chandler Declaration at ¶¶ 43-44.

42. After learning of NEDOI's requirement for an amended SPA, LFG subsequently engaged in negotiations with the Buyers over the form of consideration to be paid under an amended form of the Stock Purchase Agreement. The Board of Directors of LFG was unwilling to accept the Buyers' amended proposal to LFG which would have required it to accept a note with similar terms to the FNF Note in lieu of the intended $157 million in cash consideration. See Chandler Declaration at ¶¶ 44-46. Instead, the Debtor continued to negotiate with the Buyers regarding the form of consideration. As a result of those discussions, the Buyers agreed to (a) limit the amount of non-cash consideration that would be substituted for cash consideration to $100 million, (b) provide LFG the option of accepting either a note or FNF stock as non-cash consideration, and (c) improve the terms of the FNF Note to include annual interest. Although not as favorable to the Company as the terms of the SPA, LFG had little choice but to accept the revised terms that resulted from these additional negotiations, given the lack of alternatives available to it and the position of the NEDOI. See Chandler Declaration at ¶47.

43. On December 8, 2008, Old Republic submitted a letter to the Board of Directors of LFG, NEDOI, and the United States Trustee which contained an offer to acquire all of the common stock of Lawyers Title only. This offer, which consisted of cash consideration equal to $63 million and the paydown of approximately $76 million of intercompany liabilities, was highly conditional, and not likely, in the view of the Board, to result in a transaction timely enough to ensure a going concern at closing. See Chandler Declaration at ¶ 48. On December 9, 2008, Stewart submitted a Form A application to NEDOI, which contemplated the purchase of

the stock of the Underwriters, Southland, and OneStop. Stewart's offer provided for total consideration of $25 million (only $5 million of which would be paid in cash, with the remaining $20 million in stock of the parent company of Stewart) plus the assumption of approximately $70 million of liabilities. By its proposal, Stewart proposed to issue new "admissible" securities to Commonwealth NE and Lawyers Title valued at $70 million. See Chandler Declaration at ¶ 49.

44. On December 10, 2008, Old Republic withdrew its offer. On December 12, 2008, Stewart filed an amendment to its Form A Application, increasing its proposed consideration. Stewart proposed to assume the Intercompany Receivable and issue new "admissible" securities to Commonwealth and Lawyers Title valued at $157,002,790 in satisfaction of the receivable. Stewart's amended Form A Application also provided that it would deliver (a) stock of its parent company of approximately $41 million in market value, (b) a subordinated note of $10 million, (c) $5 million of cash, and (d) an option to purchase $88 million of par value auction rate securities held by the Underwriters at a discount of $44 million. NEDOI has scheduled a hearing for December 15, 2008 on the Form A Applications submitted by the Buyers and Stewart. See Chandler Declaration at ¶¶ 50-51.

F. The Revised SPA

45. On December 12, 2008, LFG and the Buyers executed an amended and restated version of the SPA (the "**Revised SPA**"). The Revised SPA[6] anticipates the total purchase price for the stock of the Underwriters to be approximately $282 million. Under the terms of the Revised SPA, the Buyers will pay a total of approximately $135 million in cash to

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[6] The Revised SPA was filed with the Bankruptcy Court on December 12, 2008 and is also publicly available on http://chapter11.epiqsystems.com/landamerica. To the extent there are any inconsistencies between the summary description of the Revised SPA contained herein and the terms and conditions of the Revised SPA, the term of the Revised SPA control.

LFG. Additionally, FNF will pay LFG $147 million in consideration, consisting of (a) $47 million in cash (subject to dollar-for-dollar reduction if the Intercompany Receivable exceeds $157 million), (b) a $50 million subordinated note due in 2013, with interest at the 5-year treasury rate at closing plus 1 percent, and (c) approximately $50 million in common stock of FNF valued at the greater of the market share price at closing and $14.00 per share. The Revised SPA is subject to termination by FNF if the closing of the transaction does not occur on or before December 22, 2008. Further, the Revised SPA provides that Fidelity National Title Insurance Company will separately purchase United Capital for a sum equal to its statutory book value at closing.[7] The United Capital purchase is expected to close in the first quarter of 2009. See Chandler Declaration at ¶¶ 53-55. The remainder of the provisions of the Revised SPA are substantially similar to the terms and conditions of the SPA set forth in the Sale Motion.

RESPONSE

A. The Sale is a Sound Exercise of Business Judgment

46. Ample authority exists for approval of the proposed Sale. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that a debtor in possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under section 363(b), approval of a sale is appropriate if the court finds the transaction has a sound business purpose or represents a reasonable business judgment on the part of the debtor. See In re WBQ Partnership, 189 B.R. 97, 102 (Bankr. E.D.Va. 1995) (adopting "sound business purpose" test for section 363(b) sales as set forth in In re Lionel Corp.); In re W.A. Mallory Company, Inc., 214 B.R. 834, 836-37

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[7] As of September 30, 2008, United Capital's statutory book value was approximately $16 million.

(Bankr. E.D.Va. 1997) (noting that court follows the 'sound business purpose' test when examining section 363(b) sales).

47. Although section 363 of the Bankruptcy Code does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor's assets prior to confirmation of a plan, courts in other Circuits have required that the decision to sell assets outside the ordinary course of business be based upon the sound business judgment of the debtors. See In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986); see also Myers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D.D.C. 1991). A debtor's showing of a sound business purpose need not be unduly exhaustive but, rather, a debtor is "simply required to justify the proposed disposition with sound business reasons." In re Baldwin United Corp., 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984). Whether or not there are sufficient business reasons to justify a transaction depends upon the facts and circumstances of each case. Lionel, 722 F.2d at 1071.

48. This District has adopted the "sound business purpose" test for section 363(b) sales. See In re WBQ Partnership, 189 B.R. at 102. The debtor has the burden of proving the four elements of this test: (a) a sound business reason or emergency justifies a pre-confirmation sale; (b) the sale has been proposed in good faith; (c) adequate and reasonable notice of the sale has been provided to interested parties; and (d) the purchase price is fair and reasonable. See Id.

49. As to the first element, given LFG's financial instability and illiquidity, and the rehabilitation proceedings commenced by NEDOI, LFG no longer has the ability to provide necessary assurances to the Company's employees and customers and must quickly consummate a sale in order to preserve and realize the value of the Underwriters before they further deteriorate. See Evans Declaration at ¶¶ 9-12 It is urgent that the Underwriters be sold now. If the Revised SPA is not consummated, it is extremely likely that the Underwriters will end up in runoff, the runoff will span decades and, at the end of that process, little or no value would then be available to LFG and its stakeholders on account of these presently valuable assets. See Evans Declaration at ¶¶14, 16.

50. Second, the Sale has been proposed in good faith through arm's length negotiations. "A negotiation conducted at arm's length helps to insure that the agreed price ultimately will be fair and reasonable." Id. at 103. The terms of the SPA and the Revised SPA were negotiated in good faith and at arm's length, and all parties were represented by counsel. Moreover, there is no evidence of fraud or collusion in the terms of the proposed sale.

51. Third, the Debtor has provided adequate and reasonable notice of the Sale to interested parties as described in the Sale Motion and approved by the Order Approving Sale Notice and Scheduling Sale Hearing, dated November 28, 2008. All interested parties, including all known creditors of LFG and any parties contacted by JPMorgan or who previously expressed any interest in purchasing the Underwriters were served with the Sale Notice. The Sale Notice also was published in The Wall Street Journal and The Richmond Times-Dispatch.

52. Fourth, the purchase price in the Revised SPA is fair and reasonable given the unique circumstances of this case. In WBQ Partnership, the Court found that, based on the "unique situation" presented, a public auction would not command a higher price than the private

sale proposal it was presented with by the debtor. Id. at 104. Accordingly, the Court held that "the proposed purchase price is fair and reasonable, and that the proposed sale satisfies the elements of the sound business purpose test under 11 U.S.C. §363(b)." Id. The Debtor respectfully submits that this Court should make a similar determination based upon the evidence presented.

53. The assertion by certain Objectors that the Debtor should establish bid and auction protocols is misguided given the circumstances of this case. Although formal bidding procedures and stalking horse protections are typical for 363 sales, this is not a typical 363 sale. In this case, the circumstances are dire and time has run out. In any case, the absence of procedures did not prevent interested parties such as Stewart from making a competing offer for the Debtor's assets, yet it did spare the estate any costs associated with break up fees, expense reimbursements or other liabilities that are customarily incurred as a result of such procedures. Other interested parties had a full opportunity to conduct due diligence and make an offer. Seven parties have signed non-disclosure agreements with the Debtor since the Petition Date, and, where requested, such parties have been given the opportunity to meet with management, visit the Company on site and have access to information. Certain of the parties that contacted the Debtor postpetition had already had the opportunity to and, in some cases, performed extensive due diligence prepetition. See Chandler Declaration at ¶¶ 18, 20, 49-51. As detailed above, the Debtor undertook an extensive marketing process prepetition with the assistance of both an investment banker and mergers and acquisition counsel in pursuit of a buyer for all Company assets. This process, coupled with the Debtor's continued willingness to entertain offers postpetition, to provide diligence access to interested parties, and to consider all available

alternatives, illustrates that LFG and the Board have acted in accordance with their fiduciary duties to maximize value for creditors.

54. Further, contrary to the assertions by certain Objectors, the Debtor does not have time to conduct another process for identifying potential purchasers, even if the process is an expedited one. The prepetition sale process did not yield incremental interest or value, despite the fact that the Underwriters were more valuable several months ago. As Old Republic, a competing title insurer, correctly states in its objection, the common stock in the Underwriters is a wasting asset. See Old Republic Objection at ¶ 13. Stewart, the other Objector most familiar with the business of the Underwriters, also notes in its Objection its agreement with the Debtor's statement that each day that passes increases exponentially the risk of loss of value at the Underwriters. See Stewart Objection at ¶12. While both Stewart and Old Republic submitted proposals postpetition, Old Republic's proposal was withdrawn and Stewart's proposal is inferior to the Buyers. No other parties have submitted meaningful proposals. As set forth in the Evans Declaration, given the potential for rapid deterioration of the Underwriters and the impediments caused by the need for regulatory approval, no meaningful alternatives to the proposed transaction exist. See Evans Declaration at ¶¶ 13-16.

55. Bankruptcy Rule 6004(f)(1) provides that "[a]ll sales not in the ordinary course of business may be by private sale or by public auction." Courts often allow a chapter 11 debtor to sell assets outside the ordinary course of business by private sale when the debtor demonstrates that the sale is permissible pursuant to section 363(b) of the Bankruptcy Code. See, e.g., In re Loral Space & Communications Ltd., et al., Case No. 03-41710 (RDD) (Bankr. S.D.N.Y. Sep. 30, 2005); In re International Wire Group, Inc., et al., Case No. 04-11991 (BRL) (Bankr. S.D.N.Y. June 10, 2004); Palermo v. Pritam Realty, Inc. (In re Pritam Realty, Inc.), 233

B.R. 619 (D.P.R. 1999) (upholding bankruptcy court approval of private sale); In re Wieboldt Stores, Inc., 92 B.R. 309 (N.D. Ill. 1988) (affirming right of chapter 11 debtor to transfer assets by private sale); In re Condere Corp. 228 B.R. 615 (Bankr. S.D. Miss 1998) (approving private sale of chapter 11 debtor's assets when section 363(b) standards met). The Debtor respectfully submits that the circumstances of this case justify approval of the Sale under the Revised SPA.

B. The Sale Must be Expedited

56. Unless the Sale to the Buyers is expeditiously consummated, the Company will not be in a position to pursue any sale of the Underwriters. Title insurers function as going concerns insofar as (a) commercial lenders are willing to accept the insurer's title policies as adequate to safeguard their interests as mortgagees, (b) title agents produce new business for the insurers, and (c) insurance regulatory officials are satisfied that the insurer possesses sufficient surplus to support the issuance of new policies. In the case of the Underwriters, all three criteria are becoming increasingly absent. Without near term certainty that the Underwriters will be sold and continue as viable going concerns, there will soon be no business left to sell to any interested party.

1. Lenders and Customers

57. Title insurance companies issue policies to property owners and their mortgagees insuring that the title passed during the transfer is valid. The insurance policy must, of course, be acceptable to the lender offering the mortgage as well as to the buyer. Most mortgage lenders and commercial customers insist that the title insurers meet certain standards of financial strength, and they rely on various rating agencies to determine whether the insurers meet those standards.

58. Real estate lenders will often not accept title insurance policies from companies threatened with, or under state rehabilitation proceedings. See Evans Declaration at ¶

5. In an attempt to stop this refusal from occurring with the Underwriters, the Buyers signed "cut-through"[8] reinsurance agreements with the Underwriters in order to give comfort to both customers and lenders. Customers are nonetheless fleeing the Underwriters in large numbers and, even with this reinsurance backstop from the Buyers, four of the top five mortgage originators have either refused to accept the title insurance policies of the Underwriters in real estate closings, or have imposed significant restrictions on the acceptance of those policies or the handling of the closings. Fannie Mae and Freddie Mac are considering the Underwriters' situation, and have stated that one potential outcome would be a prohibition against the acceptance of the Underwriters' policies. Such an outcome would essentially end the residential title business of the Company.[9] See Evans Declaration at ¶ 5.

59. Specifically, the reinsurance backstop has not proven useful in bringing in new title insurance business from customers and lenders, as many third parties are concerned about doing business with the Underwriters and have indicated that they would prefer to use a different title insurer. As a result, the Company's employees have spent countless hours with bankers and lenders attempting to explain the present situation of the Underwriters and the ample protection now provided by their arrangements with the Buyers, but in many cases, lenders, as well as customers, are simply too uncertain about the situation to take any risks. See Evans Declaration at ¶6. The reinsurance agreements have primarily played a role in assisting the Underwriters to close "open orders" for property buyers who have upcoming closings and for whom it may be too late to move their title insurance order to another insurer. Without the

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8 A "cut-through" reinsurance agreement allows the insured to go directly against the reinsurer. These clauses are extremely unusual and contrary to usual reinsurance practice. In spite of the presence of this pro-insured benefit in the Buyers' reinsurance agreements, lenders and property buyers are still taking their business elsewhere.

9 NEDOI has persuaded Fannie Mae and Freddie Mac to continue to accept policies written by the Underwriters until December 16, 2008, the date of the Sale Hearing. See Evans Declaration at ¶ 5.

prospect of future orders, however, and given that current customers have the ability to move existing orders to other insurers, the loss of business faced by the Underwriters has been extensive. See Evans Declaration at ¶ 11. Each day that passes in which the Sale is not consummated increases exponentially the loss of value at the Underwriters.

2. Support of Title Agents and Employee Retention

60. The business of the Underwriters is not one built upon bricks and mortar. Rather, the Underwriters' principal assets are their key employees and their ability to retain their broad customer base. Given this, absent near term certainty that the Underwriters will be sold and continue as viable going concerns, the Company anticipates that a rapid attrition of customers and businesses will result and employees will depart for other title insurers. See Evans Declaration at ¶ 11.

61. When title agents employed directly by a title insurer are unable to sell policies with that insurer, they may sever their relationship with the insurer and take their business elsewhere. See Evans Declaration at ¶ 11. Many title agent employees of the Underwriters have delayed leaving the Company in reliance upon (a) the reinsurance backstop currently in place with the Buyers and (b) in particular, the immediate closing of the Sale. Absent the imminent approval and closing of the Sale, however, these employees likely will desert the Company in large numbers. See Evans Declaration at ¶ 11. Since title insurance is a business based on the relationships of individual title agents employed by the title insurers, who are responsible for generating a large percentage of their commercial business, once these people leave, it is likely that the business will not return. See Evans Declaration at ¶ 10. This will cause a significant loss of value and irreparable harm to the estate of LFG.

3. Adequacy of Surplus

62. NEDOI placed the underwriters into rehabilitation because of their "hazardous financial condition" and inadequate surplus. At this point, the Underwriters have little ability to issue new policies without either a large cash infusion or a sale to a more stable title insurer such as the Buyers. Without the ability to increase their surplus to acceptable levels, the Underwriters must be sold in order to continue to remain in business. See Evans Declaration at ¶ 14.

C. The Sale is Not a Sub Rosa Plan

63. The LFG Committee has asserted that the Sale constitutes a *sub rosa* plan that runs afoul of the confirmation standards of the Bankruptcy Code.[10] This Court should not be swayed by this maneuver for leverage. Unlike Braniff, the classic *sub rosa* case, the Sale cannot be said to "short circuit the requirements of Chapter 11 for confirmation of a reorganization plan." In re Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983). To the contrary, this transaction is the key to preserving value for, and the substantive rights of, all parties.

64. Understandably, certain courts have been wary of approving sales, settlements and transactions that alter certain of creditors' rights, as such actions should be subject to the appropriate safeguards afforded in the plan confirmation process. To this end, courts have scrutinized transactions that will have a great impact on the estate, searching for signs that parties are attempting to sidestep the confirmation process. See, e.g., Braniff Airways, 700 F.2d at 940. (finding settlement constituted a *sub rosa* plan). The Debtor does not dispute

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10 The LFG Committee's *sub rosa* plan argument consists primarily of vague allegations which should not be countenanced. Broad generalizations that fail to identify specific chapter 11 protections the Sale strips away are blatantly insufficient to support the torpedoing of the Sale. "In addressing the question of sub rosa plans, 'the objector must specify exactly what protection is being denied.'" In re Iridium Operating, LLC, 2005 WL 756900, at *7 (S.D.N.Y. Apr. 4, 2005) (quoting In re Continental Airlines, Inc., 780 F.2d 1223, 1226 (5th Cir. 1986)).

the wisdom of such jurisprudence; however, the instant facts are miles apart from those of Braniff and its brethren.

65. In Braniff, the debtors sought to enter into a settlement that would markedly curtail the rights of creditors under a future plan of reorganization. There, the United States Court of Appeals for the Fifth Circuit would not allow the debtors and certain creditors to enter into a settlement agreement that: (a) designated certain currency for distribution to certain former employees, shareholders and, to a lesser extent, unsecured creditors; (b) required secured creditors to vote a portion of their claims in a certain manner; and (c) provided for blanket third-party releases of claims against the debtor, its secured creditors, officers and directors. Id. In stark contrast, here, it is clear that the Sale is not a substitute for confirmation of a plan of reorganization, but instead a means of securing value for LFG's stakeholders which can eventually be distributed to such parties through a plan in the future. See, e.g., In re Naron & Wagner, Chartered, 88 B.R. 85, 88 (Bankr. D. Md. 1988) (finding that sale of all debtor's assets did not constitute *sub rosa* plan, because the sale would not restructure rights of creditors). The only requirement imposed upon LFG for use of the sale proceeds is the need to contribute from the purchase price under the Revised SPA cash in an amount necessary to ensure that the benefit obligation of the Cash Balance Plan of LFG, a pension plan guaranteed by the Pension Benefit Guaranty Corporation, is topped up to reach the market value of the Cash Balance Plan's assets.[11] This single requirement is wholly insufficient to classify the Sale as a *sub rosa* plan which dictates the future terms of a plan of reorganization.

66. The Braniff court specifically condemned the proposed settlement because the secured creditors were required to vote a portion of their claims in favor of *any* future plan

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[11] See Revised SPA, Section 5.8(k).

approved by a majority of the creditors' committee. 700 F.2d at 940. However, the Debtor does not seek to alter the universe with respect to creditors' ability to vote on a plan. The fact that the Sale does not restrict creditors' right to vote as they deem fit on a proposed reorganization plan is further evidence that the contemplated transaction is not a *sub rosa* plan. See, e.g., In re Cajun Elec. Power Cooperative, Inc., 119 F.3d 349, 355 (5th Cir. 1997).

67. Importantly, if the ultimate plan that governs distributions to creditors of LFG is unacceptable to such parties, they may still reject the plan. Moreover, such "creditors will still be afforded the rights provided under the Bankruptcy Code regarding the issues of disclosure, voting and priority." In re Allegheny International, Inc., 117 B.R. 171, 176 (Bankr. W.D. Pa. 1990). Lastly, the Sale does not contemplate the broad extinguishment of claims that was proposed by the Braniff settlement.

68. The Sale is not a plan in disguise as the LFG Committee contends. However, one thing is certain — unless the Court approves the Sale, the creditors will have a lot less consideration to fight over when they ultimately vote on a plan. In such an instance, these same creditors may look back wistfully at a deal that would have brought tens of millions of dollars into the estate for distribution.

CONCLUSION

WHEREFORE, LFG respectfully requests that the Court overrule the Objections, grant the Sale Motion, and approve the Revised SPA.

Dated: Richmond, Virginia
December 15, 2008

Respectfully submitted,

/s/ Dion W. Hayes______________

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