

Jeffrey L. Tarkenton (VA Bar # 20631)
Todd D. Ross
Womble Carlyle Sandridge & Rice PLLC
1401 Eye Street, N.W., Suite 700
Washington, D.C. 20005
(202) 467-6900 – Telephone
(202) 261-0050 – Facsimile

Counsel to Old Republic International Corporation

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

In re:)	Chapter 11
)	
LandAmerica Financial Group, Inc., <i>et al.</i> ,)	Case No. 08-35994
)	
Debtors.)	Jointly Administered
_____)

**OBJECTION BY OLD REPUBLIC INTERNATIONAL CORPORATION TO THE
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**

Old Republic International Corporation (“Old Republic”), by and through its undersigned counsel, hereby objects (the “Objection”) to the 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 (the “Sale Motion”)¹ filed by LandAmerica Financial Group, Inc. (“LFG”), and represents as follows:

¹ Unless otherwise provided, capitalized terms not defined herein shall have the meanings ascribed to them in the Sale Motion.

BACKGROUND

1. On November 26, 2008 (the “Petition Date”), LFG and LandAmerica 1031 Exchange Services, Inc. (“LES”, and together with LFG, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors have continued in possession of their property and have continued to manage their businesses and financial affairs as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

2. Old Republic is a New York Stock Exchange listed insurance holding company with interests in the property and liability, mortgage guaranty, title insurance and life and health insurance fields.

3. Old Republic is the parent company of Old Republic National Title Insurance Company, Old Republic General Title Insurance Corporation, Mississippi Valley Title Insurance Company and American Guaranty Title Insurance Company which are members of the Old Republic Title Insurance Group (“ORTIG”), which is one of five groups of national title insurance companies.

4. ORTIG has a 6% share of the U.S. title insurance market. The four other groups of national title insurance companies and their market shares are as follows: The First American Corporation (“First American”) - 29%; Fidelity National Financial, Inc. (“FNF”) - 26%; LFG (including Commonwealth Land Title Insurance Company (“Commonwealth”), United Capital Title Insurance Company (“United”), and Lawyers Title Insurance Corporation (“Lawyers Title”)) - 19%; Stewart Information Services Corporation - 12%.²

² Data for the percentages of market share is from ALTA, and is for the first three quarters of 2008.

5. Old Republic and several of its subsidiaries currently hold approximately 9.9% of LFG's outstanding common stock, which they acquired between November 2007 and October 2008 in reliance on LFG's published financial reports.

6. LFG asserts in the Sale Motion that it pursued a sale of its entire business prior to the Petition Date. LFG states that it reviewed and considered a "large number of potential strategic and financial suitors" that it believed might enter into such a transaction, and executed non-disclosure agreements with "approximately" five of them. Sale Motion, ¶ 12-13.

7. Neither LFG nor its investment bankers contacted Old Republic seeking to sell LFG's business to Old Republic.

8. LFG entered into the Prior Merger Agreement with FNF for the sale of its entire business pre-petition. After FNF exercised a "diligence out" and terminated the Prior Merger Agreement, LFG entered into an alternative agreement with FNF, not for the sale of the entire business, but only for the sale of LFG's stock in three subsidiaries, Commonwealth, United, and Lawyers Title (collectively, the "Underwriting Companies").

9. On the Petition Date, LFG filed the Sale Motion, pursuant to which it seeks to sell its stock in the Underwriting Companies to Fidelity National Title Insurance Company and Chicago Title Insurance Company pursuant to a stock purchase agreement (the "SPA"). Fidelity National Title Insurance Company and Chicago Title Insurance Company are subsidiaries of FNF.

10. FNF's acquisition of the Underwriting Companies would give it an approximate 45% aggregate national market share of the U.S. title insurance business.

11. On December 9, 2008, Stewart Title Guaranty Company submitted an offer to LFG to purchase the stock in both Lawyers Title and Commonwealth.³

12. Both Lawyers Title and Commonwealth are in rehabilitation proceedings pending before the Nebraska Department of Insurance and the department has scheduled separate hearings to be held on Monday, December 15, 2008, to consider the offers made by FNF and Stewart Title.

OBJECTION

13. LFG claims in the Sale Motion that the common stock in the Underwriting Companies is a wasting asset. Sale Motion at ¶¶18-19. LFG's claim is correct. The Court should authorize the sale of the stock on an expedited basis in order to avoid further deterioration in the stocks' value. At the same time, however, the Court should approve a sale of the stock to one or more purchasers who can obtain the regulatory approvals that will be required for the SPA to close. If the regulatory agencies refuse to approve the sale, then LFG will have to return to this Court, perhaps months from now, and seek to market and sell the stock which, by then, will have steadily deteriorated in value.

14. To close the sale to FNF (or any other party), LFG will need to obtain the approval of the Federal Trade Commission ("FTC") as well as from the Departments of Insurance for Nebraska, California and New Jersey. Those regulators will closely examine, among other things, the impact the acquisition would have on the title insurance market.

15. When evaluating whether to approve FNF's acquisition of the Underwriting Companies, the state insurance commissioners are required to examine the potential impact of the resulting market concentration. *See* Neb. Rev. Stat. § 44-2127(1)(b) (requiring director of

³ Also on December 9, 2008, Old Republic submitted an offer to purchase the common stock in Lawyers Title, which it subsequently withdrew.

insurance to evaluate whether a stock acquisition would substantially lessen competition in insurance or tend to create a monopoly before approving transaction); Cal. Ins. Code § 1215.2(d)(2) (commissioner may disapprove a stock acquisition if resulting transaction would substantially lessen competition in insurance or create a monopoly); N.J. Stat. Ann. § 17:27A-2(d)(1)(ii) and (vii) (commissioner may disapprove a stock acquisition if resulting transaction would substantially lessen competition in insurance or create a monopoly, or if the acquisition is likely to be prejudicial to the insurance buying public). Under the Hart-Scott-Rodino Act and the Clayton Act, the FTC will evaluate, among other things, whether the acquisition will threaten the competitive process. 15 U.S.C. §§ 18, 18a.

16. FNF's acquisition of the Underwriting Companies would result in FNF holding an unacceptably large share of the national title insurance market which would directly threaten the competitive process. FNF's aggregate market share would total approximately 45%. Moreover, its market share in several large states including Texas, New York, Pennsylvania, New Jersey, Arizona, Virginia, Washington and Illinois would exceed 50%. Attached hereto as Exhibit 1 is a chart identifying FNF's projected market share in 12 large states following the proposed acquisition of the Underwriting Companies.

17. FNF's acquisition of the Underwriting Companies would result in First American, which is currently the largest competitor in the title insurance industry, and FNF holding between them and their subsidiaries more than 80% of the market share in five large states including Pennsylvania, Arizona, Michigan, Washington and Illinois and more than 86% of the market share in Arizona, Michigan and Washington. The projected market share of FNF and First American in twelve large states following FNF's proposed acquisition of the Underwriting Companies is identified on Exhibit 1.

18. In considering whether to approve FNF's proposed acquisition of the Underwriting Companies, the FTC and the state insurance commissioners will carefully consider the following facts which, under the standards that the FTC and the insurance commissioners will apply, amply support the denial of the proposed acquisition:

- FNF's acquisition of the Underwriting Companies which would result in FNF controlling 45% of the U.S. title insurance business would undermine price competition. Price competition would be further eroded because FNF and First American would together control 74% of the U.S. title insurance business and, using their near monopoly power, they could artificially inflate prices, especially in states where their market share exceeds 74%.
- FNF's control of 45% of the U.S. title insurance market would undermine the reform goals of the Real Estate Settlement Procedures Act ("RESPA") which sought to facilitate the use of packaging by settlement service providers in order to reduce administrative expenses which could be passed on to the consumers.
- FNF's control of 45% of the U.S. title insurance market, and up to 58.4% of any one state's title insurance market would undermine meaningful consumer choice and would likely lead to the abusive packaging of loan and settlement services to the detriment of consumers.
- The concentration of title plant ownership would provide FNF with a critical advantage in providing, controlling, and selling access to real estate information. Title plant services are used by abstractors, title insurers, title insurance agents, and others to determine ownership of, and interests in, real property and they promote the efficient searching and examining of land records and permit owners to search the records for many counties from one centralized location.
- The concentration of title plant ownership within FNF would create an unfair advantage in recruiting title agents by offering title plant access as an incentive to forming an affiliation that smaller entities could not match. The concentration would produce market barriers for new entrants and would result in the elimination of existing competitors who cannot compete as efficiently, due to inferior plants or due to reliance on courthouse searches.
- The concentration of seven title insurance companies within FNF would distort data used by state departments of insurance to promulgate rates or review rating bureau recommendations. Many states establish rates based

on the aggregate of income, expense and loss data supplied by title insurance companies or by third parties with access to the financial information provided by the companies. Promulgated rates are set by a state's insurance regulator after reviewing data collected from the industry. If FNF acquires the Underwriting Companies and controls almost half of the market, then the data the states use will be skewed in favor of FNF's business model which in turn will prejudice smaller companies, especially those relying on an independent network of agents.

- Smaller companies would suffer in the promulgated rate and rating bureau states because their experience and data would not be competitive with the overwhelming level of data coming from the FNF family of companies and smaller companies would be subject to rates which would reflect the FNF business model and experience.
- The proposed acquisition by FNF would give disproportionate power to FNF and First American to dominate national committees which promulgate the forms and determine the coverage afforded to consumers. The Forms Committee of the American Land Title Association ("ALTA") develops and approves standardized forms of title insurance policies which are used throughout the U.S. Decisions of the Forms Committee are made by a majority vote and, at present, each of the major title insurance underwriters has two attorneys as sitting members of the committee. FNF's acquisition of the Underwriting Companies would entitle it to four members which, given the small size of the committee, could enable it to control what insurance coverages are available to consumers.
- Control of industry forms by FNF and First American, particularly closing protection letters, could lead to lenders refusing to use title agents thereby hindering the ability of title agents to offer title insurance and harming consumers by limiting choice.
- Market share concentration in FNF and First American would result in a significant decrease in the number of existing title agents and would erect a barrier against title agents entering the market. Nearly half of FNF's business comes from direct operations or affiliated agencies which means it has the necessary in-house infrastructure and personnel to manage title and closing operations itself, and thus capture the entire premium and closing fees. Direct operations domination would force local title agents out of existing markets, result in a decrease in competition and create a barrier to entry into the industry, which could result in higher prices and reduced service for consumers.
- Market share concentration in FNF and First American would provide them with too much control in state trade associations such as land title associates and title insurance trade groups and would allow them to exert a

disproportionate influence within each association thereby allowing them to dictate industry positions on matters vital to consumers.

- FNF would control about one half of the title insurance industry's ability to insure and reinsure. The most commonly used line item that states use in measuring the maximum single transaction risk an insurer may assume in that state is "surplus as regards policyholders". If a transaction's risk size exceeds the statutory limit, the insurer must reinsure the excess risk with another title insurance company. The concentration of surplus/reinsurance in FNF would result in limited access to reinsurance and less competitive pricing for insureds. Moreover, FNF would be able to price reinsurance in excess of current market rates where its participation is essential due to the size of the transaction. Indeed, FNF's current market concentration allowed FNF to raise its reinsurance premium rates recently by 50%.
- The market concentration would give FNF disproportionate control over determining the underwriting of large commercial transactions. Currently, most very large transactions require several insurers to participate as equals in insuring a project which results in each insurer independently evaluating the transaction for risk. The size of FNF post-acquisition would provide it with underwriting authority over every significant transaction that exceeded the remaining title insurers' capacity.

19. The weakening of the FNF group, the high market concentration level that would result from a sale of the Underwriting Companies to FNF, and the resulting risk of harm to competition in the industry, will subject the proposed sale to FNF to close scrutiny by both the FTC and the state insurance commissioners, and would likely lead to at least one, if not all of the agencies refusing to approve the sale.

20. First, FNF's acquisition of the Underwriting Companies would result in an anti-competitive market concentration in the title insurance industry that would be detrimental to the interests of smaller title insurance companies.

21. Second, FNF's acquisition of the Underwriting Companies, when coupled with the market share held by First American, currently the largest title insurance company, would concentrate an aggregate market share of nearly 74% in just two financial institutions

(approximately 45% for FNF and 29% for First American), which would be detrimental to the interests of smaller title insurance companies.

22. Third, increased market concentration in the title insurance industry would adversely impact consumers and other title insurance buyers by increasing prices for title insurance products.

23. Fourth, the depletion of reserves of the FNF underwriters, coupled with the highly leveraged debt that FNF would be shackled with, could create an unstable risk environment for the insureds of both FNF and the Underwriting Companies.

24. In fact, the FTC has raised antitrust and unfair business practices concerns when title insurance companies have merged two of their title plants together. While ultimately being resolved through a consent agreement, the FTC issued a Decision and Order that required Commonwealth Land Title Insurance Company and First American Title Insurance Company to segregate their title plant businesses and remain in competition with one another. It also ordered that for a period of ten years from the date thereof, Commonwealth Land Title Insurance Company could not, without advance notification to the FTC, sell any of its stock to any entity that has a direct or indirect ownership interest in a title plant serving the District of Columbia. The FTC's stance in that matter is a harbinger of bad tidings for the proposed sale to FNF. Copies of the Complaint and Decision and Order are attached hereto as Exhibit 2.

25. Consideration of the likelihood that the FTC and the state insurance commissioners will approve FNF's acquisition of the Underwriting Companies is important for approval of a sale other than in the ordinary course of business pursuant to Section 363(b) of the Bankruptcy Code. *See In re Bakalis*, 220 B.R. 525, 532-33 (Bankr. E.D.N.Y. 1998) (trustee's selection of a bid as the "highest and best" bid based on perceived certainty and relatively quick

regulatory approval ratified by court); In re Financial News Network, Inc., 1991 WL 127524 *5 (Bankr. S.D.N.Y. May 10, 1991) (court considered reduced antitrust risk in determining that the successful bidder had the best qualitative and quantitative bid and awarding the bid to it as being in the best interest of the debtor, creditors and equity holders). The “temptation of jeopardizing virtually assured benefits by supporting a bid that exposes the estate to a much greater risk of . . . a failed closing and the associated chance of being left with a devalued asset” does not reflect the exercise of sound business judgment. See In re Bakalis, 220 B.R. at 532.

26. FNF’s acquisition of the Underwriting Companies would clearly lessen competition and threaten the competitive process in the U.S. title insurance market. Under these facts, the FTC and the state regulatory agencies ought not approve FNF’s proposed acquisition of the Underwriting Companies. If the sale is denied, then LFG will have to start over in this Court to locate a purchaser for the Underwriting Companies. Rather than risk delay and the further deterioration in the value of the Underwriting Companies, the Court should order an expedited procedure for identifying all potential purchasers and establish a bid procedures process for the submission and evaluation of offers.

WHEREFORE, Old Republic objects to the relief sought in the Sale Motion and respectfully requests that the Court enter an order denying the Sale Motion and ordering such further relief as is just and proper.

Dated: December 11, 2008

Respectfully submitted,

/s/ Jeffrey L. Tarkenton
Jeffrey L. Tarkenton (VA Bar # 20631)
Todd D. Ross
Womble Carlyle Sandridge & Rice PLLC
1401 Eye Street, N.W., Suite 700
Washington, D.C. 20005

(202) 467-6900 – Telephone

(202) 261-0050 – Facsimile

jtarkenton@wcsr.com

Counsel to Old Republic International Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of December 2008, I served a copy of the foregoing Objection by Old Republic International Corporation to the 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 via the Court's CM/ECF system or by first class mail, postage prepaid, upon the following:

Dion W. Hayes, Esq.
John H. Maddock, III, Esq.
McGuireWoods LLP
One James Center
901 E. Cary Street
Richmond, VA 23219
Counsel for the Debtors

Paul V. Shalhoub, Esq.
Rachel C. Strickland, Esq.
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
Counsel for the Debtors

Bruce H. Matson, Esq.
Christopher L. Perkins, Esq.
LeClairRyan
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Counsel for The Official Committee of Unsecured Creditors

Jeffrey S. Sabin, Esq.
Mark M. Elliot, Esq.
Justin G. Imperato, Esq.
Bingham McCutchen LLP
399 Park Ave.
New York, New York 10022
Counsel for The Official Committee of Unsecured Creditors

Robert B. Van Arsdale
Office of the U.S. Trustee
701 E. Broad St., Suite 4304
Richmond, VA 23219
Assistant United States Trustee

Augustus C. Epps, Jr., Esq.
Christian and Barton
909 East Main Street, Ste. 1200
Richmond, Virginia 23219
Co-Counsel for Proposed Buyers

Todd Padnos, Esq.
Dewey and LeBieuf LLP
One Embarcadero Center
San Francisco, CA 94111
Co-Counsel for Proposed Buyers

/s/ Jeffrey L. Tarkenton
Jeffrey L. Tarkenton