IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

IN RE: LANDAMERICA 1031 EXCHANGE SERVICES, INC. INTERNAL REVENUE SERVICE § 1031 TAX DEFERRED EXCHANGE LITIGATION	**CASE NO.: MDL No. 2054 8:09-MN-02054-JFA**
Angela M. Arthur, as Trustee of the Arthur Declaration of Trust, dated December 29, 1988; Vivian R. Hays, an individual; Leapin Eagle, LLC, a limited liability company; Denise J. Wilson, an individual; Gerald R. Terry, an individual; Ann T. Robins, an individual; and Jane T. Evans, an individual; on their own behalf and on behalf of a class of others similarly situated, **Plaintiffs,** **v.** **SunTrust Bank; Theodore Chandler, Jr. G. William Evans; Stephen Conner; Ronald B. Ramos; Devon M. Jones; and Brenton J. Allen,** **Defendants.**	**RELATED CASES:** **Southern District of California No. 3:09-cv-00054** **District of South Carolina No. 8:09-cv-01739-JFA** **District of South Carolina No. 8:09-cv-00415-JFA**

PLAINTIFFS' OPPOSITION TO SUNTRUST BANK, INC'S MOTION TO STAY PROCEEDINGS AGAINST SUNTRUST

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Plaintiffs, Angela M. Arthur et al. ("Plaintiffs"), hereby oppose the Motion of Defendant SunTrust Bank ("SunTrust") to stay all claims against SunTrust until the entire action can proceed against all defendants, which may be years in the future. The Amended Complaint (Docket No. 19) includes claims against SunTrust as well as former officers/directors of LandAmerica 1031 Exchange Services, Inc. ("LES") and LandAmerica Financial Group, Inc. ("LFG"). These "Individual Defendants" are Theodore L. Chandler Jr., Stephen Conner, G. William Evans, Ronald B. Ramos, Devon M. Jones and Brenton J. Allen.

The Joint Chapter 11 Plan of LFG and LES (the "Plan") provides for a temporary injunction of this case against the Individual Defendants, but no such stay against SunTrust. The Plan also provides for litigation to be filed against SunTrust by a Litigation Trust of one of the Debtors. As set out below, a stay of the class litigation against SunTrust will benefit no one, including SunTrust. If SunTrust truly seeks efficiency, instead of delay, it may petition the MDL Panel to transfer any subsequent Litigation Trust proceeding filed against it as a tag-along action to MDL 2054. This would require SunTrust to suffer through only one consolidated case, instead of two separate actions in two courthouses in two States; which is what will happen if the stay it seeks from this Court is granted.

I.

PROCEDURAL HISTORY

As set out in the Amended Complaint (Docket No. 19), the Arthur/Terry Plaintiffs were clients of LES who transferred legal title to 1031 Exchange Funds to LES which were deposited at SunTrust and lost. LES filed for bankruptcy on November 26, 2008. Plaintiffs filed claims in the LES Bankruptcy and sued SunTrust in this Court for assisting LES in running a Ponzi scheme from February 2008 through the end of November, 2008. Plaintiffs contend that SunTrust is jointly and severally liable with LES for Plaintiffs' losses as an aider and abettor and on other grounds. Plaintiffs have received a small partial distribution of their 1031 Exchange

Funds out of the LES bankruptcy, but a substantial deficit remains on the repayment of their total losses.

This matter was brought before this Court pursuant to a June 12, 2009 Centralization Order issued by the Multi-District Litigation Panel transferring the "Arthur Class Action," Case No. 3:09-cv-0054 from the Southern District of California to the District of South Carolina for coordinated or consolidated pretrial proceedings with the "Terry Class Action", Case No. 8:09-cv-00415 (see Docket No. 19 in Case No. 00415). The Arthur plaintiffs and Terry plaintiffs joined together and filed the Amended Complaint as co-plaintiffs in Docket No. 8:09-MN-02054-JFA. (See Docket No. 19). The Centralization Order issued by the MDL Panel concluded that centralization of the two pending class action cases against SunTrust and the Individual Defendants under 28 U.S.C. § 1407 would eliminate duplicative discovery and inconsistent rulings and conserve resources of the parties, their counsel and the judiciary. The conservation of resources through the elimination of waste by attempting to streamline litigation should be the goal of all parties before this Court, including SunTrust.

The Chapter 11 Plan for LES and LFG creates two Litigation Trusts. [see Confirmed Plan §§ 1.9-1.13 and 1.158-1.160 at dkt. #66, Ex. A, Appendix I]. The LES Trust is charged with the authority to sue, among others, SunTrust for selling the Auction Rate Securities ("ARS") to LES, which were wrongfully purchased with Exchange Funds. Counsel for the LES Trust, Jenner & Block ("Jenner"), has already submitted an attorney's fee bill in excess of $1.4 million for the ARS litigation to be prosecuted against SunTrust, which bill includes attorney and paralegal time submitted by **over 50 people** working on the matter at Jenner. See Exhibit 1. The other Litigation Trust is called the "LFG Trust" and it is charged with the authority to sue, among

others, the officers and directors of LES and LFG in an action which will likely include some or all of the Individual Defendants named by the Plaintiffs in this MDL Class Action.

Clearly, pursuant to the Chapter 11 Plan, there will be ongoing litigation brought by the LES Trust against SunTrust and ongoing litigation brought by the LFG Trust against the Individual Defendants and their insurers.

II.

THE MDL CLASS ACTION AGAINST SUNTRUST SHOULD NOT BE STAYED

A. The Competing Interests Weigh Strongly in Favor of the Plaintiffs' Action Against SunTrust Proceeding.

The primary thrust of SunTrust's request for a stay is that a stay will avoid multiple proceedings, though SunTrust ignores the impending litigation from the LES and LFG litigation trusts. The cases cited by SunTrust in its brief are either inapplicable at best or support Plaintiffs' position that a stay is improper. In none of the eleven cases cited by SunTrust was a contested action stayed against a party that was unrelated and independent of the bankrupt debtor or stayed party. *Cf. Matter of Johns-Manville Corp.*, 26 B.R. 405, 413 (Bankr.S.D.N.Y.1983) (denying stay under 11 U.S.C. §362 "because the only relationship demonstrated between the co-defendants is that of joint tortfeasors. Each co-defendant is an entirely independent entity, quite unlike each officer of a debtor corporation."). Six of the cited cases involved an application for stay where one of the defendants was in bankruptcy; however, five of the six cases pertained to requests for a stay by co-defendants related to the debtor in bankruptcy either as an officer, director, shareholder or controlled corporation.[1] The remaining case - the unreported opinion of

[1] See *Fed. Life Ins. Co. v. First Fin. Group of Tex., Inc.* 3 B.R. 375 (S.D. Tex. 1980); *Int'l Consumer Prods. v. Complete Convenience, LLC*, No. 07-325 (MLC), 2008 WL 2185340 (D.N.J. May 23, 2008); *In Re Adelphia Commc'ns Sec. Litig.* No. 02-1781, 2003 WL 22358819 (E.D. Pa. May 13, 2003); *Roberts v. We Love Country, Inc.*, No. 04-CV-5631, 2005 WL 2094843; and *Gulfmark Offshore Inc. v. Bender Shipbuilding & Repair Co., Inc.*, No.

Beardsley v. All Am. Heating, Inc. [2] - was an uncontested motion for stay consented to by all parties.

Because SunTrust faces imminent Litigation Trust proceedings and also is a defendant entirely independent from the stayed co-defendants, the four factor analysis employed by the court in *In Re Loewen Group Securities, Inc.*, No. 98-6740, 2001 WL 530544 (E.D. Pa. May 16, 2001) decidedly points to rejection of SunTrust's request for a stay.

In *Loewen Group Sec., Inc.* the court identified factors to consider in determining whether a court should proceed without a party "whose absence from the litigation is compelled by other reasons": (1) plaintiff's interest in having a forum and whether or not plaintiff has a satisfactory alternative forum; (2) whether the defendants may wish to avoid multiple litigation or inconsistent relief or sole responsibility for liability they share with another; (3) the interest of the outsider whom it would have been desirable to join and the extent to which the judgment may, as a practical matter, impair or impede the absent party's ability to protect his/her interest; and (4) the interest of the courts and the public in the complete, consistent and efficient settlement of controversies. *In Re Loewen Group Securities, Inc.*, 2001 WL 530544 (E.D. Pa.).

As to the first factor, this action is the Plaintiffs' only available forum. The 1031 Exchangers have already been severely damaged by the loss of their §1031 exchange funds, which in the case of many exchangers consisted of their life savings. The central issue is not whether the plaintiffs and proposed class members were damaged, but whether all who are responsible will be held accountable. And without this litigation, the Plaintiffs may have no

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09-0249-WS-N, 2009 WL 2413664 (S.D. Ala. Aug. 3, 2009) which all stayed actions against officers, directors, shareholders or controlled corporation of the bankrupt debtor already stayed.

[2] See *Beardsley v All Am. Heating, Inc.*, No. C05-1962P, 2007 WL 1521225 (W.D. Wash. May 22, 2007).

further redress for their losses, particularly with regard to the consequential damage element of their losses.

As to the second and fourth factors, a stay will only create multiple sequential litigation for the parties, requiring them to observe Litigation Trust proceedings on the side-lines as the ARS litigation proceeds when there is no reason the cases cannot move through the courts at the same time. As to the third factor, SunTrust has no relationship with the Individual Defendants, such as an indemnification agreement, or the relationship between a corporation and its own officers and directors, that would require their presence to protect SunTrust's interest.[3]

Of the remaining five cases cited by SunTrust, two resulted in denials of the stay petitions. Most notably in *Landis v North American Co.* the United Supreme Court vacated the district court's stay, stating "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. North American Co.*, 299 U.S. 248, 255, 57 S.Ct. 163, 166 (1936). In *Clinton v. Jones*, the Supreme Court highlighted the importance of the plaintiff's right to have its case brought to trial by overturning a stay of a civil suit against the President of the United States as an abuse of discretion since the plaintiff's interest in bringing her case to trial outweighed the interests of the President in performing his duties. See *Clinton v. Jones*, 520 U.S. 681, 707-708, 117 S.Ct. 1636, 1651 (1997). The remaining two cases[4] noted by

[3] See *A.H. Robins v Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) where the Fourth Circuit cited as unsupportive of an automatic stay under the Bankruptcy Code facts where the third-party defendant was "independently liable as, for example, where the debtor and another are joint tort feasors or where the nondebtor's liability rests upon his own breach of duty."

[4] See *Childers Foods, Inc. v Rockingham Poultry Marketing Co-op., Inc.*, 203 F.Supp. 794 (W.D. Va. 1962) (staying case on patent infringement while U.S. Patent office completed interference proceeding to determine the validity of disputed patent); see also *CMAX v. Hall* 300 F.2d 265, 269 (staying civil suit for collection of air freight undercharges while Civil Aeronautics Board completed concurrent licensing proceeding on validity of Plaintiff's license to ship freight.)

SunTrust pertained to staying civil suits while concurrent administrative proceedings dispositive of the civil suits were proceeding - a factual scenario not relevant to this case.

Ignoring the injunction of the Bankruptcy Court [dkt. #66] and the stay of this Court consistent therewith [dkt. #100], the Individual Defendants have taken upon themselves to continue participation in this action and filed a Response supporting SunTrust's Motion to Stay Proceedings [dkt. #103]. The Court in its Minute Entry of January 11, 2010 [dkt. #98] instructed only SunTrust and the Plaintiffs to file briefs on the stay issue. The Individual Defendants seem to view this Court's stay and the Bankruptcy Court injunction to mean they can participate when and if they want, which is counter to this Court's instructions and the purpose of the injunction in the Chapter 11 plan. Therefore, their Response should be disregarded.

As to the substance of the Individual Defendants' argument that the Injunction protects them from all discovery, they are plainly wrong. In its Order, the Bankruptcy Court stated:

> For the avoidance of doubt, nothing contained in this Order or the Plan shall preclude (a) Persons who have held, hold or may hold Claims against … the Debtors or the Estates from … commencing, enforcing, collecting or otherwise recovering on any suit, action or other proceeding that is not an Enjoined Action against Persons other than Debtors …

Order Confirming Joint Chapter 11 Plan, ¶6, pp. 11-12 at dkt. #66, Ex. A.

Consistent with the Order and the Chapter 11 Plan, Charles Gibbs, attorney for the Unsecured Creditors Committee of LES, confirmed by e-mail of November 4, 2009 (copied to Debtors' counsel) that the Injunction in the Plan would not enjoin or affect the Plaintiffs' ability to conduct discovery from the officers and directors of LES or LFG. See Exhibit 2. The Injunction is for the benefit of the Debtors and their Estates, not for the benefit of the Individual Defendants, a point they clearly miss. Discovery is permitted against the Individual Defendants,

and judicial economy is best served by allowing discovery in this case to proceed concurrently with actions of the Litigation Trusts.

B. SunTrust's Purported Concerns re Judicial Economy are Better Handled Through the MDL Tag-Along Procedure.

The Litigation Trusts have several options for bringing their actions against the Defendants, including filing the suits as adversary proceedings in Bankruptcy Court. Adversary proceedings are "civil action[s] pending in a district court" because, like all bankruptcy cases, the matters are simply referred from the district court to the bankruptcy court. 28 U.S.C. § 157(a). Consistent with this reasoning, the MDL Panel has long held that adversary proceedings in bankruptcy courts may be transferred pursuant to 28 U.S.C. § 1407. *See, e.g., In Re Phar-mor, Inc. Securities Litig.*, MDL 959, 1994 WL 41830 at *1 n.2 (J.P.M.L. Jan. 31, 1994) ("Because federal bankruptcy jurisdiction is vested in district courts, the Panel has never found any jurisdictional impediment to transfer of adversary proceedings as tag-along actions in multi-district dockets"). *Id.* Any Adversary Proceeding brought by the LES Trust against SunTrust will involve common questions with the two class actions centralized as MDL 2054.

The Chapter 11 Plan which temporarily stays the MDL Class Action against the Individual Defendants already creates waste and inefficiency which should not be compounded by a stay of the litigation against SunTrust. Plaintiffs' counsel (Hollister & Brace) has been lead counsel in two other MDL Actions involving failed 1031 Qualified Intermediaries ("QI") and responsible, in part, for recovering over $200 million in settlements from numerous defendants to pay for lost 1031 Exchange Funds in those cases[5]. In both of those complex MDL Actions,

[5] MDL No. 1878, *In Re: Southwest Exchange Inc. Internal Revenue Service § 1031 Tax-Deferred Exchange Litigation*, United States District Court for the District of Nevada Case No. 2:07-CV-01394-RCJ-LRL; and MDL No. 2028 *In Re: Edward H. Okun Internal Revenue Service § 1031 Tax Deferred*

only one defendant agreed to settle without a Rule 23 Bar Order issued by the Class Action courts – and that defendant is still being sued by the Exchangers in MDL 2028. It is safe to assume, based upon the experience of counsel prosecuting these 1031 cases, that the insurers for the Individual Defendants will not pay one penny to the LFG Trust without obtaining a simultaneous release from the Class Plaintiffs in MDL 2054. The primary reason is that the "case or controversy" to recover damages measured by lost Exchange Funds belongs exclusively to the Exchangers, and not to the QI in bankruptcy. See *McHale v. Citibank, N.A. (In Re: 1031 Tax Group, LLC)* 2009 Bankr. LEXIS 3810 a. 52 Bankr. Ct. Dec. 138 (Bankr. S.D.N.Y. Dec. 3, 2009). Therefore, the stay of the class litigation against the Individual Defendants will ultimately have to be lifted before any Litigation Trust proceeding against the Individual Defendants can be effectively resolved.

A stay of the MDL Class Action against SunTrust would cause additional waste of judicial time and will cause SunTrust ultimately to suffer through two separate actions as a defendant; one with the LES Trust as the plaintiff and one later on with the Arthur/Terry Class as the plaintiff. Instead of seeking a stay of MDL 2054, SunTrust may petition the MDL Panel to designate the anticipated Litigation Trust proceeding, when filed, as a tag-along action pursuant to Panel Rule 1.1 and make it a part of MDL 2054.

Efficiency would dictate that MDL 2054 be expanded to include the Litigation Trust Proceeding to be filed by the LES Trust against SunTrust. Document discovery would be shared, depositions would be taken once and dispositive motions heard by one judge. Staying MDL 2054 in its entirety until all the Litigation Trust proceedings are over will serve no

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observable benefit to anyone—especially the 1031 Exchangers who lost, in some cases, their life savings.

SunTrust's contention that it would be difficult to defend MDL 2054, for aiding and abetting the LES Ponzi scheme, without the presence of the Individual Defendants as defendants in the case is not correct. Plaintiffs frequently must try cases with an empty chair. Cases against accessories to crimes often must be pursued when the principal criminals are in jail and unavailable. Cases may have to go forward with a defendant absent for jurisdictional reasons. The possible lack of participation of the Individual Defendants at the trial against SunTrust is Plaintiffs' dilemma, not SunTrust's, as Plaintiffs have the burden of proof at trial.

Moreover, SunTrust has the burden of making a clear showing that the stay it seeks is warranted and that the Individual Defendants are indispensable parties. See *Matter of Safeguard Mfg. Co*., 25 B.R. 415, 418 (Bankr. Conn. 1982) (ruling where plaintiff has cause of action against movant alone and movant has not shown that stayed party is indispensable, stay should not be granted); see also *Bedel v. Thompson*, 103 F.R.D. 78 (D. Ohio 1984)(holding bankrupt corporation not an indispensable party where current defendants could be required to fully satisfy judgment under several liability since joint tortfeasors are not indispensable parties). SunTrust is a joint tortfeasor in this case and has produced not even a hint of case law that would support concluding that the officers and directors of a co-wrongdoer are indispensable or must be present as defendants. Plaintiffs could just as easily have brought this case against SunTrust alone. Accordingly, SunTrust has not met its that burden to show it is entitled it to a stay.

III.

CONCLUSION

The LES and LFG bankruptcies have already injured the 1031 Exchangers by causing delay in the prosecution of the MDL Class Action and the incurrence of astronomical professional fees, which have been funded by the Plaintiffs' Exchange Funds on deposit at LES. Further delay of the case against SunTrust due to the stay of the case against the Individual Defendants would add insult to the injury. The motion by SunTrust should be denied. Justice delayed is no justice at all.

Respectfully submitted this 1st day of February, 2010.

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