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	
Angela M. Arthur, as Trustee of the Arthur Declaration of Trust, dated December 29, 1988, *et al.*,	Case No.: MDL No. 2054
Plaintiffs,	Southern District of California C.A. No. 3:09-cv-00054
vs.	District of South Carolina C.A. No.: 8:09-cv-0041
Suntrust Bank, *et al.*,	
Defendants.	

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT FOR LACK OF PERSONAL JURISDICTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)2 FILED BY DEFENDANTS CHANDLER , EVANS, RAMOS AND JONES (Docket entry # 50-1), BY DEFENDANT ALLEN (Docket entry # 56-1) AND BY DEFENDANT CONNOR (Docket entry # 48-1)

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I. PRELIMINARY STATEMENT

Plaintiffs file this Memorandum in opposition to Motions to Dismiss based on lack of personal jurisdiction pursuant to FRCP 12(b)(2) filed by Theodore L. Chandler, Jr ("Chandler"), Brenton Allen ("Allen"), G. William Evans ("Evans"), Stephen Connor ("Connor"), Ronald R. Ramos ("Ramos") and Devon M. Jones ("Jones") (collectively "Defendants"). Plaintiffs position in Opposition is based on this Memorandum of Points and Authorities, filed concurrently herewith, all documents and arguments submitted in support hereof, and the complete Court file. Plaintiffs also incorporate by reference their Memorandum in Opposition to Defendant SunTrust Bank, Inc.'s Motion to Dismiss the Amended Complaint, and Plaintiffs' Memorandum in Opposition to the individual Defendants' Motions to Dismiss for lack of standing pursuant to the Federal Rule of Civil Procedure 12(b)6.

II. STATEMENT OF FACTS

Plaintiffs are individual persons or legal entities which entered into Exchange Agreements with LandAmerica 1031 Exchange Services, Inc. ("LES"), a Maryland corporation and a wholly owned subsidiary of LandAmerica Financial Group, Inc. ("LFG"), a Virginia corporation. LES was a Qualified Intermediary ("QI"), which assisted clients in performing like-kind Exchanges ("1031 Exchanges") pursuant to Section 1031 of the Internal Revenue Code, after executing Exchange Agreements authored by LES. The Agreements authorized LES, doing business as a QI, to serve briefly as fiduciary for its clients, holding Exchange Funds in trust while like-kind property was identified. Exchange Agreements created an interest split with LES and its clients, for funds generated by the deposits. Exhibit 9. Exchange Agreements warned Exchangers that amounts deposited might be at risk, if they exceeded FDIC coverage limits for banking institutions. Wilson Exchange Agreement, p. 3.

Plaintiffs' Exchange Funds were diverted to the use of the corporation, which purchased Auction Rate Securities ("ARS"), even after the collapse of the ARS market. A Petition for Chapter 11 Bankruptcy protection was filed by LES in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division (the "Bankruptcy Court"), on November 26, 2008. LFG, the parent corporation, also filed for Bankruptcy on that date. Exchange Funds deposited by more than 400 Exchangers, including Plaintiffs, were never recovered.

LES operated its exchange business throughout the United States, Mexico, the Caribbean, Latin America, Europe and Asia and maintained regional offices in Los Angeles, CA, Richmond, VA, Orlando, FL Chicago, IL, Portland, OR and Houston, TX. Chandler Declaration ("Chandler Decl.") at ¶ 6. It solicited clients through its website and advertising brochures, through marketing efforts to reach professionals across the United States, such as attorneys, accountants, developers and corporations. Deposition Transcript of Connor ("Connor Dep."), at p.46, l. 24-25. Its advertising brochures offered a "signed, written guaranty of the unrestricted availability of full amount of exchange funds", promised that Exchange Funds would be "Held in Trust", and promoted its A- credit ratings through Standard & Poors. See Exhibit 9. Instead, LES, through its Defendant corporate officers and directors, recklessly determined to invest in Auction Rate Securities ("ARS") for the benefit of the corporation. Ramos Dep. p. 16: l. 14-18. These investments contravened express provisions in Exchange Agreements, and breached LES' fiduciary duties to Exchangers. In February, 2008, the ARS market collapsed and LES funds were no longer liquid. Ramos Dep. p. 18: l.10-14. In response, LES did not terminate or reduce its investment in worthless ARS, but continued to purchase them. Deposition Transcript of Ramos ("Ramos Dep.") p.29: l.10-17. Eventually, LES intentionally began to pay aging Exchange accounts with money

accepted from new Exchangers, in a classic Ponzi scheme, without notice to existing Exchangers of this dramatic shift in liquidity or of its inability to warrant fund safety. (Amended Complaint ("Am. Complt.") at ¶¶ 8, 10). LES refused to recognize its operational insolvency, and failed to advise new or existing Exchangers of its inability to meet its promises of the "100% safety" of Exchange funds. (Am. Complt. ¶¶ 103, 131), Exhibit 10. However, it continued soliciting Exchange fund deposits throughout the US. (Am. Complt. ¶9). Exchanger clients of LES reside in 42 states, though LES had only five (5) regional offices. Exhibits 7, 8. A website containing necessary information to establish Exchange accounts maintained by LES. Connor Dep. p.12:l. 10-23; p.13: l. 1-14. When its ability to repay existing Exchanges dissolved, LES and LFG filed for Chapter 11 bankruptcy. (Am. Compl. ¶ 140, 158).

This case is comprised of two actions, Case No. 3:09-cv-00054, filed in the Southern District of California, and Case No. 8:09-cv-00415, filed in the District of South Carolina. Plaintiffs in the District of South Carolina, the "Terry Plaintiffs", moved to consolidate the South Carolina action with the case then pending in the Southern District of California, the "Arthur action". The United States Judicial Panel on Multi-District Litigation, after argument, ordered that the cases be consolidated pursuant to 28 U.S.C. § 1407, and transferred the Arthur action to the District of South Carolina, by Order dated June 12, 2009.

During the time when LES operated its exchange business throughout the United States, it acted through "more than 100 subsidiaries", across the US. Chandler Decl. ¶ 6. It solicited clients through its website and advertising brochures as well as through its regional offices. Chandler. Decl. ¶6; Connor Dep. p. 12: l. 3-9.

Defendants Chandler, Connor, Allen, Evans, Ramos and Jones have moved to

dismiss the instant action in South Carolina, asserting lack of personal jurisdiction there, and insufficient and non-specific pleadings of fraud. This is Plaintiffs' Memorandum in support of their Opposition to Defendants' Motions to Dismiss for lack of personal jurisdiction.

STATEMENT OF FACTS FOR DEFENDANTS CHANDLER, CONNOR, ALLEN, JONES, RAMOS, AND EVANS

A. Theodore Chandler

Chandler was Chairman of the LFG Board of Directors. Chandler Decl. ¶ 2. He resided in and commonly worked in LFG headquarters' offices in Richmond, VA. Chandler Decl. ¶ 2-5. He maintained regular and ongoing contact with LES' officers and employees and conducted telephonic meetings with them. Chandler Decl. ¶ 20. Specifically, on October 18, 2008, Chandler participated in conference calls with Evans, Connor, Ramos, Jones and Allen regarding LES' strategic alternatives, including the termination of all LES operations on the following Monday, October 20, 2008. Connor Dep. p. 57: l. 4-25; Ramos Dep. p. 32:l. 5-14; p.34: l. 19-25; p.36: l. 7-12; p.41: l. 11-21. He participated in other conversations both in person and by telephone with Ramos, Evans, and Connor. Ramos Dep. p. 32:l. 5-14; p.34: l. 19-25; p.36: l. 7-12; p.41: l. 11-21., and generally managed the affairs of LFG and participated in discussions as to the management of LES. Chandler Decl. ¶ 2, 6, 20. He authored a letter to then U.S. Treasury Secretary Paulson, to solicit the aide of the U.S. government for LES, because of its dire financial state. Deposition Transcript of Allen ("Allen Dep."), February 19, 2009, p.60: l. 10-22. He met with Allen at the Boston offices where Allen worked. Allen Dep. p. 65: l.12-14.

B. Devon M. Jones

Devon M. Jones served as Vice President for both LFG and at LES, where she also held the position of Assistant Treasurer. She was responsible for the financial management and cash

management for the company's daily operations. She held the same positions at Centennial Bank and Loan care, both LFG subsidiaries. Deposition Transcript of Jones ("Jones Dep."), February 11, 2009, p 16: l. 5-25; p. 18: l. 11-19.. Together with other LES Treasury Department staff, she had authority to withdraw Exchange Funds for movement to other accounts. LES held an Exchange account ("3318") at SunTrust Bank. From that account, which she supervised, LES also received interest payments and made disbursements for operating expenses. Jones Dep. p. 28: l. 9-20; p. 27: l. 17-25. She also moved substantial funds to Smith Barney accounts shortly prior to the LES Bankruptcy filing. Jones Dep. p.30: l. 6-17; p.31: l. 4-25. Some Exchanger funds required segregation and she accomplished this through Citibank accounts. Jones Dep. p. 38: l. 5-11. She reported to Ronald Ramos who performed dual authorization functions where required. Jones Dep. p. 39: l. 9-19; p. 41: l. 4-19. SunTrust account #3318 Bank Statements came to her. Jones Dep. p 50: l. 6-19. LES moved Exchange Funds into and out of accounts at Centennial Bank, through both a manual and an online operation. Jones Dep. p. 98: l. 6-24. She is responsible for all banking for LES, which included "almost every bank" across the United States. Jones Dep. p. 99: l. 9-13.. She attended Investment Committee meetings at LFG, from which reports were made to the LFG Board of Directors. Jones Dep. p. 17: p. 7-20; 102: l. 8-16. SunTrust account 3318 accepted all client Exchanger fund deposits. Jones Dep. p. 104: l. 3-9. On three occasions in Q3 and Q4 of 2008 , a liquidity crisis at LES resulted in her request for funds "infusions" to LES from LFG in amounts of $21.7 million, $12.9 million and $5.7 million. Jones Dep. p. 110: l. 10-23; p. 111: l. 3-15; p.112: l. 3-23; p. 128: l. 20-21. All funds used to buy ARS were paid from SunTrust account # 3318. Jones Dep. p. 122: l. 5-9. She was responsible to redeem ARS as required by the daily cash needs of LES, with dual authorization from Ramos. Jones Dep. p.

136: l. 1-7. She manually 'swept" SunTrust account 3318 on a daily basis. Jones Dep. p. 141:l. 14-20. She assisted in the determination of interest spread splits between LES and the Exchangers. Jones Dep. p. 144: l. 15-25. She determined dividend payments due to LFG on a weekly basis. Jones Dep. p. 148: l.11-22. She made facsimile and email transmissions for Exchange deposits to SunTrust account 3318. Jones Dep . p.158: l. 6-15. Calls to Citibank to discuss interest rates and Exchange accounts were made by conference calls, which Ramos joined. Jones Dep. p. 253: l. 4-23. She participated in discussions regarding the liquidity crises at LES after ARS froze in February, 2008. She was responsible for reconciliation of Exchange account ledgers. Jones Dep. p. 54: l. 8-18.

C. Ronald Ramos

Ronald Ramos served as Senior Vice President and Treasurer of LFG and LES, with responsibility for oversight of cash management, investment management, debt management, and insurance procurement. Deposition of Ramos ("Ramos Dep.") February 19, 2009, p. 13: l. 2-12. He reports to William Evans and Devon Jones reports to him. Ramos Dep. p 13: l. 13-20. He supervises LES employees who decide into which accounts Exchange Funds will be deposited. Ramos Dep. p. 14: l. 1-6. He was responsible to establish investment guidelines for LES and to outline acceptable investments for LES, considering the quality and liquidity of investments, as well as investment ratings by Moody's. Ramos Dep. p. 15: l. 10-20. He accepted the investment recommendation of Devon Jones regarding the purchase of ARS. Ramos Dep. p. 17: l. 2-20. Upon discovering the collapse of the ARS market in February, 2008, he discussed the liquidity crisis with members of the LFG Investment Committee, which reports to the LFG Board of Directors. Ramos Dep. p.20: l. 4-23. He also discussed the ARS illiquidity with G. William Evans, who is a member of the

LFG Board of Directors. Ramos Dep. p. 20: l. 15-17. He was actively involved with the reporting disclosures of LES liquidity to the SEC and reviewed and discussed the LES 10Q filing with various persons in the Comptroller's office at LES. Ramos Dep. p. 27: l. 2-12. He assisted in the determination of a valuation method for LES ' investments in ARS . Ramos Dep. p. 27: l. 14-25; p.28: l. 1-11. He appeared before the Investment Committee of the Board of Directors on matters involving manager performance, at times when the Committee heard reports of the ARS illiquidity. Ramos Dep. p. 28: l. 12-22. On October 1, 2008, Ramos met with Evans, Chandler, Jones, Allen and Connor to continue a series of discussions which had begun in late August, 2008 on the ongoing liquidity crisis. Ramos Dep. p. 32: l. 5-14. These meetings were held in person and by telephone. Ramos met with Evans, Chandler, Gluck (LES' in-house counsel), Jones , and Connor personally and by telephone on October 1, 2008 to discuss cash flow projections, the impact on business volume resulting from the collapse of ARS and various spreadsheet and business models. Ramos Dep. p. 34: l. 19-25; p. 35: l. 1- 21. He conferred with Brent Allen, the underwriting counsel for LES, regarding the impact segregated accounts would have on LES revenue streams. Ramos Dep. p. 41: L. 13-24. He was responsible for the production and approval of Minutes prepared following LFG Board Meetings. Ramos Dep. p. 38: l. 11-16

He also sent and received email communications from William Evans regarding potential and existing valuation issues regarding LES' bonds. (Am. Complt. ¶ 76). On October 17, 2009, he personally directed the movement of $25 million from LFG Holdco to LES, in response to the liquidity crisis at LES, and made recommendations for a sale of the ARS block at a 30% discount, and reported holdings at both LFG Holdco and LES to Gluck, Evans and Chandler. (Am. Complt. ¶76). He discussed with Evans, Chandler, Connor and

Allen LES' strategic alternatives for LES, the need for liquidity, the potential for termination of company operations, and the need for immediate resolution to LES holdings in ARS, over the weekend of October 17, 2008. Ramos Dep. p. 41: l. 11-24, p. 69: l. 3-17. Multiple meetings over that weekend took place in person and by telephone. Ramos Dep. p. 46: l. 13-25; p. 47: l. 12-23. He was involved in Chandler's request for assistance for LES from the U.S. Treasury Department. Ramos Dep. p. 67: l.20-23. On November 24, 2008, he announced that the company would cease operations (in anticipation of its Chapter 11 Petition on November 26, 2008). Ramos Dep. p.105: l. 7-12. He participated in communications with the Nebraska Department of Insurance regarding a finding that absent a prompt infusion of funds from another source, LES would face the termination of operations. Ramos Dep. p. 128: l. 22-25; p. 129: l. 1-14.

D. Stephen Connor

Connor was Senior Vice President for both LES and LFG. Deposition Transcript, February 19, 2009 ("Connor Dep."), p.9: l. 9-15. He reported to G. William Evans who succeeded Pam Saylors as President of LES. Connor Dep. p. 9: l. 16-24. His office was located in Chicago, IL, where he lived. Connor Dep. p. 11:l. 8-9. He was responsible for approval of all LES marketing materials, approval of the LES website content for its multiple domain names, for presentation of LES to the public, and for growth and profitability of LES. Connor Dep. p. 11: l. 13-20; p.12: l. 7-17. He personally drafted LES written guaranties for Exchange clients who requested them, as many as 50 in number for 2008 alone. Connor Dep. p. 17: l. 6-24; p. 18: l. 9-19. He requested an opinion from Ernst & Young as to how to reflect such guaranties on the corporate records. Connor Dep. p. 19: l. 3-17. In April, 2008, he learned from receipt of profit and loss statements about LES investment in ARS and

inquired of LES headquarters personnel why this number was not higher. Connor Dep. p. 21: l. 15-24. He learned from Ramos what the investment process was for LES use of Exchange Funds. Connor Dep. p. 28: l. 10-25. He requested this investment information for distribution to Exchangers in a "marketing piece". Connor Dep. p. 29: l. 6-17. He became concerned for the ongoing financial viability of LES when he received a telephone call from Ramos on October 18, 2008 and was included in discussions with LES officers about the liquidity crisis. Connor Dep. p. 31: l. 6-22; 32: l. 4-18. He recommended return to the segregated exchange funds model. Connor Dep. p. 32: l. 1-3. Besides Ramos and Saylors, Ted Chandler personally assured him of the viability of LES going forward. Connor Dep. p. 36: l. 9-25. He participated in a teleconference with Chandler, Evans, Gluck (in- house counsel) and Ramos about the liquidity crisis on October 18, 2008. Connor Dep. p. 57: l. 4-25. He received instructions from LES counsel on October 18, 2008 to cease operations and accept no more Exchange deposits. Connor Dep. p. 40: l. 20-24. He was involved in "all substantive communications regarding any changes to the business model" of LES, and no one but LES President held a higher position in the company. Connor Dep. p. 41: l. 5-18. He met regularly, at least monthly, with the professionals (brokers, real estate agents, attorneys, developers and corporations) who were "targeted" for marketing by LES, either by phone or in person. Connor Dep. p. 46: l. 11-25; p. 47: l. 21-25; p. 48 l. 4-8. He participated in creating SEC filings for LES and/or LFG, creating real property holding and valuation reports. Connor Dep. p. 52: l. 5-25; p. 53: l. 2-9. He received an email from LES counsel, attaching a Non-Disclosure Agreement for his execution. He signed the document without knowing why LES was requesting it. Connor Dep. p. 63: l. 11-25; p 64: l. 9, 10. He saw and approved the marketing documents which promised that LES accepted Exchange funds "in trust". Connor

Dep. p. 75: l. 3-13. He did not direct the recall of marketing brochures containing language for 100% Exchange Fund safety guaranty following the LES liquidity crisis. Connor Dep. p. 46: l. 1-20.

E. G. William Evans

G. William Evans served as Executive Vice President and Chief Financial Officer of LFG, and served as an officer and director of LES. Declaration of G. William Evans ("Evans Decl.", December 15, 2008, Exhibit 1) at ¶ 1. Other officers, including Brenton Allen, Stephen Connor, reported directly to him. Connor Dep. p. 9: l. 23, 24. He has served as officer and director of various LFG and LES subsidiaries since 1976. Evans Decl. ¶ 1. He was responsible for the financial, accounting and corporate performance of LFG, including its corporate development. Evans Decl. ¶ 1. He is 'very familiar with the strategic operation, business and financial affairs of the LES and LFG". Evans Decl. ¶ 1. He learned from Ramos about the collapse of the ARS market in February, 2008. Ramos Dep. p. 20:l.8,9. He participated in the attempt to raise funds for LFG and LES by selling stock in corporate subsidiaries, to stem the ongoing liquidity crisis at LES caused by LES ongoing investment in ARS after the collapse of that market, through a stock purchase agreement with Fidelity National Title Insurance Co. Evans Decl. ¶ 2. The LES liquidity crisis deepened when lenders refused to accept title policies of LFG affiliates. Evans Decl. ¶ 7. He acknowledged the critical relationship between lender confidence and new client business for LES. Evans Decl. ¶ 8. He noted the national impact of the loss of these relationships, especially in consideration of the determination by the Nebraska Department of Insurance that LES would soon be unable to continue operations. Evans Decl. ¶ 13. Critical employees of LES and LFG reported to Evans, including Ronald Ramos. Ramos Dep. p 13: l. 6-16. He participated in

crucial discussions over the weekend of October 18, 2008, with Jones, Allen, Ramos, Chandler and Connor, regarding strategic business decisions, whether to suspend or continue the LES acceptance of client funds, and whether to continue to accept only segregated Exchange Funds. These meetings which took place by phone and in person, included a decision to close LES operations on Monday, October 20, 2008, which decision was reversed over that same weekend. (Am. Complt. ¶ 78). Prior to October, 2008, he participated in multiple discussions with Allen, Ramos and Chandler, regarding significant liquidity issues at LES, created by its ongoing ARS investments, and what strategic options were available to LES and LFG. Allen Dep. p. 62: l. 19-25; p. 63: l. 16-25; p. 64: l. 22-25: p. 65: l. 1, 2.

F. Brenton J. Allen

Brenton J. Allen served as Vice President and National Underwriting counsel for LES. Deposition of Brenton J. Allen ("Allen Dep."), February 12, 2009, p. 12: l. 14-25. He developed forms of Exchange Agreements for LES, and formulated the intent and performance of escrow documents. Allen Dep. p. 15: l. 9-25; p. 16: l. 1-23. It was his role to insure that LES did not incur liability for failed transactions. Allen Dep. p. 12: l. 17-25. He also served as Assistant Secretary for LFG. Allen Dep. p. 13: l. 17, 18. He had direct client contacts where required, to provide written guaranties from LFG of the safety and security of Exchange Funds of LES. Allen Dep. p.14: l. 2-6. He was responsible for drafting Exchange Agreements, or reviewing existing Agreements, for compliance with Internal Revenue Code § 1031, and for CFR § 1.103(k) and (g). Allen Dep. p. 16: 5-23. He had contact with LES employees in its field offices, particularly when issues arose from Exchangers as to contents of Exchange Agreements. Allen Dep. p. 18: l. 2-15. He controlled all Exchange Agreements of LES, in whatever form they existed, since field employees of LES merely printed them

from the computer systems, and were not permitted to alter them without his approval. Allen Dep. p. 19: l. 16-21; p. 22: l. 1-10. He permitted Exchange Documents to specify whether the account was commingled or segregated, by way of its paragraph 3. Allen Dep. p. 23: l. 20-25; p. 24: l. 14-17. He had responsibility to ensure that Exchange contracts with clients would comply with IRS rules and Regulation 468(b) requirements. Allen Dep. p. 32: l. 3-6. He was active with the Exchange funds deposited with Centennial Bank, a subsidiary of LFG, including whether these accounts were segregated or commingled. Allen Dep. p. 32: l. 12-25; p. 34: l. 4-10. He was responsible for the interpretation of the language of Exchange Agreements. Allen Dep. p. 36: l. 16-20. He reviewed all marketing and advertising materials. Allen Dep. p. 48: l. 11-15. He was involved in discussions as to the request for emergency aide from the U.S. Treasury. Allen Dep. p. 58: l. 14-25. He participated in calls where numerous corporate officers, including Ramos and Connor, discussed strategic options for LES following the collapse of the ARS market. Allen Dep. p.61: l. 11-19; p. 62: l. 22-25; p. 63: l. 9-20. He learned on October 19, 2008 of the liquidity crisis which threatened continued operations of LES, and discussed the implications of commingling client funds and the revenue consequences of such a decision in teleconferences. Allen Dep. p. 64: l. 10-25; p. 65: l. 1, 2. He met Theodore Chandler when the CEO visited his Boston offices. Allen Dep. p. 65: l. 12-14. He also participated in discussions of potential changes to the Exchange Agreements. Allen Dep. p. 68: l. 11-24. He testified that he "certainly sat in on phone calls with customers" of LES. Allen Dep. p. 73: l. 14-20. He wrote articles and spoke in public meetings on behalf of LES, and was available to customers and field representatives of LES regarding pending or future Exchanges. Allen Dep. p. 73: l. 7-10. He participated in managing the terms of Centennial Bank's acceptance of Exchange Funds into commingled

accounts. Allen Dep. p. 86: l. 11-17. He had direct client contact concerning segregated accounts requested, and regularly reviewed Exchange Agreements to be certain of their compliance with IRC provisions and Treasury regulations. Allen Dep. p. 85: l. 1-19; p. 90. l. 1-15. He was called into telephone conferences regarding client requests by Steven Offner, counsel for Millard Refrigerated. Allen Dep. p. 99: l. 15-25. He was involved in LES client Exchange Agreements whether the funds were held in segregated or in commingled accounts. Allen Dep. p.181: l. 11-20. In general, Allen was involved in major decisions regarding the ability of LES to move forward to accept both commingled and segregated funds, following the collapse of the ARS market, and his actions were made on behalf of the corporation, largely through telephone and email contacts. He had direct client contact with Exchangers regarding the terms of the Exchange Agreements, including client requests for the written guaranty of 100% security of client funds, which he drafted on many occasions. In sum, he was an agent of LES for effectuating corporate decisions and implementing them.

III. LEGAL STANDARD

A Motion filed under Rule 12(b)2 tests the authority of the Court to exercise personal jurisdiction over Defendants. Plaintiffs assert that through the actions undertaken as corporate officers and directors of LES and LFG, by Chandler, Evans, Connor, Ramos, Jones and Allen, in directing corporate activity, Defendants have established sufficient minimum contacts with South Carolina and with California, to meet and exceed state and federal due process standards for this Court's exercise of personal jurisdiction over them individually and collectively.

IV. ARGUMENT

In response to Motions filed pursuant to Rule 12 (b)(2) and (6), Plaintiffs bear the

burden of proof to assert the necessary jurisdictional facts. *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). However, where, as here, Defendants move to dismiss as an initial response, it is only required that Plaintiffs make out a *prima facie* case establishing a basis for personal jurisdiction. *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp*., 751 F.2d 117, 120 (2d Cir. 1984)**;** *Brown v. Geha-Werke GmbH*, 69 F. Supp. 2d 770 (D.S.C. 1999**)**; *Data Disc. Inc. b. Systems Technology Assn., Inc*., 557 F. 2d 1280, 1285 (9th Cir. 1977). Such a *prima facie* case need demonstrate only that specific facts, if found to be true, will support jurisdiction over Defendants. *Data Disc. Inc*., *Id.* at 1285. Such a showing is normally required as to each Defendant, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980), and the instant Opposition to the Motion to Dismiss addresses the contacts for each Defendant. Plaintiffs are required to make such a showing only by a preponderance of the evidence. *Blue Mako, Inc, v. Minidis*, 472 F. Supp. 2d 690 (M.D.N.C. 2006).

In a multi-district litigation ("MDL") action, the Court must apply the choice of law rules of the transferor court for pre-trial motions. *In re Educational testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litigation*, 517 F. Supp. 2d 832 (E.D. LA 2007); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 21 F. Supp. 2d 593, 597 (E.D. La. 1998) *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 674 (5th Cir. 2003) .

Further, Defendants Motions to Dismiss must be evaluated under a "plausibility standard" which permits the court to accept factual allegations made by plaintiff, in the absence of a showing they constitute mere speculation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Otherwise, the uncontroverted allegations contained in a complaint must be accepted as true, and conflicts over the contents of affidavits must be resolved in plaintiffs' favor. *AT&T Companie Bruxelles Labert*, 94 F.ed 586, 588 (9th Cir.1996). *Dole Food*

Company Inc. v. Malcolm Watts et al, 303 F. 3d 1104 (9th Cir. 2002).

A. CALIFORNIA STATUTORY AND FEDERAL DUE PROCESSSTANDARDS FOR MINIMUM CONTACTS ARE SATISFIED FOR CALIFORNIA PLAINTIFFS

In order to exercise California's personal jurisdiction over non-resident defendants, each defendant must have established sufficient minimum contacts with the state to permit the relevant forum to exercise personal jurisdiction which "does not offend traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 66 S. Ct. 154 (1945). The minimum contacts of Defendants are well established by LES' continuous and systematic contacts with the state of California, and are adequate to confer general and specific jurisdiction over Defendants there. Specifically, the contacts by Defendants with California include: 1) the presence of LES regional offices in Los Angeles, 2) the existence of Exchange Agreements executed there with at least one hundred eighteen (118) Exchangers 3) whose funds were accepted there, 4) for properties located there, and 5) whose funds passed through financial institutions there, 6)including in many cases, Centennial Bank, located in San Bernardino County, California. Centennial Bank is a corporate subsidiary of LFG and Defendants Evans and Jones served among its corporate officers.

California's long arm statute is co-extensive with federal due process requirements, and therefore the analysis of its state law jurisdiction is the same as the federal due process analysis. *Panavision Int'l L.P. v. Toeppen*, 141 F. 3d 1316, 1320 (9th Cir. 1998). A proper basis for specific jurisdiction in California exists when the following standards are met:

> (1) the non-resident defendant has purposefully directed its activities or consummated some transaction with the forum or a resident thereof; or performed some act by which he purposefully avails himself of the privileges of conducting activities in the forum , there by invoking the benefits and protections of its laws;

> (2) the claim must be one which arises out of or relates to the defendants' forum related activities; and
>
> (3) the exercise of jurisdiction comports with fair play and substantial justice.

Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1485 (9th Cir. 1993).

Courts have recognized that conduct "expressly aimed" at the forum state or its residents will support the exercise of jurisdiction in CA, even where the harmful action took place elsewhere. *Calder v. Jones*, 465 U.S. 783, 79 L.Ed. 2d 804, 104 S. Ct. 1482 (1984) (CA news editor and reporter caused defamatory article to be published in FL.). Here, the "bulk of the harm" caused to California Exchangers took place in CA, where their contracts were signed, where their funds were accepted and deposited, where the offices of LES were located, and where their losses were sustained. *Core-Vent*, *supra*, 11 F. at 1486.

Purposeful direction may be established under an "effects test" where the defendant (1) committed an intentional act (2) expressly aimed at the forum state which (3) caused harm that the defendant knows is likely to be suffered in the forum state. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002); *Matsunoki Group, Inc. v. Timberwork Or., Inc*., 2009 U.S. Dist. LEXIS 37573 (N.D. Cal. Apr. 16, 2009)

Defendants acting for and through LES negotiated ongoing contract terms, which could not be concluded in a single day. Exchange Agreements articulated periods defined by IRS § 1031 for the identification of the replacement property (45 days), and for the conclusion of the entire transaction (180 days). LES established local banking relationships in CA, through which it operated, including its own branches of Centennial Bank, an LFG subsidiary. In short, Defendants decided where and under what contract terms to act. They committed to hold client funds "in trust", to preserve the funds, and to accept direction

where and how to apply sale proceeds. Defendants determined LES' fees for services, and negotiated interest payment splits with Exchangers. They agreed to return Exchange Funds to the client if the transaction was not timely completed. See Exhibit 9, Wilson Exchange Agreement.

Defendants, and each of them, mischaracterize the applicable legal standard for personal jurisdiction. None of the Defendants is required to have contact with any Exchanger in order to be subject to personal jurisdiction in California courts. It was standard practice for LES to conduct its regular business activity, in both California and South Carolina, by means of telephone and internet communications. (Am. Complt. ¶¶ 74), 76, 78, 86, Even wire transfers were directed by means of facsimile and/or email. The due process standard of reasonableness is clearly violated if Defendants in these circumstances escape personal jurisdiction. LES activity was not conducted from a specific situs in the United States. Instead, through its officers and directors who are Defendants here, LES solicited business across the US and on several continents. Chandler Decl. ¶6. Defendants claim to have conducted business through LES' Virginia headquarters. However, LES acted through its agents and officers, Defendants Chandler, Ramos, Evans, Jones, Connor and Allen, by whatever means they personally chose. The location of Connor's offices in Chicago did not, for example, as a single factor, either advance or inhibit LES' business solicitations across the United States, nor prevent the remaining Defendants from communicating with him regularly there. LES Exchange operations were not confined to its five regional offices, but were pervasive through more than 100 subsidiaries across the country. Chandler Decl. ¶6. Plaintiffs' funds were appropriated by LES in 42 different states. LES converted the funds of at least 100 California residents, and some Exchange

transactions there were completed pursuant to LES' Ponzi scheme before the bankruptcy filing. LES thus conducted extensive business operations in California. Similarly, through teleconferences with each other, Defendants together determined to embark on a Ponzi scheme, following their intentional and breach of fiduciary duty in continuing to invest in ARS.

Defendants, on behalf of LES, purposefully availed themselves of the privileges of doing business there, and the Plaintiffs losses resulted directly from LES' Exchange activity there. None of the actions of LES could have been completed except through the activities and decisions of these Defendants. It is elementary that a corporation can only act through its officers. Corporate activity is not protected in circumstances of gross negligence, or breach of fiduciary duty. *World-Wide Volkswagen, supra. International Shoe Co. v. Washington, supra.* This is the crux of the Plaintiffs' claims. Defendants violated Exchange Agreement terms and converted Exchange Funds to corporate use and for this they are liable. That they accomplished this result through gross negligence rather than outright theft does not shield them from personal jurisdiction in California courts.

The final consideration under California's long arm statute is an analysis of the reasonableness of requiring Defendants to submit to that state's jurisdiction. In fact, it would be wholly unreasonable to grant Defendants' motions, precisely because of the way LES conducted business. The very means (telephone, fax and internet communications) used by LES to capture Exchange business throughout the country are the same technologies which California courts have noted will reduce litigation costs. The 9th Circuit has recognized that the burden to defend actions by non-residents, even those outside the United States, is substantially decreased in an age of sophisticated electronics.

The court in *Sinatra v. National Enquirer, Inc*. held that mere inconvenience to European defendants was not dispositive of the plaintiff's claims against them in California, which they unsuccessfully contested there on grounds of lack of personal jurisdiction. "Modern advances in communications have significantly reduced the burden of litigating in another [jurisdiction]." *Sinatra v. National Enquirer, Inc*., 854 F. 2d 1191, 1199 (9th Cir. 1988).

LES as a corporation acted through its corporate officers and directors, the Defendants here. Their conduct on behalf of LES to set up offices in California and to accept Exchange funds from hundreds of Exchangers was purposeful, and organized in a way for LES to avail itself of the privilege of doing business in California. LES, acting through these Defendants, engaged in substantial, systematic and ongoing connections with the state of California, precisely directed at California residents. These facts unquestionably establish the Defendants' focus upon California residents. Chandler, Allen and Conner, acting together with remaining Defendants, were responsible for the growth, profitability and servicing of LES capabilities, including marketing. See Connor Dep. p 10; l. 10-20; Allen Dep., p. 48: l. 9-15. LES, through these Defendants, created and distributed brochures and other marketing materials, and utilized and approved multiple internet websites for its nationwide services. Conner Dep. p. 11: l. 10-16. The concerted actions of Defendants in determining to pay aging Exchanges with new Exchange funds was designed to accomplish these same ends of profitability and growth. Connor and Allen created written guaranties from LFG of Exchange Fund security for as many as fifty (50) Exchangers in 2008 alone and both Connor and Allen had direct Exchanger contact. Allen Dep. p. 73: l. 14-20; Connor Dep. p. 17: l. 6-24; p.18: l. 9-19. Conner admits to conferring with Ramos in or around April, 2008 concerning the ARS illiquidity and the LES

investment process, and he further concedes that he did not take action to amend marketing materials which were his responsibility, to reflect the sudden loss of Exchange funds after February, 2008. Connor Dep. p. 21, 23 . In California alone, more than 118 Exchangers lost funds. California maintains a strong interest in providing a forum for its residents and citizens who are tortiously and intentionally injured. See *Panavision*, *supra*, 141 F. 3d at 1323, and *Dole Food Co*, supra, 303 F. 3d 1104, 1115. This is particularly true where California was selected by Defendants as its business forum.

Taken as a whole, such concerted activity cannot be said to be "random, fortuitous or attenuated". *World-Wide Volkswagen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980). LES, through the corporate decisions of Defendants, solicited business across the country and could reasonably foresee the risk of litigation in states where it had regional offices, such as California. The totality of LES' conduct in and connections with these states, through Defendants personally, demonstrates purposeful availment of the resources there, and provided LES through its Defendant officers and directors, with clear notice of the risk of suits there. *World-Wide Volkswagen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980).

Therefore, the exercise of personal jurisdiction by California courts over Defendants is fair and reasonable, and comports with notions of fair play and substantial justice. Defendant's arguments of lack of personal jurisdiction must fail.

Once it is established that Defendants purposefully availed themselves of the privilege of doing business in California, and that they established minimum contacts, Defendants can only defeat personal jurisdiction if they "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable". *Burger*

King Corp. v. Rudziewicz, 471 U.S. 462, 477, 85 L.Ed. 2d 528, 105 S. Ct. 2174 (1985). Here, Defendants claim only that they are non-residents and had no contact with Arthur Plaintiffs. They fail to show any considerations which would prevent the exercise of personal jurisdiction over them.

B. SOUTH CAROLINA STATUTORY AND FEDERAL DUE PROCESS STANDARDS FOR MINIMUM CONTACTS ARE SATISFIED FOR SOUTH CAROLINA PLAINTIFFS.

A federal district court may exercise personal jurisdiction to the same extent as a state court sitting in the same jurisdiction as the district court. *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., Ltd*., 484 U.S. 97, 108 (1987). Since the courts of South Carolina extend jurisdiction to the limits created by the federal Constitution, federal courts in South Carolina need only determine whether the exercise of jurisdiction comports with relevant principles of due process, such that maintenance of the suit does not offend traditional notions of fairness and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In cases consolidated by the MDL Panel, the Fourth Circuit has accepted the general rule that the law of the transferee Circuit controls pretrial issues, including whether the court has personal jurisdiction over the action. See, *In re Digitek Products Liab. Litig. v. Actavis, Inc*., 2009 WL 1939170 (S.D.W.Va. 2009) (citing *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig*., 241 F.R.D. 435, 439 (S.D.N.Y. 2007)); *Bradley v. United States*, 161 F.3d 777, 782 n.4 (4th Cir. 1998). Because this case has been consolidated in the District of South Carolina, the law of the Fourth Circuit applies.

Plaintiffs contend that the activities of Conner, in concert with those of Defendant Chandler, Chairman and CEO of LFG, the corporate parent of LES, together with those of

Defendants Conner, Allen, Evans, Ramos and Jones, are sufficiently pervasive in South Carolina to subject them to the general jurisdiction of this Court. Defendants Ramos, Evans and Jones and Chandler engaged in grossly negligent conduct in directing the actions of LES. Beginning in February, 2008, a devastating course was plotted, which eventually led to the loss of Exchange Funds for more than 400 LES Exchangers. Defendants acted grossly, wantonly and with reckless disregard for the contractual rights of Exchangers to whom they owed fiduciary duties when they together determined to continue investing in ARS after the market collapsed. They also exercised gross and reckless judgment when they failed to notify Exchangers of the consequences of the ARS investments, and decided to accept new Exchange funds to conceal this breach of fiduciary duty. It is of no moment, in the minimum contacts analysis, that Defendants, in making and executing these grossly negligent decisions, did so by telephone while sitting in their respective homes or offices in Illinois or Virginia. The consequences to Terry Plaintiffs - and indeed to all Exchangers who lost funds - was the same. Over a period from February to November, 2008, Defendants' meetings and teleconferences concerned the impact of, and the planned response to, the precipitous ARS decline on LES and its holdings, and culminated in express decisions to continue to accept client Exchange Funds, despite the collapse of the ARS market. Together Defendants determined to engage in deception, and in violations of the express terms of Exchange Agreements, without notice to new or existing Exchangers. They also decided to rescind prior directives requiring segregated accounts for Exchange Funds, and to use commingled client accounts to repay older Exchange escrows. Ultimately, hundreds of LES Exchangers lost $191 million in at least 42 states across the country, including South Carolina.

However, even if Defendant's activities in South Carolina were insufficient to subject them to general jurisdiction, the District Court may nonetheless assert specific jurisdiction where the claim or cause of action arises from the activities of the Defendant in that forum. Here, LFG through its wholly owned subsidiary, LES, created a Qualified Intermediary which devolved into an active Ponzi scheme. In response, the officers and directors of LFG and LES (including Chandler, Conner, Evans, Ramos, and Jones) repeatedly met, and together, they wantonly and intentionally determined to continue their planned course of conduct, despite their knowledge that the ARS market had become illiquid in February, 2008. LES continued its deceit by representing to the SEC, and to any members of the general public who had reason to examine its website or corporate advertising materials, that it could meet its guarantee of the "100% safety" of Exchange Funds despite its operational insolvency. In SEC 10-Q filings for Q3 and Q4 of 2008, LES represented that it held Exchange Funds "in trust" and made no disclosure of its insolvency or of its ongoing misrepresentations to clients as to the security of Exchange Funds. (Am. Complt. ¶¶ 71 and 72); Allen Dep. p. 52: l. 21-25; p. 53: 1. 1-9.

South Carolina has enacted long-arm statutes for the express purpose of enabling citizens to redress wrongs committed against them in their home jurisdictions by non-resident defendants. The South Carolina long-arm statute provides for personal jurisdiction based upon the conduct of the Defendant undertaken within that jurisdiction, measured by specifically enumerated factors.

> A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from:
>
> (1) transacting any business in this State;
>
> (2) contracting to supply services..... in the State;

> (3) commission of a tortious act in whole or in part in this State;
>
> (4) causing tortious injury.... in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
>
> (7) entry into a contract to be performed in whole or in part by either party in this State.....

S.C. Code Annotated § 36-2-803

LES, with the express involvement of Connor and Allen, circulated brochures and other advertising materials which represented that client Exchange Funds would be held "in trust" at LES and were 100% safe. Defendants solicited South Carolina residents to use LES' QI services through its website and agents. Defendants did, in fact, enter into Exchange contracts there with Terry Plaintiffs. Upon active agreement and strategic planning by Chandler, Connor, Evans, Allen, Ramos and Jones, Defendants continued LES' investment in ARS, with no notice to any Exchangers, including the Terry Plaintiffs, of the improper use of their funds. The Terry Plaintiffs would scarcely have consented to risk all of their Exchange Funds through deposits made with LES, had they known that their funds would be lost in order to maximize corporate profits. Clearly, Plaintiffs would not have paid Exchange fees, typically $1000, to LES for the privilege of losing their Funds. Defendants engaged in continuous, systematic and pervasive conduct to engage all residents of the United States, including South Carolina Plaintiffs, in its scheme to obtain Exchange Funds to continue the LES' Ponzi scheme. By so doing, LES derived substantial revenue from persons consuming its services in that state.

Defendants, acting for LES, sought to deceive Plaintiffs into believing its 'guaranties' of fund safety and security, in order to continue to fund the ongoing deception at LES. Defendants and each of them owed a duty of care to all LES Exchangers, including the Terry Plaintiffs. LES: 1) entered into contracts with South Carolina residents, 2) who executed them in South Carolina, 3) agreed to render services both immediately and over a 6 month term, 4) accepted Exchange Funds through South Carolina financial institutions, and 5) caused tortious injury there by failing to return client funds. Defendants seek to escape liability by arguing that they are not residents of South Carolina. To be liable for their actions, it is not required that Defendants, or any of them, visit South Carolina for LES business purposes, or have personal contact with Terry Plaintiffs. It is sufficient for the reach of the South Carolina long-arm statute that they transacted business there (by signing Exchange Agreements there), contracted to supply ongoing services there (by agreeing to hold client funds safely and disburse them at the direction of Exchangers), committed tortious acts there (by breaching their fiduciary duties to maintain client funds safely for completion of the exchange transactions), and caused tortious injury there (by failing to return Exchange Funds or disburse them according to directions of the clients).

These facts alone meet seven of eight statutory tests for personal jurisdiction over Defendants in South Carolina. Beyond the satisfaction of the South Carolina state law factors for the exercise of personal jurisdiction, there are additional federal due process considerations. These have also been met by Plaintiffs. The Fourteenth Amendment to the U. S. Constitution limits the power of a state court to exercise personal jurisdiction over a non-resident Defendant if doing so would offend traditional standards of substantial justice and notions of fair play. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 1985 U.S. LEXIS

104 (U.S., June 26, 1985, Decided). Where , as here, the Defendants are not personally present within the territorial jurisdiction of a state, due process requires that Defendants be shown to have had minimum contacts with the state, so as to render any judgment against them enforceable, despite the absence of their consent to suit. *Burger King Corp. v. Rudzewicz*, 471 U.S.462, 1985 U.S. LEXIS 14 (U.S., May 20, 1985, Decided); *Helicopteros Nacionales de Columbia, S.A. v. Hall* 466 U.S. 408, 1984 U.S. LEXIS 68 (U.S., April 24, 1984, Decided).

The proper measure of the adequacy of Defendant's contacts with South Carolina includes a review of the totality of the circumstances for due process purposes. Plaintiffs have demonstrated various acts by which Defendants invoked the privilege of doing business in South Carolina and asserted the protection of its laws. Such acts included personal , telephonic and other communications with the officers and /or directors both of LFG and LES, through which the Exchange Company acted to solicit clients, acceptance of their Exchange Funds, offering promises to guarantee the safety of those funds , and then appropriating them for corporate use.

Corporations act through their officers and directors. In Paragraph 20 of his Affidavit, Chandler admits to having contact with LES employees, through "calls to employees of LFG subsidiaries in South Carolina"..... This is precisely the form of contact which Plaintiffs assert, and which the law converts to "minimum contacts" and "continuous and systematic contacts" to warrant the exercise of personal jurisdiction. Rarely could Plaintiffs of any state prove minimum contacts in a jurisdiction of a non-resident defendant if they were required to demonstrate that corporate officers made direct contacts with prospective clients. In various teleconferences and meetings before October, 2008,

Defendants met by phone to discuss the liquidity crisis at LES. On October 18, 2008, during the course of a teleconference, Defendants together decided to close down the entire operations of LES. That decision was revisited and reversed over the same weekend, after further telephone meetings, and LES continued to accept Exchanger deposits. On month later, LES and LFG filed Petitions for Bankruptcy. Defendants determined to proceed with the and reckless investment in Auction Rate Securities without informing past or new Exchangers of their illiquidity, all in violation of the Exchange Agreements. LES utilized electronic transmissions through its website to present and extol the competence and skill of its services in the 1031 Exchange business. It went so far as to cite itself as a "Fortune 2007 Most Admired Company", fit for the safekeeping of the Exchange Funds it accepted. Exhibit 10.

Defendants now propose the unreasonable result that these Exchangers should be denied access to the courts of South Carolina to redress the grossly negligent and intentional activities which caused their losses, because Defendants claim that they live elsewhere.

> ....Whether minimum contacts are present is not determined by using a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances....

Better Business Forms v. Davis, 462 S.E. 2d, 832, 833 (1995).

In its argument denying minimum contacts with South Carolina, Defendants fail to observe or consider the interests of the Plaintiffs, or those of the state of South Carolina to permit its citizens, including South Carolina Exchangers, to obtain relief that is both effective and convenient. Such an argument ignores the concern for judicial economy which forms a substantial basis for consolidation in this MDL action, and ignores the

convenience and interests of South Carolina Plaintiffs.

> In evaluating whether the exercise of jurisdiction is 'constitutionally reasonable', the courts may weigh 'the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies' .....

Christian Science Bd. of Dirs., 259 F.3d at 217 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)).

The MDL order of consolidation of the Terry and the Arthur actions reflects the intention of the MDL Panel to preserve the interests of judicial economy, minimize the costs of litigation and thereby protect the potential funds available to repay Exchanger claims. If Defendant were to prevail in their Motions to Dismiss, and Plaintiffs were to file against them in their resident states, Virginia and Illinois, the MDL process would again result in the transfer of the action to South Carolina. Describing such a legal circle would further waste judicial resources and corporate assets.

In evaluating *in personam* jurisdiction to hear claims against non-residents, Courts have generally established a three-part test for determining when the exercise of its limited jurisdiction is appropriate under federal Constitutional principles:

> (1) the nonresident Defendant must do some act or consummate some transaction with or in the forum state, or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or results from the Defendant's forum-related activities; and
>
> (3) exercise of jurisdiction must be reasonable. (Emphasis added)

Brown v. Geha-Werke GmbH, 69 F. Supp. 2d 770 (D.S.C. 1999); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392 (9th Cir. Cal. 1986).

As previously noted, Defendants personally participated in specific decisions on behalf of LFG and LES, including the strategic directive to rescind previous promises to hold client funds only in segregated accounts, which caused financial losses to South Carolina Plaintiffs. LES executed contracts in South Carolina, with the knowledge, direction and assistance of Conner and the other Defendants, after inviting clients to engage its 1031 Exchange Services there, generated fees there for its services, and created contractual agreements to accept its Exchange clients' instructions there as to how and when the proceeds should be paid out for replacement property.

The 4th Circuit has held that a sufficient connection between the non-resident Defendant and the forum state results where Defendant conducts business in South Carolina .

> This burden is satisfied when there has been some act related to the cause of action alleged by which the non-resident Defendant purposefully avails himself of the privilege of conducting activities within the forum state. The commission of a **single tortious act is a sufficient contact** upon which to base the assertion of *in personam* jurisdiction, particularly when the tortious act arises out of a contact which had substantial connection with that state.

Columbia Briargate Co. v. First Nat'l Bank, 713 F.2d 1052 (4th Cir. S.C. 983)(Emphasis added).

The establishment of minimum contacts with the jurisdiction by Conner and LES ensures that Defendant had "fair warning" of the potential for litigation in South Carolina. To require Defendant to submit to the personal jurisdiction of South Carolina after having availed themselves of the privilege of doing business there comports with standards of "fundamental fairness". Conner relies too heavily upon the literal construction of "presence" , as if his conduct is separate from corporate conduct.

> ..... This is not a random or fortuitous exercise of jurisdiction...Directors and officers derive many benefits from the legal fiction of the corporation. It does not seem unfair to require them to shoulder.....the ... burdens of such a fiction..... The law imposes substantial responsibilities, and substantial liability, upon corporate directors.

Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F. 2d 522, 530 (4th Cir. W. Va. 1987).

Viewed from a slightly different perspective**,** South Carolina courts have held that the due process analysis consists of two branches. The "minimum contacts" branch focuses on the connection or affiliation of the nonresident Defendant with the forum state and the relationship between that connection and the litigation. The "fairness" branch analyzes whether the assertion of personal jurisdiction would be fair in light of specific enumerated factors. The 4th Circuit has held that, where a defendant was incorporated and maintained its principal place of business in Texas, the mere fact that it initiated customer mailings and sent catalogs to South Carolina residents constituted contacts sufficient to satisfy due process.

> ....[T]he agreement terms were fully negotiated by both parties with more than merely incidental involvement by South Carolina as an area of part performance of the contract, and exercise of jurisdiction over the store would not violate due process...

Kimbrel v. Neiman-Marcus, 665 f. 2d 480 (4th Cir. S.C. 1981).

Nothing could be more purposefully directed toward the citizens of South Carolina than the execution of contracts with them, as happened with each South Carolina Plaintiff.

This Court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume the credibility of the claims and averments of plaintiffs, and draw the most favorable inferences for the existence of jurisdiction. *ESAB Group, Inc. v. Centricut* L.L.C., 34 F. Supp. 2d 323 (D.S.C. 1999). Moreover, a motion to dismiss under

Rule 12(b) may be granted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); see also *Edwards*, 178 F.3d at 244. .

C. CORPORATE OFFICERS WHO KNOW OF OR ACQUIESCE IN THE CONVERSION OF CLIENT FUNDS ARE PERSONALLY LIABLE

Corporate officers and directors are personally liable for conversions of funds of third parties, where they participate in, have knowledge of or acquiesce in the misconduct. 3A *Fletcher Cyc. Corp.*§ 1140. Every person is liable for tortious and grossly negligent conduct, and this is no different for corporate officers and directors who plan and participate in the misconduct. E.S. Tsai, Annotation, *Liability of Corporate Directors or Officers for Negligence in Permitting Converstion of Property of Third Persons by Corporation*, 29 A.L.R. 660 (1970). Defendants may not escape jurisdiction by asserting that their activities as a corporate officers and directors shield them from liability for activities which would otherwise establish minimum contacts. *American Agr. Chemical Co. v. Barnes Co.*, 28 F. Supp. 73 (E.D. S.C. 1939) . The U.S. Supreme Court has found an identical argument to be without merit, holding that the actions of other defendant employees “does not somehow insulate [Defendants] from jurisdiction”. *Calder v. Jones*, 465 U.S. 783, 790 (1984). Using this premise, courts have held that owners , directors and officers of a corporation have established such minimum contacts with a forum state as are sufficient for the courts to maintain personal jurisdiction over them, where activities are purposefully directed at the forum state or its residents, and there caused financial harm to others. See, e.g. *Davis v. Metro Productions, Inc.*, 885 F.2d 515 (9th Cir. Ariz. 1989). At noted above , Defendants and each of them, actively participated in the LES and LFG

decisions to 1) invest in ARS, 2) continue to invest in ARS following the collapse of that market in February, 2008, 3)continue to accept client exchange funds whether segregated or not, on October 20, 2008 despite LES' corporate insolvency, 4) fail to disclose the ongoing operational insolvency to new or existing Exchangers, and 5) report to the SEC in LES 10 Q filing for Q3, 2008 that it stood ready to meet its pledge of 100% client fund security . (Am. Complt. ¶ 72). It was not required that officers actively participate in this ongoing breach of fiduciary duty. All Defendant LES and LFG officers and directors knew when they reversed the decision to cease operations on October 20, 2008 that a letter bearing that same date would be sent to United States Treasury Secretary Henry M. Paulson Jr. seeking immediate federal assistance to preserve the ongoing viability of both LES and LFG. Clearly, all of these Defendants knew of and acquiesced in the decision to take totally conflicting actions in accepting client funds on the date they sought government assistance, without disclosure of the operational insolvency of LFG and LES. None of the Defendants took any action to oppose this gross negligence and breach of fiduciary duty, upon Exchangers who unwittingly relied on LES claims of its stability and the security of their funds. No defendant has asserted that he or she even disagreed with this corporate position, of which all Defendants were aware. For this reason alone, no Defendants may be dismissed from this action, based on a claim of non-residence in the forum state. The impact of these actions, and failures to observe his or her fiduciary duties to Exchangers , was unambiguous and devastating. More than 400 Exchangers lost funds because as a corporation, neither LES nor LFG through its corporate directors and officers were willing to face the consequences of the failure of the ARS market in February, 2008. Instead , they took action only to conceal the insolvency of LES. This conduct renders each Defendant

personally liable for his corporate activity, and Motions to dismiss for lack of personal jurisdiction must be dismissed.

In Burger King Corp. v. Rudzewicz, supra, the defendants had very few Florida contacts regarding its franchise agreement, entered in Florida. Nearly all of its dealings in negotiating the contract were conducted with agents in Michigan, and no portion of the contract was set to be performed in Florida. Defendant did not enter the state of Florida, and contested its personal jurisdiction there. The court held that the defendant had nonetheless "purposefully availed" himself of the privilege of doing business in Florida by creating "continuing obligations between himself and residents of the forum...". *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L.Ed.2d 58, 105 S. Ct.2174 (1985).

Here, Defendants caused the corporation to enter into actual agreements with residents of South Carolina, and these Exchange Agreements provided for at least part performance in that state. It is an elementary principle of corporate law that a director has a fundamental interest in the actions of the corporation he directs.

> .....Certainly, a director of a corporation has created a continuing obligation between himself and the corporation, one which inures to the director's benefit, not to mention that of the corporation.

Burger King Corp. v. Rudzewicz, supra at 476.

Moreover, the test for 'constitutional reasonableness" includes consideration of the interest of the forum jurisdiction in matters of the most efficient resolution of controversies. Notably absent from Defendants' arguments is the necessity for balancing the interests of the state of South Carolina in "obtaining convenient and effective relief" for its injured citizens against the burden imposed on Defendant officer who establishes the requisite minimum contacts. *Christian Science Bd. of Dir*s., 259 F.3d at 217 (citations omitted).

Contrary to the assertions of the LES officers and Directors, their connections to this state were purposeful, intentional, and anything but "random, fortuitous or attenuated". *World-Wide Volkswagen*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Defendants used email communications to contact various other corporate officers among them on numerous issues. For example, Connor's execution of a Confidentiality Agreement was conducted through email exchanges between Connor and corporate counsel, Michelle Gluck and Michael Beverly, dated October 21, 2008. Connor Dep. p. 63: l .8-22. (Am. Complt. ¶ 151). This is precisely the form of contact which the Plaintiffs assert, and which the law converts to "minimum contacts" and "continuous and systematic contacts" to warrant the personal jurisdiction. Plaintiffs need not demonstrate that Defendants were physically present in the states where they acted, and both Connor and Allen had direct contact with Exchanger clients. Through Allen and Connor, Defendants had email and telephone contact with LES' agents in South Carolina, and undertook action there with LES' express understanding and approval. These contacts underscore the validity of this Court's personal jurisdiction over Defendant. Connor, for example, was not required, in the present electronic age, to live near the corporate headquarters of LES in Virginia. Indeed, no Defendant was required ever to leave home in order to engage in corporate activity. LES regularly used internet means to open new bank accounts to hold Exchanger Funds, and likewise to direct wire transactions to be made. Dep. Jones p 203, 221, 224. Connor's actions on behalf of the corporation were nationwide in scope. Connor Dep. p 11: l. 10-20. The 4th Circuit has recognized that even control of a corporate website is sufficient for the establishment of minimum contacts. *Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209 (4th Cir. N.C. 2001).

Both the 4th Circuit and the 9th Circuit have adopted an 'instrumentality rule'

which authorizes jurisdiction over a defendant in circumstances where corporate control was exercised through corporate officers and directors to commit deceit. *DeWitt v. Hutchins*, 309 F. Supp. 2d 743 (M.D. N.C. 2004); *Stan Lee Trading , Inc. v. Holtz*, 649 F. Supp. 577, 581 (C.D. CA 1986). For example, Connor claims that he did not personally profit from his conduct on behalf of LES, but does not dispute that he is an alter ego of LES or LFG. He has testified to his knowledge of and inquiries into LES' investments in ARS. Connor Dep. p. 29: l. 6-17. Corporate officers and directors are jointly and severally liable for corporate misdeeds, and for aiding and abetting a conversion. *Harry Clayton Cook, Jr. v. The 1031 Exchange Corp. et al*, Not Reported in S.E. 2d, 29 VA.Cir. 302 , 1992 WL 885015 (VA. Cir.Ct. (1992) (attached). Corporations act entirely through their directors and officers, and are liable for conduct in that capacity. Plaintiffs need not demonstrate any personal enrichment to Defendants to warrant the Court's exercise of personal jurisdiction over them. For more than a century, South Carolina courts have recognized the duty of even uncompensated corporate officers to conform their conduct to standards of fiduciary responsibility, and have also recognized the personal liability that arises against those in positions with corporate authority to act:

> Corporations conduct their operations only through the medium of agents, and these agents must be selected either by the stockholders, directors, or the president, or other managing officers. In the selection of these officers or agents, as in all other matters, the board of directors must act jointly, and as a board; hence it is difficult to fix personal, individual, responsibility for mistakes of judgments, or negligence.

Virginia-Carolina Chemical Co. v. Ehrich et al. 230 F 2d 1005 (E.D.South Carolina, 1916); *Loring v. Frue*, 104 U.S. 223, 26 L. Ed. 713, 1881 WL 19766 (1881).

Giving Plaintiffs every benefit of the doubt, Plaintiffs have produced sufficient evidence to make a *prima facie* showing that Defendants purposefully directed activities at

South Carolina and California, causing harm to Plaintiffs. Defendants had a reasonable expectation that LES' website invitations, the Exchange brochures it produced and circulated among various real estate brokers and other agents, and the actual contacts made with citizens of South Carolina through its agents there would, and in fact did, result in new Exchange business in South Carolina and California, thus satisfying the provisions of the long-arm statute as to the officers and directors. This Court possesses jurisdiction over Defendants based on continuous and systematic contacts with South Carolina, including acceptance of client funds there, and Defendants' regular contacts between and among LES' officers and directors to insure the ongoing solicitation of Exchange Funds from its citizens. See, e.g., *Saft America, Inc. v. Plainview Batteries, Inc*., et al., 659 S.E. 2d 39 (April 15, 2008).

While the signing of a single contract alone may not automatically establish minimum contacts, for officers, courts will look to future contract consequences, and future contract terms to find minimum contacts. To hold otherwise would permit Defendants as corporate agents to benefit further from tortious acts. Defendants' arguments, if successful, would otherwise lead to the absurd conclusion that all Exchangers, regardless of domicile, who unwittingly fell into the LES and LFS deceptive trap, must be compelled to travel to Defendants' own resident jurisdictions to recover funds stolen elsewhere. It is fundamental that interpretations of state law which lead to absurd results are erroneous. *Nixon v. Mo. Mun. League*, 541 U.S. 125 (U.S. 2004).

D. FIDUCIARY SHIELD ARGUMENTS ARE INAPPLICABLE FOR THESE DEFENDANTS

Nowhere do Defendants claim that they are entitled to be shielded from the activities of LES, or deny that LES and LFG are their corporate alter egos**.** Instead, they

assert that they had no direct contact with Plaintiffs anywhere. Corporations can only act through its natural persons, who are officers, directors, employees and agents. *Pritchard v. Whitelock*, 95 Cal. App. 2d 144, 149 (Cal. Ct. App. 1949). Otherwise, the Affidavits and Declarations submitted by Defendants as to their activities and positions relative to LES and LFG would be wholly irrelevant. Plaintiffs here allege, and Defendant nowhere deny, the unity of interests of LFG and LES, even if LFG has a separate legal structure. The officers overlapped each entity and acted in the presumed interest of each. Defendants misconstrue the distinction between personal liability based on *ultra vires* acts, and liability imputed to an officer or director of a corporation for ordinary activities in the scope of employment, through which corporate activity takes place. *Agarwal v. Johnson*, 81 Cal. App. 3d 513 (Cal. Ct. App. 1978); *Pritchard v. Whitelock*, 95 Cal. App. 2d 144, 149 (Cal. Ct. App. 1949)

On October 18, 2008, Defendant Chandler expressly and recklessly assured Stephen Connor, Senior Vice President of both LFG and LES, of the 'financial viability of LES', only a few weeks before the company's bankruptcy filing. Conner Dep. p 36: l. 9-25. Ronald Ramos, Michelle Gluck, and William Evans also participated in a conference call on that same date with Chandler, Jones and Allen, whose purpose included a discussion of the falling float in the LES commingled transactions at SunTrust Bank, and the values of the Citibank segregated accounts, plans in regard to Exchanger accounts and the illiquid status of ARS holdings. Conner Dep. p 57: l. 4-25; p. 58: l. 6-25; p. 59: l. 1-25; p. 60. l. 1-23. The corporate entities of both LFG and LES were impacted by ARS investments and by the collapse of that market. Jones testified that she sough infusions of capital during three separate liquidity crisis during Q3 and Q4 of 2008. Chandler, with knowledge of all other Defendants, sought government aid from the United States Treasury Secretary Paulsen.

Most notably, Chandler, in discussions with Evans, an officer and director of LES, specifically planned, participated in, and aided LES in the violation of its duties owed to Plaintiffs including:

a) the unauthorized use of Plaintiff's exchange funds, upon direction of Chandler in consultation with LES and LFG corporate officers, and conversion and diversion of such funds to other corporate purposes;

b) the misrepresentation to South Carolina citizens, including the Terry Trust, as to its intentions for the use of Exchange Funds on Deposit and the existing liquidity crisis;

c) the conversion of Exchange Funds for purposes other than those declared in the Exchange Agreement which formed the contract between Plaintiffs and LES, including the purchase of ARS; and

d) the willful failure to disclose to Plaintiffs, including citizens of South Carolina, the actual risk to LES clients because of LES' intention to use new Exchange Funds to close aging Exchange account escrows.

V. CONCLUSION

Here, Plaintiffs have satisfied the standards for both specific and for general jurisdiction over Defendants. Courts may exercise personal jurisdiction over a nonresident defendant if a non-resident defendant's activities in the forum are "substantial, continuous and systematic". *Ado Finance, AG v. McDonnell Douglas Corp.*, 931 F. Supp. 711, 714-715 (D. Cal. 1996). Deposition testimony from three LES and LFG employees, Stephen Connor, Ronald Ramos and Devon Jones confirm that Defendant Chandler was deeply involved in the development and execution of the Ponzi scheme at LES. Ramos informed Chandler both directly and through the Investment Committee of the Board of Directors of the "freeze" of LES' ARS investments, and all Defendants participated in the discussion of ways to manage and respond to the liquidity crisis at LES. All corporate Defendants participated in discussions to halt all company operations on or about October 17, 2008, and in the reversal of that decision on October 19, 2008. They further participated in the

decision to request assistance from the United States Department of Treasury, and the decision to amend the default policy of LES as to incoming Exchange funds, to terminate commingled accounts and accept new Exchange Funds only into segregated accounts. Together, they conferred and reversed that decision, determining to continue the deception.

Virtually all of these activities were carried out by executives and officers of both LFG and LES. Deposition testimony establishes active involvement of all Defendants in LES' breach of fiduciary duty to its Exchange clients. This conduct constitutes a sufficient predicate for the Court's exercise of general jurisdiction over Defendants, whose actions as agents of LFG and LES, were "substantial, continuous and systematic" so as to subject them to the exercise of this Court's jurisdiction.

Defendants had the ability to exercise control over Plaintiffs' Exchange Funds, for the protection of the funds or for diversion to the planned unlawful and grossly negligent uses of LES. Plaintiffs have demonstrated facts and circumstances which satisfy both federal and South Carolina standards relating to the exercise of personal jurisdiction over Defendants. Plaintiffs assert that the facts, taken as a whole, support personal jurisdiction over each Defendant, and compel a determination that their Motions to Dismiss must be denied.

Respectfully submitted, this 12th day of November, 2009,

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