IT IS ORDERED as set forth below:

Date: October 09, 2009

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
REAL ESTATE EXCHANGE SERVICES, INC.,	:	**Case No. 08-85871-PWB**
Debtor.	:	**Chapter 11**
ROBERT J. McCAMY and DAVID C. ROWE,	:	**Contested Matter [19]** **Contested Matter [26]**
Movants,	:	
v.	:	
JEFFREY K. KERR, Trustee for Real Estate Exchange Services, Inc., and OFFICIAL OF UNSECURED CREDITORS,	:	
Respondents.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTIONS TO COMPEL DISBURSEMENT OF FUNDS

David C. Rowe, Jr., and Robert J. McCamy have filed motions to compel the turn-over of funds from the bank accounts of Real Estate Exchange Services, Inc. ("REES"), the Chapter

11 debtor in this case in which Jeffrey K. Kerr is the Chapter 11 trustee (the "Trustee").[1] [Docket Nos. 19 and 26].[2] Each contends that funds belong to him due to the existence of an express, resulting, or constructive trust in his favor with regard to proceeds from the sale of his real property that REES received as an intermediary under a Real Property Exchange Agreement that contemplated REES's acquisition of other real property to transfer to him to complete a "like-kind" exchange of the properties qualifying for tax-deferred treatment under § 1031 of the Internal Revenue Code, 26 U.S.C. § 1031, and applicable regulations of the Internal Revenue Service.

The Trustee asserts that the bank accounts are property of the Debtor's estate, not subject to any trust. [Docket No. 133]. The Official Committee of Unsecured Creditors (the "Committee") asserts that REES held the funds in the bank accounts in trust for the benefit of all of the creditors of REES, each of whom, like Messrs. Rowe and McCamy, has a claim for proceeds from the sale of its real property that REES received as an intermediary under a similar Real Property Exchange Agreement. The Committee thus contends that the funds in the bank accounts are not subject to a specific trust in favor of Messrs. Rowe and McCamy to the exclusion of the other clients. [Docket Nos. 46, 129]. Both the Trustee and the Committee further contend that, in any event, the commingling of proceeds from the sale of Mr. Rowe's and Mr. McCamy's properties prevents them from tracing those proceeds to the funds the Trustee

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[1]The court directed the appointment of a Chapter 11 trustee on January 28, 2009 [Docket No. 50] and approved the appointment of Mr. Kerr as the Chapter 11 trustee on January 29, 2009 [Docket No. 56].

[2]The motions seek to compel REES, as debtor in possession, *see* 11 U.S.C. § 1107(a), to turn over the funds. The Trustee upon his appointment automatically was substituted for REES. FED. R. BANKR. P. 2012(a).

now holds.

The motions seek orders to turn over property of the estate, which are core proceedings under 28 U.S.C. § 157(b)(2)(E) within the District Court's jurisdiction under 28 U.S.C. § 1334(b). This Court has authority under 28 U.S.C. § 157(b)(1) to hear and determine these core proceedings, referred to this Court under 28 U.S.C. § 157(a) and L.R. 83.7, N.D.Ga.[3] The Court conducted an evidentiary hearing on both motions on June 18 and 19, 2008. This constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52(a), applicable under FED. R. BANKR. P. 7052, applicable in these contested matters under FED. R. BANKR. P. 9014.

Following the evidentiary hearing, the Trustee filed a motion to strike citations in Mr. McCamy's brief to depositions of Ronald Raitz and Alan Buchalter, both of whom testified at trial. [Docket No. 140]. The depositions were not introduced into evidence at the hearing and, therefore, do not constitute admissible evidence. The Court will, therefore, grant the Trustee's motion to strike.

Because the motions involve common questions of law and fact and were the subject of a joint evidentiary hearing, the Court will order that the motions be consolidated, FED. R. CIV. P. 42, *applicable under* FED. R. BANKR. P. 7042 and 9014, and will enter a single judgment with regard to both motions. FED. R. BANKR. P. 9021.

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[3]None of the parties has asserted that the relief sought in the motions must be sought in an adversary proceeding. *See* FED. R. BANKR. P. 7001(1). To the extent that Rule 7001 would require an adversary proceeding, the parties have waived any such requirement and agreed to determination of the issues in the context of the motions.

I. STATEMENT OF FACTS

Although the parties dispute the legal effect and consequences of the written agreements and the conduct of the parties, the underlying material facts are not in dispute.

A. Introduction and Explanation of § 1031 Exchange Transactions

REES was engaged in the business of serving as an intermediary for clients desiring to effect exchanges of real property that qualify for tax-deferred treatment in accordance with §1031 of the Internal Revenue Code, 26 U.S.C. § 1031. In general, § 1031 permits deferral of tax on a gain from the disposition of a taxpayer's property if the taxpayer exchanges it for similar property.

If a taxpayer sells property in one transaction and purchases a replacement property from a different seller, the Internal Revenue Code treats the transactions as separate and requires recognition of gain on the sale. The property owner may accomplish a tax-deferred exchange in such a circumstance, however, if the parties utilize a "qualified intermediary" and structure the transactions so that the intermediary is deemed, for tax purposes, to have acquired the taxpayer's property and transferred the purchased property to the taxpayer. Thus viewed, an exchange for purposes of § 1031 occurs because the taxpayer has exchanged its property for property of the intermediary.

For the transactions to qualify as a tax-deferred exchange under § 1031 and applicable regulations, the intermediary must receive the proceeds from the sale of the taxpayer's property (such that the intermediary is treated as acquiring the property, which the intermediary then transfers to the purchaser), and the intermediary must pay the purchase price to the seller of the acquired property (such that the intermediary is treated as the owner of the acquired property that

it then transfers to the taxpayer). The transactions thus effect an exchange of properties for tax purposes between the taxpayer and the intermediary that qualifies for tax-deferred treatment. Generally, the replacement property must be identified within 45 days and acquired within 180 days from the sale of the taxpayer's property. In the interim period, the taxpayer cannot have access to funds from the sale of the taxpayer's property that the intermediary receives.

Accomplishing a tax-deferred exchange through an intermediary as just described requires several steps that take place under an exchange agreement (called a "Real Property Exchange Agreement" in this case) executed between the owner of the property (called the exchanger) and the intermediary. The exchanger assigns the property to be sold (referred to as the relinquished property) and the contract for its sale to the intermediary, who sells it to the purchaser and receives the sales proceeds. The owner then identifies a replacement property, contracts for its purchase, and assigns the sales contract to the intermediary who acquires the replacement property and transfers it to the exchanger. For tax purposes, the exchanger is deemed to have exchanged the relinquished property for the replacement property with the intermediary. Although the intermediary is deemed to be the purchaser of the relinquished property and the seller of the replacement property, Section 1031 and regulations of the Internal Revenue Service permit the deeds to the properties to be executed directly between the actual buyer and seller. If the exchanger does not identify a replacement property, or if the replacement property is not acquired, within the required times, the exchange agreement ends and the intermediary is obligated to pay the exchanger the amount of the funds it received, plus applicable interest.

B. Explanation of REES's Intermediary Business and Business Failure

REES executed a Real Property Exchange Agreement (the "Exchange Agreement") with each of its clients. Section C below summarizes the language of the Exchange Agreements material to the issues the Motions present. This section describes the Exchange Agreements in general fashion as they relate to the conduct of REES's intermediary business and the circumstances that led to its failure and Chapter 11 filing.

REES made money by providing intermediary services in two ways. First, it received a fee for its services. Second, it invested proceeds from the sale of an exchanger's property pending the acquisition of replacement property for the exchanger and retained any excess investment income over the interest the parties agreed the exchanger would receive.

Consistently with the requirements for effecting a qualified tax-deferred exchange transaction as discussed above, the Exchange Agreements between REES and each of its clients provided for REES to receive the proceeds from the sale of the client's property – sometimes referred to as "exchange funds." The Exchange Agreements then obligated REES either to purchase a property the client identified and pay the client the excess of the amount it received (plus applicable interest) over the amount it paid to acquire the identified property or, if no acquisition transaction occurred, to pay the client the amount of the sales proceeds it received (plus applicable interest).

As permitted by the Exchange Agreements, REES deposited sales proceeds in bank accounts and purchased auction rate bonds. Each Exchange Agreement permitted REES to commingle the exchanger's sales proceeds with sales proceeds of other clients. REES kept these accounts and investments representing sales proceeds from its clients separate from its operating

accounts from which it paid its operating expenses. Section D below more specifically describes REES's handling of sales proceeds, particularly as they relate to the issues raised by the Motions.

REES failed because it invested a substantial amount of sales proceeds, approximately $9.7 million, in auction rate bonds. Although conventional wisdom at the time of these investments was that auction rate securities were a safe and highly liquid investment, the market for auction rate bonds collapsed, and REES was unable to meet its obligations to acquire replacement properties for its clients or pay them the amounts it owed if sales did not take place.

At the time of its Chapter 11 filing on December 17, 2008, REES owed 20 clients approximately $13,552,000, representing amounts owed on account of sales proceeds it received from the sales of client properties, plus applicable interest.[4] As matters now stand, REES's assets – now under the control of the Trustee – consist of the bank account balances (including the funds in question here) of approximately $4,344,500,[5] and auction rate bonds with a face value of

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[4]Exhibit 16, Schedule F. REES listed total obligations to 22 exchange clients of $14,434,407 on Schedule F of its schedule of liabilities. A draft balance sheet REES prepared as of January 13, 2009 [Exhibit 15], reflects different amounts that for present purposes are not material. The total amount includes $881,800 owed to The Panola Express, LLC ("Panola"). In a separate proceeding, the Court ruled that Panola was entitled to its exchange funds that had been deposited into a bank account specifically designated as a trust account for its benefit. [Docket No. 15]. That amount, therefore, has been paid, leaving remaining obligations of $13,552,000, and reducing the number of unpaid clients to 21. Robert J. McCamy is listed twice because he engaged in two transactions. Thus, there are 20 clients. Schedule F reflects that three clients are owed a total of $1,422. The Court's observations with regard to REES' assets and liabilities are made by way of summary and not as binding findings of fact on any party.

[5]See Order Entered April 27, 2009 at 2. [Docket No. 112]. The asset analysis excludes interest that may have been earned on the funds and other assets with a value not material to the present discussion. The analysis also excludes a secured debt secured by other deposits that has been satisfied through the use of the deposits pursuant to an agreement approved by the Court. See next footnote. The settlement of that secured debt did not implicate the funds in question here.

approximately $9.3 million[6] but a market value substantially less than that. Although the parties agree that the market value of the securities is substantially less than their face value and that they are, as a practical matter, illiquid, it appears that, if the securities are held to maturity,[7] the estate will eventually have approximately $13,644,000 (plus interest and less administrative expenses) with which to pay approximately $13,552,000 in claims.

As sections E and F explain, REES received proceeds from the sales, in unrelated transactions, of properties owned by Messrs. Rowe and McCamy. Because REES did not acquire and transfer replacement properties to them, REES is obligated to pay them the amounts it received, plus interest. The issue here is whether they are entitled to an Order directing the disbursement of $ 4,186,000 from REES' bank accounts by virtue of an express, resulting, or constructive trust on such funds or whether their claims are payable on the same basis as the other

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[6]Debtor's schedules reflect a debt of $388,200 to Georgian Bank (the "Bank"), which claimed a security interest in the auction rate bonds in the amount of $9.7 million. [Exhibit 16, Schedule D]. The Bank also claimed attorney's fees in the amount of approximately $35,000, for a total claim of approximately $423,000. The principal of REES, Ronald Raitz, personally guaranteed this debt. Mr. Raitz and REES are potential beneficiaries under a Professional Liability Insurance Policy. The Trustee, the Bank, Mr. Raitz, and his wife, Bridgette Raitz, entered into a settlement agreement pursuant to which the Bank accepted $423,000 in cash from Ms. Raitz in satisfaction of its claim against REES and its bankruptcy estate, Ms. Raitz paid $50,000 in cash to the Trustee for the benefit of the estate, and Ms. Raitz received auction rate bonds with a face value of $400,000. [Motion for Order Authorizing Compromise and Settlement of Claims By and Between Jeffrey K. Kerr, as Chapter 11 Trustee, Georgian Bank, Bridgette Raitz, and Ronald Raitz, filed April 8, 2009, Docket No. 106, amended on May 11, 2009, Docket No. 118]. The settlement agreement, as amended, also provided that the Trustee would not claim any violation of the automatic stay based on Mr. Raitz, or any other insured under the insurance policy, seeking payment of any litigation defense costs. The Court approved the settlement by Order entered on May 13, 2009. [Docket No. 119].

As a result of the settlement, the Bank has no claim against the estate or any of its assets, and the Trustee now holds auction rate bonds with a face value of approximately $9.3 million.

[7]The problem is one of valuation based on liquidity, not ultimate collectibility.

unpaid exchangers.

C. Summary of the Terms of the Real Property Exchange Agreements

Mr. Rowe executed a "Real Property Exchange Agreement" with REES dated May 29, 2008. [Exhibit 1]. The agreement was amended on September 19, 2008. [Exhibit 9].

Mr. McCamy engaged in two transactions with REES and executed two such agreements, one on October 15, 2008 [Exhibit 18] and another on October 21, 2008 [Exhibit 19]. The two agreements executed by Mr. McCamy are identical in all material respects except for the description of the property.

Determination of the issues in these proceedings requires consideration of other facts beyond the terms of the written agreements. The circumstances of Mr. Rowe's transaction differ from those of Mr. McCamy's, but for the most part the material terms of the written agreements are the same.[8] This section summarizes the material terms of the agreements.

Each Real Property Exchange Agreement refers to the owner of the property, REES's client, as the "Exchanger" and REES as the "Intermediary." Each agreement defines the property being sold by the Exchanger as the "Relinquished Property" and the property to be acquired as the "Replacement Property." The "Purchaser" is the party buying the Relinquished Property and the "Seller" is the party selling the Replacement Property that the Exchanger is acquiring.

The Recitals at the beginning of each exchange agreement state that the purpose of the agreement is to effect a tax-deferred exchange transaction under § 1031 of the Internal Revenue

[8]The differences appear to relate to technical changes in Internal Revenue Service regulations between the time of execution of Mr. Rowe's agreement in May and Mr. McCamy's agreements in October. Differences between Mr. Rowe's and Mr. McCamy's agreements are discussed later in this section and in Part II.

Code. In this regard, the fourth recital states:[9]

> **WHEREAS**, Intermediary is willing to accept and to hold the proceeds from the sale of Relinquished Property, as set forth herein and received from the closing of Relinquished Property, to utilize the same in securing, acquiring, and transferring to Exchanger suitable Replacement Property to complete the tax-deferred exchange according to the terms and conditions as set forth herein.

Each Exchange Agreement provides for the exchanger (Mr. Rowe,[10] Mr. McCamy,[11] or one of the other exchangers who executed a similar agreement) to assign its rights in the relinquished property to REES, who will transfer it to the purchaser.[12] At the closing of the sale of the relinquished property, the sales proceeds are to be "transferred, assigned, and/or conveyed

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[9]Rowe Exchange Agreement at 1 [Exhibit 1]; McCamy Exchange Agreements at 1 [Exhibits 18 and 19].

[10]Exhibit 1 is a copy of Mr. Rowe's Exchange Agreement.

[11]Exhibits 18 and 19 are copies of Mr. McCamy's Exchange Agreements.

[12]Paragraphs 1 and 2 of the Exchange Agreements [Exhibits 1, 18, and 19] provide as follows:

> 1. Subject to and conditioned upon the close of the Relinquished Property Agreement and subject to and upon the terms and conditions set forth in this Agreement, Intermediary hereby agrees to acquire the Relinquished Property from Exchanger, to transfer the Relinquished Property to Purchaser, to acquire the Replacement Property from the seller thereof ("Seller") and to transfer the Replacement Property to Exchanger.
>
> 2. Exchanger shall convey all of Exchanger's rights, but not obligations, in Relinquished Property to the Intermediary. Exchanger will directly convey or deed Relinquished Property to Purchaser. . . . Exchanger shall execute on or before the closing of Relinquished Property, an Assignment of Relinquished Property Agreement, assigning Exchanger's rights, but not obligations, thereunder to Intermediary.

to [REES] pursuant to the terms of [the] Agreement."[13]

Each Exchange Agreement requires REES to deposit the proceeds "into banks, savings and loan accounts, money market deposit accounts, commercial paper, funding agreement, auction rate bonds, repurchase agreements, or in time deposits."[14] The exchanger may not direct where REES holds the proceeds,[15] and each Exchange Agreement permits (but does not require) REES to deposit proceeds "in accounts containing funds of other parties who have utilized [REES's] services in other Exchange Agreements."[16]

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[13]Paragraph 6 of the Exchange Agreements provides:

> 6. At the close of Relinquished Property, the proceeds, including cash, shall be transferred, assigned, and/or conveyed to Intermediary pursuant to the terms of this Agreement.

[14]Paragraph 7 of Mr. Rowe's Exchange Agreement [Exhibit 1] states:

> 7. Intermediary is instructed to deposit all cash funds received into banks, savings and loan accounts, money market deposit accounts, commercial paper, funding agreement, auction rate bonds, repurchase agreements, or in time deposits.

Paragraph 7 of each of Mr. McCamy's Exchange Agreements [Exhibits 18 and 19] provides, "Intermediary shall deposit Exchange Account funds" into the same specified investments. "Exchange Account" is defined in paragraph 3, discussed later in the text. The difference in the language is not material.

[15]Paragraph 17 of Mr. Rowe's Exchange Agreement [Exhibit 1] concludes with, "Exchanger may not direct where funds are held by Intermediary." The same language is in the First Amendment to Mr. Rowe's Exchange Agreement. [Exhibit 9].

Paragraph 7 of each of Mr. McCamy's Exchange Agreements concludes with, "exchanger may not direct where Exchange Account funds are held by Intermediary." "Exchange Account" is defined in paragraph 3, discussed later in the text. The difference in the language is not material.

[16]Paragraph 8 of each of Mr. Rowe's Exchange Agreement [Exhibit 1] and Mr. McCamy's Exchange Agreements [Exhibits 18 and 19] provides:

Paragraph 3 of each Exchange Agreement provides for REES to establish an "Exchange Account" for the transaction in REES's books and records.[17] In general, the Exchange Account begins with the cash proceeds received from the sale of the Relinquished Property, is increased by interest REES is obligated to pay under paragraph 17 of the Exchange Agreement, and is decreased by the cash REES pays to acquire the Replacement Property.[18]

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8. Intermediary is authorized to make said deposits in accounts containing funds of other parties who have utilized Intermediary's services in other Exchange Agreements.

[17]Paragraph 3 of Mr. Rowe's Exchange Agreement [Exhibit 1] and of Mr. McCamy's Exchange Agreements [Exhibits 18 and 19] provides in material part:

> 3. In order to account for and monitor the Exchange Value, as hereinafter defined, with respect to Relinquished Property, Intermediary agrees to establish an exchange account concerning this transaction in Intermediary's books and records in favor of Exchanger (hereinafter referred to as the "Exchange Account"). The opening entry for the Exchange Account shall be the Exchange Value with respect to Relinquished Property as determined under Paragraph 4 below. Thereafter, the balance in the Exchange Account shall be reduced from time to time by (I) Intermediary's fees and costs, (ii) the Exchange Value with respect to each Replacement Property (i.e., all amounts expended by Intermediary in connection with the acquisition of each Replacement Property, as determined under paragraph 5 below), and (iii) any other payments made or costs or expenses incurred by Intermediary for which Exchanger is obligated or responsible under this Agreement.
>
> The balance of the Exchange Value remaining in the Exchange Account also shall be increased in accordance with paragraph 17 below.

Paragraph 4 defines "Exchange Value" with regard to the Relinquished Property as, essentially, the net proceeds received from the sale of the Relinquished Property after payments of real estate commissions, title insurance premiums, and other closing costs chargeable to the seller and exclusion of the amounts of any encumbrances on the Relinquished Property. Paragraph 5 defines "Exchange Value" with regard to the Replacement Property as, essentially, the cash required to acquire the Replacement Property. Paragraph 17 provides for payment of interest on the amount in the Exchange Account. Paragraph 9 provides that REES is not required to pay more to acquire the Replacement Property than the balance in the Exchange Account.

[18]See preceding footnote.

Paragraph 17 states the conditions under which the exchanger earns interest "on the Exchange Account."[19] Interest is payable without regard to the interest that REES actually earns on its deposits or investments. All of the agreements provide in paragraph 17 that any additional interest shall be retained by the Intermediary.[20]

With regard to the Exchange Account, paragraph 15 states, "The Exchanger shall have no rights to receive, pledge, borrow, or otherwise obtain the benefits of the Exchange Account, including other property held by [REES], or any growth factor or interest earned on the Exchange Account or other property held by [REES] prior to the termination of this Agreement."[21]

The Exchanger must identify the Replacement Property it desires the intermediary to acquire within 45 days after the transfer of the Relinquished Property and negotiate an agreement for its acquisition with the seller. The exchanger assigns the acquisition agreement to REES, which then acquires the property and, in turn, transfers it to the exchanger.[22] REES is not required to pay more to acquire the Replacement Property than the balance in the Exchange Account;[23] if acquisition of the Replacement Property requires cash in excess of the Exchange Account balance,

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[19]In Mr. Rowe's case, the interest under the original Exchange Agreement was at the rate of the Federal Cost of Funds Rate, minus 150 basis points. [Exhibit 1, ¶ 17]. Under an amendment to the Exchange Agreement, discussed later in the text, the rate was fixed at .75 percent. [Exhibit 9]. In Mr. McCamy's case, the interest was 3/4 percent. [Exhibits 18 and 19, ¶ 17]. Calculation of interest is not a material issue in these proceedings.

[20]Mr. Rowe's agreement states, "Any additional interest earned shall be retained by the Intermediary." Mr. McCamy's agreements state, "Any additional interest which accrues to the Exchange Account during such time shall be retained by the Intermediary."

[21]Exchange Agreements [Exhibits 1, 18, and 19] ¶ 15.

[22]Exchange Agreements [Exhibits 1, 18, and 19] ¶ 11.

[23]Exchange Agreements [Exhibits 1, 18, and 19] ¶ 9.

the exchanger must provide it.[24]

Each Exchange Agreements provides for termination of the Exchange Agreement when one of four conditions occurs.[25] Upon termination, REES is obligated to pay or distribute the Exchange Account to the exchanger.[26]

The first three conditions occur: (1) if the exchanger fails to identify a replacement property within 45 days; (2) if the exchanger has received the Replacement Property it identified; or (3) if a "material and substantial contingency" relating to the deferred exchange occurs. The fourth condition arises in any other circumstance at the expiration of the exchange period, defined as 180 days after the closing of the sale of the Relinquished Property or the due date, including extensions, of the exchanger's tax return, whichever is earlier. All of the agreements state that the provisions are "meant to incorporate and conform with [IRS Regulation] § 1.1031(k)-1(g)(6)" and that the regulation controls "if any of these provisions are inconsistent" with the regulation.

The Exchange Agreements contemplate the prompt payment or disbursement of the money owed to the exchanger upon termination of the agreement. Under Mr. Rowe's exchange agreement, he is entitled to interest as specified under paragraph 17 (discussed above) until

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[24]Exchange Agreements [Exhibits 1, 18, and 19] ¶ 10.

[25]The termination provision is in paragraph 18 of Mr. Rowe's agreement [Exhibit 1] and in paragraph 19 of each of Mr. McCamy's [Exhibits 18 and 19]. Paragraph 18 of Mr. McCamy's Exchange Agreements deals with the payment of interest between the time of termination of the agreement and disbursement of the Exchange Account balance to Mr. McCamy. Part II further discusses this provision.

[26]Paragraph 18 of Mr. Rowe's Exchange Agreement [Exhibit 1] provides that REES "shall pay the Exchange Account to Exchanger." Paragraph 19 of Mr. McCamy's Exchange Agreements [Exhibits 18 and 19] provides that REES "shall distribute the Exchange Account to Exchanger."

payment of the Exchange Account. Under Mr. McCamy's Exchange Agreements, Mr. McCamy is entitled to interest under paragraph 17 until the earlier of termination of the agreement or 180 days after the closing of the Relinquished Property. Paragraph 18 of Mr. McCamy's Exchange Agreements then provides that, beginning on the 181st day after the closing of the Relinquished Property, Mr. McCamy "shall earn all of the interest and [REES] shall retain none of the interest which accrues on the Exchange Account."[27] Moreover, paragraph 18 provides that, at that time, Mr. McCamy "shall have full and complete control over the Exchange Account."[28] Paragraph 18 of Mr. McCamy's agreements incorporate IRS Regulation § 1.468B-6.

Finally, all of the agreements contain the following "merger" clause:[29]

> This Agreement may not be amended or modified in any respect whatsoever except by an instrument in writing signed by the parties hereto. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof.

An amendment [Exhibit 9] to Mr. Rowe's Exchange Agreement is discussed in Section E below.

D. REES's Banking Practices

REES maintained a "sweep account" with Wachovia Bank, which it used as a "clearing account" to receive proceeds received from the sale of its clients' relinquished properties. REES

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[27]McCamy Exchange Agreements ¶ 18(a) [Exhibits 18 and 19].

[28]McCamy Exchange Agreements ¶ 18(b) [Exhibits 18 and 19].

[29]The provision is in paragraph 23 of Mr. Rowe's Exchange Agreement [Exhibit 1] and in paragraph 24 of Mr. McCamy's Exchange Agreements [Exhibits 18 and 19].

maintained a balance in this account to fund acquisitions of replacement properties for exchangers it anticipated in the near term. Funds in excess of that amount were transferred into other bank accounts or other investments. REES maintained separate operating accounts. Thus, REES in effect segregated funds of exchangers from REES's own operating funds.

Wachovia "swept" substantially all of the deposits in the sweep account at the close of each business day into the Federal Reserve System. The next business day, Wachovia credited the account in the amount of the swept funds plus interest. Thus, the funds in the sweep account were commingled with other funds in the Federal Reserve System on a daily basis.

E. Mr. Rowe's Transactions

Mr. Rowe signed his Real Property Exchange Agreement on May 29, 2008.

On Monday, June 16, 2008, the sale of Mr. Rowe's Relinquished Property occurred and REES received net proceeds of $1,913,851.67 plus an exchange fee of $1,250, a total of $1,915,101.67, by way of a wire transfer into its Wachovia sweep account. [Exhibits 2, 29; Stipulation[30]].

Mr. Rowe or his real estate attorney, Ms. Sherry Olson, in discussions with Mr. Buchalter, an exchange counselor with REES, had requested that the sales proceeds be deposited into a separate account. On Wednesday, June 18, Ms. Olson sent an e-mail message to Mr. Buchalter which stated [Exhibit 5]:

> Alan Barker of North Georgia Bank said that REES can get 3.39% with no time limitations. Mr. Rowe would like REES to put the money there since you already have

[30]At the hearing, the parties announced a stipulation with regard to the transfers of funds referenced in these findings.

an account. Please call me.

Ms. Olson followed up with an e-mail message to Mr. Buchalter on Thursday, June 19 [Exhibit 4], asking, "What did Ricky find out from Bank of North Georgia about the interest rate?"

Mr. Buchalter responded to Ms. Olson on Friday, June 20 [Exhibit 3]:

> My boss, Ron Raitz, did talk to Bank of North Georgia. The 3.39% rate your client was quoted is an introductory rate only available on individual accounts, not on corporate accounts. They will give our corporate account interest at 2.29%, and we will pay Mr. Rowe 1.75%. Our business model is such that we keep part of the interest.

Mr. Buchalter testified, consistently with these e-mail messages, that Mr. Rowe had requested that his funds be placed into a separate account, and that he had asked REES's accounting manager to deposit the funds in a separate account at the Bank of North Georgia. Mr. Rowe testified that he understood that REES would hold sales proceeds in trust, that he did not understand that the proceeds would be property of REES, and that he did not contemplate making a loan to REES. The Exchange Agreement, however, did not give Mr. Rowe the right to direct the investment of his funds and did not provide for interest at the rate of 1.75 percent. No transfer of funds to Bank of North Georgia occurred at this time with regard to Mr. Rowe's account.

On June 20, REES disbursed $325,203.58 to purchase a replacement property for Mr. Rowe, and on June 26 paid attorney's fees incurred by Mr. Rowe in connection with the transactions (a permitted disbursement under the Exchange Agreement). The balance of Mr. Rowe's exchange account, therefore, was $1,588,209.35. These disbursements occurred from the Wachovia sweep account. [Exhibit 29; Stipulation].

In September, Mr. Rowe became concerned about banks being in trouble and wanted to make sure his funds were in accounts guaranteed by the Federal Deposit Insurance Corporation. [Exhibits 6-8]. Mr. Ron Raitz, the president of REES, suggested that Mr. Rowe's funds be put into CDAR accounts through the Synovus program in which Bank of North Georgia was a participant. Through the Synovus program, the funds in the CDAR accounts would have FDIC protection. REES advised Mr. Rowe that he could "convert his exchange account" to this program but that the interest rate would have to be reduced to .75 percent. [Exhibit 7]. Mr. Rowe signed an amendment to the Exchange Agreement dated September 19. [Exhibit 9]. Ms. Olson transmitted the agreement signed by Mr. Rowe to REES on September 24. [Exhibit 12].

The amendment changes only paragraph 17 of the Exchange Agreement relating to the payment of interest and provides, as did the original Exchange Agreement, that "Exchanger may not direct where funds are held by Intermediary." The amendment does not direct the deposit of funds in any account and does not provide for funds to be held in trust. The amendment concludes with this provision:

> Except as expressly amended and supplemented herein, the Agreement shall remain in full force and effect, and the parties hereby ratify and confirm the terms and conditions thereof.

On September 19, 2008, REES transferred $1,500,000 from its Wachovia sweep account to Bank of North Georgia, [Exhibit 32, Stipulation], representing Mr. Rowe's exchange funds. [Exhibit 10]. On October 3, 2008, REES transferred $1,500,000 from Bank of North Georgia to the National Bank of South Carolina, which in turn made 15 deposits of $100,000 each in CDAR accounts with various banks within the Synovus system. [Exhibits 33, 40; Stipulation]. These

accounts were maintained as REES accounts, and none of the bank statements indicate that the funds belong to Mr. Rowe or that REES holds the deposits on his behalf. Nevertheless, it is clear that all of the transactions just described represent Mr. Rowe's exchange account.[31]

As explained below, REES made additional deposits into the CDAR program through the National Bank of South Carolina upon receipt of funds from the sale of Mr. McCamy's properties, bringing the total deposits in CDAR accounts to $4,186,000. [Stipulation].

In late October, Mr. Rowe decided not to proceed with the exchange transaction and asked REES how long it would take to get the money wired. REES responded that the balance could not be released until December 13, the day after the 180th day following the sale of the relinquished property. [Exhibit 13].

As explained below, REES did not pay Mr. Rowe the amount in his Exchange Account prior to the filing of its Chapter 11 case.

F. Mr. McCamy's Transactions

Mr. McCamy executed two exchange agreements with regard to separate properties, one on October 15, 2008 [Exhibit 18] and the other on October 21, 2008 [Exhibit 19]. Mr. McCamy wanted to make sure that funds from the sale of his properties were protected as deposits insured by the FDIC. REES advised Mr. McCamy of available alternatives, and he decided that he wanted the funds in CDAR accounts under the Synovus program available through the Bank of North Georgia just discussed with regard to Mr. Rowe's transactions.[32] [Exhibits 23 and 24].

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[31]The evidence does not explain why REES transferred $1,500,000 instead of the entire balance of Mr. Rowe's exchange account, $1,588,209.35.

[32]Mr. McCamy's son communicated with REES on Mr. McCamy's behalf with regard to these matters.

Despite the importance to Mr. McCamy of the security of his funds and his understanding that deposit of the funds in an FDIC-insured account was a condition precedent to the exchange transactions, the exchange agreements state that he cannot direct where REES holds the funds.

The first agreement involved a property that Mr. McCamy owned jointly with another party who was also doing an exchange transaction through REES. The sale of that property closed on October 15, 2008, and $1,859,398.10 was wired that day to the Wachovia sweep account. [Exhibit 33; Stipulation[33]]. The next day, $928,000, representing Mr. McCamy's share of the proceeds, was transferred to the Bank of North Georgia. [Exhibit 33; Stipulation]. On October 17, the sum of $928,000 was transferred into the Synovus system described above.[34] [Exhibit 40; Stipulation].

The second transaction closed on Friday, October 24, 2008, and $1,759,385.20 was wired into the Wachovia sweep account. [Exhibit 33; Stipulation]. On Monday, October 27, $1,758,000 was transferred from the Wachovia sweep account to the Bank of North Georgia [Exhibit 33; Stipulation], and then into the Synovus system.[35] [Exhibit 40; Stipulation]. All of these funds were combined with the funds transferred with regard to Mr. Rowe's account as described in Section E.

These accounts were maintained as REES accounts, and none of the bank statements

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[33]At the hearing, the parties announced a stipulation with regard to the transfers of funds referenced in this Order.

[34]Six deposits of $150,000 each and one of $28,000 were made into various accounts in other banks.

[35]Eight deposits of $150,000 each, one of $250,000, one of $186,000, and one of $122,000 were made into various accounts in other banks.

indicate that the funds belong to Mr. McCamy or that REES holds the deposits on his behalf. Nevertheless, it is clear that all of the transactions just described represent transfers made with reference to Mr. McCamy's exchange account.

Mr. McCamy did not identify replacement properties with regard to either transaction by the deadlines of November 29 and December 8. [Exhibits 27 and 28]. REES, therefore, became obligated to pay Mr. McCamy the balances in his exchange accounts.

G. REES's Treatment of and Accounting for Funds in Synovus Accounts and Current Status of Funds

As just discussed, REES deposited a total of $4,186,000 into the accounts in the Synovus system, $1,500,000 with regard to Mr. Rowe's exchange account and $2,686,000 with regard to Mr. McCamy's.

Mr. Ron Raitz, the principal of REES, testified that he did not intend to create a trust with regard to these exchange account balances or to hold the funds in escrow and that he believed that disposition of exchange account balances was governed by the written exchange agreements. Nevertheless, Mr. Raitz thought that REES could not use funds in the Synovus accounts for any purposes other than funding acquisition of replacement properties for Messrs. Rowe and McCamy or disbursing the funds in the accounts to them in accordance with their interests. Mr. Raitz acknowledged this understanding in letters dated December 12 to Mr. Rowe [Exhibit 14] and to Mr. McCamy [Exhibit 21] shortly before the filing of the bankruptcy case, quoted below. Further, REES treated funds attributable to Mr. Rowe's and Mr. McCamy's exchange accounts as segregated in a draft balance sheet prepared after the filing of the bankruptcy case.[36] Thus,

[36]Exhibit 15.

from and after the transfer of funds as described above into the Synovus accounts, Mr. Raitz, and therefore REES, consistently treated the funds in the Synovus accounts as segregated funds for the benefit of Mr. Rowe and Mr. McCamy.

As explained above, both Mr. Rowe and Mr. McCamy requested that REES pay them the amounts owed to them. REES declined to do so for reasons explained in the December 12 letters just referenced. Each letter stated in pertinent part:[37]

> Your account was placed in separate bank account at your request, but no trust agreement to hold such funds was requested or established. Accordingly, these funds are currently held in the name of Real Estate Exchange Services, Inc. When we first notified REES clients last week of the lack of liquidity experienced by REES [with regard to the auction rate bonds], we did not notify you because we considered your accounts to be separate from the other REES clients' funds. Subsequently, however, we have been informed that the separate accounts may not be respected as funds now owned by Real Estate Exchange Services. Moreover, other REES clients have made specific demands that REES use whatever liquidity is available to it to fund their exchange actions or return of their exchange funds. Accordingly, we sought the advice of bankruptcy counsel regarding this issue to advise us whether the law would treat these accounts as separate from any other funds held by REES for its clients. Our bankruptcy counsel has advised us that he does not believe the bankruptcy court will consider these funds to be separate from other REES funds. Only accounts where a separate trust entity was established and is the title holder of the account are likely to be considered funds not under the control of REES.

[37]Exhibits 14, 21.

Accordingly, we do not believe we can return these funds to you without agreement of the other REES clients or under order from some court.

On December 9, 2008, the funds were transferred to the Bank of North Georgia. [Exhibit 35]. Since the filing of REES's chapter 11 case, the funds have been maintained in identifiable, segregated accounts. Thus, the Trustee now holds all of these funds, plus accumulated interest, in a segregated account that is clearly traceable from the CDAR accounts in the Synovus system.

II. DISCUSSION

The question here is whether Messrs. Rowe and McCamy are entitled to subject cash deposits to satisfaction of their claims to the exclusion of other exchange clients. To answer this question, the Court must consider two issues. The first is whether REES held the funds in question in express, resulting, or constructive trusts for their benefit. If so, the second issue is the extent to which each can establish that the funds in question constitute the *res* that is the subject of such a trust, *i.e.,* whether he can trace the proceeds from the sale of his properties to the funds that the Trustee now holds.

A. Existence of a Trust

Messrs. Rowe and McCamy assert that the Trustee holds funds for their benefit under either an express or implied trust. Under Georgia law, "[a]n implied trust is either a resulting trust or a constructive trust." O.C.G.A. § 53-12-90. For reasons explained below, the Court concludes that the facts do not show the existence of express, resulting, or constructive trusts.

1. Express Trust

O.C.G.A. § 53-12-20 states the requirements for an express trust. First, it must be created or declared in writing. O.C.G.A. § 53-12-20(a). Second, it must have five elements,

"ascertainable with reasonable certainty." O.C.G.A. § 53-12-20(b). The five elements are: (1) an intention by a settlor to create a trust; (2) trust property; (3) a beneficiary; (4) a trustee; and (5) active duties imposed on the trustee, which duties may be specified in the writing or implied by law. The law does not require formal words to create a trust, O.C.G.A. § 53-12-21(a), and, therefore, use of the word "trust" is not an essential requirement for the creation of an express trust. *E.g., Odum v. Henry*, 254 Ga. 739, 334 S.E.2d 304 (1985). *See also Cronic v. Baker*, 284 Ga. 452, 667 S.E.2d 363 (2008).

Provisions in Exchange Agreements

Messrs. Rowe and McCamy point to various provisions of the Exchange Agreements that they say establish an express trust. These provisions include the language in the recitals stating that REES is to "accept and hold" sales proceeds and to utilize them "in securing, acquiring, and transferring to Exchanger suitable Replacement Property" and the requirement in paragraph 7 that REES deposit proceeds from the sale of relinquished property into specified types of accounts or investments. Other provisions, however, demonstrate a contrary intent. Thus, paragraph 2 provides for Exchanger to convey all of its rights in the relinquished property to REES, paragraph 3 provides for the establishment of an "Exchange Account" in REES's "books and records in favor of Exchanger," and paragraph 6 provides that sales proceeds "shall be transferred, assigned and/or conveyed" to REES upon closing of the sale of the relinquished property. The Exchanger may not direct where REES holds the funds, and under paragraph 15 has "no rights to receive, pledge, borrow or otherwise obtain the benefits of the Exchange Account ... prior to the

termination" of the agreement.[38] Moreover, the provisions in paragraph 17 for payment of a specified amount of interest on the proceeds, as opposed to all or a part of the interest actually earned, is consistent with a loan.[39] These latter provisions appear to establish a relationship similar in legal effect to the deposit of funds with a bank that transfers legal title to the funds to the bank and creates an obligation on the part of the bank to pay the amount of the deposit to the depositor's order.

Each Exchange Agreement REES executed with its clients restricts REES's use of proceeds received from the client to certain types of investments and contemplates the use of such proceeds to acquire a replacement property, but permits the commingling of proceeds with those of other clients. The Court for present purposes assumes, but does not decide,[40] that the combination of the restrictions on the investment and use of funds with permission to commingle requires REES to segregate and hold investments of exchange funds for the benefit of all exchange clients, such that an express trust, consisting of all investments made with exchange

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[38]The provision is in paragraph 17 of Mr. Rowe's agreement [Exhibit 1] and in paragraph 7 of Mr. McCamy's agreements [Exhibits 18, 19].

[39]See RESTATEMENT (THIRD) OF TRUSTS § 5, cmt. k (2003):

> If there is an understanding between the parties that the person to whom funds are transferred is to pay "interest" thereon (at a fixed or current rate, and not merely such interest or other earnings as the funds, being invested, may earn), it becomes close to certain that the relationship is a debt rather than a trust. Interest is normally paid for the "use of funds." Accordingly, recipients of funds who pay interest are, in the absence of a definite understanding to the contrary, borrowers who are entitled to use the funds for their own purposes.

[40]The Court need not, and does not, resolve this question in the context of these proceedings. Moreover, in view of the fact that there are no creditors in this case except the exchange clients who are, collectively, the beneficiaries of all of the assets, ultimate resolution of this case may not require determination of this issue at all.

funds, exists with all exchange clients as beneficiaries.[41] In other words, REES held funds in trust for all clients collectively, not individually. Messrs. Rowe and McCamy under this assumption are beneficiaries, with other exchange clients, of a pooled trust, the *res* of which consists of all

[41] *But see Millard Refrigerated Services, Inc. v. LandAmerica 1031 Exchange Services, Inc. (In re LandAmerica Financial Group, Inc.)*, 2009 WL 1011647 (Bankr. E.D. Va. Apr. 15, 2009), and *Frontier Pepper's Ferry, LLC v. LandAmerica 1031 Exchange Services, Inc. (In re LandAmerica Financial Group, Inc.),* 2009 WL 1269578 (Bankr. E.D. Va. May 7, 2009). In these related cases, the court held that exchange funds held by a qualified intermediary were property of the estate under the terms of exchange agreements similar to those at issue here and that the exchange funds were not the subjects of an express or resulting trust under Virginia law.

In *Millard Refrigerated,* the court held the § 1031 exchange agreement did not create an express trust, despite its requirement that the client's funds be placed in segregated accounts. In that case, the material language of the exchange agreement provided, 2009 WL 1011647 at * 5:

> [The intermediary] shall have sole and exclusive possession, dominion, control and use of all Exchange Funds, including interest, if any, earned on the Exchange Funds. . . . This agreement I) expressly limits the Taxpayer's rights to receive, pledge, borrow or otherwise obtain the benefits of money or other property held by the qualified intermediary. . . . Taxpayer shall have no right, title, or interest in or to the Exchange Funds or any earnings thereon and Taxpayer shall have no rights, power, or option to demand, call for, receive, pledge, borrow, or otherwise obtain the benefits of any of the Exchange Funds. . . .

Mr. Rowe's and Mr. McCamy's Exchange Agreements [Exhibits 1, 18, and 19] appear to have the same effect. Thus, paragraph 6 provides that, upon the closing of the relinquished property, "the proceeds, including cash, shall be transferred, assigned, and/or conveyed to Intermediary pursuant to the terms of this Agreement." Paragraph 3 establishes an "Exchange Account" in REES's books and records with its opening entry being, effectively, the amount of the cash proceeds. Paragraph 15 then concludes with, "The Exchanger shall have no rights to receive, pledge, borrow, or otherwise obtain the benefits of the Exchange Account, including other property held by [REES] or any growth factor or interest earned on the Exchange Account or other property held by Intermediary, prior to the Termination of this Agreement."

In contrast, the court in *Siegel v. Boston (In re Sale Guaranty Corp.)*, 220 B.R. 660 (B.A.P. 9th Cir. 1998), *aff'd sub nom. Siegel v. Newman (In re Sale Guaranty Corp.),* 199 F.3d 1375 (9th Cir. 2000), held that an express trust existed with regard to exchange funds deposited in a segregated trust account. The court noted that the evidence did not indicate that the account had not been set up as a trust account. *Id.* at 668.

of the deposits and investments that REES made with proceeds from the sale of properties of its exchange clients.

The foregoing analysis does not, however, answer the question of whether an express trust existed in favor of Messrs. Rowe and McCamy with regard to the CDAR accounts in the Synovus system (and their identifiable and traceable proceeds that the Trustee now holds). The Exchange Agreements that Messrs. Rowe and McCamy executed do not themselves provide for REES to hold their funds in a specific account or to segregate their funds from those of other clients. To the contrary, paragraph 8 of each Exchange Agreement expressly permits commingling of the client's proceeds with proceeds of sales of properties of other clients. Thus, if the provisions of the Exchange Agreements discussed so far create an express trust, the trust is only a pooled trust for the benefit of all exchange clients in the deposits and other investments REES made with such proceeds. These provisions do not give any particular client a beneficial interest in any identifiable account or investment. These provisions do not create an express trust in favor of any exchanger with the proceeds from the sale of its properties as its *res*.

Messrs. Rowe and McCamy have, however, identified other provisions of the Exchange Agreements that they contend establish the creation of an express trust with regard to their sales proceeds. These provisions deal with termination of the Exchange Agreement and with payment or disbursement of the Exchange Account to the exchanger if the exchanger does not identify or conclude arrangements for REES to acquire a replacement property.

Each Exchange Agreement (paragraph 18 of Mr. Rowe's and paragraph 19 of Mr. McCamy's) provides for its termination if a replacement property is not acquired. In Mr. Rowe's case, paragraph 18 provides that REES "shall pay" the Exchange Account to Mr. Rowe upon

termination of the agreement and written notice to REES. In Mr. McCamy's case, paragraph 19 of each of his agreements provides that, upon termination, REES "shall distribute" the Exchange Account in accordance with Mr. McCamy's disbursement instructions.

In both cases, "Exchange Account" is defined as "an exchange account concerning this transaction in Intermediary's books and records in favor of Exchanger."[42] Thus, these provisions do not contemplate that termination results in the exchanger's receipt of specifically identified property. Rather, they require that REES pay the balance shown in the Exchange Account to the exchanger. As such, they do not create an express trust with regard to their sales proceeds or CDAR accounts.

Mr. McCamy's Exchange Agreements contain additional provisions that Mr. Rowe's agreement does not contain. Paragraph 18 of Mr. McCamy's agreements applies "[i]f the Exchange Account has a balance on the one hundred eighty-first day after the closing of the Relinquished Property and ending upon [REES's] conveyance of the remaining Exchange Account balance to Exchanger ('Holding Period')." Paragraph 18(a) provides for the exchanger to earn all of the interest that accrues on the Exchange Account during the Holdover Period, and paragraph 18(b) provides that, during the Holdover Period, "Exchanger shall have full and complete control over the Exchange Account." Paragraph 18(c) obligates REES to "make all reasonable efforts to distribute the Exchange Account to Exchanger on the first business day of the Holdover Period."

As with the termination paragraphs just discussed, the provisions of Mr. McCamy's paragraph 18 operate with regard to an "Exchange Account," not any specifically identified

[42]Exhibits 1, 18, 19, ¶ 3.

property or proceeds from the sale of his properties. Thus, the facts that, upon termination, he earns interest on the Exchange Account under paragraph 18(a) and has "full and complete control" over the Exchange Account under paragraph 18(b) do not establish that he owns a beneficial interest in a specified account or investment or that REES is holding his specific proceeds in a segregated account. Rather, both provisions are thoroughly consistent with other provisions of the Exchange Agreement that establish his "Exchange Account" as an account in REES's books and records and that permit the commingling of proceeds from the sale of his properties with those of other exchange clients.

Thus, paragraph 18(a) changes the interest provisions of paragraph 17 (which in Mr. McCamy's case apply only through the 180-day exchange period beginning on the date of the closing of the reliquished property) and permits him to receive all of the interest attributable to his Exchange Account during a different period. Notably, paragraph 18(a) does not provide for Mr. McCamy to retain interest on an account or investment that he owns, nor does its operation require the existence of such a separate account or investment.[43]

Paragraph 18(b) similarly changes the operation of provisions applicable during the 180-day exchange period that, as required for a tax-deferred exchange under § 1031 and applicable regulations, permit distributions or use of the Exchange Account by Mr. McCamy only for

[43]The Court is not called upon to determine how such interest would be calculated in view of the commingling of exchange funds from all of REES's clients and its investment of those proceeds in various investment vehicles with different rates of return. The Court observes, however, that such a calculation would appear to be arithmetically possible simply by calculating the daily return on all of the investments and paying Mr. McCamy a pro rata share based on comparison of his Exchange Account balances with the total of all Exchange Account balances. In other words, the specific identification of a deposit account or investment attributable only to his sales proceeds is not necessary to the operation of this paragraph.

acquisition of replacement property. For example, paragraph 15 permits reimbursement only of certain expenses in connection with acquisition of the replacement property and provides that the exchanger "shall have no rights to receive, pledge, borrow, or otherwise obtain the benefits of the Exchange Account . . . prior to the termination of this Agreement." Paragraph 18(b), by giving Mr. McCamy "full and complete control over the Exchange Account" at the expiration of the 180-day period, permits him to direct disbursement of the Exchange Account as he chooses at that time, which he cannot do during the 180-day exchange period. But his control, quite plainly, is only over disbursement of the "Exchange Account," not specifically identified property.

For all of the foregoing reasons, the Court concludes that the Exchange Agreements that Mr. Rowe and Mr. McCamy executed do not establish an express trust in their favor in which the *res* consists of their sales proceeds or the CDAR accounts in the Synovus system into which they assert those proceeds were deposited.

To establish their rights as beneficiaries of an express trust with regard to their sales proceeds and the deposit of such proceeds in the CDAR accounts, therefore, Messrs. Rowe and McCamy must rely on facts outside the four corners of the Exchange Agreements. The Court considers each of their circumstances separately.

Mr. McCamy's Assertion of Express Trust

Mr. McCamy relies on the facts that Messrs. Raitz and Buchalter committed REES to place his funds in the CDAR accounts and that REES in fact did so. If the parties had reduced this commitment to writing, it might have met the requirements for the creation of an express trust with regard to his specific proceeds and the accounts REES committed to use for his benefit. Because no such writing existed, however, these facts are insufficient to establish an express trust.

Mr. McCamy's request for, and REES's commitment to, segregation of his funds is insufficient to create an express trust because it is not in writing. O.C.G.A. § 53-12-20(a). If the Exchange Agreement constitutes the writing necessary for the creation of the trust, its terms, as just explained, do not provide for Mr. McCamy to have a beneficial interest in his sales proceeds or in the segregated CDAR accounts. A conclusion that an express trust existed with regard to his proceeds or any segregated account, therefore, must be based on the discussions between the parties prior to execution of the Exchange Agreements and REES's commitment to segregate funds in accordance with those discussions.

The parol evidence rule precludes this result. O.C.G.A. § 24-6-1 states the parol evidence rule in Georgia:

> Parol contemporaneous evidence is generally inadmissible to contradict or vary the terms of a valid written instrument.

With regard to the *construction* of an express trust, O.C.G.A. § 53-12-27 provides:

> When the construction of an express trust is at issue, the court may hear parol evidence of the circumstances surrounding the settlor at the time of the execution of the trust and parol evidence to explain all ambiguities, both latent and patent.

Applying the parol evidence rule in O.C.G.A. § 24-6-1 (or its predecessor), courts have consistently ruled that oral representations allegedly made as inducements to enter into a contract are inadmissible to add to, take from, or vary the terms of the writing,[44] and that all oral

[44] *E.g.,* Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813, 256 S.E. 2d 785 (1979); S & S Builders, Inc. v. Equitable Inv. Corp., 219 Ga. 557, 134 S.E.2d 777 (1964); Pepsico Truck Rental, Inc. v. Eastern Foods, Inc., 145 Ga. App. 410, 243 S.E.2d 662 (1978).

negotiations that occur prior to, or at the time of, execution of the written agreement are merged into, terminated, and extinguished by the writing.[45] The rule states a principle of substantive law.[46]

Mr. McCamy contends that an express trust exists, with the proceeds from the sale of his property deposited in the CDAR accounts as the *res*, on the basis of discussions, negotiations, and commitments made prior to or in connection with the execution of the written Exchange Agreement. REES's commitment to segregate Mr. McCamy's funds as he requested contradicts the terms of the Exchange Agreements that expressly and unambiguously permit investment of sales proceeds in auction rate bonds and pooling with funds of other clients and provide that Mr. McCamy cannot direct where REES holds exchange account funds.[47]

Moreover, each of Mr. McCamy's Exchange Agreements contains a "merger" clause that states:[48]

> This Agreement may not be amended or modified in any respect whatsoever except by an instrument in writing signed by the parties hereto. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof.

When a written agreement contains a "merger" clause such as this, the writing governs the rights and obligations of the parties, notwithstanding prior or contemporaneous discussions,

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[45]*E.g.,* Thompson v. Arrington, 209 Ga. 343, 72 S.E.2d 293 (1952).

[46]*E.g.,* Franks v. Reese, 151 Ga. App. 670, 261 S.E.2d 420 (1979).

[47]Exhibits 18, 19, ¶¶ 7, 8.

[48]Exhibits 18, 19, ¶ 24.

representations, or oral agreements.[49]

Mr. McCamy's Exchange Agreements expressly and unambiguously permit investment of his sales proceeds in auction rate bonds and the pooling of those sales proceeds with proceeds from sales of property of other exchangers. The "merger" clause makes it clear that the Exchange Agreement itself sets forth the entire agreement of the parties. Because the parol evidence contradicts the unambiguous language of the written Exchange Agreements, it cannot be the basis for the creation of an express trust.

For the foregoing reasons, the Court concludes that an express trust does not exist that gives Mr. McCamy rights as the beneficial owner of an interest in the CDAR accounts.

Mr. Rowe's Assertion of Express Trust

The facts giving rise to Mr. Rowe's assertion of an express trust arose after his execution of his Exchange Agreement on May 29, 2008,[50] beginning at the time of the closing of the sale of his relinquished property on June 16, 2008.[51] At that time, an exchange of e-mail messages occurred between Mr. Rowe's attorney, Sherry Olson, and REES's exchange counselor, Alan Buchalter.

An e-mail from Ms. Olson states that Mr. Rowe had learned that REES is a customer of Bank of North Georgia and that the bank's representative said that REES could earn interest of

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[49]*E.g.,* First Data POS, Inc. v. Willis, 273 Ga. 792, 546 S.E.2d 781 (2001), *on remand,* 250 Ga. App. 850, 553 S.E.2d 319 (2001); Cook v. Regional Communications, Inc., 244 Ga. App. 869, 539 S.E.2d 171 (2000); Choice Hotels Int'l., Inc. v. Ocmulgee Fields, Inc., 222 Ga. App. 185, 474 S.E.2d 56 (1996).

[50]Exhibit 1.

[51]Exhibit 2.

3.39 percent with no time limitations. The message then states, "[Mr. Rowe] would like REES to put the money there since you already have an account."[52] A later e-mail asks, "What did Ricky [presumably meaning Ron Raitz] find out from Bank of North Georgia about the interest rate?"[53]

Mr. Buchalter responded that Mr. Raitz had talked to Bank of North Georgia and that the 3.39 percent interest rate was an introductory rate available only on individual accounts. He then explained that the bank would pay interest at 2.29 percent on "our corporate account, and we will pay Mr. Rowe 1.75%. Our business model is such that we keep part of the interest."[54]

This exchange of e-mails focuses on the interest rate to be paid to Mr. Rowe and does not evidence a commitment to segregate funds or to establish a separate account for Mr. Rowe. Indeed, Mr. Buchalter's e-mail clearly states that the funds will be in REES's corporate account. It is questionable, therefore, that these communications establish a commitment on REES's behalf to establish the required elements of a trust "with reasonable certainty" as O.C.G.A. § 53-12-20(b) requires. In any event, no transfer of funds to an account at Bank of North Georgia occurred at this time.

Ms. Olson and REES exchanged additional e-mail messages in September. Ms. Olson's e-mails evidence Mr. Rowe's concern that his money be placed in accounts insured by the Federal Deposit Insurance Corporation.[55] REES responded with a suggestion that the funds could be

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[52]Exhibit 5.

[53]Exhibit 4.

[54]Exhibit 3.

[55]Exhibit 6 (E-mail from Ms. Olson to Mr. Buchalter, September 18, 2008, at 10:49 a.m.).

placed in money market accounts spread over 35 banks that would be insured[56] and advised Ms. Olson as follows:[57]

> We've received the information from Bank of North Georgia on the Synovus Shared Money Market account and we can make the change first thing tomorrow if Mr. Rowe would like to convert his exchange account. However, Ron said that we would have to drop the interest rate we are paying per the exchange agreement to .75% due to the lower rate the new account will be earning. Let us know how you want to proceed.

On September 19, 2009, REES e-mailed to Mr. Rowe an amendment to the original exchange agreement. The message stated:[58]

> I have attached an amendment to David Rowe's exchange agreement to reflect the new interest rate he will earn on his exchange account. This new interest rate is due from moving the balance in his exchange account to a shared money market account at the Bank of North Georgia. Please have David execute this amendment and return it to me via fax or e-mail.

Mr. Rowe executed and sent the agreement by facsimile to REES on September 19.[59] The Amendment identifies the original Exchange Agreement; recites that "the parties are desirous of

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[56]Exhibit 6 (E-mail from Mr. Raitz to Ms. Olson, September 18, 2008, at 4:07 p.m.).

[57]Exhibit 7 (E-mail from Margaret Damiani, Accounting Manager, to Ms. Olson, September 18, 2008, at 5:09 p.m.).

[58]Exhibit 8 (E-mail from Mr. Buchalter to Ms. Olson, September 9, 2008, at 9:42 a.m.).

[59]Exhibit 9.

amending the Agreement to properly reflect the amount of interest Exchanger shall earn on the Exchange Account;" and amends paragraph 17 of the Exchange Agreement by restating its provisions with a provision for an interest rate of .75% beginning September 19, 2008. The revised paragraph 17 in the amendment repeats the following language that the original paragraph 17 included: "Exchanger may not direct where funds are held by [REES]."

The amendment concludes with the following language:

> This First Amendment is effective as of the date indicated below and will remain coterminous with the Agreement. Except as expressly amended and supplemented herein, the Agreement shall remain in full force and effect, and the parties hereby ratify and confirm the terms and conditions thereof.

Like Mr. McCamy's Exchange Agreements discussed earlier, Mr. Rowe's original Exchange Agreement contains a "merger" clause:[60]

> This Agreement may not be amended or modified in any respect whatsoever except by an instrument in writing signed by the parties hereto. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof.

The amendment did not change any other provisions of the original Exchange Agreement and expressly provides that all of the other original provisions remain in effect. Consequently, after the amendment, paragraph 7 continues to authorize the deposit of funds received from Mr. Rowe into auction rate bonds, and paragraph 8 continues to permit the commingling of Mr.

[60]Exhibit 1, ¶ 23.

Rowe's proceeds with those of exchange clients.[61] Moreover, the amendment's express language continues to prohibit Mr. Rowe from directing where REES holds his funds.

Importantly, the Amendment states that Mr. Rowe and REES "hereby ratify and confirm" the terms and conditions of the original Exchange Agreement. This ratification necessarily includes ratification of the original agreement's merger clause. Consequently, the Exchange Agreement, as amended, is the sole source for determining the rights and obligations of the parties.

As already discussed, the terms of Mr. Rowe's original Exchange Agreement do not create an express trust with regard to his sales proceeds or the CDAR accounts. Nothing in the Amendment changes any of those provisions or otherwise contains language that could create such a trust. Indeed, the Exchange Agreement, even as amended, specifically contradicts the creation of such a trust.

The creation of an express trust with regard to Mr. Rowe's sales proceeds thus depends on the discussions and e-mails between Ms. Olson and REES. The e-mails arguably establish a written agreement[62] for the segregation at that time of Mr. Rowe's funds in the CDAR accounts that may create an express trust. The e-mails, however, constitute parol evidence in view of the later execution of the Amendment.

As discussed earlier, the parol evidence rule prohibits use of parol evidence to contradict or vary the terms of a valid written instrument. O.C.G.A. § 24-6-1. Parol evidence may be used,

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[61]Exhibit 1.

[62]The parties have not addressed whether an exchange of e-mails meets the requirement of a writing, and the Court does not do so either.

however, when he *construction* of an express trust is at issue to "explain all ambiguities, both latent and patent." O.C.G.A. § 53-12-27.

These principles preclude Mr. Rowe's reliance on the e-mails to establish an express trust. The discussions and e-mails led to the execution of the Amendment and occurred prior to execution of the Amendment. They contradict the terms of the written Exchange Agreement, as amended, and the provisions of the amended instrument with regard to the creation of an express trust are not ambiguous. The terms of the Exchange Agreement, as amended, clearly do not establish a trust with regard to Mr. Rowe's proceeds or the CDAR accounts. As such, the e-mails and other parol evidence with regard to events prior to execution of the Amendment cannot be used to establish the creation of an express trust.

For the foregoing reasons, the Court concludes that an express trust does not exist that gives Mr. Rowe rights as the beneficial owner of an interest in the CDAR accounts.

2. Resulting Trust

Under Georgia law, a resulting trust is "implied for the benefit of the settlor or the settlor's successors in interest when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have the beneficial interest in the property" under one of three circumstances. O.C.G.A. § 53-12-91.

The first two circumstances contemplate the existence of an express trust. Under O.C.G.A. § 53-12-91(1), a trust is implied when "[a] trust is created but fails, in whole or in part, for any reason." Under O.C.G.A. § 53-12-91(2) a trust is implied when "[a] trust is fully performed without exhausting all the trust property." Subsection (1) thus requires the creation of a trust, and subsection (2) requires its full performance. Unless an express trust was created,

therefore, a trust cannot be implied under either of these two subsections. Because the Court has concluded that express trusts did not exist, resulting trusts cannot be implied under either of these subsections.

The third circumstance, specified in subsection (3), permits a resulting trust when "[a] purchase money resulting trust as defined in subsection (a) of [O.C.G.A.] § 53-12-92 is established." O.C.G.A. § 53-12-92(a) defines a purchase money resulting trust as "a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property."

REES did not take title to property using funds supplied by either Mr. Rowe or Mr. McCamy. Consequently, no purchase money resulting trust arose.

3. Constructive Trust

Under O.C.G.A. § 53-12-93(a), a constructive trust is a trust "implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." A constructive trust is a remedial device created by a court of equity to prevent unjust enrichment.[63]

Although parol evidence cannot establish the existence of an express trust, as discussed above, O.C.G.A. § 53-12-94 permits parol evidence of the "nature of the transaction, the circumstances, and the conduct of the parties, either to imply or rebut the trust," when a trust is sought to be implied. Thus, REES's commitments to segregate the funds of Messrs. Rowe and McCamy are material to consideration of whether REES held those funds in constructive trusts.

[63]Lee. v. Lee, 260 Ga. 356, 392 S.E.2d 870 (1990).

O.C.G.A. § 53-12-93 effectively states two requirements that are material here. First, the circumstances must show that *the person holding legal title* to property cannot enjoy the beneficial interest in the property in question. Second, the statute requires that, "either from fraud or otherwise," enjoyment of the beneficial interest by the holder of legal title violates "some established principle of equity."

REES acquired legal title to the proceeds from the sale of properties of Messrs. Rowe and McCamy pursuant to a written Exchange Agreement that expressly permitted REES to invest those proceeds in bank deposits, auction rate bonds, and other instruments and to commingle those proceeds with proceeds from the sales of properties of other exchange clients. The evidence shows that REES kept sales proceeds from all of its clients in separate accounts, although it generally commingled them, and did not use any of the proceeds for its own use or payment of its operating expenses. REES intended that all sales proceeds be used to fund its obligations under all of its Exchange Agreements, either to purchase replacement properties for exchange clients or to pay them the balances in their Exchange Accounts. REES never intended to enjoy, and did not enjoy, the beneficial interest in Mr. Rowe's and Mr. McCamy's sales proceeds, other than realization of the spread between the interest earned on investments and the interest payable to them, as the Exchange Agreements contemplated and the circumstances in both Mr. Rowe's and Mr. McCamy's transactions clearly reflect.

Consequently, REES's exchange clients collectively (including, of course, Messrs. Rowe and McCamy), not REES itself, "enjoy the beneficial interest" in the funds that Messrs. Rowe and McCamy claim if they do not. Because REES did not and does not enjoy the beneficial interest in the property in question, the Court concludes that the constructive trust principles of O.C.G.A.

§ 53-12-93 do not permit imposition of a constructive trust in these circumstances.

Imposition of a constructive trust further requires a showing that, either from fraud or otherwise, the enjoyment of the beneficial interest in the property violates some established principle of equity. No fraud occurred in this case. Thus, the question is whether some other "established principle of equity" requires imposition of a constructive trust.

Courts have imposed constructive trusts under Georgia law when the failure to do so would result in unjust enrichment of the holder of legal title.[64] The effect of a constructive trust in this case would be to take the funds that Messrs. Rowe and McCamy claim away from other exchange clients who otherwise will receive a pro rata share of them. The failure to do that does not result in the unjust enrichment of the other exchange clients and certainly does not result in the unjust enrichment of REES, which effectively served as a stakeholder in the circumstances of this case.[65]

Messrs. Rowe and McCamy essentially assert that the Court should impose a constructive trust because REES received proceeds from the sales of their properties, undertook to use the funds to purchase replacement properties they identified or to return the funds if a replacement

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[64] *E.g.,* Edwards v. Edwards, 267 Ga. 780, 482 S.E.2d 701 (1997).

[65] The Court of Appeals of Georgia in *Deer Creek, Inc. v. Section 1031 Services, Inc.,* 235 Ga. App. 891, 510 S.E.2d 853 (1999), held that one exchange client could not impose a constructive trust on funds of the exchange intermediary that an arbitrator had awarded to other clients because the clients receiving the funds had not been unjustly enriched. *Deer Creek* involved fraudulent conduct of the operator of the exchange intermediary, who had absconded with most of the funds. The court noted that the clients to whom the funds had been awarded had not engaged in any wrongdoing and were not unjustly enriched by "reclaim[ing] their own investments." *Id.* at 893. It appears from the opinion that the funds in question were in commingled escrow accounts. The result of the case, therefore, was that the unpaid client could not challenge the prior award of the funds to the other clients. *Deer Creek* arose in a different procedural context than the issues here and does not directly address the issues presented here.

property was not identified or could not be purchased, and made what, as discussed above, the law must treat as an unenforceable commitment to segregate those funds. Cases that arguably support this argument are those in which courts have imposed constructive trusts when an owner conveys property to one party to hold it for the benefit of the owner or another party,[66] when an owner transfers property to another for a particular purpose,[67] or when a party receives proceeds from the sale of property and fails to remit them to another with an interest in them.[68]

But such cases do not involve the transfer of property in accordance with a written contract whose very purpose is to govern the use and disposition of the transferred property and that specifically defines, in considerable detail, the rights and obligations of the parties with regard to the transferred property. In the cases before the Court, in contrast, sophisticated and experienced real estate investors entered into agreements designed to achieve tax benefits available if they complied with technical and structural requirements of the Internal Revenue Code and IRS regulations. They had the opportunity to define their relationships and respective rights and obligations by contract in circumstances in which it is customary and perhaps essential to achieving their purposes that they do so. Under the legally enforceable terms of those agreements, REES is obligated to pay Messrs. Rowe and McCamy. The fact that those agreements do not create a legally enforceable, express trust with regard to their specific sales

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[66]*E.g.,* Hancock v. Hancock, 205 Ga. 684, 54 S.E.2d 385 (1949).

[67]*E.g., In re* McDowell, 258 B.R. 296 (Bankr. M.D. Ga. 2001); Salzburger Bank v. Standard Oil Co., 173 Ga. 722, 161 S.E. 584 (1931); Bunch v. Byington, 292 Ga. App. 497, 664 S.E.2d 842 (2008); *see In re* McBarnette, 173 B.R. 248, 249 n. 1 (Bankr. N.D. Ga. 1994) (dicta); *cf*. Federal Empl. Credit Union v. Capital Auto. Co., 124 Ga. App. 144, 183 S.E.2d 39 (1971).

[68]Kelly v. Johnston, 258 Ga. 660, 373 S.E.2d 7 (1988).

proceeds does not provide a basis for a court of equity to impose a constructive one.

In this regard, the Court notes the equitable principle, "Equity is ancillary, not antagonistic, to the law; hence, equity follows the law where the rule of law is applicable and follows the analogy of the law where no rule is directly applicable." O.C.G.A. § 23-1-6. The rule of law applicable here is that an express trust must be in writing. When a writing specifically and unequivocally defines the circumstances under which a party acquires cash proceeds and the use and disposition of them but does not create an express trust, the constructive trust remedy is not available to supplant the legal rule.

B. Tracing of the Funds

The Court's conclusions that Messrs. Rowe and McCamy have not established that their sales proceeds or the CDAR accounts are the subjects of express, resulting, or constructive trusts makes it unnecessary to resolve the tracing issue that the parties have raised. In the interest of judicial economy and to enable effective appellate review of the issues in these proceedings, however, it is appropriate to resolve the dispute between the parties concerning this issue.

The Trustee and Committee contend as a matter of law that the funds in question cannot be traced because they were deposited into the Wachovia sweep account and thence commingled with other funds in the Federal Reserve System. The court in *Frontier Pepper's Ferry LLC v. LandAmerica 1031 Exchange Services, Inc. (In re LandAmerica Financial Group, Inc.,* 2009 WL 1269578 at *12 (Bankr. E.D. Va. May 7, 2009), reached this conclusion. The Court declines to do so. The funds were deposited into a bank account and were withdrawn from the same account. Although it is technically true that the funds were commingled, the account was replenished the next day, and there was not, and could not be, any serious question about the security of the funds

or any risk of loss as a result of the commingling. Tracing principles do not take this type of technicality into account.

The fact that Mr. Rowe's and Mr. McCamy's funds were commingled in the Synovus accounts also raises a commingling question. Although the funds were commingled, it is clear that REES could and did properly account for them separately on its books, and division of the funds in accordance with their respective interests is clearly possible. The Court concludes, therefore, that the commingling of funds identified as belonging to both under these circumstances does not preclude their ability to trace their own separate funds.

Resolution of these legal issues ends the inquiry with regard to tracing of Mr. McCamy's funds. The Trustee and Committee concede that Mr. McCamy can otherwise trace his funds.

The Trustee and the Committee raise an additional issue with regard to Mr. Rowe's funds. Mr. Rowe's funds were deposited into the Wachovia sweep account and commingled with deposits of proceeds from sales of properties of other investors. The commingling of funds ordinarily prevents tracing, but a trust beneficiary may nevertheless trace his funds if he can establish that the balance in the account never fell below the amount of his trust funds. In this regard, the legal presumption is that the first withdrawals are of funds other than the trust funds. The principle is known as the "lowest intermediate balance" rule.[69] The beneficiary cannot claim additional deposits into the account as trust funds.[70]

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[69] *See, e.g.*, General Elec. Capital Corp. v. Union Planters Bank, N.A., 409 F.3d 1049, 1059-1060 (8th Cir. 2005) ("Under the lowest intermediate balance rule, it is assumed the traced proceeds are the last funds withdrawn from a contested account."); City of Farrell v. Sharon Steel Corp., 41 F.3d 92, 102 (3d Cir. 1994).

[70] *See* Merchants Express Money Order Co. v. Supermarkets of Cheltenham, Inc. (*In re* Supermarkets of Cheltenham, Inc.), 1999 WL 260956 (Bankr. E.D. Pa. Apr. 28, 1999).

Between the time that Mr. Rowe's funds were placed in the Wachovia sweep account and the time that REES transferred $1,500,000 from that account into the Synovus system, the balance in the Wachovia sweep account dropped to $274,997.69.[71] Thus, the Trustee and the Committee contend that Mr. Rowe's ability to trace his funds is limited to $274,997.69.

Mr. Rowe counters by showing that the total of all cash accounts of REES that contained exchange funds always exceeded the $1,500,000 transferred into the Synovus accounts on September 19. [Exhibit 44; Testimony of Mr. Myers]. He asserts that the proper tracing inquiry should take account of all of the exchange funds held by REES, not just those in the Wachovia sweep account. Mr. Rowe cites *Kupetz v. United States (In re California Trade Technical Schools, Inc.),* 923 F.2d 641 (9th Cir. 1991), and *United States v. McConnell (In re Flying Boat, Inc.)*, 258 B.R. 869 (N.D. Tex. 2001), to support his position.

The Court concludes that tracing principles do not extend to permit consideration of funds in other accounts. Mr. Rowe's funds were placed into the Wachovia sweep account. Other accounts held exchange funds derived from other exchange clients. Mr. Rowe's theory of the case is that his money was segregated from the exchange funds of all other clients and accounts that REES held for other exchange clients. Deposits in other accounts were not segregated, and REES never identified or treated any of those other accounts as his. His claim to segregated funds as the beneficiary of a trust *res* to the exclusion of other clients does not properly permit him to incorporate other funds in which he did not have an interest as part of that *res.* Funds withdrawn from the Wachovia sweep account were no longer segregated, and he cannot rely on them for

[71]This occurred on July 18, 2009. The amount is calculated by adding the ending balance in the account on July 18, 2008, of $ 997.69 [Exhibit 30, page 6] to the amount of funds swept that night, $274,000 [Exhibit 30, page 5].

purposes of tracing his money. These circumstances distinguish his situation from the cases he cites. Consequently, Mr. Rowe can properly trace funds only to the extent of $274,997.69.

III. CONCLUSIONS OF LAW

Based on the foregoing, the Court enters the following conclusions of law:

1. With regard to Mr. Rowe:

(a) REES did not hold, and the Trustee does not hold, the proceeds from the sale of Mr. Rowe's real property, the CDAR bank account deposits REES made with reference to his Exchange Account in the Synovus system through the Bank of North Georgia, or the bank account deposits the Trustee now holds that represent the funds that were in the CDAR accounts, in an express trust for the sole benefit of Mr. Rowe. Thus, Mr. Rowe is not the equitable owner of, and does not have an equitable ownership interest in, bank account deposits that the Trustee now holds, except to the extent that he may be, with other exchange clients of REES, the beneficiary of a "pooled" trust for the benefit of all such clients.

(b) REES did not hold, and the Trustee does not hold, the proceeds from the sale of Mr. Rowe's real property, the CDAR bank account deposits REES made with reference to his Exchange Account in the Synovus system through the Bank of North Georgia, or the bank account deposits the Trustee now holds that represent the funds that were in the CDAR accounts, in a resulting trust.

(c) REES did not hold, and the Trustee does not hold, the proceeds from the sale of Mr. Rowe's real property or the CDAR bank account deposits REES made with reference to his Exchange Account in the Synovus system through the Bank of North Georgia, or the bank account deposits the Trustee now holds that represent the funds that were in the CDAR accounts, in a

constructive trust.

(d) In the interests of judicial economy and to facilitate appellate review, the Court makes the following alternative conclusions of law to the extent that, contrary to the foregoing conclusions of law, Mr. Rowe is determined to be the beneficiary of an express, resulting, or constructive trust (other than a "pooled" trust for the benefit of all other exchange clients) specifically with regard to his funds:

(I) Mr. Rowe's beneficial interest in any such specific trust would be limited under tracing principles applicable to commingled accounts to $274,997.69, the lowest intermediate balance in the Wachovia sweep account into which REES deposited proceeds from the sale of his real estate prior to establishment of the CDAR accounts.

(ii) Mr. Rowe would be entitled to an Order directing disbursement of $274,997.69 of such funds to him.

2. With regard to Mr. McCamy:

(a) REES did not hold, and the Trustee does not hold, the proceeds from the sale of Mr. McCamy's real properties, the CDAR bank account deposits REES made with reference to his Exchange Accounts in the Synovus system through the Bank of North Georgia, or the bank account deposits the Trustee now holds that represent the funds that were in the CDAR accounts, in an express trust for the sole benefit of Mr. McCamy. Thus, Mr. McCamy is not the equitable owner of, and does not have an equitable ownership interest in, bank account deposits that the Trustee now holds, except to the extent that he may be, with other exchange clients of REES, the beneficiary of a "pooled" trust for the benefit of all such clients.

(b) REES did not hold, and the Trustee does not hold, the proceeds from the sale of Mr.

McCamy's real properties, the CDAR bank account deposits REES made with reference to his Exchange Accounts in the Synovus system through the Bank of North Georgia, or the bank account deposits the Trustee now holds that represent the funds that were in the CDAR accounts, in a resulting trust.

(c) REES did not hold, and the Trustee does not hold, the proceeds from the sale of Mr. McCamy's real properties or the CDAR bank account deposits REES made with reference to his Exchange Accounts in the Synovus system through the Bank of North Georgia, or the bank account deposits the Trustee now holds that represent the funds that were in the CDAR accounts, in a constructive trust.

(d) In the interests of judicial economy and to facilitate appellate review, the Court makes the following alternative conclusions of law to the extent that, contrary to the foregoing conclusions of law, Mr. McCamy is determined to be the beneficiary of an express, resulting, or constructive trust (other than a "pooled" trust for the benefit of all other exchange clients) specifically with regard to his funds:

(I) Mr. McCamy would be able to trace the proceeds from the sale of his real properties to funds in bank account deposits that the Trustee now holds.

(ii) Mr. McCamy would be entitled to an Order directing disbursement of $2,186,000 of such funds to him.

IV. CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the Trustee's Motion to Strike Use of Deposition Testimony" [Docket No. 140], be, and the same hereby is **GRANTED**; and it is further

ORDERED and ADJUDGED that Mr. McCamy's "Motion to Compel Debtor to Release and Disburse Trust Funds" [Docket No. 19] be, and the same hereby is **DENIED**; and it is further

ORDERED and ADJUDGED that Mr. Rowe's "Motion to Compel Debtor in Possession to Release and Disburse Funds Held in Trust by Debtor in Possession for David C. Rowe" [Docket No. 26], be, and the same hereby is **DENIED**.

[END OF ORDER]

These findings of fact and conclusions of law are not intended for publication.

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