**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
**WILMINGTON DIVISION**

**IN RE:**

**BATE LAND & TIMBER, LLC,** **CASE NO. 13-04665-8-SWH**
**CHAPTER 11**

**DEBTOR.**

# SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF OBJECTIONS TO CONFIRMATION OF AMENDED PLAN OF REORGANIZATION AND BATE LAND COMPANY, L.P.'S SUMMARY OF TESTIMONY IN OPPOSITION TO CONFIRMATION OF PLAN OF REORGANIZATION

**NOW COMES** Bate Land Company, LP ("BLC"), by and through counsel and pursuant to the Order Regarding Submission of Supplemental Briefs [DE-268] entered by this Court on August 12, 2014, hereby submits this *Supplemental Memorandum of Law in Support of the Objections to Confirmation of Amended Plan of Reorganization and Bate Land Company L.P.'s Summary of Testimony in Opposition to Confirmation of Plan of Reorganization* (the "Supplemental Memorandum"), opposing confirmation of the Plan of Reorganization [DE-47] dated August 30, 2013, as supplemented by the Amended Treatment to Class 4 of the Debtor's Plan of Reorganization (the "Amendment") and the Amended (Clarified) Treatment to Class 4 of the Debtor's Plan of Reorganization [DE-139] (the "Clarification") filed by Bate Land & Timber, LLC (the "Debtor") on December 23, 2013, and January 3, 2014, respectively (collectively, the "Amended Plan").

## I. FACTUAL BACKGROUND

### A. DEBTOR'S ACQUISITION OF REAL PROPERTIES AND OWNERSHIP STRUCTURE

On or about April 14, 2006, the Debtor and BLC executed an Agreement for Purchase and Sale of Non-Residential Real Property (the "Purchase Contract"), under which the Debtor purchased seven-nine (79) tracts of real property, totaling approximately 17,000 acres in nine (9) separate counties in eastern North Carolina (collectively, the "Properties") for $65,000,000.00 (the "Purchase Price"). Under the Purchase Contract, the Debtor was required to pay $9,000,000.00 of the Purchase Price at closing. Thereafter, on September 8, 2006, the Debtor executed a Purchase Money Promissory Note in the original principal amount of $56,000,000.00, with interest accruing at a rate equal to 9.00% per annum (the "Purchase Money Note"). Repayment of and performance of the duties required under the Note was secured by Purchase Money Deeds of Trust on the Properties sold to the Debtor under the Purchase Contract.

The Debtor, a North Carolina limited liability company, filed a voluntary petition seeking relief under chapter 11 of the Bankruptcy Code on July 26, 2013 (the "Petition Date"). The Debtor is compromised of the following members:

| NAME AND ADDRESS | TITLE | NATURE AND PERCENTAGE OF STOCK OWNERSHIP |
|---|---|---|
| **High Meadows Investment, LLC**<br>**Attn: Manager or Agent**<br>**PO Box 1969**<br>**Shallotte, NC 28459** | **Member** | **25%**<br>**Member** |
| **Saunders GST Irrevocable Trust**<br>**Attn: Manager or Agent**<br>**PO Box 1969**<br>**Shallotte, NC 28459** | **Member** | **1%**<br>**Member** |
| **Mark A. Saunders**<br>**PO Box 1969**<br>**Shallotte, NC 28459** | **Member Manager** | **74%**<br>**Member/Manager** |

Statement of Fin. Affairs [DE-37], at 25. High Meadows Investment, LLC ("High Meadows Investment") is a limited liability company organized and existing under the laws of the State of Wyoming. High Meadows investment is owned and controlled by its sole member, Mark A. Saunders ("Saunders"). As reflected above, Saunders is also the manager of the Debtor, holding a 74% membership interest.

### B. FAILED ATTEMPT TO SURRENDER BROAD CREEK AND SMITH CREEK TO BLC TWO HOURS PRIOR TO FILING

Less than two (2) hours prior to the filing of the above-captioned case and unbeknownst to BLC, the Debtor executed and recorded a Special Warranty Deed in Book 583, Page 121 of the Pamlico County Registry (the "Prepetition Special Warranty Deed"), conveying two of the tracts serving as security for the Purchase Money Note, referenced as Harold H. Bate Tract #56 (McCotter) and Harold H. Bate Tract #95 (Weyco), commonly referred to as "Broad Creek" and "Bay River/Smith Creek," respectively, to BLC.

Post-petition, on September 10, 2013, the Debtor preemptively filed an Objection to Claim [DE-56] (the "Objection to Claim"), asserting that its prepetition transfer of Broad Creek and Smith Creek to BLC satisfied, in full, any claim asserted by BLC. Thereafter, on September 27, 2013, BLC filed a proof of claim, Claim No. 7, in the amount of $12,924,417.87 (the "BLC Claim")[1] and a Motion to Set Aside Special Warranty Deed [DE-71].

On December 4, 2013, this Court entered an Order Regarding Objection to Claim and Motion to Set Aside Special Warranty Deed [DE-122] (the "Order"), overruling the Objection to Claim filed by the Debtor to the BLC Claim on the grounds that the Prepetition Special Warranty Deed was neither solicited nor accepted by BLC and, therefore, "fail[ed] for want of acceptance." In re Bate Land & Timber, LLC, No. 11-08676-8-SWH, at 14 (Bankr. E.D.N.C. Dec. 4, 2013). The Order also allowed the Motion to Set Aside the Special Warranty Deed on the same grounds.

**C. CIRCUMSTANCES SURROUNDING PREPETITION TRANSACTIONS BETWEEN DEBTOR AND NORTHEN BLUE, LLP**

Prior to the Petition Date, on or about November 28, 2011, various other related entities, owned and controlled by Saunders, including the Debtor, engaged John Northen of Northen Blue, LLP (collectively, "Northen Blue"), "in connection with the restructuring of existing secured and unsecured debt in the context of Chapter 11 proceedings[]" (the "Initial Engagement Letter"). An initial retainer of $25,000.00 was paid to Northen Blue (the "Northen Blue Retainer"), the source of which is unknown. Thereafter, on or about May 22, 2013 (approximately sixty-five (65) days before the Petition Date), the Debtor executed another engagement letter (the "Second Engagement Letter"), under which Northen Blue was engaged to represent the Debtor "in connection with the restructuring of existing secured and unsecured debt in the context of a Chapter 11 proceeding . . . ." Notwithstanding the execution of the Second Engagement Letter solely by the Debtor, the file number assigned to both engagements by Northen Blue (File No. N-28322p) remained the same.

[1] BLC, on May 28, 2014, amended the BLC Claim to include post-petition interest, both at the contract rate and the default rate of 12% per annum, plus costs.

On July 18, 2014, and approximately eight (8) days prior to the Petition Date, Saunders—in his capacity as manager of the Debtor—executed a Promissory Note in favor of Northen Blue in the original principal amount of $14,142.83, with interest accruing at a fixed rate equal to 4.00% per annum (the "Northen Blue Note"). The Northen Blue Note called for six (6) monthly payments of principal and interest in the amount of $2,384.71, due on the last day of each month, beginning July 31, 2013, and continuing thereafter until satisfied.

The Northen Blue Note was secured by a North Carolina Deed of Trust, prepared by Elanie R. Jordan ("Jordan"),[2] on 348.58 acres, more or less, of real property located in Craven County, North Carolina and referred to as "Laura Elizabeth Williams-Wilson" Tract (the "Northen Blue Deed of Trust"). The Northen Blue Deed of Trust was executed on July 19, 2014, by Saunders, on behalf of the Debtor, and recorded in Book 3215, Page 255, of the Craven County Registry on July 23, 2013. Within seventy-two (72) hours of the Petition Date and as a result of the Northen Blue Note and the Northen Blue Deed of Trust, the Debtor transformed a wholly unsecured obligation owed to Northen Blue for unpaid legal fees, into a secured obligation.[3] Six (6) days prior to the scheduled due date of July 31, 2013, and within twenty-four (24) hours of the Petition Date, the Debtor made the first payment to Northen Blue under the Northen Blue Note.

**D. DEBTOR'S ACQUISITION OF JOHN DEERE EQUIPMENT LEASED TO A NON-DEBTOR ENTITY THREE DAYS PRIOR TO PETITION DATE**

Approximately two (2) years prior to the Petition Date, in or about 2011, Ocean Ridge Plantation ("Ocean Ridge"), a related non-debtor entity wholly owned by Saunders, leased a John Deere 6310 Utility Tractor and a John Deere MX10 Rotary/Flail Cutter (collectively, the "John Deere Equipment"), from Revels Turf & Tractor, LLC ("Revels Turf & Tractor"), an authorized John Deere dealer located in

[2] Jordan is general counsel for The Coastal Companies, LLC, a non-debtor related entity wholly owned and controlled by Saunders.

[3] Post-petition, Northen Blue filed a proof of claim in the above-captioned case, Claim No. 2, as amended, in the amount of $11,770.52, all of which it contends is secured pursuant to the Northen Blue Deed of Trust (the "Northen Blue Claim").

Fuquay-Varina, North Carolina. The lease payments were made by Ocean Ridge. Revels Tr., at 33 (May 6, 2014). Three (3) days prior to the Petition Date, the Debtor purchased the John Deere Equipment pursuant to a Loan Contract-Security Agreement it executed in favor of John Deere Financial in the original amount of $26,523.00,[4] with interest accruing at a rate equal to 6.60% per annum (the "John Deere Contract"). The John Deere Contract called for five (5) monthly payments of $6,382.95, commencing on July 11, 2014. To secure repayment and performance of the obligations set forth in the John Deere Contract, John Deere Financial was granted a security interest in the John Deere Equipment, which was perfected by the filing of a UCC Financing Statement with the North Carolina Secretary of State on July 29, 2014, File No. 2013007242H. John Deere Financial, post-petition, filed a proof of claim, Claim No. 3, in the amount of $26,565.51, all of which it contended was secured by the John Deere Equipment (the "John Deere Claim").

On October 15, 2013, John Deere Financial filed an Objection to Confirmation of Plan [DE-88] (the "John Deere Objection"), raising numerous concerns regarding the timing and impropriety surrounding the execution of the John Deere Contract. The John Deere Objection also asserted that the Plan, as proposed by the Debtor, was not filed in good faith nor was it feasible. After the filing of the John Deere Objection, C. Turner Revels, Jr. ("Revels"), who owned and operated Revels Turf & Tractor, approached and purchased the John Deere Claim from John Deere Financial. As illustrated in his testimony, this transaction was motivated by the existing business relationship with Ocean Ridge. As a result, on December 5, 2013, Tyler J. Russell—on behalf of John Deere Financial—filed an Assignment of Claim 3 of Deere & Company to Revels Turf & Tractor, LLC [DE-125].

### E. EMPLOYMENT OF OLIVER FRIESEN CHEEK, PLLC AS ATTORNEY FOR DEBTOR

After the Petition Date, on August 9, 2013, George Mason Oliver of Oliver Friesen Cheek, PLLC (collectively, "OFC") filed a Disclosure of Compensation of Attorney for Debtor [DE-25], under which

[4] The John Deere Contract indicates that the Debtor made a cash down payment of $14,000.00 towards the total purchase price of $39,000.00. However, and as illustrated by the testimony presented to the Court, the John Deere Contract misrepresents the amount of the cash down payment. Approximately $9,000.00 of the purported cash down payment was lease credits owed to Ocean Ridge.

OFC certified that the source of compensation paid, in the amount of $48,424.40, and to be paid to it, was the Debtor. Disclosure of Compensation of Atty for Debtor [DE-25], at 2 ("I certify that the foregoing is a complete statement of any agreement or agreement for payment to me for representation of the Debtor in this bankruptcy proceeding."). Thereafter, on August 16, 2013, the Debtor filed an Application for Employment of Attorney [DE-31] (the "Application for Employment"), requesting entry of an Order authorizing it to employ George Mason Oliver and Oliver Friesen Cheek, PLLC, as its attorney in the above-captioned chapter 11 bankruptcy case. Attached to the Application for Employment was an Attorney's Affidavit, which disclosed that OFC's representation of the Debtor commenced on May 28, 2013, and the Debtor was charged a retainer of $48,424.40. According to the Attorney's Affidavit, OFC "received $10,000.00 on July 3, 2013, $7,211.40 on July 26, 2013 and $31,213.00 on July 26, 2013 ***from the Debtor.***" App. for Employment of Attorney [DE-31], at 3 (emphasis added).[5] On September 6, 2013, the Court entered an Order Authorizing Employment of Attorney for Debtor [DE-53] (the "Employment Order"), under which the Debtor was authorized to retain and employ OFC to advise and represent the Debtor throughout its chapter 11 bankruptcy proceeding.

### F. SCHEDULES, STATEMENT OF FINANCIAL AFFAIRS AND DEBTOR'S SUBSTANTIAL OWNERSHIP IN VALUABLE RELATED ENTITY, SQUIRES CG, LLC

On August 23, 2013, and within the time frame established by the Court, the Debtor filed its Schedules and Statement of Financial Affairs [DE-37]. On Schedule B, the Debtor scheduled its 97.09% interest in Class B of Squires CG, LLC ("Squires CG") at $6,406,382.00. Sch. B [DE-37], at 6. On August 26, 2014, and as required by Fed. R. Bankr. P. 2015.3, the Debtor filed a Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Estate of Bate Land & Timber, LCC Holds a Substantial or Controlling Interest [DE-42] (the "July 2015 Report"). The value of the Debtor's controlling interest in Squires CG is a "current value," which consists of approximately 488.68

[5] The date upon which OFC received $10,000.00 from the Debtor does not match the date that was later provided in the Statement of Financial Affairs. Compare App. for Empl. of Attorney [DE-31], at 3, with, Statement of Fin. Affairs [DE-37], at 21.

acres in Pamlico County, North Carolina that has been adjusted and discounted by $2,135,461.00 for marketability and control. Id. at 3. As evident from the July 2015 Report, this "current value" does not, however, include the other assets on the balance sheet of Squires CG, including cash, amounts due from related parties of $1,939,176.00 and substantial note and interest receivables totaling $7,633,483.00. Id. at 3, 6. Over the course of the case, the value of the Debtor's interest in Squires CG has continued to increase substantially.

**G. TREATMENT OF BLC UNDER AMENDED PLAN**

The Debtor filed its Amended (Clarified) Treatment to Class 4 of the Debtor's Plan of Reorganization on January 3, 2014, under which it proposes to treat BLC as secured in an amount equal to the outstanding principal and interest due as of the Petition Date, plus costs and expenses approved by the Court under § 506(c), less any postpetition payments. Based on the Court's valuation of certain specified tracts of real property in Pamlico, Beaufort, Craven, Jones, Brunswick and Pender (the "Proposed Properties"), the Debtor will then either elect to surrender some or all of the Proposed Properties in full or partial satisfaction of the remaining balance, and/or pay the remaining balance based on a twenty (20) year amortization, with interest accruing at a rate equal to 4.5% per annum. In the event the balance is repaid over time, the Amended Plan permits the Debtor to sell any of BLC's collateral, in any size increments, and pay a release fee to BLC equal to 70% of the net sales proceeds. The Amended Plan, as proposed, would also permit the Debtor to cut timber on certain tracts (the "Development Tracts"), while remitting only 50% of the gross proceeds to BLC.

BLC, on November 1, 2013, filed its Objection to Confirmation of the Debtor's Plan of Reorganization [DE-105] (the "Objection to Confirmation"). On February 10, 2014, BLC filed a Supplemental Objection to Confirmation of Amended Plan of Reorganization [DE-162] (the "Supplemental Objection to Confirmation").

Over the course of multiple days, between February 24, 2014, and May 28, 2014, the Court heard testimony, received evidence and arguments in support of and in opposition to confirmation of the Amended Plan.

On June 9, 2014, and consistent with the Court's directive at the conclusion of the hearings, BLC submitted its Summary of Testimony in Opposition to Confirmation of Plan of Reorganization [DE-259] (the "BLC Summary of Evidence"), summarizing the testimony and arguments in opposition of confirmation of the Amended Plan. On June 16, 2014, and after obtaining an extension of time, the Debtor filed its Summary of Evidence in Support of Confirmation of Plan [DE-262] (the "Debtor Summary of Evidence").

## II. ARGUMENT

### A. SUMMARY OF ARGUMENT

As previously chronicled in the Objection to Confirmation, the Supplemental Objection to Confirmation and the BLC Summary of Evidence, the Amended Plan, as proposed by the Debtor cannot be confirmed because it fails to meet the requirements of § 1129 of the Bankruptcy Code.[6]

The Debtor has failed to demonstrate, by a preponderance of the evidence, that the Amended Plan complies with the requirements of § 1129(a). Specifically, and based upon a totality of the circumstances, the Amended Plan has not been proposed in good faith and, therefore, does not comply with § 1129(a)(3). Additionally, and because the Debtor—as the proponent of the Amended Plan—has failed to comply with the provisions of Title 11 of the United States Code, confirmation is prohibited under § 1129(a)(2). Furthermore, the Debtor has failed to prove—by a preponderance of the evidence—that the Amended Plan is feasible, in violation of § 1129(a)(11).

Absent surrender of all the Properties to BLC, the Amended Plan violates § 1129(b)(2)(A) because it is not fair and equitable with respect to BLC by failing to provide BLC with the indubitable equivalent of the BLC Claim. Furthermore, and in the event the Debtor elects to repay any portion of the BLC Claim over time, the Amended Plan is not fair and equitable because: (1) the proposed repayment terms—over twenty years with interest accruing at 4.5% per annum—are not fair and equitable; (2) it provides for the sale of the Properties, which are subject to the lien of BLC, without allowing BLC to

[6] Unless otherwise indicated herein, all statutory references are to the Bankruptcy Code, 11 U.S.C. § 101 et seq.

credit bid in violation of RadLax Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012); (3) provides for a release price which is not sufficient to repay BLC in full; and (4) it proposes to repay BLC through the harvesting and sale of timber on the Properties without remitting the full amount of the timber proceeds to BLC.[7]

### B. THE DEBTOR HAS FAILED TO PRESENT SUFFICIENT RELIABLE EVIDENCE FROM WHICH THE COURT CAN VALUE THE PROPERITES.

Rule 3012 of the Federal Rules of Bankruptcy Procedure provides that "[t]he court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest . . . ." Fed. R. Bankr. P. 3012. Likewise, § 506(a) provides that a claim is secured "to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." 11 U.S.C. § 506(a). Pursuant to § 506(a)(1), collateral must be valued "in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a)(1); see Associates Commercial Corp. v. Rash, 520 U.S. 953, 962 (1997) (emphasizing that "the 'proposed disposition or use' of the collateral is of paramount importance to the valuation question.").

In the dirt-for-debt context, which is applicable here, bankruptcy courts must also take a variety of quantitative and qualitative (i.e., non-monetary) aspects into consideration when making its determination of value. In re Simons, 113 B.R. 942, 947-48 (Bankr. W.D. Tex. 1990) (observing that a conservative approach to valuation was appropriate because surrendering property to the secured lender is accompanied by significant known and unknown risks and the potential for error in the valuation process is significant). "The concept of valuation requires quantitative evidence sufficient to make a particular numerical determination." In re Panther Mountain Land Dev., LLC, 438 B.R. 169, 194 (Bankr. E.D. Ark. 2010).

[7] As chronicled below, the harvesting and sale of timber on tracts of real property that are subject to the lien of another is also contrary to North Carolina law. As such, the Amended Plan proposes a course of conduct that does not comply with applicable North Carolina law, in violation of § 1129(a)(3).

Specifically, and as recognized by Judge Howard in Gateway Bank & Trust Co. v. Clarendon Holdings, LLC (In re Clarendon Holdings, LLC):

> Where a plan shifts to the creditor the burden to sell, and hence the risk of loss or potential for gain, the court must take these matters into consideration in valuing the property. If, for example, a depressed market makes the potential for loss greater than the potential for gain, valuation must be approached conservatively. Additionally, the valuation of property surrendered to a creditor should take into account the loss of income a creditor may encounter prior to the sale or liquidation of the property.

No. 7:11-CV-247, 2013 WL 8635348, at *2 (E.D.N.C. Mar. 18, 2013) ("Clarendon Holdings II"); accord In re Sailboat Props., LLC, No. 10-03718, 2011 WL 1299301, at *2 (Bankr. E.D.N.C. Mar. 31, 2011) (reaffirming "the importance of case-by-case analyses when valuing property because of the various ways in which property can be disposed of or used, and the difficulty in determining the price such property would generate at a hypothetical sale, as well as the inherent vagaries in the valuation process." (citing In re Peerman, 109 B.R. 718, 721 (Bankr.W.D.Tex.1989) (additional citations omitted))). For example and depending on the circumstances, courts may "further discount the value of surrendered collateral to take into account the time and expense involved in reducing that collateral to cash through sale or other liquidation." In re Immanuel, LLC, No. 10-11585, 2011 WL 938410, at *3 (Bankr. W.D. Mich. Mar. 14, 2011).

The plan proponent, in the valuation context, bears the burden of establishing that the court has ***"no doubt that the secured creditor receives consideration equal to its claim in value or amount."*** SunTrust Bank v. Bannerman Holdings, LLC (In re Bannerman Holdings, LLC), Case No. 7:11–CV–00009–H (E.D.N.C. Sept. 30, 2011) (quoting In re Philadelphia Newspapers, LLC, 599 F.3d 298, 326 (3d Cir. 2010) (dissenting opinion)). As discussed in more detail below and despite the extensive evidence presented to the Court as to their valuation, the Debtor has failed to present this Court with sufficient and reliable evidence from which it can make a determination as to their value for purposes of § 506. See Panther Mountain, 438 B.R. at 194 (emphasizing that a bankruptcy court, in valuing collateral, "is duty-bound to make extensive and often illusive determinations, assessments, evaluations, and calculations; but it is not permitted to guess.").

As this Court recognized in Sailboat Properties, a major component of the valuation analysis is the highest and best use of the collateral. 2011 WL 1299301, at *2 (adopting the four-step inquiry for highest and best use employed by the Peerman Court).

> Under this inquiry, the court first must ask: what is the highest and best use of the collateral? Second, what use of the collateral will yield the highest value? Third, is the highest and best use of the collateral the use that will yield the highest net value? And finally, is that use reasonably available to the secured creditor?

Id. at *2-3 (citing Peerman, 109 B.R. at 722). The highest and best use of real property is not cast in stone, rather it changes over time and is subject to a variety of factors, including—but not limited to—market conditions as well as state and federal land-use regulations. Although the creditor bears the risks associated with the disposal of surrendered collateral, the means of said disposal and the use contemplated must be reasonably available. Peerman, 109 B.R. at 723.

As chronicled in the BLC Summary of Evidence, the highest and best use for the Properties at issue is heavily contested and disputed. As summarized therein, the comparable sales utilized by the Debtor's appraiser, Karen Cross ("Cross"), reveals significant flaws which undermine the creditability and reliability of her conclusion as to the highest and best use of the Properties and the values she ascribed thereto. For example, the numerous listings she couched as "comparable sales" are not reflective of fair market value and, due to their extended time on the open market, they fail to meet the definition of market value placed in her appraisals. See generally Dr.'s Exh. 1, Pg. 10. The age of the comparable sales utilized by Cross and the large adjustments made to comparable sales, in most of her appraisals, also raise serious doubts as to the ultimate conclusion of value. See, e.g., Cross Tr., at 19 (Apr. 29, 2014) (utilizing comparable sales that were outside of the five-year period previously testified as her threshold for age of comparable sales); Cross Tr., at 112 (Apr. 28, 2014); Cross Tr., at 133, 142 (Mar. 24, 2014).

Likewise, the Debtor's reliance on appraisals prepared by Moody (or the assumptions made therein) and other appraisers prior to 2011, as evidence of value, is not appropriate because such appraisals are not probative evidence of the value of any of the Properties. See In re Hoosier Hi-Reach, Inc., 64 B.R. 34, 38 (Bankr. S.D. Ind. 1986) (finding that a two-year old appraisal of real property was not probative evidence of value); see also In re Featherworks Corp., 25 B.R. 634, 642-43 (Bankr. E.D.N.Y. 1982). Similarly, the Debtor's reliance on items and prior appraisals which were excluded from the record by the Court, in the Debtor Summary of the Evidence is wholly improper. See Summary of Evid. in Support of Confirmation of Plan [DE-262], at 13.

However, the evidence presented—once scrutinized—is insufficient to carry the mountainous burden of establishing that there is no doubt that BLC will receive consideration equal to the BLC Claim in value or amount under the Amended Plan.

### C. THE AMENDED PLAN, AS PROPOSED, CANNOT BE CONFIRMED BECAUSE IT FAILS TO MEET THE REQUIREMENTS SET FORTH IN § 1129(a).

A plan proponent "has the burden of establishing by a preponderance of the evidence that the plan complies with the statutory requirements for confirmation of § 1129(a)." In re Swartville, No. 11-08676, 2012 WL 3564171 (Bankr. E.D.N.C. Aug. 17, 2012) (quoting In re Atrium High Point P'ship, 189 B.R. 599, 609 (Bankr. M.D.N.C. 1995)); see In re Radco Props., Inc., 402 B.R. 666, 671 (Bankr. E.D.N.C. 2009) ("In order for a plan of reorganization to be confirmable, the plan must satisfy the thirteen requirements set forth in Section 1129 of the Bankruptcy Code. The proponent of the reorganization plan bears the burden of proof as to introduction and persuasion that each of these requirements has been satisfied.").

#### 1. THE AMENDED PLAN DOES NOT COMPLY WITH § 1129(a)(3) BECAUSE THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATE THAT IT WAS NOT PROPOSED IN GOOD FAITH.

Section 1129(a)(3) provides that "[t]he court shall confirm a plan if . . . [t]he plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Notwithstanding the fact that "good faith" is not defined by the Bankruptcy Code, this inquiry under § 1129(a)(3) is "narrowly focused, and tests directly whether the debtor's conduct in formulating, proposing and confirming a plan displays the requisite honesty of intention." Swartville, 2012 WL 3564171, at *5 ("While the term 'good faith' remains undefined by the Bankruptcy Code, courts have interpreted the § 1129(a)(3) requirement as mandating a 'reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Code.'" (citations omitted)). The primary objective of the reorganization chapter of the Bankruptcy Code is to promote the restructuring of debt and the preservation of economic units. See In re Nite Lite Inns, 17 B.R. 367, 370 (Bankr. S.D. Cal. 1982).

"When conducting a good faith inquiry, a court must view the plan in light of the totality of the circumstances surrounding the proposal of the plan." In re Osborne, No. 12–00230, 2013 WL 2385136, at *3 (Bankr. E.D.N.C. May 30, 2013) (citation omitted). "Part of the good faith analysis is that the plan must deal with the creditors in a fundamentally fair manner." In re Marshall, 298 B.R. 670, 676 (Bankr. C.D. Ca1. 2003).

Good faith has been found lacking in a variety of circumstances. The First Circuit, for example, found the absence of good faith where a plan of reorganization was proposed for ulterior motives. See, e.g., Gonzalez Hernandez v. Borgos, 343 F.2d 802, 805 (1st Cir. 1965) (holding "a Chapter XII proceeding may not be used as a vehicle to place a debtor's assets beyond the reach of his dependent children."); see generally In re Weathersfield Farms, Inc., 14 B.R. 572 (Bankr. D. Vt. 1981).

The facts of the instant case are strikingly similar to those present in Swartville and In re Eng, No. 13-02195, 2014 WL 1655901, at *3 (Bankr. E.D.N.C. Apr. 25, 2014), where this Court denied confirmation of a chapter 11 plan on the grounds that the debtor in each case failed to demonstrate that the plan was filed in good faith as required by § 1129(a)(3). Swartville, 2012 WL 3564171, at *5-6; Eng, 2014 WL 1655901, at *3 ("[B]ased on the totality of the circumstances surrounding the plan, the court concludes that the proposed impaired treatment of Class 7[, which consists of general unsecured claims less than 5,000.00,] was not in good faith. And thus, accordingly, the debtor has failed to carry its burden under § 1129(a)(3) of the Bankruptcy Code.").

In Swartville, when determining whether the plan proponent has satisfied its burden under § 1129(a)(3), this Court found of vital importance, the existence of a two-party controversy between the Debtor and its largest secured creditor, TD Bank, N.A. ("TD Bank"). Id. at *5. Despite observing that "many chapter 11 cases are instigated by, heavily involved in, and ultimately resolved around, the dispute between a debtor and its secured creditor[,]" this Court refused to permit a distortion of the provisions and protections embodied in the Bankruptcy Code that would result from allowing the accepting vote of a *de minimus* unsecured claim to provide a basis upon which it would consider cram-down of the claim of a substantial secured creditor under § 1129(b)(2). Id. (holding that "the Bankruptcy Code demands that some other class of creditors which will not be paid according to existing contractual terms accept its treatment before the secured creditor can be forced to participate in the confirmation process as a means to that resolution."). In denying confirmation, the Court was "persuaded by the position espoused by courts who evaluate the significance and degree of impairment in the context of a good faith analysis required under § 1129(a)(3)." Id. at *4. Of the four non-insider unsecured creditors in Swartville, whose claims totaled approximately $8,901.00, only one—Michaly Land Design, which held an unsecured claim in the amount of $1,170.00—filed a ballot. 2012 WL 3564171, at *6. As a result, the accepting ballot of this non-insider unsecured creditor represented 0.07202% of the claim of the non-accepting secured creditor, TD Bank ($1,624,530.00), the debtor was attempting to cram-down under § 1129(b)(2).

In Eng and relying upon its prior decision in Swartville, this Court observed "that the improper impairment of a class of claims can serve as grounds to deny confirmation because such proposed treatment may fail to satisfy the good faith requirement of § 1129(a)(3)." Eng, 2014 WL 1655901, at *3 (citing Swartville, 2012 WL 3564171, at *4). The debtor in Eng, during the course of the confirmation hearing, testified that he had access to a brokerage account containing approximately $40,000.00, which could be made available within a short period of time. Id. at *3. Employing the same percentage comparison formula it utilized in Swartville, the Eng Court observed that the claims of the debtor's impaired accepting class (Class 7), totaling less than $6,000.00,[8] "represent less than 1/4% of the secured claim asserted by . . . [the largest secured creditor] and an even smaller percentage of the total claims asserted in this case." Eng, 2014 WL 1655901, at *3. The lack of any explanation, justification or reason

[8] The impaired non-insider accepting class in Eng, Class 7, consisted of general unsecured claims in an amount less than $6,000.00, total aggregate claims of which the debtor estimated at $5,760.52. Id. at *2. The debtor proposed to pay claimants in Class 7, in full, through twenty (20) quarterly installments to commence on the earlier of January 15, April 15, July 15 or October 15, following 180 days after the effective date. Id. The only claimant in Class 7 that cast a ballot was the City of Greenville, which held a claim in the amount of $915.42. Id.

why postponement and impairment of this relatively small class of claims existed, compelled the Court to "conclude that the proposed impaired treatment of Class 7 was not in good faith." Id.

In this case, the Debtor's access to and substantial control over the assets of Squires CG (totaling approximately $18,142,618.00), the continuous stream of payments from non-debtor related entities to fund the Debtor's post-petition operations, and the timing and circumstances surrounding the Northen Blue Claim and the John Deere Claim (as well as its subsequent post-petition assignment to Revels), all demonstrate a lack of good faith and, despite having the ability, an unwillingness to pay the claims of creditors. As a result, the Debtor has acted in bad faith not only in the filing of the Amended Plan, but in filing this case. As was the case in Swartville and Eng, this is a two-party dispute between the Debtor and its secured creditor, BLC. The claims, not including BLC, total approximately $164,575.21 (the "Remaining Claims") and represent less than 1% of the BLC Claim. The Remaining Claims are therefore *de minimus* and any impairment or manipulation, in payment or classification, should be heavily scrutinized by the Court when assessing whether the Amended Plan was proposed in good faith. See Swartville, 2012 WL 3564171, at *2 (holding that "[a]rtificial impairment . . . may be found where debtor deliberately 'impairs a *de minim is* claim' solely for the purpose of achieving a forced confirmation over the objection of a creditor." (quoting In re Dunes Hotel Assocs., 188 B.R. 174, 184 (Bankr. D.S.C. 1995)) (alterations omitted)). Further, there is sufficient evidence before the Court to question the validity of a significant number of the Remaining Claims.

Utilizing the percentage formula developed by this Court in Swartville, those Remaining Claims not belonging to an "insider" of the Debtor (the "Non-Insider Remaining Claims") on the Petition Date, represent 0.71% of all the claims scheduled in the above-captioned case. However, the Remaining Claims that are classified as unsecured (the "Unsecured Remaining Claims"), represent less than one-half (1/2) of a percent (0.50%) of the BLC Claim. Just as in Swartville, the foregoing percentages demonstrate, quite compellingly, "[j]ust how much of a two party dispute exists . . . ." 2012 WL 3564171, at *5. The Amended Plan proposes to delay payment of the Remaining Claims, notwithstanding the overwhelming evidence in the SOFA, the July 2015 Report, and the Monthly Operating Reports that, if the Debtor so elected, it could pay (or arrange to pay) all the Remaining Claims immediately. See id. at *6 (emphasizing that "[t]he fact that the debtor only has $181.45 in its DIP account, although argued by the debtor to constitute a business reason for the delay in payment, is not relevant.").

The absence of any justification, economic or otherwise, for delaying payment to the Remaining Claims by the Debtor, is further evidence that the Amended Plan, as proposed, lacks good faith. In re W.C. Peeler Co., Inc., 182 B.R. 435, 436 (Bankr. D.S.C. 1995) (requiring, in cases where the impairment of a class is nominal, that the debtor demonstrate that the proposed impairment is necessary for "economical or other justifiable reasons," beyond the debtor's desire to have its proposed plan confirmed). The Debtor, through the testimony presented, has not demonstrated any justification—other than "it's time for it to stand on its own[,]" Saunders Tr., at 152 (Feb. 24, 2014), or for delaying payment to the Remaining Claims. See Fed. Nat'l Mortg. Ass'n v. Village Green I, GP, 483 B.R. 807, 815-16 (W.D. Tenn. 2012) (holding that "artificial impairment" can also be accomplished where a plan proponent deliberately impairs a *de minimis* claim that could easily be paid in full on confirmation, solely for purpose of achieving a forced confirmation of plan over creditor's objection under § 1129(b)(2)); see also Windsor on the River Assocs. v. Balcor Real Estate Fin. (In re Windsor on the River Assocs.), 7 F.3d 127, 130-133 (8th Cir. 1993) (emphasizing that, for purposes of § 1129(a)(10), a claim is not impaired if the alteration of rights in question arises solely from the debtor's exercise of discretion). The impairment of the Remaining Claims, under the Amended Plan, is not economically necessary nor is it otherwise justifiable; therefore, the proposed impairment was for the purpose of triggering the cram down provisions of § 1129(b). See In re Fur Creations by Varriale, Ltd., 168 B.R. 760, 766-67 (Bankr. S.D.N.Y. 1995) ("There must be a showing that the proposed impairment is necessary for economical or other justifiable reasons and not just to achieve 'cram down.'").

Here, the Debtor has not demonstrated any reason for why these claims could not have been paid immediately. While the Debtor may claim a lack of funds, the Monthly Operating Reports filed in the case reveal routine and systematic post-petition funding from non-debtor related entities to meet ongoing expenses and costs, including appraisal expenses, consulting expenses, legal expenses and quarterly fees assessed pursuant to 28 U.S.C. § 1930(a)(6). Furthermore, the SOFA indicates that, despite having to rely on the support from related entities, the Debtor made a large payment of $1,592,225.72 on December 31, 2012, to MAS Properties, LLC, an insider entity. On the date of that payment, the obligations owed on some of the Remaining Claims were outstanding.

The Debtor, through its actions, has demonstrated a lack of the honesty of intention that is required for those who seek the extraordinary relief and remedies afforded under the Bankruptcy Code. An examination of the Debtor's actions and maneuvers, in the three-week period prior to the Petition Date, amply demonstrate an intention to gerrymander, manipulate and generate certain claims and classes, in an effort to gain a tactical advantage over BLC in this two-party dispute. See In re Hotel Assoc. of Tucson, 165 B.R. 470, 475 (9th Cir. BAP 1994) (finding that "impairment in an attempt to gerrymander a voting class of creditors is indicative of bad faith"); accord Swartville, 2012 WL 3564171, at *6 (recognizing that "[a]lthough the debtor can and should avail itself of the protections built into the Bankruptcy Code, it may not distort the carefully balanced provisions through overreaching."). Within this time period, and in order to procure an impaired accepting class of claims, the Debtor: (1) executed the Northen Blue Note and the Northen Blue Deed of Trust; (2) purchased the John Deere Equipment that was previously leased to a related entity owned and operated by Saunders; (3) included a contingent, disputed and unliquidated unsecured claim on Schedule F purportedly held by Bank of America, the dispute forming the basis of which was previously settled; (4) included claims of certain creditors that are clearly barred by the applicable three-year statute of limitations. On the contrary, and as evidenced by these skillful maneuvers, the whole purpose of the Debtor's bankruptcy filing was to circumvent BLC's right to foreclose on the Properties subject to the Deeds of Trust following its prepetition default. See Disclosure Statement [DE-47], at 4 ("The Debtor filed this case after it was unable to resolve a disagreement with Bate Land Company, L.P.").

The circumstances surrounding the creation of the Northen Blue Claim, the timing of and effect of the transfer of the John Deere to Revels, and the blatant legal invalidity of the Paramounte Claim, all of which were listed on Schedule D or Schedule F, also demonstrate the Debtor's lack of good faith. The overwhelming evidence, both direct and circumstantial, demonstrate a lack of good faith through its flagrant prepetition and post-petition creation, manipulation and alternation of certain classes and claims. These circumstances and actions by the Debtor, both prepetition and post-petition, are not coincidental; rather they are part of a calculated and systematic scheme to artificially engineer and impair certain claims and classes, in an effort to resolve the prepetition disagreement it had with BLC, in its favor, by cramming down the obligations owed to BLC under § 1129(b)(2). See Disclosure Statement [DE-47], at 4.

The nature, validity and classification of the Remaining Claims, along with the fact that a majority of them were ***created immediately prior to the commencement of this case,*** compel the conclusion that they were incurred or created in an attempt to create an impaired accepting class in violation of §§ 1124 and 1129(a)(3). As in Swartville, this Court cannot permit the Debtor to distort the carefully balanced provisions of the Bankruptcy Code through its overreaching prepetition and post-petition tactics. 2012 WL 3564171, at *6.

**2. THE AMENDED PLAN, SPECIFICALLY THE PROVISIONS RELATING TO THE METHOD AND SOURCE OF PAYMENTS CONTEMPLATED THEREUNDER, VIOLATE NORTH CAROLINA LAW.**

As mentioned above, § 1129(a)(3) provides that "[t]he court shall confirm a plan only if . . . has been proposed in good faith and *not by any means forbidden by law."* 11 U.S.C. § 1129(a)(3) (emphasis added). The term "law" in § 1129(a)(3) refers to federal and applicable state law, which in this case is North Carolina law. In re Koelbl, 751 F.2d 137, 139 (2d Cir. 1984) (stating, in *dicta*, that if a chapter 11 plan proposed by a debtor's former employee, purporting to transfer ownership to that former employee violated the duty of loyalty under New York law, confirmation must be denied under § 1129(a)(3)); In re Dapontes, 364 B.R. 866, 867 (Bankr. D. Conn. 2007) ("The 1129(a)(3) prohibition is expansive, i.e., it includes both federal and any other applicable law." (citation omitted)); In re Mahoney, 80 B.R. 197 (Bankr. S.D. Cal. 1987) (denying confirmation of a plan of reorganization proposing to create corporation whose corporate form—providing for cumulative voting and failing to require annual election of directors—violated California corporation law). Accordingly, a plan that proposes a course of conduct forbidden by or inconsistent with applicable state law, violates § 1129(a)(3). See generally 5 Collier on Bankruptcy ¶ 1129.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (emphasizing that "section 1129(a)(3) requires that the proposal of the plan comply with all applicable law, not merely the bankruptcy law."); see also Dapontes, 364 B.R. at 868 (denying confirmation of a plan of reorganization on the grounds that the proposed assignment of the debtor's future income to fund the plan payments made thereunder is expressly prohibited by Conn. Gen. Stat. § 52–361a(i)).

The Plan proposed by the Debtor in the instant case is analogous to the one proposed in Weathersfield Farms, which the court found violated § 1129(a)(3). 14 B.R. at 572. The plan of reorganization in Weathersfield Farms, proposed a long-term construction and operation of self-contained communities in two separate phases, the first of which would be the generation of necessary cash derived from the harvesting of timber on approximately thirty (30) acres of the 250 acres it owned in rural Vermont. Id. The debtor's sole secured creditor, First Inter-State Bank, which held liens on all the debtor's real property and was the only creditor impaired by the plan, objected to confirmation. Id. The court sustained the objection and denied confirmation of the plan, finding that it was not proposed in good faith and, therefore, violated § 1129(a)(3). Id. at 572-73 (emphasizing that confirmation must be denied where the plan was proposed "to thwart efforts of [the] secured creditor in completing its state foreclosure action").

The severing and sale of standing timber by the Debtor, absent explicit authorization or express consent of BLC, violates North Carolina law. North Carolina courts distinguish between standing timber and severed timber, specifically with respect to the classification and treatment of each. Fordham v. Eason, 351 N.C. 151, 154, 521 S.E.2d 701, 703 (1999) (citing Austin v. Brown, 191 N.C. 624, 627, 132 S.E. 661, 662 (1926); Frank Hitch Lumber Co. v. Brown, 160 N.C. 281, 283, 75 S.E. 714, 714–15 (1912)); see Williams v. Parsons, 83 S.E. 914, 915 (N.C. 1914) (holding that "deeds for standing timber, as ordinarily drawn, convey a fee-simple interest in such timber as realty, determinable as to all such timber as is not cut and removed within the time specified in the deed and that, while such estate exists, it is clothed with the same attributes and subject to the same laws of devolution and transfer as other interests in realty." (citations omitted)).

Historically, North Carolina treated any interest in standing timber as real property. Drake v. Howell, 133 N.C. 162, 165, 45 S.E. 539, 540 (1903); Westmoreland v. Lowe, 225 N.C. 553, 554, 35 S.E.2d 613, 614 (1945) ("Standing trees on land are real property and contracts and conveyances in respect thereto are governed by the same rules applicable to other forms of real property." (citation omitted)); accord First Carolinas Joint Stock Land Bank of Columbia v. N.Y. Title & Mortg. Co., 172 S.C. 446, 450, 174 S.E. 406, 408 (1934) ("Growing timber constitutes a portion of the realty embraced by a mortgage on the land unless expressly or impliedly excepted." (citation omitted)).[9] Timber, once severed from the real property upon which it is situated, however, is classified as personal property. See N.C. Gen. Stat. § 25–2–207(2); see also Fordham, 351 N.C. at 154, 521 S.E.2d at 703-04.

Generally, a deed of trust or mortgage may specifically authorize and/or prohibit the harvesting of timber on the property subject to the security instrument. Feliciana Bank & Trust v. Manuel & Sessions, LLC, 943 So. 2d 736, 739 (Miss. Ct. App. 2006) (recognizing that the language of a deed of trust may explicitly prohibit the harvesting of timber without authorization from the mortgagee).

North Carolina courts have emphasized that any and all proceeds resulting from the sale of timber harvested or removed from the mortgaged premises must be credited towards the balance of the outstanding indebtedness secured thereby. See Brown v. Daniel, 13 S.E.2d 623 (N.C. 1941); Fleming v. N.C. Joint Stock Land Bank of Durham, 215 N.C. 414, 417, 2 S.E.2d 3, 4 (1939) (emphasizing that the mortgagee must account to the mortgagor for the value of wood and timber removed from the premises, if any, during its occupancy); Green v. Rodman, 63 S.E. 732, 733 (N.C. 1909) ("A mortgagee in possession of the land is liable for its rents and profits to the mortgagor, and the latter is entitled to have the same credited on the mortgage debt."). In Brown, the North Carolina Supreme Court held that "[t]he

[9] See also 59 C.J.S. *Mortgages* § 236 ("As a general rule, crops, timber, and nursery stock growing on mortgaged land are covered by the mortgage unless expressly or impliedly excepted therefrom."). As realty, transactions involving the harvesting, extraction and sale of standing timber must comply with the formalities required for a transfer of an interest in real property, such as the statute of frauds. See Dulin v. Williams, 239 N.C. 33, 38, 79 S.E.2d 213, 217 (1953); Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 341, 42 S.E.2d 218, 220 (1947); Morton v. Pine Lumber Co., 178 N.C. 163, 167, 100 S.E. 322, 323 (1919).

mortgagee in possession is liable to the mortgagor for timber cut and removed from the premises during such possession at the instance or by permission of said mortgagee, and for his benefit, and is compelled to credit the proceeds or the market value upon the mortgage debt." 13 S.E.2d at 625 (citations omitted).[10] As recognized by the North Carolina Court of Appeals in Carroll v. Parker, 2 N.C. App. 573, 576, 163 S.E.2d 547, 550 (1968), the principles articulated in Brown, which dealt with mortgages, apply to deeds of trust.

Application of the foregoing to the facts of the instant case, compel the conclusion that the Plan, which proposes to retain a portion of proceeds derived from the sale and harvesting of timber on tracts of real property encumbered by the Deeds of Trust, violates § 1129(a)(3). As mentioned above, North Carolina courts have treated standing timber as part of the premises secured by the deed of trust or mortgage. As a result, the retention of any portion of the proceeds resulting from the sale, harvesting or removal of the standing timber on any of the properties retained by the Debtor and encumbered by the Deeds of Trust, is prohibited under applicable North Carolina law. Any and all proceeds resulting from the sale, harvesting or removal of standing timber from those tracts encumbered by the Deeds of Trust must be credited towards the outstanding indebtedness owed to BLC. Accordingly, the Debtor's proposed retention of any portion of the proceeds is contrary to applicable North Carolina law and, therefore, violates § 1129(a)(3).

Assuming, for purposes of argument, that BLC consents to the harvesting of the particular tracts for purposes of residential development, such consent or authorization does not empower the Debtor to harvest and remove standing timber sufficient to make the payments called for under the Plan feasible. See Martin, 127 A. at 294. Accordingly, the Plan cannot extend the scope of the consent or authorization given by BLC nor can it relieve the Debtor of its obligation to procure the prior written consent of BLC to conduct a massive harvest of the standing timber on those tracts subject to the Deeds of Trust. See id.;

[10] In sending the matter back for a new trial, the Brown Court noted that the main controversy between the parties was the of authority and responsibility for the cutting of timber on the mortgaged tracts and liability resulting therefrom—with the defendant (mortgagor) contending it was done at the instance of and for the benefit of the mortgagee, the plaintiff (mortgagee) contending it was done at the sole instance of the mortgagor.

Brown, 13 S.E.2d at 625; Fleming, 215 N.C. at 417, 2 S.E.2d at 4; Green, 63 S.E. at 733.

In this case, the Amended Plan provides for the retention of certain Properties by the Debtor, which contain standing timber subject to the liens held by BLC. The Debtor, in the Amended Plan, proposes to utilize a portion of the proceeds resulting from the sale and/or removal of harvestable standing timber located to make the requisite payments required thereunder. Because, as previously discussed herein, this proposed course of conduct violates applicable North Carolina law and the existing Deeds of Trust, the Amended Plan violates § 1129(a)(3), which prohibits confirmation of any plan whose provisions and/or means are forbidden by applicable North Carolina law.

**3. THE DEBTOR, AS THE PROPONENT OF THE AMENDED PLAN, HAS NOT COMPLIED WITH THE PROVISIONS OF TITLE 11; THEREFORE, CONFIRMATION MUST BE DENIED UNDER § 1129(A)(2).**

Section 1129(a)(2) states that a plan may only be confirmed where "[t]he proponent of the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). Implicit in this concept is that § 1129(a)(2) requires compliance with court orders issued in furtherance of the reorganization process. In re Greate Bay Hotel & Casino, Inc., 251 B.R. 213, 236 (Bankr. D.N.J. 2000).

Numerous bankruptcy courts have indicated that "serious violations of the Bankruptcy Code by a [proponent] can and should result in a denial of confirmation of a plan under § 1129(a)(2)." In re Landing Assocs., Ltd., 157 B.R. 791, 810 (Bankr. W.D. Tex. 1993); see, e.g., Cothran v. United States, 45 B.R. 836, 838 (S.D. Ga. 1984) (denying confirmation because of debtor's violation of § 363(c)(2), spending cash proceeds from sale of collateral without court permission); In re Lapworth, No. 97–34529, 1998 WL 767456, *3 (Bankr. E.D. Pa. Nov. 3, 1998) (holding that the debtor's violation of § 502(b), by making post-petition interest payments to unsecured creditor, which was neither cured or disclosed in disclosure statement, prevented confirmation pursuant to § 1129(a)(2)); In re Keiser, 204 B.R. 697 (Bankr. W.D. Tex. 1996) (concluding that a debtor's failure to attend meeting of creditors violated § 1129(a)(2)); In re

Wermelskirchen, 163 B.R. 793 (Bankr. N.D. Ohio 1994) (recognizing that debtor's failure to include all creditors in his schedules violated § 521(1) and thus, § 1129(a)(2)).[11]

Section 330(a), governing the compensation of officers and professionals, provides that "the court may award to . . . *a professional person employed under section 327 or 1103*—(A) reasonable compensation for actual, necessary services rendered by the . . . professional person[ ] or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1) (emphasis added). Section 330(a), therefore, "does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327." Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004); In re Spencer, 48 B.R. 168, 171 (Bankr. E.D.N.C. 1985) ("Failure to obtain prior court approval [of the employment of counsel] will result in a denial of attorney's fees." (citation omitted); accord DeRonde v. Shirley (In re Shirley), 134 B.R. 940, 943–44 (9th Cir. BAP 1992) ("Failure to receive court approval for the employment of a professional in accordance with § 327 and Rule 2014 precludes the payment of fees."). Simply put and "[a]bsent compliance with the Code or Bankruptcy Rules, there is no right to compensation." 3 Collier on Bankruptcy ¶ 330.08[1][c].

"The bankruptcy court[] . . . has the authority and the obligation to review the reasonableness of any compensation paid to attorneys for work performed prior to and after entry of the order for relief." In re Tosh, No. 12-03300, 2013 WL 2661496, at *2 (Bankr. E.D.N.C. June 12, 2013) (citing Bergstrom v. Dalkon Shield Claimants Tr. (In re A.H. Robins Co., Inc.), 86 F.3d 364, 373 (4th Cir.1996)); see In re Sledge, 352 B.R. 742, 747 (Bankr. E.D.N.C. 2006). Attorneys "hired to represent a debtor-in-possession must give notice to creditors and receive court approval prior to being compensated by the estate." Lavender v. Wood Law Firm, 785 F.2d 247, 248 (8th Cir. 1986); accord In re Byrd, 151 B.R. 925, 927 (D.S.D. 1993).

[11] At least one court has held that a chapter 11 plan may not be confirmed where any infraction has occurred, regardless of whether it was cured or authorized by the court *nunc pro tunc*. See In re Briscoe Enterprises, Ltd. II, 138 B.R. 795, 809 (N.D. Tex. 1992).

Here, the Debtor has continuously paid professionals whose employment and/or compensation was not approved by this Court in violation of §§ 327 and 330. These professionals include an appraiser (presumably Cross), a consultant, and legal professionals.

On two separate instances, in December 2013 and February 2014, the Debtor paid appraisal expenses, presumably to Cross, despite the fact that it never sought nor procured approval from the Court of her employment. Nor has the Court approved and authorized the Debtor to pay, directly or indirectly, any compensation to a professional for appraisal services.

Specifically, in the December Monthly Operating Report [DE-153] (the "December Monthly Report") filed on February 4, 2014, the Debtor paid appraisal expenses in the amount of $5,876.84. Dec. Mon. Operating Rpt. [DE-153], at 7. The Debtor also paid consulting expenses totaling $1,172.04 in December 2013, id., despite the fact that this Court has neither authorized the employment of, nor awarded compensation to, any consultant. Additionally, the February Monthly Operating Report (the "February Monthly Report") reveals that the Debtor paid another $9,500.00 for expenses relating to "Appraisal." Feb. Mon. Operating Rpt. [DE-204], at 7. As of the filing of this Supplemental Memorandum, the Debtor has neither sought nor procured court approval of the employment or compensation earned by any consultant or appraiser, including Cross. As such, the Debtor was not authorized to remit these funds—either directly or indirectly—to these professional persons in violation of §§ 327 and 330.

The Monthly Operating Reports filed by the Debtor during this case also reveal that it paid, without any authorization from the Court, legal fees and expenses in excess of $7,000.00. The April Monthly Operating Report [DE-257] (the "April Monthly Report") and the May Monthly Operating Report [DE-263] (the "May Monthly Report"), which were filed on June 5, 2014, and June 24, 2014, respectively, reveal that the Debtor paid legal expenses in excess of $7,000.00. The April Monthly Report reveals that the Debtor paid "Other Expenses – Legal & Quarterly Fee," totaling $7,325.00 in April. Apr. Mon. Operating Rpt. [DE-257], at 7. The quarterly fee, assessed against the Debtor for the first quarter of 2014 pursuant to 28 U.S.C. § 1930(a)(6), was $ 325.00. See March Mon. Operating Rpt.

[DE-227], at 15. Therefore, and by implication, the Debtor paid legal fees totaling $7,000.00 in April. Likewise, the May Monthly Report indicates that the Debtor paid legal expenses of $665.24. May Mon. Operating Rpt. [DE-263], at 7. Furthermore, neither the April Monthly Report nor the May Monthly Report, in Part G, indicate that the Debtor has made any payments to professionals. See id. at 12 ("Report ***all payments*** made to professionals (i.e., accountants, attorneys, realtors) paid by debtor" (emphasis added)).

OFC is the only attorney whose employment has been approved and authorized by this Court, see Order Authorizing Emp. of Attorney [DE-53], and—to date—OFC has not filed any application seeking approval of fees and reimbursement of expenses. Therefore, and as illustrated above, the payment of legal fees and expenses by the Debtor totaling $7,665.24, contravened § 330 and Fed. R. Bankr. P. 2016. See Fed. R. Bankr. P. 2016 (requiring a supplemental disclosure of compensation be filed, within fourteen (14) days, after any payment or agreement not initially disclosed).

Accordingly and based upon the foregoing, the Debtor violated §§ 327 and 330 of the Bankruptcy Code, as well as Fed. R. Bankr. P. 2016, by paying professionals whose employment and/or compensation was not specifically authorized and approved by the Court. Because the Debtor, as proponent of the Amended Plan, failed to comply with these requirements, confirmation must be denied pursuant to § 1129(a)(2).

**4. THE AMENDED PLAN, AS PROPOSED, VIOLATES § 1129(a)(11) BECAUSE IT IS NOT FEASIBLE.**

Section 1129(a)(11) states that the plan proponent must prove, by a preponderance of the evidence, that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). As the Plan's proponent, the Debtor "bears the burden to show feasibility of the plan by a preponderance of the evidence." Radco Properties, 402 B.R. at 678 (citations omitted). Although success under a proposed plan does not have to certain or guaranteed, more is required "than mere hopes and desires," In re Grandfather Mountain Ltd.

P'ship, 207 B.R. 475, 485 (Bankr. M.D.N.C. 1996), because feasibility is "firmly rooted in predictions based upon objective fact." Radco Properties, 402 B.R. at 678 (quoting In re Cheatham, 78 B.R. 104, 109 (Bankr. E.D.N.C. 1987)); see In re Hoffman, 52 B.R. 212, 215 (Bankr. D.N.D. 1985) ("Sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are visionary promises.").

Where the plan provides for deferred payments over time, the plan proponent must (1) establish that "projections of future expenses and earnings must be derived from realistic and reasonable assumptions which are not merely speculative," Grandfather Mountain, 207 B.R. at 485; (2) demonstrate, based upon these projections, an ability to make the payments proposed; and (3) provide reasonable assurance that the plan, as proposed, can be effectuated. An assessment of feasibility should include consideration of "the debtor's prior performance, the adequacy of the capital structure, the earning power of the business, economic conditions, the ability of management, and any other related matter that determines the prospects of a sufficiently successful operation to performance of the provisions of the plan." In re Atrium High Point Ltd. P'ship, 189 B.R. 599, 609 (Bankr. M.D.N.C. 1995) (citation omitted). Moreover, additional factors warranting consideration when determining feasibility include:

> (1) the adequacy of the [debtor's] capital structure; (2) the earning power of the [debtor's] business; (3) economic conditions [that the debtor will face during the plan period]; (4) the ability of [the debtor's present] management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

In re Mallard Pond, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997) (citation omitted).

Regardless of whether the Debtor elects to pay a portion of the BLC Claim over time, the Debtor cannot demonstrate, by a preponderance of the evidence, that the Amended Plan is feasible. The SOFA reveals that, from January 1, 2013, to the Petition Date, the Debtor earned no income, \$0.00, from the operation of its business. Statement of Fin. Affairs [DE-37], at 18. Additionally, the SOFA indicates that for the same period, the Debtor earned income, other than from employment or operation of its business, of approximately \$3,213.00. Id. at 18-19. Although its Disclosure Statement describes the Debtor's business as "investing in real property and timber management," neither it nor the Amended Plan provide any details upon which creditors, such as BLC, may assess its ability to perform under the Amended Plan, including details on the Debtor's proposed operations, capital structure, projected earning power, economic conditions, management structure, and ongoing viability of operations. Disclosure Statement [DE-47], at 4. As a result and based upon its historical performance, the accuracy of which was verified under penalty of perjury in the SOFA, and the lack of the aforementioned details concerning its operations, the Debtor does not possess the ability to generate sufficient income to support any of the payments contemplated by the Amended Plan.

The historical and current financial information submitted to this Court by the Debtor clearly demonstrates that, without continued support from related entities and insiders, it does not have sufficient income nor earning capacity to support the payments required for confirmation of the Amended Plan. The Debtor cannot establish feasibility based solely on its unencumbered properties. On Schedule A, the Debtor lists three properties which are not encumbered by the liens of BLC (the "Unencumbered Properties"). The Debtor scheduled the value of the Unencumbered Properties at $1,344,875.00, Sch. A [DE-37], at 4. However, the scheduled value of one the Unencumbered Properties was called into question by its own appraiser, when she appraised the value of the Lupton tract at $95,000.00, approximately $62,700.00 or forty-percent (40%) less than scheduled value of $157,500. Compare id. at 4, with, Dr.'s Exh. 18a. Thus, the Debtor cannot prove that the Amended Plan is feasible by relying on its remaining unencumbered property.

Likewise, the Monthly Operating Reports reveal that the Debtor is wholly incapable—absent continued infusions of capital from outside third-party sources—of remitting the quarterly fees assessed under 28 U.S.C. § 1930(a)(6), delinquent property taxes for 2013 and 2014, closing costs and other fees associated with the transfer proposed under the Amended Plan, along with the timely remitting payments to the Remaining Claims.

Irrespective of the values ascribed on the particular tracts of Properties the Debtor purports to surrender to BLC under the Amended Plan, the Debtor will be required to remit quarterly fees between $20,000.00 and $30,000.00 to implement and effectuate the transfers contemplated therein. See In re WM Six Forks, LLC, Case No. 12-05854-8-ATS, at 14 (Bankr. E.D.N.C. Sept. 23, 2013) (holding that the term "disbursement," for purposes of assessing the applicable quarterly fee under 28 U.S.C. § 1930(a)(6), included a credit bid successfully exercised by a secured creditor pursuant to § 363(k) of the Bankruptcy Code); see also In re Huff, 270 B.R. 649, 653 (Bankr. W.D. Va. 2001) (concluding that payments the debtor made in connection with a transaction to refinance an existing debt, which was satisfied by the proceeds from a new loan, was a disbursement for purposes of 1930(a)(6)).[12] The June Monthly Operating Report [DE-267], which was filed on July 30, 2014, reveals that the Debtor has approximately $16,000.00 in its bank account. June Mon. Operating Rpt. [DE-267], at 7. Absent further funding from equity and/or other non-debtor related entities, the Debtor lacks sufficient funds to remit the quarterly fees associated with any surrender, partial or otherwise, of the Properties to BLC on account of its claim. See WM Six Forks, Case No. 12-05854-8-ATS, at 14.

In addition to remitting quarterly fees, the Debtor will also be required to satisfy its administrative expense claims pursuant to § 1129(a)(9), which would be comprised of the post-petition ad valorem taxes and amounts owed to OFC and other court-approved professionals for services provided to, and expenses incurred on behalf of, the Debtor. The Amended Plan proposes to pay administrative expense claims, including those awarded to OFC, "in cash and in full including accruals to date of payment within ten (10) days from the Effective Date of the Plan . . . ." Absent any indication or determination as to compensation incurred by, and awarded to, OFC, the Court cannot assess whether the Amended Plan is feasible.

Accordingly and based upon the foregoing, the Debtor has failed to demonstrate—by a preponderance of the evidence—that the Amended Plan is feasible. Absent such proof, §1129(a)(11) prohibits confirmation of the Amended Plan.

**D. ASSUMING IT SATISFIES THE REQUIREMENTS OF § 1129(a), THE AMENDED PLAN, VIOLATES § 1129(b)(2)(A)(iii) BECAUSE THE TREATMENT PROPOSED TO BLC IS NOT FAIR AND EQUITABLE.**

[12] The confirmation order in WM Six Forks, LLC provided—in accordance with a previously executed purchase agreement between the debtor and its secured creditor, Lenox Mortgage XVII LLC ("Lenox Mortgage")—"for the transfer of the property to Lenox Mortgage in full satisfaction of its allowed claim." See id. at 3.

A dirt-for-debt plan of reorganization is one under which a chapter 11 debtor attempts to convey certain collateral, either in whole or in part, to a secured creditor in full satisfaction of that creditor's claim. See Ron C. Bingham II & D. Cooper Robertson, Reconciling "Dirt-for-Debt Plans with "Indubitable Equivalent" Standard, 28 Am. Bankr. Inst. J. 36, 36 (Oct. 2009). Generally, dirt-for-debt plans share the following five characteristics:

> One, the debtor contends that the mortgagee is oversecured. Two, the debtor proposes to force the mortgagee to accept a conveyance of property comprising less than 100 percent of the mortgagee's collateral. Three, the debtor relies on the bankruptcy court's valuation of the collateral in order to determine the amount of collateral to convey. Four, the debtor contends that the conveyance will satisfy the mortgagee's secured claim in full. Five, the debtor seeks to retain the remainder of the collateral free and clear of the mortgagee's interest.

Alfred S. Lurey and Brett J. Berlin, When Can Less Than All of a Secured Creditor's Collateral Serve as the Indubitable Equivalent of the Creditor's Secured Claim?, 28 Cumb. L. Rev. 333, 333 (1998).

**1. ORIGINS OF INDUBITABLE EQUIVALENCE**

The indubitable equivalence standard, as set forth in § 1129(b)(2)(A)(iii), derives from Metropolitan Life Insurance Co. v. Murel Holding Corporation (In re Murel Holding Corporation), the 1935 seminal decision by Judge Learned Hand, where he stressed that indubitable equivalence must be "completely compensatory." 75 F.2d 941, 942 (2d Cir. 1935). In Murel, the Metropolitan Life Insurance Company ("Metropolitan Life") held a $400,000 first mortgage on a Manhattan apartment building valued at $540,000. Id. at 941-42. The debtor's plan of reorganization, under section 77B of the Bankruptcy Act of 1878, proposed for the mortgagee to forego all amortization payments and postponed the maturity date for ten (10) years, with Metropolitan Life to receive only interest payments until maturity. Id. at 942-43.

The legislative history to § 1129 reveals that Congress' codification of the indubitable equivalence standard in § 1129(b)(2)(A)(iii) was intended to incorporate the strict approach adopted by Judge Hand in Murel Holding. See, e.g., S. Rep. No. 95-989, 95th Cong., 2d Sess. 127-28 (1978); 124 Cong. Rec. H. 11089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S.C.C.A.N. 6436, 6475; see also In re Sandy Ridge Dev. Corp. v. Louisiana Nat'l Bank (In re Sandy

Ridge Dev. Corp.), 881 F.2d 1346, 1350 (5th Cir.) ("Sandy Ridge I"), reh'g denied, 889 F.2d 663 (5th Cir. 1989) ("Sandy Ridge II").

The Third Circuit, in In re Philadelphia Newspapers, held that "the 'indubitable equivalent' under subsection (iii) is the ***unquestionable value*** of a lender's secured interest in the collateral." 599 F.3d 298, 310 (2010) (observing that "indubitable" is defined as "not open to question or doubt," and equivalent as "equal in force or amount" or "equal in value."); see Black's Law Dictionary 620 (9th ed. 2009) (defining the term "equivalent" as "nearly equal" or "virtually identical.").

### 2. INDUBITABLE EQUIVALENCE IN PARTIAL DIRT FOR DEBT CONTEXT

Under certain circumstances, which are not present here, courts have confirmed plans of reorganization under which the debtor proposes to surrender a *portion* of the collateral in *full* satisfaction of the secured creditor's claim. In re Atlanta S. Bus. Park, Ltd., 173 B.R. 444, 449 (Bankr. N.D. Ga. 1994) (recognizing that a debtor's plan proposing to surrender a portion of the over-secured creditor's collateral in full satisfaction of its claim was not *per se* fatal to confirmation); In re Simons, 113 B.R. 942, 947 (Bankr. W.D. Tex. 1990) (holding that chapter 11 plan was fair and equitable where treatment surrendered less than all of the collateral to an over-secured creditor as a credit upon the secured claim, the remainder of which was to be paid over time); In re May, 174 B.R. 832, 837 (Bankr. S.D. Ga. 1994) (holding that a creditor can be provided the "indubitable equivalent" of its claim when a plan surrenders only a portion of the collateral in full satisfaction of its claim). Such results, however, are not common because "where the creditor is earmarked to receive part of its collateral, it will be a ***rare case*** in which the creditor will have received the indubitable equivalent of its claim." In re Park Forest Dev. Corp., 197 B.R. 388, 396 (Bankr. N.D. Ga. 1996) (citation omitted; emphasis added); accord In re CRB Partners, LLC, Nos. 11-11924-CAG, 11-11915-CAG, 2013 WL 796566, at *6 (W.D. Tex. Mar. 4, 2013) (emphasizing that "any plan proposing a cramdown and involving only a partial surrender of collateral, especially real property in a down market, poses challenges and risks in the crucial process of valuation." (citing Bannerman I, 2010 WL 42600003, at *7)).

Included within these rare cases, where bankruptcy courts have found that a secured creditor received the indubitable equivalent of its claim through the surrender of a portion of its collateral, the partial dirt for debt plan at issue proposed to transfer a portion of the real property collateral to the secured creditor ***in addition to some other form of consideration***, primarily in the form of cash or a cash equivalent. See Atlanta Southern Business Park, 173 B.R. at 451-52. More often than not, however, courts have refused to find that a partial surrender of collateral results in a secured creditor receiving the indubitable equivalent of its claim. See Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1420 (9th Cir. 1996); In re Prosperity Park, 2011 WL 1878210 at *5 (Bankr. W.D.N.C. May 17, 2011) (denying confirmation of a plan where the creditor's secured claim totaled $430,280.09 and the creditors unsecured claim totaled $653,203.07 and the debtor proposed to convey a portion of its real property, which it valued at $663,410.00 in full satisfaction of the secured debt); In re Walat Farms, Inc., 70 B.R. 330, 334 (Bankr. E.D. Mich. Feb. 9, 1987) (holding that a debtor may not "cramdown" its plan of reorganization, which proposed to convey 400 acres of collateral to a secured creditor in full satisfaction of its $589,000.00 secured claim when said creditor was secured by a 760 acre parcel of real property. in full satisfaction of its $589,000.00 secured claim).

Several bankruptcy courts, including one in this district, have expressed extreme doubt as to whether a partial dirt-for-debt plan, in an uncertain real estate market, provides a secured creditor with "the indubitable equivalent of its claim unless the appraised value of the property, demonstrated by competent proof, far exceeds the amount of the debt to be paid." In re Martindale, 125 B.R. 32, 38 (Bankr. D. Idaho 1991); accord In re Legacy at Jordan Lake, LLC, 448 B.R. 719, 723 (Bankr. E.D.N.C. 2011); In re SUD Props., Inc., No. 11-03833, 2011 WL 5909648, at *6 (Bankr. E.D.N.C. Aug. 23, 2011) (recognizing that "[t]he valuation process is made more difficult in uncertain real estate conditions."). This Court has, likewise, recognized "the unique challenges of a partial dirt-for-debt case[,]" when combined with "wide varying valuations." See In re Clarendon Holdings, LLC, No. 11-02479, 2011 WL 5909512, at *1 (Bankr. E.D.N.C. Oct. 19, 2011) (hereinafter, cited as "Clarendon Holdings I"), rev'd and remanded, Clarendon Holdings II, 2013 WL 8635348, at *2; see also In re Bannerman Holdings, LLC, No. 10-01053, 2010 WL 4260003, at *8 (Bankr. E.D.N.C. 2010) (hereinafter, cited as "Bannerman I") (noting a conservative approach should be taken with regard to valuation, given the inherent uncertainties involved in the process), rev'd on other grounds, SunTrust Bank v. Bannerman Holdings, LLC (In re Bannerman Holdings, LLC), No. 7:11-CV-00009-H (E.D.N.C. Sept. 30, 2011) (hereinafter, cited as "Bannerman II"). Accordingly, and as announced by Judge Howard in Bannerman II, "where there is considerable doubt as to the underlying value of the property to be surrendered, the risk that the creditor will not realize the value of its claim is too great and the indubitable equivalence standard will not be met." No. 7:11-CV-00009-H, at 11.

The debtors in Martindale, who were farmers unable to service their secured debt, proposed an "eat dirt" plan, under which they would satisfy their obligations by disposing of their real property and equipment through sale or surrender to secured creditors. 125 B.R. at 34. Specifically, the plan in Martindale proposed surrendering—to Farm Credit Bank of Spokane ("FCB")—a portion of the debtors' farm property referred to as the "dry farm." Id. Despite the lack of any offer to purchase the dry farm and that some period of time will be required to accomplish a sale, the debtors "propos[ed] an immediate credit against FCB's claim for the anticipated sales proceeds." Id. The remainder of the farm property, referred to as the "irrigated farm," would be marketed and sold at a price determined by FCB's appraiser, with any proceeds realized by the sale transferred to FCB. Id. Judge Pappas, in addressing whether the combined surrender and deferred sale of the farm property was fair and equitable to FCB, denied confirmation of the debtors' proposed plan of reorganization, concluding that "FCB has not come close to realizing the indubitable equivalent of payment in full." Id. at 39-40. In reaching this conclusion, the Martindale Court observed the following:

> Satisfaction of a secured claim by distributions of property should only be permitted if a showing can be made by a debtor that the property transferred is the equivalent of cash to be paid on sale of the property or of installment payments secured by a continuing lien on the property. For example, in Sun Country, the Court approved a property-for-debt plan provision calling for the transfer of property worth $287,500 as against a debt of only $153,500. Certainly, indubitable equivalent treatment should not be less favorable than a deferred payment or sale provision as described in Section 1129(b)(2)(A)(i) and (ii).

Id. at 39 (internal citations omitted).

Similarly, in Legacy at Jordan Lake, the debtor proposed to surrender certain real property collateral, consisting of undeveloped lots and raw land, in full satisfaction of the secured claim asserted by its secured creditor, Capital Bank, N.A. ("Capital Bank"). 448 B.R. at 722-23.[13] Both Capital Bank and the Bankruptcy Administrator objected to the plan of reorganization and, during the course of the confirmation hearing, the Debtor presented the testimony of an expert real estate appraiser, an expert in real estate valuations, its real estate agent and two of its members. Id. Despite providing extensive testimony regarding the value of the real property collateral, Judge Doub held that Capital Bank would not receive the indubitable equivalent of its claim and, therefore, the treatment proposed by the debtor was not fair and equitable under § 1129(b)(2)(A)(iii). Id. at 728-29 ("Without competent, expert evidence of the value of the property to be surrendered, testimony as to the impact of Capital and the Debtor competing as sellers in the Project, and the lack of funding for the construction of the amenities, the Debtor has failed to provide that its proposed treatment of Capital equals the indubitable equivalent of its claim by even a preponderance of the evidence."). In reaching its conclusion and citing Martindale, the court emphasized the effect an uncertain real estate market has on the determination of whether there is sufficient value to satisfy the indubitable equivalent requirement under § 1129(b)(2)(A)(iii) and the spectrum of proof required thereunder. Additionally, the court opined that "there was no credible evidence about how the valuation of lots would be impacted by the Debtor and Capital competing against one another for lot sales in the Project." Id. at 728 (distinguishing Bannerman I where "[t]he competition for sales between the debtor and the secured lender was not a factor . . . .").

In this district, every analysis of a dirt-for-debt plan of reorganization under §1129, partial or otherwise, traces its roots to the methodology and guidelines established by In re Fazekas, Case No. 92-02262-8-JRL (Bankr. E.D.N.C. May 17, 1993). The individual chapter 11 debtors in Fazekas proposed to transfer three of the five tracts of real property serving as security for United Carolina Bank ("UCB") in full satisfaction of its secured claim, which totaled approximately $530,616.00. Case No. 92-02262-8-JRL, at 2-3. UCB objected to confirmation of the plan, placing a much lower value on the five properties

[13] The debtor in Legacy at Jordan Lake originally proposed three separate options, see 448 B.R. at 721-22, however, during the course of the confirmation hearing, two of the options were abandoned. See id. at 723.

and arguing that, as matter of law, the transfer of three properties was not the indubitable equivalent of its claim. Id. at 3-4. Ultimately, the Fazekas Court concluded—without valuing all five properties—that "it is abundantly clear that the transfer of these three [properties] alone is not the indubitable equivalent of UCB's claim." Id. at 9. In reaching this conclusion, the Fazekas Court explained that in a slow or depressed real estate market where real properties are likely to remain on the market for several years, "the fair market value of these properties is not equivalent to their present value to a creditor forced to accept them in satisfaction of its claim." Id. at 7.

The court in Fazekas developed a three-step valuation method, based upon its observation that the fair market value of the properties "must be discounted to reflect, the time each property will remain unsold, the cost to [the creditor] of retaining an illiquid investment during this time, and the risk inherent in this transaction.". Id. at 6-8.[14] "First, the court will determine the fair market value of each property." Id. at 7. "Next, the fair market value will be reduced by 10% to reflect the costs which UCB [or another secured creditor] is likely to incur in liquidating the properties." Id. (emphasizing that "[t]his adjustment corresponds to the commission normally charged by commercial real estate brokers in eastern North Carolina."). "Finally, a discount rate will be applied to the net value of each property to reflect costs associated with UCB's [or another secured creditor's] loss of the use of its money curing the time that the properties remain unsold." Id. at 8.

In applying this three-step method to the Old Amoco Property, which was one of the three properties the debtors in Fazekas proposed to surrender to the secured creditor, Judge Leonard recognized that it "pose[d] the most troublesome valuation because of the disparity in the values assigned to it by each party. UCB values this property at $150,000, the debtors' plan values it at $208,000, while Mike Nadeau, the debtors' expert witness values it at $232,000." Id. at 8-9. Using this analysis, the court valued the three properties with a present value of $404,655.66, Id. at 9, which was less that the total claim asserted by UCB. Id.

[14] This valuation method, set forth in Fazekas, was later adopted by this Court in Bannerman I, 2010 WL 4260003, at *4.

Since Fazekas, the United States Bankruptcy Court for the Eastern District of North Carolina has applied this methodology in a wide variety of contexts and under a multitude of circumstances. See, e.g., SUD Properties, 2011 WL 5909648, at *6 (Bankr. E.D.N.C. Aug. 23, 2011) (denying confirmation of a partial dirt for debt plan of reorganization based, in large part, upon the uncertainty resulting from a wide disparity in the values reached by the parties' appraisals on the real properties); Legacy at Jordan Lake, 448 B.R. at 728 (denying confirmation of a dirt for debt plan, but recognizing that the court may consider a "dirt" for "debt" plan when sufficient evidence is presented as to the value of the property to be surrendered); Sailboat Properties, 2011 WL 1299301, at *8 (valuing the collateral to be surrendered at an amount less than the creditor's filed claim and dividing the secured creditor's claim into secured and unsecured parts when the debtor was surrendering all of the collateral); Bannerman I, 2010 WL 2010 WL 4260003, at *4.

**3. APPLICATION OF § 1129(B)(2)(A)(III) AND THE RELEVANT CASE LAW, COMPELS THE CONCLUSION THAT THE AMENDED PLAN IS NOT FAIR AND EQUITABLE TO BLC BECAUSE IT DOES NOT PROVIDE BLC WITH THE INDUBITABLE EQUIVALENT OF ITS CLAIM.**

Despite the extensive testimony presented to the Court, the Debtor has failed to demonstrate that the partial surrender of certain Properties to BLC in full satisfaction of the BLC Claim is "indubitable," leaving no reasonable doubt that BLC will be paid in full. In re 431 W. Ponce De Leon, LLC, ___ B.R. ___, 2014 WL 3925509, at *17 (Bankr. N.D. Ga. Aug. 11, 2014) (holding that "an equivalent is 'indubitable' if *no reasonable doubt exists* that the creditor will be paid in full." (citation omitted)). There is "inherent difficulty in satisfying the indubitable equivalent standard[]" and, therefore, "[i]f any doubt exists, the plan should not be confirmed." SUD Properties, 2011 WL 5909648, at *6 (citation omitted); accord Walat Farms, 70 B.R. at 335 (stating that the requirements of 11 U.S.C. § 1129(b)(2)(A)(iii) are not met if there is any doubt regarding whether the creditor will realize the full value of its claim).

The instant case is analogous to the Ninth Circuit's decision in Arnold & Baker Farms. The debtor in Arnold & Baker, as is the case here, proposed to surrender a portion of the real property securing the secured creditor's claim of $3,837,618.00, which was secured by 1320 total acres of real property. Id. at 1418-20. The bankruptcy court confirmed the plan, as proposed, which conveyed 566.5 acres to the secured creditor in full satisfaction of its claim, based upon its assigned value of $7,300.00 per acre. Id. at 1421.[15]

On appeal, the Ninth Circuit reversed the bankruptcy court, holding that the plan did not provide the secured creditor with the indubitable equivalent of its secured claim. Id. at 1422-23 (framing the issue as whether "a distribution of land with an estimated value of $4,135,450 constitutes the indubitable equivalent of a $3,837,618 claim secured by 1,320 acres."). In reaching this conclusion, the Arnold & Baker Farms Court observed that "in order for a partial distribution to constitute the most 'indubitable equivalence,' the partial distribution must insure the safety of or prevent jeopardy to the principal." Id. at 1422. The Ninth Circuit noted, given the wide disparity in the values attributed to the property by the appraisals, demonstrated that the "value of the real property was far from certain." Id. This large disparity in the values, according to the court, "illustrates the obvious uncertainty in attempting to forecast the price at which real property will sell at some uncertain future date." Id. The Ninth Circuit's analysis also relied upon the fact that the secured creditor originally provided funds to the debtor, repayment of which was secured by all 1,320 acres of real property, and acquired the ability—through foreclosure—to realize the value from all of the 1,320 acres in the event of a default. Id. Lastly, if the surrendered real property was later sold by the secured creditor at a value lower than that calculated by the bankruptcy court, it would have no recourse to foreclose or attach to the remaining undistributed collateral that the debtor retained, free and clear of liens. Id. The foregoing analysis compelled the conclusion that the proposed partial surrender of the real property did not "insure the safety of or prevent jeopardy to the principal." Id.

The wide disparity in the appraisals conducted by Cross and Moody, their respective conclusions as to the values of the Properties, and the lack of any testimony concerning the impact any competition

[15] The debtor's appraisal valued the property to be surrendered at $7,894.00 per acre; however, the secured creditor's appraisal represented the value of the property as an average of $1,391.00 per acre. Arnold & Baker Farms, 5 F.3d at 1422. The bankruptcy court adopted the debtor's valuation, valuing the property to be surrendered at $7,300.00 per acre; as a result, the value of the 566.5 acres to be conveyed to the secured creditor was $4,135,450.00. Id.

between the Debtor and BLC as to the sale of the Properties will have on their value, gives rise to reasonable doubt that the Amended Plan, which proposes to the surrender less than all of the Properties to BLC, will result in BLC receiving the indubitable equivalent of its claim. Compare Legacy at Jordan Lake, 448 B.R. at 728 (competition between secured lender and debtor in sale of surrendered property was a non-monetary factor in assessing its value), with, Bannerman I, 2010 WL 4260003, at *7-8 (competition between secured lender and the debtor was not a factor).

Here, as in Arnold & Baker Farms and SUD Properties, valuation evidence presented by the Debtor—over the course of the hearings—is far from certain. As framed by the SUD Properties Court, "***[t]oo much variation in values and too much uncertainty in the market equals no indubitable equivalent.***" 2011 WL 5909648, at *11 (emphasis added); accord Bannerman II, No. 7:11-CV-00009-H, at 11.

First, the large disparity in the respective values placed on the Properties, all of which are vacant and unimproved tracts of raw land, raises significant doubts as to the level of certainty accompanying their valuation. These doubts, alone, compel the conclusion that the Amended Plan does not provides BLC with the indubitable equivalent of its claim. See generally SUD Properties, 2011 WL 5909648, at *11 (concluding that the significant disparity presented in the appraisals of the parties raises significant doubts as their values "being sufficient accurate to be used to determine an indubitable equivalent calculation."); Bannerman II, No. 7:11-CV-00009-H, at 12 ("The wide-ranging valuations presented to the bankruptcy court, . . . are indicative of the uncertainty in the value of th[e] particular property."). The magnitude of the disparity in values here, in excess of forty million dollars ($40,000,000.00), should also cast extreme doubt upon the ability to forecast and place values on each of the Properties, let alone support any the determination that the Debtor has demonstrated that BLC will receive the indubitable equivalent of its claim under the Amended Plan. As was the case in Bannerman, "the wide-ranging valuations are indicative of uncertainty and weigh against a finding of indubitable equivalence." Bannerman II, No. 7:11-CV-00009-H, at 12 (emphasizing that "as the uncertainty of the valuation increases so does the risk of error.").

The character and attributes of the Properties, as well as the corresponding effect on their value, in the instant case are also distinguishable from those analyzed in Bannerman, which involved a condominium development this Court described as "a superior project, in excellent condition, with a good location and amenities not found in comparable projects." Bannerman I, 2010 WL 4260003, at *6. The partial dirt for debt plan in Bannerman, proposed to surrender to the secured creditor, SunTrust Bank ("SunTrust"), eleven (11) condominiums which were in excellent condition and ready to be offered for sale on the market. Id. at *5-6. The testimony regarding the values of these condominium units, based on the three (3) separate opinions of value presented to the Court by the debtor and SunTrust, ranged from $362,250.00 to $470,925.00 per unit. Id. Here, by contrast, the Properties are large vacant tracts of raw land. The evidentiary presentation regarding the values of the Property was heavily disputed and contested by both the Debtor and BLC.

Additionally, the Debtor failed to present any evidence from which the Court can apply the methodology established in Fazekas to reach the present value of the Properties. Specifically, the record is devoid of any evidence of the costs associated with the sale or liquidation of the Properties and an appropriate discount rate reflecting those costs associated with BLC's loss of the use of its money while the Properties surrendered remain unsold. See Fazekas, No. 92-02262-8-JRL, at 7-8; see In re 4.98 Westgate Partners, LLC, No. 11-05768-8-JRL, at 4 (Bankr. E.D.N.C. Nov. 21, 2012) (holding that the Fazekas valuation methodology was appropriate when addressing whether a proposed surrender of real property is the indubitable equivalent; however, it "is not the appropriate valuation tool when determining the secured or unsecured statute of a claim where the property is to be retained by the debtor."). Every determination of the present value of collateral, according to this Court in Bannerman, must "take[] into account the time value of money and 'compensate[] the creditor for not receiving its money today by charging an additional sum based on a rate of interest called the 'discount rate.'" Bannerman I, 2010 WL 4260003, at *7 (quoting In re Bryson Props., XVIII, 961 F.2d 496, 500 (4th Cir. 1992)). The Fourth Circuit, in Bryson Properties, adopted the following analysis for determining the appropriate discount rate:

> The appropriate discount rate must be determined on the basis of the rate of interest which is reasonable in light of the risks involved. Thus, in determining the discount rate, the Court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration to the quality of the security and the risk of subsequent default.

961 F.2d at 500 (citation omitted).

Here, and unlike Fazekas and Bannerman I, the appraisals of the Properties proffered to the Court by the Debtor do not address nor identify, as a component of their present value, any costs associated with their sale and a discount rate compensating BLC for the time value of money. See generally Bannerman I, 2010 WL 4260003, at *7. In Bannerman, for example, this Court adopted a discount rate, which it found conservative in light of the evidence presented by both the debtor and SunTrust. Id. at *7 (finding that a discount rate of 12% was conservative in light of the evidence presented supporting a discount rate of between 10.15% and 15%). Absent any evidence of an appropriate discount rate, the Court cannot undertake a determination of the present value of the collateral that will compensate BLC for the loss of its money and the inherent uncertainties and risks involved in the course of action contemplated by the Amended Plan.

Accordingly and for the reasons stated herein, the partial surrender of a portion of the Properties, in full satisfaction of the BLC Claim, violates § 1129(b)(2)(A)(iii) because BLC does not realize the indubitable equivalent of its claim. Accordingly, the Amended Plan is not fair and equitable to BLC and, therefore, cannot be confirmed under § 1129(b).

## CONCLUSION

Accordingly, and for the reasons stated herein and in addition to those set forth previously in the Objection to Confirmation, the Supplemental Objection to Confirmation and the BLC Summary of Evidence, BLC respectfully requests that the Court enter an Order denying confirmation of the Amended Plan, and granting BLC such other and further relief as the Court determines to be just, reasonable and proper.

Respectfully submitted this, the 11th day of September, 2014.

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Telephone: (919) 870-6258
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**CERTIFICATE OF SERVICE**

I, JOSEPH Z. FROST, 9208 Falls of Neuse Road, Suite 111, Raleigh, North Carolina 27615 certify that I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age, that on the 11th day of September, 2014, the foregoing was served on the following parties shown below as indicated:

***VIA CM/ECF DELIVERY ONLY***
Brian C. Behr
Parker W. Rumley
Office of the Bankruptcy Administrator
Bankruptcy Administrator's Office
434 Fayetteville Street, Suite 640
Raleigh, NC 27601
*Counsel for Bankruptcy Administrator*

***VIA CM/ECF DELIVERY ONLY***
George Mason Oliver
OLIVER FRIESEN CHEEK, PLLC
Post Office Box 1548
New Bern, NC 28563
*Counsel for Debtor*

***VIA ELECTRONIC DELIVERY ONLY***
Bate Land Company, LP
Attn: Benny Mullinix

I certify under penalty of perjury that the foregoing is true and correct.

*s/Joseph Z. Frost*
JOSEPH Z. FROST
N.C. State Bar No. 44387
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STUBBS & PERDUE, P.A.
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