

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

In re:	)	
	)	
<b>LOUDOUN HEIGHTS, LLC,</b>	)	Case No.: <b>13-15588-BFK</b>
Debtor.	)	(Chapter 11)
	)	

**MOTION FOR ORDER APPROVING COMPROMISE AND SETTLEMENT  
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

Loudoun Heights, LLC (the “Debtor”), by and through its undersigned counsel, and Creditor, M&T Bank, by and through its undersigned counsel, respectfully move this Court for entry of an order approving the settlement agreement reached between the Debtor and M&T Bank, pursuant to Federal Rule of Bankruptcy Procedure 9019(a), and state the following in support thereof:

**Jurisdiction**

1. On December 16, 2013, the Debtor filed a voluntary petition under Chapter 11 of title 11 of the United States Code. The Debtor continues to operate in this case as a debtor-in-possession.
2. Creditor, M&T Bank filed its Proof of Claim on or around March 19, 2014.
3. The exercise of jurisdiction over this proceeding by the Court is authorized by 28 U.S.C. §§ 157(b)(2) and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
4. Venue is appropriate in this proceeding pursuant to 28 U.S.C. § 1409.

## **Procedural History and Background**

### ***I. The Parties***

5. The Debtor is a limited liability company organized under the laws of the Commonwealth of Virginia. The Debtor is owned by Little Piney Run Estates, LLC (“Little Piney Run”), which holds a 93% ownership interest, and the Robert and Dee Leggett Foundation, which owns a 7% interest.

6. Joseph L. Bane, Jr. is a 51% owner of Little Piney Run, and is a manager of the Debtor.

7. Little Piney Run is also owned by Dean Morehouse and Jerome Guyant, who each hold a 24.5% membership interest in Little Piney Run.

### ***II. The Subject Real Property***

8. The Debtor currently owns property commonly known as 10942 Harpers Ferry Road, Purcellville, Virginia, which is comprised of five independent parcels of realty (the “Property”). The Property is more particularly described in the Consent Order, attached hereto as **Exhibit A** (the “Consent Order”).

9. The Property was conveyed to the Debtor by Little Piney Run in 2007.

10. In addition to the Property, the Debtor also owns a 313-acre parcel (the “313-Acre Parcel”), which was conveyed to the Debtor by the Robert and Dee Leggett Foundation.

### ***III. The M&T Bank Loans***

11. On or around February 15, 2006, M&T Bank extended a \$3,300,000.00 loan to Little Piney Run (the “Little Piney Run Loan”), which was evidenced by, *inter alia*, a Purchase Money Credit Line Deed of Trust on the Property, a Purchase Money Credit Line Deed of Trust Note, and an Assignment of Interests, Contracts, Plans, and Permits (collectively, these

documents constitute the “Little Piney Run Loan Documents”). True and correct copies of the Little Piney Run Loan Documents are attached hereto as **Exhibits B, C, and D.**

12. On or around February, 27, 2008, M&T Bank extended a \$3,700,000.00 loan to the Debtor (the “Loudoun Heights Loan”), which is evidenced by, *inter alia*, a Purchase Money Credit Line Deed of Trust (the “Deed of Trust”) on the Property, a Purchase Money Credit Line Deed of Trust Note (the “Note”), and an Assignment of Interests, Contracts, Plans and Permits (the “Assignment”, and together with the Deed of Trust and the Note, the “Loan Documents”). True and correct copies of the Loan Documents are attached hereto as **Exhibits E, F, and G.**

13. The proceeds from the Loudoun Heights Loan were used to pay off the outstanding obligation to M&T Bank under the Little Piney Run Loan. *See* **Exhibit H.**

***IV. Stream Mitigation and Stream Credits Associated with the Property***

14. The Property has been enrolled in a compensatory mitigation program pursuant to, *inter alia*, the Clean Water Act, whereby it is eligible to receive stream mitigation credits (the “Stream Credits”) for environmental preservation, enhancement and remediation performed on the Property.

15. Properties enrolled in stream mitigation credit programs must be associated with entities known as mitigation banks. All of the properties associated with a common mitigation bank comprise a mitigation bank site, which can include properties from multiple different landowners. Previously, the Property was included in the Pipken Mitigation Bank Site (the “Pipken Site”). The Pipken Site is also comprised of real property owned by several other entities who are not the subject of the instant bankruptcy proceeding.

16. Prior to the Property being conveyed to the Debtor, when it was still owned by Little Piney Run, Little Piney Run entered into a Stream Mitigation Development Agreement

with Loudoun Mitigation Bank, LLC (“Loudoun Mitigation”). **Exhibit I.** Pursuant to this agreement, Loudoun Mitigation was retained to perform all the necessary work on the Pipken Site for the issuance of the Stream Credits. Loudoun Mitigation was also given the authority to market and sell the Stream Credits after they were issued, and retain a percentage of the sale proceeds as its compensation.

17. As part of its participation in the stream mitigation credit program, on January 9, 2008, the Debtor entered into the Declaration of Restrictions of Loudoun Heights, LLC (the “2008 Declaration of Restrictions”), which among other things, purported to impose real covenants on the Property that preserve its natural character. *See Exhibit J.* These restrictions prevent certain construction on the Property that would interfere with certain streams located thereon. Such restrictions are required by federal regulations, in order for stream credits to be issued for a piece of real property. 33 C.F.R. §§ 332.4(c) & 332.7(a) (2014) (noting that an encumbrance must be placed on real property that ensures its long-term environmental protection before stream credits may be made available for that property).

18. The Pipken Site is overseen by an Interagency Review Team (the “IRT”), comprised of representatives from various State and federal agencies. The IRT for the Pipken Site is co-chaired by representatives from the United States Army Corps of Engineers and the Virginia Department of Environmental Quality.

***V. The Pipken Site’s Suspension and Partial Re-instatement***

19. The entire Pipken Site was suspended from participation in a stream mitigation credit program on or around May 31, 2011 by the IRT. This suspension occurred after Jerome Guyant, a minority owner of Little Piney Run, represented to the Army Corps of Engineers that Loudoun Heights had improperly enrolled the Property in a compensatory mitigation program.

Jerome Guyant has also represented at various times that the transfer of the Property from Little Piney Run to the Debtor was not properly authorized by Little Piney Run. Despite making these representations as it suits him, Mr. Guyant has never filed an action to challenge the conveyance of the Property to the Debtor.

20. During the Pipken Site's suspension, no Stream Credits associated with the Pipken Site could be sold—including those associated with the Property.

21. On or around December 16, 2011, the properties other than the Property against which M&T Bank is secured were reinstated into the Pipken Site. To date, the Property has not been reinstated into the Pipken Site, and remains suspended. Thus, no Stream Credits are available for sale that are associated with the Property.

**VI. *The Debtor's Motions Regarding the Stream Credits***

22. On or around December 27, 2013, the Debtor filed its Motion to Approve the Sale of Its Stream Credits and Approval to Allow Loudoun Mitigation Bank, LLC to Act as Selling Agent (the "Stream Credits Motion"). In the Stream Credits Motion, the Debtor requested permission from the Court to execute any documents and perform any work necessary to have the Property re-instated in the Pipken Site, and to have the Stream Credits re-instated and sold. Among the measures the Debtor claimed were necessary to re-instate the Property in the Pipken Site was recording a new declaration of restrictions on the Property.

23. M&T Bank filed an opposition to the Stream Credits Motion, arguing *inter alia* that there was too much uncertainty surrounding the transaction proposed in the Stream Credits Motion for it to be approved by this Court. M&T also maintained that it was entitled to any proceeds from the sale of the Stream Credits by virtue of its first priority duly perfected lien against the Property, and that the Stream Credits could not be sold free and clear of its lien.

Further, M&T contended that the declaration of restrictions the Debtor desired to record was vague and ambiguous in violation of Local Rules 6004-1 and 9022-1(D).

24. In a Reply, the Debtor alleged that the Stream Credits were general intangibles not secured by M&T Bank's duly perfected first priority lien against the Property.

25. On January 30, 2014, following a preliminary hearing on the Stream Credits Motion, this Court issued its Order Setting Evidentiary Hearing. In that Order, the Court scheduled an evidentiary hearing to resolve the Stream Credits dispute for April 24, 2014, and ordered discovery as well.

26. The Debtor and M&T Bank have engaged in extensive discovery to determine the work, government approvals, time, and cost involved in re-instating the Property into a stream mitigation credits program and thereafter selling the Stream Credits.

27. On or around March 29, 2014, the Debtor filed its Amended Motion Requesting Approval of the Contract Between Debtor and Loudoun Mitigation Bank, LLC Regarding the Sale of Stream Credits (the "Amended Stream Credits Motion"). In the Amended Stream Credits Motion, the Debtor again requested that this Court approve the Debtor's sale of the Stream Credits and the Debtor taking all necessary action to achieve their sale. However, the Debtor amended its argument by stating that the Stream Credits are actually the Property of Loudoun Mitigation, and are not part of the Debtor's bankruptcy estate. The Debtor also alleged that no new declaration of restrictions was required to be recorded on the Property in order for Stream Credits to be made available.

28. M&T Bank opposed the Amended Stream Credits Motion, again contending that there was too much ambiguity surrounding the Debtor's proposed transaction and asserting its

right to receive the proceeds from the sale of the Stream Credits pursuant to its duly perfected first priority lien against the Property.

29. Little Piney Run filed an objection to the Stream Credits Motion, but not the Amended Stream Credits Motion.

**VII. The Debtor's Motions Regarding Trail Easements**

30. In addition to its various motions regarding the Stream Credits, the Debtor also filed the Debtor's Application for Entry of an Order Authorizing the Sale of Tax Credits Resulting from Conveyance of Two Trail Easements, for Approval of Virginia Easement Exchange, LC as Selling Agent, and Granting Two 50-Foot Wide Trail Easements (the "Trail Motion").

31. In the Trail Motion, the Debtor requested this Court to authorize the creation and recordation of two trail easements across the Debtor's real property. The trails were designed to connect the Debtor's real property to nearby parks, waterfronts, and historic sites. The Debtor maintained in the Trail Motion that if the trail easements were recorded and conveyed to the Old Dominion Land Conservancy, Inc., certain tax credits would be created, which could be sold to benefit the Debtor's bankruptcy estate.

32. One of the proposed trail easements was due to be placed across the Property against which M&T Bank holds its duly perfected first priority lien. The other trail easement was proposed for the 313-Acre Parcel.

33. M&T Bank opposed the Trail Motion, arguing *inter alia* that its collateral Property should not be devalued by the recordation of the trail easements. Indeed, M&T Bank's investigation showed that the trail easements could have a significant detrimental impact on the

value of the Property, which would not be sufficiently offset by the creation of any tax credits associated with the trail easements.

34. M&T Bank also raised a number of other objections to the Trail Motion, including that the Debtor did not supply sufficient information for creditors to evaluate the proposed transaction, the requested relief was premature, and the proposed trail easements did not comply with Local Rule 6004-1.

35. Following a preliminary hearing, on March 1, 2014 this Court issued another Order Setting Evidentiary Hearing, which scheduled an evidentiary hearing for the Trail Motion for May 16, 2014.

***VIII. The Debtor's Motion Regarding a Conservation Easement and Access Easement***

36. On or around February 18, 2014, the Debtor also filed the Debtor's Application for Entry of an Order Authorizing the Sale of Tax Credits Resulting from Conveyance of a Conservation Easement, for Approval of Virginia Easement Exchange, LC as Selling Agent, and Granting a 60-Foot Wide Access Easement (the "Conservation Easement Motion"). In the Conservation Easement Motion, the Debtor requested permission to record a conservation easement that covered all of the Debtor's real property—including the Property against which M&T Bank holds its duly perfected first priority lien.

37. The Conservation Easement Motion also requested permission to record an access easement across a strip of the Property<sup>1</sup>, which would connect the 313-Acre Parcel with Harpers Ferry Road. The access easement would also enable pedestrians using the proposed trail easement over the 313-Acre Parcel to access other points of interest—including the Potomac River.

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<sup>1</sup> More specifically, the Debtor requested an easement across PIN # 472-46-0191.

38. The Debtor argued that the creation and recordation of the conservation easement would create tax credits, which could be sold to enrich the Debtor's bankruptcy estate.

39. M&T Bank opposed the Conservation Easement Motion for similar reasons to its opposition of the Trail Motion. Among other things, M&T Bank argued that the Conservation Easement Motion failed to provide creditors sufficient information to evaluate the proposed transaction, wrongfully sought to encumber the Property against which M&T Bank holds a duly perfected first priority lien, and that the proposed easements failed to comply with Local Rule 6004-1.

40. In its Order Setting Evidentiary Hearing, issued on March 1, 2014, the Court scheduled an evidentiary hearing for the Conservation Easement Motion for the same day as the hearing on the Trail Motion.

41. The Debtor and M&T Bank have entered into a settlement agreement that resolves the Stream Credits Motion, the Trail Motion, and the Conservation Easement Motion without the need for multiple time-consuming and expensive evidentiary hearings. The terms and conditions of that settlement agreement are set forth herein.

#### **Settlement Terms**

42. The Debtor and M&T Bank have agreed to settle the Stream Credits Motion, Trail Motion and Conservation Easement Motion upon the terms set forth in the Consent Order attached hereto as **Exhibit A**. The terms of the Consent Order include, but are not limited to the following:

a) The Stream Credits Motion is granted, subject to the terms, conditions and limitations set forth in the Consent Order. Pursuant to the terms of the Consent Order, the Debtor will be granted the authority to sign the contract (see **Exhibit K**) with Loudoun

Mitigation Bank, LLC, Loudoun Mitigation Bank, LLC and the Debtor will be authorized to re-enter the Property into the Pipken Mitigation Site, and Loudoun Mitigation Bank, LLC will be authorized to sell the stream credits and provide one-half of the proceeds to the Debtor;

b) Little Piney Run's objection to the Stream Credits Motion is overruled;

c) The automatic stay of Section 362 of the United States Bankruptcy Code is terminated in the Debtor's bankruptcy case as to M&T Bank and the Property;

d) M&T Bank shall forbear from exercising and enforcing its rights and remedies under the Loan Documents and applicable law with respect to the Property until 5:00 p.m. on October 22, 2014, so as to allow the Debtor the time and opportunity to monetize the Stream Credits;

e) After 5:00 p.m. on October 22, 2014, M&T Bank shall be immediately entitled to exercise and enforce all of its rights and remedies under the Loan Documents and applicable law with respect to the Property, including without limitation, foreclosing on the Property pursuant to the terms and conditions of the Loan Documents and applicable law and applying all proceeds arising therefrom to reduce the indebtedness owed by the Debtor to M&T Bank under the Loan Documents in such order, proportion and manner as M&T Bank, in its sole and absolute discretion deems appropriate;

f) The Debtor shall not record any further documents against the Property except as provided for below;

g) the Debtor acknowledges that with respect to the 2008 Declaration of Restrictions, the covenants and restrictions set forth therein only apply to the 300-foot easement area on each side of the stream traversing the Property and not to any other

portion of the Property, and that the 2008 Declaration of Restrictions does not preclude the building of residential homes or other structures on any part of the Property other than within the 300-foot easement area on either side of the stream traversing the Property. Furthermore, the Debtor shall cause Loudoun Mitigation Bank, LLC to immediately supply M&T Bank with a letter indicating that the covenants and restrictions set forth in the Declaration of Restrictions only apply to the 300-foot easement area on each side of the stream traversing the Property and not to any other portion of the Property, and that the 2008 Declaration of Restrictions does not preclude the building of residential homes or other structures on any part of the Property other than the 300-foot easement area on either side of the stream traversing the Property. The Debtor shall also cause a document to be executed by the Debtor and Loudoun Mitigation Bank, LLC, and file the same in the land records of Loudoun County, Virginia, indicating that the covenants and restrictions set forth in the Declaration of Restrictions only apply to the 300-foot easement area on each side of the stream traversing the Property and not to any other portion of the Property, and that the 2008 Declaration of Restrictions does not preclude the building of residential homes or other structures on any part of the Property other than the 300-foot easement area on either side of the stream traversing the Property;

h) Upon request from the Debtor, and upon terms agreeable to M&T Bank, M&T Bank shall provide a letter of cooperation to the Army Corps of Engineers in a form and substance acceptable to M&T Bank, to assist the Debtor and Loudoun Mitigation Bank, LLC in their efforts in obtaining and monetizing the Stream Credits;

i) M&T Bank is granted a first priority lien and security interest in, to and against eighty percent (80%) of any Stream Credit proceeds associated with or arising

from the Property and all accounts, accounts receivable and other amounts now or hereafter payable to the Debtor as a result thereof, or from the Debtor's contract with Loudoun Mitigation Bank, LLC, any other mitigation bank or the Army Corp. of Engineers. Such a security interest and lien shall serve as collateral for all indebtedness that is owed by the Debtor to M&T Bank under the Loan Documents;

j) Upon the request of M&T Bank, the Debtor shall execute a Security Agreement in favor of M&T Bank, granting M&T Bank a first priority lien in, to and against eighty percent (80%) of any Stream Credits proceeds associated with or arising from the Property or Loudoun Mitigation Bank, LLC, or any other mitigation bank associated with the Property and all accounts, accounts receivable and other amounts now or hereafter payable to the Debtor as a result thereof, or from the Debtor's contract with Loudoun Mitigation Bank, LLC, any other mitigation bank or the Army Corp. of Engineers. M&T Bank shall be immediately authorized to file a UCC-1 financing statement with the Virginia State Corporation Commission to perfect such security interest and lien;

k) If the Debtor receives payment from Loudoun Mitigation Bank, any other mitigation bank, or on account of any Stream Credits or any accounts, accounts receivable or other amounts now or hereafter due and owing to the Debtor in connection with the Property or as a result thereof, or from the Debtor's contract with Loudoun Mitigation Bank, LLC, any other mitigation bank or the Army Corp. of Engineers, M&T Bank shall receive 80% of such payment, which amounts the Debtor estimates will be approximately \$480,000.00, for application by M&T Bank to reduce the indebtedness that is owed to M&T Bank by the Debtor under the Loan Documents in such order,

proportion or manner as M&T Bank, in its sole and absolute discretion, deems appropriate;

l) The Debtor shall receive and retain payment of 20% of any payment that the Debtor receives from Loudoun Mitigation Bank, or any other mitigation bank, on account of the Stream Credits or any accounts, accounts receivable or other amounts now or hereafter due and owing to the Debtor in connection with the Property or as a result thereof, or from the Debtor's contract with Loudoun Mitigation Bank, LLC, any other mitigation bank, or the Army Corp. of Engineers, which amounts the Debtor estimates will be approximately \$120,000.00, and the Debtor shall use such amounts to pay its administrative expenses, including costs for site work to further develop the 313-Acre Parcel, fees for necessary professionals, taxes and insurance on the Property and on the 313-Acre Parcel, U.S. Trustee's fees, and other costs of its bankruptcy estate;

m) On the last day of each month after the entry of the Consent Order, the Debtor shall supply M&T Bank and its counsel with a written report setting forth the status and progress of the Debtor's efforts at obtaining and monetizing the Stream Credits for payment to M&T Bank;

n) The Debtor's Trail Motion and Conservation Easement Motion will be withdrawn with prejudice with respect to the Property, and the Debtor shall not re-file the Trail Motion or the Conservation Easement Motion, or any similar motion, with respect to the Property;

o) The Debtor's Trail Motion and Conservation Easement Motion will be approved with respect to the 313-Acre Parcel, therefore:

i. The Debtor is authorized to obtain re-approval from the Virginia Department of Conservation for placement of the conservation and trail easements on the 313-Acre Parcel;

ii. The Debtor is authorized to convey the conservation and trail easements on the 313-Acre Parcel to the Old Dominion Land Conservancy; and

iii. Virginia Easement Exchange, LC is approved to be the seller of the tax credits resulting from conveyance of the conservation and trail easements on the 313-Acre Parcel.

p) M&T Bank will grant the Debtor a 60-foot wide easement over Parcel No. 472-46-0191, on the northern edge, so that the Debtor and the 313-Acre Parcel have access to Harpers Ferry Road; provided, however, that M&T Bank will only be obligated to grant such an easement to the Debtor if M&T Bank's engineers approve the size, location and other aspects of such easement and the easement is granted pursuant to an easement agreement that is acceptable to M&T Bank in all respects;

q) After M&T Bank conducts a foreclosure sale of the Property and applies all proceeds arising therefrom to reduce the indebtedness that is owed by the Debtor to M&T Bank under the Loan Documents, the maximum deficiency amount due and owing from the Debtor to M&T Bank under the Loan Documents shall be the lesser of \$2,000,000.00 or the actual amount due and owing from the Debtor to M&T Bank under the Loan Documents (the "Deficiency Amount" or the "Deficiency Claim");

r) The Deficiency Amount shall not be reduced by any amounts M&T Bank receives from the foreclosure sale or other liquidation of the Property or any amounts that

M&T Bank receives as a result of the Stream Credits or any accounts, accounts receivable or other amounts that are due and payable in connection therewith;

s) The Debtor's plan of reorganization may provide that payment on account of the Deficiency Amount shall commence and occur after payment of other unsecured creditors of the Debtor holding claims against the Debtor in the aggregate amount not to exceed \$200,000.00;

t) The Debtor shall incorporate the terms and conditions of the Consent Order into any plan of reorganization the Debtor has filed or hereafter files.

#### **Authority for Settlement**

43. Settlement agreements between parties to a bankruptcy proceeding are generally favored. *See In re Frye*, 216 B.R. 166, 172 (Bankr. E.D. Va. 1997) ("We recognize that settlement agreements between parties to lawsuits are designed to put an end to litigation and are favored by the law."); *see also Sassalos v. Bishop*, 160 B.R. 646, 653 (D. Or. 1993) ("Pursuant to Bankruptcy Rule 9019(a), compromises are favored in bankruptcy...."). The compromise of claims in bankruptcy court is governed by Federal Rule of Bankruptcy Procedure 9019, which states:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a) (2014).

44. The basic criteria for a bankruptcy court to consider in determining whether to approve a settlement was set forth by the United States Supreme Court in the seminal case *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). In that case, the Supreme Court stated:

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

*Id.* at 424-25.

45. In conjunction with the more abstract guidance provided by the Supreme Court, the United States Bankruptcy Court for the Eastern District of Virginia set forth a number of factors for a court to consider in evaluating a proposed settlement agreement in *In re Austin*, 186 B.R. 397 (Bankr. E.D. Va. 1995). The factors a court should consider include:

- a) The probability of the trustee's success in the litigation;
- b) Any collection difficulties;
- c) The complexity, time and expense of the litigation; and
- d) The interests of creditors with proper deference to their reasonable views.

*Id.* at 400; *In re Frye*, 216 B.R. at 174.

46. Based on the general framework provided by *Anderson*, the settlement agreement set forth in the Consent Order is fair and equitable, and is in the best interest of the Debtor's bankruptcy estate when compared to litigating the Motions. This is well illustrated by examining each of the factors enumerated in *Austin*.

***I. Probability of Success in Litigation.***

47. The Debtor's probability of success in litigating the Trail Motion and the Conservation Easement Motion are low. Both of those motions require M&T Bank to subordinate its lien on the Property, or necessitate the Debtor proving that one of the conditions

expressed in 11 U.S.C. § 363(f) is present. M&T Bank is not willing to subordinate its lien, and it is unlikely that the Debtor can satisfy any of the conditions set forth in 11 U.S.C. § 363(f).

48. Moreover, the outcome of the litigation involving the Stream Credits is uncertain at best. Determining the party entitled to the proceeds from the sale of the Stream Credits involves not only a matter of first impression in Virginia, but a matter of first impression in this Country. Both M&T Bank and the Debtor are convinced of their positions, and there is no way to predict the outcome of this dispositive issue. Moreover, the 313-Acre Parcel will provide more than ample funds to pay all of the priority creditors and unsecured creditors in full, and M&T Bank will receive the remaining funds to pay any deficiency remaining after the foreclosure sale of the Property. Accordingly, the argument over which creditor gets the stream credit proceeds is not relevant, since there are ample funds to pay the unsecured creditors in this case, and the Debtor needs the access easement through the 12-acre parcel in order to create value for the Debtor's landlocked 313-Acre Parcel.

## ***II. Potential Difficulties in Collection.***

49. There are few apparent difficulties in M&T Bank being able to collect on the settlement agreement set forth in the Consent Order. In the event that the Stream Credits are sold, M&T Bank should have no trouble collecting those funds. Moreover, as expressed above, under the Consent Order, M&T Bank will have immediate relief from the automatic stay. Thus, M&T Bank can foreclose on the Property any time after 5:00 p.m. on October 22, 2014.

50. Other creditors should have no difficulty collecting, and in the event there is a problem, the creditors would still not be prejudiced by the entry of the Consent Order. Indeed, those creditors would not receive any portion of the sale proceeds from the Stream Credits without the entry of the Consent Order.

***III. Complexity of Litigation, with Attendant Expense, Inconvenience and Delay***

51. This factor highly weighs in favor of approving the entry of the Consent Order. As seen in the briefing attendant to the Stream Credits Motion, the sale of stream mitigation credits involves a complex set of federal and State statutes and regulations. Determining the propriety and process of their sale in a court proceeding will be an extremely complex endeavor. The Consent Order gives the Debtor a chance to monetize the Stream Credits without expensive litigation and without devaluing M&T Bank's collateral Property. Moreover, the U.S. Army Corps of Engineers would be reluctant to allow Loudoun Mitigation Bank, LLC to reinstate the Property into the Pipken Mitigation Bank Site unless M&T Bank was in full cooperation with the Debtor. The reason for this reluctance is that members of Little Piney Run Estates, LLC have made in the past, and are currently making, threats that they do not approve the reinstatement of the Property into the Pipken Mitigation Bank Site.

52. Litigating the Stream Credits Motion will be made more complex by the fact that it involves the matter of first impression as to whether M&T Bank has a security interest in the Stream Credits by virtue of its duly perfected first priority lien against the Property. Both the Debtor and M&T Bank have taken staunch opposing positions on this issue, and it will require a complex day-long (or longer) evidentiary hearing with numerous expert witnesses to resolve.

53. Moreover, approving the Consent Order will prevent extensive expense, inconvenience and delay. As noted above, the Stream Credits Motion will require an expensive day-long evidentiary hearing to resolve. This will involve testimony from expert witnesses, which will add to the cost of litigation. Similarly, the Trail Motion and the Conservation Easement Motion will also involve long, expensive proceedings. Discovery will be required in advance of the evidentiary hearing on those motions. By means of comparison, M&T Bank took

5 depositions in conjunction with the Stream Credits Motion. It is reasonable to expect that at least as many depositions will be necessary to adequately prepare for the hearing on the Trail Motion and Conservation Easement Motion. Written discovery requests are also likely to be issued, with responses being time consuming and expensive.

54. As a final point on this factor, holding hearings on the Stream Credits Motion, the Trail Motion and the Conservation Easement Motion will also needlessly delay the resolution of this bankruptcy proceeding. Not only will the evidentiary hearings themselves be time consuming, but any appeals could drag these issues out for even longer periods of time. Given M&T Bank and the Debtor's positions on the issues, an appeal is very likely to result.

***IV. Paramount Interest of Creditors.***

55. It is in the interest of all creditors that the Consent Order be entered. As indicated above, litigating the various motions will be time consuming, costly, and will carry an uncertain result for the Debtor's bankruptcy estate.

56. On the other hand, the settlement agreement set forth in the Consent Order is in the best interest of the Debtor's creditors, as it will not needlessly deplete the assets of the Debtor's bankruptcy estate to fund expensive and lengthy litigation.

57. Creditors will also benefit from the entry of the Consent Order, as it calls for 20% of the proceeds from the sale of the Stream Credits to be paid into the Debtor's bankruptcy estate. This amount is estimated to be \$120,000.00, and will be available to the Debtor to pay its administrative expenses, including costs for site work to further development of the 313-Acre Parcel, fees for necessary professionals, taxes and insurance on the Property and on the 313-Acre Parcel, the U.S. Trustee's fees, and other costs of its bankruptcy estate.

58. Further, the unsecured creditors are benefited by the terms of the Consent Order, which permit payment of the unsecured creditors before M&T Bank is paid on its Deficiency Claim, including Federal, state, and local taxes totaling over \$50,000.00 and general unsecured creditors with claims that total approximately \$68,000.00 (in an aggregate amount not to exceed \$200,000).

59. M&T Bank, as a secured creditor, will also benefit from the entry of the Consent Order, in that it will have a lien against the proceeds of the sale of the Stream Credits in the event that the Debtor monetizes them and will have a right to receive 80% of the sale proceeds paid to the Debtor. Further, after October 22, 2014, M&T Bank will be able to foreclose on the Property and apply the proceeds to reduce the Debtor's obligations to M&T Bank.

60. Finally, creditors will also benefit from the entry of the Consent Order because it will increase the value of the 313-Acre Parcel. The Consent Order provides that an access easement be granted over a portion of the Property so that the 313-Acre Parcel may access Harpers Ferry Road. This should increase the value of the 313-Acre Parcel, thus increasing the value of the Debtor's bankruptcy estate and making more money available to pay creditors.

### **Conclusion**

61. For the foregoing reasons, this Court should approve the settlement agreement set forth in the Consent Order and enter the Consent Order without delay. Entering the Consent Order will avoid a great amount of time and cost in litigating the numerous motions filed by the Debtor and avert the uncertainty those motions pose for the Debtor's bankruptcy estate. This is ultimately in the best interest of all the creditors, who will benefit from not having the assets of the Debtor's bankruptcy estate depleted by litigation expenses. Creditors will also benefit by

having these issues resolved in a timely manner and from an influx of cash into the Debtor's bankruptcy estate if the Stream Credits are monetized.

WHEREFORE, Loudoun Heights, LLC and M&T Bank respectfully request that this Court enter the Consent Order in the form attached hereto as Exhibit A.

Respectfully submitted,

/s/ Frank Bredimus

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 30th day of April, 2014, I caused a copy of the foregoing to be sent electronically via the ECF system to all those parties entitled to receive notice through the same, and via first class mail, postage prepaid to the following:

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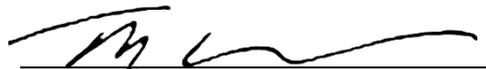
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