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

IN RE:	CHAPTER 11
SHOTWELL LANDFILL, INC.	**CASE NO. 13-02590-8-SWH**
CAPITOL RECYCLING, LLC	**CASE NO. 13-07567-8-SWH**
CAPITOL WASTE TRANSFER, LLC	**CASE NO. 13-07568-8-SWH**
DEBRIS REMOVAL PARTNERS, LLC	**CASE NO. 13-07570-8-SWH**
SHOTWELL TRANSFER STATION II, INC.	**CASE NO. 13-07572-8-SWH**
KING'S GRADING, INC.	**CASE NO. 13-07573-8-SWH**

Debtors.

INITIAL BRIEF IN SUPPORT OF CONFIRMATION OF DEBTORS' PLAN, REGARDING VALUATION, AND IN OPPOSITION TO LSCG'S PLAN

Now Come the Debtors and, pursuant to the court's instructions, file this Initial Brief prior to closing arguments in Support of Confirmation of the Debtors' Plan (filed February 3, 2014), Regarding Valuation, and Opposing LSCG's Plan. To assist the court, the Debtors provide the following outline of their Arguments:

I. The Debtors' Plan Should Be Confirmed
  - A. Overview of the Debtors' Plan
  - B. The Debtors' Plan Is Feasible
    1. The Debtors' Projections
    2. The Appraisers' Projections
    3. William Nelson's Projections
    4. There Was No Pre-Petition Default
    5. Mr. Gurkins Is an Excellent CRO
  - C. The Debtors' Plan Is Fair and Equitable
  - D. The Debtors' Plan Has Been Accepted By Four Impaired Classes
  - E. The Debtors' Plan Preserves Equity

I. The Debtors' Plan Should Be Confirmed

A. Overview of the Debtors' Plan

The Debtors' Plan proposes to pay all creditors in full (no matter how pending claims objections are determined), with interest, over time, through continued operations. The Debtors' Plan also proposes that existing equity interests will remain in place. The Plan keeps Doug Gurkins in control of the Debtors' finances. In short, it is safe, it is fair, and it either pays everyone in full or leaves their rights unaltered. Stated another way: it does exactly what Chapter 11 is meant to do.

The majority of the debt in this case was purchased by LSCG Fund 18, LLC ("LSCG"). The Debtors' Plan proposes to pay the secured portion of LSCG's claim in full, at the Secured Rate (proposed at five percent (5%)) with a 25 year amortization and a seven year balloon. The Debtors' Plan proposes to pay the unsecured portion of LSCG's claim in full, over 25 years at the Unsecured Rate (proposed at the Federal Judgment Rate). The Debtors' Plan is drafted to specifically provide for a higher interest rate if the court finds it necessary for confirmation.

B. The Debtors' Plan Is Feasible

At various times in this case, creditors hostile to the Debtors' reorganization efforts have simultaneously (and contradictorily) argued both that: 1) the Debtors have too little cash flow to support the Plan; and 2) the Debtors' should be required to increase the amount of monthly payments under the Plan. Hearing both of these arguments made at the same time (and occasionally by the same lawyer) is a pretty good indicator that the monthly payments proposed by the Debtors are about right.

The feasibility of the Debtors' Plan is demonstrated by: 1) the Debtors' projections; 2) the projections contained in the four appraisals; 3) the projections of LSCG's non-appraiser valuation witness William Nelson; 4) the fact that there was no pre-petition default; and 5) the continued involvement of Doug Gurkins, the Court Restructuring Officer ("CRO").

1. The Debtors' Projections

The Debtors' Projections are attached as Exhibit H to the Debtors' Amended Disclosure Statement filed May 16, 2014. These projections show that, regardless of the extent to which LSCG is found to be secured, the Debtors will have sufficient cash flow to make the payments called for by the Debtors' Plan. These projections were supported by ample testimony, as follows:

-On July 29, 2014, David King testified:

- The projections in the Disclosure Statement are conservative (Page 88, Line 16), (also July 30, 2014, Page 167, Line 10)[1]

[1] Unless otherwise stated, all page and line references are to the pages of transcripts appearing on the court's CM/ECF system.

- Cash on hand will increase throughout the life of the Plan (Page 90, Line 7-8)
- Cash on hand will never go below $1 Million (Page 90, Line 10-12)
- This remains true even if LSCG is treated as fully secured (Page 92-93)
- He is 100% confident that all payments can be made (Page 94, Line 1-12)
- All payments can be made even if his projections are wrong and those of Mr. Nelson or those of Integra are correct (Page 98, Line 19-23)

2. The Appraisers' Projections

Because some classes are paid in full quicker than others, the first few years of the Debtors' Plan require the highest payments. During these first few years (and omitting one-time payments such as administrative expenses) the Debtors' Plan calls for total monthly payments of between $86,720 and $112,661 (the exact amount will largely depend upon the valuation of LSCG's collateral). Using the highest monthly number (the number if LSCG is found to be fully secured) of $112,661, the Plan would call for annual payments of $1,351,932. Each and every appraisal admitted contains projections that demonstrate the Debtors' ability to make such payments. Similarly, each and every appraiser who testified used projections which demonstrate the Debtors' ability to make annual Plan payments of $1,351,932. The projections used by the various appraisers were as follows:

■Integra Appraisal dated August 21, 2013. This appraisal was admitted on the motion of Mr. Waldrep as Exhibit F at the hearing on February 20, 2014 (page 134), and shows initial annual net cash flow of $3,031,065 (appraisal page 54) (this figure increases in subsequent years).

■Keystone Appraisal dated June 7, 2012. This appraisal was admitted for limited purposes on August 6, 2014 as Exhibit 14, and shows initial annual cash flow before debt service and income taxes as $3,206,000 (appraisal page 90) (this figure increases in subsequent years). The cash flow portion of the appraisal was also included in the chart prepared by Mr. Thomas and admitted on the motion of Mr. Waldrep as Exhibit D on August 6, 2014.

■Frank Leatherman Appraisal dated March 24, 2014. This appraisal was admitted on August 6, 2014 as Exhibit 5, and contains projections showing initial net annual income of $1,740,093 (appraisal page 59) (this figure increases in subsequent years).

■Ron Thomas Appraisal dated May 4, 2014. This appraisal was admitted on the motion of Mr. Waldrep as Exhibit C at the hearing on August 6, 2014, and shows "net cash" in the first year of $2,363,416 (appraisal page 30) (this figure increases in subsequent years).

In short, all four appraisers (including the one hired by Womble, Carlyle) used projections which show that the Debtors will have sufficient cash flow to fund the Debtors' Plan. In addition, on July 31, 2014, the CRO testified that he believes the Debtors could make the payments under the Debtors' Plan.

3. William Nelson's Projections

In addition to the four licensed appraisers, the court heard the testimony and received the report of William Nelson, a non-appraiser expert hired by Womble, Carlyle. Mr. Nelson's report was admitted on April 16, 2014. Mr. Nelson's report projects the Debtors' EBITDA for 2014 as $2,097,825 (report page 15). Like the four licensed appraisers, Mr. Nelson projects cash flow more than sufficient to make the Plan payments.

Despite his EBITDA projections, Mr. Nelson expressed concern over the Debtors' financial viability due to his belief regarding the need for significant capital expenditures. Unfortunately, Mr. Nelson based his belief on uninformed and simply incorrect information provided by Smith & Gardner, the engineers hired by LSCG (page 15 of Mr. Nelson's report). The clearest examples Mr. Nelson's errors are:

■Mr. Nelson's report indicates that $340,626 would be needed to remove the stockpiles at the landfill.

-David King testified on July 29, 2014 that he had already removed these stockpiles through a permitted burn, at a cost of about $10,000 (page 99).

■Mr. Nelson's report indicates that $35,898 would be needed to remove the stockpiles at Capital Waste Transfer.

- David King testified on July 29, 2014 that he had already removed these stockpiles through normal operations, at a cost of about $3,000 (page 100).

■Mr. Nelson's report indicates that $383,900 would be needed to remove the stockpiles at the Apex Transfer Station.

- David King testified on July 29, 2014 that he had already removed these stockpiles through normal operations, at a cost of about $25,000 (pages 100-101).

■Mr. Nelson's report indicates that $355,000 will need to be spent to obtain the Phase 4 permit to construct.

-David King testified on July 29, 2014 that he already had the permit to construct (page 103) and that it cost about $112,000 (July 30, 2014 - page 7).

■Mr. Nelson's report indicates that $1,000,000 will need to be spent on equipment.

- David King testified on July 29, 2014 that the equipment was in manageable condition and that he had spent $1,200,000 since the filing of the case and that all maintenance was already caught up (pages 101-102).

■Mr. Nelson's report indicates that $1,500,000 will need to be spent on the removal of LCID materials.

- David King testified on July 29, 2014 that he had removed and sold all of that material (mostly to a chicken plant for burner fuel) at a cost of about $30,000 (page 108).

In short, Mr. Nelson's concerns over anticipated capital expenditures were wildly overstated and almost entirely unfounded.

4. There Was No Pre-Petition Default

Projections, by their nature, are uncertain. They are, by definition, predictions of future performance. While bankruptcy courts regularly rely on projections to determine feasibility, it is also proper to look at the Debtors' past performance. In this case, the evidence is undisputed that until maturity of the loans, the Debtors made all payments on their secured debt (previously held by BB&T). David King provided this undisputed testimony in response to a question by Mr. Behr on May 21, 2014 (page 259) and again in response to a question by Mr. Janvier on July 29, 2014 (page 44).

5. Mr. Gurkins Is an Excellent CRO

Throughout this case, LSCG has argued that the Debtors' Plan is not feasible because David King cannot be trusted with the Debtors' finances. This concern over feasibility is cured by the Debtors' proposal to keep Mr. Gurkins in place post-petition. Mr. Gurkins testified on July 31, 2014 that he is willing to stay in place if the Debtors' Plan is confirmed. Mr. Gurkins is well known to the court and most counsel, and is a man of unquestionable experience, integrity, and ability. In fact, even LSCG's most recent Plan proposes to keep Mr. Gurkins in place.

The uncontradicted testimony is that Mr. Gurkins has and will continue to have both the powers and ability to control the Debtors' finances. The following testimony is illustrative:

■Mr. Gurkins testified on May 21, 2014 that if appointed CRO, he would take control of the financial decisions for Shotwell. (pages 75-78). He testified that he felt comfortable having exclusive authority to authorize expenditure of estate funds.
■Mr. King testified at the same hearing that he was comfortable allowing Gurkins to have exclusive signing authority on Shotwell's accounts. (page 175)
■Mr. King testified on July 29, 2014 that Mr. Gurkins was in control of when checks were cut. (pages 83-84)
■Mr. King further testified that he would not make any decisions about expanding business operations though the MRF or the purchase of new equipment without the approval of Mr. Gurkins. (pages 102-103)
■On July 29, 2014, Mr. King testified that Mr. Gurkins was making improvements in the check writing processes within Shotwell and the appointment of Mr. Gurkins was beneficial for the business. (page 114).
■On July 31, 2014, Mr. Gurkins testified that
-Mr. King is following his directions;
-Mr. King is knowledgeable about the landfill business;
-Mr. King is listening to him;
-When asked about Mr. King's influence over him, Mr. Gurkins stated: "Nobody influences me. I'm sorry that is the best answer I can give you."

C. The Debtors' Plan Is Fair and Equitable

The Debtors' Plan treats LSCG and all creditors fairly and equitably within both the meaning of Section 1129(b) and within the common usage of the terms "fair" and "equitable." To start with common usage of the term, the Debtors' Plan is fair because it pays all creditors in full, with interest. With regard to the treatment of LSCG in particular the Plan is remarkable in that it gives LSCG treatment very similar to what LSCG expected when it bought the debt. Exhibit 12, admitted on July 29, 2014, is LSCG's internal report detailing its expectations. Page 5 of that report explains: "While it's difficult to know how the loan will be restructured, we've assumed the following restructure: 5% interest rate, 20 year amortization, 3 year balloon payment." The Debtors' Plan terms (5% interest, 25 year amortization, 7 year balloon) are similar to what LSCG expected.

To determine the appropriate interest rate to be paid secured creditors, courts look to the Supreme Court's decision in Till v. SCS Credit Corp., 541 U.S. 465 (2004). "The burden of establishing the proper risk adjustment is borne by the creditor." In re Pamplico Highway Dev., LLC, 468 B.R. 783, 792 (Bankr. D.S.C. 2012)(citing Till, 541 U.S. at 479). As stated in Till, "Moreover, starting from a concededly low estimate and adjusting upward places the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing…Finally, many of the factors relevant to the adjustment fall squarely within the bankruptcy court's area of expertise." 541 U.S. at 478-79.

The analysis set out in Till will usually result in an interest rate of prime plus 1% to 3%. As stated in Till, "The Bankruptcy Court in this case approved a risk adjustment of 1.5%, App. to Pet. for Cert. 44a-73a, and other courts have generally approved adjustments of 1% to 3%, see In re Valenti, 105 F.3d 55, 64 (CA2) (collecting cases), abrogated on other grounds by Associates Commercial Corp. v. Rash, 520 U.S. 953, 138 L. Ed. 2d 148, 117 S. Ct. 1879 (1997)." Till, 541 U.S. at 480.

The Debtor and LSCG each called a witness[2] to testify about interest rates and amortization periods. The Debtor called John Logan, a long time Raleigh resident with extensive knowledge of lending markets and real world experience first with Cameron-Brown Company and then with Dickinson, Logan, Todd & Barber, Inc. Mr. Logan had previous experience testifying as an expert on Till issues before the court. On August 18, 2014, Mr. Logan testified as follows:

■There is no market for financing of this type without a credit worthy guarantor (page 11).
■In judging the risk of loans, lenders look at the loan to value ratio (page 14).
■Most lenders don't want a loan to value ratio above 70% (page 14).
■Most lenders like a debt service coverage of 1.25.
■A 25 year amortization with a 7 year call, if we had a solvent guarantor, should have an

[2] In addition, the CRO testified on July 31, 2014 that he believed 5% to be the "going rate."

interest rate of between 4.25% and 4.75% (pages 18-19)(the Plan proposes 5%).

LSCG called Timothy Dragelin, a Charlotte consultant with FTI Consulting. Mr. Dragelin testified as follows:

■There is an efficient market for landfill loans (pages 84-86).
■But there is not an efficient market for this loan, and so a Till analysis is required (pages 87-88).
■The appropriate interest rate would be 9.5% (page 100).
■Mr. Dragelin assumed a LTV of 100% (page 10 of Dragelin report).
■Mr. Dragelin assumed a value of $17,000,000 based upon an expired Waste Industries Letter of Intent (page 11 of Dragelin report).
■Mr. Dragelin assumed cash flow "barely sufficient to cover required Plan Payments" (page 12 of Dragelin report).
■Mr. Dragelin assumed that the capital expenditures identified by Mr. Nelson were required (page 12 of the Dragelin report).

There are many differences between Mr. Dragelin's analysis and Mr. Logan's. Perhaps the easiest way to summarize them is simply to say this: nearly all of Mr. Dragelin's assumptions were wrong. To wit: 1) the LTV is nowhere near 100% (as described below, the MAI appraisals show total values, excluding cash on hand, of $24,000,000 to $28,080,000); 2) the value of the entire enterprise is well in excess of $17,000,000; 3) cash flow is more than sufficient to cover Plan payments; and 4) Mr. Nelson's assumptions about capital expenditures have been demonstrated to be completely wrong.

Till, of course, was decided in the context of Chapter 13 but is commonly relied upon in Chapter 11 cases. Till and the cases following it strongly suggest that interest rates in reorganization plans should generally end up in the range of prime plus 1-3%. Prime is (and has for quite some time been) 3.25%. The Debtor's Plan proposes a rate of 5%. This rate equals prime plus 1.75% - very near the middle of the usual Till range. Mr. Dragelin's proposed rate of 9.5% would equal prime plus 6.25% - very far outside of the Supreme Court's Till range.

The 5% rate proposed by the Debtor is also supported by the history of the loan at issue made by BB&T (later purchased by LSCG). BB&T initially adjudged the riskiness of the loan and the loan originally bore interest at the prime rate (Testimony of David King on July 29, 2014 at page 42). The rate proposed by the Debtor is 1.75% above prime.

D. The Debtors' Plan Has Been Accepted By Four Impaired Classes

The Debtors filed their ballot report on July 28, 2014. After the filing of the ballot report, this court made several rulings on claims objections, entered an Order estimating the claim of Mr. Barnes, and denied the motion to designate the claims held by David Stallings. The result of these various Orders is that Classes 4, 6, 8, and 10 have accepted the Debtors' Plan.

The Debtors' Plan is a true consolidated Plan. With a true consolidated plan, section

1129(a)(10) is analyzed on a "per plan" basis, rather than a "per debtor" basis. In SGPA, Inc., 2001 Bankr. LEXIS 2291 (Bankr. M.D. Pa. September 28, 2001), the court held that, "in a joint plan of reorganization it is not necessary to have an impaired class of creditors of each Debtor vote to accept the Plan." Id. at *21. The court went on to find that, as in this case, the Debtors filed one plan of reorganization, and that "[w]hether these Debtors were substantively consolidated or jointly administered would have no adverse affect on the Subordinated Bondholders." Id. at *22. Other courts have made similar findings. See e.g., JPMorgan Chase Bank, N.A. v. Charter Commc'ns. Operating, LLC (In re Charter Commc'ns.), 419 B.R. 221, 266 (Bankr. S.D.N.Y. 2009) ("it is appropriate to test compliance with section 1129(a)(10) on a per-plan basis, not, as the CCI Noteholders argue, on a per-debtor basis"); In re Enron Corp., 2004 Bankr. LEXIS 2549 (Bankr. S.D.N.Y. July 15, 2004) ("the Plan governs the treatment of claims against the 177 jointly administered Debtors, pursuant to applicable law, the affirmative vote of one impaired class under the Plan is sufficient to satisfy section 1129(a)(10)").

E. The Debtors' Plan Preserves Equity

Paragraph 16.2 of the Debtors' Plan is short but important. It reads: "The existing Allowed Equity Interests in the Debtor shall remain the same as pre-petition." The Debtors' Plan preserves equity in the purest, clearest, and simplest manner possible. Unlike LSCG's Plan, the Debtors' Plan causes no harm to any equity interest.

II. All Evidence Indicates that LSCG is Under-Secured

A. Identification of LSCG's Collateral

The property on which LSCG claims a security interest is described both in the Debtors' schedules and in LSCG's proofs of claim. The Debtors' do not believe that there is a significant dispute over the identification of LSCG's collateral. In summary, LSCG claims the following collateral:

1. The Landfill real estate;
2. A limited amount of equipment;
3. The cash collateral of Shotwell Transfer Station II, Inc.

LSCG does not claim a lien on the following assets:

1. The remaining equipment.
2. The cash collateral of the other five entities.[3]
3. General Intangibles.

[3] Footnote 1 to LSCG's Plan filed October 7, 2014, recognizes that LSCG claims no lien on the cash in Shotwell's possession.

B. Only Four Witnesses Opined on the Value of LSCG's Collateral

While many witnesses testified on the full value of the Debtors--including all or nearly all tangible assets--only six witnesses opined on the value of LSCG's real estate collateral. These values ranged from a low of $1,300,000 by Integra, to a high of $12,385,500 by Mr. Thomas. In its latest Plan, LSCG identified the amount of its claim (not including post-petition interest and attorney's fees) as $13,728,012.15.[4] Accordingly, there should be no dispute that LSCG is under-secured. The values given by the various witnesses are as follows:

Valuation	Real Estate Value	Full Value[5]	Credentials
Keystone	$2,710,000	$24,000,000	MAI Appraiser
Integra	$1,300,000	$25,060,000	MAI Appraiser
Thomas	$12,398,500	$13,700,000	Appraiser
Nelson	n/a	$15,232,435	Unlicensed
Leatherman	n/a	$28,080,000	MAI Appraiser
Gurkins	$0[6]	$25-30,000,000	CRO / Auctioneer[7]

The Debtors propose to value the LSCG's collateral at $2,710,000. This is the highest number given by an MAI appraiser, and would also be the number arrived at by "tossing out" the high and low numbers.

III. LSCG's Plan Should Not Be Confirmed

To date, LSCG has filed seven plans and seven disclosure statements. Several of the disclosure statements related to the same plan, and several plans were unaccompanied by disclosure statements. The most recent plan was filed on October 7, 2014 (47 days after the close of evidence and four days before this initial brief was due) (hereafter, the "LSCG Plan.")[8] No disclosure statement accompanied the LSCG Plan. No witnesses were asked about the LSCG Plan. No evidence has been presented as to the LSCG Plan. The Debtors have not been given an opportunity to call or question any witnesses about the LSCG Plan.

A. LSCG's Prior Disclosure Statement Is Inadequate

To the extent LSCG intends to argue that the Disclosure Statement filed July 18, 2014 relates to their most recent Plan, that Disclosure Statement is inadequate. The most significant inadequacies are:

[4] See paragraph II.3.C on page 8 of LSCG's Plan.
[5] It should be noted that none of the valuations include the over $1 Million of cash on hand or accounts receivable. Accordingly, each of the "Full Value" numbers is understated by at least $1 Million.
[6] Mr. Gurkins testified that the value of the real estate without the permit would be $0.
[7] Mr. Gurkins has probably sold more real estate before this bankruptcy court than the next two people combined, and a generation of bankruptcy trustees in this district have relied on his valuation opinions.
[8] Counsel for LSCG has confirmed by e-mail that LSCG intends to brief and argue this most recent Plan, rather than its prior plans.

■The Disclosure Statement fails to describe the LSCG Plan. It describes a completely different plan, which has since been amended twice. While it still calls for liquidation, the current LSCG Plan is very different than the plan presented in the Disclosure Statement. Among other things: 1) the new plan calls for the deposit of $2.7 Million on confirmation into an escrow account; 2) the new plan calls for the purchase by LSCG of nearly all claims; 3) the new plan proposes to keep the CRO in place.

■The Disclosure Statement fails to show whether the $2.7 Million is available for deposit (or whether LSCG will need to borrow such funds), fails to disclose whether the various creditors have agreed to have their debt purchased as required by the LSCG Plan, and fails to disclose whether or not the CRO has agreed to remain in place under the LSCG Plan.

■The Disclosure Statement fails to disclose LSCG's discussions, cooperation, and agreements with Waste Industries. The Disclosure Statement further fails to disclose that discussions with Waste Industries and efforts to force the Debtors into liquidation have been ongoing since shortly after LSCG purchased the debt.

■The Disclosure Statement, on page 4, describes five "appraisals." The Disclosure Statement falsely states that "the additional value provided by the Affiliated Debtor's other than Shotwell is minimal." That statement is contradicted by every one of the five "appraisals."

■The Disclosure Statement fails to disclose that three of these "appraisals" list a separate, lower value for LSCG's primary collateral. In particular, the Disclosure Statement fails to disclose it that the Thomas appraisal was done for Womble, Carlyle, Sandridge, & Rice, LLP and shows a value for the landfill real estate of only $12,389,500. LSCG should disclose that it is giving itself a secured claim in excess of its lawyer's own appraiser's valuation.

■The Disclosure Statement fails to disclose (as required by this Court's Order dated May 1, 2014) that by consolidating the debts of all creditors into one Plan, and treating unsecured creditors equally regardless of which Debtor owed the debt in question, the Plan could prejudice the creditors of any particular Debtor. On page 5, the Disclosure Statement states this concern with respect to the Debtors' Plan, but then fails to state that the same is true with respect to LSCG's Plan. That concern is much more important with regard to the LSCG Plan, since, unlike the Debtors' Plan, LSCG's Plan does not propose to pay creditors in full (creditors would only be paid in full under the LSCG Plan if claims total less than $2.7 Million).

■The Disclosure Statement inexplicably states, on page 14, that general unsecured claims total $360,000. There is simply no justification for this figure. Currently Allowed Unsecured Claims far exceed this figure. Unsecured Creditors are misled by this Disclosure Statement into thinking that they will get a much larger pro-rata share of any distribution.

■The Disclosure Statement fails to disclose the possible causes of action against David Cook, LSCG, and Waste Industries. The Disclosure Statement fails to alert creditors that the LSCG Plan fails to specifically preserve such actions.

■By Order dated May 1, 2014, this court ruled that a disclosure statement should contain a separate liquidation analysis for each Debtor. The ruling was made so that creditors would be able to see their projected recovery if the Debtors were liquidated separately, rather than in a consolidated manner. The seven Liquidation Analyses attached as Exhibit B to the LSCG Disclosure Statement are inconsistent, misleading, and nonsensical. For example:

a) The "Expected Recovery" (meaning sale proceeds) for the combined Debtors is listed as $21,214,487. The same number is used on each of the six liquidation analyses for each separate Debtor. A separate liquidation analysis (as this court has previously

ordered is required) is meaningless if each separate analysis assumes that every dollar of sale proceeds would be generated by the liquidation of each separate Debtor.

b) The claim of LSCG on the first "All Debtors" Liquidation Analysis is listed as $13,728,012.15. However, the claim of LSCG as to King's Grading is listed as $14,599,106.96. How could the combined claim for all Debtors be less than the claim for just one of the Debtors?

B. LSCG Presented No Real Testimony In Support Of Its Plan

In In re RADCO Props, Inc., 402 B.R. 666 (Bankr. E.D.N.C. 2009), this court explained with regard to the requirements of Section 1129(a): "The proponent of the reorganization plan bears the burden of proof as to introduction and persuasion that each of these requirements has been satisfied. In re Smith, 357 B.R. 60, 66 (Bankr. M.D.N.C. 2006); In re Piece Goods Shops Company, L.P./Piece Goods Shops Corp., 188 B.R. 778, 791 (Bankr. M.D.N.C. 1995); In re Guilford Telecasters, Inc. (dba WGGT–TV), 128 B.R. 622, 625 (Bankr. M.D.N.C. 1991)." The United States Bankruptcy Administrator has created a helpful guide to assist Chapter 11 practitioners with the process of confirming a plan. Exhibit 21 to the Chapter 11 Administrative Packet as revised September, 2014, provides a helpful list of matters to which an officer of the Debtor should testify. According to this list, an officer of the Debtor should:

a. indicate that all of counsel's statements[9] are correct;

[9] According to Exhibit 21 to the Chapter 11 Administrative Packet, counsel should:
a. describe the general character of the plan; e.g., liquidation, partial liquidation, sale to third party, merger, continued operation (§1123(a)(5));
b. describe the debtor's business -- e.g., history, nature of business, highlights, principals, number of employees;
c. describe the debtor's problems;
d. describe the debtor's activities in chapter 11 -- sales of assets, salaries paid, gross sales, profit or loss, adequate protection payments;
e. indicate how the debtor's problems have been solved;
f. review operation projections, make comparisons with prior operating statements;
g. describe how the debtor will finance future operations;
h. describe the debtor's assets with an estimate of value -- indicate any change from the date of the petition (the court wants to know if the creditors' position has improved or deteriorated in Chapter 11);
i. review the specifics of the plan by class -- state the nature of the debts in each class (e.g., trade debt, insider loan, tort claim), state the amount in each class, identify any insider claims, review the acceptances and rejections;
j. state the amount, date of assessment, and specifically how the tax claims will be paid (§1129(a)(9)(A));
k. state the amount and how the costs of administration will be paid (§1129(a)(9)(A));
l. if a class is unimpaired, state why it is unimpaired (§1124);
m. indicate that the debtor has sufficient funds on hand to fund immediate payments required by the plan;
n. indicate what rights are provided to claimants who are to receive future payments;
o. indicate the mechanics of consummation and estimate when the plan will be "substantially consummated" (§1101(2));
p. indicate if there are any anticipated items which will come before the court (e.g., objections to claims, valuation of collateral, approval of sales); and

b. give an opinion concerning the prospects of successful operations;
c. give an opinion that the creditors are receiving more under the plan than they would receive in a Chapter 7 liquidation (§1129(a)(7)(a)(ii));
d. indicate that no payments have been made or promised to any creditors or other parties except as provided in the plan (e.g., no creditors are being paid "outside the plan");
e. state that all salaries paid or to be paid in the future to "insiders" have been disclosed (§1129(a)(5)(B));
f. identify all officers and directors who will serve after confirmation (§1129(a)(5)(A));
g. indicate that any rate requiring approval by a regulatory commission has been approved (§1129(a)(6));
h. state that all payments made or to be made for services or costs and expenses in connection with the plan or the case have been disclosed and approved, or are subject to approval (§1129(a)(4)); and
i. indicate that confirmation will not likely be followed by liquidation or the need for further reorganization (§1129(a)(11)).

While this list is certainly not mandatory, it does provide a very good list of the testimony which the Court and Bankruptcy Administrator expect.

Few, if any, contested plans in this district have been supported by weaker testimony from a plan proponent than LSCG's Plan. The individual testifying on behalf of LSCG, the plan proponent, was Jonathon Grossman. Mr. Grossman testified on August 20, 2014. The entirety of his direct examination by Mr. Waldrep lasted six pages. Four of those pages were spent on his work background and responsibilities. After incorrectly indicating that LSCG's collateral included accounts receivable (page 7) the only substantive testimony Mr. Grossman gave was:

- Identifying Exhibit G as LSCG's Plan.
- Stating that the Plan called for liquidation.
- Stating that the Plan was proposed in good faith.
- Stating that LSCG will be able to fund the payments called for by that plan.

On cross examinations, Mr. Grossman admitted:

- He had very little involvement in creating the Chapter 11 Plan. (pages 12-13)
- He did not know why the classes were classified differently from one another. (page 13)
- He did not know if Caterpillar Financial Services Corporation, Caterpillar Financial Services Commercial, or North State Bank had agreed to sell LSCG their claims, even though the Plan provided for those purchases. (pages 13-14)
- He did not know why Ford was treated the way the Plan stated. (pages 14-15)
- He did not know who will be driving the Ford truck after the Plan is confirmed. (page 15)
- He did not know why the small unsecured creditors are being treated differently than the general unsecured creditors. (pages 15-16)

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q. indicate whether the debtor is current with its Judicial Conference Quarterly Fees as required by §1129(a)(12).

■He did not recall reviewing the Disclosure Statement in this case. (p. 16)
■He did not know whether the transfer stations added significant value to the value of the landfill. (p. 19)
■He had not reviewed the various liquidation analyses attached to the disclosure statement. (p. 20)

C. Reorganizations are Favored Over Liquidations

Although plans of liquidation are allowed, the Supreme Court and nearly all courts within the Fourth Circuit recognize that reorganizations, when feasible, are preferable to liquidations. As stated in In re Schwarzmann, 203 B.R. 919 (Bankr. E.D. Va. 1995): "The court also notes policy reasons for approving debtor's plan instead of the bank's competing plan. The philosophy of the bankruptcy code is to preserve economic units and, therefore, reorganization is preferable to liquidation." Id. at 925; see also Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 37 n.2 (2008) ("Although the central purpose of Chapter 11 is to facilitate reorganizations rather than liquidations (covered generally by Chapter 7), Chapter 11 expressly contemplates liquidations."); Nat'l Labor Relations Bd. v. Bildisco & Bildisco, 465 U.S. 513, 527-28 (1984) ("The Bankruptcy Court is a court of equity…[it] must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization…[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."); Claridge Apartments Co. v. Comm'r of Internal Revenue, 323 U.S. 141, 145 (1944) ("Congress adopted the Chandler Act in 1938. That statute was a general revision of the provisions for bankruptcy reorganization, including those previously made under § 77B. One of its principal objects was to encourage the freer use of bankruptcy reorganization in order to avoid unnecessary or premature liquidations."); Quarles v. U.S. Trustee, 194 B.R. 94, 97 (W.D. Va. 1996) (internal quotation marks omitted) ("It is true that the provisions of Chapter 11 evince a congressional determination that it is better to reorganize...when possible, particularly when reorganization is in the best interest of creditors."); Crestar Bank v. Walker (In re Walker), 165 B.R. 994, 1001 (E.D. Va. 1994) ("[I]t is necessary to keep in mind that reorganization under Chapter 11 was intended to afford the earnest debtor an opportunity to restructure its finances in such a fashion as to permit continued operation of business ventures so as to enable payment of creditors, rather than face immediate liquidation."); In re Davidson Chem. Co., 14 F. Supp. 821, 843 (D. Md. 1936) ("Reorganization is constructive rehabilitation and when deemed feasible holds out definite prospect of future success. Liquidation is, however, highly destructive of all security interests. In other words, reorganization as contrasted with liquidation is presumably worth all it actually and necessarily costs--at least where the cost is made moderate."); In re RTJJ, Inc., 2013 Bankr. LEXIS 481, at *38-39 (Bankr. W.D.N.C. Feb. 6, 2013) (Reorganization was preferable to liquidation because reorganization was fair to all creditors and offered benefits to all creditors. In addition, unsecured creditors received distributions, employees kept their jobs, and the debtor provided a valuable service to the community. The court believed the creditor's preferred foreclosure to "rid itself of this nonperforming loan, at any cost. Its aims are noneconomic…and are destructive. Reorganization is preferable."); In re Quail Farm, LLC, 2010 Bankr. LEXIS 1261, at *12-13 (Bankr. N.D.W.V. May 5, 2010) (internal quotation marks

omitted) ("Because a Chapter 11 plan of reorganization may include liquidation, the test under § 1112(b)(4)(A) is not whether the debtor can confirm a plan, but, rather, whether the debtor's business prospects justify continuance of the reorganization effort…when a debtor proposes to reorganize by continuing to do business as opposed to liquidation, the court must concern itself with whether the debtor has formulated, or can formulate within a reasonable amount of time, a reasonably detailed business plan."); In re Naron & Wagner, Chartered, 88 B.R. 85, 89 (Bankr. D. Md. 1988) ("The primary function of Chapter 11 is for the reorganization of a business, although liquidation plans are authorized."); In re Love-Seemann Props., 49 Bankr. 770, 772 (Bankr. D. Haw. 1985) ("The purpose of the Bankruptcy Code is to afford a means to a hard-pressed Debtor to avoid a forfeiture of his investment and to afford him an opportunity for a 'fresh-start.' Fresh-start means an ability to clear his liabilities without incurring any forfeiture."); In re L.S. Good & Co., 8 B.R. 315, 318 (Bankr. N.D.W.V. 1980) ("[L]iquidation is generally not the proper function of reorganization proceedings, but the function of Chapter 7 proceedings.").

D. LSCG's Ballot Report Is Unreliable and Should Be Disregarded

In this district, ballots are sent to the attorney for the plan proponent. Ballots are not filed with the court, except as part of a ballot report filed by the plan proponent. As a result of this long-standing procedure, the court and parties rely entirely upon the attorneys for the plan proponent to preserve ballots and to provide an accurate tally of votes. The plan proponent is usually, but not always, the debtor.

LSCG filed a Ballot Report (Docket #756) for its "Amended Consolidated Chapter 11 Plan dated July 16, 2014" on August 15, 2014. No ballot report has been filed for LSCG's Second Amended Plan (Docket #783) or Third Amended Plan (Docket #864). An Amended Ballot Report was filed on August 18, 2014 (Docket #760).

Undersigned counsel knew that counsel for Mr. Barnes had objected to LSCG's Plan shortly before the balloting deadline, and was therefore very surprised that LSCG's report showed only an accepting ballot for Mr. Barnes. Undersigned counsel suspected that LSCG's ballot report might be inaccurate. At the hearing on August 19, 2014, undersigned counsel asked Mr. Waldrep, counsel for LSCG, whether the ballot report (Docket #756) included all of the ballots received. Mr. Waldrep responded that it did. During a break, undersigned counsel asked whether Mr. Waldrep received another unreported (and rejecting) ballot from Mr. Barnes. Mr. Waldrep stated that he had, and promptly disclosed this omission to the court (page 91).

Undersigned counsel then inquired whether the ballot was received timely. Mr. Waldrep stated that he would investigate the timing (page 92). Eventually, Mr. Waldrep disclosed that the unreported ballot was, in fact, received after the balloting deadline.

Now having even more concern over the ballot report filed by LSCG, undersigned counsel reviewed the limited number of ballots which he knew had been transmitted to counsel for LSCG. Undersigned counsel realized that not only had the LSCG report omitted the rejecting Barnes ballot, but also had omitted a timely rejecting ballot cast by Deans, Inc. Undersigned

counsel brought this to counsel for LSCG's attention, and LSCG filed yet another Amended Ballot Report on August 26, 2014 (Docket #790) correcting this latest omission.

Undersigned counsel has no doubt that these multiple omissions by LSCG's counsel were entirely unintentional. But the omissions do cast significant doubt on the accuracy of LSCG's ballot reports as a whole. It is probably unrealistically optimistic to expect that the only two errors in LSCG's ballot reports are the ones found by counsel for the Debtors. LSCG's ballot reports should be disregarded.

E. LSCG Falsely Labels Classes as Impaired

LSCG's Plan incorrectly labels classes 2, 4, 6, 7, 8, 9, and 10 as "Impaired" despite providing that the holders of such claims will be paid by LSCG within 30 days of the Confirmation Date. No reasonable definition of "Impaired" can include such treatment. Nor has there been any testimony to explain the purpose of such minimal alleged impairment. The LSCG Plan does not, of course, disclose whether these claimants have agreed to have their claims "purchased." The Debtors know that several claimants do not want to sell their claims. Such claimants have not, of course, been given the chance to vote on this Plan.

F. LSCG has Acted in Bad Faith

LSCG's Plan has not been filed in good faith as required by Section 1129(a)(3), and LSCG has acted in bad faith throughout this case. LSCG caused the Debtor to incur significant attorneys' fees through unwarranted and aggressive tactics uncharacteristic of normal conduct in this district. Among other things:

■LSCG falsely alleged that an emergency existed and that NCDENR was about to completely shut down the Landfill (Renewed Emergency Motion, Docket #426, page 15), and caused the court to schedule an unnecessary emergency hearing.

-On July 31, 2014, the CRO testified that he met with NCDENR and was told that the landfill was never in danger of closure.

■LSCG falsely alleged that an "emergency" existed due to a potential fire hazard (Renewed Emergency Motion, page 17).

-After extensive testimony, the court eventually summarized the testimony as "It's just, if wood is there, there's more fuel." (May 21, 2014, page 165). Both engineers testified that the danger of fire at Shotwell was the same danger faced at any C&D landfill and are "typical" or "not significant."[10]

■LSCG has abused the access to Quickbooks granted by the Debtors (see Debtors' Motion to modify, Docket #403).

■LSCG has pulled investigative LexisNexis reports on the owner of Debtor, on undersigned counsel, and on other parties involved in this case. (See Exhibit "A" to Motion to Amend filed April 21, 2014, Docket #421).

-Upon information and belief, these reports contain information on the minor children of undersigned counsel.

[10] Both witnesses testified on May 21, 2014. Mr. Moore's testimony is found on pages 104-105 and 172. Mr. Smith's testimony is found on pages 41, 57, and 65.

■LSCG has (unsuccessfully) solicited an amicus brief arguing that "(Shotwell) is represented in the bankruptcy by the Janvier Law Firm, PLLC, a two lawyer firm in Raleigh, North Carolina. LSCG . . . is represented by Womble Carlyle Sandridge & Rice, LLP, the oldest and largest law firm in the state." This amicus request also made defamatory statements about Shotwell and was sent to representatives of the Debtors' competitors. (See Exhibit "B" to Motion to Amend filed April 21, 2014, Docket #421).

IV. Conclusion

For over a year, LSCG has attempted to force a perfectly viable company into liquidation through aggressive and expensive litigation. LSCG's latest (seventh) plan seeks to prevent reorganization by "buying" a liquidation. This Court should not allow LSCG to do that.

Respectfully submitted, this the 10th day of October, 2014.

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