

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION

In the Matter of:  
BATE LAND & TIMBER, LLC  
Debtor

Chapter 11  
Case No.: 13-04665-8-SWH

**SUMMARY OF EVIDENCE IN SUPPORT OF CONFIRMATION OF PLAN**

NOW COMES, the Debtor, by and through its undersigned counsel of record, and hereby submits this summary of evidence, in support of confirmation of the Debtor's Plan of Reorganization ("Plan").

**I. Value**

- A. Highest and Best Use—Attached hereto are the following charts summarizing the testimony on this issue for the following properties:

Exhibit A—Broad Creek Tract

Exhibit B—Smith Creek Tract

Exhibit C—Spring Creek Tract

Exhibit D—Laura Williams #17/Smaller Williams Tract

Exhibit E—Laura Williams #16/Larger Williams Tract

Exhibit F—Magnolia Tract

Exhibit G—Island Creek Tract

Exhibit H—Rocky Point Tract

Exhibit I—Timber/Agriculture Tracts

Exhibit J—Mallory Tract

Exhibit K—Governor's Island Tract

The charts attached are in the same format as in the charts filed by BLC. They show all information included by BLC in its charts, in the column on the left (named "BLC"). The column on the right (named "Debtor") includes information in support of Debtor's position, which was not included in BLC's charts.

- B. Mr. Moody's opinion on Highest and Best Use changed from 2005/2006 to now. (Debtor Ex. 19b). Prior appraisals are germane as to current values, especially when the same appraiser prepares all of the appraisals.
- C. Moody made certain assumptions in his 2005/2006 appraisals, when he determined that the Highest and Best Use of certain tracts was for residential development. BLC has argued that those assumptions were not well-founded, and therefore the Highest and Best Use of those tracts is no longer for residential

development. That is not true. Those assumptions made by Moody in 2005/2006 turned out to be well-founded, and do not explain the changes in Highest and Best Use in Mr. Moody's most recent appraisals. (Comment – I had to reread the aforementioned sentence a number of times to try to determine the point being made. It finally occurred to me that, perhaps, the point was based on Moody's very dogmatic statement made on his first day of testimony (4/30/14) – "Market conditions and soils are the biggest factors in determining HBU..... that and history" ["history" seemed liked an afterthought]. If this is the basis for our argument, we need to start out by quoting Moody and then summarize the evidence that neither soils nor the market is materially different from prior appraisals, thus Moody has fallen on his own sword by changing the HBU when the "biggest" change "factors" did not changes. It would also seem we would want market evidence to come directly after soils evidence. If Moody's statement is not why we're talking about prior appraisals and changes in HBU – I'm just not getting it and overall it doesn't seem that impactful. Maybe the sentence just needs more work/clarity. [GMO Comment: I agree—the sentence was worded poorly. BLC's summary of evidence had a similar statement that I tried to re-word (but still make it similar). I have reworded it, above.]

1. Prior Broad Creek appraisals were predicated on there being an approved subdivision plan and there being septic approvals for that subdivision plan. (Moody, 4/30/14 Tr., Pg. 177)
  - a. No evidence was introduced to show that a subdivision plan would not be approved by Pamlico County.
  - b. Tom Gulley's testimony and report, which were agreed to by Craig Turner, established that the Altavista soils on the Broad Creek tract can support septic systems for 203 three-bedroom homes. The Wahee soils can support additional septic systems for homes built on the Wahee soil. (Debtor Ex. 90; Gulley, 5/15/14 Tr., Pg. 24-25).
2. 2005 Broad Creek appraisal – "The value derived in this appraisal is based on the extraordinary assumption that the subject's soils are suitable for development of the subject in typical densities with no extraordinary wastewater issues." (Debtor Ex. 43, Pg. 4). See immediately above.
3. 2005 Smith Creek appraisal – "The value derived in this appraisal is based on the extraordinary assumption that the subject's soils are suitable for development of the subject in typical densities with no extraordinary wastewater issues." (Debtor Ex. 44, Pg. 4)
  - a. Gulley's testimony and report, which were agreed to by Turner, established that the Altavista soils on the Smith Creek tract can support septic systems for up to 1,221 three-bedroom homes. The Fork and Wahee soils can support additional septic systems for homes built on the Fork and Wahee soils. (Debtor Ex. 91; Gulley, 5/15/14 Tr., Pg. 31-

32).

4. BLC takes the position that the Highest and Best Use of the Development Tracts is timber, or timber as an interim use.

- a. The videos make clear that the highest and best use of those tracts cannot be timber, especially after the tracts have already been thinned for residential development. (Debtor Ex. 75 (DVD))
- b. This is especially true given the testimony about how long it takes for that “interim use” to produce any money.

- (1) First the trees that are there would have to be clear-cut, which would hurt the value of the tracts. (Tabak, 5/5/14 Tr., Pg. 167)
- (2) Mr. Moody testified that the Broad Creek tract “contains insufficient merchantable timber volume to support an economically viable harvest.” (Moody, 5/1/14 Tr., Pg. 39)
- (3) Then you would have to go to the expense of bedding and replanting more trees on the tract (Tabak, 5/5/14 Tr., Pg. 167)
- (4) Then you would have to wait between 20 and 30 years until you had enough timber to commercially harvest. (Tabak, 5/5/14 Tr., Pg. 169) (Moody, 5/1/14, Pg. 190)
- (5) So, this “interim use” is an expensive, 20-30 year proposition – a long term use, not an interim one, which begins with clear-cutting the tracts that have just recently been residentially thinned to add value.
- (6) As a residential development tract, however, consider the Broad Creek tract as an example.
- (a) Mr. Saunders went through the math during his testimony (Saunders, 5/6/14 Tr., Pg. 84-86)
- (b) The Broad Creek tract is 212 acres = 9,234,720 square feet.
- i. The square root of 9,234,720 is 3,039.
- ii. This means if the Broad Creek tract were shaped like a square (as is fairly common), one of the four lines of a square, or 3,039’, would be waterfront.
- iii. The Broad Creek tract, however, has 15,230’ of waterfront, five times more than the typical tract because it is a peninsula.

- iv. 15,230' should yield 140 waterfront lots while 3,039' feet might yield 25.
- v. 140 waterfronts might sell for \$200k each, or \$28MM.
- vi. The Smith Creek tract is similar.

D. Moody's November 2013 chart of values is proof as to his bias and methodology.

1. "that was a consulting agreement and not an appraisal assignment." (Moody, 5/5/14 Tr., Pg. 107)
  - a. Regardless, Moody could not explain how his values for the tracts changed so much in just a couple of months. (Debtor Ex. 19b)
  - b. Moody had no reports to explain the values on his November chart, and no work files to support them. (Moody, 5/5/14, Pg. 107)
2. Moody testified he was not acting as an appraiser at the time, because he was acting as a "litigation consultant" (Moody, 5/5/14 Tr., Pg. 107-108), yet USPAP prohibits an appraiser serving as both an appraiser and a litigation consultant in the same case. This is because when an appraiser serves as a litigation consultant, he loses the objectivity required by an appraiser to give an unbiased opinion of market value. (USPAP Ethical Rules and Advisory Opinion 4 (USPAP, Pg. U-7 and A-71). Moody lost his ability to provide objective valuations on these tracts a long time ago, as was clear from his testimony.

## II. Selection and Use of Comparable Sales (Methodology)

A. Karen Cross

1. The format of Cross' reports is familiar to anyone who regularly reviews appraisal reports.
2. Cross used the best comparables available and made numeric adjustments that are easy to understand, consistent and logical—they make sense.
3. Cross analyzed the market for each county and spent considerable time becoming very familiar with each area. (Cross, 3/17/14 Tr., Pg. 22).
4. When Cross made an error in an appraisal, she brought it up to the Court and provided a new report for the Court so that there would be no confusion.
5. Cross did not find the same Highest and Best Use for all tracts. (Debtor Ex. 19b)
  - a. Some of the properties have a Highest and Best Use for Residential Development, and some do not. (Debtor Ex. 19b)
  - b. She did not just blindly find that all tracts have Highest and Best Use as Residential Development—that would have given a higher value for the Debtor's properties.

(Debtor Ex. 19b)

- c. Two examples of that are the Rodman Caroon and Barnett Spencer tracts.
    - (1) Each is a large, beautiful waterfront tract in Pamlico County.
    - (2) Cross did not determine that the Highest and Best Use for these two tracts was residential development, because they are too far away from infrastructure. Cross found that they are better suited as recreational tracts. (Cross, 4/29/14 Tr., Pg. 82-86)
  - d. Cross determined that the Highest and Best Use of several tracts was for timber production or agriculture.
6. Cross elected not to use some comparables and listings that would have greatly increased the opinions of value for the Debtor's properties. In every appraisal, Cross listed those at the end of her report. (Cross, 4-29-14 Tr., Pg. 73-74).
7. 2009 and 2010 Coastal Land Trust sales should be used as comparable sales because the methodology used was sound and well-supported, the sales were reflective of fair market value, and the sales meet the definition of fair market value.
- a. Cross used the 2010 Coastal Land Trust Sale eight times. She used the 2009 Coastal Land Trust Sale 6 times. (BLC Ex. 249)
  - b. Cash price for 2009 sale was \$13,500 per acre (Debtor Ex. 1, Pg. 47). Fair market value price of 2009 sale was \$ 18,024 per acre (Debtor Ex. 22A)
  - c. Cash price for 2010 sale was \$9,028 per acre (BLC Ex. 215). Fair market value price of 2010 sale was \$15,481 per acre (Debtor Ex. 22B)
  - d. The Court summarized Cross's use of the Mashburn appraisals very well: "She is using his value -- what she did was she used the comp for her valuation of Broad Creek and then in order for her to get the price in her grid so that she would have apples and apples, she took a valuation, since she did not believe that the actual HUD statement or whatever the closing statement was a real indication of value because it left out this tax component, she under -- she looked behind the HUD or whatever the closing document is and figured out what the real price was and in order to do that she used Mr. Mashburn's appraisal. Did I say that right?" Cross replied: "Very much." (Cross, 4/28/14 Tr., Pg. 138).
  - e. Cross relied on the sales price and "the fact that I realized, I recognized that it was a bargain sale and that the grantee, or excuse me, the grantor would be receiving a, some monetary funds but also additional financial, what the word I'm looking for,

compensation which was in turn a tax, some tax relief, a tax relief.” (Cross, 4/28/14 Tr., Pg. 124-125). Had Cross used only the cash received at closing, that would not have told the whole picture. Had Cross done that, it would not have been logical, and it would have been misleading. Instead, Cross used the fair market value given for the tracts at the time of the sales, as sworn to by the appraiser when he signed the IRS Form 8232.

- f. Cross has not used a transaction similar to this before as a comparable, but “consulted with several of her appraisal peers as to the usage of it.” Gene Merrit and Larry Robinson “both confirmed that if they had the copy of the IRS tax form, that they would then consider it to be a comparable sale, but they would have to have both of those pieces of information.” (Cross, 3/24/14 Tr., Pg. 150-151)
- g. The Debtor received certification from the state that it was entitled to a North Carolina state income tax credit, not just a donation deduction. (Debtor’s Ex. 80, Pg. 1)
- h. Mark Saunders testified about the importance of the tax benefits, regarding the Coastal Land Trust sales. He was asked whether the Debtor would have sold those two properties for the amounts shown on the HUD-1s, if not for the tax benefits received, and his answer was: “Absolutely not. I would have never have agreed to sell for the price that it was sold for. The other benefits, the tax considerations, both federal and state, were extremely important to me. They were part of the original negotiations. If we were to go to the contract, we would see that the tax benefits were stipulated in the contract. And it was critical that the buyers cooperate in a fashion such that those tax benefits would indeed be realized. The point is without those tax benefits I would not have sold those properties for the price that they were sold for.” (Saunders, 5/14/14, Pg. 7-8).
- i. The definition of Market Value, quoted in every appraisal report, includes “payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto.” This type of tax benefit is included in this definition. (Cross, 4/28/14 Tr., Pg. 126)
- j. Moody did not use these comparables at all—not even the HUD-1 cash prices paid. (Moody, 5/1/14 Tr., Pg. 187). Moody, despite the clear video evidence of high quality existing and under construction new homes contiguous to one of the subject tracts, determined that the Highest and Best Use was “Continued timber production, followed

by residential development when market conditions improve”, and Moody’s value for this tract was a confounding \$5,510 per acre; some 65%-70% lower than comparables located literally across the street.

8. Listings used by Karen Cross are indicators of market value and should be used as comparable sales.

- a. “[Listings] give you a range of values of what’s going on out in the market and market participants expect for that type of property.” (Cross, 3/24/14 Tr., Pg. 107)
- b. “And I always make adjustments like that for listings, because they are not confirmed sales, and you have to allow for some, you know, price negotiations that are going to go on between the buyer and seller.” (Cross, 3/17/14 Tr., Pg. 60). In all of Cross’ appraisal reports, she consistently made downward adjustments for listings that were used.
- c. “[T]here are some lenders who require the use of listings in appraisals....So, and it’s certainly not an uncommon practice and it’s not anything that USPAP advises against.” (Cross, 3-17-14 Tr., Pg. 60).
- d. Cross considered several additional sales and listings in her reports, which she did not use as comparables. They show per-acre values which are far higher than the opinions of fair market value determined by Cross—some nearly three times higher. (Cross, 3-17-14 Tr., Pg. 77-84)

9. Adjustments

- a. “In my practice if I have to use anything pretty much above 45 or 50 percent, it is not a comp and I won’t use it.” (Cross, 3/24/14 Tr., Pg. 142) She clarified that she “generally like[s] to stay below—in that range.” (Cross, 4/29/14 Tr., Pg. 111).

B. Chuck Moody

1. Showing the math: Moody’s methodology was completely different from Cross’ methodology, particularly because Moody did not show his math in his appraisal reports because he didn’t *use* any math. (Moody, 5/1/14 Tr., Pg. 71-73).
2. Moody testified that he “did not make a numerical adjustment. I did make a subjective adjustment in reaching my value conclusion.” (Moody, 5/1/14 Tr., Pg. 97). He described it as his “subjective reasoning,” because he did not have “objective numbers” in his appraisal reports. (Moody, 5/1/14, Pg. 74-75)
3. Moody did not even show his math in his work files. Why? Because you can’t show what you don’t use. (Moody, 5/1/14, Pg. 72-73).

4. Moody would have the Court believe that he was somehow mysteriously able to mentally process all relevant facts, conditions, comparables and adjustments and unequivocally ascertain true market value.
5. The Court must question why Moody did not show his math, and why he did not make any numeric adjustments to the comparables he chose to use. Moody's answer to this question is there is "not an abundance of good data in the market for these property types, and we don't have a good basis to make these [percentage] adjustments." (Moody, 5/1/14 Tr., Pg. 73-75). However, Moody found over forty comparables to use in his appraisals. He found at least four comparables for every subject property he appraised. (Moody, 5/1/14 Tr., Pg. 75). Is the answer to the why-is-there-no-math question because the subjective approach is a much more convenient one when the objective is to back into a grand total valuation that is slightly less than the total debt?
6. A review of Moody's 2005 and 2006 appraisals shows that he did not show his math in some of those appraisals either, when there were more sales in the market. (Moody, 5/1/14, Pg. 77-78). He was able to give no reason for this. When asked to explain why, his answer was that he "can't explain why that adjustment grid is not in this appraisal." (Moody, 5/1/14, Pg. 78).
7. The Summary at the end of every one of Moody's appraisals is also telling: "[t]he market sales used in this valuation have provided a well-supported value conclusion for the subject property." (BLC Ex. 47, Pg. 29).
8. Because Moody did not show his math, it is impossible for the Court to understand how Moody arrived at his values or why Moody arrived at his values.
9. Moody testified that appraising timber is similar to appraising real estate. For appraising timber, he testified that it uses "pretty easy math;" "it's just multiplication;" and "even a forester can do it." (Moody, 5/1/14 Tr., Pg. 16)
10. If Moody were asked by the Court to do the math again and show the Court how he arrived at his value for timber, he can replicate it—**for timber**. "But again, if you needed to you could do that math? You could sit here and you could put pen to paper and it's just, like you said, arithmetic, it's multiplication?" "A. That's correct." (Moody, 5/1/14 Tr., Pg. 19). Moody cannot do that for his appraisals of the real property.
11. A review of Moody's appraisal of the Broad Creek tract serves as an example of how Moody's methodology is incomprehensible and leads to a misleading result.
  - a. Moody testified that soils and market conditions "combined led me to the conclusion that this property would be used—it'll be used for timber production."



(Moody, 5/1/14 Tr., Pg. 35)

- b. Water frontage is an important feature of this tract, and Moody agreed that the water frontage on this tract is “very navigable. It’s deep water and the water comes basically up to the shoreline of the tract.” He agreed that the water at the tract was six to ten feet deep. (Moody, 5/1/14 Tr., Pg. 37).
- c. Despite that, Moody did not include in his report how much water frontage the Broad Creek tract has. Cross included this information in her report, showing that the property has 15,229 linear feet of water frontage—2.88 miles. 74% of the total linear perimeter footage is on the water. (Moody, 5/1/14, Pg. 37-38)
- d. Moody admitted that the water frontage is not as important to him, because he found that the Highest and Best Use is for timber production—that is why Moody did not pay much attention to it. (Moody, 5/1/14 Tr., Pg. 37).
- e. The Pamlico Sound is only five miles away from this tract by boat. There are no bridges between this tract and the Pamlico Sound. (Moody, 5/1/14, Pg. 38)
- f. The comparables used by Moody for this tract are telling, as well.
  - (1) Comparable 1: Dawson’s Creek
    - (a) This comparable is twice as large as the subject property. (Moody, 5/1/14, Pg. 42-43)
    - (b) Moody testified that buyers generally pay less per acre for a larger tract than for a smaller tract and that he has made adjustments for that in other appraisals. (Moody, 5/1/14, Pg. 43-44). In this appraisal, however, he made no numerical adjustment for that. (Moody, 5/1/14, Pg. 44)
    - (c) The buyer of this comparable allocated the purchase price between lots and vacant land, which is the allocation that Moody used. Moody noted that this allocation did not match the revenue stamps, but made no numerical adjustment for that. (Moody, 5/1/14, Pg. 45-46)
    - (d) Moody noted that the comparable had inferior waterfront as compared to the Debtor’s property. “It’s decidedly inferior...no question about it” (Moody, 5/1/14 Tr., Pg. 50). This was partly due to the 10-foot bridge that blocked access from this property to deep water. Moody testified that there is a complicated plan to dig a canal (he referred to it as “a narrow ditch”) to avoid the bridge. Despite this,

Mr. Moody made no numerical adjustment to this comparable.  
(Moody, 5/1/14, Pg. 46-50)

- (e) This comparable was also a bank sale, yet Moody made no numerical adjustment to this comparable to account for that fact.  
(Moody, 5/1/14, Pg. 50)

i. However, when Moody appraised the Governor's Island tract, which is the **only** appraisal where he made numeric adjustments, he adjusted bank sales by **fifty percent**.  
(Moody, 5/5/14 Tr., Pg. 85)

- (f) Moody noted that this comparable was generally an inferior tract, yet he made no numerical adjustment to account for that fact. (Moody, 5/1/14, Pg. 52)

(2) Comparable 2: Perquimans County tract (Blue Water)

- (a) The seller of this comparable was a Chapter 11 Debtor. Moody testified that he did not investigate the bankruptcy case at all. Moody made no numerical adjustment for the fact that it was a bankruptcy sale. (Moody, 5/1/14, Pg. 53)

- (b) This comparable was sold via a public auction, four years after the bankruptcy case was filed. Moody did not know that at the time he decided to use it as a comparable. The high bidder at the auction was not the ultimate purchaser of the property, and was a real estate broker, suggesting that the bidder sold the contract to the ultimate purchaser. Moody did not know that, and agreed that "would have been good information to have." He made no numerical adjustments for any of these facts. (Moody, 5/1/14, Pg. 53-55)

- (c) This comparable is two and a half times larger than subject, yet Moody made no numerical adjustment for that fact. (Moody, 5/1/14, Pg. 55-56)

- (d) This comparable has less water frontage than subject, yet Moody made no numerical adjustment for that fact. (Moody, 5/1/14, Pg. 57-58)

- (e) The only numerical adjustment made by Moody to this comparable was a downward adjustment of 52.8% for location. (Moody, 5/1/14, Pg. 58-61)
- (f) Moody stated that, for this subject property, he relied on this comparable more than any other. (Moody, 5/1/14, Pg. 62)
- (3) Comparable 3: Stallings sale
  - (a) This comparable is a 26 acre tract—only 10% of the size of the subject property. (Moody, 5/1/14, Pg. 63)
  - (b) This comparable is used for one single family residence, which means this comparable does not have the same Highest and Best Use as the subject. (Moody, 5/1/14, Pg. 63)
  - (c) This comparable has only 1,000 linear feet of water frontage, as compared to the subject's 15,229 linear feet of water frontage. Yet Moody made no numerical adjustment to account for that. (Moody, 5/1/14, Pg. 65)
- (4) Comparable 4
  - (a) This comparable was only half the size of the subject, with a higher ratio of wetlands than subject. Mr. Moody made no numerical adjustment for either condition. (Moody, 5/1/14, Pg. 66-68)
  - (b) Moody described this comparable as "somewhat inferior to the subject," yet made no numerical adjustments to account for that. (Moody, 5/1/14, Pg. 68)
  - (c) This comparable has only 1800 linear feet of water frontage (not even 12% of the subject's water frontage), yet Moody made no numerical adjustment. (Moody, 5/1/14, Pg. 68)
  - (d) This comparable's water frontage had depths of only 1-3 feet, as compared to the subject's 6-10 foot depths. Moody testified that one cannot even get a kayak in the water at the comparable property. Yet Moody made no numerical adjustments. (Moody, 5/1/14, Pg. 68-69)
- g. Moody's methodology was nearly the same for all of his appraisals in this case—no grids and no numeric adjustments made. (Bay River/Smith Creek: Moody, 5/1/14 Tr., Pg. 89-91); (Spring Creek: Moody, 5/1/14 Tr., Pg. 95-99); (Barnett Spencer: Moody, 5/1/14 Tr., Pg. 124-127); (Rodman Caroon: Moody, 5/1/14 Tr., Pg. 108-124); (Timber

Tracts: Moody, 5/1/14 Tr., Pg. 147); (Magnolia: Moody, 5/1/14 Tr., Pg. 179-180); (Laura Williams #17 (smaller Williams): Moody, 5/1/14 Tr., Pg. 188); (Laura Williams #16 (larger Williams): Moody, 5/1/14 Tr., Pg. 191-192); (Island Creek Tract: Moody, 5/5/14 Tr., Pg. 40-42); (Mallory Tract: Moody, 5/5/14 Tr., Pg. 62-67, 72); (

h. Moody has been an appraiser for a long time. {He is currently on the North Carolina Appraiser Board. He should know what he is doing. It is because he knows what he is doing, that one has to question why he did it this way, this time. He testified that he has done many appraisal reports where he showed his math. (Moody, 5/1/14, Pg. 71)

i. USPAP addresses this.

(1) **USPAP Standards Rules 1-1(c.) (Pg. U-16)** In developing a real property appraisal, an appraiser must: (a) be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal assignment. (b) not commit a substantial error of commission or **omission** that significantly affects an appraisal (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually may not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.

(2) **Standards Rule 2: REAL PROPERTY APPRAISAL, REPORTING. (Pg. U-21)** In reporting the results of a real property appraisal, an appraiser must communicate each analysis, opinion and conclusion in a manner that is not misleading

(3) **Standards Rule 2-1.** Each written or oral real property appraisal report must:

- (a) Clearly and accurately set forth the appraisal in a manner that will not be misleading
- (b) Contain sufficient information to enable the intended users of the appraisal to understand the report properly and,
- (c) Clearly and accurately disclose all assumptions, extraordinary assumptions, hypothetical conditions and limiting conditions in an assignment

12. Comparables used by Moody for "Development Tracts" (as that term was used by the seller/lender in the purchase contract and other closing documents), which did not have a

Highest and Best Use of residential development, should not be considered.

- a. Moody testified that the Highest & Best Use drives which comparables an appraiser will use in his appraisal. (Moody, 4-30-14 Tr., Pg. 165-166).
- b. Moody testified that an appraiser cannot consider any comps that do not have the same Highest & Best Use as the subject—otherwise, “the effect would be a misleading value because you’d be using data that is not consistent with the highest and best use of the property.” (Moody, 4/30/14 Tr., Pg. 166). Cross also testified that “what makes a sale comparable to the subject” is “[o]ne that is similar in highest and best use.” (Cross, 3/17/14 Tr., Pg. 124).
- c. One example of how Highest and Best Use can have a dramatic effect on value:  
Island Creek Tract
  - (1) 2009 appraisal by Shaw commissioned by a third party: \$19.6 million, or \$10,600/acre (Moody, 5/5/14 Tr., Pg. 47-48).
  - (2) 2009 appraisal by Worsley commissioned by a third party: \$18.6 million, or \$10,100/acre (Moody, 5/5/14 Tr., Pg. 47).
  - (3) 2014 appraisal by Cross: \$16.5 million, or \$9,600 per acre (Debtor Ex. 19b)
  - (4) 2014 appraisal by Moody: \$4.3 million, or \$2,500 per acre (including timber) (BLC Ex. 19b)

C. Market:

1. Moody agreed with everything on the exhibits that contained Cross’ summaries of the relevant real estate market. (Moody, 5/1/14, Pg. 22-30) (BLC Ex. 268) (Debtor Ex. 60, 63)
2. Pamlico County
  - a. During his testimony on direct examination, Moody made the sweeping statement that “At this point in time, there are no subdivisions in Pamlico County that are doing really well. Really well means to me that they’re selling lots, of greater two or three lots a month and they’ve got a cash flow that’s paying all of their carrying costs and paying their debt.” (Moody, 4/30/14 Tr., Pg. 155)
  - b. However, on cross-examination, Moody admitted that he did not have any specifics on that, as to any particular subdivision. (Moody, 5/1/14, Pg. 26-27)
  - c. Moody admitted that he did not know anything about the subdivisions in Pamlico County that are doing well, but had no reason to dispute Cross’ findings in that regard. (Moody, 5/1/14, Pg. 23-24)

- d. Moody admitted that he was only aware of one that had undergone financial restructuring: River Dunes. (Moody, 5/1/14, Pg. 25)
    - (1) Moody said that “Ed Mitchell seems to be a lot more comfortable these days that they’re going to be able to continue on.” (Moody, 5/1/14, Pg. 25)
    - (2) Moody agreed that was “good for that project”, and good for the market in Pamlico County. (Moody, 5/1/14, Pg. 26)
  - e. Moody was not familiar with the Plantation Oak subdivision, which just received approval from the Pamlico county Planning Board for Phases 2 and 3, adding another 21 lots to the development. Three homes under construction—two pre-sold, and third under contract. (Moody, 5/1/14, Pg. 24)
  - f. Moody testified that everything Cross reported about River Dunes (the upscale community directly across the water from the Broad Creek tract) is correct, including: how River Dunes is improving; repainting of amenities; installation of additional landscaping; construction of tennis courts; construction of the new fire department; recent sales; recent construction; and the money that is being spent on improvements and marketing. (Moody, 5/1/14, Pg. 22-24)
  - g. Moody testified that everything Cross reported about Arlington Place was true: five lots sold last year; construction ongoing; plans and buildings getting approved; two cottages sold with a third under contract; boathouse facility sold; and “a great deal of interest from not only out-of-state second home buyers and retirees, but also from local Pamlico, New Bern, and Greenville buyers, as well.” (Moody, 5/1/14, Pg. 23-24)
  - h. Moody acknowledged the recent commercial activity in Pamlico County, including the new WalMart. (Moody, 5/1/14, Pg. 29)
3. Craven County
- a. Moody testified that Craven County is doing well and did not suffer the same drop in values that many other areas in eastern NC did. (Moody, 5/1/14, Pg. 195)
  - b. “Craven County seems to be doing okay [the whole time]...We don’t have these great big booms or these big busts.” (Moody, 5/1/14, Pg. 195)
  - c. “I think Craven County is—in general it appears to be a fairly stable real estate. Does it have an up and down? Yeah, but when compared to other parts of the country and some of the colleagues I’ve talked to in other parts of the country, we’re—you know, we don’t do terribly great, we don’t do terribly bad.” (Moody, 5/1/14, Pg. 196). He next agreed that Craven County is “doing better.” (Moody, 5/1/14, Pg. 196)

- d. Moody's appraisal reports discussed at length all of the subdivisions that are moving forward in Craven County right now, and the fact that those are subdivisions owned by market participants in Craven County that would not be moving forward if it were not the right time to do so. (Moody, 5/1/14, Pg. 194-196). He agreed that it was "good news for Craven County." (Moody, 5/1/14, Pg. 195). "In the long term, it's a viable market." (Moody, 5/1/14, Pg. 197)
    - (1) These are projects in the same neighborhood as the Debtor's properties and would compete with the Debtor's properties. (Moody, 5/1/14, Pg. 193)
  - e. Moody also agreed that the Magnolia Farms letter of intent from the Coastal Land Trust might have affected his opinion of value, had he known about it. (Moody, 5/5/14, Pg. 23-25)
    - (1) Though not accepted by the Debtor, that was for \$900,000.00 (\$10,588 per acre), nearly twice Moody's opinion of value for that tract. (Moody, 5/5/14, Pg. 24)
  - f. Moody admitted that Trent River lots go for \$1,000,000 in New Bern, yet he valued the water frontage on the Island Creek tract at only \$10,000 per acre. It is also noteworthy that he testified to attaching this waterfront value to only a small portion of the actual water frontage that this tract has. . (Moody, 5/5/14, Pg. 34, 43-44)
4. Brunswick County
- a. Moody did not know about the new subdivisions in Brunswick County. (Moody, 5/5/14, Pg. 74-77)
  - b. Moody was incorrect regarding the zoning of the Mallory tract. (Moody, 5/5/14 Tr., Pg. 70-72).
  - c. Moody's numbers in Brunswick County were completely wrong, for lots sold.
    - (1) Moody said there were 272 lots sold in Brunswick County in 2013. (BLC Ex. 59, Pg. 11) (Moody, 5/5/14, Pg. 78-79). The exhibit shows that the true number of lots sold in Brunswick County in 2013 was 1,329. (Debtor Ex. 70) (Moody, 5/5/14, Pg. 78-79)
  - d. Moody's numbers in Brunswick County were completely wrong, for days on market for lots. Moody said the average days on market was 266. (BLC Ex. 59, Pg. 11). The exhibit shows that the true average days on market was 151 (Debtor Ex. 70) (Moody, 5/5/14, Pg. 78-79).

- e. Moody was aware that Brunswick County is the fastest growing county in North Carolina, but was not aware that Brunswick County ranks 47<sup>th</sup> in the nation, out of 3007 counties. (Moody, 5/5/14, Pg. 73)
- f. Moody was not aware that the Mallory tract has an approved PUD for 290 homes. (Moody, 5/5/14, Pg. 72)

5. Pender County

- a. Moody's numbers in Pender County were completely wrong, for new building permits. Moody said 2013's number of building permits was sixty-three. (BLC Ex. 60, Pg. 10). The exhibit shows that the true number was 278. (Debtor Ex. 64) (Moody, 5/1/14, Pg. 210-211)
- b. Moody testified that the Rocky Point tract could not be developed, (which, obviously severely lowered his valuation) because of an access issue, then admitted he must have been incorrect. He stated that he was now satisfied that the tract has access, however, he did not offer a corrected appraisal with a revised value. (Moody, 5/5/14, Pg. 20-21)
  - (1) His prior, erroneous conclusion of no developable access was mysteriously based on his "observation," but he had not done a title search or received a title opinion from anyone. (Moody, 5/5/14, Pg. 15)
- c. Moody testified that he was worried about a railroad being put back in that might impede access, to the Rocky Point tract. However, he did not realize the state had done a feasibility study that showed it would cost \$80 million, and he agreed that it was unlikely that the state would spend money on that. (Moody, 5/5/14, Pg. 22)

6. Moody did not even consider whether the timber/agricultural tracts could be converted into farmland from timber land. (Moody, 5/1/14 Tr., Pg. 133)

- a. Moody said that the cost to clear the land would be more than the land is worth. (Moody, 5/1/14 Tr., Pg. 137)
- b. But remember the numbers from the cross-examination.
  - (1) Moody's value for the Timber tracts: \$462,500 (Exhibit 19b)
  - (2) 692 timber acres at \$4,500/acre agricultural value: \$3,114,000 (Moody, 5/1/14 Tr., Pg. 147, 152-153)
  - (3) Take out the cost to convert at \$1,500/acre, results in a value of \$2,076,000 (Moody, 5/1/14 Tr., Pg. 153)
  - (4) Bottom line: \$2,076,000 value as agricultural land vs. \$462,500 (Moody, 5/1/14 Tr., Pg. 153)

D. Chuck Moody's Bias



1. Moody has done consulting work for Bate Land Company for at least the last eleven years, on these tracts.
2. Moody appraised some of the tracts in 2003. (Moody, 5/5/14, Pg. 112)
3. Moody appraised some of the tracts in 2005. (Moody, 5/5/14, Pg. 112)
4. Moody appraised some of the tracts in 2006. (Moody, 5/5/14, Pg. 112)
5. Starting in 2009—up until at least the dates he testified in this case—Moody has acted as a paid consultant for BLC regarding these properties.
  - a. Moody has been paid hourly for this work--\$125 per hour. (Moody, 5/5/14, Pg. 113)
  - b. Moody met periodically with BLC and Stubbs and Perdue, since 2009, to talk about these properties. During these meetings, Moody discussed the values of the Debtor's properties. (Moody, 5/5/14, Pg. 105)
  - c. Moody monitored the properties, looking for any signs to show changes in values. (Moody, 5-1-14 Tr., Pg. 5-8)
  - d. Moody looked for any sign that the properties were being marketed—signs on the properties, postings on LoopNet. (Moody, 5/5/14 Tr., Pg. 97-98).
  - e. Moody produced periodic opinions of value for the properties, which he did not call “appraisals” and which had no reports or work files. (Moody, 5/5/14, Pg. 105, 107, 109)
  - f. Moody attended settlement discussions with BLC and the Debtor, prior to the filing of the Chapter 11, when there was a lawsuit between the parties in 2011. (Moody, 5/5/14, Pg. 108-109)
  - g. Since the Chapter 11 was filed, Moody has continued to act as a paid consultant for BLC. (Moody, 5/5/14, Pg. 114-115)
    - (1) Moody has not been paid transactionally for each appraisal, as is typically done with appraisers. Moody has been paid hourly for this work--\$140 per hour. Moody referred to his work in preparing the appraisals for this case, as “litigation work.” (Moody, 5/5/14, Pg. 114)
    - (2) As of the time he testified, Moody estimated that he had been paid \$35,000 so far, just for work done for BLC since the Chapter 11 was filed. (Moody, 5/5/14, Pg. 115)

- h. Moody described himself as a “litigation consultant” on the stand—which is what he has been—and he described the type of work he has done for BLC since the Chapter 11 was filed. (Moody, 5/5/14, Pg. 108)
- (1) Attending strategy sessions with BLC and its counsel. (Moody, 5/5/14, Pg. 118)
  - (2) Meeting with Ken Kirkman to discuss Cross’ appraisals (Moody, 5/5/14, Pg. 118)
  - (3) Attempting to attend the depositions of the Debtor, Mr. Cheers and Mr. Saunders; (Moody, 5/5/14, Pg. 116-117)
    - (a) When the Debtor objected, Moody sat downstairs and reviewed the documents produced by the Debtor in discovery responses all day, because “Mr. Stubbs asked me to”—it was not something that Moody suggested should be done. (Moody, 5/5/14, Pg. 100-102)
    - (b) Moody gave his hand-written summaries of that review to BLC’s counsel—and it was even introduced as an exhibit in this trial. (Moody, 5/5/14, Pg. 100-102)
  - (4) Moody attended the hearing in November on BLC’s stay motion.
    - (a) Moody prepared a list of values as of that time, for BLC’s counsel to argue that the values for all tracts were less than the debt – a “coincidental” requirement in BLC’s attempt to argue waste and subsequently argue for a lifting of the automatic stay. (Debtor Ex. 19b)
      - i. That list was prepared strictly for litigation purposes, to use at that hearing—Moody did not prepare appraisal reports to support them, and did not have work files to support them.
      - ii. Moody testified that “[t]hey were values that were determining—they were not appraisals per se, that was consulting work....so we were not doing a USPAP appraisal on these parcels, we were doing—I was doing consulting work.” (Moody, 4/30/14 Tr., Pg. 174) “That should have been marked confidential and should have been retained internally.” (Moody, 4/30/14 Tr., Pg. 175)

- iii. In its attempts to “sell high and foreclosure low,” BLC obtained values from Moody for the November 2013 hearing on its motion to lift stay—values that were coincidentally just below the claimed debt amount.
- (5) Moody attended the deposition of Karen Cross, and took notes on a yellow legal pad.
  - (a) Moody discussed his notes with BLC’s counsel during the breaks at the deposition, and told her what questions to ask Ms. Cross. (Moody, 5/5/14, Pg. 117-118)
  - (b) Moody gave his legal pad to BLC’s counsel during the deposition. BLC’s counsel read from it, when asking questions of Ms. Cross. (Moody, 5/5/14, Pg. 117-118)
- (6) Moody assisted BLC’s counsel in preparation for the hearing, particularly with respect to the cross-examination of Ms. Cross. (Moody, 5/5/14, Pg. 116)
- i. Mr. Moody’s activities matter, because USPAP prohibits such dual roles, and that must go to the credibility of Mr. Moody’s testimony and the weight this court gives to his appraisal reports. (USPAP Ethical Rules and Advisory Opinion 4 (USPAP, Pg. U-7 and A-71) (Moody, 5/5/14, Pg. 119-124)
  - (1) “an appraiser must promote and preserve the public trust inherent in appraisal practice by observing the highest standards of professional ethics, must comply with USPAP and obligated by law or regulation or by agreement with the client or intended users. In addition to these requirements, an individual should comply any time that individual represents that he or she is performing the service as an appraiser.” (USPAP, Pg. U-7) (Moody, 5/5/14, Pg. 119)
  - (2) “an appraiser must perform assignments with impartiality, objectivity, independence and without accommodation to personal interests.” (USPAP, Pg. U-7) (Moody, 5/5/14, Pg. 119-120)
  - (3) “an appraiser must not advocate the cause or interest of any party or issue.” (USPAP, Pg. U-7) (Moody, 5/5/14, Pg. 120)
  - (4) An appraiser “must not misrepresent his or her role when providing evaluation services that are outside of appraisal practice.” (USPAP, Pg. U-7) (Moody, 5/5/14, Pg. 120)

- (5) In the “litigation services” section of the Advisory Opinions, it gives an example of an appraiser (“Marie”) who has been hired to act as a litigation consultant. “She commonly aids attorneys in developing cross-examination strategies for expert witness testimony from appraisers. How does USPAP apply in Marie’s litigation services?” (USPAP, Pg. A-71) (Moody, 5/5/14, Pg. 120-121)
  - (6) “As an appraiser, Marie cannot act as an advocate for any party or issue.” (USPAP, Pg. A-71) (Moody, 5/5/14, Pg. 121)
  - (7) “If Marie’s services include providing an opinion of value, she must also comply with the appropriate appraisal standards, Standards 1, 2, 7, 8, 9 and 10. If Marie’s services include providing an opinion about the quality of another appraiser’s work, the appraisal review requirements Standard 3 apply.” (USPAP, Pg. A-71) (Moody, 5/5/14, Pg. 121)
  - (8) “If Marie provides litigation services as an advocate, then she is providing a valuation service outside of appraisal practice.” (USPAP, Pg. A-71) (Moody, 5/5/14, Pg. 123)
  - (9) “When performing services outside of appraisal practice, Marie can act as an advocate and accept contingent compensation. The only USPAP obligation is that she not misrepresent her role. She must use care to distinguish her role from other roles that would carry an expectation of being impartial, objective and independent, i.e., acting as an appraiser.” (USPAP, Pg. A-71) (Moody, 5/5/14, Pg. 123-124)
  - (10) **“Marie may provide litigation services by either acting as an appraiser or acting as an advocate for the client’s cause. However, she must not perform both roles in the same case.”** (USPAP, Pg. A-71) (Moody, 5/5/14, Pg. 124)
- j. Moody even testified that “it’s important to keep those separate,” when referring to acting as an appraisal, and acting as a consultant, (Moody, 5/5/14, Pg. 109). But, USPAP does not say you must keep roles separate; USPAP says you must not perform both roles in the same case. Moody violated USPAP. Moody violated professional standards. Moody violated ethical standards. Moody was not impartial. Moody was not objective. Moody was not independent. Moody’s opinions of value are not credible.

6. Sales since 2006 sale by BLC to Debtor
  - a. The properties sold by the Debtor since 2006 have been sold for prices 56% higher than the Contract Prices. (Debtor Ex. 78)
  - b. If that same 56% to the Contract Value is applied to the remaining properties (\$31.4 million of Contract Value), the total would be \$49 million, which is very close to Cross's appraised values.
- E. Good Faith—the Debtor has proposed its Plan in good faith.
  1. Northen Blue
    - a. Mr. Saunders testified that “every [billing] entry [by Northen Blue] starting with the April 3, 2013 was exclusively related to Bate Land & Timber matters.” The work done prior to April 2013 was also done for the benefit of the Debtor, and the Debtor was obligated to pay Northen Blue for that work. (Saunders, 2/24/14, Pg. 40-41)
    - b. No party has filed an objection to the proof of claim filed by Northen Blue.
  2. John Deere/Revels Turf & Tractor
    - a. Mr. Revels testified that he did not have any special or side agreements with the Debtor or Mr. Saunders, with respect to the treatment of his company's claim in the Plan. (Moody, 5/5/14, Pg. 57)
    - b. Revels testified that he handled this transaction the same way he has handled other transactions when he has bought claims out of bankruptcy cases. (Revels, 5/6/14, Pg. 11)
    - c. No party has filed an objection to the proof of claim filed.
    - d. Mr. Revels' ballot accepting the plan was submitted after he bought the claim.
  3. Ability to Pay
    - a. The Debtor is not required to obtain funds to pay claims from other sources.
    - b. The Plan is feasible, as the Debtor can generate funds once it is free of BLC.
    - c. “Bate Land & Timber recognizes it needs to stand on its own. It's time for it to stand on its own. It's past time for it to stand on its own. And that's what it intends to do once it completes the process here in this Court.” (Saunders, 2/24/14 Tr., Pg. 152)
    - d. “Debtor will be able to make payments to Northen Blue starting one year from now if it doesn't have to worry about paying release fees to Bate Land Company for property sales and timber sales.” (Saunders, 2/24/14 Tr., Pg. 45)
  4. Soil Scientists
    - a. Gulley testified that all of these Development tracts can support development. They all have more than enough good soils to provide septic systems. No sewer is needed on any of those

tracts. His calculations were conservative, using the low end of absorption numbers. (Gulley, 5/15/14 Tr., Pg. 63)

- b. The video showed what Mr. Saunders accomplished at SeaScape, and that was fourteen years ago. (Debtor Ex. 75)
- c. Gulley testified that technology has improved, and costs have come down, since SeaScape was developed in the early 2000s. (Gulley, 5/15/14 Tr., Pg. 42-43)
- d. Gulley testified that consumers will not “bat an eye” at paying up to twenty-five percent of their lot price for a septic system, and these systems would be far below that. (Gulley, 5/15/14 Tr., Pg. 56)
- e. Gulley testified that “[t]he developer normally does not put in the individual septic systems on the site.” (Gulley, 5/15/14 Tr., Pg. 56) He testified that these systems could be used in part of a subdivision, or in an entire subdivision, “as needed.” (Gulley, 5/15/14 Tr., Pg. 62) He testified that the only infrastructure cost to the developer would be a small PVC pipe, which he dismissed as not being very expensive. (Gulley, 5/15/14 Tr., Pg. 67-68)
- f. The video of SeaScape showed big, beautiful homes—with these types of septic systems used.
- g. Craig Turner agreed with Tom Gulley’s testimony. When asked whether Mr. Turner agreed with Mr. Gulley’s testimony, Mr. Turner said “[b]y and large, yes. I mean, Tom and I—I hired Tom. I know him. But, yes. It’s—I listened to him state the facts as he found, and the figures. I understand how he derived his calculations. You could derive them any number of ways, but stating what he did, I followed his, and, yes.” (Turner, 5/15/14 Tr., Pg. 88)

F. Indubitable Equivalent and Seller-Financing

- a. This Court has held many times that deeding real property in satisfaction of debt is proper under 11 U.S.C. sec. 1129.
- b. The indubitable equivalence argument is even stronger in a case like this one—a case with seller-financing.
- c. Under North Carolina law, purchase-money sellers are only entitled to get property back in satisfaction of debt—nothing more. That is the only remedy afforded to the seller under North Carolina law.<sup>1</sup>
- d. The directive is simple and straight-forward: find the value, transfer enough property to satisfy the debt. There can be no question that is proper in this case..

WHEREFORE, the Debtor prays for the following:

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<sup>1</sup> This Court has ruled against the Debtor regarding the application of Contract Price as it relates to indubitable equivalence. The Debtor renews this argument, and incorporates its arguments regarding this herein, as if fully set forth.

1. That the Court confirm the Debtor's Plan; and
2. For such other and further relief as the Court deems just and proper.

DATED: 06/16/2014

s/George Mason Oliver  
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CERTIFICATE OF SERVICE

I, George M. Oliver, Post Office Box 1548, New Bern, North Carolina 28563, certify:

That I am, and at all times hereinafter mentioned was, more than eighteen (18) years of age;

That on the 16th day of June, 2014, I served copies of the foregoing Summary of Evidence on the parties electronically as indicated.

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

DATED: 06/16/2014

s/George Mason Oliver  
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TO:

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Bate Land & Timber, LLC (via email transmission)

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