UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
BENTLEY PREMIER BUILDERS, LLC,	§	CASE NO. 13-41940
	§	(Chapter 11)
	§	
DEBTOR.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CONFIRMATION OF PROPOSED, COMPETING PLANS OF REORGANIZATION

On March 28, March 31, April 1, and April 10, 2014, the Court conducted a consolidated hearing (herein "Consolidated Hearing") with respect to the following contested matters:

(1) confirmation of the competing Joint Chapter 11 Plan of Reorganization, as amended, filed by Starside LLC and the Phillip M. Pourchot Revocable Trust;
(2) confirmation of the competing Chapter 11 Plan of Reorganization, as amended, filed by Sandy Golgart;
(3) the Second Motion to Determine Claim Amounts (for Voting and Distribution Purposes) [Doc. No. 357] filed by Starside LLC and the Phillip M. Pourchot Revocable Trust;
(4) the Expedited Motion to Allow Taxing Authority to Amend Their Ballot for Purposes of Voting on the Proposed Chapter 11 Plans of Reorganization [Doc. No. 363] filed by Sandy Golgart;
(5) the Expedited Motion of the Phillip M. Pourchot Revocable Trust and Starside, LLC to Clarify and/or Reclassify Claim of Normandy Estates Homeowner's Association [Doc. No. 412] filed by Starside LLC and the Phillip M. Pourchot Revocable Trust;
(6) the Expedited Motion to Strike or Designate the Ballot of Normandy Estates Homeowners Association [Doc. No. 454] filed by Sandy Golgart; and
(7) the Motion to Designate the Ballot of Wyndsor Pointe Homeowners Association [Doc. No. 443] filed by Starside LLC and the Phillip M. Pourchot Revocable Trust (herein collectively "Contested Matters").

This consolidated opinion constitutes the Court's findings of fact and conclusions of law with respect to each of the Contested Matters in accordance with Federal Rules of Bankruptcy Procedure (herein "Bankruptcy Rules ") 7052(a)(1) and 9014(c).[1] In reaching the findings and conclusions set forth in this consolidated opinion, the Court has considered and weighed all the evidence, testimony, admitted exhibits, arguments of counsel, and pleadings and briefs filed by all parties with respect to the Contested Matters, regardless of whether or not they are specifically referred to in this consolidated opinion.

I. JURISDICTION

The Court has jurisdiction over each of the Contested Matters under 28 U.S.C. §§ 157 and 1334. The Contested Matters arise in a bankruptcy case referred to this Court by the Standing Order of Reference entered in this District. The Contested Matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2). The Court is authorized to enter a final order with respect to each of the Contested Matters.

II. CONTESTED MATTERS— RELEVANT PROCEDURAL BACKGROUND

1. On August 6, 2013 (the "Petition Date"), Bentley Premier Builders, LLC (the "Debtor") filed its Chapter 11 petition. The Debtor filed its bankruptcy schedules on August 30, 2013.

2. There are two homeowner's associations involved in the Contested Matters. The Debtor's original schedules included a disputed, unsecured debt for

[1] To the extent any findings of fact are construed to be conclusions of law, they are hereby adopted as such. Likewise, to the extent any conclusions of law are construed to be findings of fact, they are hereby adopted as such.

dues owed to Wyndsor Pointe Homeowner's Association (the "Wyndsor Pointe HOA"). The Debtor's original schedules did not include any debt for dues owed to Normandy Estates Homeowner's Association (the "Normandy Estates HOA").

3. Shortly after filing for bankruptcy, the Debtor agreed to the appointment of a Chapter 11 Trustee to oversee its operations and financial affairs.[2] On September 26, 2013, the Court entered an agreed order granting the U.S. Trustee's motion for appointment of Chapter 11 Trustee. The Court thereafter entered an order granting the U.S. Trustee's motion for appointment of Jason Searcy as the estate's Chapter 11 Trustee.

4. The original deadline for filing claims against the Debtor's estate was December 5, 2013. The Chapter 11 Trustee filed a motion to extend this bar date. His reconciliation of the Debtor's books and records had determined that the Debtor failed to include all of its obligations to creditors in the original bankruptcy schedules. The Court granted the Chapter 11 Trustee's motion and entered an order establishing a supplemental bar date of February 21, 2014.

5. Eighteen creditors filed proofs of claim during the supplemental period. Some of these creditors are listed in the Debtor's original schedules. Others are not listed.

6. The Debtor has not proposed a plan for reorganizing its business under Chapter 11 of the Bankruptcy Code. However, with the appointment of the

[2] In a typical case, the court does not appoint a trustee in a Chapter 11 bankruptcy. The Chapter 11 debtor assumes most of the duties and powers of a trustee, continuing in possession and managing the business until the court determines, upon request of a party in interest, that grounds exist for the appointment of a trustee. *See* 11 U.S.C. §§ 1101, 1104.

Chapter 11 Trustee, § 1121(c)(1) of the Bankruptcy Code permitted the non-debtor parties to file their own Chapter 11 reorganization plans for the Debtor. Accordingly, on November 27, 2013, Sandy Golgart filed her *Chapter 11 Plan of Reorganization for Bentley Premier Builders, LLC* [Docket No. 172] (the "Golgart Plan") and her *Disclosure Statement* [Docket No. 171] in support of the same.

7. On December 5, 2013, the Phillip M. Pourchot Revocable Trust (the "Pourchot Trust") filed its proof of its secured claim [Claim No. 22] (the ("Pourchot Trust Claim") in the amount of $39,064,076.87. Starside LLC filed proof of its secured claim [Claim No. 21] (the "Starside Claim" and, collectively, with the Pourchot Trust Claim, the "Pourchot Claims") on the same day, in the amount of $6,225,925.89, plus accrued interest and reasonable attorney's fees.

8. Starside and the Pourchot Trust (the "Pourchot Parties") filed their own plan of reorganization to compete with the plan proposed by Golgart. In particular, on December 6, 2013, they filed their *Joint Chapter 11 Plan of Reorganization* [Docket No. 181] (the "Pourchot Parties' Plan") and their *Disclosure Statement* [Docket No. 182] in support of same.

9. The Chapter 11 Trustee filed amended bankruptcy schedules on January 14, 2014. The amended schedules did not include any debt owed to the Normandy Estates HOA. As of the date of the amended schedules, the Normandy Estates HOA had not filed a claim against the bankruptcy estate.

10. On January 27, 2014, the Court entered an order approving the parties' disclosure statements, as amended. The parties thereafter mailed out a single

solicitation package that included both disclosure statements (with all exhibits and approved solicitation materials) and a single ballot.

11. The last date and time to cast a ballot for acceptance or rejection of the plans was March 7, 2014.

12. On February 7, 2014, Golgart filed an objection to the allowance of the Pourchot Trust Claim. On February 28, 2014, Golgart filed an objection to the allowance of the Starside Claim. Golgart objected to the Pourchot Claims on the basis that the Pourchot Claims included default interest and failed to provide an accurate calculation and basis for the calculated interest included in the Pourchot Claims, among other things.

13. On February 19, 2014, the Normandy Estates HOA filed proof of an unsecured claim in the amount of $73,219.94 [Claim #10] for unpaid homeowner's association ("HOA") dues. Golgart objected to the allowance of the claim.

14. On March 7, 2014, the Pourchot Parties filed a motion to allow their filed Claims both for voting purposes regarding the two competing plans, and to determine the allowable amounts of the Pourchot Claims for all other purposes under § 502 of the Bankruptcy Code. This motion is one of the Contested Matters. Golgart opposes the motion. In her written opposition to the motion, Golgart requests that the Pourchot Claims be temporarily allowed for voting purposes only in the principal amount of $29,439,669.62.

15. On March 19, 2014, the Normandy Estates HOA amended its proof of claim to state that it is a secured claim, under Texas law, and that it is accruing

interest. Pourchot signed the amended claim as one of the directors of the Normandy Estates.

16. On March 19, 2014, the Pourchot Parties filed a *Motion to Clarify and/or Reclassify Claim of Normandy Estates Homeowners Association.* This motion is another one of the Contested Matters. Although HOA dues are secured claims under Texas law, Golgart's proposed plan appears to classify such claims as unsecured claims.

17. The Normandy Estates HOA is comprised of three directors appointed by the Chapter 11 Trustee: (1) Phillip Pourchot, (2) Marc Powell, who also manages the Debtor's operations, and (3) Dr. Kim Castleberry. The Normandy Estates HOA voted for the plan proposed by the Pourchot Parties and against the plan proposed by Golgart. Golgart filed a motion seeking to strike Normandy Estates' ballot on the grounds that the ballot "is the vote of Phillip Pourchot in favor of his own Plan and, in bad faith, against Golgart's Plan." Golgart's motion to strike is one of the Contested Matters.

18. Prior to the end of the voting deadline, the Collin County Tax Assessor ("Collin County") voted against the Golgart Plan. As of the Petition Date, Collin County held statutory ad valorem tax liens on certain real property owned by the Debtor. The tax liens secure the repayment of ad valorem property taxes assessed against the property of the Debtor for tax years 2012 and 2013 in sum of $287,444.62. In addition, as of January 1, 2014, additional liens attached to the properties to secure repayment of taxes to be assessed for tax year 2014.

19. Collin County objected to confirmation of any plan that did not contain language specifically providing for the retention of its statutory tax liens, including liens attached for tax year 2014, until such time as all taxes, penalties and interest secured by such liens are paid in full.

20. Golgart agreed to modify her plan to provide language requested by the taxing authority in its objection to her plan. On March 12, 2014, Golgart filed a *Motion to Allow Taxing Authority to Amend Their Ballot for Purposes of Voting on the Proposed Chapter 11 Plans of Reorganization*. This motion is one of the Contested Matters. The Pourchot Parties oppose the motion, arguing that it is a calculated effort by Golgart, in bad faith, to obtain confirmation of her plan. The Pourchot Parties contend that, without Collin County's affirmative ballot, Golgart does not have an impaired class of creditors consenting to her plan and, thus, her plan cannot go forward.

21. On March 24, 2014, the Pourchot Parties filed a *Motion to Designate the Ballot of Wyndsor Pointe Homeowners Association*. This Motion is another one of the Contested Matters. In the motion, the Pourchot Parties assert that the Wyndsor Pointe HOA initially voted against the Golgart Plan but changed its vote under suspicious circumstances. Accordingly, they argue that the Wyndsor Pointe HOA's ballot should be "designated" under § 1129(e) of the Bankruptcy Code, and neither counted as an accepting ballot for the Golgart Plan, nor as a rejecting ballot against the Pourchot Parties' Plan.

III. FACTUAL BACKGROUND AND FINDINGS OF FACT

1. The Debtor is a Texas limited liability company formed on or about July 17, 2007. Phillip M. Pourchot (50% owner) and Sandy Golgart (50% owner) were the initial members of the Debtor. The members executed a Company Agreement dated October 30, 2007 (the "Company Agreement").

2. Pourchot and Golgart formed the Debtor to develop high-end residential real estate under the name "Bentley Premier Builders," with its principal place of business in Plano, Collin County, Texas.

A. The Debtor Purchases Real Property

3. According to the expert testimony at trial, the real estate market in the Dallas – Fort Worth area expanded rapidly between 1997 and 2007. Sales began dropping in 2008 and hit bottom in 2011. Pourchot and Golgart, however, were not victims of the real estate market. They hoped to profit by buying property while it was cheap and selling it as the local real estate market improved.

4. Golgart and Pourchot initially capitalized the Debtor with a $1 million investment ($500,000 each). The Debtor's first investment was to buy several lots in the Wyndsor Pointe subdivision. The Debtor also purchased lots in the Normandy Estates subdivision beginning in 2008. In 2011, the Debtor acquired approximately 70 lots – all of the remaining lots – in the Normandy Estates subdivision from a distressed real estate company.

5. Some of the lots in the subdivisions are larger than other lots. The Debtor adopted names for the different sizes of lots as a marketing strategy. The

Debtor refers to the larger lots as "estate lots." The Debtor refers to the smaller lots as "villa lots," "patio lots," "town home lots," or variations of those terms.

6. Pourchot and Golgart had a personal relationship prior to forming the Debtor. Pourchot wanted Golgart to be happy and intended for her to become rich through their real estate venture. Golgart viewed the Debtor's business as her business.

B. The Debtor Borrows Funds

7. The Debtor borrowed the principal sum of $23,485,528.42 from the Pourchot Trust between 2008 and 2012 pursuant to a promissory note dated January 11, 2008 in the original principal sum of $12,000,000.00 (the "Trust Note") and multiple advances totaling $11,485,528.42 ("Subsequent Loans"). Payment of the Trust Note and the Subsequent Loans is secured by a first lien Deed of Trust on certain properties owned by the Debtor. Such documents are collectively referred to as the "Loan Documents."

8. The terms of the Trust Loan provided for a non-default interest rate of LIBOR plus .84%. The non-default interest rate under the Trust Loan is the same rate Pourchot was being charged for the funds he borrowed to loan to the Debtor. However, the Trust Note further provided that all past due principal and interest would bear interest at the maximum lawful rate.

9. In order to allow Bentley an opportunity to "get up and running," the Pourchot Trust agreed to a period of 19 months wherein interest would continue to accrue but no payments were required under the terms of the Trust Note. After the

expiration of the 19-month period, interest was to be paid each calendar quarter through maturity in January 2015.

10. The Debtor never made any payments to the Pourchot Trust under the Trust Note. Likewise, the Debtor has never made any payments to the Pourchot Trust under the Subsequent Loans.

11. The Pourchot Trust did not immediately declare the Debtor in default or immediately initiate any collection activity with respect to the Trust Note or the Subsequent Loans.

12. On January 1, 2011, Phillip Pourchot assigned his membership interest in the Debtor to the Pourchot Trust. Phillip Pourchot is the co-Trustee of the Pourchot Trust. The Pourchot Trust continues to own a fifty percent (50%) member's interest in the Debtor.

13. Under the Company Agreement, management of the Debtor is fully reserved to the members. The Debtor does not have "managers" as that term is defined in the Texas Business Organization Code.

14. In addition to amounts borrowed from the Pourchot Trust, the Debtor borrowed $7,250,000 from Sovereign Bank, as evidenced by a promissory note dated May 10, 2011, and secured by a deed of trust covering approximately 100 residential lots and two commercial lots. The Sovereign Bank note required monthly interest payments and had a one year maturity with an option for an additional 12 months.

15. Sovereign Bank asked both Golgart and Pourchot to personally guaranty the Debtor's obligations under the note. Golgart refused. Mr. Pourchot

and the Pourchot Trust provided personal guarantees of the Debtor's obligation to Sovereign Bank. In addition, in order to induce Sovereign Bank to make this loan to the Debtor, the Pourchot Trust agreed to subordinate its liens to Sovereign Bank's liens and agreed to pledge $2 million of its own (non-Debtor) assets under a Securities Account Control Agreement.

16. Thus, Golgart limited her ultimate financial exposure to her initial investment of $500,000 while Pourchot, individually or through the Pourchot Trust, had financial exposure in excess of $30,000,000.

C. Golgart and Pourchot Attempt to Sell Lots

17. The Debtor's office is located in a model home built by the Debtor in the Normandy Estates subdivision. Initially, Pourchot and Golgart were often on the Debtor's property during the week, and they hosted open houses in the model home on the weekends.

18. The personal relationship between Golgart and Pourchot deteriorated after they formed the Debtor. They sometimes spoke only through lawyers. Golgart increasingly excluded Pourchot from participating in the Debtor's business decisions.

19. As their personal relationship deteriorated, Pourchot's role in the Debtor's business became more limited. He continued to host open houses on the weekends during 2010 – 2012.

20. Pourchot and Golgart interviewed a real estate sales person in 2012. They ultimately did not hire him. Pourchot believed the particular individual they interviewed was not qualified and wanted too much for his services.

21. Pourchot and Golgart are not licensed as brokers or appraisers. Golgart priced the lots for the Debtor. Pourchot did not research the prices the Debtor was asking for its lots. He relied on Golgart's assessment of the value of the lots as well as the value of the Debtor's construction business.

22. Despite their efforts, the Debtor was not profitable. The Debtor purportedly showed a profit in 2012, according to Golgart's description of its tax return for that year, but the Debtor was not paying all of its bills during that period. The Debtor, for example, had failed to pay all of its property taxes and vendors.

23. Pourchot and Golgart did not draw salaries or receive any distributions from the Debtor.

24. The Debtor operated its business out of one bank account. Pourchot was unable to access current, online information about the Debtor's bank account after November 2012, and he demanded that Golgart provide him with documentation concerning the Debtor's financial status. By January 2013, Golgart and Pourchot were preparing for serious litigation against each other.

D. The Sovereign Bank Note Comes Due

25. In March 2013, Sovereign Bank inquired about what the Debtor proposed to do about the impending maturity date of the Sovereign Bank note on May 10, 2013. Sovereign Bank refused to consider extending the maturity date unless the Debtor began making payments on the principal balance.

26. Pourchot declined to advance additional funds to the Debtor to make interest or principle payments to Sovereign Bank. Because the Debtor did not have

the means to refinance or pay off the note, Pourchot formed Starside to acquire the interests of Sovereign Bank and its note and deed of trust. Sovereign Bank assigned such interests to Starside on or about April 19, 2013.

27. Starside thereby stepped into the shoes of Sovereign Bank. Starside did not change any of the rights or obligations of the parties. Golgart nonthless asserts that Pourchot violated Section 5.09 of the Bentley Company Agreement, which states: "The Company may transact business with any Member, Officer, or affiliate thereof, provided the terms of those transactions are no less favorable than those the Company could obtain from unrelated third parties."

28. The Debtor stopped making payments on the Sovereign Bank note after the assignment to Starside. The Debtor was not generating a profit and did not have the funds to pay Starside without additional loans or advances from Pourchot or the Pourchot Trust.

E. Litigation Ensues Between Pourchot and Golgart

29. As of March and April 2013, Pourchot believed that the Debtor's property would sell itself over time because it had so much potential if managed properly. He made a list of things he saw to be incorrect in Golgart's management of the Debtor, and he met with Golgart to discuss the issues on the list in April 2013.

30. By the time Pourchot and Golgart met in April 2013, Golgart had formed another company, HKG PROPERTIES, LLC. Pourchot had formed Starside, as previously discussed, and acquired the Sovereign Bank note and deed of trust.

31. In May 2013, Golgart hired Mark Powell to act as the Debtor's construction manager.

32. Litigation between Golgart and Pourchot ensued in May 2013 when the Pourchot Parties filed a collection action in state court. The Pourchot Parties posted their collateral for non-judicial foreclosure in August 2013. Golgart, without the consent of Pourchot, filed this bankruptcy case for the Debtor on the day of the posted foreclosure sale.[3]

33. Prior to the Debtor's bankruptcy, Golgart and the Debtor filed suit against Phillip Pourchot, the Pourchot Trust and Starside. Her claims include (a) Breach of Company Agreement, (b) Tortious Interference with the Company Agreement, (c) Shareholder Oppression, (d) Gross Negligence and Willful Misconduct, (e) Defamation (Against Pourchot), (f) Judicial Partition of Real Property, and (g) Attorney Fees as well as damages, exemplary damages, equitable relief, court costs, and interest. The defendants counterclaimed for (x) Defamation, and (y) Declaratory Judgment.

F. The Debtor's Real Estate Assets

34. The Debtor currently owns approximately 75 acres of land located generally at Spring Creek Parkway and Tennyson Parkway and commonly known as the Normandy Estates subdivision. Most of the land is subdivided into lots, and all but one of the lots is residential. A model home is located within Normandy Estates which, as previously discussed, the Debtor uses as its office.

[3] Pourchot initially sought to dismiss the bankruptcy case. He withdrew his motion to dismiss and, instead, sought the appointment of a Chapter 11 trustee to oversee the Debtor's business.

35. According to the parties' disclosure statements, briefing, and representations at the Consolidated Hearing, the Debtor has sold only seven lots since 2008.[4] All of those lots are located in the Normandy Estates subdivision.

36. The Debtor also owns 5.484 acres of property zoned commercial. The commercial lot adjoins the Normandy Estates subdivision located at the intersection of Tennyson Parkway and Corporate Drive.

37. In addition, the Debtor owns the common area property including an amenities center, guard house, fencing, pool workout facility, and related common area properties for the Normandy Estates subdivision. The Debtor, however, had not maintained the common areas prior to bankruptcy. The landscaping was in poor condition, and the gates to the subdivision were not working, among other problems.

38. The Debtor also currently owns 15 lots in Frisco, Texas, and houses on two of these lots, in what is commonly known as the Wyndsor Pointe subdivision. One of the houses is leased, and the other house is leased with an option to purchase.

G. Golgart's Management of the Debtor

39. Golgart had little experience in building homes prior to forming the Debtor. She is not a licensed builder; she is not a licensed real estate broker; she is not a licensed realtor. She had never managed a subdivision prior to her involvement with the Debtor.

40. Prior to forming the Debtor, Golgart's real estate construction experience was limited to building several homes for herself. Notwithstanding her

[4] Golgart filed a post-closing brief contending that, in fact, the Debtor sold eight lots since its inception.

scant experience, she has been the "face" of the Debtor. She has held herself out as the manager of the Debtor's business of developing subdivisions and building high-end customs homes worth hundreds of thousands to millions of dollars.

41. Golgart's testimony that the Debtor lost $6 million in pending sales as a result of the initiation of collection activity by the Pourchot Parties was not credible or supported by the documentary evidence at trial. Likewise, Golgart's testimony that the Debtor entered bankruptcy with $500,000 of uncollected accounts receivable was not credible or supported by the evidence at trial.

42. The Debtor entered into contracts to build 10 homes between 2007 and August 6, 2013 (the bankruptcy petition date). At least five of those customers fired the Debtor and hired another contractor to finish the jobs. The Debtor actually built less than one house per year on average.

43. The bids the Debtor submitted to customers were much lower than bids offered by other builders of high-end homes. The preponderance of the evidence established that the Debtor, under Golgart's management, entered into money-losing contracts for the construction of new homes.[5] Further, the Debtor's customers were unhappy with the quality of the Debtor's work.

44. Among other problems, the Debtor failed to pay all the bills due to mechanics and materialmen, and liens were placed on customers' homes. The Debtor's customers blamed Golgart for these and other problems.

[5] Golgart's position is that the Debtor should reject these money-losing contracts, leaving the homeowners with partially built homes. Pourchot, in contrast, feels that he has a moral and ethical obligation to complete the home even if that means he will personally incur a financial loss.

45. Of the limited number of houses the Debtor built or started to build for customers, six customers have asserted proofs of claim against the Debtor totaling approximately $800,000. They all voted to reject Golgart's proposed plan. Golgart signed affidavits supporting objections to the allowance of their claims after they voted against her plan. Immediately prior to the Consolidated Hearing, however, Golgart reached agreements to allow the claims of the homeowners and several other creditors for voting purposes.

46. Golgart's conflicts with customers and her management of the Debtor have depressed the value of the Debtor's business. These problems existed prior to the initiation of litigation between Golgart and Pourchot.

47. The real estate company that owned Normandy Estates prior to the Debtor failed, and the Debtor's business has shown virtually no signs of success. While the local real estate market has improved over the past several years, and other builders are constructing homes in the area, the Debtor's business has not significantly increased.

H. The Appointment of the Chapter 11 Trustee

48. When this Court appointed the Chapter 11 Trustee, one effect of such appointment was the removal of Golgart from her position as the *de facto* manager of the Debtor. The Chapter 11 Trustee then retained Marc Powell to handle the Debtor's day-to-day construction operations. Powell is earning $11,000 per month for his services.

49. The Chapter 11 Trustee discovered that the Normandy Estates HOA was not functioning. There are only 21 homes in the development, and none of the homeowners or lot owners, including the Debtor, had paid their 2013 dues. Further, the only members of the board of directors for the Association were Pourchot and Golgart.

50. The Chapter 11 Trustee asked Powell and Pourchot to serve on the board of directors for the Normandy Estates HOA during the Debtor's bankruptcy. He also asked Dr. Castleberry, who lives in the subdivision. He did not ask Golgart, because the homeowners in the Normandy Estates subdivision strongly dislike her.

51. Golgart filed a proposed Chapter 11 plan. In her plan, Golgart proposes to retain control of the Debtor's business and to satisfy the secured claims of the Pourchot Parties by giving them back some of their collateral. Golgart originally chose twelve lots, including the model home in Normandy Estates, she planned to retain. In her testimony during the Consolidated Hearing, Golgart agreed that the Debtor would transfer four additional lots to the Pourchot Parties to satisfy their secured claims.

52. The Pourchot Parties filed a competing Chapter 11 plan. An important component of the Pourchot Parties' Plan is a change in ownership and management of the Debtor. Pourchot has expressed an interest in retaining Powell to continue to manage the Debtor's day-to-day operations.

53. Pourchot has never made any money from the Debtor. He expects that he, personally, will lose money as a result of the Pourchot Parties' Plan if it is

confirmed. Pourchot testified, credibly, that he feels a moral obligation to satisfy the Debtor's obligations, especially the Debtor's obligation to its customers. He also testified that he will use at least $10 million of his personal assets to backstop the Pourchot Parties' Plan.

54. The Pourchot Parties contend that the Debtor's assets are worth less than the Debtor's obligations to them. Neither Pourchot nor Golgart will receive anything on account of their equity interests in the Debtor under the Pourchot Parties' Plan.

55. The parties disagree about the value of the Debtor's real property. Their competing plans were filed in good faith and reflect a good faith dispute over the value of the Debtor's property.

56. The Pourchot Parties filed proofs of claim totaling over $45.2 million. In their claims, the Pourchot Parties indicated that such amounts were the maximum amounts they could assert. At the Consolidated Hearing, they established that the minimum amount of such claims would be $31.4 million.

57. The minimum secured claim of the Pourchot Trust is $24,618, 581.77. The Pourchot Trust's minimum claim includes principle in the amount of $23,485,523.32 plus interest at the most conservative LIBOR rate, but excludes default interest.[6]

58. The minimum secured claim of Starside is $6,807,941.43, which is a simple calculation of outstanding principal in the amount of $6,225,925.89 plus

[6] Golgart objects to the default rate of interest for various reasons. To the extent she is relying upon the subordination agreement between the Pourchot Trust and Sovereign Bank, Golgart is confusing the timing of payments (*i.e.*, who gets paid first) with the right to payment.

interest accrued at the contractual default rate of 15% ($2,509.57 per day). Starside's minimum claim does not include reasonable costs and attorneys fees that may be allowable under § 506(b) of the Bankruptcy Code.

59. Thus, the minimum secured claim of the Pourchot Parties is $31,426,523.

60. Golgart contends that combined value of the Debtor's assets and its construction business significantly exceeds $31.4 million. At the Consolidated Hearing, she sought to establish that the Debtor's assets are worth at least $36,000,000. She proposes to reorganize the Debtor with property she values at $4,510,000 and to generate cash to pay claims by selling lots and developing homes on those lots.

61. In contrast, the Pourchot Parties presented evidence to establish that the Debtor has no equity in its property. They contend that Pourchot and Golgart are "out of the money" on account of their equity interests and that they cannot recover their equity investments in the Debtor, or any profits from the Debtor, through bankruptcy.

62. At the Consolidated Hearing, Golgart testified that she recently received interest from several unidentified parties to purchase unidentified lots owned by the Debtor for an unidentified amount. Golgart does not have a contract with any of these parties. Further, she admitted that the Chapter 11 Trustee already refused to sell a lot to one of the parties.

IV. SUMMARY OF THE COMPETING PLANS

A. The Golgart Plan

1. The issues between Golgart and Pourchot and his entities are not resolved under the Golgart Plan. They may or may not decide to continue with the pending state court litigation against each other. Golgart predicts that none of this litigation or her continuing dispute with Pourchot will affect performance of her plan.

2. Under her plan, Golgart will be the Debtor's "Managing Member." She will receive a salary of $12,000 monthly to assume the same duties she held prepetition, all allowed Claims of the Pourchot Trust and Starside will be paid by transferring some of their collateral to them, and Pourchot and his entities will no longer be creditors of the Debtor. Golgart's plan will strip the Pourchot Parties' liens from the collateral the Debtor will retain. The Pourchot Trust will remain as co-owner of the Debtor with Golgart and will have certain limited rights as a co-owner.

3. Under the Golgart Plan, all of the lots in Wyndsor Pointe, and most of the lots in Normandy Estates, would go to satisfy the secured claims of the Pourchot Parties. The Debtor would retain the model home and in seven additional lots in Normandy Estates. Golgart proposes to pay other creditors and fund her plan by selling lots and building homes. Golgart has significant personal assets, but she has not pledged to use any of those assets to fund or backstop her plan. According to

Golgart, the Debtor will not require any further investment from her in order to effectuate its proposed plan of reorganization.[7]

B. Starside and the Pourchot Trust's Joint Plan

4. Under the joint plan proposed by the Pourchot Parties, the proponents will infuse the Debtor with the capital necessary to complete any ongoing construction jobs. Under their plan, all vendors, subcontractors, home warranty claimants, HOAs and taxing authorities will be paid in full, and the Debtor will emerge with only one owner—the successful bidder at an auction. Because the Pourchot Trust and Starside have the largest financial stake in this case, they intend to credit bid up to the combined amount of their secured claims.

5. The Pourchot Parties acknowledge that there are open disputes concerning the characterization of the subsequent advances they made to the Debtor as debt or equity as well as the calculation of interest payable to the Pourchot Trust. The Pourchot Trust has filed a proof of claim for over $39 million. If their joint plan is confirmed, the Pourchot Trust will voluntarily reduce the secured portion of the claim to $23 million – or such other amount as set by the Court. Starside and the Pourchot Trust would be the last to be paid under the Pourchot Parties' Plan.

6. With respect to the proposed auction of the Debtor's equity, the Chapter 11 Trustee sent letters to prospective bidders. The prospective bidders who received letters included Golgart. The Chapter 11 Trustee did not receive any serious interest from Golgart or anyone other than the Pourchot Parties.

[7] As discussed more fully below, the Debtor's lack of sales calls into question the feasibility of the Golgart Plan.

V. LEGAL ANALYSIS AND CONCLUSIONS OF LAW

1. In addition to considering confirmation of the parties' competing plans of reorganization, the Court has several contested motions to decide. The Court will first address the motions relating to the amounts of the Pourchot Parties' claims and balloting issues. The Court will then address confirmation and, especially, the value of the Debtor's assets.

A. The Amount of the Pourchot Parties' Claims

2. Section 1126(a) of the Bankruptcy Code states, "the holder of a claim or interest allowed under section 502 of this title may accept or reject a plan." Section 502(a) provides, "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest .... objects." Thus, "only holders of claims to which no party has objected to vote on Chapter 11 plans." *Jacksonville Airport, Inc., v. Michkeldel, Inc.*, 434 F.3d 729, 731 (4th Cir. 2006).

3. Here, Golgart has objected to the allowance of the Pourchot Parties' claims. The Pourchot Parties responded to her objections.

4. At the Consolidated Hearing on March 28, 2014, the Pourchot Parties requested that the Court estimate their claims for purposes of voting and evaluating the competing plans. The parties agreed that the Court's estimation would not have preclusive effect on Golgart's pending objections to the Pourchot Parties' claims.

5. Authority to temporarily allow a claim comes from Bankruptcy Rule 3018(a), which states: "Notwithstanding objection to a claim or interest, the court

after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan."

6. The Bankruptcy Code and Bankruptcy Rules do not prescribe a method for estimating or temporarily allowing claims. However, "the bankruptcy court is governed by traditional rules governing the estimation of the ultimate value of the claim, and the bankruptcy court should use whatever method is best suited to the circumstances to fix the claim." *In re TransAmerican Natural Gas Corp.,* 79 B.R. 663, 666 (Bankr. S.D. Tex. 1987) (citing *In re Brints Cotton Marketing, Inc.,* 737 F.2d 1338, 1341 (5th Cir. 1984)). The burden of proof in a Bankruptcy Rule 3018(a) estimation process is the same as that for objections to claims. *See In re Easterly Const. Co., Inc.*, 2009 WL 3447290 at *1 (Bankr. M.D. La. Oct. 22, 2009) (citing *In re Frascella Enterprises, Inc.*, 360 B.R. 435, 458–9 (Bankr. E.D. Pa. 2007); *In re LJSC, Ltd.*, 2006 WL 2038649 at *4 (Bankr. D. Kan. May 3, 2006)).

7. In this case, at the Consolidated Hearing, the Pourchot Parties introduced evidence supporting their claims, including Pourchot's testimony and the loan and assignment documents. They established by a preponderance of the evidence that Starside acquired the Sovereign Bank note in good faith. Further, the acquisition of the Sovereign Bank note by Starside did not violate the Company Agreement.

8. The Debtor was unable to pay the Sovereign Bank note. The Sovereign Bank note was maturing, and Pourchot and the Pourchot Trust would have been liable for the balance of the note as guarantors. The Debtor would have

received a loan from Sovereign Bank without the guaranties from Pourchot and the Pourchot Trust. In addition, Sovereign Bank would not agree to extend the maturity date or refinance without additional collateral.

9. The Court concludes that the *Second Motion to Determine Claim Amounts (for Voting and Distribution Purposes)* [Doc. No. 357] filed by the Pourchot Parties, as amended at the hearing, will be **GRANTED**. The Court concludes that Starside has a secured claim in the estimated principal amount of $6,225,925.89 plus interest accrued at the contractual default rate of 15% ($2,509.57 per day). The Court further concludes that the Pourchot Trust has a secured claim in the minimum, estimated principal amount of $23,485,523.32 plus interest at the most conservative LIBOR rate. The Pourchot Trust has not established that its claim should include interest at the default rate of 17.75% – at least, not for purposes of this claim estimation.[8]

B. The Debtor's Motion to Allow Collin County to Change its Vote

10. On January 21, 2014, Collin County objected to its treatment under the Golgart Plan through its *Objection to Confirmation* [Docket No. 242]. Collin County voted against the Golgart Plan and for the Pourchot Parties' Plan by its ballot dated January 30, 2014.

11. On March 12, 2014, Golgart filed motion seeking to allow Collin County to change its vote on the Golgart Plan to an acceptance. Pursuant to Bankruptcy Rule 3018(a):

[8] Golgart objects to the default rate of interest for various reasons. To the extent she is relying upon the subordination agreement between the Pourchot Trust and Sovereign Bank, Golgart is confusing the timing of payments (*i.e.*, who gets paid first) with the right to payment.

> [A] plan may be accepted or rejected [by an entity entitled to accept or reject the plan] in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. [...] For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection.

Thus, Bankruptcy Rule 3018(a) permits a change in vote to occur on a showing of cause. The burden is on the creditor to establish "cause" to change its vote. *In re Kellogg Square Partnership*, 160 B.R. 332, 335 (Bankr. D. Minn. 1993).

12. The test for determining whether cause has been shown should often not be a difficult one to meet. As long as the reason for the vote change is not tainted, the change of vote should usually be permitted. The court must ensure only that the change is not improperly motivated. COLLIER ON BANKRUPTCY, 3018.01[4], ¶ 3018-7 (16th Ed.).

13. Here, the motivation for Collin County's vote change is not tainted by ill intent or improper motivation. Rather, it simply reflects a resolution of confirmation issues. The resolution of confirmation issues relating to Collin County is typical in the context of proposed Chapter 11 plans of reorganization. Further, Collin County's treatment is consistent with the statutory requirements of the Bankruptcy Code.

14. The Court, therefore, concludes that "cause" exists for Collin County to change its vote based upon a preponderance of the evidence. Golgart's *Motion to Allow Taxing Authority to Amend Their Ballot for Purposes of Voting on the Proposed Chapter 11 Plans of Reorganization* [Doc. No. 363] will be **GRANTED**.

C. The HOA Claims

15. Class 2.3, Other Secured Claims, of the Golgart Plan includes potential HOA claims secured by assessment liens. This case involves two such claimants – the Wyndsor Pointe HOA and the Normandy Estates HOA.

16. While the Debtor owns all or substantially all of the remaining lots in the Normandy Estates subidivision, the Debtor is simply a builder in the Wyndsor Pointe subdivision. In its original schedules, the Debtor listed the Wyndsor Pointe HOA as a creditor with a disputed claim in an unknown amount. In the amended schedules filed after the appointment of the Chapter 11 Trustee, the Debtor listed the Wyndsor Pointe HOA as an unsecured creditor with an undisputed claim in the amount of $6,814.56.

17. During the supplemental bar date period, the Wyndsor Pointe HOA filed a secured proof of a claim in the amount of $6,814.56. The Wyndsor Pointe HOA voted in favor of the Golgart Plan.

18. In contrast to the Wyndsor Pointe HOA, which the Debtor did not control, the Debtor controlled the Normandy Estates HOA prior to bankruptcy. The Debtor kept the accounting records for the Normandy Estates HOA. Golgart did not believe the Debtor owed any dues or fees to the Normandy Estates HOA prior to bankruptcy, and the Debtor did not include the Normandy Estates HOA as a creditor in its original bankruptcy schedules. The Debtor's amended bankruptcy schedules also did not include any debt owed to the Normandy Estates HOA.

19. During the supplemental bar date period, the Normandy Estates HOA filed a proof of claim in the amount of $73,719.94.[9] The Normandy Estates HOA rejected the Golgart Plan and voted in favor of the Pourchot Parties' Plan.

1. Golgart's Objection to the Claim by the Normandy Estates HOA

20. As an initial matter, Golgart objects to the allowance of the proof of claim filed by the Normandy Estates HOA. Pursuant to Bankruptcy Rule 3018(a), as previously discussed, a bankruptcy court has discretionary power to permit a disputed claim to be voted.

21. Golgart testified that she believed the Normandy Estates HOA owed the Debtor approximately $53,000 as of the petition date. She explained that this figure is based on her recollection of the Debtor's pre-bankruptcy books and records as well as her recollection of the Normandy Estates HOA's books and records. She further explained that the Debtor had advanced funds to the Normandy Estates HOA so that it could meet its obligations to homeowners by maintaining the common areas, among other things.

22. While there is no dispute that the Debtor advanced funds to the Normandy Estates HOA, Golgart's testimony as to the amount the Debtor is owed by the Normandy Estates HOA was speculative, unreliable, and not supported by the credible evidence at trial.

23. The Debtor's books and records were in disarray when the Court appointed the Chapter 11 Trustee. The books and records of the Normandy Estates

[9] Normandy Estates originally filed its claim as unsecured. It later amended the claim to state that it is secured by an assessment lien under Texas law.

HOA, which were kept by the Debtor, also were in shambles. Golgart's vague testimony regarding her recollection of these books and records was not reliable or credible evidence regarding the Debtor's obligation to the Normandy Estates HOA.

24. Following their appointment as directors of the HOA for Normandy Estates, Pourchot, Powell and Dr. Castleberry worked with the accountants for the Chapter 11 Trustee to put the Normandy Estates HOA's books and records in order. They discovered that one of the reasons the Normandy Estates HOA did not have sufficient funds to function was that the Debtor had not been paying all of the required dues to the HOA.

25. The Debtor, as one of the homeowners in Normandy Estates, owed HOA dues just like any other owner within the Normandy Estates subdivision. The Debtor did not pay all of the dues it owed to the Normandy Estates HOA. In particular, when the Debtor purchased the bulk of the lots in Normandy Estates in 2011, the Debtor did not pay any HOA dues on account of those acquired lots.

26. The Normandy Estates HOA's proof of claim is based on a detailed analysis of its transactions with the Debtor. Its proof of claim complies with the requirements of Bankruptcy Rule 3001 by alleging facts that are sufficient to support the claim. Furthermore, at trial, the Normandy Estates HOA sustained its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence. *See In re Consumers Realty & Dev. Co.*, 238 B.R. 418 (B.A.P. 8th Cir. 1999); *In re Alleghany Int'l, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992).

The Court concludes that the Normandy Estates HOA holds a secured claim against the Debtor's estate in the amount of $73,719.94.

27. The Court further concludes that the claim of the Normandy Estates HOA was timely. The order establishing a supplemental bar date for proofs of claim did not limit its scope to only certain claimants. The order applied to all creditors of the Debtor – including creditors like the Wyndsor Pointe HOA and the Normandy Estates HOA, who were certainly aware of the Debtor's bankruptcy case but did not file proofs of claim until after the Court established a supplemental filing period.[10]

2. Normandy Estates Motion to Clarify the Classification of its Claim

28. As previously discussed, the Golgart Plan does not clearly provide that HOA dues will be treated as secured claims.

29. HOA dues are secured claims under Texas law. In Texas, a homeowner's obligation to pay assessments levied by an HOA is secured by an assessment lien in favor of the HOA that attaches to each lot in the applicable community. Such lien is a contractual lien that is created by and reserved in the Declarations establishing such HOA. Further, such assessment lien is evidenced by the recordation of the Declarations in the Official Public Records of the county or counties where the property is located and there is no requirement by the HOA to record additional documents. *See Inwood North Homeowners' Association, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

[10] It is disingenuous for Golgart to object to the timeliness of the Normandy Estate HOA's proof of claim but not the proof of claim of the Wyndsor Pointe HOA, which differs from its scheduled claim and was filed even later.

30. Here, the HOA claims are secured claims under Texas law. The *Expedited Motion of the Phillip M. Pourchot Revocable Trust and Starside, LLC to Clarify and/or Reclassify Claim* [Doc. No. 412] will be **GRANTED** and the Normandy Estates HOA's claim is clarified to be a secured claim under Class 2.3 of the Golgart Plan.

3. Golgart's Motion to Strike or "Designate" the Ballot by Normandy Estates HOA

31. Even assuming the Normandy Estates HOA has an allowed, secured claim against the Debtor, Golgart argues that the Court should disqualify its vote rejecting the Golgart Plan and in favor of the Pourchot Parties' Plan. She asserts that the decision of the Normandy Estates HOA to file a claim and vote against her plan is a bad faith attempt by Pourchot and the Pourchot Parties to block confirmation of her plan.

32. Section 1126(e) of the Bankruptcy Code provides, "[o]n request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." 11 U.S.C. §1126(e). The term "good faith" as used in § 1126(e) "was intentionally left undefined, so that it might be developed in accordance with cases as they arose." *In re The Landing Assocs., Ltd.*, 157 B.R. 791, 802 (Bankr. W.D. Tex. 1993). The U.S. Supreme Court has stated "that the good faith requirement was designed to eliminate those 'obstructive tactics and holdup techniques' employed . . . to secure an unfair advantage through acceptance or rejection of the plan." *Id.* (quoting *Young v. Higbee Co.*, 324 U.S. 204, 210-11 (1945)).

33. Here, the board of directors for the Normandy Estates HOA was difficult to fill because there are so few homeowners in the subdivision, and the positions are temporary, ending when a plan is confirmed. The Chapter 11 Trustee appointed three members to serve on the board – Pourchot, as the secured lenders' representative, Mark Powell, as the Chapter 11 Trustee's representative, and Dr. Castleberry, as the homeowners' representative.[11]

34. The three members of the board met to discuss the competing plans. They reviewed copies of the plans separately and in private. They then voted privately as to which plan they preferred. All members of the board, including the only board member with no connection to the Debtor, Dr. Castleberry, voted against the Golgart Plan and in favor of the Pourchot Parties' Plan.[12]

35. The Court concludes, based on the record before it, the rejection of the Golgart Plan by the Normandy Estates HOA was in good faith. The Normandy Estates HOA was not seeking to extract better treatment from Golgart by voting against her plan. The Normandy Estates HOA was not acting with malice or seeking to obtain some advantage to which it was not otherwise entitled. The Normandy Estates HOA simply chose between two competing plans.

[11] Dr. Castleberry also is an eye doctor for both Pourchot and Golgart.

[12] Golgart argues that Normandy Estates is an insider and, therefore, its rejection of her plan should not count. Golgart cites § 1129(a)(10) of the Code in support of her argument. This provision, however, does not apply to the rejection of a proposed plan. Rather, it instructs bankruptcy courts to disregard any "acceptance" by an insider. *See In re Deluca,* 194 B.R. 797, 803 (Bankr. E.D. Va. 1996).

36. Pourchot acted in good faith in his capacity as a member the board of directors for the Normandy Estates. Further, § 1126 of the Bankruptcy Code does not require disinterestedness by creditors voting on a plan.[13]

37. A party seeking to disqualify a ballot has a heavy burden of proof. S*ee DISH Network Corp. v. DBSD North America, Inc. (In re DBSD North America, Inc.)*, 634 F. 3d 79, 101-02 (2d Cir. 2011) ("Bankruptcy courts should employ § 1126(e) designation sparingly as the 'exception not the rule.'" (quoting *In re Adelphia Communications Corp.*, 359 B.R. 54, 61 (Bankr. S.D.N.Y. 2006)). Golgart did not meet this burden. Accordingly, based on the credible evidence before the Court, Golgart's *Expedited Motion to Strike or Designate Ballot of Normandy Estates Homeowners' Association* [Doc. No. 454] will be **DENIED**.

D. The Motion by Starside and the Pourchot Trust to Strike or "Designate" the Ballot of Wyndsor Pointe HOA

38. The Pourchot Parties filed a motion seeking a finding that Golgart did not solicit the Wyndsor Pointe HOA's vote in good faith. Accordingly, they argue that the Wyndsor Pointe HOA's ballot should not be counted as an accepting ballot for the Golgart Plan or as a rejecting ballot for the Pourchot Parties' Plan.

39. The Wyndsor Pointe HOA initially voted against the Golgart Plan. Golgart called the Wyndsor Pointe HOA when she saw the ballot, and the Wyndsor Pointe HOA assured her that the ballot was a mistake. Golgart obtained a revised

[13] Other sections of the Code, in contrast, require "disinterestedness." The Code defines the term "disinterested" as a person (1) who "is not a creditor, an equity security holder, or an insider," (2) who "is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor," and (3) who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14).

ballot from the Wyndsor Pointe HOA in favor of her plan on the day the ballot was due and immediately withdrew her objection to the Wyndsor Point HOA's proof of claim.

40. The treatment the Golgart Plan provides to the HOAs is consistent with the Bankruptcy Code and applicable Texas law. Golgart did not promise the Wyndsor Pointe HOA special treatment to which it would not otherwise be entitled in order to obtain its vote in favor of her plan.

41. The Court concludes that the Pourchot Parties failed to carry their burden to establish grounds to disqualify the Wyndsor Pointe HOA's vote in favor of the Golgart Plan. The Pourchot Parties' *Motion to Designate the Ballot of Wyndsor Pointe Homeowners Association* [Doc. No. 443] will be **DENIED**.

42. With these findings and conclusions in mind, the Court now turns to the objections to confirmation of the parties' competing plans of reorganization.

E. Objections to Confirmation of the Golgart Plan

43. In order to confirm a Chapter 11 plan, the plan proponent must show, by a preponderance of the evidence, the plan complies with all applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1). If the plan does not comply with one of the applicable provisions, the plan may not be confirmed.

44. Generally, a bankruptcy court may confirm a Chapter 11 plan only if each class of creditors affected by the plan consents. *See* 11 U.S.C. § 1129(a)(8). Section 1129(b) creates an exception to that general rule, permitting confirmation of nonconsensual plans commonly known as "cramdown" plans if "the plan does not

discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

45. A bankruptcy court may only confirm one plan. If a bankruptcy court has before it competing, confirmable plans, the bankruptcy court must "consider the preferences of creditors and equity security holders in determining which plan to confirm." 11 U.S.C. § 1129(c)

46. Here, the Pourchot Parties raise several objections to the confirmation of the Golgart Plan. They object that (1) the Golgart Plan is not in the best interest of creditors; (2) the Golgart Plan does not provide them with the "indubitable equivalent" of their secured claims; (3) Golgart failed to get the necessary votes, and (4) Golgart proposed her plan in bad faith. Golgart, in turn, objects that the Pourchot Parties' Plan cannot be confirmed because it was filed in bad faith.

1. Best Interest of Creditors

47. As an initial matter, the Pourchot Parties object that the Golgart Plan is not confirmable as it is not in the best interest of creditors. Section 1129(a)(7) of the Bankruptcy Code requires a plan of reorganization to meet the "best interests of creditors" test, which requires that each dissenting creditor receive at least as much as they would in a hypothetical Chapter 7 liquidation of the Debtor. *See* 11 U.S.C. § 1129(a)(7).

48. *Collier on Bankruptcy* explains that this provision is one of the cornerstones of Chapter 11 practice. "It is an individual guaranty to each creditor or

interest holder that it will receive at least as much in reorganization as it would in liquidation." *Id.* at ¶ 1129.02[7].

49. Golgart contends that her plan provides for the surrender of collateral that would fully satisfy the secured claims of Starside and the Pourchot Trust. Thus, according to Golgart, her plan satisfies § 1129(a)(7) by providing the Pourchot Parties with at least as much as they would receive in a liquidation of the Debtor's assets. She presented her own testimony as to the value of the Debtor's assets as well as the expert testimony of Charles Horner and Earnest Gatewood.

50. Horner's real estate license qualifies him to appraise between one and four single family lots. Horner's appraisal of the fair market value of the model home in Normandy Estates for $1,400,000 was credible and persuasive. In addition, Horner's appraisal of the fair market value of one of the completed homes in Wyndsor Pointe at $850,000 was credible and persuasive.

51. Horner is not qualified to appraise subdivisions – and he did not attempt to do so in this case. Golgart, therefore, presented no expert testimony regarding the value of the Wyndsor Pointe lots – other than the one lot included in Horner's appraisal. Instead, Golgart testified as to her opinion on the value of those lots. In arriving at her lay opinion, Golgart used Horder's appraisal of one lot in Wyndsor Pointe for $200,000 to extrapolate a value for other lots and then increased the value of some of the lots that she deemed more attractive.

52. While owners are free to testify as to the value of their company's assets, courts generally give less weight to their testimony when compared to real

experts' testimony. *See In re Westwood Plaza Apts.,* 147 B.R. 692, 7010 (Bankr. E.D. Tex. 1992) ("As [the owner] is not an accredited appraiser, the court must give his testimony regarding the present value of the property less weight than that of an expert.") (citation omitted).

53. Golgart's other expert, Gatewood, previously appraised some of the Debtor's property. In March 2010, he appraised 35 "estate lots" and 34 "patio lots" or "villa lots" in Normandy Estates. He valued the cumulative retail value of the lots at $19,150,000, and his "lot absorption" rate predicted that the Debtor would sell all of the 79 lots by September 2013. The Debtor's actual sales fell far short of Gatewood's prediction regarding the lot absorption rate.

54. Gatewood appraised the Debtor's property in Normandy Estates again two days before the beginning of the Consolidated Hearing. His new appraisal substantially ignored his incorrect projection regarding the lot absorption rate in his prior proposal. Gatewood explained at the hearing that the Debtor's property had been "locked in litigation" for years and, therefore, his original lot absorption rate was inaccurate.

55. The lot absorption rate from Gatewood's prior appraisal clearly was inaccurate. But to blame the inaccurate absorption rate on litigation ignores the fact that litigation between Golgart and Pourchot did not ensue until a few months prior to bankruptcy. While the litigation may have some bearing on the lot absorption rate, Gatewood failed to account for the impact of the Debtor's poor relationship with its

customers. More than half the Debtor's customers were unhappy with the work done by the Debtor and Golgart.

56. In his current appraisal, Gatewood states that the total retail value of all the Debtor's lots in Normandy Estates, including the model home, is $30,335,000. He predicts that the Debtor will sell all of the 69 remaining unsold lots in Normandy Estates within 4.5 years. The lot absorption rate assumed in Gatewood's report is not reasonable or reliable under the facts of this case.

57. Based on her testimony and the appraisals of her experts, Golgart asserts that the total retail value of the Debtor's real estate assets is at least $36,033,830. This includes $2,600,000 for the lots in Wyndsor Pointe, $1,775,000 for the two homes in Wyndsor Pointe, and $30,355,000 for model home and lots in Normandy Estates.

58. The Pourchot Parties presented the expert testimony of Charles Dannis with respect to the value of the Debtor's real property. Dannis' appraisal concludes that the bulk value of all the Debtor's assets is $19,600,000 and that the retail value is $26,248,182. This figure includes the Wyndsor Pointe properties, which Dannis concluded have a retail value of $2,915,789.

59. Dannis explained that the difference between his appraisal and the appraisal of Gatewood is that Gatewood did not consider the historically low lot absorption rates or all of the ramifications of such low sales. Dannis opined that many potential purchasers will look at how few homes have been built in the Normandy Estates subdivision over the past six years and assume gross

mismanagement or that the lots are overpriced or some combination. He further opined that, in his opinion, the Debtor's lots are overpriced.

60. The Court, having considered the evidence introduced at the Consolidated Hearing, concludes that the fair market value of the Debtor's real property is as follows: $8,024,005 for the Normandy Estates residential villa lots; $11,481,640 for the Normandy Estates residential estate lots; $2,200,000 for the vacant commercial lot in Normandy Estates; $1,400,000 for the model home in Normandy Estates; $1,742,793 for the Wyndsor Pointe lots; and $1,455,000 for the two completed homes in Wyndsor Pointe. The total fair market value of the Debtor's real property is $26,303,448. This is far less than even the estimated minimum amount of the Pourchot Parties' secured claims of $31 million.

61. The Debtor's construction business has no significant value.

62. In light of the Court's determination of the fair market value of the Debtor's assets, the Pourchot Parties will not receive as much under the Golgart Plan as they would in a Chapter 7 case. Their objection that the Golgart Plan does not meet the "best interest of creditors" test under § 1129(a)(7) will be **SUSTAINED**.

2. Cram Down of Starside and the Pourchot Trust

63. Even if the Golgart Plan met all of the requirements of § 1129(a), other than § 1129(a)(8), it also must satisfy the requirements set forth in § 1129(b) in order for it to be "crammed down" the throat of the Pourchot Parties. *See* 11 U.S.C. § 1129(b)(1). The valuation issue materially impacts the issue of whether the Golgart Plan satisfies these requirements.

64. Starside and the Pourchot Trust, the holders of Class 2.1 and 2.2 secured claims, respectively, voted to reject the Golgart Plan and have objected to confirmation of the Golgart Plan. Consequently, in order for the Court to confirm the Golgart Plan over the rejection of the Pourchot Parties and their objections to confirmation, the Court must find that the Golgart Plan complies with 11 U.S.C. §1129(b)(1). Specifically, the Court must find that the Golgart Plan does not unfairly discriminate against the Pourchot Parties, and that the Golgart Plan is fair and equitable with respect to the treatment of their secured claims.

65. Section 1129(b)(2)(A) of the Bankruptcy Code provides that a plan is fair and equitable with respect to a class of secured creditors if, among other things, such creditors receive "the indubitable equivalent of such claims." 11 U.S.C. § 1129(b)(2).

66. The concept of indubitable equivalence is rooted in the language of *In re Murel Holding Corp.,* 75 F.2d 941 (2nd Cir. 1935) (J. Learned Hand). *See* 124 Cong. Rec. H 11089 (daily ed. September 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6436 at 6475. In *Murel,* the court stated that

> a creditor who fears the safety of his principal will scarcely be content with ... [interest payments alone]; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that ... unless by a substitute of the most indubitable equivalence."

Murel, 75 F.2d at 942.

67. In order to satisfy the indubitable equivalence test, Golgart has proposed a plan that is colloquially referred to as a "dirt for debt" plan. Golgart

contends that the value of the real property she proposes to transfer to the Pouchot Parties is equal to or exceeds the debt the property secures, which she further contends forces the Pourchot Parties to accept less than all of their collateral as the "indubitable equivalent" of its secured claim – the so-called "dirt-for-debt" rule.

68. *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346 (5th Cir. 1989) is a seminal "dirt for debt" case. *Sandy Ridge* held that in a plan, a debtor may transfer property directly to a secured creditor in full satisfaction of that creditor's secured claim as long as the transferred property is the "indubitable equivalent" of the claim. The Fifth Circuit held that such an approach is permissible because, citing § 1123(a)(5), "[a] plan may include a 'give-back'.... Section 1123(a)(5) allows the 'distribution of all or any part of property of the estate' to creditors." *Id.* at 1352.

69. While *Sandy Ridge* authorizes "dirt for debt" plans, a court considering such a plan must consider the risks the debtor is shifting to the creditor in assessing the fair market value of property that debtor proposes to surrender. *See, e.g., In re River Road Hotel Partners, LLC,* 651 F.3d 642, 650, 651 (7th Cir. 2011) (discussing surrender of real property as "indubitable equivalent" of secured claim and extent to which credit bidding is countenanced under § 1129(b)(2)(A), the goal being to "provide the Lenders with the *current market value* of the encumbered assets"); *Sandy Ridge,* 881 F.2d at 1348, 1350 (surrender of all mortgaged property to mortgagee satisfied "indubitable equivalent" requirement and also satisfied secured claim to the extent of property's fair market value).

70. Significantly, Golgart proposes to surrender only a portion of the Pourchot Parties' collateral and to effectively strip the liens from the retained collateral. Any plan proposing a cramdown and involving only a partial surrender of collateral poses challenges and risks in the crucial process of valuation. *In re Bannerman Holdings*, LLC, 2012 WL 4260003 at *8 (E.D.N.C. October 20, 2010). Returning only a portion of a creditor's collateral shifts the burden of selling the property to the creditor and may increase its risk of exposure. *See In re Simons,* 113 B.R. 947 (Bankr. W.D. Tex. 1994).

71. In this case, under the Golgart Plan, the risk of selling the surrendered collateral at the valued amount would fall on the Pourchot Parties. Because of this material shifting of risk and potential windfall to equity, if there is any doubt regarding whether the Pourchot Parties will realize the full value their claims, then the requirements of § 1129(b)(2)(A)(iii) are not met. *In re Walat Farms, Inc.,* 70 B.R. 330, 334 (1987).

72. For example, in *In re CRB Partners, LLC*, 2013 Bankr. LEXIS 800, Case No. 11-11915 (Bankr. W.D. Tex. March 4, 2013), the debtors owned multiple parcels of land, all of which served as the bank's collateral. Under one of the filed plans, the debtor proposed to convey one of the parcels worth $1,340,000.00 to the bank in complete satisfaction of its secured claim asserted for $1,339,997.27. The debtor proposed to retain other parcels free and clear of the bank's lien. The bank objected. The bankruptcy court ruled that the nominal equity cushion unfairly increased the bank's risk and failed to give the bank the indubitable equivalent of its claim. *Id.* at 22.

73. Here, even if the fair market value of the Debtor's real property were equal to or slightly greater than the estimated minimum amount of the Pourchot Parties' secured claims, the Golgart Plan would not be fair and equitable. First, the Pourchot Parties' claims have not yet been fully litigated. While the parties agree about the minimum amount of the Pourchot Parties claims, at least for confirmation and voting purposes, the claims could be allowed in a significantly higher amount. The Golgart Plan does not account for this contingency.

74. Second, as previously discussed, the Golgart Plan proposes to shift the burden of selling the lots and the risk of loss to the Pourchot Parties. At the historical sales rate of the Debtor, and in light of the Debtor's historically poor relationship with customers, it could take more than 10 years for the returned lots to sell. Further, the Pourchot Parties would bear the costs of sale and other costs of carrying the property until the sale, including real estate taxes and HOA dues. The Golgart Plan provides a great risk to the Pourchot Parties that they will end up with less than their claim amounts by receiving only a portion of their collateral.

75. The Court concludes that the Pourchot Parties will not receive the "indubitable equivalent" of their secured claims under the Golgart Plan. The Golgart Plan fails to satisfy § 1129(b) and cannot be confirmed. The Pourchot Parties objection to "cramdown" under § 1129(b) also will be **SUSTAINED**.

3. Requirement for a Consenting, Impaired Class

76. Even if the Golgart Plan provided the Pourchot Parties with the indubitable equivalent of their claims and was in their best interests, the Pourchot

Parties contend that her plan is not confirmable because she failed to obtain the necessary votes. Section 1129(a)(10) of the Bankruptcy Code requires, as a condition to obtaining confirmation, that "at least one class of claims that is impaired under the plan has accepted the plan, determined without including the acceptance of the plan by an insider." 11 U.S.C. § 1129(a)(10).

77. The Golgart Plan relies upon Class 1, which consists of Collin County, as an impaired, consenting class. The Pourchot Parties argue that secured tax claimants such as Collin County do not constitute an impaired, consenting class.

78. Unsecured tax claims may not be classified in a Chapter 11 plan. *See* 11 U.S.C. § 1123(a)(1). In contrast, the Bankruptcy Code does not prohibit the classification of secured tax claims such as the claim of Collin County. In fact, § 1123(a)(1) says that a debtor is required classify a secured tax claim (since it is not a § 507(a)(8) claim).

79. Congress added § 1129(a)(9)(D) as part of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. Section 1129(a)(9)(D) requires plan proponents to treat secured tax claims in the same manner as unsecured tax claims, if, but for the security, the tax claim would qualify for treatment as a priority unsecured tax claim within the meaning of § 1129(a)(9)(C). Section 1129(a)(9)(C) addresses the treatment of unsecured tax claims under § 507(a)(8).

80. Courts disagree about whether or when a secured tax claim is an impaired claim entitled to vote. Compare *In re Mangia Pizza Invs., LP*, 480 B.R. 669, 677–79 (Bankr. W.D. Tex. 2012) (reasoning that secured tax creditor who accepted

treatment worse than what § 1129(a)(9)(D) required should not be given ability to vote), with *In re Greenwood Point, LP*, 445 B.R. 885, 90607 (Bankr. S.D. Ind. 2011) (concluding that secured tax creditor who received treatment in accordance with § 1129(a)(9)(D) is nevertheless an impaired claim entitled to vote).

81. Section 1124(1) broadly defines "impairment" and provides that a class of claims is impaired unless "the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." The "standard for impairment is very lenient and 'any alteration of the rights constitutes impairment even if the value of the rights is enhanced.' " *In re Wabash Valley Power Assoc., Inc.*, 72 F.3d 1305, 1321 (7th Cir. 1995) (quoting 5 COLLIER ON BANKRUPTCY ¶ 1124.03[1] (15th ed. 1994)). *See also In re Village at Camp Bowie I, L.P.*, 710 F.3d 239 (5th Cir. 2013) (discussing the meaning of "impairment" under the Bankruptcy Code).

82. In Texas, property taxes generally are due upon the receipt of the tax bill. *See* TEX. TAX CODE § 31.02(a). Here, the Golgart Plan proposes to pay Collin County's secured claim over time as she sells the Debtor's properties. The proposed treatment of Collin County's secured tax claim alters the rights of the claimant and is a significant impairment under § 1124.

83. In summary, Collin County's secured tax claim is impaired under the Chapter 11 plan proposed by Golgart. And, because the secured tax claim is allowed to be "classified," it is an impaired accepting "class," which satisfies § 1129(a)(10).

4. Feasibility of the Golgart Plan

84. Section 1129(a)(11) of the Bankruptcy Code requires a plan proponent to demonstrate that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). The courts have defined this requirement of § 1129(a)(11) as demonstrating that the plan is feasible. *In re Am. Homepatient, Inc.*, 298 B.R. 152, 169 (Bankr. M.D. Tenn. 2003); *In re Mallard Pond Ltd.*, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997); *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 507-8 (Bankr. S.D. Tex. 1989). In considering whether a plan is feasible, the proponent of the plan does not have to guarantee success, "but a court cannot confirm a visionary scheme that promises creditors more than the debtor can possibly attain after confirmation, 'notwithstanding the proponent's sincerity, honesty and willingness to make a best efforts attempt to perform according to the terms of the plan.'" *In re Mallard Pond*, 217 B.R. at 785 (quoting *In re Rack Eng'g Co.*, 200 B.R. 302, 305 (Bankr. W.D. Pa. 1996)).

85. Here, as the Court has previously explained, the value of the Debtor's assets is insufficient to satisfy all of the claims in this case. Furthermore, the Debtor has sold very few lots, and built very few homes, since its inception. Golgart failed to submit credible evidence that lot sales will improve, and customers will hire the Debtor to build their homes, after confirmation so that she can use the proceeds to

fund her plan. Golgart failed to establish that the Debtor will have sufficient liquidity to perform under her proposed plan.

86. Based on the credible evidence at the Consolidated Hearing, the Court finds and concludes that the preponderance of the evidence establishes that the Golgart Plan is not feasible.

5. Golgart's Good Faith

87. Section 1129(a)(3) requires that a plan be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start. *In re Sun Country Dev., Inc.,* 764 F.2d 406, 408 (5th Cir. 1985). "Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of § 1129(a)(3) is satisfied." *Id.* A plan may satisfy the good faith requirement even though the plan may not be one which the creditors would themselves design and indeed may not be confirmable. *In re Briscoe Enter., Ltd., II,* 994 F.2d 1160, 1167 (5th Cir. 1993). The standard of proof required to prove a Chapter 11 plan was proposed in good faith is by a preponderance of the evidence. *Id.* at 1165.

88. The Pourchot Parties argue that Golgart did not propose her plan in good faith because she has sought to compete with the Debtor by building homes in Normandy Estates under the guise of a new name (HKG PROPERTIES). They also

argue that she filed a barrage of objections to the homeowners' proofs of claim solely to prevent their votes against her plan from being counted.

89. The preponderance of the credible evidence at trial did not establish bad faith by Golgart. Golgart and the Pourchot Parties disagree about the fair market value of the Debtor's assets. In addition, Golgart adamantly disputes the substance of some of the claims filed against the Debtor, including the claims filed by some of the Debtor's customers. However, she agreed to allow the homeowners' claims for purposes of voting on the eve of the Consolidated Hearing. The Pourchot Parties' objection to the Golgart Plan based on bad faith will be **OVERRULED**.

F. Objections to Confirmation of the Pourchot Parties' Plan

90. Finally, the Court turns to Golgart's objections to the Pourchot Parties' Plan. Golgart's only objection to the Pourchot Parties' Plan prior to the Consolidated Hearing was that it was filed in bad faith. After the evidence closed, and after the parties submitted closing briefs, Golgart submitted a supplemental closing brief in which she raised new objections.

91. At the Consolidated Hearing, Golgart argued that Pourchot's actions in acquiring the Sovereign Bank note was part of a scheme to seize control of the Debtor and that the terms of the Pourchot Parties' proposed plan are further evidence of Pourchot's bad faith. The credible evidence did not support her argument. Pourchot acquired the Sovereign Bank note because of his exposure as a guarantor and because he did not want to increase his exposure.

92. Golgart also argued that Starside's claim is "invalid" because Pourchot's acquisition of the Sovereign Bank note violated Texas Business Organization Code § 101.356. She asserted that Pourchot was required to, but did not, obtain consent to the acquisition from the Debtor or Golgart.

93. Section 101.356 does not apply in this case. That section requires a majority vote before the *company* takes certain actions, but does not require a vote before a *member* takes those actions. Starside is not a member of the Debtor. Furthermore, the preponderance of evidence introduced at the Consolidated Hearing established that the Starside's acquisition of the Sovereign Bank note was intrinsically fair to the Debtor, did not alter the terms and conditions of the Debtor's obligations under the note, and did not violate the Company Agreement.

94. The terms of the Pourchot Parties' Plan also do not show any bad faith. Golgart has proposed a plan that keeps her in control of some of the Debtor's assets; the Pourchot Parties have proposed a plan that excludes all equity. The fundamental dispute is whether the Debtor's assets exceed the Pourchot Parties' secured claims. This is a good faith dispute, and the parties' competing plans are not evidence of bad faith.

95. In a supplemental post-closing brief, Golgart complains that Pourchot froze out equity bidding on the Debtor by inflating his claims. The evidence does not support Golgart's argument. The estimated minimum amounts of the Pourchot Parties' claims exceed the value of the Debtor's assets. There is no equity in the Debtor to chill.

96. Golgart also argues that the Pourchot Parties' Plan attempts to dilute her equity by failing to preserve claims that could pay her on her 50% equity position. Golgart failed to present evidence at trial that would support this argument, such as evidence of actions for alleged pre- or post-petition wrongs that could be preserved for equity and the value of those actions.

97. The parties submitted a ballot summary describing the votes they received on their competing plans of reorganization. The ballot summary reflects that creditors prefer the Pourchot Parties' Plan. With respect to unsecured creditors, the Debtor's customers with warranty and construction claims (Class 5), subcontractors (Class 2), and general unsecured claims (Class 5) preferred the Pourchot Parties' Plan.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the Golgart Plan does not meet all of the requirements of § 1129 of the Bankruptcy Code. The Golgart Plan fails to satisfy §§ 1129(a)(7), 1129(a)(11) and 1129(b)(1). The Pourchot Parties objections to confirmation of the Golgart Plan will be **SUSTAINED** as set forth in these findings and conclusions, and confirmation of the Golgart Plan will be **DENIED**.

The Pourchot Parties' Plan meets all of the requirements of § 1129, Golgart's objections to confirmation of the Pourchot Parties' Plan will be **OVERRULED** as set forth in these findings and conclusions. The Pourchot Parties are to submit separate orders consistent with these findings and conclusions within seven (7) days,

including (1) a confirmation order, (2) an order granting Golgart's motion to allow Collin County to amend its ballot, (3) an order granting the Pourchot Parties' motion to clarify and/or reclassify the Normandy Estates HOA's claim, (4) an order denying Golgart's motion to strike or designate the Normandy Estates HOA's ballot, and (5) an order denying the Pourchot Parties' motion to strike or designate the Wyndsor Pointe HOA's ballot.

Signed on 6/13/2014

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE