

POINTE OF NO RETURN: IN RE TELLICO LANDING, LLC

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I. INTRODUCTION AND OVERVIEW

This bankruptcy proceeding represents only one front in a multi-forum litigation war among several parties. The bankruptcy results in part from the recent housing crash and its chilling effect on the development of a residential community named “Rarity Pointe.” Also contributing to the proceeding were internal disputes within Tellico Landing, LLC, the entity behind Rarity Pointe. While events outside this proceeding dictated each party’s respective bankruptcy litigation goals, the Bankruptcy Code provided for the means by which each party went about pursuing those goals. This story is largely told chronologically, with occasional asides explaining how bankruptcy law affects each party’s rights, and, perhaps more importantly, how each party’s interests dictated its preferred application of bankruptcy law.

A. *Bankruptcy Generally; A Note to the Lay Reader*

Chapter 11 bankruptcy “is, in essence, a judicially-supervised negotiation process.”¹ Typically, Chapter 11 involves an effort to reorganize a struggling business so that it may continue in existence “and pay [its] creditors over time.”² The goals of Chapter 11 generally fall into two broad categories: preserving the going concern value of a distressed business and assuring equitable distribution among a distressed

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¹ THOMAS J. SALERNO ET AL., PRE-BANKRUPTCY PLANNING FOR THE COMMERCIAL REORGANIZATION 7 (2d ed. 2008), available at WestlawNext Bankruptcy Texts & Treatises.

² *Chapter 11 – Bankruptcy Basics*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (last visited July 26, 2015).

business's creditors.³ The idea behind preserving the going concern value is that the value of an operating business as a whole is greater than the sum of all its parts.⁴ Through various protections, the Bankruptcy Code (the "Code") gives distressed individuals and businesses some leverage with creditors that otherwise would not exist.

The Code sets out eligibility requirements to file under Chapter 11.⁵ Generally, individuals, partnerships, and corporations may file for Chapter 11 protection.⁶ Most banking institutions and governmental units may not seek relief under Chapter 11.⁷ The Code refers to a person who files for bankruptcy as a "debtor."⁸ A debtor may file a Chapter 11 petition in a district that contains the location of the debtor's "domicile, residence, principal place of business . . . or principal assets" within the previous 180 days of filing the petition.⁹ A debtor may additionally file a Chapter 11 petition in a district where there is a current pending Chapter 11 proceeding of a debtor's "affiliate, general partner, or partnership."¹⁰ When the debtor is a business entity, the person filing the petition must have the authority to do so.¹¹ "In absence of federal incorporation, that authority finds its source in local law."¹² If the person filing the petition has no authority to do so, the proceeding must be dismissed.¹³

Numerous considerations—legal, financial, and strategic—should pre-date filing a bankruptcy petition. Because the goal of Chapter 11 is to reorganize and preserve a business, would-be debtors need to have an exit strategy before filing.¹⁴ Proceeding with a Chapter 11 case

³ John D. Ayer, et. al., *An Overview of the Automatic Stay*, 22-Jan. AM. BANKR. INST. J. 16 (2004), available at http://www.nacmoregon.org/files/8.4_Chapter_11_-_An_Overview_of_the_Automatic_Stay.pdf.

⁴ JAY ALIX ET AL., FINANCIAL HANDBOOK FOR BANKRUPTCY PROFESSIONALS § 6.1 (2d ed. 2014), available at WestlawNext Bankruptcy Texts & Treatises.

⁵ 11 U.S.C. § 109(d) (2010).

⁶ 11 U.S.C. § 109(b), (d) (2010); 11 U.S.C. § 101(41) (2010).

⁷ 11 U.S.C. § 109(b), (d) (2010); 11 U.S.C. § 101(41) (2010).

⁸ 11 U.S.C. § 101(13) (2010).

⁹ 28 U.S.C. § 1408(1) (1984).

¹⁰ *Id.*

¹¹ *Price v. Gurney*, 324 U.S. 100, 106 (1945).

¹² *Id.*

¹³ *Id.*

¹⁴ ALIX, *supra* note 4, § 6.1.

without a strategy risks thwarting the goals behind reorganization.¹⁵ Often, though, businesses file Chapter 11 to acquire the Code's protections to fend off "impending doom."¹⁶ Frequently, debtors file petitions to delay an imminent foreclosure in residential and commercial settings without the benefit of a predetermined bankruptcy strategy.¹⁷ If the court determines the case to be a "single asset real estate" case, then creditors may be able to take advantage of Code provisions limiting the ability of a debtor to delay foreclosure.¹⁸

1. A Note on Common Debtor Protections

Among the most valuable protections bankruptcy affords debtors is the "stay."¹⁹ By filing for protection under the Code, an "estate" is created, generally consisting of any "interest in property" that belongs to the debtor.²⁰ At this time, the stay is executed, preventing creditors from pursuing or enforcing claims against the debtor or the estate.²¹ Subject to exceptions, this prevents many creditor actions, including commencing or continuing legal action against the debtor, enforcing existing judgments against the debtor, and collecting pre-petition claims against the debtor.²² In design and effect, this gives the debtor "breathing room" from creditors,²³ enabling the debtor to focus on forming a "reorganization plan" to satisfy creditor claims and, hopefully, preserve the business.

The debtor-in-possession or trustee also enjoys the general ability, subject to court approval, to assume or reject executory contracts and unexpired leases.²⁴

¹⁵ ALIX, *supra* note 4, § 6.1.

¹⁶ ALIX, *supra* note 4, § 6.1.

¹⁷ ALIX, *supra* note 4, § 6.1.

¹⁸ 11 U.S.C. § 362(d)(3) (2010).

¹⁹ Ayer, *supra* note 3.

²⁰ 11 U.S.C. § 541(a) (2014).

²¹ 11 U.S.C. § 362(a) (2010).

²² *Id.*

²³ Ayer, *supra* note 3.

²⁴ 11 U.S.C. § 365 (2005).

Upon filing under Chapter 11, a debtor continues to possess and operate the business as a “debtor[-]in[-]possession.”²⁵ This differs dramatically from Chapter 7 proceedings, where upon filing a trustee is appointed to collect the debtor’s assets, liquidate, and distribute the proceeds to creditors.²⁶ A trustee, however, will be appointed to operate a debtor’s business, where cause such as fraud or gross mismanagement by the debtor-in-possession exists.²⁷ Absent such a determination, a debtor may continue to control the day-to-day operation of the debtor’s business.²⁸

Where a trustee has not been appointed, a debtor-in-possession enjoys the exclusive right, for the first 120 days of the proceeding, to file a reorganization plan with the bankruptcy court.²⁹ Unless this 120-day exclusive period is extended, no other party to the proceeding may file a plan.³⁰ Accordingly, the debtor-in-possession initially enjoys power as a gatekeeper of plan development. This is a valuable right, as “[t]he development, negotiation, and ultimate confirmation of a reorganization plan is central to the [C]hapter 11 process.”³¹

A reorganization plan, confirmed by a bankruptcy court, can allow a debtor, with the blessing of the law, to restructure and eliminate debt.³² Furthermore, a bankruptcy judge can confirm a plan, even over the objection of a creditor, if the plan meets certain Code requirements.³³ In this sense, the plan is said to “cram down” the wishes of objecting parties.³⁴ Upon confirmation of a plan, the plan is binding on all interested parties and the debtor is discharged of pre-confirmation debts.³⁵

²⁵ 11 U.S.C. § 1107(a) (1984).

²⁶ 11 U.S.C. § 704(a) (2010).

²⁷ 11 U.S.C. § 1104(a) (2010).

²⁸ *See id.*

²⁹ 11 U.S.C. § 1121(b), (c)(1) (2005).

³⁰ 11 U.S.C. § 1121(c), (d)(1) (2015).

³¹ Mitchel Appelbaum & Elisabetta G. Gasparini, “Gifting” to Junior Classes: Can it be done? 26-Feb. AM. BANKR. INST. L. REV. 16 (2007).

³² 11 U.S.C. § 1123(b) (2005).

³³ 11 U.S.C. § 1129(b) (2010).

³⁴ *In re Sunflower Racing, Inc.*, 219 B.R. 587, 590 (Bankr. D. Kan. 1998).

³⁵ 11 U.S.C. § 1141 (2010).

Now that the reader has a foundation for understanding the basic landmarks in a typical Chapter 11 case, we turn to the case at hand. This is Tellico Landing's story.

B. *Cast of Characters*

1. *Tellico Landing, LLC* (“*Tellico Landing*”) – The debtor and namesake of the proceeding. Tellico Landing is a member-managed limited liability company with three members: Ward Whelchel, Robert Stooksbury, and LTR Properties, Inc.
2. *LTR Properties, Inc.* (“*LTR*”) – The managing member of, and 50% interest holder in, Tellico Landing. LTR Properties, Inc. is 100% owned and operated by Mike Ross.
3. *Mike Ross* (“*Ross*”) – Sole principal of LTR Properties, Inc. and high-profile real estate development known mostly for his “Rarity” property developments across East Tennessee. Ross takes a leading role in this case, with Robert Stooksbury his frequent adversary.
4. *Robert Stooksbury* (“*Stooksbury*”) – Member of, and 25% interest holder in, Tellico Landing. Stooksbury has initiated both state and federal lawsuits naming Ross as a defendant before the start of Tellico Landing's bankruptcy case. It would be an understatement to describe Stooksbury and Ross's business partnership as suffering a “falling out.”
5. *Ward Whelchel* (“*Whelchel*”) – Member of, and 25% interest holder in, Tellico Landing. Whelchel is not an active participant in the case.
6. *WindRiver Investments, LLC* (“*WindRiver*”) – Tellico Landing's largest creditor during the bankruptcy proceeding.
7. *Athena* – A South Carolina limited liability company that enters the scene late in the case, suggesting that it acquire all of LTR's assets.
8. *Resident Group Members* – Home purchasers in Tellico Landing's Rarity Pointe Development. Resident Group Members filed a lawsuit within Tellico Landing's bankruptcy proceeding, alleging that Ross, through LTR, used deposits of Resident Group

Members, paid specifically for the construction of community amenities, on other projects.

C. General Timeline of Major Events

- June 2011 – Tellico Landing files for Chapter 11 bankruptcy protection.
- July 2011 – Stooksbury requests relief from stay; claims are filed; Judge Stair recuses himself and Judge Parsons steps in.
- August 2011 – Business as usual; Tellico Landing files grim operating reports.
- September 2011 – Tellico Landing makes a big push for Debtor in Possession (“DIP”) financing; WindRiver wants a trustee appointed in the case.
- October 2011 – First reorganization plan filed with disclosure statement; objections roll in.
- November 2011 – Responses given to Resident Group adversary proceeding; WindRiver requests relief from stay.
- December 2011 – Second reorganization plan filed with disclosure statement; Tellico Landing renews its request for DIP financing.
- January 2012 – WindRiver is denied relief from stay.
- February 2012 – Tellico Landing finally receives DIP financing.
- March 2012 – Amended second reorganization plan filed; objections roll in; parties file separate motions to dismiss the case.
- April 2012 – Stooksbury replies to Tellico Landing’s responses to his motion to dismiss the case.
- May 2012 – Motion to dismiss granted.
- June 2012 – WindRiver forecloses and wins bid for the property.

- July 2012 to 2015 – Rarity Pointe renamed WindRiver: A Lakefront & Golf Community; now operating successfully.

II. PRE-FILING CONSIDERATIONS

Tellico Landing, was created in 2001 to develop a track of land in Loudon County, Tennessee, into a residential and golf development known as Rarity Pointe.³⁶ Tellico Landing was comprised of Ross, as LTR, Stooksbury, and Whelchel.³⁷ Ross owned a 50% interest.³⁸ Stooksbury and Whelchel each owned 25% interests.³⁹ LTR was the managing member of Tellico Landing.⁴⁰ At this time, Ross was making a name for himself by developing “an empire of upscale residential projects across East Tennessee.”⁴¹ To finance the development of Rarity Pointe, Tellico Landing got financing from SunTrust Bank.⁴²

In the spring of 2002, Tellico Landing executed a contract for the transfer of a part of approximately 540 acres of land (the “Property”) to LTR.⁴³ Under the terms of the contract, LTR would construct a golf course on the Property at LTR’s sole expense.⁴⁴ Upon the golf course’s

³⁶ Hugh G. Willett, *Rarity Point Developer Faces Suit*, KNOXVILLE NEWS SENTINEL, Apr. 2, 2009, <http://www.knoxnews.com/business/rarity-pointe-developer-faces-suit>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Exhibit 2 to Robert Stooksbury’s Motion to Dismiss Bankruptcy and/or Prohibit Additional Financing at 18, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 20, 2012), ECF No. 248.

⁴¹ Josh Flory, *Rarity Developer Mike Ross Indicted by Federal Authorities*, KNOXVILLE NEWS SENTINEL, Nov. 30, 2012, <http://www.knoxnews.com/business/rarity-developer-mike-ross-indicted-by-federal> [hereinafter *Rarity Developer Mike Ross*].

⁴² Josh Flory, *Rarity Pointe Auction Latest in Series*, KNOXVILLE NEWS SENTINEL, Jun. 14, 2011, <http://www.knoxnews.com/business/rarity-pointe-auction-latest-in-series> [hereinafter *Rarity Pointe Auction*].

⁴³ Exhibit 1 to WindRiver’s Memorandum in Support of WindRiver Investments LLC’s Motion for the Appointment of a Trustee at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 14, 2011), ECF No. 33-1.

⁴⁴ *Id.*

completion, Tellico Landing would transfer the golf course to LTR.⁴⁵ As compensation for management services, LTR would receive 12% of the gross sales price for each sale of real estate in the Property.⁴⁶

Each lot on the Property was sold subject to a covenant to pay an initial deposit for privileges of the “Rarity Pointe Club.”⁴⁷ These deposits, however, did not entitle lot purchasers to use the golfing facilities.⁴⁸

In 2009, Tellico Landing member Stooksbury sued Ross individually, along with a host of other entities with ties to Ross, in federal court.⁴⁹ This lawsuit accused Ross (and LTR) of violating civil Racketeer Influence and Corrupt Organization Act (“RICO”) provisions and a host of state laws in part by failing to build the golf course as contractually promised and using Tellico Landing funds to construct the golf course in contravention of LTR’s promise to build the golf course at LTR’s sole expense.⁵⁰ Stooksbury eventually obtained a default judgment in his federal suit against Ross based on Ross’s failure to comply with court discovery orders.⁵¹ Stooksbury additionally filed a lawsuit seeking Tellico Landing’s dissolution.⁵²

Later, federal authorities would indict Ross.⁵³ The indictment would allege that Ross, in multiple residential real estate developments, diverted deposits from buyers that were supposed to be spent constructing certain facilities and instead applied the deposits “for use in

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Exhibit 2 to WindRiver’s Memorandum in Support of WindRiver Investments LLC’s Motion for the Appointment of a Trustee at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 14, 2011) ECF No. 33-2.

⁴⁸ *Id.*

⁴⁹ Complaint at 1, *Stooksbury v. Ross, et al.*, No. 3:09-cv-00498 (E.D. Tenn. Nov. 18, 2009), ECF No. 1.

⁵⁰ *See generally id.*

⁵¹ Order of Default Judgment at 1-2, *Stooksbury v. Ross, et al.*, No. 3:09-cv-00498 (E.D. Tenn. Jan. 30, 2012), ECF No. 250.

⁵² *See* Motion of Robert T. Stooksbury, Jr. for Relief from Stay, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. June 6, 2011), ECF No. 10.

⁵³ *Rarity Developer Mike Ross, supra* note 41 (quoting the indictment).

other real estate ventures.”⁵⁴ Federal authorities would eventually drop the charges, citing the discovery of “new exculpatory evidence.”⁵⁵

Ross felt the wrath of the real estate bubble’s burst, as his portfolio of real estate development interests suffered losses.⁵⁶ This led to a number of lawsuits and foreclosures.⁵⁷ One of these foreclosures was to take place on July 1, 2011: the foreclosure on Tellico Landing’s Rarity Pointe development.⁵⁸ WindRiver, who had just recently acquired SunTrust’s debt in Rarity Pointe, brought the foreclosure action.⁵⁹ According to Tellico Landing’s attorney, Tellico Landing was at this point “land-rich and cash-poor.”⁶⁰ Just days before the scheduled foreclosure, Ross turned to the Bankruptcy Code.⁶¹

III. FILING, FIRST-DAY ORDERS, AND LITIGATION

A. *The Petition*

Tellico Landing filed its voluntary petition in the U.S. Bankruptcy Court for the Eastern District of Tennessee on June 27, 2011. At the time of filing, it averred that its debts were “primarily business debts” and that it “estimate[d] that funds will be available for distribution to unsecured creditors,”⁶² of which it averred there were less than fifty. The petition and supporting documentation described Tellico’s current ownership interests as LTR Properties (50% ownership), Stooksbury

⁵⁴ *Id.*

⁵⁵ Josh Flory, *Government Drops Criminal Case Against Mike Ross*, KNOXVILLE NEW SENTINEL, May 23, 2013, <http://www.knoxnews.com/business/government-moves-drop-criminal-case-against-mike-r> [hereinafter *Government Drops Criminal Case*].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Rarity Pointe Auction*, *supra* note 42.

⁵⁹ Josh Flory, *Late Move by Rarity Pointe Development Firm Cancels Auction*, KNOXVILLE NEW SENTINEL, July 1, 2011, <http://www.knoxnews.com/business/late-move-rarity-pointe-development-firm-cancels-a> [hereinafter *Late Move*].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Voluntary Petition at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. June 27, 2011), ECF No. 1.

(25%), and Whelchel (25%).⁶³ Tellico reported recent gross income at approximately \$65,000 for 2010 and less than \$30,000 for 2011.⁶⁴

Tellico Landing’s petition set out in its schedule of total assets and liabilities the following:

Real property	\$30,150,000.00
Personal property	\$10,294,352.00
Secured creditors’ claims	\$6,738,160.00
Unsecured priority claims	\$348,244.00
Unsecured non-priority claims	\$1,446,051.13 ⁶⁵

Specifically, the company listed its real property assets as “Rarity Point Resort,” with 204 residential lots, vacant land, golf course, and “Discovery Center” worth \$30 million (with a secured claim north of \$6.5 million), as well as a separate rental home valued at \$150,000.00.⁶⁶ Also listed were accounts receivable valued north of \$10 million.⁶⁷ The unsecured priority claims were exclusively back taxes owed on Tellico Landing to Loudon County and the State of Tennessee.⁶⁸ Unsecured non-priority claims amounted to miscellaneous fees accrued for legal work, street paving, signage, and property management.⁶⁹ All told, Tellico Landing filed with total assets of \$40,444,352.00 accompanied by a mere \$8,532,455.13 in total liabilities.⁷⁰ As evidenced below, Tellico Landing’s assets would lose value—and quickly.

Dissension among the ranks was evident with even a cursory glance at the petition. Interestingly enough, Tellico Landing included in

⁶³ *Id.* at 10; *see also* List of Equity Security Holders at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. June 27, 2011), ECF No. 4.

⁶⁴ Voluntary Petition, *supra* note 62, at 4.

⁶⁵ Voluntary Petition, *supra* note 62, at 12.

⁶⁶ Voluntary Petition, *supra* note 62, at 14.

⁶⁷ Voluntary Petition, *supra* note 62, at 16.

⁶⁸ Voluntary Petition, *supra* note 62, at 20.

⁶⁹ Voluntary Petition, *supra* note 62, at 21. Notably, a substantial portion of the unsecured non-priority claims were listed as reimbursements owed to none other than the three Tellico members: Ross, Whelchel, and Stooksbury. Voluntary Petition, *supra* note 62, at 21-22.

⁷⁰ Voluntary Petition, *supra* note 62, at 12.

its petition under “Schedule B - Personal Property” a claim described as a “[p]ossible cause of action for breach of fiduciary duty of one of the members, Robert Stooksbury,” listing an unknown value for that claim.⁷¹ Meanwhile, a company called WindRiver Investments, LLC, out of Knoxville, was listed as the central secured creditor.⁷² WindRiver had “[p]urportedly acquired” a secured interest in Tellico Landing’s real properties (the resort, golf course, etc.) in June 2011 and held a first mortgage on those properties.⁷³ WindRiver also held a secured interest in the rental home that Tellico Landing owned.⁷⁴ Of course, Tellico Landing noted on its petition that it disputed WindRiver’s secured claim, which was valued north of \$6.5 million.⁷⁵

In the petition, Tellico Landing noted that Lynn Tarp of Hagood, Tarp & Cox, PLLC, of Knoxville, would serve as debtor’s counsel.⁷⁶ Tellico Landing filed a Notice of Creditors Meeting with its petition, calling the meeting for one month later, on July 27, 2011 in Knoxville.⁷⁷ The meeting notice set the deadline for filing proof of creditor claims at October 25, 2011.⁷⁸ As stated in the notice, the petition filing prohibits creditors from taking collection actions, a debtor protection known as the automatic stay.⁷⁹ Moreover, the notice stated that, while creditors’ attendance is not mandatory, the debtor’s

⁷¹ Voluntary Petition, *supra* note 62, at 17.

⁷² Voluntary Petition, *supra* note 62, at 18.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See generally* Voluntary Petition, *supra* note 62. *See also* Application to Employ Counsel, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 at 1 (Bankr. E.D. Tenn. July 5, 2011), ECF No. 9 (noting that Hagood, Tarp & Cox, PLLC has 28 years of bankruptcy experience and would serve as general debtor’s counsel for \$20,000). The application was approved on July 19, 2011. Order Approving Application of Employment of Counsel, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. July 20, 2011), ECF No. 15.

⁷⁷ Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. June 27, 2011), ECF No. 6 [hereinafter Notice of Creditors Meeting].

⁷⁸ *Id.* at 1.

⁷⁹ Notice of Creditors Meeting, *supra* note 77, at 2; *see also* 11 U.S.C. § 362 (2010).

representatives *must* be present at the creditors meeting “to be questioned under oath by the trustee and by creditors,” requirements of section 341 of the Code.⁸⁰

After Ross filed the Chapter 11 petition, an attorney for Stooksbury hinted at a suspicion that this particular petition was filed “merely [as] an effort to delay foreclosure.”⁸¹ Just months before, Ross filed Chapter 11 petitions on behalf of some of his other real estate developments, also days before their respective foreclosures.⁸²

B. *Post-Petition*

Generally speaking, once a Chapter 11 debtor files its petition and manages any first-day orders, the case often slows down. During this slow-down period, which is often phrased as returning to “business as usual,” the company’s operation is anything but normal. While the DIP must attempt to operate its business(es) in a fashion so as to preserve the going concern, the DIP must simultaneously meet the requirements of the Code. Although seemingly calm on the surface, this period of a bankruptcy case can be busier than the first days after filing due to both the Bankruptcy Rules’ and Code’s demands.

Tellico Landing’s bankruptcy story, however, quickly became chaotic. Thus, the filing and resolution of the various motions and claims are best told chronologically. From here, the authors have elected to outline the action on a month-to-month basis.

C. *“First-day Orders” and How the Case Unfolded*

1. July

On July 6, 2011, just nine days after Tellico Landing filed its petition, Stooksbury filed the first motion for relief from stay.⁸³ In his motion, Stooksbury requested the automatic stay to be lifted “to allow the parties to the two referenced lawsuits to proceed with discovery, or in the alternative to allow for the termination of the consolidation of the two lawsuits in order for the lawsuit, in which the debtor is not a party,

⁸⁰ Notice of Creditors Meeting, *supra* note 77, at 2; *see also* 11 U.S.C. § 341 (2005).

⁸¹ *Late Move*, *supra* note 59.

⁸² *Late Move*, *supra* note 59.

⁸³ Motion of Robert T. Stooksbury, Jr. for Relief from Stay at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. June 6, 2011), ECF No. 10 [hereinafter *Stooksbury Relief from Stay*].

to proceed.”⁸⁴ The “two lawsuits” referenced were (1) an action that Stooksbury filed in 2009 in Blount County Chancery Court against LTR for the dissolution of Tellico Landing; and (2) a separate action that Stooksbury filed in 2009 in the same court against Ross, LTR, RPL Properties LLC, LC Development Company LLC, and Rarity Management Company LLC.⁸⁵ Because these two cases had previously been consolidated in 2009, Stooksbury needed the court to either lift the stay or terminate the consolidation so he could proceed with his case pending against Ross, LTR, and other entities, in which Tellico Landing was not included.⁸⁶

On July 8, 2011, WindRiver initiated two state court actions against Ross seeking to enforce personal guarantees Ross signed as security for Tellico Landing’s debt, which WindRiver had recently acquired.⁸⁷ Stooksbury’s Motion for Relief from Stay was granted on July 29, allowing for discovery and unconsolidation in both of the Blount County lawsuits.⁸⁸

i. *A Note on Claims*

Once a bankruptcy proceeding is initiated, a major focus of the proceeding involves “the establishment and determination of the claims against the debtor and its property.”⁸⁹ To establish a claim, a creditor may file a “proof of claim” in the proceeding.⁹⁰ If a creditor does not file

⁸⁴ *Id.*

⁸⁵ *Id.* at 1-2. These lawsuits were docketed as Nos. 09-050 and 09-057, respectively. *Id.* Tellico apparently had already filed an Answer in suit No. 09-050. *Id.* at 1.

⁸⁶ Stooksbury Relief from Stay, *supra* note 83, at 2. In essence, Stooksbury wanted to be able to proceed with discovery in case No. 09-057, which was locked down by Tellico Landing’s Chapter 11 filing. *See* Stooksbury Relief from Stay, *supra* note 83.

⁸⁷ Verified Complaint for Injunctive Relief at 9-12, 16-18, Tellico Landing, LLC v. WindRiver Investment, LLC, No. 3:11-ap-03205 (Bankr. E.D. Tenn. Aug. 22, 2011), ECF No. 1-1.

⁸⁸ Order Approving Motion of Robert T. Stooksbury, Jr. for Relief from Stay, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. July 29, 2011), ECF No. 21.

⁸⁹ W. HOMER DRAKE, JR. & CHRISTOPHER S. STRICKLAND, CHAPTER 11 REORGANIZATION § 10:1 (2d ed. 2014), available at WestlawNext Bankruptcy Texts & Treatises.

⁹⁰ 11 U.S.C. § 501 (2005).

a proof of claim, the debtor or trustee may file a claim on the creditor's behalf.⁹¹

The Code broadly defines "claim." Specifically, "claim" means a

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.⁹²

In Chapter 11, "[a] proof of claim or interest is deemed filed" if it is listed in the debtor's schedule of liabilities unless the schedule lists the claim or interest "as disputed, contingent, or unliquidated."⁹³ If the schedule does not list a claim "as disputed, contingent, or unliquidated," the debtor's schedule shall be "prima facie evidence of the validity and amount to the claim[.]"⁹⁴ If the debtor's schedule does not list a claim or lists it as disputed, contingent, or unliquidated, the creditor must file a proof of claim.⁹⁵ Failure to do so will result in loss of creditor status "with respect to such claim for the purposes of voting and distribution."⁹⁶ If the debtor's schedule does list the claim of a creditor, a creditor may supersede the scheduling of that claim by filing its own proof of claim.⁹⁷ In Chapter 11, the court will fix the time for filing claims, which may be extended under certain conditions.⁹⁸

In *Tellico Landing's* case, claims started rolling in soon after the petition was filed. The first two claims filed were for unsecured priority

⁹¹ *Id.*

⁹² 11 U.S.C. § 101(5) (2010).

⁹³ 11 U.S.C. § 1111(a) (2010).

⁹⁴ FED. R. BANKR. P. 3003(b)(1).

⁹⁵ *Id.* at (b)(1), (c)(2).

⁹⁶ *Id.* at (c)(2).

⁹⁷ *Id.* at (c)(4).

⁹⁸ *Id.*

tax claims⁹⁹ by the Loudon County Trustee and the Tennessee Department of Revenue on July 8, 2011, and July 18, 2011, for \$70,722.00 and \$129,280.99, respectively.¹⁰⁰ The Tennessee Department of Revenue also claimed \$27,070.21 as an unsecured nonpriority claim for late fees.¹⁰¹ For almost three months, these were the only claims filed against Tellico Landing.

On July 28, 2011, U.S. Bankruptcy Judge Richard Stair, Jr. recused himself from the case.¹⁰² In his place, Judge Stair ordered that all future matters would be heard by Judge Marcia Phillip Parsons.¹⁰³ The court also appointed a U.S. Trustee in place of a creditors committee, noting that an “insufficient number” of unsecured creditors were interested in forming a committee.¹⁰⁴

2. August

One of the administrative obligations of any DIP is to file monthly operating reports showing, among other things, the DIP’s profitability and cash flow.¹⁰⁵ On August 25, 2011, Tellico Landing filed its first few monthly operating reports for the June and July operating periods.¹⁰⁶ These reports showed that no executive wages had been paid,

⁹⁹ 11 U.S.C. § 507(a)(8) gives priority to unsecured government claims generally “to the extent that such claims are for” certain taxes. 11 U.S.C. § 507(a)(8) (2010).

¹⁰⁰ Loudon County Trustee Proof of Claim at Claim 1-2, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. July 13, 2011); Tenn. Dept. of Rev. Proof of Claim at Claim 2-2, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Nov. 09, 2011).

¹⁰¹ Tenn. Dept. of Rev. Proof of Claim at Claim 2-2, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Nov. 09, 2011).

¹⁰² Order of Recusal of Judge Stair and Appointment of Judge Parsons, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. July 28, 2011), ECF No. 18.

¹⁰³ *Id.*

¹⁰⁴ Notice of U.S. Trustee that no Committee of Unsecured Creditors will be Appointed, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. July 15, 2011), ECF No. 13.

¹⁰⁵ 11 U.S.C. § 308 (2010). *See also* FED. R. BANKR. P. (2015).

¹⁰⁶ Debtor’s Monthly Operating Report for the Period Ending June 2011, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Aug. 25, 2011), ECF No. 26; Debtor’s Monthly Operating Report for the Period Ending July 2011, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Aug. 25, 2011), ECF No. 27.

that no property had been sold or transferred (other than in the ordinary course of business), and that Tellico Landing had made almost no profit.¹⁰⁷

Although Stooksbury, who earlier gained relief from the stay, successfully limited some of the Code’s protections to Tellico Landing, Tellico Landing later sought to expand the Code’s protections from protecting itself to also protect Ross individually. On August 22, 2011, Tellico Landing initiated an adversary proceeding against WindRiver seeking to enjoin WindRiver from enforcing against Ross the personal guarantees Ross signed on Tellico Landing’s behalf.¹⁰⁸ Adversary proceedings, discussed more below, are separate and distinct lawsuits that occur within the forum of bankruptcy court.¹⁰⁹ In its complaint, Tellico Landing acknowledged that Ross personally guaranteed Tellico Landing’s debt.¹¹⁰ However, Tellico Landing stated that Ross was Tellico Landing’s key representative, would “be instrumental in proposing a confirmable plan,” and “should be temporarily protected from the lawsuit filed by WindRiver in order to enable him to devote most of his full time and energy to the affairs of Tellico Landing[’s]” bankruptcy proceeding.¹¹¹

3. September: Things Heat Up

Tellico Landing needed cash, one thing no business—Chapter 11 debtor or not—can live without.¹¹² Because Tellico Landing was “land-rich and cash-poor,” it was going to have to obtain outside financing to have any chance of turning Rarity Pointe around.¹¹³ To induce lenders to

¹⁰⁷ Debtor’s Monthly Operating Reports for the Period Ending June 2011, *supra* note 106; Debtor’s Monthly Operating Reports for the Period Ending July 2011, *supra* note 106.

¹⁰⁸ Verified Complaint for Injunctive Relief, *supra* note 87, at 1.

¹⁰⁹ Doron Kenter, *What’s the Difference Between a Contested Matter and an Adversary Proceeding Anyway?*, WEIL BANKR. BLOG, (Feb. 28, 2014), <http://business-finance-restructuring.weil.com/executory-contracts/whats-the-difference-between-a-contested-matter-and-an-adversary-proceeding-anyway/> (last updated Aug. 26, 2014).

¹¹⁰ Verified Complaint for Injunctive Relief, *supra* note 87, at 2-3.

¹¹¹ Verified Complaint for Injunctive Relief, *supra* note 87, at 3-4.

¹¹² Robert L. Eisenbach III, *DIP Financing: How Chapter 11’s Bankruptcy Loan Rules Can Be Used To Help A Business Access Liquidity*, IN THE (RED) THE BUS. BANKR. BLOG (Apr. 2, 2015 10:51 AM), <http://bankruptcy.cooley.com/2013/11/articles/business-bankruptcy-issues/dip-financing-how-chapter-11s-bankruptcy-loan-rules-can-be-used-to-help-a-business-access-liquidity/>.

¹¹³ *Late Move*, *supra* note 59.

extend financing to Chapter 11 debtors, the Code provides several measures to provide lenders assurance that they will recoup whatever they loan to a debtor.¹¹⁴ These measures generally give a lender (“DIP financier”) various levels of priority over other creditors.¹¹⁵ The most valuable inducement is Code section 364(d), which allows a bankruptcy court to “authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate” if credit is otherwise unavailable to a debtor *and* the current senior lien holder is adequately protected.¹¹⁶ What this means is that if a debtor cannot obtain credit on other terms, a DIP lender can secure a loan to the debtor with a lien superior or equal to any pre-existing lien on property of the estate as long as any original secured creditor(s) is/are adequately protected.

On September 12, 2011, Tellico Landing filed its first motion for DIP financing pursuant to section 364 of the Code, and asked for an expedited hearing on the issue.¹¹⁷ Tellico Landing stated that it owns the Rarity Pointe real property valued at \$30 million and owes WindRiver its principal investment of approximately \$6.7 million, a debt secured by a first priority lien on the Rarity Pointe real property.¹¹⁸ Tellico Landing argued in its motion that it required an additional \$2.75 million to reorganize to “aggressively market” its lots for sale that Tellico Landing estimated would bring in gross revenue of approximately \$22 million.¹¹⁹ Tellico Landing stated that it had obtained conditional financing from Heritage Solutions, LLC, in the amount of \$2.75 million, a deal that would provide Heritage Solutions with a superpriority lien on the Rarity Pointe real estate.¹²⁰ Stating compliance with the rules of adequate

¹¹⁴ Eisenbach, *supra* note 112.

¹¹⁵ See 11 U.S.C. § 364(b)-(d) (1994).

¹¹⁶ 11 U.S.C. § 364(d) (1994) (emphasis added).

¹¹⁷ Motion for Authority to Obtain Credit Secured by a Senior Lien on Property of the Estate that is Subject to a Lien, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 12, 2011), ECF No. 28 [hereinafter Motion for DIP Financing]; Motion for Expedited Hearing on Motion for Authority to Obtain Credit Secured by a Senior Lien on Property of the Estate that is Subject to a Lien, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 13, 2011) ECF No. 31.

¹¹⁸ Motion for DIP Financing, *supra* note 117, at 1-2.

¹¹⁹ Motion for DIP Financing, *supra* note 117, at 2.

¹²⁰ Motion for DIP Financing, *supra* note 117, at 2.

protection when affecting another creditor's interest, Tellico Landing averred that WindRiver's principal investment was adequately protected by the \$30 million value of the Rarity Pointe real estate.¹²¹ Tellico Landing amended its motion for DIP financing on September 19, 2011.¹²² However, the terms in the amendment are indistinguishable from Tellico Landing's initial motion for DIP financing.¹²³

Days later on September 14, 2011, WindRiver filed a motion under section 1104 requesting that the court order the U.S. Trustee to appoint a Chapter 11 trustee to the Tellico Landing estate.¹²⁴ Section 1104 permits a party in interest, such as WindRiver, to request that the court order the appointment of a trustee "at any time after the commencement of the case but before [plan] confirmation" either for cause (e.g. fraud, dishonesty, gross mismanagement) or if the appointment is in the parties' and estates' best interest.¹²⁵ In its supporting memorandum, WindRiver stated that it was requesting a trustee "for cause" because of LTR/Ross's fraudulent actions—to wit, the collection of membership dues for a clubhouse that was never built.¹²⁶

The next day, WindRiver also moved the court to subject Tellico Landing to the "single asset real estate" provisions of section 362(d)(3).¹²⁷ The Bankruptcy Code defines single asset real estate ("SARE") cases as "a single property or project, other than residential real property with fewer than four residential units, which generates

¹²¹ Motion for DIP Financing, *supra* note 117, at 2-3.

¹²² Amended Motion for Authority to Obtain Credit Secured by a Senior Lien on Property of the Estate that is Subject to a Lien, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 19, 2011) ECF No. 36 [hereinafter Amended Motion for DIP Financing].

¹²³ Compare Motion for DIP Financing, *supra* note 117, at 2-3, with Amended Motion for DIP Financing, *supra* note 122, at 2-3.

¹²⁴ WindRiver Investments, LLC's Motion for the Appointment of a Trustee, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 14, 2011), ECF No. 32.

¹²⁵ 11 U.S.C. § 1104 (2010).

¹²⁶ Memorandum in Support of WindRiver Investments, LLC's Motion for the Appointment of a Trustee at 3, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 14, 2011), ECF No. 33.

¹²⁷ WindRiver Investments, LLC's Motion for the Entry of an Order Determining that the Debtor is Subject to the "Single Asset Real Estate" Provisions of 11 U.S.C. § 362(d)(3), *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 15, 2011), ECF No. 34.

substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.”¹²⁸ Generally speaking, SARE bankruptcies will not be afforded the full automatic stay awarded to debtors under a normal Chapter 11 filing.¹²⁹ For example, courts may condition the stay upon a SARE debtor quickly filing a reorganization plan “that has a reasonable possibility of being confirmed within a reasonable time” or instead make interest payments adequate to compensate a lender with a lien upon the debtor’s real estate for the duration of the bankruptcy proceeding.¹³⁰

In its memorandum supporting its motion to subject Tellico Landing to the SARE provisions, WindRiver argued that Tellico Landing’s Rarity Pointe development is “clear[ly] . . . one distinct tract” and, thus, the court should grant relief from the automatic stay within 90 days unless Tellico Landing has filed a reorganization plan “that has a reasonable possibility of being confirmed” or makes monthly interest payments to its secured creditors.¹³¹ WindRiver also pointed to

¹²⁸ 11 U.S.C. § 101(51B) (2010).

¹²⁹ The Code’s provisions dealing with SARE cases grew out of perceived abuses of the Code by real estate owners who filed Chapter 11 solely to avoid foreclosure (and its resulting tax effects). Dale C. Schian, *Bankruptcy: The Nature of Single Asset Real Estate*, SCHIAN WALKER (Mar. 30, 2014), <http://www.schianwalker.com/articles/single-asset-real-estate.htm> (last updated Sept. 1, 2011). Particularly in the 1980s, “a real estate crisis (sound familiar? –Eds.) led many single asset real estate entities to” file Chapter 11 petitions, “clogg[ing] the bankruptcy courts” in some judges’ eyes. *Id.* Debtors at this time often filed these bankruptcies hoping to use the protection of the stay to ride out the downturn and “captur[e] the benefits of a market reversal.” *Id.* Consequently, many commentators “point[ed] out that the traditional policy justifications for bankruptcy, such as preserving going concern value, jobs, and providing an orderly distribution to a diverse body of creditors” do not apply to SARE cases. *Id.* While the court never rules on WindRiver’s motion to subject this case to the Code’s SARE provisions, ask yourself whether this case fits the typical SARE scenario – a last-minute attempt to starve off pending foreclosure on the (realistic or not) hope that the real estate market reverses itself before the end of the proceeding.

¹³⁰ *See* 11 U.S.C. § 362(d)(3) (2010).

¹³¹ Memorandum of Law in Support of WindRiver Investments, LLC’s Motion for the Entry of an Order Determining that the Debtor is Subject to the “Single Asset Real Estate” Provisions of 11 U.S.C. § 362(d)(3) at 3, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 15, 2011) ECF No. 35 [hereinafter Memorandum of Law in Support of WindRiver’s SARE Motion].

precedent showing that single *projects*, not just single properties, should be classified as SARE under the Code.¹³² The parties later jointly agreed to continue a hearing on the SARE determination (as well as the hearing on the appointment of a trustee) until October 24, 2011.¹³³

i. *WindRiver Responds to Tellico Landing's Attempt to Shield Ross Personally*

On September 21, 2011, WindRiver answered Tellico Landing's adversary complaint to enjoin it from Ross's personal guarantee of Tellico Landing's debt.¹³⁴ In its answer, WindRiver countered that the state court actions enforcing the personal guarantee would be simple, especially because Ross admitted that he was liable for Tellico Landing's debt.¹³⁵ Thus, WindRiver asserted that the actions would require little time.¹³⁶ WindRiver additionally noted that Ross had been involved in litigation with Stooksbury for years and that Ross had delayed these proceedings.¹³⁷ Indeed, WindRiver attached a state trial court order imposing sanctions against Ross for failing to respond to discovery requests for over two years.¹³⁸ Consequently, in WindRiver's view, its present action would require substantially less of Ross's time than the lawsuits that Ross had already been involved in at the time he filed

¹³² Memorandum of Law in Support of WindRiver's SARE Motion, *supra* note 125, at 3 (citing *In re Webb Mtn, LLC*, No. 07-32016, 2008 WL 656271, at *4 (Bankr. E.D. Tenn. Mar. 6, 2008)) (emphasis added). See also *In re Pensignorkay, Inc.*, 204 B.R. 676, 681-82 (Bankr. E.D. Pa. 1997) ("[A] tract of undeveloped land . . . that the Debtor acquired with the intention of creating subdivided parcels suitable for building and development . . . constitutes a 'single property or project.'").

¹³³ Order Continuing the Hearings on the Motion to Appoint a Trustee and SARE Determination, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 6, 2011), ECF No. 58.

¹³⁴ Answer of Windriver Investments, LLC to Verified Complaint For Injunctive Relief, *Tellico Landing, LLC v. WindRiver Investment, LLC*, No. 3:11-ap-03205 (Bankr. E.D. Tenn. Sept. 21, 2011), ECF No. 8 [hereinafter *Windriver Answer to Verified Complaint*].

¹³⁵ *Id.* at 4.

¹³⁶ *Id.* at 4.

¹³⁷ *Id.* at 4.

¹³⁸ Exhibit 1 to Answer of Windriver Investments, LLC to Verified Complaint For Injunctive Relief, *LLC v. WindRiver Investment, LLC*, No. 3:11-ap-03205 (Bankr. E.D. Tenn. Sept. 21, 2011), ECF No. 8-1.

Tellico's Chapter 11 petition.¹³⁹ Tellico Landing and WindRiver would eventually agree to a dismissal of this proceeding.¹⁴⁰

On September 23, 2009, the first of several waves of additional claims crashed onto Tellico Landing's shores.¹⁴¹ The first of these claims, filed upon behalf of a trust benefiting Bill and Ann Addison, arose out the payment of a \$20,000 "social membership" fee upon their purchase of a lot in the Rarity Pointe development.¹⁴² The proof of claim alleged that at the time of sale, Tellico Landing promised this fee was to be applied to the construction of common amenities in Rarity Pointe, such as a pool, fitness center, and tennis courts, which would be available to all Rarity Pointe social club members.¹⁴³ The proof of claim further alleged that the social membership fee was not applied toward the construction of community amenities, but rather used to construct the golf course in Rarity Pointe, to which Rarity Pointe residents had no privilege of use, although they had paid the social membership fee.¹⁴⁴

The Addisons were not alone.¹⁴⁵ Knoxville Attorney F. Scott Milligan entered his notice of appearance in the bankruptcy proceeding on September 23, 2009,¹⁴⁶ and filed proofs of claim upon behalf of the Addisons as well as twelve other claimants.¹⁴⁷ Eventually Milligan would file claims for a total of 79 claimants, totaling \$1,687,500 in unsecured

¹³⁹ Windriver Answer to Verified Complaint, *supra* note 134 at 4.

¹⁴⁰ Stipulation of Voluntary Dismissal at 1, *Tellico Landing, LLC v. WindRiver Investments, LLC*, No. 3:11-ap-03205 (Bankr. E.D. Tenn. Aug. 22, 2011), ECF No. 17.

¹⁴¹ *See, e.g.*, Addison Electing Small Bus. Trust Proof of Claim at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claim 3-1).

¹⁴² *Id.* at 3.

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *See generally In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claims No. 4-59; 60-78; 82-86).

¹⁴⁶ F. Scott Milligan Notice of Appearance at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Sept. 23, 2011), ECF No. 41.

¹⁴⁷ *See generally In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claims No. 3-1 to 15-1).

claims against Tellico Landing.¹⁴⁸ Two property owners, Robert and Lynn Mauer and Gregory and Kathleen Horn, would file social membership fee claims on their own behalf.¹⁴⁹

Aside from the social membership fee claimants, few other proofs of claims would be filed. WindRiver filed a proof of claim for the amount of secured debt it held against Tellico.¹⁵⁰ The Knoxville law firm Long, Ragsdale & Waters filed the last proof of claim for unpaid legal fees.¹⁵¹ The Tennessee Department of Revenue filed a request for payment as an administrative expense tax that was incurred since the initiation of the bankruptcy proceeding.¹⁵² Though technically not a “claim” but, rather, an “administrative expense,” the department’s request for payment of taxes, like a proof of claim, added to the list of monetary demands against Tellico Landing.

4. October: Boiling Over

Tellico Landing kicked off October by filing its first reorganization plan and accompanying disclosure statement, filing its first objections to the Resident Group Member claims, and responding to WindRiver’s motion to appoint a trustee. Tellico Landing accomplished this feat in October’s first week.

i. *Tellico Landing’s Reorganization Plan*

Tellico Landing filed its first plan on October 4, 2011.¹⁵³ The development and confirmation of a Chapter 11 plan lies at the heart of the Chapter 11 process. Generally, with some exceptions, a confirmed

¹⁴⁸ See generally *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claims No. 4-58; 60-78; 82-86).

¹⁴⁹ Robert and Lynn Mauer Proof of Claim at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claim No. 59-1); Gregory and Kathleen Horn Proof of Claim at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claim No. 82-1).

¹⁵⁰ WindRiver Proof of Claim at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claim No. 81-1).

¹⁵¹ Long, Ragsdale & Waters Proof of Claim at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claim No. 88-1).

¹⁵² Tenn. Dept. of Rev. Request for Payment of Admin. Expense at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. 2011) (Claim No. 87-2).

¹⁵³ Tellico Landing Plan of Reorganization at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 4, 2011), ECF No. 47.

Chapter 11 plan discharges a debtor from debts arising before the date of a plan's confirmation.¹⁵⁴ A plan must separate creditors into classes of similarly situated claims and give each class as least as much as the class would receive if the debtor's business were liquidated.¹⁵⁵ By the Bankruptcy Code's terms, each class of creditors votes on whether to accept or reject the plan.¹⁵⁶ To accept a plan, a class must vote by at least one-half in number of creditors and two-thirds in amount of the creditors' claims of the creditors actually voting.¹⁵⁷ However, the Code allows a plan to be "crammed down" on dissenting creditors as long as at least one class of creditors assents to the plan and the plan satisfies each creditor's claim in full, *or* provides that creditors junior in priority to any creditor not paid in full receive nothing under the plan.¹⁵⁸ Essentially, this means that claims can only be paid in accordance with their priority level; if a claim is not paid in full, no other junior claim can receive anything.

In its plan, Tellico Landing created ten classes of creditors, of which Tellico Landing designated all but one as "impaired."¹⁵⁹ The plan provided that Heritage Solutions, LLC ("Heritage") would provide up to \$2.75 million in post-petition financing to Tellico Landing, for which Heritage would receive a lien upon Rarity Pointe senior to that of other creditors, including WindRiver.¹⁶⁰ In short, Tellico Landing's plan contemplated that Tellico Landing would use new financing to pay off claims and rejuvenate Rarity Pointe Marketing efforts to generate new revenue to pay everyone in full (except that Tellico Landing still disputed the validity of the Resident Group claims).¹⁶¹

Tellico Landing would use its post-petition financing to first pay all Class 1 priority tax claims to Loudon County, Tennessee (the sole member of the plan's only unimpaired class), in full upon the plan's

¹⁵⁴ 11 U.S.C. § 1141(d)(1)(A) (2010).

¹⁵⁵ 11 U.S.C. § 1129(a) (2010).

¹⁵⁶ 11 U.S.C. § 1129(a)(7) (2010).

¹⁵⁷ 11 U.S.C. § 1126(c) (1984).

¹⁵⁸ 11 U.S.C. § 1129(b)(2) (2010).

¹⁵⁹ Tellico Landing Plan of Reorganization, *supra* note 153, at 2.

¹⁶⁰ Tellico Landing Plan of Reorganization, *supra* note 153, at 2-3.

¹⁶¹ Tellico Landing Plan of Reorganization, *supra* note 153.

confirmation.¹⁶² Tellico Landing also would pay Class 2, the Tennessee Department of Revenue, its tax claim in full over 60 monthly installments.¹⁶³ This tax claim would not be discharged until paid in full.¹⁶⁴ Heritage itself was the sole Class 3 creditor, and would be repaid in three years at 8% interest.¹⁶⁵ The plan provided that Tellico Landing would pay WindRiver, the sole Class 4 creditor, the balance of its loan with monthly payments over five years at 4.25% interest.¹⁶⁶ Should Rarity Pointe sales fail to pay off WindRiver's loan in full after five years, Tellico Landing would refinance to pay off the debt's balance at that time.¹⁶⁷ Upon payment in full, Tellico Landing would convey the golf course to LTR.¹⁶⁸

Tellico Landing would pay Class 5 unsecured non-insider creditors (APAC Atlantic, Inc., Long, Ragsdale & Waters, P.C., and Sun Sign Graphics) in full via monthly payments over 60 months at 4% interest.¹⁶⁹ Tellico Landing's principals would fund these payments "to the extent they wish to retain their interests."¹⁷⁰

Tellico Landing would pay the administrative claims in Class 6 (U.S. Trustee and Tellico Landing's counsel) in full within 30 days of the plan's confirmation.¹⁷¹

Tellico Landing would pay Class 7 (unsecured insiders of Tellico Landing) "only after all other creditors are paid in full and in no event before 66 months following the date of confirmation."¹⁷² No interest would accrue on these claims.¹⁷³

Class 8 members (Tellico Landing's principals: LTR, Stooksbury, and Whelchel) would "retain their interests . . . only to the extent to

¹⁶² Tellico Landing Plan of Reorganization, *supra* note 153, at 3.

¹⁶³ Tellico Landing Plan of Reorganization, *supra* note 153, at 2.

¹⁶⁴ Tellico Landing Plan of Reorganization, *supra* note 153, at 2.

¹⁶⁵ Tellico Landing Plan of Reorganization, *supra* note 153, at 2-3.

¹⁶⁶ Tellico Landing Plan of Reorganization, *supra* note 153, at 3.

¹⁶⁷ Tellico Landing Plan of Reorganization, *supra* note 153, at 3.

¹⁶⁸ Tellico Landing Plan of Reorganization, *supra* note 153, at 3.

¹⁶⁹ Tellico Landing Plan of Reorganization, *supra* note 153, at 3.

¹⁷⁰ Tellico Landing Plan of Reorganization, *supra* note 153, at 3.

¹⁷¹ Tellico Landing Plan of Reorganization, *supra* note 153, at 4.

¹⁷² Tellico Landing Plan of Reorganization, *supra* note 153, at 4.

¹⁷³ Tellico Landing Plan of Reorganization, *supra* note 153, at 4.

which they provide new value to” Tellico Landing.¹⁷⁴ LTR would guarantee repayment to Heritage and Tellico Landing’s bankruptcy counsel.¹⁷⁵ If other principals declined to contribute a pro rata share to these costs, their interests were to be reduced accordingly.¹⁷⁶

Tellico Landing, with funding from LTR, would fulfill its obligation to the Class 9 member, Tennessee Valley Authority, to construct a public trail on Tellico Landing’s property within two years.¹⁷⁷

Class 10 consisted of the Resident Group members.¹⁷⁸ Tellico Landing would hold deposits from new home sales in escrow until enough money existed to build the amenities.¹⁷⁹ Until then, Rarity Pointe lot owners would have access to the amenities at Rarity Bay.¹⁸⁰

The plan assumed that the liquidation value of Tellico Landing’s property was less than the debt WindRiver held—around \$6.7 million according to Tellico Landing—when it filed the plan.¹⁸¹ Tellico Landing nevertheless believed that its property was worth around \$22 million if developed in the ordinary course of business.¹⁸² Tellico Landing would continue to explore potential claims against Stooksbury, and would apply any future recovery to pay debts to Heritage and WindRiver.¹⁸³

ii. *Tellico Landing’s Disclosure Statement*

No party may solicit votes accepting or rejecting a plan until the bankruptcy court approves a written disclosure that contains “adequate information” “that would enable [] a hypothetical investor of [each] relevant class [of claims or interests] to make an informed judgment

¹⁷⁴ Tellico Landing Plan of Reorganization, *supra* note 153, at 4.

¹⁷⁵ Tellico Landing Plan of Reorganization, *supra* note 153, at 4.

¹⁷⁶ Tellico Landing Plan of Reorganization, *supra* note 153, at 4.

¹⁷⁷ Tellico Landing Plan of Reorganization, *supra* note 153, at 4.

¹⁷⁸ Tellico Landing Plan of Reorganization, *supra* note 153, at 5.

¹⁷⁹ Tellico Landing Plan of Reorganization, *supra* note 153, at 5.

¹⁸⁰ Tellico Landing Plan of Reorganization, *supra* note 153, at 5-6.

¹⁸¹ Tellico Landing Plan of Reorganization, *supra* note 153, at 3, 6.

¹⁸² Tellico Landing Plan of Reorganization, *supra* note 153, at 6.

¹⁸³ Tellico Landing Plan of Reorganization, *supra* note 153, at 5.

about the plan.”¹⁸⁴ The United States Trustee may object to the adequacy of a disclosure statement, but may not file a plan.¹⁸⁵

In its disclosure statement (“Disclosure”), Tellico Landing described the background on Rarity Pointe, including when Ross joined Tellico Landing through LTR in 2001 and the development and success of Rarity Pointe through the early 2000s.¹⁸⁶ This part of the Disclosure, while perhaps relevant, read mostly as a marketing puff piece. To some extent, this reflects the use of the Disclosure to *induce* “a hypothetical investor” to accept the Plan in conjunction with the Disclosure’s official purpose of *informing* “a hypothetical investor” about a plan.¹⁸⁷ Tellico Landing stated that Stooksbury refused to personally guarantee a debt on behalf of Tellico Landing in 2005, which, according to Tellico Landing, constituted a breach of Tellico Landing’s operating agreement.¹⁸⁸ This in turn spurred Ross to construct a golf course to regain positive public perception.¹⁸⁹ Tellico Landing then described the real estate crash’s effect on Tellico Landing, and Stooksbury’s lawsuits against Ross.¹⁹⁰ The Disclosure then largely repeated Tellico Landing’s Plan almost verbatim.¹⁹¹

iii. *Tellico Landing’s Claim Objections*

Tellico Landing filed its first claim objections the day after filing its first plan and Disclosure. Objections are necessary if a DIP disputes a claim because once a claim is filed, it “is deemed allowed, unless a party in interest . . . objects.”¹⁹² Parties in interest include creditors, creditors’ committees, equity holders’ committees, and holders’ committees.¹⁹³ Objections to allowance of claims must be in writing and filed in the

¹⁸⁴ 11 U.S.C. § 1125(a)(1), (b) (2005).

¹⁸⁵ 11 U.S.C. § 307 (1986).

¹⁸⁶ See generally Tellico Landing Disclosure Statement at 1-12, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 4, 2011), ECF No. 48.

¹⁸⁷ 11 U.S.C. § 1125(a)(1) (2005).

¹⁸⁸ Tellico Landing Disclosure Statement, *supra* note 186, at 17.

¹⁸⁹ Tellico Landing Disclosure Statement, *supra* note 186, at 13.

¹⁹⁰ Tellico Landing Disclosure Statement, *supra* note 186, at 15-17.

¹⁹¹ See generally Tellico Landing Disclosure Statement, *supra* note 186, at 18-24.

¹⁹² 11 U.S.C. § 502(a) (2005).

¹⁹³ 11 U.S.C. § 1109(b) (1978).

bankruptcy court.¹⁹⁴ A trustee or a debtor in possession has a duty to inspect for, and object to, improper claims.¹⁹⁵

Tellico Landing objected to almost all social membership fee claims as they were filed.¹⁹⁶ Owing to the large number of social membership fee claims, Tellico Landing filed a series of “omnibus objections,” which object to more than one claim in each objection.¹⁹⁷ Bankruptcy procedure rules allow omnibus objections where, as here, “the objections are based solely on the grounds that the claims should be disallowed” because of at least one of the eight enumerated reasons, including that filed proofs of claims duplicate other claims and that “they have been filed in the wrong case.”¹⁹⁸ In its omnibus objections, Tellico

¹⁹⁴ FED. R. BANKR. P. 3007(a).

¹⁹⁵ 11 U.S.C. § 704(a)(5) (2010); 11 U.S.C. § 1106(a)(1) (2010).

¹⁹⁶ Tellico Landing Omnibus Objections to Claims Nos. 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and 58, at 2-3, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 7, 2011), ECF 60 [hereinafter Omnibus Objections to Claims 54 & 55]; Tellico Landing Omnibus Objections to Claims Nos. 60, 61, 62, 63, 64, 65, and 66, at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 22, 2011), ECF 76 [hereinafter Omnibus Objections to Claim 60]; Tellico Landing Omnibus Objections to Claims Nos. 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, and 78, at 2, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 28, 2011), ECF 90 [hereinafter Omnibus Objections to Claim 76].

¹⁹⁷ Omnibus Objections to Claims 54 & 55, *supra* note 196; Omnibus Objections to Claims 60, *supra* note 196; Omnibus Objections to Claim 76, *supra* note 196.

¹⁹⁸ FED. R. BANKR. P. 3007(e). The rule lists eight available reasons for the objections, to wit:

- (1) they duplicate other claims;
- (2) they have been filed in the wrong case;
- (3) they have been amended by subsequently filed proofs of claim;
- (4) they were not timely filed;
- (5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;
- (6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;
- (7) they are interests, rather than claims; or

Landing asserted that it “has incurred no debt and affirms that no money is owed to any of the claimants.”¹⁹⁹ Generally, when objections to claims are made, the bankruptcy court will hold a hearing and determine the validity and amount of such claims.²⁰⁰

iv. *Tellico Landing Responds to WindRiver’s Request for a Trustee*

In response to desires for a trustee to replace Tellico Landing, Tellico Landing responded on October 5, 2011, that it had operated “in the open” where all of its members and its secured creditors could know how membership dues were being used.²⁰¹ Tellico also stated that it was deeply affected by the Great Recession of 2007-08 and that all dues collected were unrestricted.²⁰² In essence, Tellico Landing felt that the funds it collected could be used for any of the amenities in Rarity Bay, not just the clubhouse construction.²⁰³

In a supplemental motion filed October 13, 2011, WindRiver argued that LTR/Ross had again breached the Golf Course Agreement “by improperly using thousands of dollars of the Debtor’s funds to pay for numerous expenses related to the golf course,” solidifying LTR/Ross’s “pattern of fraudulent, dishonest, and incompetent” management.²⁰⁴ By the end of the month, the court had continued WindRiver’s motion hearing on the trustee appointment to late October

(8) they assert priority in an amount that exceeds the maximum amount under §507 of the Code.

Id.

¹⁹⁹ Omnibus Objections to Claims 54 & 55, *supra* note 196; Omnibus Objections to Claims 60, *supra* note 196; Omnibus Objections to Claim 76, *supra* note 196.

²⁰⁰ 11 U.S.C. § 502(b) (2005).

²⁰¹ Tellico Landing, LLC’s Response to Motion for the Appointment of a Trustee at 2, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 5, 2011), ECF No. 51.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Supplemental Memorandum in Support of WindRiver Investment LLC’s Motion for the Appointment of a Trustee at 4, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 13, 2011), ECF No. 67.

and then again to November 10, 2011.²⁰⁵ As revealed below, the court never had occasion to rule on WindRiver’s motion.

v. *Resident Group Members File Their Own Adversary Proceeding*

Objections “accompanied by a demand for affirmative relief” proceed not a common “contested matters,” but as “adversary proceedings.”²⁰⁶ What is the difference? “[A] contested matter involves a contested request for relief in the context of *the main bankruptcy proceeding* . . . while an adversary proceeding involves the filing of a complaint, commencing” a *separate lawsuit* within the forum of bankruptcy court.²⁰⁷ The Federal Rules of Bankruptcy Procedure largely adopt verbatim the Federal Rules of Civil Procedure for adversary proceedings.²⁰⁸

The social membership fee claimants wanted more than to hold unsecured claims against Tellico; they wanted the amenities they alleged that they were promised.²⁰⁹ Accordingly, on October 14, 2011, fourteen social membership fee claimants (the “Resident Group”) filed an adversary complaint against Tellico Landing.²¹⁰ In the complaint, the Resident Group largely repeated the assertions in the proofs of claim—that is, their social membership fees were improperly used to construct a golf course and marina, which they had no right to use.²¹¹ Based on the total number of lots in Rarity Pointe, the Resident Group believed that

²⁰⁵ Order Continuing Hearings on Motions for the Appointment of a Trustee and Determination of the Debtor as a SARE Case, *supra* note 133, at 1; Order Continuing Hearings on Motions for DIP Financing, Determination of the Debtor as a SARE Case, and Appointment of a Trustee, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 24, 2011), ECF No. 79.

²⁰⁶ DRAKE & STRICKLAND, *supra* note 89, at § 10:4.

²⁰⁷ Kenter, *supra* note 109 (emphasis added).

²⁰⁸ See generally FED. R. BANKR. P. 7001–87.

²⁰⁹ See Adversary Complaint at 7, Snider, et al. v. Tellico Landing, LLC, No. 3:11-ap-03220 (Bankr. E.D. Tenn. Oct. 14, 2011), ECF No. 1 [hereinafter Resident Group Adversary Complaint].

²¹⁰ *Id.* at 1.

²¹¹ *Id.* at 4–7.

Ross, through LTR, used \$3.5 million to \$4.5 million in social membership deposits to construct the golf course.²¹²

The Resident Group also requested equitable relief of “impos[ing] an equitable lien and/or constructive trust²¹³ upon [Tellico Landing’s] property [or, in the alternative, at least upon the golf course] for the benefit” of the Resident Group.²¹⁴ In essence, the Resident Group asked for an interest in Tellico’s property to secure the Resident Group’s claim to the construction of community amenities. Should the amenities not be built, a constructive trust and/or equitable lien would give the Resident Group in effect title to Tellico Landing’s property, which the Resident Group could use to satisfy its claim. Because WindRiver already held an interest in the Rarity Pointe development, the Resident Group’s requested remedy could affect WindRiver’s rights. Accordingly, the Resident Group named WindRiver as a party to the action but did not allege that WindRiver was responsible for any of the claims in the complaint.²¹⁵ The Resident Group additionally sought class certification.²¹⁶

The Resident Group’s request for a constructive trust in Tellico Landing’s property was one way to ensure that both Tellico Landing *and* WindRiver accounted for the amenities in their respective long-term

²¹² *Id.* at 8.

²¹³ BLACK’S LAW DICTIONARY (10 ed. 2014), *available at* WestlawNext Black’s Law Dictionary, defines a constructive trust as:

[a]n equitable remedy by which a court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrongdoer gains title. The court declares a constructive trust in favor of the victim of the wrong, who is given a right to the property rather than a claim for damages.

BLACK’S LAW DICTIONARY (10 ed. 2014), *available at* WestlawNext Black’s Law Dictionary. Similarly, an equitable lien is “[a] right, enforceable only in equity, to have a demand satisfied from a particular fund or specific property, without having possession of the fund or property.” *Id.*

²¹⁴ Resident Group Adversary Complaint, *supra* note 209, at 7.

²¹⁵ *Id.*

²¹⁶ *Id.*

strategies. Should the Resident Group succeed in obtaining a constructive trust upon Tellico Landing's property, this property would not be part of Tellico Landing's bankruptcy estate, and would be beyond the reach of other creditors, including WindRiver.²¹⁷ Thus, in practical effect, a successful constructive trust claim here would give the Resident Group members commensurate status as secured creditors.²¹⁸ The Resident Group may have asserted this claim just to force Tellico Landing to address the claim in its reorganization plan. However, it is equally likely that this was a show of force by the Resident Group to grab WindRiver's attention. Constructive trusts are largely creatures of state law.²¹⁹ Should WindRiver foreclose on Rarity Pointe, whether by relief from the stay, pursuant to a confirmed reorganization plan, dismissal of the proceeding, or otherwise, the Resident Group likely could still assert its constructive trust claim against Rarity Pointe under state law. This would cast uncertainty over title to Rarity Pointe, likely lowering the price WindRiver could see at a foreclosure sale (and thus lowering WindRiver's ability to recoup its investment or pursue its own desire to take title to Rarity Pointe). Essentially, in making its constructive trust claim, the Resident Group made amenity construction (and consequently the constructive trust claim's resolution) to be in WindRiver's interest, as well as its own.

vi. *Disclosure Objections*

Meanwhile, the parties were also reviewing and evaluating Tellico Landing's Disclosure. Just as Tellico Landing used its Disclosure in part to raise support for its plan, objections by the parties to the adequacy of the Disclosure went beyond the scope of the Disclosure's information. In reviewing the objections below, notice how the parties' objections often address the merits of the plan. Despite being couched in terms of the adequacy of the Disclosure's *explanation* of the plan's practicability, the objections often appear to attack the practicability *of the plan itself*. Like Tellico Landing's use of its Disclosure, these objections also provide an indirect way to voice reasons to reject Tellico Landing's plan.

²¹⁷ Craig Millet, *Beware The Constructive Trust Claim*, LAW360 (Oct. 13, 2010), <http://www.gibsondunn.com/publications/Documents/MilletBewaretheConstructiveTrustClaim.pdf>.

²¹⁸ *Id.*

²¹⁹ *Id.*

Just as the Code prohibits solicitation of acceptance of a plan before a formal ruling on the adequacy of an accompanying disclosure statement, the Code also prohibits solicitation of votes *rejecting* a plan in the same manner.²²⁰

The U.S. Trustee objected to the adequacy of Tellico Landing’s Disclosure. Among other objections, the U.S. Trustee asserted that the Disclosure failed to:

- explain the required votes for approval of the plan;
- include “a more thorough description of all the assets currently owned by” Tellico Landing;
- include adequate details surrounding the proposed DIP financing by Heritage, specifically information of Heritage’s principals and their experience and relationship, if any, with Tellico Landing’s principals;
- include a Chapter 7 liquidation analysis, supported by more than Tellico Landing’s assertions as to the ordinary course of business value and liquidation value of Tellico Landing’s assets, to inform creditors what they would receive should a liquidation take place;
- include information about experience of Tellico Landing’s proposed marketing team to overcome the U.S. Trustee’s suspicion of Tellico Landing’s ability to meet its sales projections;
- explain the risks the plan posed to WindRiver and Heritage, and what remedies creditors would have should Tellico Landing default on plan terms; and
- adequately address “[t]he status and probable outcome of any on-going litigation involving” Tellico Landing.²²¹

WindRiver also objected to the adequacy of Tellico Landing’s Disclosure.²²² Notably, WindRiver stated that Tellico Landing failed to “explain or verify” the Disclosure’s value estimation of Tellico Landing’s

²²⁰ 11 U.S.C. § 1125(a)(1), (b) (2005).

²²¹ U.S. Trustee Objections to Adequacy of Disclosure Statement at 1-3, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 27, 2011), ECF No. 85.

²²² WindRiver Objection to Adequacy of Disclosure Statement at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 28, 2011), ECF No. 87.

property.²²³ WindRiver additionally raised the following objections, among others, that the Disclosure failed to:

- disclose the actual extent to which LTR used Social Membership Fees to construct the golf course;
- address the constructive trust/equitable lien request by Resident Group members;
- provide documentation of a binding commitment of Heritage to provide post-petition financing;
- address the possibility and outcome of Tellico Landing failing to meet its lot sale projections, noting that no lots had been sold in the last three years; and
- address the status of pending litigation against Ross.²²⁴

Stooksbury additionally objected to Tellico Landing's Disclosure, mostly on the grounds that, according to Stooksbury, the Disclosure mischaracterized Welchel and Stooksbury's participation in Tellico Landing's business and the success of Ross's other developments.²²⁵ Stooksbury additionally contended that the Disclosure "g[ave] a false picture of Rarity Pointe re-sale revenues."²²⁶ Stooksbury further objected that the Disclosure failed to:

- address that Ross had withheld Tellico Landing financial information from Welchel and Stooksbury despite court orders to provide the information;
- address the extent to which Ross and entities under his control owe money to Tellico Landing;
- address the extent of unfinished infrastructure in Rarity Pointe; and

²²³ *Id.* at 4.

²²⁴ *Id.* at 1-4.

²²⁵ Stooksbury Objection to Adequacy of Disclosure Statement at 1-2, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Oct. 28, 2011), ECF No. 86.

²²⁶ *Id.* at 2.

- address the fact that 45 lots in Rarity Pointe had been foreclosed, with several resold at prices as low as 36% of the original purchase price.²²⁷

5. November

After multiple a continuances, the court held a hearing on November 14, 2011, on Tellico Landing’s motion for DIP financing and entered an order four days later denying Tellico Landing’s motion.²²⁸

i. *Parties Respond to the Resident Group Adversary Proceeding*

As a named defendant, WindRiver responded to the Resident Group’s adversary complaint on November 21, 2011.²²⁹ WindRiver did not contest the merits of Resident Group member claims nor their entitlement to their requested relief; rather, WindRiver merely asserted in its answer that any interest of Resident Group members would be subordinate to WindRiver’s interest in Tellico Landing’s property.²³⁰

A day later, Tellico Landing filed its own answer.²³¹ Consistent with its omnibus objections, Tellico Landing denied that Resident Group members held valid claims against Tellico Landing and were entitled to relief.²³² Notably, Tellico Landing admitted that social membership “deposits were used to help construct the golf course,” but that this was not improper because “[t]here were no restrictions on the use of the funds.”²³³ Tellico Landing also admitted it represented to prospective lot purchasers the social membership deposits would entitle them to use of amenity facilities.²³⁴ Tellico Landing denied, however, that no amenities

²²⁷ *Id.* at 1-2.

²²⁸ Order Denying Authority to Obtain Credit Secured by a Senior Lien on Property of the Estate that is Subject to a Lien, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Nov. 14, 2011), ECF No. 125.

²²⁹ Answer of WindDriver, LLC, *In re* Tellico Landing, LLC, No. 3:11-ap-03220 (Bankr. E.D. Tenn. Nov. 21, 2011), ECF No. 6.

²³⁰ *Id.* at 4-5.

²³¹ Answer of Tellico Landing, LLC, *In re* Tellico Landing, LLC, No. 3:11-ap-03220 (Bankr. E.D. Tenn. Nov. 21, 2011), ECF No. 7 [hereinafter Answer of Tellico Landing].

²³² *Id.* at 1.

²³³ *Id.* at 3.

²³⁴ *Id.* at 2.

were provided to purchasers because “all lot owners had the right to access the [offsite] amenities available at Rarity Bay upon their payment of monthly dues.”²³⁵ Note carefully that Rarity Bay is a separate development in which Ross was involved.²³⁶

Tellico Landing also asserted a number of affirmative defenses in its answer.²³⁷ Specifically, Tellico Landing asserted that applicable statutes of limitations had run on “[s]ome if not all” of Resident Group members’ claims.²³⁸ Moreover, Tellico Landing stated that “[m]any of the proposed class of plaintiffs acquired their lots with full knowledge that the development had stalled due to economic conditions that have prevailed throughout the country since 2007” and that “[m]any of the proposed class of plaintiffs acquired their lots with no intention of ever using any social membership.”²³⁹ Tellico Landing also asserted that the Resident Group members “have no contractual rights that bind [Tellico Landing] to build the amenities” and, for good measure, that their “complaint fails to state a claim for which relief may be granted.”²⁴⁰ Tellico Landing additionally denied that Resident Group members were entitled to class certification and that “[t]he relief sought by the plaintiffs will have a chilling effect on sales and possibly triggering a default on its plan and thus a liquidation of the remaining lots at below current market prices.”²⁴¹

Tellico Landing further stated that it had “proposed a plan that binds LTR to build the amenities.”²⁴² If a confirmed Chapter 11 plan provides for injunctive or equitable relief in favor of a party, then requests by that party for the same relief cannot form the basis of an

²³⁵ *Id.*

²³⁶ Dave Flessner, *Broken Dreams*, CHATTANOOGA TIMES FREE PRESS (Mar. 6, 2011), <http://www.timesfreepress.com/news/news/story/2011/mar/06/broken-dreams/44135/>.

²³⁷ Answer of Tellico Landing, *supra* note 231, at 3-4.

²³⁸ Answer of Tellico Landing, *supra* note 231, at 3.

²³⁹ Answer of Tellico Landing, *supra* note 231, at 3.

²⁴⁰ Answer of Tellico Landing, *supra* note 231, at 4.

²⁴¹ Answer of Tellico Landing, *supra* note 231, at 1-3.

²⁴² Answer of Tellico Landing, *supra* note 231, at 3.

adversary proceeding.²⁴³

The Court eventually consolidated almost all of the Social Membership Fee claims into this adversary proceeding²⁴⁴ and, like the other adversary proceeding, this proceeding too would eventually be dismissed.²⁴⁵

ii. *WindRiver Requests Relief from the Stay*

On November 22, 2011, WindRiver filed its own motion for relief from the automatic stay.²⁴⁶ In its motion, WindRiver sought permission to enforce its Deed of Trust on the Tellico Landing real property assets, pointing out that Tellico Landing filed for Chapter 11 bankruptcy just “four days prior to the date scheduled for WindRiver’s foreclosure sale of the debtor’s real property.”²⁴⁷ By way of background, WindRiver had previously acquired the promissory notes from Tellico Landing’s original financier, SunTrust Bank, in June 2011.²⁴⁸ The Deed of Trust held by WindRiver encumbered Tellico Landing’s real property, which, at the time, was valued at \$8.7 million.²⁴⁹ At the time of WindRiver’s motion for relief from the stay, Tellico Landing owed WindRiver approximately \$8 million and, critically, also owed Loudon County approximately \$1 million for property taxes that stood as a superior lien on the property.²⁵⁰ WindRiver concluded that these facts meant that the Tellico Landing real estate had no equity and that the property was unnecessary for an effective reorganization of the debtor’s estate.²⁵¹ In bankruptcy parlance, this meant that WindRiver held a

²⁴³ FED. R. BANKR. P. 7001(7).

²⁴⁴ Agreed Order, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Nov. 14, 2011), ECF No. 126.

²⁴⁵ Stipulation of Dismissal, *In re* Tellico Landing, LLC, No. 3:11-ap-03220 (Bankr. E.D. Tenn. May 25, 2012), ECF No. 23.

²⁴⁶ Motion of WindRiver Investments, LLC for Relief from the Automatic Stay, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Nov. 22, 2011), ECF No. 129.

²⁴⁷ *Id.* at 1.

²⁴⁸ *Id.* at 2.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 3.

²⁵¹ *Id.*

secured interest in the real property that was not adequately protected, entitling WindRiver to seek relief from the stay imposed.²⁵²

6. December

Tellico Landing responded—with a lower-case “r”—to WindRiver’s motion for relief from stay. On December 13, 2011, Tellico Landing fired back at WindRiver, opposing its motion to lift the automatic stay.²⁵³ However, its response was a mere two-sentence token gesture, stating only that “no cause [is] shown” to lift the stay, that the property is indeed necessary for reorganization, and that Tellico Landing has “substantial equity in its property” that secures WindRiver’s debt.²⁵⁴

i. *Tellico Landing Files New Plan And Renews its Motion for DIP Financing*

Before the court ruled on the adequacy of Tellico Landing’s Disclosure, Tellico Landing filed a Second Plan of Reorganization and a Second Disclosure Statement on December 13, 2011.²⁵⁵ Because Tellico Landing later amended its Second Plan of Reorganization and Second Disclosure Statement before any party filed objections, these filings do not warrant further discussion.

Also on December 13, 2011, Tellico Landing filed a renewed motion for DIP financing, again asking for the authority to obtain credit secured by a senior lien on real property that was already subject to a lien.²⁵⁶ Tellico Landing, as the DIP, again asked the court to permit

²⁵² *Id.*; See 11 U.S.C. § 362(d)(1)-(2) (2010).

²⁵³ See generally Response to Motion Lift [sic] the Automatic Stay, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Dec. 13, 2011), ECF No. 136.

²⁵⁴ *Id.* at 1.

²⁵⁵ Second Plan of Reorganization, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Dec. 13, 2011), ECF No. 132; Second Statement of Disclosure, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Dec. 13, 2011), ECF No. 131.

²⁵⁶ See Renewed Motion for Authority to Obtain Credit Secured by a Senior Lien on Property of the Estate that is Subject to a Lien at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Dec. 13, 2011), ECF No. 139 [hereinafter Renewed Motion for DIP Financing].

financing in the amount of \$2.75 million from Heritage Solutions.²⁵⁷ In return for the financing, Heritage Solutions would receive a super-priority lien on Rarity Pointe real estate, the property on which WindRiver held a secured first priority lien.²⁵⁸ Tellico argued that WindRiver's interest was adequately protected by the approximately \$24 million value of the Rarity Pointe real estate, a slightly lower figure than the market value quoted in Tellico Landing's first motion for DIP financing.²⁵⁹ As it did in its original financing motion, Tellico Landing promised that it was reserving \$350,000 of the new financing it would receive from Heritage Solutions to pay interest that it owed to WindRiver.²⁶⁰

7. January

On January 18, 2012, WindRiver filed a memorandum in support of its motion for relief from stay, demonstrating its causes for the court to consider.²⁶¹ WindRiver argued in its memorandum that relief from the stay would be appropriate because its financial relationship with Tellico Landing precisely matches the reasons in section 362(d) for the cause that permits relief from the stay, to wit: (1) "for cause, including the lack of adequate protection," and (2) lack of equity in the property and the property's status as unnecessary to an effective reorganization.²⁶² WindRiver argued that although "adequate protection" is not defined in the Code, equity cushions or periodic cash payments can provide adequate protection when debtor property values are decreasing—but Tellico Landing had no income with which to protect WindRiver.²⁶³ Moreover, Tellico Landing's property was already subject to liens that exceeded the value of the property.²⁶⁴ WindRiver had yet a better argument in support of its motion: under section 362(d)(2), the *debtor*—not WindRiver—has the burden of proving that its property is necessary

²⁵⁷ *Id.* at 2.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 2-3.

²⁶⁰ *Id.* at 3.

²⁶¹ See generally Memorandum in Support of WindRiver Investments, LLC's Motion for Relief from the Automatic Stay, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Jan. 18, 2011), ECF No. 166.

²⁶² *Id.* at 3 (quoting 11 U.S.C. § 362(d)(1)-(2) (2010)).

²⁶³ *Id.* at 4.

²⁶⁴ *Id.*

for an effective reorganization.²⁶⁵ In short, WindRiver argued that Tellico Landing's only proposed reorganization plan was "entirely contingent" on the approval of DIP financing, which had already been denied.²⁶⁶ Furthermore, WindRiver argued that the series of judgments against Ross and related entities would also adversely impact any viable reorganization plan.²⁶⁷ Consequently, in WindRiver's view, Tellico Landing could not satisfy its burden of proof under section 362(d)(2) to show that its property was necessary to a viable reorganization plan that could be put together in a reasonable time.²⁶⁸

i. *An Important Hearing*

On January 18, 2012, the court held a hearing on the multiple pending motions in the case. After the hearing, the court summarily denied WindRiver's motion for relief from stay on January 25, 2012.²⁶⁹

8. February

WindRiver promptly filed its Notice of Appeal²⁷⁰ of the court's denial of its motion for relief from stay on February 2, 2012.²⁷¹ One day later on February 3, 2012, the court breathed new life into Tellico Landing's plans by allowing its renewed motion to receive DIP

²⁶⁵ *Id.* (citing *In re Sharon*, 200 B.R. 181, 194 (Bankr. S.D. Ohio 1996)).

²⁶⁶ Memorandum in Support of WindRiver Investments, LLC's Motion for Relief from the Automatic Stay, *supra* note 261, at 4-5.

²⁶⁷ *Id.* at 5.

²⁶⁸ *Id.* at 5-6; see *In re Mary Harpley Builder, Inc.*, 44 B.R. 151, 154 (Bankr. N.D. Ohio 1984).

²⁶⁹ Order Denying WindRiver's Motion for Relief from the Automatic Stay, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Jan. 25, 2011), ECF No. 180.

²⁷⁰ Appeals from a federal bankruptcy court are taken to the United States District Court in the district where the bankruptcy court sits. 28 U.S.C. § 158(a) (2010). Accordingly, WindRiver filed its appeal in the United States District Court for the Eastern District of Tennessee. Record on Appeal, *In re Tellico Landing, LLC*, No. 3:12-cv-00162 (E.D. Tenn. Apr. 5, 2012), ECF No. 1.

²⁷¹ Notice of Appeal at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Feb. 2, 2012), ECF No. 191.

financing.²⁷² In its order, the court stated that it based its decision on the testimony of Ross, Jim Macri, Dr. William Legg, and stipulated testimonies of James Fitzgerald and Bailey Sharp.²⁷³ The court concluded that, as of the January 20 hearing, Tellico Landing’s real property had debts of over \$9 million with a “present net value” of \$15 million.²⁷⁴ The court further found that Tellico Landing was unable to obtain credit in any other fashion than the super-priority lien and that WindRiver had adequate protection of its interest in Tellico Landing’s debtor estate.²⁷⁵

Thus, after a nearly five-month battle, Tellico Landing successfully received DIP financing from Heritage, including \$100,000 to pay for new advertising and approximately \$1 million to cover property taxes owed.²⁷⁶ On February 12, 2012, WindRiver filed its Notice of Appeal on the DIP financing issue.²⁷⁷ While WindRiver and Tellico Landing would brief their respective positions in WindRiver’s appeals of the orders denying WindRiver a relief from stay and granting Tellico Landing’s motion for DIP financing, both appeals would eventually be stayed and dismissed before the district court ruled on either.²⁷⁸

9. March

i. *Tellico Landing Amends its Second Plan and Second Disclosure Statement*

Tellico Landing subsequently filed an Amended Second Disclosure Statement (“Amended Disclosure”) and an Amended Second

²⁷² Order Approving Authority to Obtain Credit Secured by a Senior Lien on Property of the Estate that is Subject to a Lien, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 3, 2012), ECF No. 197.

²⁷³ *Id.* at 1.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1-2.

²⁷⁶ *Id.* at 2.

²⁷⁷ Notice of Appeal, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Feb. 12, 2012), ECF No. 205.

²⁷⁸ Agreed Order, *In re* Tellico Landing, LLC, No. 3:12-cv-00162 (E.D. Tenn. June 4, 2012), ECF No. 10; Stipulation of Dismissal with Prejudice, *In re* Tellico Landing, LLC, No. 3:12-cv-00162 (E.D. Tenn. July 9, 2012), ECF No. 11; Agreed Order, *In re* Tellico Landing, LLC, No. 3:12-cv-00163 (E.D. Tenn. June 4, 2012), ECF No. 11; Stipulation of Dismissal with Prejudice, *In re* Tellico Landing, LLC, No. 3:12-cv-00163 (E.D. Tenn. July 9, 2012), ECF No. 12.

Plan of Reorganization (“Amended Plan”) the following March 5 and 6, respectively.²⁷⁹ Two important events occurred by the end of March 6. First, LTR’s assets had been executed to satisfy a judgment held by Athena of SC, LLC (“Athena”).²⁸⁰ Athena’s principal was to create a new entity, “NEWCO,” to step into the shoes of LTR in Tellico Landing’s affairs.²⁸¹ Thus, the Amended Disclosure provided that NEWCO would perform the obligations and acquire the rights of LTR.²⁸² Second, Stooksbury obtained a default judgment against Ross on March 6 for \$18,346,915.00.²⁸³ Tellico Landing accordingly supplemented its Amended Disclosure to reflect Stooksbury’s judgment.²⁸⁴

Other than accounting for these two events, the Amended Plan and Amended Disclosure largely echoed the original Plan and Disclosure, with a few other variations. Most notably, the Amended Disclosure:

- proceeded upon the court’s prior approval of Tellico Landing’s proposed terms of DIP financing by Heritage;
- noted the court found that the total “net present value of all of Rarity Pointe is \$15,000,000,” but that Ross still believed the development was worth \$22,000,000 “in the ordinary course of business;”

²⁷⁹ Amended Second Disclosure Statement, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 5, 2012), ECF No. 218; Amended Second Plan of Reorganization, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 6, 2012), ECF No. 220.

²⁸⁰ Amended Second Disclosure Statement, *supra* note 279, at 13.

²⁸¹ Amended Second Disclosure Statement, *supra* note 279, at 13.

²⁸² Amended Second Disclosure Statement, *supra* note 279, at 13.

²⁸³ Order, *Stooksbury v. Ross*, No. 3:09-cv-00498 (E.D. Tenn. Jan. 30, 2012), ECF No. 250; Judgment in a Civil Case, *Stooksbury v. Ross*, No. 3:09-cv-00498-TAV-HBG (E.D. Tenn. Mar. 6, 2012), ECF No. 390.

²⁸⁴ Supplement to Amended Second Plan of Reorganization, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 6, 2012), ECF No. 221; Supplement to Amended Second Disclosure Statement, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 6, 2012), ECF No. 222.

- stated that none of multiple recent state and federal court judgments against Ross would affect Tellico Landing’s future affairs; and
- challenged Stooksbury’s previous objections to the original Plan and Disclosure as made in bad faith to derail the reorganization process. Tellico Landing did not elaborate, as it “did not believe it necessary to address the Stooksbury objections any further.”²⁸⁵

ii. *The Objections*

WindRiver, the U.S. Trustee, the Resident Group, and Stooksbury all filed their objections to the Amended Disclosure on March 12, 2012.

WindRiver, as in its first objection, objected that the Amended Disclosure failed to adequately discuss (1) the true extent to which LTR used Social Membership Fees to construct the golf course, (2) the relief requested by Resident Group members, and (3) the nature of outside pending litigation against Ross.²⁸⁶ Additionally, WindRiver contended that the Amended Disclosure, among other shortcomings, failed to adequately explain:

- the nature and effect of Athena’s judgment against LTR;
- how LTR had authority to transfer rights such as social membership deposits to NEWCO;
- how WindRiver’s collateral would be adequately protected during the Amended Plan’s implementation, especially in light of WindRiver’s interest being subordinated to Heritage’s DIP financing lien;
- what events would cause a default under the Amended Plan and what remedies would exist;
- whether the proposed DIP financing “has obtained the requisite approval of [Tellico Landing’s] members”;
- “address the legal or factual basis for the proposed replacement

²⁸⁵ Amended Second Disclosure Statement, *supra* note 279, at 19-20, 21.

²⁸⁶ WindRiver Investments, LLC’s Objections to the Adequacy of the Debtor’s Amended Second Disclosure Statement at 1-2, 5, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 12, 2012), ECF No. 226.

of LTR as a member of [Tellico Landing] by NEWCO”]; and

- discrepancies between the Amended Disclosure’s estimated sale expenses and expert witness estimations of sale expenses.²⁸⁷

The U.S. Trustee objected to the Amended Disclosure for lack of specification on the marketing strategy for Rarity Pointe lot sales and how marketing expenses would be paid should lot sales prove insufficient to cover costs.²⁸⁸ The U.S. Trustee also objected to:

- the lack of information of exact amounts owed to certain creditors, and the lack of an “estimate[d] percentage return anticipated for each Class;”
- the dearth of information regarding the extent to which LTR’s assets were executed upon by Athena.²⁸⁹

The U.S. Trustee also wanted information on NEWCO’s equity holders and golf course management experience.²⁹⁰ Lastly, the U.S. Trustee “[found] it very disturbing that there were no disclosures regarding litigation with Athena in prior drafts of the Disclosure Statement. To the extent that the debtor is aware of *any* on-going proceedings that may have an effect on Tellico Landing or its assets or distribution under the Plan, this should be disclosed.”²⁹¹

F. Scott Milligan filed objections on behalf of the Resident Group members the same day as the U.S. Trustee.²⁹² In it, the Resident Group asserted that the Amended Disclosure failed to adequately detail the Resident Group members’ claims, the pending adversary proceeding,

²⁸⁷ *Id.* at 2-7.

²⁸⁸ Restated Objections of U.S. Trustee to Debtor’s Amended Second Disclosure Statement at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 12, 2012), ECF No. 228.

²⁸⁹ *Id.* at 2-3.

²⁹⁰ *Id.* at 3.

²⁹¹ *Id.* (emphasis in original).

²⁹² Objection to Amended Second Disclosure Statement by Plaintiff Property Owners, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 12 2012), ECF No. 229.

and how their requested constructive trust and/or equitable lien would impact Tellico Landing's reorganization.²⁹³ The Resident Group members additionally objected to the Amended Disclosure's lack of detail surrounding amenities to be built, such as cost projections and completion dates.²⁹⁴ Additionally, the Resident Group wanted more information concerning NEWCO's obligations and the relationship of NEWCO's principals with Ross.²⁹⁵

Armed with a recent federal court judgment against Ross, Stooksbury objected to the Amended Disclosure primarily on the grounds that it failed to address the federal court's judicial findings of fact that Ross, through himself and various entities, "committed numerous wrongful acts, including mail fraud, wire fraud, breaches of fiduciary duty, and common law fraud while operating" Rarity Pointe.²⁹⁶ Specifically, Stooksbury asserted that,

it was established: that LTR Properties, Inc., Michael L. Ross, and numerous other related business entities and persons operated an illegal real estate enterprise and conspiracy in violation of federal and state law. This conspiracy was used to siphon off millions of dollars from the various 'Rarity' developments, including Rarity Pointe, in order to use the money for other purposes and personal gain²⁹⁷

Consequently, according to Stooksbury, the Amended Disclosure's depiction of Tellico Landing's formation and operation is contradicted by judicially established facts and "[was] a blatant effort to re-litigate [those] facts already established in" federal court.²⁹⁸ Stooksbury further alleged that this conduct "violat[ed] fundamental principles of law, including collateral estoppel and *res judicata*."²⁹⁹

Like the U.S. Trustee and the Resident Group, Stooksbury

²⁹³ *Id.* at 1.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 2.

²⁹⁶ Objections to Disclosure Statement at 1, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 12, 2012), ECF No. 230.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 4.

²⁹⁹ *Id.* at 2-4 (emphasis in original).

objected to the paucity of information concerning Athena and NEWCO; but Stooksbury went one step further.³⁰⁰ He asserted that Athena's execution of LTR's assets was "a fraudulent conveyance and is most likely a continuation of LTR Properties, Inc.'s and Mike Ross's fraudulent activities."³⁰¹ Stooksbury additionally objected to the Amended Disclosure's lack of explanation on why Tellico Landing should transfer the golf course to NEWCO as LTR's successor, after paying WindRiver in full, when LTR failed to satisfy contractual conditions to receiving the golf course in addition to "engag[ing] in illegal and fraudulent conduct while constructing the golf course."³⁰² As a precursor of things to come, Stooksbury additionally faulted the Amended Disclosure for failing to acknowledge that Ross lacked the authority to file bankruptcy on behalf of Tellico Landing in the first place.³⁰³

The Court never ruled on the adequacy of Tellico's Amended Disclosure. Instead, that issue would take a back seat to subsequent—and dispositive—motions to dismiss the case.

iii. *The Motions to Dismiss*

Barely over a week after filing his objections to Tellico Landing's Amended Disclosure, Stooksbury filed three separate motions on March 20, 2012, seeking to (1) appoint a trustee, (2) remove LTR as Tellico Landing's managing member, and (3) dismiss the case and/or prohibit additional DIP financing.³⁰⁴ Each of these motions represented a different way for Stooksbury to get what he wanted: to dismiss the bankruptcy case (and lift the stay) or at least limit the obstacles between him and recovering his judgment against LTR and Ross.

³⁰⁰ *Id.* at 3.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Objections to Disclosure Statement, *supra* note 296 at 4.

³⁰⁴ Motion to Appoint Chapter 11 Trustee, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 20, 2012), ECF No. 247; Motion to Remove Debtor's Managing Member, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 20, 2012), ECF No. 249; Motion to Dismiss Bankruptcy and/or Prohibit Additional Financing, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 20, 2012), ECF No. 248.

In all of these motions, Stooksbury repeated the “facts established as a matter of law” in Stooksbury’s default judgment against Ross, namely that Ross and LTR had committed acts of mail fraud, wire fraud, money laundering, and racketeering while operating Rarity Pointe.³⁰⁵ In his motion to appoint a trustee, Stooksbury quoted the Code’s language permitting appointment of a trustee “for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor.”³⁰⁶ Stooksbury then shortly stated that the facts established in his judgment gave the bankruptcy court “cause” to appoint a trustee.³⁰⁷

Stooksbury additionally attacked the validity of the entire bankruptcy proceeding, asserting that LTR and/or Ross never had authority file a bankruptcy petition on Tellico Landing’s behalf.³⁰⁸ Remember, a person filing bankruptcy on behalf of a business entity must have the authority to do so, and state law determines whether authority exists.³⁰⁹ Note also that LTR held a 50% interest in Tellico Landing, with Whelchel and Stooksbury each holding a 25% interest.³¹⁰ Stooksbury pointed to Tellico Landing’s Operating Agreement provisions stating:

8.6 Restrictions on Authority of the Managing Member. Notwithstanding the express grant of authority to the Managing Member in Section 8.1, above, the following matters shall require approval by a vote of not less than 75% of the Membership Interests, unless a different voting requirement is provided for elsewhere in this Agreement:

(a) Any sale or other disposition of the Company or its assets (other than a sale of assets in the normal course of business), whether by way of

³⁰⁵ Motion to Appoint Chapter 11 Trustee, *supra* note 304, at 2; Motion to Dismiss Bankruptcy and/or Prohibit Additional Financing, *supra* note 304, at 2; Motion to Remove Debtor’s Managing Member, *supra* note 304, at 2.

³⁰⁶ Motion to Appoint Chapter 11 Trustee, *supra* note 304, at 3.

³⁰⁷ *Id.*

³⁰⁸ Motion to Dismiss Bankruptcy and/or Prohibit Additional Financing, *supra* note 304, at 4.

³⁰⁹ Price v. Gurney, 324 U.S. 100, 106 (1945).

³¹⁰ Voluntary Petition, *supra* note 62, at 10. *See also* List of Equity Security Holders, *supra* note 63, at 1.

sale of membership interests, sale of all or substantially all of the assets of the Company, merger or otherwise;

(b) The dissolution of the Company;

(c) Any refinancing of the existing debt of the Company, or any plan of financing that would require the grant of a security interest in the assets of the Company, whether in the form of a mortgage or otherwise;

(d) Any amendment of this Agreement or of the Articles of Organization of the Company;

(e) The admission of a new Member;

(f) The employment, whether as an agent, independent contractor, employee or otherwise, of any any [sic] individual who is a family member or relative of a Member, or that is an entity that is a related party or affiliate of a Member.³¹¹

From these provisions, Stooksbury asserted that LTR could not, without the approval of Welchel or Stooksbury, file a bankruptcy petition on Tellico Landing's behalf.³¹² Alternatively, Stooksbury argued that even if LTR *did* have authority to file, the fact that Tellico Landing's Amended Disclosure stated that LTR was no longer a member of Tellico Landing required that both Welchel and Stooksbury would have to consent to any DIP financing.³¹³ Thus, Stooksbury asked the court to dismiss the proceeding or enter an order requiring Welchel and Stooksbury's approval "before [Tellico Landing] enters into a DIP financing agreement."³¹⁴

The first requested relief would lift the stay and allow Stooksbury to enforce his judgment; the second would continue the stay, but at least

³¹¹ Motion to Dismiss Bankruptcy and/or Prohibit Additional Financing, *supra* note 304, at 3-4 (alterations in original).

³¹² *Id.* at 4.

³¹³ *Id.* at 4.

³¹⁴ *Id.* at 4-5.

prevent a DIP lender from further encumbering Tellico Landing's assets (which would make Stooksbury's recovery of his own judgment more difficult).

Stooksbury also pointed to Tellico Landing's Operating Agreement to support his motion to remove LTR as Tellico Landing's managing member and Ross as chief manager.³¹⁵ Specifically, Stooksbury pointed to a provision conditioning LTR's managing member status on Ross's ownership and control of LTR.³¹⁶ The Operating Agreement further provided that "for so long as LTR is the Managing Member . . . it shall have the right to appoint the Chief Manager."³¹⁷ Although Stooksbury reiterated his suspicion that Athena's execution of LTR's assets was "a fraudulent conveyance and a continuation of LTR," Stooksbury pointed to Ross's signature on the Amended Disclosure as an admission that Ross no longer owned and controlled LTR.³¹⁸ Thus, Stooksbury asserted that LTR no longer complied with the Operating Agreement, preventing LTR from continuing as Tellico Landing's managing member.³¹⁹ Stooksbury then requested that he and Whelchel elect Tellico Landing's new managing member in accordance with the Operating Agreement.³²⁰ Should Stooksbury succeed with this request, he and Whelchel could elect Tellico Landing's new managing member, presumably someone who would dismiss the bankruptcy on behalf of Tellico Landing.

WindRiver filed its own motion to dismiss on March 26, 2012, also asserting that LTR had no authority to file bankruptcy on Tellico Landing's behalf.³²¹ In its motion, WindRiver noted that bankruptcy courts recognize that filing a bankruptcy on behalf of business entity "requir[es] specific authorization."³²² WindRiver then stated that Tellico Landing's Operating Agreement gave LTR no express authority to file a

³¹⁵ Motion to Remove Debtor's Managing Member, *supra* note 293, at 3-5.

³¹⁶ *Id.* at 5.

³¹⁷ *Id.* at 5.

³¹⁸ *Id.* at 3.

³¹⁹ *Id.* at 5.

³²⁰ *Id.* at 5.

³²¹ WindRiver Investments, LLC's Motion to Dismiss Bankruptcy and Memorandum in Support of Motion to Dismiss Bankruptcy at 6, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 26 2012), ECF No. 253.

³²² *Id.* at 3.

bankruptcy petition on Tellico Landing's behalf.³²³ WindRiver further argued that Tennessee law requires the consent of all of a limited liability company's members to do any "act which would make it impossible to carry on the ordinary business of the LLC," which, in this case, included filing bankruptcy.³²⁴

Tellico Landing responded to Stooksbury's motion to dismiss on March 30, 2012.³²⁵ Predictably, it asserted that LTR did, in fact, have authority to file Tellico Landing's bankruptcy petition.³²⁶ Tellico Landing relied on the Operating Agreement's provision "expressly delegat[ing] to the Managing Member the authority to conduct and manage the business and affairs of [Tellico Landing] and authorize it to take all actions necessary, advisable or convenient to the development of [Rarity Pointe] and the fulfillment of the business interests of [Tellico Landing]." ³²⁷ Furthermore, Tellico Landing argued that nowhere did the Operating Agreement's limitations on the managing member's authority explicitly preclude the managing member from filing a bankruptcy petition.³²⁸ Tellico Landing also noted that Tellico Landing's other members did not participate in Tellico Landing's affairs during the 18 months preceding Tellico Landing's bankruptcy.³²⁹ Reaching, Tellico Landing argued in the alternative that Stooksbury's motion to dismiss should be barred by the equitable doctrine of laches because Stooksbury "never voiced any opposition or objection to [Tellico Landing] to the filing until he filed his Motion to Dismiss."³³⁰

Regarding Stooksbury's request to limit additional DIP financing, Tellico Landing asserted that Stooksbury's former silence to Tellico Landing's motion for such financing constituted Stooksbury's

³²³ *Id.* at 4.

³²⁴ *Id.* at 5.

³²⁵ Debtor's Response to Motion to Dismiss Bankruptcy and/or Prohibit Additional Financing, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 30 2012), ECF No. 257.

³²⁶ *Id.* at 1.

³²⁷ *Id.* at 2.

³²⁸ *Id.* at 4-5.

³²⁹ *Id.* at 5.

³³⁰ *Id.* at 6.

acceptance, or alternatively Stooksbury's ratification, of such action.³³¹ Tellico Landing additionally stated that Stooksbury's opposition to DIP financing should also be barred by the doctrine of laches.³³²

Responding to Stooksbury's motion to appoint a trustee, Tellico Landing denied that the facts established in Stooksbury's default judgment failed to demonstrate cause and that Stooksbury's motion should be denied by the doctrine of laches.³³³ Tellico Landing did state, however, that it would not object if the court appointed a trustee to "serve the parties' and estate's interests."³³⁴

Tellico Landing responded to Stooksbury's motion to remove LTR by stating that: (1) no sale or transfer of LTR's "Membership Interests in violation of the Operating Agreement" occurred; (2) that, rather, LTR pledged its membership interests in conformance with the Operating Agreement; (3) that LTR's membership interests have not been foreclosed upon; and (4) to the extent LTR did breach the Operating Agreement by pledging its membership interests, LTR should be given the opportunity to cure the breach.³³⁵

10. April

Stooksbury replied on April 9, 2012, to Tellico Landing's response to Stooksbury's motion to dismiss, arguing that the record made clear that LTR did not have authority and sought no consent of Whelchel or Stooksbury to file the bankruptcy petition.³³⁶ Stooksbury further stated that all of his motions and objections had been timely filed and that Tellico Landing's reliance on equitable principles should preclude Tellico Landing from continuing the bankruptcy.³³⁷

³³¹ *Id.* at 7-9.

³³² *Id.* at 10.

³³³ Debtor's Response to Motion to Appoint Chapter 11 Trustee at 2, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 30 2012), ECF No. 259.

³³⁴ *Id.* at 3.

³³⁵ Debtor's Response to Motion to Remove Debtor's Managing Member at 3-5, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Mar. 30, 2011), ECF No. 258.

³³⁶ Robert T. Stooksbury, Jr.'s Reply in Support of his Pending Motions at 1-2, *In re* Tellico Landing, LLC, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Apr. 9, 2012), ECF No. 263.

³³⁷ *Id.* at 2-6.

Meanwhile, by agreement of the parties, the court, on April 26, 2012, continued until May 14, 2012, the hearing “on the adequacy of [Tellico Landing’s Amended Disclosure] and the objections thereto, the motion to appoint a Trustee, and the motion to determine if the case is a single asset real estate case.”³³⁸ By this point, nine months had elapsed since the start of the proceeding.

11. May

On May 8, 2012, Tellico Landing filed its response to WindRiver’s motion to dismiss, largely echoing the assertions Tellico Landing made in response to Stooksbury’s motion to dismiss.³³⁹ Notably, Tellico Landing asserted that its counsel had sought the consent of Whelchel prior to filing Tellico Landing’s bankruptcy, but Whelchel did not want to be a part of the proceeding.³⁴⁰

On May 10, 2012, WindRiver also filed a motion in reply to Tellico Landing, rebutting, among other things, Tellico Landing’s argument that Stooksbury and Whelchel ratified the filing of Tellico Landing’s petition.³⁴¹ Tellico Landing continued to project confidence—regardless of whether others believed it—of its ability to reorganize. On May 10, 2012, just four days before the hearing, Tellico Landing filed a motion asserting a justification for the instant proceeding because “Tellico [Landing] filing its Petition [gave Tellico Landing] a lifeline, allowing [Tellico Landing] to remain viable while it seeks confirmation of a plan that will enable [Tellico Landing] to continue operating and looking at ways in which it can successfully complete [Rarity Pointe].”³⁴²

³³⁸ Agreed Order at 1, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Apr. 26, 2012), ECF No. 289.

³³⁹ Debtor’s Response to Motion to Dismiss Bankruptcy at 1-9, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. May 8, 2012), ECF No. 292.

³⁴⁰ *Id.* at 6.

³⁴¹ Reply of WindRiver Investments, LLC to Debtor’s Response to Motion to Dismiss Bankruptcy at 5, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. May 10, 2012), ECF No. 298.

³⁴² Debtor’s Reply to Stooksbury’s Reply in Support of his Pending Motions at 6-7, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. May 10, 2011), ECF No. 297.

But by May, Heritage, Tellico Landing's would-be DIP lender, had backed out of the deal that was approved by the court because of "the passage of time and the complexities that have arisen in this case."³⁴³ Not wanting to admit defeat, Tellico Landing filed another motion for DIP financing, stating that it had received a \$4.1 million commitment from Athena of S.C., LLC to jump-start the building of amenities and to aggressively advertise the Rarity Pointe real estate.³⁴⁴ Tellico Landing maintained that WindRiver's principal interest in the estate, which had risen to \$8 million, was still adequately protected because Rarity Pointe was valued at (the plunging price of) \$15 million.³⁴⁵ Tellico Landing would soon run out of time to have this motion considered.

i. *The Court's Order*

After holding a hearing on the above motions on Monday, May 14, 2012, the court continued the hearing to Friday, May 18, 2012, at which time the court rendered its opinion.³⁴⁶ In short, the court found that LTR had no authority to file the bankruptcy petition and eliminated such authority that Ross individually may have derived from LTR.³⁴⁷ The court also found that Whelchel and Stooksbury did not ratify the petition's filing, and that the doctrine of laches did not bar the challenges to LTR's authority.³⁴⁸ The court relied specifically on the Operating Agreement's restrictions on the managing member's authority with a 75% membership interest approval as including a restriction on filing for bankruptcy protection.³⁴⁹

The court noted that its ruling was consistent with other cases,

³⁴³ Motion for Authority to Obtain Credit Secured by a Senior Lien on Property of the Estate that is Subject to a Lien at 2, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. May 11, 2012), ECF No. 306.

³⁴⁴ *Id.*

³⁴⁵ *Id.* Recall that the two previous motions for DIP financing valued the Rarity Pointe real estate at \$30 and 24.5 million, respectively. *See* Amended Motion for DIP Financing, *supra* note 122, at 2; Renewed Motion for DIP Financing, *supra* note 256, at 2.

³⁴⁶ Transcript of Court's Opinion at 4, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. Jan. 2, 2013), ECF No. 341.

³⁴⁷ *See generally id.*

³⁴⁸ *Id.* at 12, 16-18.

³⁴⁹ *Id.* at 12-13.

holding that operating agreement language granting general authority to a business entity's manager does not typically include authority to file for bankruptcy unless explicitly stated.³⁵⁰ The court additionally questioned WindRiver's standing to challenge Tellico Landing's filing, but it found resolving the issue unnecessary because Stooksbury had such standing.³⁵¹ Thus, in accordance with its holdings, the court entered an order dismissing the bankruptcy proceeding.³⁵²

After the order, the parties began wrapping up the proceeding. The adversary proceedings were dismissed,³⁵³ and WindRiver dismissed the pending appeals of the bankruptcy court's previous orders to the district court.³⁵⁴ The bankruptcy proceeding was finally over.

IV. THE EPILOGUE

With the case dismissed (and the stay extinguished), WindRiver proceeded with foreclosure of the Rarity Pointe development on June 17, 2012.³⁵⁵ WindRiver was itself the winning bidder, posting credit bids for the development properties.³⁵⁶ WindRiver's attorney stated that WindRiver planned to "come up with a long-term plan for continued development of the property, [including constructing amenities] and undertaking a program for the sale of lots and encourage homeowners that already have purchased property to go ahead and build homes in the development."³⁵⁷ Rarity Pointe Community Association board member

³⁵⁰ *Id.* at 13-15.

³⁵¹ *Id.* at 18-19.

³⁵² Order, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. May 21, 2011), ECF No. 331.

³⁵³ Stipulation of Voluntary Dismissal, *supra* note 140; Stipulation of Dismissal, *supra* note 245.

³⁵⁴ Stipulation of Dismissal with Prejudice, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. July 7, 2012), ECF No. 334; Stipulation of Dismissal with Prejudice, *In re Tellico Landing, LLC*, No. 3:11-bk-33018 (Bankr. E.D. Tenn. July 9, 2012), ECF No. 335.

³⁵⁵ Josh Flory, *Rarity Point Properties Sold at Foreclosure*, PROPERTY SCOPE (June 21, 2012), http://propertyscope.knoxnews.com/2012/06/21/rarity_pointe_properties_sold/.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

Steve Maynard expressed optimism, stating that, “the people of the community are looking forward to this new beginning.”³⁵⁸

Shortly thereafter, WindRiver changed Rarity Pointe’s name to “WindRiver: A Golf and Lakefront Community,” seeking to clarify that the development’s “new owners had no business relationship with the Rarity brand.”³⁵⁹ WindRiver eventually constructed community amenities including a fitness center, park, and tennis courts.³⁶⁰ The authors note that, upon their 2014 visit to the new WindRiver community, the amenities—and particularly, the new clubhouse—appeared well-built, well-kept, and looked to be moving forward nicely.

Meanwhile, the federal judge in Stooksbury’s first lawsuit against Ross ordered Ross’s properties, including certain assets of the Rarity Bay development, into receivership.³⁶¹ Thereafter, Stooksbury initiated a second lawsuit against Ross and others, accusing them of engaging in a series of fraudulent transactions to defraud Stooksbury and other creditors out of their ability to collect their claims and judgments against Ross.³⁶² The court in the original lawsuit ordered on December 30, 2014, that the receiver conduct a sale of certain Rarity Bay assets, while allowing Stooksbury, subject to certain contingencies, to post a bid at the sale in the value of his judgment.³⁶³ On April 17, 2015, the court in the first action approved the sale of Rarity Bay assets to Salem Pointe Capital, LLC for the sum of \$5.75 million.³⁶⁴ The sale closed on May 18,

³⁵⁸ *Id.*

³⁵⁹ Josh Flory, *Name Change for Rarity Pointe*, PROPERTY SCOPE (Aug. 30, 2012), http://propertyscope.knoxnews.com/2012/08/30/name_change_for_rarity_pointe/.

³⁶⁰ WindRiver, *Signature Sports and Wellness Club*, WINDRIVER: A LAKEFRONT AND GOLF COMMUNITY, <http://windriverliving.com/signature-sports-wellness-club/> (last visited Apr. 3, 2015).

³⁶¹ Memorandum and Order at 10, *Stooksbury v. Ross*, No. 3:09-cv-00498 (E.D. Tenn. May 23, 2012), ECF No. 548.

³⁶² *See generally* Complaint, *Stooksbury v. Ross*, No. 3:12-cv-00548 (E.D. Tenn. May 19, 2012), ECF No. 1.

³⁶³ Order at 1-3, *Stooksbury v. Ross*, No. 3:09-cv-00498 (E.D. Tenn. Dec. 30, 2014), ECF No. 1436.

³⁶⁴ Memorandum Opinion and Order at 5-6, *Stooksbury v. Ross*, No. 3:09-cv-00498 (E.D. Tenn. Apr. 17, 2015), ECF No. 1530.

2015.³⁶⁵ Stooksbury received the bulk of the sale proceeds while the receiver retained a sum for his services.³⁶⁶

³⁶⁵ Notice of Compliance with Court Order and Receipt of Funds at 1, *Stooksbury v. Ross*, No. 3:09-cv-00498 (E.D. Tenn. May 19, 2015), ECF No. 1548.

³⁶⁶ *Id.* at 1-2.