UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re:	**CHAPTER 11**
The Cliffs Club & Hospitality Group, Inc., *et al.*,[1] *d/b/a* The Cliffs Golf & Country Club,	**Case No. 12-01220**
	Jointly Administered
Debtors.	

DEBTORS' RESPONSE TO OBJECTION BY CATHERINE AND DANIEL GOLDBERG TO CONFIRMATION OF THE FIRST AMENDED AND RESTATED JOINT CHAPTER 11 PLAN FILED BY THE DEBTORS AND THE PLAN SPONSOR

COME NOW The Cliffs Club & Hospitality Group, Inc. and its affiliated debtors in the above-captioned Chapter 11 cases, as debtors and debtors-in-possession (collectively, the "Debtors"), by and through undersigned counsel, and hereby respond (this "Response") to Objection of Catherine and Daniel Goldberg (the "Goldbergs") to Confirmation of the First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor (the "Goldberg Objection" or the "Goldberg Obj."), pursuant to which Goldberg requests that this Court deny confirmation of the First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor dated June 30, 2012, as amended [Dkt. Nos. 479 and 616, Ex. A]

[1] The Debtors, followed by the last four digits of their respective taxpayer identification numbers and Chapter 11 case numbers, are as follows: The Cliffs Club & Hospitality Group, Inc. (6338) (12-01220); CCHG Holdings, Inc. (1356) (12-01223); The Cliffs at Mountain Park Golf & Country Club, LLC (2842) (12-01225); The Cliffs at Keowee Vineyards Golf & Country Club, LLC (5319) (12-01226); The Cliffs at Walnut Cove Golf & Country Club, LLC (9879) (12-01227); The Cliffs at Keowee Falls Golf & Country Club, LLC (3230) (12-01229); The Cliffs at Keowee Springs Golf & Country Club, LLC (2898) (12-01230); The Cliffs at High Carolina Golf & Country Club, LLC (4293) (12-01231); The Cliffs at Glassy Golf & Country Club, LLC (6559) (12-01234); The Cliffs Valley Golf & Country Club, LLC (6486) (12-01236); and Cliffs Club & Hospitality Service Company, LLC (9665) (12-01237).

(the "Plan").[2] Out of about 2,000 current club members of the Debtors, the Goldbergs are the only club members to object to confirmation of the Plan. In support of this Response, the Debtors respectfully represent as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Response under 28 U.S.C. § 1334. Venue of this proceeding is proper pursuant to 28 U.S.C. § 1409. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

BACKGROUND

2. On February 28, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

3. On March 12, 2012, the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee") in these Chapter 11 cases pursuant to that certain Fourth Amended Appointment of Committee of Unsecured Creditors [Docket Entry No. 141]. No trustee or examiner has been appointed in these Chapter 11 cases.

4. The Debtors are authorized to operate their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

5. A description of the Debtors' businesses, the reasons for filing these Chapter 11 cases, and the relief sought from this Court to allow for a smooth transition into operations under Chapter 11 are set forth in the Declaration of Timothy P. Cherry in Support of First Day Motions (the "Cherry Declaration"), which has been filed with the Court [Dkt. No. 44]

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan.

6. On July 2, 2012, the Debtors filed the Plan and the First Amended and Restated Disclosure Statement to Accompany the First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor [Dkt. No. 480] (the "Disclosure Statement").

7. On July 27, 2012, the Debtors filed the Statement of Changes Made by Amendment to the First Amended and Restated Joint Chapter 11 Plan Filed by the Debtors and the Plan Sponsor dated June 30, 2012 [Dkt. No. 616].

8. The Goldbergs are members of the Cliffs at High Carolina Golf & Country Club, LLC. Because, as of yet, there is no golf course and there are no country club amenities at High Carolina, the Goldbergs, like all members of that particular Club, do not and have not paid dues, and yet have received the benefits of reciprocity in access to club amenities at any of the completed clubs operated by the Debtors, which benefits are enjoyed by all members at any of the Debtors' clubs.

9. It is important to note that 26 of the 36 club members at The Cliffs at High Carolina Golf & Country Club, LLC cast ballots to accept or reject the Plan. 88% of such voting club members (or 23 of 26 voting members) holding claims totaling $4,353,769 voted to accept the Plan while only 12% (or 3 of 26 voting members) holding claims totaling $469,514 voted to reject the Plan. Counting the amount of claims held by those club members of The Cliffs at High Carolina Golf & Country Club, LLC who voted on the Plan, had they been separately classified, as the Goldbergs seem to suggest, that class would have accepted the Plan by 88% in number and more than 90% in dollar amount. Perhaps more importantly, 17 of the club members of The Cliffs at High Carolina Golf & Country Club, LLC have already elected to rejoin the New Clubs. [Declaration of Katie S. Goodman, Dkt. No. 642, Exhibit 1.]

10. The Goldbergs contend in the Goldberg Objection, "They have a claim in the amount of $150,000 resulting from their membership in the Club." (Goldberg Obj., at p. 1.) As indicated below, the $150,000 claim of the Goldbergs (the "Goldberg Claim"), is a contingent unsecured claim that is not currently due and payable under the terms of the executory contract between the Goldbergs and The Cliffs at High Carolina Golf & Country Club, LLC. In August of 2009, the Goldbergs purchased an undeveloped lot in the Cliffs at High Carolina community from The Cliffs at High Carolina, LLC (a non-debtor affiliate) for the sum of $820,000 pursuant to that certain The Cliffs Communities Real Estate Sale and Purchase Agreement entered into as of July 31, 2009 (the "Contract"). In the Contract, the Cliffs at High Carolina granted the Goldbergs the right to a $150,000 credit against their initiation deposit as a golf club member with the Cliffs at High Carolina Golf & Country Club, LLC. The Goldbergs also executed an Addendum entitled "Membership Initiation and Club Credit for Company Homesite Purchase" (the "Addendum") at or about the time that they executed the Contract and a Club Membership Addendum (the "Club Membership Addendum") and both the Addendum and the Club Membership Addendum were executed by The Cliffs Golf & Country Club, Inc. Because the Goldbergs received a full credit for their initiation deposition and so did not actually pay any money to any of the Debtors for their golf club membership in The Cliffs at High Carolina Golf & Country Club, LLC, the Addendum and the Club Membership Addendum significantly limited their entitlement to a refund of the initiation deposit that is the basis for the Goldberg Claim. As provided in both the Addendum and the Club Membership Addendum, the Cliffs Membership Initiation Deposit shall only be refunded (a) upon a resignation occurring more than five (5) years following the closing of the purchase of the Property; (b) upon a sale by Purchaser of the Property within the five (5) year vesting period, and only if the resale buyer acquires the same

Club Membership and pays the full initiation deposit then required; or (c) upon a resale by Purchaser occurring after the five (5) year vesting period. The Club Membership Addendum further qualified these limitations.

11. Consequently, because the Goldbergs purchased their a lot at the Cliffs at High Carolina on August 21, 2009, the earliest point in time that they might be entitled to a refund of the $150,000 initiation deposit (for which they received a $150,000 credit and paid $0) would be August 21, 2014 if they were to resign their golf membership at such time, because there is no evidence that they have sold their property to a third party who has joined the club and paid the then current membership initiation deposit for a golf membership. Furthermore, the Debtors club membership agreements provide for resigning members to be added to a resigned member list at each club that further controls when a resigned member may receive payment on account of that resigned members initiation deposit.

12. There is an aura of unreality that pervades the Goldberg Objection and that stems from their failure to take cognizance of several real world fundamental facts of life with which the Debtors -- and all of the other club members -- have grappled in these Chapter 11 Cases. The Cliffs at High Carolina was the newest development of the Cliffs Communities that are served by the golf and country clubs operated by the Debtors. Under the Cliffs Communities concept, a club member at any one of the Debtors' Clubs has reciprocal rights to use the same amenities to which such club member's use classification permits at his or her home club. Thus as golf club members at The Cliffs at High Carolina Golf & Country Club, the Goldbergs have been able to use any of the six completed golf courses. Unfortunately, the Cliffs at High Carolina is only in a nascent stage. Very little development had occurred when the national economy collapsed and when the Goldbergs purchased their lot at the Cliffs at High Carolina. Although the Debtors

were able to obtain financing and designated $5 million for the purchase of land at High Carolina on which to construct a golf course, they were not able to obtain a release of that future golf course property from a lien that was substantially greater than the value of the land that was planned to house the first Tiger Woods-designed golf course. Additionally, Tiger Woods suffered several significant setbacks in his personal life at a critical point in the development stage of the Cliffs at High Carolina community. As a result, The Cliffs at High Carolina Golf & Country Club, LLC, owns no real property and its only assets – an underwater option to purchase land for the golf course from a non-debtor affiliate and a mechanic's lien for work done by that Debtor to clear the land for the future golf course that it did not own are both junior to a significant secured claim against a non-debtor affiliate of the Debtors and in any event such "assets" serve as collateral for the following secured loans: $7.5 million DIP Financing, the $2.0 million Bridge Loan and at least $64,050,000 Indenture Trustee – Note Holder Claims. The Goldbergs complain:

> Further, High Carolina Golf & Country Club, LLC indicated that the Tiger Woods Golf Course, the Clubhouse and cart storage would be available for use by November 2010; that the hiking and nature trails would be available by December 2009, and that the Tennis Courts , Fitness Center, Pool, Inn and Spa would be available by July 2012.
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> Three years have come to pass since the Goldbergs purchased a lot and their membership, but none of this has come to pass. Instead of a thriving developed community, the Goldbergs have a lot which is occasionally accessible on an unpaved road with no amenities in the middle of nowhere.

(Goldberg Objection, at p. 7).

13. The simple hard fact is that in the event this Plan is not confirmed and there is a Chapter 7 liquidation of The Cliffs at High Carolina Golf & Country Club, LLC, the holder of the Goldberg Claim and any other club member of The Cliffs at High Carolina Golf & Country Club, LLC will receive no distribution from that estate. Perhaps that is why almost 90% of those

club members have voted to accept the Plan. The other practical reality is that it may be years before the economic circumstances justify, if ever, the construction of a golf course at the Cliffs at High Carolina, and the Debtors lack the wherewithal to complete that project. The Debtors chose to sell all of the Clubs hoping to preserve the opportunity for similar reciprocal amenity use rights in a bankruptcy court-approved process that has resulted in successful bidder becoming the Plan Sponsor. The Plan Sponsor has offered reciprocal use rights to those club members who elect to rejoin the New Clubs, which may explain why 17 of those club members have already elected to rejoin the New Clubs.

RELIEF REQUESTED

For the reasons set forth below, the Goldberg Objection is unfounded and should be denied.

A. The Plan Complies with 11 U.S.C. § 1129(a)(1)

1. Class 7 Contains Claims and Interests that are Substantially Similar Pursuant to 11 U.S.C. § 1122

The Goldbergs contend that the Plan does not comply with the applicable provisions of title 11 of the Bankruptcy Code. (Goldberg Obj., at p. 9). The Goldberg's first argument is that the Plan violates 11 U.S.C. § 1129(a)(1). Section 1129(a)(1) requires that "[t]he court shall confirm a plan only if . . . [t]he plan complies with the applicable provisions of [Title 11]."

The Goldbergs contend that members of Class 7 do not possess claims or interests that are "substantially similar" as required by 11 U.S.C. § 1122. Section 1122(a) provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." The Fourth Circuit Court of Appeals has previously stated that § 1122 "requires substantial similarity between claims that are placed in the same class," however that code section also "grants some flexibility in

classification of unsecured claims." *In re Bryson Props., XVIII*, 961 F.2d 496, 502 (4th Cir. 1992); *see also In re U.S. Truck Co.*, 800 F.2d 581, 585 (6th Cir. 1986) ("Congress incorporated into section 1122 . . . broad discretion to determine proper classification according to the factual circumstances of each individual case."); *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 WL 2319201, *4 (Bankr. M.D.N.C. Sept. 22, 2005) ("Section 1122 . . . leaves some flexibility in the classification of unsecured claims."); *In re Piece Goods Shops Co.*, 188 B.R. 778, 788 (Bankr. M.D.N.C. 1995) ("Plan proponents are to be given considerable discretion in classifying claims according to the facts and circumstances of their cases.")

Although the term "substantially similar" is not defined within the Bankruptcy Code, the Code's legislative history suggest that the term requires "classification based on the nature of the claims or interests classified . . . ." *In re Mason*, 456 B.R. 245, 249 (Bankr. N.D. W. Va. 2011) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 406 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 118 (1978)). *See also In re The Mason & Dixon Lines Inc.*, 63 B.R. 176, 181 (Bankr. M.D.N.C. 1986) (stating that § 1122 "does not require that similar claims *must* be grouped together, but merely that any group created must be homogeneous"). A South Carolina bankruptcy court has previously acknowledged that the term "substantially similar" has been construed to mean "similar in legal character or affect as a claim against a debtor's assets or as an interest in the debtor." *In re Moore*, 31 B.R. 12, 15 (Bankr. D.S.C. 1983) (quoting *In re Iacovoni*, 2 B.R. 256, 260 (Bankr. D. Utah 1980) (adding that "such construction means that 'only debts which have identical legal right in the debtor's (or the estate's) assets may be classified together'"). "In classifying claims 'the focus of the classification is the legal character of the claim as it relates to the *assets of the debtor*." *In re Heron, Burchette, Ruckert &*

Rothwell, 148 B.R. 660, 670 (Bankr. D.D.C. 1992) (quoting *In re AOV Indus., Inc.*, 792 F.2d 1140, 1150 (D.C. Cir. 1986)).

The Goldbergs argue that the claims within Class 7 are not "substantially similar" because six of the eight included clubs "have readily accessible property and completely finished and available amenities", and another club "provides a $7.5 million facility to complete the amenities for [the] club", while the remaining club to which the Goldbergs are a member, High Carolina Golf & Country Club, LLC ("High Carolina") has "no completed amenities", "no hope of having any in the foreseeable future", and is required to either expend additional funds for a membership with no value or accept a 4% distribution on account of their claim. (Goldberg Obj., at p. 9.)

This argument lacks merit. "Section 1122(a) requires that claims in a class be substantially similar, not identical." *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 670 (Bankr. D.D.C. 1992). "That the claims arise from different facts does not warrant separate classification." *Id.* Thus, the fact that High Carolina has not yet been completed, and, in fact, is in the same condition it was in at the time the Goldbergs purchased their membership interest, is irrelevant. Rather, as a member of a club owned by the Debtor, the Goldbergs are similarly situated to all of the members of the other seven clubs within Class 7 (the "Remaining Clubs") by virtue of the fact that they each hold a membership interest in one of the Debtors clubs which they may either use to elect to renew a membership in the New Clubs, or which they may forfeit for a pro rata distribution as a Class 7 creditor of the bankruptcy estate. Thus, each claim within Class 7 shares "common priority and rights against the debtor's estate." *See id.* ("The members of [the class] have substantially similar claims in that they allege various facts which have a substantially similar effect.") *See* also Declaration of Katie S. Goodman at ¶ 37 – 38. Further,

the Goldbergs' Objection fails to recognize the fact that they are entitled to select a membership at any of the other seven clubs, allowing them to receive the exact same treatment as the other members of Class 7. This fact is irrelevant, however, for purposes of an analysis under § 1122 because "[t]he issue of whether all claims within a class are receiving the same treatment is a matter that is separate and distinct from whether such claims are substantially similar to one another." *In re Dow Corning Corp.*, 244 B.R. 634, 664-65 (Bankr. E.D. Mich. 1999)

Bankruptcy Courts in the Fourth Circuit have previously allowed the classification of claims within a single class that were more factually distinct than those within Class 7 in the present case. For example, in *In re Piece Goods Shops Co.*, 188 B.R. 778 (Bankr. M.D.N.C. 1995), the debtor placed all general unsecured claims within a single class. When the debtor's plan was challenged under § 1122, the court determined that the relevant issue was "whether the claims in a class have the same or similar legal status in relation to the debtor." *Id*. at 788. The court went on to add that "[u]nsecured claims, whether trade, tort, unsecured notes, or deficiency claims of secured creditors, are generally included in a single class because they are 'of equal rank entitled to share pro rata in values remaining after payment of secured and priority claims." *Id.* (quoting *FGH Realty Credit Corp. v. Newark Airport/Hotel Ltd. P'ship*, 155 B.R. 93 (D.N.J. 1993)). Consequently, even though the objecting creditor asserted that its claim was factually distinct due to the fact that it has previously financed the leveraged buyout of the debtor, it was the holder of preferred stock, and it had agreed to subordinate a portion of its unsecured claim, all of the general unsecured creditors were appropriately classified within the same class because they had "the same legal status in relation to the Debtors." *Id. See also In re Quigley Co.*, 377 B.R. 110, 116 (Bankr. S.D.N.Y. 2007) (noting that settling and non-settling claimants could be placed within the same voting class because, as unsecured creditors, they have "the same legal

rights against" the debtor's bankruptcy estate); *In re Union Fin. Serv. Grp.*, 325 B.R. 816, 821 n. 3 (Bankr. E.D. Mo. 2004) (fact that one claim was subordinated to others did not prevent them from being classified together because, with respect to debtor, all were unsecured nonpriority claims); *In re Dow Corning Corp.*, 244 B.R. at 655 (stating claims arising from fraudulent representation were substantially similar to claims based on indemnification and could be grouped within same class on ground that both were "nonpriority, unliquidated and disputed unsecured claims").

The Goldbergs' argument is essentially that their claim for damages within the bankruptcy is stronger than that of the other Class 7 members due to the fact that High Carolina remains unfinished, while Remaining Clubs have been or will be completed. The Goldbergs fail to acknowledge that their claim is similar to every club member of the Debtors, all of whose club membership agreements with the Debtors, the Plan is rejecting as executory contracts. In this regard, the Goldbergs' claim does not involve a distinct legal right compared to the other class members, but merely a distinct factual situation that may provide a stronger basis for their claim or which may affect their claim's underlying value. "To be substantially similar, claims need not be identical. And there is certainly no requirement that claims be classified according to their values." *In re Dow Corning Corp.*, 244 B.R. at 655 (internal citations omitted). Thus, such distinctions are irrelevant for the purposes of classification pursuant to 11 U.S.C. § 1222(a). *See In re N. Am. Refractories Co.*, No. 02-20198, 02-21626, 2007 WL 7645287, *14-15 (Bankr. W.D. Pa. Nov. 13, 2007) (allowing classification of claims within same class notwithstanding fact that some claims were subject to better defenses by debtor, stating that it was "the *nature of the claims* being classified that must be substantially similar . . . not the nature or availability of defenses"); *In re Resorts Int'l, Inc.*, 145 B.R. 412, 448 (Bankr. D.N.J. 1990) ("even though some

class members may have stronger claims, or stronger defenses than others, they may be classified together so long as their claims are substantially similar and their treatment is approximately equal").

As indicated above, even if the club members of The Cliffs at High Carolina Golf & Country Club, LLC were separately classified from the other club members of the Debtors, that class would have still voted to accept the Plan, and the Goldbergs would not be able to avail themselves of protections afforded to an objecting class under the Chapter 11 cramdown provisions in § 1129(b). *See* 11 U.S.C. § 1126(c).

Because the Goldbergs hold the same legal rights to the assets of the Debtors bankruptcy estates as the other club members (i.e., unsecured claims for damages arising from the Debtors' rejection of their club membership agreements as executory contracts under the Plan), all the members of Class 7 are substantially similar pursuant to 11 U.S.C. § 1122 and may be placed within the same class.

2. The Plan Provides for Equal Treatment of All Creditors Within Class 7 and Therefore Satisfies 11 U.S.C. § 1123(a)(4)

The Goldbergs' second argument under § 1129(a)(1) is that the Plan fails to treat their claim equally with the claims of other members of Class 7, violating § 1123(a)(4). (Goldberg Obj., at p. 10). Section 1123(a)(4) requires that a Chapter 11 Plan "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."

The Goldbergs argue that they are treated distinctly from other members of Class 7 because of "the choices they are offered" and "the amounts they are required to pay". (Goldberg Obj. at p. 10.) The Goldbergs specifically compare their treatment to the members of The Cliffs at Mountain Park Gold & Country Club, LLC ("Mountain Park"), who they claim receive

"reduced fees and dues" and "the benefit of a $7.5 million infusion of funds to be used to complete their amenities." (*Id.*) The Goldbergs then cite to *In re AOV Industries, Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986), for the propositions that "the most conspicuous inequality that § 1123(a)(4) prohibits is payment of different percentage settlements to co-class members" and that there must be "equal consideration tendered for equal payment." *Id.*

The Goldbergs' citation and their argument, however, misses the purpose behind § 1123(a)(4). The Goldbergs' assertion that "High Carolina members are required to tender the same consideration as other class members for membership which has no value to them" and, thus, that "they are required to tender such consideration in the face of the substantially higher value provided to the members of . . . the other clubs," ((Goldberg Obj., at p. 11), is both inaccurate and fails to assert a legal basis on which to conclude that the Plan violates Bankruptcy Code section 1123(a)(4).

First, the Plan does not require High Carolina members to "tender the same consideration as other class members for membership which has no value to them." Even though High Carolina currently remains uncompleted, the club members of High Carolina have been given the option of acquiring a membership in any of the Remaining Clubs. Therefore, should High Carolina club members accept the Plan, they will be entitled to receive treatment that is exactly equal, if not better, than all of the other members of Class 7, who are limited to continuing membership in their current clubs. In this regard, they are entitled to share in the "substantially higher value" that is allegedly provided to members of the Remaining Clubs. Further, in the event High Carolina members do not accept the Plan, they are entitled to a pro rata distribution that is exactly equal to that of any other member of the Remaining Clubs who reject the Plan.

Consequently, the High Carolina members receive treatment that is precisely equal to other members of Class 7 and therefore the Plan satisfies the standard set forth in *AOV Industries*.

Second, the determination reached in *AOV Industries* requiring precise equality of treatment between all members of a class has been rejected in certain contexts.

> *AOV* sets forth a test of such impractical rigidity that it will be unworkable any time there is a class containing disputed and unliquidated claims. The cornerstone of *AOV*'s reasoning, of course, is the notion that all creditors within a class are entitled to share in the distribution of available funds on a *pro rata* basis. This foundational principle of bankruptcy law is simple to apply when all claims within a class are undisputed and liquidated. The court need ensure only that available proceeds are divided equally based upon the known values of the claims. . . .
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> The situation changes considerably, however, when a class is composed of disputed and unliquidated claims. Under this scenario, the precise value of the claims will not be known. And short of actually liquidating the claims, there is no way to determine whether a proposed settlement is offering to pay claimants the same percentage recovery on their respective claims. Any attempt to practically apply the rule of *AOV*, then, would be unduly burdensome and would severely inhibit, if not eliminate the estate's ability to settle disputed and unliquidated claims.

In re Dow Corning Corp., 244 B.R. at 667-68.

Consequently, other court's have determined that the conclusion reached by the court in *AOV Industries* does not demand "that all class members must be treated precisely the same in all respects but rather that there be an approximate measure of equality." *In re Resorts Int'l, Inc.*, 145 B.R. at 448. *See also In re Quigley Co.*, 377 B.R. at 116 ("Section 1123(a)(4) does not require precise equality, only approximate equality."); *In re Dow Corning Corp.*, 244 B.R. at 669 ("we reject the notion that a plan must always provide strict proportional equality of payments within a class").

At the least, the High Carolina club members' treatment under the Plan provides "an approximate measure of equality," *In re Resorts Int'l, Inc.*, 145 B.R. at 448, because it is at least

approximately equal to the treatment of other members of the Remaining Clubs within Class 7. *See In re Dow Corning, Corp.*, 244 B.R. at 670 (where creditors under Chapter 11 plan were given opportunity to either litigate their claims or receive settlement payments computed under an identical formula, all members within the class received "equal treatment" notwithstanding the fact that "the payment formula may yield different amounts depending upon the variables that each claimant brings to the equation").

Because the treatment of the High Carolina members is approximately equal, if not precisely equal, to the members of Remaining Clubs within Class 7, the Debtor's Plan provides "the same treatment for each claim or interest of a particular class" pursuant to § 1123(a)(4) and, therefore, the Plan satisfies 11 U.S.C. § 1129(a)(1).

3. The Plain Does Not Fail to Disclose Essential Terms

The Goldbergs' third argument under § 1129(a)(1) is that the Plan fails to "disclose or explain certain very basic terms which are essential for knowledgeable consideration of the proposals." (Goldberg Obj., at p. 11.)

Section 1125 of the Bankruptcy Code provides:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.

11 U.S.C. § 1125.

The Plan and the previously filed Disclosure State provide all essential information necessary for the creditors, including the Goldbergs, to have adequate information to make an informed decision regarding how to vote under the Plan. Specifically, each of the items which the Goldbergs assert is "missing" from the Plan and Disclosure Statement has been previously

filed with the Court and distributed to all of the creditors, including Goldberg. Specifically, the Debtor disclosed "[a] description of the property being transferred pursuant to the exhibits and schedules to the Asset Purchase Agreement, which were provided on August 3, 2012. [Dkt. No. 641].

The Goldbergs challenge the absence of "[a] description of the litigation involving the property being transferred, the affiliates, insiders, property to be transferred by insiders, amenities, and foreclosures of amenity property." Although certain litigation recently has been filed (July 25, 2012) by Bruce Cassidy Jr. against Jim Anthony and certain non-debtor affiliates of the Debtors in the United States District Court for the District of South Carolina, and although a consent TRO has been entered in that litigation against certain non-debtor affiliates of the Debtors, such litigation does not impact the Plan because the transaction between the Debtors and the Plan Sponsor does not require the transfer of any property at High Carolina by the Debtors to the Plan Sponsor.

The Bankruptcy Court entered an order approving the Disclosure Statement as containing adequate information. The Goldbergs did not object to the Disclosure Statement. Thereafter, the Debtors have filed additional information including the Second Plan Supplement [Dkt. No. 615], a draft of the Disclosure Schedules to the Asset Purchase Agreement [Dkt. No. 641] and the Declarations of Katie S. Goodman [Dkt. No. 642] and John Kunkel [Dkt no. 643].

Consequently, all relevant information has either already been provided within the Plan and the Disclosure Statement, has been furnished in subsequent filings, or will be provided by the Debtor at the hearing scheduled for Monday August 6, 2012 ("Confirmation Hearing"). For those reasons, the Debtor has satisfied its obligations to provide adequate information pursuant to 11 U.S.C. § 1125.

B. The Debtor's Plan Has Been Proposed In Good Faith Pursuant to 11 U.S.C. § 1129(a)(3)

The Goldbergs next assert that the Plan should be not confirmed because it was not proposed in good faith. One of the requirements for the confirmation of a Chapter 11 plan is that it "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). The Goldbergs fail to make any specific assertion as their reasoning behind why the Plan was not proposed in good faith, other than to reiterate their concerns about the disclosure of key terms within the Plan and the Disclosure Statement. Because those identified terms have either already been disclosed or will be disclosed at the Confirmation Hearing, the Goldbergs have failed to allege any grounds establishing that the Plan was not proposed in good faith.

Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." In the context of § 1129(a)(3), good faith is not some free-floating conception of ethics or morality; rather, it has a specific meaning: good faith means that "the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'" *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988) (quoting *Koelbl v. Glessing* (*In re Koelbl*), 751 F.2d 137, 139 (2d Cir. 1984)); see also *Official Comm. of Unsecured Creditors v. Nucor Corp.* (*In re SGL Carbon Corp.*), 200 F.3d 154, 165 (3d Cir. 1999) (finding that good faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11); *Fin. Sec. Assurance Inc. v. T-H New Orleans, L.P.* (*In re T-H New Orleans L.P.*), 116 F.3d 790, 802 (5th Cir. 1997) (good faith inquiry involves a totality of circumstances analysis, "keeping in mind the purpose of the [Bankruptcy Code] is to give debtors a reasonable opportunity to make a fresh start"). "Generally, a plan is proposed in good faith if there is a reasonable likelihood that it will

achieve a result consistent with the goals of the Bankruptcy Code," *In re Piece Goods Shops Co., L.P.*, 188 B.R. 778, 790 (Bankr. M.D.N.C. 1995) (citing *Hanson v. First Bank of S. Dakota, NA*, 828 F.2d 1310 (8th Cir. 1987)) and "[t]he primary goal of chapter 11 is to promote the restructuring of the debtor's obligations so as to preserve the business and avoid liquidation." (citing *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.")). "In order to determine if a plan has been filed in good faith, a court should consider the totality of the circumstances." *In re Radco Props., Inc.*, 402 B.R. 666, 673 (Bankr. E.D.N.C. 2009) (citing *In re Piece Goods Shops Co., L.P.*, 188 B.R. at 790). Here, that the Plan has been proposed in good faith is evidenced by the fact that the Plan provides for the ongoing operation of the Clubs under new ownership while maximizing the value of the Debtors and the recovery to creditors. The Plan was the result of extensive negotiations with the Indenture Trustee, the Creditors' Committee and other core constituencies.

1. The Releases provided by the debtor to non-parties pursuant to the plan are permissible and do not serve as a basis to deny confirmation

The Goldberg attempt to argue, in connection with their assertion that the Debtor's Plan was not proposed in good faith, that certain releases within the Plan of various non-debtors (the "Non-Debtor Releases") are impermissible and should serve as a basis for denying confirmation of the Plan. The Goldbergs' argument fails, however, because the cases she relies upon do not envision the consensual releases which are provided for in the Plan, and which would not apply to creditors who have voted to reject the Plan, such as the Goldbergs.

The authority to grant releases to non-debtors arises from § 105 of the Bankruptcy Code, which provides bankruptcy courts with the power to issue "any order, process or judgment that is

necessary or appropriate to carry out the provisions of [Title 11]." *See In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989) (rejecting notion that bankruptcy courts were foreclosed from releasing and enjoining causes of action against non-debtors). "[W]hether a court should lend its aid in equity to a Chapter 11 debtor will turn on the particular facts and circumstances of the case." *Behrmann v. Nat'l Heritage Foundation*, 663 F.3d 704, 711 (4th Cir. 2011). "The Court of Appeals for the Fourth Circuit has determined that the bankruptcy court may release the liabilities of non-debtors in certain circumstances, including when the plan is overwhelmingly approved and where the injunction is essential to a workable reorganization." *In re Railworks Corp.*, 345 B.R. 529, 536 (Bankr. D. Md. 2006).

The Goldbergs attempt to argue that non-debtor releases are granted only in rare circumstances that involve unique factual situations and that the Debtor has failed to make the requisite factual showing that the various elements set forth in cases such as *In re Dow Corning*, 280 F.3d 648, 711-12 (6th Cir. 2002), and *In re Railworks Corp.*, 345 B.R. at 536, have not been satisfied. (Goldberg Obj. at pp. 14-16.) The Goldbergs' detailed assessment of the required factual findings necessary to justify releases, however, is wholly irrelevant to the Plan in this Bankruptcy Case. The types of releases contemplated by the Goldbergs are "non-consensual releases" or releases that are imposed on all creditors and interest holders in a bankruptcy regardless of whether or not they vote to approve the plan of reorganization. *See e.g.*, *In re Dow Corning Corp.*, 280 F.3d at 658 (listing factors necessary for bankruptcy court to "enjoin a *non-consenting* creditor's claims against a non-debtor") (emphasis added). By contrast, the releases contemplated by the Plan are "consensual" in that they are only applied against those creditors and interest-holders who vote to accept the Plan.

Specifically, § 10.03(b) of the Plan provides:

Releases by ~~Hol~~ders of Claims and Interests. Effective as of the Effective Date, and except as otherwise provided in the Plan or the Confirmation Order, to the fullest extent permitted under applicable law, in consideration for the obligations of the Persons set forth below under the Plan and, if applicable, the Cash, securities, contracts, releases and other agreements or documents to be delivered in connection with the Plan, **each Holder of a Claim or Interest who votes in favor of the Plan or is presumed to have voted in favor of the Plan pursuant to section 1126(f) of the Bankruptcy Code** will be deemed to have forever waived and released (i) the Debtors, (ii) the Liquidation Trustee, (iii) the Liquidating Trust, (iv) the Releasees, and (v) the D&O Releasees from any and all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of such Holders of Allowed Claims under the Plan to enforce the Plan and the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder), whether in tort, contract, violations of federal or state securities laws, or otherwise, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or part of any act, omission, transaction, event or other occurrence, including actions in connection with indebtedness for money borrowed by the Debtors, taking place on or prior to the Effective Date in any way relating to the Debtors, the Chapter 11 Cases, or the Plan. . . .

(Plan at § 10.03(b), Doc. 616-1, p. 61.)

Additionally, the Plan provides for certain "Released Claims" in connection with the releases by holders of claims and interests. Those Released Claims are set forth in § 10.01(b) of the Plan, which provides:

(b) Released Claims. AS OF THE EFFECTIVE DATE, THE CONFIRMATION ORDER WILL CONSTITUTE AN INJUNCTION PERMANENTLY ENJOINING ANY PERSON THAT HAS HELD, CURRENTLY HOLDS OR MAY HOLD A CLAIM, DEMAND, DEBT, RIGHT, CAUSE OF ACTION OR LIABILITY **THAT IS RELEASED PURSUANT TO THE PLAN** FROM ENFORCING OR ATTEMPTING TO ENFORCE ANY SUCH CLAIM, DEMAND, DEBT, RIGHT, CAUSE OF ACTION OR LIABILITY AGAINST (I) ANY DEBTOR, (II) THE LIQUIDATING TRUST, (1II) ANY RELEASEE, (IV) ANY D&O RELEASEE, OR (V) ANY EXCULPATED PERSON, OR ANY OF ITS PROPERTY, BASED ON, ARISING FROM OR RELATING TO, IN WHOLE OR IN PART, ANY ACT, OMISSION, OR OTHER OCCURRENCE TAKING PLACE ON OR PRIOR TO THE EFFECTIVE DATE WITH RESPECT TO OR IN ANY WAY RELATING TO THE CHAPTER 11 CASE, ALL OF WHICH CLAIMS, DEMANDS, DEBTS, RIGHTS, CAUSES OF ACTION OR LIABILITIES WILL BE DEEMED RELEASED ON AND AS OF THE EFFECTIVE DATE . . . .

(Plan at § 10.01(b), Doc. 616-1, pp. 50-51.)

Therefore, because all "Released Claims" must be released "pursuant to the Plan," and the Plan only provides for releases by a holder of any claims and interests "who votes in favor of the Plan or is presumed to have voted in favor of the Plan pursuant to section 1126(f) of the Bankruptcy Code," no claimholder who votes against the Plan, such as the Goldbergs, is subject to the releases. "[C]ourts have found releases that are consensual and non-coercive to be in accord with the strictures of the Bankruptcy Code. Unlike the injunction created by the discharge of a debt, a consensual release does not inevitably bind individual creditors. It binds only those creditors voting in favor of the plan of reorganization." *In re Specialty Equip. Co.*, 3 F.3d 1043, 1047 (7th Cir. 1993) (internal citations omitted). Thus, because the Debtor's Plan proposes a consensual release, "a creditor who votes to reject the Plan [such as the Goldbergs] or abstains from voting may still pursue any claims against third-party nondebtors." *Id.* *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005) ("Courts have approved nondebtor releases when . . . the affected creditors consent."); *In re Monroe Wells Serv., Inc.*, 80 B.R. 324, 334 (Bankr. E.D. Pa. 1987) ("a plan provision permitting individual creditors the option of providing a voluntary release to nondebtor plan funders does not violate 11 U.S.C. § 524(e))").

The Fourth Circuit Court of Appeals appears to have addressed this question in *A.H.* Robins, because it subsequently stated that in its decision in that case "we determined that section 524(e) does not deny the bankruptcy court the power to release liabilities of a non-debtor under the terms of a Chapter 11 plan when the creditors of the non-debtor approved of and accepted the terms of the plan." *Stuart, L.L.C. v. First Mount Vernon Indus. Loan Assoc.*, 3 Fed. Appx. 38, 42 (4th Cir. 2001) (citing *in re A.H. Robins Co.*, 880 F.2d at 702). *Cf. Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 228 (4th Cir. 2000) ("[W]hen a release of

liability of a nondebtor is a consensual provision . . . agreed to by the affected creditor, it is no different from any other settlement or contract . . . .").

Thus, the Goldbergs incorrectly rely on *In re Transit Group, Inc.*, 286 B.R. 811 (Bankr. M.D. Fla. 2002), as a basis for finding non-debtor releases are permissible only in limited and enumerated circumstances and that "Debtors should not automatically expect to release officers, directors, insurers, or creditors from future liability" unless they can establish through factual findings some "extraordinary reason" for the releases. Rather, because the releases are only applied to consenting claimholders, the factors identified by the Goldbergs are not required, the non-debtor releases contemplated by the Plan are permissible and, therefore, should not serve as a basis for denying confirmation.

Finally, because the non-debtor releases within the Plan are only applicable to claimholders who vote to accept the Plan, and because the Goldbergs have already voted to reject the Plan and therefore are not subject to those releases, they lack standing to even assert an argument challenging those releases. Even though the Goldbergs are creditors of the Debtor and, therefore, are entitled to object to confirmation of the Plan, *see* 11 U.S.C. § 1128(b), even where a party falls into one of the specifically enumerated "party in interest" categories in § 1109(b), that party still lacks standing to object to aspects of the proposed plan that do not directly affect their own interests as party in interest. In re Orlando Investors, L.P., 103 B.R. 593, 596 (Bankr. E.D. Pa. 1989) (even parties in interest "'have standing only to challenge those parts of a reorganization plan that affect their direct interests.'") (quoting In re Evans Prods. Co., 65 B.R. 870, 874 S.D. Fla. 1986)).

A party in interest may have standing to object to one provision of plan that directly affects its pecuniary interest as party in interest but lack standing to object to other plan

provisions that do not. In re Ofty Corp., 44 B.R. 479, 481 (Bankr. D. Del. 1984). "'Only parties adversely affected by provisions of a plan may raise an objection to confirmation based on such provisions.'" In re Gaston & Snow, 1996 WL 694421, *7 (S.D.N.Y. Dec. 4, 1996) (quoting In re Johns-Manville Corp., 68 B.R. 618, 623-24 (Bankr. S.D.N.Y. 1987)); accord TM Patents, L.P. v.IBM Corp., 121 F. Supp. 2d 349, 362 (S.D.N.Y. 2000) (A party in interest who is not directly aggrieved by a provision in a plan of reorganization lacks standing to object to that specific provision).

Therefore, because the Goldbergs retain all claims that they would otherwise have against the various non-debtor parties that have been released under the Plan, they are not adversely affected by the non-debtor releases and are therefore not parties in interest with respect to those provisions within the Plan.

Consequently, because the consensual non-debtor releases have been expressly upheld by numerous bankruptcy courts and the Fourth Circuit has implied that such non-debtor releases are permitted in bankruptcy proceedings, and because as a non-consenting creditor, the Goldbergs lack standing to challenge the non-debtor releases, those release are valid and cannot serve as a basis for denying confirmation of the Debtor's Plan.

C. The Goldberg's Objection that the Plan Should Not be Confirmed Because it Would Not Meet the Absolute Priority Rule if the Classification of Creditors Was Corrected Is Untrue and Lacks Merit.

As evidenced by the Declaration of Balloting Agent Regarding Solicitation and Tabulation of Votes In Connection With the Plan [Dkt. No. 636], all seven (7) classes of creditor claims have voted to accept the Plan. Consequently, Bankruptcy Code Section 1129(b) sole relevance is to the confirmation of the Plan despite the deemed rejection by the Class 8 equity holders who are not receiving or retaining anything on account of their equity interests under the

Plan. Because there is no class of interests junior to Class 8, the absolute priority rule is satisfied.

As indicated above in paragraph 9, even if a separate class of claims had been created for the club members of The Cliffs at High Carolina Golf & Country Club, LLC, based on the votes cast by such club members, such a class would have accepted the Plan by the requisite percentages in number and amount.

D. The Plan is Feasible and confirmation is proper under 11 U.S.C. § 1129(a)(11).

The Goldberg Objection concludes with an argument that the Plan should not be confirmed because the Debtors cannot show that it is feasible. The Debtors respectfully disagree. Section 1129(a)(11) of the Bankruptcy Code requires that the Bankruptcy Court find that the plan is feasible as a condition precedent to confirmation. Specifically, the Bankruptcy Court must determine that

> [c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

The Plan proposes the liquidation of the Debtors and so Bankruptcy Code section 1129(a)(11) has been satisfied. On its face, Bankruptcy Code section 1129(a)(11) would seem to be inapplicable because the Plan provides for the sale of substantially all of the Debtors' assets. See, e.g., In re Machne Menachem, Inc., 371 B.R. 36, 71-72 (Bankr. M.D. Pa. 2006) ("In light of the fact [that proponent's] plan leaves the Debtor with no continuing business (only funds and the ability to litigate pending actions), the Court finds the usual feasibility factors are inapplicable to the instant case."). To the extent Bankruptcy Code section 1129(a)(11) is applicable, the Debtors submit that the Plan satisfies the requirements thereof and is feasible because the implementation of the Plan and the wind-down of the

Debtors' affairs pursuant thereto will be administered by the Liquidation Trustee and funded by proceeds from the Sale. Because the sale of substantially all of the Debtors' assets to the Plan Sponsor is expected to close on the Effective Date, the foregoing distributions are not dependent upon any operations by the Debtors.

The only notable remaining feasibility concern is the certainty of closing with respect to the Sale to the Plan Sponsor. In these circumstances, however, feasibility requires a probability of closing, not a guarantee. See, e.g., In re Reading Broad., Inc., 386 B.R. 562, 574 (Bankr. E.D. Pa. 2008) ("While I acknowledge that there is no guarantee that [the purchaser] will complete the purchase of the station assets from the trustee, section 1129(a)(11) of the Bankruptcy Code does not impose such a high standard. Rather, I concluded on January 17th that the evidence at the confirmation hearing was sufficient to demonstrate that the sale had a probability of closing and that the trustee's plan would be consummated.").

The Goldberg Objection focuses on a lack of information regarding what must occur on behalf of the Debtors in order to comply with the Plan and what must be provided from non-Debtor parties not under the control of the Plan proponents. The Goodman and Kunkel Declarations [Dkt. No. 642 and 643] and the Debtors' filing of a draft of the Schedules to the Asset Purchase Agreement [Dkt. No. 641] further demonstrate that the Plan is feasible.

NOTICE OF THIS RESPONSE

14. No trustee or examiner has been appointed in these Chapter 11 cases. Notice of this Response will be served pursuant to the Order Establishing Certain Notice, Case Management and Administrative Procedures [Dkt. No. 121], and upon the Goldbergs. The Debtors submit that, under the circumstances, no other or further notice is required.

NO PRIOR REQUEST

15. No previous request for the relief sought in this Response has been made to this Court or any other court.

WHEREFORE, the Debtors respectfully request that the Goldbergs Objection be denied and that this Court grant such other and further relief as the Court may deem just and proper.

[*signature follows*]

Dated: August 4, 2012

Respectfully submitted,

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