

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re: The Cliffs Club & Hospitality Group, Inc., et al.,¹ d/b/a The Cliffs Golf & Country Club, Debtors.	CHAPTER 11 Case No. 12-01220-JW Jointly Administered
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**LIMITED OBJECTION OF THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS TO ENTRY OF ORDER
APPROVING BIDDING PROCEDURES [DOC. NO. 42]**

The Official Committee of Unsecured Creditors (the "Committee") of the above captioned debtors and debtors in possession (the "Debtors"), by and through its proposed counsel, Bingham McCutchen LLP, submits this limited objection to entry of an order granting the *Motion for Order (a) Approving Bidding Procedures for Auction to Become the Designated Sponsor of the Debtors' Chapter 11 Plan of Reorganization; (b) Approving Break Up Fee and Expenses Reimbursement Payable in Certain Circumstances to the Carlile Development Group; and (c) Approving the "Substitution Conditions" Contained in the DIP Loan Agreement [doc. no. 42]*.

The Committee does not object to the substantive relief sought, and understands the importance of an expedited and efficient process to sell the Clubs to a well-capitalized and qualified ownership team. The Debtors need the ability to run a fair and informed process garnering as many bids as possible and welcoming the evaluation of the bona fides,

¹ The Debtors, followed by the last four digits of their respective taxpayer identification numbers, are as follows: The Cliffs Club & Hospitality Group, Inc. (6338); CCHG Holdings, Inc. (1356); The Cliffs at Mountain Park Golf & Country Club, LLC (2842); The Cliffs at Keowee Vineyards Golf & Country Club, LLC (5319); The Cliffs at Walnut Cove Golf & Country Club, LLC (9879); The Cliffs at Keowee Falls Golf & Country Club, LLC (3230); The Cliffs at Keowee Springs Golf & Country Club, LLC (2898); The Cliffs at High Carolina Golf & Country Club, LLC (4293); The Cliffs at Glassy Golf & Country Club, LLC (6559); The Cliffs Valley Golf & Country Club, LLC (6486); Cliffs Club & Hospitality Service Company, LLC (9665).

qualifications, capital resources, and business strategies of any would be owner or operator to determine if they can and will live up the to requirements of running and operating the Cliffs. The outcome of these cases will directly affect the lives of homeowners who have paid in their money, and continue to pay dues every month, and whose homes and neighborhood communities depend on a successful reorganization, and to the trade and local workers who have committed their hard labor and resources to the developments; they too hang in the balance. Accordingly, the Committee's objections are limited and pointed; directed at material concerns that impact the chapter 11 process and that could not be informally resolved.

I. RELEVANT BACKGROUND

1. On February 28, 2012 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

2. On March 12, 2012, pursuant to the Fourth Amended Appointment of Committee of Unsecured Creditors [doc. no. 141], the Office of the United States Trustee (the "U.S. Trustee") appointed the Committee. The Committee consists of the following members: (i) John W. Sager; (ii) Janet D. Hilligoss; (iii) Harrell's, LLC; (iv) H. Michael Krimbill; (v) Adams Herndon Carson Crow & Saenger, PA; (vi) John Mack; and (vii) Hoot Gibson. On March 7, 2012, the Committee selected Bingham McCutchen LLP as its proposed counsel.

3. On the Petition Date, the Debtors filed a motion seeking relief related to the approval of bid procedures, stalking horse bidder and break-up fee [doc. no. 42] (the "Bid Procedures").

4. Prior to the hearing on the Bid Procedures, the Committee had discussions with key parties to discuss its comments and concerns. It is the Committee's understanding that the Bid Procedures will be revised to accommodate certain changes the Committee has requested.

However, as of the time of filing of this limited objection, the Committee has not yet received for review revised Bid Procedures and, accordingly, the Committee reserves all rights to raise any additional issues not addressed as anticipated.²

II. OBJECTION TO BID PROCEDURES³

A. **The Carlile Group Should Not Be Deemed A Qualified Bidder Unless The Carlile Group Fulfills All Qualified Bidder Requirements**

5. The Bid Procedures deem the Carlile Group a Qualified Bidder, subject only to delivery of Carlile Transaction Documents. (Bid Procedures § VI) Other potential bidders, however, must satisfy a number of requirements, including evidence of financial ability to consummate the proposed transaction, to be deemed a Qualified Bidder. (Bid Procedures §§ IV, VI) The Carlile Group should only be deemed a Qualified Bidder after it, too, has satisfied the same requirements as expected of other Potential Qualified Bidders, including providing evidence of its financial wherewithal to consummate the sale.

B. **The Carlile Group Should Be Bound To Consummate The Transaction In Order To Receive Stalking Horse Bidder Protections**

6. The Carlile Term Sheet provides that “the Investor must be reasonably satisfied that, no later than Plan Closing, it can acquire all assets of those other than the Filing Debtors needed to effectuate its post-Plan Closing operations and land acquisitions.” (Carlile Term Sheet § C.4) This essentially creates an option for the Carlile Group and allows them to refuse to consummate the transaction if the Carlile Group thinks they will be unable to assemble all the needed development real estate by Plan Closing. The Carlile Group should not receive stalking

² According to the Committee’s understanding, the Bid Procedures shall be amended to allow for the Chief Restructuring Officer to consider views of all constituencies (including member interests) in assessing the highest and best bid; the Committee will be provided with appropriate notice; and that any objections to determinations at the auction and the final sale itself shall remain subject to objections by parties in interest and a final order of the Court.

³ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Bid Procedures.

horse bidder protections, including a break-up fee and expense reimbursement, unless the Carlile Group is bound to consummate the proposed transaction. Further, absent a committed purchase agreement binding the Carlile Group, it is premature to approve the Bid Procedures and stalking horse bidder protections.⁴

C. No Basis Has Been Provided For The \$1 Million Break-up Fee

7. The Bid Procedures provide a \$1 million break-up fee to the Carlile Group. (Bid Procedures § IV(viii)) Forgetting for the moment the burgeoning case law regarding whether Bankruptcy Courts should condone break-up fees or reject them as unnecessary and chilling to an auction process, the Carlile Group must provide an explanation for the \$1 million break-up fee in light of the proposed transaction to allow the Committee to make a determination as to the reasonableness of a \$1 million break-up fee. Bankruptcy courts generally limit break-up fees to about 3% of the proposed purchase price. Moreover, as this Court discussed in *In re Daufuskie Island Properties, LLC*, 09-00389-W, slip op. at 15 (Bankr. D.S.C. Jun. 17, 2011), the following factors set forth in *Calpine Corp. v. O'Brien Env't'l Energy, Inc. (In re O'Brien Env't'l Energy, Inc.)*, 181 F.3d 527, 534-36 (3d Cir. 1999) should be considered in determining the reasonableness of a proposed break up fee: (1) whether the relationship of the parties who negotiated the break-up fee is tainted by self-dealing or manipulation; (2) whether the fee harms rather than encourages, bidding; (3) whether the fee is unreasonable in relation to the purchase price; (4) whether the requested fee correlates with a maximization of value for the estate; (5) whether the underlying agreement is an arms-length transaction negotiated by the estate representative and the proposed stalking horse buyer; (6) "whether the principal secured creditors and the official creditors committee are supportive of the concession;" (7) whether the break-up

⁴ In fact, the Carlile Group just distributed a draft purchase agreement this week. Of course, all rights and remedies are reserved in connection with the review and approval of the sales agreement and related transfer documents.

fee is a fair and reasonable percentage of the proposed purchase price: (8) whether the amount of the break-up fee is so substantial that it has a "chilling effect" on other potential buyers: (9) the "existence of available safeguards beneficial to the debtor's estate;" and (10) whether there is a substantial adverse impact on unsecured creditors where such creditors oppose the break-up fee.

8. Based on the available information regarding the proposed transaction, a \$1 million break-up fee is excessive and unreasonable, and creates an unnecessary hurdle for potential bidders. It is to the benefit of the estates and their creditors for the Debtors to obtain the largest pool of bids. Requiring bids to be sufficiently high enough to cover a \$1 million break-up fee (among other things) will narrow the number of bids received at the outset of this sale process to the detriment of the estates and their creditors

D. Mechanism For Expense Reimbursement Of The Carlile Group Should Be Based On, And Not Exceed, Actual Accruals

9. The Bid Procedures provide that the Carlile Group is to receive \$750,000 (to be increased by an additional \$100,000/month commencing in September 2012) as expense reimbursement. (Bid Procedures § IV(viii)) Given the size of these cases and the proposed transaction, \$750,000 for reimbursement of the fees and expenses of the proposed stalking horse bidder appears excessive. Any reimbursement of fees and expenses of the proposed stalking horse bidder must not exceed actual fees and expenses accrued.

E. Bidders Should Be Required To Deliver A Definitive Form Of New Membership Plan And Related Agreements

10. The Bid Procedures currently only requires the Carlile Group and Potential Qualified Bidders to deliver "a description" of the new member plan and related agreements. (Bid Procedures §§ VI) These documents are critical for members to understand the changes to their membership terms. The Carlile Group and any Potential Qualified Bidder should be

required to deliver a definitive form of new membership plan and related agreements, and as early as possible.

F. The Timetable For Certain Bid Procedure Events Should Be Extended To Allow Sufficient Time To Review And Negotiate

11. Potential Qualified Bidders are required to deliver Qualified Bidder Transaction Documents by April 21, 2012. (Bid Procedures § VI) In the event of competing bids, an Auction will be held two days thereafter on April 23, 2012. (Bid Procedures § VII) This timeframe is too truncated to allow parties in interest sufficient time to review and negotiate terms. The Committee suggests additional time be provided to allow for negotiation and consideration of competing proposals. To the extent that no competing proposals are received, the Committee is willing to consider a shortening of the timeframes to facilitate the sale and plan process.

III. CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) grant the Committee's limited objections, (ii) modify the proposed order approving the bidding procedures to address the Committee's limited objections; and (iii) grant such other and further relief as it deems just and proper.

Dated: March 13, 2012

Respectfully submitted,

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