UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	)	CHAPTER 11
	)	
The Cliffs Club & Hospitality Group,	)	Case No. 12-01220-jw
et al.[1], d/b/a The Cliffs Golf and	)	
Country Club,	)	
	)	(Jointly Administered)
Debtors.	)	

OBJECTION TO PLAN CONFIRMATION

Catherine and Daniel Goldberg (the "Goldbergs"), by and through their undersigned attorney, hereby object to confirmation of the First Amended and Restated Joint Chapter 11 Plan filed by the Debtors on July 2, 2012 (Docket # 479) and amended on July 27, 2012 (Docket # 616); the Plan Supplement to the Joint Chapter 11 Plan Filed by the Debtors and the Plan Sponsor filed on July 1, 2012 (Docket # 470); and the Second Plan Supplement to the First Amended and Restated Joint Chapter 11 Plan Filed by the Debtors and the Plan Sponsor filed on July 27, 2012 (Docket # 615) (collectively, the "Plan"). In support of their objection, the Goldbergs show as follows:

I. INTRODUCTION

The Goldbergs are owners of undeveloped property in the High Carolina community and are members of The Cliffs at High Carolina Golf & Country Club, LLC. They have a claim in the amount of $150,000 resulting from their membership in the Club. The Plan proposes treatment of their claim in ways which are highly discriminatory and prejudicial and which do

[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 (7576); The Cliffs at Glassy Golf & Country Club, LLC (6559); The Cliffs Valley Golf & Country Club, LLC (6486); and Cliffs Club & Hospitality Service Company, LLC (9665).

not comply with the requirements of 11 U.S.C. § 1129 for many reasons, including the following:

- High Carolina members are dissimilar from other members of their class and are not receiving equal treatment;
- The plan and disclosure statement glazes over and would approve undisclosed insider dealings that may deprive the High Carolina members of the present value of their claims against non-debtors and their ability to enjoy free use of their property;
- While all other members receive the ability to enjoy the communities they bought into, and will have marketable properties, the result of the plan on High Carolina members is to deliver imperious leverage to the plan sponsor to determine whether the High Carolina properties are ever usable or marketable and what form the High Carolina community would take, if there ever is one; and
- The vague and overbroad plan releases are patently unconfirmable and demonstrate the sponsor's illegal overreaching.

II. STATEMENT OF FACTS

a. Brief History of the Debtors

As provided in the Disclosure Statement approved by the Court by order entered on July 2, 2012 (the "DS"), the Cliffs communities began with the opening of its first community in 1991. From this beginning, they have expanded to include 8 different club communities with

3,734 lots having been sold. Numerous entities have been formed and have evolved over the years, dealing with the development and sale of this property and concept.

The entities have been roughly divided into four different categories:

CATEGORY 1: The companies which own and sell the real estate (the "DevCo Companies");

CATEGORY 2: The companies which own and sell the club memberships (the "Club Companies");

CATEGORY 3: The companies which service these entities; and

CATEGORY 4: The companies which hold these entities.

Of these four categories, the companies falling primarily within Category 2 above have filed Chapter 11. They are listed as follows:

1. CCHG Holdings, Inc.
2. The Cliffs Club & Hospitality Group, Inc.
3. The Cliffs at Mountain Park Golf & Country Club, LLC
4. The Cliffs at Keowee Vineyards Golf & Country Club, LC
5. The Cliffs at Walnut Cove Golf & Country Club, LLC
6. The Cliffs at Keowee Falls Golf & Country Club, LLC
7. The Cliffs at Keowee Springs Golf & Country Club, LLC
8. The Cliffs at High Carolina Golf & Country Club, LLC
9. The Cliffs at Glassy Golf & Country Club, LLC
10. The Cliffs Valley Golf & Country Club, LLC
11. Cliffs Club & Hospitality Service Company, LLC

(collectively, the "Debtors").

b. **Other Related Entities**

The DevCo Companies (Category 1), which own and sell the residential real estate in the various communities, have not filed Chapter 11 and the Plan attempts to shield them from liability as a result of the filing by the Club Companies.

The DevCo Companies and the Club Companies have set up 8 different communities, all of which operate using the same concept. The real estate is sold by the DevCo Companies to the purchaser, who is then entitled to become a member of the Club Companies, who own and control the Club amenities. Each real estate purchaser is allowed to become a member with the Club Companies upon payment of a sizeable membership fee, followed by dues and fees on a regular schedule.

The DS carefully advises that the Club Companies do not own the real estate involved for sale, but does not provide the names of the DevCo Companies who do own and sell the underlying real estate. It appears that the ownership of the Club Companies and the DevCo Companies is the same and that through several layers of ownership, the ultimate owner of the DevCo Companies and the Club Companies is Cliffs Communities, Inc. ("CCI"). CCI, in turn, is owned 80% by James Anthony. One of the apparent goals of the Plan is to horse trade with CCI and its owners and affiliates by providing them with releases from liabilities in exchange for transfers of undisclosed assets.

c. **Current Status of Property**

The 8 club communities and their current status, as disclosed in the DS, are provided below:

Name of Club	Percent of lots sold	Amenities Completed
The Club at Glassy	95%	18 hole Tom Jackson Golf Course Natural areas Hiking trails Wellness center

		Chapel 22,000 sq. ft. clubhouse
The Club at Cliffs Valley	90%	18 hole Parkland Style Golf Course designed by world renowned golf Architect, Ben Wright 15,000 sq. ft. wellness center 28,000 sq. ft. clubhouse
The Club at Keowee Vineyards	86.75%	18 hole Tom Fazio designed golf course Tennis courts Clubhouse/restaurant Lake house Hiking trails Private marina Marina market Equestrian center
The Club at Walnut Cove	70.6%	Jack Niklaus Signature Course Wellness center with an indoor lap pool, state of the art fitness equipment, an outdoor pool, sauna, and tennis courts
The Club at Keowee Falls	70%	Jack Niklaus designed 18 hole golf course Clubhouse and restaurant atop the mountain

		Hiking trails Keowee Towne, including a wellness center, gourmet grocer, the Market at Keowee Town, and a hardware store
The Club at Keowee Springs	50%	Tom Fazio designed 18 hole golf course Beach club Golf training center containing the PGA Tour Academy
The Club at Mountain Park	61%	70% complete Gary Player designed golf course (to be completed pursuant to the Plan)
The Club at High Carolina	3.08%	None

d. **The Goldbergs**

The Goldbergs purchased their lot in High Carolina in July 2009. At the time of the purchase of their lot, they also purchased a golf membership for $150,000 from High Carolina Golf & Country Club, LLC, presumably one of the Debtors.

The purchase was premised upon improvements in the High Carolina community, including compliance with the Plan Development shown as the Department of Housing and Urban Development Property Report ("HUD Property Report"), with all infrastructure, including roads, water, sewer, electricity and other utilities to be completed as required by the HUD Property Report. The seller agreed to provide access by private, paved, two lane roads as shown on recorded plats, with such roads to be completed by June 2010. Water lines were to be available by March 2010, secured by irrevocable letters of credit posted with Buncome County,

NC. All electrical lines were to be in place by April 2010. Telephone lines were to be in place by April 2010.

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.

Three years have passed since the Goldbergs purchased the 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.

e. **Plan Provisions**

The DS provides that the Debtors own or lease all core amenities for every Club except High Carolina. The only club without completed amenities, other than High Carolina, is Mountain Park. The DS and Plan provide that all amenities at Mountain Park will be completed using an estimated $7.5 million of funding established by the Plan, designated as the "Mountain Park Facility." However, no such provision is made for High Carolina, and the DS and Plan repeatedly emphasize that High Carolina is being treated differently. High Carolina does not have, nor will it ever have, any amenities.

In addition, because the Mountain Park Facility is incomplete, the Plan makes special provisions for its club members, allowing them to reduce and defer the fees and expenses of membership. No such provision is made for High Carolina members.

In fact, the DS and Plan are candid about the fact that the Debtors do not own the property on which the High Carolina amenities were to be developed and that there are currently no plans whatsoever to develop those amenities. Specifically, the DS states that "the Debtors do not currently own any property at High Carolina, including all golf courses, practice areas, clubhouses, wellness centers, pools, tennis courts, pavilions, nature centers, restaurants, an equestrian center and other clubhouse amenities." [DS, Docket 480 at p. 34.]

Despite the fact that High Carolina members have no amenities and have limited access to their real estate, they are grouped in Class 7 of the Plan with all other club members, who have full access to all of the club amenities and $7.5 million set aside for completion of other amenities. The Plan asks High Carolina members to renew their worthless membership and pay additional fees and expenses, consisting of a transfer fee of $5,000 and annual dues of $10,380, when they are currently exempt from these payments. Absent such payment, they may completely lose the $150,000 membership they purchased. Their property will be substantially devalued because of the inability of future purchasers to obtain a membership. If they choose not to become a member, they will receive approximately 4% of their investment and future transferees of the property lose the ability to become a member in the future. The choice being offered to High Carolina members and their treatment under the Plan is diametrically different than the value of the choice being offered to other club members.

The Goldbergs have been offered a Hobson's choice – they can pay even more money in transfer fees and dues to retain a membership for amenities which do not exist, or they can decline the membership and receive 4% of their membership investment with a disastrous impact on the value of their lot and no method of achieving what they were promised. This has been offered in the same class with other members of the other 7 clubs, all of whom will be glad to

renew their membership and pay the fees to allow them to continue using the amenities which are freely available to them.

III. PLAN CONFIRMATION

The plan is unfair and inequitable and does not meet the requirements of the Bankruptcy Code. Confirmation should be denied for the following reasons:

A. <u>The Plan does not meet the requirements of 11 U.S.C. § 1129(a)(1), which requires that a Plan comply with the applicable provisions of Title 11.</u>

a. 11 U.S.C. § 1122

"Section 1122(a) of the Code governs the classification of claims, providing 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.'" *In re W.R. Grace & Co., et al.*, 2012 WL 2130981 at *37 (D. Del. June 11, 2012) (*quoting* 11 U.S.C. § 1122(a)).

Class 7 contains a group of club members who are not substantially similar. Six (6) of the 8 clubs have readily accessible property and completely finished and available amenities. One of the clubs does not have completed amenities, so the Plan provides a $7.5 million facility to complete the amenities for this club. Only High Carolina, with no completed amenities and no hope of having any in the foreseeable future, is required to choose whether to spend additional funds for a membership with no value or accept a 4% distribution.

A proponent has the ability to classify claims and interests but a proponent may "not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." *In re Greate Bay Hotel & Casino*, 251 B.R. 213, 224 (Bankr. D.N.J. 2000) (*quoting In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1167 (5th Cir.), cert. denied, 510 U.S.

992, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993)). *See also In re Lumber Exchange Bldg. Ltd. Partnership*, 968 F.2d 647 (8th Cir. 1992); *In re Bryson Properties, XVIII*, 961 F.2d 496, 502 (4th Cir. 1992).

b. 11 U.S.C. § 1123(a)(4)

The Plan also violates Section 1129(a)(1) in that it does not comply with 11 U.S.C. § 1123(a)(4), which provides in relevant part that "a plan shall . . . provide the same treatment for each claim or interest of a particular class . . . ." 11 U.S.C. § 1123(a)(4). As noted above, High Carolina members should not be grouped with other club members who have current value in their club membership. However, if the plan proponent attempts to group creditors into one class, it must provide the same treatment to each member of the class. In this case, the members of Class 7 are receiving extremely disparate treatment, not only in the choices they are offered, but also in the amounts they are required to pay.

For example, the members of Mountain Park, the club which has incomplete amenities which are to be completed pursuant to the Plan, are offered reduced fees and dues until the amenities are completed. High Carolina receives no such dispensation, despite the fact that there are absolutely no amenities whatsoever and no plans to complete them. The members of Mountain Park receive the benefit of a $7.5 million infusion of funds to be used to complete their amenities. Nothing has been offered to the members of High Carolina. "Once a plan has classified creditors, it must '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.'" *In re AOV Industries, Inc.*, 792 F.2d 1140, 1151 (D.C. Cir. 1986) (*quoting* 11 U.S.C. § 1123(a)(4)). *See also In re B & W Enterprises*, 19 B.R. 421, 425 (Bankr. D. Idaho 1982).

"Even though neither the Code nor the legislative history precisely defines the standards of equal treatment, the most conspicuous inequality that § 1123(a)(4) prohibits is payment of different percentage settlements to co-class members." *In re AOV Industries, Inc.*, 792 F.2d at 1152. "The other side of the coin of unequal payment, however, has to be unequal consideration tendered for equal payment." *Id.* "It is disparate treatment when members of a common class are required to tender more valuable consideration . . . in exchange for the same percentage of recovery." *Id. See also In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 1996) (finding that Canada and the United States, who were both members of the same class, were treated differently by the debtor's plan, as Canada was afforded far more recovery rights for its claims than was the United States).

In this instance, High Carolina members are required to tender the same consideration as other class members for membership which has no value to them. In fact, they are required to tender such consideration in the face of the substantially higher value provided to the members of Mountain Park and the other clubs.

c. *Failure to Disclosure Essential Terms*

The Plan does not disclose or explain certain very basic terms which are essential for knowledgeable consideration of the proposals. While the Goldbergs have only recently retained counsel, review of the available documents reveals that the following essential information is missing:

A description of the property being transferred has not been disclosed. An Asset Purchase Agreement (the "APA") is attached to the Plan Supplement to the Joint Chapter 11

Plan Filed by the Debtors and the Plan Sponsor (Docket # 470) and to the Second Plan Supplement to the First Amended and Restated Joint Chapter 11 Plan Filed by the Debtors and the Plan Sponsor (Docket # 615), but no description of the property being transferred is contained in the APA. Instead, it refers to exhibits and schedules which are supposed to be attached to the APA and which are incorporated by reference, but which are not included. It is not possible to determine what property is being transferred pursuant to this Plan.

Further, it is evident from the Plan that other non-estate property is also being transferred to affiliates, insiders and related parties but none of this information is provided. It is thus impossible to evaluate what is being transferred and the impact of this transfer on the Goldbergs.

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 is ongoing and has not been disclosed. For example, litigation has been filed in federal district court against Mr. Anthony and various DevCo Companies, seeking an immediate injunction against transferring certain property apparently to be conveyed as a condition precedent to consummation of the Plan. On information and belief, the property containing the projected amenities for High Carolina is about to be sold at foreclosure sale. Because this drastically impacts the valuation of the Plan and its feasibility, failure to provide this information renders the Plan unconfirmable.

A description of the parties being released has not been disclosed. While there is a list of the individuals receiving releases, the other entities, such as the DevCos, receiving releases are not fully identified or explained, with language in the DS and Plan referring vaguely to release of affiliates of the Debtors. Failure to identify the parties being released leads inevitably to other flaws in the Plan, involving the legality of such releases, which is discussed below.

A description of the insiders and affiliates has not been provided. It is evident that part of the conditions precedent for consummation of the Plan involve negotiations and contributions from such insiders and affiliates with some type of consideration offered to the insiders and affiliates for these exchanges. Not only are the insiders and affiliates not identified, the transactions occurring outside the Bankruptcy Court to achieve Plan consummation are not discussed or explained.

Section 1123 of the Bankruptcy Code sets forth the minimum standards for a Plan, and Section 1125 requires that adequate information be given to holders of a claim or interest. The plan proponent must prove, by a preponderance of evidence, at the confirmation hearing that it has complied with the applicable provisions of the Code. 11 U.S.C. § 1129(a)(2). Thus, approval of a disclosure statement does not alleviate the plan proponent's burden of proof as to full and adequate disclosure which must be made at the confirmation stage. *See In re Michelson*, 141 B.R. 715, 719 (Bankr. E.D. Calif. 1992). "Reassessing the adequacy of disclosure from the vantage of the confirmation hearing is an efficient safeguard of the integrity of the reorganization process. When the adequacy of information is initially determined during the presolicitation phase, the court is acting in a context in which information may be sketchy and preliminary. . . . By the time of the confirmation hearing, the context has changed. More information is available. The plan proponent has specific facts to prove." *Id.*

It is evident from the lack of very basic information that the Proponent of the Plan has not met its burden.

B. Confirmation of the Plan should be denied because it has not been proposed in good faith.

Because the Plan is so vague about so many basic provisions, it is difficult to determine with certainty exactly how it impacts the creditors, the Debtors, the purchaser, the insiders, the affiliates and the related entities. It is possible that the missing information has been withheld inadvertently, although this seems unlikely. Instead, the logical conclusion is that the information has been withheld because it would impede confirmation.

If confirmed, the Plan would allow the purchaser to determine the value of the property of the High Carolina members, who represent the smallest community with the most valuable land.

Confirmation should be denied because the Plan has not been proposed in good faith, as required by 11 U.S.C.§ 1129(a)(3).

C. Confirmation of the Plan should be denied because it provides for extensive releases of numerous non-Debtor parties, without explanation or justification.

As noted above, the Plan provides that numerous parties, many of whom are not identified, receive releases as a result of confirmation. Application of the analysis approved by the Fourth Circuit Court of Appeals regarding releases indicates that confirmation of the Plan should be denied.

The Fourth Circuit has held that Section 105(a) gives the bankruptcy court the power to issue an injunction against suits against non-debtor third parties, and that Section 524(e) does not preclude the discharge (release) of a non-debtor party when it has been accepted and confirmed as part of the reorganization process. *Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694 (4th Cir. 1989). However, the allowance of a non-debtor release is the exception, not the rule. Approval of non-debtor releases "should be granted cautiously and infrequently." *Behrmann v. Nat'l Heritage Foundation*, 663 F.3d 704, 712 (4th Cir. 2011).

While the Fourth Circuit has not adopted a specific test for the approval of release provisions, it has stated that the factors set forth in *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir.2002), are "instructive":

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id. at 711-12 (*quoting Dow Corning* at 658).

The Fourth Circuit in *Behrmann* likewise noted that the following factors set forth in *In re Railworks Corp.*, 345 B.R. 529 at 536 (Bankr. D. Md. 2006), are helpful as well: (1) overwhelming approval for the plan; (2) a close connection between the causes of action against the third party and the causes of action against the debtor; (3) that the injunction is essential to the reorganization; and (4) that the plan of reorganization provides for payment of substantially all of the claims affected by the injunction.

Despite these specific factors set forth in other decisions, the Fourth Circuit is "satisfied to leave to a bankruptcy court the determination of which factors may be relevant in a specific case." *Behrmann* at 712. Significantly, while the bankruptcy court appears to have discretion as to the factors it deems relevant to a specific case, the court is required to "make specific factual findings in support of its decision to grant equitable relief." *Id.* It is not sufficient to conclude

that there are unique circumstances, without specifying what those circumstances are. Likewise, it is not sufficient to conclude that the provisions are "essential", "important", "integral", "material", or the like. Such conclusions are "meaningless in the absence of specific factual findings explaining why this is so." *Id.*

This case does not appear to contain the type of unusual circumstances that have supported releases in other cases:

> The types of unusual circumstances necessary to justify granting non-debtor releases are varied. One example involved debtors engaged in extensive, nation-wide product liability litigation. In consideration for setting up a large fund to pay claims, courts have allowed non-debtor releases against the debtor's insurers, shareholders, and directors. *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir.2002) (debtor's insurer supplied $2.35 billion to a fund from which product liability claimants were paid.); *In re A.H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir.1989) (debtor's insurer supplied $350 million to a fund from which product liability claimants were paid). Another example of unusual circumstances deemed sufficient to justify non-debtor releases involved the payment of a large settlement to the Securities and Exchange Commission that the non-debtors would not have paid without the quid pro quo of a release from further claims. *In re Drexel Burnham Lambert*, 960 F.2d 285, 293 (2nd Cir. 1992) (Drexel's management paid $300 million to settlement). In yet another case, the Seventh Circuit Court of Appeals allowed non-debtor releases if the plan provides an alternative means for those claimants who choose not to settle to recover in full. *In re Specialty Equip. Co., Inc.*, 3 F.3d 1043 (7th Cir.1993) (according to the terms of the plan of reorganization, each creditor could choose not to grant the releases and pursue their claims against third parties).

In re Transit Group, Inc., 286 B.R. 811, 817 (Bankr. M.D. Fla. 2002). "Debtors should not automatically expect to release officers, directors, insurers, or creditors from future liability, unless some extraordinary reason is proven." *Id.*

In the *Transit Group* case, only one of the proposed non-debtor releases was approved. In that case, the Debtor attempted to release current officers, a related affiliate, the Unsecured Creditors Committee, and two other non-insiders providing financing. The one release that was approved involved an entity that provided substantial pre-petition and post-petition financing to

the debtor, and which had also agreed to provide exit financing as well as voluntary subordination of its $90 million unsecured claim behind other unsecured creditors in the same class. The court found that the entity contributed substantial assets to the reorganization and that the release was fair and necessary. *Id.* at 819-19. By contrast, the other financing party had not provided unusual financing or assistance during the Chapter 11 case. No unusual circumstances existed to justify a release to this entity, so it was denied. As to the insider officers for whom releases were sought, the court did not find that the mere "possibility" that indemnification claims might exist to be compelling.

> While the possibility that such indemnification claims conceivably may exist, the debtor has failed to establish that any are imminent or likely. Because there is no imminent threat of any such indemnification claims, there is no real risk that the reorganized debtor will have to pay any indemnity claims made by these officers. . . . Thus, the debtor's reorganization efforts do not appear impacted. Rather, the request for a non-debtor release appears prophylactic in nature and designed to insure no such indemnification claims are ever asserted . . . .

Id. at 820. "These types of requests seeking to insulate the debtor's officers and directors should not be routinely included in every Chapter 11 plan or reorganization filed by a corporation. The debtor has failed to establish that the non-debtor release as to current officers is necessary or fair." *Id.*

Of particular interest was the court's reasoning as to the denial of the proposed release of the debtor's subsidiary corporation. The subsidiary was a co-obligor and guarantor, and the debtor argued essentially that any suit against the subsidiary would be futile because all the subsidiary's assets were under lien. The court first noted that "simply because a creditor may try to sue [the subsidiary] and fail is not a good reason to deny the creditor the right to try." More compelling, however, the court reasoned:

> Nor is the fact that [the subsidiary] is a co-obligor with [the debtor] on certain debts sufficient to justify the grant of the non-debtor release. [The subsidiary] is an affiliate of the debtor. [The subsidiary] could have filed a Chapter 11 case together with [the debtor]. It did not. Now, [the subsidiary] would like to receive the benefit of [the debtor's] plan of reorganization without encountering all the related scrutiny and efforts a Chapter 11 case requires. Rarely, if ever, can one envision a case where a related affiliate of the debtor is entitled to a non-debtor release. Certainly, [the debtor] has failed to demonstrate such a release is fair or necessary in this case.

Id.

In the Cliffs bankruptcy, there is a broad proposed release. In fact, it is so broad that it is difficult to decipher exactly who is to be released. The released parties consist of two primary groups, the "D&O Releasees" and the "Releasees." These groups are more specifically defined as follows:

> D&O Releasees: Current and former directors, members, and managers of the Debtors or of the Parents. (Docket 480-1 at p. 18.) "Parent" is defined in the Disclosure Statement as including Cliffs Communities, Inc., CCHG Holdings, Inc., and The Cliffs Club & Hospitality Group, Inc. (Docket 480-1 at p. 25.) Cliffs Communities, Inc. is a non-debtor.
>
> Releasees: The Debtors, the CRO, the DIP Lender, the Bridge Lender, the Indenture Trustee, Negotiating Group Member, Advisory Board member, any Note Holder who votes a Class 1 Claim to accept the Plan, the Plan Sponsor, the Committee, officers and directors of CMAG, CMAHG or CIPOC provided they are an Accepting Club Member, the current and former officers, directors, employees, agents, stockholders, shareholders, managers, members, affiliates, partners, attorneys, advisors and professionals of the above mentioned parties, and any Club Member who is an Accepting Club Member. The releases of James B. Anthony, Lucas Anthony and Timothy Cherry are further conditioned on future actions of James B. Anthony. (Docket 480-1 at p. 29.)

In the Plan Supplement to the Joint Chapter 11 Plan Filed by the Debtors and the Plan Sponsor (Docket # 470) filed on July 1, 2012, at Attachment 7, the Debtors list some of the

individuals subject to the proposed release, but the list is not complete as it does not contain all of the categories of "Releasees."

First, the categories of the proposed released parties are too broad. Particularly troublesome is that the broad definition of "Releasees" includes "affiliates" of the Debtors. The term "affiliates" is not defined in the Plan or Disclosure Statement, but is used throughout to include related non-Debtor entities. There is nothing that limits the released parties to a defined list of individuals and entities.

Second, there is no evidence that the release, as to any party, is fair or necessary. Like in *Transit Group*, there is no justification for releases for any of the officers, directors, or managers. No evidence has been presented as to any impact it may have on the Plan if such a release were denied. As to the parties involved in the negotiations surrounding the Plan, there has been no suggestion that any of their actions were so extraordinary and unusual so as to justify a release. The release of any of the affiliate companies is wholly without rationalization, as these parties could have filed Chapter 11 with these Debtors, and could have subjected themselves to the same scrutiny of a Chapter 11 debtor, but chose not to do so. They cannot simply obtain the benefits of the Chapter 11 on the coattails of these Debtors. The release of creditors voting to accept the Plan, and to those who are Accepting Club Members, appears to be nothing more than an improper attempt to garner favorable votes.

There is no identity of interest between the Releasees and the Debtors. None have provided extraordinary and unusual benefit to the reorganization. Without specific factual evidence as to unique circumstances which might justify the extraordinary grant of third party releases, the proposed release is improper and impermissible and renders the Plan unconfirmable.

D. The Plan should not be confirmed because it would not meet the Absolute Priority Rule if the classification of creditors were corrected.

Because the ballot deadline has not yet passed, it is not possible to determine whether an impaired class of creditors may vote to reject the Plan. However, it appears that the High Carolina members were included in Class 7 in an attempt to avoid such a result.

As noted above, if the High Carolina members were properly classified, in a separate class befitting their unique status in this case, it becomes more likely that an impaired class would vote to reject the Plan. In that event, the provisions of 11 U.S.C. § 1129(b) come into play, sometimes known as the Absolute Priority Rule.

It is evident from the discussion above that the High Carolina members are not being treated fairly and equitably and that there are creditors who should not be senior in priority who are receiving far greater benefit. For example, the general unsecured creditors are estimated to receive between 50 and 70% of their claims, as opposed to the 4-10% distribution projected for Class 7. Given proper classification, such treatment would violate the Absolute Priority Rule, leading to denial of confirmation.

> Section 1129(b)(2)(B)(ii), known as the 'absolute priority rule,' provides in relevant part:
>
> For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
> (B) with respect to a class of unsecured claims –
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

In re Ferguson, C/A 11-02958-jw at *17 (Bankr. D.S.C. July 6, 2012) (*quoting* 11 U.S.C. § 1129(b)(2)(B)(ii)).

"In brief, the absolute priority rule provides that if a purposed plan allows 'the debtor to retain property, any dissenting class of creditors must be paid in full in order for the plan to be crammed down.'" *Id.* (*quoting In re Maharaj*, 681 F.3d 558, 562 (4th Cir. 2012)). "The rule stems from the requirement that a plan must be fair and equitable before it can be confirmed over the objection of dissenting creditors." *In re Bryson Properties, XVIII*, 961 F.2d 496, 503 (4th Cir. 1992) (citing 11 U.S.C. § 1129(b)(2). *See also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988).

The Proponent's inability to meet the requirements of the Absolute Priority Rule in the event of proper classification is further indication that the classes were gerrymandered in order to avoid its requirements and that the Plan should not be confirmed because of improper classification, lack of good faith and inability to meet the Absolute Priority Rule in the event that these other defects are corrected.

E. Confirmation of the Plan should be denied because the Plan's provisions are not feasible, as required by 11 U.S.C. § 1129(a)(11).

"Section 1129(a)(11) sets forth the following requirement for confirmation of a chapter 11 plan: 'Confirmation 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.'" *In re Gyro-Trac (USA)*, Inc., 441 BR. 470, 482 (Bankr. D.S.C. 2010) (*quoting* 11 U.S.C. § 1129(a)(11)).

"The question of feasibility is a question of fact in which the debtor bears the burden to show feasibility of the plan by a preponderance of the evidence." *In re Radco Props., Inc.*, 402 B.R. 666, 678 (Bankr. E.D.N.C. 2009) (*citing In re Investment Co. of Southwest, Inc. (F.H. Partners, L.P. v. Investment Co. of Southwest, Inc., Four Hills Associates, Bank of America)*, 341

B.R. 298, 310 (10th Cir. BAP 2006)). Feasibility is 'firmly rooted in predictions based on objective fact.'" *Id.* (*quoting In re Cheatham*, 78 B.R. 104, 109 (Bankr.E.D.N.C.1987).

"Section 1129(a)(11) does not require that the debtor's plan is guaranteed to be successful, but must merely 'present a workable scheme of organization and operation from which there may be a reasonable expectation of success.'" *Id.* at 482-83 (*quoting In re Walker*, 165 B.R. 994, 1004 (E.D.Va. 1994)). *See also In re Smith*, 357 B.R. 60, 69 Bankr. M.D.N.C. 2006) ("Success need not be guaranteed-the possibility that a plan may fail is not fatal-but a plan must be supported by adequate evidence that some reasonable assurance of success exists.") (*citing Kane v. Johns–Manville Corp.*, 843 F.2d 636, 649 (2nd Cir. 1988); *In re Prussia Assocs.*, 322 B.R. 572, 584 (Bankr. E.D. Pa. 2005)). "It is not enough for a debtor to exhibit 'sincerity, honesty and willingness' or make 'visionary promises' with respect to its plan. *Id.* at 483 (*quoting In re Walker*, 165 B.R. at 1004). "'The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts.'" *Id.* (*quoting In re Walker*, 165 B.R. at 1004).

As noted at some length above, the provisions of the Plan regarding what is being transferred, both by Debtor and non-Debtor entities, is extremely vague. However, it is clear that something must be transferred.

The Disclosure Statement repeatedly refers to other non-Debtor assets which must be conveyed to the Purchaser but such assets are not defined or specified and the party conveying such assets is not identified. The Purchaser indicates that it may not close absent such transfers, which are a condition precedent to closing.

In addition, the APA requires the transfer of Related Real Property from the Affiliated Owners. Related Real Property is defined as the real property and improvements described in

Schedule 15.1, which is not included. The Affiliated Owners are not identified. No information is provided as to what must be transferred, who must transfer it or what the terms of the transfer may be.

In addition, at a hearing before the Honorable Mary G. Lewis on August 1, 2012, in the case of *Bruce Cassidy, Jr. vs. The Cliffs at High Carolina, LLC, et al*, C/A No. 6:12-cv-02089-MGL (D.S.C. August 1, 2012), the Court issued a temporary restraining order, prohibiting some of the Defendants from conveying any property at or near High Carolina outside the ordinary course of business. In the event that these defendants fall within the unidentified non-Debtors who are required to convey assets in order to achieve plan consummation, it appears that the requirements for consummation of the Plan must fail.

The Plan proponent must bear the burden of showing that consummation of the Plan according to the terms of the Plan is feasible and not likely to be followed by liquidation or further financial reorganization. In this instance, the information contained in the Plan does not specify what must occur on behalf of the Debtors in order to comply with the Plan. More importantly, it is completely silent as to what must be provided from non-Debtor parties not under the control of the proponents. Unless and until this information is provided, along with proof that the non-Debtor parties are willing and able to comply, it is doubtful that the Plan is feasible and it is highly probable that further liquidation or financial reorganization will be necessary.

IV. CONCLUSION

The treatment of the Goldbergs' claim in these cases is insufficient and inequitable and does not meet the confirmation requirements set forth in the Bankruptcy Code and firmly

established by Bankruptcy Law. Confirmation of the Plan should be denied because of the numerous defects in the Plan, making compliance with the Bankruptcy Code impossible. The requirements imposed by bankruptcy law have been designed to insure, to the extent possible, that the goals of bankruptcy jurisprudence are met and that creditors, even creditors with small claims, are not forced to endure inequitable and unjust treatment, for the benefit of the Debtor, the Debtor's affiliates and insiders, and the purchaser.

The defects outlined in this objection are substantial and are so numerous and render the Plan so defective that minor modifications to the existing Plan will not render the Plan confirmable. The Goldbergs ask that the Court protect their rights as provided in the Bankruptcy Code and that the Debtor and the Purchaser be required to comply with the law. The Goldbergs ask that confirmation be denied.

RESPECTFULLY SUBMITTED on this the 1st day of August, 2012, at Columbia, South Carolina.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	)	CHAPTER 11
	)	
The Cliffs Club & Hospitality Group,	)	Case No. 12-01220-jw
et al.[1], d/b/a The Cliffs Golf and	)	
Country Club ,	)	
	)	(Jointly Administered)
Debtors.	)	

CERTIFICATE OF SERVICE

I, Kathy H. Handrock, hereby certify that on behalf of Barbara George Barton, District Court I.D. #1221, Attorney for Daniel and Catherine Goldberg, I served a copy of the **Objection to Plan Confirmation,** filed August 1, 2012**,** to the creditors and parties in interest as shown on the attached list, by electronic means to those parties with a designated email address, and by depositing the same with the United States Post Office, first-class postage prepaid, to those parties without a designated email address, and also that the aforementioned **Objection to Plan Confirmation,** filed August 1, 2012, was served on the parties in interest via electronic filing and electronic transmission through CM/ECF pursuant to Rule 5 of the Federal Rules of Civil Procedure and Local Rule 5.05, as incorporated by Rule 7005 of the Federal Rules of Bankruptcy Procedure, and as further authorized by *Guidelines for the Filing of Documents*, Operating Order 08-07 (Bankr. D.S.C. 2008). I certify that the above service was made on August 1, 2012.

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August 1, 2012

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 (7576); The Cliffs at Glassy Golf & Country Club, LLC (6559); The Cliffs Valley Golf & Country Club, LLC (6486); and Cliffs Club & Hospitality Service Company, LLC (9665).

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