UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re	)	**Chapter 11**
	)	
The Cliffs Club & Hospitality Group, Inc., *et al.*, *d/b/a* The Cliffs Golf & Country Club,[1]	)	**Case No: 12-01220**
	)	**Jointly Administered**
	)	
	)	**Re: Docket No. 479, 630**
	)	
Debtors.	)	**Objection Deadline: August 1, 2012**
	)	
	)	**Hearing Date: August 6, 2012 @ 10:00**
	)	**a.m. ET**

AMENDED OBJECTION OF BRUCE CASSIDY, JR.
TO CONFIRMATION OF FIRST AMENDED AND RESTATED
JOINT CHAPTER 11 PLAN FILED BY THE DEBTORS AND THE PLAN SPONSOR

Bruce Cassidy, Jr. ("Cassidy") files the following Amended Objection to entry of an order confirming the *First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor dated June 30, 2012* [D.I. 479] (as supplemented, the "Plan"), averring as follows:

Preliminary Statement[2]

1. The Plan, in short, takes impermissible liberties with the Chapter 11 process; does not meet the requirements for confirmation as set forth in Section 1129; and thus is not confirmable. Specifically, the Plan is not confirmable for the following reasons:

[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 (7576) (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).

Violation	**Code Section/Authority**
Contribution of Non-Debtor Assets to the Plan: - The Debtors identify Cassidy as a creditor, yet Cassidy's Agreement (as defined herein) is with a non-debtor affiliate. The Plan should not impair Cassidy's non-bankruptcy rights with a non-debtor third-party. - Cassidy objects to the Plan to the extent that any real property being contributed to the Debtors' estate is contributed by non-debtor affiliates subject to a Temporary Restraining Order ("TRO") dated August 1, 2012. [3]	Judge Mary G. Lewis entered a TRO at a hearing dated August 1, 2012 in U.S. District Court for the District of South Carolina ("SC District Court") at Docket No. 12-02089-MGL. A true and correct copy of the TRO is attached hereto as Exhibit A
Recharacterization of Debt to Equity: - The Debtors seek to recharacterize over $42 million dollars in "DevCo Affiliate" claims, yet fail to disclose the identity of such entities or the scope of such claims.	
Unfair Discrimination: - The Plan unfairly discriminates between general unsecured creditors and there is no reasonable basis for the discrimination.	§1129(b)
Best Interests of Creditors: - The Plan does not comply with the "best interests of creditors test": o The Liquidation Analysis is factually insufficient. o The Plan does not provide an analysis of consideration the Debtors will receive in exchange for insider / non-debtor releases.	§ 1129(a)(7); § 1123(b)(3)
Feasibility: - The Plan violates Section 1129(a)(11), as the Plan is not feasible and is likely to be followed by a liquidation or further reorganization.	§ 1129(a)(11)
Good Faith: - The Plan has not been proposed in good faith: o The Debtors fail to disclose non-debtor assets included in the Plan. o The relevant schedules of the asset purchase agreement have not been filed.	§1129(a)(3)

[3] Pursuant to the Judge Lewis's August 2, 2012 Order documenting the outcome of the August 1, 2012 hearing, a copy of which is attached hereto, The Cliffs at High Carolina, LLC, and Longview Land Company, LLC, are temporarily restrained for fourteen days from conveying any property at or near The Cliffs at High Carolina other than in the ordinary course of business and as stipulated. Cassidy intends to seek a similar TRO against Longview Land Company II, LLC ("Longview II"), as well by August 6, 2012.

Background

A. The Debtors' Bankruptcy Case

2. On February 28, 2012, the Debtors filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"). The Debtors are continuing to operate their businesses as debtors in possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

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* [D.I. 141].

4. On July 2, 2012, the Debtors filed the Plan [D.I. 479] and its *First Amended And Restated Disclosure Statement To Accompany First Amended And Restated Joint Chapter 11 Plan Filed By The Debtors And The Plan Sponsor Dated June 30, 2012* (the "Disclosure Statement") [D.I. 480].

5. Pursuant to the *Order (I) Approving the First Amended Disclosure Statement in Respect to the First Amended Chapter 11 Plan of Reorganization of The Cliffs Club & Hospitality Group, Inc., et al., d/b/a The Cliffs Golf & Country Club; (II) Establishing Notice and Objection Procedures for Confirmation of the Second Amended Plan; (III) Approving Solicitation Package and Procedures for Distribution; (IV) Approving Form of Ballot; and (V) Establishing Procedures for Voting on the Second Amended Plan* (the "Solicitation Order") [D.I. 478], the voting deadline for the Plan is August 1, 2012 (the "Voting Deadline"). Likewise, the deadline to object to the Plan is August 1, 2012.

6. Pursuant to the Solicitation Order, the Court has scheduled a hearing to consider confirmation of the Plan on August 6, 2012 at 10:00 a.m. ET (the "Confirmation Hearing").

7. On July 1, 2012, the Debtors filed the Plan Supplement to the Plan [D.I. 470].

8. On July 27, 2012, the Debtors filed the Second Plan Supplement to the Plan [D.I. 616] and the Amendment to the Plan [D.I. 617].

9. The Debtors have identified that Cassidy is a creditor of the Debtors and a party in interest in the above-captioned proceeding.[4] Pursuant to the April 14, 2008 Founder's Program Agreement (the "Agreement"), a copy of which is attached hereto as Exhibit B, Cassidy is a participant in the Founder's Program (the "Program") at The Cliffs at High Carolina Golf & Country Club ("The Club at High Carolina"). The Agreement was executed by Cassidy and The Cliffs at High Carolina, LLC, a non-debtor affiliate of the Debtors. The Debtors claim the Agreement falls within the definition of a Club Membership Agreement[5] under the Plan.

10. Pursuant to the Agreement, Cassidy made a $2,000,000 payment to a non-debtor-affiliate, The Club at High Carolina, in connection with the Program in exchange for: (i) a lifetime Honorary Club Membership in the Club at High Carolina (the "Honorary Club Membership"); (ii) the right to purchase certain real estate that would include a $2.5 million homesite credit at the first Tiger Woods' designed golf course in North America – being, The Club at High Carolina; and (iii) benefits and opportunities associated with a golf and country club membership at the The Club at High Carolina.

11. The precise terms that Cassidy bargained for never materialized. The Club at High Carolina and the residential real estate contemplated under the Agreement were never

[4] The Debtors list Cassidy's claim on Schedule G of The Cliffs at High Carolina Golf & Country Club, LLC as an executory contract, which the Debtors' seek to reject pursuant to Plan §6.06 (Rejection of Club Member Agreements). By extension, Cassidy will undoubtedly have rejection damages claims against the Debtors.

[5] The Plan defines "Club Membership Agreements" as all agreements entered into by one of more or the Debtors or any predecessor or Affiliate of the Debtors with Club Members relating to the Debtors' golf, family, wellness and other membership programs including, without limitation, any discounted membership agreement, any honorary membership agreement and the Membership Deposit Obligations.

developed. Cassidy has not realized any meaningful benefit in exchange for the $2,000,000 actually paid by Cassidy pursuant to the Agreement.

12. Moreover, the Disclosure Statement identifies that the Debtors commingled business functions and commingled cash generated from operations, as well as had extensive intercompany payables with their non-debtor affiliates that are indirectly owned by The Cliffs Communities, Inc. (Disclosure Statement at Section VII (C), pg. 42; Section VII (D), pg. 43).

13. As set forth in the Disclosure Statement, funds and assets of the Debtors and non-debtor affiliates have been commingled and have been used to satisfy obligations of other entities. Moreover, as stipulated on the record by counsel to James Anthony in SC District Court on August 1, 2012, land acquired by Anthony-controlled entities and now held by Longview Land Company II, LLC, was to be used for potential additional development of residential lots at The Cliffs at High Carolina.[6]

14. Given these facts, it is impossible for Cassidy to determine who he holds a claim against, including Debtors or non-debtors. The Plan does not give him any guidance.

15. On or about May 31, 2012, Cassidy filed a secured claim against the Debtors in the amount of $2,600,000.00 (the "Cassidy Claim"). The claim was assigned as claim number 1148 by the Claims Agent.

16. The Debtors filed an Objection to the Cassidy Claim on July 20, 2012 [D.I. 588].

17. As of the date of this Objection, the Court has not yet scheduled a hearing on the Debtors' Objection to the Cassidy Claim. As such, there has been no Order of Court entered disallowing the Cassidy Claim. Pursuant to Fed. R. Bankr. Proc. 3003, the Cassidy claim supersedes any scheduling of the claim pursuant to § 521(a)(1) of the Bankruptcy Code.

[6] As the hearing at the SC Court was the same date of this Objection, Cassidy will supplement this Objection with copies of the transcript of the hearing at the SC Court as soon as such transcripts are made available.

Objection

A. Cassidy is not a Claim Holder Against the Debtors, but Against a Non-Debtor Affiliate

18. Cassidy's Honorary Club Membership is through a non-debtor affiliate, which includes reciprocity rights with the Debtors. The Agreement signed by Cassidy is between Cassidy and a non-debtor affiliate, The Club at High Carolina. By including Cassidy on Schedule G, the Debtors are attempting to reject contracts to which the Debtors are not a party. To that end, this Honorable Court should not confirm a plan that impairs Cassidy's non-bankruptcy rights against a non-debtor affiliate. Cassidy further objects to the Plan to the extent that the confirmation order modifies or strips Cassidy's rights with any non-debtor affiliate without proper consideration.

B. The Debtors Fail to Disclose Affiliate Claims that the Debtors Seek to Recharacterize as Equity

19. The Debtors fail to identify what debt is to be recharacterized as equity, yet seek to characterize over $42 million dollars in non-debtor affiliate claims as equity. Further, Plan § 7.03 requests the Court to recharacterize certain intercompany payables by the Debtors to "DevCo Affiliates" as equity, yet fails to identify which "DevCo Affiliates" the Debtors are referring to. The term "DevCo Affiliates" is not defined under the Plan, and is only generally defined in the Disclosure Statement. *See* Disclosure Statement at Section IV(A), pg. 21. It is simply improper to "lump" the intercompany transfers together and ignore the fact that one non-debtor entity may be owed money from the Debtors and that such entity may have its own distinct creditors. The magnitude of the intercompany transfers is significant – approximately $44 million owed by the Debtors "DevCo Affiliates", versus $87 million owed to the Debtors. Additionally, the Debtors expressly stated in the Disclosure Statement that the Debtors commingled business functions and commingled cash generated from operations, as well as had

extensive intercompany payables with their non-debtor affiliates. The failure to disclose the scope of such intercompany payables, which "DevCo Affiliates" the Debtors are referring to, or whether any potentially fraudulent transfers of assets were made between the Debtors and the "DevCo Affiliates", makes it impossible for general unsecured creditors to determine if assets of "DevCo Affiliates" they contracted with have been transferred to the Debtors' estate. Without the identification and quantification of such potential transfers for recovery to the Debtors' estate, creditors are left without adequate information to vote for or against the Plan.

C. The Plan Violates Section 1129(b) By Unfairly Discriminating Between General Unsecured Creditors

20. The Plan cannot be confirmed because it unfairly discriminates among similarly situated creditors by providing greater recoveries to purported "trade creditors" than to other general unsecured creditors (the Club Members).

21. Specifically, Plan § 3.11 identifies that General Unsecured Claims will receive approximately 75% of their allowed claims (if their class votes for the Plan). Under Class Seven, the Club Members must elect to become an Accepting Club Member in order to obtain any potentially meaningful recovery. The Debtors estimate recovery for Accepting Club Members to be between 35-75% of Accepting Club Member Claims, and as set forth more fully below, require Accepting Club Members to incur a series of affirmative obligations to New ClubCo in order to receive such recovery. Otherwise, Club Members face the harsh penalty of recovery under the Rejecting Member Fund. Club Members that decline to join New Clubco will receive a *de minimis* recovery of their Club Member Claims - between 4-10%.

22. Section 1129(b) provides the bankruptcy court shall confirm a plan that "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). When an

impaired class does not vote in favor of the Plan, it may only be "crammed down" if it does not discriminate unfairly and is fair and equitable to the impaired rejecting class. 11 U.S.C. § 1129(b)(1).

23. Although courts have struggled to give the unfair discrimination test an objective standard, the Fourth Circuit affirmed one such test, which considers the following four factors: i) whether there is a reasonable basis for the discrimination; ii) whether the plan can be confirmed and consummated without the discrimination; iii) whether the discrimination is proposed in good faith; and (iv) the treatment of the classes discriminated against. *Ownby v. Jim Beck, Inc. (In re Jim Beck, Inc.),* 214 B.R. 305, 307 (W.D. Va. 1997), *aff'd,* 162 F.3d 1155 (Table) 1998 WL 546067 (4th Cir. 1998). *See also, In Re 203 North LaSalle Street Limited Partnership,* 190 B.R. 567, 585–86 (Bankr.N.D.Ill.1995), *aff'd,* 195 B.R. 692 (N.D. Ill. 1996, *aff'd,* 126 F.3d 955 (7th Cir. 1997); (distilling the "unfairness test" into two elements, *to wit:* (1) whether the discrimination has a reasonable basis; and (2) whether the discrimination is necessary for reorganization.); *See generally,* 7 Collier on Bankruptcy ¶ 1129.03[3][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed., 2011).

24. Applying the four-factor test affirmed by the Fourth Circuit in *Ownby*, the Debtors have failed to provide any evidence to establish a reasonable basis for disparate treatment between Class Five (General Unsecured Claims[7]) and Class Seven (Club Member Claims[8]) of the Plan. As such, Cassidy submits the only reason for the Debtors' separate

[7] The Plan collectively defines "General Unsecured Claims" as trade claims, Rejection Claims and any other Claim that is not an Administrative Claim, DIP Facility Claim, Priority Tax Claim, Professional Fee Claim, or an otherwise classified Claim. Plan §1.01.

[8] The Plan defines "Club Member Claim" as any Claim of whatever nature held by a Club Member against one or more of the Debtors that is not a Note Holder Claim, including, without limitation, a Claim under any of the Club Membership Agreements for Membership Deposit Obligations, club credits, dues credits, and any other credits or claims under any other agreements, specifically including under any agreements for honorary membership(s), or any

classification of Class Five and Class Seven is to gerrymander the vote in order to confirm the Plan.

No Reasonable Basis for Discrimination

25. The first factor affirmed by *Ownby* to evaluate unfair discrimination is whether a reasonable basis for the discrimination exists. This factor is highly relevant, as a significant disparity in recovery exists between the purported "trade creditors" and contract/lease rejection claims in Class Five against the Club Member Claims under Class Seven. To date, the Debtors have failed to provide any evidence that the Plan could not be consummated without the present discrimination.

26. The Debtors will undoubtedly attempt to justify this disparity in treatment by claiming that trade creditors who provide goods and services to the Debtors are entitled to better treatment than other general unsecured creditors because they are important to the Debtors' post-emergence business. This rationale, however, has been rejected by numerous courts and is unpersuasive under the facts of this case. For example, in *Snyders Drug Stores. Inc.*, 307 B.R. 889, 895 (Bankr. S.D. Ohio 2004), the bankruptcy court held that discrimination between trade creditors and landlords of rejected leases was not permissible because the debtor produced no evidence that the trade creditors being provided preferential treatment were critical to the debtor's ability to reorganize or would otherwise refuse to transact business with the debtor.

27. That also is the case here. The Plan fails to provide *any* rationale for the discrimination in favor of "trade creditors." Ironically, the Plan does not even identify who the trade creditors are or what critical goods and services they provide to the Debtors. Further, the Club Members, the actual customers of the Debtors, would be just as critical to the

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Claim of whatever nature held by any other person with respect to a discounted or free membership in any of the Clubs or access to any of the Clubs. Plan §1.01.

reorganization as the Debtors' trade and service suppliers. Therefore, a reasonable basis for the discrimination between Class Five and Class Seven does not appear to be an area of concern in the Debtors' evaluation and classification scheme.

Whether The Plan Can Be Confirmed And Consummated Without The Discrimination

28. Similar to the lack of a reasonable basis for the discrimination, the Debtors have failed to prove the Plan cannot be confirmed and consummated without separating the classes. The Debtors have presented no evidence indicating that providing a greater recovery to General Unsecured Claims is necessary and that it would be impossible to consummate the Plan in a less discriminatory manner. Further, the Plan does not require that the relationship between the trade creditor and the Debtors be critical or necessary to the Debtors' Plan and is not reserved for trade creditors that otherwise would not continue to supply goods and services to the Debtors. Therefore, the Debtors simply cannot establish that the discrimination they propose is compatible with the Bankruptcy Code. *See In re Moore*, 31 B.R. 12 (Bankr. D. S.C. 1983), where the Court held that the debtors' plan of rehabilitation under Chapter 13 (despite meaningful payment to the class discriminated against) did not meet the burden of proving that they could not perform the plan without the classification. *Id.* at 17.

Whether The Discrimination Is Proposed In Good Faith

29. The discrimination in the Plan is not made in good faith as the Plan fails to provide any basis for the discrimination. Cassidy submits that the only purpose for such disparity is to impermissibly gerrymander the vote over the impaired class of Club Member Claims. Therefore, based on the record presented and the facts set forth herein, the discrimination of treatment between Class Five and Class Seven is not made in good faith.

Treatment of the Class Discriminated Against (Class Seven)

30. There is no question that the Plan provides for significantly disparate treatment among these similarly situated creditors. Aside from the disparity of the percentages of recovery, further conditions to recovery apply to the Club Member Claims. Accepting Club Members must potentially pay a Transfer Fee, a Membership Reinstatement Fee (if applicable), and execute an agreement to pay at least one year of dues under the New ClubCo Membership Plan. It is only then that a Club Member will receive a membership with New ClubCo and the right to satisfaction by New ClubCo of a percentage of the Debtor's Membership Deposit Obligations to Accepting Club Members, pursuant to a five year vesting schedule (20% per year). Therefore, in order to obtain the proposed recovery, an Accepting Club Member would need to continue as a member of New ClubCo and pay membership dues to New Clubco for five years. Rejecting Club Members will recover under the Rejecting Member Fund, which the Debtors largely propose to fund through the net recovery of the Retained Actions under the Plan – in essence, creating a speculative timeline for distribution. In contrast, recovery under Class Five is proposed to be paid in full through three (3) equity infusions provided by the Plan Sponsor, which will be paid in full by the second anniversary of the Effective Date of the Plan.[9] There are no additional conditions on recovery under Class Five.

31. Based on the record presented and the facts set forth herein, the discrimination is simply impermissible. Courts elsewhere have reached similar conclusions under analogous facts. *See,* e.g., *In re Sentry Operating Co. of Texas,* 264 B.R. 850 (Bankr. S.D. Tex 2001); *Liberty National Enterprises v. Ambanc La Mesa Limited Partnership (In re Ambanc La Mesa Limited Partnership),* 115 B.R. 650, 656 (9th Cir. 1987) (discrimination in favor of trade

[9] *See* Plan §1.01, General Unsecured Claim Sponsor Funding.

creditors not permitted unless court makes specific findings that such discrimination is reasonable, a plan could not be confirmed without the discrimination, the discrimination was proposed in good faith and was reasonably related to the purpose of the discrimination); *In re Nutritional Sourcing Corp.*, 398 B.R. 816 (Bankr. D. Del. 2008) (finding that a plan that discriminated against trade creditors could not be confirmed).

32. For example, in *Sentry*, the debtor proposed a plan containing two separate classes of general unsecured creditors. One class of unsecured creditors, the "trade class", was to receive substantially better treatment than another class whose claims arose from a note. The debtor argued that such classification was permissible because goodwill between the debtor and trade creditors was essential to the debtor's ongoing business. The court rejected the debtor's reasoning finding that there was no evidence to support that conclusion. Further, the court noted that providing trade creditors with better treatment also served another purpose - ensuring that the debtor obtained an impaired consenting class for its plan. The court found that this reason for discriminating was clearly improper and rendered the discrimination impermissible, even if the debtor could articulate a business reason for the discrimination.

33. *Sentry* is directly applicable to the instant case. The Debtors articulate no business reason to favor Class Five (the trade class). Further, the Debtors clearly have an ulterior motive for discriminating in favor of trade creditors - to obtain a favorable vote of Class Five. The Debtors are gerrymandering the vote over the impaired class of Club Member Claims. This is simply not a legitimate reason for discriminating among creditors.

34. Moreover, as was the case in *Sentry*, in this case, the disparate treatment being provided by the Debtors to Club Member Claims is aimed more at depriving a discrete group of creditors of recoveries than preserving good will with trade creditors. In short, the Plan targets a

small group of creditors, the holders of the Club Member Claims, for unfair treatment while providing substantial recoveries to the Debtors' other general unsecured creditors, the similarly situated trade creditors. A Plan whose sole purpose is to discriminate against a discrete group of creditors cannot satisfy the requirement of section 1129(b) that a Plan not discriminate unfairly and should not be confirmed.

D. The Plan Violates 1129(a)(7) of the Bankruptcy Code Because it Cannot Comply With The Best Interests Of Creditors Test And 1123(b)(3) as it Relates to Settlements of Claims and Interests of the Debtors

35. Section 1129(a)(7) provides that in order for a plan to be confirmed, the plan must provide creditors with at least as much as the creditors would have received in a Chapter 7 liquidation. See e.g., *In re A.H. Robins, Co., Inc.*, 880 F.2d 694, 698 (4th Cir. 1989); *In re Smith*, 357 B.R. 60, 67 (Bankr. M.D.N.C. 2006); *In re Grandfather Mountain Limited Partnership*, 207 B.R. 475, 484 (Bankr. M.D.N.C. 1996); *In re Piece Goods Shops Company, L.P./Piece Goods Shops Corp.*, 188 B.R. 778, 791 (Bankr. M.D.N.C. 1995). This section is commonly referred to as the "best interest of creditors test." The plan proponent bears the burden of introducing evidence of its current financial situation, assets, liabilities, and prospects to satisfy the court that the proposed plan meets this test. *In re Benson*, 2011 Bankr. LEXIS 646 (Bankr. E.D.N.C. Feb. 18, 2011).

Failure to Provide Adequate Liquidation Analysis

36. In this case, it is unlikely that all unsecured creditors will accept the Plan. Accordingly, the Debtors must demonstrate that the creditors will receive as much pursuant to a Chapter 11 plan of reorganization as they would from a Chapter 7 liquidation. 11 U.S.C. § 1129(a)(7)(A)(ii). Exhibit D of the Disclosure Statement [D.I. 469] sets forth the Debtors' Liquidation Analysis. The Liquidation Analysis does not contain a separate analysis of each Debtor and is therefore factually insufficient. The Debtors even admit that "any liquidation

analysis with respect to the Debtors is inherently speculative." [Disclosure Statement, pg. 97]. The Debtors have not met their burden under 11 U.S.C. § 1129(a)(7) as they have not demonstrated that creditors will receive as much pursuant to the proposed Plan as they would from a Chapter 7 liquidation.

Non-Debtor Releases

37. In addition, Plan § 10.03 purports to release claims of the Debtors against various parties and provides certain conditional releases for the non-debtor Insiders (Lucas Anthony, Tim Cherry, James B. Anthony and potentially others).

38. In *In re Continental Airlines, Inc.*, 203 F.3d 203 (3rd Cir. 2000), the 3rd Circuit stated that non-consensual releases of claims by third parties against non-debtors must be fair, necessary to the reorganization, based on fair consideration and supported by specific factual findings sustaining those conclusions.

39. The 4th Circuit found the *Dow Corning* and the *In Re Railworks Corp.* factors instructive in considering whether to approve non-debtor releases as part of a final plan of reorganization. A bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor when the following factors are present:

> (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;
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> (2) the non-debtor has contributed substantial assets to the reorganization;
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> (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;
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> (4) the impacted class, or classes, has, or have, overwhelmingly voted to accept the plan;
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> (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.

See, *Behrmann v. Nat'l Heritage Found., Inc.*, 663 F.3d 704 (4th Cir. 2011).

40. Further, approval of non-debtor releases in the context of a Chapter 11 plan of reorganization should be granted cautiously and infrequently. *Id*. at 712, citing *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005). "No case has tolerated non-debtor releases absent the finding of circumstances that may be characterized as unique." *Id.*, citing *Dow Corning*, 280 F.3d at 657-58.

41. The Plan does not provide an analysis of the consideration the Debtors are receiving in exchange for the release of claims, nor does it provide the potential value of the recovery of such claims for the Debtors' estate. Such claims represent legitimate avenues of recoveries for general unsecured creditors and would be available for distribution to unsecured creditors in a Chapter 7 liquidation. Under these circumstances, the Debtors cannot establish that the best interests of creditors test is satisfied.

Compromises in Chapter 11 Plans must be fair and equitable

42. Finally, while 1123(b)(3)(a) of the Bankruptcy Code permits a Chapter 11 Plan to include provisions for the settlement of claims belonging to a debtor or the estate, the Bankruptcy Court has a duty to determine that a proposed compromise formed as part of a reorganization Plan is fair and equitable and is in the best interests of the estate. See, e.g. *In re Babb*, 2009 Bankr. LEXIS 4459, 3-4 (Bankr. E.D.N.C. Apr. 16, 2009), *U.S. ex rel. Rahman v. Oncology Assoc., P.C.*, 269 B.R. 139, 150 (D. Md. 2001) (citing *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1135 (8th Cir.), cert. den., 469 U.S. 1207, 105 S. Ct. 1169, 84 L. Ed. 2d

320 (1985)); see also *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1010 (4th Cir. 1985). The Supreme Court did not distinguish settlements in the context of a plan from other settlements. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968) ("TMT"). The Supreme Court explained that the bankruptcy court should apprise [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. *TMT* at 390 U.S. 414. "Compromises may be effected separately during reorganization proceedings or in the body of the reorganization plan itself. The decision of whether to approve a particular compromise lies within the discretion of the Bankruptcy judge and pursuant to Bankruptcy Rule 9019(a)." *In re Texaco, Inc.*, 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988). *See also*, *In re Arden*, 176 F.3d 1226, 1228 (9th Cir. 1999) (applying Rule 9019 factors in review of settlement under Bankruptcy Code section 1123(b)(3)). "Using a different standard in plan-connected settlements than in independent pre-or post-plan settlements lacks an economic, legal, or rational basis. If a settlement is essential to the plan and if it treats one class better than its statutory position, a higher standard may be necessary." *In re MCorp Fin., Inc.*, 160 B.R. 941, 951 (S.D.Tex.1993).

E. The Plan Violates Section 1129(a)(11), as the Plan is not Feasible and is Likely to be Followed by a Liquidation or Further Reorganization

43. Section 1129(a)(11) of the Bankruptcy Code sets forth the following requirement for confirmation of a Chapter 11 plan: "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." *11 U.S.C. § 1129*. "A court may consider several factors in assessing a plan's feasibility, including the reorganized debtor's capital structure, the debtor's projected earning power, the current state of the economy, the ability of management and the likelihood that the current management will

continue to work for the reorganized debtors, and any other factors the court finds relevant to the success of the debtor's plan." *In re Gyro-Trac (USA*), Inc., 441 BR. 470, 483 (Bankr. D.S.C. 2010) (internal citation omitted).

44. The burden of proving feasibility rests upon the Debtor. The proponent of a plan of reorganization must demonstrate a reasonable prospect that the plan of reorganization will succeed. *In re DeLuca*, 1996 Bankr. LEXIS 1950 (Bankr. E.D. Va. Apr. 12, 1996). 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. *Gyro-Trac (USA), Inc.* at. 482-483 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. The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts. *Id.*. A court may consider several factors in assessing a plan's feasibility, including the reorganized debtor's capital structure, the debtor's projected earning power, the current state of the economy, the ability of management and the likelihood that the current management will continue to work for the reorganized debtors, and any other factors the court finds relevant to the success of the debtor's plan. *Id.*

45. As noted previously, the provisions of the Plan are ambiguous. It is unclear what property will be transferred under the APA, as the relevant schedules have yet to be filed. If real property is tranferred to the Plan from The Cliffs at High Carolina, LLC (a non-debtor entity), Cassidy will have a substantial claim agains the Debtors' estate. Since the Debtors have not contemplated this in their Plan (nor have they contemplated the fact that other possible creditors who are similarly-situated to Cassidy may come forward), the Plan is completely unfeasible.

46. 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 provided in the Plan is inadequate and does not specifically state what is to be provided by the non-debtor parties. Unless more detail is given as to how this Plan is to succeed, it is highly unlikely that this Plan is feasible.

F. The Plan Violates Section 1129(a)(3) Because it was Not Proposed in Good Faith

47. Section 1129(a)(3) of the Bankruptcy Code requires that the Plan "has been proposed in good faith . . . ". 11 U.S.C. § 1129(a)(3). Although "good faith" is not defined in the Bankruptcy Code, courts have held that a plan is proposed in good faith "if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code." *In re Texaco Inc.*, 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988) (quoting *In re Toy & Sports Warehouse Inc.*, 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984). "Good faith requires a fundamental fairness in dealing with one's creditors." *In re Jorgensen,* 66 B.R. 104, 109 (Bankr. 9th Cir. 1986). The determination of whether a plan is proposed in good faith should also be made "in light of the totality of circumstances surrounding the establishment of a chapter 11 plan". *In re The Leslie Fay Cos., Inc.*, 207 B.R. 764, 768 (Bankr. S.D.N.Y. 1997)(citations omitted).

48. The Plan, as initially proposed, violates Sections 1129(a) and 1129(b) of the Bankruptcy Code; and fails to demonstrate good faith on the basis that the Debtors fail to disclose non-debtor assets included in the Plan. With regard to the real property contribution by non-debtor affiliates, the Debtors fail to identify what real property will actually be conveyed. Further, §11.3(j) of the APA identifies the conveyance of such real property as a condition precedent to the consummation of the sale transaction contemplated under the APA. Finally, the

APA cites to its schedules for material components of the APA – yet despite submitting two supplements to the Plan, such schedules are still not included in the solicitation materials sent to creditors. Without this information, it is **simply impossible** for a general unsecured creditor, such as Cassidy, to make any informed decision on whether to vote against or in favor of the Plan, pursue an alternative plan or seek conversion to chapter 7. Such information is critical to many of the creditors that contracted with the both the Debtors and its non-debtor affiliates, as the assets being transferred from a "DevCo Affiliate" or other non-debtor affiliate entity, may likely render such affiliate insolvent by the transfer. To that end, lumping such critical information together in a summary fashion, without providing the background of corresponding non-debtor entities and corresponding liabilities against the contributed assets, fails to demonstrate good faith to creditors that have claims against the Debtors and non-debtor affiliates.

Reservation of Rights

49. Pursuant to the Solicitation Order, the Voting Deadline is the same deadline for parties to file confirmation objections. Accordingly, Cassidy is filing this Objection without the benefit of the vote tabulation and therefore reserves his rights to supplement this Objection prior to the Confirmation Hearing.

Conclusion

50. In conclusion, the Plan: (i) fails to provide adequate information of non-debtor assets that may be contributed under the Plan; (ii) seeks to convert claims of undisclosed "DevCo Affiliates"; (iii) unfairly discriminates between general unsecured creditors in violation of Section 1129(b); (iv) does not comply with the best interest of creditors test under Section 1129(a)(7) or settlements of claims pursuant to Section 1123(b)(3); (v) violates 1129(a)(11) as the Plan is not feasible as presented; and (vi) despite

two Plan supplements, fails to provide adequate information on a good faith basis for a general unsecured creditor to make an informed decision to support the Plan.

51. For the reasons set forth above, Cassidy respectfully requests that the Court deny confirmation of the Plan.

Dated: August 2, 2012

Respectfully submitted,

By /s/ Sidney Wike
Sidney Wike
District Court # 6729
Law Office of Sidney Wike, LLC
311 Pettigru Street
Greenville, SC 29601
(864) 239-0007

Local Counsel for Bruce Cassidy Jr.

and

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Counsel for Bruce Cassidy Jr.

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Bruce Cassidy, Jr.,	)	Civil Action No.: 6:12-cv-02089-MGL
Plaintiff,	)	
vs.	)	**ORDER**
The Cliffs at High Carolina, LLC, The Cliffs Communities, Inc., James B. Anthony, Waterfall Investment Group, Longview Land Company II, LLC, Longview Land Company, LLC, and John Does 1 through 100,	)	
Defendants.	)	

This matter is before the court on Plaintiff's Emergency Motion for Appointment of a Receiver and for Temporary Restraining Order and Preliminary Injunction filed on July 26, 2012 and Amended Emergency Motion for Appointment of a Receiver and for Temporary Restraining Order and Preliminary Injunction. (ECF Nos. 3 & 12).

DISCUSSION

On July 25, 2012, Plaintiff Bruce Cassidy, Jr. brought suit against Defendants The Cliffs at High Carolina, LLC, The Cliffs Communities, Inc., James B. Anthony, and John Does 1 through 100 for breach of contract, breach of fiduciary duty, fraudulent transfers and seeking specific performance damages for injuries suffered by Plaintiff as a result of Defendants' actions. (ECF No. 1). Plaintiff further sought the request of the appointment of a receiver, the entry of a Temporary Restraining Order ("TRO") and a Preliminary Injunction. (ECF Nos. 1, 3 & 12). On July 31, 2012, Plaintiff amended his Verified Complaint against Defendants The Cliffs at High Carolina, LLC, The Cliffs Communities, Inc., James B. Anthony, and John Does 1 through 100, to add as parties

Defendants Waterfall Investment Group, Longview Land Company II, LLC, and Longview Land Company, LLC. (ECF No. 11). On August 1, 2012, this court held a hearing concerning Plaintiff's above-referenced motions.

At that hearing and on the record, Plaintiff, through counsel agreed to withdraw his request for a Preliminary Injunction and appointment of a receiver at this time because the defendants present reached an agreement concerning the entry of a TRO. Plaintiff also agreed to withdraw his request for a TRO, Preliminary Injunction, and appointment of a receiver as it relates to all other named Defendants except for Defendants The Cliffs at High Carolina, LLC, Longview Land Company, LLC, and Longview Land Company II, LLC.

Additionally, counsel for Defendants The Cliffs at High Carolina, LLC and Longview Land Company, LLC agreed to consent to a TRO that would restrain those defendants from conveying any property at or near The Cliffs at High Carolina other than in the ordinary course of business to third-party purchasers. Counsel for these defendants also agreed, on the record, to give opposing counsel notice of any intent to convey property in the ordinary course of business. Plaintiff and Defendants The Cliffs at High Carolina, LLC and Longview Land Company, LLC also agreed to allow a conveyance of the roads at The Cliffs at High Carolina and the gatehouse to the property owner's association.

Plaintiff's counsel represented to the court that Defendant Longview Land Company II, LLC was added to the action on August 31, 2012 by amended complaint, was in the process of being served, and would be notified of the existence of any order entered by the court granting injunctive relief. Longview Land Company II, LLC was not represented at the hearing and this court was asked to consider Plaintiff's request for *ex parte* injunctive relief as it related to Defendant Longview Land

Company II, LLC pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. Plaintiff sought to enjoin Longview Land Company II, LLC from conveying or transferring any property or other assets affiliated or associated with The Cliffs at High Carolina.

Rule 65 of the Federal Rules of Civil Procedure governs the issuances of injunctions and restraining orders. Specifically, Rule 65(b)(1) states: The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

> (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b)(l). Thus, the court may only grant a TRO which is issued "without written or oral notice to the adverse party," or a preliminary injunction, after notice to the adverse party, under strict conditions. Fed. R. Civ. P. 65. Both the TRO and preliminary injunctions are "extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001).

The substantive standards for granting a request for a temporary restraining order and entering a preliminary injunction are the same. *See, e.g., Virginia v. Kelly*, 29 F.3d 145, 147 (4th Cir.1994) (applying preliminary injunction standard to a request for temporary restraining order). In order for such injunctive relief to be granted, the movant must establish that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v.*

Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). All four requirements must be satisfied. *Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 346 (4th Cir.2009), *vacated on other grounds* 130 S.Ct. 2371 (2010), *reinstated in relevant part on remand* 607 F.3d 355 (4th Cir.2010) (per curiam). As the Fourth Circuit has explained, the Supreme Court requires "that the plaintiff make a clear showing that it will likely succeed on the merits at trial." *Real Truth About Obama, Inc.*, 575 F.3d at 346 (citing *Winter*, 129 S.Ct. at 374, 376). Moreover, the movant must make a clear showing that it will likely suffer irreparable harm without a TRO. *Id.* at 347 (citing *Winter*, 129 S.Ct. at 374–76). Further, the Supreme Court in *Winter* emphasized the public interest requirement, i.e., requiring courts to " 'pay particular regard for the public consequences in employing the extraordinary remedy of injunction,' " *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798 (1982)).

Based on the record at this time, the court finds that Plaintiff has not clearly shown that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest. Plaintiff's amended complaint asserts that "on information and belief" Longview Land Company II, LLC is "among. . .the Anthony-Controlled Entities" and that "unlawful actions were undertaken directly by Defendants High Carolina, Cliffs Communities, Waterfall Investment Group, Longview Land Company II, LLC and Longview Land Company, LLC, and/or James Anthony and/or directly by, together with, vicariously by, or in concert with and with substantial assistance or encouragement from additional non-debtor John Doe entities or individuals. . ." (ECF No. 11, 3-4). As factual background in the complaint, Plaintiff asserted his belief that "Defendants have directed significant funds or other assets invested in and belonging to High Carolina away from

High Carolina and to other non-debtor Anthony-Control Entities that are controlled by Defendants Cliffs Communities and James B. Anthony, including without limitation Defendants Waterfall Investment Group, Longview Land Company II, LLC, and Longview Land Company LLC." *Id.* at 6-7. Plaintiff also asserts the belief, based on a supplemental asset purchase agreement, that Longview Land Company II, LLC is an "affiliate owner" of real property at the High Carolina development referenced in the supplemental asset purchase agreement[1] in the Proposed Plan of Reorganization associated with the transfer of real property to occur as part of the Debtor's Proposed Plan of Reorganization (subject to waiver). *Id.* at 8-9. Finally, Plaintiff asserts that according to the Debtor's Disclosure Statement, "[d]ebtors comingled business functions and commingled cash generated from operations, as well as had extensive intercompany payables with its non-debtor affiliates that are indirectly owned by The Cliffs Communities, Inc." *Id.* at 9.

To assume, without more, that Longview Land Company II, LLC and any entities which controls it, will transfer assets to a buyer as part of the proposed plan reorganization or otherwise is speculative at best, and Plaintiff failed to provide any evidence to support the proposition. *See Mike's Train House, Inc. v. Broadway Ltd. Imports, LLC*, 708 F.Supp.2d 527, 532 (D.Md.2010) (stating that "mere speculation about possible market share losses is insufficient evidence of irreparable harm."); *see, e.g., Z–Man Fishing Products, Inc. v. Renosky*, 790 F.Supp.2d 418, 423 (D.S.C.2011) (no proof of irreparable harm where party failed to establish "any evidence of lost goodwill, loss of market share, or price erosion."). In particular, there is no evidence in the record at this time and nothing brought to the attention of this court which would indicate that Longview

[1] This supplemental asset purchase agreement has not been made a part of the record and therefore could not be considered by this court.

Land Company II, LLC immediately threatens or intends to transfer asserts, finances, or land associated with The Cliffs at High Carolina. Plaintiff's contentions, at this time, are too speculative, to support a finding of irreparable harm. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir.1992) (irreparable harm must not be speculative, but rather actual and imminent). Further, Plaintiff's allegation about past events or conduct made in the Complaint do not demonstrate that Plaintiff will suffer any immediate, irreparable harm in the absence of the requested relief. *See* Fed. R. Civ.P. 65(b)(l)(A).

The court also notes that Rule 65(b)(1)(B) requires that Plaintiff's counsel certify in writing what efforts were made to give notice of the request for a temporary restraining order to Longview Land Company II, LLC as well as to show why such notice should not be required. Even if the court assumes that sufficient facts have been alleged showing that immediate and irreparable injury will result without injunctive relief, Plaintiff's counsel has not certified in writing any efforts made to put Longview Land Company II, LLC on notice of the motion, nor has it offered any reason as to why such notice should not be required in satisfaction of the "stringent restrictions" of Rule 65(b)(1). *See Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 438–39 (1974) (citation omitted). The requirements of Rule 65(b)(1) are not mere technical niceties that a court may disregard, but rather crucial safeguards of due process. *Tchienkou v. Net Trust Mortg.*, No. 3:10–CV–00023, 2010 WL 2375882, at * 1, (W.D.Va. June 09, 2010) (citation omitted). While this court appreciates that Longview Land Company II, LLC was recently added to this action and that Plaintiff is swiftly attempting to make service upon that party, nothing in Plaintiff's motion satisfies this notice requirement. Therefore, this failure constitutes a separate and independent basis for denying the request for this *ex parte* injunctive relief at this

juncture.

CONCLUSION

Accordingly, Plaintiff's request for a temporary restraining order is DENIED without prejudice as it relates to Defendant Longview Land Company II, LLC.

This court accepts the consent agreement reached between Plaintiff Cassidy and Defendants The Cliffs at High Carolina LLC and Longview Land Company, LLC to restrain those defendants specifically from conveying any property at or near The Cliffs at High Carolina, other than in the ordinary course of business to third party purchasers, as stipulated by the parties. Defendants The Cliffs at High Carolina LLC and Longview Land Company, LLC are so restrained for a 14-day period beginning on August 1, 2012.

IT IS SO ORDERED.

s/Mary G. Lewis
United States District Judge

Spartanburg, South Carolina
August 2, 2012

EXHIBIT B

The Cliffs at High Carolina
Founder's Program

Founder's Program Agreement

This Agreement describes the Founder's Program at High Carolina, a unique and limited opportunity that offers many rights, opportunities and benefits associated with a membership in The Cliffs at High Carolina. This Agreement is divided into three parts: (i) summary of the terms of the Founder's Program; (ii) detailed description of the terms and conditions; and (iii) legal disclosures associated with participation in the Founder's Program. If you would like to participate in the Founder's Program, please review this Agreement and sign below.

I. Summary of the Terms

The following is a summary of the primary terms of the Founder's Program at The Cliffs at High Carolina. These are described in greater detail under the Terms and Conditions below.

Initial Deposit.

To participate in the Founder's Program, a participant must make an initial deposit of $2,000,000. It is not required, but this initial deposit may be used towards the purchase of a homesite in The Cliffs at High Carolina.

Program Benefits.

Participation in the Founder's Program includes the following benefits.

- Homesite Credit: A $2,500,000 homesite credit to be used towards the purchase of one or more homesites in the area currently designated as Founder's Ridge or another location in High Carolina.
- Honorary Club Membership: A Lifetime Honorary Full Golf (Founder's) Membership in The Cliffs at High Carolina Golf and Country Club. Membership will allow the participant access to all of the High Carolina facilities, amenities, and golf course (usage fees are applicable). Participants in the Founder's Program will have full reciprocal privileges at all Cliffs Communities, including The Cliffs' international properties (usage fees are applicable).
- Preferred Purchase Opportunity: A preferred purchase opportunity for a homesite located in the area currently designated as Founder's Ridge in The Cliffs at High Carolina.
- The ability to offer a Full Golf Club Membership to a potential purchaser with any future sale of your property in The Cliffs at High Carolina.
- Unique Founder's Gift Package and Club Offerings.

II. Terms and Conditions

Homesite Credit.

Each participant in the Founder's Program will be entitled to a $2,500,000 Homesite Credit towards the purchase price of a homesite located in The Cliffs at High Carolina. The Homesite Credit will be applied to the then current list price of High Carolina property, with any excess to be paid by the participant. If the list price of the lot purchased is less than the amount of the Homesite Credit, the participant may apply the remaining amount of the Homesite Credit towards an additional homesite located in The Cliffs at High Carolina. The Homesite Credit can only be used on homesites in High Carolina. A full Homesite Credit may not be transferred to a third party within one year following the payment of the initial deposit, and thereafter may be transferred to a third party only with the prior written consent of The Cliffs. No partial amount of a Homesite Credit may be transferred to a third party, and there will be no reimbursement for any unused portion of a Homesite Credit.

The Cliffs anticipates that the inaugural release of homesites in High Carolina, excluding those in the area currently designated as Founder's Ridge, will be made available for purchase beginning in November 2008. The Cliffs anticipates that the homesites in the area currently designated as Founder's Ridge will be released and available for purchase beginning in November 2009. A participant in the Founder's Program may apply the Homesite Credit towards the purchase of a homesite at any time following the release of the lots.

If a participant in the Founder's Program does not use the Homesite Credit within three years from the initial release date of homesites in High Carolina, such participant may request a full refund of the initial deposit ($2,000,000), without interest. No portion of the initial deposit will be refundable prior to the end of the three-year period following the initial release date.

Lifetime Honorary High Carolina Golf and Country Club Membership.

Each participant in the Founder's Program will be provided with an Honorary Club Membership in The Cliffs at High Carolina Golf & Country Club. The Honorary Club Membership will entitle each participant access to the High Carolina club facilities, amenities, and golf course. The Honorary Club Membership will be provided for the lifetime of a participant in the Founder's Program. The Cliffs will waive the membership initiation deposit for all participants in the Founder's Program. In addition, if a participant elects to use the Homesite Credit to purchase a homesite within the area currently designated as Founder's Ridge or a homesite to be released after November 2009, The Cliffs will also waive all subsequent Honorary Club Membership annual club dues for the life of the participant. Participants who elect to purchase a homesite in the initial homesite offering, currently anticipated to be November 2008, and in advance of the homesites being released for sale in the area currently designated as Founder's Ridge, will be required to pay annual club dues (which will begin within 60 days of the opening of The Cliffs at High Carolina golf course). If a participant in the Founder's Program does not use the Homesite Credit within three years from the initial release date of homesites in High Carolina and requests a full refund of the initial deposit, The Cliffs will nevertheless waive all subsequent Honorary Club Membership annual club dues for the life of the participant.

The Honorary Club Membership may be retained even if a participant in the Founder's Program does not purchase a homesite in High Carolina or sells his property in the future. In addition, a participant in the Founder's Program who purchases a homesite in The Cliffs at High Carolina will have the right to offer a Full Golf Membership to a potential purchaser upon the future sale of his property. The potential purchaser would pay the then current membership initiation deposit to The Cliffs at High Carolina Golf and Country Club (not to the participant).

Preferred Purchase Opportunity on Founder's Ridge.

Each participant in the Founder's Program will have a preferred opportunity to purchase a homesite in the area currently designated as Founder's Ridge. When the homesites in the area currently referred to as Founder's Ridge are released (currently anticipated to be in November 2009), each participant in the Founder's Program who has not previously used the full Homesite Credit will have an opportunity to select a homesite in the area currently designated as Founder's Ridge for purchase. At the appropriate time, The Cliffs will outline the selection process for all properties and notify all participants in the Founder's Program. It is anticipated that the selection process will have components of a lottery selection process to make it fair and equitable for all participants of the Founder's Program. The selection process for property at The Cliffs at High Carolina will be at the sole determination and discretion of The Cliffs.

Unique Founder's Gift Package and Club Offerings.

Each participant in the Founder's Program will receive a unique gift package and club offerings only available to participants of the Founder's Program.

Conditions on Participation in the Founder's Program.

The Founder's Program is an exclusive program being offering to a limited number of qualified persons. To participate in the Founder's Program, a participant must represent and agree to each of the following statements by setting forth such participant's initials below.

(a) I am an "accredited investor" as defined by Rule 501(a) promulgated under the federal Securities Act of 1933, because I am either (i) a natural person and my individual net worth, or joint net worth with my spouse, at the time of my purchase exceeds $1,000,000 or I had an individual income in excess of $200,000 in each of the two most recent years or joint income with my spouse in excess of $300,000 in each of those years and I have a reasonable expectation of reaching the same income level in the current year, or (ii) an entity that qualifies as an accredited investor. I agree to provide The Cliffs with any additional information it may request to verify that I am an accredited investor.

_____ [Initial Here]

(b) I have had an opportunity to ask questions of and receive answers from representatives of The Cliffs concerning participation in the Founder's Program. I also understand that The Cliffs will, upon my request, make available to me a copy of any relevant information regarding The Cliffs or the plans for High Carolina and its proposed development which The Cliffs possesses or can obtain without unreasonable expense. I have such knowledge and experience in financial and business matters that I am capable of evaluating the merits and risks of the investment in the Founder's Program. I acknowledge that I have conducted my own due diligence with respect to The Cliffs, the Founder's Program, the development plans for High Carolina, and any other matter which I believe to be material to my decision to participate in the Founder's Program and further acknowledge that I am making my decision to participate based on this due diligence.

_____ [Initial Here]

(c) I am participating in the Founder's Program for my own account and not with the intent to sell my Homesite Credit to others. I acknowledge that there are restrictions on my ability to transfer my Homesite Credit or the other benefits associated with participation in the Founder's Program, as described above.

_____ [Initial Here]

(d) I acknowledge that I have read and understand the Legal Disclosures set forth below, including the description of the financial risks that may be associated with my participation in the Founder's Program.

_____ [Initial Here]

(e) I acknowledge that The Cliffs provided this Agreement to me on a confidential basis solely for me to consider participating in the Founder's Program. I acknowledge that this offer is not transferable to any other person and

I agree on behalf of myself and my representatives to maintain the confidentiality of the information provided to me in connection with my evaluation of the Founder's Program.

CC JA [Initial Here]

(f) I acknowledge that although I am receiving a Homesite Credit that can be used to purchase real estate in High Carolina, I am under no obligation to purchase this real estate, and no interest in land or real property of any sort is being offered or sold pursuant to this Agreement.

CC JA [Initial Here]

III. Legal Disclosures

(a) The Cliffs is offering participation in the Founder's Program to a limited number of persons, which will not exceed 40 participants. Deposits from participants will not be held in escrow. The Cliffs intends to use the funds generated from the deposits made by Founder's Program participants for general corporate purposes, including development of The Cliffs at High Carolina, including its facilities, amenities, and golf course. The Cliffs does not anticipate generating sufficient proceeds from these deposits to cover all of the costs of developing High Carolina. The Cliffs anticipates generating the remaining funds necessary for developing High Carolina through cash on hand and lines of credit it believes it can secure. Nevertheless, there is a risk that The Cliffs may not have or be able to raise sufficient funds to complete High Carolina on a timely basis, or at all. If this were to occur, the value of the High Carolina lots and club membership could be negatively affected.

(b) The Cliffs anticipates that homesites in The Cliffs at High Carolina will become available for purchase beginning in November 2008, and homesites in the area currently designated as Founder's Ridge will become available for purchase beginning in November 2009. In addition, The Cliffs anticipates that the High Carolina golf course will be completed and open for play in 2010. However, The Cliffs makes no assurances that these dates will be achieved. Real estate construction can be subject to delays due to many factors, including conditions beyond The Cliffs' control such as environmental issues, third party delays, government regulation, weather, and other natural conditions. The occurrence or re-occurrence of any such conditions may require increased capital expenditures by The Cliffs and could cause delays in the proposed release dates and opening date. If any of these events were to occur, the value of the High Carolina lots and club membership could be negatively affected.

(c) The Homesite Credit may be used towards the purchase of a homesite in High Carolina at The Cliffs' then current list price for the homesites. The Cliffs makes no representation that this list price will be equal to or greater than the fair market value of the homesites. In addition, The Cliffs makes no assurances that any participant in the Founder's Program will be able to sell any homesite at a price equal to or greater than the price at which the homesite was purchased. Golf is a discretionary recreational activity with relatively high participation costs. A severe economic downturn could weaken sales of the real estate and in turn reduce the value of the real estate in The Cliffs at High Carolina.

(d) A participant in the Founder's Program may request a full refund of such participant's deposit, without interest, if such participant does not use the Homesite Credit within three years of the initial release date of the High Carolina properties. This repurchase obligation would be an unsecured liability of The Cliffs at High Carolina, LLC, which is a subsidiary of The Cliffs Communities, Inc. There can be no assurances that The Cliffs at High Carolina, LLC will have sufficient available funds to repay this deposit in full upon demand, or even at all.

(e) This Agreement shall be governed by and construed in accordance with the domestic laws of the State of South Carolina without giving effect to any choice or conflict of law provision or rule (whether of the State of South Carolina or any other jurisdiction) that would cause the application to this Agreement of the laws of any jurisdiction other than the State of South Carolina. Subject to the provisions of Section (f) below, all legal proceedings arising out of or relating to this Agreement or any other transactions contemplated hereby shall be brought either in the United States District Court of South Carolina, Greenville Division, or in any court in Greenville County of the State of South Carolina having jurisdiction thereof. The parties consent and waive all objections to the personal jurisdiction of, and venue in, any such court.

SDB

(f) Except as may be otherwise set forth herein, any dispute, controversy, difference or claim arising out of or relating to or in connection with this Agreement or the transactions contemplated hereby shall be finally settled by arbitration in accordance with the then existing Rules for Commercial Arbitration of the American Arbitration Association or any successor thereto. Any such arbitration shall be submitted to a three member panel selected through the rules governing selection and appointment of such panels of the American Arbitration Association or any successor thereto. The arbitration shall be conducted in Greenville, South Carolina or such other place as the parties thereto may agree. The award rendered by the arbitrators in the arbitration proceeding shall be final and binding upon the parties thereto and a judgment thereon may be entered in any court of competent jurisdiction.

(g) This Agreement shall constitute the entire agreement between the parties hereto with respect to the subject matter hereof. This Agreement may be amended or modified only by a writing executed by the party to be bound thereby. This Agreement may be executed in multiple counterparts, each of which shall constitute an original but all of which shall constitute but one and the same instrument. This Agreement may be executed and delivered by facsimile transmission, which will constitute the legal delivery hereof. This Agreement shall be governed by and construed in accordance with the laws of the State of South Carolina.

SIGNATURE PAGE
TO
THE FOUNDER'S PROGRAM AGREEMENT WITH THE CLIFFS AT HIGH CAROLINA, LLC

IN WITNESS WHEREOF, the undersigned has executed this Founder's Program Agreement and delivered the required initial deposit as of the date set forth below:

Witness

Witness

Name: Brian A. Cassidy Jr.
Title: President

Redacted

State of Residence or Incorporation:

Ohio

Tarpon Real Estate Investments, LLC

Address: 6612 Main Bay Row

Sun OH 45153

Email: BCassidyJr@yahoo.com

Phone Number: Redacted.

S.S.#: Redacted

Date: April 17, 2008

Accepted:

THE CLIFFS AT HIGH CAROLINA, LLC

By:
Name: Scott D. Beville
Its: · Executive Vice President, Cliffs Communities, Inc.
· President, Cliffs Real Estate, Inc.
Date: 4/14/08