UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

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

DEBTORS' RESPONSE TO KEOWEE FALLS INVESTMENT GROUP, LLC'S OBJECTION TO CONFIRMATION OF THE FIRST AMENDED AND RESTATED JOINT CHAPTER 11 PLAN FILED BY THE DEBTORS AND THE PLAN SPONSOR AS SUPPLEMENTED BY THE DEBTORS AND THE PLAN SPONSOR

COME NOW The Cliffs Club & Hospitality Group, Inc. and its affiliated debtors in the above-captioned Chapter 11 cases, as debtors and debtors-in-possession (collectively, the "Debtors"), by and through undersigned counsel, and hereby respond (this "Response") to Keowee Falls Investment Group, LLC's Objection to Confirmation of the First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor as supplemented by the Debtors and the Plan Sponsor (the "KFIG Objection"), pursuant to which KFIG requests that this Court deny confirmation of the First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor dated June 30, 2012, as amended [Docket Entry Nos.

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

479 and 616, Ex. A] (the "Plan").[2] In support of this Response, the Debtors respectfully represent as follows:

JURISDICTION AND VENUE

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

BACKGROUND

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

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

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

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

6. On July 2, 2012, the Debtors filed the Plan and the First Amended and Restated Disclosure Statement to Accompany the First Amended and Restated Joint Chapter 11 Plan

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

filed by the Debtors and the Plan Sponsor [Docket Entry No. 480] (the "Disclosure Statement").

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

RELIEF REQUESTED

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

A. The Plan Has Been Proposed in Good Faith and Not By Any Means Forbidden by Law Pursuant to Section 1129(a)(3) of the Bankruptcy Code, and Complies with Section 1122(a) of the Bankruptcy Code.

1. The recharacterization of KFIG's unsecured claims into equity investments in the Debtors is proposed in good faith and is consistent with classification requirements of the Bankruptcy Code.

9. KFIG alleges that the Plan does not comply with 11 U.S.C. § 1129(a)(3), which requires that the Plan be "proposed in good faith and not by any means forbidden by law." (KFIG Objection, ¶ 8). KFIG complains that the Plan improperly proposes to recharacterize KFIG's unsecured claims into equity investments in the Debtors "to make the Plan more attractive to the Plan Sponsor at the expense of KFIG's unsecured creditors." *Id*. KFIG further complains that the Debtors have improperly classified the KFIG Claims in order to accomplish such recharacterization. KFIG's positions are wholly without merit.

10. Section 1129(a)(3) of the Bankruptcy Code requires that a plan of reorganization be "proposed in good faith and not by any means forbidden by law." In the context of § 1129(a)(3), good faith is not some free-floating conception of ethics or morality; rather, it has a specific meaning: good faith means that "the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected.'" *Kane v.*

Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988) (quoting *Koelbl v. Glessing* (*In re Koelbl*), 751 F.2d 137, 139 (2d Cir. 1984)); see also *Official Comm. of Unsecured Creditors v. Nucor Corp.* (*In re SGL Carbon Corp.*), 200 F.3d 154, 165 (3d Cir. 1999) (finding that good faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11); *Fin. Sec. Assurance Inc. v. T-H New Orleans, L.P.* (*In re T-H New Orleans L.P.*), 116 F.3d 790, 802 (5th Cir. 1997) (good faith inquiry involves a totality of circumstances analysis, "keeping in mind the purpose of the [Bankruptcy Code] is to give debtors a reasonable opportunity to make a fresh start"). "Generally, a plan is proposed in good faith if there is a reasonable likelihood that it will achieve a result consistent with the goals of the Bankruptcy Code," *In re Piece Goods Shops Co., L.P.*, 188 B.R. 778, 790 (Bankr. M.D.N.C. 1995) (citing *Hanson v. First Bank of S. Dakota, NA*, 828 F.2d 1310 (8th Cir. 1987)) and "[t]he primary goal of chapter 11 is to promote the restructuring of the debtor's obligations so as to preserve the business and avoid liquidation." (citing *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.")). "In order to determine if a plan has been filed in good faith, a court should consider the totality of the circumstances." *In re Radco Props., Inc.*, 402 B.R. 666, 673 (Bankr. E.D.N.C. 2009) (citing *In re Piece Goods Shops Co., L.P.*, 188 B.R. at 790). Here, that the Plan has been proposed in good faith is evidenced by the fact that the Plan provides for the ongoing operation of the Clubs under new ownership while maximizing the value of the Debtors and the recovery to creditors. The Plan was the result of extensive negotiations with the Indenture Trustee, the Creditors' Committee and other core constituencies.

11. With respect to KFIG's specific objection, in good faith, the Debtors indeed seek to recharacterize KFIG's unsecured claims into equity investments in the Debtors, because the Debtors fully believe that such recharacterization is appropriate and supported by applicable law. In fact, on July 12, 2012, the Debtors filed the Debtors' First Omnibus Objection to the Allowance of Claim Nos. 1251, 1252, 1253, 1254, 1255, 1258, 1259, 1261, 1262, 1263, 1268, 1270, 1271, 1272, 1273, and 1274 filed by Cliffs Development Company Affiliates (the "DevCo Claims Objection"), including objections to: (i) claim number 1254 filed by KFIG in the amount of $450.00; and (ii) claim number 1261 filed by KFIG in the amount of $16,669,860.00 (collectively, the "KFIG Claims") [Docket Entry Nos. 528 and 532].

12. As set forth in the DevCo Claims Objection, most of the appellate courts, including the Fourth Circuit Court of Appeals, that have considered the issue of recharacterizing debt claims to equity have determined that bankruptcy courts have the power to recharacterize what is ostensibly debt to equity based on their equitable authority under Bankruptcy Code Section 105 in a manner consistent with the priority scheme for the distribution of the debtor's assets found in Bankruptcy Code Section 726. The Fourth Circuit precedent is *In re Dornier Aviation*, 453 F.3d 225 (4th Cir. 2006) (Implementation of the Code's priority scheme requires a determination of whether a particular obligation is debt or equity and given the broad language of section 105(a) and the larger purpose of the Bankruptcy Code, a bankruptcy court's power to recharacterize is essential to the proper and consistent application of the Code) and *In the Matter Of: Lothian Oil Inc. v. Lothian Oil Inc.*, 650 F.3d 539 (4th Cir., 2011) (recharacterization extends beyond insiders and is part of the bankruptcy courts' authority to allow and disallow claims under 11 U.S.C. § 502). *See also, In re Tiger*

Aircraft, LLC, 2010 Bankr. LEXIS 2353, 7-13 (Bankr. N.D. W. Va. 2010); *Vieira v. AGM II, LLC* (*In re Worldwide Wholesale Lumber, Inc.*), 378 B.R. 120, 125 (Bankr. D.S.C. 2007); *but see Carolina Shores, LLC v. Dixon* (*In re Daufuskie Island Props., LLC*), 431 B.R. 649, 655-56 (Bankr. D.S.C. 2010) (recharacterization denied where debtor had executed a note with a fixed maturity date and other factors demonstrated denial was proper).

13. The Fourth Circuit has joined other circuits that use an eleven factor test, stating, "None of these factors is dispositive and their significance may vary depending upon circumstances." *In re Dornier*, at page 233. The factors that a court may consider in determining whether it should recharacterize a claim include:

> (1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claim of outside creditors; (10) the extent to which the advances were used to acquire capital assets; (11) the presence or absence of a sinking fund to provide repayments. *AutoStyle Plastics*, 269 F.3d at 749-506. These factors all speak to whether the transaction 'appears to reflect the characteristics of … an arm's length negotiation." *Id*. at 750 (quoting *Cold Harbor*, 204 B.R. at 915) (amendment in original). This test is a highly fact-dependent inquiry that will vary in application from case to case.

14. At some point in time following confirmation of the Plan, if confirmed, this Court will either grant or deny the Debtors' DevCo Claims Objection. The Debtors fully believe that the application of the above eleven factors to the Cliffs Development Company Affiliates claims (including the KFIG Claims) reveals that all of the factors support the recharacterization of such claims to equity. The ultimate treatment of the KFIG Claims will depend on the Court's decision, after KFIG has the opportunity to present its arguments. The KFIG Claims will either be deemed Class 5 general unsecured claims or Class 8 equity

interests, and treated accordingly. The Debtors actually provided KFIG a customized Class 5 ballot in the full amount of its asserted claim, evidencing that the Debtors generally have treated and will treat the KFIG Claims as general unsecured claims until such time as this Court may grant the Debtors' DevCo Claims Objection.[3]

15. In no way does the assertion by the Debtors of well-founded objections to the KFIG Claims violate the "good faith" provisions of 11 U.S.C. § 1129(a)(3). Moreover, the Debtors clearly have not violated the classification requirements of 11 U.S.C. § 1122(a) in light of the fact that the Debtors have heretofore classified the KFIG Claims as Class 5 general unsecured claims, and will continue to treat the KFIG Claims as such until this Court rules otherwise.

16. The Plan has been proposed in good faith, is consistent with applicable law, and will achieve a result consistent with the objectives and purposes of the Bankruptcy Code; accordingly, the KFIG Objection should be denied.

2. The release provisions of Article X, Section 10.01(b) of the Plan are proposed in good faith.

17. KFIG alleges that the release provisions of Article X, Section 10.01(b) of the Plan further evidence that the Plan does not comply with the "good faith" requirements of 11 U.S.C. § 1129(a)(3), on the basis that such provisions encourage Jim Anthony to breach his fiduciary duty to KFIG's chapter 11 bankruptcy estate by waiving and releasing KFIG's claims against the Debtors. (KFIG Objection, ¶ 9). KFIG's objections on this ground are wholly without merit, and should be denied.

[3] KFIG elected not to cast a ballot for or against the Plan by the August 1, 2012 deadline.

18. First, as set forth above, the Debtors fully believe and have ample evidence to support their position that the KFIG Claims should be recharacterized from purported claims against the Debtors to equity investments in the Debtors. As such, the KFIG Claims will be deemed Class 8 equity interests, will receive no distribution under the Plan. Accordingly, KFIG has no legitimate claims against the Debtors for Mr. Anthony to waive or release.

19. Second, Mr. Anthony has the choice of whether or not to agree to waive the KFIG Claims. Mr. Anthony is in no way required to agree to waive such claims. Indeed, he is free to elect not to do so, the result of which is simply that he may not qualify for a release under the Plan. The Debtors are not encouraging any breach of any fiduciary duty that Mr. Anthony may have, and the Debtors note that Mr. Anthony may not be entitled to a release under the Plan in any event.

20. Finally, because KFIG is itself a Chapter 11 debtor, any release of the KFIG Claims would have to be on notice and an opportunity for hearing. Accordingly, the KFIG estate would have to affirmatively seek authority to waive and release its claims, and KFIG's creditors would be afforded the opportunity to object.

21. Accordingly, the release provisions of Article X, Section 10.01(b) of the Plan do not violate the "good faith" provisions of 11 U.S.C. § 1129(a)(3). The Plan has been proposed in good faith, is consistent with applicable law, and will achieve a result consistent with the objectives and purposes of the Bankruptcy Code; accordingly, the KFIG Objection should be denied.

B. The Plan Does Not Unfairly Discriminate Against KFIG's Interests, and Is Fair and Equitable with Respect to Each Class of Claims and Interests, in the Event of Cramdown.

22. KFIG asserts that the Plan should not be confirmed because, in the event that the Debtors request that the Court invoke the "cramdown" provisions of 11 U.S.C. § 1129(b),

KFIG asserts that the Plan unfairly discriminates against its interests and is not fair and equitable with respect to each class of claims or interests. (KFIG Objection, ¶ 10). KFIG's objections on this ground are wholly without merit, and should be denied.

23. First, all classes of allowed claims that voted on the Plan have voted to accept the Plan, as set forth in the Declaration of Balloting Agent Regarding Solicitation and Tabulation of Votes in Connection with the First Amended and Restated Joint Chapter 11 Plan Filed by the Debtors and the Plan Sponsor executed by Julia Osborne on behalf of BMC Group, Inc., as the Debtors' claims, noticing and vote tabulation agent. Accordingly, the Debtors will not need to request that the Court invoke the "cramdown" provisions of 11 U.S.C. § 1129(b) with respect to any classes of creditors, and KFIG's objections on this ground are moot.

24. Moreover, KFIG offers no argument or evidence whatsoever to show the basis on which the Plan unfairly discriminates against its interests and is not fair and equitable with respect to each class of claims or interests. Thus, KFIG's objections on this ground should be disregarded and flatly denied.

25. Finally, to the extent that this Court grants the Debtors' DevCo Claims Objection, and the KFIG Claims are properly treated as Class 8 equity interests, it would be appropriate for the Debtors to cram down KFIG's interests in light of the fact that equity is receiving no distribution under the Plan, which treatment complies with the absolute priority rule under 11 U.S.C. § 1129(b)(2)(B)(ii). Accordingly, the KFIG Objection should be denied.

NOTICE OF THIS RESPONSE

26. No trustee or examiner has been appointed in these Chapter 11 cases. Notice of this Response will be served pursuant to the Order Establishing Certain Notice, Case

Management and Administrative Procedures [Docket Entry No. 121], and upon KFIG. The Debtors submit that, under the circumstances, no other or further notice is required.

NO PRIOR REQUEST

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

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

[*signature follows*]

Dated: August 3, 2012

Respectfully submitted,

/s/ Däna Wilkinson
Däna Wilkinson
District Court I.D. No. 4663
LAW OFFICE OF DÄNA WILKINSON
365-C East Blackstock Road
Spartanburg, SC 29301
864.574.7944 (Telephone)
864.574.7531 (Facsimile)
danawilkinson@danawilkinsonlaw.com

-and-

/s/ J. Michael Levengood
Gary W. Marsh
Georgia Bar No. 471290
J. Michael Levengood
Georgia Bar No. 447934
Bryan E. Bates
Georgia Bar No. 140856
MCKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, Suite 5300
Atlanta, Georgia 30308
404-527-4000 (phone)
404-527-4198 (fax)
gmarsh@mckennalong.com
mlevengood@mckennalong.com
bbates@mckennalong.com

Attorneys for Debtors and Debtors in Possession