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.	)	

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

Catherine and Daniel Goldberg (the "Goldbergs"), by and through their undersigned attorney, hereby reply to the Debtors' Response to the Goldbergs' Objection (the "Objection") to 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 reply, the Goldbergs show as follows:

[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).

The Plan continues to be defective for the reasons previously set forth in the Objection and for additional reasons which have become apparent as a result of the information contained in the voluminous filings since the balloting was completed, which indicate:

- That many of the material disclosures made pre balloting are inaccurate and inconsistent with the current proposed Plan;
- That the information provided pre balloting was incomplete and insufficient to allow informed balloting, especially in light of the new disclosures;
- That the treatment of the High Carolina members continues to be discriminatory;
- That the balloting summary improperly includes ballots which should be excluded and that appropriate analysis and exclusion might lead to a dissenting class;
- That substantive consolidation should include all parties, both Debtors and non Debtors; and
- That the releases which the Debtors indicate are consensual are not in fact fully informed consensual releases and fatally taint the balloting process.

These defects are more fully explored below.

1. **The Plan is not in compliance with 11 U.S.C. §1123(a)(4) in that the High Carolina members are not being treated like the other members in Class 7.**

The Declaration of Katie Goodman (Docket 642) goes on at some length about the treatment of the club members pursuant to the Plan. It then distinguishes the High Carolina members from every other club by stating, "[t]he amenities for the Club at High Carolina are still in the planning stage, and the Debtors do not own any real property at The Club at High Carolina." (Docket 642, p. 7)

"The Debtors have no ability or intent to develop the Club at High Carolina. The Debtors do not own any property at the Club at High Carolina." (Docket 642, p. 7)

Once again, the Debtors indicate that the members at High Carolina are being treated exactly the same as all other club members, while inconsistently indicating that they are being treated completely differently from all other club members.

2. **Much of the information which has now been provided should have been provided prior to the balloting, in order to allow informed votes to be cast.**

The Plan was premised upon certain transactions which would lead to the complete restructuring of the Club concept and ongoing Club amenities, including the transfer of the High Carolina property owned by non-Debtor affiliates. This led the High Carolina members to anticipate that the Plan Sponsor would at least own some of the property necessary to move forward with completion of the amenities at some point. In fact, the feasibility of the Plan and the transfer to the Plan Sponsor were conditioned upon several things, including the transfer of property of non-Debtor affiliates.

"The Plan Sponsor may not close if it does not acquire certain non-Debtor assets indirectly controlled by James B. Anthony, including, without limitation, the Waterfall property, the Chapel property, the High Carolina property and intellectual property." (Disclosure Statement, Docket 480, p. 74)

Contrary to this assertion in the approved Disclosure Statement, the Declaration by Katie Goodman now states: "No property at High Carolina is currently intended to be part of the transaction contemplated by the Plan or transferred to the Debtors or the Plan Sponsor pursuant to the Asset Purchase Agreement." (Docket 642, p. 7)

"More specifically, the Plan Sponsor has agreed that it will not acquire, and that the Debtor need not provide for the transfer of or access to, the property included in the club popularly referred to as High Carolina." (Docket 642, p. 7)

It is therefore apparent that, contrary to the information provided in the approved Disclosure Statement, the Plan Sponsor has now decided to completely abandon High Carolina.

3. **The information which has just been provided remains incomplete and insufficient to allow proper balloting.**

One of the many issues faced by a concerned creditor is the identification of the property being transferred pursuant to the Asset Purchase Agreement ("APA") and the parties being released by the APA. The additional disclosures to the APA (Docket 641), filed on August 3, 2012 at 4:41 p.m. (2 days post balloting) provide the following pieces of additional information:

1. The list of related real estate to be conveyed has not yet been identified. (p. 853)
2. The buyer released persons (p. 841) (the persons being released by the Seller and anyone else voting in favor of the Plan) include all owners, officers, directors, employees, professionals, agents, subsidiaries and affiliates of the listed Persons. Once again, there is no attempt to identify or define the subsidiaries or affiliates and no way to determine what impact, if any, this release has on the effected creditor or on prior balloting.
3. The seller released persons (p. 837) (the persons being released by the Buyer and anyone else voting in favor of the Plan) has exactly the same language with exactly the same result. There is no way to determine who is being released and how this release impacts the concerned creditors. Even more troubling is that the list of released persons includes The Cliffs at High Carolina Golf & Country Club, LLC and any affiliates. The Cliffs at High Carolina, LLC are such an affiliate. Therefore, this new exhibit to the APA is completely contradictory to the information provided in the Declaration which provides that the Cliffs at High Carolina, LLC are not transferring any property to the Plan Sponsor and are NOT being released.

In fact, when considering the new information in conjunction with the original APA (Docket 615-1), p. 36, the inclusion of the vaguely broad releases of all affiliates would include almost every entity involved in any of these proceedings.

4. Review of the recent post balloting disclosures reveals for the first time that the gates and entrances of all of the developments are not owned and will not be transferred by the APA and that there is no transfer of the Cliffs circle logo, which is shown in most disclosures filed by the Debtors herein.

5. In addition, the real property owned by the Debtors and conveyed pursuant to the APA does not include the golf practice range at Mountain Park, which is owned mysteriously by a "non-affiliated Person" who is not identified. The golf courses at Keowee Springs and Walnut Cove are not owned completely by the Debtors and are instead partially owned by Waterfall Investment Group, LLC. Since conveyance of these assets is a condition precedent to closing of the sale, the fact that they are not owned or controlled by the Debtors and that there is no indication that they will, in fact, be conveyed, leads to feasibility issues which must be addressed.

6. The schedule of Litigation (p. 799) contains 114 different lawsuits which may impact the Debtors. Some of this litigation, which was not previously disclosed, involves the property which must be transferred by non-Debtors in order to comply with conditions precedent for closing. Had this been disclosed prior to balloting, it is likely that it would have raised feasibility issues which should have been addressed.

In short, the very recent post balloting disclosures contain information which was essential to an informed vote on the Plan and non-disclosure of this information casts doubt on

the validity of the ballot summary and whether the ballots were cast by creditors who were fully informed.

4. **The balloting summary and declarations improperly include ballots cast by insiders and other related parties which should not be included.**

Many of the comments provided by the Debtor and Plan Sponsor regarding High Carolina rely upon the ballot tally and indicate that High Carolina overwhelmingly supports the Plan. The list of High Carolina members attached to the Declaration is inadequate, in that it does not provide full names and contact information for the members, which has never been provided. However, even this vague and insufficient list indicates errors in the balloting process.

As noted herein, the ballot summary tabulates votes from voters who do not understand the votes they are casting because of incomplete or inconsistent information or because they had no idea they were giving full releases to culpable parties. In addition, many of the ballots of High Carolina members, as shown on the Exhibit attached to Katie Goodman's declaration (Docket 642) should be disallowed. It is apparent that the vote cast by Steve Carlile ("Carlile") should be completely eliminated, since Carlile is a member of the Plan Sponsor. *11 U.S.C. § 1129(a)(10).* On information and belief, Jeff Thode is an employee of Wells Fargo, who is a secured creditor receiving $64,050,000 under the Plan. On information and belief, John Stites is a builder with lots in multiple clubs and receiving contracts from the parties. Bruce Johnson is a member of the Creditors Committee and is an architect receiving contracts from the parties. Elimination of these ballots and other similarly inappropriate ballots may be sufficient to render the votes of this potential class to be dissenting and their inclusion certainly explains the positive ballots on which the Debtor relies for its arguments.

In other words, proper classification of the High Carolina members in a separate class, with appropriate disclosure and balloting, could have resulted in a dissenting class, requiring the implementation of 11 U.S.C.§ 1129(b) and the requirements of the Absolute Priority Rule.

5. **Some of the information which has now been provided is completely inconsistent with the information which was provided prior to balloting. Inclusion of this information prior to balloting might have allowed informed votes to be cast, resulting in negative balloting.**

"The Plan Sponsor may not close if it does not acquire certain non-Debtor assets indirectly controlled by James B. Anthony, including, without limitation, the Waterfall property, the Chapter property, the High Carolina property and intellectual property." (Docket 480, at p. 74)

This is directly contrary to the Declaration of Katie Goodman (Docket 642, p. 7). " No property at High Carolina is currently intended to be part of the transaction contemplated by the Plan or transferred to the Debtors or the Plan Sponsor pursuant to the Asset Purchase Agreement."

6. **The information which has now been provided regarding the releases was never made apparent to the creditors casting ballots, such that they knew that the votes they cast would have resulted in their final release of any and all claims they had against other liable parties.**

In Debtors' Response to the Goldbergs' Objection (Docket 648), the Debtors argue that the Goldbergs' argument as to impermissible releases is misplaced because the Plan in the case at bar contemplates consensual releases, rather than non-consensual releases. While many of the cases that discuss the need for extraordinary circumstances are in the context of a non-consensual release, many of the cases do not distinguish between that and a consensual release. In fact, in a case cited by the Debtors to support its position, *In re Metromedia Fiber Network, Inc.*, the court stated: "Nondebtor releases may also be tolerated if the affected creditors consent. But, this is

not a matter of factors and prongs. No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique." 416 F.3d 136, 142 (2d Cir. 2005) (citations omitted). An argument can be made that unique circumstances must be present, whether the release is consensual or not. The distinction in case law is not always present.

Regardless, the fact that the Debtors attempt to characterize the releases as "consensual" by having them apply only to those voting in favor of the Plan does not make them acceptable. A consensual release in a plan is akin to a contractual settlement, governed by principles of contract law. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.2d 223, 228 (4th Cir. 2000) (citing *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 507 (D.N.J. 1997)). The parties are free to agree or not agree, whereby the agreement is deemed to be a voluntary consent to its specific terms. However, it should be recognized that a plan of reorganization is not a typical contract. "Accordingly, it is not enough for a creditor to abstain from voting for a plan, or even to simply vote 'yes' as to a plan." *Arrowmill*, 211 B.R. at 507. *See also In re Congoleum Corp.*, 362 B.R. 167, 194 (D.N.J. 2007) ("this Court agrees with those courts that have held that a consensual release cannot be based solely on a vote in favor of a plan."). Contract law principles dictate that the creditor must give "unambiguous assent". *Congoleum*, 362 B.R. at 194. When a plan of reorganization is complex, as in this case, it cannot be presumed that the creditor fully understands and actively consents to all of the details, particularly those that involve rights the creditor may have against non-debtor third parties. The creditor may determine that it can't do better as against the debtors, so it might as well agree to the plan, without realizing that the plan contains provisions as to the creditor's rights against others.

To protect against an inadvertent release that is buried in a plan, in most cases there is actual notice of the release on the ballot itself, and often there is an opt-out provision that also

appears on the ballot. *See In re Washington Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011) (consensual third party release is effective only when creditor both voted in favor of the plan *and* did not opt out of the release on the ballot); *In re Calpine Corp.*, 2007 WL 4565223, *10 (Bankr. S.D.N.Y. 2007) (ballots "explicitly stated that a vote to accept the Plan or abstention from voting without opting out of the releases each constitutes an acceptance and assent to the releases set forth in the Plan . . . . Thus, [voting creditors] were given due and adequate notice that they would be granting the releases by acting in such a manner."); *In re DBSD North America, Inc.*, 419 B.R. 179, at 218 (Bankr. S.D.N.Y. 2009) ("the ballots set forth in both capitalized and bold text the effect of consenting to the Plan or abstaining without opting out of the release"); *In re Winn-Dixie Stores, Inc.*, 356 B.R. 239, 259 (Bankr. M.D. Fla. 2006) (consensual releases upheld when they were "disclosed in bold and consipicuous lettering on the ballot"). *See also In re Chemtura Corp.*, 439 B.R. 561, 611 (Bankr. S.D.N.Y. 2010) (suggesting that consensual release is valid only when ballot grants opportunity to opt out, or when factors for a non-consensual release are met); *In re Conseco, Inc.*, 301 B.R. 525 (Bankr. N.D. Ill. 2003) (consensual release is permissible when creditor is given opportunity to opt out).

The ballots issued in the case at bar did not contain any reference to any release. Moreover, this is an extremely complex bankruptcy. The Amended Plan filed on July 2, 2012 (Docket 479), is 161 pages, accompanied by the Amended Disclosure Statement (Docket 480) which is 350 pages. The Plan Supplement filed on July 1, 2012 (Docket 470), is 335 pages. The Second Plan Supplement filed on July 27, 2012 (Docket 615), is 192 pages. The Statement of Changes filed on July 27, 2012 (Docket 616), is 225 pages. These documents alone constitute 1,263 pages. Additional documents, constituting over 1000 more pages, have been filed in the last two (2) days. Information on the releases appears on just a handful of the pages that have

been filed and noticed to the parties in interest. In addition, there are so many parties, abbreviations, and broad general terms such as "affiliates" and "managers", that it is impossible for even an experienced attorney to decipher who and what is attempted by the release. Like *Congoleum*, "[t]his is an immensely complicated plan and it would be difficult for any layperson to comprehend all of its details." *Id.* The ballot does not contain any statement concerning the release or that a vote accepting the plan constitutes consent to the release. Even if it did, given the complexity of this case and the ambiguities in the Plan as to the release provisions, such a statement would be "of questionable value." *See id.* There is no opt-out provision on the ballot.

It cannot be a foregone conclusion that the creditors voting in favor of the plan are giving their unambiguous consent to the broad release, particularly when the ballot does not even call attention to this significant alteration of rights as to non-debtor parties. The release is too broad, too ambiguous, and the plan is too complex to presume that a creditor is actively consenting to the release with a vote in favor of the plan. The inclusion of the broad release, and attempting to couch it as "consensual" in order to obtain approval, demonstrates that the plan has not been proposed in good faith. As such, the plan does not meet the requirements under § 1129, and specifically § 1129(a)(3). The release should be analyzed as a non-consensual release, since those voting in favor of the plan have not actively consented to the specific release, as it was not on the ballot. The release should be approved only if the debtor meets the burden of showing that it is fair and necessary as to each party released, as required by Fourth Circuit law.

Had the release and the specific result of an affirming vote been on the ballot, the outcome of the voting may have been considerably different. Class 7, and particularly the Class 7 voters with lots in High Carolina, would have likely voted overwhelmingly against the Plan. With a dissenting vote by the High Carolina owners, the Goldbergs' position as to classification

and the absolute priority rule remain viable objections to the Plan. The Debtors assert that the Goldbergs do not have standing to challenge the releases because the releases do not apply to them as rejecting voters. However, the lack of good faith affects the legal confirmability of the Plan, and the failure to properly provide notice on the ballots as to the releases has had an undeniable effect on the outcome of the votes. This, in turn, affects the Goldbergs' arguments as to classification and the absolute priority rule. The Goldbergs most certainly have standing to raise these issues.

The above discussion focuses on the releases by Holders of Claims and Interests, set forth in Section 10.03(b) of the Plan. The Debtors ignore that the Goldbergs' objection also applies to the releases by the Debtors, contained in Section 10.03(a) of the Plan. "In evaluating releases, courts distinguish between the debtor's release of non-debtors and third parties' release of non-debtors." *In re Washington Mutual, Inc.*, 442 B.R. at 346.

> In *Zenith,* the Court identified five factors that are relevant to determine whether a debtor's release of a non-debtor is appropriate:
> (1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources;
> (2) a substantial contribution to the plan by the non-debtor;
> (3) the necessity of the release to the reorganization;
> (4) the overwhelming acceptance of the plan and release by creditors and interest holders; and
> (5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan.

Id. (quoting *Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999)). As outlined in the Goldbergs' objection, the Debtors must provide the specific basis for its release of each party contemplated by the Plan, including the consideration given by each person/entity which would justify such release. The Debtors have not done so, and even if it did, it is apparent that the

Zenith factors would not be met by most, if not all, of the parties and entities the Debtors seek to release.

7. **The information now provided with regard to substantive consolidation leads to the conclusion that substantive consolidation of all parties, both the Debtors and the non Debtor affiliates, is the only method of determining and equitably apportioning the assets and liabilities of these parties.**

Katie Goodman provides in her declaration (Docket 642) that the books and records of the Debtors are hopelessly intertwined and seeks substantive consolidation of the entities. She further indicates that all parties dealing with any of the Cliffs entities have always assumed that they were dealing with an umbrella Cliffs Club entity. (Docket 642, p. 4). Taking her declaration to its logical conclusion, all of the Cliffs entities should be substantively consolidated, not just the Club entities. It appears that they all operated as one unit, with funds flowing back and forth as needed, with debts being incurred as a single unit and that the individual entities were not treated individually by the owners or the creditors. A review of the release provisions throughout the pleadings indicates that the Debtors and non Debtors operated as one unit. If substantive consolidation is necessary, it should involve a consolidation of all of the entities, not just the Debtor entities.

Ms. Goodman goes on to say that the creditors will not be impaired by consolidation. (Docket 642, p. 4). Given the information provided (and not provided), it is not possible to determine whether this statement is accurate or not.

"Substantive consolidation is an action allowed by the broad equitable powers of 11 U.S.C. § 105." *Campbell v. Cathcart* (*In re Derivium Capital, LLC*), 380 B.R. 429, 441 (Bankr. D.S.C. 2006) (citing *Sampsell v. Imperial Paper & Color Corp*., 313 U.S. 215, 218, 61 S.Ct. 904, 85 L.Ed. 1293 (1941)). *See also Stone v. Eacho*, 127 F.2d 284 (4th Cir. 1942); *In re Bonham*, 226 B.R. 56, 75 (Bankr. D. Alaska 1998) (*aff'd Alexander v. Compton (In re Bonham*),

229 F.3d 750 (9th Cir. 2000)). South Carolina Bankruptcy Courts "ha[ve] previously utilized the test adopted in the Second Circuit to determine whether to substantively consolidate a debtor's estate with a [non-debtor] related entity." *Id*. at 442 (*citing In re Keene Properties of South Carolina*, C/A No. 04–06897–W, slip op. (Bankr. D.S.C. Dec. 4, 2004); *see also In re Augie/Restivo Baking Co. Ltd*., 860 F.2d 515, 518 (2nd Cir. 1988). "Under this test, substantive consolidation is appropriate when 1) creditors dealt with the entities as a single economic unit and did not rely on separate identities in extending credit or 2) when the affairs of the debtor are so entangled that consolidation will benefit all creditors." *Id*.

> In Derivium, the following was sufficient to justify substantive consolidation: (1) the affairs of Derivium and the non-debtor entities were so entangled that their pre-petition operations were as a single entity for all practical purposes; (2) consolidation would benefit creditors because untangling the pre-petition affairs would be unduly expensive; (3) Derivium and the non-debtor entities had unity of ownership; (4) debt, guarantees, and cash were shared between Derivium and the non-debtors, as well as transfers of assets without observation of corporate formalities; (5) Derivium and/or at least one of the non-debtors were grossly undercapitalized; (6) the estate would benefit by avoiding the harm caused by the non-debtors from transfers of assets and other actions; (7) the estate would benefit by increasing assets for distribution; (8) the estate would benefit by streamlining the liquidation/distribution processes; and (9) creditors of Derivium and the non-debtors did not rely on their separate identities when extending credit.

In re Geo. W. Park Seed Co., Inc., et al, 2010 WL 5173179 at *4 (Bankr. D.S.C. July 22, 2012).

Given the information provided by the Debtors, it is not possible to determine whether substantive consolidation is appropriate. However, if it is appropriate, substantive consolidation should include Non Debtors as well as Debtors so that true substantive consolidation can occur.

WHEREFORE, having shown that the Plan should not be confirmed in that it does not meet the requirements of 11 U.S.C. § 1129, the Goldbergs ask that confirmation be denied and for such other and further relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED on this the 5th day of August, 2012, at Columbia, South Carolina.

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