UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

In re:	Chapter 11
	Case No. 9:10-bk-03846-ALP
FIDDLER'S CREEK, LLC et al.,	**(Jointly Administered under Case No. 9:10-bk-03846-ALP)**
Debtors.	
_____/	

MATTHEW SUFFOLETTO, STEPHEN SHULMAN, STEVEN TAUB, RAYMOND DAVID, AND GLENN VICIAN'S OBJECTION TO SECOND AMENDED JOINT PLAN OF REORGANIZATION FOR FC GOLF LTD. AND FC GOLF, LLC

COMES NOW, Matthew Suffoletto, Stephen Shulman, Steven Taub, Raymond David, and Glenn Vician, (collectively, the "**Class Action Plaintiffs**"), by and through undersigned counsel and files this, their Objection to Second Amended Joint Plan of Reorganization for FC Golf Ltd. and FC Golf, LLC [Dkt. 764] pursuant to Chapter 11 of the United States Bankruptcy Code ("**Objection**"). In support hereof the Class Action Plaintiffs state as follows:

I. – BACKGROUND

1. On April 22, 2010, the Class Action Plaintiffs filed an action in the Federal District Court of Florida, Fort Myers Division, against Aubrey J. Ferrao, Case No. 2:10-cv-241-FtM-36-DNF ("**Original Complaint**"). The Original Complaint named only Aubrey J. Ferrao individually and did not name any of the Debtors in this jointly administered case.

2. On July 22, 2010, the Class Action Plaintiffs filed their First Amended Class Action Complaint ("**Amended Complaint**"), after receiving District Court approval to do so. The Amended Complaint also only names Aubrey J. Ferrao individually. This filing is relevant to the Class Action Plaintiffs Objection because the Amended Complaint contains a civil theft claim against Aubrey J. Ferrao, again individually.

3. The Golf Club Membership Agreement ("**Membership Agreement**"), attached hereto as **Exhibit "A**", provides for the escrow of initiation deposits as follows:

> Initiation Deposits will initially be held in escrow pursuant to an Escrow Agreement for Initiation Deposits until the Golf Club Facilities are constructed.
>
> If the Golf Club provides security ensuring completion of the Golf Club Facilities or a refund of amounts paid in respect of a membership in the Golf Club if the Golf Club Facilities are not completed, the escrow agent is authorized to release amounts held in escrow as more particularly provided in the Escrow Agreement for Initiation Deposits.

The security required by this escrow provision is that <u>which is sufficient to ensure the completion of the Golf Club Facilities,</u> which as of this date, is greater than the $13,083,230.00 which is the amount of the actual initiation deposits themselves. To complete the Golf Club Facilities, the Debtor needs to develop one complete golf course and one large club house. A formal analysis of completing this development is not in the Second Amended Joint Plan or the plans of the other Debtor's filed in this consolidated case. The Second Disclosure Statement indicates that there is ongoing planning to develop a golf course, but nothing in the Second Amended Joint Plan addresses the funds necessary to do so.

II. – SPECIFIC OBJECTIONS

4. The Class Action Plaintiffs object to the provisions of paragraph 7.4 of the Second Amended Joint Plan as follows:

a. The Debtor proposes to pledge a mortgage to secure an amount equal to $13,083,230.00 for the benefit of Golf Club Members. This amount is represented to be the total initiation deposits paid by the Golf Club Members in connection with the Membership Agreement. The

Membership Agreement requires that the escrow funds can only be released upon the posting of security to ensure the completion of the Golf Club Facilities which far exceeds the $13,083,230.00 of initiation deposits which are no longer in escrow. These funds were released improperly and form the basis of the Class Action Plaintiffs claims against Aubrey J. Ferrao. Merely offering to securitize the amount of the initiation deposit is not sufficient under the terms of Membership Agreement to allow for the disbursement of the initiation deposits. A modification in this manner of the executory Membership Agreements that are being assumed in the Second Amended Joint Plan to accomplish this is not permitted as a clause proscribed by 11 USC § 365(e). *In re Yates Development, Inc., 256 F.3d 1285 (2001)*

b. The sixth paragraph of section 7.4 purports to bind the parties to the provisions of the Golf Club Membership documents and the Confirmation Order from or after the effective date. While this is not offensive, the provision that states "including the terms and provisions set forth herein", suggests that the Golf Course Membership document provisions have been changed. The Class Action Plaintiffs object to the change of any of the provisions of the Golf Club Membership documents as they existed at the time they were entered into by the parties, except to the degree they were changed in conformance with the original agreements. These are executory contracts which are being assumed, and pursuant to the provisions of 11 U.S.C. §365, the Debtor must accept the benefits and burdens of the bargain that was struck when the original Golf Club Membership documents were agreed to by the parties. The defaults which have occurred can be cured, and are not within the ambit of 11 U.S.C. §365(e)(1).

c. Class Action Plaintiffs specifically object to the provisions of the correspondingly numbered subparagraphs of paragraph 7 of section 7.4 as follows:

(ii) There is no settlement in compromise of the alleged disputes as referenced in this subparagraph. The Class Action Plaintiffs have not settled in compromise with the Debtor, and if the Debtor is able to cure the defaults. It can either deposit $13,083,230.00 into an escrow account, or provide sufficient security necessary to ensure the completion of the Golf Club Facilities. While arguably the security should have been pledged before the initial escrow deposits were used, strict compliance with this timing issue should not prevent the Debtor from curing the default as long as the amount of the security pledged is consistent with the terms of the Membership Agreement.

(v) The current mortgage on the property being offered to securitize the initial escrow deposits does not "**constitute a full and prompt cure of any and all alleged defaults**" and does not satisfy the requirements of 11 U.S.C. §365. The specific default, as previously set forth, was the removal from escrow by Aubrey J. Ferrao without having complied with the provisions of the Membership Agreement. The only cure is to return the escrow deposits or post security sufficient to construct the 2nd golf course and additional clubhouse.

(vii) The FC Golf debtors have not provided adequate assurances of future performance, as required by §365 of the Bankruptcy Code as the proceeds of the exit financing are to be used for working capital and general corporate purposes, and are not specifically slated be used for the completion of the Golf Club Facilities. Additionally, Article 8, paragraph 8.1, General Overview of the Plan, does not include plans on how the Golf Club Facilities are to be completed.

(viii) The Class Action Plaintiffs object to any determination by an Order confirming this Second Amended Joint Plan that Aubrey J. Ferrao did not receive, converted, or otherwise benefit, directly or indirectly, any of the initiation deposits paid by the Golf Club Members in connection

with the Membership Agreement or otherwise. This is an attempt by the Debtors to procure a release of Aubrey J. Ferrao from the civil theft claims filed by the Class Action Plaintiffs against him taking of the escrow deposits which were held in trust for the benefit of the Golf Course Members. This is in essence and end run around Mr. Ferrao's exposure to liability as set forth in the Amended Complaint now pending in the District Court. Aubrey J. Ferrao is not a named debtor and should not be released from claims that the Class Action Plaintiffs, have against him. It would be inequitable for this Court to made a determination that he did not receive, convert, or otherwise benefit these initiation deposits. There has no contested matter initiated in this consolidated bankruptcy case or adversarial matter filed by the Debtors on the issues raised by the Class Action Plaintiffs in the Amended Complaint, and Aubrey J. Ferrao's individual liability to the Class Action Plaintiff's is far outside the scope of the Second Amended Joint Plan .

(ix) This sub paragraph suggests that the granting of the mortgage constitutes adequate security for the refund of the initiation deposits, and again, this is not the proper cure. The mortgage should be of sufficient value to complete the Golf Club Facilities, which is an amount much in excess of the escrow deposits which were improperly distributed by Aubrey J. Ferrao.

5. The Class Action Plaintiffs object to the provision of paragraph 12.4.2, to the extent that the Class Action Plaintiffs claims against Aubrey J. Ferrao are construed as being a claim against the FC Golf Debtors. The single and only Defendant in the Class Action Plaintiff's Complaint and Amended Complaint is Aubrey J. Ferrao. This issue is collaterally addressed in an Order on the Debtors' Motion for Sanctions against the Class Action Plaintiffs, where this Court determined that the claims against Mr. Ferrao were disguised claims against the Debtor. While the Class Action Plaintiffs have asked the Court to re-visit this analysis given the evidence

presented, this determination does not change the fact that the Amended Complaint is still against Mr. Ferrao individually. Mr. Ferrao, a non Debtor, should not be allowed to shield himself individually from the civil theft claim of the Class Action Plaintiffs, regardless of the outcome of the Debtors' Motion for Sanctions. If this language is intended to include a dismissal of the Class Action Plaintiff's claims against Mr. Ferrao individually, it is not proposed in good faith, is not necessary for the reorganization of the Debtors, and is not fair and equitable. The District Court that allowed the Complaint to be amended to include this claim should make the decision as to Mr. Ferrao's liability to the Class Action Plaintiffs.

WHEREFORE, for the reasons set forth herein, the Class Action Plaintiffs object to the confirmation of the Debtors' Second Amended Joint Plan as not complying with 11 U.S.C. §1129.

Dated: May 12, 2011

/s/ A. Christopher Kasten II

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 12, 2011, I electronically filed a true and correct copy of Matthew Suffoletto, Stephen Shulman, Steven Taub, Raymond David, and Glenn Vician's Objection to Second Amended Joint Plan of Reorganization for FC Golf Ltd. And FC Golf, LLC with the Clerk of the United States Bankruptcy Court for the Middle District of Florida by using the CM/ECF system and I furnished a copy of the foregoing document(s) to the following parties in the manner of service indicated below:

/s/ A. Christopher Kasten II
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