IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re: Foxwood Hills Property Owners Association, Inc., Debtor.	Case No. 20-02092-hb Chapter 11 **DEBTOR'S RESPONSE TO ORDER REGARDING 11 U.S.C. § 1102**

Foxwood Hills Property Owners Association, Inc. (the "**Association**"), the debtor-in-possession in this case, hereby responds to the Order Regarding 11 U.S.C. § 1102 (the "**Order**") entered on April 8, 2021 providing notice that the Court is considering entering an order pursuant to 11 U.S.C. § 1102 directing the Office of the United States Trustee (the "**UST**") to appoint one or more committees of equity interest holders in this case. The Association opposes the appointment of any such committees. Although the intent in appointing such a committee is to facilitate communication and resolution of disputes, in practice, the appointment of such a committee would only lead to additional contentious issues and added costs to the estate. It is also unnecessary in regard the proposed plan of reorganization in this case, as the Association's plan of reorganization is to be amended.

In regard to the possible appointment of a committee of equity interest holders in this case, the Association would show that:

1. The equity interest holders in this case are already represented by a group elected or appointed from their ranks: the Board of the Association. The Board is comprised of lot owners, who serve without pay, and elections are held annually for the Board positions which expire on a rotating basis. The most recent election occurred in March 2021.

2. The owners of lots in the Community are identified in the Chapter 11 Plan of Reorganization as "equity interest holders" because the lot owners collectively, by the nature of the Association (a property owners association), comprise the Association. However, they do not qualify as "equity security holders"

under 11 U.S.C. §§ 101(16) and (17), and thus do not qualify for the appointment of a committee to represent them under 11 U.S.C. §§ 1102(a)(2) and (b)(2). The owners hold no certificates or interests, or even ownership percentages, that would qualify as an "equity security," and their ownership interests are not tradeable or transferable independent of the lot the owner owns. The appointment of a committee under 11 U.S.C. §§ 1102(a)(2) and (b)(2) is, by the express language of the statute, for equity security holders, not for the interests of lot owners in their property owners association.

3. The lot owners who appeared at the hearing on April 6, 2021 in opposition (the "**Objectors**") to the Association's Disclosure Statement to Chapter 11 Plan of Reorganization filed on March 4, 2021 [ECF 189] (the "**Disclosure Statement**"), the Chapter 11 Plan of Reorganization filed on March 4, 2021 [ECF 188] (the "**Plan**") and the proposed new Bylaws filed as Exhibit A to Chapter 11 Plan of Reorganization on March 22, 2021 [ECF 214] are not representative of the equity members in this case, who number over 3,300 of record. The Objectors are vocal, but the views and positions they argue are not the views and positions of most owners in the Community.

4. Notably, during this case, a group of unhappy lot owners, including many of the Objectors, attempted in July and August of 2020 to remove five of the seven Board members they dislike. The group (the "**Petitioners**") filed a petition for a special meeting to vote on the removal of the five Board members they dislike. In response, another group of owners countered with their own petition for a special meeting to vote on the removal of the two other Board members. Following the procedures set in the existing Bylaws, the Association conducted the special meetings and removal votes on September 5, 2020. **The votes were over two-thirds (2/3) in support of the then existing five Board members the Petitioners sought to remove, and over two-thirds (2/3) for removal of the other two Board members the Petitioners sought to keep on the Board.** The equity interest holders have in fact voted on their representatives – in annual elections, most recently in March 2021, and in two special votes conducted on September 5, 2020. The appointment of a committee to represent the Objectors, at the estate's expense, would circumvent these votes by the full membership.

5. The selection of a committee which is honestly representative of the owners/members, and

not just the Objectors, is not easily done. A committee appointed of equity interest holders would likely be comprised primarily of the Objectors, because they are the most vocal and because owners who are not discontented are not likely to volunteer for a committee in opposition to their Board. Moreover, if a truly representative committee were appointed, the views among committee members would likely be divergent and without consensus. Indeed, the committee could end up needing mediation of its own to determine positions it would espouse for equity interest holders. Without a properly representative group of committee members, the committee would become no more than a mouthpiece for the Objectors (at the expense of all other owners) in opposition to the Board supported by the majority of members (as shown by the results of the special votes on September 5, 2020).

6. The Objectors' arguments are their arguments, not arguments made by the majority, or even a large percentage, of owners. They should not be given weight as if they are made on behalf of all owners, because they are not representative of the majority of owners.

7. The Association is in the process of preparing amendments to the Disclosure Statement and the Plan, which amendments include the deletion of the approval of new or amended Bylaws from the Plan. The Objectors argued at the April 6 hearing that the approval of new or amended Bylaws should be made pursuant to the provisions for amendment in the existing Bylaws. As stated by the Association at the hearing, the Association was not attempting to force new Bylaws on the membership, but had thought that the Plan confirmation process would be an efficient way for new Bylaws to be approved by the membership, on the mistaken belief that the amendments would not be controversial. As just stated, the proposed new Bylaws are no longer part of the Plan. If the Association seeks approval of new or amended Bylaws, it will do so under and in accordance with the provisions of the existing Bylaws.[1]

8. The other amendments to the Plan will streamline it, and the appointment of a committee would serve no useful purpose. The Association will add language further clarifying that the Plan does not

[1] This approach should satisfy the Objectors, since they argued that the Association should amend the Bylaws only under and pursuant to the provisions of the existing Bylaws. Moreover, for those Objectors also arguing that the Chapter 11 case should not have been filed, the proposal of new or amended Bylaws under the provisions of the existing Bylaws is the same result that would occur if there were no bankruptcy case.

amend or modify restrictions of record, but only states how the Association will apply and enforce provisions (*e.g.*, the Association will not seek to compel removal of a mobile home that has been on property for years, even though the restrictions for the section in which the lot is located prohibit mobile homes), and that the Plan does not alter or affect the rights of owners to enforce (or oppose) restrictions of record.[2] Amendments also will be made regarding the treatment of undeveloped property which has been deemed "outparcel" property for many years, in accordance with that past treatment and applicable legal authorities. The primary purpose and provisions of the Plan, after amendment, will be the payment of creditors, which even the Objectors stated they support.

9. The appointment of a committee would result in substantial additional expense to the estate. The committee would almost certainly retain an attorney, who would need to devote much time to matters. Already, the Association's attorneys have accepted a substantial discount of their fees and expenses, and they likely will need to do so again – not because they have not provided services that are reasonable, necessary and/or appropriate, but because the legal expense in this case has been far greater than anticipated. The addition of another attorney to represent a committee in duplication of the member elected Board, is an unnecessary and burdensome expense for the Association.

10. In the event the Court were to decide to appoint a committee, the committee necessarily should exclude from appointment any owner who denies membership in the Association. An owner cannot deny membership and at the same time purport to be a member representative.

WHEREFORE, the Association prays that (1) the Court not issue an order directing the UST to appoint a committee of equity interest holders in this case, and (2) if the Court nevertheless decides to enter such an order, that (a) the committee be comprised of members truly representative of the full membership, and (b) owners who deny that they are members of the Association be excluded from appointment to the committee.

[2] The Plan does not change the restrictions. However, restrictions of record regarding membership and assessments are addressed in Adversary Proceeding No. 20-80049-hb, independent of the Plan.

/s/ Julio E. Mendoza, Jr.
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