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7 Continental Country Club, Inc.

8 **IN THE UNITED STATES BANKRUPTCY COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 In re:
11 CONTINENTAL COUNTRY CLUB,
12 INC., an Arizona Non-profit corporation,
13 EIN 86-0414438
14 Debtor.

Chapter 11

Case No. 3:21-bk-00956-EPB

**DEBTOR'S (I) OBJECTION TO THE
LAKEFRONT GROUP'S PROOF OF
CLAIM; AND (II) MOTION FOR
CLAIM ESTIMATION**

16 Continental Country Club, Inc., an Arizona non-profit corporation and the Debtor and
17 Debtor in Possession in the above-captioned Chapter 11 reorganization case (the "Debtor"),¹
18 hereby objects to and opposes the allowance of the "Proof of Claim" filed by the Lakefront
19 Group a/k/a Lakeside Legionnaires on May 10, 2021 (Claim 15) ("POC"). Pursuant to 11
20 U.S.C. § 502(c), the Debtor requests that the Court estimate for the purposes of allowance or
21 disallowance the POC so that it would not unduly delay the administration of the case.

22 **SUMMARY OF OBJECTION AND MOTION**

23 The POC asserts a claim against the Debtor for "\$15,217,256.49 or compliance with
24 the Declaration, the 1990 Settlement Judgment, and the Coconino Superior Court's

25
26
27 ¹ Unless defined otherwise, all capitalized terms used herein shall the same meaning as defined in the
Plan as amended (Doc. 317).

1 10/30/2020 Order.” POC, part 2, ¶7. As to the basis of the POC, the Lakefront Group states,
2 “Judgement see attached summary of damages and Exhibits attached thereto.” *Id.* at ¶8. As
3 an alternative to a money judgment, the Lakefront Group seeks compliance with the
4 Declaration.

5 Pursuant to 11 U.S.C. § 502(a), the Debtor objects to the allowance of the POC for the
6 following reasons:

- 7 • The POC fails to contain sufficient information or a reliable methodology to establish
8 the validity and amount of any purported damages the Lakefront Group may assert –
let alone damages in excess of \$15 million.
- 9 • After the POC was filed, Debtor rejected the settlement agreement upon which the
10 Lakefront Group bases its POC for amount and enforceability.² The Lakefront Group
11 did not amend the POC to address this Court’s Order granting Debtor’s Motion to
Reject the Settlement.
- 12 • The POC is void of any legal basis for the Lakefront Group’s claims as asserted.
- 13 • Debtor’s proposed Plan offers the Lakefront Group two alternatives for achieving a
14 water recreational area at Lake Elaine, and therefore Debtor objects to the POC as
contingent, unmatured, and subject to being fully satisfied by Debtor’s Plan.

15 This Objection raises evidentiary issues and the Debtor hereby requests an evidentiary
16 hearing. Indeed, these issues are best presented to the Court through a claim estimation
17 proceeding pursuant to 11 U.S.C. § 502(c). Bankruptcy Code § 502(c) mandates that the
18 Court estimate for purpose of allowance: “(1) any contingent or unliquidated claim, the fixing
19 or liquidation of which, as the case may be, would unduly delay the administration of the
20 case; or (2) any right to payment arising from a right to an equitable remedy for breach of
21 performance.” Protracted delay in liquidating the POC will hold up Debtor’s Plan
22 confirmation process and harm numerous innocent creditors and parties in interest.

23 This Objection and Motion are based upon: (i) the entire record in this Chapter 11
24 reorganization case and the adversary proceeding (removed litigation); and (ii) the attached

25 ² While the Lakefront Group originally appealed this Court’s March 7, 2022 decision authorizing the
26 Debtor’s Motion to Reject the Settlement (Doc. 290) and formal Order (Doc. 292), on May 16, 2022,
27 the U.S. Bankruptcy Appellate Panel of the Ninth Circuit entered the “Order Dismissing Appeal” that
followed the parties’ stipulation to dismiss. *See* Case No. 22-1056 at Doc. 8-1.

1 Memorandum of Points and Authorities.

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. THE LAKEFRONT GROUP BEARS THE ULTIMATE BURDEN OF PROOF.**

4 While Bankruptcy Rule 3001(f) states that a proof of claim is prima facie evidence of
5 the validity of the claim, the “ultimate burden of proving the amount and validity of their
6 claim by a preponderance of the evidence” rests with the claimant. *In re Harford Sands Inc.*,
7 372 F.3d 637, 641 (4th Cir. 2004). If there is a dearth of evidence as to how a creditor arrived
8 at its estimated damages, then the Court should find that it is speculative and disallow it. *Id.*
9 While some cases discuss a shifting burden, the U.S. Supreme Court has long held the burden
10 of proof “to be a ‘substantive’ aspect of a claim.” *Raleigh v. Illinois Dep’t of Revenue*, 530
11 U.S. 15, 20–21, 120 S. Ct. 1951, 1955, 147 L. Ed. 2d 13 (2000). In sum, “the burden of proof
12 is an essential element of the claim itself; one who asserts a claim is entitled to the burden of
13 proof that normally comes with it.” *Id.* For the reasons set forth below, the Lakefront Group’s
14 POC fails to carry its burden of establishing entitlement to over \$15 million.

15 **II. THE LAKEFRONT GROUP FAILS TO CARRY ITS BURDEN OF PROOF.**

16 The POC is insufficient to establish validity and amount of the Lakefront Group’s
17 putative claim for the following non-exhaustive³ reasons:

- 18 1. The Settlement has been rejected and no longer serves as a basis for any
19 putative claim;
- 20 2. The Declaration neither supports a claim to a lake nor monetary damages;
- 21 3. The Coconino Superior Court’s 10/30/2020 Order cannot serve as the basis for
22 damages;
- 23 4. The loss of value claim of the Lakefront Group is speculative, at best, and is not
24 supported by any admissible or reliable evidence;
- 25 5. The Lakefront Group is not entitled to attorneys’ fees and/or costs; and

26 ³ The Debtor has propounded discovery that relates to, *inter alia*, this Objection. The Debtor reserves
27 the right to supplement this Objection by any defense that is revealed through discovery.

1 Tracts. With respect to Tract D, the plat states only that “Tract D is hereby dedicated for the
2 use of the Continental Country Club Homeowners as a water recreational area with
3 limitations per deed restrictions.” The plat does not require the Debtor to build the Lakefront
4 Group a lake. The Plan on file satisfies the plat by offering a series of ponds with connecting
5 streams. As the Court ordered at the final hearing on the Disclosure Statement, the Debtor
6 finalized those plans and filed them with the Court.

7 **C. The Coconino Superior Court’s 10/30/2020 Order Cannot Serve As The Basis**
8 **For Damages.**

9 While the state court made numerous pronouncements regarding the matter, “no final
10 judgment was entered prior to Debtor filing its bankruptcy petition.” *See* Order. Accordingly,
11 the non-final state court rulings cannot serve as the basis for the Debtor’s POC. *See Arizona v.*
12 *California*, 530 U.S. 392, 414, *supplemented*, 531 U.S. 1 (2000) (no preclusive effect in the
13 absence of a valid and final judgment); *Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, 514, 990
14 P.2d 1069, 1073 (Ct. App. 1999) (ruling on motion *in limine* was not a valid decision on the
15 merits and would not be given estoppel effect); Restatement (Second) of Judgments § 27
16 (1982) (issue preclusion requires, among other elements, a valid and final judgment). Here,
17 the underlying state court action was stayed by the filing of the voluntary petition before any
18 valid and final judgment was entered. Moreover, the state court litigation has been
19 consensually removed to this Court for adjudication on the merits.

20 **D. The Lakefront Group Fails to Articulate a Basis or Methodology for Its**
21 **Supposed Damages.**

22 The Lakefront Group’s loss of value claims is speculative, at best, and wholly
23 inadmissible. In total, the Lakefront Group seeks approximately \$15,000,000. For loss of
24 value of the Lakeshore Owners, the POC sets forth an amount of \$7,760,744.00. For the
25 Lakeshore Condominium Owners, the POC asserts damages of \$2,060,758.00. For the
26 Lakeside Class of Members who are not even adjacent to the Lake, the POC seeks
27 \$4,878,066.00.

1 How did the Lakefront Group arrive at these sizable damage calculations? Did they
2 use a market approach? No. Did they even get an appraisal? No. There is no evidence
3 attached to the POC which explains or justifies the aforementioned estimations.

4 The POC references Exhibits I-K in support of these estimates, which are merely an
5 allocation of these amounts to various owners setting forth the supposed value of their
6 property with and without a lake. It appears from analyzing the foregoing exhibits that the
7 Lakefront Group discounted their home values by 10% across all owners regardless of their
8 location, sales history, amenities, etc.⁵ It is also without regard to any actual market
9 transactions.⁶ In this regard, it is unclear whether any of the homeowners actually suffered
10 any damages if their properties did not sell during the relevant time period for a loss that can
11 causally be attributed to the absence of a water feature. In short, the POC lacks any
12 explanation, methodology, or evidence to support this 10% discount, which is at the core of
13 the loss of value claim.

14 Specifically, in the 500 plus pages of supporting documentation, mostly consisting of
15 attorneys' fees bills, no MAI appraisal report was attached to support these asserted damages.
16 In fact, the POC is bereft of any expert testimony or report that is based upon some unique
17 knowledge, skill, experience, training, or education that would permit one to opine on
18 damages. The homeowners are not qualified to offer this expert opinion testimony. Fed. R.
19 Evid. 702 requires that all expert testimony "is not only relevant, but reliable." *Kumho Tire*

20
21 _____
22 ⁵ The 10% depreciation is also used in *The Lakeside Legionnaires' Objection to the Debtor's First*
23 *Amended Plan of Reorganization* filed on July 22, 2022 at Doc. 345 ("Plan Objection"). The only
24 "evidence" in the Plan Objection for the 10% figure is a citation to a blog written by an out of state
25 real estate agent filled with anecdotes of other real estate agents from Florida, Michigan, and
26 California. This is not admissible evidence as it is hearsay under Fed.R.Evid. 801 and does not
27 satisfy *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) and its progeny.

25 ⁶ To get to a sweeping 10% discount, one would expect to see sales comparisons of residential real
26 estate sold with and without a lake (or water feature). Such comparable properties would then be
27 analyzed by an appraiser to control for differences such as square footage, amenities, and location,
e.g., *Tahoe v. Flagstaff*. The POC, however, lacks any reference to either sales comparisons or any
analysis by a licensed or certified real estate appraiser.

1 *Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert v. Merrell Dow*
2 *Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)). To determine whether expert testimony is
3 reliable, the Supreme Court has identified the following factors to be considered:

4 (1) whether a theory or technique can be, and has been, tested; (2) whether the
5 theory or technique has been subjected to peer review and publication; (3) a
6 technique's known or potential rate of error and the existence and maintenance
7 of standards controlling the techniques operation; and (4) whether a particular
8 technique or theory has gained general acceptance in the relevant scientific
community.

9 *In re Nellson Nutraceutical, Inc.*, 356 B.R. 364, 372 (Bankr. D. Del. 2006) (quoting *Chartwell*
10 *Litigation Trust v. Addus Healthcare, Inc.*, (*In re Med Diversified Inc.*), 334 B.R. 89, 95
11 (Bankr. E.D.N.Y. 2005). In the instant case, the POC fails to provide any facts or information
12 to support the conclusory assertions of damages, let alone evidence sufficient to demonstrate
13 that any estimate or calculation is “scientifically valid” and based upon “reasoning or
14 methodology [that] properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 593.

15 If the proffered expert lacks formal education and training in valuations, then his report
16 and testimony should be excluded. *See In re Med Diversified, Inc.*, 334 B.R. at 96 (despite
17 individual’s experience of more than 20 years as an accountant and liquidating agent or
18 bankruptcy trustee, report and testimony excluded as he did not have the formal education and
19 training to perform valuations). Moreover, even if the valuation expert is qualified, the use of
20 an improper valuation methodology makes reliance upon the conclusions unjustified. *See In*
21 *re Hirsch*, 351 B.R. 291, 297 (Bankr. E.D.N.Y. 2006) (used an income capitalization
22 approach because the real estate appraiser could not locate comparable sales); *In re Mirant*
23 *Corp.*, 334 B.R. 800, 816 (Bankr. N.D. Tex. 2005) (method was unsuitable due to inadequate
24 data).

25 While a homeowner may be able to testify about the value of their own property under
26 Fed.R.Evid. 701, nothing makes them qualified to testify about the value of their property but
27 for certain features such as a lake. Similarly, homeowners are not qualified to testify about the
value of their home without a lake but with ponds and streams, for example. The POC fails to

1 estimate the alleged loss of value based upon the difference, if any, between the home's
2 putative value with a lake versus its value with ponds and streams. Moreover, is that supposed
3 difference in value transitory or permanent? For example, if the homeowner in question is not
4 selling their home then have they really lost any value (unliquidated, contingent, and
5 unmatured, at best). Lastly, the POC, without basis or explanation, applies the 10% lost value
6 to homes that faced Lake Elaine and condos or townhomes that never had a view of Lake
7 Elaine.

8 Without proper methodology, a homeowners' opinion of value is given no weight. *See*
9 *In re Brown*, 244 B.R. 603, 612 (Bankr. W.D. Va. 2000); Judge Barry Russell, *Bankruptcy*
10 *Evidence Manual* §701.2 at p. 720. A homeowner is likely not competent to draw value
11 comparisons or testify that a particular feature is worth "X" instead of "Y." *See In re Meeks*,
12 349 B.R. 19, 21 (Bankr. E.D. Cal. 2006) (bankruptcy court did not have to give the
13 homeowners' opinion much weight concerning home value and as to value difference
14 between their home and allegedly "comparable" properties). Even an uncontradicted opinion
15 of value by the owner may be insufficient to satisfy a burden of proof. *In re Brown*, 244 B.R.
16 603, 610 (Bankr. W.D. Va. 2000). For all the reasons given above, the Lakefront Group's loss
17 of value claim should be given no weight.

18 **E. No Award of Attorneys' Fees or Costs is Appropriate.**

19 The purported basis for the Lakefront Group's request for \$510,011.15 in attorneys'
20 fees and \$7,677.04 in costs is the state court pronouncements and the supposed breach of the
21 Settlement Agreement. Neither of these items are to be given any weight given the
22 intervening bankruptcy filing and the rejection of the Settlement Agreement. The definitive
23 pronouncement on attorneys' fees and bankruptcy comes from the U.S. Supreme Court in
24 *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 126 (2015), wherein the Supreme Court
25 denied debtor's counsel fees defending a fee award. In sticking by the American Rule, the
26 Supreme Court held that it would not deviate from that presumption absent "explicit statutory
27 authority." *Id.* Here, the Lakefront Group has failed to establish, among other things, the

1 statutory authority and that it is the prevailing party. Regardless, a wholly unsecured creditor
2 is not entitled to fees under 11 U.S.C. § 506. Lastly, with the rejection of the Settlement
3 Agreement, the Lakefront Group does not have a prepetition contract claim.

4 **F. The Lakefront Group’s Putative Claim Is Contingent, Unmatured, and/or**
5 **Satisfied.**

6 The POC is filed requesting allowance of an unsecured claim either (i) in excess of
7 \$15,000,000 or (ii) in compliance with the Declaration. As the Debtor’s Plan is still pending
8 confirmation, compliance with the Declaration or plat is also still pending. Thus, at best, the
9 Lakefront Group’s rights, if any, are contingent, unmatured, and subject to being fully
10 satisfied. As noted above, the plat, which is controlling, entitles the Lakefront Group to a
11 water feature and the Plan provides them with a water feature in the form of ponds connected
12 by streams. As the POC requested, the Plan gives the Lakefront Group a choice of \$2.5
13 million dollars or a water feature. To date, the Debtor is informed and believes that the
14 Lakefront Group will not accept cash but is insisting on a lake and a lake alone – for which
15 they are not entitled. The Debtor must have this Court’s intervention to resolve this decades-
16 old dispute.

17 **III. THE COURT SHOULD ESTIMATE THE POC.**

18 The Debtor and the Lakefront Group need a claim estimation hearing to resolve the
19 POC. *See* 11 U.S.C. § 502(c) (authority to estimate for purpose of allowance contingent or
20 unliquidated claims if needed to avoid “unduly delay[ing] the administration of the case” or to
21 adjudicate “any right to payment arising from a right to an equitable remedy for breach of
22 performance”). As this Court knows, it has control over its docket to facilitate the
23 administration of this reorganization case. *See* 11 U.S.C. § 105(a).

24 **IV. CONCLUSION.**

25 Based upon all of the foregoing, the Debtor respectfully requests that the Court enter
26 an Order: (a) sustaining the Objection; (b) disallowing the Lakefront Group’s POC; (c) setting
27 oral argument and an evidentiary hearing on the POC; and (d) setting a claim estimation

1 proceeding to resolve the POC for Debtor's Plan confirmation purposes.

2 RESPECTFULLY SUBMITTED this 2nd day of August, 2022.

3
4 **ENGELMAN BERGER, P.C.**

5 By /s/ Scott B. Cohen, SBA #14377

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12 **COPY** of the foregoing transmitted
13 via the Court's ECF system, and
14 as indicated this 2nd day of August
15 2022, to the following parties:

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A copy of the foregoing document will be posted on Debtor's court-approved web portal for the benefit of all property owners who have not otherwise opted out of this form of service.

/s/ Alyssa C. Moomaw
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