

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re:

CCHG Liquidation Co.,

Debtor.

CHAPTER 11

Case No. 12-01220

Substantively Consolidated

**MOTION OF THE LIQUIDATION TRUSTEE
FOR ENTRY OF AN ORDER APPROVING ENTRY INTO TOLLING AGREEMENT**

COMES NOW Katie S. Goodman, solely in her capacity as the Liquidation Trustee for CCHG Liquidation Co. (the “Liquidation Trustee”), and files this Motion for the entry of an order, substantially in the form attached hereto as Exhibit A, approving and authorizing the Liquidation Trustee to enter into a tolling agreement between the Liquidation Trustee and Mr. James B. Anthony, substantially in the form attached hereto as Exhibit B, as may be amended or extended from time to time (the “Tolling Agreement”). In support of this Motion, the Liquidation Trustee respectfully represents as follows:

BACKGROUND

1. On February 28, 2012 (the “Petition Date”), The Cliffs Club & Hospitality Group, Inc. and its affiliated debtors¹ filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

¹ The debtors (now substantively consolidated as a single debtor), 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. n/k/a CCHG Liquidation Co. (6338) (12-01220); CCHG Holdings, Inc. (1356) (12-01223); The Cliffs at Mountain Park Golf & Country Club, LLC n/k/a CCHG Liquidation Co. II, LLC (2842) (12-01225); The Cliffs at Keowee Vineyards Golf & Country Club, LLC n/k/a CCHG Liquidation Co. III, LLC (5319) (12-01226); The Cliffs at Walnut Cove Golf & Country Club, LLC n/k/a CCHG Liquidation Co. IV, LLC (9879) (12-01227); The Cliffs at Keowee Falls Golf & Country Club, LLC n/k/a CCHG Liquidation Co. V, LLC (3230) (12-01229); The Cliffs at Keowee Springs Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VI, LLC (2898) (12-01230); The Cliffs at High Carolina Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VII, LLC (7576) (12-01231); The Cliffs at
{footnote continued}

2. On July 2, 2012, the debtors filed 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 No. 616, Ex. A] (the “Plan”),² as well as the First Amended and Restated Disclosure Statement to Accompany the First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor [Docket Entry No. 480] (the “Disclosure Statement”).

3. On August 17, 2012, this Court entered that certain Order Confirming First Amended and Restated Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor (the “Confirmation Order”).

4. On August 31, 2012, the debtors filed that certain Notice of Occurrence of Effective Date of Chapter 11 Plan; Limitation of Notice; and Related Matters, reflecting that the Effective Date of the Plan occurred on August 23, 2012.

5. The Plan provided for the creation of a liquidating trust (the “Liquidating Trust”) for the benefit of certain classes of creditors of the debtors, and the Liquidation Trustee was appointed as the trustee of the Liquidating Trust. Under the Plan, the debtors assigned to the Liquidating Trust certain Retained Actions. Among other things, the Plan provides:

Causes of Action Retained by Debtors or Assigned to the Liquidating Trust. From and after the Effective Date, because the Debtors will have assigned the Retained Actions to the Liquidating Trust, the Liquidation Trustee will have the right to prosecute any avoidance, equitable subordination or recovery Cause of Action arising under Sections 105, 502(d), 510, 542-551, and 553 of the Bankruptcy Code that belonged to any of the Debtors as of the Effective Date and has not been expressly compromised, settled, or released pursuant to the Plan or an order of the Bankruptcy Court entered prior to the Confirmation Date. Except for any Cause of Action that has been expressly compromised, settled, or released pursuant to the Plan or an order of the Bankruptcy Court entered prior to the Confirmation Date,

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Glassy Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VIII, LLC (6559) (12-01234); The Cliffs Valley Golf & Country Club, LLC n/k/a CCHG Liquidation Co. IX, LLC (6486) (12-01236); and Cliffs Club & Hospitality Service Company, LLC n/k/a CCHG Liquidation Co. X, LLC (9665) (12-01237).

² Capitalized terms not defined herein shall have the meaning ascribed thereto in the Plan.

nothing contained in the Plan or the Confirmation Order will be deemed to be a waiver or relinquishment of any right or Cause of Action that the Debtors or the Liquidating Trustee may have, or which the Liquidating Trustee may choose to assert on behalf of the Liquidating Trust beneficiaries pursuant to any provision of the Bankruptcy Code or any applicable non-bankruptcy law, including, without limitation (a) any claim against any person or entity, to the extent that such person or entity asserts a cross-claim, counterclaim, and/or Claim for setoff seeking affirmative relief against the Debtors, or their officers, directors, or representatives; (b) the turnover of any property of the Estates; and (c) Causes of Action against current or former directors, shareholder, officers, professionals, and other persons relating to acts or omissions occurring on or prior to the Petition Date.

6. As set forth in the Plan Supplement to the Joint Chapter 11 Plan filed by the Debtors and the Plan Sponsor [Docket Entry No. 470], the debtors' books and records reflect that Mr. James B. Anthony owes the debtors the sum of at least \$6,407,138 pursuant to certain notes and loan obligations. Pursuant to the Plan, the Liquidation Trustee has the authority to pursue a cause of action against Mr. Anthony to recover these sums owing to the debtors, for the benefit of certain beneficiaries of the Liquidating Trust. The Liquidation Trustee has been conducting an investigation into potential causes of action against Mr. Anthony.

RELIEF REQUESTED

7. The Liquidation Trustee believes that it is in the Liquidating Trust's best interests to enter into the Tolling Agreement, rather than commence an action against Mr. Anthony at this time.

8. The Tolling Agreement would toll the expiration of any deadline or time limitation that would or might expire after the date of the Tolling Agreement, applicable to any claims that might be brought against Mr. Anthony by or on behalf of the Liquidation Trustee, for a specified period of time.

9. Section 108 of the Bankruptcy Code provides:

If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action,

and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) **two years after the order for relief.**

11 U.S.C. § 108(a) (emphasis added).

10. Section 546(a)(1)(A) of the Bankruptcy Code provides:

An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of- (1) the later of — (A) **2 years after the entry of the order for relief**; or (B) 1 year after the appointment or election of the first trustee...

11 U.S.C. § 546(a)(1)(A) (emphasis added).

11. Thus, unless extended, the Liquidation Trustee's deadline to commence certain causes of action against Mr. Anthony may expire on February 28, 2014, which date is two years after the Petition Date.

12. Section 105(a) grants this Court authority to “issue any order, process, or judgment” the Court deems “necessary or appropriate to carry out the provisions” of the Bankruptcy Code. 11 U.S.C. § 105(a). In addition, inasmuch as these potential claims represent assets of the substantively consolidated estate, and entering into the Tolling Agreement may not be in ordinary course of business, the Liquidation Trustee seeks authorization from this Court pursuant to section 363 of the Bankruptcy Code.

13. Bankruptcy courts have approved tolling agreements—similar to the Tolling Agreement—that have included provisions tolling and extending the limitations periods contained in sections 108(a) and 546(a). *See, e.g., In re Tribune Corp.*, 08-13141 (KJC) (Docket Nos. 6165, 6417 and 9238) (approving a proposed tolling agreement and then approving a proposed amendment thereto tolling and further tolling the “limitation periods contained in sections 108(a), 546(a), and 549(d) of the Bankruptcy Code and in other applicable statute or law”); *In re Anderson*

News, LLC, 09-10695 (CSS) (Docket No. 978) (approving tolling agreements extending Sections 108(a) and 546(a)); *Official Comm. Of Unsecured Creditors of Teleglobe Communs. Corp. v. Pac. Bell Tel Co. (in re Teleglobe Communs. Corp.)*, 2004 Bankr. LEXIS 2166, at *11-12 (Bankr. D. Del. 2004) (honoring tolling agreement entered into by committee with certain defendants with respect to statute of limitations).

14. Moreover, courts that have addressed tolling have held that section 546(a) is a true statute of limitations and parties may therefore agree to extend this time period. *See Marsh v. Levy (in re Martin Levy of Berlin D.M.D., P.C.)*, 416 B.R. 1, 7 (Banks. D. Mass. 2009) (collecting cases from the Fifth, Ninth, Tenth, and Eleventh Circuits, as well as the Bankruptcy Courts for the Eastern District of New York, Southern District of Florida, Northern District of Illinois, Northern District of Oklahoma, Eastern District of California and District of Maine, all of which held that the deadline for commencing avoidance actions set by section 546(a) is subject to waiver, estoppel and tolling); *see also 5-546 Collier on Bankruptcy* ¶ 546.02[4] (“Although there is a split of authority among the courts of appeal, the better view is that statute of limitations in section 546(a) is not jurisdictional in nature. Under this view, if the defense is not timely asserted, a defendant may waive its statute of limitations defense under section 546(a). In addition, the section 546(a) limitations periods may be extended by stipulation between the parties to the proceeding.”) (internal citations omitted).

15. Similarly, bankruptcy courts throughout the country have held that a debtor or Liquidation Trustee may obtain a court order extending the time period established by section 546(a) for commencing avoidance actions. *See, e.g., IBT Int’l, Inc. v. Northern (In re Int’l Admin. Servs.)*, 408 F. 3d 689 (11th Cir. 2005) (affirming order extending section 546(a) limitations period); *Frentz v. Stites & Harbison (In re Thermoview Indus., Inc.)*, 381 B.R. 255 (Bankr. W.D.

Ky. 2008) (overruling motion to dismiss on limitations ground where court approved chapter 11 trustee's motion to extend section 546(a) limitations period).

16. Given the support in the case law, the Liquidation Trustee believes the relief requested is authorized by the Bankruptcy Code and is in the best interests of the estate, its creditors, and the parties-in-interest in this case. The Liquidation Trustee asserts that good cause exists for the entry of an order granting the Liquidation Trustee authority and approval to enter into the Tolling Agreement in order that the Liquidation Trustee need not commence suit against Mr. Anthony while continuing her evaluation of potential causes of action against him, and because the arrangement will effectively preserve estate assets and decrease the expenditure of resources until such time as the Liquidation Trustee determines whether to move forward with prosecution of the claims.

17. Therefore, the Liquidation Trustee respectfully requests that the Court authorize the Liquidation Trustee to enter into the Tolling Agreement.

NOTICE

18. Notice of this Motion has been provided to Mr. Anthony, his counsel, and each other party entitled to notice, as listed in the certificate of service filed in connection herewith. In light of the nature of the relief requested, the Liquidation Trustee submits that no other or further notice is necessary.

WHEREFORE, the Liquidation Trustee respectfully requests the Court to issue an order substantially in the form attached hereto as Exhibit A, approving and authorizing the Liquidation Trustee to enter into the Tolling Agreement.

This 21st day of January, 2014.

/s/ Däna Wilkinson

Däna Wilkinson
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Exhibit A

Proposed Order

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

Case No. 12-01220

**ORDER GRANTING MOTION OF THE LIQUIDATION TRUSTEE
FOR ENTRY OF AN ORDER APPROVING ENTRY INTO TOLLING AGREEMENT**

The relief set forth on the following pages, for a total of 3 pages including this page, is hereby ORDERED.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re:

CCHG Liquidation Co.,

Debtor.

CHAPTER 11

Case No. 12-01220

Substantively Consolidated

**ORDER GRANTING MOTION OF THE LIQUIDATION TRUSTEE
FOR ENTRY OF AN ORDER APPROVING ENTRY INTO TOLLING AGREEMENT**

Upon the motion [Docket Entry # _____] (the “Motion”)¹ of Katie S. Goodman, solely in her capacity as the Liquidation Trustee for CCHG Liquidation Co.² (the “Liquidation Trustee”), requesting the entry of an order approving and authorizing the Liquidation Trustee to enter into a tolling agreement between the Liquidation Trustee and Mr. James B. Anthony, substantially in the form attached to the Motion as Exhibit B, as may be amended or extended from time to time (the “Tolling Agreement”); the Court having jurisdiction to consider the Motion and the relief requested therein; a hearing having been held on February ____, 2014 to consider the Motion; due

¹ All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

² The debtors (now substantively consolidated as a single debtor), 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. n/k/a CCHG Liquidation Co. (6338) (12-01220); CCHG Holdings, Inc. (1356) (12-01223); The Cliffs at Mountain Park Golf & Country Club, LLC n/k/a CCHG Liquidation Co. II, LLC (2842) (12-01225); The Cliffs at Keowee Vineyards Golf & Country Club, LLC n/k/a CCHG Liquidation Co. III, LLC (5319) (12-01226); The Cliffs at Walnut Cove Golf & Country Club, LLC n/k/a CCHG Liquidation Co. IV, LLC (9879) (12-01227); The Cliffs at Keowee Falls Golf & Country Club, LLC n/k/a CCHG Liquidation Co. V, LLC (3230) (12-01229); The Cliffs at Keowee Springs Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VI, LLC (2898) (12-01230); The Cliffs at High Carolina Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VII, LLC (7576) (12-01231); The Cliffs at Glassy Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VIII, LLC (6559) (12-01234); The Cliffs Valley Golf & Country Club, LLC n/k/a CCHG Liquidation Co. IX, LLC (6486) (12-01236); and Cliffs Club & Hospitality Service Company, LLC n/k/a CCHG Liquidation Co. X, LLC (9665) (12-01237).

notice of the Motion and hearing having been given to all parties entitled thereto, as listed in the certificate of service attached to the Motion and filed with the Court; it appearing that no other or further notice need be provided; no objections having been filed or asserted; the Court having determined that the relief sought in the Motion is in the best interests of the debtor's substantively consolidated bankruptcy estate, its creditors, and all parties in interest; and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED as follows:

1. The Motion is GRANTED.
2. The Liquidation Trustee is authorized to enter into the Tolling Agreement, and to perform all obligations thereunder without further order of this Court.
3. To the extent that the Liquidation Trustee has already entered into the Tolling Agreement, such entry is approved and the Liquidation Trustee is authorized to perform all obligations thereunder without further order of the Court.
4. The Liquidation Trustee is authorized to amend the Tolling Agreement, with the consent of Mr. Anthony, without further order of this Court.
5. The Liquidation Trustee is authorized to extend the term of the Tolling Agreement, with the consent of Mr. Anthony, without further order of this Court.
6. The Liquidation Trustee is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.
7. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

AND IT IS SO ORDERED.

Exhibit B

Form of Tolling Agreement

TOLLING AGREEMENT

This Tolling Agreement is made and entered into as of this ___ day of _____, 2014, by and between Mr. James B. Anthony (“Mr. Anthony”) and Katie S. Goodman, solely in her capacity as the Liquidation Trustee for CCHG Liquidation Co. (the “Liquidation Trustee”). Mr. Anthony and the Liquidation Trustee shall be referred to collectively herein as the “Parties.”

WHEREAS, on February 28, 2012, The Cliffs Club & Hospitality Group, Inc. (n/k/a CCHG Liquidation Co.) and its affiliated debtors (collectively, the “Debtors”)¹ filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of South Carolina (the “Bankruptcy Court”), Case no. 12-01220;

WHEREAS, the Liquidation Trustee has asserted various claims against Mr. Anthony relating to the sum of at least \$6,407,138 alleged owing by Mr. Anthony to the Debtors pursuant to certain notes and loans reflected in the Debtors’ books and records, as referenced in a demand letter dated September 30, 2013 from the Liquidation Trustee to Mr. Anthony;

WHEREAS, pursuant to sections 108(a)(2) and 546(a)(1)(A) of the Bankruptcy Code, February 28, 2014 is the deadline for the Liquidation Trustee to file a complaint to pursue such claims and/or other potential claims against Mr. Anthony;

WHEREAS, Mr. Anthony has asserted certain defenses to the Liquidation Trustee’s claims, or otherwise contests liability to the Debtors;

WHEREAS, the Parties desire to encourage resolution and/or such further review or disposition of their dispute as may result in no lawsuit or claim being filed and, in any case, wish to avoid the expense and uncertainty of litigation at this time, and are willing to make the stipulations, covenants, and agreements hereinafter set forth in order to defer and postpone the commencement of litigation;

WHEREAS, the Parties desire that, for the period of this Tolling Agreement, they should be able to consider issues relating to the possibility of settling disputes without regard to the time constraints that exist because of any expiration of any applicable statute of limitations; and

¹ The Debtors (now substantively consolidated), followed by their respective chapter 11 case numbers, are as follows: The Cliffs Club & Hospitality Group, Inc. n/k/a CCHG Liquidation Co. (12-01220); CCHG Holdings, Inc. (12-01223); The Cliffs at Mountain Park Golf & Country Club, LLC n/k/a CCHG Liquidation Co. II, LLC (12-01225); The Cliffs at Keowee Vineyards Golf & Country Club, LLC n/k/a CCHG Liquidation Co. III, LLC (12-01226); The Cliffs at Walnut Cove Golf & Country Club, LLC n/k/a CCHG Liquidation Co. IV, LLC (12-01227); The Cliffs at Keowee Falls Golf & Country Club, LLC n/k/a CCHG Liquidation Co. V, LLC (12-01229); The Cliffs at Keowee Springs Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VI, LLC (12-01230); The Cliffs at High Carolina Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VII, LLC (12-01231); The Cliffs at Glassy Golf & Country Club, LLC n/k/a CCHG Liquidation Co. VIII, LLC (12-01234); The Cliffs Valley Golf & Country Club, LLC n/k/a CCHG Liquidation Co. IX, LLC (12-01236); and Cliffs Club & Hospitality Service Company, LLC n/k/a CCHG Liquidation Co. X, LLC (12-01237).

WHEREAS, the Parties have determined that it is in their respective best interests at this time to enter into this Tolling Agreement to defer any litigation against Mr. Anthony, without thereby waiving any claims or defenses available to the Parties, in accordance with the provisions below;

NOW, THEREFORE, in consideration of the mutual agreements hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. The expiration of any deadline or time limitation that would or might expire after the date of this Tolling Agreement, applicable to any claims that might be brought against Mr. Anthony by or on behalf of the Liquidation Trustee, shall be, and hereby is, tolled from the date of this Tolling Agreement up to and including **June 30, 2014** (the "Expiration Date") without prejudice to: (i) any longer period to which the Liquidation Trustee may be entitled under applicable law; or (ii) any extension of the Expiration Date by agreement of the Parties. Mr. Anthony shall not assert any defense based on the expiration of any deadline or time limitation that would or might expire after the date of this Tolling Agreement and prior to the Expiration Date.

2. This Tolling Agreement shall take effect immediately upon the execution by the Parties.

3. Neither this Tolling Agreement nor any action taken pursuant to this Tolling Agreement shall constitute or be construed to be a waiver or release of any right, claim, or defense of any of the Parties.

4. Mr. Anthony shall stipulate to any motion and/or proposed order filed in any appropriate court, specifically including the Bankruptcy Court, effectuating the terms of this Tolling Agreement, prior to or following the expiration of any deadline or time limitation that would or might expire after the date of this Tolling Agreement and prior to the Expiration Date, to the extent the Liquidation Trustee deems any such motion and/or proposed order necessary or advisable, in the Liquidation Trustee's sole discretion.

5. Each Party represents, warrants, and states that all legal action necessary for the effectuation and execution of this Tolling Agreement has been validly taken and that the individual whose signature appears below on behalf of the Party is duly authorized to execute this Tolling Agreement on behalf of the Party.

6. This Tolling Agreement accrues to the benefit of the Parties and their successors in interest.

7. This Tolling Agreement shall be governed by the Bankruptcy Code and the state laws of South Carolina.

8. This Tolling Agreement comprises the entire agreement of the Parties with respect to the subject matter hereof, and may be amended only by written instrument signed by both Parties stating that it is an amendment to this Tolling Agreement. No other statement,

written or oral, other than appearing in this instrument or in a validly executed amendment to this instrument, is a part of this Tolling Agreement.

9. This Tolling Agreement may be signed in counterpart originals with the same force and effect as if signed in a single original document.

IN WITNESS WHEREOF, the Parties have caused this Tolling Agreement to be signed as of the day and year first written above.

JAMES B. ANTHONY

**KATIE S. GOODMAN, SOLELY IN HER CAPACITY
AS THE LIQUIDATION TRUSTEE FOR CCHG
LIQUIDATION CO.**
