

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

In re: The Cliffs Club & Hospitality Group, Inc., et al.,¹ d/b/a The Cliffs Golf & Country Club, Debtors.	CHAPTER 11 Case No. 12-01220 Jointly Administered
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LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO (I) ENTRY OF FINAL ORDER AUTHORIZING USE OF CASH COLLATERAL (DOC. NOS. 34, 98); AND (II) ENTRY OF FINAL ORDER APPROVING POSTPETITION FINANCING [DOC. NOS. 40, 99]

The Official Committee of Unsecured Creditors (the "Committee") of the above captioned debtors and debtors in possession (the "Debtors"), by and through its proposed counsel, Bingham McCutchen LLP, submits this limited objection to (1) entry of a order granting on a final basis the *Motion (a) for Authorization to (i) Utilize Cash Collateral Pursuant to 11 U.S.C. Section 363; and (ii) Provide Adequate Protection Pursuant to 11 U.S.C. Sections 361, 363, and 364(d) and (b) to Schedule a Final Hearing Pursuant to Bankruptcy Rule 4001* [doc. no. 34]; and (2) entry of an order granting on a final basis the *Debtors Motion for Entry of Interim and Final Orders Pursuant to 11 U.S.C. Sections 105, 361, 362, 363, 364 and 507(b) (i) Approving Post-Petition Financing, (ii) Granting Liens and Providing Superpriority Administrative Expense Status, (iii) Granting Adequate Protection, (iv) Modifying the Automatic Stay and (v) Scheduling a Final Hearing* [doc. no. 40].

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 (4293); The Cliffs at Glassy Golf & Country Club, LLC (6559); The Cliffs Valley Golf & Country Club, LLC (6486); Cliffs Club & Hospitality Service Company, LLC (9665).

The Committee does not object to the substantive relief sought in the Debtors' filings and understands the value of the financing offered and the need to use cash collateral to insure continued operations and to allow the Debtors to conduct an expedited and efficient sale and reorganization process. The short term maintenance of the *status quo* allowed by the proposed financing package is a welcomed stop gap measure and is not taken for granted. Accordingly, the Committee's objections are limited and pointed; directed at material concerns that impact the chapter 11 process and could not be informally resolved.

I. RELEVANT BACKGROUND

1. On February 28, 2012 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.
2. On March 12, 2012, pursuant to the Fourth Amended Appointment of Committee of Unsecured Creditors [doc. no. 141], the Office of the United States Trustee (the "U.S. Trustee") appointed the Committee. The Committee consists of the following members: (i) John W. Sager; (ii) Janet D. Hilligoss; (iii) Harrell's, LLC; (iv) H. Michael Krimbill; (v) Adams Herndon Carson Crow & Saenger, PA; (vi) John Mack; and (vii) Hoot Gibson. On March 7, 2012, the Committee selected Bingham McCutchen LLP as its proposed counsel.
3. On the Petition Date, the Debtors filed motions seeking relief related to (i) authorization to use cash collateral [doc. no 34] (the "Cash Collateral Motion"); and (ii) approval of postpetition financing (the "DIP Financing") [doc. no. 40] (the "DIP Motion"). Other motions were also filed on the Petition Date by the Debtors and were either granted, scheduled for another date, or are not objected to by the Committee.
4. After a hearing held on March 5, 2012, the Court entered the (a) *Interim Order (i) Authorizing Use of Cash Collateral, (ii) Providing Adequate Protection, and Scheduling Final*

Hearing [doc. no. 98] (the “Interim CCO”) and (b) *Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507 (i) Approving Post-Petition Financing, (ii) Granting Liens and Providing Superpriority Administrative Expense Status, (iii) Granting Adequate Protection, (iv) Modifying the Automatic Stay, and (v) Scheduling a Final Hearing* [doc. no. 99] (the “Interim DIP Order”).²

5. Prior to filing this limited objection, the Committee had discussions with key parties to discuss its comments and concerns. It is the Committee's understanding that the proposed final order approving the DIP Financing and proposed final order authorizing use of cash collateral shall reflect certain changes the Committee has requested. However, as of the time of filing of this limited objection, the Committee has not yet received for review revised proposed orders and, accordingly, the Committee reserves all rights to raise any additional issues not addressed as anticipated.³

II. OBJECTIONS TO ORDERS APPROVING USE OF CASH COLLATERAL AND DIP FINANCING⁴

A. The Estates Should Not Be Forced To Waive Section 506(c) Claims

6. The Indenture Trustee seeks a waiver of any claims under section 506(c) of the Bankruptcy Code against the Indenture Trustee, the Prepetition Note Collateral or the Post-

² As of the filing of this limited objection, the Committee has just received draft proposed final orders. Accordingly, citations in this limited objection shall reference the Interim CCO and Interim DIP Order.

³ For example, the Committee has requested that any adequate protection be limited to the diminution of collateral value during these cases and that any amounts paid during the cases above and beyond amounts authorized by the Bankruptcy Code be subject to disgorgement; that any third party releases be restricted to estate causes of action; that notice be provided to the Committee; among other things.

Certain provisions appear to be contrary to the District of South Carolina Local Bankruptcy Rules (“SC LBR”). For example, immediate entitlement to relief from the automatic stay upon a default, conversion of the case or appointment of a trustee should be upon order of the Court. The Interim DIP Order and Interim CCO each provide a 14-day notice period before the automatic stay is terminated. (Interim CCO ¶ 17(b); Interim DIP Order ¶ 37) Because there is an adequate notice period, the Committee is not objecting to this provision.

⁴ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the DIP Motion and/or Cash Collateral Motion, as applicable.

Petition Note Collateral in connection with use of cash collateral. (Interim CCO ¶¶ 13, 21) The DIP Financing Agreement similarly provides for a waiver of claims under section 506(c) of the Bankruptcy Code with respect to any of the DIP Collateral. (Agreement § 9.1(m))

7. The purpose of section 506(c) is to provide a means for a debtor in possession to recover expenses from collateral to the extent that those expenses benefit the secured creditor and to prevent a windfall to a secured creditor at the expense of the estate. *In re JKJ Chevrolet, Inc.*, 26 F.3d 481, 483 (4th Cir. 1994). A debtor in possession owes fiduciary duties to creditors of the estate, and its failure to seek recovery of a claim under section 506(c) of the Bankruptcy Code may constitute a breach of its fiduciary duties. *See id.* at 485.

8. By waiving all rights under section 506(c) of the Bankruptcy Code, the estates will be solely responsible for any and all expenses related to the preservation and disposition of collateral to the detriment of creditors. To the extent the Court authorizes a waiver of rights under section 506(c) of the Bankruptcy Code, such waiver should be limited to only that period of time during which the DIP Lender continues to extend postpetition financing to the Debtors and the Indenture Trustee (and Noteholders) continue to authorize the Debtors to use cash collateral. *See* SC LBR 4001-4(b)(1)(C). The Committee objects to any waiver of the estates' rights to recover reasonable, necessary costs and expenses of preserving or disposing of collateral during any period of time when the DIP Lender terminates DIP Financing or the Indenture Trustee terminates authorized use of cash collateral.

B. Avoidance Actions And Recoveries Should Be Available Solely For General Unsecured Creditors And Carved Out Of Superpriority Claims

9. Although the DIP Lien and Supplemental Lien do not attach to proceeds of actions or claims arising under chapter 5 of the Bankruptcy Code (the "Avoidance Action Proceeds"), each of the DIP Lender and the Indenture Trustee is permitted to satisfy their

respective superpriority claims from such Avoidance Action Proceeds. (Interim DIP Order ¶¶ 26 n.6, 28; Agreement § 3.1(c); Interim CCO ¶¶ 9, 10) Allowing the DIP Lender and Indenture Trustee to reach Avoidance Action Proceeds to satisfy their respective superpriority claims is a backdoor means of achieving the same result as if the DIP Liens and Supplemental Lien had attached to the Avoidance Action Proceeds -- the DIP Lender and Indenture Trustee could exhaust the Avoidance Action Proceeds to recover on their respective superpriority claims before any of such proceeds could be used to benefit unsecured creditors. *See* SC LBR 4001-4(b)(1)(H).

10. The DIP Lender and Indenture Trustee are already receiving a multitude of protections, including liens, superpriority claims, reimbursement of fees and expenses, and cash payments, none of which are available to general unsecured creditors. Avoidance Recoveries are a source of unencumbered cash and should be reserved for general unsecured creditors.

C. Mechanism For Expense Reimbursement Of DIP Lenders Should Be Based On, And Not Exceed, Actual Accruals

11. The DIP Financing Agreement provides that the DIP Lender will receive a Prepetition All Inclusive Fee of \$242,000 and a Post-petition All Inclusive Fee of \$50,000/month. (Agreement § 4.3(b)) This flat fee structure for reimbursement of the fees and expenses of the DIP Lender is inappropriate. The DIP Motion and documents provide no explanation of what these All Inclusive Fees reimburse. The current mechanism does not require delivery of a detailed accounting of the fees and expenses accrued or an opportunity for the Committee or the U.S. Trustee to review the reasonableness and relevance of the fees and expenses sought to be reimbursed. Further, any reimbursement of fees and expenses of the DIP Lender must not exceed actual fees and expenses accrued.

D. There Should Be No Constraint On Terms Debtors May Propose In A Plan

12. The Committee does not object to the DIP Lender and Indenture Trustee conditioning financing or the consensual use of cash collateral on certain payment terms being provided for in a plan of reorganization. For example, it is an event of default for the Debtors to propose a plan that fails to provide, among other things, for the payment in full of the Prepetition Bridge Loan. However, there should not be any constraint on the Debtors ability to propose the contents of a plan of reorganization. The effect of any failure to provide for any terms in a plan of reorganization should constitute a default on the part of the Debtors. The provision should not be an injunction or order of the Court compelling treatment of any claims. *See* SC LBR 4001-4(b)(1)(D). That is improper. Further, this provision would have the effect of treating the Prepetition Bridge Loan as a postpetition debt, which is also inappropriate.

E. The Committee Should Be Granted Automatic Standing To Pursue Challenges

13. The Interim DIP Order provides the Committee with only 70 days after the Petition Date (May 8, 2012) during which it may investigate and for a party with standing to commence a challenge to the Debtors' stipulations. (Interim DIP Order ¶ 18) However, the Committee is not granted automatic standing to commence and prosecute an appropriate adversary proceeding or contested matter without having to file a separate motion seeking standing or authority to do so and to obtain an order of this Court granting standing. The 70-day period is a short timeframe to begin with in which the Committee must complete its investigation of the prepetition financing, the prepetition claims and the parties related thereto. Requiring the Committee to seek a separate order of this Court conferring standing would cause delay and diversion of estate resources from focusing on the substantive issues of any challenge.

14. The Indenture Trustee has agreed to confer the Committee with automatic standing. (Interim CCO ¶ 25) Any proposed final DIP Order should similarly provide the Committee with automatic standing.

F. The Right To Seek A Determination Of The Secured Status of the Note Obligations Should Be Reserved

15. The right of the Committee and any party in interest to seek a determination as to the secured status of the Note Obligations under section 506(a) (or otherwise) of the Bankruptcy Code should be expressly reserved. It is unclear what, if any, diligence has been done to make a determination regarding the secured status of the Note Obligations. Further, based on information and belief, there is no available updated valuation of the Prepetition Note Collateral. Accordingly, release of this right, especially at this stage in the cases, is premature. *See* SC LBR 4001-(b)(1)(A).

G. The Carve Out For Committee Fees And The Investigation Cap Should Be Modified

16. The current Carve Out for Committee expenses is budgeted at \$15,000/month for the course of the cases. (*See* DIP Motion Ex. C (DIP Budget); Interim CCO Ex. A (Cash Collateral Budget)) In addition, the Committee has a budget of \$25,000 to conduct an investigation regarding potential claims related to the prepetition financing.

(Agreement § 4.1(c); Interim CCO ¶ 4) These amounts are extremely low, especially in comparison to the Carve Out for the other professionals involved in these cases,⁵ and have the potential effect of emasculating the role of the Committee. To ensure the Committee is able

⁵ During the 13-weeks forecast in the budget, (i) Debtors' financial advisors have a Carve Out of \$500,000 and Debtors' legal counsel have a Carve Out of \$695,000; (ii) the Carlile Group (a) as potential stalking horse bidder, is to receive \$750,000 as expense reimbursement as part of any break-up fee, and (b) as DIP Lender has a Carve Out of \$275,000 for fees related to monitoring the cases; and (iii) the Indenture Trustee is to receive \$940,000 as adequate protection payments. The Committee, on the other hand, has a Carve Out of \$45,000 during the first 13 weeks of the cases.

conduct its necessary work and to protect its professionals, the Committee should have a reasonable Carve Out for expenses and for investigating the prepetition financing. In addition, the Carve Out should include reimbursement of reasonable expenses of Committee members.

III. CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court (i) grant the Committee's limited objections, (ii) modify the proposed orders, in accordance with this limited objection, (a) authorizing use of cash collateral and (b) approving postpetition financing; and (iii) grant such other and further relief as it deems just and proper.

Dated: March 13, 2012

Respectfully submitted,

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