

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

Joint Administration Pending

MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER AUTHORIZING
THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS OF
ALCOHOLIC BEVERAGE CLAIMANTS

COME NOW The Cliffs Club & Hospitality Group, Inc. and its affiliated debtors in the above-captioned Chapter 11 cases, as debtors and debtors in possession (collectively, the “Debtors”), and hereby move for entry of an order substantially the form annexed hereto authorizing the Debtors to pay certain prepetition claims of alcoholic beverage vendors. In support of this Motion, the Debtors rely upon and incorporate by reference the Declaration of Timothy P. Cherry in Support of First Day Motions, filed concurrently herewith (the “Cherry Declaration”). In further support of the Motion, the Debtors, by and through its undersigned counsel, respectfully represent:

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).

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these Chapter 11 cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On the date hereof (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors are authorized to operate their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

3. No creditors' committee has been appointed by the United States Trustee in these Chapter 11 cases. No trustee or examiner has been appointed in these Chapter 11 cases.

4. A description of the Debtors' businesses, the reasons for filing these Chapter 11 cases, and the relief sought from this Court to allow for a smooth transition into operations under Chapter 11 are set forth in the Cherry Declaration filed with the Court.

RELIEF REQUESTED

5. By this Motion, the Debtors seek entry of an order authorizing the Debtors to pay certain prepetition claims of alcoholic beverage vendors. The statutory bases for the relief requested herein are sections 105, 363, 1107(a) and 1108 of the Bankruptcy Code and Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

BASIS FOR RELIEF

6. The Debtors have identified various vendors with prepetition claims for payments who sold the Debtors alcoholic beverages prior to the Petition Date and who, pursuant to various state laws in jurisdictions in which the Debtors operate, must be paid for such goods at the time of delivery (collectively, the "Beverage Claimants").

7. Compliance with the various state laws in the states in which the Debtors operate requires that the Debtors pay such vendors via cash or check on delivery. If such vendors are not paid, state liquor licensing agencies may terminate or suspend the Debtors' liquor licenses, severely disrupting their business operations. As of the Petition Date, the Debtors have issued checks in the approximate aggregate amount of \$21,500 to Beverage Claimants for beverages delivered prior to the Petition Date, but certain of such checks have likely not cleared (collectively, the "Beverage Claims"). The Beverage Claims were "paid" prior to the Petition Date, but became prepetition claims only as a result of the fact that such checks have not cleared before the commencement of these chapter 11 cases.

8. In light of the fact that the continued delivery of alcoholic beverages by the Beverage Claimants is critical to the Debtors' businesses, and to avoid any termination or suspension of the Debtors' liquor licenses, by this Motion the Debtors request authority to direct the financial institutions at which the Debtors maintain their accounts relating to the payment of Beverage Claims to honor checks presented for payment of Beverage Claims and all fund transfer requests made by the Debtors related thereto, to the extent that sufficient funds are on deposit in such accounts.

9. Courts generally acknowledge that it is appropriate to authorize the payment (or other special treatment) of prepetition obligations in appropriate circumstances. *See e.g., In re Tropicana Entm't LLC*, No. 08-10856 (KJC) (Bankr. D. Del. May 6, 2008); *In re Leiner Health Prods, Inc.*, No. 08-10446 (KJC) (Bankr. D. Del. March 12, 2008); *In re Wickes Holdings, LLC*, No. 08-10212 (KJC) (Bankr. D. Del. Feb. 5, 2008); *In re Polymer Group, Inc.*, No. 02-05773-JW (Bankr. D.S.C. May 16, 2002); *In re Polymer Group, Inc.*, No. 02-05773-JW (Bankr. D.S.C. May 29, 2002).

10. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors in possession are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [its] creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the fiduciary duties of any debtor in possession is the obligation to “protect and preserve the estate, including an operating business’s going-concern value.” *Id.* Some courts have noted there are instances in which a debtor can fulfill this fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.* The *CoServ* court specifically noted the pre-plan satisfaction of prepetition claims would be a valid exercise of the Debtors’ fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate” *Id.*

11. Consistent with debtors’ fiduciary duties, courts have also authorized payment of prepetition obligation under § 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of prepetition wages).

12. Additionally, Bankruptcy Code section 105(a), which provides in relevant part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title,” permits bankruptcy courts to authorize payments on account of certain prepetition claims when necessary to effectuate a successful reorganization. *See* 11 U.S.C. § 105(a); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 (3d Cir. 1972); *In re Gulf Air, Inc.*, 112 B.R. 152, 153 (Bankr. W.D. La. 1989); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989). Under Bankruptcy Code § 105(a), courts may permit pre-plan payments of prepetition

obligations when essential to the continued operation of the debtor's business. Specifically, the court may use its power under § 105(a) of the Bankruptcy Code to authorize payment of prepetition obligations pursuant to the "necessity of payment" rule (also known as the "doctrine of necessity"), where such payment is essential to the continued operation of the debtor. *See, e.g., In re Lehigh & New Eng. Ry. Co.*, 657 F.2d at 581; *In re Penn Cent. Transp. Co.*, 467 F.2d at 102 n.1; *In re United Am., Inc.*, 327 B.R. 776, 782 (Bankr. E.D. Va. 2005) (explaining that "doctrine of necessity" requires that three prongs be met: "(1) the [prepetition creditor] must be necessary for the successful reorganization of the debtor; (2) the transaction must be in the sound business judgment of the debtor; and (3) the favorable treatment of the [prepetition creditor] must not prejudice other unsecured creditors."); *In re Synteen Tech., Inc.*, No. 00-02203, 2000 WL 33709667, at *2 & n.5 (Bankr. D.S.C. April 14, 2000) (distinguishing the Fourth Circuit decision in *Official Comm. of Equity Sec. Holders v. Mabey (In re A.H. Robbins Co., Inc.)*, 832 F.2d 299, 302 (4th Cir. 1987), which limited the applicability of Bankruptcy Code § 105(a) with respect to the authorization of payment of prepetition creditors, and applying the "doctrine of necessity" as an exception to that ruling); *In re Just for Feet*, 242 B.R. 821, 824-25 (Bankr. D. Del. 1999); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994); *In re NVR L.P.*, 147 B.R. 126, 127 & n.2 (Bankr. E.D. Va. 1992) (noting the *In re A.H. Robbins Co., Inc.* limitation on § 105(a) of the Bankruptcy Code and explaining that the "doctrine of necessity" is a well-recognized exception to that rule). Further, the rationale behind the "necessity of payment" rule – the rehabilitation of a debtor in reorganization cases – is "the paramount policy and goal of Chapter 11." *In re Ionosphere Clubs, Inc.*, 98 B.R. at 176; *see also Burchinal v. Cent. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1490 (9th Cir. 1987); *In re Synteen Tech., Inc.*, 2000 WL 33709667, at *2 & n.5 (stating that "necessity of payment"

doctrine is applied to issues that are “critical to the reorganization of debtor’s business or fundamentally necessary to the continuation of debtor’s operations”); *In re Just for Feet*, 242 B.R. at 826; *In re NVR L.P.*, 147 B.R. at 127 & n.2; *In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991); *Mich. Bureau of Workers’ Disability Comp. v. Chateaugay Corp.* (*In re Chateaugay Corp.*), 80 B.R. 279, 287 (S.D.N.Y. 1987); 3 COLLIER ON BANKRUPTCY, 105.04[5][a] (15th ed. rev. 2004) (discussing cases in which courts have relied on the “doctrine of necessity” or the “necessity of payment” rule to pay prepetition claims immediately).

13. Courts have permitted postpetition payment of prepetition claims pursuant to section 105(a) of the Bankruptcy Code in other situations, such as if nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors’ business reorganization plan. See *In re Ionosphere Clubs*, 98 B.R. at 167-77 (finding that § 105 of the Bankruptcy Code empowers Bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

14. This flexible approach is particularly critical where a prepetition creditor provides vital goods or services to debtors that would be unavailable if the Debtors did not satisfy their prepetition obligation. In *In re Structurelite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988), the bankruptcy court stated it “may exercise its equity powers under § 105(a) [of the Bankruptcy Code] to authorize payment of prepetition claims where such payment is necessary to ‘permit the greatest likelihood of survival of the debtors and payment of creditors in full or at least proportionately.’” *Id.* The court explained that “a *per se* rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” *Id.* at 932.

15. Here, it is critical that checks held by the Beverage Claimants are paid and honored by the Debtors' banks and financial institutions in the ordinary course of business to avoid any interruption in the Debtors' business operations. Suspension or termination of the Debtors' liquor licenses would immediately and irreparably damage the Debtors' revenues and reputation.

16. It is critical to the success of the Chapter 11 Cases that the Debtors continue to receive sufficient supplies of liquor of the same quality, quantity, consistency and price as the Debtors received prepetition. The hardship the Debtors would suffer from the disruptions in their business in the event of a refusal of a Beverage Claimant to ship to the Debtors or from the termination or suspension of the Debtors' liquor licenses would result in decreased revenues, and thus, in immediate and irreparable harm to the Debtors' businesses.

17. The Debtors submit that because the relief requested is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein, Bankruptcy Rule 6003 has been satisfied.

18. To successfully implement the foregoing, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay under Bankruptcy Rule 6004(h).

RESERVATION OF RIGHTS

19. Nothing contained herein is intended to or should be construed as an admission of the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve the right to contest any invoice related to any of the Debtors' trade obligations subject to this Motion under applicable non-bankruptcy law.

Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Courts' order is not intended to and should not be construed as an admission of the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

NOTICE

20. No trustee, examiner, or creditors' committee has been appointed in these Chapter 11 cases. Notice of this Motion will be given to: (a) the Office of the United States Trustee for the District of South Carolina; (b) counsel to the Indenture Trustee (as defined in the Cherry Declaration); (c) counsel to the DIP Lender (as defined in the Cherry Declaration); (d) the Debtors' fifty (50) largest unsecured creditors (on a consolidated basis); (e) those persons who have formally appeared in the bankruptcy cases and requested service pursuant to Bankruptcy Rule 2002; and (f) all applicable government agencies to the extent required by the Bankruptcy Rules and the Local Rules. The Debtors submit that, under the circumstances, no other or further notice is required.

NO PRIOR REQUEST

21. No previous request for the relief sought herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form annexed hereto, granting the relief requested in this Motion and such other and further relief as may be just and proper.

[signature follows]

Dated: February 28, 2012

Respectfully submitted,

/s/ Dána Wilkinson
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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

Case No. 12-01220

**ORDER AUTHORIZING
THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS OF
ALCOHOLIC BEVERAGE CLAIMANTS**

The relief set forth on the following pages, for a total of 5 pages including this page, is hereby **ORDERED**.

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

Joint Administration Pending

ORDER AUTHORIZING
THE DEBTORS TO PAY CERTAIN PREPETITION CLAIMS OF
ALCOHOLIC BEVERAGE CLAIMANTS

Upon the motion (the "Motion")² of the Debtors for an order authorizing the Debtors to pay certain prepetition claims of alcoholic beverage vendors; and upon the Cherry Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and after due deliberation thereon; and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED.

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).

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

2. The Debtors are authorized, in the reasonable exercise of their business judgment, to pay all or part of the prepetition claims of the Beverage Claimants, including Beverage Claimants who delivered goods that were received by the Debtors in the ordinary course of business prior to the Petition Date, in an amount not to exceed \$21,500 in the aggregate.

3. In accordance with this Order and any other order of this Court, each of the financial institutions at which the Debtors maintain their accounts relating to the payment of Beverage Claims are directed to honor checks presented for payment and all fund transfer requests made by the Debtors related thereto, to the extent that sufficient funds are on deposit in such accounts.

4. Nothing in the Motion or this Order, nor as a result of the Debtors' payment of claims pursuant to this Order, shall be deemed or construed as an admission as to the validity or priority of any claim against the Debtors or an approval or assumption of any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code.

5. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

6. The requirements of Bankruptcy Rule 6004(a) are waived.

7. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

8. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion.

9. This Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order

10. The Debtors shall, within three (3) business days hereof, serve a copy of this Order on all parties that received notice of the Motion, as well as all parties that have appeared in these Chapter 11 cases and requested notice since the Debtors filed the Motion, and file a certificate of service evidencing such service.

AND IT IS SO ORDERED.

Prepared and presented by:

/s/ Däna Wilkinson

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