

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

In re:

The Cliffs Club & Hospitality Group, Inc., et  
al.,<sup>1</sup> d/b/a The Cliffs Golf & Country Club,

Debtors.

CHAPTER 11

Case No. 12-01220

Joint Administration Pending

**MOTION FOR ENTRY OF ORDER AUTHORIZING THE PAYMENT OF  
PREPETITION TRUST FUND TAXES IN THE ORDINARY COURSE OF BUSINESS**

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 file this motion (the “Motion”) pursuant to sections 105(a), 507(a) and 541(d) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) for an order authorizing them to pay prepetition trust fund taxes in the ordinary course of business, subject to any orders entered by the Court in connection with the use of cash collateral and debtor-in-possession financing, and respectfully represent as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

<sup>1</sup> 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).

### **BACKGROUND**

2. On the date hereof (the "Petition Date"), the Debtors filed their voluntary petitions for relief under the Bankruptcy Code. The Debtors are authorized to operate their businesses as debtors-in-possession pursuant to Sections 1107(a) 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 Declaration of Timothy P. Cherry in Support of First Day Pleadings (the "Cherry Declaration"), filed with the Court concurrently herewith.

### **Trust Fund Taxes**

5. In the ordinary course of business, the Debtors collect sales, use and other trust fund type taxes (however denominated) (the "Trust Fund Taxes"), and subsequently remit such taxes to the appropriate federal, state and local taxing authorities (each, a "Taxing Authority"). For example, the Debtors collect and remit sales taxes in connection with the sale of various services and goods. The Debtors may also be responsible for remitting use taxes to the appropriate Taxing Authorities on personal property and certain related services.

6. There is often a lag-time between the time when the Debtors incur an obligation to pay the Trust Fund Taxes and the date when payment of such taxes is due. Various governmental units may therefore have claims against the Debtors for Trust Fund Taxes that have accrued, but are unpaid and not yet due, as of the Petition Date. The relevant Taxing Authority may also make retrospective adjustments to determine any payment deficiency or surplus for a particular period resulting in a demand for further payment from or refund to the

taxpayer. While the Debtors are making their best efforts to calculate the amounts with respect to the Trust Fund Taxes owed as of the Petition Date, the calculation of such amount is difficult to determine with complete certainty because the Debtors' books have not yet been closed for the most recent month. Accordingly, the amounts set forth herein may be subject to change; however, the Debtors estimate that the total amount of prepetition Trust Fund Taxes owing to the various Taxing Authorities will not exceed \$200,000.

### **RELIEF REQUESTED**

7. By this Motion, pursuant to sections 105(a), 507(a) and 541(d) of the Bankruptcy Code, the Debtors seek entry of an order authorizing, but not directing, the Debtors to pay prepetition Trust Fund Taxes owed to the appropriate Taxing Authorities in the ordinary course of business, as such payments become due and payable and to the extent adequate funds are available to make such payments, and to the extent consistent with any orders entered by the Court in connection with the use of cash collateral and debtor-in-possession financing.

### **BASIS FOR RELIEF**

8. Pursuant to section 541(d) of the Bankruptcy Code, "property of the estate" is defined as:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d). Thus, courts have held that property held by the debtor in trust (either express or constructive) for another is not property of the debtor's estate. *See, e.g., EBS Pension L.L.C. v. Edison Bros. Stores, Inc. (in re Edison Bros., Inc.)*, 243 B.R. 231, 235 (Bankr. D. Del. 2000); *Begier v. IRS*, 496 U.S. 53, 57-61 (1990) (holding that withheld federal income and FICA taxes and excise taxes collected from its customers were not property of the debtor's estate); *City*

of *Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 96-97 (3d Cir. 1994) (holding that debtor withheld city income taxes in trust); *Shank v. Wash. State Dept. of Revenue (In re Shank)*, 792 F.2d 829, 830 (9th Cir. 1986) (sales taxes required by state law to be collected by sellers from their customers are "trust fund" taxes); *DeChiaro v. N.Y. State Tax Comm'n*, 760 F.2d 432, 433-34 (2d Cir. 1985) (same); *In re Am. Int'l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (excise and withholding taxes); *Shipley Co. Inc. v. Darr (In re Tap, Inc.)*, 52 B.R. 271, 272 (Bankr. D. Mass. 1985) (withholding taxes).

9. Because the Trust Fund Taxes do not constitute estate property, their payment will not adversely affect the Debtors or their creditors. Moreover, many Taxing Authorities impose personal liability on the officers and directors of corporations to the extent such taxes are collected but not remitted. The Debtors' officers and directors may be subject to civil or even criminal liability as a result of such non-payment. The prosecution of such actions during the pendency of these cases would be a significant distraction, and therefore, be detrimental to the Debtors' reorganization efforts.

10. Even if the Trust Fund Taxes were deemed to be property of the Debtors' estates, claims for payment of the Trust Fund Taxes would be afforded priority status under section 507(a)(8) of the Bankruptcy Code. *See* 11 U.S.C. § 507(a)(8). Pursuant to section 1129 of the Bankruptcy Code, such claims would have to be paid in full under any chapter 11 plan in these cases. *See* 11 U.S.C. § 1129(a)(9)(C). In other words, the proposed relief should only affect the timing of the payment of the Trust Fund Taxes and should not prejudice the rights of other creditors or parties in interest.

11. Further, even if the Trust Fund Taxes were considered property of the estate, payments to the Taxing Authorities should be authorized under section 105(a) of the Bankruptcy

Code. Pursuant to section 105(a) of the Bankruptcy Code, “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). This provision essentially codifies the bankruptcy court’s inherent equitable powers. *See Mgmt. Tech. Corp. v. Pardo (In re Mgmt. Tech. Corp.)*, 56 B.R. 337 (Bankr. D.N.J. 1985).

12. In previous chapter 11 cases, bankruptcy courts in this district and other districts has exercised its equitable powers under section 105 of the Bankruptcy Code to authorize debtors to pay a variety of prepetition claims of creditors, including prepetition tax obligations. *See, e.g., In re BI-LO, LLC*, Case No. 09-02140-HB (Bankr. D.S.C. 2009); *In re Polymer Group, Inc.*, Case No. 02-05773-JW (May 14, 2002); *LandSource Communities Dev.*, Case No. 08-11111 (Bankr. D. Del. July 8, 2008); *In re Global Power Equip. Group Inc.*, Case No. 06-11045 (BLS) (Bankr. D. Del. Oct. 3, 2006); *In re Radnor Holdings Corp.*, Case No. 06-10894 (PJW) (Bankr. D. Del. Aug. 23, 2006); *In re Werner Holding Co. (DE), Inc.*, Case No. 06-10578 (KJC) (Bankr. D. Del. June 13, 2006); *In re J.L. French Auto. Castings, Inc.*, Case No. 06-10119 (MFW) (Bankr. D. Del. Feb. 13, 2006); *In re Russell-Stanley Holdings, Inc.*, Case No. 05-12339 (PJW) (Bankr. D. Del. Aug. 22, 2005). The Debtors submit that the present circumstances warrant similar relief in these chapter 11 cases.

13. Finally, some, if not all, of the agencies collecting taxes may audit the Debtors if such taxes are not paid forthwith. Such audits needlessly would divert the Debtors’ attention away from the reorganization process and diminish their estates. The Trust Fund Taxes represent a relatively *de minimis* portion of the Debtors’ unsecured liabilities. Accordingly, the Debtors seek authority to continue to pay such Trust Fund Taxes in the ordinary course of

business. For all of the foregoing reasons, the Debtors believe that granting the relief requested herein is appropriate and in the best interest of the Debtors, their estates and their creditors.

14. Nothing in this Motion should be construed as impairing the Debtors' right to contest the amount or validity of any taxes or fees that may be due and owing to the Taxing Authorities. The Debtors expressly reserve their rights to contest claims related to the Trust Fund Taxes under applicable law.

15. Pursuant to Rule 6003 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Court may grant relief within twenty-one (21) days after the filing of the petition regarding a motion to pay all or part of a prepetition claim only if such relief is necessary to avoid immediate and irreparable harm. Here, the relief requested is necessary to avoid immediate and irreparable harm to the Debtors' estates for the reasons as set forth above. Accordingly, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

16. The Debtors request a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), "[an] order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). As set forth above, proposed payment on account of the above-described Trust Fund Taxes is critically important to prevent irreparable damage to the Debtors' operations. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent it applies.

#### **NOTICE**

17. Notice of this Motion shall be provided 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.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form annexed hereto, granting the relief requested herein and such other and further relief as the Court may deem proper.

Dated: February 28, 2012

Respectfully submitted,

/s/ Däna Wilkinson

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

Case No. 12-01220

**ORDER AUTHORIZING THE PAYMENT OF PREPETITION TRUST FUND TAXES  
IN THE ORDINARY COURSE OF BUSINESS**

The relief set forth on the following pages, for a total of 4 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.*,<sup>1</sup> *d/b/a* The Cliffs Golf & Country Club,

Debtors.

CHAPTER 11

Case No. 12-01220

Joint Administration Pending

**ORDER AUTHORIZING THE PAYMENT OF PREPETITION TRUST FUND TAXES  
IN THE ORDINARY COURSE OF BUSINESS**

This matter coming before the Court on the Motion for Entry of an Order Authorizing the Payment of Prepetition Trust Fund Taxes in the Ordinary Course of Business (the "Motion"),<sup>2</sup> filed by the above-captioned debtors and debtors in possession (the "Debtors"); and the Court having reviewed the Motion and the Cherry Declaration and having considered the statements of counsel and the evidence adduced with respect to the Motion at a hearing before the Court (the "Hearing"); and the Court having found that (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (ii) venue is proper in this district pursuant to 28 U.S.C. §§1408 and 1409, (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b) and (iv) notice of the Motion and the Hearing was sufficient under the circumstances; and after due deliberation the Court having determined that the relief requested in the Motion is necessary and essential for

<sup>1</sup> 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).

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

the Debtors' reorganization and such relief is in the best interests of the Debtors, their estates and their creditors; and good and sufficient cause having been shown;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Debtors are authorized, but not directed, to pay all Trust Fund Taxes, including, but not limited to, prepetition sales, use and other trust fund type taxes (however denominated) due and owing to all federal, state and local Taxing Authorities; provided, however, that payments authorized to be made pursuant to this Order shall not exceed \$200,000.
3. Notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors under any approved debtor in possession financing facility, any budget in connection therewith, and any order regarding the use of cash collateral.
4. Nothing in this Order or the Motion shall be construed as prejudicing any rights the Debtors may have to contest the amount or validity of any Trust Fund Tax or other trust fund-type tax obligations allegedly due to any Taxing Authority.
5. Notwithstanding the possible applicability of Rules 6003 and 6004(h) of the Federal Rules of Bankruptcy Procedure or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
6. This Court shall, and hereby does, retain jurisdiction with respect to all matters arising from or related to the implementation and interpretation of this Order.

AND IT IS SO ORDERED.

**Prepared and presented by:**

/s/ Däna Wilkinson

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