

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
RED TOP RENTALS, INC.) CAUSE NO: 09-05229-JKC-11
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DEBTOR.)
_____)
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)
)

**FIRST DAY MOTION
REQUESTING AUTHORITY TO PAY PRE-
PETITION TRUST FUND TAXES**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

In support of the above-entitled motion (this “Motion”), Red Top Rentals, Inc., the debtor and debtor-in-possession (the “Debtor”), by counsel, states:

1. The Debtor filed its petition for relief under Title 11, Chapter 11 of the United States Code on April 20, 2009 (the “Petition Date”).
2. Since the Petition Date, the Debtor has continued in the possession of its property pursuant to 11 U.S.C. §§1107 and 1108, codified at 11 U.S.C. §101, *et seq.* (the “Code”), and is a debtor-in-possession. No trustee or examiner has been appointed in this case. No committees have been appointed or designated.
3. This Court has jurisdiction over this Motion and this matter pursuant to 28 U.S.C. §157(b). Venue of this case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).
4. The statutory predicates for relief are §§103, 105(a), 363(b)(1), 363(c)(1), 502(i), 505 507(a)(8), 1106, 1107(a), 1108 and 1129(a)(9) of the Code.

5. In the ordinary course of business, the Debtor incurs “trust fund” taxes, including sales and withholding tax (collectively the “Taxes”) from various taxing authorities, including the States of the Indiana, Kentucky and Ohio in addition to the U.S.A. (collectively the “Authorities”). The Debtor also incurs personal and real property (the real property taxes are only incurred through real property common area maintenance (i.e. CAMS) lease provisions) taxes, neither of which are “trust fund” assessable.

6. On the Petition Date, the Debtor held Taxes incurred or collected from pre-petition sales to their customers as well as arising from Debtor’s pre-petition payroll withholding obligations that had not yet been paid to the Authorities.

7. The Debtor incurred pre-petition sales tax from the States of Indiana, Kentucky, and Ohio. The Debtor estimates that the total amount of pre-petition Taxes incurred and collected from pre-petition sales is approximately: 1) Indiana \$84,746.11, 2) Kentucky \$4,127.03, and 3) Ohio \$4,097.34 for an estimated total amount of pre-petition sales tax of \$92,970.48. The Debtor estimates that the total amount of pre-petition Taxes incurred and collected for Debtor’s pre-petition payroll withholding obligations are approximately \$7,773.03 in connection with payrolls on April 17, April 24, and May 1, 2009. The Debtor also estimates that it has incurred approximately \$64,976.00 in Indiana personal property taxes and no Indiana real estate taxes. However, as previously stated, neither the personal property nor the real estate taxes are held in trust. The Debtor intends to pay said non-trust fund taxes through its plan of reorganization.

8. By this Motion, the Debtor seeks authority to pay the Taxes to the taxing Authorities in the ordinary course of Debtor’s business as and when such payments become due and owing. To be clear, the definition of “Taxes” as used herein does not include the non-trust fund taxes, i.e. Indiana personal property and real property taxes.

9. The money to be used to fund all payments of Taxes is the cash collateral of M&I Bank (“M&I”). M&I has agreed to allow the use of cash collateral for the payment of the Taxes.

10. Section 105(a) of the Code provides, “[t]he court may issue any order, process, or judgment necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. §105(a). The purpose of §105(a) of the Code is “to assure the Bankruptcy Court’s power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction.” 2 Collier, Bankruptcy ¶ 105.02, at 105-4 (15th rev. ed. 1988). Thus, §105(a) of the Code essentially codifies the Bankruptcy Court’s inherent equitable powers.

11. In conjunction with §105(a), the Taxes are entitled to priority status pursuant to § 507(a)(8) of the Code and, therefore, must be paid in full under any plan of reorganization pursuant to § 1129(a)(9) of the Code. Thus, the payment of these Taxes at this time only affects the timing of their payment and does not prejudice the rights of other creditors.

12. Also in conjunction with §105(a), §363(b)(1) of the Code provides a mechanism for the debtor to use property of the estate out of the ordinary course (of distribution under the Code). Section 363(c)(1) of the Code provides a mechanism for the debtor to use property of the estate in the ordinary course (of distribution under the Code). The Debtor submits that the relief requested herein is in the ordinary course. Sections 1106, 1107 and 1108 of the Code provide that a debtor in possession has the powers of a trustee to operate an ongoing business, including “an implied duty of the debtor-in-possession to ‘protect and preserve the estate, including an operating business’ going-concern value” In re: CEI Roofing, Inc., 315 B.R. 50, 59 (Bankr.N.D. Tex 2004) (*citing In re Coserv, L.L.C.*, 273 B.R. 487, 497 (Bankr.N.D.Tex.2002)).

13. The Seventh Circuit’s recent decision In re Kmart Corporation, 359 Fed. 3d 866 (7th Cir. 2004), is distinguishable, and does not prohibit the Debtor from being permitted to pay the Taxes as requested herein. In Kmart, the Seventh Circuit upheld a district court ruling

denying the Debtor permission to make critical vendor payments. The Court found that §105(a) of the Code, by itself, does not provide authority to make critical vendor payments, as the bankruptcy Court had solely relied upon. The Court left open the issue whether §363(b)(1), in conjunction with §105(a) of the Code could provide support for paying critical vendors.

14. The holding of the Kmart decision is not binding on the particular relief being sought in this Motion and moreover is easily distinguishable from this case, both on its facts and on the law. It is not binding because the Debtor in Kmart relied solely upon §105(a) of the Code as the statutory basis for relief whereas here the Debtor relies upon §105(a) in conjunction with other Code sections, including §§103, 363(b)(1), 363(c)(1), 502(i), 505, 507(a)(8), 1106, 1107(a), 1108 and 1129(a)(9).

15. Kmart is further distinguishable in that this Motion seeks Court authority to pay priority taxes (which are accorded priority status under the Code), not “critical vendors” (which are not accorded priority status under the Code).

16. The Debtor submits that, to the extent the Debtor has collected Taxes from their customers and have collected payroll withholding Taxes for their employees, such funds constitute so-called “trust fund” taxes that were required to be collected from third parties and must be held in trust by the Debtor for payment to the Authorities. See, e.g., Begies v. Internal Revenue Service, 496 U.S. 53 (1990); In re Shank, 792 F.2d 829, 830 (9th Cir. 1986) (sales tax required by state law to be collected by sellers from their customers is a “trust fund” tax); Dechario v. New York State Commission, 760 F.2d 432, 433-34 (2nd Cir. 1985) (state sales tax found to be a “trust fund” tax).

17. To the extent these “trust fund” taxes are collected, they do not constitute property of the Debtor’s estate under §541(d) or cash collateral under §363(c) of the Code. Section 541(d) of the Code provides, “[p]roperty 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

(a)(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); See In re American Int'l Airways, Inc., 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (excise and withholding taxes); In re Tap, Inc., 52 B.R. 271, 278 (Bankr. D. Mass. 1985) (withholding taxes). Therefore, the Debtor does not have any equitable interest in the Taxes. Thus, the Court should grant the Motion and authorize the Debtor to pay the Taxes to the Authorities as they become due.

18. Moreover, the Debtor's officers or directors may be held personally liable to the extent the Debtor fails to remit any "trust fund" Taxes to the Authorities. To the extent any pre-petition "trust fund" Taxes remain unpaid, the Debtor's officers may be subject to claims during the pendency of these proceedings. Additionally, unpaid Taxes may adversely affect the Debtor's ability to continue to conduct business and may result in the Authorities auditing the Debtor, effectively diverting the Debtor's attention from the reorganization process. Such potential claims, actions, or lawsuits would prove extremely distracting to the Debtor, for the named officers and directors whose attention to the Debtor's bankruptcy case is required, and for this Court, which might be asked to entertain various motions seeking injunctions with respect to potential state court actions. Therefore, it is in the best interest of the Debtor's estate and the underlying policies of the Bankruptcy Code to eliminate the possibility of the foregoing distractions and grant this Motion.

19. For all the foregoing reasons, the Debtor believes that granting the relief requested herein is appropriate and in the best interest of the Debtor, the bankruptcy estate, and Debtor's creditors.

20. Nothing in this Motion should be construed as impairing the Debtor's right to dispute its liability for, or to otherwise object to, any sales or withholding taxes asserted as due by the Authorities.

21. **Statement pursuant to L.R. B-9013-3(b).** Prior to filing this Motion, below signed counsel emailed a copy of this Motion (or a substantially similar version of this Motion) to counsel for the United States Trustee. Since then, below signed counsel and counsel for the UST have discussed its contents. Additionally, below signed counsel has contacted the senior courtroom deputy to advise that a case with first day motions will be filed. The only other party arguably effected by this motion, M&I Bank, also received a copy of this Motion prior to its being filed.

22. Attached hereto as **Attachment A** is an order the Debtor has drafted regarding this Motion. The Debtor requests this order be used by the Court to grant the relief requested herein.

Request for Relief

The Debtor respectfully requests the Court grant this Motion and for all just and proper relief in the premises.

Respectfully submitted,

TUCKER | HESTER, LLC

/s/ Jeffrey M. Hester

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