

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

IN RE: )  
BRUNO'S SUPERMARKETS, LLC, )  
 ) Chapter 11  
Debtor. ) Case No. 09-00634  
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DEBTOR'S MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 363(b) AND (c) AND  
507(a)(8), FOR AUTHORIZATION TO PAY PRE-PETITION  
BUSINESS LICENSE TAXES

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COMES NOW, Bruno's Supermarkets, LLC ("Bruno's" or "Debtor"), as debtor and debtor-in-possession and pursuant to §§ 105(a), 363(b) and (c) and 507(a)(8) of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), moves this Court (this "Motion") to enter an order authorizing Debtor to pay certain pre-petition business license taxes. In support of this Motion, Debtor relies on the *Affidavit of James Grady in Support of Chapter 11 Petitions and First Day Motions*, filed contemporaneously herewith, and states as follows:

**JURISDICTION AND VENUE**

1. On February 5, 2009 (the "Petition Date"), Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the Clerk of this Court. Debtor continues to operate its business and manage its assets as debtor-in-possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

2. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of Debtor's chapter 11 case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The

statutory predicates for the relief requested herein are Bankruptcy Code §§ 105(a), 363(b) and (c) and 507(a)(8).

## **FACTUAL BACKGROUND**

### **Company Background and Industry**

3. Bruno's is a privately held company headquartered in Birmingham, Alabama that owns and operates three grocery store chains: Bruno's, Food World, and FoodMax. Combined, Bruno's has a total of 66 locations in Alabama and the Florida panhandle. There are a total of 2 FoodMax locations. Food World has 41 locations with approximately 34 stores in Alabama and 7 stores in Florida. Bruno's has a total of 23 locations with 21 stores in Alabama and 2 stores in Florida. Bruno's employs a total of approximately 4,200 employees, approximately 40% of which are full time employees and approximately 60% of which are part time employees. Bruno's has a total of 2,600 union employees and 1,600 non-union employees. Bruno's is a party to certain collective bargaining agreements with the United Food & Commercial Workers Local #1657 (collectively, the "CBA"), and the majority of Bruno's employees are covered by the CBA.

4. Bruno's was founded in 1933 by Joe Bruno with the opening of an 800 square foot corner grocery store in Birmingham, Alabama. By 1959, Bruno's had grown to be a chain of 10 grocery stores. In 1972, Bruno's launched Food World, which was designed as a chain of discount grocery stores. By the early 1990s, Bruno's was one of the Top 40 grocery store chains in the country as measured by sales volume. In 1995, after a prolonged period of stagnant sales and earnings, Bruno's was acquired by Kohlberg Kravis Roberts & Co in a leveraged buyout. Due to the significant debt incurred by Bruno's through the leveraged buyout and substantial losses in 1996 and 1997, Bruno's filed for bankruptcy under chapter 11 of the Bankruptcy Code in early 1998. At the time of Bruno's emergence from bankruptcy in 2000, Bruno's operated

approximately 152 stores in Alabama, Georgia, Florida and Mississippi. Bruno's was acquired, in 2001, by Ahold USA, Inc., the U.S. subsidiary of Royal Ahold, an international supermarket conglomerate. In 2005, Bruno's was sold to Lone Star Fund V (U.S.), L.P. ("Lone Star Five"), one of the funds held by the private equity firm Lone Star Funds. Following the sale to Lone Star Five, Bruno's sold approximately 100 of its stores to C & S Wholesale Grocers.

### **Debt Structure**

5. Bruno's has a revolving line of credit with Regions Bank (the "Revolver"). The current amount outstanding under the Revolver is approximately \$10.8 million. The Revolver is secured by the majority of Bruno's assets. Bruno's owes approximately \$22.5 million in accounts payable to trade and other creditors. There is also approximately \$6.8 million owed to various state and local taxing authorities. Bruno's also owes an affiliated company, Bi-Lo, LLC ("Bi-Lo"), approximately \$3.5 million.

6. The vast majority of Bruno's grocery stores are located on leased property. Bruno's does, however, own the real property on which five of its stores are located.

### **Events Leading to Bankruptcy**

7. Debtor's bankruptcy filing has been precipitated by a variety of factors that have led to a deterioration in Bruno's business and a lack of liquidity. Over the past 18 months, the country has seen a significant decline in the economy as a whole. The economic decline has resulted in a significant decrease in consumer spending, including food and grocery items. This decreased demand has led to a decline in Bruno's sales.

8. Furthermore, Bruno's has also seen an increased amount of competition in its core market from other grocers. With an abundance of older locations, Bruno's has had difficulty

competing with the newer grocery stores that have moved into its markets. This increased competition from newer grocery stores has reduced Bruno's market share.

9. Additionally, the frozen credit markets have limited the availability of capital for improvements to Bruno's stores to allow Bruno's to compete with the newer stores of its competitors. Furthermore, the lack of available capital has resulted in Bruno's being unable to locate sufficient working capital with which to operate its stores.

10. Bruno's is a party to certain collective bargaining agreements with the United Food & Commercial Workers Local #1657 (collectively, the "CBA"), and the majority of Bruno's employees are covered by that CBA. Under this agreement, Bruno's provides benefits and working conditions which significantly exceed those provided to other area workers in the industry. Furthermore, Bruno's is a party to an exclusive distribution agreement with unfavorable terms for the majority of the goods that Bruno's sells through its stores.

#### **Debtor's Pre-Petition Business License Taxes**

11. In the normal course of Debtor's business operations, Debtor is obligated to remit certain business license taxes (the "Taxes"), to state, county and/or municipal taxing authorities (collectively, the "Taxing Authorities"). These Taxes are levied for the privilege of operating a business, conducting a particular activity, or maintaining a physical structure within a particular Taxing Authority's jurisdiction. Generally, Debtor is required to remit these Taxes to the relevant Taxing Authority at least annually. The process by which Debtor remits these Taxes varies, depending on the exact nature of the Tax and the identity of the Taxing Authority. A list of certain of the Taxing Authorities is attached hereto as Exhibit "A."

12. As of the Petition Date, Debtor has initiated payment(s) for approximately \$400,000.00 worth of unpaid, pre-petition Taxes through the issuance of certain checks (the

"Payments in Transit"). As of the Petition Date, the Payments in Transit are in route to the appropriate Taxing Authority.

**RELIEF REQUESTED**

13. By this Motion, Debtor seeks authorization for the applicable banks and financial institutions to process, honor, and pay any and all checks, drafts and pre-petition wire transfer requests relating to the Payments in Transit, and to rely on the representations of Debtor as to which checks, drafts or wire transfer requests are issued and authorized to be paid in accordance with this Motion without any duty of further inquiry and without liability to any party for following Debtor's instructions.

14. Debtor further requests that nothing herein shall preclude Debtor from contesting, in its sole discretion, the validity and amount of any claim for payment of the Taxes.

15. Debtor estimates that while the outstanding pre-petition liability for all pre-petition taxes owing may be more than the amount of the Payments in Transit, Debtor only seeks authorization for payment for the Payments in Transit, and in no event more than \$400,000.00 in the aggregate. Debtor will seek further approval from this Court if circumstances arise that would require Debtor to exceed that amount.

**APPLICABLE AUTHORITY**

16. The relief requested herein relating to the payment of such Taxes to the Taxing Authorities should be authorized. Debtor submits that the Taxes would be entitled to priority status under Bankruptcy Code, whether as claims secured by liens on Debtor's property arising under laws of state or jurisdiction in which the claim arises, or under § 507(a)(8) of the Bankruptcy Code. To the extent of their priority status, these claims must be paid in full under any chapter 11 plan. Accordingly, to the extent that Debtor is successful in confirming a chapter

11 plan, the proposed relief will only affect the timing of the payment of these pre-petition Taxes and will not prejudice the rights of any other creditors or parties in interest.

17. Moreover, Debtor seeks relief to conduct activities squarely within its normal scope of business operations, and debtors-in-possession need not specifically seek authorization to conduct activities or use funds constituting property of their estate with respect to ordinary course transactions. *See, e.g.* 11 U.S.C. § 363(c)(1); *compare* §363(b)(1) (providing that a debtor-in-possession need only seek notice and hearing to conduct activities or use property of the estate *outside* the ordinary course of debtor's business). In the event this Court deems the requested relief to be *outside* the ordinary course of Debtor's business, this Court nevertheless is empowered to authorize Debtor to expend these funds outside of the ordinary course of debtor's business pursuant to Bankruptcy Code § 363(b). *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D. N.Y. 1989) ("Section 363(b) gives the court broad flexibility in tailoring its orders to meet a wide variety of circumstances"); *see also In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 155 (D. Del. 1999) ("Section 363(b) should be interpreted liberally to provide a bankruptcy judge with 'substantial freedom to tailor his orders to meet differing circumstances' and to avoid 'shackling the judge with unnecessarily rigid rules'") (internal citation omitted).

18. Although Bankruptcy Code § 363(b) does not set forth a standard for determining when it is appropriate to authorize transactions outside of the ordinary course, courts generally grant such relief if Debtor articulate a sound business purpose. *See Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991); *In re Aerovox, Inc.*, 269 B.R. 74, 80 (Bankr. D. Mass. 2001). The "debtor's business decision should be approved by the court unless it is shown to be so manifestly unreasonable that it could not be based upon sound

business judgment, but only on bad faith, or whim or caprice." *In re Aerovox, Inc.*, 269 B.R. at 80 (internal citation omitted). As set forth below, Debtor has sound business justifications for granting the relief requested herein.

19. Payment of the Taxes will avoid potential administrative difficulties and the interruption of Debtor's business activities. If Debtor does not pay such amounts, the Taxing Authorities may attempt to suspend Debtor's business operations, file liens, seek to lift the automatic stay, and pursue other remedies that will cause harm to the estates. Furthermore, Debtor believes that it is likely that some, if not all, of such Taxing Authorities will cause Debtor to be audited if the Taxes are not paid. Such audits also would unnecessarily divert the attention away from the reorganization process. Therefore, it is in the best interests of the estate's creditors and Debtor's prospects for reorganization to eliminate the possibility of the foregoing distractions.

20. Moreover, this Court has approved payment of certain other taxes, such as sales and use taxes on the grounds that the payment of such taxes was necessary to effectuate a successful reorganization in other chapter 11 cases. *See, e.g., In re Citation Corp.*, chapter 11 No. 04-08130-TOM (Bankr. N.D. Ala Sept. 18, 2004); *In re Meadowcraft, Inc.* chapter 11 No. 02-06910 (TOM) (Bankr. N.D. Ala. Jan. 13, 2003); *In re Alabaster Indus., Inc.* chapter 11 No. 98-02220 (BGC) (Bank. N.D. Ala. Oct. 29, 1998).

21. Finally, nothing in this Motion or the relief requested herein should be construed as impairing Debtor's right to contest the amount of any Taxes that may be due to the Taxing Authorities.

#### **NOTICE AND PRIOR MOTIONS**

22. Notice of this Motion has been provided to (1) the Office of the Bankruptcy Administrator for the United States Bankruptcy Court for the Northern District of Alabama,

Southern Division; (2) counsel to Regions Bank, Debtor's pre-petition lender; (3) counsel for Debtor's proposed post-petition lender; (4) the holders of Debtor's equity interests; (5) Debtor's twenty (20) largest unsecured creditors; and (6) the District Director of the Internal Revenue Service for the Northern District of Alabama.

23. No previous request for the relief sought herein has been made in this bankruptcy case to this or any other court.

**WHEREFORE**, Debtor requests this Court enter an order, substantially similar to the order attached hereto as Exhibit "B," and grant Debtor such other and further relief as this Court may deem just and proper.

/s/ Marc P. Solomon

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Marc P. Solomon

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BRUNO'S SUPERMARKETS, LLC

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"Exhibit A"

<u>Taxing Authority</u>	<u>Type of Tax</u>
City of Adamsville	Business License
City of Alabaster (Alabama)	Business License
City of Auburn (Alabama)	Business License
City of Bessemer (Alabama)	Business License
City of Birmingham (Alabama)	Business License
City of Center Point (Alabama)	Business License
City of Cullman (Alabama)	Business License
City of Demopolis (Alabama)	Business License
City of Dora (Alabama)	Business License
City of Fairhope (Alabama)	Business License
City of Gardendale (Alabama)	Business License
City of Gadsden (Alabama)	Business License
City of Gulf Shores (Alabama)	Business License
City of Hueytown (Alabama)	Business License
City of Jasper (Alabama)	Business License
City of Monroeville (Alabama)	Business License
City of Pell City (Alabama)	Business License
City of Prattville (Alabama)	Business License
City of Saraland (Alabama)	Business License
City of Spanish Fort (Alabama)	Business License
City of Sylacauga (Alabama)	Business License
City of Trussville (Alabama)	Business License
City of Tuscaloosa (Alabama)	Business License
City of Wetumpka (Alabama)	Business License
Jefferson County (Alabama)	Business License
Division of Plant Industry (Alabama)	Business License

**"Exhibit B"**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

IN RE: )  
BRUNO'S SUPERMARKETS, LLC, )  
 ) Chapter 11  
Debtor. ) Case No. 09-00634  
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ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 363(b) AND (c) AND 507(a)(8)  
AUTHORIZING DEBTOR TO PAY PRE-PETITION BUSINESS LICENSE TAXES

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This matter came to be heard upon the motion (the "Motion") of Bruno's Supermarkets, LLC ("Bruno's") as debtor and debtor-in-possession (the "Debtor"), for authorization to pay pre-petition amounts owing in respect of pre-petition business license taxes (the "Taxes") pursuant to §§ 105(a), 363(b) and (c) and 507(a)(8) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"); upon consideration of the *Affidavit of James Grady in Support of Chapter 11 Petitions and First Day Motions*; the court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; due notice of this Motion has been provided to (1) the Office of the Bankruptcy Administrator for the United States Bankruptcy Court for the Northern District of Alabama, Southern Division; (2) counsel to Regions Bank, Debtor's pre-petition lender; (3) counsel for Debtor's proposed post-petition lender; (4) the holders of Debtor's equity interests; (5) Debtor's twenty (20) largest unsecured creditors; and (6) the District Director of the Internal Revenue Service for the Northern District of Alabama; and it appearing that no other notice or further notice need be provided; the Court having determined that the relief sought in the Motion is in the best interests of Debtor, its

creditors, and all parties in interest; upon the Motion and all of the proceedings before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED** that Debtor is authorized and empowered to pay the pre-petition Taxes pursuant obligations owing to those Taxing Authorities set forth on Exhibit "A" to the Motion, up to an aggregate amount of \$400,000.00, as evidenced by the Payments in Transit as of the Petition Date (as defined in the Motion), and it is further

**ORDERED** the applicable banks and financial institutions to process, honor, and pay any and all checks, drafts and pre-petition wire transfer requests relating to the Payments in Transit, and to rely on the representations of Debtor as to which checks, drafts or wire transfer requests are issued and authorized to be paid in accordance with this Motion without any duty of further inquiry and without liability to any party for following Debtor's instructions; and it is further.

**ORDERED** that Debtor is authorized to pay the Taxes without prejudice to Debtor's right to seek additional or further relief in the future; and it is further

**ORDERED** that nothing in this Order or the Motion shall be construed as prejudicing any rights Debtor may have to contest the amount or basis of any sales, use and rental tax obligations allegedly due any Taxing Authority.

Dated: February \_\_\_, 2009

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UNITED STATES BANKRUPTCY JUDGE