

**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**
)

**DEBTOR'S EMERGENCY MOTION TO PAY CERTAIN PRE-PETITION DEBTS TO
COMPLY WITH ALABAMA AND FLORIDA LAWS REGULATING SUPPLY OF
ALCOHOLIC BEVERAGES**

COMES NOW, Bruno's Supermarkets, LLC ("Bruno's" or "Debtor"), as debtor and debtor-in-possession, and moves this Court (this "Motion") to enter an order authorizing Debtor to honor or pay certain pre-petition obligations to suppliers of beer and wine located in Alabama and Florida (the "Beer and Wine Suppliers") in order to comply with Alabama and Florida state laws regarding the same. In support of this Motion Debtor 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. The 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)(7).

Alcoholic Beverage Suppliers.

3. The viability of Debtor's businesses depends on Debtors relationships with its vendors in order to ensure timely delivery of products to be sold at Debtor's various locations. If this relationship breaks down or is halted it could have detrimental effects on Debtor's ability to operate its business and to remain viable. The Beer and Wine Suppliers are among that group of vendors whose trade relations with Debtor are currently in jeopardy.

4. Under the laws of the state of Alabama, all sales of alcoholic beverages made by wholesalers to retail licensees shall be for cash. Ala. Admin. Code Chapter 20-X-8-.09. *See also* ALA. CODE § 28-3-49 (stating that rules and regulations authored by the Alcoholic Beverages Control Board are to be given the full force and effect of law). "Cash" under the Alabama Code includes any United States legal tender currency, electronic transfer of funds from the retail licensee to the wholesaler licensee, check drawn on the retail licensee's account, bank certified check or cashier's check, guaranteed check or postal money order, all payable to the wholesaler licensee. *Id.* The intent of this law is to require that the product delivery and payment result in a simultaneous transaction. *Id.* The Alabama Code prohibits any credit from being extended to the retailer and failure to comply with the Code results in separate violations of the regulation by both the vendor and the vendee. *Id.* Therefore, Debtor is required to pay the Beer and Wine Suppliers at the time of delivery.

5. Florida law, while not directly prohibiting credit upon the sale of alcoholic beverages, has strict punishments if any "credit" to vendors is not reimbursed within 10 days. FLA. STAT. ANN. § 561.42 (2008). Failure to remit payment within the 10 day deadline permits the Division of Alcohol Beverages and Tobacco to "declare in writing to such vendor and to all manufacturers and distributors within the state that all further sales to such vendor are prohibited

until such time as the division certifies in writing that such vendor has fully paid for all liquors previously purchased." *Id.* Therefore, if Debtor is prevented from making payments for pre-petition expenses incurred by deliveries of the Beer and Wine Suppliers, further alcoholic beverage deliveries from all suppliers within the state of Florida may be discontinued by declaration of the Florida Division of Alcohol Beverages and Tobacco. *Id.* In order to comply with both Alabama and Florida law and to alleviate the risk of having suppliers cease deliveries, Debtor needs to be able to pay the pre-petition indebtedness to the Beer and Wine Suppliers.

6. By virtue of the filing of the bankruptcy, some checks given to the Beer and Wine Suppliers pre-petition were dishonored.

RELIEF REQUESTED

7. Debtor seeks authorization pursuant to §§ 105(a) and 363(b) and (c) of the Bankruptcy Code to pay its pre-petition obligations arising from the supply of alcoholic beverages by the Beer and Wine Suppliers in the ordinary course of business. The dollar value of the amount owed to the Beer and Wine Suppliers, as of February 5, 2009 is believed to be \$236,000.00.

8. The Debtor is paying for post-petition deliveries from the Beer and Wine Suppliers in the ordinary course of business. Debtor seeks authority to continue paying for such post-petition deliveries via check.

9. The relief requested herein is authorized by § 105(a) of the Bankruptcy Code, which allows the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code." Relief in this case is necessary to prevent the potential violation of certain state statutes governing alcohol deliveries and the potential harm of the supply chains being cut off by the Beer and Wine Suppliers which would in turn negatively affect the Debtor's ability to successfully reorganize.

10. Moreover, pursuant to the "doctrine of necessity," courts often allow the immediate payment of pre-petition claims where the payments are essential to the debtor's continued operations, even though the Bankruptcy Code may not explicitly authorize payment. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821, 824 (Bankr. D. Del. 1999) (noting that a debtor may pay a class of pre-petition creditors in advance of a confirmed plan if such payment is essential to the continued operation of the business).

11. The doctrine of necessity recognizes that paying pre-petition obligations outside of the plan of reorganization is often necessary to realize the paramount purpose of a chapter 11 reorganization – *i.e.*, preventing the liquidation of the debtor in possession and preserving its potential for rehabilitation. Debtor's sales, marketability and customer base will be severely harmed if, upon the filing of this chapter 11 case, Debtor is unable to fulfill its obligations to the Suppliers. Furthermore, payment of the pre-petition indebtedness owed to the Beer and Wine Suppliers is necessary to ensure the continued supply of alcoholic beverages to Debtor's numerous consumer grocery store locations. Accordingly, payment of Debtor's obligations to the Beer and Wine Suppliers in connection with the state law requirements of Alabama and Florida is consistent with § 105(a) of the Bankruptcy Code and the "doctrine of necessity."

12. The relief sought herein is also authorized by §363(c), which provides that a debtor in possession may 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 the 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).

13. 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 Debtors articulate a sound business purpose. *See, In re Friedman's, Inc.*, 366 B.R. 891, 895 (Bankr. S.D. Ga. 2005) (upholding debtor's implementation of a key-employee retention plan when the plan was advanced "after application of sound business judgment," and would ensure stable continuity of the reorganizing debtor). 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." *Id.* at 895 (internal citation omitted).

14. As set forth herein, Debtor submits that payment of the pre-petition debt owed to the Beer and Wine Suppliers is essential to, most importantly, compliance with state statutes, but also to Debtor's continued operation, successful reorganization and is in the best interests of Debtor and its customers, creditors, and estates.

15. Authorization to pay all amounts owing to Beer and Wine Suppliers shall not be deemed to constitute post-petition assumption or adoption of any program or policy pursuant to § 365 of the Bankruptcy Code. Debtor is in the process of reviewing these matters and reserves all

of its rights under the Bankruptcy Code with respect thereto. Moreover, authorization to pay all amounts on account of the Beer and Wine Suppliers shall not affect Debtor's right to contest the amount or validity of any such obligations.

NOTICE

16. 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, the Debtor's pre-petition and post-petition lender; (3) the holders of the Debtor's equity interests; (4) the Debtor's twenty (20) largest unsecured creditors; and (5) the District Director of the Internal Revenue Service for the Northern District of Alabama. In light of the nature of the relief requested herein, Debtor submits that no further notice of this Motion is needed or required.

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

WHEREFORE, Debtor respectfully requests that this Court enter an order substantially in the form attached hereto as Exhibit "A", and grant such other and further relief as this Court deems just and proper.

/s/ Derek F. Meek

Robert B. Rubin
Derek F. Meek
Marc P. Solomon

Attorneys for Debtor
BRUNO'S SUPERMARKETS, LLC

OF COUNSEL:
BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100

EXHIBIT A

**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**
)

**ORDER ALLOWING PAYMENT TO CERTAIN PRE-PETITION DEBTS IN
COMPLIANCE WITH ALABAMA AND FLORIDA LAWS REGULATING SUPPLY OF
ALCOHOLIC BEVERAGES**

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 honor or pay pursuant to state law certain pre-petition obligations to suppliers of beer and wine located in Alabama and Florida (the "Beer and Wine Suppliers"), pursuant to title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"); 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, the Debtor's pre-petition and post-petition lender; (3) the holders of the Debtor's equity interests; (4) the Debtor's twenty (20) largest unsecured creditors; and (5) 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 the 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 to pay the Beer and Wine Suppliers, as determined by Debtor in its sole discretion (subject to the conditions of Debtor's post-petition financing arrangements), by check for post-petition deliveries, to continue receiving deliveries of alcoholic beverages by the Beer and Wine Suppliers; and it is further

ORDERED that, pursuant to §§105(a) and 363(b) and (c) of the Bankruptcy Code, Debtor is authorized, but not obligated, to pay the pre-petition obligations to the Beer and Wine Suppliers, estimated at no more than \$236,000, in the ordinary course of its business in the same manner and on the same basis as Debtor implemented and maintained prior to the commencement of this chapter 11 case; and it is further

ORDERED that Debtor is authorized, but not required, to continue to honor all pre-petition obligations owed to the Beer and Wine Suppliers that it deems are necessary in the same manner as such obligations were honored before the commencement of Debtor's chapter 11 case; and it is further

ORDERED that nothing in this Motion should be construed as a waiver by Debtor of its rights to contest any invoice of a Beer and Wine Supplier, whether paid or unpaid, under applicable nonbankruptcy law; and it is further

ORDERED that the banks and financial institutions that process, honor and pay any and all checks on account of obligations to be paid pursuant to this Order are authorized to do so and may rely on the representations of Debtor as to which checks are issued and authorized to be paid in accordance with this Order without any duty of further inquiry and without liability for following Debtor's instructions; and it is further

ORDERED that nothing in the Motion shall be deemed a request for authority to assume, and nothing in this Order shall be deemed an authorization to assume, any executory contract under 11 U.S.C. § 365; and it is further

ORDERED that, except as provided herein, notwithstanding the relief granted herein or any actions taken hereunder, nothing contained in this Order shall create any rights in favor of, or enhance the status of any claim held by, any of the Debtor's customers or any other third party.

Dated this the ____ day of February, 2009.

UNITED STATES BANKRUPTCY JUDGE