

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Chapter 11
)
AcuSport Corporation,) Case No. 18-52736
)
Debtor.) Honorable John E. Hoffman, Jr.

**MOTION FOR AN ORDER AUTHORIZING DEBTOR
TO PAY CERTAIN PREPETITION TAXES AND FEES**

AcuSport Corporation, the debtor and debtor in possession (“*Debtor*” or “*AcuSport*”) in this chapter 11 case (the “*Case*”), files this motion (the “*Motion*”) for entry of an order, pursuant to sections 105(a), 363(b), 507(a), and 541 of title 11 of the United States Code (the “*Bankruptcy Code*”), authorizing, but not directing, Debtor to remit and pay certain prepetition taxes, assessments, and fees (collectively, the “*Taxes and Fees*”) to taxing authorities. In support of this Motion, Debtor respectfully states as follows:

JURISDICTION AND VENUE

1. 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 is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On May 1, 2018 (the “*Petition Date*”), Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor continues to manage and operate its business as a debtor in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

3. No request has been made for the appointment of a trustee or examiner, and no official committee has been appointed in this case.

4. A detailed description of Debtor's business, capital structure, and events leading to this Case is more fully set forth in the Declaration of John K. Flanagan (the "*Flanagan Declaration*") filed contemporaneously herewith, which is incorporated herein by reference.

5. AcuSport is recognized nationwide as one of the leading distributors of outdoor and shooting sports products. The company is headquartered in Bellefontaine, Ohio and has regional sales offices in Pennsylvania, Georgia, Minnesota, Montana, California and Texas. To ensure and enable customer service to the West Coast, AcuSport also operates a warehouse and distribution facility located in Salt Lake City, Utah.

6. As part of its business, AcuSport provides consulting services to independent retailers, helping them to efficiently acquire products, utilize state-of-the-art business tools and provide value-added services that increase profitability and strengthen retailers' businesses. AcuSport's commitment to independent retailers is the cornerstone of its business.

7. AcuSport prospered for years following its inception in 1982, with substantial sales growth leading to the expansion of its facility in Bellefontaine. However, AcuSport began to experience financial difficulty in late 2016 and early 2017.

8. In the time leading up to the 2016 presidential election, consumers were concerned about the possibility of stricter gun control laws, which led to increased sales of firearms and accessories. As a result, AcuSport, along with other firearms businesses, prepared for a spike in demand by, among other things, purchasing substantial amounts of inventory. Contrary to expectations, no spike in demand for firearms occurred following the 2016 election. Indeed, demand decreased. The reduction in sales directly impacted AcuSport's gross revenue, and, ultimately, its bottom line. The harm to AcuSport's financial position was further exacerbated because AcuSport had expected — and prepared for — an increase in sales. The

reduction in sales negatively impacted AcuSport's operational performance, resulting in defaults under AcuSport's prepetition secured credit agreement, and ultimately, the company entered into a series of forbearance agreements with the Prepetition Lenders.

9. In connection with the forbearance agreements with the Prepetition Lenders, AcuSport retained Huron Consulting Services LLC as its financial advisor and Huron Transaction Advisory LLC as its investment banker. AcuSport also agreed to seek a refinancing process of its secured debt obligations. Huron Transaction Advisory LLC was retained for the purposes of preparing, marketing, and leading the consummation of one or more potential strategic alternatives, including a refinancing process, and eventually, a sale process. In that regard, AcuSport spent several months prior to the filing of this Case exploring potential sales and other strategic options.

10. AcuSport eventually obtained an offer from United Sporting Companies, Inc. ("*United*") to purchase (through an affiliate), among other things, AcuSport's inventory, real estate, equipment, technology, and certain other intangible assets. In order to effectuate a transaction to United (or another higher or better bidder or bidders), and to maximize the value of its assets for the benefit of all its constituents, AcuSport filed for bankruptcy relief and has sought the approval of bidding and sale procedures with United as the stalking horse.

RELIEF REQUESTED

11. By this Motion, Debtor seeks authority, pursuant to sections 105(a), 363(b), 507(a), and 541 of the Bankruptcy Code, to remit and pay certain Taxes and Fees to taxing authorities, whether accrued prepetition or postpetition, in the ordinary course of Debtor's business.

BACKGROUND REGARDING DEBTOR'S TAXES AND FEES

12. In the ordinary course of its business, Debtor collects, withholds, and incurs various Taxes and Fees that it periodically remits to taxing, licensing, regulatory, and other governmental authorities (“*Taxing Authorities*”). The types of Taxes and Fees can be generally categorized as one of the following: sales and use taxes, property taxes, franchise and corporate-level taxes, and other business taxes.¹

13. In connection with certain of the Taxes and Fees, Debtor collected funds prior to the Petition Date that it is holding in trust for Taxing Authorities, and that should be remitted to those Taxing Authorities. In addition, other Taxes and Fees relating to prepetition periods may be assessed during the Case. Thus, Debtor seeks authority to pay the Taxes and Fees described herein that it determines are undisputed, due and payable.

A. Sales and Use Taxes

14. Debtor incurs and collects sales taxes that it must remit to various sales tax authorities on a periodic basis. These taxes are incurred in connection with sales of its inventory to customers, and the sales tax rates are set by the relevant Taxing Authorities. Debtor’s filing and remittance deadlines vary by state. Debtor periodically files sales tax returns in at least fourteen (14) states. In general, these are “trust-fund taxes” that are held by Debtor but essentially belong to the various Taxing Authorities.

15. As of the Petition Date, Debtor estimates that it has collected and owes an aggregate amount of approximately \$5,000.00 in sales taxes to various Taxing Authorities for sales completed prior to the Petition Date.

¹ Payment of payroll and related taxes with respect to employee wages and compensation are not addressed herein but are the subject of a separate motion Debtor has filed contemporaneously herewith.

16. In addition, Debtor is required to pay use taxes in Ohio on account of certain purchases of personal property and goods. Debtor must self-assess the use taxes and make payments according to the requirements of applicable state law. Debtor's use taxes are typically estimated and paid in advance, then tried up the following month (depending on the actual taxes assessed), with Debtor receiving a credit or paying an additional amount the next month. As of the Petition Date, Debtor estimates that it owes \$2,000.00 in prepetition use taxes.

17. Accordingly, Debtor requests authority to pay prepetition sales and use taxes in the approximate aggregate amount of \$7,000.00 to relevant Taxing Authorities.

B. Property Taxes

18. Debtor has obligations to certain Taxing Authorities for real and personal property taxes that come due periodically. Debtor generally pays such property taxes in the ordinary course of business at differing times throughout the year, depending on the jurisdictions.

19. Property taxes are generally calculated and assessed in arrears. For 2017, Debtor owed Taxing Authorities approximately \$95,000.00 for real and personal property taxes, of which nearly \$90,000.00 related to real property taxes and approximately \$5,000.00 related to personal property taxes.

20. Debtor has previously paid \$44,945.00 toward the real property taxes assessed for 2017. Debtor estimates that as of the Petition Date, it owes a total of \$43,605.00 in additional real property taxes for 2017. Real property taxes for the first four months of 2018 have also accrued through the Petition Date, but such taxes will not be due until the end of 2018.

21. Debtor typically pays a total of approximately \$5,000.00 per year in personal property taxes in various jurisdictions where it operates. The amounts making up this total are due and payable at various points throughout the year in the jurisdictions in which Debtor has

personal property. As of the Petition Date, Debtor estimates that it may owe a total of \$5,000.00 for prepetition personal property tax obligations to all Taxing Authorities where such obligations are owed.

22. If Debtor does not timely remit payments for its real and personal property taxes, the tax obligations could give rise to liens and/or secured claims in favor of relevant Taxing Authorities, as well as interest and penalties for past-due taxes. Thus, Debtor requests authority to pay all such property taxes as and when they become due, even if they relate to a period prior to the Petition Date. Further, Debtor requests authority to continue to pay property taxes relating to tax periods subsequent to the Petition Date in the ordinary course of business.

C. Franchise and Corporate Taxes

23. Debtor is required to pay franchise and corporate-level taxes to certain Taxing Authorities in multiple states. Debtor typically owes and pays approximately \$30,000.00 per year to various Taxing Authorities for such taxes, but such taxes have not been paid in some time. Thus, as of the Petition Date, Debtor owes an estimated \$30,000.00 in franchise and corporate-level taxes to various Taxing Authorities.

24. Accordingly, Debtor requests authority to pay the amounts due to relevant Taxing Authorities for franchise and corporate taxes, in the approximate aggregate amount of \$30,000.00.

D. Other Taxes

25. Debtor is subject to various other types of taxes based on the volume of business Debtor conducts in the relevant jurisdictions, including the Ohio commercial activity tax (the “*CAT Tax*”), the Georgia net worth tax (the “*GNW Tax*”), and the Washington sales volume tax (the “*WSV Tax*”).

26. The CAT Tax is imposed on certain businesses for the privilege of doing business in Ohio. It is measured by gross receipts relating to business transactions occurring in Ohio, and it is imposed on businesses with gross receipts exceeding \$150,000.00 per calendar year. The CAT Tax is paid quarterly, and Debtor's current approximate quarterly obligation is \$8,878.00 (which is the amount Debtor paid for the first quarter of 2018). As of the Petition Date, Debtor estimates that it may owe prepetition CAT Tax in the approximate amount of \$3,000.00 for the period beginning April 1, 2018 through the Petition Date.

27. The GNW Tax is based on Debtor's sales in Georgia. The GNW Tax is typically paid annually, in the approximate aggregate amount of \$18,860.00 (which is the amount paid for 2017). Estimating the current amount that would be owing for 2018 is difficult, but Debtor believes it may owe an amount approximating \$5,000.00 in GNW Tax relating to prepetition periods.

28. The WSV Tax is based on Debtor's shipments into Washington, which results in Debtor owing up to approximately \$40,000.00 per year. The WSV Tax is typically paid monthly. As of the Petition Date, Debtor estimates it may owe WSV Tax in the amount of \$1,000.00 for prepetition periods.

29. Debtor requests authority to pay any prepetition obligations that may be owing in respect of the CAT Tax, the GNW Tax, or the WSV Tax in order to ensure that Debtor's operations in the applicable states are not adversely affected on a postpetition basis.

BASIS FOR RELIEF REQUESTED

30. Pursuant to sections 105(a), 507(a), 363(b), and 541 of the Bankruptcy Code, the Court should authorize Debtor to pay Taxes and Fees owing to Taxing Authorities, as and when they become due and payable.

A. Certain Taxes and Fees are Held in Trust and are not Property of Debtor's Estate.

31. Section 541(d) of the Bankruptcy Code provides, in relevant part, that “[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) and (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). Certain of the Taxes and Fees are held in trust for the benefit of third party payees, such as taxing authorities, and are, therefore, not property of Debtor’s estate. *See, e.g., Begier v. IRS*, 496 U.S. 53 (1990) (holding prepetition payment of trust fund taxes could not be avoided because such funds transferred were not property of the estate); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 96 (3d Cir. 1994) (holding withholding taxes were subject to a trust); *In re Wendy’s Food Systems, Inc.*, 133 B.R. 917 (Bankr. S.D. Ohio 1991) (sales taxes were held in trust by debtor for taxing authority); *In re Am. Int’l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (holding withholding taxes were not property of debtor’s estate); *In re Hanson*, 8 B.R. 34, 37 (Bankr. N.D. Ohio 1980) (sales tax in connection with sale of business was held by counsel for the purchaser and was, therefore, held in trust for the “benefit of the State of Ohio sales tax authority”).

32. Debtor is required to collect certain taxes from its customers and hold them for the benefit of Taxing Authorities until they are remitted. Accordingly, funds held in trust on behalf of third party payees, such as Taxing Authorities, are not property of Debtor’s estate and payment of such Taxes and Fees will not prejudice Debtor’s estate and its creditors. In addition, in certain jurisdictions, failure to remit trust-fund taxes may result in personal liability to responsible parties, such as Debtor’s officers or employees. Debtor cannot risk imposing personal liability on such parties at such a crucial time.

B. Claims for Taxes and Fees May Be Entitled to Priority Status Pursuant to Section 507(a)(8) of the Bankruptcy Code.

33. Taxing Authorities' claims for Taxes and Fees owed by Debtor may be entitled to priority claim status pursuant to section 507(a)(8) of the Bankruptcy Code. Generally, unsecured claims of governmental units are entitled to priority status for the following types of tax claims: (a) taxes calculated based on income or gross receipts; (b) prepetition property taxes; (c) taxes required to be collected and withheld for which the Debtor is liable; (d) employment taxes; (e) excise taxes; and (f) customs taxes. *See* 11 U.S.C. § 507(a)(8). Likewise, governmental units may assess interest and penalties that are given priority claim status when the underlying taxes are provided priority status under section 507(a)(8)(B). *See* 11 U.S.C. § 507(a)(8)(G).

34. In addition, in order to confirm a plan in this Case, certain of the Taxes and Fees must ultimately be paid in full, irrespective of the relief requested herein. *See* 11 U.S.C. § 1129(a)(9)(C) (certain claims, including priority tax claims, must be paid in full in order for chapter 11 plans to be confirmable). Thus, if a plan is confirmed in this Case, granting the relief requested in this Motion will only impact the timing of the payments.

C. Section 105 of the Bankruptcy Code and the Necessity Doctrine Permit Debtor to Preserve the Value of its Estate by Paying Taxes and Fees.

35. Numerous courts have used their equitable powers under section 105(a) of the Bankruptcy Code, along with the "necessity doctrine," to authorize payment of prepetition obligations because such payment is determined to be necessary to the chapter 11 process. *See, e.g., In re The Wornick Company, et al.*, No. 8-10654 [Docket No. 64] (Bankr. S.D. Ohio Feb. 15, 2008); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991); *In re Just for Feet*, 242 B.R. 821, 825 (D. Del. 1999); *In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991); *In re SIS Corp.*, 108 B.R. 608, 609-10 (Bankr. N.D. Ohio 1989); *see*

also 11 U.S.C. § 105(a) (A court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11].”). Section 1107(a) of the Bankruptcy Code requires the Debtor to “protect and preserve the estate, including [its] operating business’s going-concern value.” See *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). And, it is well established that debtors may pay certain prepetition claims in the performance of their fiduciary duty to preserve the estate and the business’s going-concern value. See, e.g., *Miltenberger v. Logansport Ry.*, 106 U.S. 286, 312 (1882). Thus, courts developed the “necessity doctrine” as a tool for determining whether to permit a debtor to pay a prepetition claim. See *Just for Feet, Inc.*, 242 B.R. at 825-26 (developing and discussing the doctrine of necessity); see also *Quality Interiors, Inc.*, 127 B.R. at 396 (citations omitted) (“A general practice has developed, however, where bankruptcy courts permit the payment of certain prepetition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment”).

36. Here, Debtor’s estate and its creditors will benefit from an order of this Court authorizing Debtor to pay prepetition Taxes and Fees owing to Taxing Authorities. Timely payment of prepetition Taxes and Fees will save Debtor the potential interest and penalties on past-due taxes, as well as avoidable legal expenses. Without the relief requested herein, Debtor will almost certainly experience additional financial burdens and distractions from its efforts to maximize the value of its estate. Thus, Debtor should be permitted to timely and fully pay Taxes and Fees to Taxing Authorities.

D. Section 363 of the Bankruptcy Code Supports the Relief Requested Herein.

37. Section 363(b) provides, in relevant part, that “[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the

estate.” 11 U.S.C. § 363(b)(1). Although the Bankruptcy Code does not define “ordinary course of business,” courts have relied on section 363(b) of the Bankruptcy Code to authorize debtors to pay prepetition claims when a “sound business purpose” exists for making such payments. *See In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *see also In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding payment of prepetition claims is permissible if debtor shows “some business justification, other than the mere appeasement of major creditors”).

38. Here, the foregoing standard is met. Debtor requests authority to pay Taxes and Fees in the same manner that it would have paid such Taxes and Fees prior to the Petition Date. If Debtor fails to timely satisfy its obligations to Taxing Authorities, the failure to do so will result in additional but unnecessary administrative and financial burdens on Debtor. Among other things, Taxing Authorities could attempt to suspend Debtor’s operations, file liens, impose audits, and pursue other remedies for unpaid Taxes and Fees. Accordingly, in Debtor’s business judgment there is a “sound business purpose” for paying the prepetition Taxes and Fees now. Furthermore, Debtor submits it is in the best interest of its estate and creditors for the relationships between Debtor and Taxing Authorities to remain undisturbed.

NOTICE

39. Notice of this Motion has been provided to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the Southern District of Ohio; (b) Debtor’s twenty (20) largest unsecured creditors; and (c) the agent for Debtor’s primary secured lender group, Wells Fargo Bank, National Association. Debtor respectfully submits that such notice is appropriate under the circumstances and no other or further notice need be given.

REQUEST FOR WAIVER OF MEMORANDUM IN SUPPORT

40. Debtor requests that the Court deem the contents of this Motion to be sufficient for purposes of satisfying the memorandum in support of Rule 9013-1(a) of the Local Bankruptcy Rules for the Southern District of Ohio. The relief requested in the Motion raises no novel issues of law.

WHEREFORE Debtor respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: May 1, 2018

Respectfully submitted,

/s/ Thomas R. Allen

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:)	Chapter 11
)	
AcuSport Corporation,)	Case No. 18-52736
)	
Debtor.)	Honorable John E. Hoffman, Jr.

ORDER AUTHORIZING DEBTOR TO PAY
CERTAIN PREPETITION TAXES AND FEES
[RELATED TO DOC. NO. X]

Upon the motion (the “*Motion*”)¹ of AcuSport Corporation, the debtor and debtor in possession (“*Debtor*”), in this chapter 11 case (the “*Case*”), for entry of an order (this “*Order*”), pursuant to sections 105(a), 363(b), 507(a), and 541 of title 11 of the United States Code (the “*Bankruptcy Code*”), authorizing Debtor to pay certain prepetition Taxes and Fees [Docket No.

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

X]; and upon consideration of the Flanagan Declaration and the entire record of this Case; and it appearing that the Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 1334 and 157; and it appearing that the Motion is a core matter pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that due and adequate notice of the Motion has been given under the circumstances, and that no other or further notice need be given; and it appearing that the relief requested in the Motion is in the best interests of Debtor's estate, its creditors, and other parties in interest; and after due deliberation, and good and sufficient cause appearing therefore,

IT IS ORDERED that:

1. The Motion is granted as set forth herein.
2. Debtor is hereby authorized, but not directed, in its sole discretion, to pay all Taxes and Fees described in the Motion, in the ordinary course of its business, whether such Taxes and Fees accrued or were assessed prior to or subsequent to the Petition Date.
3. This Order shall be without prejudice to Debtor's rights to contest the validity of any Taxes and Fees on any grounds and shall not be construed as an implication of admission that any particular claim constitutes an allowed claim entitled to relief requested in the Motion or otherwise.
4. The authorizations in this Order for Debtor to make payments and otherwise disburse funds are subject to the terms and conditions of the Court's orders authorizing the use of cash collateral or postpetition financing entered in the Case.
5. This Court shall retain jurisdiction and power with respect to all matters arising from or related to the implementation or interpretation of this Order.

IT IS SO ORDERED.

Submitted By:

/s/ Thomas R. Allen _____

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J. Matthew Fisher (0067192)

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