

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

In re:  hhgregg, Inc., <i>et al.</i> , <sup>1</sup>  Debtors.	Chapter 11  Case No. 17-01302-11  (Joint Administration Requested)
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**DEBTORS' FIRST DAY MOTION FOR ENTRY OF AN ORDER, PURSUANT TO SECTIONS 105(a), 363(b), 507(a)(8), AND 541 OF THE BANKRUPTCY CODE, (I) AUTHORIZING THE DEBTORS TO PAY PREPETITION SALES AND USE TAXES AND (II) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS AND ELECTRONIC TRANSFER REQUESTS RELATED TO THE FOREGOING**

hhgregg, Inc. and its above-captioned affiliated debtors and debtors in possession (each, a “Debtor” and, collectively, the “Debtors”) hereby submit this motion (the “Motion”) for the entry of an order, substantially in the form attached hereto as Exhibit B, pursuant to sections 105(a), 363(b), 507(a)(8), and 541 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), (i) authorizing, but not directing, the Debtors, in their sole discretion, to remit and pay prepetition sales, use, and similar taxes (collectively, the “Taxes”) to various federal, state, county, and city taxing authorities (each, an “Authority” and, collectively, the “Authorities”) as listed in Exhibit A, and (ii) authorizing the Debtors’ banks and financial institutions (collectively, the “Banks”) to receive, process, honor, and pay all checks and electronic payment requests relating to the foregoing. The facts and circumstances supporting this Motion are set forth in the concurrently filed *Declaration of Kevin J. Kovacs in Support of*

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<sup>1</sup>The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: hhgregg, Inc. (0538); Gregg Appliances, Inc. (9508); hhg Distributing, LLC (5875). The location of the Debtors’ corporate headquarters is 4151 E. 96th Street, Indianapolis, Indiana 46240.

*the Debtors' Chapter 11 Petitions and First Day Motions* (the "First Day Declaration").<sup>2</sup> In further support of this Motion, the Debtors respectfully state as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief requested herein are sections 105(a), 363(b), 507(a)(8), and 541 of the Bankruptcy Code and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

### **FACTUAL BACKGROUND**

#### **I. General**

3. On the date hereof (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Concurrently with this Motion, the Debtors have also filed certain other motions and applications seeking certain "first day" relief.

4. The Debtors have continued in possession of their properties and have continued to operate and maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. No request has been made for the appointment of a trustee or examiner, and no official committee has been established in these chapter 11 cases.

6. Additional information about the Debtors' business and the events leading up to the Petition Date can be found in the First Day Declaration, which is incorporated herein by reference.

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<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

**II. The Sales and Use Taxes**

7. In the ordinary course of business, the Debtors incur or collect and remit an assortment of sales, use, and other similar taxes in connection with the operation of their retail stores. In many states where the Debtors operate, they are required to collect sales taxes from their customers on a per-sale basis and then remit sales taxes to the applicable Authority. Additionally, the Debtors may incur and collect use taxes when they purchase taxable products for which no sales tax was charged by their vendors. The sales and use taxes collected or incurred are typically remitted to the Authorities in the month or quarter following the month or quarter in which the related transactions occurred. In general, sales taxes accrue on a per transaction basis and are calculated based upon a statutory percentage of the sale price. The Debtors paid approximately \$113 million in sales taxes in 2016 and approximately \$7.3 million in sales tax for the period from January 1, 2017 through February 28, 2017. The Debtors also paid approximately \$375,000 in use taxes during 2016 and also approximately \$405,000 in white goods tax during 2016. The Debtors believe that there are approximately \$6.5 million of sales and use taxes that have accrued as of the Petition Date. The Taxes consist entirely of current tax obligations and are not in respect of catch-up payments. Of note, the Debtors are involved in a dispute regarding stores in Illinois with various taxing authorities regarding a recent clarification of whether sales tax should be collected in certain circumstances surrounding the installation of various appliances. Additionally, the Debtors are involved with resolving ordinary course tax questions and matters which are not fully resolved at the time the petition was filed.

**RELIEF REQUESTED**

8. By this motion, the Debtors seek authority to pay all Taxes in the ordinary course of business that were owed to the Authorities prepetition, but were not in fact paid or processed prepetition, or that were paid prepetition in an amount less than is actually owed, or that were

rejected, lost, or otherwise not received in full by any Authority.<sup>3</sup> Furthermore, to the extent that any checks, drafts, deposits, or transfers issued or initiated by the Debtors on account of prepetition Taxes have not cleared as of the Petition Date, the Debtors also seek an order authorizing the Banks to honor and process such payments.

### **BASIS FOR RELIEF**

#### **I. Request to Pay Prepetition Sales and Use Taxes in the Ordinary Course**

9. The Court should permit the Debtors, in their sole discretion, to pay outstanding Taxes. Numerous grounds justify granting the relief requested herein. *First*, the Taxes are likely entitled to priority status under section 507(a)(8) of the Bankruptcy Code and, therefore, must be paid in full under any chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(c). Thus, the Debtors submit that the payment of the Taxes as requested by this Motion will likely affect only the timing of the payments, and not the amounts that would ultimately be received by the Authorities. Further, paying the Taxes will give the Authorities no more than that to which they otherwise are entitled under a chapter 11 plan, and will save the Debtors the potential interest expense (and penalties) that might otherwise accrue if the relief requested herein is not granted.

10. *Second*, the Debtors' failure to pay the Taxes could have a material adverse impact on their ability to operate in the ordinary course of business and thus harm the Debtors' chapter 11 efforts, to the detriment of all constituents. For example, the Authorities could initiate audits of the Debtors if the Taxes are not paid on time, which would unnecessarily divert the Debtors' attention away from the chapter 11 process and result in unnecessary expenses. Moreover, if the Debtors do not pay such amounts in a timely manner, the Authorities may attempt to suspend the Debtors' operations, file liens, seek to lift the automatic stay, seek

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<sup>3</sup> The Debtors believe that no prepetition amounts that are the subject of this Motion are delinquent, except where payment was timely remitted but was not honored as of the Petition Date.

payment from the Debtors' directors and officers, or pursue other remedies that could materially harm the Debtors' estates and their efforts in connection with these chapter 11 cases.

11. *Third*, the Taxes are likely “trust fund” taxes that the Debtors are required to collect from third parties and hold in trust for the benefit of such Authorities. To the extent that the Debtors hold these sales, use, and other taxes on behalf of the Authorities, the Taxes do not constitute property of the Debtors' estates. *See Begier v. IRS*, 496 U.S. 53, 57–60 (1990) (holding that any prepetition payment of trust fund taxes is not an avoidable preference because such funds are not property of the debtor's estate); *Rosenow v. Ill. Dep't of Revenue*, 715 F.2d 277, 279–82 (7th Cir. 1983) (holding that sales tax required by state law to be collected by sellers from their customers is a “trust fund” tax and not released by bankruptcy discharge). As a consequence, the Debtors would not have an equitable interest in the Taxes, and assuming they could be identified and traced, those amounts would not constitute property of the Debtors' estates and would not be subject to the automatic stay. *See In re Marrs-Winn Co., Inc.*, 103 F.3d 584, 589 (7th Cir. 1996) (citing *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994)). Accordingly, because the Debtors have no equitable interest in trust fund taxes, payment of any such Taxes does not prejudice the rights of any of the Debtors' other creditors. See 11 U.S.C. § 541(d). The Debtors should therefore be able to pay the Taxes as they become due and payable.

12. *Fourth*, sections 105(a) and 363(b) of the Bankruptcy Code authorize the requested relief. Section 105(a) of the Bankruptcy Code allows the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code. 11 U.S.C. § 105(a). Similarly, section 363(b)(1) of the Bankruptcy Code authorizes a debtor to use property of the estate other than in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1). The Seventh Circuit's decision in *In re Kmart*

*Corp.*, 359 F.3d 866, 872-73 (7th Cir. 2004), supports the use of section 363(b)(1) to pay the Taxes. Indeed, *Kmart* stands for the proposition that section 363(b)(1) should be construed “to do the least damage possible to priorities established by contract and by other parts of the Bankruptcy Code.” *Id.* at 872.

13. *Fifth*, some states hold corporate officers personally liable for unpaid sales and use taxes in certain circumstances. *See, e.g.*, John F. Olsen, *Director & Officer Liability: Indemnification and Insurance* § 3:21 (2003) (stating “some states hold corporate officers personally liable for any sales tax and penalty owed and not paid by the corporation regardless of cause”). To the extent that any such “trust fund” taxes remain unpaid by the Debtors, their officers could be subject to lawsuits or criminal prosecution during the pendency of these chapter 11 cases. Even the possibility of any such lawsuit or criminal prosecution would most certainly distract the Debtors and their officers from their efforts in these chapter 11 cases.

14. Finally, in numerous chapter 11 cases in this and other districts, courts have authorized debtors to pay prepetition tax obligations in light of the foregoing considerations. *See, e.g., In re Conroe Lodging Assocs., LLP*, Case No. 13-11705 (Bankr. S.D. Ind. 2013); *In re Ontario Lodging Assocs., LLC*, Case No. 13-11712 (Bankr. S.D. Ind. 2013); *In re Buehler Foods, Inc.*, Case No. 05-70961 (Bankr. S.D. Ind. 2005); *In re ATA Holdings Corp.*, Case No. 04-19866 (Bankr. S.D. Ind. 2004); *In re Caesars Entertainment Operating Company, Inc.*, Case No. 15-01145 (Bankr. N.D. Ill. 2015); *In re ITR Concession Co.*, No. 14-34284 (Bankr. N.D. Ill. 2014); *In re Halcón Res. Corp.*, Case No. 16-11724 (BLS) (Bankr. D. Del. Aug. 19, 2016). The Debtors submit that the circumstances of these chapter 11 cases warrant granting similar relief, and that doing so is in the best interests of the Debtors, their estates, and creditors, and therefore should be granted.

**II. Request for Authority for Banks to Honor and Pay Checks in Connection Herewith**

15. In addition, by this Motion, the Debtors request that the Banks be authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to the prepetition obligations described herein, whether such checks were presented or fund transfer requests were submitted before or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. The Debtors represent that these checks are drawn on identifiable disbursement accounts and can be readily identified as relating directly to the authorized payment of obligations described herein. Accordingly, the Debtors believe that checks other than those relating to authorized payments will not be honored inadvertently.

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

**III. Request for a Waiver of Bankruptcy Rule 6003(b)**

17. The Debtors seek immediate authorization for the relief requested in this Motion. Pursuant to Bankruptcy Rule 6003(b), the Court cannot grant “a motion to use, sell, lease or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” within 21 days of the filing of the petition unless the relief is “necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003(b). For the reasons set forth above, the Debtors submit that the requirements of Bankruptcy Rule 6003(b) are met and that the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

**IV. Request for a Waiver of Bankruptcy Rule 6004(h)**

18. In addition, by this motion, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). For the reasons set forth above, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h).

**V. Reservation of Rights**

19. Nothing in this Motion or the proposed order attached hereto (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors or their estates; (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates with respect to the validity, priority, or amount of any claim against the Debtors or their estates; (iii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates with respect to any and all claims or causes of action against an Authority; or (iv) shall be construed as a promise to pay a claim.

**NOTICE AND NO PREVIOUS REQUEST**

20. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) the Office of the United States Attorney for the Southern District of Indiana; (iii) the Internal Revenue Service; (iv) the Debtors’ thirty (30) largest unsecured creditors; (v) the Prepetition Secured Parties; (vi) counsel to the Agent for the Debtors’ prepetition secured lenders and the lenders providing debtor in possession financing, c/o Sean M. Monahan, Choate, Hall & Stewart LLP, Two International Place, Boston, MA 02110; and (vii) the Authorities listed in Exhibit A. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule B-

9013-3(d). In light of the nature of the relief requested, the Debtors submit that no other or further notice is necessary.

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

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter the order substantially in the form annexed hereto as Exhibit B, granting the relief requested herein and such further relief as may be just and proper under the circumstances.

Respectfully submitted,

**MORGAN, LEWIS & BOCKIUS LLP**

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