

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re: : Chapter 11  
: :  
ALSET OWNERS, LLC, *et al.*,<sup>1</sup> : Case No. 09-\_\_\_\_ (\_\_\_\_)  
: (Joint Administration Requested)  
Debtors. :  
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**MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (I) FOR  
AUTHORITY TO PAY PREPETITION SALES, USE AND TRUST FUND  
TAXES AND (II) TO DIRECT THE DEBTORS' BANKS TO HONOR  
PREPETITION CHECKS FOR PAYMENT OF SUCH AMOUNTS**

Alset Owners, LLC, a Delaware limited liability company, and certain of its direct and indirect subsidiaries, the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), by and through their undersigned counsel, file this motion (the “Motion”) pursuant to sections 105(a) and 541 of title 11 of the United States Code (the “Bankruptcy Code”) for entry of an order (i) authorizing the Debtors, in their discretion, to pay prepetition amounts owing in respect of prepetition sales, use and other trust fund taxes, and (ii) directing banks and other financial institutions to honor and process all checks and wire transfers related to the payment of such amounts. In support of this Motion, the Debtors respectfully state as follows:

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<sup>1</sup> The Debtors and the last four digits of their respective tax identification numbers are: Alset Owners, LLC, a Delaware limited liability company (7520); Altes, LLC, a Delaware limited liability company (6927); Setla, LLC, a Delaware limited liability company (6752); and Checkers Michigan, LLC, a Delaware limited liability company (8016).

## **JURISDICTION AND VENUE**

1. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a) and 541 of the Bankruptcy Code.

## **BACKGROUND**

3. On the date hereof (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. On the Petition Date, the Debtors jointly filed this Motion along with other motions or applications seeking certain typical "first day" relief, including the Debtors' request to have these cases jointly administered.

4. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. No trustee or examiner has been appointed in these chapter 11 cases, and no official committee of unsecured creditors has been established to date.

6. The events leading up to the Petition Date and additional facts and circumstances supporting the relief requested herein are set forth in the Declaration of Leonard Levitsky in Support of Chapter 11 Petitions and First Day Relief (the "Levitsky Declaration"), which is fully incorporated herein by reference.<sup>2</sup>

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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 Levitsky Declaration.

## RELIEF REQUESTED

7. By this Motion, the Debtors request entry of an order pursuant to sections 105(a) and 541 of the Bankruptcy Code authorizing, but not directing, them to pay prepetition sales, use and other trust fund taxes (collectively, the “Trust Fund Taxes”) to various federal, state and local taxing authorities (each a “Taxing Authority,” and collectively, the “Taxing Authorities”) in the ordinary course of the Debtors’ businesses, regardless of whether the debts were incurred prior to or following the Petition Date.<sup>3</sup> Such relief will be without prejudice to the Debtors’ right to contest the amounts of any Trust Fund Taxes on any grounds. Further, in the event that any Taxing Authority, after the Petition Date, attempts to cash a check issued by the Debtors before the Petition Date in satisfaction of any of the Trust Fund Taxes, the Debtors seek entry of an order (a) directing the Debtors’ banks to honor such checks and/or fund transfer requests and (b) authorizing, but not directing, the Debtors to issue replacement checks, submit replacement fund transfer requests or provide other means of payment to the Taxing Authorities to the extent necessary to pay all outstanding prepetition Trust Fund Taxes.

8. To implement the relief requested herein, the Debtors further request that the order approving this Motion authorize banks and other financial institutions to honor and process transfers, deposits, or checks issued by any of the Debtors on account of any prepetition Trust Fund Taxes that have not cleared as of the Petition Date and to rely on the representations of the Debtors as to which checks are issued and authorized to be paid in accordance with this Motion without any duty of further inquiry and without liability for following the Debtors’ instructions.

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<sup>3</sup> Simultaneously herewith, the Debtors have filed another motion which seeks the authority for the Debtors to pay employee withholding taxes incurred prepetition. *See* Debtors’ Motion to Pay Employee Wages, Benefits and Related Relief.

## **BASIS FOR RELIEF REQUESTED**

9. The Debtors incur Trust Fund Taxes in the ordinary course of their business. Prior to the Petition Date, the Debtors paid these obligations in a timely fashion in accordance with and subject to applicable grace periods, if any. For example, sales and use taxes are typically calculated based upon a statutorily mandated percentage of the price at which food at the Debtors' restaurants is sold or is consumed in the operation of a business, or on a "per line" or "per account" basis. For the most part, the Debtors pay the Trust Fund Taxes, including the sales and use taxes in arrears. The Debtors prepare and file sales and use tax returns for obligations incurred in connection with their business. The Debtors estimate that the Trust Fund Taxes are not more than \$275,000.

10. The Debtors currently owe Trust Fund Taxes to the states of Missouri, Illinois, Arkansas, Ohio, and Michigan. "Trust fund" taxes or fees are taxes or fees that are collected from third parties and held in trust for payment to the taxing or regulatory authorities or other trust beneficiaries. *See, e.g., In re Shank*, 792 F.2d 829, 803 (9th Cir. 1986) (sales tax required by state law to be collected by sellers from their customers is "trust fund" tax); *DeChiaro v. New York State Tax Comm'n*, 760 F.2d 432, 433-34 (2d. Cir. 1985) (same); *see also In re Columbia Gas Sys. Inc.*, 997 F.2d 1039 (3d Cir. 1993) (refunds required to be collected by federal law created trust fund that was not property of the debtor's estate); *In re Taylor Tobacco Enters., Inc.*, 106 B.R. 441, 446 (E.D.N.C. 1989) (holding that sales taxes are trust fund taxes).

11. To the extent these "trust fund" taxes, fees or other amounts are collected, they are not property of the estate under section 541(d) of the Bankruptcy Code. *Begier v. IRS*, 496 U.S. 53, 67 (1990) (trust fund taxes are not property of the estate); *In re Al Copeland Enters., Inc.*, 133 B.R. 837 (Bankr. W.D. Tex. 1991) (debtor obligated to pay Texas sales taxes

plus interest, as such taxes were “trust fund” taxes), *aff’d*, 991 F.2d 233 (5th Cir. 1993); *In re American Int’l Airways, Inc.*, 70 B.R. 102, 103 (Bankr. E.D. Pa. 1987) (funds held in trust for federal excise and withholding taxes are not property of debtor’s estate and, therefore, not available for distribution to creditors); *see also* 11 U.S.C. § 541(d) (limiting property of the estate to property in which a debtor has legal title). Accordingly, because the Debtors have no equitable interest in the Trust Fund Taxes, payment of such Trust Fund Taxes does not prejudice the rights of any of the Debtors’ other creditors, and the Debtors should be able to pay any Trust Fund Taxes as they become due and payable.

12. In many states which have laws providing that the Trust Fund Taxes constitute “trust fund” taxes, officers and directors of the collecting entity may be held personally liable in certain circumstances for the non-payment of such funds to the Taxing Authorities. To the extent any accrued Trust Fund Taxes of the Debtors were unpaid in such jurisdictions as of the Petition Date, the Debtors’ officers could be subject to lawsuits during the pendency of these cases. Such potential lawsuits would prove extremely distracting for the Debtors, for the named officers whose attention to the Debtors’ bankruptcy cases is required, and for this Court, which might be asked to entertain various motions seeking injunctions of potential state court actions. It is, therefore, in the best interests of the Debtors’ estates and consistent with the goals of chapter 11 of the Bankruptcy Code that the relief requested herein be granted, thereby eliminating the possibility of this potential distraction.

13. Moreover, the Debtors’ failure to pay the Trust Fund Taxes likely would cause the Taxing Authorities to take precipitous action, including initiating state audits, filing a multitude of liens and creating significant administrative problems. Prompt and regular payment of the Trust Fund Taxes will avoid this unnecessary governmental action.

14. Even if some of the Trust Fund Taxes ordinarily would not be considered “trust fund” taxes in a particular jurisdiction, payment of such taxes should nevertheless be authorized because some Taxing Authorities may audit the Debtors if such taxes are not timely paid. Such audits would needlessly divert the Debtors’ attention from their reorganization efforts. In addition, like unpaid property taxes, some Taxing Authorities also may seek to impose liens on the Debtors’ assets on account of unpaid “trust fund” taxes, which liens would require time, effort and expense for the Debtors to challenge and remove. An improper lien or the failure to pay Trust Fund Taxes might also affect the Debtors’ good standing in a particular state, potentially affecting the Debtors’ ability to continue operating in the ordinary course. Timely payment of the Trust Fund Taxes is necessary to avoid such distractions and is thus in the best interests of the Debtors and their estates.

15. Accordingly, the Court should authorize the Debtors to make the tax or fee payments to the Taxing Authorities pursuant to section 105(a) of the Bankruptcy Code which provides that “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Under section 105(a), the Court “can permit pre-plan payment of a prepetition obligation when essential to the continued operation of the debtor.” *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999).

16. Moreover, many of the Trust Fund Taxes may be entitled to priority status under section 507(a)(8) of the Bankruptcy Code. Assuming the Debtors are successful in confirming a chapter 11 plan, the Debtors’ payment of such Trust Fund Taxes in the ordinary course of business likely will affect only the timing of the payments and not the amounts the Taxing Authorities otherwise would be entitled to receive. *See* 11 U.S.C. § 1129(a)(9)(c).

Because other creditors and parties in interest will not be prejudiced if this Court grants the relief sought herein, the Debtors respectfully submit that this Court should authorize them to pay undisputed prepetition Trust Fund Taxes.

17. Under Rule 6003 of the Federal Rules of Bankruptcy Procedure (“Rule 6003”), any motion seeking to use property of the estate pursuant to section 363 of the Bankruptcy Code, or seeking to satisfy prepetition claim amounts within 20 days of the Petition Date, requires that the debtor demonstrate that such relief would prevent “immediate and irreparable harm.” Rule 6003 is relevant only to the extent that the Trust Fund Taxes constitute property of the Debtors’ estates. As set forth above, the Debtors do not believe that the Trust Fund Taxes are property of their estates pursuant to section 541(d) of the Bankruptcy Code.

18. To the extent that Rule 6003 is applicable to the Trust Fund Taxes, the Debtors believe that, among other things, their successful reorganization will require good standing within the states in which they do business and a complete devotion of effort by their officers and directors to these cases. As described more fully herein and in the Levitsky Declaration, failure to pay Trust Fund Taxes in the first 20 days of these cases may result in Taxing Authorities taking action against the Debtors and cause possible administrative and legal difficulties for the Debtors. Further, failure to pay “trust fund taxes” in the first 20 days of these cases may result in the officers of the Debtors being held personally liable in certain circumstances. The possible administrative and legal action, and claims against the officers of the Debtors would divert critical resources of the Debtors away from the administration of the estates and cause immediate and irreparable harm to the Debtors and their estates.

19. For the foregoing reasons, to the extent necessary, the Debtors submit that they have satisfied the requirements of Rule 6003 and should be authorized, at their discretion, to immediately pay the Trust Fund Taxes.

20. In numerous chapter 11 cases, bankruptcy courts in this District have exercised their equitable powers under section 105(a) of the Bankruptcy Code to authorize debtors to pay their prepetition tax obligations. *See, e.g., In re Midway Games, Inc.*, Case No. 09-10465 (Bankr. D. Del. Feb. 13, 2009) (KG); *In re Hilex Poly Co. LLC*, Case No. 08-10890 (Bankr. D. Del. May 6, 2008) (KJC); *In re Linens Holdings Co.*, Case No. 08-10832 (CSS) (Bankr. D. Del. May 2, 2008); *In re Sharper Image Corp.*, Case No. 08-10322 (Bankr. D. Del. Feb. 20, 2008) (KG); *In re Lillian Vernon Corp.*, Case No. 08-10323 (Bankr. D. Del. Feb. 21, 2008) (BLS). The Debtors submit that the present circumstances warrant similar relief in these chapter 11 cases.

#### **RESERVATION OF RIGHTS**

21. Nothing in this Motion or any order entered with respect hereto should be construed as affecting the Debtors' ability to contest the amount or basis of any Trust Fund Taxes that may be due to the various Taxing Authorities, or requiring the Debtors to pay any of the applicable Trust Fund Taxes, and the Debtors expressly reserve all of their rights and defenses with respect thereto.



## **NOTICE**

22. Notice of this Motion has been provided to: (a) the Office of the United States Trustee; (b) the United States Securities and Exchange Commission; (c) the Office of the United States Attorney for the District of Delaware; (d) the Internal Revenue Service; (e) the Debtors' thirty (30) largest unsecured creditors on a consolidated basis; (f) Textron Financial Corporation; (g) counsel to Checkers Drive-In Restaurants, Inc. and (h) the Taxing Authorities. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary or required.

## **NO PRIOR REQUEST**

23. The Debtors have not previously sought the relief requested herein from this or any other Court.

WHEREFORE, the Debtors respectfully request that the Court enter an order, in substantially the form attached hereto, (i) authorizing the Debtors, in their discretion, to pay the Trust Fund Taxes to the Taxing Authorities in the ordinary course of the Debtors' businesses regardless of whether the Trust Fund Taxes were incurred prior to or following the Petition Date, (ii) directing the Debtors' banks and other financial institutions to honor and process all checks and wire transfers involving the payment of such Trust Fund Taxes, and (iii) granting such other and further relief as the Court deems just and proper.

Dated: June 5, 2009

**BLANK ROME LLP**

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PROPOSED ATTORNEYS FOR  
DEBTORS AND DEBTORS IN  
POSSESSION

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re: : Chapter 11  
: :  
ALSET OWNERS, LLC, *et al.*,<sup>1</sup> : Case No. 09-\_\_\_\_\_ (\_\_\_\_)  
: (Joint Administration Requested)  
Debtors. :  
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**ORDER (I) AUTHORIZING, BUT NOT DIRECTING, THE DEBTORS TO PAY  
PREPETITION SALES, USE AND TRUST FUND TAXES AND  
(II) DIRECTING THE DEBTORS' BANKS TO HONOR PREPETITION CHECKS  
AND OTHER FUND REQUESTS FOR PAYMENT OF SUCH AMOUNTS**

Upon the motion (the "Motion")<sup>2</sup> of the above-captioned debtors and debtors in possession for entry of an order pursuant to sections 105(a) and 541 of the Bankruptcy Code (i) authorizing the Debtors, in their discretion, to pay prepetition sales, use, and other trust fund taxes (collectively, the "Trust Fund Taxes") to various state and local taxing authorities (each a "Taxing Authority," and collectively, the "Taxing Authorities") in the ordinary course of the Debtors' business regardless of whether the debts were incurred prior to or following the Petition Date, and (ii) directing the Debtors' banks and other financial institutions to honor and process all checks and wire transfers involving the payment of such amounts; and upon consideration of the Levitsky Declaration; and the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and (c) notice of the Motion was due and proper under the circumstances and that no other or further notice need be provided; and it appearing that the

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<sup>2</sup> Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Motion.

relief requested in the Motion is in the best interests of the Debtors' estates, their creditors and other parties-in-interest and necessary to avoid immediate and irreparable harm to the Debtors' estates; and after due deliberation, and good and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is granted.
2. The Debtors are hereby authorized, in their discretion, to pay to the Taxing Authorities the Trust Fund Taxes collected by the Debtors from their customers, or incurred in the ordinary course of business, in an amount not to exceed \$275,000.
3. All applicable banks and other financial institutions are hereby directed to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts to be paid by the Debtors under this Order whether presented prior to or after the Petition Date. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order without any duty of further inquiry and without liability for following the Debtors' instructions.
4. Nothing in the Motion or this Order, nor the Debtors' payment of claims pursuant to the Order, shall be deemed or construed: (a) as an admission as to the validity of any claim against the Debtors; (b) as an admission that a claim is a "trust fund" tax; (c) as a waiver of the Debtors' right to dispute any claim; (d) to waive or release any right, claim, defense or counterclaim of the Debtors or their estates, or to estop the Debtors or their estates from asserting any right, claim, defense or counterclaim; or (e) as an admission that any obligation is entitled to administrative priority.
5. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

6. The Debtors are hereby authorized and empowered to take all actions necessary to implement the relief granted in this Order.

7. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: June \_\_, 2009

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United States Bankruptcy Judge