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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
	§	Case No. 04-35113-HDH
CEI Roofing, Inc., et al.	§	(Jointly Administered)
	§	
	§	Hearing Date and Time: May 20, 2004
Debtors.	§	@ 10:00 a.m.

**EMERGENCY MOTION FOR AUTHORIZATION
TO PAY PREPETITION SALES AND USE TAXES PURSUANT
TO SECTIONS 105(a) AND 507(a)(8) OF THE BANKRUPTCY CODE**

COME NOW, CEI Roofing, Inc. and its affiliated debtors and debtors in possession (collectively, the “Debtors”), and file this Emergency Motion for Authorization to Pay Prepetition Sales and Use Taxes Pursuant to Sections 105(a) and 507(a)(8) of the Bankruptcy Code (the “Motion”). In support of the Motion, the Debtors respectfully show the Court the following:

I. JURISDICTION

1. This Court has jurisdiction to consider the Motion creating this contested matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and

1409. The relief requested in the Motion is authorized under Sections 105(a) and 507(a)(8) of the United States Bankruptcy Code (the “Code”).

II. BACKGROUND

2. General Roofing Services, Inc., (“GRS”) the parent corporation, is a Florida corporation founded in 1998 and has become the nation’s leading comprehensive provider of commercial roofing solutions in the United States. GRS has a national presence through twenty-eight operating subsidiaries and thirty-six operating locations in twenty-three states. GRS’s services include: (i) new roof construction; (ii) replacement or restoration of existing roofing systems; and (iii) emergency and proactive maintenance services. GRS provides these services to commercial multi-property owners and managers in a variety of industries. The service segment of the business provides on call repairs as well as proactive repairs, proactive inspection and maintenance. The construction segment provides roofing systems for new buildings, replacement of significantly damaged roofs, and restoration of existing, mature roofs.

3. The facts and circumstances supporting this Motion are further set forth in the Affidavit of Gerard Mozian, Chief Financial Officer of GRS, in support of certain first day motions (the “Affidavit”) filed contemporaneously herewith.

III. ANALYSIS

4. In connection with the normal operation of their business, the Debtors collect sales and use taxes (the “Sales and Use Taxes”) from their customers and other third parties on behalf of state and local taxing authorities. Such taxes are calculated based upon a statutorily mandated percentage of the price at which products and services are sold and are remitted for payment to the appropriate taxing authorities (the “Taxing Authorities”) as they become due and payable.

5. On a periodic basis, typically monthly, the Debtors pay the Taxing Authorities all funds collected as Sales and Use Taxes. The funds are drawn by check or by means of an electronic funds transfer. Accordingly, prior to submitting payment to the appropriate Taxing Authority for a given period, the Debtors may hold a significant balance of collected, but unremitted, Sales and Use Taxes. As of the Petition Date, the Debtors do not believe that they owe any Sales and Use Taxes related to prepetition sales. If the Debtors do owe any Sales and Use Taxes related to prepetition sales, then such amounts are *de minimis*. The Debtors request authority to pay any Sales and Use Taxes that accrued prior to the Petition Date without the need for further Court approval.

6. Sales and Use Taxes are afforded priority status under Section 507(a)(8) of the Bankruptcy Code and, therefore, must be paid in full before any general unsecured obligations may be satisfied. *See* 11 U.S.C. §§ 507(a)(8) and 1129(a)(9)(C). The Debtors submit that sufficient assets exist to pay all prepetition Sales and Use Taxes in full. Accordingly, the proposed relief will only affect the timing of the payment of prepetition Sales and Use Taxes and will not prejudice the rights of any other creditors or parties in interest.

7. Moreover, courts have directed that amounts collected as sales and use taxes must be held in trust for the benefit of taxing authorities; accordingly, such funds may not constitute property of the Debtors' estates. *See, e.g., Begier v. Internal Revenue Service*, 496 U.S. 53 (1990); *In re Megafoods Stores, Inc.*, 163 F.3d 1063, 1067-68 (9th Cir. 1998); *In re Al Copeland Enterprises, Inc.*, 991 F.2d 233, 237 (5th Cir. 1993) (debtor was obligated to pay sales taxes plus interest because they constituted "trust fund" taxes); *In re Equalnet Communications Corp.*, 258 B.R. 368, 370 (Bankr. S.D. Tex. 2000) ("[C]ertain pre-petition tax claims, such as sales taxes, could be trust fund claims."); 5 COLLIER ON BANKRUPTCY, ¶ 541.11[4], at 541-67 (15th Ed.

2000) (Bankruptcy Code’s “trust fund” tax provisions, not “excise” tax provisions, govern priority and dischargeability of creditor claims for sales taxes required by state law to be collected by sellers from their customers); *DeChiaro v. New York State Tax Commission*, 760 F.2d 432 (2d Cir. 1985) (same); *see also United States v. Energy Resources Co.*, 110 S. Ct. 2139 (1990) (upholding application of Section 105 to find that if necessary for the success of a plan, the court can order the IRS to allow payment of taxes to trust fund portion first); *In re Shank*, 792 F.2d 829 (9th Cir. 1986).

8. Even if the Court finds that the Sales and Use Taxes are not “trust fund” taxes, the payments to the Taxing Authorities should be authorized pursuant to Section 105 of the Bankruptcy Code. Section 105(a) provides that “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Thus, Section 105(a) essentially codifies the bankruptcy court’s inherent equitable powers.

9. Courts often use their equitable powers to authorize payment of a debtor’s prepetition obligations where, as here, such payment is necessary to effectuate the “paramount purpose” of Chapter 11 reorganization—which is to prevent the debtor from going into liquidation and to preserve the debtor’s potential for rehabilitation. Without question, the payment of the Sales and Use Taxes to the Taxing Authorities is necessary. It is in the best interest of the Debtors’ estates that the Sales and Use Taxes be timely paid so as to avoid administrative difficulties. Withholding the payment of the Sales and Use Taxes would likely cause the Taxing Authorities to take precipitous action, including a marked increase in state audits and lien filings. Prompt and regular payment of the Sales and Use Taxes will avoid this unnecessary governmental action.

10. Additionally, the Debtors' officers and directors may be held personally liable, either civilly or criminally, under various state laws that define them as fiduciaries for the Taxing Authorities with respect to collecting the Sales and Use Taxes. A prosecution of these individuals for failing to pay the Sales and Use Taxes to the Taxing Authorities would seriously undermine the Debtors' ability to reorganize.

11. In sum, the payment of the Debtors' prepetition Sales and Use Taxes in full and on time is necessary for the conservation of the Debtors' estates. A delay in the payment of the Sales and Use Taxes could cause certain governmental authorities to take aggressive action with respect to the Debtors, such as filing liens or seeking to modify the automatic stay. Responding to these actions would add unnecessary administrative expenses to the estates and needlessly distract the Debtors from their primary focus of reorganizing the Debtors' business and finances.

IV. CONCLUSION

WHEREFORE, the Debtors respectfully request the entry of an Order granting the Motion to authorize the payment of the Sales and Use Taxes as they become due in the ordinary course of business and granting the Debtors such further relief as is just and proper.

Dated this 7th day of May, 2004.

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By: /s/Keith Miles Aurzada

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the parties listed on the attached service list via regular United States first class mail on the 7th day of May, 2004.

 /s/Keith Miles Aurzada
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