

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re:	)	Chapter 11
	)	
Oberweis Dairy, Inc., <i>et al.</i> , <sup>1</sup>	)	Case No. 24-05385
	)	(Joint Administration Requested)
Debtors.	)	
	)	Honorable David D. Cleary
	)	
	)	<b>Hearing Date: Thursday, April 18, 2024</b>
	)	<b>Hearing Time: 9:00 a.m.</b>

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on Thursday, April 18, 2024 at 9:00 a.m. CDT we will appear before the Honorable David D. Cleary, or any judge sitting in that judge’s place, **either** in courtroom 644 of the Dirksen Federal Building, 219 S. Dearborn Street, Chicago, Illinois, 60604 **or** electronically as described below, and present the **MOTION OF DEBTORS FOR AUTHORITY TO PAY PREPETITION SALES, USE, TRUST FUND, AND SIMILAR TAXES AND RELATED OBLIGATIONS**, a copy of which is attached.

**Important: Only parties and their counsel may appear for presentment of the motion electronically using Zoom for Government. All others must appear in person.**

**To appear by Zoom using the internet**, go to this link: [https:// www.zoomgov.com/](https://www.zoomgov.com/). The enter the meeting ID and passcode.

**To appear by Zoom using a telephone**, call Zoom for Government at 1-669-254-5252 or 1-646-828-7666. Then enter the meeting ID and passcode.

**Meeting ID and passcode.** The meeting ID for this hearing is **161 122 6457**, and the passcode is **Cleary644**. The meeting ID and passcode can also be found on the judge’s page on the court’s web site.

**If you object to this motion** and want it called on the presentment date above, you must file a Notice of Objection no later than two (2) business days before that date. If a Notice of Objection is timely filed, the motion will be called on the presentment date. If no Notice of Objection is timely filed, the court may grant the motion in advance without calling it.

By: /s/Adam P. Silverman  
Proposed Counsel for the Debtors

<sup>1</sup> The Debtors in this case, and the last four digits of their respective federal employer identification numbers, are Oberweis Dairy, Inc. (‘7516); The Oberweis Group, Inc. (‘1378); North Aurora Ice Cream, LLC (‘8506); TOGI RE I, LLC (‘5952); Third Millennium Real Estate L.L.C. (‘1589); and TOGI Brands, LLC (‘7072).

HOWARD L. ADELMAN, ESQ. (ARDC# 0015458)  
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**Proposed Counsel for the Debtors and Debtors in Possession**

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that he served a copy of this notice and the attached motion on each entity shown on the attached list at the address shown and by the method indicated on the list on April 15, 2024, at or before 11:59 p.m.

By: /s/Adam P. Silverman  
Adam P. Silverman

**SERVICE LIST**

**VIA CM/ECF**

Patrick S. Layng  
Office of the U.S. Trustee, Region 11

Eric Rein  
Counsel for CIBC Bank USA

***VIA OVERNIGHT DELIVERY***

***20 Largest Creditors***

1836 Farms  
1149 S. Virginia Street  
Terrell, TX 75160

Labrynth Ventures, LLC  
Attn: Patrick McCoy  
6942 N Keystone  
Lincolnwood, IL 60712

Altium Packaging  
2500 Windy Ridge Pkwy,  
Suite 1400  
Atlanta, GA 30339

Nussbaum Transportation Services  
19336 N. 1425 E Road  
Hudson, IL 61748

Associated Electrical Contractors, LLC  
319 Lamb Road  
Woodstock, IL 60098

Pearl Valley Eggs  
968 S. Kent Rd.  
Pearl City, IL 61062

Cook County Treasurer  
118 N. Clark Street  
Unit 112  
Chicago, IL 60602

Penske Truck Leasing Co. L.P.  
13690 Lakefront Drive  
Earth City, MO 63045

Ecolab  
26252 Network Place  
Chicago, IL 60673

Plymouth Foam Inc.  
1800 Sunset Drive  
Plymouth, WI 53073

Greco & Sons  
1550 Hecht Road  
Bartlett, IL 60103

QCS Purchasing Cooperative  
901 Warrenville Road Unit 405  
Lisle, IL 60532

Hiretech  
200 Westlake Park Blvd #501  
Houston, TX 77079

RSM McGladrey  
5155 Paysphere Circle  
Chicago, IL 60674

International Food Products  
29205 Network Place  
Chicago, IL 60602

Senscient Flavors  
2800 W. Higgins Rd.  
Hoffman Estates, IL 60169

Katies Pizza And Pasta  
10650 Gateway Blvd  
St Louis, MO 63132

St Charles Trading  
1400 Madeline Lane  
Elgin, IL 60124

Stanpac  
C/O Adriana Lopez  
801 Mangrum Street  
Brenham, TX 77833

Tocco-Greco  
3850 Mueller Rd.  
Suite 200  
St Charles, MO 63301

Trico Mechanical Inc.  
1980 Rt 30 Suite 11  
Sugar Grove, IL 60554

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
Oberweis Dairy, Inc., <i>et al.</i> , <sup>1</sup>	)	Case No. 24-05385
	)	(Joint Administration Requested)
Debtors.	)	
	)	Honorable David D. Cleary
	)	
	)	<b>Hearing Date: Thursday, April 18, 2024</b>
	)	<b>Hearing Time: 9:00 a.m.</b>

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**MOTION OF DEBTORS FOR AUTHORITY TO PAY PREPETITION SALES, USE, TRUST FUND, AND SIMILAR TAXES AND RELATED OBLIGATIONS**

NOW COME Oberweis Dairy, Inc., The Oberweis Group, Inc., TOGI Brands, LLC, North Aurora Ice Cream, LLC, Third Millennium Real Estate L.L.C., and Togi RE I, LLC, debtors and debtors in possession (the “**Debtors**”), by and through their undersigned proposed counsel and, pursuant to sections 105, 363, 507, 1107, and 1108 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the “**Bankruptcy Code**”), move this Court for entry of an order authorizing, but not directing, them to pay prepetition sales, use, trust fund, and similar taxes and related obligations (the “**Motion**”). In support of the Motion, the Debtors respectfully state as follows:

**I. BACKGROUND**

1. On April 9, 2024 (the “**Petition Date**”), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have remained in possession of their assets and have continued to operate their businesses under

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<sup>1</sup> The Debtors in this case, and the last four digits of their respective federal employer identification numbers, are Oberweis Dairy, Inc. (‘7516); The Oberweis Group, Inc. (‘1378); North Aurora Ice Cream, LLC (‘8506); TOGI RE I, LLC (‘5952); Third Millennium Real Estate L.L.C. (‘1589); and TOGI Brands, LLC (‘7072).

the jurisdiction of this court as debtors in possession in accordance with 11 U.S.C. §§ 1107 and 1108.

2. Neither a trustee nor a committee of unsecured creditors has been appointed in the Debtors' Chapter 11 Cases (the "**Chapter 11 Cases**"). Concurrently with the filing of this Motion, the Debtors have filed motions seeking joint administration of the Chapter 11 Cases; anticipating no objections to these motions, and in the interest of efficiency, this Motion has only been filed in the above-captioned proposed lead case, that of ODI.

3. Collectively, the Debtors operate a business (the "**ODI Business**") that manufactures, packages, and distributes milk, ice cream, and other dairy and non-dairy foods (collectively, the "**ODI Products**"), and sells the ODI Products through both retail and wholesale channels, primarily in the Midwest. The retail side of the ODI Business comprises three distinct segments: 40 "Oberweis Dairy" branded retail stores that serve ice cream products and other foods; direct-to-doorstep home delivery; and sales to consumers in national grocery stores and regional supermarkets. Further information about the nature of the ODI Business and the factual background relating to the commencement of the Chapter 11 Cases is set forth in the *Declaration of Adam Kraber in Support of Chapter 11 Petitions and First-Day Motions* filed on the Petition Date and incorporated herein by reference.

4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. Venue lies properly in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (M), and (O). The statutory predicates for the relief requested herein are sections 105, 363, 507, 1107, and 1108 of the Bankruptcy Code.

**II. RELIEF REQUESTED**

5. By this Motion, the Debtors seek an order authorizing, but not directing, the Debtors to pay prepetition sales, use, trust fund, and similar taxes and related obligations (collectively, the “**Taxes**”) owed to the appropriate federal, state, and local taxing or related authorities (each a “**Taxing Authority**,” and collectively, the “**Taxing Authorities**”) consistent with and in the ordinary course of the Debtors’ business, on an unaccelerated basis, as such payments become due, and to the extent adequate funds are available to make such payments.

6. In the ordinary course of their business, the Debtors collect various Taxes, from their customers, independent contractors, and other third parties. Sales and use taxes accrue as the Debtors sell, purchase, and use goods and are calculated in accordance with statutorily mandated formulas. Personal Property taxes are assessed in Indiana, Michigan, and Missouri as a result of the Debtors ownership and use of various equipment, machinery, and other tangible assets.

7. To the best of their knowledge, the Debtors were current on all their tax obligations as of the Petition Date. By this Motion, the Debtors seek to pay the Taxes summarized in the following chart:

<b>Tax Obligations Coming Due by April 30</b>	<b>Dollar Amount (Approx.)</b>
Sales	\$260,000.00
Personal Property	\$10,000.00
Real Estate	\$181,933.00
<b>Total</b>	<b>\$451,933.00</b>

**III. BASIS FOR RELIEF REQUESTED**

8. A large portion, if not all, of the Taxes, may constitute “trust fund” taxes, which are required to be collected from third parties and held in trust for payment to Taxing Authorities.

Because such funds are held in trust for the Taxing Authority, the Debtors hold only legal title, and not a sufficient equitable interest to make the funds property of their bankruptcy estates. 11 U.S.C. § 541(d); *see also In re Markos Gurnee P'ship*, 163 B.R. 124, 130 (Bankr. N.D. Ill. 1993) (holding that a collecting party, such as an employer, is seen as holding collected taxes, on behalf of the actual taxpayer, for the benefit of the taxing body as trustee); *Begier v. I.R.S.*, 496 U.S. 53, 59-67 (1990) (holding that debtor's withheld federal income and FICA taxes and state excise taxes were not property of the debtor, and therefore could not be recovered as preferences when prepaid prior to bankruptcy petition). No court authority is needed to pay the Taxes because the Debtors never held a sufficient equitable interest to make the funds property of the bankruptcy estates.

9. Even if some of the Taxes are property of the Debtors' estates, the corresponding claims of Taxing Authorities are, at least in large part, priority claims under section 507(a)(8) of the Bankruptcy Code. Because Taxing Authorities must already be paid ahead of general unsecured creditors, *see generally* 11 U.S.C. § 507, their payment will not rearrange priorities among creditors. Instead, by granting this Motion, the Court will merely be permitting the Taxing Authorities to be paid somewhat sooner than they would otherwise. And the Debtors submit that ample reason exists to do so.

10. By paying the Taxes as they come due postpetition for amounts collected prepetition, the Debtors will avoid unnecessary fees, interest, and penalties that would otherwise dilute the recovery of creditors in the Chapter 11 Cases – or even preclude such recovery, given that certain tax-related penalties are entitled to priority, *see* 11 U.S.C. § 507(a)(8)(G). Additionally, many state statutes hold officers and directors of collecting entities personally liable for sales, use, trust fund, and similar taxes. If the Taxes are not paid, the Debtors' officers



and board members may personally be subject to actions to collect the Taxes, distracting them from their duties at a time when they are instrumental in maximizing the value of the Debtors' estates.

11. The relief sought herein is authorized by several different sections of the Bankruptcy Code. One such provision is section 105(a) of the Bankruptcy Code, which states 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). Additionally, section 363(b) of the Bankruptcy Code permits a bankruptcy court, after notice and a hearing, to allow the "use, sale, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). Courts generally grant such a motion if it is supported by "sound business reasons." *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991).

12. Likewise, payment of the Taxes is permissible under sections 1107(a) and 1108 of the Bankruptcy Code, which vest debtors in possession with authority to continue operating their businesses. Sometimes this authority and the concomitant duty to maximize estate value may be fulfilled only through the pre-plan payment of certain unsecured claims. *In re Commercial Mortg. & Fin., Co.*, 414 B.R. 389, 396 (Bankr. N.D. Ill. 2009) (noting that a debtor in possession "has the discretionary authority to exercise [its] business judgment in operating the debtor's business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation").

13. Paying the Taxes will benefit the Debtors' estates and creditors, without harming any party or subverting the objectives of the Bankruptcy Code. Accordingly, it is appropriate for the Court to allow the Debtors to do so.

**IV. SATISFACTION OF BANKRUPTCY RULE 6003**

14. Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) empowers a court to grant relief in the first 21 days after the filing of a bankruptcy petition “to the extent that relief is necessary to avoid immediate and irreparable harm.” As discussed in more detail above, failure to pay the Taxes could result in unnecessary fees, interest, and penalties which are both immediate (in that they accrue immediately upon a missed payment) and irreparable (in that they are unlikely to be subsequently reversed). Therefore, the Debtors submit that the requirements of Bankruptcy Rule 6003 are satisfied.

**V. WAIVER OF BANKRUPTCY RULE 6004(a) AND (h)**

15. Because the Debtors, their estates, and creditors will suffer immediate and irreparable harm if the Taxes are not timely paid, the Debtors request that the notice provisions of Bankruptcy Rule 6004(a) and the 14-day stay under Bankruptcy Rule 6004(h) be excused, to the extent they are applicable to the relief sought herein.

**VI. NOTICE**

16. Notice of the filing of this Motion and the hearing scheduled therefor has been provided by CM/ECF, overnight delivery, and/or facsimile to (a) the Office of the United States Trustee for Region 11; (b) each of the Debtors’ 20 largest unsecured creditors pursuant to Bankruptcy Rule 1007(d); (c) counsel to the Debtors’ senior secured lender, CIBC Bank USA; and (d) all other parties who have requested service of all filings via the Court’s CM/ECF system. In light of the nature of the relief requested, the Debtors submit that no other or further notice is required.

WHEREFORE, Oberweis Dairy, Inc., The Oberweis Group, Inc., TOGI Brands, LLC, North Aurora Ice Cream, LLC, Third Millennium Real Estate L.L.C., and TOGI RE I, LLC,

debtors and debtors in possession herein, respectfully request the entry of an order in accordance with the foregoing recommendations in the form filed herewith and made a part hereof without further notice, and for such other and further relief as is just.

Respectfully Submitted:

OBERWEIS DAIRY, INC., *et al.*,

By: /s/Adam P. Silverman

Proposed Counsel for the Debtors

HOWARD L. ADELMAN, ESQ. (ARDC# 0015458)  
ADAM P. SILVERMAN, ESQ. (ARDC #6256676)  
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**Proposed Counsel for the Debtors and Debtors in Possession**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
Eastern Division

In Re:	)	Case Number: 24-05385
	)	
Oberweis Dairy, Inc., et al.,	)	Chapter: 11
	)	Honorable David D. Cleary
	)	
Debtor(s)	)	

**ORDER GRANTING MOTION OF DEBTORS FOR AUTHORITY  
TO PAY PREPETITION SALES, USE, TRUST FUND, AND  
OTHER TAXES AND RELATED OBLIGATIONS**

THIS CAUSE coming to be heard on the motion of Oberweis Dairy, Inc.; The Oberweis Group, Inc.; North Aurora Ice Cream, LLC; TOGI RE I, LLC; Third Millennium Real Estate L.L.C.; and TOGI Brands, LLC (the “Debtors”), pursuant to sections 105, 363, 507, 1107 and 1108 of the United States Bankruptcy Code, for an order authorizing, but not directing, the Debtors to pay prepetition sales, use, trust fund, franchise, and other similar taxes and related obligations (the “Motion”); the Court having reviewed the Motion and having determined that cause exists to grant the relief requested therein; and the Court having jurisdiction and the subject matter of the Motion;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Motion is granted to the extent provided herein.
2. The Debtors are authorized, but not directed, to pay prepetition sales, use, trust fund, and other similar taxes and related obligations owed to the appropriate federal, state, and local taxing or related authorities consistent with and in the ordinary course of the Debtors’ business, on an unaccelerated basis, as such payments become due, and to the extent adequate funds are available to make such payments.
3. Due to the immediate and irreparable harm that could occur if the Motion were not granted, the requirements set forth in Fed. R. Bankr. P. 6003(b) are satisfied with respect to the relief granted herein.
4. Notwithstanding Fed. R. Bankr. P. 6004(h), this order shall be effective and enforceable immediately upon its entry.
5. The Debtors are authorized to take all steps necessary to carry out this order.

Enter:

Dated:

United States Bankruptcy Judge

**Prepared by:**

HOWARD L. ADELMAN, ESQ. (ARDC# 0015458)

Form G5 (20240101\_bko)

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