IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In Re:	)	
	)	
JEFFERSON COUNTY, ALABAMA,	)	
a political subdivision of the State of Alabama,	)	Case No. 11-05736-TBB
	)	
Debtor	)	Chapter 9
	)	

MEMORANDUM IN SUPPORT OF MOTION REQUESTING ALLOWANCE OF ADMINISTRATIVE CLAIMS OF NORFOLK SOUTHERN RAILWAY COMPANY

COMES NOW Norfolk Southern Railway Company, an administrative creditor and party in interest (hereinafter "Norfolk Southern"), and, in support of its Motion Requesting Allowance Of Administrative Claims (Doc. No. 2343) ("Motion") and as directed by the Court to address the issue of the characterization of its claims as administrative expenses under 11 U.S.C. § 503, respectfully shows to the Court as follows:

1. The Motion seeks an Order allowing Norfolk Southern's claims for refunds under the Alabama Taxpayers' Bill of Rights and Uniform Procedures Act of consumer use tax and educational consumer use tax paid by Norfolk Southern to Jefferson County during periods beginning after the petition date and continuing through June, 2013. Such taxes were erroneously paid, paid in excess of the amount due, or paid through mistake of law or fact and are due to be refunded by Jefferson County under applicable Alabama law.

2. As documented in the Direct Petitions For Refunds attached to the Motion, Norfolk Southern remitted to Jefferson County postpetition payments of consumer use tax and educational consumer use tax unlawfully imposed by Jefferson County on the purchase and/or use of diesel fuel for rail transportation purposes under Jefferson County Ordinance No. 1769 and Ala. Act No. 405 (1967) as follows:

Period of Payment	Amount Remitted
November 16, 2011 -- January 20, 2012	$224,976.52
January 21, 2012 -- January 20, 2013	$982,484.34
January 21, 2013 -- June 20, 2013	$422,045.94

3. In July, 2013, the imposition of use tax on the purchase and/or use of diesel fuel for rail transportation purposes in Alabama was determined by the United States Court of Appeals for the Eleventh Circuit to be discriminatory and unlawful in violation of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, now codified as 49 U.S.C. §11501. *CSX Transportation, Inc. v. Alabama Department of Revenue*, 720 F. 3d 863 (11th Cir. July 1, 2013), *cert. granted*, 134 S. Ct. 2900 (July 1, 2014).

4. The entitlement of Norfolk Southern to the requested refunds may be confirmed, modified, or rebutted as a result of the disposition by the United States Supreme Court of the currently pending certiorari proceeding. As a result of its awareness of this prospect, Norfolk Southern has agreed with Jefferson County's request to this Court that proceedings with regard to the Motion should properly be held in abeyance pending the action of the Supreme Court on the issues now before that Court.

In an effort to expedite the disposition of matters pending before the Court in this case, the Court has now directed the parties to address the issue whether, assuming that Norfolk Southern is entitled to the refunds sought, the refund requests are properly characterized as claims for administrative expenses under 11 U.S.C. § 503. The discussion that follows addresses that issue exclusively and demonstrates that the refund payments would be administrative expenses. In its Objection filed March 31, 2014 (Doc. No, 2404), Jefferson County has made only a broad objection to "the allowance of any claim as an administrative expense." (*Id*. at Paragraph 4). Norfolk Southern reserves any discussion of informal suggestions made by Jefferson County as to alternative characterizations of the refund claims under the Bankruptcy Code and Plan until Jefferson County's written reply to this memorandum is received.

5. A claim for refund of taxes paid postpetition is a "*Reading*" "nonlisted administrative expense under 503(b) in general."

Section 503(b) of Title 11, made applicable in a Chapter 9 case by § 901, provides that "[a]fter notice and a hearing there shall be allowed administrative expenses," "including" expenses in nine specified categories. In its Objection, Jefferson County excitedly opines that Norfolk Southern's tax refund claim cannot be characterized as an administrative expense for "preserving the estate" under the category of §503(b)(1)(A) because there is no "estate" in a Chapter 9 case. Norfolk Southern agrees completely with this conclusion, but this conclusion is not relevant to the discussion because Norfolk Southern has never contended that it has a claim for §503(b)(1)(A) expenses. It is well established in the Eleventh Circuit that the expense categories list in

§503(b) is "illustrative rather than exhaustive" and that "[i]t is clear from the face of the statute . . . that expenses not explicitly listed in section 503(b) can receive administrative-expense status in one of two ways, either as a nonlisted "actual, necessary" expense of preserving the estate under 503(b)(1)(A) or as a nonlisted administrative expense under 503(b) in general. Either way, there is room in the statute for courts to accord administrative-expense priority to postpetition expenses, and courts have given this status to certain categories of postpetition claims that are not explicitly listed in the statute." *In re N.P. Mining. Co., Inc.,* 963 F.2d 1449, 1452-58 (11th Cir. 1992). *Accord, e.g. In re Colortex Industries, Inc.,* 19 F.3d 1371, 1377 (11th Cir.1994); *Park Nat. Bank v. Univ. Ctr. Hotel, Inc.,* 1:06CV00077 MPAK, 2007 WL 604936 (N.D. Fla. Feb. 22, 2007*); Younger v. United States (In re Younger),* 165 B.R. 965, 968 (S.D.Ga.1994); *In re Hackney,* 351 B.R. 179, 183 (Bankr. N.D. Ala. 2006); *In re Zell,* 03-5417-3P7, 2005 WL 2483325 (Bankr. M.D. Fla. Oct. 3, 2005); *Matter of Growth Dev. Corp.,* 168 B.R. 1009, 1018-19 (Bankr. N.D. Ga. 1994).

The meaning of "nonlisted administrative expense" allowable under §503 derives from the Bankruptcy Act decision of the Supreme Court in *Reading Co. v. Brown,* 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968) and from the subsequent caselaw applying *Reading* under the Bankruptcy Code. In *Reading,* plaintiffs injured by a fire caused by the negligence of a Chapter XI receiver sought the Act equivalent of administrative expense treatment for their damage claim. The Supreme Court observed that "[t[he question in this case is whether the negligence of a receiver administering an estate under a Chapter XI arrangement gives rise to an 'actual and necessary' cost of

operating the debtor's business. The Act does not define 'actual and necessary,' nor has any case directly in point been brought to our attention. We must, therefore, look to the general purposes of s64a, Chapter XI, and the Bankruptcy Act as a whole." The trustee argued unsuccessfully that "first priority as 'necessary' expenses should be given only to those expenditures without which the insolvent business could not be carried on."

> **In our view the trustee has overlooked one important, and here decisive, statutory objective: fairness to all persons having claims against an insolvent**. Petitioner suffered grave financial injury from what is here agreed to have been the negligence of the receiver and a workman. It is conceded that, in principle, petitioner has a right to recover for that injury from their 'employer,' the business under arrangement, upon the rule of respondeat superior. Respondents contend, however, that *478 petitioner is in no different position from anyone else injured by a person with scant assets: its right to recover exists in theory but is not enforceable in practice.
>
> That, however, is not an adequate description of petitioner's position. At the moment when an arrangement is sought, the debtor is insolvent. Its existing creditors hope that by partial or complete postponement of their claims they will, through successful rehabilitation, eventually recover from the debtor either in full or in larger proportion than they would in immediate bankruptcy. Hence the present petitioner did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law. That business will, in any event, be unable to pay its fire debts in full. But the question is whether the fire claimants should be subordinated to, should share equally with, or should collect ahead of those creditors for whose benefit the continued operation of the business (which unfortunately led to a fire instead of the hoped-for rehabilitation) was allowed.
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> ***479** Recognizing that petitioner ought to have some means of asserting its claim against the business whose operation resulted in the fire, respondents have suggested various theories as alternatives to 'administration expense' treatment. None of these has case support, and all seem to us unsatisfactory.
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> . . .

{W]e see no reason to indulge in a strained construction of the relevant provisions, for we are persuaded that it is theoretically sounder, as well as linguistically more comfortable, to treat tort claims arising during an arrangement as actual and necessary expenses of the arrangement rather than debts of the bankrupt. In the first place, in considering whether those injured by the operation of the business during an arrangement should share equally with, or recover ahead of, those for whose benefit the business is carried on, the latter seems more natural and just. Existing creditors are, to ***483** be sure, in a dilemma not of their own making, but there is no obvious reason why they should be allowed to attempt to escape that dilemma at the risk of imposing it on others equally innocent.

. . .

Although there appear to be no cases dealing with tort claims arising during Chapter XI proceedings, decisions in analogous cases suggest that **'actual and necessary costs' should include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible.** It has long been the rule of equity receiverships that torts of the receivership create claims against the receivership itself; in those cases the statutory limitation to 'actual ***484** and necessary costs' is not involved, but the explicit recognition extended to tort claims in those cases weighs heavily in favor of considering them within the general category of costs and expenses.

In some cases arising under Chapter XI it has been recognized that 'actual and necessary costs' are not limited to those claims which the business must be able to pay in full if it is to be able to deal at all. For example, state and federal taxes accruing during a receivership have been held to be actual and necessary costs of an arrangement. The United States, recognizing and supporting these holdings, agrees with petitioner that **costs that form 'an integral and essential element of the continuation of the business' are necessary expenses even though priority is not necessary to the continuation of the business.** Thus the Government suggests that 'an injury to a member of the public—a business invitee—who was injured while on the business premises during an arrangement would present a completely different problem (i.e., could qualify for first priority)' although it is not suggested ***485** that priority is needed to encourage invitees to enter the premises.

. . .

> We hold that damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter XI arrangement

Reading Co. v. Brown, 391 U.S. 471, 476-85, 88 S. Ct. 1759, 1762-67, 20 L. Ed. 2d 751 (1968) (emphasis added).

> In addition to the statutory definition of administrative claim, there is what has been called the "Reading" administrative ***302** claim. In *Reading Co. v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968), the Supreme Court held that innocent third parties who suffered losses from a fire at a plant operating under Chapter XI of the Bankruptcy Act were entitled to assert administrative claims. The Supreme Court in *Reading* described the statutory objective of bankruptcy as "fairness to all persons having claims against an insolvent." 391 U.S. at 477, 88 S.Ct. 1759. There has been some debate amongst the circuits whether and to what extent *Reading* survived the enactment of the Bankruptcy Code in 1978. That issue is settled in the Eleventh Circuit. In *Alabama Surface Mining Commission v. N.P. Mining Company Inc. (In re N.P. Mining Co., Inc.)*, 963 F.2d 1449 (11th Cir.1992) ("*N.P.Mining* "), the Eleventh Circuit held that *Reading* is still good law.

In re ER Urgent Care Holdings, Inc., 474 B.R. 298, 301-02 (Bankr. S.D. Fla. 2012).

> Although greatly expanding the language of the Code, the *Reading* decision reflects the core concern of § 503 --equity-- with the focus directed on the care and preservation of estate. **This concept of "fairness" permeates the case law dealing with administrative expenses, as such expenses are dealt with on a case-by-case basis.** "The central question in determining whether a claim is granted administrative expense priority is whether the third party should be paid at the expense of the debtor's existing unsecured creditors." *In re Ybarra*, 424 F.3d 1018, 1025 (9th Cir.2005). **The focus when deciding whether to allow an administrative expense claim is on preventing unjust enrichment of the debtor, and not on compensating a creditor for its loss.**

Park Nat. Bank v. Univ. Ctr. Hotel, Inc., 1:06CV00077 MPAK, 2007 WL 604936 (N.D. Fla. Feb. 22, 2007) (emphasis added).

> While the Debtor's conduct is not tortious, as in *Reading*, or a nuisance, as was the case in [*Spunt v. Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.)*, 755 F.2d 200, 202 (1st Cir.1985)], both **these cases support the general proposition that an innocent party damaged by a debtor's**

postpetition wrongful conduct should be entitled to compensation for any injury received therefrom.

Matter of Growth Dev. Corp., 168 B.R. 1009, 1020-21 (Bankr. N.D. Ga. 1994) (emphasis added).

Applying these principles in the context of Chapter 9 is not complicated. It is plain that the absence of an estate in Chapter 9 is not an impediment to an award of administrative expenses. Both §503(b)(3) and (5) recognize administrative expense treatment for certain expenses in connection with a substantial contribution "in a case under Chapter 9." It is also plain that a Chapter 9 debtor continues to "operate its business" as a governmental unit during the case[1], including the collection of taxes. The cost of refunding taxes collected illegally or in error as required by state law is a cost ordinarily incident to the operation of its business as government. Retention of postpetition taxes to which it is not legally entitled would effect both violation of state law and continuing unjust enrichment for Jefferson County, which has had the use of the taxes during the case. Under *Reading*, a taxpayer who has paid the County postpetition taxes to which the County is not entitled and who has a right under state law to a refund cannot be left with a "right to recover [that] exists in theory but is not enforceable in practice." Under *Reading*, a postpetition tax refund claimant, which has "had an

[1] Under §1108, a Chapter 11 debtor has authority to operate its business unless and until the Court takes away that authority. Section 1108 is inapplicable in a Chapter 9 case because §904 makes it clear that a Chapter 9 debtor in all events retains its ability to conduct its ordinary "governmental business" free of the control of the Court. "A Chapter 9 debtor such as Jefferson County retains not just full title over its property, it also keeps the same degree of control over it in a bankruptcy case along with complete control over its property's operations without restrictions ***463** on the ability to sell, use, or lease it." *In re Jefferson County*, 484 B.R. 427, 462-63 (Bankr. N.D. Ala. 2012).

insolvent [taxing authority] thrust upon it by operation of law," is entitled to administrative expense status for its refund under the principle of "fairness to all persons having claims against an insolvent.[2]"

The provisions of the Plan for Adjustment of Debts confirmed in this case do not present an impediment to this analysis. The Plan defines "Claim" as "any 'claim' as that word is defined by Bankruptcy Code section 101(5) against the County or against property of the County, whether or not asserted in the Case," and the §101(5) definition of "claim" broadly encompasses any "right to payment," which would include a right to payment of a refund. The Plan defines "'Allowed' or 'Allowed _____ Claim'" to mean "(b) with respect to a Claim arising on or after the Petition Date (excluding a 503(b)(9) Claim), a Claim that has been allowed pursuant to Section 2.2(a) of the Plan." Norfolk Southern's Claim for refund of taxes paid postpetition plainly arose after the Petition Date. In relevant part Section 2.2(a) of the Plan reads:

> Section 2.2. Allowance and Treatment of Administrative Claims.
>
> (a) Allowance of Administrative Claims.
>
> (i) Administrative Claims Generally.
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> Unless otherwise expressly provided in the Plan or agreed by the County, Administrative Claims will be Allowed only if:
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> (A) On or before the Administrative Claims Bar Date, the Person holding such Administrative Claim both Files with the Bankruptcy Court and serves on the County a motion requesting allowance of the Administrative Claim; and

[2] A Chapter 9 debtor is by definition insolvent. 11 U.S.C. § 109(c)(3).

(B) The Bankruptcy Court enters a Final Order finding that such asserted Administrative Claim is an Allowed Claim.

The County or any other party in interest may File an objection to such motion within sixty (60) calendar days after the expiration of the Administrative Claims Bar Date, unless such time period for filing such objection is extended by the Bankruptcy Court.

The Plan defines "Administrative Claim**"** to mean "a Claim for administrative costs or expenses that is entitled to priority in payment under Bankruptcy Code sections 503(b), 507(a)(2), and 901." This definition in no way attempts to limit administrative expenses to only those described in the enumerated illustrative categories of §503(b). Although Jefferson County has in objection to other administrative claims asserted that "the Plan does not provide for the allowance or payment of alleged administrative claims outside the narrowly construed terms of section 503(b),[3]" the actuality of what the Plan provides is otherwise. Under very clear law in this Circuit, "administrative costs or expenses that are entitled to priority in payment under Bankruptcy Code sections 503(b), 507(a), and 901" include a "*Reading*" "nonlisted administrative expense under 503(b) in general."

The Norfolk Southern Motion was timely and properly filed as specified in Section 2.2(a) of the Plan, and the allowance of the refund requests would in all respects be a proper allowance of administrative expenses.

[3] Objection to Application for Administrative Expenses filed by Creditor Revenue Cycle Management, LLC (Doc. No. 2383) at Paragraph 23.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing motion by means of the Bankruptcy Court's CM/ECF system and by delivery by First Class Mail, postage prepaid to J. Patrick Darby, Jay R. Bender, Jennifer H. Henderson, One Federal Place, 1819 Fifth Avenue North, Birmingham, Alabama 35203, attorneys for the debtor, Jefferson County, Alabama, this 30th day of September, 2014.

/s/ Donald J. Stewart
Of Counsel