

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

In re:

HINES HORTICULTURE, INC., et al.,¹

Debtors.

)
) Chapter 11

)
) Case No. 08- 11922

)
) Joint Administration Requested

**MOTION OF THE DEBTORS FOR AN ORDER AUTHORIZING, BUT NOT
DIRECTING, THE DEBTORS TO CONTINUE THEIR CUSTOMER PROGRAMS AND
HONOR PREPETITION COMMITMENTS RELATED THERETO**

The above-captioned debtors (collectively, the “Debtors”) hereby move the Court, pursuant to this Motion (the “Motion”), for the entry of an order, substantially in the form of Exhibit A, authorizing, but not directing, the Debtors to continue their customer programs and honor prepetition commitments related thereto. In support of this Motion, the Debtors respectfully state as follows:²

Jurisdiction

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

¹ The Debtors in these Chapter 11 Cases and the last four digits of each Debtor’s federal tax identification numbers are: Hines Horticulture, Inc. (3204) and Hines Nurseries, Inc. (1319). The location of the Debtors’ corporate headquarters and the service address for both Debtors is: 12621 Jeffrey Road, Irvine, California 92620.

² The facts and circumstances supporting this Motion are set forth in the Declaration of Claudia M. Pieropan, Chief Financial Officer of Hines Horticulture, Inc., in Support of First Day Motions (the “First Day Declaration”), filed contemporaneously herewith. Capitalized terms used but not defined herein shall have the meanings set forth in the First Day Declaration.

3. The statutory bases for the relief requested herein are sections 105(a), 363, 507(a)(7) and 1129(a)(9) of the Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

Background

4. On the date hereof (the “Petition Date”), each of the Debtors filed a petition with the Court under chapter 11 of the Bankruptcy Code (collectively, the “Chapter 11 Cases”). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in the Chapter 11 Cases, and no committees have been appointed or designated. Concurrently with the filing of this Motion, the Debtors have requested procedural consolidation and joint administration of the Chapter 11 Cases.

5. The Debtors operate one of the largest commercial nursery operations in North America, producing and distributing one of the broadest assortments of ornamental shrubs, color plants and container-grown plants in the industry. The Debtors sell their green goods to more than 1,180 retail and commercial customers, representing more than 6,670 outlets throughout the United States, including premium local and regional garden centers, as well as leading national home centers and retailers, such as The Home Depot, Lowe’s and Wal-Mart.

6. As of the Petition Date, the Debtors employed approximately 1,600 employees. The Debtors’ employee base fluctuates seasonally from a low of approximately 1,500 to a high of approximately 3,000 employees during the activity-intensive preparation and selling season from February to June. None of the Debtors’ employees are represented by a labor union. Hourly, salaried and contract labor comprise nearly 45% of the Debtors’ production costs.

7. The Debtors produce approximately 5,100 varieties of ornamental shrubs, color plants, and container-grown plants grown primarily for outdoor use, most of which are sold under the Hines NurseriesTM trade name. The Debtors operate seven nurseries located in Arizona, California, Oregon and Texas.

8. In 2007, the Debtors recorded net sales of approximately \$215.1 million. In addition, the Debtors recorded net sales of \$40.5 million for the first three months of 2008, ended March 31, 2008. As of March 31, 2008, the Debtors reported approximately \$297.4 million in total assets and approximately \$317.3 million in total liabilities, including secured obligations under the Debtors' prepetition secured credit facility (the "Prepetition Credit Facility") in the approximate amount of \$38.0 million and approximately \$175.0 million under the Debtors' 10.25% senior subordinated unsecured notes due 2011 (the "10.25% Senior Notes").

9. Several factors have led to the filing of these Chapter 11 Cases. First, the Debtors experienced significantly greater than expected declines in revenue. The Debtors' decline in revenue stems primarily from, among other things: (a) inclement weather in many parts of the country during the spring planting season; (b) a weaker consumer environment for products in the Debtors' industry; (c) pricing pressure from certain of the Debtors' largest customers; and (d) significant increases in production and distribution costs. Additionally, the Debtors have suffered recently from a severe liquidity shortfall, precipitated by a recent downward adjustment in the rate at which the Debtors' prepetition secured lenders (the "Prepetition Lenders") have been willing to loan against the Debtors' inventory under the Debtors' Prepetition Credit Facility. This downward adjustment was made based on the results of a new inventory valuation report commissioned by the administrative agent for the Prepetition Lenders that showed a decline in the value of the Debtors' inventory.

10. Prior to the Petition Date, the Debtors and their advisors extensively explored multiple restructuring alternatives, including the sale of all or specific portions of the Debtors' operations, a new debt or equity capital infusion and a comprehensive restructuring of the Debtors' balance sheet. As a result of these efforts, contemporaneously herewith, the Debtors filed a motion seeking approval of bidding procedures for the sale of all or substantially all of the Debtors' assets and asking this Court to set a hearing date to approve the sale transaction. The Debtors' proposed stalking horse bidder is an affiliate of Black Diamond Capital Management LLC ("Black Diamond"). In addition to being the Debtors' stalking horse bidder, Black Diamond is the Debtors' largest unsecured creditor, holding a majority of the Debtors' 10.25% Senior Notes.

Description of Debtors' Customer Programs

11. The Debtors' have two primary customer programs under which they offer volume rebates and honor product returns and exchanges in the ordinary course of business, as described below.

A. Volume Rebates

12. In the ordinary course of business, the Debtors offer certain volume rebates to some of their larger customers (the "Volume Rebates"). The amount of the Volume Rebates accrued at any given time will vary based on the volume of customer purchases, which in turn often vary from season to season. Typically, the Volume Rebates represent a certain percentage of the aggregate amount of goods purchased by the customer and are either paid in arrears on a monthly basis or are deducted by the customer from future payments to the Debtors. While the Debtors' obligations with respect to Volume Rebates vary from month to month and are calculated in arrears, the Debtors are unable to precisely estimate the amount of Volume Rebates

incurred as of the Petition Date; however, they believe that their total outstanding obligations for Volume Rebates as of the Petition Date will not exceed \$1.3 million.

B. Returns and Exchanges

13. The Debtors' customers may also hold contingent claims against the Debtors for returns or exchanges relating to products sold prior to the Petition Date (collectively, the "Product Return Claims"). These limited Product Return Claims relate to products sold that became or were defective to some degree. For example, occasionally plants may die prematurely due to no fault of the customer. In such situations, to engender and maintain goodwill with their customers, the Debtors, in their discretion, may permit a customer to return or exchange such defective products. It is difficult to estimate with precision the aggregate amount of potential Product Return Claims for goods purchased prior to the Petition Date. Based on historical data, however, the Debtors estimate that Product Return Claims relating to products sold prepetition will be de minimis.

Relief Requested

14. By this Motion, the Debtors seek the entry of an order, authorizing, but not directing, the Debtors to continue to honor their obligations related to the Volume Rebates and the Product Return Claims and any similar customer-related obligations (collectively, the "Customer Programs") and to honor prepetition commitments related thereto.

Basis for Relief

15. The Court may grant the relief requested herein pursuant to section 363 of the Bankruptcy Code. Section 363 provides, in relevant part, that "[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under this section, a court may authorize a debtor to pay certain prepetition claims. See In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989)

(affirming lower court order authorizing payment of prepetition wage claims pursuant to section 363(b)). To do so, “the debtor must articulate some business justification, other than the mere appeasement of major creditors.” Id. at 175.

16. Honoring prepetition commitments under the Customer Programs will benefit the Debtors and their creditors by allowing the Debtors’ operations to continue without interruption. In essence, the Debtors hope to continue during the postpetition period those Customer Programs that they believe were effective prepetition. The Debtors also believe that the relief requested herein is necessary to preserve their customer relationships and goodwill for the benefit of their estates. The importance of the Debtors’ customers to their business cannot be underestimated. The Debtors’ Customer Programs have generated valuable goodwill and repeat business and have contributed to the Debtors’ overall revenue. If the Debtors do not honor their obligations under the Customer Programs, the Debtors risk alienating their customers and encouraging customers to procure products from the Debtors’ competitors, all to the detriment of the Debtors and their business. The substantial benefit conferred on the Debtors by the Customer Programs justifies the granting of the relief requested in this Motion.

17. The Court may also rely on its general equitable powers to grant the relief requested in this Motion as codified in section 105(a) of the Bankruptcy Code. Section 105 empowers 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). A bankruptcy court’s use of its equitable powers to “authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” Ionosphere Clubs, 98 B.R. at 175-176 (citing Miltenberger v. Logansport, C. & S.W. R.Co., 106 U.S. 286 (1882)). Section 105(a) authorizes a court to “permit pre-plan payment of a pre-petition 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).

18. Application of section 105(a) in the context of this Motion is appropriate because the relief requested herein is consistent with the rehabilitative policy of chapter 11 of the Bankruptcy Code. A debtor in possession is a fiduciary with a duty to protect and preserve the estates, including the value of the business as a going concern. In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (“There are occasions when this [fiduciary] duty can only be fulfilled by the preplan satisfaction of a prepetition claim.”). Granting the relief requested in this Motion will enhance the likelihood of the Debtors’ successful rehabilitation, maximize the value of the estates’ assets and thus benefit the estates’ creditors.

19. The Customer Programs are an important aspect of the Debtors’ business, which depends on their customers’ brand loyalty and repeat business, particularly with respect to the Debtors’ largest customers. Thus, honoring the Customer Programs should not reduce the value of the Debtors’ estates and, in fact, should benefit the Debtors’ estates by maximizing sales.

20. Where retaining loyalty and patronage of customers is critical to successful chapter 11 cases, courts in this district and others have routinely granted relief similar to that requested here. See, e.g., In re ACG Holdings, Inc., Case No. 08-11467 (Bankr. D. Del. July 16, 2008); In re Vertis Holdings, Inc., Case No. 08-11460 (Bankr. D. Del. July 16, 2008); In re Tropicana Entm’t Corp., Case No. 08-10856 (Bankr. D. Del. May 6, 2008); In re Sharper Image Corp., Case No. 08-10322 (Bankr. D. Del. Feb. 20, 2008); In re Dura Auto. Sys., Inc., Case No. 06-11202 (Bankr. D. Del. Nov. 20, 2006); In re The Boyds Collection, Ltd., Case No. 05-43793 (Bankr. D. Md. Oct. 24, 2005); In re Tower Auto., Inc., Case No. 05-10578 (Bankr. S.D.N.Y. Feb. 3, 2005); In re Kmart Corp., Case No. 02-B02474 (Bankr. N.D. Ill. Jan. 25, 2002).

Accordingly, the Debtors request the authority to continue their Customer Programs and honor prepetition commitments related thereto in their sole discretion.

21. Nothing contained in this Motion is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

The Requirements of Bankruptcy Rule 6003 Are Satisfied

22. Bankruptcy Rule 6003 authorizes this Court to allow the Debtors to honor prepetition obligations related to the Customer Programs because such relief is necessary to avoid immediate and irreparable harm to the Debtors and their estates. See Fed. R. Bankr. P. 6003(b). Immediate and irreparable harm exists where the absence of relief would impair a debtor's ability to reorganize or threaten a debtor's future as a going concern. See In re Ames Dep't Stores, Inc., 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing application of immediate and irreparable harm standard as applied to Bankruptcy Rule 4001); see also In re First NLC Fin. Servs., LLC, 382 B.R. 547, 549 (Bankr. S.D. Fla. 2008) ("The Advisory Committee commentary [to Bankruptcy Rule 6003] plainly suggests that courts rely on the procedures and advanced case law under Rule 4001(b)(2) and (c)(2) for implementation of new Rule 6003.").

23. As described above, the Debtors' Customer Programs are integral to the Debtors' operations and are necessary to maintain the confidence and goodwill of the Debtors' customers, which is critical to the success of the Chapter 11 Cases. Failure to satisfy obligations with

respect to the Customer Programs in the ordinary course of business during the first days of these Chapter 11 Cases would cause immediate and irreparable harm, as such failure will jeopardize customer loyalty and trust, likely causing important customers to turn to competitors.

No Prior Request

24. No prior motion for the relief requested herein has been made to this or any other court.

Notice

25. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) the entities listed on the Consolidated List of Creditors Holding the 30 Largest Unsecured Claims filed pursuant to Local Rule 2002-1(b); (c) counsel to the agent for the Debtors' prepetition and proposed postpetition secured lenders; (d) the indenture trustee for the Debtors' 10.25% Senior Notes; and (e) the Internal Revenue Service. A copy of this Motion is also available on the website of the Debtors' proposed notice and claims agent, Epiq Bankruptcy Solutions, LLC, at <http://chapter11.epiqsystems.com/hines>.³ Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

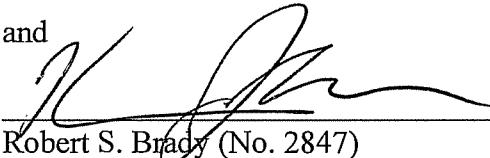
³ Contemporaneously herewith, the Debtors have filed an application for approval by this Court of their retention of Epiq Bankruptcy Solutions, LLC as their notice and claims agent.

WHEREFORE, for the reasons set forth herein and in the First Day Declaration, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, (a) authorizing, but not directing, the Debtors to continue their Customer Programs and honor prepetition commitments related thereto and (b) granting such other and further relief as is just and proper.

Dated: August 20, 2008
Wilmington, Delaware

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EXHIBIT A

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

In re:)	
)	Chapter 11
HINES HORTICULTURE, INC., et al., ¹)	Case No. 08- <u>11922</u>
Debtors.)	Joint Administration Requested
)	

**ORDER AUTHORIZING, BUT NOT DIRECTING, THE DEBTORS
TO CONTINUE THEIR CUSTOMER PROGRAMS AND HONOR
PREPETITION COMMITMENTS RELATED THERETO**

Upon the motion (the “Motion”)² of the above-captioned debtors (collectively, the “Debtors”) for the entry of an order (the “Order”) authorizing, but not directing, the Debtors to continue their customer programs and honor prepetition commitments related thereto and the First Day Declaration; it appearing that the relief requested is in the best interests of the Debtors’ estates, their creditors and other parties in interest; the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); venue being proper before this court pursuant to 28 U.S.C. §§ 1408 and 1409; notice of the Motion having been adequate and appropriate under the circumstances; and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED

1. The Motion is granted as provided herein.

¹ The Debtors in these Chapter 11 Cases and the last four digits of each Debtor’s federal tax identification numbers are: Hines Horticulture, Inc. (3204) and Hines Nurseries, Inc. (1319). The location of the Debtors’ corporate headquarters and the service address for both Debtors is: 12621 Jeffrey Road, Irvine, California 92620.

² Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

2. The Debtors are authorized, but not directed, to continue their Customer Programs and to honor any prepetition commitments related thereto.

3. This Order is not intended and should not be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code.

4. Any payment made pursuant to this Order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

5. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied by the contents of the Motion or otherwise deemed waived.

6. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

7. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Date:
Wilmington, Delaware

United States Bankruptcy Judge