



2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory basis for the relief requested herein is section 363(b) of the Bankruptcy Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”).

### **Background**

4. On August 20, 2008 (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. On August 21, 2008, the Court entered an order jointly administering the Debtors’ Chapter 11 Cases pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). On September 3, 2008, The U.S. Trustee appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (“the Committee”).

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 Nurseries™ 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.

9. Several factors 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 the prices of raw materials, most notably, fuel. Additionally, the Debtors suffered from a severe liquidity shortfall, precipitated by a downward adjustment in the rate at which the Debtors' prepetition secured lenders were willing to loan against the Debtors' inventory.

#### **Relief Requested**

10. By this Motion, the Debtors seek the entry of an order pursuant to section 363(b) of the Bankruptcy Code authorizing the employment of A&M as their restructuring advisors in accordance with the terms and conditions set forth in the Engagement Letter (as defined below) effective nunc pro tunc to the Petition Date.

### A&M's Qualifications

11. Founded in 1983, A&M is a preeminent turnaround management consulting firm that provides specialized management and advisory services to troubled companies. Since its inception, A&M has grown to become a global provider of management and advisory services to companies in crisis or those in need of performance improvement or business consulting services in specific financial and operational areas. A&M's core services include Turnaround Management Consulting, Interim and Crisis Management, Creditor Advisory and Performance Improvement. A&M professionals have been called upon in a number of complex restructuring situations to provide crisis management to distressed companies, including, but not limited to, the chapter 11 cases of In re DJK Residential, LLC, Case No. 08-10375 (Bankr. S.D.N.Y. Feb. 25, 2008), In re Movie Gallery, Inc., Case No. 07-33849 (Bankr. E.D. Va. Oct. 18, 2007), In re Medicor Ltd., Case No. 07-10877 (Bankr. D. Del. Aug. 24, 2007), In re Spiegel, Inc., Case No. 03-11540 (Bankr. S.D.N.Y. Apr. 10, 2003), In re The Warnaco Group, Inc., Case No. 01-41643 (Bankr. S.D.N.Y. Dec. 13, 2001), and In re Phar-Mor, Inc., Case No. 92-41599 (Bankr. N.D. Ohio Dec. 9, 1992).

12. A&M has extensive experience providing restructuring consulting services in chapter 11 proceedings and has an excellent reputation for the services it has rendered in chapter 11 cases on behalf of debtors and creditors throughout the United States. The Debtors believe that A&M is well-qualified and able to advise the Debtors in a cost-effective, efficient and timely manner. The Debtors have hired A&M to provide restructuring consulting services related to their restructuring efforts, subject to approval by the Court, pursuant to an engagement letter dated August 21, 2008, (including the indemnification agreement attached thereto, the

“Engagement Letter”), a copy of which is annexed as Exhibit 1 to Exhibit A attached hereto and incorporated by reference herein.<sup>2</sup>

### **Services to Be Provided**

13. Under the Engagement Letter, the Debtors have retained Michael Kang to serve as the Debtors’ Chief Restructuring Officer. Mr. Kang’s role as Chief Restructuring Officer has been to assume day-to-day responsibility for various aspects of the Chapter 11 Cases, including with respect to the Debtors’ obligations and duties as a debtor-in-possession under the Bankruptcy Code. In his capacity as Chief Restructuring Officer, Mr. Kang reports to the Debtors’ Chief Executive Officer. Mr. Kang has worked as a restructuring and financial consultant for over 12 years and has substantial knowledge and experience advising large companies and in assisting troubled companies with stabilizing their financial condition, analyzing their operations and developing an appropriate business plan to accomplish restructuring initiatives. Mr. Kang’s experience includes an array of advisory positions for companies across a variety of industries, including retail, consumer products, food processing, manufacturing and telecommunications.

14. Subject to further order of the Court and consistent with the Engagement Letter, the Debtors request approval of their employment and retention of A&M to render the following services:

- a. assistance in a financial review of the Debtors, including but not limited to a review and assessment of financial information that has been, and that will be, provided by the Debtors to its creditors, including without limitation the Debtors’ short and long-term projected cash flows;
- b. assistance in identification of cost reduction and operations improvement opportunities;

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<sup>2</sup> The Engagement Letter superseded a previous engagement letter between the Debtors and A&M dated August 14, 2008.

- c. assistance in the preparation of a liquidation analysis;
- d. assistance in review and analysis of the Debtors' operational restructuring plan;
- e. assistance in coordination and management of various activities related to the Chapter 11 Cases; and
- f. other activities as are approved by the Debtors' board of directors and agreed-to by A&M.

15. A&M will carry out unique functions and will use reasonable efforts to coordinate its services with the Debtors and with the Debtors' other professionals to avoid unnecessary duplication of services provided by the other professionals that the Debtors have retained in these Chapter 11 Cases or the Debtors' senior management.

16. In addition, the Debtors have engaged William Kosturos, a Managing Director of A&M, to serve as Senior Advisor to the Debtors pursuant to the Engagement Letter. Mr. Kosturos will provide consulting services on an as-needed basis in his role as Senior Advisor, although Mr. Kang will have primary responsibility on this engagement in his role as Chief Restructuring Officer. The Debtors believe such services will compliment, and not duplicate those services provided by A&M generally and Mr. Kang in particular. Additional A&M personnel will also be used to provide services to the Debtors on an as-needed basis as set forth more fully in the Engagement Letter.

17. The Debtors believe that retention of Mr. Kang as their Chief Restructuring Officer and Mr. Kosturos as Senior Advisor will enable Mr. Kang and Mr. Kosturos to perform their functions on a cost-efficient and productive basis. The temporary employment of restructuring professionals, such as Mr. Kang and Mr. Kosturos, is a common practice in bankruptcies of size and scope comparable to the Chapter 11 Cases.

18. Since Mr. Kang has assumed a postpetition senior management position at the Debtors, A&M may not be considered a "disinterested person" as defined by section 101(14) of

the Bankruptcy Code. Under section 101(14), a person is not disinterested if, “within 2 years before the date of the filing of the petition, [that person was] a director, officer, or employee of the debtor.” Although the Engagement Letter was not executed until after the Petition Date, Mr. Kang began advising the Debtors prior to the commencement of the Chapter 11 Cases. As a result, the Debtors have sought authority to retain A&M under the terms of the Engagement Letter pursuant to section 363 of the Bankruptcy Code rather than section 327 out of an abundance of caution.<sup>3</sup> Notwithstanding the appointment of Mr. Kang as the Debtors’ Chief Restructuring Officer, and as described more fully in the Kang Declaration, A&M does not hold or represent an adverse interest to the Debtors’ estates.

**Professional Compensation**

19. As set forth in the Engagement Letter, the hourly billing rates for A&M professionals who may be assigned to this engagement are as follows:

Managing Director	\$550 - \$750
Director	\$450 - \$550
Associate	\$300 - \$450
Analyst	\$175 - \$300

20. The hourly rates set forth above are consistent with and typical of arrangements entered into by A&M and comparable firms in connection with the rendering of similar services under similar circumstances. These hourly rates are subject to periodic adjustments to reflect market, economic and other conditions. The rates set forth above are set at a level designed to fairly compensate A&M for its work and to cover fixed and routine overhead expenses. Prior to filing their Chapter 11 Cases, the Debtors provided A&M with a total retainer of \$150,000.

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<sup>3</sup> Pursuant to section 327(a) of the Bankruptcy Code, a debtor may retain, “one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons . . . .”

A&M subsequently invoiced the Debtors for \$65,422.77, relating to all prepetition services provided by A&M, leaving a balance of \$84,577.23 on A&M's retainer. The Debtors do not owe any prepetition amounts to A&M.

21. If the Court grants the relief requested herein, A&M will be employed as the Debtors' restructuring advisors in these Chapter 11 Cases pursuant to section 363 of the Bankruptcy Code. As noted above, A&M may not be considered disinterested because Mr. Kang began advising the Debtors prior to the Petition Date, and Mr. Kosturos may provide senior management services to the Debtors on an as-needed basis. As a result, the Debtors have sought to retain A&M as provided herein pursuant to section 363 out of an abundance of caution, as noted above. To maintain transparency, the Debtors propose that A&M: (a) submit invoices to the Debtors twice monthly, and the Debtors shall be authorized (but not directed) to pay such invoices; (b) file with the Court a monthly report with the names and functions of A&M personnel performing services for the Debtors on or after the 25th day of each month following the month for which compensation has been received and submit such report to the Office of the United States Trustee for the District of Delaware (each, a "Monthly Report"); and (c) file quarterly reports (each, a "Quarterly Report") of compensation paid and serve such quarterly reports in substantial conformity with the procedures for interim fee applications required under the interim compensation procedures approved by the Court pursuant to the Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Members of Official Committees [Docket No. 113] (the "Interim Compensation Procedures"). Quarterly Reports will set forth the compensation earned by A&M and an itemization of the expenses incurred during the period and a summary of the services provided to the Debtors.

Parties in interest shall have the right to object to fees paid to A&M when reports of compensation are filed with the Court by filing a written objection.

### **Indemnification Agreement**

22. The Debtors have agreed to indemnify and to make certain contributions to A&M in accordance with the indemnification provisions set forth in the indemnification agreement attached to the Engagement Letter (the “Indemnification Agreement”), as modified by the proposed retention order. The indemnification and contribution provisions set forth therein are customary and reasonable terms of consideration for advisors such as A&M for engagements both out-of-court and in chapter 11. The terms of the Engagement Letter and the Indemnification Agreement were fully negotiated between the Debtors and A&M at arm’s-length. The Debtors respectfully submit that the Indemnification Agreement, as modified by the order requested herein, is reasonable and in the best interests of the Debtors, their estates and creditors. Accordingly, as part of this Motion, the Debtors request that the Court approve the Indemnification Agreement as modified by the Debtors’ proposed order.

### **Basis for Relief**

23. The Court may authorize employment of A&M pursuant to section 363 of the Bankruptcy Code. Section 363 of the Bankruptcy Code provides, in relevant part, that a debtor in possession “after notice and hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). “In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions.” In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (Bankr. D. Del. 1999); see also In re Del. & Hudson Ry. Co., 124 B.R. 169, 175–76 (D. Del. 1991).

24. Bankruptcy courts have analyzed the propriety of a debtor's employment of corporate restructuring officers, restructuring advisors and restructuring professionals under section 363 on numerous occasions and have determined that it is an appropriate exercise of the debtor's business judgment to employ restructuring professionals in this manner. See, e.g., In re Powermate Holding Corp., Case No. 08-10498 (Bankr. D. Del. Apr. 15, 2008); In re DJK Residential, LLC, Case No. 08-10375 (Bankr. S.D.N.Y. Feb. 25, 2008); In re Movie Gallery, Inc., Case No. 07-33849 (Bankr. E.D. Va. Oct. 18, 2007); In re Am. Home Mortgage Holdings, Inc., Case No. 07-11047 (Bankr. D. Del. Sept. 4, 2007); In re Medicor Ltd., Case No. 07-10877 (Bankr. D. Del. Aug. 24, 2007); In re Calpine Corp., Case No. 05-60200 (Bankr. S.D.N.Y. Jan. 17, 2007); In re ACR Mgmt., LLC, Case No. 04-27848 (Bankr. W.D. Pa. June 16, 2004); In re Cable & Wireless USA, Inc., Case No. 03-13711 (Bankr. D. Del. Jan. 14, 2003); In re Mirant Corp., Case No. 03-46590 (Bankr. N.D. Tex. Sept. 29, 2003); In re Fleming Cos., Inc., Case No. 03-10945 (Bankr. D. Del. June 25, 2003); In re NRG Energy, Inc., Case No. 03-13024 (Bankr. S.D.N.Y. June 2, 2003); In re Exide Techs., Inc., Case No. 02-11125 (Bankr. D. Del. May 10, 2002); In re Enron Corp., Case No. 01-16034 (Bankr. S.D.N.Y. Mar. 12, 2002).

25. Additionally, the Indemnification Agreement, as modified by the proposed order, is substantially similar to the indemnification agreement previously approved by the Court pursuant to the Order Authorizing the Employment and Retention of Miller Buckfire & Co., LLC as Investment Banker and Financial Advisor for the Debtors and Debtors in Possession Effective Nunc Pro Tunc to the Petition Date [Docket No. 118], entered on September 9, 2008. Indemnification provisions of the type described herein have also been approved in other chapter 11 cases by courts in this district and others. See, e.g., In re Linens Holding Co., Case No. 08-10832 (Bankr. D. Del. May 27, 2008); In re DJK Residential, LLC, Case No. 08-10375 (Bankr.

S.D.N.Y. Feb. 25, 2008); In re Movie Gallery, Inc., Case No. 07-33849 (Bankr. E.D. Va. Oct. 18, 2007); In re Dura Auto. Sys., Inc., Case No. 06-11202 (Bankr. D. Del. Nov. 20, 2006); In re FLYi, Inc., Case No. 05-20011 (Bankr. D. Del. Dec. 2, 2005); In re Foamex Int'l, Inc., Case No. 05-12685 (Bankr. D. Del. Oct. 17, 2005); In re Oakwood Homes Corp., Case No. 02-13396 (Bankr. D. Del. July 21, 2003).

26. The Debtors submit that the employment of A&M is a sound exercise of their business judgment pursuant to section 363. A&M can provide the Debtors with substantial expertise necessary to stabilize the Debtors' business during the Chapter 11 Cases. A&M personnel will be able to assist Debtors' existing management to ensure that the estate is managed so as to preserve and enhance value for all parties in interest. The Debtors have also stipulated to their own obligation to seek the retention of A&M and Mr. Kang as set forth herein as a condition of the Debtors' postpetition financing.<sup>4</sup> Denial of the Debtors' employment of A&M would unjustly disadvantage the Debtors and all parties in interest by denying them the assistance of uniquely qualified restructuring advisors who have significant experience assisting companies in distressed situations.

#### **No Prior Request**

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

#### **Notice**

28. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) the Committee; (c) counsel to the agent for the

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<sup>4</sup> See Final Order Authorizing (A) Secured Post-Petition Financing on a Super Priority Basis Pursuant to 11 U.S.C. § 364, (B) Use of Cash Collateral Pursuant to 11 U.S.C. § 363 and (C) Grant of Adequate Protection Pursuant to 11 U.S.C. §§ 363 and 364 [Docket No. 124] at ¶ K.

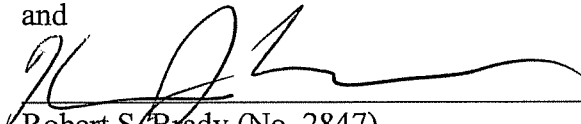
Debtors' postpetition secured lenders; and (d) parties that have requested service of documents pursuant to Bankruptcy Rule 2002. A copy of this Motion is also available on the website of the Debtors' notice and claims agent, Epiq Systems, Inc., at <https://chapter11.epiqsystems.com/hines>. In light of the nature of the relief requested, the Debtors respectfully submit that no further notice is necessary.

WHEREFORE, for the reasons set forth herein and the Kang Declaration, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, (a) authorizing the Debtors to employ and retain A&M as their restructuring advisors effective nunc pro tunc to the Petition Date, (b) approving the terms of the Engagement Letter and the Indemnification Agreement as modified by the Debtors' proposed order and (c) granting such other and further relief as is just and proper.

Dated: September 12, 2008  
Wilmington, Delaware

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