

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

In re:)
) Chapter 11
)
LANG HOLDINGS, INC.,) Case No. 09- <u>12543</u> (_____)
a Delaware corporation, <u>et al.</u> , ¹)
) (Joint Administration Pending)
Debtors)
_____)

**DEBTORS' MOTION FOR ORDER PURSUANT TO 11 U.S.C §§ 105(a) AND 363
AUTHORIZING DEBTORS TO HONOR CERTAIN PREPETITION OBLIGATIONS
TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS**

Lang Holdings, Inc., and its affiliated debtors and debtors in the above-captioned cases (collectively, the "Debtors"), hereby move (the "Motion") for entry of an order pursuant to sections 105(a) and 363 of title 11 of the United States Code (the "Bankruptcy Code") authorizing, but not directing, the Debtors to honor certain prepetition obligations to customers and to continue customer programs. In support of this Motion, the Debtors rely on the Declaration of Laurie Gilner in Support of Chapter 11 Petitions and First Day Relief (the "Gilner Declaration"), filed concurrently herewith. In further support of the Motion, the Debtors respectfully represent as follows:

JURISDICTION

1. The Court has jurisdiction over these chapter 11 cases and this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of these chapter 11 cases and this Motion is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Lang Holdings, Inc. (9551); Turner Acquisition, Inc. (2115); Avalanche Publishing Acquisition, Inc. (3038); The Lang Companies, LLC (9182); Avalanche Publishing, Inc. (9793); and The Lang Store, Ltd., (2398). The mailing address of each of the Debtors is 514 Wells Street, Delafield, Wisconsin 53018.

are sections 105(a), 363(b) and 363(c) of the Bankruptcy Code and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

GENERAL BACKGROUND

2. On the date hereof (the "Petition Date"), the Debtors each commenced with this Court voluntary cases under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. As of the date hereof, no request for appointment of a chapter 11 trustee or examiner has been made, and no official committee has been appointed.

4. Information regarding the Debtors' history and business operations, their capital structure and primary secured indebtedness and the events leading up to the commencement of these chapter 11 cases can be found in the Gilner Declaration, which is incorporated herein by reference.

THE CUSTOMER PROGRAMS

5. The Debtors distribute their products through four primary channels:

(a) **Strategic Accounts**. The Strategic Accounts segment is the largest distribution channel by sales volume, accounting for 50.1% of overall sales in fiscal year 2008. Strategic Accounts includes mass merchants, national book chains, warehouse clubs, craft stores and office supply stores.

(b) **Gifts & Specialty**. The Gifts & Specialty ("G&S") segment is the second-largest distribution channel, consisting of sales to over 10,000 independent retailers which accounted for 20.7% of overall sales in fiscal year 2008.

(c) **Direct to Consumer**. The high-margin Direct to Consumer ("DTC") segment accounted for approximately 7.5% of overall sales in fiscal year 2008. DTC includes sales of products directly to more than 500,000 individual

consumers per year through the Debtors' three consumer websites² and consumer catalogs.

(d) **Retail Stores**. The Retail Store segment is the smallest distribution channel, consisting of brick-and-mortar stores in Delafield, Door County and New Berlin, Wisconsin and Wrentham, Massachusetts (the "**Retail Stores**") that sell the Debtors' products as well as products from the Debtors' competitors, thus providing the Debtors' management an excellent perspective on its competition in the context of a retail environment. In addition to providing market intelligence, the Retail Stores provide the Debtors an outlet to move excess inventory at a reasonable margin.

6. The Debtors are able to distinguish themselves and remain competitive among their peers by maintaining high levels of customer service, consistently producing goods that meet their customers' specifications, and providing competitive pricing. In furtherance thereof, the Debtors have instituted and adopted certain customer-related programs designed to enhance customer satisfaction, sustain goodwill, incentivize their customers to continue purchases, and ensure that the Debtors remain competitive in the industry (collectively, the "**Customer Programs**"). While the terms of the Customer Programs differ depending upon the particular customer and/or the type of products purchased, the Customer Programs adopted and maintained by the Debtors are similar to those adopted and maintained by the Debtors' competitors in the relevant market segments. The Debtors maintain the following Customer Programs:

(a) **Markdown Allowances**. The Debtors participate in "Shared Markdown" programs with certain Strategic Accounts and G&S customers, whereby the Debtors match their customers' post-Christmas retail price reductions with corresponding reductions in the wholesale cost of the Debtors' products so as to protect the customer's profit margin. The markdown stages are generally defined before the program commences.

The Debtors estimate that, in the aggregate, their Strategic Accounts and G&S customers may be entitled to Markdown Allowances totaling approximately \$95,000 on goods sold prior to the Petition Date.

² The websites are: www.turnerlicensing.com; www.lang.com; and www.avalanchepub.com.

(b) **Guaranteed Sales.** The Debtors sell products to certain Strategic Accounts and G&S customers on a “Guaranteed Sale” basis, whereby the Debtors are obligated to provide a credit for unsold merchandise.

The Debtors estimate that potential credits of approximately \$4.5 million in the aggregate may be (or become) due and owing on account of merchandise sold by the Debtors on a “guaranteed sale” basis prior to the Petition Date.

(c) **Miscellaneous Programs.** As is customary in their industry, the Debtors offer pre-negotiated customer-specific incentives to certain Strategic Account and G&S customers, whereby the Debtors allow credits for, among other things, shared advertising costs, new store allowances, aggregate purchase volume, or sales growth (the “Miscellaneous Programs”).

The Debtors estimate that potential credits of approximately \$13,000 in the aggregate may be (or become) due and owing on account of Miscellaneous Programs instituted prior to the Petition Date.

(d) **Returns, Refunds and Exchanges.** Certain customers hold contingent claims against the Debtors for refunds, returns, exchanges, substitutions, price adjustments (including sales price adjustments to billing) and other credit balances (collectively, the “Refunds” and individually each a “Refund”) relating to goods sold to the customers prior to the Petition Date. In addition, the Debtors typically issue Refunds in the ordinary course of business for damaged or faulty goods.

The Debtors estimate there are approximately \$500,000 in the aggregate of potential obligations for returns, refunds and exchanges relating to goods sold prior to the Petition Date.

(e) **Promotional Codes.** In the ordinary course of business, the Debtors issue promotion, offer and discount codes (collectively, the “Promotional Codes”) to be presented by customers at the time of purchase of goods from the Debtors’ catalogs and online retail businesses. The Debtors believe that continuing to honor the Promotional Codes is an essential component to maintaining their relationships with their DTC customers.

7. The Debtors believe that the Customer Programs are consistent with industry standards -- particularly in light of the seasonality of the Debtors’ products -- and are absolutely necessary to sustain the good will they have developed with their customers and to attract future customers.

8. The Debtors are also party to certain merchant card processing agreements pursuant to which the Debtors are able to accept credit card payments, subject to certain adjustments, returns, promotional fees and refunds.

9. The Debtors' continued ability to honor and process credit card transactions is essential to the Debtors' ability to preserve and maximize the value of their business during the pendency of these chapter 11 cases. Without this ability, the Debtors would lose a major avenue for conducting sales transactions in the ordinary course of their operations in the DTC and Retail Stores segments. Under the terms of their merchant card processing agreements, the Debtors are generally responsible for paying certain fees to the credit card companies and processors, certain amounts of which may have accrued but remain unpaid as of the Petition Date. The Debtors request authority to continue to pay these fees in the ordinary course of business, including, but not limited to, amounts related to promotional fees and returns and exchanges, to avoid interruption of these vital credit card processing services and programs.³

RELIEF REQUESTED

10. By this Motion, the Debtors request the entry of an order authorizing, but not directing, the Debtors to (i) honor prepetition obligations relating to the Customer Programs and merchant card processing agreements, and (ii) continue, renew, replace and/or terminate any of the Customer Programs, as they determine advisable in the ordinary course of business, pursuant to Bankruptcy Code sections 363(b), 363(c) and 105(a).⁴

³ Any amounts owed to the card processor for fees would arguably be secured by the receivable that is owed to the Debtors; therefore, the card processor likely would attempt to recoup its claims from or offset its claims against the amounts owed to the Debtors.

⁴ To be clear, the Debtors are not, by this Motion, assuming any executory contracts, unexpired leases or similar agreements, and nothing set forth herein shall be construed as a request to assume any agreement pursuant to section 365 of the Bankruptcy Code.

BASIS FOR RELIEF

11. Sections 1107(a) and 1108 of the Bankruptcy Code authorize a debtor in possession to operate its business. Further, section 363(c) of the Bankruptcy Code authorizes a debtor in possession operating its business pursuant to section 1108 of the Bankruptcy Code to use property of the estate in the ordinary course of business without notice or a hearing. The Debtors submit that honoring prepetition obligations relating to the Customer Programs and continuing, renewing, replacing and/or terminating the Customer Programs in the ordinary course of business is permitted by sections 363(c), 1107(a) and 1108 of the Bankruptcy Code without further application to the Court.

12. The Court may also authorize the payment of obligations under the Customer Programs and continuation of the Customer Programs under section 363(b) of the Bankruptcy Code. Bankruptcy Code section 363(b) provides that “[t]he trustee, 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 Ionosphere Clubs, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (authorizing payment of prepetition claims where the debtors articulates “some business justification, other than the mere appeasement of major creditors”); see also In re Armstrong World Indus., Inc., 29 B.R. 391, 397 (S.D.N.Y. 1983) (authorizing, pursuant to section 363, a contractor to pay prepetition claims of some suppliers who were potential lien claimants, because the payments were necessary for the general contractors to release funds owed to the debtors).

13. Additionally, section 105(a) of the Bankruptcy Code authorizes 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 prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” In re Ionosphere Clubs, Inc., 98 B.R. at 175. Under section 105(a) of the Bankruptcy Code, the Court “can permit pre-plan payment of a prepetition 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) (“To invoke the necessity of payment doctrine, a debtor must show that payment of the pre-petition claims is ‘critical to the debtor’s reorganization.’”).

14. Moreover, in a long line of well-established cases, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor’s estate for the benefit of all creditors. See, e.g., Miltenberger v. Logansport Ry., 106 U.S. 286 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent “stoppage of [crucial] business relations”); In re Lehigh & New Eng. Ry., 657 F.2d 570 (3d Cir. 1981); Dudley v. Mealy, 147 F.2d 268 (2d Cir.), cert. denied, 325 U.S. 873 (1945); Michigan Bureau of Workers’ Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.), 80 B.R. 279 (S.D.N.Y. 1987), appeal dismissed, 838 F.2d 59 (2d Cir. 1988) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits); In re Environdyne Indus., 150 B.R. 1008 (Bankr. N.D. Ill. 1993); In re NVR L.P., 147 B.R. 126, 127 (Bankr. E.D. Va. 1992); In re Financial News Network, Inc., 134 B.R. 732 (Bankr. S.D.N.Y. 1991); In re Gulf Air, Inc., 112 B.R. 152 (Bankr. W.D. La. 1989); In re Ionosphere Clubs, Inc., 98 B.R. 174 (Bankr. S.D.N.Y. 1989). “The Supreme Court, the Third Circuit and the District of Delaware all recognize the court’s power to authorize payment of prepetition claims when such payment is necessary for the debtor’s survival during chapter 11.” In re Just for Feet, Inc., 242 B.R. at 825. Furthermore, “[t]he necessity of payment doctrine

recognizes that paying certain pre-petition claims may be necessary to realize the goal of chapter 11 – a successful reorganization.” Id. at 825-26.

15. While the Debtors have distinguished themselves from their competitors by offering a breadth and uniqueness of products that is unmatched in the industry, the Debtors’ success in the Strategic Accounts and G&S segments depends largely on their ability to provide competitive pricing and guaranteed profit margins for their customers. To that end, the Debtors developed the Shared Markdown, Guaranteed Sales and Miscellaneous Programs to protect their customers’ profit margins and to provide financial incentives for the customers to complement the quality of the Debtors’ products. Customer Programs such as these are common in the Debtors’ industry, especially given the seasonality of the Debtors’ products. The Debtors believe the Shared Markdown, Guaranteed Sales and Miscellaneous Programs are specially tailored to meet the competitive demands of their industry and to allow the Debtors to offer the most attractive pricing to their customers. If such Customer Programs were discontinued, the Debtors believe they would lose substantial amounts of goodwill they have developed with their customers and possibly future business from existing customers. The Debtors submit that if they are not authorized to continue these Customer Programs, the potential loss in customers may far exceed the cost of the programs.

16. Additionally, the Debtors’ Refund obligations are especially important to the continued success of the Debtors’ business. Failure to honor or pay such obligations would likely be perceived by the Debtors’ customers as a repudiation of the Debtors’ promise to stand behind the quality of their products, which, in turn, could erode the Debtors’ existing customer base and alienate future customers, in either case to the detriment of the Debtors’ estates, creditors and other parties in interest. Similarly, a failure to honor Promotional Codes issued

prepetition would likely alienate the Debtors' website and catalog customers, which represent a growing and highly profitable segment of the Debtors' overall sales.

17. Considering the relative expense of the relief requested herein to the benefits it produces and the critical importance of the Customer Programs, entry of an order granting the relief requested herein is appropriate and, indeed, essential. As a result, granting the relief requested herein is in the best interests of the Debtors, their estates and their creditors.

18. Courts in this district have authorized debtors to honor certain prepetition obligations to customers, to continue prepetition customer programs and/or to continue processing credit card transactions in the ordinary course. See, e.g., In re CCS Medical, Inc., Case No. 09-12390 (CSS) (Bankr. D. Del. July 8, 2009); In re Proliance Int'l, Inc., Case No. 09-12278 (CSS) (Bankr. D. Del. July 6, 2009); In re Eddie Bauer Holdings, Inc., Case No. 09-12099 (MFW) (Bankr. D. Del. June 18, 2009); In re Building Materials Holding Corp., Case No. 09-12074 (KJC) (Bankr. D. Del. June 17, 2009); In re Badanco Acquisition LLC, Case No. 09-11638 (CSS) (Bankr. D. Del. May 13, 2009); In re Stock Building Supply Holdings, LLC, Case No. 09-11554 (MFW) (Bankr. D. Del. May 7, 2009); In re Norwood Promotional Prods. Holdings, Inc., Case No. 09-11547 (PJW) (Bankr. D. Del. May 7, 2009).

19. Pursuant to the recent revisions to Bankruptcy Rule 6003, the Court may authorize payment of a prepetition claim within 20 days after the Petition Date only if such relief is necessary to avoid immediate and irreparable harm. As described above, it is vital to the Debtors' reorganization efforts that they be authorized to continue the Customer Programs in order to maintain the Debtors' operations and the confidence and goodwill of their customers. Failure to continue the Customer Programs and immediately honor the obligations thereunder could lead to a disruption of the Debtors' operations and a potential loss of customers. Similarly,

failure to abide by the merchant card processing agreements could lead to disruption of the Debtors' ability to process credit card transactions, which would severely impact the Debtors' DTC and Retail Stores distribution channels. For the reasons set forth throughout this Motion, the Debtors submit that the relief requested is necessary to avoid immediate and irreparable harm pursuant to Bankruptcy Rule 6003 and they should be authorized, at their discretion, to continue the Customer Programs.

20. For all the reasons discussed herein, the Debtors submit that continuing the Customer Programs, and making payments thereunder in the ordinary course of business, is critical to the Debtors' reorganization efforts and in the best interests of their estates, and therefore should be approved.

21. To the extent Fed. R. Bankr. P. 6004(h) is applicable to this Motion, the Debtors also seek a waiver of the ten-day stay under Fed. R. Bankr. P. 6004(h).

NOTICE

22. The Debtors will provide notice of this Motion to: (i) the Office of the United States Trustee; (ii) the Debtors' thirty (30) largest unsecured creditors on a consolidated basis; (iii) the agent for the Debtors' prepetition secured lenders; and (iv) the agent for the Debtors' postpetition secured lenders. Notice of this Motion and any order entered with respect thereto will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto, granting the Motion and such other and further relief as is just and proper.

Dated: Wilmington, Delaware
July 16, 2009

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ David R. Hurst _____

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Debtors in Possession*

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

In re:)
) Chapter 11
)
LANG HOLDINGS, INC.,) Case No. 09-12543 (____)
a Delaware corporation, et al.,¹)
) (Joint Administration Pending)
Debtors)
)
_____)

**ORDER PURSUANT TO 11 U.S.C §§ 105(a) AND 363 AUTHORIZING
DEBTORS TO HONOR CERTAIN PREPETITION OBLIGATIONS
TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS**

Upon consideration of the Motion² of the above-captioned Debtors for entry of an order pursuant to sections 105(a) and 363 of the Bankruptcy Code authorizing, but not directing, the Debtors to continue to honor certain customer programs described therein (collectively, the “Customer Programs”); and upon consideration of the Gilner Declaration and the entire record of these chapter 11 cases; and due and sufficient notice of the Motion having been given under the circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors and other parties in interest; and after due deliberation, and good and sufficient cause appearing therefor; it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. The Motion is GRANTED.

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Lang Holdings, Inc. (9551); Turner Acquisition, Inc. (2115); Avalanche Publishing Acquisition, Inc. (3038); The Lang Companies, LLC (9182); Avalanche Publishing, Inc. (9793); and The Lang Store, Ltd., (2398). The mailing address of each of the Debtors is 514 Wells Street, Delafield, Wisconsin 53018.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

2. The Debtors are authorized, but not directed, in their sole discretion and in the ordinary course of business, to honor and perform all obligations in respect of the Customer Programs without regard to whether the Debtors' obligations under any such Customer Programs arose before or after the Petition Date.

3. The Debtors are authorized, but not directed, to continue, renew, replace, modify and/or terminate such of their Customer Programs as they deem appropriate, in their discretion, and in the ordinary course of business, without further application to the Court.

4. The Debtors are authorized, but not directed, in their sole discretion and in the ordinary course of business, to continue processing credit card transactions pursuant to their merchant card processing agreements without further application to the Court, and the automatic stay of section 362 of the Bankruptcy Code is hereby modified to the extent (and only to the extent) necessary to permit such transactions.

5. The authority granted herein to continue the Customer Programs and to perform under the merchant card processing agreements shall not create any obligation on the part of the Debtors or their officers, members, attorneys or agents to pay obligations under the Customer Programs or merchant card processing agreements, and none of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay or provide credits under the Customer Programs or the merchant card processing agreements, and nothing contained in this order shall be deemed to affect the status or otherwise affect the payments provided under the Customer Programs or the merchant card processing agreements to the extent they are not paid.

6. Neither the provisions contained herein, nor any actions or payments made by the Debtors pursuant to this Order, (i) shall be deemed an assumption or adoption of any

policy, program, practice, contract or agreement, or shall otherwise affect the Debtors' rights under section 365 of the Bankruptcy Code to assume or reject any executory contract or unexpired lease; or (ii) shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtors may have to subsequently dispute such obligation on any ground that applicable law permits.

7. Notwithstanding anything to the contrary herein, payments made pursuant to this Order shall be subject to (i) any requirements imposed on the Debtors under any order entered by the Court approving postpetition financing and/or the use of cash collateral and (ii) any budget approved in connection therewith.

8. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.

9. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

10. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

11. This Court shall retain jurisdiction over any and all matters arising from or related to the implementation or interpretation of this Order.

Dated: Wilmington, Delaware
July __, 2009

United States Bankruptcy Judge