

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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In re : Chapter 11
: :
HARRY & DAVID HOLDINGS, INC, *et al.*,¹ : Case No. 11-____ (____)
: :
Debtors. : (Joint Administration Pending)
: :
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**MOTION OF THE DEBTORS FOR AN ORDER
AUTHORIZING THEM TO PAY PREPETITION EMPLOYEE
WAGES, BENEFITS, BUSINESS EXPENSES AND RELATED ITEMS**

The above-captioned debtors (collectively, the "Debtors") hereby move the Court for the entry of an order pursuant to sections 105(a), 363, 507(a)(4), 507(a)(5), 541(b)(7) and 541(d) of title 11 of the United States Code (the "Bankruptcy Code") (i) authorizing the Debtors to pay: (a) prepetition employee wages, salaries, overtime pay, bonuses, contractual compensation, sick pay, vacation pay and other accrued compensation, as well as related Withholdings and Deductions (as such terms are defined below) (collectively, the "Prepetition Compensation"); (b) unreimbursed prepetition business expenses (collectively, the "Prepetition Business Expenses"); (c) prepetition contributions to, and benefits under, employee benefit plans (collectively, the "Prepetition Benefits"); and (d) all costs and expenses incident to the foregoing payments and contributions (including payroll-related taxes and processing costs) and (ii) granting certain related relief. In support of this Motion, the Debtors incorporate the statements contained in the Declaration of Kay Hong in Support of First-Day Pleadings

¹ The Debtors are the following four entities (the last four digits of their respective taxpayer identification numbers, if any, follow in parentheses): Harry & David Holdings, Inc. (4389); Harry and David (1765); Harry & David Operations, Inc. (1427); Bear Creek Orchards, Inc. (7216). The address of each of the Debtors is 2500 South Pacific Highway, Medford, Oregon 97501.

(the "First Day Declaration") filed contemporaneously herewith and further respectfully state as follows:

Background

1. On the date hereof (the "Petition Date"), each of the Debtors commenced a case under chapter 11 of the Bankruptcy Code.² By a motion filed on the Petition Date, the Debtors have requested that their chapter 11 cases be consolidated for procedural purposes only and administered jointly.

2. The Debtors are a vertically integrated, multi-channel specialty retailer and producer of branded premium gift-quality fruit, food products, and gifts marketed under the Harry and David®, Wolferman's®, and Cushman's® brands. The Debtors market their products through catalogs distributed through the mail, the Internet, business-to-business, consumer telemarketing, Harry and David Stores, Cushman's seasonal stores, and wholesale distribution to other retailers. For the twelve months ending December 25, 2010, the Debtors generated approximately \$416 million in revenue.

Prepetition Compensation

3. As of the Petition Date, the Debtors had approximately 1,950 employees.³ Many of the employees are owed or have accrued various sums for Prepetition Compensation. These amounts remained unpaid on the Petition Date because, among other things: (i) the Debtors commenced their chapter 11 cases in the midst of their customary payroll period;

² This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue for this matter is proper in this district pursuant to 28 U.S.C. § 1409.

³ In addition, the Debtors utilize the services of approximately 60 independent contractors, who primarily provide public relations, finance and creative services for the Debtors. To the extent that prepetition amounts remain due and owing to such contractors (or any agencies that may provide them), the Debtors propose to pay such amounts as "Prepetition Compensation" hereunder.

(ii) checks previously issued on account of such obligations may not have been presented for payment or may not have cleared the banking system; (iii) amounts related to prepetition services, while accrued in whole or in part, had not yet become due and payable by the Debtors; and (iv) amounts deducted from employee paychecks were not then due to be paid over to the intended recipient or account, including (a) deductions taken from employees' paychecks to make payments on behalf of the employees for or with respect to, e.g., the Debtors' employee benefit programs or amounts due third parties (collectively, the "Deductions")⁴ and (b) withholdings from employees' paychecks on account of various federal, state or local income, FICA, Medicare, state disability, workers' compensation and other taxes for remittance to the appropriate federal, state or local taxing authority (collectively, the "Withholdings"). The Debtors estimate that the total amount of unpaid gross wages, salaries and other compensation was no more than \$7 million and the total amount of unpaid Deductions and Withholdings was no more than \$100,000 as of the Petition Date. The Debtors seek authorization to honor and pay Prepetition Compensation.

Prepetition Business Expenses

4. The Debtors customarily reimburse their employees for a variety of business expenses incurred in the ordinary course of their businesses. Generally, the Debtors reimburse no more than \$180,000 in such business expenses on a monthly basis. It is difficult for the Debtors to determine the exact amount of Prepetition Business Expenses that are outstanding, because employees may not submit reimbursement forms promptly. Nonetheless, the Debtors estimate that their obligations for Prepetition Business Expenses as of the Petition

⁴ Specifically, the Debtors take voluntary and/or involuntary Deductions from their employees' paychecks in connection with the Debtors' employee benefit programs, loan repayments and garnishments.

Date to employees will not exceed \$180,000. The Debtors seek authorization to reimburse all Prepetition Business Expenses.

Prepetition Benefits

5. The Prepetition Benefits relate to the Debtors' employee benefit programs, including: (i) plans maintained by the Debtors that provide medical, dental, vision, prescription drug, accident, life and disability insurance; (ii) flexible spending accounts; (iii) a 401(k) retirement plan for certain of their Employees; and (iv) ordinary course severance programs for hourly and salaried Employees⁵ (collectively, the "Benefit Programs").⁶

6. The Debtors maintain self-insured plans that provide general health, vision and prescription drug insurance (collectively, the "Self-Insured Plans"). Under the Self-Insured Plans, the Debtors assume liability for and initially pay certain benefits, rather than paying

⁵ The Debtors maintain an ordinary course severance program that is available to each of their Employees upon the occurrence of certain specified events (the "Severance Program"). Pursuant to this Motion, the Debtors are seeking authority to: (i) pay all prepetition severance claims in an amount not to exceed \$11,725 per individual; and (ii) make postpetition payments to Employees terminated after the Petition Date, if any, in accordance with the Severance Program. The Debtors believe that total prepetition amount outstanding under the Severance Program is approximately \$33,000. As clarification the Debtors are not seeking, pursuant to this motion, authority to: (i) make any severance payments over the \$11,725 priority cap in section 507 of the Bankruptcy Code to any individuals whose employment with the Debtors was terminated prior to the Petition Date; (ii) make any postpetition severance payments not permitted under section 503(c) of the Bankruptcy Code; or (iii) make any severance payments outside the Severance Program to any individuals pursuant to a contract or offer letter.

In the ordinary course of business, the Debtors make periodic contributions to a pension plan maintained by the Debtors for certain covered Employees and former employees (collectively, the "Pension Plan") in accordance with the Pension Plan's documents and applicable law. Pursuant to this Motion, the Debtors are seeking authority to make minimum required contributions as required by law (the "Pension Funding Payments"). The next Pension Funding Payment is due in April 2011.

⁶ In addition, the Debtors provide the employees with certain leave policies and benefits (including military duty leave, jury duty leave, maternity leave, state disability leave, workers' compensation leave, medical leave and family medical leave), some of which are mandated or encouraged by law and some of which may have pay or benefits components. The Debtors also provide their employees with paid holidays, sick days, personal days and bereavement leave.

The descriptions of the Debtors' benefit programs contained herein are provided for convenience only and are qualified in all respects by the actual terms of such programs. Nothing contained herein shall have the effect of modifying the terms of the benefit programs or altering any party's rights and obligations thereunder.

premiums for independent insurance coverage. Aetna Inc. ("Aetna") serves as the third-party claims agent for, and processes and initially pays, the medical claims of covered Employees. The Debtors reimburse Aetna for all payments it makes under the Self-Insured Plans.

7. The Debtors also maintain certain insured benefit plans under which the Debtors, the Employees or both contribute to the payment of premiums for insurance or other coverage provided by third parties (collectively, the "Insured Plans"). The Insured Plans provide dental, accident, life, long-term disability and short-term disability insurance.

8. Certain Prepetition Benefits were owed but remained unpaid as of the Petition Date because certain obligations under the Benefit Programs accrued either in whole or in part prior to the Petition Date, but will not become payable in the ordinary course of the Debtors' business until a later date. The Debtors estimate that the value of the unpaid Prepetition Benefits was no more than \$100,000, as of the Petition Date. The Debtors seek authority to pay all Prepetition Benefits that, as of the Petition Date, had accrued but remained unpaid.

Costs and Expenses Incident to the Foregoing

9. The Debtors incur costs incident to Prepetition Compensation and Deductions (collectively, the "Prepetition Processing Costs"). Included in the Prepetition Processing Costs are processing costs and the employer portion of payroll-related taxes, as well as accrued but unpaid prepetition charges for administration of the Prepetition Benefits, such as payments owed to Aetna for reimbursement of amounts paid by Aetna under the Self-Insured Plans and for its service as third-party administrator of the Self-Insured Plans. The Debtors estimate that the aggregate amount of Prepetition Processing Costs accrued but unpaid, as of the Petition Date, was no greater than \$4 million. Payment of the Prepetition Processing Costs is justified because the failure to pay any such amounts might disrupt services provided by third-party providers with respect to Prepetition Compensation, Deductions and Prepetition

Benefits. By paying the Prepetition Processing Costs, the Debtors may avoid even temporary disruptions of such services and thereby ensure that their employees obtain all compensation and benefits without interruption. The Debtors seek authorization to pay all Prepetition Processing Costs.

Legal Basis for Relief Requested

10. The payment of the Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits and Prepetition Processing Costs is warranted under sections 105(a), 363, 507(a)(4), 507(a)(5), 541(b)(7) and 541(d) of the Bankruptcy Code and case law in this District and elsewhere.

Employee Wages and Related Costs Enjoy Priority Status under the Bankruptcy Code

11. Under section 507(a)(4) of the Bankruptcy Code, employees are granted a priority claim for:

allowed unsecured claims, but only to the extent of \$11,725 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for —

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor

11 U.S.C. § 507(a)(4). Likewise, under section 507(a)(5) of the Bankruptcy Code, employees are granted a priority claim for:

allowed unsecured claims for contributions to an employee benefit plan —

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of —

(i) the number of employees covered by each such plan multiplied by \$11,725; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(5).

12. In addition, the costs of administering employee benefits programs are also entitled to priority treatment under section 507(a)(5) of the Bankruptcy Code. Allegheny Int'l, Inc. v. Metro. Life Ins. Co., 145 B.R. 820 (W.D. Pa. 1992). In Allegheny, the court ruled that the prepetition claims of a medical benefits plan administrator for, among other things, fees charged for performing administrative, actuarial and claims services in connection with the medical benefits plans of a chapter 11 debtor were entitled to priority under section 507(a)(5) of the Bankruptcy Code. The court stated that "[i]t would be useless to prioritize expenses for contributions to an employee benefit plan and not prioritize the expenses necessary to administer those plans." Id. at 822-23.

13. In the instant case, the Debtors believe that the amount of Prepetition Compensation owing to or on account of the overwhelming majority of their employees will not exceed the sum of \$11,725 allowable as a priority claim under section 507(a)(4) of the Bankruptcy Code. Therefore, the payment of these amounts pursuant to this Motion would not deplete assets otherwise available to other unsecured creditors under a plan. Likewise, because

the Prepetition Processing Costs are entitled to priority under section 507(a)(5) of the Bankruptcy Code, amounts paid on account of such Prepetition Processing Costs also are not available for distribution to unsecured creditors.

Funds Held in Trust Are Not Available for General Distribution to Creditors

14. Section 541(d) of the Bankruptcy Code provides that "property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest" becomes property of a debtor's estate only to the extent of the debtor's legal title therein. 11 U.S.C. § 541(d). It is well established in this District that "property a debtor holds in trust for another is not property of the estate" within the meaning of section 541 of the Bankruptcy Code. See Golden v. The Guardian (In re Lenox Healthcare, Inc.), 343 B.R. 96, 100 (Bankr. D. Del. 2006); see also In re Columbia Gas Sys., Inc., 997 F.2d 1039, 1059 (3d Cir. 1993) (concluding that property which a debtor holds in trust — either express or constructive — for another does not become property of the estate when the debtor files for bankruptcy; stating that "Congress clearly intended the exclusion created by section 541(d) to include not only funds held in express trust, but also funds held in constructive trust."); EBS Pension L.L.C. v. Edison Bros. Stores, Inc. (In re Edison Bros., Inc.), 243 B.R. 231, (Bankr. D. Del. 2000) (same).

15. More specifically, it is well established under section 541(d) of the Bankruptcy Code that taxes collected on behalf of taxing authorities are not property of the estate. See Begier v. IRS, 496 U.S. 53, 59 (1990) (holding that taxes such as excise taxes, FICA taxes and withholding taxes are property held by the debtor in trust for another and, as such, do not constitute property of the estate); see also Old Republic Nat'l Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 721 (4th Cir. 1998) (holding that deposits subject to an express trust are excluded from the bankruptcy estate); City of Farrell v. Sharon Steel Corp. (In re Sharon

Steel Corp.), 41 F.3d 92, 98-103 (3d Cir. 1994) (finding that funds withheld from employees' paychecks may be subject to a trust, and thus are not property of a debtor's estate, even where such funds were commingled with the debtor's other property). Accordingly, such funds are not available for general distribution to a debtor's creditors.

16. The Withholdings are held in trust for the benefit of the appropriate federal, state or local taxing authorities. Likewise, certain of the Deductions also are held in trust for, among others, the Debtors' employees themselves. Thus, the Withholdings and Deductions likely are not property of the Debtors' estates within the meaning of section 541 of the Bankruptcy Code. As a result, the remittance of the Withholdings and Deductions is warranted because it will not adversely affect the Debtors' estates or their creditors.

17. Further, many federal, state and local taxing authorities impose personal liability on the officers and directors of entities responsible for collecting taxes from employees to the extent any such taxes are collected but not remitted. Accordingly, if these amounts remain unpaid, there is a risk that the Debtors' officers and directors may be subject to lawsuits on account of any such nonpayment during the pendency of these chapter 11 cases. Such lawsuits obviously would constitute a significant distraction for officers and directors at a time when they should be focused on the Debtors' efforts to (i) stabilize their postpetition business operations and (ii) develop and implement a successful reorganization strategy. To avoid the serious disruption of the Debtors' reorganization efforts that could result from the nonpayment of any withholding taxes, the Debtors seek authority to remit all Withholdings collected on behalf of the employees, including prepetition Withholdings, to the applicable taxing authorities to the extent that that they have not already been remitted.

Certain Employee Withholdings and Contributions for ERISA Plans Are Not Property of the Estate

18. In addition to the general exclusion of certain property from a debtor's estate under section 541(d) of the Bankruptcy Code, section 541(b)(7) of the Bankruptcy Code specifically provides that property of the estate does not include amounts withheld by an employer from wages of an employee, or amounts received by an employer from employees, for payment as contributions to an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). Amounts withheld or collected from employees on account of certain Prepetition Benefits, such as 401(k) accounts, medical, life, disability and other insurance, or other benefits that are subject to title I of ERISA and thus satisfy the standards of section 541(b)(7) of the Bankruptcy Code, are not property of the Debtors' estates and not available for distribution to the Debtors' creditors. As such, the remittance of amounts constituting Prepetition Benefits that do not constitute property of the Debtors' estates will not adversely affect the Debtors' estates or their creditors and is therefore warranted.

The Doctrine of Necessity Provides a Further Basis for Granting the Requested Relief

19. Section 363(b)(1) of the Bankruptcy Code provides: "The 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). Section 105(a) of the Bankruptcy Code provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent the abuse of process.

11 U.S.C. § 105(a). Section 105(a) of the Bankruptcy Code grants bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code under equitable common law principles.

20. Courts have repeatedly recognized "the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operations of the debtor." In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); see also In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (finding that a debtor is entitled to pay certain prepetition creditors upon a showing that the payment is "essential to the continued operation of the business") (citations omitted). The United States Supreme Court first articulated the equitable common law principle commonly referred to as the "doctrine of necessity" over 125 years ago in Miltenberger v. Logansport, C. & S.W.R. Co., 106 U.S. 286, 1 S.Ct. 140, 27 L.Ed. 117 (1882). "The Supreme Court, the Third Circuit and the District of Delaware all recognize the court's power to authorize payment of pre-petition claims when such payment is necessary for the debtor's survival during chapter 11." In re Just for Feet, Inc., 242 B.R. 821, 825 (D. Del. 1999). "The 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.

21. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay critical prepetition claims, even though such payment is not explicitly authorized under the Bankruptcy Code. See In re Columbia Gas Sys., Inc., 136 B.R. 930, 939 (Bankr. D. Del. 1992) (citing In re Lehigh & New England Rwy. Co., 657 F.2d 570, 581 (3d Cir. 1981) (recognizing that "if payment of a prepetition claim 'is essential to the continued operation of [the debtor], payment may be authorized.'")).

22. The bankruptcy court's exercise of its authority under the "doctrine of necessity" is appropriate to carry out specific statutory provisions of chapter 11, specifically sections 1107(a), 1108 and 363(b)(1) of the Bankruptcy Code, which collectively authorize a debtor in possession to maintain and operate the debtor's business and use estate property outside of the ordinary course of business. Indeed, a debtor in possession operating a business under section 1108 of the Bankruptcy Code has a duty to protect and preserve the value of its business, and prepetition claims may be paid if necessary to perform the debtor's duty. See In re CoServ, L.L.C., 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) ("There are occasions when this duty can only be fulfilled by the preplan satisfaction of a prepetition claim.").

23. This Motion satisfies the foregoing criteria, as the relief sought herein plainly is essential to the Debtors' reorganization. The immediate impairment of the Debtors' relationships with their employees and the irreparable harm to workforce morale sure to attend any delay or disruption in the payments and benefits provided to employees — at the very time when the dedication, confidence and cooperation of those employees is most critical — would clearly imperil the Debtors' chances of a successful reorganization. The Debtors operate in a highly competitive sector of the domestic economy (i.e., specialty retailing). Companies within the Debtors' sector depend upon their employees' proactive, "customer first" attitude. Any diminution in employee motivation or morale will have an immediate harmful impact on the Debtors' operations and the going concern value of the estates.

24. Indeed, maintaining the goodwill of the Debtors' employees and ensuring the uninterrupted availability of their services will (i) assist the Debtors in maintaining the necessary "business as usual" atmosphere and, in turn, protect the going concern value of the estates and maximize the value ultimately available to creditors and (ii) preserve the Debtors'

relationships with vendors and, crucially, customers, because the Debtors' employees are their "face to the world." The creditors of the Debtors will ultimately benefit from the payment of these prepetition claims.

25. Furthermore, any harm resulting from the Debtors' failure to obtain the relief requested herein would not be limited to the Debtors' estates. Because the amounts represented by Prepetition Compensation, Prepetition Business Expenses and Prepetition Benefits are needed to enable the Debtors' employees to meet their own personal obligations, they would suffer undue hardship and, in many instances, serious financial difficulties if the relief requested herein is not granted. Many would likely seek other employment (possibly with the Debtors' competitors) to the detriment of the Debtors and their reorganization prospects.

26. In light of the foregoing, the Debtors respectfully submit that the payment of the employee-related obligations as requested herein is (i) necessary and essential for the Debtors' reorganization, (ii) in the best interests of the Debtors, their estates and their creditors and (iii) necessary to prevent immediate and irreparable harm to the Debtors, their estates and their employees.

27. This Court and courts in other Districts have routinely approved the payment of prepetition claims of employee wages, salaries, expenses and benefits in various chapter 11 cases. See, e.g., In re Summit Business Media Holding Co., No. 11-10231 (PJW) (Bankr. D. Del. Jan. 28, 2011); In re CB Holding Corp., No. 10-13683 (MFW) (Bankr. D. Del. Dec. 13, 2010); In re Atrium Corp., No.10-10150 (BLS) (Bankr. D. Del. Feb 22, 2010); In re The Fairchild Corp., No. 09-10899 (CSS) (Bankr. D. Del. March 20, 2009); In re Smurfit-Stone Container Corp., No. 09-10235 (BLS) Bankr. D. Del. Jan. 27, 2009); In re Tribune Co., No. 08-

13141 (KJC) (Bankr. D. Del. Dec. 10, 2008); In re Boscov's Inc., No. 08-11637 (KG) (Bankr. D. Del. Aug. 5, 2008).⁷

Request for Authority for Banks to Honor and Pay Checks Issued to Pay Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits and Prepetition Processing Costs

28. In addition, by this Motion, the Debtors request that all applicable banks and other financial institutions (collectively, the "Banks") be authorized, when requested by the Debtors, to receive, process, honor and pay any and all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits and Prepetition Processing Costs, regardless of whether such checks were presented or fund transfer requests were submitted prior to or after the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments. The Debtors represent that these checks are drawn on identifiable payroll and disbursement accounts and can be readily identified as relating directly to the authorized payment of Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits and/or Prepetition Processing Costs. Accordingly, the Debtors believe that checks other than those relating to authorized payments will not be honored inadvertently.

29. Nothing contained herein is intended or shall be construed as: (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' rights to dispute any claim on any grounds; (iii) a promise to pay any claim; or (iv) an implication or admission that any particular claim against the Debtors would constitute a claim for Prepetition

⁷ These unreported orders are not attached to this Motion. Copies of these orders will be made available to the Court at or prior to the hearing on this Motion and are available to other parties upon request from the Debtors' counsel.

Compensation, Prepetition Business Expenses, Prepetition Benefits or Prepetition Processing Costs.

Requests for Immediate Relief & Waiver of Stay

30. Pursuant to Rules 6003(b) and 6004(h) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtors seek (i) immediate entry of an order granting the relief sought herein and (ii) a waiver of any stay of the effectiveness of such an order.

Bankruptcy Rule 6003(b) provides, in relevant part, that "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding . . . a motion to pay all or part of a claim that arose before the filing of the petition." Accordingly, where the failure to grant any such requested relief would result in immediate and irreparable harm to the Debtors' estates, the Court may allow the Debtors to pay all or part of a claim that arose before the Petition Date prior to the twenty-first day following the Petition Date. Bankruptcy Rule 6004(h) provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise."

31. As set forth above and in the First Day Declaration, the payment of the Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits and Prepetition Processing Costs is necessary to prevent the immediate and irreparable damage to the Debtors' (i) operations (and customer confidence therein), (ii) going-concern value and (iii) ability to reorganize that would result from a collapse of employee morale. Accordingly, the Debtors submit that ample cause exists to justify (i) the immediate entry of an order granting the relief sought herein and (ii) a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

Notice

32. Notice of this Motion shall be provided to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Debtors' twenty (20) largest unsecured creditors on a consolidated basis, as identified in their chapter 11 petitions; and (iii) counsel to the Debtors' proposed postpetition secured lenders. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Del. Bankr. L.R. 9013-1(m). Due to the urgency of the circumstances surrounding this Motion and the nature of the relief requested herein, the Debtors respectfully submit that no further notice of this Motion is required.

33. WHEREFORE, the Debtors respectfully request that the Court enter an order substantially in the form attached hereto as Exhibit A: (i) granting the relief sought herein; and (ii) granting to the Debtors such other and further relief as the Court may deem proper.

Dated: March 28, 2011
Wilmington, Delaware

Respectfully submitted,

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PROPOSED ATTORNEYS FOR THE DEBTORS

EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

-----X
In re : Chapter 11
: :
HARRY & DAVID HOLDINGS, INC, *et al.*,¹ : Case No. 11-_____ (____)
: :
Debtors. : (Jointly Administered)
: :
-----X

**ORDER AUTHORIZING DEBTORS TO PAY PREPETITION
EMPLOYEE WAGES, BENEFITS, BUSINESS EXPENSES AND RELATED ITEMS**

This matter coming before the Court on the Motion of the Debtors for an Order Authorizing Them to Pay Prepetition Employee Wages, Benefits, Business Expenses and Related Items (the "Motion"),² filed by the above-captioned debtors (collectively, the "Debtors"); the Court having reviewed the Motion and the First Day Declaration and having considered the statements of counsel and the evidence adduced with respect to the Motion at a hearing before the Court (the "Hearing"); the Court having found that (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (ii) venue is proper in this district pursuant to 28 U.S.C. § 1409, (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (iv) notice of the Motion and the Hearing was sufficient under the circumstances and (v) there is good cause to waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h) to the extent it is applicable; and after due deliberation the Court having determined that the relief requested in the Motion is (i) necessary and essential for the Debtors' reorganization, (ii) in the best interests of the Debtors,

¹ The Debtors are the following four entities (the last four digits of their respective taxpayer identification numbers, if any, follow in parentheses): Harry & David Holdings, Inc. (4389); Harry and David (1765); Harry & David Operations, Inc. (1427); Bear Creek Orchards, Inc. (7216). The address of each of the Debtors is 2500 South Pacific Highway, Medford, Oregon 97501.

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

their estates and their creditors and (iii) necessary to prevent immediate and irreparable harm to the Debtors, their estates and their employees; and good and sufficient cause having been shown;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Debtors are authorized, in the Debtors' sole discretion, to pay the Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits and Prepetition Processing Costs that accrued but remained unpaid as of the Petition Date, in an aggregate amount not to exceed \$11.38 million.
3. The Debtors are authorized, but not directed, to continue the Severance Program on a postpetition basis.
4. The Debtors are authorized, but not directed, to make the Pension Funding Payments.
5. The Banks are authorized and directed, when requested by the Debtors, to receive, process, honor and pay all checks presented for payment of, and to honor all funds transfer requests made by the Debtors related to, Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits and Prepetition Processing Costs, whether such checks were presented or funds transfer requests were submitted prior to or after the Petition Date, provided that funds are available in the Debtors' accounts to cover such checks and funds transfers. The Banks are authorized to rely on the Debtors' designation of any particular check or funds transfer as approved by this Order.
6. Nothing in the Motion or this Order, nor the Debtors' payment of claims pursuant to this Order, shall be deemed or construed as: (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' rights to dispute any claim on any grounds; (iii) a promise to pay any claim; or (iv) an implication or admission that any particular

claim is a claim for Prepetition Compensation, Prepetition Business Expenses, Prepetition Benefits or Prepetition Processing Costs.

7. The requirements of Bankruptcy Rule 6003(b) have been satisfied with respect to the payments authorized by this Order.

8. This Order shall be immediately effective and enforceable upon its entry. To the extent that it may be applicable, the fourteen-day stay imposed by Bankruptcy Rule 6004(h) is hereby waived.

9. Notwithstanding anything to the contrary contained herein, (i) any payment made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors under any order approving debtor-in-possession financing (a "DIP Order"), and (ii) any claim for which payment is authorized pursuant to this Order that is treated as an administrative expense of the Debtors' estates shall be and is subject and subordinate to any and all claims, liens, security interests and priorities granted to the DIP Agents (as defined in the DIP Order) in accordance with and subject to the terms of the applicable DIP Order, and payment on any such claim shall be subject to any and all restrictions on payments in the DIP Order and any other order of the Court authorizing the Debtors' use of cash collateral.

Dated: _____, 2011
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE