

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)**

| | | |
|---|--|--|
| <p>In re</p> <p>The Boyds Collection, Ltd., et al.¹</p> <p style="text-align: center;">Debtors.</p> | <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> | <p>Case No. 05-____ () through</p> <p>05-____ ()</p> <p>Chapter 11</p> <p>(Jointly Administered under</p> <p>Case No. 05-____ ())</p> |
| <p>* * * * * * * * * * * * *</p> | | |

**DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER (A) AUTHORIZING
THE DEBTORS TO PAY PRE-PETITION SHIPPING AND WAREHOUSING
CHARGES AND (B) AUTHORIZING FINANCIAL INSTITUTIONS TO PAY ALL
CHECKS AND ELECTRONIC PAYMENT REQUESTS MADE BY THE DEBTORS
RELATING TO THE FOREGOING**

The Boyds Collection, Ltd., et al., the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), by counsel, file this Emergency Motion for Entry of an Order (A) Authorizing the Debtors to Pay Pre-Petition Shipping and Warehousing Charges and (B) Authorizing Financial Institutions to Pay All Checks and Electronic Payment Requests Made by the Debtors Relating to the Foregoing (the “Motion”), and in support thereof state:²

Jurisdiction

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

2. The statutory bases for the relief requested herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”).

¹ The Debtors in the proposed jointly administered cases include: The Boyds Collection, Ltd.; The Boyds Collection, Ltd., LP; Boyds Operations Inc.; The Boyds Collection - Pigeon Forge, LLC; The Boyds Collection - Myrtle Beach, LLC; The Boyds Collection - Branson, LLC; J&T Designs and Imaginations, Inc.; HC Accents & Associates, Inc.; and Boyds Bear and Company, LP.

² The facts and circumstances supporting this Motion are set forth in the Affidavit of Jan L. Murley in Support of First Day Motions filed contemporaneously herewith.

Background

3. On the date hereof (the “Commencement Date”), the Debtors each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (collectively, the “Reorganization Cases”). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Contemporaneously herewith, the Debtors requested an order for the joint administration of the Reorganization Cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

4. The Boyds Collection, Ltd. (“Boyds”) is a leading designer, marketer and distributor of high-quality, hand-crafted collectibles, gift and other specialty products. Boyds was founded in 1979 and is the parent company, holding direct or indirect ownership interests in eight (8) domestic subsidiaries and four (4) foreign subsidiaries.

5. Boyds operates in two segments: a wholesale gift business and a retail gift/entertainment business. Boyds’ wholesale business designs, imports and distributes plush animals, resin figurines and other specialty giftware via a global network of independent retailers and distributors. Boyds imports substantially all of its products from manufacturers in China through buying agencies. Boyds’ retail business sells plush animals, resin figurines and specialty giftware products and provides a unique interactive entertainment experience at its Gettysburg, Pennsylvania and Pigeon Forge, Tennessee retail stores.

6. As set forth in the Form 10-Q filed by Boyds on August 12, 2005, as of June 30, 2005, the Debtors’ consolidated books and records reflected assets totaling approximately \$66.9 million and liabilities totaling approximately \$101.7 million. For the three months ended June 30, 2005, Boyds reported revenues of approximately \$17.1 million and net losses of approximately \$101.3 million.

7. The significant indebtedness of Boyds consists of: (i) approximately \$56.5 million in aggregate principal amount under a senior secured credit agreement, dated as of February 23,

2005 (the “Pre-Petition Credit Agreement”) and (ii) approximately \$34.4 million in aggregate principal amount pursuant to certain 9% senior subordinated notes due in 2008.

8. During 2001, Boyds’ financial results began to deteriorate significantly as a consequence of industry-wide and company-specific factors. Over a period of several years, retail sales of plush toys shifted from small independent retailers, in which Boyds had a leading presence, to large regional and national retailers and mass merchandisers, in which Boyds did not have a meaningful presence. Moreover, the large retailers competed with Boyds’ product line at lower price points. This shift in distribution channels coincided with a general cooling of consumer demand for “collectible” products. As a result, the retail sales of Boyds and its direct industry competitors were negatively affected.

9. In response, during 2004 Boyds began to implement various operational restructuring and cost reduction programs. Such programs focused on (i) redirecting sales efforts towards larger regional and national channels, (ii) developing products specifically targeted to these channels, (iii) selectively expanding distribution to include direct in-home marketing initiatives and (iv) developing co-branding campaigns with well-recognized brands such as NASCAR, Coca-Cola, Crayola and M&Ms. Unfortunately, despite the efforts of Boyds’ management to reposition the business in response to the changing industry sales dynamics, Boyds was not able to increase sales in the new channels quickly enough to offset the decline in sales from the company’s traditional core-market of independent retailers.

10. By the fall of 2005, it had become apparent that Boyds could not avoid a financial restructuring. From September to the Commencement Date, Boyds engaged in discussions with the lenders (the “Pre-Petition Lenders”) under the Pre-Petition Credit Agreement regarding the terms of a comprehensive plan to restructure Boyds’ operations and existing debt obligations. Though Boyds and the Pre-Petition Lenders made substantial progress in these negotiations, as of the Commencement Date, negotiations were still ongoing. The Pre-Petition Lenders were unwilling to extend the waiver or commit to providing any further liquidity outside of a reorganization. On the Commencement Date, the Debtors, in the exercise of their prudent

business judgment, determined that it was in the best interest of all their stakeholders to commence the Reorganization Cases, continue negotiations with the Debtors' creditor constituencies and consummate a restructuring under the auspices of this Court.

Relief Requested

11. By this Motion, the Debtors seek the authority to continue to pay, in the ordinary course and in their sole discretion, pre-petition Shipping and Warehousing Charges, as such term is defined below. The Debtors also request an order authorizing financial institutions to receive, process, honor and pay all checks issued and electronic payment requests made relating to the foregoing.

A. Shippers and Warehousemen

12. The Debtors have a reputation for reliability and dependability among their customers. Indeed, many of the Debtors' pricing policies and marketing strategies revolve around that reliability and dependability. This reputation depends in substantial part on the timely delivery of product to the Debtors' customers. In turn, the Debtors' ability to make such timely deliveries depends on a successful and efficient system for the receipt of such product from China. Furthermore, as indicated above, the Debtors' supply and delivery system depends upon the use of reputable domestic common carriers, shippers and truckers (collectively, the "Shippers"), as well as a third-party warehouse at Hanover Terminal, Pennsylvania to store goods in transit (the "Warehousemen"). A list of Shippers and Warehousemen is attached hereto as Exhibit A.

13. Boyds transfers the goods that are purchased in China to the United States via ocean cargo ships leaving from Hong Kong or Shanghai ports and dropping the goods at the ports of Norfolk, Virginia or Long Beach, California. The goods delivered to the Norfolk port are shipped by truck to Boyds' headquarters and warehoused at a facility owned by the Debtors in McSherrystown, Pennsylvania (the "Boyds Warehouse"). The goods delivered to the Long Beach port are transferred to Baltimore, Maryland via train and then delivered to the Boyds Warehouse by truck. Goods are then shipped to its customers directly from the Boyds

Warehouse via Federal Express and the United Parcel Service. Boyds also ships goods from the Boyds Warehouse to its two retail stores in Gettysburg, Pennsylvania and Pigeon Forge, Tennessee by truck.³

14. It is essential for the Debtors' businesses, and their efforts to maximize value for all creditors, that they maintain a reliable and efficient supply and distribution system. Because the Debtors are in many cases dependent on third parties for transfer of these goods, it is essential that these Reorganization Cases not be a reason or excuse for any third party to cease performing timely services or to retain products or goods. If the Debtors are unable to provide goods to customers on a timely basis, the Debtors will suffer a significant loss of credibility and customer goodwill, thereby causing substantial harm to the Debtors' businesses and their reorganization efforts. Moreover, such a disruption in the Debtors' supply line could cripple the Debtors' operations.

15. Accordingly, by this Motion, the Debtors seek to prevent the breakdown of their delivery network and request authority to pay certain pre-petition charges relating to shipping and warehousing which the Debtors determine necessary or appropriate to (a) obtain release of critical or valuable goods or equipment that may be subject to liens, (b) maintain a reliable, efficient and smooth distribution system and (c) induce critical shippers to continue to carry goods, and equipment and make timely delivery.

16. Under some state laws, a Shipper or a Warehousemen may have a lien on the goods of the Debtors which they have in their possession, which secures the charges or expenses incurred in connection with the transportation or storage of the goods.⁴ In addition, pursuant to

³ At any given time, the Debtors are in transit on trucks operated by various common carriers. Therefore, the identity of the common carriers vary and cannot be specifically identified on Exhibit A.

⁴ For example, section 7-307 of the Uniform Commercial Code provides, in pertinent part, that a "carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." See U.C.C. § 7-307(1) (2003). While the Debtors do not concede that any of the Shippers or Warehousemen do in fact have valid liens, the risk that such liens will be asserted in this case is significant and has the potential to lead to or severe disruption of the Debtors' business operations.

section 363(e) of the Bankruptcy Code, the Shippers or Warehousemen, as bailees, may be entitled to adequate protection of a valid possessory lien. Indeed, even if the Shippers and Warehousemen did not have a valid lien, their possession (and retention) of the Debtors' goods and supplies would severely disrupt, and potentially cripple, the Debtors' operations.

17. The Debtors expect that, at any given time, the value of the goods in transit is up to approximately \$2,000,000. The Debtors also expect that as of the Commencement Date, certain of the Shippers and Warehousemen will have outstanding invoices for goods that were delivered to the Debtors or the Debtors' customers prior to the Commencement Date (the "Shipping and Warehousing Charges"). As a result, the Shippers and Warehousemen will likely argue that they are entitled to possessory liens for transportation and storage, as applicable, of the goods in their possession and as such they may refuse to deliver or release such goods before their claims have been satisfied and their liens redeemed.

18. The Debtors expect the Shipping and Warehousing Charges to be approximately \$700,000.00 as of the Commencement Date. The Debtors submit that the payment of this amount as requested in this Motion is amply justified by the necessity of the Shippers and Warehousemen to their business operations and the potential losses that the Debtors may suffer if their operations are disrupted. Moreover, the Debtors do not believe that there are viable timely alternatives to the Shippers or the Warehousemen that they have used prior to the Commencement Date. The Debtors, thus, believe that it is essential to the value of their estates that they be permitted to make payments on account of the Shipping and Warehousing Charges.

19. Accordingly, by this Motion, the Debtors seek an order authorizing them, inter alia, to make non-disputed pre-petition payments to the Shippers and Warehousemen relating to the Shipping and Warehousing Charges as the Debtors, in their business judgment, determine is necessary or appropriate in order to obtain the release of goods held by such Shippers and Warehousemen. However, the Debtors represent that they will only pay Shipping and Warehousing Charges where they believe, in their business judgment, the benefit their estates and creditors exceed (a) the costs that their estates would incur by bringing an action to compel

the turnover of such goods and (b) the delays associated with such actions, or where a valid and enforceable lien is shown to exist on products held by such Shippers or Warehousemen.

B. Banks and Other Financial Institutions

20. The Debtors further request that all applicable banks and other financial institutions be authorized to receive, process, honor and pay all checks presented for payment and to honor all electronic payment requests made by the Debtors related to the pre-petition obligations described herein, whether such checks were presented or electronic requests were submitted prior to or after the Commencement Date. The Debtors further request that all such banks and financial institutions be authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Motion. The Debtors represent that they have sufficient cash reserves to promptly pay all pre-petition obligations set forth herein on an ongoing basis and in the ordinary course.

Basis for Relief

A. The Court May Rely on Section 363(b) to Grant the Motion

21. The Court may authorize the Debtors to pay Shipping and Warehousing Charges under section 363(b) of the Bankruptcy Code. That section 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 pre-petition claims. See FV Steel and Wire Co., Case No. 04-22421 (Bankr. E.D. Wis. Feb. 26, 2004) (authorizing the continuation of customer programs and the payment of pre-petition claims under section 363 of the Bankruptcy Code); In re Ionosphere Clubs Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (affirming lower court order authorizing payment of pre-petition wages pursuant to section 363(b) of the Bankruptcy Code); In re UAL Corp., Case No. 02-48191 (Bankr. N.D. Ill. Dec. 9, 2002) (authorizing payment of pre-petition claims under section 363 of the Bankruptcy Code as an out-of-the-ordinary-course transaction). In order to do so, “the debtor must articulate some business justification, other than the mere appeasement of major creditors.” Ionosphere Clubs, 98 B.R. at 175.

22. As discussed more fully herein, the Debtors' submit that the payment of the Shipping and Warehousing Charges meets this standard because (a) the failure to pay the Shipping and Warehousing Charges could lead to a complete breakdown in the Debtors' business operations and significantly deter the ability of the Debtors to reorganize, (b) Shippers and Warehousemen may have valid liens on goods in their possession and (c) Debtors do not have access to any viable alternatives to the Shippers and Warehousemen that are the subject of this Motion.

B. The Court May Rely on Its General Equitable Powers to Grant the Motion

23. The Court's general equitable powers are codified in section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, 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." In re Ionosphere Clubs, Inc., 98 B.R. at 175. Under section 105(a), a court "can 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) (citing Ionosphere Clubs, 98 B.R. at 177); see also, e.g., In re United American, Inc. 327 B.R. 776, 783 (Bankr. E.D. Va. 2005) (holding that "to justify the pre-plan payment of a pre-petition obligation, the proponent of the payment must show substantial necessity.")⁵

24. In these Reorganization Cases, the payment of the Shipping and Warehousing Charges are not simply necessary for the continued operations of the Debtors -- they are

⁵ While the Fourth Circuit has expressed some concern regarding distributions to creditors holding pre-petition unsecured claims (see Official Comm. of Equity Security Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987)), the requested payment of the Shipping and Warehousing Charges is clearly distinguishable from those of the unsecured pre-petition tort claimants in the Mabey case. Indeed, under circumstances where the payment of pre-petition claims was far less critical than in this case and where it appears that no liens had been asserted, many courts in the Fourth Circuit have authorized the payment of pre-petition obligations. See, e.g., In re USGen New England, Inc., Case No. 03-30465 (PM) (Bankr. D. MD. July 22, 2003) (authorizing payment of pre-petition claims of critical vendors); In re Startec Global Commc'ns Corp., Case No. 01-25013 (DK) (Bankr. D. Md. Dec. 20, 2001) (same); In re Fast Mart Convenience Stores, Inc., No. 01-60386 (Bankr. E.D. Va. Mar. 10, 2001) (DOT) (same).

absolutely essential for the survival of the Debtors' businesses. At any one time, the Debtors have goods in transit throughout the United States, China and the Atlantic and Pacific Oceans. These goods are the lifeblood of the Debtors' operations. The sale of the Debtors' products, and thus the operation of the Debtors' businesses, depend wholly upon the ability of the Debtors to get their goods to customers around the world. Accordingly, the continuation of the Debtors' positive relationship with the Shippers and the Warehousemen is imperative to the Debtors' ability to function in these Reorganization Cases.

25. If the Debtors' business operations are to continue, the Debtors must be able to maintain their highly effective supply and delivery system in which each of the Shippers and Warehousemen are a vital link. In the event that the Shippers and Warehousemen assert liens against the goods in transit and refuse to surrender such goods to the Debtors until the receipt of payment of the Shipping and Warehousing Charges, the Debtors could face a breakdown in their businesses. Thus, the Debtors continued operation and chances to reorganize, is directly dependent on the payment of the pre-petition Shipping and Warehousing Charges. Indeed, if this Motion is not granted, the Debtors' submit that their supply and delivery system could be drastically disrupted and their reorganization efforts jeopardized.

26. As such, the Debtors submit that the Court should exercise its powers under section 105 of the Bankruptcy Code and authorize the payment of the Shipping and Warehousing Charges.

Memorandum of Law

27. This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, the Debtors respectfully submit that such citations and discussion satisfy the requirement that the Debtors submit a separate memorandum of law in support of this Motion pursuant to Rule 9013-2 of the Local Bankruptcy Rules for the District of Maryland.

Notice

28. Notice of this Motion has been given to (a) the office of the United States trustee; (b) counsel to the Agent to the Debtors' Pre-Petition Lenders; (c) counsel for the indenture trustee for the Debtors' 9% Senior Subordinated Notes due 2008; and (d) each of the Debtors' top twenty (20) unsecured creditors.

No Prior Request

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

