

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re : Chapter 11
: :
Telogy, LLC., et al.,¹ : Case No. 10-10206 (____)
: :
Debtors. : Joint Administration Pending
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**DEBTORS' MOTION FOR ORDER AUTHORIZING DEBTORS
TO HONOR CERTAIN PREPETITION OBLIGATIONS TO
CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS**

The debtors and debtors in possession in the above-captioned cases (together, the “**Debtors**” or the “**Company**”) hereby move for entry of an order, pursuant to sections 105(a) and 363(b) of title 11 of the United States Code (the “**Bankruptcy Code**”), as supplemented by Rule 6003 of the Federal Rules of Bankruptcy Procedure (“**Bankruptcy Rules**”), authorizing, but not directing, the Debtors to honor certain prepetition obligations to customers and to otherwise continue their prepetition customer programs and practices in the ordinary course of business (the “**Motion**”). In support of the Motion, the Debtors rely upon and incorporate by reference the Affidavit of Gary B. Phillips, Chief Executive Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings (the “**Phillips Affidavit**”), which was filed with the Court concurrently herewith. In further support of the Motion, the Debtors, by and through their proposed undersigned co-counsel, respectfully represent:

BACKGROUND

1. On January 24, 2010 (the “**Petition Date**”), Telogy, LLC (“**Telogy**”) and e-Cycle, LLC filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The

¹ The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors’ executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

Debtors are continuing in the possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. The Debtors have requested that these chapter 11 cases be consolidated for procedural purposes. As of the date hereof, no official committee of unsecured creditors has been appointed.

2. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are set forth in the Phillips Affidavit.

JURISDICTION

3. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a) and 363(b) of the Bankruptcy Code, as supplemented by Bankruptcy Rule 6003(b).

CUSTOMER PROGRAMS

4. Prior to the Petition Date, and in the ordinary course of their businesses, the Debtors sought to maximize sales, develop and sustain a positive reputation in the marketplace, attract new customers, and enhance existing customer loyalty through the implementation of certain customer programs (collectively, the “**Customer Programs**”), including, without limitation, the programs and practices set forth below.

Customer Deposits

5. In the ordinary course of business, the Debtors regularly hold deposits from certain customers (the “**Customer Deposits**”). The Debtors apply Customer Deposits in satisfaction of customer invoices as part of their normal billing cycle. As of the Petition Date,

the Debtors estimate that they hold Customer Deposits in the aggregate amount of approximately \$209,631. The Debtors seek authority to honor and apply Customer Deposits received prepetition. Failure to honor and apply prepetition Customer Deposits could significantly erode customer loyalty and the Debtors' reputation in the marketplace.

Customer Credit and Refund Policies

6. From time to time, the Debtors refund payment and/or credit customers' accounts for their purchase, rental or lease of equipment that is either unavailable or returned by such customers for certain specified reasons (such practices, the "**Customer Credit and Refund Policies**"). Pursuant to the Customer Credit and Refund Policies, the Debtors will first credit a customer's account with the Company for the amount paid by the customer in connection with the transaction. In the event that a customer specifically requests a cash refund, the Debtors may provide such a refund. The Debtors estimate that, as of the Petition Date, the total amount of customer account credits relating to the Customer Credit and Refund Policies is approximately \$400,000. In addition, the Debtors estimate that their outstanding cash refund obligations in respect of the Customer Credit and Refund Policies total approximately \$5,000. The Debtors believe it is essential that they continue to honor the Customer Credit and Refund Policies postpetition in order to avoid substantial damage to customer relations and therefore, the value of these estates.

Equipment Warranties

7. The Debtors' core business is selling, leasing and renting test equipment to corporate customers. This test equipment is typically sold under warranty (such policies, the "**Equipment Warranties**"). Some of this equipment is used and refurbished for resale, lease and rental. The Debtors' businesses depend on customer confidence that the equipment is in

good working order and that the Debtors will, at their own expense, honor the Equipment Warranties and repair or replace malfunctioning equipment within the warranty period. The warranty period depends on the type, make, and model of the test equipment, and ranges from thirty days to two years. The Debtors' obligations in connection with the Equipment Warranties are typically *de minimis*. Because the Debtors believe that their Equipment Warranties generate customer loyalty and are an important selling point for potential new customers, the Debtors seek authority to honor their outstanding obligations under the Equipment Warranties postpetition.

Rental Equipment Purchase Discounts

8. As an incentive to rental customers to purchase the equipment they have been renting from the Debtors, the Debtors will from time to time offer such rental customers the option to purchase such rented equipment at a discount equal to a fraction of such customers' prior rental payments (the "**Rental Equipment Purchase Discounts**"). As of the Petition Date, certain rental customers may be entitled to purchase rented test equipment at a price reflecting Rental Equipment Purchase Discounts. While there are no cash outlays from the Company associated with the Rental Equipment Purchase Discounts, out of an abundance of caution, the Debtors seek confirmation of their authority to honor their outstanding invitations to customers to purchase equipment at prices reflecting Rental Equipment Purchase Discounts, and to continue to provide such discounts in the ordinary course of business.

9. The Debtors desire to continue the Customer Programs postpetition and to honor any and all obligations related to the Customer Programs which arise prepetition (the "**Prepetition Customer Obligations**"). The Debtors believe the Customer Programs are beneficial and critical to their business' transition into chapter 11 and the preservation of value of

these estates.² Thus the Debtors seek this Court's authority to honor, in their discretion, Prepetition Customer Obligations.

RELIEF REQUESTED

10. By this Motion, the Debtors seek entry of an order, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, as supplemented by Bankruptcy Rule 6003, authorizing the Debtors, in their discretion, to: (a) satisfy Prepetition Customer Obligations; and (b) continue, renew, replace, and/or terminate any of the Customer Programs as they determine advisable, in the ordinary course of business, without further application to this Court.

11. Also, by this Motion, the Debtors seek authorization for the applicable banks asked to process, honor and pay any and all checks on account of claims with respect to Customer Programs to rely on the representations of the Debtors as to which checks are issued and authorized to be paid in accordance with this Motion without any duty of further inquiry and without liability for following the Debtors' instructions.

BASIS FOR RELIEF

12. The Court may authorize continuation of the Customer Programs under section 363(b) of the Bankruptcy Code. Bankruptcy Code section 363(b) provides, in relevant part, 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 In re Ionosphere Clubs, 98

² Nothing contained herein shall constitute, nor shall it be construed as, a request to assume or adopt any executory contract with respect to any Customer Program, or an admission by the Debtors of liability with respect to any Prepetition Customer Obligation. The Debtors expressly reserve all rights with respect to the continuation or cessation of any Customer Program and the assumption, adoption, or rejection of any executory contract with respect to any Customer Program. In addition, the Debtors expressly reserve all defenses with respect to any Prepetition Customer Obligation.

B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (authorizing payment of prepetition claims where the debtors articulate “some business justification, other than the mere appeasement of major creditors”); In re James A. Phillips, 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. 174, 175 (Bankr. S.D.N.Y. 1989). Under section 105(a), 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, federal courts have regularly 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 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). 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. Moreover, Bankruptcy Rule 6003 clarifies the doctrine of necessity by empowering bankruptcy courts to grant relief regarding “a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” to the extent that relief is necessary to avoid “immediate and irreparable harm.”

16. Here, the importance of the Debtors’ major customers to their businesses cannot be overstated. As described in the Phillips Affidavit, on the Petition Date, Telogy filed a motion seeking this Court’s approval of a stalking horse purchase agreement for the sale of substantially all of Telogy’s assets (the “APA”), and the establishment of procedures for the submission of competing bids for Telogy’s assets. Under the APA, Telogy is obligated to continue operating its business as a going concern and to use reasonable best efforts to preserve the goodwill of customers during the period prior to closing of the sale. Accordingly, the ability

of the Debtors to, in their discretion, continue the Customer Programs and honor the Prepetition Customer Obligations is necessary to enable Telogy to comply with its obligations under the APA and consummate a value-maximizing sale of its assets, for the benefit of their creditors and estates.

17. Considering the relatively minimal expense of the relief requested herein as compared to the size of these chapter 11 cases and the critical importance of the Customer Programs to the Debtors' value as a going concern, entry of an order granting the relief requested herein is appropriate, in the best interests of the Debtors, their estates, and their creditors, and, indeed, necessary to avoid irreparable harm to the Debtors and their estates.

18. Courts in this district have authorized debtors to honor certain prepetition obligations to customers and to continue customer programs. See, e.g., In re AbitibiBowater Inc., No. 09-11296 (KJC) (Bankr. D. Del. Apr. 17, 2009); In re BT Tires Group Holding, LLC, No. 09-11173 (CSS) (Bankr. D. Del. Apr. 3, 2009); In re Sun Times Media Group, Inc., No. 09-11092 (CSS) (Bankr. D. Del. Apr. 1, 2009); In re Magna Entertainment Corp., No. 09-10720 (MFW) (Bankr. D. Del. March 6, 2009); In re EZ Lube, LLC, No. 08-13256 (CSS) (Bankr. D. Del. Dec. 10, 2008); In re Portola Packaging, Inc., No. 08-12001 (CSS) (Bankr. D. Del. Aug. 29, 2008); In re BSCV, Inc., No. 08-11637 (KG) (Bankr. D. Del. Aug. 5, 2008); In re ACG Holdings, Inc., No. 08-11467 (CSS) (Bankr. D. Del. July 16, 2008); In re Pierre Foods, Inc., No. 08-11480 (KG) (Bankr. D. Del. July 16, 2008).

19. The Debtors further submit that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein, Bankruptcy Rule 6003 has been satisfied.

20. To successfully implement the foregoing, the Debtors respectfully request a waiver of the notice requirements under Bankruptcy Rule 6004(a).

21. The Debtors further seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen days after entry of the order, unless the court orders otherwise.” For the reasons set forth above, the relief requested in this Motion is essential to prevent damage to the Debtors’ value. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

NOTICE

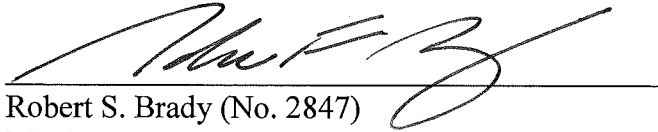
22. Notice of this Motion will be given to: (a) the United States Trustee for the District of Delaware; (b) counsel to the agent for the Debtors’ prepetition secured lenders; and (c) the Debtors’ twenty (20) largest unsecured creditors on a consolidated basis. The Debtors will serve copies of the Motion pursuant to Local Rule 9013-1(m). The Debtors submit that, under the circumstances, no other or further notice is required.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form annexed hereto as Exhibit A, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: Wilmington, Delaware
January 24, 2010

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Proposed Co-Counsel for Debtors and
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EXHIBIT A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

-----X	:	Chapter 11
In re	:	
	:	
Telogy, LLC., <u>et al.</u> , ¹	:	Case No. 10- <u>10206</u> ()
	:	
Debtors.	:	Jointly Administered
	:	
-----X	:	Ref. Docket No. _____

ORDER AUTHORIZING DEBTORS TO HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS

Upon the motion (the “**Motion**”) of the debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”) for entry of an order, pursuant to sections 105(a) and 363(b) of title 11 of the United States Code (the “**Bankruptcy Code**”), as supplemented by Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), authorizing, but not directing, the Debtors to honor certain prepetition obligations to customers and to continue customer programs; and upon the Affidavit of Gary B. Phillips, Chief Executive Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings (the “**Phillips Affidavit**”); and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by this Motion is in the best interests of these estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted.

¹ The last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors’ executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

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

3. The Debtors are authorized, in their sole discretion and in the ordinary course of business, to honor and perform all obligations in respect of the Customer Programs, including the Prepetition Customer Obligations, without regard to whether the Debtors' obligations under any such Customer Programs arose before or after the Petition Date, provided, however, that the Debtors' aggregate cash payments relating to such Prepetition Customer Obligations shall not exceed \$10,000.

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

5. All applicable banks and other financial institutions are hereby authorized and required to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order.

6. The authorization granted hereby to continue the Customer Programs shall not create any obligation on the part of the Debtors or their officers, directors, attorneys, or agents to pay or provide credits under the Customer Programs, 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 and nothing contained in this order shall be deemed to increase,

reclassify, elevate to an administrative expense status, or otherwise affect the payments or credits provided under the Customer Programs to the extent they are not paid.

7. Neither the relief granted herein nor any actions or payments made by the Debtors pursuant to this Order shall constitute an approval or assumption of any Customer Program or related agreement or policy pursuant to section 365 of the Bankruptcy Code, or an admission by the Debtors of liability with respect to any Prepetition Customer Obligation.

8. The relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors, and timely entry of this Order is not prohibited by Bankruptcy Rule 6003(b).

9. The notice requirements of Bankruptcy Rule 6004(a) are hereby deemed waived.

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

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

Dated: Wilmington, Delaware
January __, 2010

UNITED STATES BANKRUPTCY JUDGE