

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

In re:

BROOKSTONE HOLDINGS CORP., *et al.*,¹

Debtors.

Chapter 11

Case No. 18-_____ (____)

(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
AUTHORIZING DEBTORS TO HONOR AND CONTINUE CERTAIN CUSTOMER
PROGRAMS AND CUSTOMER OBLIGATIONS IN THE ORDINARY
COURSE OF BUSINESS**

Brookstone Holdings Corp. and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”) hereby move this Court (this “Motion”) for the entry of an interim order (the “Interim Order”) and a final order (the “Final Order”), substantially in the form annexed hereto as Exhibit A and Exhibit B, pursuant to sections 105(a), 363, 1107(a), and 1108 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9013-1(m) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), authorizing the Debtors to honor and continue their Customer Programs and Customer Obligations (each as defined below) in the ordinary course of the Debtors’ business. In support of this Motion, the Debtors rely upon and incorporate by reference the *Declaration of Greg Tribou in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* (the “First Day Declaration”),

¹ The Debtors, along with the last four digits of each Debtor’s tax identification number, are: Brookstone Holdings Corp. (4638), Brookstone, Inc. (2895), Brookstone Company, Inc. (3478), Brookstone Retail Puerto Rico, Inc. (5552), Brookstone International Holdings, Inc. (8382), Brookstone Purchasing, Inc. (2514), Brookstone Stores, Inc. (2513), Big Blue Audio LLC (N/A), Brookstone Holdings, Inc. (2515), and Brookstone Properties, Inc. (2517). The Debtors’ corporate headquarters and the mailing address for each Debtor is One Innovation Way, Merrimack, NH 03054.

which was filed concurrently herewith.² In further support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and pursuant to Local Rule 9013-l(f), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief requested herein are sections 105(a), 363, and 507(a)(8) of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004, and Local Rule 9013-1(m).

BACKGROUND

2. On the date hereof (the “Petition Date”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors are continuing to manage their financial affairs as debtors in possession.

3. Contemporaneously herewith, the Debtors filed a motion seeking joint administration of their chapter 11 cases (collectively, the “Chapter 11 Cases”) pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1. No trustee, examiner, or official committee of unsecured creditors has been appointed in the Chapter 11 Cases.

² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the First Day Declaration.

4. Additional information regarding the Debtors' history and business operations, capital structure and primary secured indebtedness, and the events leading up to the commencement of the Chapter 11 Cases can be found in the First Day Declaration.

THE DEBTORS' CUSTOMER PROGRAMS

5. Prior to the Petition Date, both in the ordinary course of the Debtors' business and as is customary in the industry, the Debtors offered and engaged in certain customer and other programs and practices (collectively, the "Customer Programs"). The Customer Programs include the following (as described in detail below): (a) warranties, (b) gift cards/certificates, (c) customer reward program, (d) private label credit cards, and (e) programs for returns, refunds, and adjustments.

6. To effectuate a smooth transition into chapter 11, the Debtors must maintain customer loyalty and goodwill by maintaining and honoring the Customer Programs. Indeed, the Debtors implemented the Customer Programs in the ordinary course of business prior to the Petition Date as a means by which to maintain positive, productive, and profitable relationships with their customers, encourage new purchases, enhance customer satisfaction, and ensure that the Debtors remain competitive in their industry. All of the Customer Programs are designed and implemented to encourage the Debtors' customers to increase their purchasing frequency and volume, resulting in larger net revenues for the Debtors and, in return, greater satisfaction for the customers.

7. Accordingly, the Debtors' ability to honor the Customer Programs in the ordinary course of business is necessary to retain their customer base and reputation within their industry. On account of the Customer Programs, the Debtors may owe certain obligations to their customers as well as other third parties, arising both before and after the Petition Date (collectively, the "Customer Obligations").

8. The success and viability of the Debtors' business, and ultimately the Debtors' ability to maximize the value of the Debtors' estates, are dependent upon the patronage and loyalty of their customers. In this regard, the Customer Programs are critical, and any delay in honoring Customer Obligations will severely and irreparably impair customer relations and drive away valuable customers, thereby harming the Debtors' efforts to maximize value for all interested parties.

9. Accordingly, the Debtors seek authority to continue, in their discretion, to maintain and administer, in the ordinary course of business and in a manner consistent with past practices, the Customer Programs and to honor the Customer Obligations thereunder in the ordinary course of business and during the administration of the Chapter 11 Cases. The Debtors also seek authority to modify and/or discontinue any of the Customer Programs, in their discretion, in the ordinary course of business during the administration of the Chapter 11 Cases. Each of the Customer Programs is described in more detail below.

A. **Warranty Program**

10. In the ordinary course of business, the Debtors offer their customers the opportunity to purchase warranties and service contracts (the "Warranty Program") that provide the customers with protections for malfunctioning products. The cost of the Warranty Program is not built into the purchase price of a product—customers can opt to separately purchase the Warranty Program for an amount that varies depending on the value of the product the Warranty Program covers.

11. Prior to the Petition Date, the Debtors entered into an Administration Agreement with Centricity, pursuant to which Centricity administers the Warranty Program on the Debtors' behalf. In exchange for administering the Warranty Program on the Debtors' behalf, the Debtors

compensate Centricity. As of the Petition Date, the Debtors estimate that approximately \$170,000 is due and owing to Centricity.

12. The Warranty Program is a valuable generator of revenue for the Debtors and is important to maintaining the Debtors' ongoing business and revenues. The Debtors generated approximately \$1.18 million in revenue from Warranty Program sales in fiscal year 2017. Further, the Debtors believe that honoring and continuing the Warranty Program is necessary for the Debtors' general business because it encourages the sale of products and allows customers to avoid any concern about malfunctioning products. If the Debtors dishonor or discontinue the Warranty Program, there could be significant customer attrition, a devaluation of the Debtors' brand, and a reduction in future sales as customers could move to other competitor brands that allow protection of products through a warranty or replacement plan. In addition, paying Centricity's outstanding fees is important to ensure that Centricity can continue to service the Warranty Program and avoid any failure to meet customer warranty obligations.

13. Accordingly, the Debtors seek the authority, but not direction, to pay Centricity's outstanding fees and to continue to honor the Warranty Program in the ordinary course of business during the administration of these Chapter 11 Cases, consistent with past practices.

B. Gift Cards and Gift Certificates

14. Prior to the Petition Date, in the ordinary course of business, the Debtors sold prepaid gift cards ("Gift Cards") and gift certificates ("Gift Certificates") that can be redeemed to purchase goods and services from the Debtors (the "Gift Card and Gift Certificate Program"). Gift Cards and Gift Certificates may be purchased at the Debtors' retail stores and online on the Debtors' website.

15. Once purchased, a Gift Card or Gift Certificate may be used like cash for purchases at the Debtors' retail stores and online on the Debtors' website, but may not be redeemed for cash or monetary credit except under limited circumstances as required by law. Upon their purchase, the Gift Cards and Gift Certificates are "activated" and the Gift Cards and Gift Certificates may then be redeemed at any time with no expiration date.

16. The Gift Cards and Gift Certificates are a valuable generator of revenue for the Debtors. The Debtors generated approximately \$3.1 million in revenue from Gift Card and Gift Certificate sales in fiscal year 2017. Given that the Gift Cards and Gift Certificates do not expire and can be redeemed at any time with no expiration date, the Debtors believe that, as of the Petition Date, many customers have not yet redeemed their Gift Cards and Gift Certificates. In order to preserve the Debtors' goodwill with customers and preserve the integrity of the Debtors' brand, honoring these obligations is extremely important. Failure to honor these obligations would tarnish the Debtors' reputation and would cause a decline in future sales.

17. As of the Petition Date, approximately \$17.1 million in Gift Cards and Gift Certificates issued (a) in the Debtors' retail stores and (b) online on the Debtors' website are outstanding. Accordingly, the Debtors seek the authority, but not direction, to continue to honor the Gift Cards and Gift Certificates in the ordinary course of business during the administration of these Chapter 11 Cases, whether purchased before or after the Petition Date, consistent with past practices.³

³ To the extent that the Debtors issue Gift Cards and Gift Certificates postpetition, the Debtors will implement a protocol that will enable them to distinguish between Gift Cards and Gift Certificates that were purchased and issued before the Petition Date and those that were purchased and issued after the Petition Date. Moreover, in the event that the Debtors determine it appropriate to discontinue the practice of accepting Gift Cards and/or Gift Certificates, the Debtors shall file a notice regarding such termination, no later than 7 days after terminating such practice, and shall serve such notice on the U.S. Trustee, any statutory committee appointed in these chapter 11 cases, and all parties who file a request for notice under Bankruptcy Rule 2002.

C. Customer Reward Program

18. In the ordinary course of business, the Debtors offer promotional points (the “Points”) in a loyalty program called “Brookstone Loves Reward Program” (the “Reward Program”). As of the Petition Date, there were approximately 118,000 customers enrolled as Reward Program members (collectively, the “Members”). Members receive two Points for every dollar they spend at any of the Debtors’ retail stores, online on the Debtors’ website, or through the Reward Program mobile application (the “Brookstone App”). The Debtors often offer bonus Points to drive traffic and support marketing efforts or various sale campaigns. Points post to Member accounts forty-five days following either the purchase date (for in-store purchases) or the shipment date of the entire order (for online purchases or purchases through the Brookstone App). For every 1000 Points a Member earns, such member will be eligible to receive a \$10 Brookstone Loves Rewards coupon (“Reward Coupon”) which can be used at the Debtors’ retail stores, online on the Debtors’ website, on the Brookstone App, or for phone orders from the Debtors.⁴

19. The Debtors intend to continue to honor all Point accruals through June 30, 2018 and to continue to honor all Reward Coupons under the Reward Program.⁵ As of the Petition Date, the Debtors estimate that approximately \$220,000 worth of Reward Coupons were outstanding under the Rewards Program.

D. Private Label Credit Cards and Credit Card Processing

20. In the ordinary course of business, the Debtors offer to their customers credit cards by engaging other lenders, such as Wells Fargo, National Bank (“Credit Card Issuer”), to

⁴ The Points have no cash value. If a Member account has been inactive for twelve months, the Point balance may be reset to zero.

⁵ Points will not accrue for purchases made after June 30, 2018. Reward Coupons expire three months following issuance.

issue private label credit cards (the “Private Label Card Program”). Pursuant to the Private Label Card Program, customers apply for a Brookstone credit card at a Debtor retail store or other Debtor location. The Credit Card Issuer then processes the applications, issues the credit cards as appropriate, and administers the Private Label Card Program in exchange for certain fees. Customers can use these credit cards to purchase the Debtors’ products or services on credit.

21. The Private Label Card Program is important to the Debtors’ business because the program generates sales and revenue and ensures customer loyalty and repeat business. As of the Petition Date, there were approximately 3,900 active credit card accounts under the Private Label Card Program, which generated approximately \$9.3 million in sales for fiscal year 2017. Accordingly, the Debtors seek the authority, but not direction, to continue the Private Label Card Program in the ordinary course of business and in consultation with the Credit Card Issuer during the administration of these Chapter 11 Cases, consistent with past practices.

22. Additionally, many of the Debtors’ sales are paid with credit or debit cards, (the “Credit Card Processing Program” and, together with the Private Label Card Program, the “Credit Card Program”). To facilitate these transactions, the Debtors have entered into certain agreements (collectively, the “Credit Card Agreements”) with credit card companies and processors, including, among others, Visa, American Express, Master Card, and Discover (collectively, the “Credit Card Companies”). Under the terms of the Credit Card Agreements, the Debtors are required to pay the Credit Card Companies certain fees for their services (collectively, the “Credit Card Fees”).

23. When customers return merchandise to the Debtors following a purchase made using a credit card, or when customers dispute certain charges with their credit card issuer, the Debtors may be obligated to refund to such issuer the purchase price of the returned or disputed

merchandise, subject to certain adjustments (collectively, “Chargebacks” and, together with the Credit Card Fees, the “Credit Card Obligations”). Generally, Chargebacks are satisfied by netting the amount charged back against pending payments owed by a Credit Card Company to the Debtors under the Credit Card Agreements (the “Credit Card Processor Payments”).

24. It is possible that certain Chargebacks incurred by the Debtors immediately prior to the Petition Date may not have been fully netted out against the Credit Card Processor Payments received by the Debtors prior to the Petition Date. Moreover, although the Debtors believe that Chargebacks arising after the Petition Date are postpetition obligations of the Debtors, it may be argued that such Chargebacks nevertheless are prepetition obligations where the merchandise returned or disputed was purchased from the Debtors prior to the Petition Date. In such circumstances, to the extent that the netting of the parties’ obligations would not constitute recoupment, the Debtors seek the Court’s approval to allow the Credit Card Companies to setoff Chargebacks against Credit Card Processor Payments pursuant to section 362(d) of the Bankruptcy Code.

25. The Debtors, therefore, also request authority to continue to pay the Credit Card Companies the Credit Card Fees, whether arising before or after the Petition Date, in the ordinary course of their business to avoid disrupting vital credit card processing services. The Debtors’ ability to honor and process credit and debit card transactions is essential to the Debtors’ ability to sell their merchandise and maintain customer loyalty. Without this ability, the Debtors would lose their main source of revenue for sales transactions in the ordinary course of business. The Credit Card Companies that provide services to the Debtors should continue to perform under the Credit Card Agreements. The Debtors request that the Court provide that no new or extraordinary offsets will be imposed (including, without limitation, Chargebacks), and

that the relationships with the Credit Card Companies that provide services to the Debtors be handled using the same prepetition procedures.

E. Return/Refund Program

26. Certain customers hold contingent claims against the Debtors for refunds, returns, exchanges, substitutions, issuance of store credit, price adjustments (including sales price adjustments to billing) and other credit balances (collectively, the “Return/Refund Program”) relating to goods sold or services rendered to customers in the ordinary course of business prior to the Petition Date.

27. Subject to certain restrictions and requirements, customers have 60 days to return goods purchased from the Debtors’ retail stores and on the Debtors’ website. The Debtors’ customers undoubtedly rely on the existence of the Return/Refund Program when they shop in the Debtors’ retail stores or online at the Debtors’ website. In addition, the Debtors typically issue Refunds in the ordinary course of business for damaged or faulty goods.

28. As of the Petition Date, estimating the aggregate amount of potential refunds and returns owed is difficult due to the customers’ individualized reasons and need for returning merchandise.⁶ Nevertheless, the ability to continue to provide the Return/Refund Program is vital to the Debtors’ ongoing relationship with their customers. The Debtors believe that the increase in customer loyalty generated by the Return/Refund Program far outweighs the costs of the Refunds. Accordingly, the Debtors seek authorization, by not direction, to continue, in their discretion, to honor the Return/Refund Program in the ordinary course of business during the administration of these Chapter 11 Cases, whether related to purchases made before or after the Petition Date.

⁶ The Debtors maintain a reserve of funds in order to process refunds and returns.

RELIEF REQUESTED

29. By this Motion, the Debtors seek entry of the Interim Order and the Final Order authorizing the Debtors, in their sole discretion, to maintain and administer the Customer Programs and to honor the Customer Obligations in the ordinary course of business. The Debtors also seek authority to modify and/or discontinue any of the Customer Programs, in their discretion, in the ordinary course of business.

30. Additionally, the Debtors seek authority for banks and other financial institutions (collectively, the “Banks”) to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Motion.

BASIS FOR RELIEF REQUESTED

A. Continuation of the Customer Programs is Warranted Pursuant to Section 363 of the Bankruptcy Code

31. Courts have authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of prepetition wages); *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc.*, (*In re James A. Phillips, Inc.*), 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to authorize a contractor to pay prepetition claims of some suppliers who were potential lien claimants because payments were necessary for general contractors to release funds owed to the debtors). In addition, section 363(c) allows a debtor in possession to enter into transactions involving property of the estate in the ordinary course of business without an order of the court. *See, e.g., In re James A. Phillips Inc.*, 29 B.R. at 395 n.2 (“Insofar as transactions are actually in the ordinary course, they are authorized automatically by § 363(c)(1) and

§ 1107(a), and do not require Bankruptcy Court approval.”). Indeed, where retaining the loyalty and patronage of customers is critical to a successful reorganization, courts have not hesitated to grant the relief requested. In *In re Federated Dep’t Stores, Inc.*, Nos. 1-90-00130 through 1-90-00196, 1990 Bankr. LEXIS 102, at *2 (Bankr. S.D. Ohio Jan. 15, 1990), the court authorized debtors to treat deposits or prepayments on goods and services “in the same manner as Debtors treated Deposits prior to the commencement of [the] cases.”

32. The relief requested herein is appropriate under each of the foregoing standards. The Debtors seek to continue their Customer Programs and to honor any Customer Obligations without interruption during the pendency of the Chapter 11 Cases. The Customer Programs are an integral part of the Debtors’ business and enable the Debtors to attract and retain customers. If the Debtors do not honor their Customer Programs in the ordinary course of business, the Debtors would be significantly less competitive, which undoubtedly would lead to an impactful decline in business.

33. Moreover, the Debtors would risk isolating certain customer constituencies or, possibly, encouraging them to initiate business relationships with the Debtors’ competitors. The failure to honor the Customer Programs could erode the Debtors’ reputation and brand loyalty, which could adversely affect the Debtors’ ability to maximize the value of their estates. Accordingly, in the exercise of their sound business judgment, the Debtors believe that a sound business purpose exists for the relief requested herein because it will pay dividends with respect to the value of the Debtors’ business, both in terms of profitability and the engendering of goodwill, especially at this critical time following the filing of the Chapter 11 Cases.

34. In addition, because the Debtors pay the Customer Obligations in the ordinary course of business, the Debtors submit that Court approval of the Debtors’ payment of

postpetition Customer Obligations is not necessary because of the authority granted to them by section 363(c) of the Bankruptcy Code. Indeed, most, if not all, of the Customer Programs are standard practice in the Debtors' industry. Nonetheless, out of an abundance of caution, the Debtors request that the Court grant the relief requested herein and enter an order authorizing them to pay the Customer Obligations in the ordinary course of the Debtors' business.

B. Continuation of the Customer Programs is Warranted Pursuant to Section 105(a) of the Bankruptcy Code and Under the Doctrine of Necessity

35. Courts have also authorized payment of prepetition claims in appropriate circumstances pursuant to section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code, which codifies the inherent equitable powers of the bankruptcy court, empowers the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Under section 105(a), courts may permit pre-plan payments of prepetition obligations when such payments are essential to the continued operation of the debtor's business and, in particular, where nonpayment of a prepetition obligation would trigger a withholding of goods or services essential to the debtors' business reorganization plan. *See, e.g., In re Ionosphere Clubs*, 98 B.R. at 177 (finding that section 105 empowers bankruptcy courts to authorize payment of prepetition debt when such payment is needed to facilitate the rehabilitation of the debtor).

36. Numerous courts have used their section 105(a) powers under the "doctrine of necessity" to authorize payment of prepetition obligations where, as here, such payment is an essential element of the preservation of the debtor in possession's potential for rehabilitation. *See In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002) (reasoning that because the debtor in possession has fiduciary duties it must meet, it is logical that the bankruptcy court may "use Section 105(a) of the [Bankruptcy] Code to authorize satisfaction of the prepetition claim in

aid of preservation or enhancement of the estate”); *In re Synteen Techs., Inc.*, No. 00-02203-W, 2000 WL 33709667, at *2 (Bankr. D.S.C. Apr. 14, 2000) (noting that courts have permission to “allow payment of a prepetition claim when essential to the continued operation of the debtor” (citation omitted)); *In re Just For Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) (“courts have used their equitable power under section 105(a) . . . to authorize the payment of pre-petition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization”); *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“Under [section 105] the court can permit pre-plan payment of a prepetition obligation when essential to the continued operation of the debtor”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (approving payment of prepetition unsecured claims of tool makers as “necessary to avert a serious threat to the Chapter 11 process”); *In re Quality Interiors, Inc.*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991) (“[P]ayment by a debtor-in-possession of pre-petition claims outside of a confirmed plan of reorganization is generally prohibited by the Bankruptcy Code,” but “[a] general practice has developed . . . where bankruptcy courts permit the payment of certain pre-petition claims, pursuant to 11 U.S.C. § 105, where the debtor will be unable to reorganize without such payment.”).

37. The “doctrine of necessity” is frequently invoked early in reorganization cases, during the so-called “breathing spell,” when preservation of the estate is most critical and often extremely difficult. See 2 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 105.02[4][a] (16th ed. 2018) (discussing cases in which courts have relied upon the “doctrine of necessity” or the “necessity of payment” rule to pay prepetition claims immediately). For example, in *In re Structurlite Plastics Corp.*, the court embraced “the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of prepetition

claims where such payment is necessary to ‘permit the greatest likelihood of survival of the debtor . . .’” 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988) (quoting *In re Chateaugay Corp.*, 80 B.R. 279, 287 (Bankr. S.D.N.Y. 1987)). The court explained that “a *per se* rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code.” *Id.* at 932. Flexibility of payment is particularly critical when the prepetition creditor provides vital goods or services to the debtor.

38. As stated above, maintenance of the Customer Programs and fulfillment of the Customer Obligations are critical to preserving the Debtors’ relationships with their customers, which are essential to the Debtors’ business. In turn, the ability of the Debtors to maximize profitability and the value of their business during the Chapter 11 Cases is crucial to the Debtors’ ability to maximize value for the benefit of all stakeholders. Thus, this Court should exercise its equitable powers to grant the relief requested herein.

39. Moreover, if the Debtors do not honor the Customer Obligations, the Debtors would risk alienating certain customer constituencies, possibly encouraging them to shop with the Debtors’ competitors. This could erode the Debtors’ reputation and brand loyalty, adversely affecting the Debtors’ ability to maximize value for the estates. Accordingly, in the exercise of their sound business judgment, the Debtors believe that a sound business purpose exists for the relief requested herein because it will pay dividends with respect to the Debtors’ ability to maximize value for all interested parties, both in terms of profits and goodwill.

C. The Court Should Authorize Applicable Banks to Honor Checks and Electronic Fund Transfers in Accordance with the Motion

40. In connection with the foregoing, the Debtors respectfully request that the Court (a) authorize all applicable Banks to receive, process, honor, and pay all checks and transfers issued by the Debtors in accordance with this Motion, without regard to whether any checks or

transfers were issued before or after the Petition Date, (b) provide that all Banks may rely on the representations of the Debtors with respect to whether any check or transfer issued or made by the Debtors before the Petition Date should be honored pursuant to this Motion (such banks and other financial institutions having no liability to any party for relying on such representations by the Debtors provided for herein), and (c) authorize the Debtors to issue replacement checks or transfers to the extent any checks or transfers that are issued and authorized to be paid in accordance with this Motion are dishonored or rejected by the Banks.

D. Immediate Relief is Justified

41. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within 21 days after the filing of the petition regarding a motion to “use, sell, lease, or otherwise incur an obligation regarding property of the estate” only if such relief is necessary to avoid immediate and irreparable harm. Fed. R. Bankr. P. 6003(b). Immediate and irreparable harm exists where the absence of relief would impair a debtor’s ability to reorganize or threaten the debtor’s future as a going concern. *See In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990) (discussing the elements of “immediate and irreparable harm” in relation to Bankruptcy Rule 4001).

42. Moreover, Bankruptcy Rule 6003 authorizes the Court to grant the relief requested herein to avoid harm to the Debtors’ customers and other third parties. Unlike Bankruptcy Rule 4001, Bankruptcy Rule 6003 does not condition relief on imminent or threatened harm to the estate alone. Rather, Bankruptcy Rule 6003 speaks of “immediate and irreparable harm” generally. Cf. Fed. R. Bankr. P. 4001(b)(2), (c)(2) (referring to “irreparable harm to the estate”). Indeed, the “irreparable harm” standard is analogous to the traditional standards governing the issuance of preliminary injunctions. *See* 9 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 4001.07[b][3] (16th ed. 2018) (discussing source of

“irreparable harm” standard under Rule 4001(c)(2)). Courts will routinely consider third-party interests when granting such relief. *See, e.g., Capital Ventures Int’l v. Argentina*, 443 F.3d 214, 223 n.7 (2d Cir. 2006); *see also Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 761 (7th Cir. 2001).

43. As described herein and in the First Day Declaration, the Debtors will suffer immediate and irreparable harm without Court authorization to continue the Customer Programs uninterrupted. Accordingly, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

REQUEST FOR WAIVER OF STAY

44. The Debtors also request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which 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.” Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtors seek in this Motion is necessary for the Debtors to operate their business without interruption and to preserve value for their estates. Accordingly, the Debtors respectfully request that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

DEBTORS’ RESERVATION OF RIGHTS

45. Nothing contained herein is intended or should be construed as an admission of the validity of, or a promise to pay with respect to, any claim against the Debtors; a waiver of the Debtors’ rights to dispute any claim; or an approval, assumption, or rejection of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to contest any invoice or claim on account of any Customer Obligation. Likewise, if this

Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of, or a promise to pay with respect to, any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

NOTICE

46. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) holders of the 30 largest unsecured claims on a consolidated basis against the Debtors; (c) counsel to Wells Fargo Bank, National Association in its capacity as DIP Administrative Agent and as Agent under the Credit Agreement, dated as July 7, 2014; (d) counsel to Gordon Brothers Finance Company, in its capacity as DIP Term Agent and as Term Agent under the Term Note dated June 3, 2015; (e) counsel to Wilmington Trust, National Association, in its capacity as Trustee under the Indenture dated as of July 7, 2014; (f) counsel to Sanpower (Hong Kong) Company Limited as Lender under certain secured and unsecured notes; (g) the Banks; and (h) all parties that have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. Notice of this Motion and any order entered hereon 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.

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WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: August 2, 2018
Wilmington, Delaware

/s/ Andrew L. Magaziner

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EXHIBIT A

PROPOSED INTERIM ORDER

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

In re:

BROOKSTONE HOLDINGS CORP., *et al.*,¹

Debtors.

Chapter 11

Case No. 18-_____ (____)

(Jointly Administered)

Ref. Docket No. _____

**INTERIM ORDER AUTHORIZING DEBTORS TO HONOR AND CONTINUE
CERTAIN CUSTOMER PROGRAMS AND CUSTOMER
OBLIGATIONS IN THE ORDINARY COURSE OF BUSINESS**

Upon the *Debtors' Motion for Entry of Interim and Final Orders Authorizing Debtors to Honor and Continue Certain Customer Programs and Customer Obligations in the Ordinary Course of Business* (the "Motion")² filed by the above-captioned debtors and debtors in possession (collectively, the "Debtors"); and this Court having reviewed the Motion; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; this Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and it appearing that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and this

¹ The Debtors, along with the last four digits of each Debtor's tax identification number, are: Brookstone Holdings Corp. (4638), Brookstone, Inc. (2895), Brookstone Company, Inc. (3478), Brookstone Retail Puerto Rico, Inc. (5552), Brookstone International Holdings, Inc. (8382), Brookstone Purchasing, Inc. (2514), Brookstone Stores, Inc. (2513), Big Blue Audio LLC (N/A), Brookstone Holdings, Inc. (2515), and Brookstone Properties, Inc. (2517). The Debtors' corporate headquarters and the mailing address for each Debtor is One Innovation Way, Merrimack, NH 03054.

² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

Court having considered the First Day Declaration; and this Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein; and this Court having determined that the relief sought in the Motion is in the best interests of the Debtors and their estates; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein on an interim basis until such time as this Court conducts a final hearing on this matter (the “Final Hearing”).
2. The Final Hearing shall take place on _____, 2018 at ___:__.m. (prevailing Eastern Time). Any objections or responses to the Motion shall be filed on or before 4:00 p.m. (prevailing Eastern Time) _____, 2018 and served on (a) the Office of the United States Trustee for the District of Delaware, (b) Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166 (Attn: Matthew J. Williams (mjwilliams@gibsondunn.com), David M. Feldman (dfeldman@gibsondunn.com), Matthew K. Kelsey (mkelsey@gibsondunn.com), and Keith R. Martorana (kmartorana@gibsondunn.com)), (c) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801 (Attn: Michael R. Nestor (mnestor@ycst.com), Sean M. Beach (sbeach@ycst.com), Andrew L. Magaziner (amagaziner@ycst.com)), (d) counsel to any statutory committee appointed in these Chapter 11 Cases, (e) counsel to the DIP Administrative Agent, Morgan, Lewis & Bockius LLP, One Federal Street, Boston, MA 02110 (Attn: Christopher L. Carter (christopher.carter@morganlewis.com), and (f) counsel to the DIP Term Agent, Choate, Hall & Stewart LLP, Two International Place, Boston, MA 02110 (Attn: Jonathan D. Marshall (jmarshall@choate.com)).

3. The Debtors are authorized, but not directed, to (a) maintain and administer, in the ordinary course of business and in a manner consistent with past practices, the Customer Programs and to honor the Customer Obligations thereunder in the ordinary course of business as set forth in the Motion and (b) modify and/or discontinue the Customer Programs, in their discretion, in the ordinary course of business as set forth in the motion.

4. Specifically, the Debtors are authorized, but not directed, to (a) continue to honor the Warranty Program and pay Centricity's fees in an amount not to exceed \$170,000, (b) continue to issue and honor the Gift Cards and Gift Certificates, (c) continue to honor the Reward Program, (d) continue to honor the Credit Card Program and pay related fees, including, without limitation, the Credit Card Obligations and the Credit Card Processor Payments, and (e) continue to honor the Return/Refund Program.

5. To the extent that the Debtors issue Gift Cards or Gift Certificates postpetition, the Debtors shall implement a procedure that will enable them to distinguish between Gift Cards and Gift Certificates that were purchased and issued before the Petition Date and those that were purchased and issued after the Petition Date.

6. Each of the Banks is authorized to honor checks presented for payment and all fund transfer requests made by the Debtors, to the extent that sufficient funds are on deposit in the applicable accounts, in accordance with this Order and any other order of this Court.

7. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in connection with the Customer Programs and the Customer Obligations that are dishonored or rejected.

8. Notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the

Debtors under the Debtors' postpetition financing agreements (the "DIP Documents") and any orders approving the DIP Documents and governing the Debtors' use of cash collateral (including with respect to any budgets governing or relating thereto).

9. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed (a) an admission as to the validity or priority of, or a promise to pay with respect to, any claim against the Debtors or their estates, (b) a waiver of the Debtors' right to dispute any claim on any grounds, (c) a promise or requirement to pay any claim, (d) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion, (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtors' rights under the Bankruptcy Code or any other applicable law.

10. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied because the relief requested in the Motion, as granted hereby, is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

11. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

12. This Court shall retain exclusive jurisdiction over any matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: August ___, 2018
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

PROPOSED FINAL ORDER

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

In re:

BROOKSTONE HOLDINGS CORP., *et al.*,¹

Debtors.

Chapter 11

Case No. 18-_____ (____)

(Jointly Administered)

Ref. Docket No. _____

**FINAL ORDER AUTHORIZING DEBTORS TO HONOR AND CONTINUE
CERTAIN CUSTOMER PROGRAMS AND CUSTOMER
OBLIGATIONS IN THE ORDINARY COURSE OF BUSINESS**

Upon the *Debtors' Motion for Entry of Interim and Final Orders Authorizing Debtors to Honor and Continue Certain Customer Programs and Customer Obligations in the Ordinary Course of Business* (the “Motion”)² filed by the above-captioned debtors and debtors in possession (collectively, the “Debtors”); and this Court having reviewed the Motion; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; this Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and it appearing that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and this

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² All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Motion.

Court having considered the First Day Declaration; and this Court having previously entered the *Interim Order Authorizing Debtors to Honor and Continue Certain Customer Programs and Customer Obligations in the Ordinary Course of Business* [Docket No. __]; and this Court having determined that the legal and factual basis set forth in the Motion establish just cause for the relief granted herein; and this Court having determined that the relief sought in the Motion is in the best interests of the Debtors and their estates; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein on a final basis.
2. The Debtors are authorized, but not directed, to (a) maintain and administer, in the ordinary course of business and in a manner consistent with past practices, the Customer Programs and to honor the Customer Obligations thereunder in the ordinary course of business as set forth in the Motion and (b) modify and/or discontinue the Customer Programs, in their discretion, in the ordinary course of business as set forth in the motion.
3. Specifically, the Debtors are authorized, but not directed, to (a) continue to honor the Warranty Program and pay Centricity's fees in an amount not to exceed \$170,000, to the extent not already paid, (b) continue to issue and honor the Gift Cards and Gift Certificates, (c) continue to honor the Reward Program, (d) continue to honor the Credit Card Program and pay related fees, including, without limitation, the Credit Card Obligations and the Credit Card Processor Payments, and (e) continue to honor the Return/Refund Program.
4. To the extent that the Debtors issue Gift Cards or Gift Certificates postpetition, the Debtors shall implement a procedure that will enable them to distinguish between Gift Cards

and Gift Certificates that were purchased and issued before the Petition Date and those that were purchased and issued after the Petition Date.

5. Each of the Banks is authorized to honor checks presented for payment and all fund transfer requests made by the Debtors, to the extent that sufficient funds are on deposit in the applicable accounts, in accordance with this Order and any other order of this Court.

6. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in connection with the Customer Programs and the Customer Obligations that are dishonored or rejected.

7. Notwithstanding anything to the contrary contained herein, any payment to be made, or authorization contained, hereunder shall be subject to the requirements imposed on the Debtors under the Debtors' postpetition financing agreements (the "DIP Documents") and any orders approving the DIP Documents and governing the Debtors' use of cash collateral (including with respect to any budgets governing or relating thereto).

8. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed (a) an admission as to the validity or priority of, or a promise to pay with respect to, any claim against the Debtors or their estates, (b) a waiver of the Debtors' right to dispute any claim on any grounds, (c) a promise or requirement to pay any claim, (d) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion, (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; or (f) a waiver of the Debtors' rights under the Bankruptcy Code or any other applicable law.

9. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

10. This Court shall retain exclusive jurisdiction over any matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: _____, 2018
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE