

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: VALERITAS HOLDINGS, INC., et al., Debtors. Chapter 11 Case No. 20-10290 (LSS) (Jointly Administered) Hearing Date: March 12, 2020 at 2:00 p.m. (ET) Obj. Deadline: March 5, 2020 at 4:00 p.m. (ET)

MOTION OF THE DEBTORS FOR ENTRY OF ORDER (I) AUTHORIZING THE DEBTORS TO CONTINUE CERTAIN CUSTOMER PROGRAMS AND TO HONOR CERTAIN OBLIGATIONS IN CONNECTION WITH SAME, AND (II) GRANTING RELATED RELIEF

Valeritas Holdings, Inc. and its affiliated debtors and debtors in possession (collectively, the "Debtors"), by and through their proposed undersigned counsel, DLA Piper LLP (US), hereby submit this motion (the "Motion") for entry of an order (the "Order"), substantially in the form attached to this Motion as Exhibit A, (i) authorizing the Debtors to continue the Customer Distribution Programs (defined below) and honor certain prepetition obligations related to those programs in an amount not to exceed \$419,000, and (ii) granting related relief. In support of this Motion, the Debtors rely upon and incorporate herein the Declaration of John E. Timberlake in Support of Chapter 11 Petitions and First Day Pleadings [D.I. 4] (the "First Day Declaration") and respectfully state as follows:

PRELIMINARY STATEMENT

The Debtors operate a commercial-stage medical technology company that is focused on improving health and simplifying life for people with type 2 diabetes. The field in which the

1 The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Valeritas Holdings, Inc. (8907); Valeritas, Inc. (1056); Valeritas Security Corporation (9654); Valeritas US, LLC (0007). The corporate headquarters and the mailing address for the debtors is 750 Route 202 South, Suite 600, Bridgewater, New Jersey 08807.

2 Any capitalized terms used but not defined in this preliminary statement shall have the meaning ascribed to them below.



Debtors operate in a highly competitive market and the processes to bring the Debtors' flagship product (the V-Go[®] Wearable Insulin Delivery device) to market is regulated and highly complex. The Debtors rely primarily on three main distributors (or customers)—McKesson Corporation, Cardinal Health, and AmerisourceBergen Drug Corporation (collectively, the "Distributors")—to effect delivery of V-Go[®] to patients. The Distributors order a certain number of V-Go[®] devices based on retailer demand and then distribute V-Go[®] to those retailers, who ultimately sell V-Go[®] to patients.

As set forth in the First Day Declaration, it is critical to the Debtors that the patients who have come to rely upon V-Go[®] to help meet their A1c (glucose control) goals continue to have access to V-Go[®]. The Debtors are seeking authority to preserve the status quo and avoid any delay in patient access to V-Go[®] by continuing the Customer Distribution Programs in the ordinary course post-petition, including allowing the Distributors to perform setoffs with respect to post-petition amounts and certain prepetition amounts, as is the parties' ordinary course of dealing under the Customer Distribution Contracts.

Absent the relief requested in this Motion, the Distributors are likely to cease ordering and distributing V-Go[®] to retailers, thereby severely impacting patient access to this life-saving product as well as the value of the business. The Debtors believe the Distributors also are likely to file stay relief motions, which, if granted, would permit the Distributors to exercise their setoff rights and/or terminate the Customer Distribution Agreements in accordance with their respective terms and provisions. The Debtors further believe that the Distributors also would move to file a motion seeking to compel the Debtors to assume or reject the Customer Distribution Contracts. The Distributors are also likely to seek adequate protection if Debtors seek to impair the set-off rights of the Distributors. The Debtors cannot afford the distraction or

cost that would accompany motion practice with the Distributors and will not jeopardize patient access to V-Go[®] or the going concern value of the Debtors' business.³

Therefore, not only is the requested relief important to the support and treatment of individual patients, it is also essential to the going concern value of the Debtors' business and the Debtors' ability to consummate a sale of substantially all of their assets. For these reasons, and as further explained below, the Debtors respectfully submit that the requested relief is in the best interests of the Debtors' estates, creditors, and other stakeholders and should be granted.

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (this "Court") has jurisdiction over these chapter 11 cases (the "Chapter 11 Cases"), the Debtors, property of the Debtors' estates, and this matter under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Pursuant to rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. Venue of these Chapter 11 Cases in this District is proper under 28 U.S.C. §§ 1408 and 1409.

³ At least one of the Distributors has imposed an administrative freeze on all purchase orders of V-Go[®], which it agreed to lift only upon the filing of this Motion.

4. The statutory bases for the relief requested in this Motion are sections 105(a) and 363 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 Local Rule 9013-1(m).

BACKGROUND

5. On February 9, 2020 (the “Petition Date”), each Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

6. The Debtors are authorized to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, no trustee, examiner, or official committee of unsecured creditors has been appointed in these Chapter 11 Cases.

7. Additional factual background regarding the Debtors, including their business operations, capital structure, and the events leading to the filing of these Chapter 11 Cases, is set forth in detail in the First Day Declaration, which is fully incorporated into this Motion by reference.

THE CUSTOMER DISTRIBUTION PROGRAMS

8. The Company does not engage in direct sales to patients, but instead partners with the Distributors to make V-Go® available to patients for prescription fulfilment or purchase primarily through retail pharmacies. In connection with the ordinary course operation of their business, the Debtors engage the Distributors to, among other things, distribute V-Go® (the “Customer Distribution Programs”). The Distributors are responsible for distributing 95% of the Debtors’ supply of V-Go® to retailers pursuant to those certain distribution agreements between the Company and the Distributors (collectively, the “Customer Distribution Contracts”). The Customer Distribution Contracts provide for rebates and administrative fees that the Distributors charge to the Debtors on a monthly or quarterly basis.

9. More specifically, in the ordinary course of business under the Customer Distribution Contracts, the Distributors audit invoices related to Customer Distribution Contracts to confirm that the invoices are calculated in accordance with contractual fee-for-service terms. The Distributors then submit the invoices to the Debtors for approval. The Distributors pay the invoices and the Debtors reimburses the Distributors. Once the Distributors' fees are approved by the Debtors, the Distributors setoff amounts owed to the Debtors against amounts owed to them by the Debtors, and then remit any remaining amounts back to the Debtors.

RELIEF REQUESTED

10. By this Motion, the Debtors are seeking the entry of an order (a) authorizing the Debtors to continue the Customer Distribution Programs and honor certain prepetition obligations related to those programs in an amount not to exceed \$419,000 (the "Cap"), and (b) granting related relief.

BASIS FOR RELIEF

11. Under section 363(b)(1) of the Bankruptcy Code, a bankruptcy court may authorize a chapter 11 debtor to use property of the estate other than in the ordinary course of business where the debtor has articulated a valid business justification for the requested use of estate assets. *See In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions."); *In re Filene's Basement, LLC*, No. 11-13511, 2014 WL 1713416, *12 (Bankr. D. Del. Apr. 29, 2014) ("Where the debtor articulates a reasonable basis for its business decisions . . . courts will generally not entertain objections to the debtor's conduct.") (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175

(Bankr. S.D.N.Y. 1989) (noting that section 363(b) gives the court “broad flexibility” for the debtor to pay prepetition wages as long as the debtor articulates a business justification).

12. Once a debtor articulates such a valid business justification, a presumption exists in favor of the debtor’s business decisions. *See In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (“Overcoming the presumption of the business judgment rule on the merits is a near-Herculean task.”); *see also Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (describing the business judgment rule as “a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”).

13. Additionally, the Court may rely on its equitable powers to grant the requested relief. Specifically, 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 this title.” 11 U.S.C. § 105(a); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts are authorized to enter orders allowing payment of prepetition claims that are necessary for debtors to successfully reorganize).

14. Under section 105(a) of the Bankruptcy Code and the doctrine of necessity, the Court may exercise its broad grant of equitable powers to approve this Motion, including the payment of prepetition obligations. *See In re Just For Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to the continued operation of the debtor’s business); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (same). “Under 11 U.S.C. § 105 the 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 In re Lehigh & New England Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (recognizing the doctrine of necessity and authorizing the debtor to pay prepetition claims if such payment was essential to the continued operation of the debtor). Therefore, it is within the Court's equitable power under section 105(a) of the Bankruptcy Code to approve the payment of the Debtors' prepetition obligations under and continued operation of the Customer Distribution Programs.

15. The Customer Distribution Programs are vital to the Debtors' ability to provide patients with access to V-Go[®], generate revenue, preserve and maximize the value of the Debtors' estates, and ensure the viability of the Debtors as a going concern for purposes of effectuating a sale under section 363 of the Bankruptcy Code. Were the Distributors to discontinue distributing V-Go[®] for even a short period of time, the Debtors' business could be seriously harmed. Unfortunately, the Debtors are currently facing this exact situation with respect to at least one of their Distributors.

16. Immediately following the filing of these Chapter 11 Cases, certain of the Distributors contacted the Debtors and indicated that, absent the Debtors' filing of a customer programs motion authorizing them to set off all outstanding prepetition amounts against the amounts they owe to the Debtors under the Customer Distribution Contracts, they would (a) seek stay relief in this Court to permit them to set off all prepetition amounts against their payables to the Debtors, which would severely disrupt the Debtors' cash receipts, cash flow model, and business generally, (b) seek stay relief to permit them to terminate the Customer Distribution Agreements in accordance with their respective terms and provisions, (c) cease ordering V-Go[®] for distribution, which could result in cutting off patient access to the product,⁴ and (d) move to

⁴ Indeed, one Distributor instituted an "administrative freeze" on product ordering for V-Go[®].

compel the Debtors to assume or reject the Customer Distribution Contracts. While the Debtors do not believe that the Distributors would be successful in these efforts, the Debtors cannot afford the cost or distraction that would follow and when weighed against the amounts at issue, the Debtors determined that seeking the narrow relief set forth in the Motion is in the best interests of their estates and stakeholders. Ultimately, the Debtors do not want to take the chance that patient access to V-Go[®] is interrupted in any meaningful way.

17. Accordingly, the Debtors have determined, in the exercise of their sound business judgment, that maintaining these Customer Distribution Programs and satisfying certain related prepetition obligations subject to the Cap will help preserve the going concern value of their business and therefore, is in the best interests of the Debtors, their estates, creditors, and other stakeholders.

18. Similar relief has been granted in this and other Districts. *See, e.g., In re Melinta Therapeutics, Inc.*, Case No. 19-12748 (LSS) (Bankr. D. Del. Jan. 30, 2020) (granting pharmaceutical debtor authority to continue administering customer programs and paying prepetition amounts owed thereunder), ECF No. 224; *In re Insys Therapeutics, Inc.*, Case No. 19-11292 (KG) (Bankr. D. Del. July 3, 2019) (same), ECF No. 232; *In re Achaogen, Inc.*, Case No. 19-10844 (BLS) (Bankr. D. Del. May 3, 2019) (same), ECF No. 144; *In re Pernix Sleep, Inc.*, Case No. 19-10323 (CSS) (Bankr. D. Del. Mar. 22, 2019) (same), ECF No. 182; *In re Orexigen Therapeutics, Inc.*, Case No. 18-10518 (KG) (Bankr. D. Del. Apr. 11, 2018) (same), ECF No. 165; *In re Synergy Pharms., Inc.* Case No. 18-14010 (JLG) (Bankr. S.D.N.Y. Jan. 23, 2019) (same), ECF No. 254.

WAIVER OF BANKRUPTCY RULE 6003(b)

19. Bankruptcy Rule 6003(b) provides that, “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting . . . a motion to . . . pay all or part of a claim that arose before the filing of the petition.” Immediate and irreparable harm exists where the absence of relief would significantly disrupt a debtor’s business and operations, thereby challenging a debtor’s ability to resolve a bankruptcy case in an orderly manner. *See, e.g., In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 469 (Bankr. S.D.N.Y. 2014). The Third Circuit has interpreted language similar to the “immediate and irreparable harm” language in the context of preliminary injunctions and has instructed that irreparable harm is a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 F. App’x 907, 910 (3d Cir. 2007) (citing *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Furthermore, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle Cnty.*, 40 F.3d 645, 653–55 (3d Cir. 1994).

20. As set forth in this Motion, the continuation of the Debtors’ Customer Distribution Programs and the payment of certain prepetition obligations thereunder up to the Cap are vital to the Debtors’ revenue generation and preservation and maintenance of their customer base, as well as to the well-being of patients. Absent authorization to immediately pay such prepetition obligations, the Debtors, their business, and the patients who depend on V-Go® will suffer actual and imminent harm. Accordingly, waiver of Bankruptcy Rule 6003(b) is appropriate under the circumstances.

WAIVER OF BANKRUPTCY RULE 6004(a) AND 6004(h)

21. For the successful implementation of the foregoing, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). As set forth above and in the First Day Declaration, the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors. Specifically, the failure to obtain the requested relief would jeopardize the Debtors' ability to operate their business as a going concern and preserve the value of their estates by minimizing disruption of their business and customer base in the early days of these Chapter 11 Cases. Accordingly, ample cause exists to justify a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent both apply.

RESERVATION OF RIGHTS

22. Nothing contained herein is or should be construed as: (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' or any party in interest's rights to dispute any unpaid portion of any claim; or (iii) an approval or assumption of any agreement under section 365 of the Bankruptcy Code. Likewise, if this Court grants the relief sought in this Motion, any payment made pursuant to such order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to dispute such claim at a later date.

NOTICE

23. Notice of this Motion will be provided in accordance with the Local Rules to: (a) the Office of the United States Trustee for Region 3; (b) the Prepetition Secured Lenders; (c) the DIP Lender; (d) the parties included on the Debtors' consolidated list of their 30 largest

unsecured creditors; (e) the Distributors; and (f) all parties entitled to notice pursuant to Local Rule 2002-1(b). Based on the particular circumstances surrounding this Motion and the nature of the relief sought, the Debtors respectfully submit that no other or further notice of this Motion is required.

WHEREFORE, the Debtors respectfully request that this Court (i) enter an Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in this Motion, and (ii) grant such other and further relief as the Court may deem just and proper.

Dated: February 20, 2020
Wilmington, Delaware

Respectfully submitted,

DLA PIPER LLP (US)

/s/ Maris J. Kandestin

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Proposed Counsel to the Debtors and Debtors in Possession

EXHIBIT A

Proposed Order

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

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In re:	:	Chapter 11
	:	
VALERITAS HOLDINGS, INC., <i>et al.</i> , ¹	:	Case No. 20-10290 (LSS)
	:	
Debtors.	:	(Jointly Administered)
	:	
	:	Re: D.I. ____

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**ORDER (I) AUTHORIZING THE DEBTORS TO CONTINUE CERTAIN
CUSTOMER PROGRAMS AND TO HONOR CERTAIN OBLIGATIONS
IN CONNECTION WITH SAME, AND GRANTING RELATED RELIEF**

Upon the *Motion of the Debtors for Entry of Order (I) Authorizing the Debtors to Continue Certain Customer Programs and to Honor Certain Obligations in Connection with Same, and (II) Granting Related Relief* (the “Motion”),² filed by the above-captioned debtors (collectively, the “Debtors”), for entry of an order (this “Order”), pursuant to sections 105 and 363 of the Bankruptcy Code, all as described further in the Motion; the Court having found that (i) this Court has jurisdiction over the Debtors, their estates, property of their estates, and to consider the Motion and the relief requested therein under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012, (ii) this Court may enter a final order consistent with Article III of the United States Constitution, (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (iv) venue of this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409, and (v) no further or other notice of the Motion is required under the circumstances; and this Court having reviewed the Motion; and upon the record of these Chapter 11 Cases; and

¹ The debtors in these chapter 11 cases, along with the last four digits of each debtor’s federal tax identification number, are: Valeritas Holdings, Inc. (8907); Valeritas, Inc. (1056); Valeritas Security Corporation (9654); Valeritas US, LLC (0007). The corporate headquarters and the mailing address for the debtors is 750 Route 202 South, Suite 600, Bridgewater, New Jersey 08807.

² Any capitalized terms used but not defined herein shall have the meaning ascribed to them in the Motion.

having determined that the legal and factual bases set forth in the Motion and the First Day Declaration establish just cause for the relief granted in this Order; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and after due deliberation, and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth in this Order.
2. The Debtors are authorized to continue the Customer Distribution Programs in the ordinary course of business and without further order of the Court, and to perform and honor prepetition obligations thereunder in an amount not to exceed \$419,000 in the ordinary course of business in the same manner and on the same basis as prior to the Petition Date. The Distributors may apply and setoff the amounts set forth in the Cap to prepetition amounts due and owing under the Customer Distribution Contracts.
3. The Debtors and the Distributors are authorized to settle and setoff postpetition liabilities and claims through routine bill credits or contractual application rights, in each case to the extent consistent with the parties' contractual arrangements and ordinary course of dealing prior to the Petition Date.
4. The Debtors are authorized to continue, renew, replace, modify, or terminate any Customer Distribution Programs as the Debtors deem appropriate, in their sole discretion, and in the ordinary course of business, without further order of the Court.
5. Nothing in this Order shall constitute or be construed as (i) an admission as to the validity of any unpaid claim against the Debtors; (ii) a waiver of the Debtors' or any party in

interest's rights to dispute any unpaid portion of any claim; or (iii) an approval or assumption of any agreement under section 365 of the Bankruptcy Code.

6. The Distributors reserve all rights to assert (a) cure amounts, if any, in connection with any proposed assumption and assignment of the Customer Distribution Contracts, and (b) another other claims, including administrative priority claims, against the Debtors' estates.

7. The requirements of Bankruptcy Rule 6004(a) are waived.

8. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), the terms and provisions of this Order shall be effective immediately and enforceable upon its entry.

9. The Court shall retain jurisdiction over any and all matters arising from the interpretation or implementation of this Order.