

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:	)	Chapter 11
)	
HINES HORTICULTURE, INC., et al., ¹	)	Case No. 08-11922 (KJC)
)	
Debtors.	)	Jointly Administered
)	
	)	Hearing Date: November 20, 2008 at 2:00 p.m. (ET)
	)	Objection Deadline: November 13, 2008 at 4:00 p.m. (ET)

NOTICE OF MOTION

TO: (A) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (B) COUNSEL TO THE COMMITTEE; (C) COUNSEL TO THE AGENT FOR THE DEBTORS' PREPETITION AND PROPOSED POSTPETITION SECURED LENDERS; (D) THE INDENTURE TRUSTEE FOR THE DEBTORS' 10.25% SENIOR NOTES; (E) REGISTERED HOLDERS OF COMMON STOCK; (F) THE SECURITIES EXCHANGE COMMISSION; (G) THE INTERNAL REVENUE SERVICE AND (H) THOSE PARTIES WHO HAVE REQUESTED SERVICE OF PAPERS PURSUANT TO BANKRUPTCY RULE 2002

The above-captioned debtor and debtor in possession (the "Debtor") has filed the attached **Motion of the Debtors for the Entry of an Order Establishing Notification and Hearing Procedures for Transfers and Claims of Worthlessness with Respect to Certain Common Stock and for Related Relief** (the "Motion").

Responses to the Motion, if any, must be filed on or before **November 13, 2008 at 4:00 p.m. (ET)** (the "Objection Deadline") with the United States Bankruptcy Court for the District of Delaware, 3rd Floor, 824 Market Street, Wilmington, Delaware 19801.

At the same time, you must also serve a copy of the response upon the undersigned counsel to the Debtors.

A HEARING ON THE MOTION WILL BE HELD ON NOVEMBER 20, 2008 AT 2:00 A.M. BEFORE THE HONORABLE KEVIN J. CAREY, UNITED STATES BANKRUPTCY COURT, 824 NORTH MARKET STREET, WILMINGTON, DELAWARE 19801.

¹ The Debtors in these Chapter 11 Cases, and the last four digits of each Debtor's federal tax identification numbers are: Hines Horticulture, Inc. (3204) and Hines Nurseries, Inc. (1319). The location of the Debtors' corporate headquarters and the service address for both Debtors is: 12621 Jeffrey Road, Irvine, California 92620.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: October 30, 2008
Wilmington, Delaware

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Co-Counsel for the Debtors

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

In re:)	Chapter 11
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HINES HORTICULTURE, INC., et al., ¹)	Case No. 08-11922 (KJC)
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Debtors.)	Jointly Administered
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)	Hearing Date: November 20, 2008 at 2:00 p.m. (EST)
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**MOTION OF THE DEBTORS FOR THE ENTRY OF AN ORDER ESTABLISHING
NOTIFICATION AND HEARING PROCEDURES FOR TRANSFERS OF AND CLAIMS
OF WORTHLESSNESS WITH RESPECT TO CERTAIN COMMON STOCK AND FOR
RELATED RELIEF**

The above-captioned debtors (collectively, the “Debtors”) hereby move the Court, pursuant to this motion (this “Motion”), for the entry of an order, substantially in the form attached hereto as Exhibit A, establishing notification and hearing procedures that must be satisfied before certain shareholders may make transfers of, or claims of worthlessness with respect to common stock of Hines Horticulture, Inc. (“Hines”) and any beneficial interest therein, including Options, if any, (as defined in Paragraph 10.c hereof) to acquire such stock (the “Common Stock”). These procedures will generally apply to any person or shareholder who owns, or who has owned, more than fifty percent (50%) of Hines’ stock at any time since January 1, 2005. In support of this Motion, the Debtors respectfully state as follows:

¹ The Debtors in these Chapter 11 Cases and the last four digits of each Debtor’s federal tax identification numbers are: Hines Horticulture, Inc. (3204) and Hines Nurseries, Inc. (1319). The location of the Debtors’ corporate headquarters and the service address for both Debtors is: 12621 Jeffrey Road, Irvine, California 92620.

Jurisdiction

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

2. The statutory bases for the relief requested herein are §§ 105(a), 362(a)(3), and 541 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (the “Bankruptcy Code”) and Rules 3002 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background

3. On August 20, 2008 (the “Petition Date”), each of the Debtors filed a petition with the Court under chapter 11 of the Bankruptcy Code (collectively, the “Chapter 11 Cases”). On August 21, 2008, the Court entered an order directing the joint administration and procedural consolidation of the Chapter 11 Cases. On September 3, 2008, the United States Trustee appointed an official committee of unsecured creditors (the “Committee”) pursuant to section 1102 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

The Debtors’ Net Operating Losses

4. The Debtors have incurred, and currently are incurring, significant net operating losses (“NOLs”). By this Motion, the Debtors seek authorization to protect and preserve their valuable tax attributes, including NOL carryforwards and certain other tax and business credits (“Tax Credits” and with the NOLs, the “Tax Attributes”) by establishing notification and hearing procedures that must be complied with before the making any transfer of, or declaration of worthlessness for federal or state tax purposes with respect to the Common Stock. If no

restrictions on transfers or worthlessness deductions are imposed by this Court, such trading or deductions could severely limit or even eliminate the Debtors' ability to use their Tax Attributes (including their NOLs) — a valuable asset of the Debtors' estates — which could lead to significant negative consequences for the Debtors, their estates, and the overall reorganization process.

5. The NOLs are of significant value to the Debtors and their estates because the Debtors can carry forward their NOLs to offset their future taxable income for up to 20 taxable years, thereby reducing their future aggregate tax obligations. See 26 U.S.C. § 172. Such NOLs also may be utilized by the Debtors to offset any taxable income generated by transactions completed during these Chapter 11 Cases.

6. If a 50% or greater shareholder were, for federal or state tax purposes, to treat its Common Stock as becoming worthless prior to the Debtors emerging from chapter 11 protection, section 382(g)(4)(D) of the Internal Revenue Code ("IRC") would treat such a claim as a transfer, which could trigger an ownership change, and thus adversely affect the Tax Attributes. Similarly, if a 50% or greater shareholder sought to recognize a loss by selling or otherwise disposing of its Common Stock before the Debtors emerge from chapter 11 protection, such a transfer would trigger an ownership change and adversely affect the Tax Attributes. The relief requested is particularly critical here as the Debtors attempt to expeditiously exit bankruptcy.

7. To preserve to the fullest extent possible the flexibility to implement a balance sheet restructuring that maximizes the use of their Tax Attributes, the Debtors seek limited relief that will enable them to closely monitor certain transfers of, and declarations of worthlessness with respect to, Common Stock so as to be in a position to act expeditiously to prevent such transfers and declarations, if necessary, with the purpose of preserving the Tax Attributes.

Relief Requested

8. The Debtors request that this Court grant relief immediately, thereby preserving the status quo in this regard, ordering that any transfer of, or declaration of worthlessness with respect to Common Stock in violation of the procedures set forth below (including the notification procedures set forth in paragraphs 10.a, 10.b, 10.c and 10.d hereof) shall be void *ab initio* and in the event that a 50% Shareholder does make a worthless stock deduction in violation of the procedures set forth below, such shareholder shall be required to file an amended tax return revoking such claim (the “Order”). Importantly, the relief requested herein directly affects only holders of more than 11,036,275 shares of Common Stock.²

9. The Debtors request that the Court enter an order restricting the ability of shareholders that own or have owned 50% or more, by value, of the Common Stock to (a) transfer such securities prior to the Debtors’ emergence from Chapter 11 protection, or (b) claim a deduction for the worthlessness of such securities on their federal or state tax returns for a tax year ending before the Debtors emerge from chapter 11 protection. Under Section 382 of the IRC, such a transfer would likely create an ownership change that would severely restrict the Debtors ability to use its Tax Attributes going forward. Under section 382(g)(4)(D) of the IRC, any securities held by such a shareholder are treated as though they were transferred if such shareholder claims a worthlessness deduction with respect to such securities. It is therefore essential that shareholders that own or have owned 50% or more of the Common Stock of the Debtors defer claiming such worthlessness deduction until after the Debtors have emerged from bankruptcy.

² Currently, in total, there are 22,072,549 shares of Common Stock outstanding.

10. By restricting 50% Shareholders (as the term is defined in paragraph 10.c below) from transferring, or claiming a worthlessness deduction with respect to, the Common Stock prior to the Debtors' emergence from chapter 11 protection, the Debtors can preserve their ability to seek substantive relief at the appropriate time. Accordingly, the Debtors request that the Court enter an order establishing the following procedures:

Procedure for Transferring or Claiming a Worthless Stock Deduction

- a. Prior to (i) filing any federal or state tax return, or any amendment to such a return, claiming any deduction for worthlessness of the Common Stock of Hines, for a tax year ending before the Debtors' emergence from chapter 11 protection (a "Worthlessness Deduction"), or (ii) effectuating any transfer of Common Stock (a "Transfer"), a 50% Shareholder (as the term is defined in paragraph (c) below) must file with the Court, and serve upon counsel to the Debtors, an advance written notice in the form of Exhibit 1 annexed to Exhibit A attached hereto (a "Declaration of Proposed Transfer/Worthless Stock Deduction"), of the proposed transfer or claim of worthlessness.
- b. The Debtors will have 15 calendar days after receipt of a Declaration of Proposed Transfer/Worthless Stock Deduction to file with the Court and serve on such 50% Shareholder an adversary proceeding seeking to enjoin any proposed claim of worthlessness or transfer described in the Declaration of Proposed Transfer/Worthless Stock Deduction on the grounds that such claim or transfer might adversely affect the Debtors' ability to utilize their Tax Attributes. If the Debtors file an adversary proceeding, the filing of the return with such claim or the transfer would not be permitted unless approved by a final and nonappealable order of the Court. If the Debtors do not file an adversary proceeding within such 15-day period, the filing of the return with such claim or transfer would be permitted as set forth in the Declaration of Proposed Transfer/Worthless Stock Deduction. Additional returns or transfers within the scope of this paragraph must be the subject of additional notices as set forth herein, with an additional 15-day waiting period.
- c. For purposes of these procedures: (i) a "50% Shareholder" is (A) for purposes of a Worthlessness Deduction, any person or entity defined as a "50 percent" shareholder under IRC § 382(g)(4)(D), and (B) for purposes of a Transfer, any person or entity that at any time since January 1, 2005,

has had Beneficial Ownership of 50% or more of the Common Stock;³ (ii) “Beneficial Ownership” of Common Stock includes direct and indirect ownership (e.g., a holding company would be considered to beneficially own all shares owned or acquired by its subsidiaries), ownership by such holder’s family members and persons acting in concert with such holder to make a coordinated acquisition of stock and ownership of shares that such holder has an Option to acquire; and (iii) an “Option” to acquire stock includes any contingent purchase, warrant, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable.

- d. Any holder who violates the procedures set forth in paragraphs 10.a, 10.b and 10.c above shall be required to file an amended tax return, revoking such claim or transfer, but shall not be liable for any economic damages.

11. With respect to the procedures set forth above, the Debtors request that the Court permit the Debtors to waive, in writing, any and all restrictions, stays and notification procedures contained in this Motion or in any order entered with respect hereto.

Basis for Relief

A. The Significance of the Debtors’ Tax Attributes

12. Currently the Debtors have projected NOLs of approximately \$130 million and Tax Credits of approximately \$600,000. These Tax Attributes could translate into a potential future tax savings of approximately \$52 million, based on a combined federal and state income tax rate of approximately 40%.

13. Sections 39(a), 59(e), 172(b), and 904(d) of the IRC permit corporations to carry forward Tax Attributes to offset future taxable income and tax liability, thereby significantly improving such corporations’ liquidity in the future. Thus, the Debtors’ Tax Attributes are a valuable asset of the Debtors’ estates whose availability will facilitate the Debtors’ successful reorganization and serve to improve creditor recoveries. Without the relief requested herein, the

³ 50% of more of the Common Stock is currently the equivalent of 11,036,275 or more shares.

Debtors' ability to use their Tax Attributes, however, could be limited severely under sections 382 and 383 of the IRC as a result of the claims of worthlessness or transfers made with respect thereto, prior to the consummation of the Debtors' plan. Given the significant benefit to the estates of preserving the Tax Attributes, the Debtors aver that it is clear that cause exists to grant the relief requested and such relief is in the best interests of the estates.

B. The Provisions of Sections 382 and 383 of the IRC

14. Section 382 of the IRC limits the amount of taxable income that can be offset by a corporation's NOLs in taxable years (or a portion thereof) following an ownership change.⁴ Generally, an "ownership change" occurs if the percentage (by value) of the stock of a corporation owned by one or more 5% Shareholders has increased by more than 50 percentage points over the lowest percentage of stock owned by such shareholders at any time during the three-year testing period ending on the date of the ownership change. For example, an ownership change would occur in the following situation:

An individual ("U") owns 50.1% of the stock of corporation XYZ. U sells her 50.1 % interest to another individual ("B"), who owns 5% of XYZ's stock. Under section 382, an ownership change has occurred because B's interest in XYZ has increased more than 50 percentage points (from 5% to 55.1%) during the testing period. The same result would follow even if B owned no XYZ stock prior to the transaction with U because B both becomes a 5% shareholder and increases his ownership by more than 50% percentage points during the testing period.

15. Under section 382(g)(4)(D) of the IRC, any securities held by a shareholder that owns or has owned 50% or more, by value, of the Common Stock are treated as though such shares were transferred if such shareholder claims a worthless stock deduction and such transfers

⁴ Similarly, section 383 of the IRC limits the amount of tax liability that can be offset by Tax Credits following an ownership change.

could trigger an ownership change. It is therefore essential that shareholders that own or have owned 50% or more of the Common Stock of the Debtors defer claiming such worthlessness deductions until after the Debtors have emerged from bankruptcy.

16. If an ownership change occurs, section 382 of the IRC limits the amount of a corporation's future income that may be offset by its "pre-change losses" to an annual amount equal to the value of the corporation prior to the ownership change multiplied by the long-term tax exempt rate. See 26 U.S.C. § 382(b). "Pre-change losses" would include (a) NOLs and (b) any net unrealized built-in loss (as defined in section 382(h)(3)).

17. At the same time, section 383 of the IRC limits the amount of tax liability that may be offset by "pre-change tax credits" to the liability attributable to the amount of income that could have been offset by pre-change losses but was not so offset. "Pre-change tax credits" would include Tax Credits.

18. The formulaic limitations under sections 382 and 383 of the IRC can severely restrict the ability to use "pre-change losses" and "pre-change tax attributes" because the value of the stock of a distressed company may be quite low.

19. The problem facing the Debtors, which this Motion seeks to resolve, is that if prior to the effective date of the Debtors' plan a 50% Shareholder (i) declares its shares to be worthless, or (ii) transfers such shares, such declaration or transfer may trigger an ownership change. The Debtors need the ability to monitor, and possibly object to, changes of ownership of the Common Stock to preserve flexibility in operating their businesses during the pendency of these Chapter 11 Cases, in confirming a chapter 11 plan and, finally, in maximizing their ability to reduce future federal income taxes by offsetting their post-reorganization income with the Tax Attributes.

C. The Requested Relief is Narrowly Tailored

20. The requested relief does not bar all transfers or deductions for worthless Common Stock and will only be in effect until the Debtors' exit from bankruptcy. At this juncture, the Debtors seek to establish procedures only to restrict those types of transfers or worthlessness stock deductions that would pose a serious risk under the section 382 ownership change test to preserve the Debtors' ability to seek substantive relief if it appears that proposed claims will jeopardize the use of their Tax Attributes. The restrictions on transfers or worthlessness deductions would apply only to 50% Shareholders, and even then would not prohibit such transfers or deductions entirely, but would merely require them to be postponed to taxable years ending after the Debtors emerge from chapter 11 protection.

D. The Requested Relief Is Necessary to Avoid Irreparable Harm to the Debtors

21. Once a Tax Attribute is limited under section 382 of the IRC, its use is limited forever. The relief sought herein is necessary to avoid an irrevocable loss of the Tax Attributes and the irreparable harm that would be caused by a 50% Shareholder claiming a worthless tax deduction, resulting in Debtors' inability to offset taxable income with their Tax Attributes.

E. Provisions of the Proposed Order

22. This Motion has been served upon: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the Committee; (c) counsel to the agent for the Debtors' prepetition and proposed postpetition secured lenders; (d) the indenture trustee for the Debtors' 10.25% Senior Notes; (e) registered holders of Common Stock; (f) the Securities Exchange Commission; (g) the Internal Revenue Service and (h) those parties who have requested service of papers pursuant to Bankruptcy Rule 2002.

23. Upon entry of the Order, and in any event no later than one business day following entry of the Order, the Debtors shall serve by overnight mail a notice in substantially the form of Exhibit 2 annexed to Exhibit A attached hereto (the "Notice of Order") to: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the Committee; (c) counsel to the agent for the Debtors' prepetition and proposed postpetition secured lenders; (d) the indenture trustee for the Debtors' 10.25% Senior Notes; (e) registered holders of Common Stock; (f) the Securities Exchange Commission; (g) the Internal Revenue Service and (h) those parties who have requested service of papers pursuant to Bankruptcy Rule 2002. Additionally, the Debtors will publish the Notice of Order (modified for publication) in *The Wall Street Journal (National Edition)* and the *USA Today* within 3 business days of entry of the Order.

24. The foregoing notice procedures satisfy due process and the strictures of Bankruptcy Rule 9014 by providing the relevant counterparties with a notice and an opportunity to object and attend a hearing. See, e.g., In re Colorado Mountain Cellars, Inc., 226 B.R. 244, 246 (D. Colo. 1998) (noting that a hearing is not required to satisfy Bankruptcy Rule 9014). Further, the proposed notice procedures protect the due process rights of the parties-in-interest without unnecessarily exposing the Debtors' estates to unwanted administrative expenses.

F. NOLs Are Property of a Debtor's Estate and Are Entitled to Court Protection

25. Courts have uniformly held that a debtor's NOLs constitute property of the estate under section 541 of the Bankruptcy Code and, as such, courts have the authority to implement certain protective measures to preserve the NOLs. The seminal case articulating this rule is In re Prudential Lines, Inc., 107 B.R. 832 (Bankr. S.D.N.Y. 1989), *aff'd*, 119 B.R. 430 (S.D.N.Y. 1990), *aff'd*, 928 F.2d 565 (2d Cir. 1991), *cert. denied* 502 U.S. 821 (1991). In Prudential Lines,

the Bankruptcy Court for the Southern District of New York enjoined a parent corporation from taking a worthless stock deduction with respect to its wholly-owned debtor subsidiary on the grounds that allowing the parent to do so would destroy its debtor-subsubsidiary's NOLs. In issuing the injunction, the court held that the "debtor's potential ability to utilize NOLs is property of an estate," 107 B.R. at 839, and that "the taking of a worthless stock deduction is an exercise of control over a debtor's NOLs," 107 B.R. at 842, and thus was properly subject to the automatic stay provisions of section 362 of the Bankruptcy Code. See also In re Grossman's, Inc., Case No. 97-695 (Bankr. D. Del. Oct. 9, 1997) (debtors' NOL carryforwards are property of debtors' estates protected by the automatic stay provisions of the Bankruptcy Code); In re White Metal Rolling & Stamping Corp., 222 B.R. 417, 424 (Bankr. S.D.N.Y. 1998) ("It is beyond peradventure that NOL carrybacks and carryovers are property of the estate of the loss corporation that generated them"); In re Southeast Banking Corp., Case No. 91-14561-BKC (Bankr. S.D. Fla. July 21, 1994) (debtor's interest in their NOLs "constitutes property of the estate within the scope of 11 U.S.C. § 541(a)(i) and is entitled to the protection of the automatic stay"); In re Phar-Mor, Inc., 152 B.R. 924, 927 (Bankr. N.D. Ohio 1993) ("the sale of stock is prohibited by section 362(a)(3) of the Bankruptcy Code as an exercise of control over the NOL, which is property of the estate"). Since the Debtors' NOLs are property of their estates, this Court has the authority under section 362 of the Bankruptcy Code to enforce the automatic stay by restricting a 50% Shareholder from transferring stock or claiming a worthless stock deduction that could jeopardize the existence of this valuable asset.

G. Tax Credits Are Property of a Debtor's Estate and Are Entitled to Court Protection

26. Similar to NOLs, the Tax Credits are valuable assets of the Debtors' estate. The Tax Credits, like NOLs, may be used by the Debtors to offset future income and reduce future

federal income taxes. Accordingly, the Tax Credits constitute property of the Debtors' estates under section 541 of the Bankruptcy Code and should be given the same protective treatment as NOLs. As with NOLs, this Court has the authority under section 362 of the Bankruptcy Code to enforce the automatic stay by restricting the transfer of, or claims of worthlessness with respect to, Common Stock that could reduce this valuable asset.

27. Courts have granted relief similar to that sought herein with respect to non-NOL tax credits in other cases. See, e.g., In re Delta Air Lines, Inc., Case No. 05-17923 (Bankr. S.D.N.Y. Sept. 16, 2005) [Docket No. 1640] (finding that NOL and tax credit carryforwards are property of the debtors' estate and approving notification procedures and restrictions on certain transfers of claims against and interests in the debtors to protect, among other things, \$346 million in non-NOL tax credits).

H. Bankruptcy Courts Routinely Grant the Relief Requested in the Motion

28. Courts in this jurisdiction and others have routinely restricted or enjoined claims for worthless stock deductions, or issued other injunctive relief to protect a debtor against the possible loss of its NOL carryforwards. See, e.g., In re Portola Packaging, Inc., Case No. 08-12001 (Bankr. D. Del. Sept. 2, 2008) [Docket. No. 61] (approving notification procedures and restrictions on certain transfers of, and worthless stock deductions with respect to, equity interests in the debtors); In re Dura Auto. Sys., Inc., Case No. 06-11202 (Bankr. D. Del. Nov. 20, 2006) [Docket No. 276] (approving notification procedures and restricting certain transfers of equity interests); In re J.L. French Automotive Castings, Inc., Case No. 06-10119 (Bankr. D. Del. March 3, 2006) [Docket No. 190] (approving notification procedures and restrictions on certain transfers of, and worthless stock deductions with respect to, equity interests in the debtors); In re W.R. Grace & Co., Case No. 01-01139 (Bankr. D. Del. Jan. 24,

2005) [Docket No. 7611] (approving notification procedures and restricting certain transfers of equity interests); In re Kimball Hill, Inc., Case No. 08-10095 (Bankr. N.D. Ill. May 29, 2008) [Docket No. 248] (approving notification procedures and restrictions on certain transfers of, and worthless stock deductions with respect to, equity interests in the debtors); In re DJK Residential LLC, Case No. 08-10375 (Bankr. S.D.N.Y. Feb. 25, 2008) [Docket No.159] (same); In re Calpine Corp., No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21, 2005) [Docket No. 37] (same); In re the Boyds Collection, Ltd., Case. No. 05-43793 (Bankr. E.D. Md. Nov. 1, 2005) [Docket No. 106] (same); In Re Northwest Airlines Corp., Case No. 05-17930 (Bankr. S.D.N.Y. Oct. 07, 2005) [Docket No. 616] (same); In re Delta Air Lines, Inc., Case No. 05-17923 (Bankr. S.D.N.Y. Sept. 16, 2005) [Docket No. 1640] (approving notification procedures and restricting certain transfers of equity interests); In re US Airways, Inc., Case No. 04-13819 (SSM) (Bankr. E.D. Va. Apr. 1, 2005) [Docket No. 2034] (same); In re UAL Corp., Case No. 02-B-48191 (Bankr. N.D. Ill. Dec. 30, 2002) [Docket No. 651] (approving, on an interim basis, notification procedures and restricting certain transfers of equity interests); In re US Airways Group, Inc., Case No. 02-83984 (SSM) (Bankr. E.D. Va. Oct. 2, 2002) [Docket No. 85] (approving notification procedures and restricting certain transfers of claims against and equity interests).

29. Courts granting such relief generally have done so by imposing notice and hearing requirements on any proposed transfer of stock to or by any person or entity whose holdings of such stock exceeds, or would exceed as a result of the proposed transfer, a certain threshold amount. To accomplish this, the court and the debtor are given notice of any proposed transfers of stock by entities whose aggregate stock holdings exceed a certain dollar or share threshold, giving the debtor an opportunity to object to such transfer at a hearing. The order in First Merchants Acceptance was typical in this regard. See 1998 Bankr. LEXIS 1816 (Bankr. D. Del.

1998). In that case, the court entered an order imposing on any entity intending to (a) acquire, accumulate, or sell more than a prescribed number of shares of the debtor, or to add additional shares to such a block, or (b) acquire or sell any subordinated reset notes or unsecured claims against the debtors, a duty to provide notice to the court and to the debtor's counsel, after which the debtor was afforded 30 days to object to such transaction with a hearing to be held so that the court could decide whether to allow any such transfer to be consummated. See e.g., In re Dura Auto. Sys., Inc., No. 06-11202 (Bankr. D. Del. Nov. 20, 2006) [Docket No. 276] (stock trading restrictions applied to persons who were, or would become as a result of the proposed transfer, a 4.5% stockholder); In re Calpine Corp., No. 05-60200 (Bankr. S.D.N.Y. Dec. 21, 2005) [Docket No. 37] (same); In re the Boyds Collection, Ltd., Case. No. 05-43793 (Bankr. E.D. Md. Nov. 1, 2005) [Docket No. 106] (claims trading restrictions applied to claimholders expected to fall outside a de minimis amount). The relief that the Debtors request in this Motion is less burdensome than that granted in First Merchants Acceptance, as it solely restricts shareholders who own, or have owned 50% or more of the Common Stock from transferring or claiming a worthless stock deduction outside the procedures set forth in this Motion.

30. The Debtors' Tax Attributes are valuable assets of their estates that will inure to the benefit of their stakeholders and facilitate the Debtors' reorganization. Unrestricted transfers or deductions for worthless stock jeopardize these assets and impair their value for the Debtors' stakeholders at large. The requested relief imposes a minimal burden to achieve a substantial benefit for the Debtors and their creditors and other interested parties. Accordingly, this Court should grant the requested relief and establish a notice and hearing procedure governing the transfer of, and claims of worthlessness with respect to, the Common Stock.

Notice

31. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the Committee; (c) counsel to the agent for the Debtors' prepetition and proposed postpetition secured lenders; (d) the indenture trustee for the Debtors' 10.25% Senior Notes; (e) registered holders of Common Stock; (f) the Securities Exchange Commission; (g) the Internal Revenue Service and (h) those parties who have requested service of papers pursuant to Bankruptcy Rule 2002. A copy of this Motion is also available on the website of the Debtors' proposed notice and claims agent, Epiq Systems, Inc., at <http://chapter11.epiqsystems.com/hines>. 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, the Debtors respectfully submit that no further notice is necessary.

No Prior Request

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


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WHEREFORE, the Debtors respectfully request the entry of the Order, substantially in the form attached hereto as Exhibit A, (a) authorizing the implementation of a notice and hearing procedure governing transfers of and claims of worthlessness with respect to the Common Stock of Hines Horticulture Inc. and (b) granting such other and further relief as the Court deems appropriate.

Dated: October 30, 2008
Wilmington, Delaware

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Co-Counsel for the Debtors

EXHIBIT A

Proposed Order

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

In re:)	
	)	Chapter 11
HINES HORTICULTURE, INC., et al., ¹	)	Case No. 08-11922 (KJC)
)	
Debtors.	)	Jointly Administered
	)	Ref. Docket No. _____

**ORDER ESTABLISHING NOTIFICATION AND HEARING PROCEDURES FOR
TRANSFERS OF, AND CLAIMS OF WORTHLESSNESS WITH RESPECT TO
CERTAIN COMMON STOCK**

Upon the Motion² of the above-captioned debtors (collectively, the “Debtors”) for the entry of an Order (the “Order”) authorizing, but not directing, the Debtors to establish notifications and hearing procedures that must be satisfied before certain shareholders may transfer or make claims of worthlessness with respect to common stock in Hines Horticulture, Inc. (“Hines”), this Court having determined that the relief requested in the Motion is in the best interest of the Debtors; their estates, their creditors, and other parties-in-interest; the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 1587 and 1334; consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); venue being proper in this District and before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that notice of this Motion and opportunity for a hearing on this Motion was appropriate under the particular circumstances and

¹ The Debtors in these Chapter 11 Cases and the last four digits of each Debtor’s federal tax identification numbers are: Hines Horticulture, Inc. (3204) and Hines Nurseries, Inc. (1319). The location of the Debtors’ corporate headquarters and the service address for both Debtors is: 12621 Jeffrey Road, Irvine, California 92620.

² Capitalized terms used but not otherwise defined herein shall have the same meanings set forth in the Motion.

that no other or further notice need be given; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED:

1. The Motion is granted in its entirety.
2. Any transfer of, or declaration of worthlessness with respect to, common stock in Hines or of any beneficial interest therein, including Options to acquire such stock (the “Common Stock”), in violation of the procedures set forth herein shall be null and void *ab initio*.
3. The following procedure shall apply to any transfer of, or declaration of worthlessness for tax purposes with respect to, Common Stock:
 - a. Prior to (i) filing any federal or state tax return, or any amendment to such a return, claiming any deduction for worthlessness of the Common Stock, for a tax year ending before the Debtors’ emergence from chapter 11 protection, or (ii) effectuating any transfer of Common Stock, a 50% Shareholder (as the term is defined in paragraph (c) below) must file with the Court, and serve upon counsel to the Debtors, an advance written notice in the form attached as Exhibit 1 hereto (a “Declaration Proposed Transfer/Worthless Stock Deduction”), of the intended claim of worthlessness or transfer.
 - b. The Debtors will have 15 calendar days after receipt of a Declaration of Proposed Transfer/Worthless Stock Deduction to file with the Court and serve on such 50% Shareholder an adversary proceeding seeking to enjoin any proposed claim of worthlessness or transfer described in the Declaration of Proposed Transfer/Worthless Stock Deduction on the grounds that such claim or transfer might adversely affect the Debtors’ ability to utilize their Tax Attributes. If the Debtors file an adversary proceeding, the filing of the return with such claim or the transfer would not be permitted unless approved by a final and nonappealable order of the Court. If the Debtors do not file an adversary proceeding within such 15-day period, the filing of the return with such claim or transfer would be permitted as set forth in the Declaration of Proposed Transfer/Worthless Stock Deduction. Additional returns or transfers within the scope of this paragraph must be the subject of additional notices as set forth herein, with an additional 15-day waiting period.
 - c. For purposes of these procedures: (i) a “50% Shareholder” is (A) for purposes of a Worthlessness Deduction, any person or entity defined as a

“50 percent” shareholder under IRC § 382(g)(4)(D), and (B) for purposes of a Transfer, any person or entity that at any time since January 1, 2005, has had Beneficial Ownership of 50% or more of the Common Stock;³ (ii) “Beneficial Ownership” of Common Stock includes direct and indirect ownership (e.g., a holding company would be considered to beneficially own all shares owned or acquired by its subsidiaries), ownership by such holder’s family members and persons acting in concert with such holder to make a coordinated acquisition of stock and ownership of shares that such holder has an Option to acquire; and (iii) an “Option” to acquire stock includes any contingent purchase, warrant, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable.

d. Any holder who violates the procedures set forth in paragraphs (a)-(c) above with respect to a worthless stock deduction claim shall be required to file an amended tax return, revoking such claim, but shall not be liable for any economic damages.

4. The Debtors may waive, in writing, any and all restrictions, stays, and notification procedures contained in this Order.

5. Within one business day of entry of this Order, the Debtors shall serve by overnight mail, a notice of the entry of this Order substantially in the form of Exhibit 2 attached hereto (the “Notice of Order”) to: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to the Committee; (c) counsel to the agent for the Debtors’ prepetition and proposed postpetition secured lenders; (d) the indenture trustee for the Debtors’ 10.25% Senior Notes; (e) registered holders of Common Stock; (f) the Securities Exchange Commission; (g) the Internal Revenue Service and (h) those parties who have requested service of papers pursuant to Bankruptcy Rule 2002. Additionally, the Debtors shall publish a notice of this Order in *The Wall Street Journal (National Edition)* and the *USA Today* within 3 business days of entry of the Order.

³ 50% of more of the Common Stock is currently the equivalent of 11,036,275 or more shares.

6. Upon receipt of the Notice of Order, any registered holder would be required, in turn, to provide the Notice of Order to any holder for whose account the registered holder holds Common Stock in excess of 11,036,275 shares no later than 10 days after receipt of the Notice of Order (and so on down the chain of ownership). Additionally, any person, entity or broker, or agent acting on their behalf, that sells any Common Stock to another person or entity would be required to provide a copy of the Notice of Order authorizing the procedures to the purchaser (or any broker or agent acting on their behalf).

7. The requirements set forth in this Order are in addition to the requirements of Rule 3002 of the Bankruptcy Rules and all applicable securities, corporate and other laws, and do not excuse compliance therewith.

8. All time periods set forth in this Order shall be calculated in accordance with Rule 9006(a) of the Federal Rules of Bankruptcy Procedure.

9. The Debtors are authorized to take all action necessary to effectuate the relief necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

10. Notwithstanding the possible applicability of Rules 6004(g), 7062, and 9014 of the Federal Rules of Bankruptcy Procedure or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

11. The Court retains jurisdiction with respect to all matters arising from or related to the implementation, interpretation and enforcement of this Order.

Date: _____, 2008
Wilmington, Delaware

Kevin J. Carey
United States Bankruptcy Judge

EXHIBIT 1

Declaration of Proposed Transfer/ Worthless Stock Deduction

PLEASE TAKE FURTHER NOTICE that:

[Check all the apply]

pursuant to the Proposed Worthlessness Claim, _____ proposes to declare for [federal/state] tax purposes that _____ shares of Common Stock became worthless during the tax year _____ ending _____.

pursuant to the Proposed Transfer, _____ proposes to sell, trade, or otherwise transfer _____ shares of Common Stock. If the Proposed Transfer is permitted to occur, _____ will have beneficial ownership of _____ shares of Common Stock after the transfer becomes effective.

PLEASE TAKE FURTHER NOTICE that the last four digits of the taxpayer identification number of _____ are _____.

PLEASE TAKE FURTHER NOTICE that, pursuant to that certain Order Establishing Notification and Hearing Procedures for Transfers of, or Claims of Worthlessness with Respect to, Certain Common Stock, this Notice is being (a) filed with the United States Bankruptcy Court for the District of Delaware, 824 Market, Wilmington, Delaware 19801, and (b) served upon (i) the Debtors, Hines Horticulture, Inc., 12621 Jeffery Road, Irvine, California 92620, Attn.: James Tennant, (ii) attorneys for the Debtors, Kirkland & Ellis LLP, 200 East Randolph Drive, Chicago, Illinois 60601, Attn.: Anup Sathy, P.C., Ray Schrock and Ross Kwasteniet and (iii) Co-Counsel for the Debtors, Young Conaway Stargatt & Taylor, LLP, 1000 West Street, 17th Floor, Wilmington, Delaware 19801, Attn.: Robert S. Brady and Edmon L. Morton.

PLEASE TAKE FURTHER NOTICE that the Debtors have 15 calendar days after receipt of this Declaration to file an adversary proceeding seeking to enjoin the Proposed Worthlessness Claim or Proposed Transfer described herein. If the Debtors file an adversary proceeding, such Proposed Worthlessness Claim or Proposed Transfer will not be effective unless such adversary proceeding is withdrawn by the Debtors or such action is approved by a final order of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") that becomes nonappealable. If the Debtors do not file an adversary proceeding within such 15-day period, then after expiration of such period the Proposed Worthlessness Claim and/or Proposed Transfer may proceed solely as set forth in this Notice.

PLEASE TAKE FURTHER NOTICE that any further transactions contemplated by _____ that may result in _____ selling, trading or otherwise transferring shares of Common Stock or an Option with respect thereto will each require an additional notice filed with the Bankruptcy Court to be served in the same manner as this Notice.

PLEASE TAKE FURTHER NOTICE that, pursuant to 28 U.S.C. § 1746, under penalties of perjury, _____ hereby declares that he or she has examined this Notice and accompanying attachments (if any), and, to the best of his or her knowledge and belief, this Notice and any attachments, which purport to be part of this Notice, are true, correct, and complete.

Respectfully submitted,
(Name of 50% Shareholder)

By: _____

Name: _____

Address: _____

Telephone: _____

Facsimile: _____

Date: _____, 2008
Wilmington, Delaware

EXHIBIT 2

Notice of Notification Procedures, etc.

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

In re:)	
	)	Chapter 11
HINES HORTICULTURE, INC., et al., ¹	)	Case No. 08-11922 (KJC)
Debtors.	)	Jointly Administered
)	

NOTICE OF (I) NOTIFICATION PROCEDURES APPLICABLE TO 50% HOLDERS OF COMMON STOCK, (II) NOTIFICATION AND HEARING PROCEDURES FOR TRANSFERS OF, AND CLAIMS OF WORTHLESSNESS WITH RESPECT TO COMMON STOCK AND (III) ALLOWING A HEARING ON THE PROSPECTIVE APPLICATION THEREOF

TO: (A) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (B) COUNSEL TO THE COMMITTEE; (C) COUNSEL TO THE AGENT FOR THE DEBTORS' PREPETITION AND PROPOSED POSTPETITION SECURED LENDERS; (D) THE INDENTURE TRUSTEE FOR THE DEBTORS' 10.25% SENIOR NOTES; (E) REGISTERED HOLDERS OF COMMON STOCK; (F) THE SECURITIES EXCHANGE COMMISSION; (G) THE INTERNAL REVENUE SERVICE AND (H) THOSE PARTIES WHO HAVE REQUESTED SERVICE OF PAPERS PURSUANT TO BANKRUPTCY RULE 2002.

PLEASE TAKE NOTICE THAT on August 20, 2008 (the "Petition Date"), Hines Horticulture, Inc. ("Hines") and Hines Nurseries, Inc. (together with Hines, the "Debtors"), commenced cases under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"). Subject to certain exceptions, section 362 of the Bankruptcy Code operates as a stay of any act to obtain possession of property of the Debtors' estates or property from the Debtors' estates or to exercise control over property of the Debtors' estates.

PLEASE TAKE FURTHER NOTICE THAT on October 30, 2008 the Debtors filed a motion seeking entry of an order pursuant to sections 105, 362 and 541 of the Bankruptcy Code establishing notification procedures and approving restrictions on certain transfers of, or claims of worthlessness with respect to, Hines Common Stock (the "Motion"). These procedures will

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generally apply to any person or shareholder who owns, directly or indirectly, more than a certain percentage of Hines stock.

PLEASE TAKE FURTHER NOTICE THAT on _____, 2008 the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") entered an order approving the procedures set forth below in order to preserve the Debtors' net operating losses (the "NOLs") pursuant to sections 105, 362 and 541 of the Bankruptcy Code (the "Order"). Any transfer or declaration of worthlessness of Common Stock in the Hines in violation of the procedures set forth below shall be null and void *ab initio* as an act violating the automatic stay provisions of section 362 of the Bankruptcy Code.

PLEASE TAKE FURTHER NOTICE THAT pursuant to the Order, the following procedure shall apply to any transfer of, or declaration of worthlessness for tax purposes with respect to, Common Stock:

- a. Prior to (i) filing any federal or state tax return, or any amendment to such a return, claiming any deduction for worthlessness of the Common Stock, for a tax year ending before the Debtors' emergence from chapter 11 protection, or (ii) effectuating any transfer of Common Stock, a 50% Shareholder (as the term is defined in paragraph (c) below) must file with the Court, and serve upon counsel to the Debtors, an advance written notice in the form attached as Exhibit 1 to the Order (a "Declaration Proposed Worthless Stock Deduction/Transfer"), of the intended claim of worthlessness or transfer.
- b. The Debtors will have 15 calendar days after receipt of a Declaration of Proposed Transfer/Worthless Stock Deduction to file with the Court and serve on such 50% Shareholder an adversary proceeding seeking to enjoin any proposed claim of worthlessness or transfer described in the Declaration of Proposed Transfer/Worthless Stock Deduction on the grounds that such claim or transfer might adversely affect the Debtors' ability to utilize their Tax Attributes. If the Debtors file an adversary proceeding, the filing of the return with such claim or the transfer would not be permitted unless approved by a final and nonappealable order of the Court. If the Debtors do not file an adversary proceeding within such 15-day period, the filing of the return with such claim or transfer would be permitted as set forth in the Declaration of Proposed Transfer/Worthless Stock Deduction. Additional returns or transfers within the scope of this paragraph must be the subject of additional notices as set forth herein, with an additional 15-day waiting period.
- c. For purposes of these procedures: (i) a "50% Shareholder" is (A) for purposes of a Worthlessness Deduction, any person or entity defined as a "50 percent" shareholder under IRC § 382(g)(4)(D), and (B) for purposes of a Transfer, any person or entity that at any time since January 1, 2005,

has had Beneficial Ownership of 50% or more of the Common Stock;² (ii) “Beneficial Ownership” of Common Stock includes direct and indirect ownership (e.g., a holding company would be considered to beneficially own all shares owned or acquired by its subsidiaries), ownership by such holder’s family members and persons acting in concert with such holder to make a coordinated acquisition of stock and ownership of shares that such holder has an Option to acquire; and (iii) an “Option” to acquire stock includes any contingent purchase, warrant, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable.

PLEASE TAKE FURTHER NOTICE THAT, upon the request of any entity, the notice agent for the Debtors, (the “Notice Agent”) Epiq Systems, Inc. will provide a form of the required declaration described above and a copy of the Order in a reasonable period of time. Such declaration is also available at <http://chapter11.epiqsystems.com/hines>.

FAILURE TO FOLLOW THE PROCEDURES SET FORTH IN THIS NOTICE SHALL CONSTITUTE A VIOLATION OF, AMONG OTHER THINGS, THE AUTOMATIC STAY PROVISIONS OF SECTION 362 OF THE BANKRUPTCY CODE.

ANY PROHIBITED TRANSFER OF, OR DECLARATION OF WORTHLESSNESS WITH RESPECT TO COMMON STOCK IN THE DEBTORS OR OPTION WITH RESPECT THERETO IN VIOLATION OF THE ORDER SHALL BE NULL AND VOID *AB INITIO* AND MAY BE PUNISHED BY CONTEMPT OR OTHER SANCTIONS IMPOSED BY THE BANKRUPTCY COURT.

² 50% of more of the Common Stock is currently the equivalent of 11,036,275 or more shares.

PLEASE TAKE FURTHER NOTICE THAT the requirements set forth in this Notice are in addition to the requirements of applicable law and do not excuse compliance therewith.

Dated: _____, 2008
Wilmington, Delaware

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