

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

In re:

BHCOSMETICS HOLDINGS, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 22-10050 (____)

(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL
ORDERS (I) AUTHORIZING THE DEBTORS TO PAY AND HONOR
CERTAIN (A) PREPETITION WAGES, BENEFITS, AND OTHER COMPENSATION
OBLIGATIONS; (B) PREPETITION EMPLOYEE BUSINESS EXPENSES; AND
(C) WORKERS' COMPENSATION OBLIGATIONS; (II) AUTHORIZING BANKS
TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH
OBLIGATIONS; AND (III) GRANTING RELATED RELIEF**

BHCosmetics Holdings, LLC and its affiliated debtors and debtors in possession (the "Debtors") in the above-captioned chapter 11 cases (collectively, these "Chapter 11 Cases") hereby move the Court (the "Motion") for entry of an interim order (the "Interim Order") and a final order (the "Final Order" and, together with the Interim Order, the "Proposed Orders"), substantially in the forms attached hereto as **Exhibits A** and **B**, respectively, pursuant to sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"), (i) authorizing, but not directing, the Debtors: to (a) pay their employees (collectively, the "Employees") accrued prepetition wages, salaries, and other accrued compensation (collectively, the "Employee Claims"); (b) pay accrued prepetition obligations to independent contractors and supplemental workers employed by the Debtors (collectively, the "Supplemental Workforce Claims"); (c) reimburse Employees for prepetition expenses that

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: BHCosmetics Holdings, LLC (7827); BHCosmetics Intermediate, LLC (2918); BHCosmetics, LLC (9106); and Visceral Agency LLC (9266). The Debtors' service address for purposes of these chapter 11 cases is 8161 Lankershim Blvd., North Hollywood, CA 91605.

Employees incurred on behalf of the Debtors in the ordinary course of business (the “Employee Expenses”); (d) pay all related prepetition payroll taxes and other deductions (the “Employee Withholdings”); (e) honor any prepetition obligations in respect of, and continue in the ordinary course of business until further notice (but not assume), certain of the Debtors’ employee benefits programs, plans, and policies (collectively, the “Employee Benefits”), as described below; (f) honor the Debtors worker’s compensation policies (the “Workers’ Compensation Program”); and (g) to the extent that any of the foregoing programs are administered, insured, or paid through a third-party administrator or provider, pay any prepetition claims of such administrator and provider in the ordinary course of business to ensure the uninterrupted delivery of payments or other benefits to the Employees (the “Employee Administrator Obligations” and, collectively with the Employee Claims, the Supplemental Workforce Claims, Employee Expenses, Employee Withholdings, Employee Benefits, and Workers’ Compensation Program, the “Employee Obligations”)² and (ii) authorizing the Debtors’ banks and other financial institutions (collectively, the “Banks”) to honor and process related checks and electronic transfers. In support of this Motion, the Debtors rely on the *Declaration of Spencer M. Ware in Support of Chapter 11 Petitions and Requests for First Day Relief* (the “First Day Declaration”),³ which was filed contemporaneously with this Motion and is incorporated herein by reference. In further support of this Motion, the Debtors respectfully represent as follows:

² Prior to commencing these Chapter 11 Cases, the Debtors terminated approximately 31 Employees (the “Terminated Employees”). For the purposes of the relief requested in this Motion, the term “Employees” includes the Terminated Employees and “Employee Obligations” shall include those unpaid prepetition amounts owed to the Terminated Employees or to third parties on account of the Terminated Employees.

³ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

JURISDICTION AND VENUE

1. The Court has jurisdiction over these Chapter Cases and this Motion pursuant to 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 as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and 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 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 of these Chapter 11 Cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief sought herein are sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of the Bankruptcy Code and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

3. On January 14, 2022 (the “Petition Date”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. To date, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases. Additional factual background relating to the Debtors’ business, capital structure and the commencement of these Chapter 11 Cases is set forth in detail in the First Day Declaration.

4. The Debtors are a leading beauty brand specializing in clean, vegan, and cruelty-free cosmetics and other beauty products. The Debtors sell their products on their e-commerce platform directly to consumers and wholesale to various major retailers. On or about September 29, 2021, the Debtors engaged an investment banker to conduct an exhaustive search to identify a going concern buyer. In parallel, the Debtors commenced various operational cost-savings initiatives to improve liquidity. When it became clear that a going concern sale may not be successful, the Debtors engaged a professional liquidator to commence a liquidation of their physical inventory assets (the “Inventory Sale Process”). In addition, the Debtors engaged a firm to focus on the sale of their intellectual property assets (together with the Inventory Sale Process, the “Sale Process”).

5. After a robust and thorough approximately four (4) month marketing and solicitation process, and in consultation with their professional advisors and prepetition lenders, the Debtors ultimately secured a stalking horse agreement with RBI Acquisition Holdings, LLC for the sale of a substantial portion of the Debtors’ assets.

6. The Debtors filed these Chapter 11 Cases with the goal of (i) monetizing their assets; (ii) maximizing the value of their assets for the benefit of their creditors and parties in interest; and (iii) minimizing estate obligations, to the extent possible. To that end, the Debtors will proceed with a robust bidding and auction process to maximize the value of the Debtors’ assets for the benefit of the Debtors’ estates and all stakeholders. Once the Debtors consummate the sale of their assets, the Debtors will close their merchandise distribution center and look to unburden the estates of the administrative expenses associated therewith and monetize the non-inventory assets located therein. The Debtors anticipate that the Sale Process will be completed in the first quarter of 2022.

RELIEF REQUESTED

7. By this Motion, the Debtors request that the Court enter an order authorizing, but not directing, the Debtors, in their sole discretion: (i) to pay Employee Obligations; (ii) to honor and continue in the ordinary course of business until further notice (but not assume), certain of the Employee Benefits, as described below, and the Workers' Compensation Program; and (iii) to the extent that any Employee Benefit is administered, insured, or paid through a third-party administrator or provider, to pay any Employee Administrator Obligations.

8. The Debtors also request that the Court authorize the Banks, when requested by the Debtors, in their discretion, to honor and process any checks or electronic transfers drawn on the Debtors' bank accounts to pay any prepetition obligations described herein, whether such checks or other requests were submitted prior to or after the Petition Date, provided that sufficient funds are available to make such payments. The Debtors further request that the Banks be authorized to rely on the Debtors' designation of any particular check or electronic transfer request as approved pursuant to this Motion.

I. EMPLOYEE CLAIMS: WAGES, SALARIES, AND BONUS PROGRAMS

A. Payroll and Ordinary Course Compensation

9. The Debtors' workforce currently comprises 28 full-time (salaried and hourly) Employees (collectively, the "Full-Time Employees"). Employees work either remotely or at the Debtors' distribution center located in North Hollywood, California.

10. Employees are generally paid bi-weekly on Fridays for the two-week period ending the previous Saturday (the "Bi-Weekly Payroll"). The Debtors' most recent Bi-Weekly Payroll covered the pay period from December 26, 2021 through January 8, 2022. The total amount of the Debtors' prepetition gross Bi-Weekly Payroll was approximately \$114,088.

11. The Debtors' payroll to the Employees is funded in gross to Namely, Inc. ("Namely"), the Debtors' third-party payroll administrator, two business days before each pay date, and Namely is responsible for distributing net pay to the Employees from its own accounts. The Debtors pay Namely approximately \$1,100 per month for administrative services and fees associated with processing payroll. As of the Petition Date, approximately \$500 is owing to Namely.

12. The Debtors believe that, as of the Petition Date, approximately \$57,000 was earned but remains outstanding on account of accrued prepetition wages and salaries (the "Unpaid Wage Obligations"). The amount owed to any individual Employee on account of Unpaid Wage Obligations does not exceed \$13,650 (the "Statutory Cap"). Pursuant to this Motion, the Debtors seek to pay the outstanding amounts owed to Employees as of the Petition Date for accrued and unpaid wages and salaries, in an amount not to exceed \$57,000, and Employee Administrator Obligations to Namely in an amount not to exceed \$500.

13. In addition, the Debtors supplement their workforce by retaining from time to time individuals with specialized expertise as independent contractors (the "Independent Contractors"), including (i) the Debtors' Co-Chief Executive Officer, Pamela Baxter, who was engaged prepetition to provide interim consulting and management services to the Debtors following the exit of the Debtors' former Chief Executive Officer; and (ii) certain other individuals and/or entities who provide human resource and other services.⁴ The Debtors also employ supplemental workers (the "Supplemental Workers") whose services are procured indirectly through third-party staffing agencies (collectively, the "Staffing Agencies"). The Supplemental

⁴ Independent Contractors are included in the definition of "Employee" for the purposes of this Motion.

Workers provide administrative services or work in the Debtors' distribution center and provide warehouse support services.

14. As of the Petition Date, the Debtors owed approximately \$25,000 in accrued but unpaid obligations on account of Supplemental Workforce Claims. The Debtors do not believe that any Independent Contractor or Supplemental Worker is individually owed, or has outstanding invoices in excess of, the Statutory Cap. By this Motion, the Debtors request authority to pay any and all Supplemental Workforce Claims owing to the Independent Contractors and Staffing Agencies in an amount not to exceed \$25,000.

II. EMPLOYEE EXPENSES

15. Prior to the Petition Date, the Debtors directly or indirectly reimbursed their Employees for certain expenses incurred in the scope of their employment on behalf of the Debtors. The Employee Expenses are incurred in the ordinary course of the Debtors' business operations and include, without limitation, expenses for meals, travel, automobile mileage, and other business-related expenses. All such expenses are incurred with the applicable Employee's understanding that he or she will not be held personally responsible for these costs and that the amounts will be reimbursed or paid by the Debtors in accordance with the Debtors' reimbursement policies. In all cases, reimbursement is contingent on the Debtors' determination that the charges are for legitimate, reimbursable business expenses.

16. Many Employees initially incur the Employee Expenses using personal credit cards or funds and subsequently seek reimbursement from the Debtors. The Debtors have policies whereby the Employees seek reimbursement, or submit expense reports for, the Debtors' payment of Employee Expenses. These expenses are ordinary course expenses that the Employees incur in performing their job functions.

17. Certain Employees use corporate credit cards (the “Corporate Cards”) issued by JPMorgan Chase Company (“JP Morgan”) for business expenses, including office supplies, travel, and to make payments to certain of the Debtors’ vendors.⁵ On average, the Debtors paid JPMorgan approximately \$23,500 per month in the aggregate on account of the Corporate Cards. To ensure that no individual Employee incurs liability on account of unpaid Corporate Card obligations, the Debtors seek authority, but not direction, to pay any prepetition obligations that may have accrued but have not yet been paid on account of the Corporate Cards in an amount not to exceed \$15,000.

18. Absent authority to pay the Employee Expenses, including amounts incurred prepetition, the Employees could be obligated to pay such amounts out of their personal funds. The Debtors therefore seek authority to pay all outstanding Employee Expenses (including, for the avoidance of doubt, prepetition amounts incurred in connection with the Corporate Cards) in an amount not to exceed \$16,000, and to continue the foregoing policy with respect to all Employees during the pendency of these Chapter 11 Cases.

III. EMPLOYEE WITHHOLDINGS

19. The Debtors routinely deduct certain amounts from Employees’ compensation that represent earnings that judicial or government authorities or the Employees have designated for deduction, including, for example, various federal, state and local income, Federal Insurance Contribution Act (“FICA”) and other taxes, support payments and tax levies, savings programs contributions, benefit plans insurance payments and other similar payments, and forward those amounts to various third-party recipients. In addition, the Debtors are responsible

⁵ The aggregate credit limit of the Corporate Cards is \$35,000, which is secured by cash collateral.

for remitting, for their own account, various taxes and fees associated with payroll pursuant to the FICA and federal and state laws regarding unemployment and disability taxes.

20. Based on the most recent payroll, the Debtors paid approximately \$29,000 on account of Employee Withholdings. The Debtors seek authority to deduct Employee Withholdings in the ordinary course of business and remit Employee Withholdings to the appropriate third parties, including, without limitation, amounts determined to be related to the period prior to the Petition Date.

IV. EMPLOYEE BENEFITS

21. In the ordinary course of business, the Debtors provide certain of their Employees, directly or indirectly, with a number of Employee Benefits, including but not limited to: (a) a range of medical, dental, vision, long and short-term disability, life and accidental death insurance coverage, COBRA benefits, flexible spending accounts (collectively, the “Health Care Programs”); (b) vacation, holiday, sick, and other leave benefits (collectively the “Vacation and Leave Policies”); and (c) a 401(k) retirement savings plan (the “Retirement Plan” and, together with the Health Care Programs and the Vacation and Leave Policies, the “Employee Benefits Programs”). Employee contributions for the Employee Benefits Programs, where applicable, are processed through payroll deductions from the participating Employees.

22. By this Motion, the Debtors seek authority, but not direction, to: (a) continue to provide certain of the Employee Benefits Programs for their Employees in the ordinary course of business, as set forth below; (b) continue to honor obligations under certain of the Employee Benefits Programs, including any premiums and administrative fees; and (c) pay amounts owed under certain of the Employee Benefit Programs to the extent that they remain unpaid as of the Petition Date. Each of the Employee Benefit Programs are discussed below.

A. Health Care Programs

23. *Medical Insurance Program.* The Debtors offer three fully-insured medical and prescription drug programs (collectively, the “Health Plan”) to Full-Time Employees, which are administered by Anthem Blue Cross Blue Shield (Anthem Insurance Companies, Inc.) and Kaiser Permanente (Kaiser Foundation Health Plan, Inc.). The Health Plans provide identical services, but differ in terms of annual deductibles, out-of-pocket caps, copays, and deductibles. The Debtors pay for a portion of the Health Plan premiums, and participating Employees pay the balance through paycheck withholdings depending on the coverage selected.

24. The average monthly cost (after taking into account Employee contributions) of maintaining the Health Plan, including administrative costs and premiums, is approximately \$51,888 per month.

25. *Dental Insurance Program.* The Debtors offer a fully-insured dental program (the “Dental Plan”) to Full-Time Employees, which is administered by MetLife. A portion of the Dental Plan premium is paid by employees through paycheck withholdings. The average monthly cost (after taking into account Employee contributions) of maintaining the Dental Plan, including administrative costs, has been approximately \$3,850 per month. The Debtors seek authorization to pay prepetition amounts in respect of the Dental Plan in an amount not to exceed \$3,850, and to continue to pay postpetition costs of the Dental Plan during the pendency of these Chapter 11 Cases.

26. *Vision Insurance Program.* The Debtors offer vision insurance to Full-Time Employees through MetLife (MetLife Services and Solutions, LLC) (the “Vision Plan”). The Debtors and the Full-Time Employees participating in the Vision Plan each pay a portion of the plan premium. The average monthly cost to the Debtors of maintaining the Vision Plan has been approximately \$1,000 per month. The Debtors seek authorization to continue to pay

prepetition costs, in an amount not to exceed \$3,300, and postpetition costs of the Vision Plan during the pendency of these Chapter 11 Cases.

27. *Life, Disability, and Related Insurance Coverage.* The Debtors provide Full-Time Employees with company-funded accidental death and dismemberment (“AD&D”) insurance and basic life insurance, which are offered through MetLife. The Debtors pay 100% of the costs of these benefits. In the aggregate, the average annual cost of maintaining these programs is approximately \$2,880. The Debtors estimate that as of the Petition Date they are current in respect of these benefits. However, out of an abundance of caution, the Debtors seek authorization to continue to pay prepetition and postpetition costs of these benefits during the pendency of these Chapter 11 Cases.

28. The Employees may also participate in certain benefit programs at no cost to either the Employees or the Debtors as part of the Debtors’ coverage plan. These benefits include employee assistance, relocation, identity theft prevention, and will preparation. In addition, the Debtors offer the Employees the opportunity to purchase supplemental life, AD&D, spousal life, children, accident, and critical illness insurance at the Employees’ expense. The Debtors do not incur any additional costs to offer these programs.

29. *Statutory Temporary Disability Insurance.* The Debtors operate in the state of California, which offers statutory temporary disability benefits. Given that these benefits are required by law, the Debtors seek authorization to continue to pay prepetition costs and postpetition costs of this benefit during the pendency of these Chapter 11 Cases.

30. *COBRA and Flexible Spending Accounts.* The Debtors seek to continue to perform any obligations under Section 4980B of the Internal Revenue Code to administer Continuation Health Coverage (26 U.S.C. § 4980B) (“COBRA”) in respect of former Employees

(including the Terminated Employees) and their covered dependents. In addition, the Debtors offer Full-Time Employees the use of flexible spending (“FSA” and, the benefits thereunder, the “FSA Benefits”) accounts for various health and dependent care expenses.

31. Wex, Inc. is the Debtors’ third-party administrator for the Debtors’ COBRA program and flexible spending accounts. The Debtors have paid approximately \$165 per month for administration of their COBRA and FSA obligations. The Debtors estimate that as of the Petition Date they owe approximately \$165 in respect of these benefits. The Debtors seek authorization to continue to pay prepetition costs, in an amount not to exceed \$165, and postpetition costs of the COBRA program and FSA benefits during the pendency of these Chapter 11 Cases.

B. Vacation and Leave Policies

32. *Vacation and Sick Leave.* Vacation time and sick leave (collectively, “PTO”) is accrued based on length of service. Employees that work for the Debtors for a period of three years or less are eligible to receive fifteen (15) days of PTO, and Employees that work more than three years for the Debtors are eligible to received twenty (20) days of PTO. PTO is accrued on a pro-rata basis throughout the calendar year, beginning at the time of hire. However, Employees are eligible to use PTO only after 90 days of employment. Employees are paid for any accrued but unused PTO at separation of employment. Employees carryover up to five (5) days of PTO from year to year.

33. *Personal Leave.* The Debtors provide eligible Employees with various additional forms of paid and unpaid time off, including, but not limited to: jury duty; personal, bereavement, voting, military, pregnancy disability, and rehabilitation leave; and holidays (“Personal Leave”). The amount of Personal Leave that Debtors offer varies by category of leave. Employees are not paid for unused Personal Leave upon termination of employment or retirement,

and the Debtors therefore do not make any cash payments on account of the Personal Leave policy unless otherwise required under applicable state law.

34. As of the Petition Date, approximately \$130,000 has accrued in connection with the Vacation and Leave Policies. The Debtors seek authorization, but not direction, to continue their Vacation and Leave Policies during the pendency of these Chapter 11 Cases and to honor, in the ordinary course of business, all unused time accrued under such policies prior to the Petition Date. For the avoidance of doubt, the Debtors only seek to make cash payments upon separation: (a) to the Terminated Employees and (b) to the extent required under applicable state law. No employee will receive cash payments in excess of the Statutory Cap on account of the Vacation and Leave Policies and the Employee Claims, in the aggregate, unless required under applicable state law.

C. Retirement Plan

35. The Debtors maintain the Retirement Plan, administered by Transamerica, through which qualified and participating Employees may defer a portion of their salary in a 401(k) account to help meet their financial goals and accumulate savings for their future. The Retirement Plan is funded by Employee and employer contributions. Employees that are at least eighteen (18) years old and have completed twelve (12) months with a minimum of 1,000 hours of service are eligible to participate in the Retirement Plan, as of the first day of any month. Employee contributions are deducted from participating Employees' paychecks before taxes each pay period. Such Employees may invest 1% up to 90% of annual pay, subject to annual contribution limits imposed by the Internal Revenue Service. Employees' contributions, including any rollover or transfer contributions and any related earnings, are 100% vested. At the Debtors' discretion, the Debtors provide a dollar for dollar match for an Employee's deferred compensation up to 5% of an Employee's salary. The Debtors pay Transamerica approximately \$1,200 per quarter to

administer the Retirement Plan. As of the Petition Date, the Debtors estimate that approximately \$4,000 remains outstanding in connection with the Retirement Plan, including matching contributions and fees owed to Transamerica.

36. The Debtors believe that maintaining the Retirement Plan is important to maintaining Employee morale. Accordingly, the Debtors request authority, but not the direction, to pay outstanding amounts due and to continue to administer the Retirement Plan in the ordinary course of business.

V. WORKERS' COMPENSATION PROGRAM

37. Under the laws of various states, the Debtors are required to maintain workers' compensation insurance to provide their Employees with coverage for injury claims arising from or related to their employment with the Debtors. The Debtors' Workers' Compensation Program is administered by First Liberty Insurance Corp. The Debtors pay the premium associated with their workers' compensation benefits program in monthly installment payments. The Debtors believe the total amount of installment payments outstanding is approximately \$10,000.

38. For these Chapter 11 Cases to operate as efficiently as possible, and to ensure that the Debtors comply with state law, it is necessary that the Debtors obtain authority to continue to maintain the Workers' Compensation Program in the ordinary course of business, and to pay prepetition amounts related thereto, including, without limitation, any payments for fees, retentions, premiums, as applicable, and other amounts required in connection with the program as such amounts become due in the ordinary course during the pendency of these Chapter 11 Cases.

VI. DIRECTION TO BANKS

39. Finally, the Debtors seek an order authorizing the Banks to receive, process, honor, and pay all of the Debtors' prepetition checks and fund transfers on account of any

Employee Obligations, and prohibiting the Banks from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for Employee Obligations. The Debtors also seek an order authorizing them to issue new postpetition checks or effect new postpetition fund transfers on account of the Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

BASIS FOR RELIEF

I. THE COURT SHOULD AUTHORIZE, BUT NOT DIRECT, THE DEBTORS, IN THEIR DISCRETION, TO PAY OR OTHERWISE HONOR THE EMPLOYEE OBLIGATIONS

40. The Debtors seek the relief requested herein because any delay in paying or otherwise honoring any of the Employee Obligations could severely disrupt the Debtors' relationship with, and irreparably impair the morale of, the Employees at a time when their continued dedication, confidence, cooperation, and services are most critical to the Debtors and the success of the Sale Process. The Debtors face the risk that their ability to maximize the value of their estates may be severely jeopardized if the Debtors are not immediately granted authority to pay the Employee Obligations. Granting the relief requested in this Motion on the grounds set forth below will allow the Debtors to continue to operate with minimal disruption during the liquidation process.

41. Pursuant to section 507(a)(4) of the Bankruptcy Code, each Employee may be granted a priority claim for:

allowed unsecured claims, but only to the extent of \$13,650 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for –

- (A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

- (B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services, for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor

11 U.S.C. § 507(a)(4).

42. Likewise, under section 507(a)(5) of the Bankruptcy Code, Employees may ultimately be granted a priority claim for:

allowed unsecured claims for contributions to an employee benefit plan –

- (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
- (B) for each such plan, to the extent of –
 - (i) the number of employees covered by each such plan multiplied by \$13,650; less
 - (ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(5).

43. The Debtors believe that a substantial portion, if not all, of the relief requested herein is within the statutory caps of sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code. The Debtors, therefore, would be required to pay these claims in full before any of the Debtors' general unsecured obligations may be satisfied. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims for wages, salaries, and commissions, and certain allowed unsecured claims for contributions to an employee benefit plan). Thus, granting the relief requested herein will not prejudice general unsecured creditors.

44. Even if a particular claim is not entitled to priority, payment is nonetheless justified under section 105(a) of the Bankruptcy Code and the well-established “doctrine of necessity.” The Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority 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). The United States Supreme Court first articulated the doctrine of necessity over a century ago in *Miltenberger v. Logansport Railway Company*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors, and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 309–14. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry.*, 657 F.2d 570, 581–82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious, jeopardy.”).

45. The doctrine of necessity permits the Court to authorize payment of certain prepetition claims prior to the completion of the reorganization process where the payment of such claims is necessary to the reorganization. *See In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment); *see also In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition 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) (“[T]o justify payment of a pre-petition

unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”).

46. The Employees perform a variety of critical functions for the Debtors, and their knowledge, skills, and service are essential to the success of the Sale Process. Without the continued service and dedication of the Employees, it will be difficult, if not impossible, to efficiently and effectively complete the Sale Process, continue operations, and otherwise maximize the value of the Debtors’ assets. Moreover, absent the requested relief, the Employees would suffer great hardship and, in many instances, financial difficulties, because these monies and benefits are needed to enable them to meet their personal obligations. This would have a highly negative impact on workforce morale and likely would result in unmanageable performance issues or turnover, thereby, resulting in immediate and irreparable harm to the Debtors and their estates. The Debtors, therefore, believe it is necessary to pay and/or honor the prepetition Employee Obligations to maintain employee morale and a focused workforce during this critical time, which will allow the Debtors to avoid any inopportune interruptions to their efforts to maximize the value of their estates for the benefit of all stakeholders.

II. THE COURT SHOULD AUTHORIZE THE BANKS TO HONOR AND PROCESS THE DEBTORS’ PAYMENTS ON ACCOUNT OF THE EMPLOYEE OBLIGATIONS

47. The Debtors represent that they have sufficient funds to pay the amounts described herein in the ordinary course of business by virtue of expected cash flows from the Sale Process, and anticipated access to cash collateral. As a result of the commencement of these Chapter 11 Cases and in the absence of an order of the Court providing otherwise, the Debtors’ checks and electronic fund transfers in respect of the Employee Obligations may be dishonored or rejected by financial institutions. Under the Debtors’ cash management system, the Debtors can readily identify checks or transfers as relating directly to payment of Employee Obligations.

Accordingly, the Debtors believe that prepetition checks and transfers other than those for Employee Obligations will not be honored inadvertently. The Debtors submit that any Bank should be authorized to rely on the representations of the Debtors with respect to whether any check drawn or transfer request issued by the Debtors prior to the Petition Date should be honored pursuant to this Motion.

48. For the reasons set forth above, the Debtors submit that the relief requested herein is in the best interests of the Debtors, their estates, and their creditors, and, therefore, should be granted.

IMMEDIATE RELIEF IS NECESSARY

49. Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. The Debtors believe that, among other things, the success of their chapter 11 efforts will require the continued focus and dedication of the Employees, as any deterioration in Employee morale or significant loss in workforce will have an adverse impact on the Debtors’ ability to continue to operate their business during the Sale Process. Thus, if the relief requested herein is not granted, the failure to satisfy the Employee Obligations would cause the Debtors’ estates immediate and irreparable harm by detracting from, and potentially derailing, the Debtors’ chapter 11 efforts. For this reason and those set forth above, the Debtors respectfully submit that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

WAIVER OF ANY STAY

50. 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 set forth throughout this Motion, any delay in paying the Employee Obligations would be detrimental to the Debtors, their estates, and their creditors. Indeed, the Debtors’ ability to operate their business with as little disruption as possible during the Sale Process requires, in large part, an able and willing workforce, which the Debtors currently have in the Employees. 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.

RESERVATION OF RIGHTS

51. Nothing in this Motion or any actions taken by the Debtors pursuant to relief granted in any order granting the relief requested herein (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority, or amount of any claim against the Debtors and their estates.

NOTICE

52. Notice of this Motion has been given to (i) the Office of the United States Trustee for the District of Delaware; (ii) counsel to Fifth Third Bank, National Association; (iii) holders of the twenty (20) largest unsecured claims on a consolidated basis against the Debtors; (iv) the Office of the United States Attorney General for the District of Delaware; (v) the Internal Revenue Service; (vi) the Securities Exchange Commission; (vii) the Banks; and (viii) any party that has requested notice 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). The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

CONCLUSION

WHEREFORE, the Debtors respectfully request entry of the Proposed Orders, substantially in the forms attached hereto as **Exhibits A** and **B**, (i) granting the relief requested herein, and (ii) granting such other relief as is just and proper.

Dated: January 15, 2022
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Allison S. Mielke

M. Blake Cleary (No. 3614)

Allison S. Mielke (No. 5934)

S. Alexander Faris (No. 6278)

Rodney Square

1000 North King Street

Wilmington, Delaware 19801

Tel: (302) 571-6600

Fax: (302) 571-1253

Email: mbcleary@ycst.com

amielke@ycst.com

afaris@ycst.com

Proposed Counsel to the Debtors and Debtors in Possession

EXHIBIT A

Proposed Interim Order

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

In re:

BHCOSMETICS HOLDINGS, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 22-10050 (____)

(Jointly Administered)

Docket Ref. No. ____

**INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO PAY AND HONOR
CERTAIN (A) PREPETITION WAGES, BENEFITS, AND OTHER COMPENSATION
OBLIGATIONS; (B) PREPETITION EMPLOYEE BUSINESS EXPENSES; AND
(C) WORKERS' COMPENSATION OBLIGATIONS; (II) AUTHORIZING BANKS TO
HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH
OBLIGATIONS; AND (III) GRANTING RELATED RELIEF**

Upon consideration of the motion (the "Motion")² of the Debtors for the entry of interim and final orders, pursuant to sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of the Bankruptcy Code, (i) authorizing, but not directing, the Debtors, in accordance with their stated policies and in their discretion, to pay, honor, or otherwise satisfy certain of the Employee Obligations, including amounts and obligations related to the period prior to the Petition Date, and continue certain of their Employee Benefits in the ordinary course of business; (ii) continue the Workers' Compensation Program and honor obligations related thereto, regardless of when accrued; and (iii) authorizing Banks to honor and process related checks and electronic transfers; and upon consideration of the First Day Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and this Court

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: BHCosmetics Holdings, LLC (7827); BHCosmetics Intermediate, LLC (2918); BHCosmetics, LLC (9106); and Visceral Agency LLC (9266). The Debtors' service address for purposes of these chapter 11 cases is 8161 Lankershim Blvd., North Hollywood, CA 91605.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion or the First Day Declaration, as applicable.

having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having determined that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having determined that venue of the Chapter 11 Cases and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and their creditors; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.
2. Upon entry of this Order, the Debtors are authorized, but not directed, to pay and/or honor (including to any third parties that provide or aid in the monitoring, processing or administration of the Employee Obligations), in their sole discretion, the Employee Obligations as and when such obligations are due, in an amount not to exceed \$175,000, in the aggregate; *provided, however*, that notwithstanding any other provision of this Order, no payments to any Employee shall exceed the amounts set forth in sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code unless such amounts above the \$13,650 statutory cap provided for under section 507(a)(4) of the Bankruptcy Code are a result of cash payment for unpaid amounts under the Vacation and Leave Policies that is required to be paid under applicable state law.
3. Subject to paragraph 2 of this Order, the Debtors are authorized, but not directed, in their sole discretion, to honor and continue the Employee Benefits and Employee Bonus Programs that were in effect as of the Petition Date; *provided, however*, that such relief shall not constitute or be deemed an assumption or an authorization to assume any of such Employee Benefits or Employee Bonus Programs under section 365(a) of the Bankruptcy Code.

4. The Debtors are authorized, but not directed, to continue the Workers' Compensation Program, in the ordinary course of business and in accordance with the Debtors' prepetition policies and programs, and to pay any workers' compensation obligations, deductibles, retentions, premiums, and other amounts required in connection with the Workers Compensation Program as such amounts become due in the ordinary course during the pendency of these Chapter 11 Cases, regardless of when accrued.

5. The Debtors may pay and remit any and all Employee Withholdings, whether these relate to the period prior to or after the Petition Date.

6. The Banks shall be and hereby are authorized to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Employee Obligations that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Banks are prohibited from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for Employee Obligations. The Debtors shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

7. Notwithstanding any other provision of this Order, any Bank may rely on the representations of the Debtors with respect to whether any check, draft, wire, or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to any order of this Court, and any Bank that honors a prepetition check or other item drawn on any account that is the subject of this Order (i) at the direction of the Debtors, (ii) in a good-faith belief that this Court has authorized such prepetition check or item to be honored, or (iii) as a result of an innocent

mistake made despite the above-described protective measures, shall not be liable to the Debtors or their estates on their account of such prepetition check or other item being honored postpetition.

8. Any party receiving payment from the Debtors is authorized to rely upon the representations of the Debtors as to which payments are authorized by this Order.

9. Nothing in the Motion or this Order or the relief granted (including any actions taken or payments made by the Debtors pursuant to the relief) shall (i) be construed as a request for authority to assume any executory contract under section 365 of the Bankruptcy Code; (ii) waive, affect or impair any of the Debtors' rights, claims or defenses, including, but not limited to, those arising from section 365 of the Bankruptcy Code, other applicable law and any agreement; (iii) grant third-party beneficiary status or bestow any additional rights on any third party; or (iv) be otherwise enforceable by any third party.

10. Objections to entry of an order granting the Motion on a final basis must be filed by _____, 2022 at 4:00 p.m. (ET) and served on: (i) proposed counsel to the Debtors, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware 19801, Attn: M. Blake Cleary, Esq. (mbcleary@ycst.com) and Allison S. Mielke, Esq. (amielke@ycst.com); (ii) the U.S. Trustee, 844 King Street, Suite 2207, Wilmington, Delaware, 19801, Attn: Timothy J. Fox, Jr., Esq. (Timothy.J.Fox@usdoj.gov); (iii) counsel to the Debtors' prepetition lenders, Stoll Keenon Ogden PLLC, Attn: Lea Pauley Goff, Esq. (Lea.Goff@skofirm.com), 500 West Jefferson Street, Suite 2000, Louisville, KY 40202-2828, and Attn: Amelia Martin Adams, Esq. (Amelia.Adams@skofirm.com), 300 West Vine Street, Suite 2100 Lexington, KY 40507-1801 and Stevens & Lee, P.C., Attn: Joseph H. Huston, Jr. (joseph.huston@stevenslee.com), 919 North Market Street, Suite 1300 Wilmington, DE 19801; and (iv) counsel to any statutory committee appointed in these Chapter 11 Cases. A final hearing,

if required, on the Motion will be held on _____, 2022 at _____m. (ET). If no objections are filed to the Motion, this Court may enter a final order without further notice or hearing.

11. Nothing in this Order shall be construed as binding on this Court or any other party-in-interest, or to establish the law of the case, with respect to whether an individual is or is not an insider within the meaning of section 101(31) of the Bankruptcy Code.

12. Nothing in this Order shall authorize the Debtors to pay any payments to or on behalf of “insiders” (as defined by section 101(31) of the Bankruptcy Code) that would violate section 503(c) of the Bankruptcy Code.

13. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

14. Bankruptcy Rule 6003(b) has been satisfied because the relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors.

15. Notwithstanding any provision in the Bankruptcy Rules to the contrary: (i) this Order shall be effective immediately and enforceable upon its entry; (ii) the Debtors are not subject to any stay in the implementation, enforcement, or realization of the relief granted in this order; and (iii) the Debtors are authorized and empowered, and may in their discretion and without further delay, take any action necessary or appropriate to implement this Order.

16. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

EXHIBIT B

Proposed Final Order

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

In re:

BHCOSMETICS HOLDINGS, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 22-10050 (____)

(Jointly Administered)

Docket Ref. No. ____

**FINAL ORDER (I) AUTHORIZING THE DEBTORS TO PAY AND HONOR
CERTAIN (A) PREPETITION WAGES, BENEFITS, AND OTHER COMPENSATION
OBLIGATIONS; (B) PREPETITION EMPLOYEE BUSINESS EXPENSES; AND
(C) WORKERS' COMPENSATION OBLIGATIONS; (II) AUTHORIZING BANKS
TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH
OBLIGATIONS; AND (III) GRANTING RELATED RELIEF**

Upon consideration of the motion (the "Motion")² of the Debtors for the entry of interim and final orders, pursuant to sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of the Bankruptcy Code, (i) authorizing, but not directing, the Debtors, in accordance with their stated policies and in their discretion, to pay, honor, or otherwise satisfy certain of the Employee Obligations, including amounts and obligations related to the period prior to the Petition Date, and continue certain of their Employee Benefits in the ordinary course of business; (ii) continue the Workers' Compensation Program and honor obligations related thereto, regardless of when accrued; and (iii) authorizing Banks to honor and process related checks and electronic transfers; and upon consideration of the First Day Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and this Court

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: BHCosmetics Holdings, LLC (7827); BHCosmetics Intermediate, LLC (2918); BHCosmetics, LLC (9106); and Visceral Agency LLC (9266). The Debtors' service address for purposes of these chapter 11 cases is 8161 Lankershim Blvd., North Hollywood, CA 91605.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion or the First Day Declaration, as applicable.

having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having determined that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having determined that venue of the Chapter 11 Cases and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtors, their estates, and their creditors; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. Upon entry of this Order, the Debtors are authorized, but not directed, to pay and/or honor (including to any third parties that provide or aid in the monitoring, processing or administration of the Employee Obligations), in their sole discretion, the Employee Obligations as and when such obligations are due, in an amount not to exceed \$175,000, in the aggregate; *provided, however*, that notwithstanding any other provision of this Order, no payments to any Employee shall exceed the amounts set forth in sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code unless such amounts above the \$13,650 statutory cap provided for under section 507(a)(4) of the Bankruptcy Code are a result of cash payment for unpaid amounts under the Vacation and Leave Policies that is required under applicable state law.
3. Subject to paragraph 2 of this Order, the Debtors are authorized, but not directed, in their sole discretion, to honor and continue the Employee Benefits and Employee Bonus Programs that were in effect as of the Petition Date; *provided, however*, that such relief shall not constitute or be deemed an assumption or an authorization to assume any of such Employee Benefits or Employee Bonus Programs under section 365(a) of the Bankruptcy Code.

4. The Debtors are authorized, but not directed, to continue the Workers' Compensation Program, in the ordinary course of business and in accordance with the Debtors' prepetition policies and programs, and to pay any workers' compensation obligations, deductibles, retentions, premiums, and other amounts, as applicable, required in connection with the Workers Compensation Program as such amounts become due in the ordinary course during the pendency of these Chapter 11 Cases, regardless of when accrued.

5. The Debtors may pay and remit any and all Employee Withholdings, whether these relate to the period prior to or after the Petition Date.

6. The Banks shall be and hereby are authorized to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Employee Obligations that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Banks are prohibited from placing any holds on, or attempting to reverse, any automatic transfers to any account of an Employee or other party for Employee Obligations. The Debtors shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Employee Obligations to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

7. Notwithstanding any other provision of this Order, any Bank may rely on the representations of the Debtors with respect to whether any check, draft, wire, or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to any order of this Court, and any Bank that honors a prepetition check or other item drawn on any account that is the subject of this Order (i) at the direction of the Debtors, (ii) in a good-faith belief that this Court has authorized such prepetition check or item to be honored, or (iii) as a result of an innocent

mistake made despite the above-described protective measures, shall not be liable to the Debtors or their estates on their account of such prepetition check or other item being honored postpetition.

8. Any party receiving payment from the Debtors is authorized to rely upon the representations of the Debtors as to which payments are authorized by this Order.

9. Nothing in the Motion or this Order or the relief granted (including any actions taken or payments made by the Debtors pursuant to the relief) shall (i) be construed as a request for authority to assume any executory contract under section 365 of the Bankruptcy Code; (ii) waive, affect or impair any of the Debtors' rights, claims or defenses, including, but not limited to, those arising from section 365 of the Bankruptcy Code, other applicable law and any agreement; (iii) grant third-party beneficiary status or bestow any additional rights on any third party; or (iv) be otherwise enforceable by any third party.

10. Nothing in this Order shall be construed as binding on this Court or any other party-in-interest, or to establish the law of the case, with respect to whether an individual is or is not an insider within the meaning of section 101(31) of the Bankruptcy Code.

11. Nothing in this Order shall authorize the Debtors to pay any payments to or on behalf of "insiders" (as defined by section 101(31) of the Bankruptcy Code) that would violate section 503(c) of the Bankruptcy Code.

12. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

13. Notwithstanding any provision in the Bankruptcy Rules to the contrary: (i) this Order shall be effective immediately and enforceable upon its entry; (ii) the Debtors are not subject to any stay in the implementation, enforcement, or realization of the relief granted in

this order; and (iii) the Debtors are authorized and empowered, and may in their discretion and without further delay, take any action necessary or appropriate to implement this Order.

14. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.