

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

In re:

BHCOSMETICS HOLDINGS, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 22-10050 (\_\_\_\_)

(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND  
FINAL ORDERS AUTHORIZING THE DEBTORS TO FACTOR  
CERTAIN ELIGIBLE RECEIVABLES UNDER THE FACTORING AGREEMENT  
BETWEEN THE DEBTORS AND SB360 CAPITAL PARTNERS, LLC**

BHCosmetics Holdings, LLC and its affiliated debtors and debtors in possession (the “Debtors” or the “Company”) in the above-captioned chapter 11 cases (collectively, the “Chapter 11 Cases”) hereby move the Court (this “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 annexed hereto as **Exhibits A** and **B**, respectively, authorizing, but not requiring, the Debtors to: (i) assign certain accounts receivable (the “Eligible Receivables”) under a factoring agreement (as may be amended or modified, the “Factoring Agreement,” a copy of which is attached hereto as **Exhibit C**) with SB360 Capital Partners, LLC (“SB360”)<sup>2</sup>; and (ii) satisfy their obligations related to the Factoring Agreement. In support of this Motion, the Debtors rely on the *Declaration of Spencer M. Ware in Support of Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”), which was filed contemporaneously with

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meaning ascribed thereto in the Factoring Agreement.

this Motion and is incorporated herein by reference. In further support of this Motion, the Debtors respectfully represent as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), 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 the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the United States Bankruptcy Court for the District of Delaware (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 the Debtors’ chapter 11 cases in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory and other bases for the relief requested in this Motion are sections 105(a), 363(b)(1), 363(c)(1) and 364(c)(3) of title 11 of the United States Code (the “Bankruptcy Code”), Rules 4001 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 4001-2, as applicable.

### **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.

### **THE RECEIVABLES FACTORING**

4. The Debtors have two primary sales channels: (i) their e-commerce platform, through which merchandise is purchased and shipped directly to customers from the Debtors' distribution center, and (ii) wholesale, through which merchandise is sold to retailers. With respect to certain purchase orders (the "Purchase Orders") among the Debtors and their wholesale customers (collectively, the "Wholesale Accounts"), many of which have extended payment terms, the Debtors have elected, in their business judgment and with the consent of their prepetition secured lenders, to outsource collection of the Eligible Receivables to SB360 pursuant to the Factoring Agreement. The Debtors are seeking authority to implement this practice to enhance the Company's liquidity, and mitigate against the Company's limited collection and operational resources.

5. Under the Factoring Agreement, upon the Debtors' sale of its Inventory (as defined in the Factoring Agreement) to an eligible wholesale purchaser, and upon the Debtors delivery of such Inventory to a carrier, SB360 has agreed to factor the corresponding receivable. Additionally, there may be certain purchase orders in existence prior to the execution of the Factoring Agreement which the Debtors and SB360 may determine to include in the factoring program. Further, while the parties to the Factoring Agreement intend, and the documents explicitly provide, that the transfer of assigned Eligible Receivables is intended to be an assignment of the Eligible Receivables, the Factoring Agreement provides customary protections to SB360 in the form of the grant of a security interest in the assigned Eligible Receivables and the underlying purchase orders.

6. As of the effective date of the Factoring Agreement, the Debtors and SB360 had identified existing Eligible Purchase Orders aggregating approximately \$1,439,250.00, that once transitioned to Eligible Receivables (in accordance with the Factoring Agreement) will be factored and collected by SB360 as provided for, and in accordance with the Factoring Agreement. Additional Eligible Purchase Orders to be included in this factoring program shall be identified and mutually agreed upon by the Debtors and SB360. The Factoring Agreement provides that the factoring rate for the Eligible Receivables shall be eighty-two and one half percent (82.5%) of the aggregate invoiced amount of the Eligible Factored Receivable, and any amount owed by SB360 on account of factored Eligible Receivables (defined in the Factoring Agreement, as to each Eligible Receivable, as the ERF Payment Amount) is payable within one business day of the later of (i) the date such Eligible Purchase Order is transitioned to and designated as “Eligible Factored Receivable” (as defined in the Factoring Agreement) or (ii) the date that Interim Approval Order is entered.

7. Agreements like the Factoring Agreement are often entered into under similar circumstances by retailers of a similar size and nature of the Debtors. Absent access to the liquidity provided by the Factoring Agreement, the Debtors would experience difficulties in continuing their operations while also meeting their ongoing obligations to suppliers, vendors, employees, and other creditors. In contrast, the Debtors submit that approving the Factoring Agreement on a postpetition basis will provide the Debtors with a softer landing into, and promote stability during, these Chapter 11 Cases, and facilitate the Debtors’ ability to operate normally and without undue disruption. Based on the foregoing, the Debtors believe, in their business judgment, that approval of the Factoring Agreement is in the best interests of their estates and all parties in interest.

**RELIEF REQUESTED**

8. By this Motion, the Debtors seek entry of the Interim Order and the Final Order authorizing, but not requiring, the Debtors to (i) factor the Eligible Receivables under the Factoring Agreement, and (ii) satisfy their obligations related to the Factoring Agreement as and when such obligations come due under the terms thereof.

**BASIS FOR RELIEF REQUESTED**

**A. The Debtors’ Factoring Activities are a Sound Exercise of the Debtors’ Business Judgment and in the Best Interests of the Debtors’ Estates.**

9. Section 363(b) of the Bankruptcy Code states that a debtor in possession “after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate . . . .” Under the law of this Circuit and others, if a debtor’s proposed use of its assets represents a reasonable business judgment, such use should be approved pursuant to section 363(b) of the Bankruptcy Code. *See, e.g., Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. LTV Corp. (In re Chateaugay Corp.)*, 973 F.2d 141, 143, 145 (2d Cir. 1992) (holding that a court may approve an application under section 363(b) upon a showing of a good business reason for the disposition); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070–71 (2d Cir. 1983) (stating that a judge ruling on a motion under § 363(b) should determine whether there is a good business reason to grant the request); *In re Delaware & Hudson R.R. Co.*, 124 B.R. 169, 175–76 (D. Del. 1991) (courts have applied the “sound business purpose” test to evaluate motions brought pursuant to section 363(b)); *see also In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (a bankruptcy court is authorized to approve the sale of assets of the estate outside of the ordinary course of business if the debtors articulate a reasonable business reason for the sale). Additionally, section 105 of the

Bankruptcy Code authorizes this Court to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105 (a).

10. Entry into the Factoring Agreement is a sound exercise of the Debtors’ business judgment and is in the best interests of the Debtors’ estates. After a lengthy prepetition marketing process, the Debtors have now secured a stalking horse purchaser for a significant portion of the Debtors’ assets. However, at the same time, the Debtors face strained liquidity. Approval of the Factoring Agreement, and authority for the Debtors to perform thereunder, will enhance the Debtors’ liquidity position in two ways. First, the Debtors will receive cash in exchange for the Eligible Receivables that are factored under the Factoring Agreement. The Debtors will receive this liquidity infusion within one business day of a Receivable being deemed an “Eligible Factored Receivable” under the Factoring Agreement, rather than on the standard payment terms offered to the Debtors’ wholesale customers. Second, any risk of collection on the Eligible Receivables is transferred to SB360, and the Debtors retain only those obligations with respect of the transferred Receivable set forth in the Factoring Agreement. Absent access to the liquidity provided by the Factoring Agreement, the Debtors may experience difficulties meeting their ongoing financial obligations, which difficulties may jeopardize the success of these Chapter 11 Cases. Accordingly, approval of the Factoring Agreement is appropriate.

**B. This Court Should Authorize the Debtors to Grant Security Interests in the Factored Eligible Receivables.**

11. The Debtors and SB360 intend the transfer of Eligible Receivables pursuant to the Factoring Agreement to be true sales. However, as described above, to protect SB360 against the risk of the assignment of certain Eligible Receivables later being deemed a financing arrangement rather than a true sale, the Factoring Agreement generally provides that the Debtor assigning its Eligible Receivables will grant a security interest in the Eligible Receivables in favor

of SB360. Therefore, the Debtors request that the Court authorize the grant of a security interest, to the extent required pursuant to the Factoring Agreement or similar agreements that may be entered by the Debtors, pursuant to section 364(c) of the Bankruptcy Code.

12. Section 364(c) of the Bankruptcy Code provides that when a debtor in possession “is unable to obtain unsecured credit allowable under section 503(b)(1) . . . the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt . . . secured by a lien on property of the estate that is not otherwise subject to a lien . . . or secured by a junior lien on property of the estate that is subject to a lien.” To show that the credit required is not obtainable on an unsecured basis, the debtor need only demonstrate “by a good faith effort that credit was not available” without the protections afforded to potential lenders by sections 364(c) or 364(d) of the Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, “[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable.” *Id.* at 1088.<sup>3</sup>

13. Absent a court order authorizing the Debtors’ performance under the Factoring Agreement, including their ability to grant security interests in the Eligible Receivables, SB360 may not take assignment of the Eligible Receivables. If SB360 does not take assignment of the Eligible Receivables, the Debtors could face severe liquidity constraints during the early—and potentially chaotic—stages of these Chapter 11 Cases, which would further strain management and potentially jeopardize the Debtors’ ability to maximize value for the benefit of their estates and creditors. Moreover, the Debtors would bear the potential risk of delayed or nonpayment from the purchaser of the Inventory, which risk will be mitigated by the Factoring Agreement. For these reasons, the Debtors request that the Court authorize the Debtors to factor the Eligible Receivables

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<sup>3</sup> Moreover, the costs of seeking unsecured credit, which the Debtors do not believe is available, would be far outweighed by the relative financing charges here.

pursuant to the terms and conditions described herein, including granting security interests as provided for in the Factoring Agreement.

**C. To the Extent Applicable, the Requirements of Bankruptcy Rules 4001 and 6003 and Local Rule 4001-2 Are Satisfied.**

14. Bankruptcy Rule 4001(c) permits a court to approve a debtor's request for authority to obtain financing during the fourteen-day period following the filing of a motion "to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing." Fed. R. Bankr. P. 4001(c)(2). In examining requests under Bankruptcy Rule 4001, courts apply the same business judgment standard as is applicable to other business decisions. *See, e.g., In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990).

15. Bankruptcy Rule 6003 empowers the Court to issue an order, within twenty-one (21) days after the Petition Date, granting a motion to "use . . . property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition" if such requested relief "is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003(b).

16. The Debtors believe that the transactions executed pursuant to the Factoring Agreement are true sales and, therefore, do not implicate Bankruptcy Rule 4001(c) or Local Rule 4001-2, which requires certain provisions of financing motions to be highlighted. Out of an abundance of caution, however, the Debtors submit that, to the extent applicable the requirements of Bankruptcy Rule 4001(c) and Local Rule 4001-2 are satisfied.<sup>4</sup>

17. For the reasons discussed above, entry of the Interim Order is integral to the Debtors' ability to successfully transition into chapter 11. Both Bankruptcy Rules 4001(c)(2) and 6003 limit the relief that can be approved in the initial 14 and 21 days of a chapter 11 case,

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<sup>4</sup> The Debtors submit that there are no provisions in the Factoring Agreements that are required to be identified in accordance with Local Rule 4001-2.



respectively. Here, the relief requested in the Interim Order is necessary to avoid disruption in the Debtors' operations at this critical juncture, preserve the ongoing value of the Debtors' operations, and to maximize the value of the Debtors' estates for the benefit of all stakeholders. Accordingly, the Debtors submit that they have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rules 4001(c)(2) and 6003 to support granting the relief requested herein.

**ASSUMPTION OF CONSULTING AGREEMENT**

18. As further discussed in the First Day Declaration, the Debtors and SB360 are parties to that certain pre-petition Liquidation Consulting Agreement, dated November 23, 2021, pursuant to which SB360 was engaged by the Debtors to provide certain enumerated consulting services in connection with the sale of the Debtors' owned Inventory and designated owned furniture fixtures and equipment (the "Designated Owned FF&E") that was being offered for sale, which services are set forth in detail in the Liquidation Consulting Agreement.

19. Included amongst the first day motions filed in the these cases, the Debtors are filing a motion pursuant to which the Debtors are seeking authority to, inter alia assume the Liquidation Consulting Agreement and continue liquidating their Inventory and the Designated Owned FF&E (the "Liquidation Assumption Motion"). Entry of an interim and final order granting the relief requested in the Liquidation Assumption Motion is a condition of SB360's agreement and obligations under the Factoring Agreement.

**RESERVATION OF RIGHTS**

20. Nothing contained in this Motion is intended to be or shall be construed as (i) an admission as to the validity of any claim against the Debtors, (ii) a waiver of the Debtors or any appropriate party in interest's rights to dispute any claim, or (iii) an approval or assumption of any agreement, contract, program, policy, or lease under section 365 of the Bankruptcy Code.

Likewise, if the Court grants the relief sought herein, any obligations honored pursuant to the Court's order are not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

**WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)**

21. In addition, by this Motion, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” As set forth above, the Debtors require immediate relief to preserve and maintain sufficient liquidity to allow the Debtors to maximize value for the benefit of all parties in interest. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

**NOTICE**

22. Notice of this Motion has been given to (i) the U.S. Trustee; (ii) counsel to Fifth Third Bank, National Association; (iii) SB360 and its counsel; (iv) holders of the twenty (20) largest unsecured claims on a consolidated basis against the Debtors; (v) the Office of the United States Attorney General for the District of Delaware; (vi) the Internal Revenue Service; (vii) the Securities Exchange Commission; 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).

**CONCLUSION**

WHEREFORE, the Debtors respectfully request entry of the Interim Order and Final Order, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, respectively, granting the relief requested herein and granting such other relief as is just and proper.

Dated: January 15, 2022  
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

*/s/ S. Alexander Faris*

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*Proposed Counsel to the Debtors and Debtors in Possession*

**EXHIBIT A**

**Interim Order**

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

In re:

BHCOSMETICS HOLDINGS, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 22-10050 (\_\_\_\_)

(Jointly Administered)

Docket Ref. No. \_\_\_\_

**INTERIM ORDER AUTHORIZING THE DEBTORS  
TO FACTOR THEIR CERTAIN OF THEIR RECEIVABLES  
UNDER THE FACTORING AGREEMENT BETWEEN  
THE DEBTORS AND SB360 CAPITAL PARTNERS, LLC**

Upon the Motion (the "Motion")<sup>2</sup> of the Debtors for entry of an interim order pursuant to sections 105(a), 363(c)(1), 363(b)(1) and 364(c) of the Bankruptcy Code, Bankruptcy Rules 4001 and 6004, and Local Rule 4001-2, as applicable, authorizing, but not requiring, the Debtors to: (i) factor the Eligible Receivables under the Factoring Agreement and to satisfy obligations related thereto; and (ii) satisfy their obligations related to the Factoring Agreement; and upon consideration of the First Day Declaration; and this Court having jurisdiction over this matter 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 February 29, 2012; and this matter being a core proceeding within the meaning of 28 U.S.C. § 157(b)(2); and this Court being able to issue a final order consistent with Article III of the United States Constitution; and venue

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings assigned to such terms in the Motion or the Factoring Agreement, as applicable. If any terms has an inconsistent definition in the Motion and the Factoring Agreement, the defined terms in the Factoring Agreement shall prevail.

of this proceeding and the Motion being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and appropriate notice of and the opportunity for a hearing on the Motion having been given; and the relief requested in the Motion being in the best interests of the Debtors' estates, their creditors and other parties in interest; this Court having determined that time is of the essence in effectuating the Factoring Agreement and the Debtors would suffer immediate and irreparable harm if the Factoring Agreement were not approved on an interim basis pursuant to Bankruptcy Rule 6003; this Court finding that the Debtors' decisions to (a) enter into the Factoring Agreement and (b) perform under and make payments required by the Factoring Agreement is a reasonable exercise of the Debtors' sound business judgment consistent with the Debtors' fiduciary duties and is in the best interests of the Company and the Company's estate, creditors, and other parties in interest; this Court having determined that the Factoring Agreement was negotiated in good faith and at arm's length between the Company and SB360 and that SB360 is entitled to the protection of section 363(m) of Title 11, United States Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"); and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED, ADJUDGED, AND DECREED that:**

1. The Motion is GRANTED on an interim basis as set forth herein.
2. Interim approval of the Factoring Agreement (and each of the transactions contemplated hereby) and assumption thereof, on an interim basis, is in the best interest of the Company, the Company's estate, creditors, and other parties in interest, and pending further order of this Court, the Debtors are authorized to factor the Eligible Receivables under the Factoring Agreement on a postpetition basis. The Court acknowledges SB360's obligations under the

Factoring Agreement on an interim basis are subject to the outcome and this Court's ruling on the Liquidation Assumption Motion and the entry of the interim approving same.

3. The Factoring Agreement was negotiated, proposed, and entered into without collusion, in good faith, and from arm's length bargaining positions.

4. Subject to SB360's obligations to pay each EFR Payment Amount, effective upon SB360's payment of such EFR Payment Amount in accordance with the provisions of the Factoring Agreement, the Debtors shall be deemed to have transferred all of the Debtors' right, title, and interest in and to the applicable Eligible Receivables and their corresponding Eligible Purchase Orders, with any existing liens, claims, and interests on or in such Eligible Receivables and their corresponding Eligible Purchase Orders attaching to the EFR Payment Amount.

5. Subject to SB360 having satisfied SB360's payment obligations with respect to the EFR Payment Amounts, any SB360 Remittance Amounts owed by the Company to SB360 under the Factoring Agreement shall be granted the status of super priority claims in the Chapter 11 Cases pursuant to section 364(c) of Title 11, United States Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code") senior to all other super priority claims.

6. To the extent that the Debtors, the Debtors' secured lender receives a Company Collected Payment, all such amounts shall be deemed to have been received in trust on behalf of SB360 and shall be remitted to SB360 in accordance with Section 2.3 of the Factoring Agreement.

7. To the extent necessary, the Debtors may cause, or allow SB360 to cause, financing statements to be filed in the appropriate location to perfect such security interests; provided, however, that this Interim Order shall serve to grant a continuing first-priority, fully

perfected lien in any Eligible Receivables factored under the Factoring Agreement after the Petition Date.

8. In the event any of the provisions of this Order are modified, amended, or vacated by a subsequent order of the Bankruptcy Court or any other court, without SB360's consent, SB360 shall be entitled to the protections provided in Bankruptcy Code sections 363(m) and 364(e) and, no such appeal, modification, amendment, or vacatur shall affect the validity and enforceability of the factoring or the receivables liens or priority authorized or created under the Factoring Agreement or this Order.

9. The Debtors may take any actions necessary to maintain compliance with the Factoring Agreement or any additional factoring agreements which the Debtors may enter into in accordance with this Interim Order.

10. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or any other Bankruptcy Rule, the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

11. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b) because the relief granted in this Interim Order is necessary to avoid immediate and irreparable harm to the Debtors' estates.

12. 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., Esq. (joseph.huston@stevenslee.com), 919 North Market Street, Suite 1300 Wilmington, DE 19801; (iv) counsel to any statutory committee appointed in these Chapter 11 Cases and (v) counsel to SB360, Montgomery McCracken Walker & Rhoads LLP, 437 Madison Avenue, 23<sup>rd</sup> Floor, New York, NY 10022, Attn: Maura I. Russell, Esq. (mrussell@mmwr.com). 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.

13. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order and the Factoring Agreement. Furthermore, this Court shall retain jurisdiction to hear and resolve any matter brought in connection with any dispute regarding any improper offset or withholding of payments by Eligible Customers commenced by the Debtors and/or SB360 pursuant to the Factoring Agreement.

**EXHIBIT B**

**Final Order**

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

In re:

BHCOSMETICS HOLDINGS, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 22-\_\_\_\_ (\_\_\_\_)

(Jointly Administered)

Docket Ref. Nos. \_\_\_ & \_\_\_

**FINAL ORDER AUTHORIZING THE DEBTORS TO  
FACTOR THEIR ELIGIBLE RECEIVABLES UNDER THE  
FACTORING AGREEMENT BETWEEN  
THE DEBTORS AND SB360 CAPITAL PARTNERS, LLC**

Upon the Motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of a final order pursuant to sections 105(a), 363(c)(1), 363(b)(1) and 364(c) of the Bankruptcy Code, Bankruptcy Rules 4001 and 6004, and Local Rule 4001-2, as applicable, authorizing, but not requiring, the Debtors to: (i) factor the Eligible Receivables under the Factoring Agreement; and (ii) satisfy their obligations related to the Factoring Agreement; and upon consideration of the First Day Declaration; and this Court having jurisdiction over this matter 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 February 29, 2012; and this matter being a core proceeding within the meaning of 28 U.S.C. § 157(b)(2); and this Court being able to issue a final order consistent with Article III of the United

<sup>1</sup> 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.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings assigned to such terms in the Motion or the Factoring Agreement, as applicable. If any terms has an inconsistent definition in the Motion and the Factoring Agreement, the defined terms in the Factoring Agreement shall prevail.

States Constitution; and venue of this proceeding and the Motion being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and appropriate notice of and the opportunity for a hearing on the Motion having been given; and the relief requested in the Motion being in the best interests of the Debtors' estates, their creditors and other parties in interest; and this Court finding that the Debtors' decisions to (a) enter into the Factoring Agreement and (b) perform under and make payments required by the Factoring Agreement is a reasonable exercise of the Debtors' sound business judgment consistent with the Debtors' fiduciary duties and is in the best interests of the Company and the Company's estate, creditors, and other parties in interest; and this Court having determined that the Factoring Agreement was negotiated in good faith and at arm's length between the Company and SB360 and that SB360 is entitled to the protection of section 363(m) of Title 11, United States Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"); and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED, ADJUDGED, AND DECREED THAT:**

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors may factor the Eligible Receivables under the Factoring Agreement on a postpetition basis.
3. The Factoring Agreement was negotiated, proposed, and entered into without collusion, in good faith, and from arm's length bargaining positions.
4. The Factoring Agreement (and each of the transactions contemplated hereby) is assumed in its entirety by the Debtors, and is in the best interest of the Debtors, the Debtors' estates, creditors, and other parties in interest. The Court acknowledges SB360's obligations under the Factoring Agreement beyond the date of this Order, are subject to the

outcome and this Court's ruling on the Debtors' request for entry of a Final Order granting the relief requested in the Liquidation Assumption Motion.

5. Subject to SB360's obligations to pay each EFR Payment Amount, effective upon SB360's payment of such EFR Payment Amount in accordance with the provisions of the Factoring Agreement, the Debtors shall be deemed to have transferred all of the Debtors' right, title, and interest in and to the applicable Eligible Receivables and their corresponding Eligible Purchase Orders, with any existing liens, claims, and interests on or in such Eligible Receivables and their corresponding Eligible Purchase Orders attaching to the EFR Payment Amount.

6. To the extent necessary, the Debtors may cause, or allow SB360 to cause, financing statements to be filed in the appropriate location to perfect such security interests. Provided however, that this Final Order shall serve to grant a continuing first-priority, fully perfected lien in any Eligible Receivables factored under the Factoring Agreement after the Petition Date.

7. The Debtors may take any actions necessary to maintain compliance with the Factoring Agreement or any additional factoring agreements which the Debtors may enter into in accordance with this Final Order.

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

9. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Final Order and the Factoring Agreement. Furthermore, this Court shall retain jurisdiction to hear and resolve any matter brought in connection with any dispute regarding any improper offset or withholding of payments by Eligible Customers commenced by the Debtors and/or SB360 pursuant to the Factoring Agreement.

**EXHIBIT C**

**Factoring Agreement**

**RECEIVABLE FINANCING AGREEMENT**  
**SB360 Capital Partners, LLC**  
**75 Second Avenue – Suite 570**  
**Needham, MA 02494**

January [], 2022

The following is the agreement (“Agreement”) under which SB360 Capital Partners, LLC (“SB360”) agrees to factor certain receivables owed to BHCosmetics Holdings, LLC and its affiliates (collectively, the “Company” and together with SB360, collectively, the “Parties” and each a “Party”)<sup>1</sup> by Eligible Customers (as defined below) who are buyers (including wholesale buyers and going concern buyers) of the Company’s owned inventory (“Inventory”) currently being offered for sale by the Company through its ongoing liquidation sale (“Inventory Liquidation Sale”) being conducting in accordance with that certain Consulting Agreement dated November 28, 2021 between the Company and SB360 (the “Liquidation Consulting Agreement”).

**1. IDENTIFICATION AND FULFILLMENT OF ELIGIBLE CUSTOMER RECEIVABLES:**

1.1. Eligible Customers. The Company and SB360 shall mutually agree upon (i) the customers whose receivable are eligible to participate in this factoring program (each an “Eligible Customer” and collectively, the “Eligible Customers”); (ii) which of the negotiated purchase orders with an Eligible Customer shall constitute an Eligible Purchase Order (as defined below), it being agreed that not all customers shall be deemed an Eligible Customer and not all purchase orders of an Eligible Customer shall constitute an Eligible Purchase Order.

1.2. Negotiation of Eligible Purchaser Orders. With the advice of SB360 under the terms of the Liquidation Consulting Agreement, the Company has negotiated and may in the future negotiate the terms of sale of the Company’s owned Inventory to an Eligible Customer on terms and conditions acceptable to the Company. Upon (i) the finalization of the terms of an agreed upon purchase order with an Eligible Customer for the purchase of Inventory; and (ii) agreement by the Company and SB360 to include such purchase order in the factoring program, such purchase order shall constitute an “Eligible Purchase Order”; provided however, it is agreed and understood that the existing purchase orders that have been identified and agreed to by the Company and SB360 set forth on attached Schedule 1.2, in an aggregate invoiced purchase price of \$1,439,248.39 constitute Eligible Purchase Orders (the “Existing Eligible Purchase Orders”). Each Eligible Purchase Order shall be in a form and on terms acceptable to SB360. For the avoidance of doubt, the Existing Eligible Purchase Orders are deemed to be in a form and on terms acceptable to SB360.

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<sup>1</sup> The “Company” includes BHCosmetics Intermediate, LLC, BHCosmetics, LLC, and Visceral Agency LLC.



1.3. Eligible Receivable(s). Upon SB360's verification that: (1) the Inventory subject to an Eligible Purchase Order has been loaded onto the truck to be shipped to the Eligible Customer (each a "Loaded Factored Shipment" and, collectively, the "Loaded Factored Shipments"), (2) the Company has invoiced the Eligible Customer for such Loaded Factored Shipment, and (3) the Company has provided documentation reasonably acceptable to SB360 evidencing that the applicable Loaded Factored Shipment (a) conforms to the applicable Eligible Purchase Order, (b) has been shipped to the Eligible Customer in accordance with the instructions provided for in the Eligible Purchase Order, and (c) has been invoiced to the Eligible Customer pursuant to an invoice that contains the remittance instructions approved by SB360 directing that payment on account of such invoice, the portion of the Eligible Purchase Order attributable to the Loaded Factored Shipment shall constitute an "Eligible Receivable".

1.4. EFR Payment Amount. With respect to each Eligible Receivable, SB360 shall remit a payment to the Company (the "EFR Payment Amount") in an amount equal to (x) the aggregate invoiced amount for such Eligible Receivable, multiplied by (y) the Factoring Rate (as defined below), within two (2) Business Days following the later of (i) the designation of a receivable as an Eligible Receivable pursuant to Section 1.3 hereof and (ii) entry of the Interim Approval Order.

1.5. Transfer of Title. Subject to SB360's obligation to remit payment of the EFR Payment Amount attributable to each Eligible Receivable, effective upon the Company's receipt of the EFR Payment Amount attributable thereto, the Company shall be deemed to have transferred all of the Company's right, title, and interest in and to the corresponding Eligible Purchase Order, the applicable Eligible Receivable, and the proceeds thereof (including any insurance proceeds), free and clear of all liens, claims, and interests, with any such existing lien claim or interest attaching to the respective EFR Payment Amount, in the same order and priority as such lien, claim, or interest existed on the corresponding Eligible Purchase Order and the applicable Eligible Receivable.

1.6. Payment Risk; Shipment Non-Conformity/Shortfall Repayment.

(a) SB360 shall assume all risk of payment on account of the Eligible Receivables, except to the extent that the failure of the Eligible Customer to pay is the result of either or both a Permitted Non-Conforming Claim and Permitted Shortfall Claim under the applicable Eligible Purchase Order. To the extent that there is a Permitted Non-Conforming Shipment Claim or a Permitted Shortfall Claim with respect to an Eligible Receivable, the Company shall, within two (2) Business Days after SB360's demand therefor, remit an amount equal to the (x) the purchase price attributable to such non-conformity or shortfall, multiplied by (y) the Factoring Rate (each, a "Shipment Non-Conformity/Shortfall Repayment").

(b) The Eligible Customer shall have a reasonable time following the delivery of a Loaded Factored Shipment (as defined below) to validate the unit count and the conformity of the Inventory included in the Loaded Factored Shipment (the "Delivered Inventory") to the Eligible Purchase Order and to assert either that (i) some or all of the Delivered Inventory is expired or otherwise non-conforming to the Eligible Purchase Order (a "Permitted Non-Conforming Claim"); or (ii) that there is a shortfall between the

Delivered Inventory and the invoiced Eligible Receivable (a “Permitted Shortfall Claim”). The Company and SB360 shall, in good faith, cooperate with each other, exchange information and documentation in connection with, and investigate any asserted Permitted Non-Conforming Claim or Permitted Shortfall Claim that either or both the Company and SB360 assert is invalid.

## **2. FACTORING RATE, RETURNED INVENTORY AND INTEREST RATE:**

2.1. Factoring Rate. The Factoring Rate for each Eligible Receivable shall be eighty-two and one-half of one percent (82.5%) (the “Factoring Rate”).

2.2. Returned Inventory. The Company shall not agree to any deductions, credit, or allowance with respect to any Eligible Receivable. Except for returns arising out of a valid Permitted Non-Conforming Claim, the Company shall not accept any returns of Delivered Inventory; provided however, within two (2) Business Days of the Company’s agreement to accept any return of Delivered Inventory (the “Returned Inventory”), the Company shall remit to SB360 an amount equal to the invoiced amount for such Returned Inventory multiplied by the Factoring Rate (each a “Returned Inventory Payment”). Unless and until the Company remits the Returned Inventory Payment to SB360, the Company shall receive and hold any Returned Inventory (and any proceeds (including any insurance proceeds) thereof) in trust for SB360 and, upon payment by the Company of the Returned Inventory Payment payable in respect of such Returned Inventory, such Returned Inventory shall constitute property of the Company. In the event that the Company does not timely remit the Returned Inventory Payment amount, then in addition to the other remedies available hereunder or otherwise, the Company shall deliver the Returned Inventory to SB360 or its designee within two (2) Business Days of the Company’s receipt of SB360’s written request therefor, which transfer shall be free and clear of all liens, claims and interests; provided however, it is agreed and understood that acceptance of the Returned Inventory is at the sole option of SB360 and the Company does not have the option of delivering the Returned Inventory to SB360 in lieu of remitting the Returned Inventory Payment or any other SB360 Remittance Amounts unless SB360, in its sole and absolute discretion, consents.

2.3. Company Collected Payments. In the event that an Eligible Customer remits payment on account of such Eligible Customer’s Eligible Receivable to the Company (a “Company Collected Payment”), the Company shall immediately provide notice to SB360 that the Company has received a Company Collected Payment, which notice shall identify the applicable Eligible Receivable and the Company shall immediately, and in no event later than two (2) Business Days of the earlier of the Company’s receipt of such funds and SB360’s demand therefor, remit the Company Collected Payment to SB360, without offset. (each a “Company Collected Payment Remittance”)

2.4. SB360 Remittance Amounts; Late Fee; Interest. In the event of the Company’s failure to timely remit amounts due to SB360 on account of (a) any Shipment Non-Conforming Shortfall Repayment, (b) any Returned Inventory Payment, or (c) any Company Collected Payment Remittance, or (d) reimbursement of SB360’s legal fees as

provided for in Section 3.1 below (collectively, the “SB360 Remittance Amounts”), (i) SB360 shall be entitled to offset the amount of such unpaid SB360 Remittance Amounts against any EFR Payment Amount due to the Company, and (ii) to the extent that there are no EFR Payment Amounts due to the Company or if the amount of EFR Payment Amounts due to the Company are less than the unpaid SB360 Remittance Amounts, then, to the extent of such shortfall, SB360 shall be entitled to (i) payment of a late fee in the amount equal to 20% of the past due SB360 Remittance Amount, plus (ii) interest at the rate of 12% per annum on all past due amounts. The Factoring Approval Order shall provide that SB360 shall have a super priority administrative claim for any unpaid SB360 Remittance Amounts.

### **3. PAYMENT OF LEGAL EXPENSES:**

3.1. Reimbursement of Legal Fees. The Company shall pay all SB360’s reasonable outside counsel fees incurred in connection with the preparation and execution of this Agreement and any other documents or agreements in connection with or related to this Agreement, including, expenses incurred in connection with the attendance at any Bankruptcy Court hearing in connection with this Agreement in an amount not to exceed \$25,000 (the “Documentation Cap”). In connection with SB360’s administration of this Agreement, and SB360’s protecting, preserving, and enforcing SB360’s security interests and rights hereunder, whether through judicial proceedings or otherwise, or in defending or prosecuting any actions or proceedings arising out of or relating to SB360’s transactions with the Company, all costs and expenses incurred, including, documented attorneys’ fees incurred by SB360, shall be borne and paid for by the Company and not subject to the Documentation Cap, but solely to the extent that SB360 is the prevailing party and has not otherwise received reimbursement of such costs and expenses. The Company’s reimbursement Obligations pursuant to this paragraph shall survive termination of this Agreement.

3.2. No delay or failure on SB360’s part in exercising any right, privilege, or option hereunder shall operate as a waiver of such or of any other right, privilege, or option, and no waiver, amendment, or modification of any provision of this Agreement shall be valid, unless in a writing signed by SB360 and the Company and then only to the extent therein stated. Should any provision of this Agreement be prohibited by or invalid under applicable law, the validity of the remaining provisions shall not be affected thereby. Unless otherwise specifically provided in this Agreement, any notices, requests, demands, or other communications permitted or required to be given under this Agreement shall be in writing and shall be sent by email and followed with delivery by hand or by a nationally recognized overnight delivery service, to the email addresses and office addresses of the parties set forth below (or to such other address or email address as a Party may hereafter designate by a notice to the other that complies with this section) and shall be deemed given (a) in the case of an email, when received by the recipient if the sending Party receives a confirmation of delivery; and (b) in the case of a notice that is hand delivered or sent by such overnight courier, when delivered (provided that the sending Party retains a confirmation of delivery):

If to SB360:

If to the Company:

SB360 Capital Partners, LLC  
75 Second Avenue – suite 570  
Needham, MA 02494  
Attn: Aaron Miller  
Robert Raskin  
Email: amiller@sb360.com  
rraskin@sb360.com

BHCosmetics Holdings, LLC  
8161 Lankershim Blvd.  
North Hollywood, CA 91605  
Attention: Spencer Ware  
E- mail: spencer.ware@riveron.com

with a copy to:

Montgomery McCracken Walker &  
Rhoads LLP  
437 Madison Avenue – 24<sup>th</sup> Floor  
New York, NY 10022  
Attn: Maura I. Russell, Esq.  
Email: mrussell@mmwr.com

with a copy to:

Young Conaway Stargatt & Taylor, LLP  
1000 North King Street  
Wilmington, DE 19801  
Attention: M. Blake Cleary  
E- mail: mbcleary@ycst.com

#### **4. REMITTANCE/PAYMENTS:**

4.1. Any Company Collected Payment received by the Company or on behalf of the Company by the Company's secured lender will be received in trust for SB360 and shall be remitted to SB360 in accordance with Section 2.3 hereof; provided, however, that nothing herein authorizes the Company or the Company's secured lender to collect any Eligible Receivable.

4.2. If any payment or recovery is received from or on behalf of an Eligible Customer which is a customer on both Eligible Receivables and receivables that are not Eligible Receivables, any such payment or recovery shall be first applied to the Eligible Receivables notwithstanding (i) any notation to the contrary on or with respect thereto; (ii) the payment terms thereof; (iii) the due date thereof; or (iv) whether such payments were made in the ordinary course of business or otherwise.

#### **5. REPRESENTATIONS, WARRANTIES AND COVENANTS:**

5.1. The Company represents, warrants, and covenants that:

(a) subject to obtaining Bankruptcy Court (as defined below) approval and the requisite consent of the Company's secured lender, the Company is authorized to enter into this Agreement and perform the Company's obligations hereunder;

(b) upon the commencement of the Company's contemplated Chapter 11 proceeding, the Company shall seek Bankruptcy Court approval of this Agreement and authority to continue to perform under this Agreement;

(c) during the term of this Agreement, and until all Eligible Purchase Orders included in the factoring program have been fulfilled, the Company shall continue

to employ and retain all warehouse staff and equipment necessary to pick, pack, and fill the Eligible Purchase Orders;

(d) the Company has obtained the necessary consent of the Company's existing lenders to the (i) a first priority lien and security interest in and to any Company Collected Payments; (ii) assignment of all right, title, and interest in and to the Eligible Receivables; and (iii) until the SB360 Remittance Amounts have been paid in full, in addition to the liens in the Company Collected Payments, SB360 shall be granted a super priority administrative expense claim for any such unpaid amounts

(e) the Company shall provide SB360 with copies of invoices and shipping or delivery receipts or such equivalent electronic documents as SB360 may designate or other proof of sale and delivery or performance as SB360 may from time to time require;

(f) with respect to each Eligible Receivable, the Company shall retain all communications, files, and other documentation in connection with or related to the corresponding Eligible Purchase Orders and Loaded Factored Shipments (the "Supporting Documentation"), and shall make such Supporting Documentation available to SB360, until at least such time as such Eligible Receivable has been collected;

(g) until such time as all Eligible Purchase Orders have been transitioned to Eligible Receivables, the Company shall not reject the lease for the Company's distribution center and shall remain in good standing with respect to the Company's post-petition obligations under such lease;

(h) until such time as the Eligible Receivables have been collected, the Company shall retain or have access to at least one employee in the collections department or other representative of the Company to assist SB360 in the collections of the Eligible Receivables, and the Company shall otherwise cooperate with and assist SB360 in disputing any improper offset or withholding of payments by Eligible Customers and, to the extent requested by SB360, shall bring the matter to the Bankruptcy Court for resolution;

(i) to the extent that prior to the collection of the Eligible Receivables the Company sells its name or other intellectual property, any such sale shall be subject to the rights of SB360 under this Agreement and the assignment of the right to collect such Eligible Receivables in the name of the Company and shall not otherwise diminish or otherwise interfere with SB360's efforts to collect the Eligible Receivables.

## **6. BOOKS AND RECORDS/FINANCIAL STATEMENTS:**

6.1. The Company's and SB360's respective representatives shall, at all reasonable times, have the right to examine all of the Company's and SB360's books and records with respect to the Eligible Receivables and the fulfillment of the underlying Eligible Purchase Orders.

6.2. On a weekly basis, the Company shall provide SB360 with an accounting and reconciliation of (i) all outstanding Eligible Purchase Orders and any Eligible Purchase Orders designated for exclusion from the factoring program; (ii) all Loaded Factored Shipments; (iii) all Eligible Receivables; (iv) all Company Collected Payments; and (v) any SB360 Remittance Amounts.

**7. TERM:**

This Agreement shall commence on the date hereof, shall continue until the earlier of (i) March 31, 2022 or such other date as shall be mutually agreeable to the Company and SB360, and (ii) the denial of the Bankruptcy Court of a request for interim or final approval of this Agreement. Notwithstanding any such termination, the Company's and SB360's obligations with respect to the collection of the Eligible Receivables, EFR Payment Amounts, and the SB360 Remittance Amounts shall remain in full force and effect until satisfied.

**8. EXCLUSIVITY:**

Other than any existing credit facilities of the Company, the Company agrees that the financing of Eligible Receivables shall be exclusive to the SB360 and that absent SB360's prior written consent (in SB360's sole discretion) the Company shall not enter into any financing, factoring, or other similar relationship with any other person or entity with respect to the Eligible Receivables.

**9. GOVERNING LAWS/JURY TRIAL WAIVER/JURISDICTION/VENUE AND MISCELLANEOUS SB360 PROVISIONS:**

9.1. This Agreement is deemed made in the State of Delaware and shall be governed, interpreted and construed in accordance with the laws of the State of Delaware, applicable to contracts made and to be performed within such state. No modification, waiver, or discharge of this Agreement shall be binding upon either Party unless in writing and signed by both Parties. A Party's failure, at any time, to exercise any right or remedy hereunder, shall not constitute a waiver on such Party's part with respect to such right or remedy, nor shall such failure preclude such Party from exercising the same or any other right or remedy at any subsequent time. SB360 shall have the right to withhold from any payments due to the Company under this Agreement the amount that SB360 is required to withhold under any applicable federal, state, or foreign law.

9.2. This Agreement embodies the Parties' entire agreement as to the subject matter hereof and supersedes all prior agreements (whether oral or written) as to the subject matter hereof. **TRIAL BY JURY IS HEREBY WAIVED BY EACH OF THE PARTIES IN ANY ACTION, PROCEEDING OR COUNTERCLAIM BROUGHT IN CONNECTION WITH ANY MATTERS WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT OR THE RELATIONSHIP CREATED HEREBY (WHETHER SOUNDING IN TORT OR CONTRACT). THE PARTIES HEREBY CONSENT TO THE EXCLUSIVE JURISDICTION OF THE BANKRUPTCY COURT FOR A DETERMINATION OF**

**ANY DISPUTE AS TO ANY SUCH MATTERS. IN CONNECTION THEREWITH, THE PARTIES HEREBY WAIVE PERSONAL SERVICE OF ANY SUMMONS, COMPLAINT OR OTHER PROCESS AND AGREE THAT SERVICE THEREOF MAY BE MADE BY REGISTERED OR CERTIFIED MAIL DIRECTED TO RESPECTIVE PARTIES AT THEIR RESPECTIVE NOTICE ADDRESS SET FORTH ABOVE, OR SUCH OTHER ADDRESS AS SHALL HAVE PREVIOUSLY BEEN COMMUNICATED TO THE OTHER PARTY.**

9.3. The use of “including” or “include” means “including (or “include”), without limitation.” The use of “or” may be interpreted conjunctively if the context so permits or requires.

9.4. If any provision of this Agreement shall be held invalid or unenforceable, such invalidity or unenforceability shall not affect any other provisions hereof, and this Agreement shall be construed as if such invalid or unenforceable provision had never been contained herein.

9.5. This Agreement shall be binding upon and inure to the benefit of the Parties and the Parties’ respective successors and assigns, provided, however, that the Company may not assign this Agreement or the Company’s rights hereunder without SB360’s prior written consent.

#### **10. FACTORING APPROVAL ORDER:**

10.1. Factoring Approval Order. Notwithstanding any other provisions of this Agreement to the contrary, the parties’ obligations under this Agreement shall be subject to the Bankruptcy Court’s entry of an order approving this Agreement and authorizing the Company to perform the Company’s obligations hereunder (the “Factoring Approval Order”). As soon as reasonably practical upon the filing of a case under a chapter 11 in the United States Bankruptcy Court for the District of Delaware (such case, the “Bankruptcy Case” and such court, or other court of competent jurisdiction in which the Bankruptcy Case is filed, the “Bankruptcy Court”), and in any event, no later than the earlier of (i) the date of filing of the Company’s “first day” pleadings and (ii) two (2) days after commencement of the Bankruptcy Case, the Company agrees to file a motion with the Bankruptcy Court seeking entry of an interim order (the “Interim Factoring Approval Order”) and final order (the “Final Factoring Approval Order” and together with the Interim Factoring Approval Order, the “Factoring Approval Order”) from the Bankruptcy Court assuming this Agreement and authorizing the Company to conduct the Sale in accordance with the terms of this Agreement.

10.2. Each Factoring Approval Order shall be in form reasonably satisfactory to the Parties and Fifth Third Bank, N.A. as Administrative Agent, Collateral Agent, Swing Line Lender, L/C Issuer, Lead Arranger, and Bookrunner and the other participating lenders under the Company’s prepetition secured loan documents, if any, and provide, *inter alia*, that:

(a) this Agreement is in the best interest of the Company, the Company's estate, creditors, and other parties in interest;

(b) this Agreement (and each of the transactions contemplated hereby) is assumed in its entirety and is in the best interest of the Company, the Company's estate, creditors, and other parties in interest;

(c) the Company and SB360 shall be authorized to continue to take any and all actions as may be necessary or desirable to implement this Agreement and each of the transactions contemplated hereby;

(d) the Bankruptcy Court shall retain jurisdiction over the Parties to enforce this Agreement;

(e) subject to SB360's obligations to pay each EFR Payment Amount, effective upon SB360's payment of such EFR Payment Amount in accordance with the provisions of this Agreement, the Company shall be deemed to have transferred all of the Company's right, title, and interest in and to the applicable Eligible Receivables and their corresponding Eligible Purchase Orders, with any existing liens, claims, and interests on or in such Eligible Receivables and their corresponding Eligible Purchase Orders attaching to the EFR Payment Amount.

(f) subject to SB360 having satisfied SB360's payment obligations with respect to the EFR Payment Amounts, any SB360 Remittance Amounts owed by the Company to SB360 under this Agreement shall be granted the status of super priority claims in the Company's Bankruptcy Case pursuant to section 364(c) of Title 11, United States Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code") senior to all other super priority claims;

(g) the Bankruptcy Court finds that time is of the essence in effectuating this Agreement and that the Company would suffer immediate and irreparable harm if this Agreement were not approved on an interim basis pursuant to Bankruptcy Rule 6003;

(h) upon designation of a receivable as an Eligible Receivable and payment by SB360 of the EFR Payment Amount attributable thereto, all right, title, and interest in and to such Eligible Receivable and the collection thereof shall belong to SB360 and neither the Company nor any third party shall have any rights thereto.

(i) the Bankruptcy Court finds that the Company's decisions to (a) enter into this Agreement and (b) perform under and make payments required by this Agreement is a reasonable exercise of the Company's sound business judgment consistent with the Company's fiduciary duties and is in the best interests of the Company and the Company's estate, creditors, and other parties in interest;

(j) the Bankruptcy Court finds that this Agreement was negotiated in good faith and at arm's length between the Company and SB360 and that SB360 is entitled to the protection of section 363(m) and 364(e) of Title 11, United States Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code");



(k) this Agreement is approved pursuant to Bankruptcy Code section 363 and 364, as applicable;

(l) (i) to the extent that the Company or the Company's secured lender receives a Company Collected Payment, all such amounts shall be deemed to have been received in trust on behalf of SB360, and shall be remitted to SB360 in accordance with Section 2.3 of this Agreement; and (ii) to the extent that the Company receives any Returned Inventory and any Returned Inventory Payment payable to SB360 in respect of such Returned Inventory is not paid to SB360, such Returned Inventory shall be deemed to have been received in trust on behalf of SB360 and shall be delivered to SB360 in accordance with Section 2.2 if so requested by SB360;

(n) any objection to entry of the Approval Order is overruled; and

(o) in the event any of the provisions of the Factoring Approval Order are modified, amended, or vacated by a subsequent order of the Bankruptcy Court or any other court, without SB360's consent, SB360 shall be entitled to the protections provided in Bankruptcy Code sections 363(m) and 364(e) and, no such appeal, modification, amendment, or vacatur shall affect the validity and enforceability of the factoring or the receivables liens or priority authorized or created under this Agreement or the Factoring Approval Order.

**11. CONDITIONS PRECEDENT TO SB360'S OBLIGATIONS:**

11.1. SB360's Obligations under this Agreement are expressly conditioned upon the Company's satisfaction of the following conditions: (i) the Company shall have obtained entry of one or more orders approving the assumption of the Liquidation Consulting Agreement; (ii) the Company shall have obtained either the affirmative consent of its secured lender to the terms of this Agreement or such secured lender shall not have objected to entry of the Factoring Approval Orders; and (iii) entry of the Factoring Approval Orders.

[signature page to follow]

SB360 CAPITAL PARTNERS, LLC

By: \_\_\_\_\_

Name:

Title:

AGREED:

BHCosmetics Holdings, LLC

On Behalf of Itself and Its Affiliates

By: \_\_\_\_\_

Name: Spencer Ware

Title: Chief Restructuring Officer

**CONSENTED AND AGREED TO:**

Fifth Third Bank, N.A.

By: \_\_\_\_\_

Name:

Title:

28986619.6