IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(GREENBELT DIVISION)

In re:	*	Chapter 11
CREATIVE HAIRDRESSERS, INC., *et al.*[1],	*	Case Nos. 20-14583, 20-14584
	*	(Joint Administration Requested)
Debtors.	*	

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EMERGENCY MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (I) APPROVING RELIEF RELATED TO THE INTERIM BUDGET, (II) TEMPORARILY ADJOURNING CERTAIN MOTIONS AND APPLICATIONS FOR PAYMENTS, AND (III) GRANTING RELATED RELIEF

Creative Hairdressers Inc. and its affiliated debtor and debtor in possession (collectively, the "Debtors"), by and through their proposed undersigned counsel, Shapiro Sher Guinot & Sandler, hereby submit this motion (the "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), (a) approving relief related to the Interim Budget (as defined herein), including the temporary cessation of certain non-critical payments, (b) adjourning certain motions and applications for payment, and (c) granting related relief. In support of this Motion, the Debtors rely upon, and incorporate by reference, the *Declaration of Phil Horvath in Support of the First Day Motions* (the "First Day Declaration"),[2] filed contemporaneously with this Motion. In further support of this Motion, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Debtors file this case during what is arguably the defining global crisis of the last century—the global pandemic of the novel coronavirus ("COVID-19"). Life as we know it has changed; COVID-19 has infected millions of people across the globe, killing hundreds of

[1] The Debtors in these chapter 11 cases are: (i) Creative Hairdressers, Inc. and (ii) Ratner Companies, L.C.

[2] Capitalized terms used but not otherwise defined in this Motion shall have the meaning ascribed to them in the First Day Declaration.

thousands. In order to save lives and prevent suffering, unprecedented and tremendous efforts have been undertaken by the US government in an effort to "flatten the curve" and slow the spread of COVID-19. To do this, since mid-March, states have imposed "shelter-in-place" laws that mandate the closure of all "non-essential" businesses and that people stay at home. Barbershops and salons are not considered "essential" businesses. While closures have pushed healthy "non-essential" companies to the brink of bankruptcy, companies that were already struggling for survival are now being pushed over the edge.

2. Businesses such as the Debtors' salon business are singularly dependent on their leased physical salon locations. Without salons open and generating revenue, the only way to preserve liquidity and give the Debtors a chance at a going-concern reorganization or sale is to drastically reduce the costs associated with the salons during the period that the salons are mandated by the government to be shutdown.

3. Furthermore, the present crisis poses a particularly acute challenge for businesses that are dependent on their physical locations, such as retail businesses and barbershops, that are in chapter 11. In practice, while a business outside of bankruptcy may be able to miss or stretch out a payment (whether legal or not), under the Bankruptcy Code, the same rent payments are subject to elevated priority.[3] While outside of a chapter 11 case, landlords would be required to initiate contract litigation in local courts for a tenant's breach of a lease for non-payment of rent, in a chapter 11 case, a debtor's landlords and creditors are able to quickly file a pleading and point to the provisions of the Bankruptcy Code to enforce their rights to the same rent payment. Therefore, like the retail debtors in *Pier 1* and *Modell's*,[4] the Debtors believe it is prudent to seek

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[3] *See* Lauren Coleman-Lochner, Natalie Wong, and Edward Ludlow, *U.S. Retailers Plan to Stop Paying Rent to Offset Virus*, Bloomberg (updated Mar. 24, 2020, 7:53 PM), https://www.bloomberg.com/news/articles/2020-03-24/u-s-retailers-plan-to-stop-paying-rent-to-offset-virus-closures.

[4] *See e.g.*, *In re Pier 1 Imports, Inc., et al.*, Case No. 20-30805 (KRH) (Bankr. E.D. VA, Apr. 6, 2020) [D.I. 493]; *In re Modell's Sporting Goods, Inc.*, Case No. 20-14179 (VFP) (Bankr. D. N.J., Mar. 23,

the relief requested in the Motion so that they can maximize the value of their estates for the benefit of all of their creditors and stakeholders.

4. While the economic effects of the COVID-19 pandemic may have forced the Debtors to commence these Chapter 11 Cases, the Debtors must not allow the pandemic to prevent their ability to reorganize and be sold as a going-concern. Indeed, the Debtors are hopeful of their ability to quickly sell substantially all of their assets to HC Salon Holdings, Inc., which hopes to be able to re-position the Company as American society slowly returns to normal. Furthermore, the Debtors will continue to work with the proposed DIP Lender, and any official committee subsequently appointed to these Chapter 11 Cases, to evaluate all possible value-maximizing outcomes in these Chapter 11 Cases.

5. As described further herein and in the First Day Declaration, due to "shelter in place" laws enacted in the states in which the Debtors maintain salons, the Debtors been forced to close their businesses and furlough substantially all of their approximate 10,500 employees without pay. Prior to the Petition Date, the Debtors, in consultation with their real estate advisor, A&G Realty Partners, LLC, began working with the Debtors' landlords in order to attempt to come to a consensual solution that could ease the Debtors' mounting lease expenses while they were unable to bring in any revenue stream. While certain of these efforts have been successful, with the commencement of chapter 11 immediate steps are required to prevent irreparable harm to the Debtors' business. Therefore, and as further set forth below, by this Motion, the Debtors seek court authority to:

(a) continue to pay certain critical expenses requested in the other "First Day" motions filed concurrently herewith, and as specifically outlined in the proposed Initial DIP Budget (the "Initial Budget") attached to the *Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Secured Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Adequate Protection to Prepetition*

2020) [D.I. 115]; *In re CraftWorks Parent, LLC*, Case No. 20-10475 (BLS) (Bankr. D. Del., Mar. 20, 2020) [D.I. 174].

Secured Parties, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief (the "DIP Motion") filed concurrently herewith, that are essential for the Debtors to pursue a value-maximizing outcome to these Chapter 11 Cases;

(b) temporarily cease making rent payments to landlords who have not voluntarily consented to a rent deferral;

(c) automatically adjourn any motions, applications, or demands for payment on account of unpaid invoices or otherwise to the next scheduled omnibus hearing that is no less than 45 days after the end of the Limited Operation Period (as defined below) or such date as the Court may determine, unless such payment is to be provided pursuant to the Interim Budget;

(d) automatically adjourn any motions seeking to lift the automatic stay and motions to compel rejection, assumption, or assumption and assignment of any unexpired leases or executory contracts, for the same time period; and

(e) schedule a monthly hearing to (i) provide all parties in interest an update on the sale process and business reopening timeline, (ii) resolve any material disputes related to the Proposed Order, and (iii) determine if the relief granted by the Proposed Order, if and when granted, should remain in place or be modified in response to changing circumstances.

6. The Debtors recognize that the relief requested herein is extraordinary, but as the Debtors are facing extraordinary circumstances, the Debtors believe that the relief requested by this Motion will allow the Debtors to survive this unprecedented crisis, for the benefit of their employees, stakeholders and creditors—including their landlords.

JURISDICTION AND VENUE

7. The United States Bankruptcy Court for the District of Maryland (this "Court") has jurisdiction over these chapter 11 cases (the "Chapter 11 Cases"), the Debtors, property of the Debtors' estates, and this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

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

9. The statutory bases for the relief requested in this Motion are sections 105 and 365(d) of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), rules 2002

and 9007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), rule 9013-1 and 9013-7 of the Local Rules of the United States Bankruptcy Court for the District of Maryland (the "Local Rules"). Additionally, the Motion is based upon the authority set forth in certain COVID-19 administrative orders including: (i) the Bankruptcy Court's Administrative Order 20-04 Addressing Greenbelt Division Operations (March 19, 2020) (temporarily suspending in-court proceedings); (ii) the Bankruptcy Court's Memorandum Addressing the Continuation of Hearings and the Extension of Filing Deadlines in Standing Order 2020-05 of the United States District Court for the District of Maryland [Case 20-9006, Dkt. 5] (March 26, 2020) (applying District Court Standing Order 2020-05 to bankruptcy proceedings, continuing non-emergency hearings through April 24, including relief from stay hearings, and extending deadlines by 42 days); (iii) the District Court's Standing Order 2020-07 (April 10, 2020) (superseding District Court Standing Order 2020-05, continuing non-emergency hearings through June 5, and extending deadlines by 84 days); and (iv) the Bankruptcy Court's Administrative Order 20-09 Setting Deadlines for Certain Motions and Applications (April 13, 2020) (reverting response deadlines on certain motions but continuing to adjourn non-emergency hearings through June 5 and otherwise extending deadlines per Standing Order 2020-07) (collectively, "Standing Orders").

RELIEF REQUESTED

10. By this Motion, pursuant to sections 105 and 365(d) of the Bankruptcy Code, Bankruptcy Rules 2002, Local Rules 9013-1 and 9013-7, and the Standing Orders, the Debtors seek entry of the Proposed Order, substantially in the form attached hereto as **Exhibit A**, (a) approving relief related to the Interim Budget, including the temporary cessation of non-critical payments, (b) adjourning certain motions and applications for payment, and (c) granting related relief.

BACKGROUND

A. General Background

11. On the date hereof (the "Petition Date"), each Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

12. The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, no trustee, examiner, or official committee of unsecured creditors has been appointed in these Chapter 11 Cases. No date has been set for a meeting pursuant to section 341 of the Bankruptcy Code.

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

B. The Impact of COVID-19 on the Debtors' Business and these Chapter 11 Cases

14. The impact of COVID-19 has shut down the majority of the US economy, and at the time of filing this Motion, it is estimated that more than a staggering 97% of the US population is subject to "shelter in place" orders.[5] The result of such "shelter in place" orders is that all "non-essential" brick-and-mortar businesses, such as the Debtors' salons, were required to close with only a couple days' notice. By the third week of March 2020, "shelter in place" or comparable orders have been issued in every state in which the Debtors operate, and every single

[5] *See e.g.*, Alaa Elassar, *This is where all 50 states stand on reopening*, CNN (updated at April 20, 2020, 5:59 PM) https://www.cnn.com/2020/04/15/us/states-reopen-coronavirus-trnd/index.html; Cecelia Smith-Schoenwalder, *States Eye Reopening Economies Amid Coronavirus Pandemic*, US NEWS (updated April 21, 2020 at 4:23 PM) https://www.usnews.com/news/economy/articles/2020-04-21/states-eye-reopening-economies-amid-coronavirus-pandemic; Press Release: Georgia Board of Cosmetology and Barbers Issues Safety Guidelines for Reopening, Office of the Governor of Georgia (updated April 21, 2020), https://gov.georgia.gov/press-releases/2020-04-21/georgia-board-cosmetology-and-barbers-issues-safety-guidelines-reopening (setting guidelines for reopening salons located in the state of Georgia as of April 24, 2020).

one of the Debtors more than 800 of salons was forced to close. Without incoming revenue, the Debtors were unable to meet their payroll needs, and had to make the difficult decision to furlough substantially all of their approximate 10,500 employees. In an effort to position the Debtors' business to survive, they similarly were unable to meet their April rent obligations. As state governments grapple with "re-opening" economies and lifting "shelter in place" orders, the Debtors are uncertain of when they will be able to resume their operations. Additionally, the Debtors anticipate that when they are able to re-open their salons, they will likely be subject to social distancing mandates and other regulations, which may include significantly cutting the capacity of customers and employees who may be allowed in a salon at the same time or delaying a salon's ability re-open until it acquires requisite personal protective equipment for salon employees and/or customers, among other things.

15. Prior to the economic shutdown caused by COVID-19, the Debtors and their advisors had been making strides to improve the Debtors' financial position. Indeed, guest traffic had stabilized and the Debtors' per-ticket comparable sales had increased over the same time last year.

C. Liquidity Preservation Efforts

16. Without the ability to generate revenue through the operation of their salons, the only way that the Debtors may preserve liquidity and give the Debtors the ability to sell their business as a going concern is to drastically reduce the costs associated with their salons during the period of operation under the Interim Budget, which shall commence upon entry of the order approving this Motion and shall terminate upon the earlier of Debtors filing a notice of such termination upon the re-opening of one or more salons and/or their operations generally, or at such other time as is ordered by the Court (the "Limited Operation Period"). To achieve this goal, the Debtors will be forced to make more difficult decisions about their business, including how to protect their employees and customers, while also generating revenue to continue providing

jobs to their employees. Thus far, the Debtors believe that the actions that they have taken are in line with other brick-and-mortar businesses in the beauty industry, as well as the similarly situated retail industry.[6]

(i) Employee Actions

17. As mentioned above, on March 21, 2020, due to the shutdown of the Debtors' salons due to "shelter in place" orders, the Debtors made the incredibly difficult decision to furlough substantially all of their approximately 10,500 employees. Furthermore, without the ability to continue their business operations, the Debtors were unable to make a "lag" payroll. As of Petition Date, the Debtors had begun a hibernation plan and now employ approximately 30, full and part-time employees, who will "keep the lights on" so that the Debtors can reopen their businesses when the government-mandated shutdown orders are lifted. These actions presented the only viable path to preserve liquidity under the circumstances.

(ii) Rejecting of Certain Leases and Remaining Lease Payments

18. In light of the lasting effects that COVID-19 will likely have on the economy even after governments lift "shelter in place" orders – especially for the salon services business, which require employees and customers to be in close, physical contact – the Debtors, in consultation with their financial advisors, have strategically identified certain salons that are likely to recover from the shutdown. Therefore, and as further set out in the First Day Declaration and the *Debtors' Motion for Entry of an Order (I) Authorizing the Rejection of Certain Unexpired Leases* Nunc Pro Tunc *to the Petition Date, (II) Establishing Rejection Procedures for the Rejection of Certain Leases of Non-Residential Real Estate, and (III) Authorizing the Debtors to Take All Actions Necessary to Implement the Rejection Procedures, Including the Rejection of the Leases and the Abandonment of the Remaining Property* ("Lease Rejection Motion"), filed

[6] See Charisse Jones, *Need a haircut? Want a manicure? Coronavirus leaves barber shops, nail salons struggling*, USA TODAY (updated April 15, 2020, 11:03 AM),

contemporaneously herewith, the Debtors have made the difficult decision to reject certain of their approximately 800 leases (the "Rejected Leases") effective as of the Petition Date.

19. However, for the remaining salons, which may be critical to effectuate a going concern sale of their business, the Debtors will not be able to pay their full salon rent obligations due each month until ordinary operations resume at such salons. Therefore, prior to the Petition Date, the Debtors, with the help of their proposed advisors, have obtained consensual deferred rent concessions from a number of landlords of their salons (that the Debtors are not seeking to reject). Beyond the Rejected Leases, the Debtors are currently unprepared to make potentially value-destructive determinations and reject more essential leases. As mentioned above, outside of chapter 11, in similar circumstances, brick-and-mortar driven "non-essential" retail businesses are notifying landlords of their intent to abate rent until they can enter and reopen salons.[7]

20. The Debtors understand the ramifications of the relief requested herein and do not seek it lightly. Their landlords are not without their own costs, including mortgage, tax payments, and suppliers. Every company has been and will continue to be forced to take extraordinary measures during this unprecedented crisis. In fact, certain states and the Federal Reserve have encouraged and have even ordered financial institutions to take actions that are unheard of in ordinary times, including ordering lenders to grant deferrals or not foreclose on mortgagees or

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https://www.usatoday.com/story/money/2020/04/15/coronavirus-barber-shops-salons-acupuntcure-suffer-amid-concerns-virus/2969349001/.

[7] While not a contractual right under every lease, this is an ordinary first step in this type of situation. *See, e.g.*, *COVID-19 Considerations for Landlords and Tenants*, Cooley (Updated April 13, 2020), https://www.cooley.com/news/insight/2020/2020-03-26-covid-19-considerations-for-landlords-and-tenants (discussing rent obligations and lease provisions during the COVID-19 pandemic); Steven Ostrow, C. Jason Kim, and Patrick Haggerty, *Commercial Lease Workouts During the COVID-19 Pandemic*, White and Williams, LLP (April 6, 2020), *https://www.whiteandwilliams.com/resources-alerts-Commercial-Lease-Workouts-During-the-COVID-19-Pandemic.html* (discussing issues related to chapter 11 filings and rent for tenants still in business); *Rent Abatement During COVID-19*, NAIOP, Webinar (Apr. 1, 2020), https://www.naiop.org/en/Research-and-Publications/News/NAIOP-News/2020/Rent-Abatement-During-COVID19 (encouraging landlords and tenants to reach mutually acceptable terms); *Commercial Leasing and COVID-19: An Exploration of Force Majeaure Doctrine in the Context of a Public Health Crisis*, Husch Blackwell (Mar. 23, 2020), https://www.huschblackwell.com/newsandinsights/commercial-leasing-and-covid-19-an-exploration-of-force-majeure-doctrine-in-the-context-of-a-public-health-crisis (same).

evict tenants on account of non-payment. Accordingly, as set forth in this Motion, the Debtors will temporarily cease making these payments during the Limited Operation Period.

D. Case Administration During the Limited Operations Period

21. Absent the rent abatement requested above, the Debtors anticipate a wave of motions or other pleadings seeking to compel the Debtors to make such payments or to lift the automatic stay to pursue state actions, assert setoff rights, or otherwise.[8] Accordingly, by this Motion, the Debtors propose the following case administration procedures during the Limited Operation Period:

(a) Any motion, application, action, or pleading filed in these Chapter 11 Cases seeking payment for any amounts not included in the Interim Budget shall be automatically adjourned to the next scheduled omnibus hearing that is no less than 45 days after the end of the Limited Operation Period or such date as the Court may determine. For the avoidance of doubt, any motion related to an expense included in the Interim Budget shall not be subject to automatic adjournment.

(b) Any motion, application, action, or pleading filed in these cases seeking to lift the automatic stay and any motion, application, action, or pleading filed to compel rejection, assumption, or assumption and assignment of any unexpired leases or executory contracts, including any such motion already filed, shall be automatically adjourned to the next scheduled omnibus hearing that is no less than 45 days after the end of the Limited Operation Period or such date as the Court may determine. For the avoidance of doubt, this includes any motion, application, action, or pleading seeking adequate protection or payment in connection with any motion, application, action, or pleading filed in these Chapter 11 Cases seeking to lift the automatic stay or compel rejection, assumption, or assumption and assignment. Notwithstanding the foregoing, landlords shall be permitted to seek relief from this Court during the Limited Operation Period with respect to exigent or unforeseen circumstances, and which the Debtors (in consultation with the DIP Lender) and such parties are unable to resolve consensually. Based on the Court's assessment of exigency, the Court will make itself available in its own discretion and as circumstances may permit or warrant.

(c) The Debtors will schedule a monthly hearing towards the end of each month that will (a) provide all parties in interest an update on the sale

[8] The Debtors understand that the Court can manage its docket and schedule hearings as it deems appropriate. In light of the circumstances, the Debtors believe these proposed procedures will minimize the burden on the Court and all parties in interest, thereby reducing the cost and time associated with this administrative burden.

process and business reopening timeline, (b) resolve any material disputes related to the Proposed Order, and (c) determine if the relief granted by the Proposed Order should remain in place or be modified in response to changing circumstances; provided, however, that any dispute related to payment of claims will be subject to the administrative claims procedures that may be subsequently filed (if applicable). The Debtors shall reserve all rights with respect to all claims filed in connection with the administrative claims procedures.

22. As stated above, the Limited Operation Period shall commence upon entry of the Proposed Order and shall terminate upon the earlier of Debtors filing a notice of such termination upon the re-opening one or more salons and/or their operations generally, or at such other time as is ordered by the Court. The Debtors believe that the relief requested herein is absolutely vital to the Debtors' efforts to resume operations after the "shelter in place" orders are lifted, preserve thousands of jobs, and facilitate a going-concern sale for the benefit of all creditors and stakeholders.

BASIS FOR RELIEF

I. The Court is Authorized to Approve the Interim Budget and Allow the Debtors to Defer Payments as Set Forth Herein Pursuant to Section 105 of the Bankruptcy Code

A. Section 105 of the Bankruptcy Code Grants the Court With Broad Equitable Power

23. The Bankruptcy Code and the Bankruptcy Rules, and the Local Rules provide the Debtors with the authority to establish notice, case management, and administrative procedures. In particular, Bankruptcy Rule 2002(a) provides that, unless otherwise ordered by the Court, notice of certain matters must be given to, among others, all of the Debtors' creditors, equity security holders, and other parties in interest. Fed. R. Bankr. P. 2002(a). The Bankruptcy Rules further provide that "[t]he court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules." Fed. R. Bankr. P. 2002(m); *see also* Fed. R. Bankr. P. 9007 ("When notice is to be given under these rules, the court shall designate, if not otherwise

specified herein, the time within which, the entities to whom, and the form and manner in which the notice shall be given.").

24. In addition, section 105(a) provides, in relevant part, that, "[t]he court may 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). Section 102(1) of the Bankruptcy Code states that where the Bankruptcy Code provides for an action to occur "after notice and a hearing," such action may occur "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances . . . ." 11 U.S.C. § 102(1)(A).

25. Section 105 of the Bankruptcy Code provides the bankruptcy court with broad equitable powers. As one court articulated, section 105 is "an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of § 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction." *Davis v. Davis (In re Davis)*, 170 F.3d 475, 492 (5th Cir. 1999) (citing 2 L. King, Collier On Bankruptcy § 105.01, at 105–3 (1996)). The Supreme Court has recognized that bankruptcy courts, as courts of equity, have the authority to modify creditor-debtor relationships. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) ("The Code also states that bankruptcy courts may 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions' of the Code. § 105(a). These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."). Furthermore, a court's decision to exercise its equitable powers under section 105(a) is discretionary. *In re Charles & Lillian Brown's Hotel, Inc.*, 93 B.R. 49, 54 (Bankr. S.D.N.Y. 1988) (superseded on other grounds) (noting that "the court's utilization of its powers under" under section 105(a) is discretionary). But, section 105 may not be used in a manner that is inconsistent with other provisions of the Bankruptcy Code. *See In re Gurney*, 192 B.R. 529,

537 (B.A.P. 9th Cir. 1996) (noting that section 105 "may be exercised only in a manner not inconsistent with the provisions of the Code").

26. The relief requested herein is similar to other relief granted under section 105 and other sections of the Bankruptcy Code. Courts often rely on section 105 for the authority to protect and effectively administer estate assets. See 2 Collier on Bankruptcy ¶ 105.02 (16th ed. 2020) ("It has also been used as the basis for staying actions by third parties against avoiding powers actions prior to the time the estate decides to pursue or abandon them."); *see also In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 436 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994) ("In order to allow the Trustee to assert actions which are property of the debtor's estate for the benefit of the estate as a whole, other claimants may be prohibited by the Bankruptcy Court from pursuing such actions under 11 U.S.C. § 105(a)."). Section 105 is often the basis for "tolling" certain time periods under the Bankruptcy Code. *See In re Barton*, 236 B.R. 613, 615 (Bankr. W.D. Virginia 1999) ("This court finds that 11 U.S.C. § 105(a) provides sufficient statutory authority for suspending the priority periods found in 11 U.S.C. § 507(a)(8)(A) under the factual circumstances present in the case at bar."). In addition, section 305 provides for a "full suspension" of a chapter 11 proceeding if it would benefit both the interests of the debtor and its creditors. *See* 11 U.S.C. § 305(a); *In re Monitor Single Lift* I, Ltd., 381 B.R. 455, 462–63 (Bankr. S.D.N.Y. 2008) (citations omitted).

27. The relief requested by the Debtors falls squarely within the equitable powers of section 105.[9] Instituting a "breathing spell" for the Debtors during this unprecedented economic crisis, by approving the Interim Budget and allowing for the modification of payment terms, is exactly the type of relief the bankruptcy process was designed provide. *See In re Banks*, 577 B.R. 659, 664–65 (Bankr. E.D. Va. 2017) (noting that the automatic stay provides the debtor with a

[9] The Debtors believe that section 105 of the Bankruptcy Code is the appropriate basis for relief requested herein. To the extent that the Court determines that section 305 is the appropriate basis for this

"breathing spell" from its creditors). While the Debtors are aware that the automatic stay applies to prepetition actions, in extraordinary times such as these, section 105 permits the Court to extend the principles of the Bankruptcy Code to postpetition case administration. *See* 11 U.S.C. § 105(a) ("No provision of this title providing for the raising of an issue by a party in interest shall preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent the abuse of process."). Furthermore, the adjournment of any motions, applications, or demands for payment on account of unpaid invoices or otherwise to the next scheduled omnibus hearing that is no less than 45 days after the end of the Limited Operation Period or date as the Court may determine, is in line with the recent Standing Orders, which sets forth procedures for scheduling hearings, adjournments of certain hearings, and adjustments of deadlines.

28. The Interim Budget is necessary for the Debtors to maximize the value of their assets. By reducing the Debtors' costs to only those which are absolutely necessary for a brief period of time—including, the payment of the last payroll and related employee obligations, which remain unpaid, and other costs critical to facilitate a sale of the Debtors' assets—the Debtors stand the best possible chance of effectuating a value-maximizing sale for the benefit of all creditors. The Interim Budget and administrative relief requested herein will also reduce the Debtors' professional fees during this time by narrowing the focus of these Chapter 11 Cases towards recommencing operations after the "shelter in place" orders are lifted and to the consummation of a sale for maximum value of the Debtors' estates.

B. Cause Exists to Enforce the Debtors' Unexpired Leases Until the Debtors Assume or Reject such Unexpired Lease

29. Section 365(d)(3) of the Bankruptcy Code authorizes the Court to extend the Debtors' obligations under their unexpired leases during the first 60 days of these chapter 11

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relief, the Debtors respectfully request that the Court grant this Motion pursuant to section 305 of the Bankruptcy Code.

cases for cause. *See* 11 U.S.C. § 365(d)(3). The Bankruptcy Code does not define "cause," and determining whether to extend these obligations is within the Court's discretion. *See In re Pac-West Telecomm, Inc.*, 377 B.R. 119, 126 (Bankr. D. Del. 2007) (noting that "simply being in bankruptcy cannot constitute 'cause'" on grounds that an extension would be automatic rather than discretionary). A court may look to a "specific cause" articulated by a debtor or "applicable legal precedent." *Id*. In addition, section 105 authorizes the Court to "toll" certain time periods if such tolling is "consistent with the underlying philosophy of the Bankruptcy Code." *See In re Richards*, 994 F.2d at 765.

30. The Debtors submit that the government mandated salon closures as a result of the COVID-19 pandemic satisfies the "cause" requirement of section 365(d)(3). Except for the Rejected Leases that the Debtors seek to reject pursuant to the Lease Rejection Motion, the Debtors respectfully request that all unassumed and unrejected leases remain in effect during the Limited Operation Period. At this time, due to the unprecedented crisis and unknown lasting effects that the crisis may have on the Debtors' business and the overall economy, the Debtors are unable to make the thoughtful analysis necessary to determine further leases to assume or reject. For these reasons, the Debtors believe that all unassumed and unrejected unexpired leases should remain in effect.

C. Cause Exists to Suspend Lease Payments Pursuant to the Doctrine of Intervening Impossibility and the Frustration of Purpose Doctrine.

31. The Debtors are entitled to an abatement of rent and to suspend their obligations under their leases on the equitable grounds of supervening impossibility and frustration of purpose. The doctrine of supervening impossibility excuses performance by a party under a contract when such "performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basis assumption on which the contract was made," unless the language of the contract indicates the contrary. *See* Restatement (Second) of Contracts § 261 (1981). This defense is available when a party can establish three factors: "(1) the

unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its nonoccurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable." *Opera Co. of Boston, Inc. v. Wolf Trap Foundation of Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987). One such intervening act is a governmental regulation or law. *See* Restatement (Second) of Contracts § 264 ("If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made."). Factor two is satisfied only "where the party has [no] reason to know of facts which might cause impossibility." *See Vollmar v. CSX Transp., Inc.*, 705 F. Supp. 1154, 1176 (E.D. Va. 1989). Impracticability of performance is an "objective" standard. *See* § 261, comment e ("This Section recognizes that if the performance remains practicable and it is merely beyond the party's capacity to render it, he is ordinary not discharged[.]"). In short, the doctrine of supervening impossibility is an equitable doctrine designed "as a defense to a breach of contract . . . 'on the unfairness or unreasonableness of giving [the contract] the absolute force to which its words clearly state.'" *Opera Co. of Boston, Inc.*, 817 F.2d at 1100.

32. The Debtors' request to suspend their rental payments is an applicable defense to breach of contract under the doctrine of impossibility. First, the state and local government orders mandating closures of the Debtors' salons to encourage social distancing and limit the spread of COVID-19 are "intervening acts." *See* Restatement (Second) of Contracts §§ 261, 264. Second, the COVID-19 pandemic and subsequent response by state and local governments is unprecedented and could not have been predicted by the Debtors or their landlords. *See Vollmar*, 705 F. Supp. at 1176. Finally, it is both impracticable and impossible for the Debtors to perform under their leases as a result of the guidelines that accompany most of these governmental regulations that prohibits salon operations as usual.

33. The doctrine of frustration of purpose is a similar equitable doctrine and excuses a party's performance under a contract when a party can establish the following factors: first, the frustrated purpose "must have been a principal purpose of that party" and must have been so within the understanding of both parties to the contract; second, the frustration "must be so severe that it is not to be regarded as within the risks assumed . . . under the contract"; third, "the non-occurrence of the frustrating event must have been a basic assumption [on which the contract was made]." *See* Restatement (Second) of Contracts § 265 (1981); *United States v. Johnson*, 2019 WL 6242174 *7 (E.D. Va. Nov. 22, 2019).

34. The Debtors' request to suspend its rental payments is also an applicable defense to breach of contract under the doctrine of frustration of purpose. First, the principal purpose of the Debtors in entering into their salon leases is the operation of the premises as a salon. There could be no other understanding between the parties as to the Debtors' principal purpose. Second, the severe frustration of purpose associated with government-ordered salon closures brought about by an unprecedented pandemic with global reach could neither have been anticipated in contracting nor regarded as assumed as a risk by either party to the Debtors' leases. Third, the non-occurrence of a government-ordered halt to nonessential business operation was necessarily a basic assumption of the Debtors' leases in that the purpose of such contracts is the operation of a business the government has since deemed nonessential. Accordingly, the Debtors satisfy the factors of both doctrines: the governmental response to the COVID-19 pandemic is a supervening impossibility and has frustrated the purpose of the Debtors' leases in that the Debtors are not able to operate their salons.

35. For these foregoing reasons, the Debtors respectfully request the Court to enter the Proposed Order granting the relief requested herein. The Debtors believe that such relief is absolutely vital to the Debtors' efforts to recommence operations after relevant "shelter in place"

orders are lifted, save jobs, and facilitate the successful going concern sale of the Debtors' business.

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

36. For the successful implementation of the foregoing, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h). As set forth above and in the First Day Declaration, the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen day stay imposed by Bankruptcy Rule 6004(h), to the extent both apply.

WAIVER OF MEMORANDUM OF POINTS AND AUTHORITIES

37. Pursuant to Local Bankruptcy Rule 9013-2, the Debtors state that, in lieu of submitting a memorandum in support of this Motion, they will rely solely upon the grounds and authorities set forth herein.

RESERVATION OF RIGHTS

38. Nothing contained herein is intended or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against the Debtors under the Bankruptcy Code, any foreign bankruptcy or insolvency law, or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds, (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion; (e) a request or authorization to assume, adopt, or reject any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; or (g) a waiver of any claims or causes of action which may exist against any entity under the

Bankruptcy Code or any other applicable law. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtors' rights to subsequently dispute such claim.

NOTICE

39. No trustee, examiner, or creditors' committee has been appointed in these chapter 11 cases. Notice of this motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (i) the Office of the United States Trustee, (ii) HC Salon Holdings, Inc., Richard A. Chesley, Esquire, DLA Piper LLP (US), 444 West Lake Street, Chicago, IL 60606-0089, as counsel to DIP Lender, (iii) all other parties identified on the Consolidated List of 20 Largest Unsecured Creditors filed herein by the Debtors, and (iv) the landlords. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

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

Dated: April 23, 2020

/s/ *Joel I. Sher*

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Proposed Counsel for Debtors and Debtors in Possession

EXHIBIT A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(GREENBELT DIVISION)

In re:	*	Chapter 11
CREATIVE HAIRDRESSERS, INC., *et al.*[1],	*	Case Nos. 20-14583, 20-14584
	*	(Joint Administration Requested)
Debtors.	*	

* * * * * * * * * * * * *

ORDER (I) APPROVING RELIEF RELATED TO THE INTERIM BUDGET, (II) TEMPORARILY ADJOURNING CERTAIN MOTIONS AND APPLICATIONS FOR PAYMENTS, AND (III) GRANTING RELATED RELIEF

This matter coming before the Court on motion (the "Motion"),[2] filed by the above-captioned debtors (collectively, the "Debtors"), seeking entry of an order (this "Order"), (a) approving relief related to the Debtors' Interim Budget, including the temporary cessation of certain non-critical payments, (b) adjourning certain motions and applications for payment, and (c) granting

[1] The Debtors in these chapter 11 cases are: (i) Creative Hairdressers, Inc. and (ii) Ratner Companies, L.C.

[2] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

related relief; all as further described in the Motion; and upon consideration of the First Day Declaration; and this Court having jurisdiction to consider the Motion and the relief requested therein under 28 U.S.C. 157 and 1334; and this Court having determined that this is a core proceeding under 28 U.S.C. § 157(b)(2); and this Court having determined that venue of this proceeding and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest in these particular circumstances; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED, as set forth in this Order.

2. The Debtors may enter into the Limited Operation Period, including making payments pursuant to the Interim Budget (as may be amended, modified, or supplemented pursuant to the terms of the Final DIP Order) and the Debtors may continue to pay critical expenses, including employee benefits for all furloughed employees, wages for certain employees, insurance (including insurance and utilities necessary to maintain the Debtors' leased premises to the extent the Debtors directly pay such insurance and utility costs to the insurers and utility providers in the ordinary course of business, as well as all monitored security systems to the extent such systems are in place in the

ordinary course of business), trust fund taxes, and other corporate and professional costs that are essential for the Debtors to pursue a value-maximizing outcome to these Chapter 11 Cases as provided for in the Interim Budget, from the entry of this Order until such date (a) the Debtors (after consultation with the DIP Lender) file a notice of their intent to reopen one or more salons and/or their operations generally (the "Limited Operation Period"), or (b) that the Court orders otherwise.

3. To the extent the Debtors, with the consent of the proposed DIP Lender, undertake any obligation during the Limited Operation Period (including seeking services or goods from any party), the payment of such obligations shall be included in the Interim Budget and timely paid.

4. The Debtors are authorized to temporarily defer making all other payments not contemplated by the Interim Budget, including rent payments to landlords who have not voluntarily consented to a rent deferral. For the avoidance of doubt, the Debtors' failure to make any payments under an unexpired lease or executory contract not contemplated by the Interim Budget shall not constitute a rejection of any such unexpired lease or executory contract, and the rights of all parties related to any payments or obligations accruing or due but unpaid by the Debtors during the Limited Operations Period are reserved.

5. To the extent any payment is deferred pursuant to this Order, the Debtors shall make reasonable best efforts to make such payment within 45 days following the Limited Operation Period, except as otherwise agreed to by the parties or such date as the Court may determine. Parties shall make reasonable best efforts to consensually resolve any disputes related to the amount and timing of such payments with the Debtors during such 45-day time period prior to filing a motion or application for payment, and the rights of all parties related to such payments are reserved.

6. All motions, applications, actions, or pleadings filed in these cases seeking payment of any amounts not included in the Interim Budget shall be automatically adjourned to the next scheduled omnibus hearing that is no less than 45 days after the end of the Limited Operation Period or such other dates as the Court may determine. For the avoidance of doubt, any motion related to an expense included in the Interim Budget shall not be subject to automatic adjournment.

7. All motions, applications, actions, or pleadings filed in these cases seeking to lift the automatic stay or seeking to compel rejection, assumption, or assumption and assignment of any unexpired leases or executory contracts, including any such motion already filed, shall be automatically adjourned to the next scheduled omnibus hearing that is no less than 45 days after the end of the Limited Operation Period or such other dates as the Court may determine, subject to the last sentence of paragraph 11 of this Order. For the avoidance of doubt, this (a) includes any motion, application, action, or pleading seeking (i) adequate protection or payment, (ii) to lift the automatic stay, or (iii) to compel rejection, assumption, or assumption and assignment of any unexpired lease or executory contract, and (b) does not include any motion, application, action, or pleading by the DIP Lender.

8. All parties (including, without limitation, the DIP Lender) shall be permitted to seek relief from this Court during the Limited Operation Period with respect to exigent or unforeseen circumstances, and which the Debtors (in consultation with the DIP Lender and any subsequently appointed official committee to these Chapter 11 Cases (a "Committee")) and such parties are unable to resolve consensually. Based on the Court's assessment of exigency, the Court will make itself available in its own discretion and as circumstances may permit or warrant.

9. During the Limited Operation Period, the Debtors shall schedule a monthly hearing (each, a "Subsequent Hearing") with the Court at which hearing: (a) the Debtors shall provide all

parties in interest an update on the chapter 11 process and business reopening timeline, (b) the Court may resolve any material disputes related to the Order raised by parties in interest, and (c) the Court may determine if the relief granted by the Order should be modified and/or remain in place (and set a termination date for the Limited Objection Period, if applicable) (i) in response to changing circumstances, (ii) at the request of any party in interest, which request may be made in writing prior to the Subsequent Hearing as set forth below or made orally at the Subsequent Hearing, or (iii) based on any other basis the Court shall determine.

10. The first Subsequent Hearing shall be [_____], 2020, at [__]:00 __.m. (EST). The Debtors shall file an agenda, together with an updated Interim Budget, for such Subsequent Hearing no later than [_____], 2020, at 4:00 p.m. (EST), which agenda shall indicate, among other things, whether the Debtors (to the best of their knowledge at that time) intend to continue or terminate the Limited Operation Period at the Subsequent Hearing. Any objections or responses thereto are encouraged, but not required, to be made in writing by 4:00 p.m. (EST) three (3) business days prior to the Subsequent Hearing or may be stated orally at the Subsequent Hearing. Any party seeking to modify the relief granted by this Order or otherwise resolve a material dispute related to this Order at the Subsequent Hearing is encouraged, but not required, to file a pleading seeking such relief by 4:00 p.m. (EST) three (3) business days prior to the Subsequent Hearing. Any objections or responses thereto are encouraged, but not required, to be made in writing by 4:00 p.m. (EST) one (1) business day prior to the Subsequent Hearing or may be stated orally at the Subsequent Hearing. For the avoidance of doubt, in the event that any party seeks to modify or terminate this Order, the burden shall remain on the Debtors to justify the need for the continuation of this Order in its current form or as subsequently modified, as applicable.

11. The Debtors and/or the Debtors' professionals agree to take reasonable efforts to provide timely and regular updates, including all mutually agreed information to any Committee, DIP Lender, and/or its professionals, as applicable, during the Limited Operation Period to ensure any Committee or the DIP Lender have sufficient information to timely assess the status, benefits, and risks of the continuation of the Limited Operation Period.

12. All parties reserve all claims, rights, defenses, counter-claims, and arguments with respect to the proper amount of any administrative claim, including those filed in connection with any administrative claims procedures approved by the Court, and none of the relief provided for in this Order shall be used to imply or assert that any administrative expense claimants, claims, or payments have priority over other administrative expense claims or that certain administrative expense claimants can be separately classified under a chapter 11 plan, regardless of the treatment of certain administrative expense claimants permitted by this Order.

13. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (a) an admission as to the amount of, basis for, or validity of any claim against the Debtors under the Bankruptcy Code, any foreign bankruptcy or insolvency law, or other applicable non-bankruptcy law (except as expressly set forth herein); (b) a waiver of the Debtors' or any other party in interest's right to assert or to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined or should be reduced or disallowed as a result of the entry of this Order or the filing of the Motion; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission to the validity, priority, enforceability, or perfection of any lien on, security interest in, or encumbrance on property of the Debtors' estates; or (g) a waiver of any claims or

causes of action which may exist against any entity under the Bankruptcy Code or any other applicable law. Any payment made pursuant to this Order is not intended and should not be construed as an admission as the validity of any particular claim or a waiver of the Debtors' rights to subsequently dispute such claim.

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

15. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order.

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

cc: Joel I. Sher, Esquire
Richard M. Goldberg, Esquire
SHAPIRO SHER GUINOT & SANDLER
250 W. Pratt Street, Suite 2000
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END OF ORDER