EXHIBIT 3

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

BODY CONTOUR VENTURES, LLC,[1]	Chapter 11
	Case No. 19-42510-pjs
Debtors.	Hon. Phillip J. Shefferly

_____/

CORRECTED BRIEF IN SUPPORT OF MOTION FOR ORDER CONFIRMING THAT TERMINATION OF FINANCIAL ACCOMMODATION CONTRACT IS NOT SUBJECT TO AUTOMATIC STAY, OR IN THE ALTERNATIVE GRANTING RELIEF FROM STAY TO TERMINATE CONTRACT

In support of its Motion, Denta-A-Med Inc. d/b/a The HELPcard and HC Processing Center ("HC Processing") states as follows:

[1] Debtors cases are being jointly administered for procedural purposes only and include Debtors Body Contour Ventures, LLC, Case No. 19-42510, BCA Acquisitions, LLC, Case No. 19-42511, American Aesthetic Equipment, LLC, Case No. 19-42512, Knoxville Laser Spa LLC, Case No. 19-42513, LRX Alexandria, LLC, Case No. 19-42514, LRX Birmingham, LLC, Case No. 19-42515, LRX Charlotte, LLC, Case No. 19-42516, LRX Chicago, LLC, Case No. 19-42517, LRX Colorado Springs, LLC, Case No. 19-42518, LRX Dearborn, LLC, Case No. 19-42519, LRX East Lansing, LLC, Case No. 19-42520, LRX Grand Blanc, LLC, Case No. 19-42833, LRX Hoffman Estates, LLC, Case No. 19-42521, LRX Las Vegas Summerlin, LLC, Case No. 19-42522, LRX Mesa, LLC, Case No. 19-42523, LRX Naperville, LLC, Case No. 19-42524, LRX Novi, LLC, Case No. 19-42525, LRX Orland Park, LLC, Case No. 19-42526, LRX Plymouth-Canton, LLC, Case No. 19-42527, LRX Stone Oak, LLC, Case No. 19-42528, LRX Towson, LLC, Case No. 19-42530, LRX Troy, LLC, Case No. 19-42531, Premier Laser Spa of Greenville LLC, Case No. 19-42532, Premier Laser Spa of Indianapolis LLC, Case No. 19-42533, Premier Laser Spa of Louisville LLC, Case No. 19-42534, Premier Laser Spa of Pittsburgh LLC, Case No. 19-42535, Premier Laser Spa of St. Louis LLC, Case No. 19-42536, and Premier Laser Spa of Virginia LLC, Case No. 19-42537.

I. BACKGROUND

A. The Parties and the Contract.

1. On or about July 19, 2018, HC Processing and Debtor Body Contour Ventures, LLC ("BCV") entered into a contract entitled HELPCard Merchant Agreement. A copy of the contract and its related schedules (collectively, the "Contract") is attached as **Exhibit 3A** hereto.

2. In general terms, the Contract permits BCV to offer possible financing through a revolving credit card program for its various cosmetic procedure plans to BCV's customers and potential customers through HC Processing and HC Processing's underwriting bank, on terms and conditions specified in the Contract (the "Program"). BCV is referred to in the Contract as the "Merchant", and the underwriting bank is referred to in the Contract as the "Authorized Financial Institution" (which in the case of this specific Contract is The Bank of Missouri in Missouri (the "Bank")).

3. The Contract does not obligate HC Processing or the Bank to provide financing at BCV's request. Rather, Section 5 of the "Terms of Service" section of the Contract places authority in the Bank to determine "the criteria, procedures, and methods used to accept and evaluate Applications and originate Accounts" and further provides: "Nothing in this Agreement requires that HC Processing or [Bank] take any particular action at Merchant's request with respect to approving any Application, authorizing use of any Account, making Account credit available to any Cardholder, or servicing and collecting amounts due in connection with the Accounts."

4. Under Section 8 of the Terms of Service, BCV remains liable to HC Processing and the Bank for customer "Chargebacks" and authorizes HC processing "in its discretion and at its earliest opportunity, to deduct all Chargeback amounts due from Merchant from any other

amounts that may otherwise be due to Merchant in connection with the Agreement or to debit Merchant's Transaction Processing Account for any such amount." Section 8 further provides that "HC Processing may terminate the Agreement, require establishment of a Reserve Account, or pursue other rights and remedies in the time and manner authorized by the Agreement or Applicable Law, in the event of Excessive Chargebacks."[2]

5. BCV has expressly agreed that the Contract "**is a contract of financial accommodation within the meaning of the Bankruptcy Code, 11 U.S.C. § 365, as amended from time to time.**" See Contract, Terms of Service § 14(c) (emphasis added).

6. Moreover, BCV has historically used the Program offered by HC Processing under Contract as a form of financing for BCV's own operations. Specifically, BCV has used the Program to finance payment in advance from BCV's customers and potential customers for various cosmetic procedure plans (which may require an expensive course of multiple treatments over a given period of days, weeks or months). In this way, BCV has obtained payment from HC Processing and the Bank for services before the services have been delivered to BCV's customers, at the risk of much greater exposure to HC Processing and the Bank for Chargebacks if the services cannot thereafter be provided by BCV or are for some other reason cancelled by the customers.

[2] The Glossary section of the Contract defines "Excessive Chargebacks" as follows: "(i) the aggregate number of Charge Slips subject to Chargeback exceeds three percent (3.0%) of the total number of all Charge Slips submitted by Merchant, with respect to an individual location or al Merchant locations, in any calendar quarter; or (ii) the aggregate dollar amount of all Charge Slips subject to Chargeback in any monthly billing cycle exceeds five percent (5.0%) of the total unpaid balances of all Accounts at the end of such monthly billing cycle."

B. Grounds for Termination of Contract.

7. On information and belief, at the time that HC Processing and BCV entered into the Contract, BCV owned or controlled 87 separate store locations across the United States at which BCV used the Program to sell, and finance payment in advance for, treatment plans for BCV's customers, accounting for about half of all of BCV's sales. However, as attested to in the First Day Declaration of BCV's President Richard Morgan [Docket No. 22], since late August 2018 BCV has rapidly closed 62 of those stores, leaving only 25 store locations remaining.

8. These store closings since August 2018 have generated substantial Chargebacks under the Contract, as customers in certain former store locations have not been able to complete the treatment plans they financed or have other complaints caused by the store closings.

9. At the time BCV filed for bankruptcy on February 22, 2019, BCV was already liable to HC Processing and the Bank for more than $280,000 in Chargebacks, which already meets the definition of "Excessive Chargebacks" under Section 8 of the Terms of Service section of the Contract and allows HC Processing to terminate the Contract pursuant to Section 17(b) of those same Terms of Service. However, this figure is only a preliminary figure, and HC Processing expects the total Chargebacks resulting from the 62 prior store closings will ultimately balloon to between $500,000 and $1 million.

10. In addition to Excessive Chargebacks, other grounds which are present for terminating the Contract under Section 17(b) of the Terms of Service include, but are not necessarily limited to, BCV's filing for bankruptcy and BCV's inability to maintain sufficient funds in the Transaction Processing Account as provided for in the Contract (which is meant to protect HC Processing's ability to debit that account in order to recover Chargebacks).

11. In addition, pursuant to Section 17(c) of the Terms of Service section of the Contract, HC Processing has the right to terminate the Contract based on the 62 prior store closings, which have "materially affect[ed] the volume of Card Sales generated by Merchant" within the meaning of that section.

12. The foregoing list of grounds for termination of the Contract is not meant to be exhaustive. The point here is that BCV has not been able to meet its obligations to HC Processing or the Bank under the Contract for some time leading up to the bankruptcy and will not be able to meet those obligations during the bankruptcy either.

C. Risk to HC Processing of Continuing To Extend Financing Through the Program.

13. As stated above, HC Processing expects that Chargebacks based on previously financed customer treatment plans that BCV no longer has the ability to service (after having closed 62 former locations) will ultimately balloon to between $500,000 and $1 million.

14. Applying historical data regarding the percentage of BCV treatment plan sales typically financed through the Program to the 13-week forecasted sale revenue projections in BCV's DIP cash flow forecast for the 25 remaining stores [Docket No. 53], BCV could attempt to finance another $2 million or more in treatment plan sales through the Program between now and the end of May 2019 if the Contract is not terminated. All of this $2 million carries with it the risk of additional Chargebacks (beyond those already existing) for which HC Processing risks being left "holding the bag" if BCV cannot financially back-stop or otherwise honor its obligations of guaranty under the Contract to be liable for the Chargebacks.

15. The main purpose and goal of BCV's bankruptcy appears to be to survive just long enough to get to a credit bid sale (*i.e.*, no cash for existing creditors) in May to a group of existing investors now acting as the DIP Lender. In the Interim DIP Order [Docket 71], the DIP

Lenders have been provided all sorts of special protections to mitigate their risk of loaning up to $1.7 million into this process, even though it benefits them. Yet BCV has not sought Court approval for any similar protections for the roughly $2 million BCV is assuming (in its sales forecasts) that HC Processing will finance through the Program between now and the sale.

16. Moreover, as attested to in the Morgan Declaration [Docket No. 22], BCV has "little, if any, credit available from trade and other vendors and [is] operating on a COD or CIA basis with most vendors." BCV is clearly not creditworthy, as its trade vendors have already determined.

17. Thus, if the Contract is not terminated and if HC Processing is not provided adequate protections for continued financing, HC Processing will either not continue to fund new sales under the Contract or else will shoulder a disproportionate risk of growing losses compared to either the DIP Lenders or BCV's trade creditors.

II. ARGUMENT

A. Termination of the Contract is Not Subject To the Automatic Stay.

18. The Bankruptcy Code provides special treatment for financial accommodation contracts such as the Contract. In relevant part, 11 U.S.C. § 365(c)(2) forbids a bankruptcy trustee or debtor-in-possession from assuming an executory contract if the contract "is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor[.]" Thus, the ordinary rules that allow debtors-in-possession some breathing space to determine whether or not to assume or reject executory contracts do not apply to financial accommodation contracts. Moreover, 11 U.S.C. § 365(e)(2)(B) permits the non-debtor party to a financial accommodation contract to terminate the contract solely because a bankruptcy was filed

if the contract itself treats the filing of a bankruptcy as grounds for termination (as Section 17(b) of the Terms of Service section of the Contract does here).

19. The Sixth Circuit Court of Appeals has explained the purpose of the foregoing provisions as follows:

> Section 365(c)(2) is designed "to protect a party to a contract from being forced to extend cash or a line of credit to one who is a debtor under the Bankruptcy Code." 1 Collier Bankruptcy Manual ¶ 365.02[2], at 14–15 (3d ed.1995). Thus, the trustee "may not force a creditor into the untenable position of having to extend straight cash to an insolvent debtor." Id. at 15. See also H.R.Rep. No. 595, 95th Cong., 2d Sess. 348, reprinted in 1978 U.S.C.C.A.N. 5963, 6304 ("The purpose of [section 365(c)], at least in part, is to prevent the trustee from requiring new advances of money or other property. The section permits the trustee to continue to use and pay for property already advanced, but is not designed to permit the trusee [sic] to demand new loans or additional transfers of property under lease commitments."); 2 Norton Bankruptcy Law and Practice 2d § 39:19, at 58–59 (1994) (section 365(c)(2) "fully protects the third party lender suddenly faced with a credit agreement involving a debtor in bankruptcy, where the initial agreement was based at least in part on the financial strength of the debtor.").

Tully Constr. Co. v. Cannonsburg Envt'l. Assocs. (In re Cannonsburg Envtl. Assocs., Ltd.), 72 F.3d 1260, 1266 (6th Cir. 1996); *see also In re Marcus Lee Assocs., L.P.*, 422 B.R. 21, 35 (Bankr. E.D. Pa. 2009) ("[S]ection 365(c) and (e) prevents a trustee or chapter 11 debtor in possession from assuming a prepetition lending agreement under section 365(a) and permits the lender to decline to advance postpetition funds, even if the lender had a pre-bankruptcy contractual obligation to do so.").

20. Here, not only did BCV expressly agree in the Contract itself that the Contract is a financial accommodation contract, but the Program offered by HC Processing to BCV under the Contract actually functions in practice in a way that courts have previously held to constitute financial accommodations "to or for the benefit of the debtor" within the meaning of Section 365

of the Bankruptcy Code. For example, an analogous case is presented by *Transamerica Commercial Fin. Corp. v. Citibank, N.A. (In re Sun Runner Marine, Inc.)*, 945 F.2d 1089 (9th Cir. 1991). In *Sun Runner*, the debtor had an agreement with Transamerica wherein Transamerica would lend money to the debtor's customers so that they could buy boats from the debtor. Under the agreement, Sun Runner had obligations to Transamerica in the event a customer did not pay back its loan from Transamerica similar to BCV's obligations to protect HC Processing and the Bank from Chargebacks under the Program. During the debtor's bankruptcy, Transamerica argued that the agreement was not a financial accommodation contract within the meaning of the Bankruptcy Code because Transamerica made no loans directly to the debtor under the terms of the agreement. The Ninth Circuit Court of Appeals rejected the argument and held that the agreement was a financial accommodation with the meaning of the Code. The Court should reach the same conclusion here.

21. Accordingly, for the reasons set forth above, the Court should enter an order confirming that termination of the Contract is not subject to the automatic stay.

B. In the Alternative, the Court Should Grant HC Processing Relief From the Stay to Terminate the Contract.

22. Alternatively, 11 U.S.C. § 362(d) allows the Court to grant relief from the stay for cause, including a lack of adequate protection. In determining whether a party has established cause sufficient to lift the automatic stay, bankruptcy courts typically conduct a case-by-case analysis to determine whether the movant has established that "the balance of hardships from not obtaining relief tips significantly in [its] favor." *Atl Marine, Inc. v. Am. Classic Voyages, Co. (In re American Classic Voyages, Co.)*, 298 B.R. 222, 225 (D. Del. 2003). The party seeking relief from the automatic stay need only establish a prima facie case of cause for relief. *See, e.g.*, *Joyner Auto World v. George (In re George)*, 315 B.R. 624, 627 (Bankr. S.D. Ga. 2004)

(citations omitted). Once this prima facie case is established, "the burden shifts to the debtor to prove cause does not exist." *Id.* If cause is established, the court must grant relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1) (stating that a court "shall" lift the automatic stay upon a showing of cause). *See also In re Zeoli*, 249 B.R. 61, 63 (Bankr. S.D.N.Y. 2000) (noting that relief from the automatic stay is "mandatory" if the statutory grounds for relief have been established).

23. Here, the facts set forth above establish a prima facie case for cause to allow HC Processing to terminate the Contract, whether or not the Court determines that the Contract constitutes a financial accommodation contract within the meaning of Section 365 of the Bankruptcy Code. Specifically, the facts establish that:

- BCV has already closed 62 of its 87 store locations since the Contract was entered into less than a year ago, causing massive Chargebacks under the Contract that may balloon up to $1 million;
- BCV cannot provide services to many existing customers that have already paid in advance for treatment plans using financing through the Program;
- 11 days into its bankruptcy, BCV has not sought Court approval for any adequate protections for HC Processing, which is one of BCV's major sources of financing and accounts for about half of all of BCV's sales, yet BCV may seek to create an additional $2 million or more worth of exposure to HC Processing for Chargebacks over the course of the next 13 weeks without any such protections in place simply to facilitate a credit bid sale to a group of its existing investors;

- If the Contract is not terminated, the risk of growing exposure during the bankruptcy is disproportionately borne by HC Processing as compared to the DIP Lenders and trade creditors who are requiring COD or CIA terms.

24. Accordingly, the Court should enter an order granting HC Processing relief from the automatic stay to terminate the Contract.

III. CONCLUSION

25. For all of the foregoing reasons, HC Processing respectfully requests that the Court grant the Motion.

Respectfully submitted,

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