AMERICAN BANKRUPTCY INSTITUTE

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Cutting-Edge Issues in Avoidance Actions

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CONCURRENT SESSION

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2018 ABI Southwest Bankruptcy Conference
"Cutting Edge Issues in Avoidance Actions"

Panelists: Hon. Elaine Hammond, Northern District of California Bankruptcy Court
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I. STANDING ISSUES

A. What Happens When a Bankruptcy Trustee is Unwilling to Pursue a Fraudulent Transfer Claim?

This issue arises in two distinct contexts. In certain cases, for a variety of different reasons, a Chapter 7 trustee may be hesitant to pursue a fraudulent transfer claim even though your creditor client believes it is a viable one. The other time this issue arises is when a Chapter 11 debtor refuses to do so either because the debtor-in-possession doesn't believe the claim is worth pursuing or doesn't want to for personal or business reasons.

In the former case, one option available to a creditor is to ask for the appointment of an alternative trustee at the first meeting of creditors. This rarely used option provides a creditor with the absolute right to have an alternative trustee appointed as long as the statutory requirements are met, which includes demonstrating that the petitioning creditor possesses at least 20% of the claims and the proposed trustee is otherwise qualified. *See* 11 U.S.C. § 702.

The other alternative, which is one rarely used, allows a creditor in certain instances to request the abandonment of the claim if the trustee is otherwise unwilling to pursue it even with the assistance and encouragement of the creditor. In certain instances, if the trustee concedes that the claim has no value for the estate, the Court will allow for the abandonment of the claim back to the creditor, which under State law would normally have the right to pursue it.

The majority of the Federal Circuit Courts of Appeal have allowed creditors to pursue fraudulent transfer claims when; 1) the Bankruptcy Court approves the creditor's standing; 2) the trustee is unwilling or unable to assert the claim or causes of action on behalf of the estate; and 3) allowing the creditor to pursue the claims is likely to benefit the estate.

Instead of trying to pursue the claim in a Chapter 11, a more common option is for the creditor to request either the appointment of an independent trustee for the Chapter 11 case or even conversion in extreme cases to a Chapter 7. Interestingly enough, a Chapter 11 debtor's attorney needs to be very cognizant of this possibility when filing a Chapter 11 case. Inexperienced lawyers oftentimes forget that their clients are reposed with an absolute statutory duty to take appropriate steps to maximize recovery for creditors and ignoring potential recovery, either because of a preferential or fraudulent transfer, can lead to the unpleasant result of having a Chapter 11 trustee assigned or even the case being converted.

This of course forces a lawyer from the onset to have to consider whether it even makes sense to ever try to place an individual into a Chapter 11 bankruptcy if that individual has engaged in extensive transactions with insiders or friendly parties which could trigger preferential or fraudulent transfer claims. It's very difficult to successfully convince creditors or a bankruptcy judge that your client is dealing in good faith when target defendants consist of family members or individuals with close personal relationships with the debtors.

It's not impossible to successfully represent debtors in such a situation, but it is absolutely crucial that you recognize the sensitivity of the situation.

B. When Can a Creditor Pursue a Fraudulent Transfer Claim Even if the Trustee Has Done So?

Since a bankruptcy trustee is empowered to pursue fraudulent transfer claims implemented by the debtor, creditors pursuing those claims pre-bankruptcy usually have to defer to the trustee and are no longer allowed to pursue such claims. In certain cases, this can be very frustrating to the creditor, especially in cases in which the creditor does not believe that the trustee has exhausted all recourse.

In this situation, the creditor cannot rely upon arguments that the trustee has abandoned such claims since the trustee has not.

Though there is little case law on this issue, the case law all suggests that a creditor is limited from bringing those claims to circumstances in which the claims against third parties transferees are not based upon fraudulent transfer or similar theories.

Judge Haines, in Hoyt v. Aerus Holdings, L.L.C., 447 B.R. 283 (Bkrtcy. D. Ariz. 2011), prevented creditors from pursuing third parties and concluded that claims owned by the bankruptcy trustee could not be pursued by those creditors unless the bankruptcy trustee has abandoned those claims. He so ruled in the face of creditor arguments that the claims being pursued by them could be differentiated from traditional fraudulent transfer claims.

II. SECTION 546(E): SAFE HARBOR PROVISIONS

A. Background

The Bankruptcy Code protects certain transferees from suffering avoidance and recovery of pre-petition transfers in certain financial transactions. One of those protections is 11 U.S.C. § 546(e).

Section 546(e) protects from avoidance (i) margin payments and settlement payments when the payment is made by, to, or for the benefit of a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, and (ii) transfers by, to, or for the benefit of those parties in connection with a securities contract, commodity contract, or forward contract. It does not protect any transfer that is made with actual intent to hinder, delay, or defraud creditors. Section 546(e) provides:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section

761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

As courts have recognized, the safe harbor's purpose is to "protect[] the market from systemic risk and allow[] parties in the securities industry to enter into transactions with greater confidence" – to prevent "one large bankruptcy from rippling through the securities industry." *Grede v. FCStone, LLC*, 746 F.3d 244, 252 (7th Cir. 2014).

Defendants have creatively invoked section 546(e) in response to fraudulent transfer and preference attacks. Much litigation has surrounded whether the defendant invoking section 546(e) qualifies as one of the parties subject to the safe harbor, whether the payment is a settlement payment, and whether a transfer even occurred. While section 546(e) is not limited in application to leveraged buyouts, this litigation has often arisen in the context of leveraged buyouts. *Compare Kaiser Steel Corp. v. Pearl Brewing Corp. (In re Kaiser Steel Corp.)*, 952 F.2d 1230 (10th Cir. 1991) (*held*, consideration paid to shareholders for stock in connection with LBO were "settlement payments" protected by section 546(e) safe harbor), *cert. denied*, 112 S. Ct. 3015 (1992); *Lowenschuss v. Resorts Int'l, Inc. (In re Resorts Int'l, Inc.)*, 181 F.3d 505, 514-16 (3d Cir. 1999) (same); *Quality Stores, Inc. v. Alford (In re QSI Holdings)*, 571 F.3d 545, 550 (6th Cir. 2009) (*held*, payments to selling shareholders in LBO of privately held securities insulated by § 546(e)); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009) (same); *with Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604, 610 (11th Cir. 1996) ("regardless of whether the payments [to shareholders] qualify as settlement payments, section 546(e) is not applicable since the LBO transaction did not involve a transfer to one of the listed protected entities"; intermediary bank was not a transferee because it never obtained beneficial interest in payments to shareholders), *cert. denied*, 118 S. Ct. 738, *and cert. denied*, 118 S. Ct. 739 (1998).

Avoidance action defendants should evaluate at the commencement of the action whether they have an argument that section 546(e) insulates them from having to disgorge payments that may otherwise qualify as fraudulent transfers or preferences.

B. Recent Developments

The Seventh Circuit recently joined the Eleventh Circuit and split with the Second, Third, Sixth, Eighth, and Tenth Circuits by holding that financial institutions serving as a mere conduits cannot insulate an ultimate transferee from avoidance risk when neither the debtor nor the ultimate transferee falls under the safe harbor protection of section 546(e). The U.S. Supreme Court will resolve:

In *FTI Consulting, Inc. v. Merit Management Group, LP*, 830 F.3d 690 (7th Cir. 2016), the Seventh Circuit held that a transfer that occurs through a mere conduit qualifying for protection under section 546(e) does not protect the transfer from avoidance when neither the debtor nor the true transferee qualifies for protection under the safe harbor. There, the debtor purchased shares of another entity before it commenced a bankruptcy case. Neither the debtor nor the selling shareholder was a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that would be subject to

protection from avoidance under section 546(e). But the parties conducted the equity purchase through Citizens Bank of Pennsylvania, as escrow agent, and borrowed money from Credit Suisse and other lenders to pay for the equity. The litigation trustee appointed in the debtor's bankruptcy case sued the selling shareholder, alleging that the transaction was a fraudulent transfer, and sought to avoid and recover the purchase price. In response, the selling shareholder argued that because the transfer was made through Citizens Bank and Credit Suisse was involved, the transfer was made "by or to" a financial institution and thus protected by the safe harbor. Relying on its prior decision in *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890 (7th Cir. 1988), the Seventh Circuit held that the selling shareholder did not qualify as a "transferee" entitled to protection under section 546(e), as the intermediate financial institution never had "dominion over the money" or "the right to put the money to [its] own purposes." *FTI Consulting,* 830 F.3d at 695. Neither the debtor nor the selling shareholder were "parties in the security industry"; they were "simply corporations that wanted to exchange money for privately held stock." *Id.*, at 696. The Seventh Circuit thus refused to "interpret the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds." *Id.*

The Seventh Circuit's decision departs from decisions of the Second, Third, Sixth, Eighth, and Tenth Circuits, which interpret section 546(e) to include transfers through conduits as protected. *In re Quebecor World (USA) Inc., 719 F.3d 94* (2d Cir. 2013); *In re Resorts Int'l, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999); *In re QSI Holdings, Inc.*, 571 F.3d 545, 551 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009); *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 (10th Cir. 1991). The Seventh Circuit's decision is in line with the Eleventh Circuit. *Matter of Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996).

The U.S. Supreme Court recently affirmed the Seventh Circuit ruling, unanimously holding that, in construing the "safe harbor" of Bankruptcy Code section 546(e), the only relevant transfer is the overarching transfer that the trustee seeks to avoid; the mere presence of a "financial institution" in the component parts of the transaction does not trigger application of the safe harbor. *Merit Management Group, L.P. v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018).

III. VALUATION OF AVOIDANCE ACTIONS

Sample motion attached.

IV. FRAUDULENT TRANSFER ISSUES

A. IRS 10-Year Lookback Period

When a trustee brings a claim under § 544(b), he or she is "standing in the shoes" of an existing creditor with an actual claim who could avoid the transfers in question. *See Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). Section 544(b) confers no greater rights on a trustee than a creditor would have against the defendant under state law. Thus, if the applicable statute of limitations would bar a creditor from bringing an action on the petition date, then the trustee is also barred. *See Rosania v. Haligas (In re Dry Wall Supply, Inc.)*, 111 B.R. 933, 936 (D. Colo. 1990).

Under the Uniform Fraudulent Conveyance Act, a fraudulent transfer claim must be brought within four years from the transfer date, or, if the claim alleges actual fraudulent intent, within the later of four years from the transfer date or one year after the transfer could reasonably have been discovered by the claimant. However, when the IRS is an actual unsecured creditor of the debtor, the trustee may stand in the shoes of the IRS. The IRS is a sort of "super creditor" that, under federal law, is not bound by state statutes of limitation. *United States v. Spence*, 2000 WL 1715216 at *3 (10th Cir. Nov. 15, 2000) ("[T]he United States is not bound by state statutes of limitation . . . in enforcing its rights."). The Internal Revenue Code allows the IRS to collect outstanding tax liability from a transferee of property of the delinquent taxpayer. *See* 26 U.S.C. § 6901(a)(1)(A); *Scott v. Commissioner*, 236 F.3d 1239, 1241 (10th Cir. 2001). In doing so, the IRS must first establish liability under applicable state law, such as a fraudulent transfer statute. *Scott*, 236 F.3d at 1241. Then the Internal Revenue Code replaces the state statute of limitation with its own time deadline unrelated to the date of transfer. The IRS's collection efforts are governed by 26 U.S.C. § 6502(a), which gives the government "ten years from the date of the [tax] deficiency assessment to institute a proceeding to collect on the assessment." *Spence*, 2000 WL 1715216 at *3.

A majority of courts that have the addressed this issue agree that a trustee pursuing claims under § 544(b) may invoke the Internal Revenue Code's longer statute of limitations so long as the IRS is an actual unsecured creditor in the debtor's case. *See Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697, 711-12 (Bankr. N.D. Ill. 2014); *Alberts v. HCA, Inc. (In re Greater Se. Cmty. Hosp. Corp. I)*, 365 B.R. 293, 304 (Bankr. D.D.C. 2006); *Shearer v. Tepsic (In re Emergency Monitoring Technologies, Inc.)*, 347 B.R. 17, 19 (Bankr. W.D. Pa. 2006); *G-I Holdings, Inc. v. Those Parties Listed on Exhibit A (In re G-I Holdings, Inc.)*, 313 B.R. 612, 635 (Bankr. D.N.J. 2004); *Osherow v. Porras (In re Porras)*, 312 B.R. 81, 97 (Bankr. W.D. Tex. 2004).

At least one court has disagreed with these holdings, concluding that it was not Congress' intent in passing § 544(b) to vest a bankruptcy trustee with the sovereign powers of the IRS. *Wagner v. Ultima Homes, Inc. (In re Vaughn Co.)*, 498 B.R. 297, 304-05 (Bankr. D. N.M. 2013). The *Vaughn Co.* court engaged in an extensive analysis of the policy behind statutes of limitation like 26 U.S.C. § 6502, such as the protection of sovereign immunity. The court concluded that, since those policy purposes are not present when a trustee invokes § 544(b), the trustee should not have the benefit of the longer statute of limitations.

On the other hand, the plain language of § 544(b) refers to the trustee having the power to avoid transfers that are voidable under "applicable law." 11 U.S.C. § 544(b)(1) There is no indication that this phrase is limited to state law. In fact, the Supreme Court has held that this same phrase used in another statute of the Bankruptcy Code is not limited to state law. *See Patterson v. Shumate*, 504 U.S. 753, 758 (1992). Nor is there any prohibition against the IRS serving as the "creditor holding an unsecured claim" in § 544(b). 11 U.S.C. § 544(b)(1); *see also In re Kaiser*, 525 B.R. at 714 (rejecting *Vaughn Co.* court's analysis).

B. Dominion & Control Test for Determining Initial vs. Subsequent Transferee Status

When a trustee avoids a transfer as a fraudulent conveyance, a preference, an unauthorized post-petition transfer, or otherwise, §550(a) specifies from whom he may recover. His recovery may be from "(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee." Whether a transferee falls into the first or second camp is significant. Section 550(b)(1) provides defenses to the latter group that are not available to the former. It limits the trustee's recovery rights by prohibiting recovery from immediate or mediate transferees of the initial transferee that take "for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided." 11 U.S.C. §550(b)(1). The good faith exception is available only to an "immediate or mediate transferee." *Id*. The "initial transferee" and the "entity for whose benefit such transfer was made" are strictly liable, regardless of good faith, value, or lack of knowledge of the voidability of the transfer. *Rupp v. Markgraf*, 95 F.3d 936, 938 (10th Cir. 1996); s*ee also Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190, 1195 (10th Cir. 2002).

The Bankruptcy Code does not define the term "initial transferee." The Tenth Circuit has adopted the definition set forth by the court in *Bonded Financial*, which holds that the initial transferee is the first party to exercise dominion and control over the money or other asset. *Malloy v. Citizens Bank (In re First Sec. Mortgage Co.)*, 33 F.3d 42 (10th Cir. 1994). In the case of funds on deposit, dominion and control has been defined as "the right to put the money to one's own purposes." *Id.* at 44 (quoting *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988); s*ee also Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190, 1202 (10th Cir. 2002); *Rupp v. Markgraf*, 95 F.3d 936 (10th Cir. 1996).

Bonded Financial is, in many respects, the seminal decision in this area. In this case, Ryan was a person in control of a number of companies. He had obtained a personal loan from the defendant bank to be used as working capital for one of his companies. He caused a second company, Bonded Financial, to issue its check, payable to the bank, and sent the check to the bank with a note, directing the bank to deposit the money into his personal account at this same bank. He later instructed the bank to apply those same funds from his account to the loan. When Bonded Financial filed bankruptcy, its trustee sought to recover the loan payment from the bank as a fraudulent conveyance.

The *Bonded Financial* court could have simply viewed this transaction as a payment from Bonded Financial to the bank on account of the bank loan, which payment was for Ryan's benefit. Then clearly the bank would have been the initial transferee. Instead the court viewed this as two separate transactions. The first transaction was the transfer of funds by check from Bonded to Ryan, which were deposited into Ryan's account. It held that, because Ryan had sent a note to the bank, directing it to deposit the funds in his account, the bank had merely followed his instructions and had not exercised control over the funds. Then a second transfer occurred when the bank, acting on Ryan's later instructions, withdrew the funds from the account and applied them to the indebtedness. The court held that the bank acted only as an intermediary in

the first transaction and Ryan was the initial transferee. When the bank applied the funds to the loan, it was a subsequent transferee, entitled to assert the good faith exception.

In *First Security Mortgage Co.*, the debtor company's funds were deposited into an attorney's trust account. While it does not state so expressly, it appears that the attorney disbursed the funds for his own purposes. After the company filed bankruptcy, the trustee sued the bank as the initial transferee to recover the debtor's funds, claiming a fraudulent conveyance. Adopting the reasoning of *Bonded Financial,* the Tenth Circuit held that the bank was a mere conduit, not the initial transferee.

In *Ogden,* a real estate developer had engaged in a Ponzi scheme. He placed some of the investor money in an escrow account with a title company. The escrow company released funds back to two investors. The bankruptcy trustee sued these investors to recover the funds as a preferential transfer. They defended in part by claiming that the title company was the initial transferee. The Tenth Circuit found the investors to be the initial transferees and held that the title company was a mere conduit.

In *Rupp v. Markgraf*, the wife of the company's principal caused the bank to issue a cashier's check, drawn on the debtor company's account, to pay the principal's obligation. In the trustee's suit to recover this prepetition payment, the Tenth Circuit held that the bank was a mere conduit. It held the principal liable under §550(a)(1). While the principal was not the initial transferee, he was the person for whose benefit the transfer was made. The funds were never in his account, he was not the payee or the remitter of the cashiers' check, and he could not personally access the funds, but they were used to pay his debt. The Tenth Circuit deemed the Markgrafs, who were owed money by the principal, and who were the recipients of the cashier's check, to be the initial transferees.

In a recent Ninth Circuit decision, *Matter of Walldesign, Inc.*, 872 F.3d 954 (9th Cir. 2017), the Court ruled that a corporation's sole shareholder, director and president who causes his corporation to transfer company funds from a corporate bank account does not have "dominion" over those funds in his personal capacity. The principal created an account in the corporation's name and deposited rebate checks derived from the products that the corporation sold into the account. The account monies were then used to fund the president's "lavish lifestyle." In fraudulent transfer suits that followed to avoid and recover the payments for personal use from the account, the bankruptcy court held that the recipients of the payments were not initial transferees under § 550, but were instead protected by the safe harbor of § 550(b)(1). Abrogating the previous decisions of *Ross v. John Mitchell, Inc. (In re Dietz)*, 94 B.R. 637 (9th Cir. BAP 1988), *aff'd* 914 F.2d 161 (9th Cir. 1990), and *Poonja v. Charles Schwab & Co., Inc. (In re Dominion Corp.),* 199 B.R. 410 (9th Cir. BAP 1996), the Ninth Circuit disagreed. It held that the recipients of the personal use payments from the company's accounts were strictly liable as initial transferees, adopting the Seventh Circuit's decision in *Bonded*. Because the principal never had legal control, and thus dominion, over the funds, the Ninth Circuit held he could not be the initial transferee.

In *Still v. American National Bank & Trust Co. (In re Jorges Carpet Mills, Inc.)*, 50 B.R. 84 (Bankr. E.D. Tenn. 1985), the principal of the debtor withdrew funds from the debtor

company post-petition by means of a cashier's check drawn on the company's account. He gave it to his bank to repay his personal loan. The bank had no knowledge that the funds came from the company because the cashier's check showed the principal as its remitter. The court held that the principal, not the bank, was the initial transferee. *See also Brown v. Harris (In re Auxano, Inc.)*, 96 B.R. 957 (Bankr. W.D. Mo. 1989).

Some commentators have criticized the courts for making their interpretations of §550(a)(1) fit a certain result, without remaining faithful to the statutory language. *See* Larry Chek and Vernon O. Teofan, *"The Identity and Liability of the Entity For Whose Benefit a Transfer is Made Under Section 550(a): An Alternative to the Rorschach Test,"* 4 J. BANKR. L. & PRAC. 145 (1995). However, recognizing the difference between a transferee and an intermediary, developed in *Bonded Financial,* and adopted by many circuits, was itself a judicially-created exception to the literal language of §550. In doing so, the court cautioned against the practice of many bankruptcy courts in relying on "equity" to relieve a transferee from a literal construction that they perceived as inequitable. But in acknowledging that the definition of a "transferee" was susceptible to varying interpretations, it acknowledged that a court could remain faithful to the language of the statute and still embrace an interpretation that "employed considerations of policy to *define* 'transferee' under §550(a)(1)." *Bonded Fin. Servs. v. European Am. Bank,* 838 F.2d 890, 895 (7th Cir. 1988). Yet it cautioned further that "[d]oubts about this use of equity do not imply that courts should take 'transferee' for all it could be worth rather than for what a sensible policy implies it is worth." *Id.*

Many years before this judicial exception arose, in *Bank of Marin v. England,* 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966), the Supreme Court confronted a case in which the defendant bank had been sued as a transferee for honoring prepetition checks post-petition. The court did not articulate the conduit distinction, but instead ruled that the language of §70d, §550's predecessor under the former Bankruptcy Act, was not to be strictly applied when to do so would yield an inequitable result. "Yet we do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Id.,* 385 U.S. at 103. Thus, any interpretation of "transferee" must reflect sound policy. The primary focus of all of these cases is on identifying the first party who has, or could have, exercised dominion and control over the asset and holding that party to be the initial transferee.

C. Indirect Benefit of Transfer

Section 548(a)(1)(B) allows the trustee to recover "constructive fraudulent conveyances," which are transfers made by the debtor or obligations incurred by the debtor in the two-year window preceding the bankruptcy filing if the debtor received "less than a reasonably equivalent value in exchange" and the transfer or obligation occurred when the debtor was insolvent, rendered insolvent, or somehow was in the zone of insolvency. In analyzing "reasonably equivalent value" or "REV," the court may consider both direct and indirect benefits received. *In re Image Worldwide, Ltd.,* 139 F.3d 574, 576 (7th Cir. 1998). In other words, when a particular transaction directly benefits a third party instead of the debtor, the transferee may attempt to defend on the basis that the debtor received an indirect benefit equivalent to value the debtor gave. The problem with indirect benefits is the difficulty in quantifying their value. The

transferee has the ultimate burden of proof to establish their value. *In re Wes Dor,* 996 F.2d 237 (10th Cir. 1993).

It is not uncommon for affiliated companies to enter into transactions that are intended to benefit the group of companies as a whole, but which a trustee of a particular company may question as to whether his debtor received REV. The value given by the debtor often takes the form of a co-maker's liability on a promissory note, a guarantee, or a pledge of assets to support the loan of the affiliate. If not all of the loan proceeds are distributed to the debtor, then the issue of REV value arises.

With guarantees, it is important to consider the type of guarantee. They fall into three categories: "'upstream,' 'downstream,' and 'cross-stream.' An upstream guarantee is when a subsidiary guarantees the debt of its parent; a downstream guarantee is when a parent corporation guarantees a debt of its subsidiary; a cross-stream guarantee is when a corporation guarantees the debt of an affiliate." *In re Image Worldwide, Ltd.,* 139 F.3d at 577. Theoretically, when a parent company guarantees its subsidiary's debt, it receives REV because the value of its asset, its stock in the subsidiary, is enhanced. But with the upstream guarantee of the subsidiary of the parent's debt, the subsidiary does not normally realize any direct value from the transaction.

With upstream and cross-stream guarantees, the subsidiary may still realize indirect benefits. The *Image Worldwide* court identified several examples:

- A strengthening of the corporate group as a whole, resulting in "synergy" in the business model;
- Increased borrowing power for working capital;
- Safeguarding an important source of supply or an important customer of the guarantor;
- Ability of a smaller company to use the distribution system of a larger affiliate;
- Intangibles, such as increased good will; and
- The ability to remain in shared leased premises at below market rates.

In general, courts will not recognize an indirect benefit unless it is "fairly concrete." *Id.* at 578 (*citing Heritage Bank Tinley Park v. Steinberg (In re Grabill Corp.),* 121 B.R. 983, 995 (Bankr. N.D. Ill. 1990)). And the transferee must establish its value. *See In re Wes Dor, Inc.,* 996 F.2d 237, 242 (10th Cir.1993). The question of valuation under § 548(a) is "largely a question of fact, as to which considerable latitude must be allowed to the trier of the facts." *In re Hannover Corp.,* 310 F.3d 796 (5th Cir. 2002) (*citing In re Dunham,* 110 F.3d 286, 290 (5th Cir.1997)). That being said, "we review *de novo* the methodology employed by the bankruptcy court in assigning values to the property transferred and the consideration received." *Id.* at 801.

The value of the indirect benefit is to be judged as of the date of the transaction, not with hindsight. Money spent on an investment bearing a certain degree of risk may generate value within the meaning of § 548(a)(2) of the Code, "even where the investment ultimately fails to generate a positive return." *In re R.M.L., Inc.,* 92 F.3d 139, 151 (3d Cir. 1996). In *In re Hannover Corp., supra,* the debtor was attempting to put together a large real estate development and wanted to include the transferee's land. The debtor acquired an option to buy the land and made payments to the transferee to maintain that option. Later the debtor began operating a

Ponzi scheme and eventually filed bankruptcy. Its trustee sued to recover the option payments. First, the Fifth Circuit held that it would not establish a blanket rule that an exchange of cash for a future right of exercise lacked value. "To do [so] would require rejection . . . [of] options markets." *Id.* at 801. "To determine whether the debtor received 'value,' . . . courts must consider the circumstances that existed at the time and determine if 'there was any chance that the investment would generate a positive return.' If there was no such chance at the time of the transfers that the payments would generate a positive return, then no value was conferred." *Id.* The court also held that a determination of value under § 548(a) must be made from the transferor's perspective, whereas a determination of value under § 548(c) must be viewed from the transferee's vantage point. *Id.* at 802. Thus, the "transferor's practical inability to exercise his option is irrelevant to its valuation under § 548(c)" *Id.* at 803.

In *In re R.M.L., Inc., supra,* the trustee sued to recover a $515,000 loan commitment fee the debtor had paid for a $53 million credit facility. It was undisputed that the fee charged was consistent with the "going rate" for this size of loan and that the mere opportunity of receiving such a credit facility conferred value on the debtor. However, the court upheld the bankruptcy court's finding that the chances of loan approval were so negligible given the numerous conditions imposed, which the debtor had no real chance of satisfying, that the value the Bank gave did not constitute REV. "The touchstone is *whether the transaction conferred realizable commercial value on the debtor* reasonably equivalent to the realizable commercial value of the assets transferred." *Id.* at 149. "The purpose of the [fraudulent conveyance] laws is estate preservation; thus, the question whether the debtor *received* reasonable value must be determined from the standpoint of the creditors." *Id.* at 150. "[T]he mere expectation that [an investment] would produce a [substantial benefit] (an expectation that turned out to be inaccurate in hindsight) would suffice to confer 'value' so long as the expectation was '*legitimate and reasonable.*'" *Id.* at 152 (emphasis in original).

In *In re Wilkinson,* 196 Fed. Appx. 337 (6th Cir. 2006) (not selected for official publication), the trustee offered a novel approach to valuation. In this case, the individual debtor paid $1 million to the creditor of his company. No one disputed that the debtor was indebted to his company for several million dollars. Thus, his payment of the company's debt resulted in a dollar-for-dollar reduction of his own debt, which satisfied § 548(d)(2)(A)'s definition of value. However, the trustee argued that the creditors of the debtor's bankruptcy estate, based on the proofs of claim filed, would only receive at best less than a 12% distribution. Thus, any extinguishment of unsecured debt attributable to this transfer of $1 million should only be valued at 12% of its face amount. Both the bankruptcy court and the circuit court rejected this approach to valuation. It stated that the Bankruptcy Code expressly includes the satisfaction of a present or antecedent debt as value. And his argument "ignores the fact that Wilkinson's net worth remained the same after the transfer, at negative $308 million. The district court rightly stated that "the focus should be on the overall effect on the debtor's net worth after the transfer." *Id.* at 343. *See also In re Northern Merchandise, Inc.,* 371 F.3d 1056, 1059 (9th Cir. 2004).

One of the clearest cases of indirect benefit is found in *In re PSN USA, Inc.,* 615 Fed. Appx. 925 (11th Cir. 2015). The trustee sought to recover payments made by the debtor on its parent's contract with a satellite service provider. Admittedly, the debtor was not a party to the contract and had no legal obligation to make these payments. However, the parent could not

avail itself of these services as it was not permitted to do business in this country. All of the services were for the benefit of the debtor. Under these circumstances, the court concluded that the parent and the debtor shared an identity of interests, such that any benefit the parent received under the contract also indirectly benefited the Debtor. *Id.* at 927.

On the other hand, courts have refused to find an indirect benefit when the transfer was in exchange for "preserved family and marital relationship," a "moral obligation," "love and affection," or "spiritual fulfillment." *In re Bargfrede,* 117 F.3d 1078, 1080 (8th Cir. 1997).

V. PREEFERENCE ISSUES

A. Ordinary Business Terms Test Under Bankruptcy Code Section 547(c)(2)(B)

Section 547(c)(2) provides potential defenses to avoidance of preferential payments for what have become known as the "subjective test" under subsection (A) and the "objective test" under subsection (B). The subjective test solely concerns transactions between the vendor and the debtor, assessing consistency between the parties' Preference Period transactions and collection practices with those in a benchmark historical period prior to the debtor's insolvency. The objective test assesses the consistency of the parties' Preference Period transactions with "ordinary industry terms," a vague term that is subject to debate.

One of the leading Circuit-level cases addressing the meaning of "ordinary business terms" is *Advo-System, Inc. v. Maxway Corp.,* 37 F.3d 1044, 1047 (4th Cir. 1994); *see also Siegel v. Russellville Steel (In re Circuit City Stores),* 479 B.R. 703, 709 (Bankr. E.D. Va. 2012) (following *Advo-System*). *Advo-System* acknowledged that the meaning of "ordinary business terms" in section 547(c)(2)(B) was not clearly defined by Congress.

> [T]he Code fails to define any of the phrases in § 547(c)(2). Section 547(c)(2)'s legislative history tells us simply that the "purpose of this exception is to leave undisturbed normal financial relations, because it [such an exception to the trustee's general avoidance powers] does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." S. Rep. No. 989, 95th Cong., 2d Sess. 88 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5874.

Id.

Advo-System notes that, in *In re Tolona Pizza Prods.*, 3 F.3d 1029, 1032-33 (7th Cir. 1993), the Seventh Circuit defined "ordinary business terms" to encompass the "broad range" of terms used in the relevant industry. The decision also notes that, in *Fiber Lite Corp. v. Molded Acoustical Prods. (In re Molded Acoustical Prods.)*, 18 F.3d 217, 224 (3d Cir. 1994), the Third Circuit sought to protect the usual credit transactions of a business's established creditors, thereby encouraging those creditors to extend trade credit when a business is in troubled times. This in turn gives the troubled business a chance to work out its financial difficulties and potentially sidestep an otherwise imminent bankruptcy proceeding.

The statutory phrase "ordinary business terms" appears to mean more than just the invoice payment terms (i.e., the time from invoice date to due date), and is comprised of the entirety of the vendor's collection practices, including terms changes, pressure, shipping holds, threats, or other actions. While it is clear that pressure can negate otherwise ordinary payments between the parties in the subjective context, it is unsettled whether pressure has the same negating impact when the payments were ordinary from an industry standard (the objective prong). Given the purpose of the ordinary course defense, it is unlikely that Congress would provide safe haven in section 547(c)(2)(B) to a creditor that cannot satisfy section 547(c)(2)(A) because it applied merciless pressure that forced payments by the debtor.

The legislative history behind the BAPCPA amendment refers to the National Bankruptcy Review Commission ("NBRC") report issued in October 1997 that recommended, among other things, that the ordinary course of business defense should be clarified by making 11 U.S.C. § 547(c)(2)(B) a disjunctive test. *See* Charles J. Tabb, *The Brave New World of Bankruptcy Preferences*, 13 Am. Bankr. Inst. L. Rev. 425 (2005). The NBRC stated that "the conduct between the parties should prevail to the extent that there was sufficient pre-petition conduct to establish a course of dealing," and that only when there is "not sufficient pre-petition conduct to establish a course of dealing, then industry standards should supply the ordinary course benchmark." National Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years*, § 3.2.3, at 802 (Oct. 20, 1997). The NBRC noted that "it is more accurate to rely on the relationship between the parties" than on industry standards. *Id.* Thus, the NBRC, in making this recommendation, intended that the "industry" test would be used only if the parties could not establish a sufficient course of dealing.

The language of the amendment does not, however, limit the "industry" test to situations where a course of dealing between the parties cannot be established. Even if a court declines to so find, the plaintiff may prevail if "ordinary business terms" is interpreted to include all aspects of the vendor's collection practices, rather than solely addressing the time from invoice to payment. Under this argument, the purpose of the ordinary course defense is obviated by an interpretation of section 547(c)(2)(B) where a debtor makes a payment based only on historically extraordinary creditor pressure; yet, if the time from invoice to payment happened to be common in the industry, the vendor's conduct is rewarded by ordinary course defense protection.

In one of the very few cases applying the post-BAPCPA version of section 547(c)(2), *Hutson v. Branca Banking & Trust Co. (In re National Gas Distrib.)*, 346 B.R. 394 (Bankr. E.D.N.C. 2006), Judge Small stated that the "BAPCPA changes to § 547(c)(2) now require an examination of more than just the standards of the creditor's industry." *Id.* at 404. To determine whether a transfer was within "ordinary business terms," the court had to consider the industry standards of both the creditor and the debtor, as well as the "general business standards that are common to all business transactions in all industries. . ." *Id.* Although the defendant submitted an affidavit that the transfers at issue were made in a manner typical of the banking industry, the court found the transfers to be non-ordinary because the debtor's conduct did not conform to the standards of the debtor's industry or with general sound business practices. *Id.* at 405. Even if there was no evidence of unusual collection activities by the defendant, the reality behind the transfers was that the debtor was in financial distress and was trying to pay off those debts for which the owners had personal liability. *Id.* The court held that the payments were not the "type of transfers that the 'ordinary business terms' defense is designed to protect." *Id.*

The *National Gas* approach appears to be in line with the legislative history of BAPCPA and the policy underpinnings of *Advo-System*, and simply makes conceptual sense. A creditor must establish that its preference period conduct and credit relationship with the debtor conformed to the credit practices of the creditor's industry with debtors that are not in financial distress.

Most preference litigants, however, tend to address the objective test only by comparing the time from invoice to payment in the creditor's industry to the timing of the preferential payments at issue. If "ordinary business terms" is interpreted to include the entirety of the parties' credit relationship, then often the debtor's Preferential Payments will not qualify for exception. Frequently, a vendor's collections and credit actions toward the debtor during the Preference Period depart from its standard treatment of solvent dealers. Scrutiny may be increased, credit limits and invoice terms may be reduced (thereby curtailing the debtor's ability to purchase needed inventory on credit terms), and shipments may be held pending payment.

The essential question as to the interpretation of section 547(c)(2)(B) is whether Congress intended to allow a vendor to escape liability for preferential payments after applying substantial pressure, based only on the timing of the payments that it received. Would this interpretation inappropriately reward a vendor that, only because of its leverage, received timely payments while other vendors received late payments, if they received any payment at all? The inquiry would examine whether the vendor's credit and collections practices with the debtor were consistent with the vendor's practices vis a vis its solvent customers during the Preference Period.

B. Are Section 503(b)(9) Invoices Paid After the Petition Date Eligible as New Value Under Section 547(c)(4)?

There are few reported cases on this issue, and no Circuit-level decision that directly addresses whether postpetition payment of a section 503(b)(9) administrative claim should be considered an "otherwise unavoidable transfer" in determining the eligibility of the 503(b)(9) invoices as new value under Bankruptcy Code section 547(c)(4)(B). Perhaps the best-reasoned of the reported cases is *Circuit City Stores v. Mitsubishi Digital Electronics America (In re Circuit City Stores)*, 2010 Bankr. LEXIS 4398, at *25 (Bankr. E.D. Va. Nov. 30, 2010)("*Mitsubishi*"). Under section 547(c)(4)(B), "the New Value Defense is only available if the new value was repaid with a subsequent transfer that is itself avoidable." *Id.*

The *Mitsubishi* decision analyzed all Bankruptcy Code statutes that might potentially give rise to avoidance of the debtors' payment of Mitsubishi's section 503(b)(9) claim. Noting that payment of the 503(b)(9) administrative claim would inherently occur postpetition, the decision notes that section 549 is the avoidance statute that applies to postpetition transfers, and that section 549 excludes from avoidance any transfer authorized by the Bankruptcy Code and the court. *Id.* at **28-29. As a result, the court concluded that the Debtors' postpetition payment of Mitsubishi's 503(b)(9) claim "is an 'otherwise unavoidable transfer' that section 547(c)(4)(B) of the Bankruptcy Code negates for qualification as new value." *Id.* at *29.

The court rejected Mitsubishi's argument that the postpetition timing of the transfer renders the "otherwise unavoidable transfer" language inapplicable. The court noted that the Fourth Circuit decision in *Chrysler Credit Corp. v. Hall* (*In re JKJ Chevrolet, Inc.),* 412 F.3d

545, 553 n.6 (4th Cir. 2005), "clearly stated that 'post-petition transfers may be considered under section 547(c)(2)(B)." *Id.* n.18. In so holding, the Fourth Circuit cited *Moglia v. Am. Psych. Ass'n (In re Login Bros. Book Co.)*, 294 B.R. 297, 300 (Bankr. N.D.Ill. 2003)("both the plain language and policy behind the statue indicate that the timing of a repayment of new value is irrelevant.") *Id.* While the Fourth Circuit remanded the case to the bankruptcy court for a factual determination as to whether the transactions at issue are avoidable, its apparently unequivocal statement is highly instructive.

In reaching its holding, the *Mitsubishi* court stated that allowing Mitsubishi to receive payment on its 503(b)(9) claim and use the underlying invoices as new value would result in a double payment for the goods that it supplied. 2010 Bankr. LEXIS 4398, at *34. This result "would not give equal treatment to all creditors." *Id.* The *Mitsubishi* decision is squarely in agreement with the decision in *T.I. Acquisition, LLC v. Southern Polymer, Inc. (In re T.I. Acquisition, LLC*), 429 B.R. 377, 384 (Bankr. N.D. Ga. 2010). In order to best advance the two policies that underlie section 547(c)(4)—encouraging lending to troubled debtors in order to enhance the estate and promoting equality of treatment among creditors—*T.I. Acquisition* held that a creditor must either choose payment on a section 503(b)(9) claim or use it as new value; it cannot have it both ways. *See also, Siegel v. Sony Elecs., Inc. (In re Circuit City Stores, Inc.),* 515 B.R. 302, 313 (Bankr. E.D. Va. 2014)(reaffirming the *Mitsubishi* rationale after the *Friedman's* decision discussed below).

The only-Circuit level to address the issue disagrees with *Mitsubishi* and *T.I. Acquisition: Friedman's Liquidating Trust v. Roth Staffing Cos. (In re Friedman's, Inc.)*, 738 F.3d 547 (3d Cir. 2013). Indeed, *Friedman's* notes an even split among district and bankruptcy courts as to whether postpetition activity should be considered under section 547(c)(4)(B). Several decisions have held that postpetition activity should be considered based on the same policy considerations upon which *Friedman's* determined the opposite. 738 F.3d at 553-554. The most recent of the noted decisions, *Gonzales v. Sun Life Ins. Co.* (*In re Furr's Supermarkets, Inc.)*, 485 B.R. 672, 733-34 (Bankr. D.N.M. 2012), held that cutting off the preference calculation at the petition date "makes no economic sense."

The *Friedman's* decision constitutes only one voice among several, and its holding that the petition date should be a cutoff for all preference-related analyses appears to be based on inconsistent and unpersuasive reasoning. Moreover, the *Friedman's* decision, which did not concern section 503(b)(9) claims, expressly declines to extend its reach to such claims. *Friedman's* concerned prepetition employment services that were paid postpetition pursuant to an early case prepetition wage order. *Friedman's* expressly notes that it does not address whether 503(b)(9) or reclamation claims are eligible as new value. 738 F.3d at 561 n.9. *See also Stanziale v. Car-Ber Testing, Inc.* (*In re Conex Holdings*, *LLC)*, 2013 Bankr. LEXIS 5470, at *2 (Bankr. D. Del. Dec. 27, 2013)(cites *Friedman's* substantive ruling, but notes that it "withheld judgment as to whether post-petition payments under a reclamation claim would reduce the new value defense."). While in dicta, the *Friedman's* court noted that *Phoenix Restaurant Group v. Proficient Food Co.* (*In re Phoenix Restaurant Group)*, 373 B.R. 541, 547-548 (M.D. Tenn. 2007), held that reclamation claims are not eligible as new value, this brief comment was apparently a passing observation. 738 F.3d at 551[1]; *Stanziale v. Car-Ber Testing, Inc.* (*In re*

[1] *Friedman's* notes that only three cases have decided whether 503(b)(9) claims are eligible as new value; two holding that the claims are not eligible, including the *Mitsubishi* and *T.I. Acquisitions* decisions discussed above. 738 F.3d at 553 n.2.

Conex Holdings), 534 B.R. 606, 611(D. Del. 2015)(denying motion to certify direct appeal; recognizing as dictum potential second exception regarding reclamation claims in *Friedman's*).

For several reasons, *Friedman's* appears to present the less well-reasoned holding when compared to the several other decisions that disagree with its approach. First, the plain language of section 547(c)(4)(B) does not include a limitation as to when new value may be repaid. As described above, the courts in *Mitsubishi, Furr's* and *Login Bros*. had no trouble holding that, as a result, preference analyses may include postpetition activities. *Friedman's*, however, engages in a very lengthy exploration of context and policy to find a rationale for adding "prior to the petition date" as a modifier of the statutory language.

None of the *Friedman's* contextual references justifies adding the modifying time limitation. The first notion, that the title of the section is "Preferences," cannot reasonably lead to the conclusion that, despite the statute's lack of such language, Congress intended to limit the new-value eligibility determination to prepetition activities. Indeed, this conclusion is directly contrary to the Third Circuit's decision in *Kimmelman v. Port Auth*. (*In re Kiwi Int'l Airlines)*, 344 F.3d 311, 314 (3d Cir. 2003). *Kiwi* held that a postpetition contract assumption under section 365, which requires the trustee to cure all pre-petition defaults, precludes an action to recover preference period payments made under the parties' contract.

Acknowledging that *Kiwi* requires the consideration of postpetition activities in the preference analysis, *Friedman's* attempts to limit its application to a "unique set of rights" in that case, even though section 365 is nowhere mentioned in section 547. There is no logical distinction between postpetition assumption activity and critical vendor or wage orders, all of which result in post-petition payment of the creditor's prepetition claim after the conclusion of the preference period. Indeed, the *Friedman's* court strained unpersuasively to avoid the precedential binding effect of Third Circuit's holding in *Kiwi* that a preference analysis under section 547 is not limited to prepetition activities.

Second, *Friedman's* looks to the section 547(b)(5) hypothetical-liquidation test, which is performed as of the petition date. This provision is a condition on the trustee's ability to establish a prima facie case. If the creditor would have been paid in full in a hypothetical chapter 7 case as of the petition date, there would be no purpose to the preference action; there would be no "preferential treatment" to avoid and recover for the benefit of all creditors. This provision plays a gatekeeper function; before even analyzing the substantive elements of the preference case, including the subsection (c) defenses, such creditors are excluded from the preference "net."

Third, *Friedman's* uses circular reasoning in relying on the two-year statute of limitations for preference actions found in section 546, which commences on the petition date. "If Congress had intended to allow for post-petition transactions to affect the impact on the estate, it is likely that it would have crafted a different statute of limitations." 738 F.3d at 556. This statement ignores that the statute of limitations is a procedural provision enacted to ensure that preference actions are brought without extensive delay, and does not in any manner relate to the substantive analysis of preference liability. Moreover, the court's statement directly conflicts with its own holding; if Congress had intended to limit the preference analysis to prepetition activities, it would have so crafted the language of section 547.

Fourth, *Friedman's* discussion of the "improvement in position" test found in section 547(c)(5) does not aid its analysis. Section 547(c)(5) includes the phrase "as of the date of the

filing of the petition," while section 547(c)(4)(B) does not. 11 U.S.C. § 547(c)(5). In fact, *Friedman's* acknowledges that the possibility that "this omission from § 547(c)(4) was intentional, since Congress knew how to set forth a relevant time period when it thought it applied." 738 F.3d at 556. Inexplicably, however, the decision finds to the contrary.

Finally, *Friedman's* relied on case law holding that a creditor cannot use postpetition goods or services as new value to reduce its potential preference exposure. The court does not, however, consider any of the reasons for that limitation on new value. Such an analysis would demonstrate a critical distinction. Creditors that provide postpetition goods and services are entitled to an administrative claim, as a result of which the creditor will be paid once for the value provided. If the creditor were also allowed to use the value to reduce its preference exposure, then it would be paid twice for the value, precisely the "double dipping" that *Mitsubishi, Furr's* and *Login Bros.* proscribed by including postpetition payment of section 503(b)(9) claims in their analysis of new value. The two scenarios are entirely consistent. *Friedman's* conclusion to the contrary is, indeed, inconsistent with the rationale behind this case law.

As to policy considerations, *Friedman's* notes, at 738 F.3d at 557-558, that the Supreme Court decision in *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991), recognized two policies underlying section 547. "'First, . . . creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy . . . Second, *and more important,* the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.'" (quoting H.R. Rep. 95-595, at 177-78; emphasis added).

Based on a congressional committee report discussion that section 547 is intended to discourage a preference period race to the courthouse, and requires "those who received 'a greater payment than others of his class to disgorge so that all may share equally,'" 738 F.3d at 558, *Friedman's* concludes, without meaningful explanation, that "it makes sense that the equality should be measured, and inequalities rectified, as of the petition date." *Id.*

The court then rejected the notion that, by receiving postpetition payment of its wage claim and the use of the claim as new value, the wage claimant would receive a windfall that would unjustly favor the claimant over other creditors. 738 F.3d at 559. Noting that *T.I. Acquisition* and *Login Bros*. held directly to the contrary in order to avoid inequity, the court called the "double dipping" argument "misleading because it implies that the creditor is receiving payment for goods or services that were never provided. . . . All of the money that the creditor received was for goods and services actually provided. The creditor, therefore, was never unjustly enriched . . ." *Id*.

This statement, however, ignores that *all* preferential payments are made to creditors for goods and services actually provided. The purpose of the preference statute is to bring equality of treatment by requiring creditors to disgorge preference period payments for the benefit of those creditors that did not receive payment in part or at all. As discussed at length in *Furr's*, the only way to achieve equal treatment of unsecured claimants is to analyze preferences with consideration of postpetition events that may create inequalities. 485 B.R. at 730-31. *Furr's* reached this conclusion after performing a very detailed analysis in which it applied a variety of possible rules that included and excluded possible postpetition payments to hypothetical

preference recovery scenarios in order to determine which rule resulted in the greatest equality for creditors. *Id*.

Friedman's rejected *Furr's* as "misguided" because it supports an interpretation of section 547 that results in the "absolutely equal treatment of all unsecured claims." 783 F.3d at 560. In so doing, *Friedman's* stated that "[i]f it is a rule in bankruptcy that all creditors must be treated equally, surely the exceptions swallow the rule." *Id.* The court then followed with a lengthy discussion of bankruptcy inequalities, but failed to explain how its reasoning supported the imposition of "prior to the petition date" language in section 547(c)(4)(B).

In sum, the best-reasoned cases appear to be those holding that section 503(b)(9) invoices are not eligible as new value if they are paid postpetition, as explained in *Mitsubishi, T.I. Acquisition, Kiwi, Furr's and Login Bros.*

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
RESPONSE GENETICS, INC., [1]	)	Case No. 15-15-11663 (LSS)
	)	
Debtor.	)	

Hearing Date: TBD
Objection Deadline: TBD

DEBTOR'S MOTION FOR ORDER (A) APPROVING ASSET PURCHASE AGREEMENT AND AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS; (B) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, RIGHTS, ENCUMBRANCES AND OTHER INTERESTS PURSUANT TO BANKRUPTCY CODE SECTIONS 105, 363(b), 363(f) AND 363(m); (C) ASSUMING AND ASSIGNING CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (D) GRANTING RELATED RELIEF

Response Genetics, Inc., the above-captioned debtor and debtor in possession (the "Debtor"), files this motion (the "Sale Motion") for the entry of an order: (a) approving the *Asset Purchase Agreement* dated August 9, 2015 (the "Agreement," a copy of which is attached hereto as Exhibit A),[2] between the Debtor, as seller, and Cancer Genetics, Inc. (the "Purchaser"), as buyer, and authorizing the sale (the "Sale") of substantially all of the assets of the Debtor; (b) authorizing the sale of the assets free and clear of all liens, claims, rights, encumbrances, and other interests pursuant to sections 105, 363(b), 363(f), and 363(m) of the Bankruptcy Code; (c) assuming and assigning certain executory contracts and unexpired leases, and (d) granting related relief.

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[1] The last four digits of the Debtor's tax identification number are: (5548). The location of the Debtor's headquarters and service address is 1640 Marengo St., 7th Floor, Los Angeles, CA 90033.

[2] All capitalized terms not defined herein have the meanings ascribed to them in the Agreement.

Concurrently herewith, the Debtor is filing the *Debtor's Motion for Order: (A) Approving Bid Procedures for the Sale of Substantially All of the Debtor's Assets Outside the Ordinary Course of Business; (B) Scheduling an Auction and Hearing to Consider the Sale and Approve the Form and Manner of Notice Related Thereto; (C) Approving Payment of a Break-Up Fee; and (D) Granting Related Relief* (the "Bidding Procedures Motion"), which seeks approval of certain sale and bidding procedures for the Sale, as more particularly set forth therein (the "Bidding Procedures").

In support of this Sale Motion, the Debtor respectfully states as follows:

Preliminary Statement

1. By this Sale Motion, the Debtor seeks approval of the Sale of the substantially all of the assets of the Debtor to the Purchaser, pursuant to the Agreement, or to the highest and best bidder for such assets at the auction provided for in the Bidding Procedures Motion and the Bid Procedures (the "Auction"), to take place in accordance with the order to be entered by the Court on the Bidding Procedures Motion (the "Bidding Procedures Order"). The proposed Agreement contemplates that the assets will be sold free and clear of liens, claims, encumbrances, rights, and other interests other than those liens and interests expressly permitted under the Agreement.

2. As discussed below, the Debtor's sale process is in the best interests of the Debtor and its estate and creditors. The Sale will provide for the payment of: (a) $7,000,000 in cash, (b) 788,584 shares of common stock of Purchaser at a price per share equal to $8.8767 (the "Stock Consideration"), and (c) the assumption of the Assumed Liabilities. Further, given the financial condition of the Debtor and the lack of any meaningful working capital, a sale under these conditions is in the best interest of the Debtor and its estate and creditors.

Jurisdiction

3. This Court has jurisdiction over this Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334. This proceeding is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicates for the relief sought herein are sections 105, 362, 363, 365, 1107, and 1108 of Title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 2002-1(b) and 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules").

Background

5. On August 9, 2015 (the "Petition Date"), the Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor is operating its business and managing its properties as a debtor and debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. No request has been made for the appointment of a trustee or an examiner in this case, and no official committee has yet been appointed by the Office of the United States Trustee.

7. The factual background regarding the Debtor, including its current and historical business operations and the events precipitating the chapter 11 filing, is set forth in detail in the *Declaration of Thomas A. Bologna in Support of First Day Motions* [Docket No. 2] (the "Bologna Declaration") and incorporated herein by reference.

Sale of the Assets

8. The Debtor seeks approval of the sale of substantially all of its assets necessary to the operation of its business, including, *inter alia*, unexpired leases and executory contracts, personal property, intellectual property, intangible property, inventory, vendor items, and certain claims and liabilities to be assumed by the Purchaser, all as more fully set forth in the Agreement (collectively, the "Assets").

9. The Debtor is a Los Angeles, California-based life sciences company engaged in the research and development of clinical diagnostic cancer testing. Clinical studies have shown that not all cancer therapy works effectively in every patient, and that a number of patients receive therapy that has no benefit to them and may potentially even be harmful. The outcome of cancer therapy is highly variable due to genetic differences among the tumors in cancer patients. For example, some patients respond well with tumor shrinkage and increase in life span, while other patients do not obtain a benefit from the same therapy and may actually experience toxic side effects, psychological trauma, and delay in effective treatment.

10. Prior to 1999, most cancer treatment regimens were administered without any pre-selection of patients on the basis of the particular genetics of their tumor. However, advances in molecular technologies have enabled researchers to identify and measure genetic factors in patients' tumors that may predict the probability of success or failure of many anti-cancer agents. The Debtor's goal is to provide cancer patients and their physicians with a means to make informed, individualized treatment decisions based on genetic analysis of tumor tissues. The Debtor's goal is to provide personalized genetic information that helps guide physicians and patients in choosing the treatment based on the genetics of the tumor that will most likely benefit the patient.

11. To achieve these goals, the Debtor's pathologists use tools and methods to extract the relevant data from patients that provide their physician with better information to arrive at the best treatment. These tools and methods include Microdissection, RNA Extraction, Quantitative Real-Time Polymerase Chain Reaction, Fluorescence *in situ* Hybridization, Sequencing, next generation sequencing, and Microarray. The Debtor markets ResponseDX, predictive test for lung, colon, gastric and melanoma cancer testing and in 2013 added testing for thyroid cancer and in 2014 testing for brain cancer. The Debtor also markets testing for breast cancer. In February of 2014, the Debtor commercially launched its cancer "ResponseDX: Tissue of Origin®" test to compare the expression of 2,000 genes in a patient's tumor with a panel of fifteen known tumor types that represent 90% of all cancers to help diagnosis difficult cancers to identify. ResponseDX: Tissue of Origin received clearance from the Food and Drug Administration in June 2010. The Debtor is fully licensed and accredited by the Clinical Laboratory Improvement Amendments and College of American Pathologists.

12. In light of (i) the extensive marketing process already undertaken, (ii) the additional efforts that will be made during the proposed sale process, and (iii) the current liquidity issues facing the Debtor, the timing of the sale proposed herein is reasonable under the circumstances to effectuate the Sale to the Purchaser under the terms of the Agreement or, alternatively, to a higher and better bidder for the Assets (a "Successful Bidder").

13. As of the Petition Date, the sale timelines in the *Motion for Entry of Interim and Final Orders, Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507, (i) Approving Postpetition Financing, (ii) Authorizing Use of Cash Collateral, (iii) Granting Liens and Providing Superpriority Administrative Expense Status, (iv) Granting Adequate Protection, (v) Modifying Automatic Stay, (vi) Granting Related Relief, and (vii) Scheduling a Final Hearing*

[Docket No. 8] (the "DIP Motion") and the Agreement were not aligned. As a result, the Debtor, Purchaser, and the Debtor's postpetition and prepetition lenders agreed to the following timeline:

- Entry of an order approving the Bidding Procedures Motion (the "Bidding Procedures Order") no later than August 27, 2015.
- Deadline to (a) submit competing bids, (b) object to sale, (c) object to assumption/assignment and cure claim no later than September 25, 2015.
- Auction no later than September 30, 2015.
- Entry of an order approving the Sale no later than October 2, 2015.
- Closing of Sale no later than October 9, 2015.

14. In light of the prepetition marketing efforts and based upon the current financial condition of the business, the Debtor believes that the sale process, while accelerated, provides sufficient time to fully expose the Assets for sale in the hope of achieving a competitive bidding process.

Marketing Process

15. As part of the Debtor's restructuring efforts, the Debtor determined to undergo a sale process for all or a part of its business lines. Significant efforts were undertaken to market the Assets by the Debtor, its former investment banker, and Canaccord Genuity, Inc. ("Canaccord"), its current investment banker.

16. In Spring 2014, the Debtor began interviewing investment bankers for the purpose of exploring strategic alternatives including a merger of the Debtor with one of a group of specified targets. Subsequently, in August 2014, the Debtor hired a banker that marketed the Debtor's assets for approximately six months. The Debtor's former banker was able to locate and secure interested parties willing to purchase some or substantially all of the Debtor's assets and effectuate a merger with the Debtor. During this time, the Debtor met with Purchaser,

among others, conferred regarding the terms of a potential acquisition or merger of the Debtor's operations. However, the process was lengthy and for a host of reasons the Debtor and its advisors were not able to reach acceptable terms with any of the interested parties in a timely manner.

17. In an effort to push the marketing process forward, the Debtor hired Canaccord as its investment banker to continue marketing its Assets. To this end, Canaccord prepared marketing materials, including an executive summary ("Teaser") and a management presentation, and an online data site with diligence materials. Canaccord contacted and distributed marketing materials to approximately fifty-four (54) industry participants, strategic and financial investors, and other potential buyers. Approximately ten (10) parties executed confidentiality agreements and were provided with diligence materials, including access to the online data site.

18. In July 2015, the Debtor, Purchaser, and their advisors reengaged discussions regarding Purchaser's purchase of the Assets. During this time, Purchaser conducted extensive diligence. At the same time, Canaccord continued to market the Assets to other prospective purchasers. As a result of these efforts, the Debtor received two non-binding indications of interest or letters of intent from Purchaser and another interested third party for the purchase of the Assets.

19. Ultimately, after extensive negotiations, the Debtor and the Purchaser entered into the Agreement, which is attached to hereto as Exhibit A. As noted above, the consideration for the purchase of the Assets under the Agreement is: (a) $7,000,000 in cash, (b) the Stock Consideration, and (c) the assumption of the Assumed Liabilities.

Secured Debt Obligations of the Debtor

20. On July 14, 2011, the Debtor entered into a line of credit agreement (the "Revolving Credit Facility") with Silicon Valley Bank (the "SVB"). The line of credit is collateralized by all of the Debtor's assets, including the pharmaceutical Private Payor and Medicare receivables. The amended maximum amount that can be borrowed from the credit line is $2,000,000. The line of credit is subject to various financial covenants. In 2013, the Debtor was not in compliance with certain covenants and, pursuant to an amendment on March 7, 2013, SVB waived the Debtor's existing breach of financial covenants under the credit agreement and the parties restructured the line of credit to provide that, among other things, the maturity date was extended to March 7, 2015 in addition to other borrowing covenants. On July 30, 2014, SVB waived several additional covenant violations and amended the credit agreement to provide, among other things, increased interest rate, revised borrowing covenants, and a maturity date of July 25, 2016. As of the Petition Date, the Debtor estimates that approximately $1,465,662, plus accrued fees, interest, and other charges, is outstanding under the Revolving Credit Facility.

21. On July 30, 2014, the Debtor entered into a credit agreement (the "SWK Credit Agreement") with SWK Funding LLC, as the administrative agent ("SWK") and the lenders (including SWK). On September 9, 2014, SWK, in its capacity as the initial lender, assigned part of its interests under the SWK Credit Agreement to SGFinancial, LLC ("SG"). On January 30, 2015, SG assigned all of its interests under the SWK Credit Agreement to SWK. As such, as of January 30, 2015, SWK is the sole lender under the SWK Credit Agreement. The SWK Credit Agreement provides for a multi-draw term loan up to a maximum principal amount of $12,000,000. Initially, the lenders advanced $8,500,000 to the Debtor, which is due and

payable on July 30, 2020. On February 3, 2015, the Debtor and SWK entered into a first amendment to the SWK Credit Agreement by which the Debtor drew an additional $1,500,000 of the commitment increasing the total amount advanced to $10,000,000.

22. On April 3, 2015, the Debtor and SWK entered into a second amendment to the SWK Credit Agreement by which the Debtor drew an additional $2,000,000 of the commitment increasing the total amount advanced to $12,000,000. On June 25, 2015, the Debtor and SWK entered into a third amendment to the SWK Credit Agreement by which SWK expanded the maximum principal amount of the loan to $12,750,000 and the Debtor drew the additional $750,000 of the commitment increasing the total amount advanced to $12,750,000. On August 4, 2015, the Debtor and SWK entered into a fourth amendment to the SWK Credit Agreement by which SWK expanded the maximum principal amount of the loan to $13,250,000 and the Debtor drew the additional $500,000 of the commitment increasing the total amount advanced to $13,250,000. As of the Petition Date, the amount outstanding under the SWK Credit Agreement is approximately $13,250,000 plus accrued and unpaid interest.

23. SWK is also the Debtor's postpetition lender and has provided the Debtor with a senior debtor-in-possession term loan facility in the principal amount of up to $16,250,000, inclusive of any and all amounts outstanding under SWK's prepetition credit agreement. Of this amount, up to $3,000,000 constitutes new money advances to the Debtor (the "DIP Loan"). The proceeds of the DIP Loan will be used to fund the operational expenditures of the Debtor's chapter 11 case. As set forth in the Bologna Declaration, the Debtor is in need of this postpetition financing as it continues to operate with a very thin working capital, especially with the increased restructuring costs associated with the chapter 11 case. It is in the best interest of the Debtor and its stakeholders to expedite the sales process in this case. Because of liquidity

constraints, the Debtor has not been able to inject much needed capital to grow the business. As a result, the Debtor has been susceptible to competitive pressures, which has affected its operating performance.

Continued Sale Process

24. While the prepetition marketing and sale process was thorough, as discussed above, the Debtor will send, or will have sent, notice of the Sale Motion and Bidding Procedures to all parties that the Debtor believes may be potentially interested in acquiring the Assets. The Debtor will also maintain its electronic data room with key documents and company-specific information in order to streamline the due diligence process going forward. The data room has been, and will be, available to interested parties who have, or will, execute confidentiality agreements acceptable to the Debtor. The Debtor will continue to respond to inquiries from prospective buyers through the bid deadline approved by the Court for alternative bidders to bid on the Assets. The Debtor will also continue to use Canaccord, subject to Court approval, as its investment banker to solicit any further offers for the Assets.

25. The Debtor believes that the consummation of the Sale to the Purchaser or other Successful Bidder will provide its creditors and other stakeholders with the best opportunity possible for maximizing the value of the Assets.

26. The material terms of the Agreement with the Purchaser are set forth below. Pursuant to the terms of the Agreement and subject to entry by the Court of an order substantially in the form attached hereto as Exhibit B (the "Sale Order"), the Purchaser, subject to higher or better bids, will purchase the Assets.

Agreement With Purchaser[3]

27. The key terms of the Agreement and the Sale Order are summarized below. The description below only summarizes certain provisions of the Agreement and the Sale Order as a convenience to the Court and parties in interest, and the terms of the Agreement control in the event of any inconsistency.

a. **Purchase Price**. The total consideration to be paid by Purchaser to Debtor for the Assets shall be: (a) $7,000,000 in cash, (b) 788,584 shares of common stock of Purchaser at a price per share equal to $8.8767 (*i.e.*, $7,000,023.59), and (c) the assumption of the Assumed Liabilities, including the assumption of Assumed Contracts and Assumed Leases (together, the "Assigned Contracts") subject to the agreed amount of related cure costs. *See* Agreement, §§ 1.3 and 1.4.

b. **Purchased Assets**. The Assets (inclusive of the Assigned Contracts) are those assets necessary to operate Debtors business including, but not limited to, the Debtor's inventory, fixed assets, the Assigned Contracts, intellectual property, transferable license agreements and software agreements, accounts receivable, avoidance action claims of the Debtor. *See* Agreement, § 1.1. The Assets do not include the Excluded Assets. The Excluded Assets are set forth in section 1.2.

c. **Closing.** Subject to the terms and conditions of the Agreement and the Sale Order, the sale and purchase of the Assets and the assumption of the Assumed Liabilities contemplated by the Agreement shall take place at a closing (the "Closing") to be held at the offices of Pachulski Stang Ziehl & Jones LLP located in Wilmington, Delaware, at 10:00 a.m. Eastern Time, no later than the second (2nd) Business Day following the satisfaction or waiver of all conditions to the obligations of the parties hereto set forth in sections 5 and 6 of the Agreement (other than those conditions which by their nature can only be satisfied at the Closing), or at such other place, at such other time, on such other date or in such other manner as Debtor and Purchaser may mutually agree upon in writing. However, in no event shall the Closing occur later than October 9, 2015, which assumes the Purchaser waives the requirement that the Sale Order becomes a final order; however, if Purchaser does not waive such requirement, then such date shall be October 16, 2015

d. **Deposit.** Within two (2) Business of Days after the effective date of the Agreement, Purchaser will deposit into an escrow (the "Escrow") with

[3] Unless otherwise noted, capitalized terms used in this section have the meanings ascribed in the Agreement.

Pachulski Stang Ziehl & Jones LLP (the "Escrow Holder") an amount equal to $500,000.00 (the "Initial Deposit") in immediately available, good funds (funds delivered in this manner are referred to herein as "Good Funds"). In turn, the Escrow Holder shall immediately deposit the Deposit into a client trust account. Within two (2) Business Days after the agreement by Purchaser and Seller in writing upon the form and substance of all Schedules and Exhibits as contemplated by Section 7.1(h) of the Agreement, Purchaser shall deposit an additional $500,000.00 in Good Funds into the Escrow (the "Additional Deposit" and, along with the Initial Deposit, the "Deposit"). The Deposit, together with any interest accrued thereon, shall become nonrefundable and shall be disbursed to Seller to be retained by Seller for its own account upon the termination of the transactions contemplated by this Agreement by reason of Purchaser's default pursuant to Section 7.1(d) of the Agreement, but not for any other reason. At the Closing, the Deposit (and any interest accrued thereon) shall be credited and applied toward payment of the Cash Consideration. *See* Agreement, § 1.4(b).

e. **Identity of Purchaser.** As noted above, the Purchaser is Cancer Genetics, Inc. Purchaser is an emerging leader in the field of personalized medicine, offering diagnostic products and services that enable precision medicine in the field of oncology. Purchaser has locations in the United States, India, and China.

f. **Assumption of Executory Contracts and Unexpired Leases.** The proposed sale contemplates that the Debtor may assume and assign to the Purchaser certain of the executory contracts and unexpired leases associated with the Assets. The schedule (or schedules) of the executory contracts and unexpired leases that the Purchaser may elect to be assumed by the Debtor and assigned to the Purchaser at the Sale Hearing (the "Assigned Contracts").

g. **Break Up Fee.** Subject to approval of the Bankruptcy Court, in consideration for the Purchaser having expended considerable time and expense in connection with the Agreement and the negotiation thereof and to compensate Purchaser as a stalking-horse bidder, in the event that the Debtor consummates an alternative transaction instead of the proposed Sale to the Purchaser under the terms of the Agreement, the Debtor shall pay Purchaser a breakup fee equal to $560,000 and an expense reimbursement not to exceed $125,000, plus $60,000 for the fees arising from the Debtor's auditor to the extent a successful overbidder (that is not the Purchaser) uses the auditor's work-product (the "Break Up Fee"). *See* Agreement, § 4.2.

h. **Representations, Warranties and Covenants**. The Debtor Parties made various representations customary for a transaction of this kind including,

but not limited to, those relating to organization and good standing, authorization and validity, financial statements, absence of changes, authorized capitalization, compliance with laws, licenses, environmental matters, title to assets, contracts, litigation, contracts to be assumed and assigned to the Purchaser, intellectual property, software, taxes, broker's and finder's fees, operation of the Business prior to the Closing, and insurance. *See* Agreement, § 2. The Purchaser has made certain representations, among others, relating to organization and good standing and authorization. *See* Agreement § 3. The Debtor also agreed to various covenants including, but not limited to, actions before closing, conduct of business, preservation of documents, access to information, and certain employee matters. *See* Agreement, § 4.

i. **Conditions.** The Closing is conditioned upon the occurrence of certain events customary for transactions of this kind, including the truthfulness of all representations and warranties, no material adverse change in the Debtor's business, and all consents and approvals, including approvals of the Bankruptcy Court, having been obtained. *See* Agreement, §§ 5 and 6.

k. **Rule 6004/6006 Waiver**. The proposed Sale Order provides that, upon entry, the Sale Order will be immediately enforceable, notwithstanding Bankruptcy Rules 6004 and 6006. *See* Sale Order, ¶¶ F and 18. As discussed herein, the sale and prompt consummation thereof are in the best interest of the Debtor and its estate in order to maintain and otherwise maximize the going concern value of the Debtor's assets for the benefit of the estate and its stakeholders and to comply with certain timing deadlines as discussed above.

l. **Successor Liability Findings.** The Sale Order provides that the Purchaser and its employees, officers, directors, advisors, lenders, affiliates, owners and successors and assigns shall not have any successor or vicarious liabilities. *See* Sale Order, ¶¶ R and 7.

m. **Record Retention**. While the Debtor will provide copies of its books and records to the Purchaser, the Debtor will have access to the books and records to enable it to administer its chapter 11 case. *See* Agreement, § 4.8

28. The Debtor believes that the sale of the Assets as a going concern to the Successful Bidder is in the best interests of the Debtor's estate and its creditors. The Debtor further believes that obtaining the stalking horse bid, marketing the Assets with the assistance of Canaccord, and holding the Auction on the date specified by the Court, will result in the highest

or otherwise best consideration for the Assets and will provide for either the payment or assumption of all known claims against the Debtor.

29. The Debtor has examined the alternatives to a sale of the Assets and has determined that, in light of the Debtor's financial situation, liquidity needs, and value of the Assets, a more viable alternative to sale of the Assets does not exist. The Debtor determined that the sale of the Assets optimizes value for its estate and creditors.

30. For the reasons stated above, and in light of the obvious benefits to the estate, the Debtor has determined, in the exercise of its business judgment, to consummate the proposal submitted under the Agreement with the Purchaser or, if applicable, another bidder in the event that the Debtor receives a higher or otherwise better bid to the transaction set forth in the Agreement.

Relief Requested

31. The Debtor is requesting that this Court, *inter alia*, (a) authorize the sale of the Assets to the Purchaser pursuant to the Agreement, or alternatively, to the other Successful Bidder pursuant to such competing agreement(s) with such other Successful Bidder entered into in accordance with the Bidding Procedures Order, (b) authorize such sale of the Assets to be free and clear of all liens, claims, rights, encumbrances or other interests pursuant to sections 105, 363(b), 363(f), 363(m), and 365 of the Bankruptcy Code, with such liens, claims, rights, encumbrances and interests (collectively, the "Liens, Claims and Encumbrances") attaching to the sale proceeds of the Assets (the "Sale Proceeds") with the same validity (or invalidity), priority and perfection as existed immediately prior to such sale; and (c) grant such other relief as may be necessary or appropriate.

Basis for Relief

32. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). 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).

33. A sale of the debtor's assets should be authorized pursuant to section 363 of the Bankruptcy Code if a sound business purpose exists for doing so. *See, e.g.*, *Meyers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *In re Titusville Country Club*, 128 B.R. 396 (W.D. Pa. 1991); *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 176 (D. Del. 1991). The *Delaware & Hudson Railway* court rejected the pre-Code "emergency" or "compelling circumstances" standard, finding the "sound business purpose" standard applicable and, discussing the requirements of that test under *McClung* and *Lionel*, observing:

> A non-exhaustive list of factors to consider in determining if there is a sound business purpose for the sale include: the proportionate value of the asset to the estate as a whole; the amount of elapsed time since the filing; the likelihood that a plan of reorganization will be proposed and confirmed in the near future; the effect of the proposed disposition of the future plan of reorganization; the amount of proceeds to be obtained from the sale versus appraised values of the Property; and whether the asset is decreasing or increasing in value. 124 B.R. at 176.

34. The *Delaware & Hudson Railway* court further held that "[o]nce a court is satisfied that there is a sound business reason or an emergency justifying the pre-confirmation sale, the court must also determine that the trustee has provided the interested parties with adequate and reasonable notice, that the sale price is fair and reasonable and that the Buyer is proceeding in good faith." *Id.*

35. The Debtor has proposed the sale of the Assets after thorough consideration of all viable alternatives and has concluded that the sale is supported by many sound business reasons. The Debtor has extensively marketed the Assets as described above and has proposed Bidding Procedures designed to maximize the purchase price realized from the sale of the Assets.

36. Given the Debtor's current financial conditions, the lack of adequate working capital, the Debtor's need for an expedited sale process is also necessary to preserve the business as a going concern. As set forth in the Agreement, the Debtor is required to obtain an order approving the Bidding Procedures no later than August 27, 2015 and conduct an auction no later than September 30, 2015. The Debtor believes that (i) all known trade claims against it will either be paid or have their claims assumed under the Agreement, and (ii) the prepetition and postpetition marketing of the Debtor up to the proposed deadline to submit competing bids for the Assets, will provide a sufficient opportunity to generate any potential overbids. In addition, the proposed Sale will allow the Debtor to emerge as a viable going concern. However, in light of the liquidity issues facing the Debtor, it is necessary to move as quickly as possible to consummate the Sale.

37. The Debtor has articulated sound business reasons, set forth above, for a sale of the Assets on the proposed schedule. *See, e.g.*, *In re Tempo Tech.*, 202 B.R. 363, 369-70

(D. Del. 1996) (approving a sale of all of the debtor's assets, within a month after the petition date, where the debtor faced a cash shortfall, operated in an industry where there were few potential buyers, and anticipated continuing losses and a decline in value of the bankruptcy estates); *Delaware & Hudson Railway*, 124 B.R. at 177 (affirming the bankruptcy court's approval of a sale of substantially all of the debtor's assets where the debtor would have been "in liquidation mode if required to delay a sale until after filing a disclosure statement and obtaining approval for a reorganization plan"); *Titusville Country Club*, 128 B.R. at 400 (granting an expedited hearing on a motion to approve a sale as a result of "deterioration" of the debtor's assets); *Coastal Indus., Inc. v. Internal Revenue Service (In re Coastal Indus., Inc.)*, 63 B.R. 361, 366-69 (Bankr. N.D. Ohio 1986) (approving an expedited sale pursuant to section 363(b) five weeks after the petition date where the debtor was suffering operating losses).

38. The Debtor believes that, as a result of the marketing efforts that have been undertaken and that it will continue to undertake, the highest or otherwise best offer obtained through the proposed Bidding Procedures and Auction will provide maximum value to the Debtor under the current circumstances. Other potential buyers and parties that have expressed interest in the acquisition of the Assets, will be served with this Sale Motion and/or notice thereof. The fairness and reasonableness of the consideration to be paid by the Successful Bidder is demonstrated by the marketing efforts that the Debtor has undertaken, and will continue to undertake, followed by a fair and reasonable sale process including a potential auction, and culminating in the sale of the Assets. As noted herein, notice of this Sale Motion, as well as of the Bidding Procedures Motion, will be served by the Debtor on or shortly after the Petition Date on potential bidders, as well as known putative lienholders,

39. The sale of the Assets is supported by sound business reasons and is in the best interests of the Debtor and its estate. Accordingly, the Debtor requests approval under section 363(b) of the Bankruptcy Code of the Sale to the Purchaser or other Successful Bidder, as set forth herein.

The Proposed Sale Satisfies the Requirements of Section 363(f) of the Bankruptcy Code for a Sale Free and Clear of Liens, Claims, and Interests

40. Section 363(f) of the Bankruptcy Code provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such Property of an entity other than the estate, only if –
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in a bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

41. Section 363(f) of the Bankruptcy Code provides for the sale of assets "free and clear of any interests." The term "any interest," as used in section 363(f), is not defined anywhere in the Bankruptcy Code. *Folger Adam Security v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 259 (3d Cir. 2000). In *Folger Adam*, the Third Circuit specifically addressed the scope of the term "any interest." 209 F.3d at 258. The Third Circuit observed that while some courts have "narrowly interpreted that phrase to mean only *in rem* interests in Property," the trend in modern cases is toward "a broader interpretation which includes other obligations that may flow from ownership of the Property." *Id.* at *258* (citing 3 *Collier on Bankruptcy* ¶ 363.06[1]). As

determined by the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-582 (4th Cir. 1996), a case cited approvingly and extensively by the Third Circuit in *Folger Adam*, the scope of 11 U.S.C. § 363(f) is not limited to *in rem* interests. Thus, the Third Circuit in *Folger Adam* made clear that debtors "could sell their assets under §363(f) free and clear of successor liability that otherwise would have arisen under federal statute." *Folger Adam*, 209 F.3d at 258.

42. Section 363(f) is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to warrant the sale of the Assets free and clear of all of the applicable Liens, Claims and Encumbrances, except with respect to any Liens, Claims and Encumbrances permitted under the Agreement. *See Citicorp Homeowners Services, Inc. v. Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988). The Debtor submits that each Lien, Claim and Encumbrance that is not an assumed liability satisfies at least one of the five conditions of section 363(f) of the Bankruptcy Code, and that any such Lien, Claim or Encumbrance will be adequately protected by either being paid in full at the time of closing, or by having it attach to the Sale Proceeds, subject to any claims and defenses the Debtor may possess with respect thereto. The Debtor accordingly requests authority to convey the Assets to the Purchaser or other Successful Bidder(s), free and clear of all Liens, Claims and Encumbrances except for the Liens, Claims and Encumbrances that expressly permitted under the terms of the Agreement, with such Liens, Claims and Encumbrances to attach to the Sale Proceeds, with the same validity (or invalidity), priority and perfection as existed immediately prior to the Sale, subject to the terms of the Agreement and the Sale Order.

43. The Debtor has conducted a UCC search and other lien searches of purported lienholders in conjunction with the proposed sale of the Assets. The Debtor will serve such purported lienholders with notice of this Sale Motion, and will serve notice of the Sale

Order if and when such order is entered by the Court. Other than SVB and SWK, the Debtor believes there are no other known secured creditors of the Debtor. In that regard, SWK's and SVB's claims will be paid sale proceeds, consistent with the terms of the intercreditor agreement between SWK and SWB. Out of an abundance of caution, to the extent there are any remaining other secured creditors, (a) applicable non bankruptcy law permits sale of the Assets free and clear of such creditors' claims, or (b) such creditors could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of their claims.

44. Accordingly, this Court should approve the sale of the Assets to the Successful Bidder free and clear of Liens, Claims and Encumbrances under Bankruptcy Code section 363(f), and any potential claimants should be compelled to look exclusively to the proceeds of the sale for satisfaction of their claims.

Good Faith Under Section 363(m) of the Bankruptcy Code;
Sale Not In Violation of Section 363(n) of the Bankruptcy Code

45. Section 363(m) of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of Property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such Property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). Section 363(n) of the Bankruptcy Code, among other things, provides, in turn, that a trustee may avoid a sale under such section if the sale price was controlled by an agreement among potential bidders as the sale. *See* 11 U.S.C. § 363(n). Although the Bankruptcy Code does not define "good faith," the Third Circuit in *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986), held that:

> [t]he requirement that a Buyer act in good faith . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a Buyer's good faith status at a judicial sale involves fraud, collusion between the Buyer and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

788 F.2d at 147 (citations omitted).

46. The Agreement was negotiated at arms' length and the Purchaser has acted in good faith, without collusion or fraud of any kind, and in compliance with the *Abbotts Dairies* standards. Neither the Debtor nor the Purchaser (to the best of the Debtor's knowledge) has engaged in any conduct that would prevent the application of section 363(m) of the Bankruptcy Code or otherwise implicate section 363(n) of the Bankruptcy Code with respect to the consummation of the Sale or the transfer of the Assets to the Purchaser. In addition, if a party other than the Purchaser is the Successful Bidder, the Debtor intends to make an appropriate showing at the Sale Hearing that the purchase agreement with the other Successful Bidder is a negotiated, arms' length transaction, in which the Successful Bidder at all times has acted in good faith under and otherwise in accordance with such standards.

47. The Debtor thus requests that the Court find that the Purchaser or the Successful Bidder has purchased the Assets in good faith within the meaning of section 363(m) of the Bankruptcy Code, and is entitled to the protections of sections 363(m) and (n) of the Bankruptcy Code.

Authorization of Assumption and Assignment of Assigned Contracts

48. As required by the Agreement, and in order to enhance the value to the Debtor's estate, the Debtor requests approval of the potential assumption and assignment of the

Assigned Contracts to Purchaser or the other Successful Bidder upon the closing of the transactions contemplated under the Agreement.

49. Pursuant to the Agreement, the Purchaser (or Successful Bidder) is partially responsible for payment of all cure amounts required to be paid to the counterparties to the Assigned Contracts assumed and assigned (each a "Counterparty" and collectively, the "Counterparties") under section 365(b)(1) of the Bankruptcy Code.

50. The Assigned Contracts are those contracts or leases that are to be assumed by the Debtor and assigned to the Purchaser or the other Successful Bidder as part of the sale transaction under the Agreement. The Debtor further requests that the Sale Order provide that the Assigned Contracts will be assigned to, and remain in full force and effect for the benefit of, the Purchaser or the other Successful Bidder, notwithstanding any provisions in the Assigned Contracts, including those described in sections 365(b)(2) and (f)(1) and (3) of the Bankruptcy Code, that prohibit such assignment.

51. Pursuant to the Sale Procedures Motion, the Debtor propose that an initial list (or lists) of Assigned Contracts be served on all counterparties to such contracts and leases no later than two (2) business days after the Bid Procedures Hearing.

52. Section 365(f) of the Bankruptcy Code provides, in pertinent part, that:

> The trustee may assign an executory contract or unexpired lease of the debtor only if –
>
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). Under section 365(a), a debtor "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Section 365(b)(1), in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor, providing that:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee --
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

53. Although section 365 of the Bankruptcy Code does not set forth standards for courts to apply in determining whether to approve a debtor in possession's decision to assume an executory contract, courts have consistently applied a "business judgment" test when reviewing such a decision. *See, e.g., Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523, 550 (1953); *Matter of Talco, Inc.*, 558 F.2d 1369, 1173 (10th Cir. 1977). A debtor satisfies the "business judgment" test when it determines, in good faith, that assumption of an executory contract will benefit the estate and the unsecured creditors. *In re FCX, Inc.*, 60 B.R. 405, 411 (Bankr. E.D.N.Y. 1986). The potential assumption and assignment of the Assigned Contracts, or any of them, set forth in the Agreement, will be a

necessary part of the deal that Debtor has struck with the Successful Bidder and, as stated above, will benefit the estate of Debtor.

54. As set forth above, with respect to Assigned Contracts to be potentially assumed and assigned pursuant to the Sale Hearing, the Debtor has or will send the Cure Notices to all Counterparties in connection with the Court's approval of the Bid Procedures, thereby notifying such Counterparties of the potential assumption by the Debtor and assignment to the Purchaser or the Successful Bidder of the Assigned Contracts at the Sale Hearing. The Cure Notices set forth the "cure" amounts owing on each of the Assigned Contracts, according to Debtor's books and records and, in accordance with the provisions set forth in the Bid Procedures, shall be the amounts required to be paid pursuant to section 365(b)(1) of the Bankruptcy Code ("Cure Amounts"). The Sale Procedures Motion proposes that objections, if any, to either the Cure Amounts or the assumption or assignment of Assigned Contracts to Purchaser or adequate assurance of future performance be filed on or before the objection deadline to the proposed sale. Objections to the adequate assurance of future performance of a Successful Bidder (other than the Purchaser), may be raised at the Sale Hearing.

55. Counterparties to the Assigned Contracts will have a sufficient opportunity to file an objection to the proposed Cure Amounts set forth in the Cure Notices. To the extent no objection is filed with regard to a particular Cure Amount, such Cure Amount shall be binding on the applicable contract or lease Counterparty. The payment of the Cure Amounts specified in the Cure Notices (or a different amount either agreed to by the Purchaser, or the Successful Bidder, or resolved by the Court as a result of a timely-filed objection filed by a contract or lease counterparty) will be in full and final satisfaction of all obligations to cure defaults and compensate the counterparties for any pecuniary losses under such contracts or

leases pursuant to section 365(b)(1) of the Bankruptcy Code, unless the Debtor determines (with the consent of the Purchaser or Successful Bidder) that a particular lease or contract is not truly executory, and does not need to be cured to transfer the lease or contract to the Successful Bidder or Purchaser.

56. Cure Amounts disputed by any Counterparty will either be considered by the Court either at the Sale Hearing or at some later date as may be scheduled by the Court to determine contested objections regarding Cure Amounts, that have not been resolved in advance or at the Sale Hearing. With respect to payment of Cure Amounts, the Purchaser or Successful Bidder shall bear and pay the entire amount of such cure costs.

57. The Purchaser or Successful Bidder is responsible for providing evidence of "adequate assurances of future performance" to the extent required in connection with the assumption and assignment of any Assigned Contract. The meaning of "adequate assurance of future performance" for the purpose of the assumption of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code depends on the facts and circumstances of each case, but should be given "practical, pragmatic construction." S*ee Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989). *See also In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean an absolute assurance that debtor will thrive and pay rent); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985). If necessary, the Purchaser or the other Successful Bidder shall provide evidence of its ability to provide adequate assurances to Counterparties to the Assigned Contracts at the Sale Hearing. Moreover, any Successful Bidder will be required to provide evidence that the bidder can provide adequate

assurance of future performance with respect to the Assigned Contracts at the time it submits its bid.

Notice

58. A copy of this Motion will be provided to (a) the Office of the United States Trustee; (b) the twenty largest unsecured creditors of the Debtor; (c) all parties who are known by the Debtor to assert liens with respect to the Assets, if any; (d) all entities who executed non-disclosure agreements with the Debtor in connection with a potential acquisition of any or all of the Assets or whom the Debtor believes may have an interest in bidding; (e) all counterparties to the Assigned Contracts; (f) the Purchaser and its counsel; and (g) all parties who have timely filed requests for notice under Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtor respectfully submits that such notice is sufficient, and request that the Court find that no further notice of the relief requested herein is required.

59. The Debtor requests, pursuant to Bankruptcy Rules 6004(h) and 6006(d), that the order approving this Sale Motion become effective immediately upon its entry.

No Prior Request

60. No prior request for the relief sought in this Sale Motion has been made to this or any other court.

Conclusion

61. The Debtor's proposed sale of the Assets as described in this Sale Motion is supported by sound business reasons, as set forth herein. The proposed sale is proper, necessary and serves the best interests of the Debtor, its estate and creditors, and all parties in interest. The Debtor thus requests that the Court approve the proposed Sale of the Assets free

and clear of all interests, liens, claims, and encumbrances, as requested, to the Purchaser or other Successful Bidder.

WHEREFORE, the Debtor respectfully requests that this Court (i) grant this Sale Motion and authorize the sale of the Assets to the Purchaser or other Successful Bidder and approve the Agreement, pursuant to the attached proposed order; (ii) approve the form and manner of notice of this Sale Motion, and of the proposed sale and assumptions and assignments of the Assigned Contracts; and (iii) grant such other and further relief as is just and proper.

Dated: August 14, 2015

PACHULSKI STANG ZIEHL & JONES LLP

/s/ James E. O'Neill

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Proposed Counsel for the Debtor and Debtor in Possession

EXHIBIT A

Asset Purchase Agreement

Execution Version

AMENDED AND RESTATED ASSET PURCHASE AGREEMENT

BY AND BETWEEN

RESPONSE GENETICS, INC.,
A DELAWARE CORPORATION

AND

CANCER GENETICS, INC.,
A DELAWARE CORPORATION

DATED AS OF AUGUST 14, 2015

Execution Version

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AMENDED AND RESTATED ASSET PURCHASE AGREEMENT (the "Agreement"), dated as of August 14, 2015 (the "Effective Date"), by and among Response Genetics, Inc., a Delaware corporation (the "Seller"), and Cancer Genetics, Inc., a Delaware corporation (the "Purchaser"). Capitalized terms used herein but not defined in the provisions in which they first appear shall have the meanings ascribed to them in Section 8.1(a) hereof.

WITNESSETH:

WHEREAS, Seller is a life science company engaged in the research, development and sale of clinical diagnostic tests for cancer (the "Business");

WHEREAS, subject to the terms and conditions of this Agreement, Purchaser desires to purchase the assets of Seller used primarily in the Business, and to assume certain liabilities of Seller associated with the Business, other than the Excluded Liabilities, and Seller desires to sell such assets to Purchaser and to assign such liabilities to Purchaser, all on the terms and conditions set forth in this Agreement and in accordance with Sections 105, 363 and 365 of Title 11 of the United States Code (the "Bankruptcy Code") and other applicable provisions of the Bankruptcy Code (the "Acquisition");

WHEREAS, Seller filed a voluntary bankruptcy petition (the "Bankruptcy Case") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on August 9, 2015 (the date of such filing, the "Petition Date");

WHEREAS, it is contemplated that the Bankruptcy Court will approve the Acquisition and that the Assets will be sold to Purchaser free and clear of Encumbrances (other than Permitted Encumbrances) under sections 105, 363, and 365 of the Bankruptcy Code and to the extent provided in the Sale Order, and such Acquisition will include the assumption of the Assumed Contracts by Seller and assignment of the Assumed Contracts to Purchaser under Section 365 of the Bankruptcy Code, all in accordance with and subject to the terms and conditions of this Agreement; and

WHEREAS, Seller and Purchaser entered into that certain asset purchase agreement, dated as of August 9, 2015 (the "Original Asset Purchase Agreement") and now desire to amend and restate the terms and provisions of the Original Asset Purchase in its entirety in accordance with and subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual promises herein made, and in consideration of the representations, warranties, and covenants herein contained, the parties hereto agree to amend and restate the Original Asset Purchase Agreement in its entirety as follows:

1. Purchase and Sale.

1.1 Assets to Be Transferred.

On the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller shall sell, assign, transfer, convey and deliver (or cause to be sold, assigned, transferred, conveyed and delivered) to Purchaser, and Purchaser shall purchase and assume from Seller, all of Seller's right, title and interest in and to all of the following properties, assets, and rights, tangible and intangible (including goodwill) owned, used or held by Seller in the ownership, operation, or conduct of the Business, wherever such properties, assets and rights are located, whether real, personal or mixed, whether accrued, fixed, contingent or otherwise, other than the Excluded Assets, in accordance with Sections 363 and 365 of the Bankruptcy Code (collectively, other than the Excluded Assets, the "Assets"):

(a) all Real Property Leases listed on Schedule 1.1(a), subject to the provisions of Section 1.8 below regarding Purchaser's right to add additional Real Property Leases to, and eliminate Real Property Leases from, Schedule 1.1(a) (collectively, as Schedule 1.1(a) may be amended pursuant to Section 1.8, the "Assumed Leases"), including, without limitation, all rights of the tenant thereunder to any leasehold improvements, fixtures, betterments and additions or installations;

(b) all (i) Contracts listed on Schedule 1.1(b), subject to the provisions of Section 1.8 regarding Purchaser's right to add additional Contracts to, and eliminate Contracts from, Schedule 1.1(b), and (ii) any other Contract entered into by Seller that are either (xx) short-term Contracts (for a term of 1 year or less) entered into in the Ordinary Course of the Business following the date hereof which provide for aggregate payments by Seller during the term thereof reasonably estimated at $25,000 or less, or (yy) are added by Purchaser to Schedule 1.1(b) pursuant to the provisions of Section 1.8 (collectively, including the Assumed Leases, and as Schedule 1.1(b) may be amended pursuant to Section 1.8, the "Assumed Contracts");

(c) all Intellectual Property Assets and all income, royalties, damages and payments due or payable at the Closing or thereafter relating to the Intellectual Property Assets (including damages and payments for past or future infringements or misappropriations thereof);

(d) all Fixed Assets;

(e) all Inventory;

(f) all Accounts Receivable listed on Schedule 1.1(f) (collectively, the "Included Pharma Receivables");

(g) all Prepaid Expenses;

(h) all Security Deposits;

(i) all Books and Records (to the extent transferable without violating any privacy rights of any Business Employee);

(j) all e-mail correspondence relating to the operations of the Business except to the extent the transfer of the same (A) would violate any Person's privacy rights or (B) are subject to any attorney-client, work product or similar privilege with respect to work performed in anticipation of or in connection with the preparation or administration of the Bankruptcy Case;

(k) to the extent transferable and assignable, all material licenses, franchises, permits, variances, exemptions, orders, approvals, and authorizations issued by Governmental Bodies in connection with Seller's conduct of the Business (collectively, "Permits");

(l) all Equipment;

(m) all telephone numbers, addresses (including electronic mail addresses) used by Seller in connection with the Business;

(n) all goodwill to the extent relating to the Assets and/or the Business;

(o) all rights to causes of action, lawsuits, judgments and Claims of any nature available to Seller (whether or not such cause of action, lawsuit, judgment or Claim is being pursued) arising out of, or relating to any Asset, including any cause of action, lawsuit, judgment, or Claim against a counterparty to an Assumed Contract, whether arising by way of counterclaim, set off, or rights of self-help under the Assumed Leases, the Assumed Contracts or otherwise, including all rights and claims of Seller arising under chapter 5 of the Bankruptcy Code against those Persons listed on Schedule 1.1(o) hereto (collectively, the "Included Avoidance Actions"), and including any and all proceeds of the foregoing; and

(p) all advertising, marketing and promotional materials and all other printed or written materials.

1.2 Excluded Assets.

Notwithstanding anything to the contrary contained in Section 1.1, the Assets shall exclude, without limitation, the following assets, properties and rights of Seller (collectively, the "Excluded Assets"), all of which Excluded Assets shall be retained by Seller:

(a) any cash, bank deposits and cash equivalents (excluding, in each case, Security Deposits);

(b) any assets, rights, claims, and interests expressly excluded pursuant to the provisions of Section 1.1 above;

(c) all leases, subleases, licenses or other agreements under which any Seller uses or occupies or has the right to use or occupy, now or in the future, any real property which is not the subject of an Assumed Lease;

(d) all fixed assets and Books and Records to the extent specifically identifiable to the ownership, business or conduct of any Excluded Asset or any real property which is not the subject of an Assumed Lease;

(e) any capital stock or membership interests in other Persons held by Seller;

(f) all Contracts (including Real Property Leases) other than those listed on Schedule 1.1(a) or 1.1(b) (subject to the provisions of Section 1.8) or included in the Intellectual Property Assets;

(g) Seller's rights under this Agreement and all cash and non-cash consideration payable or deliverable to Seller pursuant to the terms and provisions hereof;

(h) other than Security Deposits, any letters of credit or similar financial accommodations issued to any third party(ies) for the account of Seller and all collateral or security of any kind posted with or held by any such third party in connection therewith;

(i) all deposits and prepaid amounts of Seller held by or paid to third parties in connection with any Excluded Asset (including, without limitation, any deposits made by Seller with a utility pursuant to Section 366 of the Bankruptcy Code);

(j) any real property or tangible or intangible personal property held by Seller pursuant to a lease, license or other Contract to the extent that the associated lease, license or other Contract is not among the Assets;

(k) all rights, claims, credits and rebates of or with respect to (i) income Taxes that were paid or will be paid (whether prior to or after the Closing), and (ii) any taxes, assessments or similar charges paid by or on behalf of any Seller to the extent applicable to any period prior to the Closing;

(l) all assets of Seller's Benefit Plans;

(m) insurance proceeds, claims and causes of action with respect to or arising in connection with (A) any Contract which is not an Assumed Contract, (B) any item of tangible or intangible property that is not an Asset or (C) Seller's directors and officers liability insurance policies and any "tail" policies Seller may obtain with respect to such policies;

(n) any Real Property Lease or other Contract which is not assumable and assignable as a matter of applicable law (including, without limitation, any with respect to which any consent requirement in favor of the counter-party thereto may not be overridden pursuant to Section 365 of the Bankruptcy Code);

(o) all securities, whether capital stock or debt, of Seller;

(p) tax records, minute books, stock transfer books and corporate seals of Seller, except to the extent relating to the Assets or Assumed Liabilities;

(q) any intercompany claims, obligations, and receivables between or among Seller and any Affiliate of Seller;

(r) except to the extent such is an Asset or relates to the Assets or Assumed Liabilities, any writing or other item (including, without limitation, email correspondence) that (A) if transferred would violate any Person's privacy rights or (B) are subject to any attorney-client, work product or similar privilege with respect to work performed in anticipation of or in connection with the preparation or administration of the Bankruptcy Case;

(s) other than the Included Avoidance Actions, all of the rights and claims of Seller for preference or avoidance actions available to the Seller under the Bankruptcy Code, of whatever kind or nature, including, without limitation, those set forth in Sections 544 through 551 and any other applicable provisions of the Bankruptcy Code, and any related claims and actions arising under such sections by operation of law or otherwise, including any and all proceeds of the foregoing;

(t) except to the extent such are Included Avoidance Actions or arise under any Contracts that are Assets, all rights, claims and causes of action of Seller against officers, directors, members, principals, agents, and representatives of such Seller (whether current or former);

(u) the Non-Pharma Receivables; and

(v) those other assets of Seller, if any, listed on Schedule 1.2 attached hereto and incorporated herein by this reference.

1.3 Liabilities.

(a) Upon the terms and subject to the conditions hereof, as of the Closing, Purchaser shall assume from Seller solely the following Liabilities (collectively, the "Assumed Liabilities"):

(i) Liabilities arising under the Assumed Contracts (subject to the provisions of Section 1.8 hereof) and the Assumed Leases (subject to the provisions of Section 1.8 hereof) with respect to Purchaser's performance thereunder after the Closing Date;

(ii) only unpaid sick pay, vacation and other paid time off owing by Seller as of the Closing with respect to any Transferred Employee to the extent set forth on Schedule 1.3(a)(ii);

(iii) trade accounts payable owing to third parties as of the Closing Date to the extent such trade accounts payable are both (i) incurred by Seller in the Ordinary Course of Business between the Petition Date and the Closing and (ii) reasonably allocable to the Included Pharma Receivables or to goods and services provided during such period as will inure to the benefit of the post-Closing operation of the Business (collectively, the "Included Payables"); and

(iv) an amount equal to 50% of all Cure Costs payable in connection with the Assumed Leases and Assumed Contracts (as the same may be modified pursuant to Section 1.8 hereof), up to a maximum of $150,000.00; provided, however, to the extent Purchaser's designation for inclusion of a Real Property Lease or Contract in the Assumed Leases and/or Assumed Contracts pursuant to Section 1.8 hereof that is not among the Assumed Leases or Assumed Contracts as of the date the Schedules hereto are mutually approved and agreed to by the parties causes the aggregate amount of Cure Costs to exceed $300,000.00, Purchaser shall bear and pay the full amount of such excess (any such excess amounts, "Purchaser Exclusive Cures").

(b) Notwithstanding anything to the contrary contained in this Agreement, Seller acknowledges and agrees that Purchaser will not assume any Liability of Seller, other than the Assumed Liabilities. In furtherance, and not in limitation, of the foregoing, except for the Assumed Liabilities, neither Purchaser nor any of its Affiliates shall assume, and shall not be deemed to have assumed, and Seller shall retain any debt, Claim, obligation or other Liability of Seller whatsoever, including the following (collectively, the "Excluded Liabilities"):

(i) all Liabilities which are not Assumed Liabilities;

(ii) all Liabilities with respect to any Excluded Assets;

(iii) all Liabilities with respect to the performance after the Closing Date of the Assumed Contracts and Assumed Leases to the extent such Liabilities arise from a breach of contract or Law or any other conduct by Seller or its Affiliates or their respective representatives prior to Closing;

(iv) all Liabilities with respect to any and all indebtedness of any Seller for borrowed money not included in the Assumed Liabilities;

(v) all Claims, penalties, fines, settlements, interest, costs and expenses arising out of or incurred as a result of any actual or alleged violation by Seller or any of its Affiliates of any Law prior to the Closing;

(vi) all Claims, penalties, fines, settlements, interest, costs and expenses relating to any regulatory matters or improper billing with respect to the Business arising out of events, actions or omissions occurring prior to the Closing or otherwise relating to any period prior to Closing;

(vii) all Liabilities for Taxes arising out of or attributable to the operation of the Business prior to the Closing;

(viii) all Liabilities under the WARN Act;

(ix) an amount equal to 50% of all Cure Costs payable in connection with the Assumed Leases and Assumed Contracts, up to a maximum of $150,000.00, which amount Seller hereby agrees to bear and pay in connection with the assumption and assignment of the Assumed Contracts and Assumed Leases pursuant to this Agreement;

(x) all Liabilities for fees and expenses (i) relating to the negotiation and preparation of this Agreement and the other agreements contemplated hereby and (ii) relating to the transactions contemplated hereby and thereby, in each case, to the extent incurred by Seller or any of its Affiliates; and

(xi) other than the Included Payables, all trade accounts payable of Seller or in connection with the Business arising out of or in respect of any period prior to Closing.

1.4 Purchase Price; Deposit; and Allocation of Purchase Price.

(a) The purchase price (the "Purchase Price") for the purchase, sale, assignment and conveyance of Seller's right, title and interest in, to and under the Assets shall consist of:

(i) cash in the amount of $7,000,000 (the "Cash Consideration");

(ii) 788,584 shares of common stock of Purchaser, par value $0.0001 per share (the "Stock Consideration") at a price per share equal to $8.8767; and

(iii) the assumption of the Assumed Liabilities.

(b) Purchaser has deposited into an escrow (the "Escrow") with Pachulski Stang Ziehl & Jones LLP (the "Escrow Holder") an amount equal to $500,000.00 (the "Initial Deposit") in immediately available, good funds (funds delivered in this manner are referred to herein as "Good Funds"). In turn, the Escrow Holder has deposited the Initial Deposit into a client trust account. Within two (2) Business Days after the agreement by Purchaser and Seller in writing upon the form and substance of all Schedules and Exhibits as contemplated by Section 7.1(h), Purchaser shall deposit an additional $500,000.00 in Good Funds into the Escrow (the "Additional Deposit" and, along with the Initial Deposit, the "Deposit"). Upon entry of an order in the Bankruptcy Case approving Seller's application to employ BDO, $120,000 of the Deposit may be removed from the escrow and paid by the Escrow Holder to BDO to pay, in advance, the fees charged by BDO in connection with (i) BDO's review of the Quarterly Financial Statements, (ii) the granting of BDO's consent contemplated by Section 5.10(a) hereof,

and (iii) the performance of the other services to be performed by BDO in connection with the satisfaction of the condition set forth in Section 5.10 (b) below (the "BDO Fees"). The amount of the Deposit remaining in Escrow, together with any interest accrued thereon, shall become nonrefundable and shall be disbursed to Seller to be retained by Seller for its own account upon the termination of the transactions contemplated by this Agreement by reason of Purchaser's default pursuant to Section 7.1(d) hereof, but not for any other reason. At the Closing, the amount of the Deposit remaining in Escrow (and any interest accrued thereon) shall be credited and applied toward payment of the Cash Consideration. If the transactions contemplated herein terminate pursuant to Section 7.1 (other than pursuant to Section 7.1(d)), the Escrow Holder shall return to Purchaser the amount of the Deposit remaining in Escrow (together with all interest accrued thereon). If the transactions contemplated herein terminate pursuant to Section 7.1(d), the Escrow Holder shall disburse to Seller the amount of the Deposit remaining in Escrow (together with all interest accrued thereon).

(c) At the Closing, Purchaser shall satisfy the Purchase Price by:

(i) instructing the Escrow Holder to disburse the amount of the Deposit remaining in Escrow, together with all interest accrued thereon, to Seller;

(ii) paying to Seller Good Funds in an amount equal to (i) the Cash Consideration, *minus* (ii) the amount of the Deposit remaining in Escrow (together with all interest accrued thereon), *minus* (iii) the aggregate amount of all Damage or Destruction Losses, if any, determined pursuant to Section 4.15, *minus* (iv) the net amount, if any, payable by Seller pursuant to Section 1.9 below, *plus* (v) the net amount, if any, payable by Purchaser pursuant to Section 1.9 below ; and

(iii) issuing and delivering to SWK Funding LLC, a Delaware limited liability company ("SWK"), Swiftcurrent Partners LP ("Swiftcurrent LP") and Swiftcurrent Offshore Master Ltd. ("Swiftcurrent Master"), the Stock Consideration registered in the names of SWK, Swiftcurrent LP and Swiftcurrent Master, respectively, in accordance with the Stock Registration Instructions.

(d) Purchaser shall prepare a proposed allocation of the Purchase Price (and all other capitalized costs) among the Assets for U.S. federal, state, local and foreign income and franchise Tax purposes, including (i) the Assumed Liabilities to the extent such Liabilities are required to be treated as part of the purchase price for Tax purposes and (ii) allocation of the Cash Consideration and Stock Consideration; provided that all such allocations shall be made in accordance with Section 1060 of the Code. No later than one hundred twenty (120) days following the Closing Date, Purchaser shall deliver such allocation to Seller for Seller's review and approval, which approval Seller shall not unreasonably withhold. Upon Seller's approval of the proposed allocation prepared by Purchaser, Purchaser and Seller and their respective Affiliates shall report, act and file Tax Returns in all respects and for all purposes consistent with such allocation prepared by Purchaser. Neither Purchaser nor Seller shall take any tax position (whether in audits, Tax Returns or otherwise) with respect to the mutually approved allocation which is

inconsistent with such allocation, unless (and then only to the extent) required by a "determination" within the meaning of Section 1313(a) of the Code. For the avoidance of all doubt, in the event that Seller and Purchaser are not able to agree upon an allocation of the Purchase Price pursuant to this Section 1.4(d) within thirty (30) days following Purchaser's delivery of the proposed allocation to Seller pursuant to this Section 1.4(d), Purchaser and Seller shall each have the right to report, act and file Tax Returns based upon such separate and independent allocations as they may deem appropriate.

1.5 Closing.

Subject to the terms and conditions of this Agreement and the Sale Order, the sale and purchase of the Assets and the assumption of the Assumed Liabilities contemplated by this Agreement shall take place at a closing (the "Closing") to be held at the offices of Pachulski Stang Ziehl & Jones LLP located in Wilmington, Delaware, at 10:00 a.m., Eastern Time, no later than the second (2nd) Business Day following the satisfaction or waiver of all conditions to the obligations of the parties hereto set forth in Section 5 and 6 hereof (other than those conditions which by their nature can only be satisfied at the Closing), or at such other place, at such other time, on such other date or in such other manner as Seller and Purchaser may mutually agree upon in writing (the day on which the Closing takes place being the "Closing Date").

1.6 Closing Deliveries by Seller.

At the Closing, unless otherwise waived in writing by Purchaser, Seller shall deliver or cause to be delivered to Purchaser:

(a) A duly executed Bill of Sale to transfer the Assets to Purchaser;

(b) A duly executed counterpart of the Assignment and Assumption Agreement;

(c) A duly executed counterpart of the Real Estate Assignment;

(d) Duly executed counterparts of the Intellectual Property Assignments;

(e) A duly executed counterpart of the Transitional Services Agreement substantially in the form attached hereto as Exhibit H;

(f) The certificates required by Sections 5.1(c) and 5.2; and

(g) Such other documents, notices, items and certificates as Purchaser may reasonably require (in each case to the extent not inconsistent with the other terms, provisions and limitations set forth herein and which do not impose any additional monetary obligations on Seller not imposed by the other provisions of this Agreement or otherwise materially increase the burdens imposed upon Seller pursuant to the other provisions of this Agreement) in order to consummate the transactions contemplated hereunder; provided, however, nothing in this Section 1.6(g) shall be construed as

entitling Seller to refuse to review or respond to additional documents submitted to Seller in accordance with this provision on the basis that such review and response will entail monetary obligations to Seller's counsel or other professionals.

1.7 Closing Deliveries by Purchaser.

At the Closing, unless otherwise waived in writing by Seller, Purchaser shall deliver or cause to be delivered to Seller:

(a) An amount equal to the Cash Consideration, by wire transfer of immediately available funds to an account (or accounts) designated in writing by Seller at least two (2) Business Days prior to the Closing Date;

(b) A duly executed counterpart of the Assignment and Assumption Agreement;

(c) A duly executed counterpart of the Real Estate Assignment;

(d) A duly executed counterpart of the Intellectual Property Assignment;

(e) An Assumption of Assumed Liabilities, substantially in the form attached hereto as Exhibit I;

(f) The certificates required by Sections 6.1(c) and 6.2; and

(g) Such other documents, notices, items and certificates as Seller may reasonably require (in each case to the extent not inconsistent with the other terms, provisions and limitations set forth herein and which do not impose any additional monetary obligations on Purchaser not imposed by the other provisions of this Agreement or otherwise materially increase the burdens imposed upon Purchaser pursuant to the other provisions of this Agreement) in order to consummate the transactions contemplated hereunder; provided, however, nothing in this Section 1.7(g) shall be construed as entitling Purchaser to refuse to review or respond to additional documents submitted to Purchaser in accordance with this provision on the basis that such review and response will entail monetary obligations to Purchaser's counsel or other professionals.

1.8 Assumed Contracts and Leases.

(a) Prior to the Closing Date, Seller shall notify Purchaser in writing promptly of any entry by Seller into any new Contract, including with such notice a copy of such Contract.

(b) During the period from the Effective Date until the Closing, Seller shall not, without first obtaining Purchaser's written consent, reject or seek to assume or reject any Contract or Real Property Lease.

(c) Purchaser may, from time to time prior to and after the Closing, add to Schedule 1.1(a) or 1.1(b), as the case may be, any Contract, upon one (1) Business Day's written notice to Seller, and, upon providing such notice, such Contract shall be deemed to be added to Schedule 1.1(a) or 1.1(b), as the case may be, and Seller shall promptly deliver an updated Schedule 1.1(a) or 1.1(b) to Purchaser; provided, however, for the avoidance of doubt, Purchaser hereby acknowledges that nothing in this Section 1.8(c) shall be deemed to limit or affect Seller's right post-Closing to convert, dismiss or otherwise close the Bankruptcy Case. Additionally, prior to the sale auction conducted by Seller pursuant to the Bid Procedures Order, Purchaser may, from time to time, delete from Schedule 1.1(a) or 1.1(b) any Contract, upon one (1) Business Day's written notice to Seller, and, upon providing such notice, such Contract shall be deemed to be deleted from Schedule 1.1(a) or 1.1(b), as the case may be, and Seller shall promptly deliver an updated Schedule 1.1(a) or 1.1(b) to Purchaser. At the Closing, so long as adequate assurance of future performance thereof by Purchaser has been demonstrated to the Bankruptcy Court's satisfaction and Purchaser has paid its portion of any Cure Cost with respect thereto and, if applicable, any Purchaser Exclusive Costs, in each case, pursuant to Section 1.3 above, Seller shall assign, transfer, convey and deliver (or cause to be assigned, transferred, conveyed and delivered) to Purchaser, and Purchaser shall assume from Seller, all of Seller's right, title and interest in and to all Contracts listed on Schedule 1.1(a) and 1.1(b) (as each such schedule is amended in accordance with the provisions hereof); provided, however, Purchaser acknowledges that, while Seller shall use commercially reasonable efforts to cause the same to be assumed and assigned to Purchaser at the Closing, Seller's assumption and assignment of any Contract added to either Schedule 1.1(a) or 1.1(b) after the date which is twenty-two (22) days prior to the Sale Hearing shall not be a condition to Purchaser's obligation to consummate the transactions contemplated herein.

(d) Seller shall provide timely and proper notice to all parties to Assumed Contracts and Assumed Leases, including any Contract designated for assumption, pursuant to the Bid Procedures Order, and Purchaser shall provide Seller with evidence of adequate assurance of future performance consistent with section 365 of the Bankruptcy Code. Seller shall take all other commercially reasonable actions necessary to cause such Assumed Contracts to be assumed by Seller and assigned to Purchaser pursuant to Section 365 of the Bankruptcy Code.

(e) Upon the occurrence of the Closing, any Contract not designated as an Assumed Contract or Assumed Lease, including pursuant to Section 1.8(d), shall, unless otherwise an Asset, be deemed to be an Excluded Asset; provided that, any such Contract shall be subject to assumption by Seller and assignment to Purchaser pursuant to Section 4.16, and Seller shall provide not less than five (5) days' written notice to Purchaser prior to rejecting any such Contract.

1.9 Proration.

Current rent, current real and personal property taxes, prepaid advertising, utilities and other items of expense (including, without limitation, any prepaid insurance, maintenance, tax or common area or like payments under the Assumed Leases or

Assumed Contracts, or any of them) and relating to or attributable to the Assets shall be prorated between Seller and Purchaser as of the Closing Date. All liabilities and obligations due in respect of periods prior to or as of the Closing Date shall be paid in full or otherwise satisfied by Seller and all liabilities and obligations due in respect of periods after the Closing Date shall be paid in full or otherwise satisfied by Purchaser. Rent shall be prorated on the basis of a thirty (30) day month. For the avoidance of doubt, (i) Security Deposits shall not be subject to the provisions of this Section 1.9, and (ii) this Section 1.9 shall be subject to the provisions of Sections 1.3(a)(iii) and 1.3(b)(ix) with respect to the parties' respective responsibility for Cure Costs.

2. Representations and Warranties of Seller.

The disclosure in any section or subsection of the Seller disclosure schedule provided by Seller to Purchaser on the date hereof (the "Seller Disclosure Schedule") shall qualify other sections and subsections in this Section 2 only to the extent that disclosure in one subsection of the Seller Disclosure Schedule is specifically referred to in another subsection of the Seller Disclosure Schedule by appropriate cross-reference or except to the extent that the relevance of a disclosure in one subsection of the Seller Disclosure Schedule to another subsection of the Seller Disclosure Schedule is reasonably apparent on its face. Except as set forth in the Seller Disclosure Schedule or as disclosed in any Seller SEC Reports filed or furnished since January 1, 2014 and only as and to the extent disclosed therein (other than disclosures in the "Risk Factors" sections of any such reports or other cautionary or forward-looking disclosure contained therein), Seller hereby represents and warrants to Purchaser as follows:

2.1 Organization and Qualification; Authority.

(a) Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Seller (i) is duly qualified or licensed to do business as a foreign corporation and is in good standing under the laws of any other jurisdiction in which the character of the properties owned, leased or operated by it therein or in which the transaction of its business makes such qualification or licensing necessary, except where the failure to be so qualified, licensed or in good standing or have such corporate power and authority would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, and (ii) has the requisite corporate power and authority to own, operate and lease its properties and carry on its business as now conducted.

(b) (i) Seller has all requisite corporate power and authority to enter into this Agreement and the Transaction Documents, and, subject to entry of the Sale Order, to carry out its obligations hereunder and thereunder and consummate the transactions contemplated hereby and thereby and (i) subject to the entry of the Sale Order, the execution and delivery of this Agreement and the Transaction Documents by Seller, the performance by Seller of its obligations hereunder and thereunder and the consummation by Seller of the transactions contemplated hereby and thereby have been duly authorized by all requisite entity action on the part of Seller. This Agreement has been duly executed and delivered by Seller. Subject to entry of the Sale Order, this

Agreement constitutes, or will constitute the legal, valid and binding obligation of Seller, enforceable against it in accordance with its terms.

(c) Seller has made available to Purchaser copies of the Seller Charter and Seller Bylaws and all such documents are in full force and effect and no dissolution, revocation or forfeiture proceedings regarding Seller have been commenced. Seller is not in violation of the Seller Charter and Seller Bylaws in any material respect.

2.2 No Conflict; Required Filings and Consents.

(a) The execution and delivery by Seller of this Agreement and the Transaction Documents do not, and, subject to entry of the Sale Order, the performance of its obligations hereunder and thereunder will not, (i) conflict with or violate Seller Charter or Seller Bylaws, (ii) assuming that all consents, approvals, authorizations and other actions described in subsection (b) of this Section 2.2 have been obtained and all filings and obligations described in subsection (b) of this Section 2.2 have been made, conflict with or violate any Law applicable to Seller or by which any property or asset of Seller is bound, (iii) except as set forth in Section 2.2(a) of the Seller Disclosure Schedule, require any consent, notice or waiver under or result in any violation or breach of or constitute (with or without notice or lapse of time or both) a default (or give rise to any right of termination, amendment, acceleration, prepayment or cancellation or to a loss of any benefit to which Seller) under, or result in the triggering of any payments pursuant to (A) any Contract to which Seller is a party or by which it or any of its properties or assets may be bound or (B) any Permit affecting, or relating in any way to, the assets or business of Seller or (iv) result in the creation or imposition of any Lien or other encumbrance (except for Permitted Liens) on any property or asset of Seller except, with respect to clauses (ii), (iii) and (iv) such triggering of payments, Liens, encumbrances, filings, notices, permits, authorizations, consents, approvals, violations, conflicts, breaches or defaults which would either (xx) not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, or (yy) be removed or rendered unnecessary by the effect of the Sale Order at Closing..

(b) The execution and delivery by Seller of this Agreement and the Transaction Documents do not, and the performance of its obligations hereunder and thereunder will not, require any consent, approval, authorization of, or filing with or notification to, any Governmental Body, except for (i) applicable requirements, if any, of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), (ii) any filings required under the rules and regulations of the NASDAQ Stock Market ("NASDAQ"), to the extent applicable to Seller notwithstanding that it has been de-listed by NASDAQ, (iii) the filing of customary applications and notices, as applicable, with the FDA, the MHRA or EMEA, or pursuant to CLIA and (iv) any registration, filing or notification required pursuant to state securities or blue sky laws, and (v) where the failure to obtain such consents, approvals, authorizations or permits, or to make such filings or notifications would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

2.3 Company Products; Permits.

(a) Seller is in possession of all Permits necessary for it to own, lease and operate its properties or to carry on their business as it is now being conducted, except in each case, where the failure to possess such Permits would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. All such Permits are valid and in full force and effect, Seller has satisfied all of the material requirements of and fulfilled and performed all of its material obligations with respect to such Permits, and, to Seller's knowledge, no event has occurred that allows, or after notice or lapse of time would allow, revocation or termination thereof or results in any other impairment of the rights of the holder of any such Permits, except for any of the foregoing that would not reasonably be expected to have a Material Adverse Effect.

(b) Except as set forth in Section 2.3(b) of the Seller Disclosure Schedule, Seller is not the subject of any administrative, civil or criminal action or, to the Seller's knowledge, investigation alleging violations of any Law of any health care program funded by any Governmental Body nor are there any reasonable grounds to anticipate the commencement of any such action or investigation. Neither Seller nor any Company Product is currently subject to any outstanding investigation or audit (except for routine periodic audits conducted pursuant to regulatory or contractual requirements in the Ordinary Course of Business) by any Governmental Body involving alleged noncompliance with any Law of any health care program funded by any Governmental Body and, to the knowledge of Seller there are no grounds to reasonably anticipate any such investigation or audit in the foreseeable future.

(c) Neither Seller, nor to the knowledge of Seller, any agent, representative or contractor of Seller, has knowingly or willfully solicited, received, paid or offered to pay any remuneration, directly or indirectly, overtly or covertly, in cash or kind in return for the purchasing or ordering of, or recommending the purchasing or ordering of, any Company Product in violation of any applicable anti-kickback law, including without limitation the Federal Health Care Program Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), or any applicable state anti-kickback law.

(d) Neither Seller, nor to the knowledge of Seller, any agent, representative or contractor of Seller, has knowingly submitted or caused to be submitted any claim for payment to any health care program in violation of any applicable Law relating to false claims or fraud, including without limitation the Federal False Claim Act, 31 U.S.C. § 3729, or any applicable state false claim or fraud law.

2.4 SEC Filings.

Except as otherwise provided in Section 2.4 of the Seller Disclosure Schedule, Seller has timely filed all forms, documents, statements and reports required to be filed under the Exchange Act prior to the date hereof by it with the SEC since January 1, 2014 (the forms, documents, statements and reports filed with the SEC since January 1, 2014, including any amendments thereto, the "Seller SEC Reports"). As of their respective dates, or, if amended or superseded by a subsequent filing, as of the date of the last such

amendment or superseding filing prior to the date hereof, the Seller SEC Reports complied, and each of the Seller SEC Reports filed subsequent to the date of this Agreement will comply, in all material respects, with the requirements of the Securities Act, the Exchange Act and the Sarbanes-Oxley Act of 2002, as the case may be, and the applicable rules and regulations promulgated thereunder. As of the time of filing with the SEC, none of the Seller SEC Reports so filed or that will be filed subsequent to the date of this Agreement contained or will contain, as the case may be, any untrue statement of a material fact or omitted to state any material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, except to the extent that the information in such Seller SEC Report has been amended or superseded by a later Seller SEC Report filed prior to the date hereof.

2.5 Absence of Litigation.

Except as set forth in Section 2.5 of the Seller Disclosure Schedule, to Seller's knowledge, there are no Claims pending or, to the knowledge of Seller, threatened against Seller or by Seller, (a) relating to or affecting the Business, the Assets or the Assumed Liabilities or (b) that challenge or seek to prevent, enjoin or otherwise delay the consummation by Seller of the transactions contemplated by this Agreement. To Seller's knowledge, there are no outstanding Orders and no unsatisfied judgments, penalties or awards against, relating to or affecting the Business, the Assets or the Assumed Liabilities.

2.6 Compliance with Laws.

Except as set forth in Section 2.6 of the Seller Disclosure Schedule, Seller is in compliance in all material respects with all Laws (including health care Laws) applicable to the Business or the Assets. To Seller's knowledge, Seller has not received any material written notice of or been charged with the material breach or violation of any Laws (including health care Laws) applicable to the Business or Assets. There are no investigations pending or, to the knowledge of the Company, threatened against Seller regarding the possible material breach or violation of any Laws (including health care Laws) applicable to the Business or the Assets.

2.7 Labor and Employment Matters.

(a) There are no material labor grievances pending or, to the knowledge of Seller, threatened between Seller, on the one hand, and any of its employees or former employees, on the other hand; and (ii) Seller is not a party to any collective bargaining agreement, work council agreement, work force agreement or any other labor union contract applicable to persons employed Seller, nor, to the knowledge of Seller, are there any current activities or proceedings of any labor union to organize any such employees. Seller has not received written notice of any pending charge by any Governmental Body of (i) any alleged unfair labor practice as defined in the National Labor Relations Act, as amended; (ii) any alleged Occupational Safety and Health Act violations; (iii) any alleged wage or hour violations; (iv) any alleged discriminatory acts

or practices in connection with employment matters; or (v) any claims by any Governmental Body that Seller has failed to comply with any material Law relating to employment or labor matters. Seller is not currently and has not been the subject of any actual or, to the knowledge of Seller, threatened "whistleblower" or similar claims by past or current employees or any other persons.

(b) Except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect, Seller is currently in compliance with all Laws relating to employment, including those related to classification (for purposes of exempt or non-exempt from applicable wage and overtime wage Laws, or as an employee or independent contractor) wages, hours, collective bargaining and the payment and withholding of taxes and other sums as required by the appropriate Governmental Body and has withheld and paid to the appropriate Governmental Body all amounts required to be withheld from Seller employees and is not liable for any arrears of wages, taxes penalties or other sums for failing to comply with any of the foregoing.

(c) Except as otherwise set forth in Section 2.7(c) of the Seller Disclosure Schedule, (i) all contracts of employment to which Seller is a party are terminable by Seller on three months' or less notice without penalty; (ii) there are no established severance practices, plans or policies of Seller, in relation to, the termination of employment of any of its employees (whether voluntary or involuntary); (iii) Seller has no outstanding liability to pay compensation for loss of office or employment or a severance payment to any present or former employee or to make any payment for breach of any agreement; and (iv) there is no term of employment applicable to any employee of Seller which shall entitle that employee to treat the consummation of the Acquisition as amounting to a breach of his contract of employment or entitling him to any payment or benefit whatsoever or entitling him to treat himself as redundant or otherwise dismissed or released from any obligation.

(d) Section 2.7(d) of the Seller Disclosure Schedule sets forth, as of the date hereof, a list of Seller's employees and such employee's job title, bonus for the most recently completed fiscal year, classification as exempt or non-exempt, base rate of compensation and, as of August 9, 2015, accrued leave or vacation. Since August 9, 2015, Seller has not increased the base rate of compensation for any such employee.

(e) Section 2.7(e) of the Seller Disclosure Schedule sets forth a list of those employees who have been terminated or have resigned during the 90-day period ending on the date hereof. Except as set forth in Section 2.7(e) of the Seller Disclosure Schedule, as of the date hereof, no officer or employee of Seller has provided to any Person referenced in the definition of "Knowledge of Seller" written notice of any intention to terminate his or her employment with Seller, nor, to the Knowledge of Seller, has any officer or employee provided such notice to Seller.

(f) Except as set forth in Section 2.7(f) of the Seller Disclosure Schedule or as set forth in this Agreement, neither the execution of this Agreement nor the consummation or approval of the transactions contemplated herein will (either alone or in conjunction with any other event) (i) result in any payment becoming due to any

current or former employee, or current or former independent contractor, of Seller, (ii) increase any payments or benefits otherwise payable under any Company Plan, or (iii) result in the acceleration of the time of payment, funding or vesting of any payments or benefits under any Company Plan.

(g) Section 2.7(g) of the Company Disclosure Schedule sets forth a list of the Business Employees who, as of the date hereof, have not executed a confidentiality agreement or an invention assignment agreement with the Company, the forms of which agreements have been provided to Purchaser.

(h) Section 2.7(h) of the Seller Disclosure Schedule sets forth (i) a list of all independent contractors of Seller and (ii) the agreements between Seller and such independent contractor.

2.8 Intellectual Property.

(a) Except as set forth in Section 2.8(a) of the Seller Disclosure Letter, Seller owns or licenses, and has the right to use, all Intellectual Property necessary to conduct the Business as presently conducted and as proposed to be conducted (including the future sale of products currently under clinical development) (collectively, the "Seller Intellectual Property") the absence of which would be reasonably likely to result in a Material Adverse Effect. Except as set forth on Section 2.8(a) of the Seller Disclosure Schedule, Seller has sufficient right and license under the Seller Intellectual Property to exclusively commercialize the Company Products in each jurisdiction in which Seller markets or proposes to market such Company Products.

(b) Section 2.8(b) of the Seller Disclosure Schedule sets forth with respect to all Intellectual Property owned or licensed by Seller which is registered with any Governmental body or for which an application has been filed with any Governmental Body (the "Seller Registered Intellectual Property"): (i) the registration or application number, the date filed and the title, if applicable, of the registration or application; and (ii) the names of the jurisdictions covered by the applicable registration or application. Section 2.8(b) of the Seller Disclosure Schedule identifies and provides a brief description of any unregistered trademarks or inventions comprising Company Intellectual Property as of the date hereof: (xx) for which an application has not been filed with any Governmental Body, and (yy) the absence of which is likely to have a Material Adverse Effect. Except as disclosed in Section 2.8(b) of the Seller Disclosure Schedule, Seller is the exclusive owner or exclusive licensee of; or has an exclusive field of use to the Seller Intellectual Property free and clear (subject to entry of the Sale Order) of any liens or encumbrances.

(c) Section 2.8(c) of the Seller Disclosure Schedule identifies each Contract currently in effect that: (i) contains a grant of any right or license to any third party under any Seller Intellectual Property; or (ii) contains a grant to the Company of any right or license under any Seller Intellectual Property owned by a third party that either: (a) is material to the Company; or (b) imposes any ongoing, or has imposed in the past, royalty or payment obligations in excess of $25,000 per annum.

(d) To the Seller's knowledge, all Seller Registered Intellectual Property is valid, enforceable, and subsisting. As of the Closing Date, and except as set forth on Section 2.8(b) of the Seller Disclosure Schedule, all necessary registration, maintenance and renewal fees having a non-extendible deadline within two months after the Closing Date have been paid with respect to such Seller Registered Intellectual Property and, further, that, except where the failure to file the same would not reasonably be expected to have a Material Adverse Effect, all necessary documents and certificates with respect to such Seller Registered Intellectual Property have been filed with the relevant Governmental Bodies.

(e) To Seller's knowledge, except as set forth in Section 2.8(e) of the Seller Disclosure Schedule, Seller is not, and will not as a result of the consummation of the transactions contemplated by this Agreement be, in breach in any material respect of any license, sublicense or other agreement relating to the Seller Intellectual Property, or any licenses, sublicenses and other agreements as to which the Company is a party and pursuant to which the Company uses any patents, copyrights (including software), trademarks or other intellectual property rights of or owned by third parties (the "Third Party Intellectual Property").

(f) To Seller's knowledge, Seller has not been named as a defendant in any suit, action or proceeding which involves a claim of infringement or misappropriation of any Third Party Intellectual Property. Except as set forth in Section 2.8(f) of the Seller Disclosure Schedule, since January 1, 2012 Seller has not received (i) any actual notice or other actual communication (in writing or otherwise) of any actual or alleged infringement, misappropriation or unlawful or unauthorized use of any Third Party Intellectual Property; or (ii) any actual notice in writing offering to license the Company any such rights. To Seller's knowledge, except as set forth on Section 2.8(f) of the Seller Disclosure Schedule, the business of Seller, as currently conducted and proposed to be conducted (including the future commercialization of products currently under development), does not and would not infringe, violate, or constitute a misappropriation of any Third Party Intellectual Property.

(g) To the knowledge of the Seller, and except as set forth in Section 2.8(g) of the Seller Disclosure Schedule, no other Person is infringing, misappropriating or making any unlawful or unauthorized use of any Seller Intellectual Property.

2.9 Taxes.

(a) Except as set forth in Section 2.9(a) of the Seller Disclosure Schedule, Seller has timely filed or caused to be filed all Tax Returns required to be filed by applicable Law with respect to Seller or any of its income, properties or operations; and has paid all Taxes shown thereon as owing, except in each case where the failure to file Tax Returns or to pay Taxes would not have, or would not reasonably be expected to result in, a Material Adverse Effect.

(b) Seller has made adequate provisions in accordance with GAAP, appropriately and consistently applied, in its financial statements for the payment of all

material Taxes for which Seller may be liable for the periods covered thereby that were not yet due and payable as of the dates thereof, regardless of whether the liability for such Taxes is disputed.

(c) To the Seller's knowledge, except as set forth in Section 2.9 of the Seller Disclosure Schedule, Seller has not received any written claim or assessment against Seller for any material deficiency in Taxes, and to the knowledge of Seller there is no outstanding audit or investigation with respect to any liability of Seller for Taxes. There are no agreements in effect to extend the period of limitations for the assessment or collection of any Tax for which Seller may be liable, and no closing agreement pursuant to Section 7121 of the Code or any predecessor provision thereof, or any similar provision of state or local Law.

(d) Except as set forth in Section 2.9 of the Seller Disclosure Schedule, to Seller's knowledge, no written claim that remains unresolved has been made by any Governmental Body in a jurisdiction where Seller has not filed Tax Returns that Seller is or may be subject to taxation by that jurisdiction.

(e) Seller has not engaged in a transaction that is listed within the meaning of Section 6011 of the Code and Treasury Regulations promulgated thereunder.

(f) Seller has withheld from payments to its employees, independent contractors, creditors, stockholders and any other applicable Person (and timely paid to the appropriate taxing authority) proper and accurate amounts in compliance in all material respects with all Tax withholding provisions of applicable Laws (including income, social security, and employment Tax withholding for all types of compensation and withholding of Tax on dividends, interest, and royalties and similar income earned by nonresident aliens and foreign corporations).

(g) Neither Company nor any of its Subsidiaries (A) is or has ever been a member of an affiliated group of corporations filing a consolidated federal income Tax Return (other than the group to which they are currently members and the common parent of which is the Company), or (B) has any liability for the Taxes of any Person (other than the Company or any of the Company Subsidiaries) under Treasury Regulations Section 1.1502-6 (or any similar provision of any state, local, or foreign law), as a transferee or successor, by contract, or otherwise.

(h) Neither Seller nor any of its Subsidiaries is a party to, or bound by, or has any obligation under, any tax allocation or sharing agreement or similar contract or arrangement or any agreement that obligates it to make any payment computed by reference to the Taxes, taxable income or taxable losses of any other Person.

(i) Neither Seller nor any of its Subsidiaries will be required to include any item of income in, or exclude any item of deduction from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of any (A) change in method of accounting for a taxable period ending on or prior to the Closing Date, (B) "closing agreement" as described in Section 7121 of the Code (or any

corresponding or similar provision of state or local income Tax law) executed on or prior to the Closing Date, (C) intercompany transactions or any excess loss account described in Treasury Regulations under Section 1502 of the Code (or any corresponding or similar provision of state or local income Tax law), (D) installment sale or open transaction disposition made on or prior to the Closing Date, or (E) prepaid amount received on or prior to the Closing Date.

(j) Seller has not been either a "distributing corporation" or a "controlled corporation" in a distribution in which the parties to such distribution treated the distribution as one to which Section 355 of the Code is applicable.

(k) Seller has not been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(l)(A)(ii) of the Code.

2.10 Real Property; Assets.

(a) Section 2.10(a) of the Seller Disclosure Schedule sets forth the address of each material parcel of leasehold or subleasehold estates and other material rights to use or occupy any land or improvements held by or for Seller (the "Leased Real Property") as of the date hereof. True and complete copies of all leases and such other documents relating to the Leased Real Property (including all extensions, supplements, amendments and other modifications thereof, waivers thereunder, and nondisturbance agreements, if any, relating thereto) (the "Real Property Leases") have been made available by Seller to Purchaser. As of the Effective Date, except for matters (xx) set forth in Section 2.10(a) of the Seller Disclosure Schedule, or (yy) circumstances which would not reasonably be expected to result in a Material Adverse Effect, (i) the Leases are in full force and effect in accordance with their terms, (ii) Seller is not in default of any of its obligations under the Leases and (iii) to Seller's knowledge, the landlords under the Leases are not in default of the landlords' obligations under the Leases. At the Closing, the premises to be conveyed or leased by Purchaser following the Closing pursuant to the Leases shall be free and clear of all subtenants and occupants other than Purchaser's employees.

(b) Seller has a valid leasehold interest in (other than those that have expired or been terminated by operation of their terms since the date hereof), as the case may be, the Leased Real Property. Seller owns no real property.

(c) Seller has good and valid title to all of its material properties, interests in properties and assets, real and personal, reflected on the most recent Seller SEC Report or acquired since the date of the most recent Seller SEC Report, or, in the case of material leased properties and assets, valid leasehold interests in such properties and assets, in each case free and clean of all Liens.

(d) Except as to such items as would not reasonably be expected to result in a Material Adverse Effect, all personal property and equipment owned (including Inventory and Equipment), leased or otherwise used by Seller (i) are in a good

state of maintenance and repair, free from material defects and in good operating condition (subject to normal wear and tear), (ii) comply with the applicable leases and with all applicable Laws in all material respects, and (iii) are suitable for the purposes for which they are presently used.

2.11 Contracts.

(a) Seller has made available to Purchaser, or has filed as an exhibit to a Seller SEC Report, a complete unredacted and correct copy of each material agreement or contract to which it is a party as of the date of this Agreement, including any agreement or contract that is required to be filed as an exhibit to, or otherwise incorporated by reference in, the Seller SEC Reports pursuant to Item 601(a)(1) of Regulation S-K promulgated by the SEC. Except for this Agreement and except as listed on Section 2.12(a) of the Seller Disclosure Schedule, Seller is not a party to or bound by any Contract: (i) that would be required to be filed by the Company as a "material contract" pursuant to Item 601(b)(10) of Regulation S-K under the Securities Act; (ii) containing covenants binding upon Seller that materially restrict the ability of Seller (or which, following the consummation of the Acquisition, would materially restrict the ability of Purchaser) to compete in any business or geographic area that is material to Seller as of the date hereof, except for any such Contract that may be canceled without penalty by Seller upon notice of sixty (60) days or less; or (iii) that would prevent, materially delay or materially impede Seller's ability to consummate the transactions contemplated by this Agreement.

(b) Each of the Assumed Contracts is in full force and effect and is a valid and binding obligation of the Seller and, to Seller's knowledge, the other parties thereto, in accordance with its terms and conditions, in each case subject to the terms of the Sale Order. Seller has made available to Purchaser true and complete copies of each Assumed Contract. To Seller's knowledge, except as set forth in Section 2.11(b) of the Seller Disclosure Schedule, there is no material default under any of the Assumed Contracts by Seller (that will not be cured by compliance with the Sale Order at Closing, including, without limitation, payment of any Cure Costs the parties are required to pay pursuant to this Agreement) or, to the knowledge of Seller, by any other party thereto, and Seller has not received any written notice of any default or event that with notice or lapse of time or both would constitute a default by Seller under any Assumed Contract. Subject only to the satisfaction of the Cure Costs applicable to the Assumed Contracts and the entry of the Sale Order, subject to any consent requirements therein that survive application of the provisions of Section 365 of the Bankruptcy Code pursuant to the Sale Order, each Assumed Contract may be assumed by Seller and assigned to Purchaser pursuant to section 365 of the Bankruptcy Code.

2.12 Sufficiency of Assets.

The Assets and the Assumed Contracts as constituted on the date hereof (i) constitute all of the privileges, rights, interests, properties and assets of Seller of every kind and description and wherever located that are material or necessary for the continued conduct of the Business following the Closing as conducted as of the date

hereof, except for any of the foregoing, the absence of which would not reasonably be expected to have a Material Adverse Effect, and (ii) are sufficient to operate the Business following the Closing in substantially the same manner as conducted as of the Effective Date. Other than as disclosed on Schedule 1.1(a) (as amended from time to time in accordance with the terms of this Agreement) and Schedule 1.1(b) (as amended from time to time in accordance with the terms of this Agreement), to the Seller's knowledge, there is no outstanding material Contract to which any Seller is a party that primarily relates to the Business or is otherwise material to the operation of the Business following the Closing in substantially the same manner as conducted as of the date hereof. No right, title, or interests in or to any assets used or held for use in connection with the Business are owned by any Subsidiary of Seller.

3. Representations and Warranties of Purchaser.

Purchaser represents and warrants to Seller as follows:

3.1 Due Incorporation and Authority.

Purchaser is a Delaware corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Purchaser has all requisite entity power and authority to enter into this Agreement, carry out its obligations hereunder and consummate the transactions contemplated hereby. The execution and delivery by Purchaser of this Agreement, the performance by Purchaser of its obligations hereunder and the consummation by Purchaser of the transactions contemplated hereby have been duly authorized by all requisite entity action on the part of Purchaser and no other entity proceedings on the part of Purchaser are necessary to authorize the execution and delivery of this Agreement or to consummate the other transactions contemplated hereby. This Agreement has been duly executed and delivered by Purchaser.

3.2 No Conflicts.

The execution and delivery by Purchaser of this Agreement, the consummation of the transactions contemplated hereby, and the performance by Purchaser of this Agreement in accordance with its terms will not:

(a) violate the certificate of incorporation or by-laws of Purchaser;

(b) require Purchaser to obtain any material consents, approvals, authorizations or actions of, or make any filings with or give any notices to, any Governmental Bodies or any other Person, except for consents, approvals or authorizations of, or declarations or filings with, the Bankruptcy Court;

(c) violate or result in the breach of any of the terms and conditions of, cause the termination of or give any other contracting party the right to terminate, or constitute (or with notice or lapse of time, or both, constitute) a material default under, any material Contract to which Purchaser is a party or by or to which each of Purchaser or any of its properties is or may be bound or subject; or

(d) violate any Law to which Purchaser is subject.

3.3 Litigation.

There are no Claims pending or, to the knowledge of Purchaser, threatened against Purchaser, before any Governmental Body that would prevent or materially delay the consummation by Purchaser of the transactions contemplated by this Agreement.

3.4 Availability of Funds and Stock.

Purchaser has, and on the Closing Date will have, cash available and committed to the transactions contemplated herein that is sufficient to enable Purchaser to consummate such transactions in accordance with its obligations under this Agreement. Purchaser will have sufficient authorized shares of common stock available to issue the Stock Consideration on the Closing Date and as of the Closing Date will have taken all corporate action necessary for the issuance of the Stock Consideration.

4. Covenants and Agreements.

4.1 Conduct of Business.

Except (i) as expressly provided in this Agreement or on Schedule 4.1(b), or (ii) to the extent that the following is inconsistent with Seller's duties and obligations as a debtor in the Bankruptcy Case or with orders issued by the Bankruptcy Court, or (iii) as otherwise agreed to in writing by Purchaser, Seller agrees that, from the date hereof until the earlier of the Closing and the date, if any, on which this Agreement is terminated pursuant to Section 7.1 hereof:

(a) Seller shall operate the Business in the Ordinary Course of Business and preserve intact the Business, keep available the service of its officers and employees and preserve its relationships with customers, suppliers, vendors, lessors, licensors, licensees, contractors, distributors, agents, employees and others having business dealing with the Business.

(b) except (i) as expressly permitted or required by this Agreement or on Schedule 4.1(b) or (ii) as otherwise agreed to in writing by Purchaser, or (iii) to the extent that the following is inconsistent with Seller's duties and obligations as a debtor in the Bankruptcy Case or with orders issued by the Bankruptcy Court, Seller shall not, directly or indirectly:

(i) sell (including by sale-leaseback), lease, transfer, convey, license, mortgage or otherwise dispose of, encumber, subject to any Encumbrance (other than Permitted Encumbrances) or waive any rights with respect to, any of the Assets or any interests therein, except in the Ordinary Course of the Business;

(ii) with respect to the Business, change the method of accounting or any accounting principle, method, estimate or practice, except in

the Ordinary Course of the Business or as may be required by GAAP or any other applicable Law;

(iii) fail to maintain in full force and effect insurance covering the Assets;

(iv) incur or permit the incurrence of any Liability that would constitute an Assumed Liability, except in the Ordinary Course of Business;

(v) sell or otherwise dispose of Inventory in a manner inconsistent with the Ordinary Course of Business;

(vi) cancel, terminate or amend any Real Property Lease or any Contract;

(vii) acquire or agree to acquire by merging or consolidating with, or by purchasing any equity interest in or a portion of the assets of, or by any other manner, any business or any Person or division thereof;

(viii) enter into any joint ventures, strategic partnerships or alliances;

(ix) enter into any Contract other than in the Ordinary Course of Business;

(x) enter into any Contract the effect of which would be to grant to a third party any license to use any Intellectual Property for a period extending beyond the Closing Date other than in the Ordinary Course of Business;

(xi) adopt a plan of complete or partial liquidation, dissolution, merger, consolidation, restructuring, recapitalization or reorganization, including any plan of reorganization in the Bankruptcy Case that affects or otherwise disposes of the Assets;

(xii) sell, lease, transfer, encumber, or otherwise dispose of any Intellectual Property Assets other than in the Ordinary Course of Business;

(xiii) bill or collect Accounts Receivable other than in the Ordinary Course of Business; or

(xiv) agree in writing or otherwise to take any of the actions described in (i) through (xii) above;

(c) Upon any of the individuals identified in the definition of "Knowledge of Seller" receiving written notice from any employee of Seller indicating such employee's intention to resign or terminate employment, Seller shall promptly inform Purchaser of such employee's intention to resign or terminate.

4.2 Expenses; Break-Up Fee.

(a) Subject to the entry of the Bid Procedures Order, but without further order of the Bankruptcy Court, if this Agreement is terminated pursuant to Sections 7.1(b), 7.1(c), 7.1(e), 7.1(f), and/or 7.1(i) then Seller shall pay in cash to Purchaser, within five (5) Business Days of such termination, an amount equal to the reasonable and documented costs, fees and expenses incurred by Purchaser and its Affiliates (including fees and expenses of legal, accounting and financial advisors) in connection with this Agreement and the transactions contemplated hereby (the "Expense Reimbursement Amount") by wire transfer of immediately available funds to the account specified by Purchaser to Seller in writing; provided, however, in no event shall the Expense Reimbursement Amount exceed $125,000. Except for the Expense Reimbursement Amount and any expenses that Purchaser or Seller may be required to reimburse to the other pursuant to the provisions of Section 8.15 below, Purchaser and Seller shall bear their respective expenses incurred in connection with the preparation, execution and performance of this Agreement and the transactions contemplated hereby.

(b) Subject to entry of the Bid Procedures Order, but without further order of the Bankruptcy Court, if the Seller consummates an Alternative Transaction, then, so long as Purchaser is not then (or, if this Agreement was earlier terminated, was not) in material default of its obligations hereunder, Seller shall pay in cash to Purchaser, concurrently with the consummation of such Alternative Transaction, a break-up fee in the amount of $560,000 (the "Break-Up Fee"), by wire transfer of immediately available funds to the account specified by Purchaser to Seller in writing; provided, that, for greater certainty, the Break-Up Fee shall be payable out of (and only out of) the proceeds of an Alternative Transaction.

(c) In the event that any Person (including any purchaser of Seller's assets, lender or otherwise but excluding Purchaser or Seller) uses, or will make use of, the work performed by BDO in BDO's review of the Quarterly Financial Statements, then, so long as Purchaser is not then (or, if this Agreement was earlier terminated, was not) in material default of its obligations hereunder, if Seller consummates an Alternative Transaction, Seller shall pay in cash to Purchaser, concurrently with the consummation of such Alternative Transaction, an amount equal to 50% of the BDO Fees (the "BDO Fee Reimbursement"), by wire transfer of immediately available funds to the account specified by Purchaser to Seller in writing.

(d) The obligations of Sellers to pay the BDO Fee Reimbursement, the Expense Reimbursement Amount and the Break-Up Fee as provided herein shall be entitled to administrative expense status with priority over any and all administrative expenses of the kind specified in Sections 503(b)(1) and 507(a) of the Bankruptcy Code in the Bankruptcy Case and senior to all other superpriority administrative expenses in the Bankruptcy Case; provided, however, for the avoidance of all doubt, Purchaser acknowledges and agrees that Seller's obligations to Purchaser with respect to payment of the BDO Fee Reimbursement, the Expense Reimbursement Amount and the Break-up Fee pursuant to this Agreement shall at all times be *pari passu* with the rights afforded by the carve out in the DIP Order.

(e) Sellers agree and acknowledge that Purchaser's due diligence, efforts, negotiation and execution of this Agreement have involved substantial investment of management time and have required, and continue to require significant commitment of financial, legal and other resources by Purchaser and that such due diligence, efforts, negotiation and execution has provided, and continues to provide, value to Seller. Seller agrees and acknowledges that (a) the approval of the BDO Fee Reimbursement, the Expense Reimbursement Amount and the Break-Up Fee is an integral part of the Acquisition, (b) in the absence of Seller's obligation to pay the BDO Fee Reimbursement, the Expense Reimbursement Amount and the Break-Up Fee on the terms and conditions provided herein, Purchaser would not have entered into this Agreement, (c) the entry of Purchaser into this Agreement is necessary for preservation of the estate of Seller and is beneficial to Seller, and (d) the BDO Fee Reimbursement, the Expense Reimbursement Amount and the Break-Up Fee are reasonable in relation to Purchaser's efforts and to the magnitude of the Acquisition.

4.3 Access to Information.

From the date hereof until the earlier of (x) the Closing and (y) any termination of this Agreement pursuant to Section 7.1, upon reasonable notice, Seller shall, and shall cause each of its officers, directors, employees, auditors and agents to (i) afford the officers, employees and representatives of Purchaser reasonable access, during normal business hours, to the offices, plants, warehouses, properties, Contracts, Tax Returns, books and records of Seller and the employees of Seller set forth on Schedule 4.3(1), and (ii) furnish to the officers, employees and representatives of Purchaser such additional financial and operating data and other information regarding the operations of Seller as are then in existence and as Purchaser may from time to time reasonably request; provided, however, that such investigations shall not (i) unreasonably interfere with the operations of Seller or any of their Affiliates or (ii) include any rights to perform or conduct any Phase II environmental or other physically destructive testing or investigations without the prior written consent of Seller (which consent Seller shall have the right to withhold or condition in its sole and absolute discretion). All information provided pursuant to this Section 4.3 shall be governed by the terms of the confidentiality agreement in place between Seller and Purchaser and all discussions by Purchaser or its representatives with any employees of Seller shall be coordinated only through Seller's senior management and such senior management having the right but not the obligation to participate in or monitor such discussions; provided, however, Purchaser and its representatives shall have the right to meet privately with any employees and other independent contractors of Seller set forth on Schedule 4.3(2) without Seller's senior management or other representatives participating in such meetings to the extent the substance of such meetings will be limited to discussions of and negotiations about such individual's future employment, professional goals, role in the future of the Business and future developments of the Business.

4.4 Regulatory and Other Authorizations; Consents.

(a) Each of the parties hereto shall cooperate and use its commercially reasonable efforts (which reasonable efforts expressly exclude, except to the extent

provided for in the DIP Budget, any obligation on Seller's part to pay any fee or other amount to any third party for its consent, waiver, authorization or the like) to (i) take, or cause to be taken, all appropriate action, and do, or cause to be done, all things necessary, proper or advisable under any Law or otherwise to consummate and make effective the transactions contemplated by this Agreement and to continue the conduct of the Business by Purchaser following Closing, (ii) obtain any consents, licenses, permits, waivers, approvals, authorizations or orders required to be obtained or made in connection with the authorization, execution and delivery of this Agreement, to the extent that the need for the same is not obviated by the entry of the Sale Order, the consummation of the transactions contemplated hereby, and the conduct of the Business by Purchaser following Closing and (iii) promptly make all filings and give any notice, and thereafter make any other submissions either required or reasonably deemed appropriate by each of the parties, with respect to this Agreement and the transactions contemplated hereby and the conduct of the Business by Purchaser following Closing, including applicable securities Law, and the rules and regulations of any stock exchange on which the securities of any of the parties are listed or quoted (including the NASDAQ as to Purchaser).

(b) The parties hereto shall cooperate and consult with each other in connection with the making of all such filings and notices, including by providing copies of all such documents to the non-filing party and its advisors a reasonable period of time prior to filing or the giving of notice to the extent practicable. No party to this Agreement shall consent to any voluntary extension of any statutory deadline or waiting period or to any voluntary delay of the consummation and the transactions contemplated in this Agreement at the behest of any Governmental Body without the consent and agreement of the other parties to this Agreement, which consent shall not be unreasonably withheld or delayed. Each party shall promptly inform the others of any material communication from any Governmental Body regarding any of the transactions contemplated by this Agreement. To the extent practicable, no party to this Agreement shall agree to participate in any meeting with any Governmental Body in respect of any filing with such body, investigation or other inquiry unless it consults with the other party in advance and, to the extent permitted by such Governmental Body, gives the other party the opportunity to attend and participate at such meeting. Notwithstanding anything to the contrary contained herein, nothing herein shall be construed to require Purchaser to provide Seller or any of its Affiliates with copies of, or approval over or any material related to any necessary or appropriate filings with any Governmental Body or self-regulatory organization other than as specifically relates to the transactions contemplated hereby.

4.5 Further Action.

Each of the parties hereto shall prepare and execute such documents and take such further actions as may be reasonably required or desirable to carry out the provisions hereof and give effect to the transactions contemplated hereby. Without limiting the foregoing, from time to time after the Closing, Seller shall execute and deliver such documents reasonably necessary to further the sale, transfer, conveyance and assignment of the Assets to Purchaser hereunder (including the Intellectual Property Assets),

including, if required, a power of attorney or other instrument designating Purchaser as Seller's successor with respect to the Assets. For the avoidance of doubt, nothing in this Section 4.5 shall be deemed to obligate either Purchaser or Seller to take any action or execute or deliver any document which would (i) cause such party to incur any significant monetary cost or expense (or, in Seller's case, any cost or expense not provided for in the DIP Budget), (ii) impose on such party material burdens not expressly imposed on that party pursuant to the other provisions of this Agreement, or (iii) cause such party to become involved in any litigation or proceeding other than those proceedings expressly contemplated by this Agreement; provided, however, nothing in this Section 4.5 shall be construed as entitling Seller to refuse to review or respond to additional documents submitted to Seller in accordance with this provision on the basis that such review and response will entail monetary obligations to Seller's counsel or other professionals.

4.6 Employee Matters.

(a) From and after the date hereof, Purchaser, in its sole and absolute discretion, may: (i) in consultation and cooperation with Seller (by and through Seller's senior management personnel), communicate with any of the Business Employees about possible employment with Purchaser after the Closing Date; and/or (ii) offer employment to any of the Business Employees as of the Closing Date. Purchaser shall make offers of employment to not less than 75% of the Business Employees for compensation and otherwise on terms and conditions at least comparable to those applicable to similarly situated employees of Purchaser. Those of the Business Employees that accept Purchaser's offer of employment shall be terminated by Seller, and shall become employed by Purchaser or one of its Affiliates (referred to in this Agreement as "Transferred Employees") as of the Closing Date. All employment offers are subject to the satisfactory completion by Purchaser of its customary employment interview, background checks and drug testing procedures.

(b) To the extent that length of employment service is relevant for purposes of eligibility or vesting under any employee benefit plan, program or arrangement established or maintained by Purchaser and provided to the Transferred Employees (excluding any equity-related plan, program or arrangement), Purchaser shall credit the Transferred Employees under such plan, program or arrangement for service on or prior to the Closing in the manner set forth on Schedule 4.6(b).

(c) Seller shall be responsible for any liabilities or obligations (i) arising under the WARN Act, if any, and (ii) resulting from or precipitated by layoffs, if any, in respect of employees of Seller whose employment was terminated on or prior to the Closing.

(d) Purchaser shall assume all liability and responsibility for any health care continuation coverage ("COBRA Coverage") required under Section 4980B of the Code and Part 6 of Subtitle B of Title 1 of ERISA with respect to any Business Employees or former employees of Seller. Purchaser shall provide COBRA Coverage to

such Business Employees and former employees on such terms and at such rates as Purchaser currently provides to its own employees and former employees.

4.7 Bankruptcy Court Approvals.

On the Petition Date, Seller shall file a motion (the "Sale Motion") seeking entry of an order of the Bankruptcy Court approving the sale of the Assets to Purchaser pursuant to the terms of this Agreement (the "Sale Order"), which Sale Order Seller shall use commercially reasonable efforts to obtain. The Sale Order shall be substantially in the form and content attached as Exhibit A hereto. Seller shall file a motion (the "Procedures Motion") seeking entry of an order of the Bankruptcy Court (the "Bid Procedures Order") which establishes and approves, among other things, the competitive bidding process and bidding protections (including, without limitation, Purchaser's right to receive the BDO Fee Reimbursement, the Expense Reimbursement Amount and the Break-Up Fee), as well as the noticing procedures with respect to the assumption and assignment of the Assumed Contract and the Assumed Leases. Seller shall use commercially reasonable efforts to obtain the Bid Procedures Order. The Bid Procedures Order shall be substantially in the form and content attached as Exhibit B hereto. Seller shall conduct the sale process relating to the Assets in accordance with the rights and authority granted to Seller in the Bid Procedures Order. Purchaser shall cooperate in all reasonable respects in Seller's efforts to obtain the Bid Procedures Order and Sale Order and shall provide information demonstrating adequate assurance of future performance under Section 365 of the Bankruptcy Code with respect to each Assumed Contract.

4.8 Books and Records; Access to Personnel.

Purchaser agrees that it shall preserve and keep all books and records in respect of the operations of the Business acquired from Seller hereunder and in Purchaser's possession for a period of at least seven (7) years from the Closing Date in a manner consistent in all material respects with Purchaser's document retention and destruction policies. At any time during such seven-year period, representatives of Seller shall, upon reasonable notice, have reasonable access thereto during normal business hours to examine, inspect and copy such books and records for the purposes of preparing Tax Returns; provided, however, that, for avoidance of doubt, the foregoing shall not require Purchaser to take any such action if (i) such action may result in a waiver or breach of any attorney/client privilege, (ii) such action could reasonably be expected to result in violation of applicable Law, or (iii) providing such access or information would be reasonably expected to be disruptive to its normal business operations. During the pendency of the Bankruptcy Case, Purchaser shall also make available to Seller and its representatives (to the extent in Purchaser's or an Affiliate's employ and to the extent that the same does not unreasonably interfere with Purchase operation of the Business) access at reasonable times to those individuals listed on Schedule 4.8 to this Agreement for reasonable consultation in connection with matters relating to administration and wind down of the Bankruptcy Case.

4.9 Tax Matters.

(a) Sales, Use and Other Transfer Taxes. Purchaser and Seller shall share responsibility, on a 50%/50% basis, for any and all excise, sales, value added, use, registration, stamp, franchise, transfer and similar Taxes, levies, charges and fees incurred in connection with the transactions contemplated by this Agreement (collectively "Transfer Taxes"); provided, however, Purchaser hereby expressly acknowledges and agrees that Seller's liability for its portion of the Transfer Taxes will not exceed $65,000.00 and that Purchaser will bear and pay 100% of any amounts by which the aggregate Transfer Taxes exceed $130,000.00. The parties hereto agree to cooperate in the filing of all necessary documentation and all Tax Returns with respect to all such Taxes, including any available pre-sale filing procedure.

(b) Cooperation. The Parties shall cooperate in all reasonable respects with each other and with each other's respective representatives, including accounting firms and legal counsel, in connection with the preparation or audit of any Tax Return(s) and any Tax claim or litigation in respect of the Assets and Assumed Liabilities that include whole or partial taxable periods, activities, operations or events on or prior to the Closing Date, which cooperation shall include, but not be limited to, making available any ongoing employees, if any, for the purpose of providing testimony and advice, or original documents, or any of the foregoing.

4.10 "AS IS" Transaction.

(a) Purchaser hereby acknowledges and agrees that Seller makes no representations or warranties whatsoever, express or implied, with respect to any matter relating to the Assets that will survive or continue beyond the Closing (including, without limitation, income to be derived or expenses to be incurred in connection with the Assets, the physical condition of any personal property comprising a part of the Assets or which is the subject of any Assumed Contract to be assumed by Purchaser at the Closing, the environmental condition or other matter relating to the physical condition of any real property or improvements which are the subject of any Real Property Lease to be assumed by Purchaser at the Closing or any other real property or improvements comprising a part of the Assets, the zoning of any such real property or improvements, the value of the Assets (or any portion thereof), the transferability of Assets, the terms, amount, validity, collectability or enforceability of any assumed liabilities or Assumed Lease or other Assumed Contract, the title of the Assets (or any portion thereof), the merchantability or fitness of the Fixed Assets or Equipment or other tangible personal property included among the Assets or any other portion of the Assets for any particular purpose, or any other matter or thing relating to the Assets or any portion thereof). Without in any way limiting the foregoing, except for the representations and warranties provided herein, Seller hereby disclaims any warranty (express or implied) of merchantability or fitness for any particular purpose as to any portion of the Assets. Purchaser further acknowledges that Purchaser has conducted an independent inspection and investigation of the physical condition of all portions the Assets and all such other matters relating to or affecting the Assets as Purchaser deemed necessary or appropriate and that in proceeding with its acquisition of the Assets, Purchaser is doing so based

solely upon such independent inspections and investigations. Purchaser acknowledges that the Assets will be transferred at the Closing on an **"AS IS," "WHERE IS," and "WITH ALL FAULTS"** basis.

(b) Seller hereby acknowledges and agrees that Purchaser makes no representations or warranties whatsoever, express or implied, with respect to any matter contained herein or the transaction contemplated hereby other than the representations and warranties of Purchaser contained herein, which shall not survive or continue beyond the Closing. Without in any way limiting the foregoing, except for the representations and warranties of Purchaser provided herein, Purchaser hereby disclaims any other representations or warranties.

4.11 Press Releases and Public Announcements.

Neither Purchaser, on the one hand, nor Seller, on the other hand, shall issue any press release or make any public disclosure, either written or oral, concerning this Agreement or the transactions contemplated hereby without obtaining the prior written approval of the other party, which approval shall not be unreasonably withheld, conditioned or delayed, unless in the sole judgment of the disclosing party, disclosure is otherwise required by applicable Law, including any rules or regulations of any self-regulatory organization, or by the Bankruptcy Court with respect to filings to be made with the Bankruptcy Court in connection with this Agreement or by the applicable rules of any national securities exchange or market on which Purchaser or Seller lists securities (including NASDAQ as to Purchaser); provided that the party intending to make such disclosure shall use its commercially reasonable efforts to consult with the other party with respect to the text thereof.

4.12 Damage or Destruction.

Until the Closing, the Assets shall remain at the risk of Seller. In the event of any material damage to or destruction of any of the Assets after the date hereof and prior to the Closing (in any such case, a "Damage or Destruction Loss") Seller shall give notice thereof to Purchaser promptly thereafter. If any such Damage or Destruction Loss is covered by policies of insurance and the underlying Asset is not repaired or replaced prior to Closing, all right and claim of Seller to any proceeds of insurance for such Damage or Destruction Loss shall be assigned and (if previously received by Seller and not used prior to the Closing Date to repair any damage or destruction) paid to Purchaser at Closing in accordance with Section 1.4(b). If any such Damage or Destruction Loss is not covered by policies of insurance, Purchaser shall have the right to reduce the Cash Consideration by an amount equal to (i) if such Assets are not destroyed or damaged beyond repair and are able to be repaired to substantially the same condition that existed prior to such Damage or Destruction Loss at a cost less than their replacement cost, the estimated cost to repair or restore the Assets affected by such Damage or Destruction Loss to substantially the same condition that existed immediately prior to the occurrence of such Damage or Destruction Loss, or (ii) if such Assets are destroyed or damaged beyond repair or are not able to be repaired to substantially the same condition that existed prior to such Damage or Destruction Loss at a cost less than their replacement

cost, the replacement cost of the Assets. If Purchaser elects to reduce the Cash Consideration pursuant to this Section 4.12, Seller and Purchaser shall negotiate in good faith in an effort to agree upon the amount of such reduction. If the parties are unable to reach agreement within five (5) Business Days after notice of the Damage or Destruction Loss is given by Seller, then the amount of the reduction shall be determined by the Bankruptcy Court.

4.13 Non-Solicitation of Employees and Customers.

(a) Except on behalf of Purchaser to the extent Purchaser may hereafter agree in writing, for a period of five (5) years from the Closing Date, Seller shall not for itself or for any other Person, directly or indirectly: (i) seek to provide services in connection with any Assumed Contract, propose to enter into any successor Contract to any Assumed Contract, persuade or seek to persuade any customer or any purchaser of services of the Business as conducted by Purchaser and its Affiliates after the Closing to cease to do business or to reduce the amount of business which it does with Purchaser and its Affiliates after the Closing or contemplates doing, whether or not the relationship between the Business as conducted by Purchaser and its Affiliates after the Closing and such customer was originally established in whole or in part through the efforts of a Seller.

(b) Seller agrees that, for a period of five (5) years following the Closing Date, neither it nor its Affiliates will directly or indirectly recruit, solicit or hire any Transferred Employee, nor shall such Seller or its Affiliates encourage any Transferred Employee to terminate his or her employment or relationship with Purchaser or its Affiliates.

For the avoidance of all doubt, nothing in this Section 4.13, shall be deemed to in any way apply to or otherwise limit or restrict the activities of any officer, director, shareholder, employee, contractor, independent contractor, or other individual at any time acting for itself/themselves or on behalf of any person or entity other than Seller or its Affiliates.

4.14 Collection of Accounts Receivable.

(a) As of the Closing Date, Seller hereby (i) authorizes Purchaser or its designee to open any and all mail addressed to any Seller relating to the Business, the Assets or the Assumed Liabilities and delivered to the offices of the Business or otherwise to Purchaser or its designee if received on or after the Closing Date and (ii) appoints Purchaser, its designee or its attorney-in-fact to endorse, cash and deposit any monies, checks or negotiable instruments received by Purchaser or its designee after the Closing Date with respect to Included Pharma Receivables, the other Assets or accounts receivable relating to work performed by Purchaser after the Closing, as the case may be, made payable or endorsed to a Seller or a Seller's order, for Purchaser's or its designee's own account. Purchaser expressly agrees that all monies, checks or negotiable instruments received by Purchaser that relate to the Non-Pharma Receivables (as defined

in Section 4.14(c) below) or Excluded Assets, shall be paid over to Seller upon Purchaser's receipt as provided in Section 4.14(b) below.

(b) As of the Closing Date, (i) Seller agrees that any monies, checks or negotiable instruments received by Seller or any of its Subsidiaries after the Closing Date with respect to Included Pharma Receivables, the other Assets or accounts receivable relating to work performed by Purchaser after the Closing, as the case may be, shall be held in trust by Seller or such Subsidiary for Purchaser's or its designee's benefit and account, and immediately upon receipt by Seller or its Subsidiary of any such payment, Seller shall pay (or cause to be paid) over to Purchaser or its designee the amount of such payments without any right of set off or reimbursement, and (ii) Purchaser agrees that any monies, checks or negotiable instruments received by Purchaser or any of its Subsidiaries after the Closing Date with respect to Non-Pharma Receivables, the Excluded Assets, as the case may be, shall be held in trust by Purchaser or such Subsidiary for Seller's or its designee's benefit and account, and immediately upon receipt by Purchaser or its Subsidiary of any such payment, Purchaser shall pay (or cause to be paid) over to Seller or its designee the amount of such payments without any right of set off or reimbursement.

(c) As of the Closing Date, (i) Purchaser or its designee shall have the sole authority to bill and collect Included Pharma Receivables and accounts receivable to the extent relating to work performed by Purchaser after the Closing and Seller shall not (and shall cause its Subsidiaries not to) instigate or threaten to instigate any claims or litigation in connection with such collection efforts, and (ii) Seller or its designee shall have the sole authority to bill and collect all accounts receivable (other than Included Pharma Receivables and accounts receivable to the extent relating to work performed by Purchaser after the Closing (collectively, "Non-Pharma Receivables") after the Closing and Purchaser shall not (and shall cause its Subsidiaries not to) instigate or threaten to instigate any claims or litigation in connection with such collection efforts.

(d) Notwithstanding anything to the contrary contained in Section 8.14 hereof, (i) any designees of Purchaser who acquire any Included Pharma Receivables hereunder shall be express third party beneficiaries of the provisions of this Section 4.14 relating to the Pharma Included Receivables, and (ii) any designees of Seller who acquire any Non-Pharma Receivables shall be express third party beneficiaries of the provisions of this Section 4.14 relating to the Non-Pharma Receivables

4.15 Removal of Excluded Assets.

As promptly as practicable following the Closing Date (and in any event within ten (10) Business Days following Closing Date), Seller shall remove at their expense all of the Excluded Assets that are located at real property subject to an Assumed Real Property Lease. Seller shall, in connection with such removal, exercise commercially reasonable efforts to avoid damage to any of the Assets, and to the extent any of the Assets are damaged in connection with such removal, Seller shall promptly repair such damage at Seller's sole cost and expense.

4.16 Further Assignment of Contracts.

Following the Closing, in the event that Purchaser identifies any Contract that it desires to be assumed and assigned to Purchaser pursuant to section 365 of the Bankruptcy Code (the "Post-Closing Contracts"), Seller agrees to cooperate in all reasonable respects in effecting the assumption of such Contract and its assignment to Purchaser pursuant to section 365 of the Bankruptcy Code, including filing any necessary motions and serving any necessary notices; provided, however, for the avoidance of doubt, Purchaser hereby acknowledges that nothing in this Section 4.16 shall be deemed to limit or affect Seller's right post-Closing to convert, dismiss or otherwise close the Bankruptcy Case.. Purchaser and Seller shall each pay 50% of the amount required to cure such Post-Closing Contracts up to the amount remaining in the Overall Cure Cap. In the event such cure costs exceed the Overall Cure Cap, Purchaser shall be responsible for such excess amounts; provided, however, that in the event Purchaser, Seller, and the counterparty to a Post-Closing Contract are unable to reach an agreement as to cure amount, or if the Bankruptcy Court adjudicates a dispute over a cure amount in an amount unacceptable to Purchaser, Purchaser shall have the right to not take assignment of such Post-Closing Contract and shall not be responsible for any cure amount.

5. Conditions Precedent to the Obligation of Purchaser.

The obligation of Purchaser to consummate the transactions contemplated by this Agreement is subject to the fulfillment on or prior to the Closing Date of each of the following conditions, any one or more of which (to the extent permitted by Law) may be waived by Purchaser:

5.1 Representations and Warranties; Covenants.

(a) The representations and warranties of Seller set forth herein shall be true and correct in all respects (in the case of any representation or warranty qualified by materiality or Material Adverse Effect) or all material respects (in the case of any representation or warranty not qualified by materiality or Material Adverse Effect) on and as of the date hereof and on and as of the Closing Date with the same effect as though made at and as of such date (except those representations and warranties that address matters only as of a specified date, the accuracy of which shall be determined as of that specified date in all respects).

(b) The covenants and agreements contained in this Agreement to be performed or complied with by Seller at or before the Closing shall have been duly performed and complied with in all material respects.

(c) Purchaser shall have received a certificate, dated the Closing Date and signed by a duly authorized officer of Seller, that each of the conditions set forth in Section 5.1(a) and 5.1(b) have been satisfied.

5.2 Secretary's Certificate

Purchaser shall have received a certificate of the Secretary (or equivalent officer) of Seller certifying (a) that attached thereto are true and complete copies of all resolutions adopted by the board of directors of Seller authorizing the execution, delivery and performance of this Agreement and the other agreements contemplated hereby and the consummation of the transactions contemplated hereby and thereby, and that all such resolutions are in full force and effect and are all the resolutions adopted in connection with the transactions contemplated hereby and thereby and (b) the names and signatures of the officers of Seller authorized to sign this Agreement, such other agreements and the other documents to be delivered hereunder and thereunder.

5.3 No Order.

No Governmental Body shall have enacted, issued, promulgated, enforced or entered any statute, rule, regulation, injunction or other Order (whether temporary, preliminary or permanent) which is in effect and has the effect of making the transactions contemplated by this Agreement illegal or otherwise restraining or prohibiting consummation of such transactions and which are not satisfied or resolved or preempted by the Sale Order.

5.4 Bankruptcy Filing.

Seller shall be operating the Business and managing their property as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Case shall not have been dismissed or converted to Chapter 7 of the Bankruptcy Code and no trustee or examiner with expanded powers shall have been appointed.

5.5 Bid Procedures and Sale Orders.

The Bankruptcy Court shall have entered both the Bid Procedures Order and the Sale Order in each case, in substantially the form and substance attached hereto, and neither the Bid Procedures Order nor the Sale Order shall have been vacated, reversed or stayed.

5.6 Closing Documents.

Seller shall have delivered the documents required to be delivered to Purchaser pursuant to Section 1.6 on the Closing Date.

5.7 Material Adverse Effect.

From and after the Effective Date, there shall not have occurred any Material Adverse Effect, nor shall any event or events (which have not occurred as of the Effective Date) have occurred that, individually or in the aggregate, with or without the lapse of time, could reasonably be expected to result in a Material Adverse Effect.

5.8 Fundamental Contracts.

All Fundamental Contacts shall be duly assigned to Purchaser at Closing such that Purchaser will have substantially the same rights and obligations under such Fundamental Contracts as Seller did immediately before Seller's commencement of the Bankruptcy Case and Purchaser shall have all rights under the ALCHEMIST Program as Seller did immediately before Seller's commencement of the Bankruptcy Case. For the avoidance of doubt, the condition set forth in this Section 5.8 shall not apply to any Fundamental Contract which Seller is unable to assume and assign to Purchaser because adequate assurance of future performance by Purchaser thereof has not been demonstrated to the Bankruptcy Court's satisfaction, and in such circumstances, such Fundamental Contract shall conclusively and permanently be deemed an Excluded Asset and the parties shall proceed as though such Contract had never been included among the Assets.

5.9 Stock Consideration Registration; Representation Letter.

(a) SWK shall have delivered written instructions to Purchaser, in a form reasonably satisfactory to Purchaser, setting forth an allocation of the Stock Consideration among SWK, Swiftcurrent LP and Swiftcurrent Master, which instructions, for greater certainty, shall set forth, in whole numbers without fractionalization, the number of shares of common stock of Purchaser, par value $0.0001 per share, to issue and deliver to SWK, Swiftcurrent LP and Swiftcurrent Master, respectively (the "Stock Registration Instructions").

(b) Purchaser shall have received duly executed representations letter from SWK, Swiftcurrent LP and Swiftcurrent Master, substantially in the form attached hereto as Exhibit C.

5.10 BDO Consent.

(a) BDO shall have consented in writing to Purchaser's use of Seller's historical audited financial statements in Purchaser's filings with the SEC; provided that the commentary that may accompany such audited financial statements and any pro-forma financial statements included in Purchaser's filing with the SEC is the following language:

> "The pro-forma numbers above are derived from the historical numbers of the purchaser and seller. Over time the operations of the sellers will be integrated into the operations of the purchaser. This integration may change how certain tests are coded and submitted to payers (including Medicare) and, consequently, may result in differences in the future in the manner in which revenues and bad debt expenses are recorded when compared with the historical methods of the acquiree. At the current time the CGI does not have enough information to prepare a reliable estimate of any possible changes."

(b) Seller shall have provided Purchaser with financial statements for the second quarter of 2015 reviewed by BDO and otherwise prepared in a manner

consistent with Regulation S-X under the Exchange Act (the "Quarterly Financial Statements").

Any waiver of a condition set forth in this Section 5 shall be effective only if such waiver is stated in writing and signed by Purchaser.

6. Conditions Precedent to the Obligation of Seller to Close.

The obligation of Seller to consummate the transactions contemplated by this Agreement is subject to the fulfillment on or prior to the Closing Date of each of the following conditions, any one or more of which (to the extent permitted by Law) may be waived by Seller:

6.1 Representations and Warranties; Covenants.

(a) The representations and warranties of Purchaser set forth herein shall be true and correct in all respects (in the case of any representation or warranty qualified by materiality or material adverse effect) or all material respects (in the case of any representation or warranty not qualified by materiality or material adverse effect) on and as of the date hereof and on and as of the Closing Date with the same effect as though made at and as of such date (except those representations and warranties that address matters only as of a specified date, the accuracy of which shall be determined as of that specified date in all respects).

(b) The covenants and agreements contained in this Agreement to be performed or complied with by Purchaser at or before the Closing shall have been duly performed and complied with in all material respects.

(c) Seller shall have received a certificate, dated the Closing Date and signed by a duly authorized officer of Purchaser, that each of the conditions set forth in Section 6.1(a) and 6.1(b) have been satisfied.

6.2 Secretary's Certificate.

Seller shall have received a certificate of the Secretary (or equivalent officer) of Purchaser certifying (a) that attached thereto are true and complete copies of all resolutions adopted by the board of directors of Purchaser authorizing the execution, delivery and performance of this Agreement and the other agreements contemplated hereby and the consummation of the transactions contemplated hereby and thereby, and that all such resolutions are in full force and effect and are all the resolutions adopted in connection with the transactions contemplated hereby and thereby and (b) the names and signatures of the officers of Seller authorized to sign this Agreement, such other agreements and the other documents to be delivered hereunder and thereunder.

6.3 No Order.

No Governmental Body shall have enacted, issued, promulgated, enforced or entered any statute, rule, regulation, injunction or other Order (whether temporary,

preliminary or permanent) which is in effect and has the effect of making the transactions contemplated by this Agreement illegal or otherwise restraining or prohibiting consummation of such transactions and which are not satisfied or resolved or preempted by the Sale Order.

6.4 Bid Procedures and Sale Orders.

The Bankruptcy Court shall have entered both the Bid Procedures Order and Sale Order, and the Sale Order shall not have been vacated, reversed or stayed.

6.5 Closing Documents.

Purchaser shall have delivered the documents and payments required to be delivered by it to Seller pursuant to Section 1.7, in each case on the Closing Date.

6.6 Damage or Destruction Loss

The total Purchase Price shall not have been reduced in accordance with Section 4.12 by an amount greater than $1,400,000.

Any waiver of a condition set forth in this Section 6 shall be effective only if such waiver is stated in writing and signed by Seller.

7. Termination of Agreement.

7.1 Termination Prior to Closing.

Notwithstanding anything herein to the contrary, this Agreement may be terminated, and the transactions contemplated by this Agreement abandoned, at any time before the Closing as follows:

(a) by the mutual written consent of Seller and Purchaser;

(b) by either Seller or Purchaser if (i) the Sale Motion and Procedures Motion have not been filed within one (1) day following the Effective Date, (ii) the Bid Procedures Order has not been entered in the Bankruptcy Case by the date which is twenty (20) days following commencement of the Bankruptcy Case, (iii) the Sale Order has not been entered in the Bankruptcy Case by the date which is fifty-three (53) days following commencement of the Bankruptcy Case, or (iv) the Closing shall not have occurred by the date which is sixty (60) days following commencement of the Bankruptcy Case; provided, however, that the right to terminate this Agreement under this Section 7.1(b) shall not be available to any party whose failure to fulfill any obligation under this Agreement shall have been the cause of, or shall have resulted in, the failure of the Closing to occur prior to such date;

(c) by Purchaser, if (x) any of the representations and warranties of any Seller contained in this Agreement shall fail to be true and correct, or (y) there shall be a breach by any Seller of its covenants or agreements in this Agreement that in either

case (i) would result in the failure of a condition set forth in Section 5.1 and (ii) which is not curable or, if curable, is not cured within ten (10) calendar days after written notice thereof is delivered by Purchaser to Seller; provided, that Purchaser may not terminate this Agreement pursuant to this Section 7.1(c) if Purchaser is in material breach of this Agreement; or

(d) by Seller, if (x) any of the representations and warranties of Purchaser contained in this Agreement shall fail to be true and correct, or (y) there shall be a breach by Purchaser of its covenants or agreements in this Agreement that in either case (i) would result in the failure of a condition set forth in Section 6 and (ii) which is not curable or, if curable, is not cured within ten (10) calendar days after written notice thereof is delivered by Seller to Purchaser; provided, that Seller may not terminate this Agreement pursuant to this Section 7.1(d) if Seller is in material breach of this Agreement; or

(e) by Purchaser (provided that Purchaser is not then in material breach of any provision of this Agreement), if (x) the Bankruptcy Case is dismissed or converted to Chapter 7 of the Bankruptcy Code or a Chapter 11 trustee is appointed for Seller, (y) the Bid Procedures Order or the Sale Order are entered in forms not acceptable to Purchaser, or (z) Seller has not complied with the Bid Procedures Order or the Sale Order;

(f) upon the consummation of any Alternative Transaction;

(g) [INTENTIONALLY DELETED];

(h) by either Purchaser or Seller in the event that Purchaser and Seller are unable to agree in writing upon the form and substance of all Schedules and Exhibits hereto at or before 5:00 p.m., Eastern Time, on August 17, 2015; and in the event that Purchaser and Seller are not able to so agree the Escrow Holder shall return the Initial Deposit (together with all interest accrued thereon) to Purchaser notwithstanding any other provision of this Agreement. It is acknowledged and agreed that each of Purchaser and Seller may withhold its agreement to the Schedules and Exhibits in accordance with this Section 7.1(h) in its sole discretion without providing any reason therefor;

(i) by either Purchaser or Seller in the event that the total Cure Costs payable with respect to the assumption and assignment of the Assumed Leases and Assumed Contracts at the Closing exceeds $300,000.00 (the "Overall Cure Cap"); provided, however, (i) any Purchaser Exclusive Costs shall not be taken into account for purposes of determining whether the Overall Cure Cap has been exceeded, and (ii) neither Purchaser nor Seller shall have the right to terminate this Agreement pursuant to this Section 7.1(i) in the event that the other party hereto agrees in writing to bear the amount of such excess itself and proceeds to pay the amount of such excess at Closing; or

(j) by Seller, if the condition set forth in Section 6.6 is not satisfied as of the Closing Date.

7.2 Effect of Termination.

The Break-Up Fee and the Expense Reimbursement Amount are in the nature of liquidated damages and shall constitute the sole and exclusive remedy of Purchaser in the event of termination hereunder and each shall be paid in accordance with Section 4.2.

8. Miscellaneous.

8.1 Definitions.

(a) As used in this Agreement, the following terms have the following meanings:

"Accounts Receivable" means accounts receivable and all trade receivables of Seller to the extent relating to the Business, together with any unpaid interest accrued thereon from the respective obligors and any security or collateral therefor, including recoverable deposits.

"Acquisition" has the meaning ascribed thereto in the recitals to this Agreement.

"Additional Deposit" has the meaning ascribed thereto in Section 1.4(b).

"ALCHEMIST Program" means the Adjuvant Lung Cancer Enrichment Marker Identification and Sequencing Trials.

"Alternative Transaction" means any transaction (or series of transactions) involving the direct or indirect sale, transfer or other disposition of the Assets (or substantially all of the Assets) to any entity other than Purchaser or its affiliates, whether pursuant to section 363 of the Bankruptcy Code or as part of a chapter 11 or chapter 7 plan.

"Affiliate" means, with respect to any specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with such specified Person. For such purposes, the term "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

"Assets" has the meaning ascribed thereto in Section 1.1.

"Assignment and Assumption Agreement" means the Assignment and Assumption Agreement substantially in the form of Exhibit D hereto to be executed by Purchaser and Seller on the Closing Date.

"Assumed Contracts" has the meaning ascribed thereto in Section 1.1(b).

"Assumed Leases" has the meaning ascribed thereto in Section 1.1(a).

"Assumed Liabilities" has the meaning ascribed thereto in Section 1.3.

"Bankruptcy Case" has the meaning ascribed thereto in the recitals to this Agreement.

"Bankruptcy Code" has the meaning ascribed thereto in the recitals to this Agreement.

"Bankruptcy Court" has the meaning ascribed thereto in the recitals to this Agreement.

"BDO Fees" has the meaning ascribed thereto in Section 1.4(b).

"BDO Fee Reimbursement" has the meaning ascribed thereto in Section 4.2(c).

"Benefit Plan" means any pension, retirement, savings, profit sharing, deferred compensation, stock ownership, stock purchase, stock option, incentive, severance pay, medical, dental, health, welfare, disability, life, death benefit, group insurance, bonus, vacation pay, sick pay, post-retirement medical or life or other employee benefit plan, program, agreement, policy or arrangement (including, without limitation, each "pension plan" as defined in Section 3(2) of ERISA, any "welfare plan" as defined in Section 3(1) of ERISA and any "multiemployer plan" as defined in Section 3(37) of ERISA), whether written or unwritten, qualified or non-qualified, funded or unfunded, maintained or contributed to by Seller or their Subsidiaries (or to which any Seller or its Subsidiaries are party) for the benefit of, or with, Business Employees.

"Bid Procedures Order" has the meaning ascribed thereto in Section 4.7.

"Bill of Sale" means Bills of Sale substantially in the form of Exhibit E hereto to be executed by Seller on the Closing Date.

"Books and Records" means all files, documents, instruments, papers, books and records, including (i) all files, filings, reviews, audits, documents, instruments, papers, books and records with or relating to any regulatory matters including with any Governmental Body or other self-regulatory organization; (ii) Tax books and records (whether stored or maintained in hard copy, digital or electronic format or otherwise) to the extent relating to the Business or the other Assets; and (iii) Contracts, customer lists, customer information and account records, computer files, data processing records, payroll, employment and personnel records, advertising and marketing data and records, credit records, records relating to suppliers and other data, but "Books and Records" shall not include any of the foregoing to the extent the transfer of the same (A) would violate any Person's privacy rights or (B) are subject to any attorney-client, work product or similar privilege with respect to work performed in anticipation of or in connection with the preparation or administration of the Bankruptcy Case.

"Break-Up Fee" has the meaning ascribed thereto in Section 4.2(c).

"Business" has the meaning ascribed thereto in the recitals to this Agreement.

"Business Day" means any day that is not a Saturday, Sunday or other day on which banks located in New York, New York are authorized or obligated to close.

"Business Employees" means Seller's current employees employed in connection with, or rendering services to, the Business, wherever located.

"Cash Consideration" has the meaning ascribed thereto in Section 1.4(a).

"Claim" means a suit, claim, action, proceeding, inquiry, investigation, litigation, demand, charge, complaint, grievance, arbitration, indictment, or grand jury subpoena, including a "claim" as such term is defined in section 101(5) of the Bankruptcy Code.

"CLIA" means the Clinical Laboratory Improvement Amendments.

"Closing" has the meaning ascribed thereto in Section 1.5.

"Closing Date" has the meaning ascribed thereto in Section 1.5.

"COBRA" means the Consolidated Omnibus Budget Reconciliation Act of 1985 as described in Section 4980B of the Code, sections 601 et seq. of ERISA, each as amended, and the regulations promulgated thereunder.

"COBRA Coverage" has the meaning ascribed thereto in Section 4.6(d).

"Code" means the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

"Company Products" means the services and products of the Business.

"Competing Bid" has the meaning ascribed thereto in Section 4.13.

"Contract" means any written or oral agreement, arrangement, understanding, lease, license, sublicense, or instrument or other contractual or similar arrangement or commitment.

"Contract Retention Period" has the meaning ascribed thereto in Section 1.8.

"Cure Costs" means the cure, compensation and restatement, costs and expenses of or relating to the assumption and assignment of the Assumed Contracts (including, without limitation, Assumed Leases) included in the Assets assumed and assigned to Purchaser hereunder pursuant to Section 365 of the Bankruptcy Code.

"Deposit" has the meaning ascribed thereto in Section 1.4(b).

"DIP Budget" means the budget governing the Seller's postpetition financing during any relevant period, approved under the procedures provided for in the DIP Order.

"DIP Order" means an order of the Bankruptcy Court, entered on either an interim or final basis, approving postpetition financing for the Seller in connection with the Bankruptcy Case.

"EMEA" means the European Medicines Agency.

"Encumbrances" means all Liens, claims, conditional sales agreements, rights of first refusal, rights of first offer or rights of first negotiation or options.

"Equipment" means all machinery, rolling stock, equipment, computer equipment (including servers), software, software systems, databases and database systems used in connection with the Business.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended, and the regulations promulgated thereunder.

"Escrow" has the meaning ascribed thereto in Section 1.4(b).

"Escrow Holder" has the meaning ascribed thereto in Section 1.4(b).

"Exchange Act" has the meaning ascribed thereto in Section 2.2(b).

"Excluded Assets" has the meaning ascribed thereto in Section 1.2.

"Excluded Liabilities" has the meaning ascribed thereto in Section 1.3(b).

"Expense Reimbursement Amount" has the meaning ascribed thereto in Section 4.2(b).

"FDA" means the U.S. Food and Drug Administration.

"Fixed Assets" means all furniture, furnishings, fixtures, trade fixtures, racks, pallets, displays and office equipment used in connection with the Business located in any premises that are held or operated pursuant to the Assumed Leases assumed and assigned at the Closing.

"Fundamental Contracts" means any Contracts between Seller, on the one hand, and Pfizer Inc., Glaxosmithkline Biologicals S.A., Leidos Biomedical Research, Inc., Abbott Molecular Inc. or any of their Affiliates, on the other hand.

"GAAP" means United States generally accepted accounting principles, as applied by Seller on a consistent basis during the periods involved in accordance with Seller's historical practices.

"Governmental Body" means a domestic or foreign national, federal, state, provincial, or local governmental, regulatory or administrative authority, department, agency, commission, court, tribunal, arbitral body or self-regulated entity.

"Initial Deposit" has the meaning ascribed thereto in Section 1.4(b).

"Intellectual Property" means all intellectual property and industrial property rights and assets, and all rights, interests and protections that are associated with, similar to, or required for the exercise of, any of the foregoing, however, arising, pursuant to any jurisdiction throughout the world, whether registered or unregistered, including any and all: (i) patents (including design patents) and patent applications (including docketed patent disclosures awaiting filing, reissues, divisions, continuations, continuations-in-part and extensions), patent disclosures awaiting filing determination, inventions and improvements thereto, (ii) trademarks, service marks, certification marks, trade names, brand names, trade dress, logos, business and product names, slogans, and registrations and applications for registration thereof, (iii) copyrights (including software) and registrations thereof, (iv) inventions (whether or not patentable), processes, designs, formulae, trade secrets, know-how, industrial models, confidential and technical information, manufacturing, engineering and technical drawings, product specifications, domain names, discoveries and confidential business information, (v) intellectual property rights similar to any of the foregoing, (vi) computer software (including source code and object code versions), web site and domain names, (vii) copies and tangible embodiments thereof (in whatever form or medium, including electronic media), including, without limitation, those items and assets described in categories (i) through (vii) above, (viii) royalties, fees, income, payments and other proceeds now or hereafter due or payable with respect to any and all of the foregoing, (ix) all licenses, sublicenses, consent to use agreements, settlements, coexistence agreements, covenants not to sue, permissions, assignments of intellectual property, non-disclosure and other Contracts (including any right to receive or obligation to pay royalties or any other consideration), whether written or oral, relating to any Intellectual Property and (x) all rights to any Claims of any nature available to or being pursued by Seller to the extent related to the foregoing, whether accruing before, on or after the date hereof, including all rights to and claims for damages, restitution and injunctive relief for infringement, dilution, misappropriation, violation, misuse, breach or default, with the right but no obligation to sue for such legal and equitable relief, and to collect, or otherwise recover, any such damages.

"Intellectual Property Assets" means all Intellectual Property that is owned by Seller and used in or necessary for the conduct of the Business as currently conducted.

"Intellectual Property Assignments" means the instrument or instruments (in form and content reasonably satisfactory to Purchaser and Seller) pursuant to which Seller will assign to Purchaser all of Seller's right, title and interest, domestic and foreign, state, federal and common law, in and to the Intellectual Property, including the instruments in substantially the forms attached hereto as Exhibit F.

"Inventory" means all goods, products, and supplies sold or used in the sale of any goods or products and all other inventory owned and held by Seller, in each case to the extent relating to or used in connection with the Business, wherever located, and whether on hand, on order, in transit of the Business.

"Knowledge of Seller" means and refers to only the actual current knowledge, as of the Effective Date, of Thomas Bologna, Kevin Harris, Alan Cheeks, Eric Chan, Lisa Henderson, and the Head of Sales of Seller.

"Law" means any U.S. federal, state or local, and any foreign national, state or local, law, statute, common law, ordinance, code, treaty, rule, regulation, order, ordinance, Permit, license, writ, injunction, directive, determination, judgment or decree or other requirement of any Governmental Body or arbitrator.

"Leased Real Property" has the meaning ascribed thereto in Section 2.10(a).

"Liabilities" means any direct or indirect, primary or secondary, liability, Claims, indebtedness, obligation, penalty, cost or expense (including costs of investigation, collection and defense) of or by any Person of any type, whether accrued, absolute or contingent, liquidated or unliquidated, choate or inchoate matured or unmatured, or otherwise. Without limiting the foregoing in any manner, the term "Liabilities" includes and refers to all liabilities and obligations for or with respect to Taxes, including liabilities for Taxes of any Person under Treasury Regulation Section 1.1502-6 (or any similar provision of state, local, or foreign law), as a transferee or successor, by contract, or otherwise.

"Lien" means any security interest, mortgage, pledge, lien, encumbrance, right, hypothecation, option, charge or claim of any nature whatsoever.

"Material Adverse Effect" means any event, occurrence, fact, condition or change that is, or could reasonably be expected to become, individually or in the aggregate, materially adverse to (a) the business, results of operations, condition (financial or otherwise) or assets of the Business, (b) the value of the Assets, or (c) the ability of Seller to consummate the transactions contemplated hereby on a timely basis, unless in each case of (a), (b) or (c) the same is cured by Seller prior to any termination hereof in accordance with Section VII hereof; provided, however, that in determining whether there has been a Material Adverse Effect or whether a Material Adverse Effect would occur, any change, event or occurrence principally attributable to, arising out of, or resulting from any of the following shall be disregarded: (i) general economic, business, industry or credit, financial or capital market conditions (whether in the United States or internationally), including conditions affecting generally the industries served by the Business; (ii) the taking of any action required or permitted by this Agreement; (iii) the public announcement, pendency or completion of the transactions contemplated by this Agreement, (iv) the breach of this Agreement or any agreement or document contemplated herein by Purchaser, (v) the taking of any action with the written approval of Purchaser, (vi) pandemics, earthquakes, tornados, hurricanes, floods and acts of God, (vii) acts of war (whether declared or not declared), sabotage, terrorism, military actions or the escalation thereof; (viii) any changes or prospective changes in applicable Laws, regulations or accounting rules, including GAAP or interpretations thereof, or any changes or prospective changes in the interpretation or enforcement of any of the foregoing, or any changes in general legal, regulatory or political conditions; (ix) any event expressly described in reasonable detail in the Seller Disclosure Schedule hereafter

mutually agreed upon in writing by Purchaser and Seller or (x) any adverse effect or change in or on the Business or the Assets as a consequence of the initiation of the Bankruptcy Case or any actions taken in the Bankruptcy Case in furtherance of the transactions contemplated herein; provided further, however, that any event, occurrence, fact, condition or change referred to in clauses (i), (vi), (vii) or (viii) above shall be taken into account in determining whether a Material Adverse Effect has occurred or could reasonably be expected to occur to the extent that such event, occurrence, fact, condition or change has a disproportionate effect on the Business compared to other participants in the industries in which the Business operates.

"MHRA" means the Medicines and Healthcare products Regulatory Agency.

"Order" means any order, judgment, ruling, injunction, award, decree or writ of any Governmental Body.

"Ordinary Course of Business" means the ordinary and usual course of normal day to day operations of the Business consistent with past practice during the ninety (90) day period immediately preceding the date of this Agreement.

"Petition Date" has the meaning ascribed thereto in the recitals to this Agreement.

"Permits" has the meaning ascribed thereto in Section 1.1(k).

"Permitted Encumbrance" means (a) Liens for Taxes and assessments not yet payable, (b) inchoate mechanics' Liens for work in progress, (c) materialmen's, mechanics', carriers', workmen's and repairmen's Liens arising in the Ordinary Course of Business and not past due and payable or the payment of which is being contested in good faith by appropriate proceedings, (d) Liens that will be released at or prior to Closing, including any such landlord's liens, (e) Liens arising under original purchase price conditional sales contracts and equipment leases with third parties entered into in the Ordinary Course of Business and (f) easements, covenants, rights-of-way and other similar restrictions of record.

"Person" means any individual, corporation, partnership, limited liability company, limited liability partnership, joint venture, joint-stock company, trust, Governmental Body or other entity.

"Post-Closing Contracts" has the meaning ascribed thereto in Section 4.16.

"Pre-Closing Tax Period" means any taxable period ending on or before the Closing Date and, with respect to any taxable period beginning before and ending after the Closing Date, the portion of such taxable period ending on and including the Closing Date.

"Prepaid Expenses" means all credits, prepaid expenses (including unamortized advertising expenses), deferred charges, advance payments, security deposits, and prepaid items (including in respect of Taxes) of Seller arising in connection with the

Business, in each case which are paid or prepaid by Seller on or prior to the Closing Date and that correspond to, or are to be amortized during, a period after the Closing Date.

"Purchaser" means Cancer Genetics, Inc., a Delaware corporation.

"Purchaser Exclusive Cures" has the meaning ascribed thereto in Section 1.3(a).

"Purchase Price" has the meaning ascribed thereto in Section 1.4.

"Real Estate Assignments" means the instrument or instruments (in form and content reasonably satisfactory to Purchaser and Seller) pursuant to which Seller will assign to Purchaser all of Seller's right, title and interest, domestic and foreign, state, federal and common law, in and to the Assumed Leases, including the instrument in substantially the form attached hereto as Exhibit G.

"Real Property Leases" has the meaning ascribed thereto in Section 2.10(a).

"Representative" means, with respect to a particular Person, any director, officer, manager, partner, member, employee, agent, consultant, advisor or other representative of such Person, including legal counsel, accountants, and financial advisors.

"Sale Hearing" means the hearing conducted by the Bankruptcy Court on the Sale Motion for entry of the Sale Order.

"Sale Order" has the meaning ascribed thereto in Section 4.7.

"Sale Motion" has the meaning ascribed thereto in Section 4.7.

"Schedules and Exhibits" means the Seller Disclosure Schedule and all other schedules and exhibits contemplated by this Agreement.

"SEC" means the United States Securities and Exchange Commission.

"Securities Act" means the Securities Act of 1933, as amended.

"Seller Disclosure Schedule" has the meaning ascribed thereto in Section 2.

"Securities Act" has the meaning ascribed thereto in Section 2.10.

"Security Deposits" means all security deposits (including cash) held by landlords under Assumed Leases or counterparties to any other Assumed Contract.

"Seller" means Response Genetics, Inc., a Delaware corporation.

"Seller Bylaws" means the by-laws of Seller, as amended.

"Seller Charter" means the certificate of incorporation of Seller, as amended.

"Seller Intellectual Property" has the meaning ascribed thereto in Section 2.8(a).

"Seller Registered Intellectual Property" has the meaning ascribed thereto in Section 2.8(b).

"Seller SEC Reports" has the meaning ascribed thereto in Section 2.4.

"Stock Consideration" has the meaning ascribed thereto in Section 1.4.

"Stock Registration Instructions" has the meaning ascribed thereto in Section 5.9(a).

"Subsidiary" means, with respect to any Person, any corporation, limited liability company, partnership, association or business entity of which (i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers, or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof, or (ii) if a limited liability company, partnership, association, or other business entity (other than a corporation), a majority of partnership or other similar ownership interest thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more Subsidiaries of that Person or a combination thereof. For purposes hereof, (a) a Person or Persons shall be deemed to have a majority ownership interest in a limited liability company, partnership, association or other business entity (other than a corporation) if such Person or Persons shall be allocated a majority of limited liability company, partnership, association, or other business entity gains or losses or shall be or control any manager, managing director or general partner of such limited liability company, partnership, association or other business entity.

"Swiftcurrent LP" has the meaning ascribed thereto in Section 1.4(c).

"Swiftcurrent Master" has the meaning ascribed thereto in Section 1.4(c).

"SWK" has the meaning ascribed thereto in Section 1.4(c).

"Tax" or "Taxes" means all taxes, charges, fees, imposts, levies or other assessments, including all net income, franchise, profits, gross receipts, capital, sales, use, ad valorem, value added, transfer, transfer gains, inventory, capital stock, license, withholding, payroll, employment, social security, unemployment, excise, severance, stamp, occupation, real or personal property, and estimated taxes, customs duties, fees, assessments and charges of any kind whatsoever, together with any interest and any penalties, fines, additions to tax or additional amounts thereon, imposed by any taxing authority (federal, state, local or foreign) and shall include any successor or transferee liability in respect of Taxes.

"Tax Returns" means all returns, declarations, reports, forms, estimates, information returns and statements required to be filed in respect of any Taxes or to be supplied to a taxing authority in connection with any Taxes.

"Third Party Intellectual Property" has the meaning ascribed thereto in Section 2.8(e).

"Transaction Document" means any agreement, document, certificate or instrument delivered pursuant to or in connection with this Agreement or the transactions contemplated hereby.

"Transfer Taxes" has the meaning ascribed thereto in Section 4.9.

"Transferred Employees" has the meaning ascribed thereto in Section 4.6(a).

"Union" has the meaning ascribed thereto in Section 2.6(b).

"WARN Act" means, collectively, the Worker Adjustment and Retraining Notification Act of 1989 and any similar state or local law

8.2 [INTENTIONALLY DELETED]

8.3 Consent to Jurisdiction; Service of Process; Waiver of Jury Trial.

(a) Purchaser and Seller irrevocably and unconditionally consent to submit to the jurisdiction of the Bankruptcy Court for any litigation arising out of or relating to this Agreement and the transactions contemplated hereby (and agree not to commence any litigation relating hereto except in the Bankruptcy Court).

(b) Any and all service of process and any other notice in any such Claim shall be effective against any party if given personally or by registered or certified mail, return receipt requested, or by any other means of mail that requires a signed receipt, postage prepaid, mailed to such party as herein provided. Nothing herein contained shall be deemed to affect the right of any party to serve process in any manner permitted by law or to commence legal proceedings or otherwise proceed against any other party in any other jurisdiction.

8.4 Notices.

Any notice or other communication required or permitted hereunder shall be in writing and shall be deemed to have been duly given (a) on the day of delivery if delivered in person or by electronic mail, or if delivered by facsimile upon confirmation of receipt, (b) on the first (1st) Business Day following the date of dispatch if delivered by a nationally recognized express courier service, or (c) on the fifth (5th) Business Day following the date of mailing if delivered by registered or certified mail, return receipt requested, postage prepaid. All notices hereunder shall be delivered as set forth below, or pursuant to such other instructions as may be designated by notice given in accordance with this Section 8.4 by the party to receive such notice:

(a) if to Purchaser, to:

Cancer Genetics, Inc.
Meadows Office Complex
201 Route 17 North, 2nd Floor
Rutherford, NJ 07070
Attention: Panna Sharma, Chief Executive Officer and President
Facsimile: +1 201-528-9201
Email Address: panna.sharma@cgix.com

with a copy to:

Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Attention: James A. Grayer
Facsimile: +1 212-715-8000
Email Address: jgrayer@kramerlevin.com

(b) if to Seller, to:

Response Genetics, Inc.
1640 Marengo St. 7th Floor
Los Angeles, California 90033
Attention: Thomas A. Bologna
Facsimile: 323-224-3096
Email Address: tbologna@responsegenetics.com

with a copy to:

Pachulski Stang Ziehl & Jones
10100 Santa Monica Boulevard
13th Floor
Los Angeles, CA 90067-4003Attention: Jeffrey N. Pomerantz
Facsimile: 310.201.0760
Email Address: jpomerantz@pszjlaw.com

8.5 Entire Agreement.

This Agreement (including any exhibits or schedules hereto), that certain Mutual Non-disclosure Agreement dated May 8, 2014, between Seller and Purchaser, and any other collateral agreements executed in connection with the consummation of the transactions contemplated hereby, contain the entire agreement among the parties with respect to the subject matter hereof and supersede all prior agreements, written or oral, with respect thereto.

8.6 Waivers and Amendments.

This Agreement may be amended, superseded, canceled, renewed or extended, and the terms hereof may be waived, only by a written instrument signed by Purchaser and Seller or, in the case of a waiver, by the party waiving compliance. No delay on the part of any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any waiver on the part of any party of any such right, power or privilege, nor any single or partial exercise of any such right, power or privilege, preclude any further exercise thereof or the exercise of any other such right, power or privilege.

8.7 Governing Law.

This Agreement and all Claims with respect thereto shall be governed by and construed in accordance with federal bankruptcy law, to the extent applicable, and, where state law is implicated, the laws of the State of Delaware without regard to any conflict of laws rules thereof that might indicate the application of the laws of any other jurisdiction.

8.8 Binding Effect; Assignment.

This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns. This Agreement is not assignable by any party without the prior written consent of the other parties; provided that Purchaser may assign this Agreement to any Affiliate of Purchaser, provided, further that Purchaser shall not be relieved of any of its obligations under this Agreement as a result of such assignment.

8.9 Usage.

All pronouns and any variations thereof refer to the masculine, feminine or neuter, singular or plural, as the context may require. All terms defined in this Agreement in their singular or plural forms have correlative meanings when used herein in their plural or singular forms, respectively. Unless otherwise expressly provided, the words "include," "includes" and "including" do not limit the preceding words or terms and shall be deemed to be followed by the words "without limitation."

8.10 Articles and Sections.

All references herein to Articles and Sections shall be deemed references to such parts of this Agreement, unless the context shall otherwise require. The Article and Section headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

8.11 Interpretation.

The Parties acknowledge and agree that (a) each Party and its counsel reviewed and negotiated the terms and provisions of this Agreement and have contributed to its revision, (b) the rule of construction to the effect that any ambiguities are resolved against the drafting Party shall not be employed in the interpretation of this Agreement, and (c) the terms and provisions of this Agreement shall be construed fairly as to each

Party, regardless of which Party was generally responsible for the preparation of this Agreement.

8.12 Severability of Provisions.

If any provision or any portion of any provision of this Agreement shall be held invalid or unenforceable, the remaining portion of such provision and the remaining provisions of this Agreement shall not be affected thereby. If the application of any provision or any portion of any provision of this Agreement to any Person or circumstance shall be held invalid or unenforceable, the application of such provision or portion of such provision to Persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby.

8.13 Counterparts.

This Agreement may be executed by the parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts together shall constitute one and the same instrument. Each counterpart may consist of a number of copies hereof each signed by less than all, but together signed by all, of the parties hereto. This Agreement may be delivered by facsimile or electronic PDF format, which shall be deemed an original counterpart for all purposes.

8.14 No Third Party Beneficiaries.

No provision of this Agreement is intended to, or shall, confer any third party beneficiary or other rights or remedies upon any Person other than the parties hereto. Without limiting the generality of the foregoing, no provision of this Agreement shall create any third party beneficiary rights in any employee or former employee of Seller in respect of continued employment by Seller.

8.15 Attorneys' Fees.

In the event that Seller or Purchaser bring an action or other proceeding to enforce or interpret the terms and provisions of this Agreement, the prevailing party(ies) in that action or proceeding shall be entitled to have and recover from the non-prevailing party(ies) all such fees, costs and expenses (including, without limitation, all court costs and reasonable attorneys' fees) as the prevailing party(ies) may suffer or incur in the pursuit or defense of such action or proceeding.

8.16 No Brokerage Obligations.

Seller and Purchaser each represent and warrant to the other that such party has incurred no liability to any real estate broker or other broker or agent with respect to the payment of any commission regarding the consummation of the transaction contemplated hereby. It is agreed that if any claims for commissions, fees or other compensation, including, without limitation, brokerage fees, finder's fees, or commissions are ever asserted against Purchaser or Seller in connection with this transaction, all such claims shall be handled and paid by the Party whose actions form the basis of such claim and

such party shall indemnify, defend (with counsel reasonably satisfactory to the party entitled to indemnification), protect and save and hold the other harmless from and against any and all such claims or demands asserted by any person, firm or corporation in connection with the transaction contemplated hereby.

8.17 Survival.

The respective representations and warranties of Seller and Purchaser herein or in any certificates or other documents delivered prior to or at the Closing, shall automatically lapse and cease to be of any further force or effect whatsoever upon the Closing. Except for the respective covenants and agreements of Seller and Purchaser contained in Sections 1.4(b), 1.4(d), 1.8, 4.2, 4.4, 4.5, 4.6, 4.8, 4.9, 4.10, 4.11, 4.13, 4.14, 4.15, 4.16, 7.2 and in this Article 8, which shall survive the Closing indefinitely to the extent the same are to be performed or apply to the period following the Closing, all other covenants and agreements of Seller and Purchaser contained in this Agreement shall automatically lapse and cease to be of any further force or effect whatsoever upon the Closing.

8.18 Non-Recourse

No past, present or future director, officer, employee, incorporator, member, partner or equity holder of the parties to this Agreement will have any liability for any obligations or liabilities of Seller or Purchaser, as applicable, under this Agreement, or any agreement entered into in connection herewith of or for any claim based on, in respect of, or by reason of, the transactions contemplated hereby and thereby. Any claim or cause of action based upon, arising out of, or related to this Agreement or any agreement, document or instrument contemplated hereby may only be brought against Persons that are expressly named as parties hereto or thereto, and then only with respect to the specific obligations set forth herein or therein. Other than the parties hereto, no party shall have any liability or obligation for any of the representations, warranties, covenants, agreements, obligations or liabilities of any party under this Agreement or the agreements, documents or instruments contemplated hereby or of or for any action or proceeding based on, in respect of, or by reason of, the transactions contemplated hereby or thereby (including breach, termination or failure to consummate such transactions), in each case whether based on contract, tort, fraud, strict liability, other Laws or otherwise and whether by piercing the corporate veil, by a claim by or on behalf of a party hereto or another Person or otherwise. In no event shall any Person be liable to another Person for any punitive damages with respect to the transactions contemplated hereby.

[*Remainder of Page Intentionally Left Blank*]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

PURCHASER:

CANCER GENETICS, INC.

By: Panna Sharma

Name: Panna Sharma

Title: CEO & President

SELLER:

RESPONSE GENETICS, INC.

By: _____

Name: _____

Title: _____

[*Signature page to Amended and Restated Asset Purchase Agreement*]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

PURCHASER:

CANCER GENETICS, INC.

By:_____
Name: _____
Title: _____

SELLER:

RESPONSE GENETICS, INC.

By: Thomas A. Bologna
Name: THOMAS A. BOLOGNA
Title: CHAIRMAN & CEO

[*Signature page to Asset Purchase Agreement*]

SCHEDULES

[TO BE INSERTED]

EXHIBITS

[TO BE ATTACHED]

EXHIBIT B

Proposed Order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	Chapter 11
RESPONSE GENETICS, INC.	:	Case No. 15-11669 (LSS)
Debtor.	:	

ORDER (A) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS, AND (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Upon the Motion (the "**Motion**") of Response Genetics, Inc., as a chapter 11 debtor and debtor-in-possession (the "**Debtor**") in the above-referenced chapter 11 case (the "**Chapter 11 Case**") for (I) an order (the "**Bidding Procedures Order**") (A) approving bidding procedures (the "**Bidding Procedures**") for the auction (the "**Auction**") of substantially all of the Debtor's assets (as defined in the APA (defined below), the "**Assets**"), (B) scheduling the Auction and sale hearing related thereto, and (C) approving procedures for the assumption and assignment of certain executory contracts and unexpired leases related thereto (the "**Assignment Procedures**"); and (II) an order (the "**Sale Order**") (A) approving the sale of the Assets, and (B) approving the assumption and assignment of certain executory contracts and unexpired leases, all as more fully set forth in the Motion; and the Court having approved the Bidding Procedures and Assignment Procedures at a hearing held on [_____] (the "**Bidding Procedures Hearing**"), and having entered the Bidding Procedures Order on [_____]; and the auction for the Assets having been conducted in accordance with the Bidding Procedures approved by this Court; and the Debtor having determined that the sale of the Assets pursuant to that certain Asset Purchase Agreement (including all ancillary documents, the "**APA**," attached hereto as **Annex 1**) between the Debtor and Cancer Genetics, Inc. (the "**Purchaser**"),was the highest or otherwise best offer

for the Assets; and the Court having conducted a sale hearing on [_____] (the "**Sale Hearing**") to consider approval of the sale of the Assets to the Purchaser pursuant to the APA; and all parties-in-interest having been heard or had the opportunity to be heard regarding the approval of the APA and the transactions contemplated thereby; and upon the Motion and supporting documentation filed in connection therewith; and the Court having reviewed and considered the Motion and any objections or responses thereto; and upon the record of the Bidding Procedures Hearing, the Sale Hearing and the full record of this case; and the Court having determined that the relief sought in the Motion is in the best interests of the Debtor, its estate and creditors, and all parties-in-interest and 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 FOUND AND DETERMINED THAT:[1]

B. Jurisdiction and Venue. The Court has jurisdiction over this matter and over the property of the Debtor and its bankruptcy estate pursuant to 28 U.S.C. §§ 157(a) and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A),(M)-(O). Venue of this case and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

C. Statutory Predicates. The statutory predicates for the relief sought herein are 11 U.S.C. § 105, 363, and 365, and Fed. R. Bankr. Proc. 2002, 6004, 6006, 9008, and 9014.

D. Notice. Proper, timely, adequate and sufficient notice of the Motion and the relief requested therein, the Auction, the Sale Hearing, the assumption and assignment of the Assumed Contracts and Leases and related transactions described in the APA (all such

[1] The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate.

transactions being collectively referred to as the "**Sale Transaction**"), has been provided in accordance with sections 102(1) and 363 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006 and in compliance with the Bidding Procedures Order, and such notice was good, sufficient, and appropriate under the particular circumstances. No other or further notice of the Motion, the relief requested therein and all matters relating thereto, the Auction, the Sale Hearing, the Sale Transaction or entry of this Sale Order is or shall be required.

E. Opportunity to Object and Bid. Creditors, parties-in-interest and other entities have been afforded a reasonable opportunity to object to the Sale Transaction. A reasonable opportunity to object or be heard with respect to the Motion and the relief requested therein has been afforded to all interested persons and entities.

F. Compliance with Local Rules. The Debtor has complied in all respects with Local Rule 6004-1 of the Local Rules of Bankruptcy Practice and Procedures of the United States Bankruptcy Court for the District of Delaware (the "**Local Rules**"), establishing guidelines for the conduct of asset sales.

G. Prompt Consummation. It is in the best interests of the Debtor and its estate to sell the Assets within the time constraints set forth in the Motion and the APA. The Sale Transaction must be approved and consummated promptly as provided herein in order to maximize the value of the Assets for the Debtor's estate.

H. Compliance with Bidding Procedures Order. As demonstrated by (i) the testimony and/or other evidence proffered or adduced at the Sale Hearing and (ii) the representations of counsel made on the record at the Sale Hearing, the Debtor has marketed the Assets and conducted the sale process in compliance with the Bidding Procedures Order.

I. Marketing Process. The marketing and bidding processes implemented by

the Debtor, as set forth in the Motion, the Bidding Procedures Order, and supporting documentation filed in connection therewith, were fair, proper, complete, provided an adequate opportunity for interested parties to submit improved bids, and were reasonably calculated to result in the best value received for the Assets.

J. Corporate Authority. The Debtor has full corporate power and authority to consummate the Sale Transaction pursuant to the APA, and all other documents contemplated thereby, and no consents or approvals, other than those expressly provided for in the APA, are required for the Debtor to consummate the Sale Transaction.

K. Business Justification. The Debtor has articulated good, sufficient, and sound business reasons for entering into the APA and consummating the Sale Transaction outside a plan of reorganization. It is a reasonable exercise of the Debtor's business judgment to consummate the Sale Transaction.

L. Best Interests. Approval of the APA and the consummation of the Sale Transaction are in the best interests of the Debtor, its estate, its creditors and other parties-in-interest under applicable bankruptcy and nonbankruptcy law.

M. Highest or Otherwise Best. The Purchaser's bid for the Assets, as memorialized in the APA, is the highest or otherwise best offer received for the Assets. The purchase price to be paid by the Purchaser pursuant to the APA is fair consideration and constitutes reasonably equivalent value for the Assets, as determined by the marketing and auction process and satisfies the requirements under applicable bankruptcy and nonbankruptcy law.

N. Arm's-Length Transaction. The APA was negotiated, proposed and entered into by the Debtor and the Purchaser without collusion, in good faith and from arm's-

length bargaining positions. The Purchaser is not an "insider" of the Debtor, as that term is defined in section 101(31) of the Bankruptcy Code. Neither the Debtor nor the Purchaser have engaged in any conduct that would cause or permit the APA avoided or be the basis for an award for monetary damages under Bankruptcy Code section 363(n). Specifically, the Purchaser has not acted in a collusive manner with any person and the purchase price was not controlled by any agreement among bidders.

O. Good Faith. All of the actions taken by the Purchaser and its officers, directors, employees, counsel and other professionals in connection with the APA, the auction process and this proceeding have been taken in good faith. The Purchaser is a good faith purchaser of the Assets within the meaning of Bankruptcy Code section 363(m) and is entitled to all of the protections afforded thereby. The Purchaser proceeded in good faith in all respects in connection with the Sale Transaction in that: (i) the Purchaser in no way induced or caused the chapter 11 filing of the Debtor; (ii) the Purchaser recognized that the Debtor was free to deal with any other party interested in acquiring the Assets; (iii) the Purchaser complied with the provisions in the Bidding Procedures Order; (iv) the Purchaser agreed to subject its bid to the competitive bidding procedures set forth in the Bidding Procedures Order; and (v) all payments to be made to the Purchaser pursuant to the APA in connection with the Sale Transaction have been disclosed.

P. Free and Clear. The Assets constitute property of the Debtor's estate. The transfer of the Assets to the Purchaser will be a legal, valid, and effective transfer of the Assets, and will vest the Purchaser with all right, title, and interest of the Debtor in and to the Assets free and clear of all liens, claims, interests, obligations, rights and encumbrances, except as otherwise specifically provided in the APA. Except as specifically provided in the APA, the Purchaser

shall have no liability for any claims against the Debtor or its estate or any liabilities or obligations of the Debtor or its estate. Accordingly, the Debtor may sell the Assets free and clear of all liens, encumbrances, pledges, mortgages, deeds of trust, security interests, claims, leases, charges, options, rights of first refusal, easements, servitudes, proxies, voting trusts or agreements, and transfer restrictions under any agreement in each case, whether known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or non-material, disputed or undisputed (collectively, the "**Interests**") and adverse claims, except as provided in the APA, because one or more of the standards set forth in sections 363(f)(1)–(5) of the Bankruptcy Code has been satisfied with regard to each such Interest or adverse claim. Those non-Debtor parties with Interests or adverse claims in or with respect to the Assets who did not object, or who withdrew their objections, to the Sale Transaction or the Motion are deemed to have consented to the sale of the Assets free and clear of those non-debtor parties' Interests in the Assets pursuant to section 363(f) of the Bankruptcy Code. Those holders of Interests in any Assets who did object fall within one or more of the other subsections of section 363(f) of the Bankruptcy Code and are adequately protected by having their Interests, if any, attach to the proceeds derived from the Sale Transaction. The Purchaser would not have entered into the APA, and would not consummate the Sale Transaction, thus adversely affecting the Debtor, its estate, and its creditors, if the sale of the Assets to the Purchaser, and the assumption and assignment of the Assumed Contracts and Leases to the Purchaser were not free and clear of all Interests of any kind or nature whatsoever, or if the Purchaser would, or in the future could, be liable for any of the Interests.

Q. Adequate Assurance. The assumption and assignment of the Assumed Contracts and Leases pursuant to the terms of the Assignment Procedures and this Sale Order is integral to the Sale Transaction and is in the best interests of the Debtor and its estate, creditors and all other parties-in-interest, and represents the reasonable exercise of sound and prudent business judgment by the Debtor. The Purchaser provided adequate assurance of its future performance under the Assumed Contracts and Leases within the meaning of sections 365(b)(1)(c) and (f)(2)(B) of the Bankruptcy Code. Any counterparty to any of the Assumed Contracts and Leases that has not objected to the assumption and assignment to the Purchaser of the applicable contract or lease, or that has withdrawn its objection, is deemed to have consented to the assumption and assignment of such Assumed Contract and l Lease.

R. Avoidance and Successor Liability. The transfer of the Assets (including any individual elements of the Sale Transaction) to the Purchaser (i) does not constitute any avoidable transfers under the Bankruptcy Code or under applicable bankruptcy or non-bankruptcy law, and (ii) except as otherwise set forth in the APA, does not, and will not, subject the Purchaser to any liability whatsoever, including claims for any liabilities of the Debtor related to Medicare and Medicaid, with respect to the operation of the Debtor's business prior to the closing of the Sale Transaction or by reason of such transfer under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based, in whole or in part, directly or indirectly, on any theory of law or equity including, without limitation, any laws affecting antitrust, successor, transferee or vicarious liability.

S. Compliance with Non-Bankruptcy Law. In satisfaction of sections 363(d) and 541(f) of the Bankruptcy Code, the transfer of property as contemplated by the Sale Transaction complies with applicable non-bankruptcy law governing such a transfer.

T. Legal and Factual Bases. The legal and factual bases set forth in the Motion and at the Sale Hearing establish just cause for the relief granted herein.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Motion. The Motion is hereby granted as provided herein.

2. Objections. All objections to the Motion and the relief requested therein that have not been withdrawn, waived or settled, and all reservations of rights included in such objections, other than objections to disputed Cure Amounts, are hereby overruled on the merits and denied.

3. Sale Approval. The Sale Transaction and all of the terms and conditions and transactions contemplated by the APA are hereby authorized and approved pursuant to sections 105(a), 363(b), 363(f) and 365(a) of the Bankruptcy Code. Pursuant to section 363(b) of the Bankruptcy Code, the Debtor is authorized to consummate the Sale Transaction pursuant to and in accordance with the terms and conditions of the APA. The Debtor is authorized to execute and deliver, and empowered to perform under, consummate, and implement the APA, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Sale Transaction, and to effectuate the provisions of this Sale Order and the transactions approved hereby, and to take all further actions as may be required of the Debtor under the APA for the purpose of assigning, transferring, granting, conveying and conferring to the Purchaser or reducing to possession, the Assets, or as may be necessary or appropriate to the performance of the obligations as contemplated by the APA. The failure to specifically include any particular provision of the APA in this Sale Order shall not diminish or impair the efficacy of such provision, it being the intent of this Court that the APA and each and every provision, term and condition thereof be authorized and approved in its entirety.

4. Transfer of the Assets. As of the closing date under the APA (the "**Closing**"), the Sale Transaction effects a legal, valid, enforceable and effective sale and transfer of the Assets to the Purchaser, and shall vest the Purchaser with all right, title, and interest of the Debtor in and to the Assets.

5. Free and Clear. Except as otherwise provided for in the APA, the transfer of the Assets shall vest the Purchaser with all right, title, and interest of the Debtor in the Assets pursuant to section 363(f) of the Bankruptcy Code, free and clear of any and all Interests, whether arising by statute or otherwise and whether arising before or after the commencement of this Chapter 11 Case, whether known or unknown, including, but not limited to, Interests of or asserted by any of the creditors, vendors, employees, suppliers, or lessors of the Debtor or any other third party. Any and all such Interests shall attach to the net proceeds of the Sale Transaction, with the same priority, validity, force, and effect as they now have against the Assets. Except as set forth in the APA, the Sale Transaction will not subject the Purchaser to any liability for any Interests whatsoever, including, without limitation, statutory claims, that any of the foregoing parties or any other third party may have against the Debtor, including claims for liabilities of the Debtor related to their participation in Medicare and Medicaid programs, with respect to the operation of the Debtor's business prior to the closing of the Sale Transaction or by reason of such transfer under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based, in whole or in part, directly or indirectly, on any theory of law or equity including, without limitation, any laws affecting antitrust, successor, transferee or vicarious liability. All persons and entities asserting or holding any Interests in or with respect to the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), howsoever arising, shall be

forever barred, estopped, and permanently enjoined from asserting, prosecuting or otherwise pursuing such Interests against the Purchaser. Subject to the Interests attaching to the proceeds of the Sale Transaction, this Sale Order shall be effective as a determination that, as of the Closing, all Interests of any kind or nature whatsoever existing against the Assets prior to the Closing have been unconditionally released, discharged and terminated as to the Assets, and that the conveyances described herein have been effected. Following the Closing, no holder of an Interest in the Assets shall interfere with the Purchaser's title to or use and enjoyment of the Assets based on or related to such Interest. Each and every federal, state, and local governmental agency, recording office or department and all other parties, persons or entities is hereby directed to accept for recordation this Sale Order, and any and all documents or instruments necessary or appropriate to effectuate the transactions contemplated by this Sale Order and the APA, as conclusive evidence of the free and clear and unencumbered transfer of title to the Assets conveyed to the Purchaser. This Sale Order shall be binding upon and govern the conduct of all such federal, state, and local government agencies or departments, including any filing agents, filing officers, title agents, recording agencies or offices, secretaries of state, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title in or to the Assets.

6. Surrender of the Assets. All entities who are presently, or who as of the Closing may be, in possession of some or all of the Assets hereby are directed to surrender possession of the Assets to the Purchaser as of the Closing. On the Closing and subject to the Interests attaching to the proceeds of the Sale Transaction as provided for in this Sale Order, each of the Debtor's creditors is authorized to execute such documents and take all other actions

as may be reasonably necessary to release its Interests in the Assets, if any, as such Interests may have been recorded or may otherwise exist.

7. No Successor Liability. Purchaser is not a "successor" to the Debtor or its estate by reason of any theory of law or equity, and the Purchaser shall not assume, nor be deemed to assume, or in any way be responsible for any liability or obligation of any of the Debtor and/or its estate, other than the Assumed Liabilities, with respect to the Assets or otherwise, including, but not limited to, under any bulk sales law, doctrine or theory of successor liability, or similar theory or basis of liability except for the assumption of the Assumed Contracts and Assumed Leases and the Assumed Liabilities as expressly provided in the APA. Except to the extent the Purchaser assumes the Assumed Contracts and Leases and liabilities pursuant to the APA, neither the purchase of the Assets by the Purchaser or any of its affiliates nor the fact that the Purchaser or any of its affiliates are using any of the Assets previously operated by the Debtor will cause the Purchaser or any of its affiliates to be deemed a successor in any respect to the Debtor's business or incur any liability derived therefrom within the meaning of any foreign, federal, state or local revenue, pension, the Employee Retirement Income Security Act of 1974 (ERISA), tax, labor, employment, environmental, or other law, rule or regulation (including, without limitation, filing requirements under any such laws, rules or regulations), or under any products liability law or doctrine with respect to the Debtor's liability under such law, rule or regulation or doctrine.

8. Bulk Sale Laws Inapplicable. No bulk sale law or any similar law of any state or other jurisdiction shall apply in any way to the Sale Transaction and the transactions contemplated by the APA.

9. Good Faith. The Sale Transaction has been undertaken by the Debtor and the Purchaser at arm's-length, without collusion. The Purchaser will acquire the Assets pursuant to the Transaction Documents in good faith under section 363(m) of the Bankruptcy Code and the Purchaser shall be entitled to all of the protections in accordance therewith. The consideration provided by the Purchaser for the Assets under the APA is fair and reasonable, and neither the Sale Transaction nor any element of the Sale Transaction, may be avoided or be the basis for an award of monetary damages under section 363(n) of the Bankruptcy Code. The sale of the Assets and the consideration provided by the Purchaser shall be deemed for all purposes to constitute a transfer for reasonably equivalent value and fair consideration under the Bankruptcy Code and any other applicable law.

10. Required Permits. To the extent authorized under applicable non-bankruptcy law, the Debtor is hereby authorized to assign all state and federal licenses and permits used in connection with the Assets to the Purchaser in accordance with the terms of the APA.

11. Assumption and Assignment of Assumed Contracts and Leases. Pursuant to section 365(b), (c) and (f) of the Bankruptcy Code, the Debtor is authorized to assume and assign the Assumed Contracts and Leases designated for assignment to the Purchaser pursuant to the APA, subject to the Assignment Procedures approved in the Bidding Procedures Order. In accordance with sections 365(b)(2) and (f) of the Bankruptcy Code, upon transfer of the Assumed Contracts and Leases to the Purchaser, (i) the Purchaser shall have all of the rights of the Debtor thereunder and each provision of such Assumed Contracts and Leases shall remain in full force and effect for the benefit of the Purchaser notwithstanding any provision in any such contract, lease, or in applicable law that prohibits, restricts or limits in any way such assignment

or transfer, and (ii) none of the Assumed Contracts and Leases may be terminated, or the rights of any party modified in any respect, including pursuant to any "change of control" clause, by any other party thereto as a result of the Sale Transaction.

12. Payment of Undisputed Cure Amounts. On or as promptly after the Closing as is practical, the Cure Amounts to which no objections have been filed, or to which the Purchaser, the Debtor, and an applicable non-Debtor contract party have agreed as to the allowed Cure Amount, shall be paid pursuant to the APA.

13. Cure Payments. The payment of the undisputed Cure Amounts shall be deemed to discharge the Debtor's obligation to: (i) cure any defaults under the Assumed Contracts and Leases; and (ii) compensate, or provide adequate assurance that the Purchaser will promptly compensate, any non-debtor party to any of the Assumed Contracts and Leases for any actual pecuniary loss resulting from any default under any of the Assumed Contracts and Leases. Pursuant to section 365(k) of the Bankruptcy Code, the Debtor shall have no liabilities for any claims arising or relating to or accruing post-Closing under any of the Assumed Contracts and Leases.

14. Disbursement of Sale Proceeds. As used in this paragraph, "**Net Sale Proceeds**" shall mean all amounts paid or payable by the Purchaser to the Debtor with respect to the Sale Transaction after taking into account pro-rations and any other adjustments that affect the final purchase price specified in the APA. The Net Sale Proceeds shall be disbursed to SWK and SVB and apportioned between those two entities: (i) in a manner consistent with and required by the terms of the intercreditor agreement between SWK and SVB; or (ii) in such other manner as SWK and SVB may agree, in writing.

15. Modifications. The APA and any related agreements, documents, or other instruments may be modified, amended, or supplemented by the parties thereto, in writing signed by both parties, and in accordance with the terms thereof, without further order of this Court.

16. Binding Order. This Sale Order and the APA shall be binding upon and govern the acts of all persons and entities, including, without limitation, the Debtor and the Purchaser, their respective successors and permitted assigns, including, without limitation, any trustee appointed in a Chapter 7 case if this case is converted from Chapter 11, and all creditors of any of the Debtor (whether known or unknown).

17. Non-Severability. The provisions of this Sale Order are non-severable and mutually dependent.

18. Order Immediately Effective. Notwithstanding Bankruptcy Rules 6004(h), 6006(d) and 7062, this Sale Order shall be effective and enforceable immediately upon its entry, and the sale approved by this Sale Order may close immediately upon entry of this Sale Order, notwithstanding any otherwise applicable waiting periods.

19. Retention of Jurisdiction. This Court shall retain jurisdiction on all matters pertaining to the relief granted herein, including to interpret, implement, and enforce the terms and provisions of this Sale Order and the APA, adjudicate any dispute relating to the Sale Transaction or the proceeds thereof, and the assumption, assignment and cure of any of the Assumed Contracts and Leases.

Dated: Wilmington, Delaware
_____, 2015

_____
UNITED STATES BANKRUPTCY JUDGE