

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

In re:	)	Chapter 11
	)	
FRANK W. KERR COMPANY,	)	Case No. 16-51724
	)	
Debtor.	)	
	)	Judge Maria L. Oxholm
	)	
	)	

**MOTION OF DEBTOR FOR AN ORDER (I) AUTHORIZING THE SALE  
OF CERTAIN OF THE DEBTOR’S ANTITRUST CLAIMS FREE AND  
CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS;  
AND (II) GRANTING RELATED RELIEF**

The above-captioned debtor and debtor in possession (the “Debtor”) hereby moves the Court, pursuant to sections 105 and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rule 6004 and of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 6004-1 of the Local Rules for the United States Bankruptcy Court for the Eastern District of Michigan (the “Local Rules”), for the entry of an order, the proposed form of which is attached as Exhibit A: (a) authorizing the Debtor to sell certain of its antitrust claims to FWK Holdings, L.L.C. (“FWK”), free and clear of all liens, claims, encumbrances, and interests, and enter into that certain Agreement for Assignment of Claims with FWK (the “Assignment Agreement”), a copy of which is attached hereto as Exhibit B, and the Agreement for Preservation of Documents with FWK (the “Document Preservation Agreement,” and together with the

Assignment Agreement, the “FWK Agreements”), a copy of which is attached hereto as Exhibit C; and (b) granting related relief. In support of this Motion, the Debtor respectfully states as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of the Debtor’s chapter 11 case and this Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

### **BACKGROUND**

2. On August 23, 2016 (the “Petition Date”), certain unsecured creditors filed an involuntary petition for relief under Chapter 7 of the Bankruptcy Code against the Debtor. On September 20, 2016 (the “Relief Order Date”), the Debtor consented to the entry of an order for relief and converted the chapter 7 case to a chapter 11 case. Since the Relief Order Date, the Debtor has remained in possession of its assets and has continued to manage its business as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. An official committee of unsecured creditors was appointed on September 28, 2106, (the “Committee”).

3. Detailed facts about the Debtor and the reasons for the commencement of its chapter 11 case are set forth in the *Affidavit and Statement of*

*Jeffrey K. Tischler in Support of Chapter 11 Petition and First Day Motions*, filed contemporaneously herewith (the “Tischler Affidavit”).<sup>1</sup>

**FACTS RELEVANT TO THIS MOTION**

4. The Debtor was founded in 1913 and was one of the largest independent pharmaceutical wholesalers in the United States. In the ordinary course of its business, the Debtor, from time to time, accrues antitrust claims against various entities arising out of the Debtor’s purchases of pharmaceutical or over-the-counter products.

5. While the Debtor does not believe there to be an established market for the purchase and sale of antitrust claims, the Debtor has in the past assigned its rights to its antitrust claims, and by this motion, seeks to do the same. Specifically, on or about October 4, 2002, the Debtor entered into an Agreement for the Assignment of Claims (the “Meijer Assignment”) with Meijer, Inc. (“Meijer”), pursuant to which the Debtor assigned all of its rights, title, and interest in and to all causes of action and any resulting proceeds the Debtor may have under United States antitrust laws, common law, or statutory law, arising or relating to the Debtor’s purchase of any pharmaceutical products which were subsequently resold to Meijer.

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<sup>1</sup> Capitalized but undefined terms shall have the meanings set forth in the Tischler Affidavit.

6. The Debtor has had additional claims that were not included claims assigned to Meijer pursuant to the Meijer Assignment. During the period from May 2005 until the Petition Date, the Debtor received twenty-three (23) settlements as a member of a class covered by a class action settlement, which ranged in amount from low of \$5,769 to very large settlement of \$583,699, for an average of \$91,679. Eliminating the largest and smallest pre-petition settlements to determine a more accurate value, results in an average settlement of \$63,502. Since the Petition Date, the Debtor has received a settlement of \$4,602.11.

7. The Debtor may hold additional antitrust claims that were not assigned to Meijer. In connection with its wind-down, the Debtor, in consultation with its advisors, desired to sell its remaining antitrust claims and, prior to the Relief Order Date, received an offer from FWK to purchase such claims in exchange for the purchase price of \$330,000 (the "Purchase Price"). Consistent with the pre-petition and post-petition negotiations, and subject to approval of the FWK Agreements by this Court in accordance with the terms of the Assignment Agreement, FWK and the Debtor have agreed to the sale and purchase of the anti-trust claims not subject to the Meijer Assignment for the Purchase Price and other undertakings by FWK under the FWK Agreements. FWK is not an insider of the Debtor or in any way affiliated with the Debtor but its counsel has assisted Debtor in regard to filing claim forms for the settlements referred to above.

8. Pursuant to the Assignment Agreement, in addition to the Purchase Price, the Debtor and FWK have agreed to the following material terms:

- a. The Debtor will assign to FWK, and FWK will assume, all obligations the Debtor has under the Meijer Assignment;
- b. The Debtor will assign to FWK, and FWK will assume, all of the Debtor's rights, title, and interest in and to all causes of action the Debtor may now have and which may accrue at any time after the effective date of the Agreement arising under federal or state antitrust laws relating to the Debtor's purchases of pharmaceutical and over-the-counter products, except for those rights already assigned to Meijer pursuant to the Meijer Assignment; and
- c. The Debtor and FWK will cooperate to give effect to the terms of the Assignment Agreement, including the Debtor providing all necessary records related to the assigned claims to FWK and making witnesses available to be interviewed and to testify; and FWK will reasonably compensate the Debtor for its cooperation.

9. In connection with entering into the Assignment Agreement, the Debtor and FWK have agreed to enter into the Document Preservation Agreement, pursuant to which FWK has agreed, at no cost to the Debtor, to collect and store all of the Debtor's records relating to the antitrust claims, which the Debtor submits include substantially all of the Debtor's business records. The Debtor believes that it will cost thousands of dollars per year to collect and store such records, a cost that will be borne by the Debtor's estate absent entry into the Document Preservation Agreement with FWK.

10. The Debtor believes that the terms of the FWK Agreements, including the proposed Purchase Price, represents the highest and best offer the Debtor will receive for the antitrust claims.

### **RELIEF REQUESTED**

11. The Debtor respectfully requests that the Court: (a) authorize the Debtor to enter into the FWK Agreements and sell and assign the antitrust claims to FWK free and clear of all liens, claims, encumbrances, or other interests pursuant to sections 363(b), (f), and (m) of the Bankruptcy Code, with such liens, claims, rights, interests, and encumbrances to attach to the sale proceeds of the antitrust claims, which will be held in a segregated account by the debtor pending further order of this Court, with the same validity, priority, extent, and perfection as existed immediately prior to such sale; and (b) grant related relief.

### **BASIS FOR RELIEF**

**A. The Debtor's Entry Into the FWK Agreements is a Proper Exercise of Its Business Judgment**

12. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that “[t]he trustee, 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) of the Bankruptcy Code provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

13. In approving the sale of assets outside the ordinary course of business and outside of a chapter 11 plan pursuant to section 363 of the Bankruptcy Code, courts, including those in the Sixth Circuit, have adopted the “sound business reason” test established by the Second Circuit in *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983). See *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 391 (6th Cir. 1986); *In re Nicole Energy Servs., Inc.*, 385 B.R. 201, 230 (Bankr. S.D. Ohio 2008); *In re Jillian’s Entm’t Holdings*, 327 B.R. 616, 617 (Bankr. W.D. Ky. 2005) (stating that the *Lionel* standard has been adopted by the vast majority of courts); see also *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (Bankr. D. Del. 1991) (holding that transactions should be approved under section 363(b)(1) when: (a) they are supported by the sound business judgment of a debtor’s management; (b) interested parties are provided with adequate and reasonable notice; (c) the sale price is fair and reasonable; and (d) the purchaser is acting in good faith).

14. A debtor’s showing of sound business justification need not be unduly exhaustive; instead the debtor or trustee is “simply required to justify the proposed disposition with sound business reasons.” *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984). Whether or not there are sufficient business reasons to justify a sale depends upon the facts and circumstances of each case. See *Lionel*, 722 F.2d at 1071. Bankruptcy courts are given substantial discretion in deciding whether to authorize a sale of a debtor’s assets outside of the ordinary

course of business. *See In re Chateaugay Corp.*, 973 F.2d 141, 144 (2d Cir. 1992).

15. The Debtor believes that the sale of its antitrust claims pursuant to the Assignment Agreement, as proposed in this motion, represents a prudent and proper exercise of its business judgment and is in the best interests of the Debtor's creditors and its estate. Specifically, the antitrust claims hold little if any current value to the Debtor, because the Debtor is winding-down its business and has no intentions of remaining in business long enough to pursue any such claims. In other words, absent a sale, the Debtor will likely realize no value from the antitrust claims, which would be detrimental to all stakeholders given FWK's purchase offer. Further, the significant Purchase Price offered by FWK, as well as FWK's agreement to pay the cost of collecting and storing the Debtor's records pursuant to the Document Preservation Agreement provides a clear benefit to the estate.

16. Moreover, no prejudice will result to any parties in interest because the sale of the antitrust claims will be noticed in accordance with the notice provisions established by the Bankruptcy Rules. Such notice will: (a) afford all parties in interest with adequate and reasonable notice of the sale; (b) provide sufficient information regarding the sale of the antitrust claims and the time for filing objections to the sale; and (c) meet the requirements of the Bankruptcy Code, the Bankruptcy Rules, and legal due process.

17. Therefore, the Debtor believes that the proposed sale is the best



restructuring choice currently available for the estate and concludes that the sale is supported by sound business reasons.

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

18. Section 363(f) of the Bankruptcy Code authorizes the sale of estate property free and clear of interests in such property held by an entity if:

- (1) applicable nonbankruptcy law permits a 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 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); *see generally In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996); *In re Gulf States Steel, Inc. of Ala.*, 285 B.R. 497, 506 (Bankr. N.D. Ala. 2002). The “interests” in property that assets may be sold “free of” include liens, claims, encumbrances, and other interests. *See Leckie Smokeless*, 99 F.3d at 581-582 (scope of section 363(f) not limited to in rem interests); *In re Aneco Elect. Const., Inc.*, 377 B.R. 338 (Bankr. M.D. Fla. 2006); *see also In re Appalachia Fuels, LLC*, 503 F.3d 538 (6th Cir. 2007) (approving a sale free and

clear of “claims” arising as coal commission sales).

19. Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to permit the sale and assignment of the antitrust claims “free and clear” of all liens, claims, encumbrances, and interests. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988).

20. The Debtor believes that only J.P. Morgan Chase Bank, N.A. and Comerica Bank (the “Lenders”), the Debtor’s prepetition secured lenders, may assert liens on the antitrust claims to be sold to FWK. The Debtor submits that one or more of the conditions set forth in section 363(f) of the Bankruptcy Code will be satisfied with respect to the sale of the antitrust claims as to the Lenders, or any other party that may assert a lien on the antitrust claims. In particular, the Debtors submit that any party holding a lien will be adequately protected by having its liens, if any, attach to the proceeds of the sale, which will be held in a segregated account by the Debtor pending a further order of the Court, in the same order of priority, with the same validity, force, and effect that such creditor had prior to the sale, subject to any claims and defenses that the Debtor and its estate may possess with respect thereto. The Debtor accordingly requests authority to sell and assign the antitrust claims to FWK, free and clear of all liens and encumbrances, with

such liens and encumbrances to attach to the proceeds from the sale of the antitrust claims, which will be held in a segregated account by the Debtor pending further order of the Court, with the same validity, extent, priority, and perfection as existed immediately prior to the sale

21. Lastly, the Debtor submits that the sale should not expose FWK to any liability as a successor of the Debtor or its estate. Courts have also consistently held that a buyer of a debtor's assets pursuant to a section 363 sale takes free and clear from successor liability relating to the debtor's business. *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-90 (3d Cir. 2003) (sale of assets pursuant to section 363(f) barred successor liability claims for employment discrimination and rights under travel voucher program); *In re Leckie Smokeless Coal Co.*, 99 F.3d at 585 (affirming the sale of debtors' assets free and clear of certain taxes); *In re Insilco Techs., Inc.*, 351 B.R. 313, 322 (Bankr. D. Del. 2006) (stating that a 363 sale permits a buyer to take ownership of property without concern that a creditor will file suit based on a successor liability theory); *see also In re Chrysler LLC*, 405 B.R. 84, 111 (Bankr. S.D.N.Y. 2009) (“[I]n personam claims, including any potential state successor or transferee liability claims against New Chrysler, as well as in rem interests, are encompassed by section 363(f) and are therefore extinguished by the Sale Transaction.”).

22. Accordingly, the Court should approve the sale and assignment of the

antitrust claims to FWK free and clear of liens and encumbrances under section 363(f) of the Bankruptcy Code, and all potential claimants should be compelled to look exclusively to the proceeds of the sale for satisfaction of their claims.

**C. FWK Constitutes a Good Faith Purchaser Subject to the Protections of Section 363(m) of the Bankruptcy Code**

23. 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 at the sale. Although the Bankruptcy Code does not define “good faith purchaser,” the Third Circuit stated that “the phrase encompasses one who purchases in ‘good faith’ and for ‘value’.” *In re Abbott's Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986); *See also In re Made In Detroit, Inc.*, 414 F.3d 576, 581 (6th Cir. 2005) (following the *Abbotts Dairies* standard).

24. The FWK Agreements entered into between the Debtor and FWK are the product of good faith and free from self-dealing. The FWK Agreements were a

negotiated, arm's length transaction, in which FWK has acted in good faith, without collusion or fraud of any kind, and in compliance with the *Abbotts Dairies* standard. Further, neither the Debtor nor FWK has engaged in any conduct that would prevent the application of section 363(m) of the Bankruptcy Code or allow the Debtor to avoid the sale pursuant to section 363(n) of the Bankruptcy Code.

25. In light of the foregoing, the Debtor requests that the Court find that FWK has purchased the antitrust claims in good faith within the meaning of section 363(m) of the Bankruptcy Code, and is entitled to the protections of section 363(m) of the Bankruptcy Code.

#### **WAIVER OF RULES 6004 AND 6006**

26. Notwithstanding the possible applicability of 6004 and 6006 of the Bankruptcy Rules or otherwise, the Debtor requests the relief sought by this Motion be immediately effective and enforceable upon entry of the order requested hereby. In order to allow the immediate realization of value for the antitrust claims, the Debtor requests that any order granting this Motion is effective immediately and not subject to the 14-day stay imposed by Bankruptcy Rules 6004(h) and 6006(d).

#### **NOTICE**

27. No trustee, examiner or official committee has been appointed in this chapter 11 case. Notice of this Motion has been served on the following parties or,

in lieu thereof, to their counsel, if known: (i) the United States Trustee for the Eastern District of Michigan; (ii) those creditors listed on the Debtor's List of Creditors Holding 20 Largest Unsecured Claims; (iii) the Debtor's prepetition secured lenders; (iv) the Debtor's state, local, and federal taxing authorities; and (v) counsel for the Committee. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice need be given.

**NO PRIOR REQUEST**

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

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WHEREFORE, the Debtor requests that the Court enter an order:  
(i) approving the FWK Agreements and authorizing the Debtor's assignment of its antitrust claims to FWK free and clear of all liens, claims, encumbrances, and interests; and (ii) granting such other and further relief as is just and proper.

November 9, 2016

Respectfully submitted,

/s/ Jayson B. Ruff

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COUNSEL FOR DEBTOR  
AND DEBTOR IN POSSESSION

**EXHIBIT A**



**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
<b>FRANK W. KERR COMPANY,</b>	)	<b>Case No. 16-51724</b>
	)	
<b>Debtor.</b>	)	
	)	<b>Judge Maria L. Oxholm</b>
	)	
	)	

**ORDER (I) AUTHORIZING THE SALE OF CERTAIN  
OF THE DEBTOR’S ANTITRUST CLAIMS FREE AND  
CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND  
INTERESTS; AND (II) GRANTING RELATED RELIEF**

This matter came before the Court on the Motion of the Debtor for Entry of an Order (i) Authorizing the Sale of Certain of the Debtor’s Antitrust Claims Free and Clear of All Liens, Claims, Encumbrances, and Interests; and (iii) Granting Related Relief (the “Motion”),<sup>2</sup> filed by the above-captioned debtor and debtor in possession (the “Debtor”); the Court, having reviewed the Motion and having heard statements of counsel in support of the Motion at a hearing before the Court; the Court finding that: (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (b) this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (c) venue of the Debtor’s chapter 11 case and the Motion is proper under 28 U.S.C. §§ 1408 and 1409; (d) service and notice of the Motion

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<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

was sufficient under the circumstances; and (e) the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein;

**IT IS HEREBY FOUND AND DETERMINED THAT:**

A. **Findings and Conclusions.** 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. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. **Statutory Predicates.** The statutory predicates for the relief requested in the Motion are sections 105, 362, and 363 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, and 9014, and Local Rule 6004-1.

C. **Opportunity to Object.** A reasonable opportunity to object or be heard regarding the requested relief has been afforded to all interested persons and entities.

D. **Title to the Antitrust Claims.** The antitrust claims to be sold to FWK constitute property of the Debtor's estate and title thereto is vested in the Debtor's estate within the meaning of section 541(a) of the Bankruptcy Code.

E. **Business Justification.** The Debtor has demonstrated a sufficient basis and compelling reasons for entering into the FWK Agreements and selling the antitrust claims under section 363 of the Bankruptcy Code. Such action is an appropriate exercise of the Debtor's business judgment and in the best interests of the Debtor, its estate, its creditors, and all other parties in interest. Such business reasons include, but are not limited to, the fact that (i) the Purchase Price (\$330,000) and the undertakings under the FWK Agreements constitute the highest or otherwise best offer for the antitrust claims; (ii) the sale will present the best opportunity to realize the value of the Debtor's interest in the antitrust claims; (iii) unless the sale is concluded expeditiously as provided for in the Motion and pursuant to the Assignment Agreement, potential creditor recoveries may be substantially diminished. Entry of an order approving the FWK Agreements and all provisions thereof is a necessary condition precedent to closing the sale.

F. **Highest or Otherwise Best Offer.** The total consideration provided by FWK for the antitrust claims is the highest or otherwise best offer received by the Debtor.

G. **Good Faith Purchaser.** The FWK Agreements with FWK and the sale and assignment contemplated thereby have been negotiated by the Debtor and FWK in good faith, at arm's length, and without collusion or fraud. The terms and conditions of the FWK Agreements and the sale and assignment, including the

total consideration to be realized by the Debtor in connection with the FWK Agreements, are fair and reasonable, and the sale and assignment are in the best interest of the Debtor, its creditors, and its estate. FWK is a “good faith purchaser” of the antitrust claims, entitled to the full benefits and protections of section 363(m) of the Bankruptcy Code with respect to the sale and assignment of the antitrust claims. The terms defined in the FWK Agreements are incorporated by reference in this Order.

H. The FWK Agreements were not controlled by an agreement between potential or actual bidders within the meaning of section 363(n) of the Bankruptcy Code. The Debtor and FWK have not engaged in any conduct that would cause or permit the FWK Agreements to be avoided, or costs or damages to be imposed, under section 363(n) of the Bankruptcy Code. FWK is entitled to all the protections and immunities of section 363(n) of the Bankruptcy Code.

I. FWK will be acting in good faith in consummating the sale at any time on or after entry of this Order, and cause has been shown as to why this Order should not be subject to the stay provided by Bankruptcy Rules 6004(h) and 6006(d). FWK is not an “insider” as that term is defined in section 101(31) of the Bankruptcy Code.

J. **Corporate Power and Authority**. Subject to entry of this Order, the Debtor and FWK have full corporate power and authority to execute and deliver

the FWK Agreements and to perform all of their respective obligations thereunder, and the sale and assignment of the antitrust claims has been duly and validly authorized by all corporate authority necessary to consummate the sale and assignment. No consents or approvals, other than as expressly provided for in the Assignment Agreement and the entry of this Order, are required by the Debtor to consummate the sale and assignment.

K. **Free and Clear.** The sale and the assignment of the antitrust claims to FWK will be, as of the closing of the sale (“Closing”), a legal, valid, and effective transfer and assignment of such assets, and each such transfer vests or will vest FWK with all right, title, and interest of the Debtor to FWK free and clear of all liens, claims (as defined in section 101(5) of the Bankruptcy Code), interests, and encumbrances (collectively, “Liens, Claims, and Encumbrances”) with any Liens, Claims, and Encumbrances to attach to the consideration to be received by the Debtor in the same priority and subject to the same defenses and avoidability, if any, as of the Closing. FWK would not enter into the Assignment Agreement to acquire the antitrust claims if the sale and assignment of the antitrust claims was not free and clear of all Liens, Claims, and Encumbrances, or if FWK would, or in the future could, be liable for any such Liens, Claims, and Encumbrances. A sale and assignment of the antitrust claims, other than one free and clear of all Liens, Claims, and Encumbrances, would adversely impact the Debtor’s estate, and would

likely yield substantially less value for the Debtor's estate, with less certainty than the sale. Therefore, the sale and assignment contemplated by the Assignment Agreement is in the best interests of the Debtor, its estate and creditors, and all other parties in interest.

L. **Satisfaction of 363(f) Standards.** The Debtor may sell the antitrust claims free and clear of all Liens, Claims, and Encumbrances, because, with respect to each creditor asserting a Lien, Claim, and Encumbrance, one or more of the standards set forth in sections 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those holders of Liens, Claims, and Encumbrances who did not object or who withdrew their objections to the Motion are deemed to have consented to the Motion and sale and assignment of the antitrust claims to FWK pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of Liens, Claims, and Encumbrances 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 Liens, Claims, and Encumbrances, if any, attach to the proceeds of the sale ultimately attributable to the antitrust claims, which shall be held by the Debtor in a segregated account pending further order of this Court and in which such holders allege a Lien, Claim, and Encumbrance, in the same order of priority, with the same validity, force and effect that such holder had prior to the sale, and subject to any claims and defenses the Debtor and its estate may possess with respect thereto.

M. The sale and assignment contemplated under the Assignment Agreement does not amount to a consolidation, merger, or de facto merger of FWK and the Debtor and/or the Debtor's estate; there is not substantial continuity between FWK and the Debtor; there is no common identity between the Debtor and FWK; there is no continuity of enterprise between the Debtor and FWK; FWK is not a mere continuation of the Debtor or its estate; and FWK does not constitute a successor to the Debtor or its estate. Except as provided by the terms of the Assignment Agreement, FWK and its affiliates and their respective successors, assigns, members, partners, principals, and shareholders (or equivalent) shall have no obligations with respect to any liabilities of the Debtor, subject to the terms of the Assignment Agreement.

N. **No Fraudulent Transfer**. The sale and assignment of the antitrust claims is not for the purpose of hindering, delaying, or defrauding creditors under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia. Neither the Debtor nor FWK are or will be entering into the Assignment Agreement fraudulently.

O. **Fair Consideration**. The Purchase Price, together with the other undertakings by FWK pursuant to the FWK Agreements, constitute reasonably equivalent value and fair consideration (as those terms are defined in each of the Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, and

section 548 of the Bankruptcy Code), and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia. The Purchase Price, and the undertakings under FWK Agreements, represent a fair and reasonable offer to purchase and assume the antitrust claims under the circumstances of the Debtor's case. Approval of the FWK Agreements and the consummation of the sale and assignment are in the best interests of the Debtor, its estate, its creditors, and all other parties in interest.

P. **Compliance with Bankruptcy Code.** The consummation of the sale and assignment is legal, valid, and properly authorized under all applicable provisions of the Bankruptcy Code, including without limitation sections 105(a), 363(b), 363(f), and 363(m) of the Bankruptcy Code and all of the applicable requirements of such sections have been or will be complied with in respect of the sale and assignment as of the Closing.

Q. **Sale Not a Sub Rosa Plan.** The sale and assignment of the antitrust claims outside of a plan of reorganization pursuant to the Assignment Agreement neither impermissibly restructures the rights of the Debtor's creditors nor impermissibly dictates the terms of a liquidating plan of reorganization for the Debtor. The sale and assignment does not constitute a *sub rosa* chapter 11 plan.



R. **Time is of the Essence.** Time is of the essence in consummating the sale in order to maximize the value of the Debtor's antitrust claims. Accordingly, there is cause to lift the stays contemplated by Bankruptcy Rules 6004 and 6006.

S. The sale and assignment contemplated by the Assignment Agreement is in the best interests of the Debtor and its estate, creditors, interest holders and all other parties in interest herein; and

**IT IS HEREBY ORDERED THAT:**

1. **Relief Granted.** The Motion shall be, and hereby is, GRANTED in its entirety, subject to the terms of this Order.

2. **Objections Overruled.** All objections and responses to the Motion, this Order, the sale, or the relief granted herein that have not been overruled, withdrawn, waived, settled, or otherwise resolved, are hereby overruled and denied on the merits with prejudice.

3. **Approval.** The FWK Agreements and the sale and assignment under the Assignment Agreement are hereby approved and authorized in all respects, and the Debtor is hereby authorized and empowered to enter into, and to perform its obligations under, the FWK Agreements and to execute and perform such agreements or documents, and take such other actions as are necessary or desirable to effectuate the terms of the FWK Agreements.

4. **Good Faith Purchaser.** FWK is a good faith purchaser of the antitrust claims and is hereby granted and is entitled to all of the protections provided to a good faith purchaser under section 363(m) of the Bankruptcy Code. Pursuant to section 363(m) of the Bankruptcy Code, if any or all of the provisions of this Order are hereafter reversed, modified, or vacated by a subsequent order of the Court or any other court, such reversal, modification, or vacatur shall not affect the validity and enforceability of any sale, transfer, or assignment under the Assignment Agreement or obligation or right granted pursuant to the terms of this Order (unless stayed pending appeal), and notwithstanding any reversal, modification, or vacatur, any sale, transfer, or assignment shall be governed in all respects by the original provisions of this Order or the Assignment Agreement, as the case may be.

5. **Section 363(n) of the Bankruptcy Code.** The sale and assignment approved by this Order are not subject to avoidance or any recovery or damages pursuant to section 363(n) of the Bankruptcy Code.

6. **Authorization of Performance by the Debtor.** The Debtor and its managers, officers, employees, agents, and representatives are authorized to fully perform under, consummate, and implement the terms of the FWK Agreements together with any and all additional instruments and documents that may be reasonably necessary or desirable to implement and effectuate the terms of the

FWK Agreements, this Order, and the sale and assignment, including, without limitation, deeds, assignments, and other instruments of transfer, and to take all further actions as may reasonably be requested by FWK for the purpose of assigning, transferring, granting, conveying, and conferring to FWK, or reducing to possession any or all of the antitrust claims, as may be necessary or appropriate to the performance of the Debtor's obligations as contemplated by the FWK Agreements, without any further corporate action or orders of the Court.

7. FWK and the Debtor shall have no obligation to proceed with the Closing until all conditions precedent to their respective obligations to do so have been met, satisfied, or waived as set forth in the FWK Agreements.

8. **Valid Transfer.** Effective as of the Closing, the sale and assignment of the antitrust claims by the Debtor to FWK shall constitute a legal, valid, and effective transfer of the antitrust claims notwithstanding any requirement for approval or consent by any person and vests FWK with all right, title, and interest of the Debtor in and to the antitrust claims free and clear of all Liens, Claims, and Encumbrances, pursuant to section 363(f) of the Bankruptcy Code.

9. **Free and Clear.** Upon the Closing, the Debtor shall be, and hereby is, authorized and empowered, pursuant to sections 105, 363(b), and 363(f) of the Bankruptcy Code, to sell and assign the antitrust claims to FWK. The sale and assignment of the antitrust claims to FWK vests FWK with all right, title, and

interest of the Debtor to the antitrust claims free and clear of any and all Liens, Claims, and Encumbrances, with all such Liens, Claims, and Encumbrances to attach only to the proceeds of the sale of the antitrust claims with the same priority, validity, force, and effect as they now have in or against the antitrust claims. The Motion shall be deemed to provide sufficient notice as to the sale and assignment of the antitrust claims free and clear of all Liens, Claims, and Encumbrances in accordance with Local Rule 6004-1. Following the Closing, no holder of any Lien, Claim, and Encumbrance on the antitrust claims may interfere with FWK's enforcement of such claims based on or related to such Lien, Claim, and Encumbrance, and no interested party may take any action to prevent, interfere with, or otherwise enjoin consummation of the transactions contemplated by the Assignment Agreement.

10. The provisions of this Order authorizing the sale and assignment of the antitrust claims free and clear of Liens, Claims, and Encumbrances shall be self-executing, and neither the Debtor nor FWK shall be required to execute or file releases, termination statements, assignments, consents, or other instruments in order to effectuate, consummate, and implement the provisions of this Order.

11. **Direction to Creditors.** On the date of the Closing (the "Closing Date"), each of the Debtor's creditors is authorized and directed to execute such documents and take all other actions as may be reasonably necessary to release its

Liens, Claims, and Encumbrances in the antitrust claims, if any, as such Liens, Claims, and Encumbrances may otherwise exist.

12. **Transfer of Title and Interests.** All of the Debtor's interests in the antitrust claims to be acquired by FWK under the Assignment Agreement shall be, as of the Closing Date and upon the occurrence of the Closing, transferred to and vested in FWK. Upon the occurrence of the Closing, this Order shall be considered and constitute for any and all purposes a full and complete general assignment, conveyance, and transfer of the antitrust claims acquired and assumed by FWK under the Assignment Agreement transferring indefeasible title and interest in the antitrust claims to FWK.

13. Without limiting the effect or scope of the foregoing, except as otherwise provided in the FWK Agreements, as of the Closing Date, FWK and its affiliates and their respective successors, assigns, members, partners, principals, and shareholders (or equivalent) shall have no successor or vicarious liabilities of any kind or character, including, but not limited to, any theory of antitrust, environmental, successor or transferee liability, labor law, *de facto* merger, or substantial continuity, whether known or unknown as of the Closing Date, now existing or hereafter arising, whether asserted or unasserted, fixed or contingent, liquidated or unliquidated with respect to the Debtor or any obligations of the Debtor arising prior to the Closing Date.

14. **Injunction.** Except to the extent expressly intended to enforce the FWK Agreements, all persons and entities, including, but not limited to, the Debtor, employees, former employees, all debt security holders, lenders, trade creditors and all other creditors, holding Liens, Claims, and Encumbrances of any kind or nature whatsoever against or in the Debtor or in the Debtor's interests in the antitrust claims (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or noncontingent, known or unknown, liquidated or unliquidated, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Debtor, the antitrust claims, or the sale and assignment of the antitrust claims to FWK, shall be and hereby are forever barred, estopped, and permanently enjoined from asserting, prosecuting, commencing, continuing, or otherwise pursuing such Lien, Claim, and Encumbrance, in any manner, in any action, claim, or other proceeding of any kind, directly or indirectly, against FWK, or any affiliates, successors or assigns thereof, their property or the antitrust claims on account of the purchase and assumption of the antitrust claims. Following the Closing Date, no holder of a Lien, Claim, and Encumbrance shall interfere with FWK's enforcement of the antitrust claims based on or related to such Lien, Claim, and Encumbrance. For the avoidance of doubt, none of the foregoing shall prevent the Debtor, its estate, and its successors or

assigns from pursuing claims, if any, against FWK and/or its successors and assigns for any breach of the FWK Agreements to the extent permitted thereby.

15. Except as provided in the FWK Agreements, FWK has not assumed and is not otherwise obligated for any of the Debtor's liabilities. Consequently, all persons, Governmental Units (as defined in section 101(27) of the Bankruptcy Code) and all holders of Liens, Claims, and Encumbrances, based upon or arising out of liabilities retained by the Debtor, are hereby enjoined from taking any action against FWK or the antitrust claims, including asserting any setoff, right of subrogation, or recoupment of any kind, to recover any Liens, Claims, and Encumbrances or on account of any liabilities of the Debtor. All persons holding or asserting any Lien, Claim, and Encumbrance on the antitrust claims on account of liabilities of the Debtor are hereby enjoined from asserting or prosecuting such Liens, Claims, and Encumbrances or cause of action against FWK or the antitrust claims for any such liability.

16. **No Bulk Sales.** No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the sale and assignment of the antitrust claims.

17. **Amendments.** Subject to the terms of the FWK Agreements, the FWK Agreements and any related agreements may be waived, modified, amended, or supplemented by agreement of the Debtor and FWK, without further action or

order of the Court; provided, however, that any such waiver, modification, amendment, or supplement is not material and substantially conforms to, and effectuates, the FWK Agreements and any related agreements. Any material modification, amendment, or supplement to the FWK Agreements must be approved by Order of the Court following a motion on notice to all interested parties.

18. **Failure to Specify Provisions**. The failure specifically to include any particular provisions of the FWK Agreements or any related agreements in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court, the Debtor, and FWK that the FWK Agreements and any related agreements are authorized and approved in their entirety with such amendments thereto as may be made by the parties in accordance with this Order. Likewise, all of the provisions of this Order are non-severable and mutually dependent.

19. **Binding Order**. This Order and the FWK Agreements shall be binding upon and govern the acts of all persons and entities, including without limitation, the Debtor and FWK, their respective successors and permitted assigns, including, without limitation, any chapter 11 trustee hereinafter appointed for the Debtor's estate or any trustee appointed in a chapter 7 case if the Debtor's case is converted from chapter 11 to a chapter 7 proceeding, all creditors of the Debtor



(whether known or unknown), all non-Debtor parties to any contracts, filing agents, filing officers, title agents, recording agencies, governmental departments, secretaries of state, federal, state and local officials, 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 antitrust claims. The FWK Agreements and the sale and assignment of the antitrust claims shall not be subject to rejection or avoidance under any circumstances. This Order and the FWK Agreements shall inure to the benefit of the Debtor, its estate, its creditors, FWK and their respective successors and assigns.

20. **No Stay of Order**. Notwithstanding Bankruptcy Rules 6004 and 6006, this Order shall be effective and enforceable immediately upon entry and its provisions shall be self-executing. Time is of the essence in closing the sale and assignment referenced herein, and the Debtor and FWK intend to close the sale as soon as practicable. Any party objecting to this Order must exercise due diligence in filing an appeal and pursuing a stay, or risk its appeal being foreclosed as moot.

21. **Lift of Automatic Stay**. If and to the extent that section 362 may be applicable to a particular action in connection with the FWK Agreements and the sale and assignment, the automatic stay pursuant to section 362 of the Bankruptcy

Code is hereby lifted with respect to the Debtor to the extent necessary, without further order of the Court, to allow FWK to deliver any notice provided for in the FWK Agreements and allow FWK to take any and all actions permitted under the FWK Agreements in accordance with the terms and conditions thereof.

22. **Retention of Jurisdiction.** The Court shall retain jurisdiction to (a) interpret, implement, and enforce the terms and provisions of this Order and the FWK Agreements, including all amendments thereto and any waivers and consents thereunder and each of the agreements executed in connection therewith, in all respects, (b) to decide any disputes concerning this Order and the FWK Agreements, or the rights and duties of the parties hereunder or thereunder or any issues relating to the FWK Agreements and this Order including, but not limited to, the interpretation of the terms, conditions and provisions hereof and thereof, the status, nature and extent of the antitrust claims, and all issues and disputes arising in connection with the relief authorized herein, inclusive of those concerning the transfer of the assets free and clear of all Liens, Claims, and Encumbrances.

23. **Subsequent Plan Provisions.** Nothing contained in any chapter 11 plan confirmed in the Debtor's chapter 11 case or any order confirming any such plan or any other order in the chapter 11 case of the Debtor (including any order entered after any conversion of the Debtor's case into a case under chapter 7 of the

Bankruptcy Code) shall alter, conflict with or derogate from, the provisions of the FWK Agreements or this Order.

24. **Further Assurances.** From time to time, as and when requested by any party to the FWK Agreements, and subject to the terms of such FWK Agreements, each such party shall execute and deliver, or cause to be executed and delivered, all such documents and instruments and shall take, or cause to be taken, all such further or other actions as such other party may reasonably deem necessary or desirable to consummate the Sale, including, such actions as may be necessary to vest, perfect or confirm, or record or otherwise, in FWK its right, title, and interest in and to the antitrust claims.

25. **Governing Terms.** To the extent this Order is inconsistent with any prior order or pleading in the chapter 11 case, the terms of this Order shall govern. To the extent there is any inconsistency with between the terms of this Order and the terms of the FWK Agreements (including all ancillary documents executed in connection therewith), the terms of the Order shall govern.

**Exhibit B**

**Agreement for Preservation of Documents**

This Agreement for Preservation of Documents (this "Agreement") is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2016 (the "Effective Date"), by and between Frank W. Kerr Co. ("Kerr"), a Michigan corporation, and FWK Holdings, L.L.C. ("FWK"), an Illinois limited liability company.

**Recitals:**

- A. Kerr purchases substantial quantities of pharmaceutical and over-the-counter products for resale;
- B. Kerr entered into an Agreement for the Assignment of Claims with Meijer, Inc. ("Meijer") on October 4, 2002, by which Kerr assigned all of its rights, title, and interest in and to all causes of action and any resulting proceeds Kerr may have under the antitrust laws of the United States or the common law or statutory law of any state arising or relating to Kerr's purchases of any pharmaceutical products that it sold or sells to Meijer (the "Meijer Assignment");
- C. FWK and Kerr are currently in negotiations (the "Negotiations") for the acquisition of Kerr's rights and privileges that Kerr has under any federal or state antitrust law that Kerr has not previously assigned to Meijer under the Meijer Assignment (the "Antitrust Claims"); and
- D. While the Negotiations continue, FWK has requested that Kerr enter into this agreement, to allow for the collection and preservation of the Kerr's documents and records at no cost to Kerr.

NOW, THEREFORE, in consideration of the above Recitals and mutual covenants contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

- 1. The above Recitals are true and correct, and are hereby incorporated into this Agreement.
- 2. The parties hereby acknowledge the validity and enforceability of the Meijer Assignment.
- 3. FWK agrees that it shall, at no cost to Kerr, immediately following execution of this agreement by both FWK and Kerr, begin collecting and storing the all of Kerr's documents, records, data and other information relating to the Antitrust Claims (the "Kerr Records"), provided that (i) the Kerr Records shall remain the exclusive property of Kerr at all times, unless and until Kerr agrees in writing otherwise, and (ii) FWK shall provide for and permit Kerr with exclusive access to the Kerr Records at all times and at no cost to Kerr, subject only to the limited exceptions for FWK to access the Kerr Records as set forth in paragraph 5 of this Agreement.
- 4. Kerr and FWK agree to cooperate with each other and perform all actions that are reasonably necessary to give effect to the terms of this Agreement. Such cooperation will include as practical, for example, Kerr providing all necessary records related to the Antitrust Claims. FWK agrees to reasonably compensate Kerr for its cooperation.
- 5. Unless and until the Negotiations conclude in an agreement that provides otherwise, FWK shall only be permitted access to the Kerr Records for the limited purpose of responding to subpoenas and or discovery requests related to any Antitrust Claims, provided that FWK shall provide Kerr with 7 days notice prior to disclosing any information from the Kerr Records.

[Signatures on the Following Page]

**CONFIDENTIAL**

**F.W. KERR COMPANY**

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

Name: \_\_\_\_\_  
(Print or Type)

Title: \_\_\_\_\_

**FWK HOLDINGS, L.L.C.**

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

Name: \_\_\_\_\_  
(Print or Type)

Title: \_\_\_\_\_

DRAFT

**Exhibit C**

**Agreement for Assignment of Claims**

This Agreement for Assignment of Claims (this “Agreement”) is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2016 (the “Effective Date”), by and between Frank W. Kerr Co. (“Kerr”), a Michigan corporation, and FWK Holdings, L.L.C. (“FWK”), an Illinois limited liability company.

**Recitals:**

- A. Kerr purchases substantial quantities of pharmaceutical and over-the-counter products for resale;
- B. Kerr entered into an Agreement for the Assignment of Claims with Meijer, Inc. (“Meijer”) on October 4, 2002, by which Kerr assigned all of its rights, title, and interest in and to all causes of action and any resulting proceeds Kerr may have under the antitrust laws of the United States or the common law or statutory law of any state arising or relating to Kerr’s purchases of any pharmaceutical products that it sold or sells to Meijer (the “Meijer Assignment”);
- C. FWK seeks to acquire Kerr’s rights and privileges that Kerr has under any federal or state antitrust law that Kerr has not previously assigned to Meijer under the Meijer Assignment; and
- D. FWK has requested that Kerr enter into this agreement, and Kerr has agreed to do so.

NOW, THEREFORE, in consideration of the above Recitals and mutual covenants contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

- 1. The above Recitals are true and correct, and are hereby incorporated into this Agreement.
- 2. The parties hereby acknowledge the validity and enforceability of the Meijer Assignment.
- 3. Kerr hereby irrevocably assigns all obligations it has under the Meijer Assignment to FWK, and FWK hereby assumes all obligations, including any requests for further assistance that Meijer may request to evidence the assignment of claims from Kerr to Meijer. Notwithstanding the preceding sentence, Kerr shall continue to be obligated to provide assistance after the Effective Date of this Agreement as set forth in Section 5 below.
- 4. Kerr hereby irrevocably conveys, assigns, and transfers to FWK one hundred percent of all of its rights, title, and interest in and to all causes of action Kerr may now have or which may accrue at any time after the Effective Date against another party under any federal or state antitrust laws relating to Kerr’s purchases of pharmaceutical or over-the-counter products, except those rights, title, and interest that Kerr has assigned to Meijer.
- 5. Kerr and FWK agree to cooperate with each other and perform all actions that are reasonably necessary to give effect to the terms of this Agreement. Such cooperation will include as practical, for example, Kerr providing all necessary records related to the claims assigned to FWK and making witnesses available to be interviewed and to testify. FWK agrees to reasonably compensate Kerr for its cooperation.
- 6. In consideration for the assignment and assumption of obligations contemplated by this Agreement, FWK will pay to Kerr \$330,000.00 within seven days of the Effective Date.



**CONFIDENTIAL**

**F.W. KERR COMPANY**

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

Name: \_\_\_\_\_  
(Print or Type)

Title: \_\_\_\_\_

**FWK HOLDINGS, L.L.C.**

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

Name: \_\_\_\_\_  
(Print or Type)

Title: \_\_\_\_\_

DRAFT