

Rosen, Kantrow & Dillon, PLLC  
Counsel to Debtor In Possession  
38 New Street  
Huntington, New York 11743  
631 423 8527  
Avrum J. Rosen

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

RETURN DATE: 12/\_\_/2016  
TIME: 10:00 a.m.

-----X  
In re:

Chapter 11

JVJ PHARMACY INC.,  
d/b/a UNIVERSITY CHEMISTS,

Case No.: 16-10508-smb

Debtor.  
-----X

**DEBTOR'S APPLICATION SEEKING ENTRY OF AN ORDER UNDER SECTIONS 363(a), 363(b), 363(f), 363(m) and 365 OF THE BANKRUPTCY CODE AND RULES 2002, 6004 AND 9004 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE: (1) AUTHORIZING DEBTOR'S SALE OF ALL OR SUBSTANTIALLY ALL OF ITS ASSETS AT AUCTION; (2) APPROVING CERTAIN BIDDING PROCEDURES; AND (3) APPROVING THE MANNER AND EXTENT OF NOTICE OF SUCH AUCTION**

To: HONORABLE STUART M. BERNSTEIN  
UNITED STATES BANKRUPTCY JUDGE

JVJ Pharmacy, Inc., d/b/a University Chemists, debtor and debtor-in-possession ("Debtor" or "JVJ"), in this Chapter 11 case, by and through its counsel, Rosen, Kantrow & Dillon, PLLC ("Firm"), respectfully submit this as and for Debtor's application ("Application") seeking an Order of this Court under Sections 363(a), 363(b), 363(f), 363(m) and 365 of Title 11, United States Code ("Bankruptcy Code"), and Rules 2002, 6004 and 9004 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rule"): authorizing Debtor's sale of all or substantially all of its assets ("Property"), at a public auction, free and clear of all liens, claims, interests and encumbrances ("Liens") with such Liens, if any, to attach to the net proceeds of sale in the amount and priority as they presently exist, and an assignment and assumption of Debtor's lease of non-residential real property, subject to the terms and conditions of sale as set forth in this Motion; (ii) approving

certain bidding procedures; (iii) scheduling a hearing to approve of the sale of the Property to the successful bidder (“Sale Hearing”); (iv) approving the form and manner of notice with respect to the hearing on this Application; and (v) granting such other and further relief as this Court deems just and proper under the circumstances, and respectfully states as follows:

**PRELIMINARY STATEMENT**

1. Debtor has determined, in the exercise of its sound business judgment as debtor-in-possession that the sale of all or substantially all of its assets at a public auction sale, shall be in the best interest of the estate, its creditors, and secured creditors with perfected interests in the assets.

2. In anticipation of this Application, Debtor previously retained Paragon Ventures, LLC (“Paragon” or “Auctioneer”) as its business broker to sell Debtor’s business as a going concern, which was approved by this Court by the entry of an Order on July 11, 2016. Thereafter, Paragon actively marketed the Property for sale.

3. The sale of the Property was always a condition precedent of secured lenders for the negotiated consent to allow Debtor’s use of cash collateral, as memorialized and authorized by the Court in the myriad Orders approving Debtor’s use of cash collateral. In point of fact, Debtor has an affirmative duty to market and sell the Property, and must do so by negotiated dates certain. While those secured creditors have in no way consented to a specific sale at a specific price, they have consented to the concept of a sale of the Property and in fact require it.

4. Paragon, to date, has received at least four (4) offers for the purchase of Debtor’s assets. Debtor has not determined that any of the offers are sufficient in amount to warrant that potential bidder becoming a stalking horse bidder. Debtor has determined that the value of the Property would best be maximized by allowing the Property to go to auction and allow those

prospective buyers compete at such auction. Debtor, however, reserves its right to supplement this application subsequent to the hearing of same should any potential bidder increase its offer, such that such bidder would be entitled to the rights and benefits afforded to a stalking horse bidder, including a potential break-up fee and overbid protection, as set forth below, all consistent with sections 363(b), (f), (h), and (m) of the Bankruptcy Code.

5. Thus, Debtor seeks authorization to sell the Property at public auction, thereby maximizing the value. Subject to Court approval of this Application, and subsequent Order confirming such sale, Debtor intends to use the proceeds of the sale to fund its Chapter 11 liquidating plan.

#### **JURISDICTION**

6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

#### **VENUE**

7. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

#### **STATUTORY AUTHORITY**

8. The statutory predicates for the relief sought in this Application are Bankruptcy Code Sections 363(a), 363(b), 363(f), 363(m), and 365, and Bankruptcy Rules 2002, 6004 and 9004.

#### **BACKGROUND**

9. Debtor filed a voluntary petition for relief from its creditors pursuant to Chapter 11, of the Bankruptcy Code on March 3, 2016 (“Petition Date”). James Zambri (“Zambri”) is the President and sole shareholder of Debtor. Debtor continues to operate its business and manage its property as debtor in possession pursuant to Bankruptcy Code Sections 1107(a) and 1108. No

trustee, examiner or committee has been appointed in this case. Debtor's estate is presently administratively solvent.

10. Debtor operates a "specialty pharmacy", maintaining contracts to provide pharmaceutical products to different health care facilities, including clinics, hospitals, medical practices and individual physicians.

11. Debtor's principal location is its main office located at 74 University Place, New York, New York ("Premises"), in a small office, in addition to a retail and wholesale operation in the same building. Previously, Debtor filed a motion with this Court seeking authority to assume its non-residential real property lease ("Lease") located at the Premises with N.M.G. Realty Co., ("Landlord") under Bankruptcy Code Section 365(a), which was approved by this Court by entry of Order on October 7, 2016. That Lease expires on its terms on December 31, 2016 and Debtor has negotiated a new lease if the successful bidder wishes to assume it. It is not yet know whether the successful bidder for the Property intends on acquiring Debtor's rights under the lease of the Premises, and thus, if the lease shall be included in the sale of the Property.

12. Debtor's primary assets, the Property, consist of its: (i) inventory, which totals approximately \$232,000.00; (ii) all equipment, machinery, supplies; (iii) customer list; (iv) an established and accredited pharmacy operation with tremendous scalability; (v) a proprietary computerized management system; (vi) clinical expertise across traditional and specialty pharmacy; and (vii) geographically desirable market area. Not included in the sale are Debtor's (i) accounts receivable which totals approximately \$6,380,000.00 (less the collectability of a certain percentage of aged receivables); and (ii), and a pending action in the New York State Supreme Court, in which Debtor is a plaintiff and seeks damages from former employees and a former business partner in the approximate amount of \$5,000,000.00 (a counter suit by Defendants

may reduce the value of the damage sought by Debtor) and any and all Chapter 5 causes of action and the Debtor's cash on hand. At the present time the amount of Debtor's secured debt is approximately \$4,095,000.00.

13. Previously, Debtor filed a voluntary Chapter 11 petition ("Prior Bankruptcy") with this Court on November 3, 2011, and confirmed a plan of reorganization on August 6, 2013 (Chapter 11, Case No. 11-15126-reg). Under the terms of the confirmed plan ("Plan") [ECF Doc. No. 204] in the Prior Bankruptcy, Debtor made substantial payments to the Secured Creditors herein, which significantly reduced the amount of the debt secured to Debtor's assets, as described below.

14. Debtor entered into a secured loan with PNC Bank, National Association ("PNC") on or about November 22, 2010, in the sum of \$2,500,000.00, under a line of credit and \$500,000.00 under a term loan. In June of 2011, that line of credit was increased to \$3,000,000.00. In the Prior Bankruptcy, it was ultimately determined and agreed that PNC holds a first in priority perfected security interest in Debtor's assets, other than certain inventory which Debtor purchases in its course of doing business, which collateral is secured by purchase money security interest. Furthermore, under the confirmed plan in the Prior Bankruptcy, Debtor obligated itself to pay PNC a balloon payment in the approximate amount of \$2,600,000.00, plus interest, due on or about February, 2016.

15. Prior to the Petition Date, pursuant to that certain loan agreement dated as of July 20, 2010, between Debtor and Bank of America ("BOA"), which was subsequently assigned to Lakeland Capital West XXIII, LLC ("Lakeland"), BOA made available to the Debtor a credit line in the amount of \$1,500,000.00, to enable Debtor to purchase inventory and operate its business. The BOA/Lakeland loan is evidenced by loan documents and the filing of certain UCC-1 forms.

Lakeland is a first priority and senior secured creditor of JVJ with respect to certain equipment of JVJ in the amount of \$19,500.00, as well as being a junior secured creditor on certain property and an unsecured creditor. This Court previously entered an Order on October 26, 2016, allowing Debtor's application to obtain post-petition financing, whereby Lakeland was paid its secured claim of \$19,500.00, a result of a sale by Zambri of certain real property owned solely by Zambri.

16. Prior to the Petition Date, Debtor entered into security agreements with its major vendor, Amerisource. Upon information and belief, PNC required that these vendors subordinate their security interests to those of PNC. Amerisource, however, maintains its security interests in Debtor's collateral, and further maintains first in priority security interests in certain of Debtor's collateral (product for sale to customers) under purchase money security agreements.

17. The last date to timely file a proof of claim in Debtor's case was June 3, 2016. A review of the proofs of claim filed in the Chapter 11 period reflect that: (i) secured claims total approximately \$4,375,992.59; (ii) priority unsecured claims total \$236,088.82; (iii) general unsecured claims \$4,196,925.16. Furthermore, there are approximately \$145,254.97 in undisputed general creditors included on Schedule F of Debtor's petition, whom have not filed proofs of claim, but which must be included for distribution in Debtor's liquidating plan. Debtor anticipates that the debt shall decrease subject to future motion practice, specifically: (i) the purported secured claim of Amerisource [POC No. 10] in the amount of \$1,404,316.15 shall be reclassified as a general unsecured claim and reduced in amount; and (ii) the purported unliquidated general unsecured claim of Healthnow [POC No. 11] shall be expunged in its entirety. Debtor, and its counsel, shall hereafter undertake a due diligence investigation as to these issues and to resolve any potential claim objections.

18. As contemplated as part of its exit strategy, as previously disclosed to the Court, Debtor desires to sell its operations as a going concern in order to maximize creditor recovery in this case. In furtherance of this, after extensive due diligence, Debtor retained Paragon as a business broker to sell Debtor's business. Subsequent to its Court approved retention, Paragon proceeded to find a suitable business opportunity acceptable to Debtor whereby Debtor may be acquired, in whole or in part, by purchase of stock, purchase of assets, assumption of liabilities, merger, a royalty or percentage of sales arrangement, reorganization or other form of business combination ("Transaction"). Attendant thereto, Paragon prepared an 88 page acquisition briefing executive summary ("Acquisition Briefing Executive Summary") detailing the assets of Debtor, and its financial condition, and circulated same to those known investors in Paragon's database, subject to those third parties executing confidentiality agreements, given the HIPAA protected information in Debtor's possession. Debtor believes that without the assistance of Paragon, Debtor would not be successful in maximizing a purchase price for the sale of the business, to wit, the Property. Specifically, Paragon, on behalf of Debtor: (i) received myriad inquiries from investors; (ii) twelve (12) non-disclosure statements; and (iii) four (4) letters of intent. As of the drafting of this Application, the most feasible offer to Debtor was a purchase offer of \$1,800,000.00, all accounts received to remain property of the estate, and the only restriction as against Zambri was to not solicit customers of Debtor. While such offer is meaningful, Debtor believes the amount is not sufficient, thus not worthy of stalking horse status.

19. Debtor, and its retained professionals have investigated the estimated auction value of the Property and Debtor believes that there is substantial value in the Property available for liquidation for the benefit of Debtor's creditors.

**REQUESTED RELIEF**

20. Debtor seeks an Order of this Court, substantially in the form of the proposed Order annexed hereto:

- (a) Approving the terms, conditions and procedures for Debtor's sale of the Estate's interest in the Property to the bidder making the highest and best offer;
- (b) Approving the Bidding Procedures;
- (c) Approving the manner and extent of notice of the Auction Sale;
- (d) Allowing Debtor to sell the Estate's interest in the Property free and clear of all liens, claims, encumbrances and interests with such liens, claims, encumbrances and interests, if any to attach to the proceeds; and
- (e) Granting such other relief and further relief as is just and proper under the circumstances.

**PROPOSED SALE**

21. Here, sound business reasons exist to justify selling the Property at an Auction Sale. Indeed, allowing Debtor to proceed with the proposed Auction Sale shall maximize return to the creditors of this estate by selling Debtor's assets which have value.

22. The starting bid for the sale of the Property at auction shall be determined by the Debtor in consultation with its retained professionals. Due to the nature of the volume of assets, as well as the fact that it is as yet unknown whether the Property will be purchased in bulk, or in separate lots, Debtor and Paragon are unable to provide a numerical estimate of what the starting bid will be. Debtor respectfully submits that the intended auction sale of the Collateral is in accordance with the provisions of Section 363 of the Bankruptcy Code.

23. By virtue of the foregoing, it is respectfully requested that this Court authorize Debtor to sell the Property free and clear of all liens, claims, encumbrances and other interests



with such liens, claims, encumbrances and other interests to attach to the proceeds of sale pursuant to Section 363(b), (f) and (m) of the Bankruptcy Code and to possibly assign the Lease under Bankruptcy Code Section 365(c). The subject Collateral shall be sold “as is”, “where is”, “with all faults”. Debtor makes no representations whatsoever as to the status or condition of any of the Property.

24. Debtor may enter into a proposed Contract pursuant to an arm’s length transaction for a fair purchase price for the Property with a stalking horse bidder (“Stalking Horse Bidder”) hereafter. In Debtor’s business judgment, as supplemented based upon the advice of Paragon, its retained broker, Debtor believes that a subsequent Stalking Horse Bidder contract preserves, to the greatest extent possible under the circumstances, the value of the estate’s interest in the Property. As such, Debtor submits that the Stalking Horse Bidder’s offer could represent the highest and best offer received for the purchase of the Property. If such situation arises, Debtor shall immediately file a supplement with this Court detailing the exact terms of the proposed contract (“Contract”).<sup>1</sup>

25. Debtor anticipates that a potential Stalking Horse Bidder may request a break-up fee in relation to it increasing its offer significantly to purchase the Property. Debtor, subject to such offer being higher and better than that now proffered, would be willing to entertain a break-up fee of no more than two percent (2%), and thus includes this relief in this Application, if it becomes necessary at a future juncture. Similarly, Debtor would, under certain circumstances, be

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<sup>1</sup> It must be noted that several purchase offers include restrictive covenant provisions that require Zambri to not compete for a length of term with the successful buyer. Debtor has made clear it is has no authority to require such terms, nor does it believe this Court has the jurisdiction to enforce such terms. Thus, any such provision will not be included in any Order under Bankruptcy Code Section 363, and is separate and apart, the result of negotiations between such potential buyer and Zambri and his independent counsel.

willing to allow a Fifty Thousand Dollar (\$50,000.00) overbid protection to such potential Stalking Horse Bidder, and seeks authority for an overbid protection herein as well.

26. Debtor has provided that the sale of the Property at an auction sale be conducted by Paragon and/or Firm on or about December 7, 2016 at 11:00 A.M., subject to this Court's approval thereof ("Auction Sale").

27. Immediately following the Auction Sale, Debtor shall will file with the Court an Affirmation seeking an Order confirming the sale of the Property to any Stalking Horse Bidder or a competing offeror, depending on who should ultimately tender the highest or best offer.

### **BIDDING PROCEDURES**

28. Debtor proposes and seeks Court approval of the following bidding procedures ("Bidding Procedures") for any third party wishing to submit a bid for the estate's interest in the Property at the Auction Sale to be conducted by the Trustee's Court appointed broker:

a. These terms and conditions of sale ("Terms and Conditions of Sale") are being promulgated in connection with the Bankruptcy Court authorized public auction sale ("Sale") of the property of JVJ Pharmacy Inc., debtor in possession ("Debtor") of its primary assets, which consists of: (i) inventory, which totals approximately \$232,000.00; (ii) all equipment, machinery, supplies; (iii) customer list; (iv) an established and accredited pharmacy operation with tremendous scalability; (v) a proprietary computerized management system; (vi) clinical expertise across traditional and specialty pharmacy; and (vii) geographically desirable market area. Debtor's auctioneer is Paragon Ventures, LLC ("Paragon").

b. The Sale will take place on Wednesday, December 7, 2016 at 11:00 a.m. at the offices of Debtor's accountant, CBIZ MHM, LLC, 1065 Avenue of the Americas, New York, New York 10018, or at such later date and time as shall be chosen by Debtor.

c. Information regarding the sale of the Property can be obtained by contacting the Auctioneer.

d. In order to be permitted to bid on the Property, prior to the commencement of the Sale, each prospective bidder must register with Paragon, deliver to Paragon the original signed Terms and Conditions of Sale and a certified

check or bank check in the amount of One Hundred Fifty Thousand Dollars (\$150,000.00) ("Qualifying Deposit") made payable to Rosen, Kantrow & Dillon, PLLC, as attorneys, which amount shall serve as a good faith deposit against payment of the purchase price by such bidder in the event that such bidder is determined to have made the highest or best bid ("Successful Bidder").

e. The first bid shall be in an amount to be determined by Debtor. Bidding thereafter shall increase in increments of Twenty Five Thousand Dollars (\$25,000.00), or such amount as determined by the Debtor, in conjunction with Paragon, in Debtor's sole discretion.

f. Within forty-eight (48) hours after conclusion of the Sale, the Successful Bidder shall deliver to the Debtor by certified check or bank check an amount equal to ten (10%) percent of the successful bid minus the Qualifying Deposit (together with the Qualifying Deposit, the "Deposit"). The Successful Bidder must execute, and thereby agree to be bound by: (a) these Terms and Conditions of Sale; and (b) a Memorandum of Sale. At the conclusion of the Sale, the Debtor or its representative will return the Qualifying Deposits to all other bidders; however, the Debtor shall retain the Qualifying Deposit of the second highest bidder ("Second Bidder"), until such time as the Debtor has successfully closed the sale of the Property to the Successful Bidder. The Successful Bidder must close title ("Closing") to the Property at a date ("Closing Date") that is not more than fourteen (14) calendar days after entry of an Order of the Bankruptcy Court approving the Sale. TIME BEING OF THE ESSENCE as to the purchaser, although such date may be extended solely by the Debtor. The Closing shall take place at location that is to be determined by the Debtor.

g. The Court, prior to the Closing, may enter an Order confirming the Sale.

h. In connection with the Closing and Closing Date, the Successful Bidder is hereby given notice that Time is of the Essence against the Successful Bidder and the failure of the Successful Bidder to close for any reason whatsoever (except as otherwise provided below) including his, her or its failure to pay the balance of the Purchase Price on the Closing Date, will result in the Debtor retaining the Deposit as liquidating damages and the termination of the Successful Bidder's right to acquire the Properties under these Terms and Conditions of Sale. The Successful Bidder shall be obligated to close title to the Property and there is no contingency of any kind or nature that will permit the Successful Bidder to cancel or avoid his, her or its obligation under these Terms and Conditions of Sale. Further, the Successful Bidder must demonstrate, to the satisfaction of the Debtor or the Court, as the case may be, evidence of his, her or its ability to conclude the transaction upon these Terms and Conditions of Sale, without delay. The Debtor reserves the right to reject any offeror, who the Debtor, in its sole discretion, believes is not financially capable of consummating the purchase of the Property.

Expenses incurred by the Successful Bidder, or any competing bidder concerning the performance of any due diligence, such as obtaining title reports or environmental inspections, shall be the sole responsibility of such bidder and under no circumstances shall the Debtor or the estate or the Debtor's professionals be liable or responsible for, or pay, such expenses.

i. In the event that the Successful Bidder for the Property fails to tender the balance of the Purchase Price on the Closing Date, or otherwise perform his, her or its obligations under these Terms and Conditions of Sale, the Debtor, at her sole option, shall immediately negotiate the deposit of the Second Bidder and shall be further authorized to sell the Property to the Second Bidder without any further notice or approval of the Court, without giving credit for the Deposit forfeited by the Successful Bidder, and upon such other terms and conditions as the Debtor deems appropriate. Should the Second Bidder fail to close on the Property, within twenty (20) days of receiving from the Debtor, notice, TIME OF THE ESSENCE, (at the address set forth on the bidder registration form) that said Second Bidder is now deemed the Successful Bidder, then the Debtor shall be: (a) authorized to keep the Deposit of the Second Bidder as liquidated damages; and (b) authorized but not obligated to sell the Property to the next highest bidder, without any further notice or approval of the Court.

j. The Property is being sold and delivered "AS IS" "WHERE IS", "WITH ALL FAULTS", without any representations, covenants, guarantees or warranties of any kind or nature whatsoever, and free and clear of all monetary liens, claims and encumbrances of whatever kind or nature, such liens, claims, interests and encumbrances, if any, to attach to the proceeds of Sale in such order and priority as they existed immediately prior to the Sale Date. By delivering their respective Qualifying Deposits, all bidders acknowledge that they have had the opportunity to review and inspect the Property, the state of title thereof and laws, rules and regulations applicable thereto, and the form of the Bill of Sale that the Debtor will execute to convey the Property, and will rely solely thereon and on their own independent investigations and inspections of the Property in making their bids. All bidders acknowledge that they have conducted their own due diligence in connection with the Property, and are not relying on any information provided by the Debtor, Paragon or the Debtor's retained professionals. All bidders, by executing these Terms and Conditions of sale, expressly agree and consent that they shall purchase the Property "AS IS" "WHERE IS", "WITH ALL FAULTS".

k. Debtor, Paragon and Debtor's retained professionals have not made and do not make any representations or warranties with respect to the permissible uses of the Property. Each bidder hereby expressly agrees and acknowledges that no such representations have been made. The Debtor and her retained professionals are not liable or bound in any manner by expressed or implied warranties, guaranties, promises, statements, representations or information pertaining to the Property, made or furnished by the Debtor or any broker, agent, employee, servant

or other person or professional representing or purporting to represent the Debtor unless such warranties, guaranties, promises, statements, representations or information are expressly and specifically set forth in writing by the Debtor.

l. Nothing contained in these Terms and Conditions of Sale shall supersede or alter any provisions of Title 11, United States Code (“Bankruptcy Code”) or of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) or otherwise interfere with the jurisdiction of the Court. To the extent of any conflict between the Bankruptcy Code and/or the Bankruptcy Rules and these Terms and Conditions of Sale, the Bankruptcy Code and/or the Bankruptcy Rules shall govern. All of the terms and conditions set forth in these Terms and Conditions of Sale are subject to modification as may be directed by the Debtor or by the Court. The Debtor reserves the right to modify these Terms and Conditions of Sale at the Sale or thereafter to maintain consistency with the provisions of the Bankruptcy Code and/or prior orders of the Court.

m. Neither the Debtor, Paragon, the Debtor’s retained professionals nor the estate of the Debtor, nor PNC, are liable or responsible for the payment of fees of any broker or agent that has not been retained by an order of the Court.

n. These Terms and Conditions of Sale will be read into the record, or specifically incorporated by reference, at the Sale of the Property. By making a bid for the Property, all bidders will be deemed to have acknowledged having read these Terms and Conditions of Sale and have agreed to be bound by them.

o. If the Debtor is unable to deliver title to the Property in accordance with these Terms and Conditions of Sale for any reason whatsoever, its only obligation will be to refund the Deposit to the Successful Bidder (or Second Bidder) and upon such refund the Successful Bidder (or Second Bidder) will have no recourse or claim against the Debtor, Paragon or the Debtor’s retained professionals.

p. The Debtor reserves it’s right to withdraw the Property from the auction or from sale, either prior, or subsequent to the auction, for any reason whatsoever, as it deems necessary or appropriate.

q. The Sale of the Property is subject to confirmation by the Court. The Debtor or the Debtor’s attorney shall notify the Successful Bidder whether the Sale is confirmed. Any disputes concerning the Sale shall be determined by the Court. By participating in the Sale, all bidders consent to the jurisdiction of the Court to determine such disputes arising in the Debtor’s pending case.

r. By making a bid for the Property, all bidders will be deemed to have acknowledged having read these Terms and Conditions of Sale and have agreed to be bound by them.

**SUMMARY OF PROPOSED SALE**

29. The successful bidder shall enter into a contract of sale of the Property with Debtor Trustee, a summary of the required terms of the contract of sale are set forth below. As part of the relief requested herein, Debtor respectfully requests the Court to approve these terms and conditions and authorize Debtor to propose such other terms and conditions as Debtor deems appropriate in order to maximize the value of the Property.

30. Seller is JVJ Pharmacy Inc., Debtor In Possession herein.

31. Proposed Buyer is the bidder with the highest and best offer.

32. Property Description (i) inventory, which totals approximately \$232,000.00; (ii) all equipment, machinery, supplies; (iii) customer list; (iv) an established and accredited pharmacy operation; (v) a proprietary computerized management system; (vi) clinical expertise across traditional and specialty pharmacy; and (vii) geographically desirable market area. Not included in the sale are Debtor's (i) accounts receivable which totals approximately \$6,380,000.00 (less the collectability of a certain percentage of aged receivables); and (ii), and a pending action in the New York State Supreme Court, in which Debtor is a plaintiff and seeks damages from former employees and a former business partner in the approximate amount of \$5,000,000.00 (a counter suit by Defendants may reduce the value of the damage sought by Debtor) and any and all Chapter 5 causes of action and the Debtor's cash on hand.

33. Conveyance is in "as is" "where is" "with all faults" conditions, subject to any and all existing tenancies and/or occupancies.

34. Purchase Price is the highest and best offer made at the auction.

35. Broker - Paragon.

36. Adjustments - None.

37. Delivery of Possession on the date of closing.
38. Conditions of Closing is that this sale is expressly subject to Bankruptcy Court approval, and is subject to higher and better offers thereupon.
39. Closing at Rosen, Kantrow & Dillon, PLLC, 38 New Street, Huntington, New York 11743, no later than the fourteenth day (14th) after the issuance of the Approval Order (as that term is defined in the Contract of Sale), which closing date may be extended by Debtor from time to time, in its sole discretion.
40. Applicable Law is the law of the State of New York.
41. Risk of Loss is upon the Seller until the date of closing.
42. Debtor believes that the preceding procedures constitute appropriate bidding procedures under the facts and circumstances of this case. In order to maximize the benefit to the Estate, Debtor seeks to implement this reasonably competitive bidding process given the nature of the proposed transaction. Debtor maintains that this procedure is designed to generate a maximum recovery to the estate while serving to prevent frivolous bidding, and respectfully requests that this Court approve and authorize same.

### **GROUND FOR RELIEF**

#### **A. The Sale Of The Property Should Be Approved As An Exercise of Debtor's Sound Business Judgment**

43. Section 363(b) of the Bankruptcy Code provides that a "trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." A trustee must demonstrate a sound business justification for a sale or use of assets outside of the ordinary course of business. *See, e.g. Licensing By Paolo, Inc., v. Sinatra (In re Gucci)*, 126 F.3d 380, 387 (2d Cir, 1997); *Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*,

722 F.2d 1063, 1070 (2d Cir. 1983); *In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989).

44. Here, sound business reasons exist to justify selling the Property at the Auction Sale. Indeed, allowing Debtor to proceed with the sale of Real Property in this manner is the most effective way of selling the Property and will maximize the value to be realized for the Property.

45. Under Bankruptcy Code section 363(f), a trustee (which includes a Debtor In Possession) may sell property of the estate free and clear of any interest in such property of an entity other than the estate only if, at least one of the following conditions is satisfied:

- (1) applicable non-bankruptcy 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 bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

46. Since Bankruptcy Code section 363(f) is drafted in the disjunctive, satisfaction of any one of the five requirements shall suffice to approve the sale of the Real Property “free and clear” of all liens, claims and encumbrances. *See, e.g. Mich. Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1147 n.24 (6th Cir. 1991) (recognizing the Bankruptcy Code section 363(f) is written in disjunctive, and holding that court may approve sale “free and clear” provided that at least one subsection of 363(f) is met); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988).

47. Debtor believes that the encumbrances against the Property shall be satisfied in their majority by sale at the Auction Sale. The starting bid for the sale of the Property at the Auction Sale will be determined by Debtor, in conjunction with its retained professionals.



48. Consequently, Debtor submits that the Property may be sold in accordance with Section 363(f) of the Bankruptcy Code.

**B. The Auction Sale and Auction Procedures Are Fair, Appropriate, And In The Best Interest Of Creditors**

49. Under Bankruptcy Rule 6004(f)(1), sales of property outside the ordinary course of a debtor's business may be by private sale or by public auction. Debtor believes that a sale of the Property pursuant to public auction, subject to the auction procedures will maximize the sale proceeds received by Debtor's estate, which is the principal goal in any proposed sale of property of an estate. *See, e.g., Official Comm. Of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 659 (S.D.N.Y. 1992) ("It is a well establish principle of bankruptcy law that the ... duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting *Cello Bag Co. Inc. v. Champion Int'l Corp. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 130 (Bankr. N.D.Ga. 1988)); *See also Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 107 F.3d 558, 564-5 (8th Cir. 1997) ("primary objective of the Code [in a Bankruptcy Sale is] to enhance the value of the estate at hand.")

50. Debtor submits that conducting the Auction Sale will derive the highest and best bids for the Property, and is consistent with Debtor's duties and exercise of business judgment.

**C. The Sale of the Property Has Been Proposed In Good Faith And Without Collusion And The Successful Bidder Is A Good Faith Purchaser**

51. Bankruptcy Code Section 363(m) protects a good faith purchaser's interest in property purchased from a debtor's estate, notwithstanding that authorization of the sale conducted under Bankruptcy Code Section 363(b) is later reversed or modified on appeal.

52. Bankruptcy Code Section 363(m) provides:

The reversal or modification on appeal of an authorization under section (b) or (c) of this section of a sale or lease of property does not affect the 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.

53. While the Bankruptcy Code does not define “good faith”, the Second Circuit held that:

A [good] faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings... A purchaser’s good faith is lost by “fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders”.

*Licensing by Paolo v. Sinatra (In re Gucci)*, 126 F.3d at 390; quoting *In re Rock Industries Machinery Corp.*, 572 F.2d 1195, 1998 (7th Cir. 1978).

54. Bankruptcy Code Section 363(m) “reflects the ... ‘policy of not only affording finality to the judgment of the bankruptcy court, but particularly to give finality to those orders and judgments upon which third parties rely.’” *In re Abbotts Dairies of Penn. Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) (quoting *Hose Corp. v. Better Corp. (In re Vetter Corp.)*, 724 F.2d 52, 55 (7th Cir. 1983)); See also *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991) (noting that Bankruptcy Code Section 363(m) “furthers the finality in bankruptcy sales ... [and] assist bankruptcy courts in maximizing the price for assets sold in such proceedings”); *In re Stein & Day, Inc.*, 113 B.R. 157, 162 (Bankr. S.D.N.Y. 1990) (noting that Bankruptcy Code Section 363(m) advances the policy of finality in bankruptcy sales).

55. Debtor submits that the successful bidder arising from the Auction Sale, is or would be a “good faith purchaser” within the meaning of Bankruptcy Code Section 363(m) and the

Contract, or any similar version thereof, is or would be a good faith agreement on arm's-length terms entitled to the protections of Bankruptcy Code Section 363(m).

56. Debtor is selling the Property in an arm's length transaction. Debtor has no connection to the successful bidder arising from the Auction Sale, and the sale of the Property is subject to higher or better offers, which may be tendered at the Auction Sale, which will be duly noticed. The consideration to be received is substantial and reasonable with respect to the asset being conveyed. In addition, there is no indication of any "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders" or similar conduct that would cause or permit the sale or Contract to be avoided under Bankruptcy Code Section 363(n). *In re Gucci*, 126 F.3d 380 at 390. As a result, Debtor submits that successful bidder arising from the Auction Sale who tenders the highest or best offer, will be a good faith purchaser of the Property. Accordingly, Debtor requests that the successful bidder arising from the Auction Sale be afforded the protections under section 363(m) of the Bankruptcy Code.

**D. Request Of Waiver Of Stay Required By Bankruptcy Rule 6004(h)**

57. Debtor seeks a waiver of any stay of the effectiveness of any Order approving the relief sought in this Motion. Under Bankruptcy Rule 6004(h) "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise."

58. In order to limit the costs of preserving the Property and maximize its value, it is critical for Debtor to close the sale as soon as possible. For the reasons described above, Debtor submits that ample cause exists to justify a waiver of the 14 day stay imposed under Bankruptcy Rule 6004(h). Debtor further submits that the requirements of Local Rule 6004-1 have been

satisfied. Accordingly, Debtor respectfully requests that this Court waive such requirement with respect to any Order issued approving this Motion.

**THE PROPOSED SALE IS IN THE BEST  
INTERESTS OF CREDITORS OF THE ESTATE**

59. As set forth in detail above, Debtor believes that this proposed sale of the Estate's interest in the Property is in the best interest of the creditors of Debtor's estate.

60. Debtor believes that as the notice of this Application are (will) being sent to all of the parties who have thus far expressed an interest in this bankruptcy proceeding by filing a Notice of Appearance, and to all of the creditors of the estate, and to all parties who requested a copy of the Acquisition Briefing Summary, that this will help ensure a fair and equitable bidding process to benefit the creditors of the estate.

**NOTICE**

61. This Application has been filed with the Clerk of the Court and: (i) notice of the Application; and (ii) Application shall be provided to Debtor, Office of the United States Trustee, all parties who have filed notices of appearance in Debtor's case, all creditors, parties who have filed proofs of claims, and parties in interest, and known interested parties who requested from Paragon a copy of the Acquisition Briefing Summary, in advance of the hearing scheduled hereon.

**NO PRIOR REQUEST**

62. No previous application for the relief requested herein has been made to this or any other court.

WHEREFORE, Debtor respectfully requests that this Court enter an Order, substantially in the form submitted herein: (i) authorizing Debtor to sell the Property, free and clear of all liens, claims, encumbrances and other interests with valid liens to attach to proceeds, and for other good

and valuable consideration substantially in accordance with the terms and conditions; (ii) approving the form and manner of notice with respect to the auction hearing; and (iii) granting such other and further relief as this Court deems just and proper under the circumstances.

Dated: Huntington, New York  
November 4, 2016

Rosen, Kantrow & Dillon, PLLC  
*Attorneys for Debtor In Possession*

BY: /s/ Avrum J. Rosen  
Avrum J. Rosen  
38 New Street  
Huntington, New York 11743  
631 423 8527  
ajrlaw@aol.com