

REDACTED VERSION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Nuo Therapeutics, Inc.,

Debtor.

Chapter 11

Case No. 16-10192 (MFW)

Hearing Date: February 22, 2016 at 9:30 a.m. (ET)

Obj. Deadline: February 16, 2016 at 12:00 p.m. (ET)

**DEBTOR'S MOTION FOR ENTRY OF AN ORDER AUTHORIZING
AND APPROVING KEY EMPLOYEE INCENTIVE PLAN**

The above-captioned debtor and debtor in possession (the "Debtor"), by its undersigned counsel, hereby moves the Court (the "Motion") for the entry of an order pursuant to sections 105(a), 363(b), 503(b), and 503(c) of title 11 of the United States Code (the "Bankruptcy Code"), and substantially in the proposed form attached hereto as **Exhibit A** (i) authorizing and approving a key employee incentive plan, substantially in the form attached hereto as **Exhibit B** (the "KEIP") and (ii) granting related relief. In support of this Motion, the Debtor respectfully states the following:

Jurisdiction, Venue, and Predicates for Relief

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested herein are sections 105(a), 363(b), 503(b), and 503(c) of the Bankruptcy Code.

3. Further, pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtor hereby consents to the entry of a final judgment or order in connection with this Motion if it is determined that this Court cannot—absent the consent of the parties—enter such final judgment or order consistent with Article III of the United States Constitution.

Background

4. On January 26, 2016 (the “Petition Date”), the Debtor filed with the Court its voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above-captioned chapter 11 case. The Debtor continues to operate its business and manage its property as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. No committee has been appointed in this case. No trustee or examiner has been appointed.

6. A full description of the Debtor’s business operations, corporate structure, capital structure, and reasons for commencing this case is set forth in the *Declaration of David E. Jorden in Support of First Day Motions* [Docket No. 3] (the “Jorden Declaration”), which was filed on the Petition Date and is incorporated herein by reference. Additional facts in support of the specific relief sought herein are set forth below.

7. The Debtor and its non-debtor affiliate companies (collectively, “Nuo”) operate a biomedical company that pioneers leading-edge biodynamic therapies. The Debtor’s flagship product—the Aurix™ System (“Aurix” or the “Aurix System”)—is a biodynamic hematogel that uses a patient’s own platelets and plasma as a catalyst for healing. It is the only therapy of its kind cleared by the U.S. Food and Drug Administration (the “FDA”) for use on a variety of wound etiologies. The use of autologous biological therapies for tissue repair and regeneration is

part of a transformative clinical strategy designed to improve long-term recovery in complex chronic conditions with significant unmet medical needs. In September 2007, the Debtor (then known as Cytomedix, Inc.) received clearance from the FDA for Aurix, which was formerly known as the AutoloGel™ System. In April 2010, the Debtor acquired the Angel® Whole Blood Separation System (“Angel” or the “Angel System”) from Sorin Group USA, Inc. In February 2012, the Debtor acquired Aldagen, Inc. (“Aldagen”), a privately held cell-therapy company located in Durham, North Carolina.

8. The Debtor’s current commercial offerings consist of point-of-care technologies for the safe and efficient separation of autologous blood and bone marrow to produce platelet-based therapies or cell concentrates. Today, the Debtor has two distinct platelet-rich plasma devices, (i) the Aurix System for wound care and (ii) the Angel System for orthopedic markets. The Debtor’s product sales are predominantly in the U.S. (approximately 84%) products through direct-sales representatives and the Angel cPRP system under a licensing agreement between the Debtor and Arthrex. Growth drivers in the U.S. include the treatment of chronic wounds with Aurix in the Veterans Affairs healthcare system and the Medicare population under a National Coverage Determination when registry data is collected under Centers for Medicare & Medicaid Service’s Coverage with Evidence Development program, and the licensing agreement that allows Arthrex as a partner to promote the Angel System for uses other than wound care.

9. However, in recent years the Debtor has faced an increasingly competitive environment; indeed, the Aurix System is one of many therapies in the chronic-wound market. Consequently, the market has been slow to accept new products like Aurix. The Angel System faces similar challenges from a number of larger companies with established market share and greater resources than the Debtor. Because of this intense competition, the Debtor’s revenues have

been insufficient to cover operating expenses. The Debtor now faces severe liquidity pressures that have created difficulty in servicing its existing debt, obtaining additional or replacement financing, and funding its ongoing operations.

10. Thus, after careful evaluation and further negotiation with Nuo's stakeholders (including Deerfield Management Company, L.P.), the Debtor determined—in its reasonable business judgment—that an expedited sale of its business is essential to not only preserve the underlying value of its operations by providing customers and employees with a clear path forward, but also to maximize the value of the Debtor's assets for the benefit of the Debtor's creditors. The Debtor then commenced this chapter 11 case in order to conduct an orderly sale process under the protection of the Bankruptcy Code.

The Debtor's Need for the KEIP

11. Since the Petition Date, the Debtor and its professionals have, among other things, taken steps to implement a comprehensive sale process that will permit the Debtor to aggressively market, and eventually auction, substantially all of its assets. In furtherance of the marketing and sale process, and in connection with the Debtor's efforts to maintain and maximize its going-concern value, the Debtor's Board of Directors (the "Board") approved the KEIP to ensure that key personnel are properly incentivized to obtain the highest price for the Debtor's assets. The Debtor believes that the KEIP (i) provides much needed incentives and assurances to the Debtor's key employees during this challenging time, and (ii) incentivizes such key employees to outperform and maximize the value of the Debtor's business during the sale process. Importantly, the Debtor believes that there is an urgent need to sufficiently incentivize the Debtor's key employees to take those extraordinary steps, above and beyond their typical duties and responsibilities, that are critical to a successful conclusion to this chapter 11 case.

12. In short, achieving a value maximizing sale in this chapter 11 case will depend upon the Debtor's ability to preserve the value of its business during the postpetition marketing and sale process. The preservation of the Debtor's business, in turn, will heavily rely upon the Debtor's ability to continue attracting and retaining customers. Such preservation will be determined by the skill and dedication of the Debtor's key employees covered by the KEIP, including their ability to maintain the Debtor's relationships with the Debtor's vendors, customers and other stakeholders.

13. Moreover, to identify the KEIP Participants (defined herein), the Board (in consultation with the Debtor's CRO), evaluated the Debtor's business and the tasks that need to be completed in connection with this chapter 11 case. The Board further evaluated, among other things, the KEIP Participants' unique or significant knowledge of the Debtor's infrastructure and business and unique skills or experiences and whether same would be crucial to the Debtor's chapter 11 sale process. Further, the Board and the Debtor's CRO are reviewing and analyzing the Debtor's operational and financial needs on a continuing basis; thus, the Debtor hereby reserves the right to amend, modify, or otherwise adjust (i) the amounts payable, if any, under the KEIP as well as (ii) the List of KEIP Participants (defined herein) as it deems appropriate in its discretion and reasonable business judgment.

14. Finally, the KEIP was provided to the Debtor's postpetition lenders, and thus, has been incorporated in the approved DIP budget (as may be amended from time to time, and subject to adjustment for any waivers granted, the "Approved Budget") attached to the interim order approving the Debtor's postpetition financing [Docket No. 32].

The KEIP's Proposed Terms¹

15. Through the KEIP, the Debtor seeks to motivate and incentivize certain key employees (each, a "KEIP Participant" and, collectively, the "KEIP Participants")² whose efforts and expertise are integral to preserving the Debtor's business, a meaningful continuation of the Debtor's marketing process and the Debtor's efforts towards a competitive auction. The terms of the KEIP provide for potential performance bonuses that will serve as an important incentive for such KEIP Participants to go beyond their ordinary duties and obligations (e.g., by working longer hours, including weekends, and taking on increased responsibility, among other things) and take those important extra steps critical to preserving the value of the Debtor's business and maximizing the price obtained for the Debtor's assets. For these reasons, the Debtor respectfully submits that the payments provided by the KEIP (each a "KEIP Payment" and, collectively, the "KEIP Payments") are in the best interests of the Debtor and its estate.

16. Under the terms of the KEIP, KEIP Participants will receive certain discretionary KEIP Payments out of an increasing pool of funds tied to the total amount of Sale consideration (any such amount, the "KEIP Incentive Pool"). The amount of KEIP Payment will be determined, subject to the Debtor's discretion and reasonable business judgment, based on a number of conditions and milestones. Specifically, the KEIP Incentive Pool will be calculated as summarized below.

- A. Total Sale consideration of between \$13.0 million and \$15.05 million (not including assumed liabilities or

¹ In the event of any inconsistency between this summary and the terms and conditions of the KEIP, the provisions of the applicable KEIP shall govern and control.

² The identity of the KEIP Participants and their respective positions are provided in the list of KEIP Participants (the "List of KEIP Participants") attached as Schedule 1 to **Exhibit B**. To protect the privacy of the KEIP Participants and avoid any impact on employee morale, the Debtor seeks to file and keep under seal both the KEIP and the List of KEIP Participants pursuant to the Debtor's *Motion for Entry of an Order Authorizing the Debtor to File Under Seal Certain Portions of the Debtor's Motions to Authorize and Approve Key Employee Incentive and Retention Plans* filed contemporaneously herewith.

amounts paid to cure assumed executory contracts or unexpired leases), an aggregate amount of \$150,000 will be distributed to certain KEIP Participants on a discretionary, pro rata basis.

- B. As total Sale consideration increases above \$15.05 million up to \$18 million (not including assumed liabilities or amounts paid to cure assumed executory contracts or unexpired leases), the KEIP Incentive Pool will increase on a straight-line basis (rounded up to the nearest \$5,000 increment) from the amount of \$150,000 up to an aggregate amount of \$225,000 and will be distributed to certain KEIP Participants on a discretionary, pro rata basis.
- C. If total Sale consideration equals or exceeds \$23 million (not including assumed liabilities or amounts paid to cure assumed executory contracts or unexpired leases) the KEIP Incentive Pool will increase to \$235,000 and will increase by \$10,000 per one million dollars (\$1,000,000) of Sale consideration (not including assumed liabilities or amounts paid to cure assumed executory contracts or unexpired leases) up to \$30 million (i.e., up to an aggregate KEIP Incentive Pool of \$305,000) and will be distributed to certain KEIP Participants on a discretionary, pro rata basis.³
- D. If total Sale consideration equals \$31 million (not including assumed liabilities or amounts paid to cure executory contracts), the KEIP Incentive Pool will increase to \$320,000 and will increase by \$15,000 per one million dollars (\$1,000,000) of Sale consideration (not including assumed liabilities or amounts paid to cure assumed executory contracts or unexpired leases) up to \$35 million (i.e., up to an aggregate KEIP Incentive Pool of \$380,000), and will be distributed to certain KEIP Participants on a discretionary, pro rata basis.

17. Further, a KEIP Participant is entitled to a KEIP Payment upon the satisfaction of the following conditions: (i) the Debtor closes a Sale, or, if the Sale takes place pursuant to a

³ For the avoidance of doubt, the Debtor's postpetition lenders will fund the KEIP Incentive Pool up to an aggregate amount of \$225,000 either through loans or permitted use of such lenders' cash collateral (which amount is designated in the Approved Budget). Any portion of the KEIP Incentive Pool that exceeds \$225,000 will be paid out of cash Sale proceeds.

chapter 11 plan, the effective date of such chapter 11 plan has occurred; (ii) the DIP lenders⁴ receive a full recovery (either in cash or, if the lenders acquire assets through the Sale, a combination of cash and credit bidding) of the outstanding DIP loans as of the closing date of the Sale;⁵ (iii) the consideration for the Sale of the Debtor's assets must have been at least \$13.0 million;⁶ and (iv) such KEIP Participant is employed by the Debtor at the time that conditions (i), (ii), and (iii) are satisfied.⁷ In addition, in order to receive a KEIP Payment, each KEIP Participant will be required to execute a release in the Debtor's favor.

18. The total cost of the KEIP is expected to be between approximately \$150,000 and \$380,000.

Relief Requested

19. By this Motion, pursuant to sections 105(a), 363(b)(1) and 503 of the Bankruptcy Code, the Debtor respectfully requests the entry of an order approving and authorizing the implementation of the KEIP and providing potential performance bonuses to certain of the Debtor's key employees. In addition, the Debtor requests that all amounts earned and payable

⁴ As such parties are identified in the interim order approving the Debtor's postpetition financing [Docket No. 32].

⁵ In the event the Sale takes place pursuant to a chapter 11 plan because the highest and best offer for the assets is a chapter 11 plan bid and is approved by the Court, the lenders' DIP financing would have to be paid promptly upon such determination by the Court out of alternative DIP financing required to be provided by any successful chapter 11 plan bidder.

⁶ If the sale takes place pursuant to the terms of the stalking horse agreement provided for in that certain *Motion of the Debtor and Debtor In Possession Pursuant to Sections 105(a), 363 and 365 of the Bankruptcy Code for an Order (I)(A) Approving Procedures In Connection With the Sale of Substantially All of the Debtors Assets; (B) Scheduling the Related Auction and Hearing to Consider Approval of Sale; (C) Approving Procedures Related to the Assumption of Certain Executory Contracts and Unexpired Leases; (D) Approving the Form and Manner of Notice Thereof; (E) Approving Expense Reimbursement; and (F) Granting Related Relief; and (II)(A) Authorizing the Sale of Substantially All of the Debtors Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto; and (C) Granting Related Relief* filed with the Court on February 1, 2016 [D.I. 56], the consideration provided therein will be adequate to entitle KEIP Participants to the base payment assuming that the remaining requirements are met.

under the KEIP be afforded administrative-expense priority under sections 503(a) and 507(a)(2) of the Bankruptcy Code for all purposes in this chapter 11 case.

Basis for Relief Requested

A. Implementation of the KEIP Under Section 363(b) of the Bankruptcy Code is a Valid Exercise of the Debtor’s Business Judgment

20. The Court may authorize the Debtor to implement the KEIP under section 363(b)(1) of the Bankruptcy Code. Section 363(b)(1) provides 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). The use, sale or lease of property of the estate, other than in the ordinary course of business, is authorized when a “sound business purpose” justifies such action. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee’s judgment concerning use of property under § 363(b) when there is a legitimate business justification); *In re Chateaugay Corp.*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that in reviewing a section 363(b) application, the court must find from the evidence presented before him, a good business reason to grant such application); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (affirming bankruptcy court approval of key employee retention program and stating that “in determining whether to authorize the use, sale, or lease of property of the estate under [section 363(b)], courts require the debtors to show that a sound business purpose justifies such actions”); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 674 (Bankr. S.D.N.Y. 1989) (noting that the standard for determining a section 363(b) motion is a “good business reason”).

⁷ For the avoidance of doubt, no KEIP Participant will be entitled to payment of any kind or amount pursuant to the KEIP in the event that such KEIP Participant resigns, quits, or otherwise terminates his or her employment—for any reason—with the Debtor before the conditions to payment under the KEIP are satisfied.

21. Courts have found that a debtor's use of reasonable bonuses and other incentives to motivate employees is a valid exercise of a debtor's business judgment. *See, e.g., In re Am. W. Airlines, Inc.*, 171 B.R. 674, 678 (Bankr. D. Ariz. 1994) (finding that it is the proper use of a debtor's business judgment to propose bonuses for employees who helped propel the debtor successfully through the bankruptcy process).

22. Since the 2005 amendments to the Bankruptcy Code, courts have approved employee-bonus programs tied to performance targets as valid exercises of business judgment. *See, e.g., In re After-Party2, Inc. (f/k/a Event Rentals, Inc.)*, No. 14-10282 (PJW) (Bankr. D. Del. March 14, 2014) (approving key employee incentive plan tied to gross sale proceeds and budget milestones) [Docket No. 178]; *In re Dots, LLC*, No. 14-11016 (DHS) (Bankr. D.N.J. March 5, 2014) (approving key employee incentive plan tied to gross sale proceeds) [Docket No. 361]; *In re Vertis Holdings, Inc.*, No. 12-12821 (CSS) (Bankr. D. Del. Nov. 27, 2012) (approving key employee incentive plan) [Docket No. 355]; *In re Trident Microsystems, Inc.*, No. 12-10069 (Bankr. D. Del. Jan. 30, 2012) [Docket No. 763]; *In re Midway Games Inc.*, No. 09-10465 (KG) (Bankr. D. Del. Feb. 12, 2009) (approving a key employee incentive plan tied to sale price) [Docket No. 282]; *In re Muzak Holdings LLC*, No. 09-10422 (KJC) (Bankr. D. Del. Feb. 10, 2009) (approving \$1.75 million key employee incentive plan for senior managers) [Docket No. 239].

23. The Debtor submits that authorizing it to provide incentive compensation to the KEIP Participants will accomplish a similarly sound business purpose. The Debtor has determined that the costs associated with such additional postpetition compensation are justified by the benefits that the Debtor will realize by creating appropriate incentives for the KEIP Participants, whose experience, skill, diligent work, and knowledge and understanding of the

Debtor's business, operations, and customer relationships are critical for the Debtor to maintain its operations during the pendency of this chapter 11 case, which is crucial to the Debtor's postpetition marketing and sale efforts. In the event that the relief sought herein is not granted, the Debtor believes that there is a significant risk that the KEIP Participants will not be incentivized to continue to perform and take those extraordinary steps necessary to maximize the value of the Debtor's estate. Any significant deterioration of the "going-concern" value of the Debtor's business would materially and adversely affect the success of the sale process. The Debtor believes that the KEIP proposed in this Motion is reasonable and will provide the KEIP Participants with the appropriate incentives to work to attain a higher sale price for the Debtor's assets and will enable the Debtor to maximize the value of its assets for the benefit of its estate and creditors.

B. The KEIP Does Not Implicate Section 503(c) of the Bankruptcy Code

24. Section 503(c) of the Bankruptcy Code imposes certain restrictions on the compensation that a debtor can pay to its executives and other employees in bankruptcy. Specifically, section 503(c)(1) applies to payments that are meant to induce insiders to "remain with the [debtor's] business" by requiring, among other things, that a debtor demonstrate that the insider (a) has a bona fide job offer from another business and (b) is "essential to the survival of the business." 11 U.S.C. § 503(c)(1)(A) and (B). Section 503(c)(1) also limits the amount of retention payments that can be made to "insiders." *See id.* Likewise, section 503(c)(2) permits severance payments to "insiders" only if they are part of a program applicable to all employees and are less than ten times the mean of severance payments made to nonmanagement employees during that calendar year. 11 U.S.C. § 503(c)(2). By the statute's plain language, however, section 503(c)(1) pertains solely to retention plans of insiders and section 503(c)(2) addresses only the requirements for severance plans. Neither subsection applies to performance-based

incentive plans, such as the KEIP, which does not include retention or severance payments. *See In re Global Home Prods., LLC*, 369 B.R. 778, 785 (Bankr. D. Del. 2007).

25. Although some of the KEIP Participants may be deemed “insiders” within the meaning of the Bankruptcy Code, the KEIP has been crafted to ensure that it directly incentivizes all KEIP Participants to meet certain performance objectives and is not primarily designed to retain the KEIP Participants. Even if the KEIP has the indirect effect of reducing the Debtor’s attrition rate among the KEIP Participants, such reduction in attrition does not render the KEIP a “retention” plan as the retentive nature of the KEIP is heavily outweighed by the incentive nature of such plan. Accordingly, the Debtor believes that section 503(c)(3) of the Bankruptcy Code is the applicable subsection for this Court to evaluate the relief requested in this Motion.

1. The KEIP Should Be Authorized Pursuant to Section 503(c)(3) as a Sound Exercise of the Debtor’s Business Judgment

26. Section 503(c)(3) of the Bankruptcy Code limits the payment of obligations outside of the ordinary course of business that are not covered by sections 503(c)(1) or (2). Specifically, section 503(c)(3) precludes allowance and payment of:

other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

11 U.S.C. § 503(c)(3).

27. The relevant inquiry under section 503(c)(3) is whether the proposed incentive plan is “justified by the facts and circumstances” of the case. 11 U.S.C. § 503(c)(3). Courts have generally used a form of the “business judgment” standard to determine whether incentive programs and the payments thereunder meet the section 503(c)(3) “facts and circumstances” standard. *See, e.g., In re Nobex Corp.*, No. 05-20050 (MFW), Hr’g Tr. 86:11-87:4 (Bankr. D. Del.

Jan. 12, 2006) (section 503(c)(3) of the Bankruptcy Code is “meant to provide a standard . . . for any other transfers or obligations outside the ordinary course of business. . . . [T]he standard under [section 503(c)(3)] for any transfers or obligations made outside the ordinary course of business are those that are justified by the facts and circumstances of the case. . . . I find it quite frankly nothing more than a reiteration of the standard under [section] 363 . . . that is, based on the business judgment of the debtor, the court always considered the facts and circumstances of the case to determine whether it was justified.”) [Docket No. 194]; *In re Pliant Corp.*, No. 06-10001 (MFW) (Bankr. D. Del. Mar. 14, 2006) (ordering various relief requested in connection with debtors’ incentive bonus plans pursuant to sections 363(b) and 503(c) of the Bankruptcy Code) [Docket No. 355].

28. In applying section 503(c)(3), the court in *In re Dana Corp.*, 358 B.R. 567 (Bankr. S.D.N.Y. 2006), noted that the “test in section 503(c)(3) appears to be no more stringent a test than the one courts must apply in approving an administrative expense under section 503(b)(1)(A) . . . [a]n expense must be an actual, necessary cost or expense of preserving the estate.” *Id.* at 576. The court then went on to consider the following factors in determining whether the debtor had satisfied the “sound business judgment” test: (i) whether a reasonable relationship existed between the proposed plan and the desired results; (ii) whether the cost of the plan was reasonable in light of the overall facts of the case; (iii) whether the scope of the plan was fair and reasonable; (iv) whether the plan was consistent with industry standards; (v) whether the debtor had put forth sufficient due diligence efforts in formulating the plan; and (vi) whether the debtor received sufficient independent counsel in performing any due diligence and formulating the plan. *See id.* at 576-77.

29. The Debtor submits that the KEIP satisfies the requirements of section 503(c)(3) of the Bankruptcy Code. As discussed above, courts have applied the “sound business judgment” test to determine whether incentive programs and the payments thereunder meet the section 503(c)(3) “facts and circumstances” standard. The Debtor’s approval of the KEIP satisfies the “sound business judgment” test as articulated by the *Dana* court. *See* 38 B.R. at 576. The Debtor’s overall goal with respect to the KEIP is to maximize the value of the Debtor’s assets in connection with a sale. While all of the Debtor’s employees play a role in the Debtor’s overall financial success, the Debtor limited participation under the KEIP to those key employees critical to the Debtor’s ability to preserve the value of its estate. Moreover, the Debtor submits that the cost and scope of the KEIP is reasonable in light of the overall facts and circumstances of this chapter 11 case and is otherwise consistent with industry standards. Indeed, the cost of the KEIP represents less than approximately 2% of the book value of the Debtor’s prepetition assets.⁸

2. The Payments Contemplated Under the KEIP Constitute Actual and Necessary Costs of Preserving the Debtor’s Estate

30. The payments contemplated under the KEIP constitute actual and necessary costs and expenses of preserving the Debtor’s estate. The KEIP is a performance-based plan intended to motivate participants to achieve certain targeted results that the Debtor believes it would not have a reasonable chance of achieving without the efforts of the KEIP Participants. The Debtor’s ability to maximize recovery for the Debtor’s estate and creditors is dependent on the effects sought by the Debtor in the implementation of the KEIP. As discussed above, a reasonable relationship exists between the payments contemplated under the KEIP and the preservation of

⁸ Further, the Debtor firmly believes that a competitive auction could generate a materially higher purchase price, which would be commensurate with the Debtor’s going-concern value. In addition, the Stalking Horse Purchaser is currently entitled to a \$15.05 million credit bid in connection with a Sale.

the Debtor's business. Accordingly, the payments contemplated thereunder constitute actual and necessary costs of the Debtor's estate under section 503(b) of the Bankruptcy Code.

C. The KEIP May Additionally Be Authorized Pursuant to Section 105(a) of the Bankruptcy Code

31. Section 105(a) of the Bankruptcy Code allows the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(1); *see also U.S. v. Energy Res. Co.*, 495 U.S. 545, 549 (1990); *Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 211 (3d Cir. 2000) ("Section 105(a) of the Bankruptcy Code supplements courts' specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy Code."); *Adelphia Comm'cns Corp. v. Am. Channel (In re Adelphia Comm'cns Corp.)*, 345 B.R. 69, 85 (Bankr. S.D.N.Y. 2006) ("Section 105(a) provides broad equitable power for a Bankruptcy Court to maintain its own jurisdiction and to facilitate the reorganization process.").

32. As previously stated, the Debtor reasonably believes that the KEIP is critical to the success of the chapter 11 case and the sale process. Such payments are essential to appropriately incentivize and reward the KEIP Participants for all of their efforts throughout this case, to maintain the morale of the KEIP Participants and to ensure the KEIP Participants' continued focus on the sale of the Debtor's assets. Accordingly, the Debtor submits that such payments are necessary to maximize the value of its estate.

33. The Debtor respectfully submits that the postpetition compensation described in the KEIP is an appropriate exercise of the Debtor's business judgment, is necessary and in the best interest of the Debtor, its estate and creditors, and should be approved under sections 105(a) and 363(b) of the Bankruptcy Code and allowed as administrative expenses under 503(b) of the Bankruptcy Code.

Reservation

34. Given the Debtor's financial condition, the expedited sale process, and the various other (anticipated and unanticipated) contingencies that attend a chapter 11 case, the Debtor hereby reserves the right to—in its discretion and reasonable business judgment—amend, modify, or adjust (i) the List of KEIP Participants entitled to participate in the KEIP and (ii) the amounts of any award, bonus, or other form of compensation payable pursuant to the KEIP (but in no event to exceed the budgeted amount approved under the DIP financing except as expressly discussed herein).

Notice

35. Notice of this Motion has been provided to the (i) Office of the United States Trustee for the District of Delaware, (ii) the holders of the 20 largest unsecured claims against the Debtor; (iii) counsel to Deerfield Management Company, L.P.; (iv) the United States Attorney's Office for the District of Delaware; (v) the Internal Revenue Service; (vi) the Securities and Exchange Commission; and (vii) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtor submits that no other or further notice need be provided.

No Prior Request

36. No previous motion for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that the Court enter an order substantially in the proposed form attached hereto as **Exhibit A** (i) granting the relief requested herein and (ii) granting to the Debtor such other and further relief as the Court may deem proper.

Dated: February 3, 2016
Wilmington, Delaware

ASHBY & GEDDES, P.A.

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