REDACTED VERSION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Nuo Therapeutics, Inc.,	Case No. 16-10192 (MFW)
Debtor.	**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 RETENTION 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 retention plan, substantially in the form attached hereto as **Exhibit B** (the "KERP") 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 KERP[1]

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 Debtor's efforts to maintain and maximize its going-concern value, the Debtor's Board of Directors (the "Board") approved the KERP to ensure that key personnel stay with the Debtor through the chapter 11 sale process and work to obtain the highest price for the Debtor's assets. These key employees perform a variety of critical tasks and services for the Debtor and have unique skill sets and/or knowledge of the Debtor and its business, which makes them difficult to replace. The Debtor believes that the KERP (i) provides much needed comfort to the Debtor's key employees during this challenging time, and (ii) helps to ensure that critical employees remain in the

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

Debtor's employ, which is essential to the Debtor's efforts to maximize the value of the Debtor's business during the sale process. Without its key employees, the Debtor believes that it will struggle to maintain the Debtor's relationships with the Debtor's vendors, customers and other stakeholders, and may then be forced to cease operations to the detriment of the estate and creditors.

12. Finally, the KERP 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 KERP's Proposed Terms

13. Through the KERP, the Debtor seeks to retain certain key employees (each, a "KERP Participant" and, collectively, the "KERP Participants")[2] through the chapter 11 sale process in order to preserve the Debtor's going-concern value. To identify the KERP Participants, the Debtor (in consultation with the Debtor's professionals), evaluated the ongoing needs of the Debtor's business and the tasks that need to be completed during this chapter 11 case. The Debtor further evaluated, among other things, (i) the employees' unique or significant knowledge of the Debtor's infrastructure and business; (ii) the employees' unique skills or experiences and whether same would be crucial to the Debtor's operations during this chapter 11 case; and (iii) the time, expense, and ease of finding an adequate replacement for a given employee.

[2] The identity of the KERP Participants and their respective positions are provided in the list of KERP Participants (the "List of KERP Participants") attached as Schedule 1 to **Exhibit B**. To protect the privacy of the KERP Participants and avoid any impact on employee morale, the Debtor seeks to file and keep under seal both the KERP and the List of KERP 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.

14. Further, as mentioned above and in the Jorden Declaration, the Debtor conducted multiple rounds of cuts and layoffs before the Petition Date and as a result, the Debtor maintains a "skeleton" crew of non-insider employees. Certain of the remaining employees have the knowledge, skill, and/or experience required to ensure that the Debtor can continue to operate its business. Simply put, the failure to retain any given KERP Participant's services would threaten the Debtor's ability to operate during this chapter 11 case and maximize the value of its estate for the benefit of its various stakeholders. After consideration of the foregoing factors and circumstances, the Debtor submits that the continued employment of the KERP Participants is absolutely essential to the Debtor's business and thus, to the preservation of the Debtor's estate. Moreover, no KERP Participant is an officer or director of the Debtor, and no KERP Participant has been appointed by the Board or exercises authority sufficient to dictate corporate policy or dispose of corporate assets.

15. In the aggregate, the KERP represents approximately 6.5% of the salaries of all KERP Participants. The amount of such awards range from approximately [redacted] (each a "KERP Payment" and, collectively, the "KERP Payments") and are generally payable upon the satisfaction of the following conditions: (i) the Debtor closes a sale of substantially all of its assets (the "Sale") in this chapter 11 case or, if the Sale takes place pursuant to a chapter 11 plan, the effective date of such chapter 11 plan has occurred; (ii) the DIP lenders[3] 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;[4] and (iii) such

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

[4] In the event that 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 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.

KERP Participant is employed by the Debtor at the time that conditions (i) and (ii) are satisfied.[5] The total cost of the KERP is expected to be approximately $100,000. Furthermore, in order to receive a KERP Payment, each KERP Participant will be required to execute a release in the Debtor's favor.

16. Moreover, the Board, the Debtor, and the Debtor's professionals 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 KERP as well as (ii) the List of KERP Participants as it deems appropriate in its discretion and reasonable business judgment.

17. As set forth herein, the Debtor believes that the KERP and the KERP Payments proposed thereunder are in the best interests of the Debtor and its estate.

Relief Requested

18. 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 KERP, providing potential performance awards to certain of the Debtor's key employees. In addition, the Debtor requests that all amounts earned and payable under the KERP 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.

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

Basis for Relief Requested

A. Implementation of the KERP Should Be Approved Pursuant to Section 503(c)(3) of the Bankruptcy Code

19. The Debtor respectfully submits that the KERP should be approved pursuant to section 503(c)(3) of the Bankruptcy Code. As an initial matter, the KERP is not subject to the restrictions in section 503(c)(1) of the Bankruptcy Code because the KERP is not applicable to any "insider" (as such term is defined by section 101(31) of the Bankruptcy Code).[6] Generally, the Bankruptcy Code defines an "insider" to include, among other things, "an officer of the debtor" and a "person in control of the debtor." 11 U.S.C. § 101(31). Courts also have concluded that an employee may be an "insider" if such employee has "at least a controlling interest in the debtor or . . . exercise[s] sufficient authority over the debtor so as to unqualifiably dictate corporate policy and the disposition of corporate assets." *In re Velo Holdings, Inc.*, 472 B.R. 201, 208 (Bankr. S.D.N.Y. 2012) (citation and quotation omitted). An employee's job title, alone, does not make such employee an "insider" as defined by the Bankruptcy Code. *See In re Borders Grp., Inc.*, 453 B.R. 459, 469-70 (Bankr. S.D.N.Y. 2011) (noting that "[c]ompanies often give employees the title 'director' or 'director-level,' but do not give them decision-making authority akin to an executive" and concluding that certain "director-level" employees in that case were not insiders).

20. As discussed above, for purposes of eligibility in the KERP, the Debtor only considered non-insider employees. No KERP Participant is a director or senior manager or has been vested with authority to dictate corporate policy. In fact, each KERP Participant reports to a more senior manager and must have such manager's prior approval before taking any significant action, including actions that may affect the value or disposition of the Debtor's assets. Therefore,

no KERP Participant is an "insider" of the Debtor and the restrictions of section 503(c)(1) of the Bankruptcy Code are inapplicable to the KERP.

21. Accordingly, the relevant standard for evaluating the appropriateness of the KERP is the business judgment standard under section 503(c)(3) of the Bankruptcy Code. Generally, section 503(c)(3) of the Bankruptcy Code permits payments to a debtor's employees outside the ordinary course of business if such payments are justified by "the facts and circumstances of the case." 11 U.S.C. § 503(c)(3).[7] The majority of courts have found that this standard is no different from the business judgment standard under section 363(b) of the Bankruptcy Code. *See In re Global Home Prods., LLC*, 369 B.R. 778, 783-87 (Bankr. D. Del. 2007); *In re Velo Holdings, Inc.*, 472 B.R. at 212 (collecting cases); 4 *Collier on Bankruptcy* ¶ 503.17[4] (Henry J. Sommer & Alan N. Resnick eds. 16th ed. rev. 2012); *see also In re Nobex Corp.*, No. 05-20050 (MFW), 2006 WL 4063024, at *2-3 (Bankr. D. Del. Jan. 19, 2006) (finding that "sale-related" incentive pay satisfied the business judgment test requirements of section 363 of the Bankruptcy Code).[8]

22. Courts frequently consult a multi-factor test in considering whether an incentive plan is justified by the facts and circumstances of a particular case, which includes consideration of, among other things, (i) whether the plan was calculated to achieve the desired performance; (ii) whether the costs of the plan were reasonable in the context of the debtor's assets; (iii)

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[6] Section 503(c)(1) of the Bankruptcy Code generally prohibits retention payments to insiders unless certain conditions are met. 11 U.S.C. § 503(c)(1).

[7] Section 503(c)(3) of the Bankruptcy Code provides that "[there shall neither be allowed, nor paid –] 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."

[8] Although the Debtor believes that the business judgment rule applies to the "facts and circumstances" test of section 503(c)(3), some courts have applied a slightly higher bar. *See In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (finding that a proposed transfer was in the best interests of creditors and the debtor's estate in addition to the business judgment standard). Even if this Court were to consider these additional factors, however, the Debtor believes that they are satisfied because, as further examined below, the KERP is designed to maximize the value of the Debtor's business for the benefit of all creditors and the Debtor's estate.

whether the plan was consistent with industry standards; (iv) whether the debtor engaged in due diligence related to the need for the plan, investigated which key employees needed to be incentivized and what types of plans were generally available in the debtor's particular industry; and (v) whether the debtor received independent counsel in performing due diligence and in creating and authorizing the incentive compensation. *See In re Global Home Prods.*, 369 B.R. at 786.

24. Here, the Debtor submits that the KERP should be approved under this standard as a sound exercise of its business judgment. There is a reasonable relationship between the KERP and the results to be obtained—retaining the KERP Participants. Importantly, the KERP allows the Debtor to avoid the cost and delay associated with the loss of essential personnel and their institutional knowledge. *See In re Residential Capital, LLC*, 491 B.R. 73, 86 (Bankr. S.D.N.Y. 2013) (approving retention plan for non-insiders because of the "continuity promoted, and the institutional knowledge preserved, by the retention of such employees"). The Debtor, having implemented multiple rounds of prepetition layoffs and cutbacks, is already operating with a "skeleton" crew, many of whom have the experience, skill, and knowledge needed to operate the Debtor during the sale process. Moreover, despite its already-reduced staff, the Debtor (in consultation with the Debtor's professionals) engaged in an in-depth evaluation of its operational and administrative needs with respect to this chapter 11 case. The Debtor therefore submits that, under the circumstances, any further attrition would jeopardize the Debtor's ability to operate and thus, its going-concern value.

25. Indeed, in the context of this chapter 11 case and the Debtor's precarious financial condition, the cost of the KERP is clearly justified in comparison to the Debtor's prepetition assets: the cost of the KERP represents less than 1% of the book value of the

Debtor's prepetition assets.[9] As mentioned, many of the KERP Participants play a critical role in the Debtor's day-to-day business; many KERP Participants are the only remaining employees capable of performing certain discrete and unique tasks, each of which is crucial to the Debtor's continued operation. Further, the Debtor reasonably believes that the cost of losing and attempting to replace the KERP Participants would far exceed the cost of the KERP. Given the Debtor's circumstances, the Debtor and its professionals believe that the KERP is reasonable, fair, and narrowly tailored to achieve its objective to retain essential personnel in order to maximize the value of the Debtor's assets for the benefit of its estate and all stakeholders.

26. Accordingly, the Debtor respectfully submits that the KERP is justified by the facts and circumstances of the Debtor's chapter 11 case, is a sound exercise of business judgment and that implementation of the KERP is in the best interests of the Debtor, its estate, creditors, and all other stakeholders.

B. Implementation of the KERP Under Section 363(b) of the Bankruptcy Code is a Valid Exercise of the Debtor's Business Judgment

27. Additionally, the Court may authorize the Debtor to implement the KERP 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

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9 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.

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").

28. Courts in this and other districts have found that a debtor's use of reasonable bonuses and other incentives to motivate or retain employees is a valid exercise of a debtor's business judgment. *See, e.g., In re KB Toys, Inc.*, No. 08-13269 (KJC) (Bankr. D. Del. Jan. 6, 2009) (approving retention plan for 28 non-insider employees contemplating payments of approximately $300,000) [Docket No. 207]; *In re Mervyn's Holdings, LLC*, No. 08-11586 (KG) (Bankr. D. Del. Oct. 30, 2008) (approving retention plan for 93 non-insider employees contemplating payments of approximately $1.3 million) [Docket No. 794]; *In re New Century TRS Holdings, Inc.*, No. 07-10416 (KJC) (Bankr. D. Del. Aug. 15, 2007) (approving retention plan for non-insider employees contemplating payments of approximately $800,000) [Docket No. 2245]; *In re Linens Holding Co.*, No. 08-10832 (CSS) (Bankr. D. Del. Oct. 21, 2008) (approving retention and incentive plans for non-insiders) [Docket No. 1937]; *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). Moreover, once a debtor articulates a valid

business justification for the proposed use of estate property, the bankruptcy court should give great weight to that judgment. *See In re Comm. Mortg.*, 414 B.R. 389, 394 (Bankr. N.D. Ill. 2009) (noting that a debtor in possession "has the discretionary authority to exercise his business judgment in operating the debtor's business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation") (citations and quotation omitted).

29. For the same reasons set forth above, the Debtor's decision to implement the KERP is a valid exercise of business judgment. *See In re Global Home Prods.*, 369 B.R. at 783; *see also In re Borders Grp., Inc.*, 453 B.R. at 473–74 (holding that the "facts and circumstances" standard of section 503(c)(3) of the Bankruptcy Code is "no different" than the business judgment standard under section 363(b) of the Bankruptcy Code); *Velo Holdings*, 472 B.R. at 212 (same). The KERP is reasonable in terms of the objectives it seeks to achieve, its cost, and its scope. Additionally, the Board and the Debtor's managers performed extensive due diligence in both selecting the KERP Participants and developing the KERP's terms and conditions. Finally, the Debtor sought the advice of its counsel, its investment banker, and its financial advisors (including the Debtor's CRO) in assessing the KERP's reasonableness under the circumstances. Thus, the KERP should be approved as a valid exercise of the Debtor's business judgment pursuant to section 363(b) of the Bankruptcy Code.

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

30. 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.").

31. As previously stated, the Debtor reasonably believes that the KERP is critical to the success of the chapter 11 case and the sale process. The KERP Payments are essential to adequately reward the KERP Participants for all of their efforts throughout this case, to maintain the morale of the KERP Participants and to ensure the KERP Participants' continued focus on operating the Debtor through the chapter 11 sale process. Thus, the Debtor believes that such payments are necessary to maximize the value of its estate. The Debtor respectfully submits that the postpetition compensation described in the KERP 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.

<u>Reservation</u>

32. 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 KERP Participants entitled to participate in the KERP and (ii) the amounts of any award, bonus, or other form of compensation payable pursuant to the KERP (but in no event to exceed the budgeted amount approved under the DIP financing except as expressly discussed herein).

Notice

33. 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

34. 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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