IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: IMX ACQUISITION CORP., *et al.*, Debtors.	Chapter 11 Case No. 16-12238-BLS Jointly Administered **Hearing Date: January 10, 2017 at 1:00 p.m. (Requested)** **Objection Deadline: January 6, 2017 at 4:00 p.m. (Requested)**

MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS FOR ENTRY OF AN ORDER GRANTING STANDING TO COMMENCE AND PROSECUTE CERTAIN CLAIMS ON BEHALF OF THE DEBTORS' ESTATES AGAINST (I) DMRJ GROUP, LLC; AND (II) MONTSANT PARTNERS LLC, AND FOR RELATED RELIEF

The Official Committee of Equity Security Holders (the "Committee") of Implant Sciences Corporation ("Implant Sciences" or the "Company" and, together with its chapter 11 debtor-affiliates, the "Debtors"), by and through their undersigned counsel, hereby submits this motion (the "Motion") for entry of an order granting the Committee leave, standing and authority to commence, prosecute and, if appropriate, settle certain causes of action on behalf of the Debtors' estates against DMRJ Group, LLC ("DMRJ Group") and Montsant Partners LLC ("Montsant" and together with DMRJ Group, the "Defendants" or "DMRJ") for, among other things, the plausible and colorable claims and causes of action (collectively, the "Causes of Action") set forth in the proposed draft complaint, substantially in the form attached hereto as **Exhibit A** (the "Draft Complaint").[1] The Debtors have not at this time consented to the Committee obtaining derivative standing to prosecute the Causes of Action on behalf of the

[1] Defined terms not otherwise defined herein shall have the meaning ascribed to them in the Draft Complaint. Further, defendant parties defined here shall include those party defendants included in such definitions set forth in the Draft Complaint. To the extent that the definition of any term defined here is inconsistent with the definition ascribed to such term in the Draft Complaint, the definition in the Draft Complaint shall govern.

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Debtors' estates. In support of this Motion, the Committee attaches and incorporates by reference the Draft Complaint as required by the Final DIP Order and Investigation Extension Order and respectfully states as follows:

PRELIMINARY STATEMENT

1. From the outset of its dealings with the Debtors, DMRJ exploited its relationship as secured lenders to the Debtors to amass an unconscionable profit through the use of threats, manipulation and coercion to permit DMRJ to reap the benefits of, among other things, insider trading and a usurious interest rate—all the while tortiously interfering with the Debtors' ability to obtain more favorable financing. Through its coercion and manipulation, DMRJ has, among other things, amassed over [redacted] in illegal proceeds in addition to the millions of dollars in illegal interest it has received, all to the detriment of the Debtors' estates.

2. The Platinum Partners personnel recently indicted on charges for participating in a fraudulent scheme of over $1 billion with other financial counter-parties are the same DMRJ personnel that managed the lending relationship with the Company and the trades of Implant Sciences' stock.[2] In fact, the Committee was scheduled to depose Joseph SanFilippo on December 21, 2016; but two days earlier he became unavailable because he was arrested and indicted. Given the DMRJ Executives alleged involvement in a criminal scheme described in the indictment to defraud investors in order to maximize Platinum Partners' own profits, it, unfortunately, comes as no surprise that DMRJ also here engaged in similarly egregious and wrongful conduct at the expense of the Debtors and their investors.

[2] Among the parties subject to the indictment are Mark Nordlicht, David Levy, Joseph SanFilippo, Joseph Mann and Daniel Small (the "DMRJ Executives"). US v. Nordlicht et al., E.D.N.Y., No. 16-cr-640. The indictment (the "Indictment') is attached to the Draft Complaint as Exhibit B.

3. To be clear, this Motion and the Draft Complaint do not identify Platinum Partners or the DMRJ Executives as named defendants. As a result of DMRJ's failure to comply with the Stipulated 2004 Order, the Committee has not received a substantial portion of the discovery that this court has ordered Platinum Partners and DMRJ to produce—including, significantly, copies of internal emails by and among the DMRJ Executives and other personnel at DMRJ and/or Platinum Partners. Without the discovery, the Committee has not yet been able to ascertain the nature of claims that may exist against Platinum Partners, all or certain of the DMRJ Executives and perhaps others at DMRJ and/or Platinum Partners.

4. For the reasons set forth below, the Committee respectfully requests that the Court:

i. grant the Committee standing to prosecute, and if appropriate, settle the Causes of Action set forth in the Draft Complaint against DMRJ;

ii. grant the Committee standing with respect to any claims or causes of action that may be added to the Draft Complaint, including with respect to any additional counts as may be permitted under the applicable rules of the court of competent jurisdiction in which the Draft Complaint may be filed;

iii. suspend the Challenge Period Deadline as it applies to all parties identified in Paragraph 11 of the Final DIP Order, except with respect to BAM Administrative Services, LLC, DMRJ Group and Montsant, until such time as the Court enters an order finding that all obligations arising under the Stipulated 2004 Order have been satisfied;[3] and

iv. confirm that nothing in any order approving this Motion effects or limits the Committee's rights to discovery as set forth in the Stipulated 2004 Order, confirm that the Stipulated 2004 Order remains in full force, and effect and compel all parties to fully comply with the Stipulated 2004 Order.

[3] The Challenge Period Deadline has already expired with respect to BAM Administrative Services, LLC pursuant to the Sale Order and the Committee will seek to comply with the Challenge Period Deadline with respect to DMRJ Group and Montsant if standing is granted pursuant to this Motion.

JURISDICTION, VENUE AND STATUTORY PREDICATES

5. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S. C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are Bankruptcy Code Sections 105, 1103(c)(2) and (5) and 1109(b).

PROCEDRUAL BACKGROUND

6. On October 10, 2016 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above-captioned bankruptcy cases. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors continue in the management and operation of their businesses and property as debtors in possession. No trustee or examiner has been appointed in these cases.

7. On October 10, 2016, the Debtors announced a sale of their businesses and assets to L-3 Communications Corporation ("L-3") and entered into a stalking horse asset purchase agreement (the "APA") with the Lead Bidder. The APA includes a cash sale price of $117.5 million (subject to a working capital adjustment), plus assumption of certain liabilities, for the purchase of substantially all of the assets of the Debtors.

8. On October 24, 2016, the United States Trustee for the District of Delaware appointed the Committee. The next day, the Committee selected Brown Rudnick LLP and Saul Ewing LLP as its counsel. Subsequently, the Committee selected FTI Consulting, Inc., as its financial advisor.

9. On November 11, 2016, the Court entered its *Second Interim Order (I) Authorizing and Approving Debtors' Post-Petition Financing; (II) Granting Liens and Security Interests and Providing Superpriority Administrative Expense Status; (III) Authorizing*

Use of Cash Collateral and Affording Adequate Protection; (IV) Modifying Automatic Stay and (V) Scheduling Final Hearing [D.I. 179] (the "Second Interim DIP Order").

10. Pursuant to the Second Interim DIP Order, the Committee had until December 23, 2016 to: (i) investigate the prepetition conduct of the prepetition lenders, including DMRJ Group and Montsant, and their representatives; (ii) request standing before this Court to bring any causes of action; and (iii) thereafter file the related complaints as a representative of the estate (the "Challenge Period Deadline").

11. On November 30, 2016, the Court entered its *Final Order (I) Authorizing and Approving Debtors' Post-Petition Financing; (II) Granting Liens and Security Interests and Providing Superpriority Administrative Expense Status; (III) Authorizing Use of Cash Collateral and Affording Adequate Protection; (IV) Modifying Automatic Stay* [D.I. 298] (the "Final DIP Order") and its *Order Granting, in Part, Official Committee of Equity Security Holders' (I) Emergency Motion to Extend the Period Within Which the Committee May (A) Assert Certain Estate Claims and Cause Of Action and (B) Challenge the Validity, Enforceability, and Perfection of Certain Prepetition Secured Claims and (II) Limited Objection to Final Approval of the Debtors' DIP Motion* [D.I. 297] (the "Investigation Extension Order").

12. Under the Final DIP Order and the Investigation Extension Order, the Challenge Period Deadline was extended up to and including January 23, 2017, without prejudice to the Committee to seek further extension if necessary.

13. On December 16, 2016, the court approved the APA and the sale of the Debtors' businesses and assets to L-3. Pursuant to the *Order (A) Authorizing The Sale Of Substantially All Of The Debtors' Assets Free And Clear Of Liens, Claims, Encumbrances, And Other Interests; (B) Authorizing And Approving The Debtors' Performance Under The Asset Purchase*

Agreement; (C) Approving The Assumption And Assignment Of Certain Of The Debtors' Executory Contracts And Unexpired Leases Related Thereto; And (D) Granting Related Relief [D.O. 353] (the "Sale Order"), the Committee agreed that the Challenge Period Deadline expired only with respect to BAM Administrative Services, LLC ("BAM"). The Challenge Period Deadline has not yet expired with respect to DMRJ Group or Montsant.

THE INVESTIGATION INTO THE CAUSES OF ACTION AND REQUEST FOR SUSPENSION OF THE CHALLENGE PERIOD DEADLINE

14. Given the unfinished status of the Committee's investigation at this time, and notwithstanding the filing of this Motion and Draft Complaint, the Committee further requests that the Court (i) allow the Committee to add, and grant standing with respect to, potential additional counts to its Draft Complaint; (ii) suspend the Challenge Period Deadline with respect to all parties identified in Paragraph 11 of the Final DIP Order (except with respect to BAM, DMRJ Group and Montsant) until after the Committee has had the opportunity to conduct a thorough investigation into the Debtors' prepetition matters; and (iii) confirm the Stipulated 2004 Order is in full force and effect and compel all parties to fully comply with the Stipulated 2004 Order.[4] The Committee makes this request based on the fast-approaching Challenge Period Deadline and the limited discovery produced by Platinum Partners and DMRJ to date.

15. As of this Motion, the Debtors have reasonably cooperated with discovery requests. However, notwithstanding the December 7, 2016 discovery deadline (the "Discovery Deadline") set forth in the *Order Granting the Official Committee of Equity Security Holders*

[4] In light of Platinum Partner's and DMRJ's failure to comply in substantial part with the Stipulated 2004 Order, the Committee has been unable to complete its investigation. Moreover, given the indictment of the DMRJ Executives and fact that neither DMRJ nor Montsant are subject to the Cayman Islands insolvency proceeding of Platinum Partners, the Committee cannot in good conscience support the payment of the Prepetition Secured Obligations at this time. Accordingly, the Committee intends to submit by separate pleadings a request that the Court suspend the accrual of interest at the contract rate under the Term Notes and Line of Credit and order interest to accrue at no greater than the Federal judgment rate until such time as Platinum Partners and DMRJ fully comply with their respective obligations under the Stipulated 2004 Order.

Leave to Conduct Discovery of (I) The Debtors; (II) Platinum Partners Value Arbitrage Fund L.P.; (III) DMRJ Group, LLC; and (IV) Montsant Partners LLC, and Their Respective Current and Former Officers, Directors, and Representatives Under Rule 2004 of the Federal Rules of Bankruptcy Procedure [D.O. 283] (the "Stipulated 2004 Order"), the Committee has yet to receive the majority of Platinum Partner's and DMRJ's document production. The Committee's counsel engaged in discussions with counsel for Platinum Partners and DMRJ regarding the delay in production of relevant documents and was promised the documents no later than Friday, December 16th—more than a week later than the Discovery Deadline. Even with the additional time, Platinum Partners and DMRJ failed to produce the documents as required by the Stipulated 2004 Order. In light of the aforementioned indictment against the DMRJ Executives, the Committee was informed by Platinum Partner's and DMRJ's counsel that it is unlikely to receive this critical discovery within any reasonable timeframe, and depositions of any Platinum Partners or DMRJ individuals have been delayed for the foreseeable future. Indeed, at this juncture, Platinum Partner's and DMRJ's counsel has indicated she cannot even predict when the documents in question may be produced. As a result, the Committee's investigation, conducted under the condensed time frame and without discovery from Platinum Partners and DMRJ, is at this time incomplete.

16. Nevertheless, as demonstrated below and in the Draft Complaint, the Committee has uncovered meaningful evidence demonstrating the existence of significant and viable Causes of Action against DMRJ Group and Montsant. The Committee strongly believes that significant additional facts supporting the known Causes of Action and additional potential causes of action and potential defendants can, and will be obtained, through additional discovery. Thus, the Committee respectfully requests that the Court suspend the Challenge Period Deadline to ensure

the completion of a reasonable, proper, and responsible investigation, and allow the Committee to conduct further discovery, formal if necessary, and add counts or defendants to the Draft Complaint.

FACTUAL BACKGROUND

I. Implant Sciences' Prepetition Operations.

17. Implant Sciences was founded in Bedford, Massachusetts in 1984. Initially, the Company developed ion-based technologies and provided commercial services and products to the semiconductor, medical device, and security industries. During or around 2007, Implant Sciences changed its business model to focus exclusively on its security-related products. At that time, the Company divested itself from its noncore semiconductor and medical businesses.

18. Since that time, Implant Sciences has become a market leader and innovator in the explosives trace detection ("ETD") market. Presently, its primary business is to design, manufacture, and sell systems and sensors that detect trace amounts of explosives and drugs. The Company's products are used in the security, safety and defense industries including in particular for airport and airline security.

19. Since 2007, Implant Sciences, on information and belief, has sold more than 5,000 ETD products in 70 countries to customers such as the United States Transportation Security Administration ("TSA"), the Canadian Air Transportation Security Authority ("CATSA") and numerous central airports in Europe.

20. Currently, Implant Sciences works both independently and in conjunction with government agencies to develop cutting-edge solutions in the ETD industry and to identify new applications for its proprietary technology. Products under development include an innovating handheld detector that will detect drugs as well as explosives, a miniature mass spectrometer

utilizing quadrupole mass spectrometry, and "hyphenated" detectors, which use multiple sensors to determine the presence of a threat in settings where several chemicals are present.

21. In the months leading up to the Petition Date, Implant Sciences had announced Standing Offers from CATSA for more than 450 explosive trace detectors and was named one of sixteen companies selected by the Department of Homeland Security ("DHS") to receive the 2016 DHS small Business Achievement Award for its distinguished work in support of DHS' mission to ensure a safe and secure homeland.

22. At all times relevant to this Motion, Implant Sciences' stock was publically traded on over-the-counter markets under the trading symbol "IMSC."

II. Implant Sciences' Capital Structure.

23. On December 10, 2008, Implant Sciences entered into a note and warrant purchase agreement (as amended from time to time, the "2008 Note and Warrant Agreement") with DMRJ Group. Since then, Implant Sciences has issued numerous secured and promissory notes pursuant to this 2008 Note and Warrant Agreement, including notes in 2008 (the "2008 Note"), in 2009 (the "2009 Note"), in 2012 (the "2012 Note"), in 2013 (the "2013 Note") (collectively, the "Term Notes"). As of the Petition Date, in excess of $38 million remained outstanding on the Term Notes in aggregate principal and accrued interest. Interest currently accrues on the Term Notes at the annual rate of fifteen percent.

24. On May 4, 2015, at the request of DMRJ Group, Implant Sciences entered into an assignment agreement with DMRJ Group and Montsant, pursuant to which DMRJ Group assigned its rights, title and interest in the 2008 Note to Montsant. As set forth more fully below and in the Draft Complaint, DMRJ Group owned the 2008 Note during periods when it engaged in illegal, improper and inequitable conduct. Notwithstanding the assignment of the 2008 Note to Montsant, any claims or defenses the Committee may raise with respect to amounts owed on

account of the 2008 Note, including as a result of misconduct by DMRJ Group, shall apply with respect to Montsant as holder of the 2008 Note. On information and belief, as of the Petition Date, more than $5 million in principal and interest remained outstanding under the 2008 Note.

25. In addition to the foregoing, in 2009, the Debtors also entered into a certain revolving promissory note with DMRJ Group with in the initial principal amount of $3 million. Through a series of amendments, the revolving promissory note was ultimately replaced by that certain Amended and Restated Promissory Note, dated as of September 29, 2011, which increased the borrowing limit to $23 million (the "Line of Credit"). On information and belief, as of the Petition Date, more than $22 million of principal and interest remained outstanding under the Line of Credit. Interest currently accrues on the Line of Credit at the annual rate of fifteen percent.

26. On February 28, 2013, the Company and DMRJ Group executed an amendment to their prior agreements acknowledging that the March 2009 Note and the September 2012 Note could be prepaid on 30 days' notice. Similarly, the Line of Credit may be prepaid at any time.

27. Relevant to this Motion, at the time of Implant Sciences' bankruptcy filing, the 2008 Note held by Montsant remained outstanding, as did the 2009 Note, 2012 Note, 2013 Note and Line of Credit, each of which were held by DMRJ Group. As of the Petition Date, the total aggregate indebtedness purportedly owed by Implant Sciences to DMRJ exceeded $60,000,000.

28. In addition, the financing agreements between Implant Sciences and DMRJ contain customary and important confidentiality provisions. For example, the Line of Credit Agreement states in part: "[w]ithout the prior written consent of [Implant Sciences], neither [DMRJ] nor any of its affiliates shall disclose any confidential information of [Implant Sciences] . . . which any of its officers, directors, employees, counsel, agents, investment bankers or

accountants, may now possess or may hereafter obtain . . . and such information shall not be published, disclosed, or made accessible by any of them to any person or entity or *used by any of them* . . ." Line of Credit Agreement § 9.19 (emphasis supplied). Each of the other Agreements contains a substantially similar confidentiality provision.

III. DMRJ's Organizational Structure.

29. Defendant DMRJ Group is a limited liability company organized under the laws of the state of Delaware. On information and belief, DMRJ Group maintains its principal office at 250 West 55th St., New York, New York. On information and belief, DMRJ Group does not have any employees. Rather, it is owned, controlled and managed by its sole member, Platinum Partners Value Arbitrage Fund L.P. ("Platinum Partners").

30. Defendant Montsant is a limited liability company organized under the laws of the state of Delaware. On information and belief, Montsant maintains its principal office at 250 West 55th St., New York, New York. On information and belief, Montsant does not have any employees. Rather, it is owned, controlled and managed by its sole member Platinum Partners.

31. Platinum Partners purports to be a limited partnership organized under the laws of the Cayman Islands. On information and belief, Platinum Partners maintains its principal office at 250 West 55th St., New York, New York.

32. During the relevant times herein, individuals Mark Nordlicht, David Levy, Daniel Small and Joseph SanFilippo were officers and/or directors of Platinum Partners with the right to manage and control DMRJ's activities.

IV. DMRJ's Conversion Rights.

33. Under the terms of certain Term Notes including the 2008 Note, the 2009 note, the 2012 Note and the 2013 Note (collectively, the "Convertible Notes"), principal, accrued

interest, and preferred stock were convertible into the Company's publicly traded common stock at the discretion of DMRJ.

34. Although until January 2013 Implant Sciences' Articles of Organization specifically provided that the par value of the Company's common stock was $0.10 per share. However, and in violation of Massachusetts law, the Term Notes granted to DMRJ the right to convert debt into the Company's equity at the rate of $0.08 per share during most relevant times. The conversion price per share was at all relevant times well below the fair market value of the stock

35. During the course of its relationship with Implant Sciences, DMRJ regularly exercised its conversion rights under the Convertible Notes. [redacted] At all times, the price at which DMRJ sold the Company's stock to the pubic exceeded the $0.08 per share conversion price at which it effectively purchased the stock. Indeed, during much of the relevant period, DMRJ's sale prices achieved for its sales of Implant Sciences' stock was well in excess of $1.00 per share and during certain periods reached $1.82 per share.

36. Pursuant to the Term Notes and their subsequent amendments, DMRJ also obtained warrant rights to receive certain quantities of Implant Sciences' preferred stock. As a result of such warrants, the Company amended its Articles of Organization six times to authorize the issuance of additional shares of preferred stock that DMRJ demanded. Platinum exercised these warrant rights at a rate of $0.10 per share. [redacted]

[redacted]

37. Adding the staggering net proceeds achieved by DMRJ by selling the Company's equity and receiving interest on the various credit facilities, DMRJ received unconscionable and usurious returns on its loans, all in violation of, among other things, the criminal usury laws of the Commonwealth of Massachusetts as set forth more fully below and in the Draft Complaint.

38. To avoid increased scrutiny and reporting requirements under federal securities laws, [redacted]. In fact, as set forth more fully below, DMRJ exercised such control over the corporation that it, at all relevant times, was and still is, an affiliate of the Company as defined by federal securities law. Therefore, each of DMRJ's sales of the Company's stock constituted a sale of restricted shares in violation of federal securities law.

V. [redacted]

39. [redacted]

40. Implant Sciences provided all [redacted] information to DMRJ with the express understanding that it would be kept strictly confidential as required by the Agreements.

41. [redacted] the emails emanating from the Company during most relevant periods contained an express [redacted] The emails further provided that [redacted]

42. Moreover, DMRJ agreed to receive and use [redacted] information in accordance with the various confidentiality provisions contained in the numerous agreements described herein, [redacted]

43. Notwithstanding the foregoing express prohibitions, federal and state securities laws, and multiple common law duties owed by DMRJ to the Company (all as set forth more fully in the Draft Complaint), [redacted] Through these illegal activities, DMRJ realized significant returns, particularly given its ability to convert debt to equity at $0.08 per share during most relevant periods. [redacted]

[redacted]

44. [redacted]

[redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

(d) [redacted]

(e) [redacted]

(f) [redacted]

(g) [redacted]

[redacted]

(h) [redacted]

(i) [redacted]

(j) [redacted]

(k) [redacted]

(l) [redacted]

45. Through its improper conversions of debt to equity and subsequent sales, DMRJ has realized illegal net proceeds of nearly [redacted] -- all by utilizing material, non-public information that it misappropriated from Debtors.

VI. Implant Sciences' Attempts To Refinance, And DMRJ Dominates And Controls Implant Sciences To Preserve Its Lucrative And Illegal Relationship With The Company.

46. As early as August 2011, [redacted]. Indeed, by that

time, the Company's annual revenues had increased by more than 90%, its stock price had risen significantly, and the Company's products were becoming recognized worldwide. [redacted]

47. [redacted]

48. [redacted]

49. Notwithstanding [redacted]

50. [redacted]

51. [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
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- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

52. [redacted]

53. [redacted]

54. In the ETD market, government certifications are critical to unlocking sales to major sections of the market. Of the various certifications, TSA approval is, perhaps, the single-most coveted achievement. These types of key governmental certifications not only open up

important new markets for a company in the ETD market, but they also facilitate financing and make a company in this space a much more attractive investment.

55. In early 2013, Implant Sciences obtained a crucial certification. Specifically, on January 16, 2013, the Company announced that the TSA notified the "Company that it's Quantum Sniffer QS-B220 Explosives Trace Detector ha[d] successfully met the requirements for acceptance onto the Air Cargo Screening Technology List" (the "TSA Certification"). The Company's press release further noted that this "announcement positions Implant Sciences to sell its products into the U.S. security marketplace, which accounts for approximately 43% of the world market. . . . Implant Sciences now becomes only the third trace detection manufacturer, and the sole American-owned company, to achieve TSA approval. We've been preparing for this day and believe we have put the right team in place to execute on this significant opportunity."

56. [redacted]

57. [redacted]

[redacted]

58. [redacted]

[redacted]

59. [redacted]

[redacted]

60. [redacted]

[redacted]

[5] On December 19, 2016, Mr. Levy, along with several other DMRJ associates, were arrested and charged with multiple counts of conspiracy to commit securities fraud; multiple counts of conspiracy to commit wire fraud; multiple counts of securities fraud; and investment advisor fraud all in connection with a relationship with companies other than the Debtors here.

[redacted]

Indeed, under both the Massachusetts Wage Act and the Federal Fair Labor Standards Act, officers and directors of a corporate employer may become personally liable for unpaid payroll.

61. [redacted]

62. [redacted]

63. [redacted]

64. [redacted]

65. In direct violation of SEC regulations, [redacted]

66. [redacted]

[6] On December 19, 2016, Mr. Small, along with several other DMRJ associates, was also charged with multiple counts of conspiracy to commit securities fraud; multiple counts of conspiracy to commit wire fraud; multiple counts of securities fraud; and investment advisor fraud, all in connection with a relationship with companies other than the Debtors here.

[redacted]

67. [redacted] on November 11, 2014, the Company finalized its IDIQ contract with TSA. On that day, the Company issued a press release announcing the contract. In that press release the Company highlighted that the "IDIQ, a necessary prerequisite for competing for TSA's annual trace detection procurements, establishes contract terms under which the TSA could purchase up to $162 million of equipment and services."

68. [redacted] two days later, the Company announced that the TSA had "placed an initial order for 1,170QS-B220 Desktop Explosive Trace Detectors and ancillary supplies. The Company's related press release stated that "receiving this order from the TSA is a goal that Implant Sciences has been driving towards for a number of years. Achieving it is a major milestone for the Company."

69. Then, on November 14, 2014, the Company issued another press release touting that its "[r]evenues for the three months ended September 30, 2014 increased 60% …." In that same announcement, the Company explained that during "our recently concluded quarter we continued to progress through several regulatory approval processes. Most notably, we achieved [TSA] qualification for both air cargo and checkpoint screening, we passed the European Civil Aviation Conference ("ECAC") evaluation process and are now qualified in Europe for airport checkpoint screening for passengers and checked baggage, and our proposal to develop next generation explosives trace detection screening systems, submitted under the U.S. Department of

Homeland Security's . . . Science and Technology Directorates Broad Agency Announcement, was selected for funding. All of these are important strategic achievements that we believe position the Company for consistent and sustainable growth, as evidenced by the execution of an . . . IDIQ contract with the TSA for up to $12 million and the receipt of an initial delivery order under this IDIQ from TSA for 1,170 QS-B220's and ancillary services and supplies. We have taken important steps to broaden the markets we serve, increase or revenue opportunities, and improve our financial stability."

70. [redacted]

71. [redacted]

72. [redacted]

73. [redacted]

[redacted]

74. [redacted]

75. [redacted]

76. [redacted]

77. Ironically, [redacted] Implant Sciences had just achieved the height of its success. After years of struggling through the morass of regulatory approval, the Company had secured an IDIQ contract with the TSA that afforded the Company the opportunity to realize revenue of $162 million dollars. The TSA approval served to open up forty three per cent of the world market for ETD equipment. Furthermore, Implant Sciences had secured an initial purchase TSA order pursuant to the IDIQ, and had just reported a revenue increase of sixty per cent. The Company's stock had traded at an average of $1.23 per share over

the preceding three month period, which was the Company's highest quarterly average share price to date.

78. [redacted] Bolduc ultimately resigned as president and chairman of the board in January 2015. [redacted] Shortly thereafter, DMRJ extended the maturity dates of the credit facilities.

79. [redacted]

80. [redacted]

81. [redacted]

82. [redacted]

83. [redacted]

84. [redacted]

[redacted] The Company would be left bankrupt.

VII. DMRJ's Usurious Return.

85. Pursuant to the 2008 Note Agreement, DMRJ charged the Debtors a rate of interest as high as 2.5% per month, or 30% per annum. Pursuant to the Line of Credit and Term Notes, DMRJ charged the Debtors 15% interest on any borrowings it issued to the Debtors. Under these agreements and their various extensions and amendments, DMRJ also had the right to convert interest to shares of the Debtors' stock, and exercise warrants obtain the Debtors' stock.

86. [redacted]

87. [redacted]

88. [redacted]

89. [redacted]

RELIEF REQUESTED

90. By this Motion, the Committee seeks entry of an order substantially in the form attached as **Exhibit B** granting it authority and standing to assert, prosecute, and if appropriate,

settle causes of action against the Defendants in this Court, and to take such other action as may be necessary or appropriate in connection therewith (the "Proposed Order").

BASIS FOR RELIEF

I. Legal Standard For Statutory Equity Security Holders' Committee To Pursue Estate Claims.

91. In chapter 11 cases in which no trustee has been appointed, the Bankruptcy Code provides that a debtor-in-possession enjoys the powers that would otherwise vest in a bankruptcy trustee. See 11 U.S.C. § 1107(a). The debtor-in-possession is thus vested with the duty to maximize the value of the estate for purposes of distribution to all parties in interest. Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548, 568 (3d Cir. 2003) (en banc) ("A paramount duty of a trustee or debtor in possession in a bankruptcy case is to act on behalf of the bankruptcy estate."); see also In re Commodore Int'l, Ltc., 262 F.3d 96, 99 (2d Cir. 2001) (finding that a debtor-in possession "has an obligation to pursue all actions that are in the best interests of creditors and the estate") (quoting In re Spaulding Composites Co., Inc., 207 B.R. 899, 904 (B.A.P. 9th Cir. 1997)).

92. It is well settled, however, in this and other circuits that, under appropriate circumstances, bankruptcy courts may allow an official committee to commence and pursue litigation on behalf of the estate. See Cybergenics, 330 F.3d at 567-58 (determining that section 1109(b) and other sections of the Bankruptcy Code demonstrate Congress' approval of derivative suits by committees to recover property for the benefit of the estate, and that bankruptcy courts may exercise their equitable powers to confer such derivative suits); Infinity Investors Ltd ex re. Yes! Entm't Corp. v. Kingsborough (In re Yes! Entm't Corp.), 316 B.R. 141, 145 (D. Del. 2004) ("In *Cybergenics*, the Third Circuit recognized that the Bankruptcy Court, as a court of equity, has the power to authorize a creditor's committee to sue derivatively to recover property for the

benefit of the estate"); Unsecured Creditors Comm. v. Noyes (In re STN Enter.), 779 F.2d 901, 904 (2d Cir. 1985) (agreeing with those bankruptcy courts that have held that sections 1103(c)(5) and 1109(b) imply a qualified right for creditors' committees to initiate litigation with the approval of the bankruptcy court); Official Comm. of Unsecured Creditors v. Barron (In re Polaroid Corp.), No.03-56404, 2004 WL 1397582 (Bankr. D. Del. June 22, 2004); Official Comm. of Unsecured Creditors v. Cablevision Systems Corp. (In re Valley Media, Inc.), No. 01-11353, 2003 WL 21956410 (Bankr. D. Del. Aug. 14, 2003).

93. Like statutory creditors' committees, equity security holders' committees' entitlement is derived from Bankruptcy Code Section 1109(b), which provides, in relevant part, that "[a] party in interest, including . . . an equity security holders' committee . . . may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). An equity committee's general right to be heard in bankruptcy proceedings would be rendered meaningless unless such committees are also empowered to act, on behalf of the estate, if a debtor in possession, who is explicitly granted the right to act, unjustifiably fails to act. See In re iPCS, Inc., 297 B.R. 283, 290 (Bankr. N.D. Ga. 2003) ("If a debtor has a cognizable claim, but refuses to pursue that claim, an important objective of the Code would be impeded if the bankruptcy court has no power to authorize another party to proceed on behalf of the estate in the debtor's stead.").

94. Under these principles, courts within and without this Circuit have granted equity security holders' committees derivative standing and authority under similar circumstances as creditors' committees. See In re Washington Mut., Inc., 461 B.R. 200, 267 (Bankr. D. Del. 2011), vacated in part, No. 08-12229 MFW, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (granting Equity Committee standing motion, but directing the parties to proceed to mediation);

In re Betty Owens Sch., Inc., 1997 WL 188127, at *4, n.3 (S.D.N.Y. Apr. 17, 1997) ("[E]quity holders' committees may obtain standing to pursue a cause of action for breach of fiduciary duty on behalf of a debtor where a colorable claim exists which the debtor has refused to assert.") (quoting Nat'l Convenience Stores Inc. v. Shields (In re Schepps Food Stores, Inc.), 160 B.R. 792, 799 (Bankr. S.D. Tex. 1993)); see also 11 U.S.C. § 1109(b) ("an equity security holders' committee . . . may raise and may appear and be heard on any issue in a case under this chapter.").

II. The Committee Plainly Satisfies The Test For Derivative Standing.

95. In this Circuit, derivative standing requires a party to demonstrate: (1) a colorable claim, (2) the debtor's unjustifiable failure to act on that claim, and (3) the permission of the bankruptcy court to initiate the action. In re Yes! Entm't Corp., 316 B.R. at 145 (citing In re Valley Media, Inc., 2003 WL 21956410, at *2). In order to maximize the value of the Debtors' estate, the Committee requests that the Court grant it authority to file and prosecute the Draft Complaint on behalf of the estate.

A. The Draft Complaint Asserts Colorable Claims.

96. Asserting a "colorable claim" is a relatively low threshold to satisfy, requiring the court to "undertake the same analysis as when a defendant moves to dismiss a complaint for failure to state a claim." In re Centaur, LLC, No. 10-10799 (KJC), 2010 WL 4624910, at *4 (Bankr. D. Del. Nov. 5, 2010)[7]; July 30, 2008 Hr'g Tr. at 44:15-24, In re Distributed Energy Systems, Corp., Case No. 08-11101 (KG) (Bankr. D. Del. Jul. 30, 2008) [Docket No. 315] (noting that the colorability standard is less than a Rule 12(b)(6) standard and requires only

[7] The standard courts apply when considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is related to the pleading requirements of Fed.R.Civ.P. 8. In re Fedders N. Am., Inc., 405 B.R. 527, 537 (Bankr. D. Del. 2009). "Rule 8(a) of the Federal Rules of Civil Procedure ... requires only that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Id.

plausibility and that the claims be not "without merit"); see also Adelphia Commc'ns Corp. v. Bank of America, N.A. (In re Adelphia Commc'ns Corp.), 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005) ("Caselaw construing requirements for "colorable" claims has made it clear that the required showing is a relatively easy one to make."); Official Comm. of Unsecured Creditors v. Hudson United Bank (In re America's Hobby Center, Inc.), 223 B.R. 275, 288 (Bankr. S.D.N.Y. 1998) (observing that only if the claim is "facially defective" should standing be denied).

97. Moreover, in determining whether a claim is colorable, this Court need not conduct a mini-trial. Rather, "the Court may weigh the 'probability of success and financial recovery,' as well as the anticipated costs of litigation as part of a cost/benefit analysis conducted to determine whether the pursuit of the colorable claims are likely to benefit the estate." In re iPCS, Inc., 297 B.R. at 291 (citations omitted). Therefore, the Committee need establish only to this Court the existence of a plausible claim and that the Causes of Action have some value to the Debtors' estates.

98. As a result of its investigation, the Committee's Draft Complaint pleads more than colorable claims against DMRJ on multiple theories that, if successful, would benefit the estate, including: (1) fraudulent transfer, (2) criminal usury, (3) breach of fiduciary duty, (4) equitable subordination, (5) equitable disallowance, (6) tortious interference with a prospective business advantage, (7) aiding and abetting a breach of fiduciary duty, (8) breach of the covenant of good faith and fair dealing, (9) breach of contract, (10) racketeering, (11) misappropriation and securities fraud, and (12) fraud.

i. The Debtors' Claims For Breach Of Fiduciary Duty and Common Law Insider Trading.

99. There are plausible and valid claims against DMRJ for breach of fiduciary duty. For example, under New York Law, third party lenders can be held liable for breaching fiduciary

duties imparted to them by a fiduciary relationship. See Scott v. Dime Sav. Bank of N.Y., FSB, 886 F. Supp. 1073, 1078 (S.D.N.Y. 1995) ("The existence of a fiduciary relationship cannot be determined 'by recourse to rigid formulas'; rather, 'New York courts typically focus on whether one person has reposed trust or confidence in another who thereby gains a resulting superiority or influence over the first.'") (citations omitted). The Scott court went on to find that while the "legal relationship between a borrower and a bank is a debtor-creditor relationship that in and of itself does not create a fiduciary relationship," the facts of that case, such as—that the bank encouraged the borrower to borrow; the bank induced the borrower to invest in an affiliate of the bank, and the bank participated in stock purchases and sales of which both the bank and borrower split the proceeds, could rise to the level of a fiduciary relationship. See id.

100. DMRJ owed Implant Sciences a fiduciary duty by virtue of the relationship of trust and confidence it established with the Debtors and by virtue of the high degree of control it exercised over the Debtors' business operation and management decisions. [redacted]

101. Under New York law, a party who breaches its fiduciary duty by using corporate inside information for its own private financial gain, "[o]n familiar principles of equity[,] . . . may be required to account to his cestui for profits made through his use of confidential information belonging to the cestui." Frigitemp Corp. v. Fin. Dynamics Fund, Inc., 524 F.2d 275 (2d Cir. 1975); see Diamond v. Oreamuno, 24 N.Y.2d 494, 301 (1969) (sustaining a complaint by a corporation seeking recovery from its officers and directors of profits derived from the use of corporate insider information, without an allegation that the corporation was itself damaged).

102. [redacted] The same result is mandated under Delaware law. See, e.g., Brophy v. Cities Serv. Co., 31 Del. Ch. 241, 245 (1949) (recognizing a fiduciary duty claim for insider trading).

103. Under the Diamond and Brophy line of cases, a corporation whose confidential information is wrongfully used to trade in the corporation's securities is legally entitled to recover from the wrongdoer the proceeds of that wrongful trading. Diamond v. Oreamuno, 24 N.Y.2d 494, 505 (1969); Kahn v. Kolberg Kravis Roberts & Co., L.P., 23 A.3d 831, 840 (Del. 2011). DMRJ should be required to pay the estates the [redacted] of proceeds made through the misappropriation of this confidential information in violation of its fiduciary duties.

ii. The Debtors' Claims For Criminal Usury.

104. The facts of this case support colorable claims against DMRJ for criminal usury. Under Massachusetts law, any lender who "takes or receives, directly or indirectly, interest and expenses the aggregate of which exceeds an amount greater than twenty per centum per annum" is guilty of criminal usury. Mass. Gen. Laws ch. 271 § 49. The statute provides for a private right of action and the borrower is entitled to have the loan declared void by a court in equity. See Mass. Gen. Laws ch. 271 § 49(c).

105. Here, based on the information that has been made available to the Committee, [redacted] all of which is properly considered in the computation of illegal interest under the usury statutes. DMRJ charged the Debtors a rate of interest as high as 2.5% per month, or 30% per annum under the 2008 Note

Agreement. Additionally, pursuant to the Line of Credit and Term Notes, when utilizing its right to convert interest to shares of Implant Sciences Stock, [redacted] In addition, as set forth above, DMRJ received upward to [redacted] in illegal proceeds by, for example, converting its debt into equity and then trading on material non-public information.

106. Although Mass. Gen. Laws ch. 271 § 49 provides an exemption for lenders who register with the Office of the Attorney General of the Commonwealth of Massachusetts, the exemption only goes into effect after the date of the registration. DMRJ did not so register until April 6, 2016, long after the lending relationship had commenced and well after DMRJ had received interest and expenses well in excess of the maximum legal interest.

iii. The Debtors' Claims For Tortious Interference With A Prospective Business Advantage And Tortious Interference With A Contractual Right.

107. The Debtors have colorable and plausible claims against DMRJ for its tortious interference with a prospective business advantage. For example, under New York law, the "required elements" of a tortious interference claim are: "(a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship. Advanced Glob. Tech. LLC v. Sirius Satellite Radio, Inc., 836 N.Y.S.2d 807, 809 (Sup. Ct.), aff'd as modified, 843 N.Y.S.2d 220 (2007). Further, the conduct must have been "wrongful or improper independent of the interference allegedly caused thereby." Id. "'Wrongful means' include . . . fraud or misrepresentation . . . and some degrees of economic pressure." Id. (citations omitted).

108. Where there already exists an enforceable contract and a "defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior." NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc., 87 N.Y.2d 614, 621 (1996).

109. On numerous occasions DMRJ [redacted]

110. Through similar wrongful means, and indeed as part of the scheme to interfere with the Debtors' prospective business advantage, [redacted]

iv. The Debtors' Claims For Breach Of The Covenant Of Good Faith And Fair Dealing.

111. The Debtors have a colorable and plausible claim for breach of the implied covenant of good faith and fair dealing. Implicit in all New York contracts is a covenant of good faith and fair dealing in the course of contract performance. See Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing is "breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement." 1357 Tarrytown Rd. Auto, LLC v. Granite Properties, LLC, 142 A.D.3d 976, 977 (N.Y. App. Div. 2016) (citations omitted). The implied covenant "includes any promises which a reasonable promisee would be justified in understanding were included . . .

[though] no obligation may be implied that would be inconsistent with other terms of the contractual relationship." Id. (citations omitted).

112. Here, Implant Sciences and DMRJ were parties to multiple loan Agreements. [redacted]

113. By wrongfully preventing the debtors from refinancing, [redacted] DMRJ deprived the Debtors of their contractual right to prepay their debt — in violation of the implied covenant of good faith and fair dealing.

v. The Debtors' Claims For Breach Of Contract.

114. Similarly, there are plausible claims for breach of the loan Agreements. Pursuant to the Agreements, DMRJ had contractual obligations to keep non-public information they received by virtue of its lending relationship with the Debtors confidential.

115. By trading the Debtors' securities on the basis of the non-public information it received by virtue of its lending relationship with the Debtors, DMRJ breached the loan Agreements.

vi. The Debtors' Claims For Damages Arising From DMRJ's Unfair And Deceptive Trade Practices.

116. The Debtors have plausible claims for damages arising from DMRJ's unfair and deceptive trade practices. Massachusetts law proscribes "unfair or deceptive acts or practices in the conduct of any trade or commerce" and grants "any person . . . who has been injured by" unfair and deceptive trade practices a private right of action. See Mass. Gen. Laws. ch. 93A §§ 2, 9.

117. The Supreme Judicial Court of Massachusetts has held that "a practice or act will be unfair under [Chapter 93A] if it is (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business people." Morrison v. Toys "R" Us, Inc., 441 Mass. 451, 457 (2004) (citations omitted).

118. By virtue of its lending and other relationships with the Debtors', the DMRJ is engaged in a trade or business in Massachusetts.

119. The aforementioned conduct of DMRJ including, [redacted] constitutes unfair and deceptive trade practices in violation of Mass. Gen. Laws ch. 93A. Moreover, these acts were performed willfully and knowingly.

vii. The Debtors' Claims For Damages Under the Racketeer Influenced And Corrupt Organizations Act.

120. The Debtors have a colorable claim under the Racketeer Influenced And Corrupt Organizations Act ("RICO"). The RICO statute provides that "[a]ny person injured in his business or property by reason of a violation [under the statute] may sue . . . and . . . recover threefold the damages." 18 U.S.C. § 1964(c). As set forth in more detail in the Draft Complaint, the Department of Justice has alleged that DMRJ's principals have participated in a Ponzi-like scheme whereby they defrauded investors in DMRJ's affiliates and in at least one other borrower from DMRJ's affiliates.[8] [redacted]

[8] See also Indictment, generally.

[redacted]

121. During the relevant times herein, DMRJ was a criminal enterprise associated with and controlled by Nordlicht, Levy, Small, and SanFilippo.

122. The conduct of DMRJ through its actors Nordlicht, Levy, Small, and SanFilippo, as alleged in the Draft Complaint, constituted a pattern of racketeering in the form of, including, but not limited to, fraud in the sale of securities, extortion, mail fraud, wire fraud, institution fraud, and interference with commerce. DMRJ's actions as alleged in the Draft Complaint with respect to Implant Sciences constituted a continuous and related scheme to defraud the Debtors in order to enrich DMRJ.

viii. The Debtors' Claims For Damages Arising From DMRJ's Misappropriation And Securities Fraud.

123. There are also colorable claims against DMRJ arising from DMRJ's misappropriation of non-public information and its insider trading. For example, insider trading, which is unlawful trading in securities based on material non-public information, is a violation of the statutes § 10(b) and Rule 10b-5. See Securities Exchange Act of 1934 (the "1934 Act"), § 10(b); 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5. Furthermore, the Securities Exchange Act of 1934 prohibits the misappropriation of insider information. See United States v. O'Hagan, 521 U.S. 642, 653 (1997) (holding that the purpose of the misappropriation theory is to "protect the integrity of the securities market against abuses by 'outsiders' to a corporation who have access to confidential information").

124. Section 9(e) of the 1934 Act provides a private right of action for victims of manipulative or deceptive acts as prohibited by the 1934 Act. Courts routinely permit derivative Rule 10b-5 lawsuits brought on behalf of corporations. See, e.g., Schoenbaum v. Firstbrook, 405

F.2d 215, 219 (2d Cir. 1968) (permitting a derivative lawsuit where a defendant fraudulently influenced the issuance of a corporation's treasury stock for insufficient consideration); Ruckle v. Roto Am. Corp., 339 F.2d 24, 29 (2d Cir. 1964) (permitting derivative lawsuit where corporation fraudulently proposed to issue shares for inadequate consideration). To prevail on a misappropriation insider trading claim, a plaintiff must "establish (1) that the defendant possessed material, nonpublic information; (2) which he had a duty to keep confidential; and (3) that the defendant breached his duty by acting on or revealing the information in question." Veleron Holding, B.V. v. Stanley, 117 F. Supp. 3d 404, 430 (S.D.N.Y. 2015) (citation omitted) (refusing to enter summary judgment against a corporation's misappropriation claim after the corporation's confidential information was wrongfully used to trade securities).

125. Courts in Massachusetts, for example, have found that their securities fraud statute, such as the Massachusetts Uniform Securities Act, Mass. Gen. Laws ch. 110A §410, to be "substantially similar to the Federal securities laws. and therefore decisions construing the Federal statutory language are applicable to the state statute as well." Marram v. Kobrick Offshore Fund, Ltd., 809 N.E.2d 1017, 1025 (Mass. 2004).

126. Here, where DMRJ had access to material non-public information of the Debtors, and misappropriated that information by trading securities on the basis of that information, the Debtors have a colorable claim for damages.

ix. The Debtors' Claims For Fraud.

127. The Debtors also have colorable claims against DMRJ for fraud. Under, for example, Massachusetts law, the "elements of a common-law action for fraud are; (1) that the defendant made a false representation of material fact, (2) with knowledge of falsity, (3) for the purpose of inducing the plaintiff to act thereon, (4) and that the plaintiff relied upon the

representation as true and acted upon it to his damage." Blue Hill Chiropractic Group, Inc. v. Encompass Ins. Co., 2010 WL 7058753 (Mass. Super. Ct. Sept. 10, 2010) (citing Slaney v. Westwood Auto., 366 Mass. 688, 703 (1985).

128. Massachusetts courts have refused to dismiss a common law fraud claim where the plaintiff alleged that the defendant falsely represented that it would protect confidential information by signing a non-disclosure agreement. See CardiAQ Valve Techs., Inc. v. Neovasc, Inc., 57 F. Supp. 3d 118, 123 (D. Mass. 2014) (upholding a claim that the Defendant intended to induce the disclosure of the Plaintiff's confidential information in order to misuse it. The court held that "those allegations satisfy the requirement for pleading with particularity.").

129. Here, much like in CardiAQ, a fraud claim can be made out against DMRJ. DMRJ obtained confidential information about the debtors as a result of its lending relationship. DMRJ falsely agreed and represented that it would keep non-public information it possessed confidential, by among other things, agreeing to the confidentiality provisions in the Agreements. The Defendants did not keep the non-public information it possessed confidential. Finally, DMRJ agreed to keep the Debtors' non-public information confidential with the intent to deceive and for the purpose of inducing the debtors to enter into and maintain the Agreements.

x. The Debtors' Claims For Equitable Subordination and Equitable Disallowance.

130. Furthermore, there exist colorable claims of the Debtors to equitably subordinate the equity interests held by DMRJ to all other equity interests in the Debtors pursuant to Bankruptcy Code section 510(c). Equitable Subordination requires proof of three elements: "(i) the defendant engaged in some type of inequitable conduct; (ii) the misconduct caused injury to the creditors or conferred an unfair advantage to the defendant; and (iii) equitable subordination of the claim is consistent with bankruptcy law." Autobacs Strauss, Inc. v.

Autobacs Seven Co. (In re Autobacs Strauss, Inc.), 473 B.R. 525, 582 (Bankr. D. Del. 2012). Additionally, courts within this Circuit have permitted equity committee claims to go forward on a theory of equitable disallowance, on the basis that such theory is not inconsistent with the Bankruptcy Code. See In re Washington Mut., Inc., 461 B.R. at 267 (finding colorable claim for equitable disallowance of certain claims).

131. Here, by reason of DMRJ's conduct discussed above and in the Draft Complaint, the Debtors became insolvent and the Debtors' equity lost value, thereby harming both the Debtors and the Debtors' equity security holders. DMRJ obtained its preferential equity position on the basis of Agreements for which it has already received an extraordinary rate of return as a result of its illegal and inequitable conduct. Allowing DMRJ to further recover on its equity position in preference to the general equity security holders would be unfair and inequitable. DMRJ's equity interests should be subordinated to common equity.

132. Additionally, given the totality of bad acts and misconduct by DMRJ, which caused the Debtors' insolvency, harm to the Debtors' equity security holders, and these bankruptcy filings, it would be inequitable to allow DMRJ to further recover on the basis of the loan agreements, when they have already received an extraordinary, even criminal rate of return. DMRJ's claims on account of the loan Agreements should be disallowed.

xi. The Debtors' Claims For Fraudulent Transfer.

133. There are plausible avoidance claims pursuant to Bankruptcy Code sections 544, 548, and 550, as well as applicable state law, concerning certain of DMRJ's conversions of debt to equity for which the Debtors received less than a reasonably equivalent value. A constructive fraudulent transfer claim will generally lie where (i) the debtor is presently insolvent and (ii) the debtor will receive either no value in exchange or only value that is not the reasonable equivalent

of the transfer. See N.Y. Debt. & Cred. L. §§ 273-75; Taberna Preferred Funding II, Ltd. v. Advance Realty Group, LLC, 5 N.Y.S.3d 330 (N.Y. Sup. Ct. 2014) (internal citations omitted). Moreover, under, for example, New York law, "every conveyance made and every obligation incurred without fair consideration when the person making the conveyance . . . believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." N.Y. Debt. & Cred. L. § 275.

134. First, [redacted] the Debtors were insolvent and unable to pay their debts as they came due [redacted]

135. Additionally, DMRJ converted portions of their principal debt or interest at $0.08 per share when the average market value for the Debtors' shares was $0.68 per share, and as high as $1.39 per share, [redacted]. This conversion of debt at such a steep discount to share price was not for reasonably equivalent or fair value and such transfers and their proceeds should be avoided under the Bankruptcy Code and, for example, New York's Uniform Fraudulent Conveyance Act.

xii. Disallowance of the 2008 Note in the Hands of Montsant

136. DMRJ Group held the 2008 Note during the periods when it engaged in the illegal, improper and inequitable conduct described above and set forth more fully in the Draft Complaint. To the extent the 2008 Note in the hands of DMRJ Group would be subject to disallowance as a result of the misconduct of DMRJ Group, the 2008 Note remains subject to disallowance in the hands of Montsant. The Third Circuit recognizes that claims subject to disallowance under section 502(d) of the Bankruptcy Code are similarly disallowable in the

hands of a subsequent holder of the claim, whether received by assignment or sale. In re KB Toys Inc., 736 F.3d 247, 253 (3d Cir. 2013). To hold otherwise would contravene the aims of section 502(d) of the Bankruptcy Code, ensuring equality in the distribution of estate assets; if a transferred claim were protected from disallowance, an original claimant who received an avoidable transfer would have an incentive to sell its claim and "wash the claim of any disability." Id. at 252. Here, DMRJ Group assigned its rights, title and interest in the 2008 Note to Montsant. Third Circuit jurisprudence requires the "taint" of the DMRJ Group claim that would otherwise subject it to disallowance travels with the claim to Montsant. Id. at 252-53 ("[502(d)'s language is properly interpreted to mean that the potential disallowance runs with the claim."); see also In re Arctic Glacier Int'l, Inc., No. 12-10605 (KG), 2016 WL 3920855, at *20 (Bankr. D. Del. July 13, 2016).

B. Demand on the Debtors to Assert the Claims Would Have Been Futile.

137. Having shown that the Committee has colorable claims against the Defendants, the Committee must also demonstrate that the Debtors unjustifiably failed or refused to pursue the Causes of Action set forth in the Complaint, which may be implied, or consented to the derivative standing of the Committee. G-I Holdings, Inc. v. Those Parties Listed on Exhibit A (In re G-I Holdings, Inc.), 313 B.R. 612, 630 (Bankr. D.N.J. 2004); In re STN Enter., 779 F.2d at 904. This requirement is satisfied as a demand would be futile for the reasons set forth below.

138. A debtor's refusal to pursue certain actions can be implied even where no demand has been made. G-I Holdings, 313 B.R. at 630; Official Comm. of Unsecured Creditors v. Clark (In re Nat'l Forge Co.), 326 B.R. 532, 544-45 (W.D. Pa. 2005) (holding that bankruptcy court properly determined demand was futile when the debtor's "key employees" who presumably would have been instrumental in asserting such claims, were named as defendants in the

complaint). To the extent demand would be futile, it is excused. Id. at 548 (noting that a formal request is not required to obtain a formal refusal).

139. A debtor's equivocation is irrelevant, because there is no actual need for a committee even to make a demand, or for a debtor to formally refuse. "[I]f the demand is presumptively futile under the circumstances . . . the failure to make the demand . . . does not prevent the court from authorizing [a creditor or] other party in interest from pursuing the matter on behalf of the estate." 7 Collier on Bankruptcy, ¶1109.05[2][a] (16th ed. 2013); see also G-I Holdings, 313 B.R. at 630 ("[I]n appropriate circumstances form should not override substance. That is, a debtor's refusal . . . can be implied even where no formal demand has been made by a creditors committee").

140. This is particularly true when, as here, the Debtors in the Final DIP Order expressly waived any and all claims and causes of action against DMRJ and its representatives and stipulated to the allowance of the claims and liens. Final DIP Order at ¶ 11; see In re Nat'l Forge Co., 326 B.R at 544-45 (finding that a formal request would have been futile and that the debtor could not have "seriously entertained the idea" of contesting Bank's claims because under Interim and Final DIP Orders, debtor waived its rights to contest those very claims). Thus, it would have been futile to request the Debtors to pursue claims against DMRJ.

141. Furthermore, despite the Debtors' actual or constructive awareness of the potential claims set forth in the Complaint, the Debtors have taken no action to pursue them. See Liscouski Dep. 195:9–14. Moreover, during informal discussions with Committee counsel, Debtors' counsel indicated they had not conducted an investigation into DMRJ and the Debtors "would leave that to the Committee." The obvious and unavoidable conflict of interest here is

independently sufficient to satisfy the demand requirement and obviates the need for any formal demand and refusal. The Debtors' refusal may be implied.

142. A debtor's refusal to pursue actions on behalf of the estate must be "unjustifiable." Cybergenics, 330 F.3d at 566-67. Derivative standing should be granted when a debtor unjustifiably or unreasonably refuses to pursue claims that the Bankruptcy Court finds would benefit the estate. See id. at 568; see also Jefferson Cnty. Bd. of Cnty. Commissioners v. Voinovich (In re The V Companies), 292 B.R. 290, 294 (B.A.P. 6th Cir. 2003). If a debtor fails to initiate proceedings that are likely to benefit its estate, such failure is unjustifiable. See, e.g., In re STN Enter., 779 F.2d at 904-05. "The 'unjustifiable failure' of a debtor to bring the suit itself does not require an improper motive for the failure. Rather, a debtor's failure to bring a claim is deemed to be unjustifiable when the committee has presented a colorable claim that on appropriate proof would support recovery, and the action is likely to benefit the reorganization estate." In re Adelphia Commc'ns Corp., 330 B.R. at 374, n.19 (citing In re STN Enter., 779 F.2d at 905; Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co., Inc. (In re Sunbeam Corp.), 284 B.R. 355, 374 (Bankr. S.D.N.Y. 2002), appeal dismissed, 287 B.R. 861 (S.D.N.Y. 2003)). A creditor need only show that a debtor was "unable or unwilling to pursue claims" on the estate's behalf. In re Newcorn Enterprises Ltd., 287 B.R. 744, 749-50 (Bankr. E.D. Mo. 2002); see also Louisiana World Exposition v. Fed. Ins. Co., 858 F.2d 233, 253 (5th Cir. 1988) (finding that "[w]here the interests of an estate and its creditors are impaired by the refusal of a trustee or a debtor-in- possession to initiate adversary proceedings to recover property of the estate, . . . that refusal [is] unjustified").

143. Relevant factors courts consider in making this analysis include: (1) whether conflicts of interest exist between the debtor and the parties against whom the committee's

derivative action will be brought; (2) whether the estate's interests are protected despite the debtor's refusal; (3) whether allowing the committee to pursue the action on the debtor's behalf will benefit the estate; and (4) whether appointing a trustee and allowing the trustee, as opposed to the committee, to pursue the action would be more beneficial to the estate. In re G-I Holdings, 313 B.R. at 643 (citing Tennessee Valley Steel Corp. v. B.T. Commercial Corp. (In re Tennessee Valley Steel Corp.), 183 B.R. 795, 806 (Bankr. E.D. Tenn. 1995)).

144. In assessing whether the refusal is justified or not, a court should give special consideration to actual or possible conflicts of interest. Cybergenics, 330 F.3d at 573 (recalling the adage about the "fox guarding the henhouse"). Often it will not be realistic to order the debtor itself to pursue any claims given management's conflicts of interest. Id. Under these circumstances, courts have generally held that a debtor is hopelessly conflicted because the debtor is in essence asked to pursue claims that may implicate the very individuals who control the debtor-in-possession. Possible conflicts of interest may arise because notwithstanding the fact that the current members of senior management and directors of the Debtors were present during the facts and circumstances giving rise to the Causes of Action, they have not conducted their own investigation into the existence of any claims or causes of action, nor can they pursuant to the terms of the Final DIP Order.

145. Furthermore, in determining whether a debtor's refusal is unjustified, courts generally perform a cost-benefit analysis of the claims to determine whether the creditor's claims have colorable merit and whether, in light of the probable costs of litigation, the claims would likely benefit the estate if pursued. In re Nat'l Forge Co., 326 B.R. at 548. Even a "facially justifiable" reason for failing to prosecute a claim "is insufficient to justify the failure to bring an action if under the circumstances the claim will benefit the estate even after attorney's fees and

costs are deducted." Canadian Pacific Forest Products Ltd. v. J.D. Irving, Ltd. (In re The Gibson Group), 66 F.3d 1436, 1443 (6th Cir. 1995). In conducting this cost-benefit analysis, courts consider the probability of success and the potential costs of the litigation, including attorneys' fees, and whether it is preferable to appoint a trustee to bring suit instead of having the creditors' committee do so. Id.

146. As discussed above and in the Draft Complaint, the actions and inactions of the Defendants in the years leadings up to the Petition Date reveal a number of real and serious transgressions that, absent the Committee's involvement, will not be remedied. The potential cost of litigating the causes of action set forth in the Draft Complaint is far outweighed by (i) the potential benefit of the many standalone causes of action for damages arising from DMRJ's conduct, (ii) the potential avoidance and recovery of significant prepetition obligations and fraudulent transfers, including illegal profits inuring to DMRJ's benefit on the conversion of debt and sale of securities on inside information (iii) the potential subordination and/or disallowance of the various claims and equity interests asserted by DMRJ against the Debtors.[9] If there is no challenge to the alleged misconduct, the interests of the Debtors' estates will not be properly protected and the Debtors' estates will have lost the opportunity to recapture significant value.

NO PRIOR REQUEST

147. No previous motion for the relief requested herein has been made to this or any other Court.

NOTICE

148. Notice of this Motion has been provided to the following parties: (i) counsel to the Debtors; (ii) the office of the United States Trustee for the District of Delaware; (iii) counsel

[9] Moreover, as previously noted, the Committee seeks to reduce the rate of interest accruing on the Term Notes and Line of Credit from the onerous contract rate to the Federal judgment rate as a result of Platinum Partner's and DMRJ's failure to comply with the Stipulated 2004 Order.

to DMRJ; (iv) the parties requesting notice under Bankruptcy Rule 2002. The Committee submits that no other or further notice is required.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court: (a) enter an order, substantially in the form attached hereto as **Exhibit B**, granting the Committee standing and authority to commence, prosecute and, if appropriate, settle, on behalf of the Debtors' estates, an action or actions based upon the allegations set forth in the proposed draft complaint against: DMRJ for the plausible and colorable claims set forth in the Draft Complaint.

Dated: December 22, 2016

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Counsel to the Official Committee of Equity Security Holders of Implant Sciences Corporation

Exhibit A

(FILED UNDER SEAL – MOTION TO FILE UNDER SEAL PENDING)

Exhibit B

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: IMX ACQUISITION CORP., *et al.*, Debtors.	Chapter 11 Case No. 16-12238-BLS Jointly Administered **Re: Docket No. ___**

ORDER GRANTING STANDING TO OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO COMMENCE AND PROSECUTE CERTAIN CLAIMS ON BEHALF OF THE DEBTORS' ESTATES AGAINST (I) DMRJ GROUP, LLC AND (II) MONTSANT PARTNERS LLC, AND FOR RELATED RELIEF

Upon consideration of the *Motion of the Official Committee of Equity Security Holders for Entry of an Order Granting Standing to Commence and Prosecute Certain Claims on Behalf of the Debtors' Estates against (I) DMRJ Group, LLC and (II) Montsant Partners, LLC, and for Related Relief* (the "Standing Motion")[1]; and notice of the Standing Motion having been due and proper under the circumstances; and after due deliberation, and good and sufficient cause appearing therefor; it is hereby

ORDERED, that the Standing Motion is GRANTED; and it is further

ORDERED, that any objections to the Standing Motion or the relief requested therein that have not been withdrawn, waived or settled as announced to the Court at the hearing on the approval of the Standing Motion, and all reservations of rights included therein, are hereby denied and overruled with prejudice; and it is further

ORDERED, that pursuant to sections 105, 1103, and 1109 of the Bankruptcy Code, the Committee is granted leave, standing and authority to commence, prosecute, and, if appropriate,

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1 Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Standing Motion.

settle, on behalf of the Debtors' estates, (i) the Causes of Action set forth in the draft adversary complaint attached as **Exhibit A** to the Standing Motion (the "Draft Complaint"), and (ii) any and all additional causes of action that may be added to the Draft Complaint, including any additional counts that may be permitted under the applicable rules of the court of competent jurisdiction in which the Draft Complaint may be filed; and it is further;

ORDERED, that except with respect to BAM Administrative Services, LLC, DMRJ Group and Montsant, the Challenge Period Deadline is suspended as it applies to all parties identified in Paragraph 11 of the Final DIP Order until such time as the Court enters an order finding that all obligations arising under the Stipulated 2004 Order have been satisfied; and it is further

ORDERED, that nothing provided herein shall effect or limit the Committee's rights to discovery as set forth in the Stipulated 2004 Order, the provisions of which remain in full force and effect, and with respect to which full compliance by all relevant parties is required.

Dated: _____, 2017

_____
The Honorable Brendan L. Shannon
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
IMX Acquisition Corp., *et al.*,	)	Case No. 16-12238 (BLS)
	)	
Debtors.	)	Jointly Administered
	)	

CERTIFICATE OF SERVICE

I, Monique B. DiSabatino, hereby certify that on December 22, 2016, I caused a copy of the foregoing **[REDACTED] Motion of Official Committee of Equity Security Holders for Entry of an Order Granting Standing to Commence and Prosecute Certain Claims on Behalf of the Debtors' Estates against (I) DMRJ Group, LLC; and (II) Montsant Partners, LLC, and for Related Relief** to be served on the parties on the attached service list in the manner indicated therein.

SAUL EWING LLP

By: _____

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Dated: December 22, 2016

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