

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

Orexigen Therapeutics, Inc.,

Debtor.¹

Chapter 11

Case No. 18-10518 (___)

**DEBTOR’S MOTION FOR INTERIM AND FINAL ORDERS PURSUANT TO
11 U.S.C. §§ 105(a), 363, 1107, AND 1108 AND FED. R. BANKR. P. 6003 AND 6004
AUTHORIZING DEBTOR TO (I) HONOR CERTAIN PREPETITION OBLIGATIONS
TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS AND (II) PAY
MEDICAID AND OTHER OBLIGATIONS**

The debtor and debtor in possession in the above-captioned case (the “Debtor”) hereby moves (the “Motion”) this Court for entry of an interim order substantially in the form attached hereto as **Exhibit A** (the “Proposed Interim Order”) and a final order substantially in the form attached hereto as **Exhibit B** (the “Proposed Final Order”), pursuant to sections 105(a), 363, 1107 and 1108 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing the Debtor to continue to (i) honor prepetition obligations owed to customers and otherwise continue its prepetition customer programs and practices in the ordinary course of business and (ii) pay Medicaid and other government program obligations. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Michael A. Narachi in Support of First Day Relief* (the “First Day Declaration”), filed with the Court concurrently herewith. In further support of this Motion, the Debtor respectfully states as follows:

¹ The last four digits of the Debtor’s federal tax identification number are 8822. The Debtor’s mailing address for purposes of this Chapter 11 Case is 3344 North Torrey Pines Court, Suite 200, La Jolla, CA, 92037.



JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the “Amended Standing Order”).

2. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

3. The legal predicates for the relief requested herein are Bankruptcy Code sections 105(a), 363, 1107, and 1108, and Bankruptcy Rules 6003 and 6004.

4. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the “Local Bankruptcy Rules”), the Debtor consents to the entry of a final judgment or order with respect to this Motion if it is determined that this Court would lack Article III jurisdiction to enter such final order or judgment absent the consent of the parties.

BACKGROUND

5. On the date hereof (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner and no committee has been appointed in this chapter 11 case (the “Chapter 11 Case”).

6. Orexigen is a biopharmaceutical company focused on the treatment of obesity and the commercialization of a single pharmaceutical drug for chronic weight management. Additional details regarding the Debtor’s business and the facts and circumstances supporting the relief requested herein is set forth in the First Day Declaration, which was filed contemporaneously with this Motion and is incorporated by reference.

RELIEF REQUESTED

7. By this Motion, the Debtor requests entry of interim and final orders authorizing, but not directing, the Debtor to continue, in the ordinary course of business, to (i) honor prepetition obligations owed to Customers (defined below) and otherwise continue its prepetition Customer Programs (defined below) and practices; (ii) honor prepetition obligations owed to its managed services provider, CIS (as defined below), and otherwise continue its prepetition practices with respect to its managed services operations, including claim validation and processing; and (iii) pay Medicaid Rebates (defined below) and other related obligations (collectively, the “Customer Programs”) in an aggregate amount of \$5,620,000, and \$2,820,000 on an interim basis.² Additionally, the Debtor is seeking interim and final authority, but not direction, to pay or permit setoff against prepetition amounts owing to the Debtor, as applicable based on its prepetition practices, of Chargebacks, Returns and Wholesaler Fees (each as defined below) in the ordinary course as an integral part of the Customer Programs. These setoffs, which are included in the relief sought above, represent an aggregate amount of \$2,670,000, and \$1,770,000 on an interim basis. The continuation of the Customer Programs further described below is necessary to sustain the Debtor’s business during the course of this Chapter 11 Case and maximize the value of the Debtor’s estate.

8. The Debtor also requests that the interim and final orders (a) authorize and direct all applicable banks and other financial institutions to receive, process, honor, and pay any

² Certain Customer Programs described herein assist government-related customers, such as Medicaid recipients, the U.S. Department of Veteran Affairs, the U.S. Department of Defense, the Coast Guard, the Public Health Service and 340B Covered Entities (as defined below). These are not Customer Programs implemented by the Debtor, but are those that are required when participating in certain federal programs. Continuing to participate in these government-related programs is critical to the Debtor’s efforts to market and sell its products and continue the business as a going concern. Therefore, the Debtor requests authorization to continue to provide the benefits afforded to customers in the ordinary course of business as part of its Customer Programs.

and all checks, drafts and other forms of payment, including to fund transfers and other bank accounts used by the Debtor with respect to the Customer Programs, provided that sufficient funds are on deposit in the applicable accounts to cover such payments, (b) authorize banks to rely on the representations of the Debtor as to which checks are subject to this Motion, (c) prohibit the Debtor's banks from placing any holds on, or attempting to reverse, any automatic transfers to any account of the Customer Programs, and (d) authorize the Debtor to issue new postpetition checks to replace any checks, drafts, or other forms of payment, or effect new postpetition fund transfers, which may be inadvertently dishonored or rejected and to reimburse any expenses that may be incurred as a result of any bank's failure to honor a prepetition check.

9. For the reasons set forth herein, the Debtor submits that the relief requested is in the best interests of the Debtor, its estate, creditors and other parties in interest, and therefore, should be granted.

DESCRIPTION OF THE CUSTOMER PROGRAMS

10. Prior to the Petition Date and in the ordinary course of its business, the Debtor implemented the Customer Programs to further the commercialization of its product Contrave® and maximize the sales of the product. The Debtor seeks authority to honor and continue, in the Debtor's sole discretion, the Customer Programs that it deems to be beneficial and cost-effective to its business. Such relief is necessary to the preservation of the Debtor's critical customer relationships, the success and viability of the Debtor's business, ability to maintain access to the current and potential market for the Debtor's product, and ultimately the Debtor's ability to preserve and maximize the value of its estate for the benefit of its creditors. For these and the other reasons set forth herein, it is essential and in the best interests of the Debtor, its estate and its creditors that the Debtor be permitted to honor its prepetition and postpetition obligations in connection with the Customer Programs and to continue or implement

customer practices in the ordinary course of the Debtor's business as the Debtor deems necessary.

11. A graphical depiction of the Debtor's Customers (as defined below) and Customer Programs is attached hereto as Exhibit C. The Debtor's customers are mainly wholesalers (the "Wholesalers"), who sell the Debtor's products primarily to retail drug stores in the U.S. In addition, the Wholesalers sell the Debtor's product to hospitals and clinic patients of the U.S. Department of Veterans Affairs (the "DVA"), the U.S. Department of Defense (the "DOD"), Indian Health Services ("IHS"), 340B Covered Entities (defined below), and recipients of Medicaid benefits, including State Pharmaceutical Assistance Programs ("SPAPs"), that each receive Contrave® at a reduced price. The Debtor also sells product at a discount directly to certain Customers including specialty distributors, direct retail accounts and pharmacies (the "Specialty Distributors"). The Debtor's financial support programs are each designed to help offset the costs of Contrave®. In addition, the cost to the patient of the Debtor's products is subsidized by private insurance plans via managed care organizations ("MCOs") and prescription benefit managers ("PBMs") with which the Debtor has special pricing arrangements. Further, the Debtor's products are currently covered under Medicaid and are available to authorized users of the General Services Administration's Federal Supply Schedule ("Federal Supply Schedule"), including SPAPs, the DVA, the DOD, IHS, the Coast Guard and the Public Health Service (collectively, the "Governmental Entities" and together with Wholesalers and MCOs, and PBMs, the "Customers").

12. Through the Customer Programs, the Debtor provides, among other things, (a) discounted rates on the Debtor's product for purchases made by patients covered by health insurance; and, (b) discounted rates on the Debtor's product related to patients eligible for certain federal and State government programs. The Debtor's Customer Programs are common and

typical of those in the pharmaceutical industry, critical to the Debtor's ability to serve its Customers and essential to the Debtor's business and growth. During fiscal year 2017, approximately ninety-six percent (96%) of the Debtor's unit sales ultimately went to patients who received the Debtor's product pursuant to a Customer Program. Approximately four percent (4%) of the patients who received one of the Debtor's products received it from Specialty Distributor sales channels that are not part of these Customer Programs and, consequently, are not subject to the relief sought in this Motion.

13. Therefore, the success and viability of the Debtor's business, and ultimately the Debtor's ability to preserve and maximize value for creditors through this Chapter 11 Case, including the sale process, are fundamentally dependent upon the continuation of the Customer Programs and honoring the Debtor's obligations thereunder. Maintaining ordinary course relationships with Customers is integral to preserving the value of the business. The Debtor submits that any value-maximizing outcome to this Chapter 11 Case will, of necessity, involve the Debtor being able to continue its ordinary course operations and, thus, the Customer Programs.

14. Accordingly, the Debtor seeks authority, but not direction, to continue the Customer Programs, including authority to honor prepetition claims arising therefrom, in its sole discretion.

OVERVIEW OF THE CUSTOMER PROGRAMS

15. Prior to the Petition Date, the Debtor offered its Customers certain benefits in the form of the Customer Programs. Through the Customer Programs, the Debtor provides, among other things, (a) discounts on the products for the DVA, the DOD, IHS, 340B Covered Entities (defined below) and Specialty Distributors; (b) Medicaid Rebates (including SPAPs); (c) rebates to supplement employer and patient costs via MCOs and PBMs; and (d) a return policy

on purchases of the product. The Debtor's Customer Programs are common and typical of those in the pharmaceutical industry. Therefore, if the Debtor is to stay competitive, it is critical that the Debtor be authorized to continue the Customer Programs and honor prepetition obligations associated with the Customer Programs. The following are general descriptions of the Debtor's principal Customer Programs.

A. Customer Discounts via Wholesalers and MCOs/PBMs

16. The Debtor has contracts with Wholesalers to sell its product at wholesale acquisition cost ("WAC"), which is the base price determined by the Debtor in its sole discretion and adjusted from time to time. The contracts with Wholesalers provide for industry-standard discounts, such as the "prompt pay" discount, which affords a two percent (2%) discount to Wholesalers for paying their invoice within the payment terms of the contract. Further, the Wholesalers charge the Debtor fees for handling its products and processing retail channel orders as well as for product returns ("Wholesaler Fees"). These fees and returns are normally taken as credits against future payments by the Wholesalers to the Debtor; however, a limited portion of Wholesalers prefer their Wholesaler Fees to be paid by check instead of taken as credits against future payments. Those Wholesalers who prefer to be paid by check represent less than 1% of the total Wholesaler Fees paid by the Debtor annually. Similar to the Wholesaler payment timing noted above, any prepetition balance owing to these Wholesalers paid by check could be setoff against prepetition balances owing from these Wholesalers to the Debtor.

17. With respect to MCOs/PBMs, the Debtor enters into agreements with MCOs and PBMs to gain access to patients covered by insurance and establish a formulary position for its product within the MCOs/PBMs network of coverage. MCOs and PBMs submit Rebate claims to the Debtor based on agreed upon Rebate percentages between the MCO/PBM

and the Debtor and volume of claims. MCOs/PBMs remit invoices and claim level detail to the Debtor for their Rebate claims either monthly or quarterly, depending on their arrangement with the Debtor. Absent approval to continue making the Rebates to MCOs and PBMs there is a potential risk that they will attempt to reduce Contrave®'s tier of coverage or remove it from the formulary entirely, which would result in an inability to access a substantial market of covered patients and offer those covered patients the ability to participate in the discount programs likely resulting in significantly reduced prescriptions and ultimately revenue. For the avoidance of doubt, the Debtor does not intend to pay any prepetition amounts owed to any MCOs or PBMs who reduce the Debtor's tier of coverage.

18. Thus, (as described in more detail below), if the Debtor has contracted with certain Customers that acquire the product, or subsidize the price to the patient, for a lower agreed upon contract price than the WAC, then either (i) the Wholesaler will receive payment for the product from particular Government Entities at the lower contracted price, and the Wholesaler will chargeback the Debtor for the price difference to the WAC price originally paid ("Chargebacks") or, (ii) in the case of patients that utilize insurance, the MCOs, or PBMs, will receive a rebate from the Debtor for formulary placement ("Rebates").³ These price differences are resolved through (i) credits for Chargebacks attributed to such Wholesaler in the Debtor's accounts receivable system and are applied against subsequent payments for product made by the Wholesaler, or (ii) Rebates paid to such MCOs/PBMs based on claims generated by patients using insurance (collectively, the "Discount Programs").

19. Given that Wholesalers continue to owe the Debtor for subsequent product purchases, they will simply reduce their next payment to the Debtor for the Chargebacks they've

³ Formulary placement allows the Debtor better positioning of the product within the organizations covered by the MCOs/PBMs, effectively increasing access to the Debtor's product.

incurred. Further, because purchases and Chargebacks happen through the accounts receivable system on a daily basis, it is difficult for the Debtor to determine with precision the actual amount of outstanding Chargebacks at any particular time. These Chargebacks generally do not result in an actual payment of cash to the Wholesaler except for the less than 1% noted previously who prefer to be paid by check, or in other rare circumstances, such as where the Debtor is ending its relationship with a particular Wholesaler and the amount of the Chargeback has not yet been fully applied against subsequent orders. This same mechanism of setoff applies for Wholesaler Fees and Returns (discussed below).

20. By offering customary prompt pay discounts and Wholesaler Fees to Wholesalers, the Debtor is able to incentivize the Wholesalers to enter into contracts with the Debtor. In addition, allowing Wholesalers to set off prompt pay discounts, Wholesaler Fees, Chargebacks and Returns against amounts owing to the Debtor is a customary practice in the pharmaceutical industry. The Debtor believes that the failure to continue to allow the Wholesalers to purchase the product with the customary prompt pay discounts and Wholesaler Fees, or to allow for continued set off of prompt pay discounts, Wholesaler Fees, Chargebacks, and Returns against amounts owing to the Debtor, will result in such Customers ceasing to (a) enter into purchase agreements with the Debtor or (b) purchase the Debtor's product. Any interruption in purchases by Wholesalers will likely have a devastating impact on the Debtor's ability to continue to sell its product and be detrimental to its revenue stream.

21. In sum, the Debtor seeks authority to continue the Discount Programs in the ordinary course of business. The Debtor's average monthly liabilities for the Discount Programs are as follows: (i) Wholesaler Fees of approximately \$1.0 million, (ii) Chargebacks to Wholesalers of approximately \$400,000 and (iii) Rebate claims to MCOs/PBMs of approximately

\$900,000. The Debtor estimates that as of the Petition Date, (i) approximately \$2.2 million is outstanding for prepetition Wholesaler Fees with approximately \$1.3 million due in the interim period, (ii) 400,000 is outstanding for prepetition Chargeback claims with the entirety due in the interim period, and (iii) with respect to Rebate claims from MCOs/PBMs, approximately \$2.6 million in outstanding prepetition Rebates with approximately \$850,000 due in the interim period. The Debtor seeks the authority, but not the direction, to allow Wholesalers to continue to setoff Wholesaler Fees and Chargebacks against the Debtor's accounts receivable in the ordinary course and pursuant to prepetition customary terms between the Debtor and Wholesalers, and to pay Rebate claims to MCOs and PBMs when they become due in the ordinary course of business.

B. Government Programs

22. The Medicaid Drug Rebate Program ("MDRP") is a health program that includes the Centers for Medicare & Medicaid Services ("CMS"), State Medicaid Agencies, and participating drug manufacturers to help offset the Federal and State costs of most outpatient prescription drugs dispensed to Medicaid patients. In order to participate in MDRP, the Debtor is required to enter into agreements with two other Federal programs in order to have their drugs covered under Medicaid: A pricing agreement for the 340B Drug Pricing Program (the "340B Program") and a master agreement with the Secretary of Veterans Affairs for the Federal Supply Schedule. Each of these programs requires the Debtor to sell Contrave® at a substantial discount to WAC to the applicable Customers. In addition to MDRP, the Debtor also participates in SPAPs, which are intended to aid low-income elderly or persons with disabilities who do not qualify for MDRP.

23. **Federal Supply Schedule.** The Federal Supply Schedule collectively includes the Governmental Entities, and provides the maximum amount that can be charged to these Governmental Entities for pharmaceuticals based on a specific mandated formula set

annually. The Debtor was awarded a Federal Supply Schedule contract (the “FSS Contract”) in exchange for the Debtor providing federally mandated pricing to the Governmental Entities. Participants under the Federal Supply Schedule place orders for the product through Wholesalers who purchase the product from the Debtor and then ship the product directly to the hospitals and clinics. In accordance with the Federal Supply Schedule, in 2018, the Debtor charged member patients \$154.39 per 120ct bottle of Contrave®, a discount of approximately thirty-six percent (36%) to the Debtor’s current WAC price of \$241.73 per 120ct bottle.⁴ If the price of the product offered through the FSS Contract is lower than the WAC price, the Wholesaler will Chargeback the Debtor for the difference. The Debtor expects that the Contrave® discount will remain the same or increase in the future, contingent on price changes.

24. The Debtor seeks authority to continue operating pursuant to the FSS Contract in the ordinary course of business. The Debtor’s average monthly liability for Chargebacks related to the FSS Contract is approximately \$10,000, though Chargebacks and purchases are reconciled through the Debtor’s accounts receivable and do not generally result in cash payment. The Debtor seeks authority to allow Wholesalers to continue to setoff Chargebacks related to the FSS Contract against the Debtor’s accounts receivable in the ordinary course of business.

25. **340B Covered Entities.** Certain hospitals and health care facilities (the “340B Covered Entities”) provide the majority of their services to low income patients and receive payments from CMS to cover the costs of providing care to uninsured patients. Pursuant to the 340B Program, the Debtor provides its product to 340B Covered Entities at a discounted

⁴ The 2018 Federal Supply Schedule price includes The Industrial Funding Fee (“IFF”), a fee that is required to be added to a Federal Supply Schedule price to reimburse the VA National Acquisition Center for the costs incurred in operating the Federal Supply Schedule program. The IFF applicable to the VA FSS contract is 0.5 percent (0.5%) of total sales related to the Federal Supply Schedule program. The IFF payment is due 60 days following the end of each reporting quarter.

price set by statute, which is calculated on a quarterly basis. 340B Covered Entities submit a request for the product to one of the Debtor's Wholesalers and the Wholesaler fulfills that request and then submits a Chargeback to the Debtor for the difference between the price that the Wholesaler paid and the discounted price that the 340B Covered Entities paid for the product.

26. The Debtor's average monthly liability for Chargebacks related to the 340B Program is approximately \$390,000, but Chargebacks and purchases are reconciled through the Debtor's accounts receivable and do not generally result in a cash payment. By this Motion, the Debtor seeks authority to continue the 340B Program in the ordinary course of business and to apply any prepetition Chargebacks that may be outstanding against prepetition accounts receivable and, if necessary, against subsequent orders of the Debtor's products in the ordinary course of business.

27. **Medicaid Rebates.** MDRP covers certain outpatient drugs, including the Debtor's product, and requires the Debtor to enter into a national rebate agreement with the Secretary of the Department of Health and Human Services in exchange for Medicaid coverage of its product. The Debtor's Wholesalers provide the product to a retail pharmacy to be utilized by a Medicaid patient. Individual states collect product utilization data on the use of the product and send the Debtor a report and invoice. The Debtor is then responsible for paying a rebate ("Medicaid Rebate") on the product for each time that the product was dispensed to Medicaid patients. The amount of the Medicaid Rebate due for each unit of the individual product is based on a statutory formula. The Debtor pays the Medicaid Rebates to each State MDRP or SPAP on a quarterly basis, and the amount is shared between the states and the federal government to offset the overall cost of the prescription drugs under the Medicaid program. As of the Petition Date, the Debtor estimates that approximately \$250,000 has been accrued but has

not been invoiced for Medicaid Rebates with approximately \$150,000 due in the interim period. While this amount is not yet due and payable, it may become due and payable over the course of this Chapter 11 Case.

28. The Debtor's participation in the FSS Contract and the 340B Program requires the Debtor to participate in the MDRP and pay Medicaid Rebates. As a result, if the Debtor fails to fulfill its obligations under the MDRP, including payment of the Medicaid Rebates as they become due, it risks becoming excluded from all federal programs. As such, honoring Medicaid Rebates is integral to the Debtor's business, and the Debtor cannot risk the substantial harm that could arise from the failure to pay the Medicaid Rebates, including denial of coverage and damage to the Debtor's relationship with its Customers. Such a result would irreparably impair the Debtor's efforts to conduct its business during this Chapter 11 Case and maximize value. Consequently, the Debtor requests authorization to continue to make Medicaid Rebates pursuant to the MDRP and SPAPs during this Chapter 11 Case as related to both prepetition and postpetition sales of its products.

29. In addition, as noted above, the Debtor offers mandated price discounts as part of the FSS Contract and the 340B Program. These price discounts are honored by Wholesalers who, in turn, Chargeback the price difference between the discounted price and the WAC back to the Debtor. These Chargebacks are normally taken as credits against future payments by the Wholesalers to the Debtor. Thus, there will be prepetition amounts for these Chargebacks, which are going to be setoff against payments of prepetition receivables. The Debtor estimates the total prepetition Chargebacks at approximately \$400,000, which would be entirely setoff against the Debtor's prepetition accounts receivables and all in the interim period.

C. Sales Return Program

30. In the ordinary course of business, the Debtor's Customers may be unable to sell products it purchased from the Debtor because the product expires, the product is damaged and unsellable, there is a drop in demand, or for some other reason. Accordingly, the Debtor allows its Customers to return the expired and damaged products (a "Return") to the Wholesalers in exchange for credit within a limited time before and after the date of expiration (the "Sales Return Program"). Purchasers of Contrave® may return the expired product within six (6) months prior to and twelve (12) months after the expiration date, and may return damaged goods if the Debtor is notified of the damaged goods within five days of receipt of the damaged goods. Credits are then issued by the Debtor to the Wholesaler based on its purchase history and can be used to offset any amounts the Wholesaler owes the Debtor.

31. As of the Petition Date, the Debtor estimates that there is approximately \$70,000 in potential Returns of the Debtor's product, which would be setoff against the Debtor's prepetition accounts receivable entirely in the interim period. To maintain its Customers' goodwill and continued business, the Debtor seeks authorization to honor any prepetition Return requests and obligations under the Sales Return Program that occur postpetition in the ordinary course of business.

32. The ability of the Debtor to maximize the value of its business and its inventory is dependent on continuing the Customer Programs. Any delay in honoring the Debtor's obligations thereunder could severely disrupt the Debtor's efforts to maximize its value. Any failure to honor prepetition Customer obligations, even for a brief period of time, may drive away valuable Customers, thereby harming the Debtor's efforts to maximize the value of its inventory. Accordingly, the Debtor seeks authorization to continue the Customer Programs.

D. Managed Services Operations

33. The Debtor utilizes CIS by Deloitte (“CIS”) to provide managed services operations that include government price calculations, Medicaid and SPAPs claim validation and processing, MCO and PBM claim validation and processing, contract administration, and dispute resolution. Once Rebates or Medicaid Rebates have been validated and processed, CIS makes a funding request to the Debtor sufficient to fund payments to Medicaid, SPAPs, MCOs and PBMs, as applicable, in accordance with their terms of payment. As of the Petition Date, there is approximately \$650,000 of outstanding funding requests from CIS pertaining to Rebates due (these amounts are already reflected in the prepetition balances for Rebates noted above). CIS provides these ongoing services daily and such services are an integral part of the Debtor’s management of access to a significant segment of its target market. As of the Petition Date, there is approximately \$100,000 accrued and outstanding from CIS pertaining to its services with \$50,000 due in the interim period. Any interruption in CIS’s services will likely have a devastating impact on the Debtor’s ability to continue to sell its product and be detrimental to its revenue stream. Therefore, the Debtor seeks permission to continue paying CIS its service fees in the ordinary course, including any service fees that may have arose prepetition.

APPLICABLE AUTHORITY

34. The Debtor submits that an order authorizing it to (i) continue the Customer Programs as it determines to be appropriate; (ii) renew, modify, terminate or replace such Customer Programs or agreements that, in its discretion, is necessary and in the best interest of the Debtor’s estate, creditors and other parties in interest; and (iii) make payments owing on account of prepetition product sales, regardless of when the obligations were incurred, is in the best interests of the Debtor’s estate, its creditors, and all other parties in interest

A. The Debtor should be Authorized to Continue the Customer Programs in Its Discretion.

35. The Debtor, operating its business as debtor in possession under Bankruptcy Code sections 1107(a) and 1108, is a fiduciary “holding the bankruptcy estate and operating the business for the benefit of [its] creditors and (if the value justifies) equity owners.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” *Id.*

36. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.*; *see also In re Mirant Corp.*, 296 B.R. 427, 429-30 (Bankr. N.D. Tex. 2003) (allowing debtors to pay claims “reasonably believe[d]” to be authorized under the *CoServ* test or whose payment was necessary “in the exercise of their business judgment . . . in order for [the d]ebtors to continue their respective businesses”). The *CoServ* court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” *CoServ*, 273 B.R. at 497. The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim was a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

37. Honoring the Customer Obligations and maintaining the Customer Programs meets each element of the *CoServ* court's standard. As described above, preserving the value of the Debtor's business is contingent, in large part, upon continuing to operate in the ordinary course and the value of the Debtor's business can only be enhanced by continued customer loyalty and patronage. Approximately ninety-six percent (96%) of the Debtor's unit sales ultimately went to patients who received the Debtor's product pursuant to a Customer Program. Therefore, in the Debtor's business judgment, the uninterrupted maintenance of its Customer Programs is essential to maintaining such customer relations. Any disruption and adverse publicity that would necessarily result from discontinuing Debtor's Customer Programs would threaten its customer base and ultimately, its ability to maximize the value of its business. Accordingly, continuing the Customer Programs and honoring customer obligations is a valid exercise of the Debtor's fiduciary duties.

38. Motions seeking nearly identical relief for debtors in the biotech and pharmaceutical industry have been granted in this District. *See In re Dendreon Corporation*, Case No. 14-12515 (LSS) (Bankr. D. Del. Nov. 12, 2014 and Dec. 9, 2014) (granting interim and final relief); *In re Savient Pharmaceuticals, Inc.*, Case No. 13-12680 (MFW) (Bankr. D. Del. Oct. 16, 2013 and Nov. 19, 2013) (granting interim and final relief).

B. The Proposed Payments Are Appropriate Under Bankruptcy Code Section 363(b).

39. Under Bankruptcy Code section 363(b), a bankruptcy court is empowered to authorize a chapter 11 debtor to expend funds in the court's discretion outside the ordinary course of business. *See* 11 U.S.C. § 363(b)(1). In order to obtain approval for the use of estate assets outside the ordinary course of business, the debtor must articulate a valid business justification for the requested use. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989).

40. Once a debtor has articulated a valid business justification, “[t]he business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

41. The business judgment rule applies in chapter 11 cases. *See Integrated Res.*, 147 B.R. at 656 (noting that “Delaware business judgment rule principles have ‘vitality by analogy’ in Chapter 11” (citation omitted)); *see also Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtor’s management decisions.”).

42. As discussed above, the Debtor has determined, in the sound exercise of its business judgment, that maintaining the Customer Programs in the ordinary course of business is critical to ensure that the Debtor maintains its customer base. The failure to honor these obligations could have a material adverse impact on the Debtor’s continued operation and, by extension, its efforts to maximize the value for its stakeholders. Accordingly, the preservation and protection of the Debtor’s business through ongoing relationships with the Debtor’s Customers provides a sufficient business justification for satisfying obligations to Customers, even if such payment were deemed to be outside the ordinary course of business. *See Ionosphere Clubs, Inc.*, 98 B.R. at 175.

43. The Debtor therefore seeks authorization under Bankruptcy Code section 363(b) to honor prepetition obligations to Customers and continue the Customer Programs.

C. Maintenance of the Customer Programs Is also Appropriate Under Section 105 of the Bankruptcy Code and the Doctrine of Necessity.

44. Maintenance of the Customer Programs should be authorized under Bankruptcy Code section 105(a) and under the “doctrine of necessity.” The Court’s power to utilize the doctrine of necessity in chapter 11 cases derives from the Court’s inherent equity powers and its statutory authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The United States Supreme Court first articulated the doctrine of necessity over a century ago, in *Miltenberger v. Logansport C. & S.W. Ry. Co.*, 106 U.S. 286 (1882), in affirming the authorization by the lower court of the use of receivership funds to pay pre-receivership debts owed to employees, vendors and suppliers, among others, when such payments were necessary to preserve the receivership property and the integrity of the business in receivership. *See id.* at 309-12. The modern application of the doctrine of necessity is largely unchanged from the Court’s reasoning in *Miltenberger*. *See In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581-82 (3d Cir. 1981) (“[I]n order to justify payment under the ‘necessity of payment’ rule, a real and immediate threat must exist that failure to pay will place the [debtor’s] continued operation . . . in serious jeopardy.”).

45. The doctrine of necessity “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay pre-petition claims where such payment is essential to the continued operation of the debtor.” *In re Ionosphere Clubs, Inc.*, 98 B.R. at 176; *see also In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (stating that where the debtor “cannot survive” absent payment of certain prepetition claims, the doctrine of necessity should be invoked to permit payment); *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (“[T]he court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.”); *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr.

S.D. Ohio 1991) (“[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.”).

46. The doctrine of necessity is an accepted component of modern bankruptcy jurisprudence. *See Just For Feet*, 242 B.R. at 826 (approving payment of key inventory suppliers’ prepetition claims when such suppliers could destroy debtor’s business by refusing to deliver new inventory on eve of debtor’s key sales season); *In re Payless Cashways, Inc.*, 268 B.R. 543, 54647 (Bankr. W.D. Mo. 2001) (authorizing payment of critical prepetition suppliers’ claims when such suppliers agree to provide postpetition trade credit); *see also In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191-92 (Bankr. D. Del. 1994); *In re Ionosphere Clubs, Inc.*, 98 B.R. at 175.

47. Maintaining the Customer Programs, and satisfying any related prepetition obligations or fees, as needed in the Debtor’s business judgment, is consistent with the doctrine of necessity. As noted above, the Customer Programs are vital to the Debtor’s efforts to maximize the value of its estate. The potential harm and economic disadvantage that would stem from an inability to honor customer obligations is grossly disproportionate to the costs associated with the Customer Programs.

48. The relief requested herein is commonly granted in this District. *See, e.g., In re Dendreon Corporation*, Case No. 14-12515 (LSS) (Bankr. D. Del. Nov. 12, 2014 and Dec. 9, 2014) (granting interim and final relief); *In re Savient Pharmaceuticals, Inc.*, Case No. 13-12680 (MFW) (Bankr. D. Del. Oct. 16, 2013 and Nov. 19, 2013) (granting interim and final relief); *In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del. May 2, 2014); *In re Exide Technologies*, Case No. 13-11482 (KJC) (Bankr. D. Del. June 11, 2013 and July 11, 2013) (granting interim and final relief); *In re B456 Sys., Inc.*, Case No. 12-12859 (KJC)

(Bankr. D. Del. Nov. 7, 2012); *In re Blitz U.S.A., Inc.*, Case No. 11-13603 (PJW) (Bankr. D. Del. Dec. 5, 2011); *In re Graceway Pharms.*, Case No. 11-13036 (PJW) (Bankr. D. Del. Oct. 17, 2011).⁵

D. Immediate Relief Is Necessary to Avoid Immediate and Irreparable Harm.

49. Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003; *see also In re First NLC Fin. Servs., LLC*, 382 B.R. 547, 549 (Bankr. S.D. Fla. 2008) (holding that Rule 6003 permits entry of retention orders on an interim basis to avoid irreparable harm). The Third Circuit has interpreted the language “immediate and irreparable harm” in the context of preliminary injunctions. In that context, the court has instructed that irreparable harm is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 F. App’x 907, 910 (3d Cir. 2007) (citing *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Furthermore, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle Cnty.*, 40 F.3d 645, 653-55 (3d Cir. 1994). The Debtor submits that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

50. The Debtor also requests that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As described above, the relief

⁵ Because of the voluminous nature of the orders cited herein, they are not attached to this Motion. Copies of these orders, however, are available on request.

that the Debtor seeks in this Motion is necessary for the Debtor to operate its business without interruption and to preserve value for its estate. Accordingly, the Debtor respectfully requests that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

RESERVATION OF RIGHTS

51. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtor, a waiver of the Debtor's right to dispute any such claim, or an approval or assumption of any agreement or contract under section 365 of the Bankruptcy Code. The Debtor expressly reserves the right to contest any claim with respect to any Customer Program in accordance with applicable non-bankruptcy law. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtor's rights to dispute such claim subsequently.

NOTICE

52. Notice of this Motion shall be given to: (i) the U.S. Trustee, (ii) the parties included on the Debtor's list of thirty (30) largest unsecured creditors (iii) counsel to the DIP Administrative Agent, DIP Lenders, Prepetition Indenture Trustee and Secured Noteholders (each as defined in the First Day Declaration) (iv) all customers participating in the Customer Programs; (v) the Internal Revenue Service; (vi) the Office of the United States Attorney for the District of Delaware; and (vii) all parties entitled to notice pursuant to Local Bankruptcy Rule 9013-1(m). As this Motion is seeking "first day" relief, within two business days after entry of an order on this Motion, the Debtor will serve copies of this Motion and any order entered in respect to this Motion as required by Local Rule 9013-1(m). The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

CONCLUSION

53. WHEREFORE, the Debtor respectfully requests that the Court enter the Proposed Interim and Final Orders, substantially in the forms annexed hereto, granting the relief requested in this Motion and such other and further relief as may be just and proper.

March 12, 2018
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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Robert J. Dehney (No. 3578)
Andrew R. Remming (No. 5120)
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Proposed Counsel for Debtor and Debtor in Possession

EXHIBIT A

Proposed Interim Order

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

In re

Orexigen Therapeutics, Inc.,

Debtor.¹

Chapter 11

Case No. 18-10518 (___)

Re: D.I. _____

**INTERIM ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 363, 1107, AND 1108 AND FED.
R. BANKR. P. 6003 AND 6004 AUTHORIZING DEBTOR TO (I) HONOR CERTAIN
PREPETITION OBLIGATIONS TO CUSTOMERS AND TO CONTINUE CUSTOMER
PROGRAMS AND (II) PAY MEDICAID AND OTHER OBLIGATIONS**

Upon the motion (the “Motion”)² of the Debtor for an interim order (the “Interim Order”), pursuant to sections 105(a), 363, 1107, and 1108 of the Bankruptcy Code, and Bankruptcy Rule 6003 and 6004, authorizing the Debtor to continue to (i) honor prepetition obligations owed to Customers and otherwise continue its prepetition Customer Programs and practices in the ordinary course of business and (ii) pay Medicaid and other obligations; and upon the First Day Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest; and after due deliberation thereon and good and sufficient cause appearing therefor, it is hereby,

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED as set forth herein on an interim basis.

¹ The last four digits of the Debtor’s federal tax identification number are 8822. The Debtor’s mailing address for purposes of this Chapter 11 Case is 3344 North Torrey Pines Court, Suite 200, La Jolla, CA, 92037.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

2. Until such time as the Final Order is entered, the Debtor is authorized, but not directed, to continue the Customer Programs in the ordinary course of business, including the payment of prepetition amounts not to exceed \$2,820,000 inclusive of the Debtor's Customers setting off prepetition amounts, where applicable, against the Debtor's accounts receivable in the ordinary course and pursuant to prepetition customary terms between the Debtor and the Customers.

3. All applicable banks and financial institutions are (a) authorized and directed to receive, process, honor and pay any and all checks drawn on the payroll, drafts and other forms of payment, including fund transfers, used by the Debtor on account of the Customer Programs, whether presented before, on or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments, (b) authorized to rely on the representations of the Debtor as to which checks are subject to this Motion, and (c) prohibited from placing any holds on, or attempting to reverse, any automatic transfers on account of the Customer Programs; provided that the Debtor is authorized to issue new postpetition checks to replace any checks, drafts and other forms of payment, or effect new postpetition fund transfers, which may be inadvertently dishonored or rejected and to reimburse any expenses that may be incurred as a result of any bank's failure to honor a prepetition check.

4. The Debtor is authorized, but not directed, to continue, renew, replace, modify and/or terminate such of its Customer Programs as it deems appropriate, in its discretion, and in the ordinary course of business, without further application to the Court.

5. The provisions contained herein shall not be construed to limit, or in any way affect, the Debtor's ability to contest any claims, on any ground permitted by applicable law, and neither the provisions contained herein, nor any actions or payment made by the Debtor

pursuant to the Interim Order, shall be deemed an admission as to the validity of the underlying obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any ground that applicable law permits.

6. Nothing in the Interim Order or the Motion shall be deemed to constitute postpetition assumption, reaffirmation or adoption of any agreement under Bankruptcy Code section 365. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

7. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and that the relief requested is necessary to avoid immediate and irreparable harm.

8. Notwithstanding Bankruptcy Rule 6004(h), the Interim Order shall be effective and enforceable immediately upon entry hereof.

9. The final hearing on this Motion is set for [_____], 2018, at ___:___ [a.m./p.m.] (prevailing Eastern Time)]. Any objections or responses to entry of the proposed Final Order shall be filed and served, so as to be received by 4:00 p.m. (prevailing Eastern Time) no later than seven (7) days prior to the final hearing, upon: (i) the Debtor, care of Orexigen Therapeutics, Inc., 3344 North Torrey Pines Court, Suite 200, La Jolla, CA, 92037., Attention: Thomas Lynch, and (ii) proposed counsel for the Debtor, Hogan Lovells US LLP, 875 Third Avenue, New York, New York 10012, Attention: Christopher R. Donoho, III and John D. Beck and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market St., 16th Floor PO Box 1347, Wilmington, DE 19899-1347155 Attention: Robert J. Dehney, Andrew R. Remming and Jose F. Bibiloni.

10. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied by the contents of the Motion.

11. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in the Interim Order.

12. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Interim Order.

Dated: Wilmington, Delaware

_____, 2018

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Proposed Final Order

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

In re

Orexigen Therapeutics, Inc.,

Debtor. ¹

Chapter 11

Case No. 18-10518 (____)

Re: D.I. _____

FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 363, 1107, AND 1108 AND FED. R. BANKR. P. 6003 AND 6004 AUTHORIZING DEBTOR TO (I) HONOR CERTAIN PREPETITION OBLIGATIONS TO CUSTOMERS AND TO CONTINUE CUSTOMER PROGRAMS AND (II) PAY MEDICAID AND OTHER OBLIGATIONS

Upon the motion (the “Motion”)² of the Debtor for a final order (the “Final Order”), pursuant to sections 105(a), 363, 1107, and 1108 of the Bankruptcy Code, and Bankruptcy Rule 6003 and 6004, authorizing the Debtor to continue to (i) honor prepetition obligations owed to Customers and otherwise continue its prepetition Customer Programs and practices in the ordinary course of business and (ii) pay Medicaid and other obligations; and upon the First Day Declaration; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest; and after due deliberation thereon and good and sufficient cause appearing therefor, it is hereby,

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is GRANTED on a final basis as set forth herein.

¹ The last four digits of the Debtor’s federal tax identification number are 8822. The Debtor’s mailing address for purposes of this Chapter 11 Case is 3344 North Torrey Pines Court, Suite 200, La Jolla, CA, 92037.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

2. The Debtor is authorized, but not directed, to continue the Customer Programs in the ordinary course of business, including the payment of prepetition amounts not to exceed \$5,620,000 inclusive of the Debtor's Customers setting off prepetition amounts, where applicable, against the Debtor's accounts receivable in the ordinary course and pursuant to prepetition customary terms between the Debtor and the Customers.

3. All applicable banks and financial institutions are (a) authorized and directed to receive, process, honor and pay any and all checks drawn on the payroll, drafts and other forms of payment, including fund transfers, used by the Debtor on account of the Customer Programs, whether presented before, on or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments, (b) authorized to rely on the representations of the Debtor as to which checks are subject to this Motion, and (c) prohibited from placing any holds on, or attempting to reverse, any automatic transfers on account of the Customer Programs; provided that the Debtor is authorized to issue new postpetition checks to replace any checks, drafts and other forms of payment, or effect new postpetition fund transfers, which may be inadvertently dishonored or rejected and to reimburse any expenses that may be incurred as a result of any bank's failure to honor a prepetition check.

4. The Debtor is authorized, but not directed, to continue, renew, replace, modify and/or terminate such of its Customer Programs as it deems appropriate, in its discretion, and in the ordinary course of business, without further application to the Court.

5. The provisions contained herein shall not be construed to limit, or in any way affect, the Debtor's ability to contest any claims, on any ground permitted by applicable law, and neither the provisions contained herein, nor any actions or payment made by the Debtor pursuant to the Final Order, shall be deemed an admission as to the validity of the underlying

obligation or a waiver of any rights the Debtor may have to subsequently dispute such obligation on any ground that applicable law permits.

6. Nothing in the Final Order or the Motion shall be deemed to constitute postpetition assumption, reaffirmation or adoption of any agreement under Bankruptcy Code section 365. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any person.

8. Notwithstanding any applicability of any of the Bankruptcy Rules, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

9. The requirements set forth in Local Bankruptcy Rule 9013-1(b) are satisfied by the contents of the Motion.

10. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in the Final Order.

11. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Final Order.

Dated: Wilmington, Delaware

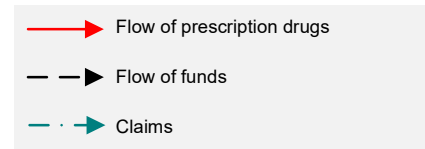
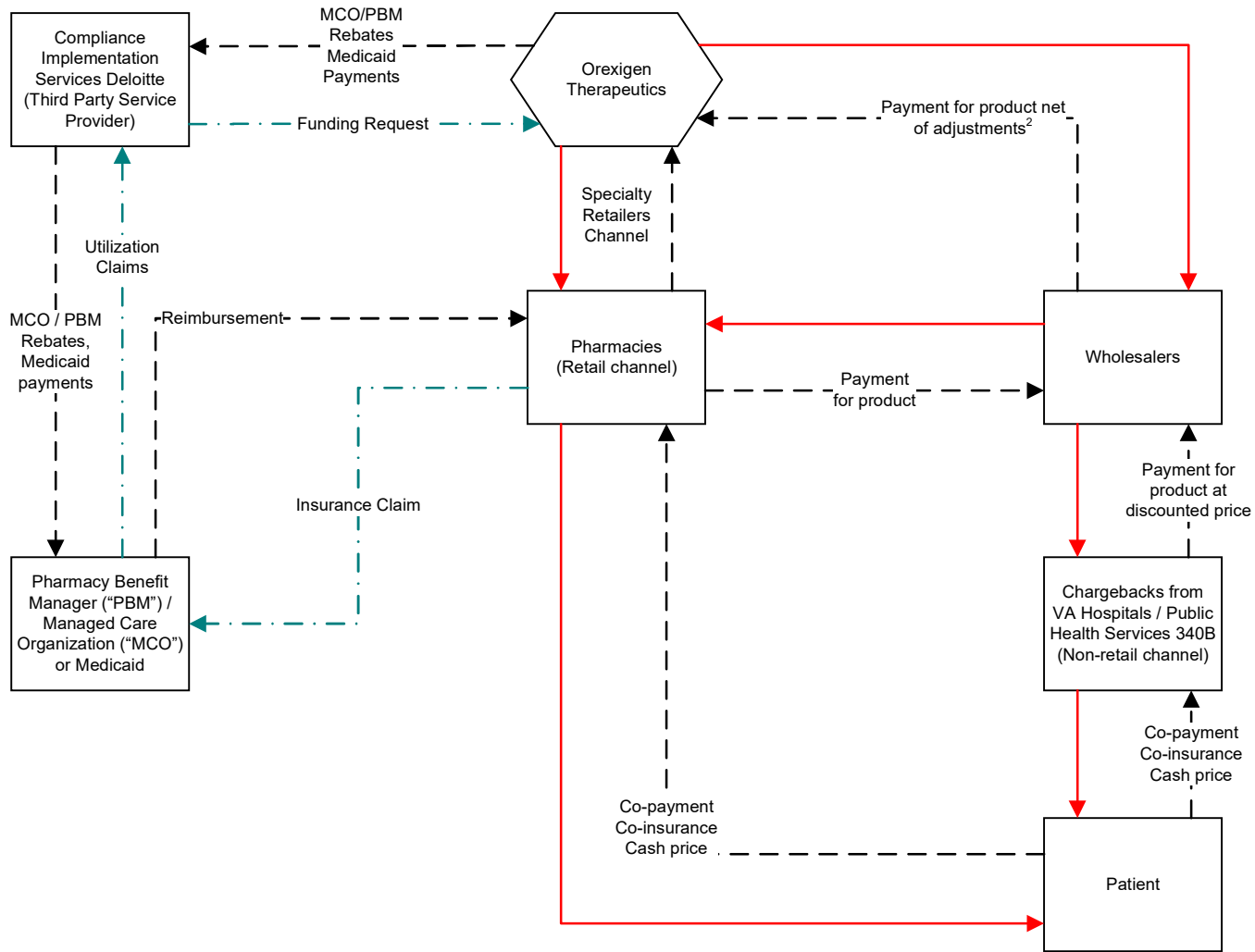
_____, 2018

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

Chart of Customer Programs

Orexigen Therapeutics
 Customer Programs
 US Sales Only¹



1. Does not include free home delivery or direct to physician/clinic sales channels
 2. Payment is made net of certain charges including prompt pay discounts, wholesaler fees, chargebacks, and returns