

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

In re

**Orexigen Therapeutics, Inc.,**

Debtor.<sup>1</sup>

Chapter 11

Case No. 18-10518 (\_\_\_)

**MOTION OF THE DEBTOR FOR INTERIM AND FINAL ORDERS (I)  
AUTHORIZING THE DEBTOR TO (A) PAY PREPETITION WAGES,  
SALARIES, AND OTHER COMPENSATION (B) PAY PREPETITION  
PAYROLL TAXES AND BENEFITS AND CONTINUE BENEFIT PROGRAMS  
IN THE ORDINARY COURSE, (II) DIRECTING BANKS TO HONOR CHECKS  
FOR PAYMENT OF PREPETITION EMPLOYEE PAYMENT AND PROGRAM  
OBLIGATIONS, AND (III) GRANTING RELATED RELIEF**

The above-captioned debtor and debtor in possession (the “Debtor”) hereby moves this Court for entry of interim and final orders (the “Motion”), substantially in the forms attached hereto as **Exhibit A** (the “Proposed Interim Order”) and **Exhibit B** (the “Proposed Final Order”), (i) authorizing but not directing the Debtor to (a) pay prepetition wages, salaries, and other compensation, and (b) pay prepetition payroll taxes and benefits and continue benefit programs in the ordinary course; (ii) directing banks to honor checks for payment of prepetition payment and program obligations; and (iii) granting related relief. In support of this Motion, the Debtor incorporates by reference the *Declaration of Michael A. Narachi in Support of First Day Relief* (the “First Day Declaration”), filed contemporaneously herewith, and respectfully states as follows:

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<sup>1</sup> 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**

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this Motion under 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This Motion is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and the Debtor confirms its consent pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested in this Motion are sections 105(a), 362, 363, and 507(a)(4)–(5) of title 11 of the United States Code (the “Bankruptcy Code”), as supplemented by Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 9013-1(m).

**GENERAL BACKGROUND**

4. On the date hereof (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (this “Chapter 11 Case”). 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.

5. The Debtor 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 are set forth in the First Day Declaration, which was filed contemporaneously with this Motion and is incorporated by reference.

**DEBTOR'S EMPLOYEE OBLIGATIONS AND PROGRAMS**

**A. Employee Salary and Expense Obligations**

6. The Debtor has approximately 111 employees in the U.S. (the "Employees") that conduct its normal business, including executive, management, financing and accounting, information technology, legal, and actuarial services.

**(i) Payroll**

7. All Employees are paid twice monthly, on the 15th and last day of each month. If either of these days falls on a weekend or holiday, employees are paid the day before the weekend or holiday. All required tax deductions and voluntary deductions are withheld automatically from paychecks. The Debtor's twice monthly Employee-related payroll obligations equal approximately \$865,000. The Debtor pre-funded ADP (defined below) on March 9, 2018 with the amounts necessary to satisfy the Employee-related payroll obligations due on March 15, 2018 to ensure that payroll would be processed on time. Although the Debtor does not anticipate owing any money on account of prepetition wages and salaries, out of an abundance of caution, the Debtor is seeking authority, but not direction, to pay prepetition Employee-related payroll obligations in an aggregate amount not to exceed \$100,000 in the interim period.

**(ii) Payroll Servicers**

8. Debtor utilizes ADP, LLC (“ADP”) as payroll service provider for Employees. ADP performs all services related to the Debtor’s Employee payroll, including payroll deductions and tax withholdings. Each payroll period, the Debtor pre-funds ADP with the amounts necessary to satisfy the Debtor’s payroll obligations two (2) business days in advance of the pay date. ADP then processes direct deposit transfers or checks. The services that ADP provides are critical to the smooth functioning of the Debtor’s payroll system. ADP is responsible for ensuring that (i) Employees are paid on time, (ii) appropriate deductions are made, (iii) payroll reporting is accurate, and (iv) appropriate amounts are remitted to the applicable taxing authorities and other payees. The Debtor pays ADP approximately \$2,000 per month for the aforementioned services (the “Payroll Maintenance Fees”). As of the Petition Date, the Debtor estimates that it owes ADP approximately \$4,000 on account of prepetition Payroll Maintenance Fees. The Debtor seeks authority to pay all Payroll Maintenance Fees in the ordinary course, including all prepetition fees.

**(iii) Payroll Deductions and Tax Withholdings**

9. ADP deducts certain amounts from Employees’ paychecks, including, without limitation: (i) pre-tax, optional contributions to health and dependent care, as described in detail below; (ii) other pre-tax and after-tax deductions payable pursuant to certain of the Employee benefit plans discussed below; (iii) certain amounts related to federal, state, and local income taxes, social security taxes, Medicare taxes, and taxes imposed by the law; (iv) matching payments on account of social security and Medicare taxes and, subject to certain limitations, additional amounts based upon a percentage of gross payroll for, among other things, state and federal unemployment insurance and (v) other miscellaneous deductions. The Debtor estimates that ADP withholds, on average, approximately 54% of each payroll in payroll deductions and

tax withholdings from Employees' paychecks, collectively. The Debtor pre-funds payroll deductions and tax withholdings to ADP two (2) business days in advance of the pay date. The Debtor's average liabilities twice-monthly for payroll deductions and tax withholdings total approximately \$467,000. The Debtor estimates that, as of the Petition Date, its liability for payroll deductions and tax withholdings is in the approximate amount of \$30,000. The Debtor is seeking authority, but not direction, to remit prepetition payroll deductions and tax withholdings in an aggregate amount not to exceed \$30,000 in the interim period.

10. In the ordinary course of processing payroll for the Employees, the Debtor may also be required by law, in certain circumstances, to withhold from certain Employees' wages amounts for various garnishments, such as tax levies, child support, and other court-ordered garnishments. Each pay cycle, the Debtor withholds such amounts from applicable Employees' paychecks and remits them to the appropriate authorities or entities on a monthly basis. On average, the Debtor withholds approximately \$2,000 in garnishments per month from Employees' wages and salaries and estimate that, as of the Petition Date, it holds approximately \$3,000 in prepetition garnishments that have not yet been remitted. The Debtor seeks authority to continue garnishing Employee wages in accordance with applicable law.

**(iv) *Expense Reimbursement***

11. In the ordinary course of business, the Debtor reimburses Employees for certain expenses incurred while performing their duties. Reimbursable expenses include payments for travel, lodging, reimbursable meals, business meals and entertainment, and other business-related activities. Non-executive staff (below Vice President-level) are entitled to expense reasonable and necessary business-related expenses while traveling on authorized company business. Travel expenses higher than those outlined in the Employee Handbook must be pre-approved by the Chief Financial Officer ("CFO"). Executive Staff (Vice President-level

and above) must also follow guidelines as outlined in the Employee Handbook; however, expenses higher than those outlined must be approved by either the CFO or respective Vice President. Employees submit expense reports via SAP Concur (“Concur”) when needed. Reports are then automatically routed to the Employee’s respective manager for review and electronic approval. Once approved by the manager, the expense report is routed to Accounts Payable for review. Accounts Payable reviews and processes the report for payment. Payment files are processed every day by Concur at 6:00 pm Pacific. Concur then transfers the funds to the Employee approximately two (2) business days after the payment file is processed (*e.g.*, if a payment file is processed on Monday, a corresponding ACH payment is made to the Employee on Wednesday).

12. The Debtor estimates that, on average, it is charged \$210,000 in Employee expense reimbursements per month. As of the Petition Date, the Debtor believes it is obligated to pay for approximately \$150,000 in outstanding prepetition expense reimbursements.

#### **B. Employee Benefits**

13. The Debtor also provides Employees with access to health and other benefit plans. For Employees, benefit plans include the following (along with a notation as to whether the Debtor or the Employee pays the applicable premium or cost):

<b>Benefit Plan</b>	<b>Premiums Paid By</b>
Medical	Orexigen Pays 85%
Dental	Orexigen Pays 85%
Vision	Orexigen Pays 85%
Basic Life Insurance	Orexigen Pays 100%
Basic Accidental Death & Dismemberment	Orexigen Pays 100%
Voluntary Insurance	Employee Pays 100%
Voluntary Accidental Death & Dismemberment	Employee Pays 100%
CIGNA Long-Term Disability	Orexigen Pays 100%
CIGNA Short-Term Disability	Orexigen Pays 100%
Orexigen 401(k) Plan	Orexigen and Employee
CONTRAVE Self-Funded Drug Plan	Orexigen Pays 100%

14. The Debtor is the primary contract party with the applicable coverage provider on the foregoing U.S. benefit programs, and is also the sponsor of the Orexigen 401(k) Plan.

**(i) *Medical, Dental and Vision Plans***

15. The Debtor offers coverage to eligible Employees, their spouses, and their dependents for medical, dental, vision, and other related benefits. All full-time Employees are eligible for these benefits (subject to the terms, conditions, and limitations of each program). Part-time employees may be eligible for the benefits package at the sole discretion of the Debtor (subject to the terms, conditions, and limitations of each program).

16. Debtor offers medical, dental, and vision insurance plans to eligible Employees through CIGNA Health and Life Insurance Co. ("CIGNA"). The Debtor offers both OAP and HMO medical plans. The Debtor initially pays 85% of the monthly premiums under the medical, dental and vision plans for each eligible U.S. Employee and his or her spouse and dependents.

17. In an average month, Debtor pays approximately \$160,000 in premiums under the medical, dental and vision plans, payable monthly in advance. As of the Petition Date, the Debtor does not owe any prepetition premiums under these plans.

**(ii) *Life and Accidental Death and Dismemberment & Long-Term and Short-Term Disability Insurance***

18. All of the Debtor's full-time Employees and their eligible dependents receive basic life insurance and accidental death and dismemberment coverage ("AD&D"), plus long-term ("LTD") and short-term disability ("STD") insurance. The Debtor initially funds 100% of the premiums under these plans for Employees. In an average month, Debtor pays approximately \$15,000 in premiums under these plans, payable monthly in advance. As of the

Petition Date, the Debtor does not owe any prepetition premiums under these plans. The AD&D benefit is equivalent to 100% of an Employee's salary up to a maximum of \$200,000 (amounts greater than \$200,000 will require a health statement). STD includes an elimination period of zero (0) days for an accident and seven (7) days for a sickness. The benefit pays 66.67% of an employee's weekly earnings, up to a weekly maximum of \$2,500. LTD includes an elimination period of 90 days. The benefit pays 66.67% of an employee's monthly earnings, not to exceed \$10,000 per month.

19. Eligible Employees may purchase supplemental personal insurance coverage. Participating Employees pay premiums for supplemental insurance through payroll withholding, which is then remitted to the appropriate provider. Employees may purchase additional life and AD&D insurance in \$10,000 increments, not to exceed \$300,000 (guarantee issue amount \$100,000). Spouses and children of employees may also purchase additional life and AD&D insurance.

**(iii) *COBRA Medical, Dental and Vision Coverage***

20. Former Employees are entitled to continue to participate in the Debtor's healthcare, dental and vision insurance coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1986 (as amended, "COBRA") for up to 18 months following the end of their employment (such coverage, the "COBRA Coverage"). Former Employees who elect to participate in the COBRA Coverage must pay a set amount, dependent on which type of plan they elect (*i.e.*, family or individual) to the Debtor's healthcare insurance provider. The Debtor currently has ten (10) former employees terminated prepetition that are currently entitled to participate in COBRA Coverage at the Debtor's cost for up to three (3) months past the Petition Date at a total cost of approximately \$15,200 per month including fees to IGOE Administrative Services ("IGOE Fees"). Additionally, one former employee is entitled to participate in COBRA

Coverage at the Debtor's cost for up to nine (9) months past the Petition Date at a cost of approximately \$1,000 per month including IGOE fees. The COBRA Coverage amounts billed to and paid by the Debtor for the months of January, February and March 2018 averaged approximately \$4,000 per month.

**(iv) *Workers' Compensation Insurance***

21. Debtor maintains a workers' compensation insurance policy that covers all Employees. The Debtor requests authority to continue the workers' compensation insurance policy in the ordinary course of business in its motion to maintain insurance programs, filed contemporaneously with this Motion.

**(v) *Paid Time-Off Benefits***

22. Employees accrue paid vacation days based on position and years of service (see the chart below for details). Employees in the part-time category (less than 30 hours a week) may accrue vacation time on a pro-rata basis with written approval of the Debtor. Temporary employees do not accrue vacation. Employees begin to accrue vacation on their start date, and are eligible to utilize the benefit as work schedules permit. Once the maximum accrual cap is reached (in accordance with the chart below), vacation will no longer be accrued until the accrued vacation drops below the cap. No Employee is permitted to use vacation time prior to actual accrual without the written approval of his or her manager. The Debtor does not "cash out" Employees for unused accrued vacation time at the end of the calendar year or at any other time while Employees remain employed by the Debtor. Upon termination, Employees are paid for accrued and unused vacation time that has been earned through the last day of work. The Debtor, from time to time, may require Employees to use vacation on specified days, with advanced written notice. Vacation time does not accrue while an Employee is on unpaid leave. As of the Petition Date, the Debtor's liability for accrued vacation time is estimated at

approximately \$1,000,000. Under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, certain obligations related to wages, salaries, commissions, vacation, severance, sick leave, and employee benefit plans are accorded priority in payment in an amount not to exceed \$12,850 for each employee to the extent such amounts accrued within 180 days of the petition date. As of the Petition Date, the Debtor estimates that approximately 64 Employees had accrued vacation time that exceeded the priority cap totaling approximately \$460,000. The remaining balance of accrued vacation time estimated by the Debtors at approximately \$540,000; however, is not a current cash-payment obligation as the Debtor's policy states that it is only to be paid out upon the Employee's termination.

23. The following is a chart that summarizes the Debtor's paid time-off benefits:

<b>Position</b>	<b>Years of Service</b>	<b>Hours Accrued per Pay Period</b>	<b>Annual Accrual Rate Number of Days</b>	<b>Maximum Accrual Cap in Days</b>
Vice President and above	1 to 3 years	6.67 hours	20 days	30 days
	4 to 10 years*	Depends on years of service	20 days <b>PLUS</b> accrual of 1 additional day/ each year of service; cap at 30 days	An amount equivalent to 1.5 times your then applicable annual accrual rate**
Those employees below the title of Vice President	1 to 3 years	5 hours	15 days	22.5 days
	4 to 10 years*	Depends on years of service	15 days <b>PLUS</b> accrual of 1 additional day/ each year of service; cap at 22.5 days	An amount equivalent to 1.5 times your then applicable annual accrual rate**

\*Effective on your anniversary date.

\*\*For example, if you have an annual accrual rate of 25 days, your maximum accrual cap will be 37.5 days.

24. Each calendar year, eligible Employees receive five (5) paid sick days. Unused sick days do not roll over to the next calendar year. The full amount of sick leave will be granted at the commencement of employment, and thereafter on January 1 of each year. Unused sick leave will expire on December 31 of each year. Accrued but unused paid sick leave does not carry over from year-to-year and will not be paid out at any time, including upon termination of employment.

25. Eligible Employees are also afforded paid time off each year of up to ten (10) days for bereavement and up to ten (10) days for jury duty. Employees are not disciplined for taking time off to perform their duties as volunteer firefighters, peace officers, or emergency rescue personnel. Employees may use any accrued vacation for these community service activities; otherwise, this time is unpaid. Employees are paid for official holidays. Employees are also eligible for unpaid leaves of absence consistent with the Uniformed Services Employment and Reemployment Rights Act and other applicable federal and state laws. Other paid or unpaid leaves of absence may be granted upon prior approval of the Debtor's chief executive officer.

**(vi) *Employee Wellness and Development Programs***

26. Debtor provides employees with a Wellness Program to encourage Employees to strive for good health both as individuals and collectively as a team. This plan does not include direct payment from the Debtor. Instead, if an Employee opts-in, that Employee's medical, dental, and vision benefits are 85% covered (as opposed to 75% covered if the employee does not opt-in). As of the Petition Date, the percentage of Employees that opt-in to this program is nearly 100%.

**(vii) *Contrave® Self-Funded Drug Plan***

27. The Debtor provides Employees with a Contrave® Self-Funded Drug Program through Ridgeway. The payment to Ridgeway averages \$2,000 per quarter encompassing a \$7 per order processing fee plus the cost of the product.

**(viii) *Retirement Plans***

28. Debtor sponsors a 401(k) retirement savings plan for the benefit of eligible Employees and former Employees. All such Employees who have completed three months of service (and are over the age of 21) are eligible to participate in the 401(k) plan. Employees may enter the plan on the first of the month after eligibility. Employees may choose either a traditional 401(k) account or a Roth 401(k) account. Employees who elect to participate in the traditional plan may defer up to 100% of their compensation on a pre-tax basis. The limit (as of 2018) is \$18,500 in one calendar year for participants under the age of 50. If the employee is 50 years or older, they may elect to defer an additional \$6,000 for the calendar year, for a maximum of \$24,500.

29. Employees who elect to participate in the Roth 401(k) program may elect to defer up to 100% of their compensation on a post-tax basis. The limit (as of 2018) is \$18,000 in one calendar year for participants under the age of 50. If the employee is 50 years or older, they may elect to defer an additional \$6,000 for the calendar year, for a maximum of \$24,000. Adjusted gross income limits as set forth for Roth IRA accounts do not apply for the Roth 401(k). Regarding vesting for both plans, the Debtor can make a matching contribution of \$0.50 on every \$1.00 contributed by an employee up to 6.0% of an Employee's annual salary. This matching contribution is determined by the Debtor's Board of Directors which reserves the right to change it at any time. Employee contributions are vested immediately at 100%. Debtor contributions, however, are subject to the following vesting schedule (vesting starts from the date

of hire, where one (1) year vesting is equal to 1,000 hours per year): 25% after one (1) year of service; 50% after two (2) years of service; 75% after three (3) years of service; and 100% after four (4) years of service. The plan is administered by Nationwide Insurance, and the Debtor pays a quarterly fee of \$1,000. The Debtor remits payment for the plan to Nationwide Insurance on a twice- monthly basis in line with the Debtor's pay cycle. The Debtor's average twice-monthly payment for the plan is approximately \$84,000. As of the Petition Date, the Debtor does not owe any amounts for the plan.

### **DEBTOR'S CONTRACTOR OBLIGATIONS**

30. In addition to its Employees, the Debtor relies on services from approximately 23 independent contractors (the "Independent Contractors") and a contractor provided by an employment agency (the "Agency Contractor") (together, the "Contractors").<sup>2</sup>

31. The Independent Contractors are individual service providers that, for the most part, receive a 1099 and have a SSN for their tax ID. They are also known as temporary employees or "temps" and provide usual and customary business service in support of the Debtor for a limited period of time (no longer than twelve (12) months). The Independent Contractors perform work in absence of an Employee (such as covering a leave of absence), during a temporary period of vacancy, and/or during period of increased work volume or other similar business necessity. They may work onsite or offsite and may be converted to an Employee at the Debtor's discretion.

32. The Debtor retains the Agency Contractor through an employment agency (the "Agency") to provide temporary support needed. The Agency bills the Debtor for work

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<sup>2</sup> The Debtor is contracted with Syneos Health (formerly inVentiv) for 50 salespeople. This contracted sales organization ("CSO") is paid monthly and also is paid incentive compensation five months in arrears.

provided by the Agency Contractor and charges fees as an addition to each worker's applicable hourly rate. The Debtor remits compensation to the Agency on account of the Agency Contractor's services upon services rendered.

33. As of the Petition Date, the Debtor estimates it may owe the Independent Contractors \$330,000 in the aggregate for prepetition services provided. As of the Petition Date, the Debtor estimates it may owe the Agency approximately \$15,000 in the aggregate for prepetition services provided by the Agency Contractor. The Debtor therefore seeks the authority, but not the direction, to pay \$345,000 on account of prepetition Contract-related Obligations in the interim period. The Debtor believes it is necessary to pay the obligations owed to the Contractors so that they will continue to assist with the Debtor's staffing needs as needed.

#### **RELIEF REQUESTED**

34. Because it is critical to preserve the value of the Debtor's business and prevent the disruption that such business will suffer if prepetition employment-related obligations are not paid when due or as expected, and additionally to maintain morale of the Debtor's workforce during this critical time, the Debtor requests entry of an interim order, attached hereto as **Exhibit A**, and a final order, attached hereto as **Exhibit B** (i) authorizing, but not directing, the Debtor to (a) pay all prepetition Employee-related claims and obligations and all prepetition Contractor-related claims and obligations in an aggregate amount not to exceed \$475,000 on an interim basis (b) pay all prepetition Employee and Contractor expense reimbursement claims in aggregate an amount not to exceed \$150,000 and (c) continue to offer, honor, and facilitate all Employee obligations and programs in the ordinary course of business during the pendency of this Chapter 11 Case; (ii) authorizing, but not directing, the Debtor to

reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for such payments where such method of payment has been dishonored postpetition; (iii) directing all banks to honor the Debtor's prepetition and postpetition checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for payment of the Employee-related obligations and Contractor-related obligations; and (iv) granting related relief.<sup>3</sup>

### **BASIS FOR RELIEF**

35. It is essential that the Debtor continues to honor all Employee-related and Contractor-related obligations to ensure the continued operation of its business and maintain continuity and morale of its workforce. The Debtor's operations may be severely impaired if the Debtor is not immediately granted authority to continue to honor obligations to its Employees and Contractors.

#### **A. Honoring Prepetition Employee Obligations is Appropriate Under Section 507 of the Bankruptcy Code.**

36. Under sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code, certain obligations related to wages, salaries, commissions, vacation, severance, sick leave, and employee benefit plans are accorded priority in payment in an amount not to exceed \$12,850 for each employee to the extent such amounts accrued within 180 days of the Petition Date.

11 U.S.C. §§ 507(a)(4)–(5). Courts have recognized that the individuals at issue need not be

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<sup>3</sup> By this Motion, the Debtor does not seek to modify the terms of any Employee program and do not seek to assume or reject such program to the extent that such program is determined to be an executory contract within the meaning of Section 365 of the Bankruptcy Code. Similarly, nothing in this Motion should be construed as a request for authorization to assume or reject any executory contract between the Debtor and any party. Furthermore, this Motion shall not be construed to limit, or in any way affect, the Debtor's right to contest on any grounds the amount claimed to be due as an Employee-related obligation. The Debtor does not waive the right to modify or terminate any Employee program to the extent that such right exists under the terms governing such program or as may be permitted or required by applicable law or further order of the Bankruptcy Court.

employees of the debtor, nor does that payment obligation have to be directly to the individual. *See, e.g., In re Integrated Health Servs., Inc.*, 291 B.R. 611, 612 (Bankr. D. Del. 2003) (MFW) (allowing third-party, nondebtor insurance company a priority claim in the amount of \$3.9 million for premiums paid by insurance company for workers' compensation coverage; payments were "contributions to an employee benefit plan" under section 507(a)(5)); *In re Corcoran*, 2010 WL 5207589, at \*1 (Bankr. D. Haw. Dec. 16, 2010) ("The plain language of [section 507(a)(4)] does not restrict priority to the claims of employees.").

37. The Debtor believes that a number of Employees are due payment in excess of the statutory priority cap of sections 507(a)(4) and 507(a)(5). However, the Debtor proposes to pay the Employees only up to the statutorily imposed limit for priority status of their claims, ensuring that granting the relief requested herein is consistent with the purpose of the Bankruptcy Code.

**B. Honoring Prepetition Employee and Contractor Obligations is Also Appropriate under Section 363 of the Bankruptcy Code.**

38. Section 363 of the Bankruptcy Code empowers the bankruptcy court to authorize a chapter 11 debtor to expend funds in the bankruptcy court's discretion outside the ordinary course of business. 11 U.S.C. § 363. Section 363(b)(1) provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). To obtain approval for the use of estate assets outside the ordinary course of business, a debtor must articulate a valid business justification for the requested use. *See In re Filene's Basement*, 2014 WL 1713416, \*12 (Bankr. D. Del. Apr. 29, 2014) (noting that under Section 363(b), "[w]here the debtor articulates a reasonable basis for its business decisions . . . courts will generally not entertain objections to the debtor's conduct") (quoting *In re Johns-Manville Corp.*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)); *In re*

*Landsource Cmtys. Dev. LLC*, 2009 WL 4874670, ¶ 15 (Bankr. D. Del. Nov. 25, 2009) (“Where valid business justification exists, a presumption exists ‘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 was in the best interests of the company.’”) (quoting *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1990)); *U.S. Trustee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 2003 WL 21738964, at \*12 (S.D.N.Y. July 28, 2003) (“To approve a transaction under § 363(b), the Bankruptcy Court must find that there is a good business reason to allow the transaction”); *In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003) (“[A] § 363 application requires a showing that there is a ‘good business reason to grant such an application.’”) (quoting *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

39. Honoring the prepetition Employee and Contractor obligations described herein serves the sound business purpose of maintaining the Debtor’s business operations, maximizing the value of the Debtor’s estate, and preserving the value of the Debtor while it seeks to restructure and sell its businesses. Accordingly, the Court should grant the requested relief under Section 363 of the Bankruptcy Code.

**C. Honoring Prepetition Employee and Contractor Obligations is Also Appropriate under the “Doctrine of Necessity.”**

40. Honoring prepetition Employee-related and Contractor-related obligations should also be authorized under section 105 of the Bankruptcy Code and the “doctrine of necessity.” Section 105 empowers the Court 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). Section 105(a) operates “to facilitate the implementation of other Bankruptcy Code provisions,” and in so doing it provides a “bankruptcy court with broad authority to exercise its equitable powers.”

*Ameriquest Mortgage Co. v. Nosek (In re Nosek)*, 544 F.3d 34, 43 (1st Cir. 2008) (internal citations omitted). These equitable powers are granted to effectuate the policies and goals of chapter 11, which include preserving the going concern value of a debtor, *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989), and to “create a flexible mechanism that will permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.” *Mich. Bureau of Workers’ Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279, 287 (S.D.N.Y. 1987); see also *In re Structurlite Plastics Corp.*, 86 B.R. 922, 932 (Bankr. S.D. Ohio 1988) (rejecting a bright line rule prohibiting payment of prepetition debts because it “may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code”).

41. Under the “doctrine of necessity” or “necessity of payment” rule, first articulated in *Miltenberger v. Logansport C. & S.W. R. Co.*, 106 U.S. 286 (1882), bankruptcy courts can exercise these equitable powers “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.” *Ionosphere Clubs*, 98 B.R. at 176; see, e.g., *In re Lehigh & N. Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (“[T]he ‘necessity of payment’ doctrine, as it has developed since its original enunciation in *Miltenberger*, teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [debtor] during reorganization, payment may be authorized even if it is made out of its corpus.”) (citation omitted); *In re LCI Holding Co., Inc.*, 2013 WL 1101111, \*2 (Bankr. D. Del. Mar. 15, 2013) (“The [d]octrine of [n]ecessity does justify the [p]lans. In a liquidating case such as this, the eligible employees’ efforts are necessary to preserve the [d]ebtor’s businesses.”); *In re Just For Feet, Inc.*, 242 B.R. 821, 825-26 (D. Del. 1999) (“The necessity of payment doctrine recognizes that paying certain

pre-petition claims may be necessary to realize the goal of chapter 11—a successful reorganization.”).

42. The Third Circuit has recognized that a debtor may pay prepetition claims under the doctrine of necessity when doing so furthers the continued operation and reorganization of the debtor. *In re Lehigh & N. Eng. Ry. Co.*, 657 F.2d at 581 (stating a court may authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor); *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-organization claims shall have been paid.”); *see also In re Motor Coach Indus. Int’l, Inc.*, 2009 WL 330993, at \*3 (D. Del. Feb. 10, 2009) (denying stay of appeal on grounds that “the viability of the ‘doctrine of necessity’ has not been brought into serious question by the courts in the Third Circuit”); *In re Just for Feet, Inc.*, 242 B.R. at 824-26 (noting that the Third Circuit permits debtors to pay prepetition claims that are essential to the continued operation of business).

43. As honoring the prepetition Employee-related and Contractor obligations is essential to the continued value and operation of the Debtor’s business, application of this Court’s Section 105(a) powers and the doctrine of necessity is appropriate in this case.

**HONORING CHECKS ISSUED AND OTHER TRANSFERS MADE IN RESPECT OF  
THE PAYMENT AND PROGRAM OBLIGATIONS**

44. To the extent any check or electronic transfer related to the Employee or Contractor obligations has not cleared as of the Petition Date, the Debtor requests that the Court authorize all banks, in the Debtor’s sole discretion, to receive, process, honor, and pay such checks or electronic transfers. If any party has not received payment for amounts owed on

account of the Employee or Contractor obligations, the Debtor seeks authority to issue replacement checks, re-issue electronic transfers, or otherwise make payments on account of Employee or Contractor obligations. The Debtor represents that each of the checks and electronic transfers can be readily identified as relating directly to the authorized payment of amounts owed on account of such obligations. Accordingly, if the requested relief is granted, checks and electronic transfers other than those relating to authorized payments will not be honored inadvertently.

**SATISFACTION OF BANKRUPTCY RULE 6003**

45. Bankruptcy Rule 6003 provides that to the extent relief is necessary to avoid immediate and irreparable harm, a bankruptcy court may approve a motion to “pay all or part of a claim that arose before the filing of the petition” prior to 21 days after the Petition Date. Fed. R. Bankr. P. 6003. As described above, the Debtor cannot operate its business absent continued services of the Employees and Contractors. The Debtor submits that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor, as described herein, and that Bankruptcy Rule 6003 has been satisfied.

**WAIVER OF BANKRUPTCY RULE 6004(a) AND (h) REQUIREMENTS**

46. Because the relief requested herein is necessary to avoid immediate and irreparable harm, to the extent required for the immediate implementation of the relief requested herein, the Debtor seeks a waiver of (i) the notice requirements under Bankruptcy Rule 6004(a); and (ii) the stay of the order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

**RESERVATION OF RIGHTS**

47. Nothing contained herein is or should be construed as: (a) an admission as to the validity of any claim against the Debtor; (b) a waiver of the Debtor’s right to dispute any

claim on any grounds; (c) a promise to pay any claim; (d) an assumption or rejection of any executory contract or unexpired lease pursuant to Bankruptcy Code section 365; or (e) otherwise affect the Debtor's rights under Bankruptcy Code section 365 to assume or reject any executory contract with any party subject to this Order. If this Court grants the relief sought herein, any payments made pursuant to the Court's order are not intended and should not be construed as an admission to the validity of any claim or a waiver of the Debtor's rights to dispute such claim subsequently.

**NOTICE**

48. Notice of this Motion is being provided to: (i) the United States Trustee; (ii) the Debtor's top 30 unsecured creditors as identified in its chapter 11 petition; (iii) counsel to the DIP Administrative Agent, DIP Lenders, Prepetition Indenture Trustee and Secured Noteholders (each as defined in the First Day Declaration) (iv) CIGNA, ADP, Syneos Health, Nationwide Insurance and all the Debtor's banks; (v) the Delaware Secretary of State; (vi) the Delaware State Treasury; (vii) the Internal Revenue Service; (viii) the Securities and Exchange Commission; (ix) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (x) any other party required to be provided notice under Local 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.

WHEREFORE, the Debtor respectfully requests entry of the Proposed Interim and Final Orders substantially in the form attached hereto as **Exhibit A** and **Exhibit B** granting the relief requested herein and such other relief as is just and proper under the circumstances.

March 12, 2018  
Wilmington, Delaware

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

/s/ Jose F. Bibiloni  
Robert J. Dehney (No. 3578)  
Andrew R. Remming (No. 5120)  
Jose F. Bibiloni (No. 6261)  
1201 N. Market St., 16th Floor  
P.O. Box 1347  
Wilmington, DE 19899-1347  
Telephone: (302) 658-9200  
Facsimile: (302) 658-3989  
rdehney@mnat.com  
aremming@mnat.com  
jbibiloni@mnat.com

- and -

Christopher R. Donoho, III  
Christopher R. Bryant  
John D. Beck  
**HOGAN LOVELLS US LLP**  
875 Third Avenue  
New York, NY 10022  
Telephone: (212) 918-3000  
Facsimile: (212) 918-3100  
chris.donoho@hoganlovells.com  
christopher.bryant@hoganlovells.com  
john.beck@hoganlovells.com

*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.<sup>1</sup>

Chapter 11

Case No. 18-10518 (\_\_\_)

**Re: D.I. \_\_\_**

**INTERIM ORDER GRANTING DEBTOR'S MOTION (I) AUTHORIZING THE DEBTOR TO (A) PAY PREPETITION WAGES, SALARIES, AND OTHER COMPENSATION (B) PAY PREPETITION PAYROLL TAXES AND BENEFITS AND CONTINUE BENEFIT PROGRAMS IN THE ORDINARY COURSE, (II) DIRECTING BANKS TO HONOR CHECKS FOR PAYMENT OF PREPETITION EMPLOYEE PAYMENT AND PROGRAM OBLIGATIONS, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the "Motion")<sup>2</sup> of the above-captioned debtor and debtor in possession (the "Debtor"), styled *Motion of the Debtor for Interim and Final Orders (I) Authorizing the Debtor to (a) Pay Prepetition Wages, Salaries, and other Compensation (b) Pay Prepetition Payroll Taxes and Benefits and Continue Benefit Programs in the Ordinary Course (II) Directing Banks to Honor Checks for Payment of Prepetition Employee Payment and Program Obligations, and (III) Granting Related Relief*, and upon the *Declaration of Michael A. Narachi in Support of First Day Relief* (the "First Day Declaration"); and the Court having jurisdiction to consider the Motion and the relief requested therein 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 February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms not defined in this Order are defined in the Motion.

consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and the relief requested being in the best interests of the Debtor and its estate and creditors; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED on an interim basis as set forth herein.
2. Until such time as the Final Order is entered, the Debtor is authorized, but not directed, in its sole discretion, (i) to pay any and all prepetition amounts relating to their ordinary course Employee-related obligations and programs and the Contractor-related obligations, provided, however, that, payments of prepetition amounts under this Order shall not exceed \$12,850 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code and shall not in the aggregate exceed \$475,000; (ii) to reimburse Employees for prepetition expenses in an aggregate amount not to exceed \$150,000; (iii) to continue the Employee programs and practices in the ordinary course to the extent such Employee programs and practices were in effect immediately prior to the filing of this Chapter 11 Case; and (iv) to continue making payments postpetition for Employee-related programs as they become due.
3. Nothing in this Order authorizes the Debtor to cash out unpaid vacation/leave time upon termination of an Employee, unless applicable state law requires such

payment, and in no event shall such payments exceed \$12,850 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code.

4. The Debtor is further authorized, but not directed, in its sole discretion, to pay all prepetition processing fees associated with, and all costs incident to, payment of the foregoing obligations.

5. The Debtor is further authorized to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for prepetition payments approved by the Court in this Order where such method of payment has been dishonored postpetition.

6. All banks and other financial institutions on which checks were drawn or electronic payment requests made in connection with the payment of the prepetition obligations approved herein are authorized and directed to (i) receive, process, honor, and pay all such checks and electronic payment requests when presented for payment (assuming that sufficient funds are then available in the Debtor's bank accounts to cover such payments) and (ii) rely on the Debtor's designation of any particular check or electronic payment request as approved by this Order.

7. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (i) an admission as to the validity of any claim against the Debtor; (ii) a waiver of the Debtor's right to dispute any claim on any grounds; (iii) a promise or requirement to pay any claim; (iv) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion; (v) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the

Bankruptcy Code; or (vi) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable law.

8. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall create, nor is intended to create, any rights in favor of, or enhance the status of, any claim held by any person or entity.

9. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) are waived.

10. The relief granted in this Order is necessary to avoid immediate and irreparable harm to the Debtor and (i) the requirements of Bankruptcy Rule 6003 are deemed satisfied and (ii) the requirements of Bankruptcy Rule 6004(h) are waived.

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

12. 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.

13. Nothing in this Order authorizes or approves any payment subject to section 503(c) of the Bankruptcy Code.

14. The hearing to consider entry of an order granting the relief requested in the Motion on a final basis shall be held on \_\_\_\_\_, 2018 at \_\_\_\_\_ (Eastern Time); and any objections to entry of such order shall be in writing, filed with the Court, and served upon (i) counsel to the Debtor, (ii) the United States Trustee, and (iii) counsel for any statutory committee appointed in these cases so as to be received no later than 4:00 p.m. (Eastern Time) on \_\_\_\_\_, 2018.

15. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, enforcement and/or interpretation of this Order.

\_\_\_\_\_, 2018  
Wilmington, Delaware

\_\_\_\_\_  
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.<sup>1</sup>

Chapter 11

Case No. 18-10518 (\_\_\_)

**Re: D.I. \_\_\_**

**FINAL ORDER GRANTING DEBTOR'S MOTION (I) AUTHORIZING THE DEBTOR TO (A) PAY PREPETITION WAGES, SALARIES, AND OTHER COMPENSATION (B) PAY PREPETITION PAYROLL TAXES AND BENEFITS AND CONTINUE BENEFIT PROGRAMS IN THE ORDINARY COURSE, (II) DIRECTING BANKS TO HONOR CHECKS FOR PAYMENT OF PREPETITION EMPLOYEE PAYMENT AND PROGRAM OBLIGATIONS, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the "Motion")<sup>2</sup> of the above-captioned debtor and debtor in possession (the "Debtor"), styled *Motion of the Debtor for Interim and Final Orders (I) Authorizing the Debtor to (a) Pay Prepetition Wages, Salaries, and other Compensation (b) Pay Prepetition Payroll Taxes and Benefits and Continue Benefit Programs in the Ordinary Course (II) Directing Banks to Honor Checks for Payment of Prepetition Employee Payment and Program Obligations, and (III) Granting Related Relief*, and upon the *Declaration of Michael A. Narachi in Support of First Day Relief* (the "First Day Declaration"); and the Court having jurisdiction to consider the Motion and the relief requested therein 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 February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with

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<sup>1</sup> 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.

<sup>2</sup> Capitalized terms not defined in this Order are defined in the Motion.

Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and the relief requested being in the best interests of the Debtor and its estate and creditors; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED on a final basis.
2. The Debtor is authorized, but not directed, in its sole discretion, (i) to pay any and all prepetition amounts relating to its ordinary course Employee-related obligations and programs and the Contractor-related obligations, provided, however, that, aggregate payments of prepetition amounts under this Order shall not exceed \$12,850 per individual Employee or Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code; (ii) to reimburse Employees for prepetition expenses; (iii) to continue the Employee programs and practices in the ordinary course to the extent such Employee programs and practices were in effect immediately prior to the filing of this Chapter 11 Case; and (iv) to continue making payments postpetition for Employee-related programs as they become due.
3. Nothing in this Order authorizes the Debtor to cash out unpaid vacation/leave time upon termination of an Employee, unless applicable state law requires such payment, and in no event shall such payments exceed \$12,850 per individual Employee or

Contractor in accordance with the priority cap provided in section 507(a)(4)–(5) of the Bankruptcy Code.

4. The Debtor is further authorized, but not directed, in its sole discretion, to pay all prepetition processing fees associated with, and all costs incident to, payment of the foregoing obligations.

5. The Debtor is further authorized to reissue checks, wire transfers, automated clearing house payments, electronic payments, or other similar methods of payment for prepetition payments approved by the Court in this Order where such method of payment has been dishonored postpetition.

6. All banks and other financial institutions on which checks were drawn or electronic payment requests made in connection with the payment of the prepetition obligations approved herein are authorized and directed to (i) receive, process, honor, and pay all such checks and electronic payment requests when presented for payment (assuming that sufficient funds are then available in the Debtor's bank accounts to cover such payments) and (ii) rely on the Debtor's designation of any particular check or electronic payment request as approved by this Order.

7. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall be deemed: (i) an admission as to the validity of any claim against the Debtor; (ii) a waiver of the Debtor's right to dispute any claim on any grounds; (iii) a promise or requirement to pay any claim; (iv) an implication or admission that any particular claim is of a type specified or defined in this Order or the Motion; (v) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the

Bankruptcy Code; or (vi) a waiver of the Debtor's rights under the Bankruptcy Code or any other applicable law.

8. Notwithstanding the relief granted in this Order and any actions taken pursuant to such relief, nothing in this Order shall create, nor is intended to create, any rights in favor of, or enhance the status of, any claim held by any person or entity.

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

10. 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.

11. Nothing in this Order authorizes or approves any payment subject to section 503(c) of the Bankruptcy Code.

12. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, enforcement and/or interpretation of this Order.

\_\_\_\_\_, 2018  
Wilmington, Delaware

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE