

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934

Date of Report: March 16, 2020
(Date of earliest event reported)

BIORESTORATIVE THERAPIES, INC.
(Exact Name of Registrant as Specified in Charter)

Delaware	000-54402	91-1835664
(State or Other Jurisdiction of Incorporation)	(Commission File No.)	(IRS Employer Identification Number)
40 Marcus Drive, Melville, New York		11747
(Address of Principal Executive Offices)		(Zip Code)

Registrant's telephone number, including area code: (631) 760-8100

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
None	N/A	N/A

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company ☒

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

Item 1.01 Entry into a Material Definitive Agreement.

On March 20, 2020, BioRestorative Therapies, Inc. (the “**Company**”) entered into a stalking horse asset purchase agreement (the “**Asset Purchase Agreement**”) with Phoenix Cell Group Holdings LLC, an affiliate of John M. Desmarais (the “**Purchaser**”), to acquire substantially all of the Company’s assets (the “**Sale**”).

Pursuant to the terms and subject to the conditions of the Asset Purchase Agreement, the purchase price is \$500,000 in cash, subject to adjustment (the “**Cash Component**”), plus the Credit Bid Amount, the Expense Reimbursement and the aggregate Cure Amounts (as such terms are defined in Asset Purchase Agreement). The Asset Purchase Agreement is subject to certain closing conditions, including certain orders being entered by the Bankruptcy Court (as defined in Item 1.03 below) and other customary closing conditions detailed in the Asset Purchase Agreement.

The Asset Purchase Agreement remains subject to higher or better offers, as well as approval of the Bankruptcy Court. The Asset Purchase Agreement provides for a breakup fee equal to 2% of the sum of the Cash Component, the Credit Bid (exclusive of amounts loaned in 2016 and 2017 by Mr. Desmarais and his affiliate) and the Cure Amounts and also provides for reimbursement of up to \$250,000 of the Purchaser’s expenses incurred in connection with the Asset Purchase Agreement and the DIP Loan Agreement (as defined in Item 1.03 below), each of which is payable upon certain termination events in accordance with the terms of the Asset Purchase Agreement.

The closing of the Sale is scheduled to be held on the second business day following satisfaction of the conditions set forth in the Asset Purchase Agreement.

The foregoing description of the Asset Purchase Agreement and the transactions contemplated thereby, including the Sale, does not purport to be complete and is qualified in its entirety by reference to the text of the Asset Purchase Agreement, which is filed as Exhibit 2.1 to this Current Report on Form 8-K and incorporated herein by reference.

Also, see Item 1.03 for a discussion of the DIP Loan Agreement.

Item 1.03 Bankruptcy or Receivership.

Chapter 11 Filing

On March 20, 2020 (the “**Petition Date**”), the Company filed a voluntary petition commencing a case under chapter 11 of title 11 of the U.S. Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Eastern District of New York (the “**Bankruptcy Court**”). The Company’s chapter 11 case (the “**Chapter 11 Case**”) is being administered under the caption, *In re: BioRestorative Therapies, Inc.*, Case No. 8-20-71757. The Company will continue to operate its business as a “debtor-in-possession” under the jurisdiction of the Bankruptcy Court and in accordance with the applicable provisions of the Bankruptcy Code and orders of the Bankruptcy Court.

In connection with the Chapter 11 Case, the Company will be filing a motion (the “**DIP Motion**”) seeking, among other things, interim and final approval of postpetition, debtor-in-possession financing (the “**DIP Financing**”) on the terms and conditions set forth in the DIP Loan and Security Agreement (the “**DIP Loan Agreement**”), dated as of March 19, 2020, by and between the Company and Phoenix Cell Group Holdings LLC (the “**DIP Lender**”). The DIP Loan Agreement provides for a senior secured superpriority debtor-in-possession credit facility of \$2,775,628 (including a rollup of existing loans of approximately \$1,351,355) (the “**DIP Facility**”), of which \$750,000 will be available following entry of the Interim DIP Order (defined below) and until the entry of the final order approving the DIP Loan Agreement (the “**Final DIP Order**”), secured by a first priority lien on all tangible and intangible property and assets of the Company, now owned or hereafter acquired, subject to certain carve outs. The Company will seek interim approval of the DIP Loan Agreement at a hearing before the Bankruptcy Court as promptly as possible as part of its “first day” relief, with a final hearing to be scheduled thereafter.

The proceeds from the DIP Financing will be used, subject to the order of the Bankruptcy Court approving the DIP Motion on an interim basis (the “**Interim DIP Order**”) and the Final DIP Order, (a) for working capital and other general purposes of the Company, including the acquisition of a director’s and officer’s liability insurance run-off and tail policy; (b) United States Trustee fees; (c) Bankruptcy Court approved professional fees and other administrative expenses arising in the Chapter 11 Case; (d) costs relating to the Sale; (e) interest, fees, costs and expenses incurred in connection with the DIP Financing, including professional fees, each subject to the terms and conditions of the DIP Loan Agreement, the orders of the Bankruptcy Court approving the DIP Loan Agreement and consistent with the financing budget attached to the DIP Motion as an exhibit (the “**DIP Budget**”), subject to certain exceptions as provided in the DIP Loan Agreement.

The maturity date of the DIP Financing will be the earliest to occur of (a) September 30, 2020; (b) the date that is 30 days after entry of the Interim DIP Order if the Final DIP Order has not been entered by the Bankruptcy Court; (c) the date of Bankruptcy Court approval of, or acceptance by the Company of, any bid for a material portion of the Company’s assets which does not provide for the payment in full of all obligations under the DIP Facility; (d) the termination by the DIP Lender upon the occurrence of an event of default under the DIP Facility or (e) the closing of the Sale.

Interest on the outstanding principal amount of the loans under the DIP Loan Agreement will be payable quarterly in arrears and on the maturity date at the rate of 8% per annum, except that the Company will have the option to add to the principal amount of the DIP Facility up to 4% of such interest instead of paying it in cash. Upon the occurrence and during the continuance of an event of default, all obligations under the DIP Loan Agreement will bear interest at a rate equal to the then current rate plus an additional 2% per annum.

The foregoing description of the DIP Loan Agreement does not purport to be complete and is qualified in its entirety by reference to the text of the DIP Loan Agreement, which is filed as Exhibit 10.1 to this Current Report on Form 8-K and incorporated herein by reference.

Item 2.04 **Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.**

The commencement of the Chapter 11 Case described in Item 1.03 above may constitute an event of default that may accelerate the Company's obligations under outstanding promissory notes in the aggregate approximate principal amount of up to \$7,669,020 (collectively, the "Notes").

Any efforts to enforce the payment obligations under the Notes are automatically stayed as a result of the filing of the Chapter 11 Case, and the creditors' rights of enforcement in respect of the Notes are subject to the applicable provisions of the Bankruptcy Code.

Item 5.02 **Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.**

(e) On March 16, 2020, the Company and Mark Weinreb, its Chief Executive Officer, entered into an agreement (the "**Weinreb Agreement**") pursuant to which, among other matters, the term of his employment agreement with the Company was extended to the earlier of (i) September 30, 2020 or (ii) the effective date of a plan of liquidation of the Company.

The foregoing description of the Weinreb Agreement does not purport to be complete and is qualified in its entirety by reference to the text of the Weinreb Agreement, which is filed as Exhibit 10.2 to this Current Report on Form 8-K and incorporated herein by reference.

Item 7.01 **Regulation FD Disclosure.**

Cautionary Information Regarding Trading in the Company's Securities

The Company cautions that trading in the Company's securities during the pendency of the Chapter 11 Case is highly speculative and poses substantial risks. Trading prices for the Company's securities may bear little or no relationship to the actual recovery, if any, by the holders of the Company's securities in the Chapter 11 Case. Based on the values for the Company's business contemplated by the Asset Purchase Agreement referred to herein, the Company expects that existing Company stockholders will receive no recovery at the end of the Chapter 11 Case, consistent with legal priorities.

Coventry Action

On March 11, 2020, in the action entitled Coventry Enterprises, LLC vs. BioRestorative Therapies, Inc., pending in the United States District Court of the Eastern District of New York (the "**Court**"), the Court ordered that the Company (i) convene and hold a special meeting, immediately and by no later than March 18, 2020, of the Board of Directors of the Company (the "**Board**"), for approval of the certain changes to the shares of the Company, as set forth below; (ii) approve a reverse split and/or a stock consolidation, solely of the Company's outstanding shares, at a ratio of 1,000 to 1, as being in the best interest of the Company; and (iii) approve of the continuation of the Company's current total authorized shares of common stock to remain at 2,000,000,000 shares; and (iv) approve of the Company's decision to call a special meeting of shareholders of the Company, within ten days of the special meeting of the Board and by not later than March 25, 2020, to approve: a) such 1,000 to 1 reverse stock split of the outstanding shares of its common stock; and b) such continuation of the authorized total of 2,000,000,000 shares, as approved by the Board and as being in the best interest of the Company; and (v) approve, as expeditiously as practicable and at the Company's sole cost and expense, the filing of such necessary and appropriate papers and instruments as may be required by the Securities and Exchange Commission ("**SEC**"), the State of Delaware and/or state securities regulatory authorities, and/or by the self-regulatory organizations, as may be required to immediately implement such changes in the shares as set forth by the order. On March 18, 2020, the Board considered the matter, and, based upon the Court order, determined to approve the foregoing items, including the 1,000 to 1 reverse split, subject to the Company having available funds to effectuate such items.

Forward-Looking Statements

This Current Report on Form 8-K contains certain forward-looking statements within the meaning of the “safe harbor” provisions of the Private Securities Litigation Reform Act of 1995, as amended, based on our current expectations, estimates and projections about our operations, financial condition, results of operations, and liquidity. Statements containing words such as “may,” “believe,” “anticipate,” “expect,” “intend,” “plan,” “project,” “estimate,” or similar expressions constitute forward-looking statements. These forward-looking statements include, but are not limited to, statements regarding expectations about the timing and execution of the Company’s strategic transactions (including the contemplated sale of substantially all of the Debtor’s assets), and the operating expectations during the pendency of the Chapter 11 Case. Potential factors that could affect such forward-looking statements include, among others, risks and uncertainties relating to the Chapter 11 Case, including, but not limited to, the Company’s ability to obtain Bankruptcy Court approval of motions filed in the Chapter 11 Case (including, but not limited to, the DIP Motion and the Bidding Procedures Motion), the effects of the Chapter 11 Case on the Company and on the interests of various constituents, Bankruptcy Court rulings in the Chapter 11 Case and the outcome of the Chapter 11 Case in general, the length of time the Company will operate under the Chapter 11 Case, risks associated with third-party motions in the Chapter 11 Case, the conditions to which the Company’s DIP Financing is subject and the risk that these conditions may not be satisfied for various reasons, including for reasons outside of the Company’s control; uncertainty associated with evaluating and completing any strategic or financial alternative as well as the Company’s ability to implement and realize any anticipated benefits associated with any alternative that may be pursued; the consequences of the acceleration of the Company’s debt obligations; the trading price and volatility of the Company’s common stock and the risks related to trading on the OTC Pink Market and the other factors disclosed in the section entitled “Management’s Discussion and Analysis of Financial Condition and Results of Operations - Factors that May Affect Future Results and Financial Condition” in the Company’s most recent Annual Report on Form 10-K filed with the SEC, as updated from time to time in our subsequent filings with the SEC. Readers are cautioned not to place undue reliance on these forward-looking statements, which reflect management’s analysis only as of the date hereof. Such forward-looking statements are not guarantees of future performance or results and involve risks and uncertainties that may cause actual performance and results to differ materially from those predicted. Reported results should not be considered an indication of future performance. Except as required by law, the Company undertakes no obligation to publicly release the results of any revision to these forward-looking statements that may be made to reflect events or circumstances after the date hereof or to reflect the occurrence of unanticipated events.

The information in this Item 7.01 shall not be deemed “filed” for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, nor shall it be deemed incorporated by reference in any filing under the Securities Act of 1933, as amended, except as shall be expressly set forth by specific reference in such filing. The filing of this Item 7.01 of this report shall not be deemed an admission as to the materiality of any information herein that is required to be disclosed solely by reason of Regulation FD.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

- 2.1 Asset Purchase Agreement, dated as of March 19, 2020, by and between BioRestorative Therapies, Inc. and Phoenix Cell Group Holdings LLC*
- 10.1 DIP Loan and Security Agreement, dated as of March 19, 2020, by and between BioRestorative Therapies, Inc. and Phoenix Cell Group Holdings LLC*
- 10.2 Letter agreement, dated March 16, 2020, between BioRestorative Therapies, Inc. and Mark Weinreb

* Certain schedules and exhibits omitted pursuant to Item 601(b)(2) of Regulation S-K promulgated by the SEC. The Company agrees to furnish a supplemental copy of any omitted schedule or exhibit to the SEC upon request.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

BIORESTORATIVE THERAPIES, INC.

Dated: March 20, 2020

By: /s/ Mark Weinreb

Mark Weinreb
Chief Executive Officer

STALKING HORSE ASSET PURCHASE AGREEMENT¹

BY AND AMONG

**PHOENIX CELL GROUP HOLDINGS LLC,
a Delaware limited liability company**

and

**BIORESTORATIVE THERAPIES, INC.,
a Delaware corporation**

March 19, 2020

This draft is not binding and its transmittal is not otherwise intended to give rise to any obligation. Proposed terms are subject to change based upon negotiations and further review by the management and board of directors (or similar governing body) of each Party, and there will be no obligation to consummate any transaction, unless and until definitive agreements have been executed and delivered.

¹ **Note to Seller:** Buyer's comments to this draft remain subject in all respect to the completion of legal, tax and financial diligence, review of the complete Disclosure Schedules and Schedules to the APA and draft Ancillary Documents (including the Bid Procedures and Sale Order).

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STALKING HORSE ASSET PURCHASE AGREEMENT

THIS STALKING HORSE ASSET PURCHASE AGREEMENT (this “*Agreement*”) is made and entered into as of March 19, 2020 (the “*Execution Date*”), by and among **PHOENIX CELL GROUP HOLDINGS LLC**, a Delaware limited liability company, or its Permitted Designees (as defined below) (“*Buyer*”); and **BioRESTORATIVE THERAPIES, INC.**, a Delaware corporation (“*Seller*”). Seller and Buyer are sometimes referred to collectively as the “*Parties*” and each individually as a “*Party*.”

WITNESSETH:

WHEREAS, Seller will file a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “*Bankruptcy Code*”), administered under a case number to be assigned by the Clerk of the Bankruptcy Court (the “*Bankruptcy Case*”), before the United States Bankruptcy Court for the Eastern District of New York (the “*Bankruptcy Court*”), within one day of entering into the DIP Loan Agreement (such date the petition is actually filed, the “*Filing Date*”) and Seller shall continue to manage its property and operate its business as a debtor and, upon the Filing Date, a debtor-in-possession in the Bankruptcy Case;

WHEREAS, Seller desires to sell to Buyer all of the Acquired Assets, subject to the assumption by Buyer of the Assumed Liabilities, and Buyer desires to purchase from Seller the Acquired Assets and assume the Assumed Liabilities, in each case, upon the terms and conditions hereinafter set forth;

WHEREAS, the Parties intend to effectuate the transactions contemplated hereby, including the purchase and sale of the Acquired Assets and the assumption of the Assumed Liabilities (the “*Asset Purchase*”), pursuant to Sections 105, 363, 365 and 1146 of the Bankruptcy Code;

WHEREAS, the execution and delivery of this Agreement and Seller’s ability to consummate the transactions contemplated hereby are subject, among other things, to consideration of Alternative Bids (if any) and the entry of the Sale Order pursuant to, *inter alia*, Sections 363 and 365 of the Bankruptcy Code;

WHEREAS, the Parties desire to consummate the transactions contemplated hereby as promptly as practicable after the Bankruptcy Court enters the Sale Order; and

WHEREAS, the Parties desire to make certain representations, warranties, covenants and agreements specified herein.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. DEFINITIONS; INTERPRETATION.

(a) Definitions. In addition to the terms defined elsewhere in this Agreement, the following terms shall have the respective meanings specified below:

“Accounts Receivable” means all accounts receivable, trade receivables, notes receivable and other rights to payment of Seller or any Acquired Subsidiary, and the full benefit of all security for such accounts receivable or rights to payment, including, but not limited to, all receivables in respect of goods shipped or products sold or services rendered to customers by Seller or any Acquired Subsidiary, any other miscellaneous accounts receivable of Seller or any Acquired Subsidiary, and any claim, remedy or other right of Seller or any Acquired Subsidiary related to any of the foregoing.

“Action” means any complaint, claim, charge, prosecution, indictment, action, suit, arbitration, audit, hearing, litigation, inquiry, investigation or proceeding (whether civil, criminal, administrative, investigative or informal) commenced, brought or asserted by any Person or group of Persons or Governmental Authority or conducted or heard by or before any Governmental Authority or any arbitration tribunal.

“Affiliate” means, with respect to any Person, (i) a spouse or member of the immediate family of such Person, (ii) any member, manager, director, officer or partner of such Person, (iii) any corporation, partnership, business, association, limited liability company, firm, trust or other entity of which such Person is a member, manager, director, officer, trustee, or partner or owns or controls or is the beneficiary of, directly or indirectly, more than twenty percent (20%) of the voting stock or other equity interests and (iv) any other Person who either directly or indirectly through one or more intermediaries is in control of, is controlled by, or is under common control with, such Person. For purposes of this definition, ***“control”*** means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of securities, partnership interests or by contract, assignment, credit arrangement, as trustee or executor, or otherwise, and the terms ***“controls,” “controlling”*** and ***“controlled by”*** shall have correlative meanings.

“Alternative Bid” means a higher or better competing bid, including in consideration of any sale, transfer, liquidation, or disposition of any of the Acquired Assets or of a plan of reorganization or liquidation with respect to any of the Acquired Assets.

“Alternative Transaction” means one or more agreements or understandings to sell, transfer, or otherwise dispose of any material portion of the Acquired Assets, either alone or together with any other portion of the Business, in a transaction or series of transactions, including any Alternative Bid, with one or more Persons, other than Buyer, any sale of stock, equity, or voting interests in any of Seller or any Acquired Subsidiary, and any merger, amalgamation, reorganization, restructuring, plan of reorganization, liquidation or refinancing, or any other similar corporate transaction directly or indirectly involving Seller or any Acquired Subsidiaries or a material portion of the Acquired Assets or Assumed Liabilities.

“Assumption Agreement(s)” means that certain assignment and assumption agreement(s) to be executed and delivered by Seller and Buyer at Closing, in form and substance reasonably agreeable to Seller and Buyer.

“Benefit Plans” means, collectively, any bonus, pension, profit sharing, deferred compensation, incentive compensation, stock ownership, stock purchase, stock option, phantom stock, stock appreciation right, retirement, vacation, severance, pay in lieu of notice, change-of-control, disability, death benefit, hospitalization, medical, worker’s compensation, supplementary unemployment benefits, or other plan, arrangement, program or practice (whether or not written) or any employment/independent contracting agreement providing compensation or benefits to any current or former employee, officer, director or independent contractor of Seller or any beneficiary thereof or entered into, maintained or contributed to, as the case may be, by Seller that have or could have any obligation or liability other than government sponsored workers compensation, pension, health insurance, parental insurance, prescription drugs, and employment/independent contracting insurance plans, including, (i) any **“employee welfare benefit plan”** (as defined in Section 3(2) of ERISA), whether or not terminated and (ii) **“employee pension benefit plan”** (as defined in Section 3(1) of ERISA), whether or not terminated.

“Bid Procedures” means such bid procedures as are filed with the Bankruptcy Court in form and substance reasonably acceptable to each of Buyer and Seller, together with such changes reasonably approved by Buyer thereon, if any, as shall have been required by the Bankruptcy Court.

“Bid Procedures Order” means an order of the Bankruptcy Court, in form and substance reasonably acceptable to each of Buyer and Seller, approving the Bid Procedures and the amount, timing and terms of payment of the Break-Up Fee and the Expense Reimbursement as set forth herein.

“Business” means the business of Seller and any Acquired Subsidiaries conducted as of the date hereof.

“Business Day” means any day other than a Saturday, Sunday, or other day on which commercial banks in New York, New York, are authorized or required by Law to be closed.

“Cash Component” means an amount equal to the aggregate of (a) cash in the amount of \$500,000; *plus* (b) an amount, which in no event shall be less than zero, equal to (i) the Maximum Principal Amount *minus* (ii) the Credit Bid Amount.

“Claim” has the meaning given that term in Section 101(5) of the Bankruptcy Code and includes, *inter alia*, all rights, claims, causes of action, defenses, debts, demands, damages, offset rights, setoff rights, recoupment rights, obligations and liabilities of any kind or nature under contract, at law or in equity, known or unknown, contingent or matured, liquidated or unliquidated, and all rights and remedies with respect thereto.

“Code” means the Internal Revenue Code of 1986, any amendments thereto, any successor statutes and any regulations promulgated thereunder.

“Contract” means any contract, purchase order, lease or sublease, license or sublicense, agreement to settle litigation or claims, or other agreement or instrument, whether written or oral, including, but not limited to, any agreement or any contract related to the use of the property of business.

“Credit Bid Amount” means an amount equal to the aggregate DIP Indebtedness as of the Closing that is bid by Buyer pursuant to section 363(k) of the Bankruptcy Code, as allowed by Order(s) of the Bankruptcy Court.

“Cure Amounts” means all cash amounts that, pursuant to section 365 of the Bankruptcy Code, will be required to be paid as of the Closing Date to cure any monetary defaults on the part of Seller under the Acquired Agreements, in each case to the extent such Contract was entered into prior to the commencement of the Bankruptcy Cases and as a prerequisite to the assumption of such Acquired Agreements under section 365 of the Bankruptcy Code; provided that, in the case of any Contract, such Contract is executory.

“DIP Indebtedness” shall mean all obligations and indebtedness of Seller and its Affiliates to Buyer or any Affiliate of Buyer, whether now or hereafter owing or existing, including, without limitation, the New Money DIP Loan, the Existing Loans, all obligations under the Existing Loan Documents (as defined in the DIP Loan Agreement), all obligations under the DIP Loan Agreement, and all other obligations or undertakings made by or for the benefit of Seller or any of its Affiliates to or for the benefit of Buyer or any Affiliate of Buyer under any other loan agreement, promissory note or undertaking now existing or hereafter entered into by Seller (or any of its Affiliates) with Buyer or any Affiliate of Buyer, together with all interest and other sums payable in connection with any of the foregoing, as allowed by Order(s) of the Bankruptcy Court.

“DIP Loan Agreement” shall mean that certain DIP Loan and Security Agreement, dated as of the date hereof, entered into by Seller, as Borrower, and Buyer, as Lender.

“Environmental Law” means any Law (i) relating to pollution or the protection, preservation or restoration of human health (in regards to exposure to Hazardous Materials) or the environment (including air, surface water, groundwater, drinking water supply, surface land, subsurface land, plant and animal life or any other natural resource), or any exposure to or release of, or the management of (including the use, storage, recycling, treatment, generation, transportation, processing, handling, labeling, production or disposal of) any Hazardous Materials or (ii) that regulates, imposes liability (including for enforcement, investigatory costs, cleanup, removal or response costs, natural resource damages, contribution, injunctive relief, personal injury or property damage) or establishes standards of care with respect to any of the foregoing. The term “Environmental Law” includes, without limitation, any common law or equitable doctrine (including, without limitation, injunctive relief and tort doctrines such as negligence, nuisance, trespass and strict liability) that may impose liability or obligations for injuries or damages due to or threatened as a result of the presence of, exposure to, or ingestion of, any Hazardous Materials.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended, and any successor statute thereto, and any regulations promulgated thereunder.

“**Existing Loans**” has the meaning assigned to such term in the DIP Loan Agreement.

“**Expense Reimbursement**” means the actual out-of-pocket costs, expenses, and fees, including legal, accounting, and other third party advisory or service costs, expenses, and fees incurred by Buyer and its Affiliates in connection with evaluating, investigating, negotiating, documenting, consummating, and performing the transactions contemplated by this Agreement, the DIP Loan Agreement (including those costs, fees and/or expenses specified in Section 9.5 of the DIP Loan Agreement) to the extent that such costs, fees and/or expenses are not actually paid to Buyer, as Lender, pursuant to the DIP Loan Agreement or are otherwise not included in the Credit Bid Amount, and any other Transaction Document, in an amount not to exceed \$250,000 (the “**Expense Reimbursement Cap**”).

“**Final Order**” means any order, ruling or judgment of the Bankruptcy Court or any other court of competent jurisdiction, as to which the time to file an appeal, a motion for rehearing or a petition for writ of *certiorari* has expired and no such appeal, motion or petition is pending.

“**GAAP**” means United States generally accepted accounting principles.

“**General Intangibles**” means all intangible assets now owned or hereafter acquired by Seller or any Acquired Subsidiary related to the Business, including all right, title and interest that Seller or such Acquired Subsidiary may now or hereafter have in or under any Acquired Agreement, all payment intangibles, rights in customer lists, all telephone and facsimile numbers, email addresses and other directory listings used primarily in connection with the Business, interest in business associations, licenses, proprietary or confidential information, technical information, procedures, designs, knowledge, skill, expertise, experience, processes, rights in models, rights in drawings, uncertificated securities, checking and other bank accounts, rights to receive dividends, distributions, cash, instruments and other property in respect of or in exchange for pledged equity securities and investment property, and rights of indemnification.

“**Governmental Authority**” means any shall mean any (a) nation, state, province, tribal, county, city, town, village, district, or other jurisdiction of any nature; (b) federal, state, local, provincial, municipal, foreign, or other government; (c) governmental or quasi-governmental authority of any nature (including any government agency, ministry, branch, department, official, or entity and any court or other tribunal); (d) multi-national organization or body; or (e) body exercising, or entitled to exercise, any administrative, executive, judicial, legislative, police, regulatory, or taxing authority or power of any nature.

“**Hazardous Materials**” means all substances defined or regulated as hazardous, a pollutant or a contaminant under any Environmental Law, including any regulated pollutant or contaminant (including any constituent, raw material, product or by-product thereof), petroleum or natural gas hydrocarbons or any liquid or fraction thereof, asbestos or asbestos-containing material, polychlorinated biphenyls, any hazardous or solid waste, and any toxic, radioactive, infectious or hazardous substance, material or agent.

“Intellectual Property” means all rights, title and interests in and to all intellectual property rights of every kind and nature however denominated, throughout the world, including (i) patents and patent applications, including continuations, divisionals, continuations-in-part, reissues or reexaminations and patents issuing thereon (collectively, **“Patents”**), (ii) trademarks, service marks, trade dress, logos, corporate names, trade names, social media accounts and handles, URLs and Internet domain names, together with the goodwill exclusively associated with any of the foregoing, and all applications and registrations therefor (collectively, **“Marks”**), (iii) copyrights (including such rights in software) and registrations and applications therefor, and works of authorship (collectively, **“Copyrights”**), (iv) designs, databases, data compilations, Software, database rights and any other rights in Software or other technology, (v) trade secrets and other proprietary and confidential information, including know-how, inventions (whether or not patentable), processes, formulations, technical data and designs, in each case, excluding any rights in respect of any of the foregoing that comprise or are protected by Patents (collectively, **“Trade Secrets”**), and (vi) rights arising under Law or Contract relating to any of the foregoing.

“IP Ancillary Rights” means, with respect to any Intellectual Property, as applicable, all income, royalties, proceeds and liabilities at any time due or payable or asserted under or with respect to any of the foregoing or otherwise with respect to such Intellectual Property, including all rights to sue or recover at law or in equity for any past, present or future infringement, misappropriation, dilution, violation or other impairment thereof, and, in each case, all rights to obtain any other IP Ancillary Right.

“Inventory” means all “inventory,” as such term is defined in the UCC, now owned or hereafter acquired by Seller or any Acquired Subsidiary, wherever located (including in-transit inventory), and without limiting the foregoing, all inventories of materials, parts, raw materials, packaging materials, supplies, spare parts, work-in-process and finished goods and products, including those items listed on Schedule 1(a), which Schedule 1(a) shall be updated, as reasonably practical, by Seller immediately prior to the Closing.

“Knowledge of Seller” means that any officer or senior executive of Seller has, or at any time had, actual knowledge of the item or matter, or received written notice of the fact or matter.

“Law” means any federal, state, provincial, local, foreign, international or supranational law (including common law), statute, treaty, ordinance, rule, regulation, Order, code, or other similar authority enacted, adopted, promulgated, or applied by any Governmental Authority.

“Liability” or **“Liabilities”** means any and all Claims, demands, fines, liabilities, losses, obligations, penalties, judgments, damages, charges, costs, debts and indebtedness (whether direct or indirect, known or unknown, absolute or contingent, asserted or unasserted, accrued or unaccrued, matured or unmatured, determined or determinable, liquidated or unliquidated, or due or to become due, and whether in contract, tort, strict liability, successor liability or otherwise), and including all costs and expenses related thereto (including fees, discounts, expenses of legal counsel, experts, engineers and consultants, and costs of investigations).

“Lien” means any “Interest” as that term is used in Section 363(f) of the Bankruptcy Code, lien (including any mechanics lien), encumbrance, license, pledge, mortgage, indenture, deed of trust, security interest, pledge, hypothecation, claim, lease, charge, escrow, option, right of first offer, right of first refusal, preemptive right, easement, servitude, reservation, covenant, encroachment, right of use, right of way, security agreement or other similar agreement, arrangement, contract, commitment, understanding or obligation (whether written or oral and whether or not relating in any way to credit or the borrowing of money) of any kind with respect to any Person, or any proxy, voting trust or agreement, transfer restriction under any shareholder or similar agreement or encumbrance or any other right of a third party in respect of an asset of such Person.

“Maximum Principal Amount” means an amount no greater than \$2,775,628.12, equal to the sum of (a) the New Money DIP Loan (whether drawn or undrawn, and in the amount approved by Order(s) of the Bankruptcy Court), *plus* (b) the Rollup (in the amount approved by Order(s) of the Bankruptcy Court).

“New Money DIP Loan” has the meaning assigned to such term in the DIP Loan Agreement.

“Order” means any judgment, order, administrative order, writ, stipulation, injunction (whether permanent or temporary), award, decree or similar legal restraint of, or binding settlement having the same effect with, any governmental Action.

“Ordinary Course of Business” means the ordinary and usual course of day-to-day operations of Seller, consistent with Seller’s past custom and practice (including with respect to quantity and frequency) through the date hereof.

“Owned Real Property” means all real property and interests in real property owned by Seller or any Acquired Subsidiary, together with all buildings, structures, fixtures and improvements erected thereon, and any and all rights, privileges, easements, licenses, hereditaments and other appurtenances of Seller or such Acquired Subsidiary relating thereto.

“Permitted Encumbrances” means (i) statutory Liens for current Taxes not yet due, (ii) vendor’s, mechanics’, materialmans’, carriers’, workers’, landlords’, repairmans’, warehousemans’ and other similar Liens (A) with respect to Liabilities that are not yet due and payable, or if due, are not delinquent, (B) that are being contested in good faith by appropriate proceedings and for which adequate reserves (based on good faith estimates of management) have been set aside for the payment thereof or (C) arising or incurred in the Ordinary Course of Business relating to obligations to which there is no default on the part of Seller or any Acquired Subsidiary and which are not, individually or in the aggregate, material to the operation of the Business and do not materially affect the market value or continued use of the asset encumbered thereby, (iii) Liens imposed or promulgated by applicable Law or any Governmental Authority with respect to real property, including zoning, building or similar restrictions which are not violated by (A) the current use or occupancy of such real property, (B) the proposed use, occupancy or development thereof or (C) the operation of the Business, or any violation of which could not materially adversely affect the market value or continued use of the asset encumbered thereby, (iv) utility easements, minor encroachments, rights of way, imperfections in title, charges, easements, rights of way (whether recorded or unrecorded), restrictions, declarations, covenants, conditions, defects and similar Liens or Claims, but not including any monetary Liens, that are imposed by any Governmental Authority having jurisdiction thereon or otherwise are typical for the applicable property type and locality as do not individually or in the aggregate materially interfere with the present occupancy under, or use or market value of the respective Owned Real Property or real property subject to any Real Property Lease or otherwise materially impair the operation of the Business, (v) any lien constituting or arising in connection with an Intellectual Property license and (vi) Liens to be released at or prior to Closing; provided that, in each case enumerated in this definition, such Lien shall only be a Permitted Encumbrance if it cannot otherwise be removed, discharged, released or transferred, as the case may be, pursuant to Section 363(f) of the Bankruptcy Code or otherwise.

“**Person**” means any individual, corporation, partnership, proprietorship, joint venture, limited liability company, association, joint-stock company, trust, unincorporated organization, Governmental Authority, or other entity, organization or institution of any type whatsoever.

“**Personal Data**” means any information that, alone or in combination with other information held by the Business, allows for the identification of or contact with a Person or can be used to identify a Person and any other information that constitutes personal information under any applicable Law.

“**Real Property Lease**” means any lease, sublease, license or other agreement under which Seller or any Acquired Subsidiary leases, subleases, licenses, uses or occupies (in each case whether as landlord, tenant, sublandlord, subtenant or by other occupancy arrangement), or has the right to use or occupy, now or in the future, any real property.

“**Rejected Agreements**” means those Contracts that are not Acquired Agreements. Subject to Section 2(f)(i), any Contract not expressly designated as an “Acquired Agreement” by Buyer by the Closing Date shall be considered a “Rejected Agreement” for purposes of this Agreement.

“**Rejection Damages Claims**” means all claims arising from or related to the rejection of a Contract under Sections 365 or 502(g) of the Bankruptcy Code, including any administrative expense claims arising from the rejection of Contracts previously assumed.

“**Rollup**” has the meaning assigned to such term in the DIP Loan Agreement.

“**Sale Hearing**” means the hearing conducted by the Bankruptcy Court to approve the transactions contemplated hereby or a competing transaction.

“**Sale Motion**” means one or more motions and supporting documentation, in form and substance satisfactory to Buyer, filed by Seller pursuant to, *inter alia*, Sections 363 and 365 of the Bankruptcy Code to secure entry of the Bid Procedures Order and the Sale Order by the Bankruptcy Court.

“**Sale Order**” means a Final Order of the Bankruptcy Court in form and substance reasonably acceptable to each of Buyer and Seller, pursuant to, *inter alia*, Sections 105, 363 and 365 of the Bankruptcy Code (i) approving this Agreement and the terms and conditions hereof, including the Break-Up Fee and the Expense Reimbursement, (ii) authorizing and approving, *inter alia*, the sale of the Acquired Assets to Buyer on the terms and conditions set forth herein free and clear of all Liabilities and Liens (other than Permitted Encumbrances), the assignment to Buyer of, and the assumption by Buyer of, the Assumed Liabilities, and the assignment to Buyer of, and the assumption by Buyer of, the Acquired Agreements, and (iii) containing certain findings of facts, including, without limitation, a finding that Buyer is a good faith purchaser pursuant to Section 363(m) of the Bankruptcy Code.

“Software” means computer software programs and databases, including all source code, object code, firmware, specifications, designs and documentation therefor.

“Subsidiary” means any corporation, partnership or limited liability company with respect to which a specified Person (or a Subsidiary thereof), directly or indirectly, owns a majority of the common stock or other equity interest, or has the power to vote or direct the voting of sufficient securities to elect a majority of the directors, managers or other governing body of such corporation, partnership or limited liability company.

“Successful Bidder” means the bidder who shall have submitted the highest or otherwise best bid at the conclusion of the Auction in accordance with the Bid Procedures and Bid Procedures Order.

“Systems” means all networks, servers, switches, endpoints, Software, platforms, electronics, platforms, websites, storage, firmware, hardware, and related information technology or out-sourced services, and all electronic connections between them.

“Tax” means any federal, state, provincial, local, foreign or other income, alternative, minimum, inheritance, accumulated earnings, personal holding company, corporation, franchise, capital stock, net worth, capital, profits, windfall profits, capital gain, gross receipts, value added, sales, use, goods and services, excise, customs duties, transfer, conveyance, mortgage, registration, stamp, documentary, recording, premium, severance, environmental (including taxes under Section 59A of the Code), real property, personal property, ad valorem, intangibles, rent, occupancy, license, occupational, employment, unemployment insurance, social security, disability, workers’ compensation, payroll, health care, withholding, estimated or other similar tax, duty or other governmental charge or assessment imposed by any Governmental Authority responsible for the administration or imposition of such or deficiencies thereof (including any and all interest, penalties, additions to tax or additional amounts imposed by any Governmental Authority with respect thereto, whether disputed or not).

“Tax Return” means any return, election, report, declaration, form or similar filing required to be filed with respect to Taxes, including any Claim for refund, information return, amended return, declaration of estimated taxes or statement relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

“Transaction Documents” means, collectively, this Agreement, the Escrow Agreement, the DIP Loan Agreement, the Bill(s) of Sale, the Assumption Agreement(s) and each other agreement, document or instrument executed and delivered by the Parties in connection with the consummation of the transactions contemplated hereby.

“**UCC**” means the Uniform Commercial Code as the same may, from time to time, be enacted and in effect in the State of New York.

“**WARN Act**” means the Worker Adjustment and Retraining Notification Act, P.L. 100-379, or any similar state, local, provincial or foreign law.

(b) Interpretation; Construction. The headings and captions of the various Sections of this Agreement have been inserted solely for purposes of convenience, are not part of this Agreement, and shall not be deemed in any manner to modify, explain, expand or restrict any of the provisions of this Agreement. Unless stated to the contrary, all references to Sections, paragraphs or clauses herein shall be to the specified Section, paragraph or clause of this Agreement, and all references to Exhibits and Schedules shall be to the specified Exhibits and Schedules attached hereto. All Exhibits and Schedules attached hereto are made a part hereof. All terms defined herein shall have the same meaning in the Exhibits and Schedules, except as otherwise provided therein. All references in this Agreement to “this Agreement” shall be deemed to include the Exhibits and Schedules attached hereto. Words used herein, regardless of the number and gender used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context requires and, as used herein, unless the context otherwise requires, the words “hereby,” “hereof,” “herein” and “hereunder,” and words of similar import, shall refer to this Agreement as a whole and not to any particular provision hereof. The term “including” shall be deemed to mean “including, without limitation.” The word, “or,” shall not be construed to be exclusive. Provisions shall apply, when appropriate, to successive events and transactions. Accounting terms used herein shall have the meanings given to them by GAAP applied on a consistent basis. References to any Law shall be construed as a reference to the same as in effect on the date of this Agreement. Unless otherwise expressly stated, all dollar amounts stated herein are in United States currency.

(c) The following terms shall have the meanings assigned to such terms on the page numbers set forth below:

Acquired Agreements	12	Bankruptcy Court	1
Acquired Assets	11	Bill of Sale	20
Acquired Subsidiaries	11	Break-Up Fee	38
Agreement	1	Buyer	1
Asset Purchase	1	Closing	20
Assumed Agreements	11	Closing Date	20
Assumed Equipment Leases	12	Closing Date Payment	19
Assumed Liabilities	14	Confidential Information	31
Assumed Permits	12	Consents	22
Assumed Real Property Leases	11	Copyrights	6
Auction	33	Effective Time	20
Bankruptcy Case	1	Escrow Agent	19
Bankruptcy Code	1	Exchange Act	22

Excluded Assets	13	Patents	6
Excluded Liabilities	14	Permitted Access Parties	29
Execution Date	1	Permitted Designees	41
Expense Reimbursement Cap	5	Purchase Price	19
Filing Date	1	Purchased Avoidance Actions	12
Inbound IP Contracts	26	Registered Intellectual Property	24
IP Contracts	26	Representatives	29
Leased Real Property	23	Scheduled Intellectual Property	24
Marks	6	SEC	22
Material Permits	26	SEC Documents	22
Non-Assigned Asset	32	Security Deposit	18
Outbound IP Contracts	26	Seller	1
Overbid Amount Requirement	34	Seller Disclosure Schedule	21
Parties	1	Termination Date	36
Party	1	Trade Secrets	6

2. **SALE AND PURCHASE OF ACQUIRED ASSETS; EXCLUDED ASSETS; ASSUMPTION OF LIABILITIES.**

(a) **Purchase and Sale of Acquired Assets.** At the Closing, pursuant to Sections 105, 363, 365 and 1146 of the Bankruptcy Code and on the terms and subject to the conditions set forth in this Agreement, Seller shall sell, transfer, assign, convey and deliver to Buyer, and Buyer shall purchase, accept and acquire from Seller, free and clear of any and all Liabilities and Liens (except for the Assumed Liabilities and Permitted Encumbrances), all of Seller's right, title and interest in, to and under all of the following properties and assets of Seller (collectively, the "**Acquired Assets**"):

- (i) All outstanding shares of capital stock or other equity interests of the Subsidiaries of the Company listed or described on Schedule 2(a)(i) (the "**Acquired Subsidiaries**") and any securities convertible into, exchangeable for, or exercisable for shares of capital stock or other equity interests of the Acquired Subsidiaries;
- (ii) All Accounts Receivable of Seller outstanding as of the Closing Date (except to the extent such amounts have been included in any budget approved by the order of the Bankruptcy Court and remain uncollected as of the Closing Date);
- (iii) Each of the Contracts listed or described on Schedule 2(a)(iii), including all rights of Seller of any nature whatsoever arising thereunder (as amended, restated, modified or extended, the "**Assumed Agreements**");
- (iv) The Real Property Leases listed on Schedule 2(a)(iv), including all rights of Seller thereunder (the "**Assumed Real Property Leases**");
- (v) the Owned Real Property set forth on Schedule 2(a)(v);
- (vi) All Intellectual Property owned or licensed by Seller or any Acquired Subsidiary, together with all IP Ancillary Rights;
- (vii) All Inventory of Seller or any Acquired Subsidiary, in each case with any transferable warranty and service rights of Seller or such Acquired Subsidiary with respect to such Inventory;
- (viii) All books and records related to the Business, except those: (i) relating exclusively to any Excluded Asset or Excluded Liability; (ii) relating to employees of Seller or any Acquired Subsidiary; and (iii) that Seller or any Acquired Subsidiary is not permitted to transfer under applicable Law or confidentiality obligations owed to third parties; provided, that Seller and the Acquired Subsidiaries shall provide Buyer with a list of any such non-transferable Books and Records and use commercially reasonable efforts to provide Buyer access to such information in a manner that would not violate applicable Law or confidentiality obligations owed to third parties;
- (ix) All General Intangibles, to the extent assignable;
- (x) All equipment, machinery, forklifts, vehicles, fixtures, furniture, furnishings, signage, leasehold improvements and other tangible personal property owned by Seller as of the Closing Date that are held for, or used in, the Business and existing as of the Closing, and all of the equipment leases listed or described on Schedule 2(a)(x), including all rights of Seller thereunder (the "**Assumed Equipment Leases**" and, together with the Assumed Agreements and Assumed Real Property Leases, the "**Acquired Agreements**");

- (xi) all Permits set forth on Schedule 2(xi) and pending applications therefor, including all rights of Seller thereunder (the “**Assumed Permits**”);
- (xii) All rights of Seller under Contracts containing non-disclosure or confidentiality, non-disparagement, non-compete, non-solicitation, assignment of Intellectual Property, or other restrictive covenants with any employees of Seller, or with any agents of Seller or with third parties;
- (xiii) All insurance policies of Seller and any claims thereunder to the extent such policies or claims relate to the Business or to any Assumed Liabilities, other than any directors and officers (or similar) insurance policies, including any proceeds received with respect to any claims thereunder either (A) received on or after the Closing Date or (B) arising out of claims relating to the Business or to any Assumed Liabilities;
- (xiv) All claims, causes of action, choses in action, rights of recovery, rights of set off, and rights of recoupment relating to the Acquired Assets set forth in Sections 2(a)(i)-(xiii).
- (xv) all avoidance actions (including any proceeds thereof), including, but not limited to, all claims and causes of action arising under Sections 544 through 553 of the Bankruptcy Code or any analogous state law against (i) any of Seller’s vendors, suppliers, customers, or trade creditors (excluding Seller’s retained professionals) in regards or related to the Acquired Assets or Business and (ii) any counterparties to any Acquired Agreements (collectively, the “**Purchased Avoidance Actions**”);
- (xvi) All goodwill and all other additional assets, properties, privileges, rights and interests of Seller as of the Closing Date associated with the Acquired Assets or the Business and not expressly referenced in this Section 2(a), of every kind and description and wherever located, whether known or unknown, fixed or unfixed, accrued, absolute, contingent or otherwise.

(b) **Excluded Assets.** Notwithstanding the provisions of Section 2(a), nothing herein contained shall be deemed to sell, transfer, assign or convey the Excluded Assets to Buyer, and Seller and its Affiliates shall retain all right, title and interest to, in and under the Excluded Assets. For all purposes of and under this Agreement, the term “**Excluded Assets**” shall mean all assets of Seller other than the Acquired Assets, including, without limitation, all of the following assets:

- (i) All cash and cash equivalents of Seller;
- (ii) All Claims, causes of action, choses in action, rights of recovery, rights of set off and rights of recoupment (x) relating to the Excluded Assets, or (y) that have accrued, arisen or been asserted against any Person or that relate to any period before the Effective Time, in each case which do not relate to the Acquired Assets (including fiduciary duty claims, tort claims and Claims against current and former employees of Seller that accrued prior to Closing), and all rights and powers of a trustee and debtor-in-possession against any Person whatsoever, including all avoidance powers granted to Seller under the Bankruptcy Code, except with respect to the Purchased Avoidance Actions;
- (iii) All rights of Seller and its Affiliates in, to and under any Rejected Agreements;
- (iv) All capital stock or other equity interests of Seller and all Subsidiaries of Seller, excluding the capital stock or other equity interests of the Acquired Subsidiaries;
- (v) The certificates or articles of incorporation and certificates or articles of formation, qualifications to conduct business as a foreign entity, taxpayer and other identification numbers, seals, minute books, stock/interest transfer books, blank stock certificates, and other corporate or company documents and records relating to the organization or maintenance of the corporate or company existence of Seller and its Affiliates;
- (vi) All Benefit Plans and trusts or other assets attributable thereto, including any assets, reserves, credits and service agreements, and all documents created, filed or maintained in connection with such Benefit Plans and any applicable insurance policies related to such Benefit Plans;
- (vii) All rights, claims or causes of action of Seller under this Agreement or the other Transaction Documents;
- (viii) Any Governmental Permit or similar right that by its terms or applicable Law is not transferable to Buyer; and

- (ix) Rights to any Tax refunds of Seller, whether such refund is received as a payment or as a credit against future Taxes.

(c) Assumed Liabilities. On the terms and subject to the conditions set forth in this Agreement, at the Closing, Buyer shall (or shall cause its designated Affiliate or Affiliates to) assume and be responsible for, effective as of the Closing, and thereafter pay, honor, perform and discharge as and when due, all Liabilities of Seller under the Acquired Agreements accruing from and after the Closing (collectively, the “**Assumed Liabilities**”).

(d) Excluded Liabilities. Notwithstanding any provision in this Agreement to the contrary, Buyer shall not assume and shall not be obligated or deemed to assume or be obliged to pay, perform or otherwise discharge any Liability of Seller or any Affiliate of Seller or relating to the Business and Seller and its Affiliates shall be solely and exclusively liable with respect to all such Liabilities, other than the Assumed Liabilities (collectively, the “**Excluded Liabilities**”). For the avoidance of doubt, the Excluded Liabilities with respect to Seller include, but are not limited to, the following:

- (i) any Liability of Seller or its Affiliates, or for which any of Seller or its Affiliates is liable, arising out of, or relating to, or in connection with the administration of the Bankruptcy Case or the negotiation, execution, and consummation of the transactions contemplated by this Agreement or any other Transaction Document (including any preparation for a transaction process, bankruptcy process, any sale process involving other potential buyers or any contemplated public offering or financing), whether incurred prior to, at or subsequent to the Closing Date, including, without limitation, all finder’s or broker’s fees and expenses and any and all fees and expenses of any representatives of Seller;
- (ii) any Liability incurred by Seller or its directors, officers, managers, stockholders, members, partners, agents or employees (acting in such capacities), including all indemnification claims;
- (iii) any Liability of Seller to any Person on account of any Action or Claim;
- (iv) any Liability relating to or arising out of the ownership, possession or operation of an Excluded Asset;
- (v) any Liability of Seller or related to the Business that arises under or relates to a violation of Environmental Laws or to the release, treatment, storage, disposal or other management of a Hazardous Material prior to the Closing Date;
- (vi) all checks and drafts that have been written or submitted by Seller prior to the close of business on the Closing Date but have not yet cleared;
- (vii) any Liability of Seller under any indebtedness, including, without limitation, indebtedness for borrowed money, any indebtedness owed to any stockholder or other Affiliate of Seller, and any Contract evidencing any such financing arrangement;
- (viii) all Liabilities (whether arising prior to, on or after the Closing Date) in respect of any employee, officer, director or independent contractor of Seller or any of its Affiliates;
- (ix) any and all Liabilities arising under any Benefit Plans;
- (x) all Liabilities in respect of Taxes, including Liabilities in respect of Taxes arising out of the conduct of the Business or ownership of the Acquired Assets;
- (xi) all Rejection Damages Claims;
- (xii) any and all Liabilities in connection with customer claims against Seller or any of its Subsidiaries, whether known or unknown, including (A) product warranties returns, rebates, credits and related claims and any Actions related to product liability claims relating to, resulting from, caused by or arising out of ownership, operation or control of the Business and (B) any and all warranties, representations and guarantees made to suppliers, manufacturers and contractors relating to products sold, or services provided, in the case of each of (A) and (B) to the extent accruing, arising out of or relating to events, occurrences, acts or omissions occurring or existing on or prior to the Closing Date;
- (xiii) all Liabilities, other than those under this Agreement, owed to Seller or its Affiliates, including intercompany debt, loans or payables;

(xiv) all Liabilities related to the WARN Act, to the extent applicable, with respect to employees of Seller, and for any Action resulting from such employees' separation of employment prior to or on the Closing Date, as with respect to all periods prior to the Closing Date, Seller shall remain liable and responsible for compliance with, as well as any liability which may arise or exist under the WARN Act with respect to the termination of any employee of Seller prior to or on the Closing Date; and

(xv) other than as specifically set forth herein, fees or expenses of Seller incurred with respect to the transactions contemplated by this Agreement.

(e) Assumption of the Acquired Agreements and Assumed Liabilities.

(i) From and after the Filing Date, Seller will deliver an updated Section 5(h) of the Seller Disclosure Schedule listing any Contracts (or any amendments thereto) entered into by Seller during the pendency of the Bankruptcy Case. Seller shall cooperate with Buyer and provide such additional information to Buyer as Buyer reasonably requests in order to identify and review such Contracts, including by providing Buyer, as promptly as practicable, with true, correct and complete copies of all Contracts related to the Business and any additional information requested regarding the calculation of the related Cure Amounts.

(ii) Notwithstanding anything to the contrary contained herein, Buyer reserves the right, in consultation with Seller, to amend or supplement Schedules 1(a), 2(a)(i), 2(a)(iii), 2(a)(iv), 2(a)(v), 2(a)(x) or 2(a)(xi), to add or remove any Subsidiaries of Seller or any Contracts or Permits that are to be assigned at any time prior to Closing, so long as any such Contract to be added to or removed from such schedules is added or removed from such schedule(s) prior to the entry of any Order of the Bankruptcy Court approving the rejection of such Contract, and, in the case of added Contracts, subject to the party to such Contract receiving information evidencing Buyer's adequate assurance of future performance and having an opportunity to object within seven days or such other period of time set forth in an Order of the Bankruptcy Court of the receipt of such information to the assignment of such Contract on the grounds that Buyer has not demonstrated adequate assurance of future performance of such Contract pursuant to Section 365 of the Bankruptcy Code. Any Contract added to Schedule 2(a)(iii) (to the extent consistent with the prior sentence) shall be deemed an Acquired Agreement, any lease added to Schedule 2(a)(iv) (to the extent consistent with the prior sentence) shall be deemed an Assumed Real Property Lease, any equipment lease added to Schedule 2(a)(x) (to the extent consistent with the prior sentence) shall be deemed an Assumed Equipment Lease, and any permit added to Schedule 2(a)(xi) shall be deemed an Assumed Permit. Seller shall transfer and assign all Acquired Agreements that Seller is a party thereto (to the extent assignable pursuant to Sections 363 and 365 of the Bankruptcy Code) to Buyer, and Buyer shall assume all Acquired Agreements from Seller, as of the Closing Date pursuant to Section 365 of the Bankruptcy Code and the Sale Order. In connection with and as a prerequisite to such assignment and assumption, Buyer shall pay in full all Cure Amounts (as determined by Seller based on the books and records of Seller or as otherwise determined by the Bankruptcy Court) to cure all defaults under such Acquired Agreements to the extent required by Section 365(b) of the Bankruptcy Code and Seller shall have no Liability therefore. The Cure Amounts for each Acquired Agreement are set forth opposite the name of each Acquired Agreement set forth on Schedule 2(a)(iii), but for the avoidance of doubt, to the extent that the Cure Amounts for any Acquired Agreement are determined by the Bankruptcy Court to be amounts higher than the amounts listed on Schedule 2(a)(iii), Buyer shall be fully responsible to pay such higher Cure Amounts.

(iii) Any motions filed by Seller with, and any proposed orders submitted by Seller to, the Bankruptcy Court seeking authorization after the date hereof to assume or reject any Contracts or Benefit Plans or to fix any Cure Amounts in connection therewith shall be satisfactory in form and substance to Buyer in its reasonable discretion. No later than 30 days prior to the Sale Hearing, Seller shall cause notice to be provided to all counterparties to the Contracts, substantially in the form as shall be annexed to the Bid Procedures as an exhibit thereto regarding the (i) assumption and assignment to Buyer all of the Acquired Agreements, except for any such Contracts which Buyer previously has advised Seller in writing that it does not wish to assume (and Seller shall thereupon be under no obligation to seek assumption and assignment to Buyer of any such Contracts), and (ii) fixing of the Cure Amounts associated with each Contract as of the Sale Hearing (or as of such later date reasonably acceptable to Buyer and Seller). Seller shall consult with, and give due consideration to the views and concerns of, Buyer prior to compromising or commencing any proceeding with respect to any material payment required to be made under the Bankruptcy Code to effectuate the assumption of any such Contract, including using commercially reasonable efforts to provide five (5) days notice of any such compromise or proceeding to Buyer.

(iv) The Sale Order shall provide that as of the Closing, Seller shall assign to Buyer the Acquired Agreements, with each Acquired Agreement identified by its name and date (if available), the other party to such Acquired Agreement and the address of such party for notice purposes, all included on one or more exhibit(s) attached to either the motion filed in connection with the Sale Order or one or more motion(s) or notice(s) regarding Seller's intention to have such Acquired Agreement assumed by, and assigned to, Buyer. Such exhibit(s) shall also set forth the Cure Amounts (if any) necessary to cure any defaults under each Acquired Agreement. Notwithstanding anything to the contrary set forth in this Agreement, to the extent that, prior to Closing, any Acquired Agreement is not subject to an order of the Bankruptcy Court with respect to the assumption and

assignment of such Acquired Agreement, any Liabilities of Seller related to such Acquired Agreement shall be the responsibility of Seller until such Acquired Agreement is assumed by Seller and assigned to Buyer.

- (v) Nothing in this Agreement shall be construed as an attempt by Seller to assign any certificates, approvals, authorizations, or Contracts to the extent that such certificate, approval, authorization, or Contract is not assignable under the Bankruptcy Code or otherwise without the consent of the other party or parties thereto, and the consent of such other party has not been given or received, as applicable. In the case of certificates, approvals, authorizations and Contracts included in the Acquired Assets that cannot be transferred or assigned effectively without the consent of third parties, which consent has not been obtained prior to the Closing (after giving effect to the Sale Order and the Bankruptcy Code), Seller shall use commercially reasonable efforts, subject to any approval of the Bankruptcy Court that may be required and the terms set forth in Section 7(j), to cooperate with Buyer in endeavoring to obtain such consent and this Agreement shall not operate as an assignment thereof in violation of any such license, certificate, approval, authorization, Real Property Lease, Contract or other commitment. For the avoidance of doubt, Seller shall not be obligated to pay any consideration to any third party from whom consent or approval is requested or otherwise incur any out-of-pocket costs or expenses, or to initiate any litigation or proceedings to obtain any such consent or approval.

(f) Further Assurances.

- (i) With respect to any Contract not set forth on Schedule 2(a)(iii), and provided such Contract has not been rejected by Seller pursuant to Section 365 of the Bankruptcy Code, upon written notice(s) from Buyer, as soon as practicable, Seller shall take all actions reasonably necessary to assume and assign to Buyer pursuant to Section 365 of the Bankruptcy Code any Contract(s) set forth in Buyer's notice(s); provided that any applicable Cure Amount shall be satisfied by Buyer. Seller acknowledges and agrees that (i) Seller shall provide Buyer with reasonable advance notice of any motion(s) to reject any Contract and (ii) the covenant set forth in this Section 2(f) shall survive the Closing. Notwithstanding anything in this Agreement to the contrary, on the date any Contract is assumed and assigned to Purchaser pursuant to this Section 2(f), such Contract shall be deemed an Acquired Agreement for all purposes under this Agreement.

- (ii) Immediately upon the Closing, Seller shall provide Buyer with full access to the Owned Real Property and each Leased Real Property, all keys, combinations, passwords, and codes to all locks, security devices and entrance doors. At the Closing, and at all times thereafter as may be necessary, Seller and Buyer shall execute and deliver such other instruments of transfer as shall be reasonably necessary to vest in Buyer title to the Acquired Assets free and clear of all Liens (other than Permitted Encumbrances), and such other instruments as shall be reasonably necessary to evidence the assignment by Seller and the assumption by Buyer or its designee of the Assumed Liabilities, including the Acquired Agreements. Each of Seller, on the one hand, and Buyer, on the other hand, shall cooperate with one another to execute and deliver such other documents and instruments as may be reasonably required to carry out the transactions contemplated by this Agreement. At the Closing, and at all times thereafter as may be necessary, Buyer shall cooperate with Seller (at Seller's expense), at Seller's request, to facilitate the procurement, possession and return to Seller of any Excluded Assets, including, without limitation, any equipment subject to any lease which does not constitute an Assumed Equipment Lease. If, following the Closing, Seller (i) receives or becomes aware that it holds any asset, property, or right that constitutes an Acquired Asset, then, at Buyer's expense, Seller shall transfer such asset, property, or right to Buyer and/or, as applicable, one or more designees of Buyer as promptly as practicable after the Closing for no additional consideration and (ii) receives any payment on accounts receivable or proceeds of insurance included in the Acquired Assets, Seller shall hold such payment in trust and promptly (and in any event within two (2) Business Days following receipt thereof) pay the amount thereof to Buyer. To the extent any assets that should have been included with the Acquired Assets are not transferred at Closing, Seller shall cause such assets to be transferred to Buyer, at Seller's expense.

- (iii) At the Closing, and at all times thereafter as may be necessary, Seller shall, at the reasonable request of Buyer, execute, deliver, and file, or cause to be executed, delivered, and filed, such other instruments of conveyance and transfer and take such other actions as Buyer may reasonably request, in order to more effectively consummate the transactions contemplated hereby and to vest in Buyer good and marketable title to the Intellectual Property included in the Acquired Assets, including, without limitation, executing, filing, and recording, with all appropriate intellectual property registration authorities and other relevant entities, all assignment instruments and other filings that are necessary to correctly record the prior chain of title with respect to ownership of the Intellectual Property included in the Acquired Assets.

3. PURCHASE PRICE.

- (a) Security Deposit. Within three Business Days after the filing of the Sale Motion, Buyer shall deliver or cause to be delivered by wire transfer or by a certified or cashier's check, the amount of three hundred thousand dollars and zero cents \$300,000.00 (the "Security Deposit") into a non-interest bearing escrow account established and maintained by Certilman Balin Adler & Hyman, LLP, as escrow agent (the "Escrow Agent"), pursuant to the terms and conditions of this Section 3(a), to be held and disbursed in accordance with an escrow agreement, to be entered to by Buyer, Seller, and the Escrow Agent, in form and substance reasonably acceptable to Buyer and Seller. At the Closing, the Security Deposit held by the Escrow Agent shall be released to Seller for payment as a credit against the Purchase Price (as defined below). If this Agreement is terminated prior to Closing, the Security Deposit shall be distributed in accordance with Section 10(c).

(b) Consideration.

- (i) The aggregate cash consideration for the Acquired Assets (the “**Purchase Price**”) shall be equal to:
- (A) the Cash Component; *plus*
 - (B) the Credit Bid Amount; *plus*
 - (C) the Expense Reimbursement; *plus*
 - (D) the aggregate Cure Amounts.
- (ii) As additional consideration for the Acquired Assets, Buyer shall assume all of the Assumed Liabilities at the Closing.

(c) Closing Date Payment. At the Closing, Buyer shall deliver, or cause to be delivered, to Seller by wire transfer in immediately available funds to an account designated in writing by Seller to Buyer prior to the Closing, an amount (the “**Closing Date Payment**”) equal to the Cash Component *less* the amount of the Security Deposit, and Buyer and Seller shall jointly instruct the Escrow Agent to release the Security Deposit to an account designated by Seller to the Escrow Agent.

(d) Allocation of Purchase Price. As soon as practicable, and no event exceeding 120 days following the Closing Date, Buyer shall provide Seller with an allocation of the Purchase Price as determined for applicable Tax purposes, among the Acquired Assets. Such allocation schedule prepared by Buyer shall be prepared in accordance with Section 1060 of the IRC for U.S. federal income Tax purposes (or in accordance with other Tax Laws, as applicable) and shall be binding on Seller. Buyer and Seller agree to use such allocation in filing all required forms under Section 1060 of the Code and all other Tax Returns, and Buyer and Seller further agree that they shall not take any position inconsistent with such allocation upon any examination of any such Tax Return, in any refund claim or in any Tax litigation. The parties shall cooperate with each other and provide such information as any of them shall reasonably request in connection with this Section 3(d).

(e) Withholding. Buyer and the Escrow Agent will be entitled to deduct and withhold from any consideration payable pursuant to this Agreement any withholding Taxes or other amounts required under the Code or any applicable Law to be deducted and withheld. To the extent any such amounts are so deducted and withheld, such amounts will be treated for all purposes of this Agreement and the Escrow Agreement as having been paid to the Person in respect of which such deduction and withholding was made.

4. CLOSING; CLOSING DOCUMENTS.

(a) Closing. The closing of the transaction contemplated hereby (the “**Closing**”) shall take place at the offices of Ropes & Gray LLP, 1211 Avenue of the Americas, New York, NY 10036, or by telephone if the Parties so agree, no later than 10:00 a.m. local time, on the second Business Day after the date upon which all conditions set forth in Article IX hereof have been satisfied or waived (other than those conditions which by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of those conditions in accordance with this Agreement), or at such other place, date and time as the Parties may agree in writing. The date on which the Closing occurs is referred to in this Agreement as the “**Closing Date**”. The Closing shall be deemed effective as of 12:01 a.m. on the Closing Date (the “**Effective Time**”).

(b) Deliveries by Seller. At or prior to the Closing, Seller shall deliver to Buyer the following:

- (i) One or more duly executed Bill(s) of Sale for the assets to be conveyed to Buyer, in form and substance reasonably agreeable to Seller and Buyer (each, a “**Bill of Sale**”);
- (ii) Duly executed counterpart(s) of one or more Assumption Agreement(s) for Acquired Agreements to be assigned and assumed by Buyer on the Closing Date;
- (iii) A certified copy of the Sale Order;
- (iv) The officer’s certificate of Seller required to be delivered pursuant to Section 9(b)(iii); and
- (v) Such other endorsements, assignments and instruments as are contemplated by this Agreement or as are reasonably deemed necessary by Buyer or Buyer’s legal counsel to consummate the sale transactions (as contemplated in the Sale Order), duly executed by Seller.

(c) Deliveries by Buyer. Subject to the fulfillment or waiver of the conditions set forth in Section 10(a), at Closing, Buyer shall deliver to Seller the following:

- (i) Duly executed counterpart(s) to one or more Assumption Agreement(s) for Acquired Agreements to be assigned to and assumed by Buyer on the Closing Date;
- (ii) The officer's certificate of Buyer required to be delivered pursuant to Section 9(c)(iii); and
- (iii) The Closing Date Payment in accordance with Section 3(c).

5. REPRESENTATIONS AND WARRANTIES OF SELLER.

As an inducement to Buyer to enter into this Agreement and to consummate the transactions contemplated hereby, except as disclosed in the disclosure schedule delivered by Seller to Buyer concurrently with the execution of this Agreement (the "***Seller Disclosure Schedule***"), Seller hereby represents and warrants to Buyer that the following statements are true, correct and complete:

(a) Organization, Qualification and Authority. Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Seller has full corporate power and authority (i) to own or lease and to operate its properties and assets (including the Acquired Assets) and to carry on the Business as it is now being conducted and (ii) to enter into this Agreement, each of the other Transaction Documents to be entered into by Seller and, subject to the Bankruptcy Court's entry of the Sale Order and such other authorization as is required by the Bankruptcy Code, perform its obligations under and consummate the transactions contemplated by this Agreement, including the Asset Purchase. The execution, delivery and performance by Seller of this Agreement and the consummation of the transactions contemplated by this Agreement, including the Asset Purchase, have been duly and validly authorized by Seller's board of directors (or a duly authorized committee thereof) or other equivalent governing body and no other actions on the part of Seller, subject to the Bankruptcy Court's entry of the Sale Order and such other authorization as is required by the Bankruptcy Code, are necessary to authorize the execution and delivery by Seller of this Agreement or the consummation of the transactions contemplated by this Agreement, including the Asset Purchase. This Agreement has been duly and validly executed and delivered by Seller and, assuming this Agreement constitutes the legal, valid and binding agreement of Buyer, this Agreement constitutes, subject to the entry of the Sale Order and such other authorization as is required by the Bankruptcy Code, the legal, valid and binding agreement of Seller and is enforceable against Seller in accordance with its terms, except as and to the extent that such validity and enforceability may be limited by equitable principles of general applicability (whether considered in a proceeding at law or in equity).

(b) Subsidiaries. Section 5(b) of the Seller Disclosure Schedule sets forth the name of each Subsidiary of the Company, and, with respect to each such entity, the jurisdiction in which it is incorporated or organized, the jurisdictions, if any, in which it is qualified to do business, the number of shares of its authorized capital stock, the number and class of shares thereof duly issued and outstanding, the names of all shareholders or other equity owners and the number of shares of stock owned by each such shareholder or the amount of equity owned by each such equity owner. Except as set forth on Section 5(b) of the Seller Disclosure Schedule, no Subsidiary of the Company owns any assets, including any property or Intellectual Property, is party to any Contracts, or has any business operations.

(c) Consents and Approvals; No Violation.

(i) Other than in connection with or in compliance with the Sale Order and the securities Laws (as to filings of Current Reports on Form 8-K with the Securities and Exchange Commission) and except as set forth in Section 5(c)(i) of the Seller Disclosure Schedule, no authorization, consent, order, license, permit or approval of, or registration, declaration, notice or filing with, any Governmental Authority is required to be made or obtained under applicable Law for the consummation by Seller of the transactions contemplated hereby.

(ii) Except as set forth in Section 5(c)(ii) of the Seller Disclosure Schedule (together with the authorizations, consents, notices and other approvals set forth in Section 5(c)(i) of the Seller Disclosure Schedule, the "***Consents***"), the execution and delivery by Seller of this Agreement does not, and (after giving effect to the Sale Order and such other authorization as is required by the Bankruptcy Code) the consummation of the transactions contemplated hereby and compliance with the provisions hereof will not, (A) require any consent or approval under, violate, conflict with, result in any breach of or any loss of any benefit under, constitute a change of control or default under, or result in termination or give to others any right of termination, vesting, amendment, acceleration or cancellation of, or result in the creation of a Lien (other than Permitted Encumbrances) upon any of the respective properties or assets of Seller pursuant to, any Contract to which Seller is a party or by which it or any of its properties or assets are bound except as would not reasonably be, individually or in the aggregate, material to the Business, (B) conflict with or result in any violation of any provision of the organizational documents of Seller or (C) conflict with or violate any applicable Laws except as would not reasonably be, individually or in the aggregate, material to the Business.

(d) Litigation. Except as set forth in Section 5(d) of the Seller Disclosure Schedule, as of the Execution Date, neither Seller, nor any Subsidiary of Seller, is a party to any pending or, to the Knowledge of Seller, threatened material Action relating to the Business or the Acquired Assets. Except as set forth in Section 5(d) of the Seller Disclosure Schedule, as of the Execution Date, neither Seller, nor any of its Subsidiaries, are subject to any outstanding Order relating to the Business or the Acquired Assets that would reasonably be expected to be, individually or in the aggregate, material to the Business.

(e) SEC Documents; Financial Statements.

(i) Except as set forth in Section 5(e)(i) of the Seller Disclosure Schedule, Seller has filed all reports, schedules, forms, statements and other documents (including exhibits and all other information incorporated by reference therein) required to be filed by Seller with the United States Securities Exchange Commission (the “SEC”) between January 1, 2016 and the Execution Date pursuant to the Securities Exchange Act of 1934, as amended, and the regulations promulgated thereunder (the “**Exchange Act**”) (collectively, the “**SEC Documents**”), each of which, as finally amended prior to the date hereof, has complied as to form in all material respects with the applicable requirements of the Securities Act and the Exchange Act as of the date filed with the SEC. For the purposes of this Agreement, including Section 9(b)(i) and the certificate to be delivered in accordance with Section 9(b)(iii), the “SEC Documents” shall not include any reports, schedules, forms, statements or other documents (including exhibits and all other information incorporated by reference therein) required to be filed by Seller with the SEC on or after the date of this Agreement. None of the SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading.

(ii) Except as set forth in Section 5(e)(ii) of the Seller Disclosure Schedule, the consolidated balance sheets, statements of operations and statements of cash flows of Seller and Seller’s Subsidiaries included in the SEC Documents complied, as of the date of filing, in all material respects with applicable accounting requirements and the published rules and regulations of the SEC applicable thereto, were prepared in all material respects in conformity with GAAP (except, in the case of unaudited statements, as permitted by the rules and regulations of the SEC) applied on a consistent basis during the periods involved (except as may be indicated therein or in the notes thereto), and present fairly (subject, in the case of unaudited statements, to normal year-end audit adjustments and the absence of footnotes) in all material respects the consolidated financial position, results of operations and cash flows of Seller and its consolidated Subsidiaries as of the dates thereof and for the periods indicated therein.

(iii) There are no off-balance sheet transactions, arrangements, obligations or relationships attributable to the Business.

(f) Real Property.

(i) Section 5(f)(i) of the Seller Disclosure Schedule contains a true, correct and complete list of all Owned Real Property. The Owned Real Property listed on Section 5(f)(i) of the Seller Disclosure Schedule constitutes all of the premises owned by Seller or its Affiliates, including any Subsidiary.

(ii) Section 5(f)(ii) of the Seller Disclosure Schedule contains a true, correct and complete list of all leases, subleases, licenses, occupancy or other agreements (verbal or written) under which Seller or any Subsidiary is a tenant or subtenant or has any right with respect to the real property leased, licensed, otherwise occupied by Seller or its Affiliates (other than the Acquired Subsidiaries) (collectively, the “**Leased Real Property**”).

(iii) The Owned Real Property and the Leased Real Property constitutes all of the premises occupied by or used in connection with the conduct of the Business. Except as set forth in Section 5(f)(iii) of the Seller Disclosure Schedule, (A) Seller has good and valid title to the Owned Real Property set forth on Schedule 2(a)(v) and to all of the buildings, structures and other improvements thereon, free and clear of all Liens (other than Permitted Encumbrances), (B) Seller has a good and valid leasehold interest in each Assumed Real Property Lease, free and clear of all Liens (other than Permitted Encumbrances), and (C) neither Seller, nor any of its Subsidiaries, has received written notice of any material default under any agreement evidencing any Lien or other agreement affecting the Owned Real Property set forth on Schedule 2(a)(v) or any Assumed Real Property Lease, which default continues on the Execution Date.

(g) Tangible Personal Property. Except as set forth in Section 5(g) of the Seller Disclosure Schedule and other than the Excluded Assets, Seller has good and valid title to, or has good and valid leasehold interests in, all tangible personal property that is used in the conduct of the Business, free and clear of all Liens other than Permitted Encumbrances, except in each case as (individually or in the aggregate) would not reasonably be expected to be material to the Business. Such owned and leased tangible personal property is in good working order, reasonable wear and tear excepted, except as (individually or in the aggregate) would not reasonably be expected to be material to the Business.

(h) Contracts. Section 5(h) of the Seller Disclosure Schedule sets forth all material Contracts in effect as of the Execution Date relating to the Acquired Assets, the Assumed Liabilities or the Business. Each Contract is a valid and binding obligation of Seller and, to the Knowledge of Seller, the other party or parties thereto in accordance with its terms and conditions, except as and to the extent that such validity and enforceability may be limited by (i) bankruptcy, insolvency, or other similar laws affecting the enforcement of creditors’ rights generally, (ii) the Enforceability Exceptions and (iii) the obligation to pay Cure Amounts under Section 365 of the Bankruptcy Code and Section 2(e). With respect to any Contract, except as set forth in Section 5(h) of the Seller Disclosure Schedule, no event has occurred or not occurred through Seller’s action or inaction or, to the Knowledge of Seller, prior to the Execution Date, through the action or inaction of any third party which, with notice or the lapse of time or both, would constitute a default or result in the termination of or a right of termination or

cancellation under any Contract, accelerate the performance or obligations required thereby, or result in the loss of any benefit under the terms of any Contract to which Seller is a party, except for the obligation to pay Cure Amounts. Except as set forth in Section 5(h) of the Seller Disclosure Schedule, none of the Seller, nor, to the Knowledge of Seller, any other party thereto has provided any written notice to terminate or modify, any Contract. To the Knowledge of Seller, Seller is not a party to a Contract which is an oral Contract. Complete and correct copies of each Contract (including all amendments and waivers thereto) and all form Contracts related to the Business have been made available to Buyer by Seller or are attached as exhibits to the SEC Documents. Except as set forth in Section 5(h) of the Seller Disclosure Schedule, following the entry of the Sale Order, no consent of any third party is required under any Contract included in the Acquired Assets as a result of or in connection with, and the enforceability of any such Contract will not be affected by, the execution, delivery and performance of this Agreement or any of the other Transaction Documents or the consummation of the transactions contemplated hereby and thereby.

(i) No Brokers. No broker, finder or investment banker is entitled to any broker's, finder's or financial advisor's fee or commission in connection with the transactions contemplated hereby based upon arrangements made by or on behalf of Seller or Seller's board of directors or for which Buyer could become liable or obligated.

(j) Intellectual Property.

(i) Section 5(j)(i) of the Seller Disclosure Schedule sets forth a list of (i) all Patents, pending Patent applications, registered Marks, pending applications for registration of Marks and registered Copyrights owned or purported to be owned by Seller (collectively, the "**Registered Intellectual Property**") and (ii) all other material Intellectual Property owned or purported to be owned by Seller (collectively with the Registered Intellectual Property, the "**Scheduled Intellectual Property**"). Each item of the Registered Intellectual Property is subsisting and lists Seller as the record owner, and is valid and enforceable. Seller owns all right, title, and interest, free and clear of all Liens (other than Permitted Encumbrances) to the Scheduled Intellectual Property.

(ii) Seller solely owns, is licensed to use or otherwise has the right to use all Intellectual Property used or necessary to conduct the Business, free and clear of any Liens other than Permitted Encumbrances.

(iii) Neither the validity, enforceability, scope of, nor Seller's title to, any Scheduled Intellectual Property is currently being challenged in any (i) outstanding ruling or order by a Governmental Authority or (ii) Action (including any opposition, cancellation, interference, inter partes review, or re-examination), pending or threatened, to which Seller is a party.

(iv) The conduct of the Business as of the Execution Date does not infringe, violate or misappropriate, and has not infringed, violated or misappropriated, in any material respect any Intellectual Property of any third Person. To the Knowledge of Seller, as of the Execution Date, no third Person is infringing, violating, or misappropriating, or has infringed, misappropriated, or violated, any Intellectual Property owned by Seller. As of the Execution Date, there is no pending claim asserted in writing against Seller (including any "cease and desist" letters and invitations to license) asserting that Seller's conduct of the Business, has infringed, violated or misappropriated, or is infringing, violating or misappropriating, any Intellectual Property of any third Person.

(v) Seller's processing of any Personal Data with respect to the operation of the Acquired Business is in compliance with all Laws and Contracts (including privacy policies and terms of use) applicable to Seller. No Person has gained unauthorized access to or made any unauthorized use of any Personal Data, confidential information or trade secret maintained by or on behalf of Seller for the Business. Seller has implemented and maintains an information security program that is comprised of reasonable and appropriate organizational, physical, administrative, and technical safeguards designed to protect the security, confidentiality, integrity and availability of its Systems and all Personal Data that they process with respect to the Business and that are consistent with all Laws and Contracts applicable to Seller. There are no claims pending or, to the Knowledge of Seller, threatened against Seller alleging a violation of any third Person's privacy or personal information or data rights, with respect to the operation of the Business.

(vi) Except as, and to the extent, set forth in the Company's press release dated September 13, 2019 with regard to OTC Markets, with respect to the operation of the Business, Seller (i) has not engaged in any unfair competition or trade practices and have not engaged in any false, deceptive, unfair, or misleading advertising or promotional practices under the Laws of any jurisdiction in which they operate or market any of their products and services and (ii) has not received any notifications or been subject to any investigation from any Governmental Authority or any advocacy or monitoring group regarding their marketing, advertising or promotional practices, or their processing of Personal Data.

(vii) Seller has maintained and currently maintains commercially reasonable practices to protect the confidentiality of any confidential information or trade secrets disclosed to, owned or possessed by it with respect to the Business. Seller is not in breach in any material respect and has not breached in any material respect any obligations or undertakings of confidentiality which it owes or has owed to any third party with respect to the Business. All current and former employees and contractors who have developed or contributed to Scheduled

Intellectual Property have executed enforceable Contracts that assign to Seller all of such Person's respective rights relating to such Intellectual Property.

(viii) Seller (i) lawfully owns, leases or licenses all Systems and (ii) will continue to have such rights immediately after the Closing. To the Knowledge of Seller, the Systems do not contain any "back door," "time bomb," "Trojan horse," "worm," "drop dead device," "virus," or other Software routines or components intentionally designed to permit unauthorized access to, maliciously disable or erase Software, hardware, or data. Seller is not in breach in any material respect of any of its Contracts relating to Systems used in the Business. Seller has not been subjected to an audit of any kind in connection with any Contract pursuant to which it uses any third-party System for the Business, nor has it received any notice of intent to conduct any such audit with respect to the Business.

(ix) Section 5(j)(ix) of the Seller Disclosure Schedule identifies under separate headings each Contract, (i) under which it uses or licenses a System or any Intellectual Property that any third-party Person owns, or owes any royalties or other payments to any Person for the use of any Intellectual Property or Systems (the "**Inbound IP Contracts**"), (ii) under which it has granted any Person any right or interest in any Scheduled Intellectual Property including any right to use any System (the "**Outbound IP Contracts**"), (iii) that otherwise affects its use of or rights in the Systems or any Scheduled Intellectual Property (including co-existence agreements and covenants not to sue), and (iv) under which it has agreed to, or has a contractual obligation to, indemnify any Person for or against any interference, infringement, dilution, misappropriation, or violation with respect to any Intellectual Property (collectively, (i) through (iv), the "**IP Contracts**").

(k) Compliance with Laws; Permits.

(i) Seller is, and since January 1, 2017 has been, in compliance in all material respects with all Laws applicable to the Acquired Assets or the operation of the Business. Since January 1, 2017, Seller has not received any written notice or, to the Knowledge of Seller, other communication from any Governmental Authority regarding any actual or alleged failure to comply in any material respect with any Law applicable to the Acquired Assets or the operation of the Business.

(ii) Section 5(k) of the Seller Disclosure Schedules contains a true, correct and complete list of all material authorizations, licenses, permits, certificates, variances, exemptions, approvals, orders, registrations and clearances of any Governmental Authority necessary for Seller to own, lease and operate the Acquired Assets, and to carry on and operate the Business as currently conducted ("**Material Permits**"). Subject to the limitations imposed on Seller as a result of having filed a petition for relief under the Bankruptcy Code, the Material Permits are valid and in full force and effect, except where the failure of any such Material Permit to be in full force and effect would not, individually or in the aggregate, reasonably be expected to be material to the Business. Seller is in compliance in all material respects with all Material Permits. There are no Actions pending or, to the Knowledge of Seller threatened, which would reasonably be expected to result in the revocation or termination of any Material Permit.

(l) Acquired Assets. The Acquired Assets comprise all of the assets, properties and rights of every type and description, real, personal, tangible and intangible used by Seller in and necessary to conduct the Business, as is currently being conducted and necessary to enable Buyer, following the Closing, to conduct the Business in the Ordinary Course of Business, as it is currently being conducted.

(m) Disclosure. No representation or warranty by Seller contained in this Agreement, and no statement contained in the schedules delivered by Seller pursuant to this Agreement, contains any untrue statement of material fact or omits to state any material fact necessary, in light of the circumstances under which it was made, to make the statements herein or therein no misleading.

(n) Insurance. Section 5(n) of the Sellers Disclosure Schedule sets forth all insurance policies with respect to the Acquired Assets other than any director and officer or similar insurance policies. All such policies are in full force and effect and Seller has complied with the terms thereof in all material respects.

(o) Tax Matters. There are no Liens for Taxes on any of the Acquired Assets other than liens described in clause (i) of the definition of Permitted Encumbrances.

6. REPRESENTATIONS AND WARRANTIES OF BUYER.

Buyer hereby represents and warrants to Seller that the following statements are true, correct and complete:

(a) Organization, Qualification and Authority. Buyer is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Buyer has full power and authority to enter into this Agreement and each of the other Transaction Documents to be entered into by Buyer and to carry out its obligations hereunder and thereunder. The execution, delivery and performance by Buyer of this Agreement and of each other Transaction Document to be entered into by Buyer, and the consummation by Buyer of the transactions contemplated hereby and thereby, have been approved by all necessary limited liability company action on the part of Buyer. This Agreement has been duly executed and delivered by Buyer and constitutes the legal, valid and binding agreement of Buyer, enforceable against it in accordance with its terms.

(b) No Approvals; Conflict. Except for the approval of the Bankruptcy Court, the execution, delivery and performance by Buyer of this Agreement and the other Transaction Documents, the fulfillment of and compliance with the respective terms and provisions hereof and thereof by Buyer and the consummation of the transactions contemplated hereby and thereby by Buyer do not and will not require any consent, authorization or approval of or any filing or registration with any Governmental Authority or other Person.

(c) Brokers' Fees. Buyer has no Liability to pay any fees or commissions to any broker or finder with respect to the transactions contemplated by this Agreement for which Seller could become liable or obligated.

(d) Ability to Close Transaction. Buyer has the financial ability to consummate a closing of the transactions contemplated hereby at the Purchase Price.

(e) Adequate Assurance of Future Performance. Buyer is ready, willing and able to provide evidence of its ability to provide adequate assurance of its future performance of each and all of the Acquired Agreements, as required under the Bankruptcy Code, and will provide such evidence in accordance with the terms of the Bid Procedures Order.

7. COVENANTS.

(a) General. Subject to Section 9 and the procedures as shall be set forth in the Bid Procedures Order, each of the Parties shall use its commercially reasonable efforts to take all actions and do all things reasonably necessary, proper or advisable in order to consummate and make effective the transactions contemplated by this Agreement, including satisfaction, but not waiver, of the closing conditions set forth in Section 10, below.

(b) Operation of Business.

(i) During the period from the Execution Date until the earlier of the termination of this Agreement in accordance with its terms or the Closing, Seller shall (i) use its reasonable best efforts to maintain the Acquired Assets and conduct the Business in all material respects in the Ordinary Course of Business, including meeting all post-petition obligations relating to the Business as they become due, (ii) use commercially reasonable efforts to preserve and maintain its relationships with any customers, suppliers, unions, partners in any joint ventures, lessors, licensors, licensees, contractors, distributors, agents, officers, and employees and other Persons with which they have significant business relationships material to the Business; provided that nothing herein shall prevent Seller from commencing or defending any Action against or by any such Person in connection with the claims of such Person in the Bankruptcy Case; (iii) use reasonable best efforts to preserve and maintain the Acquired Assets, including furnishings and equipment, ordinary wear and tear excepted; (iv) maintain the books and records of the Company in all material respects in the Ordinary Course of Business; (v) comply in all material respects with all applicable Laws (including Environmental Laws); (vi) not enter into any business, arrangement or otherwise take any action that would reasonably be expected to have a material adverse impact on the ability of Seller or Buyer to obtain any approvals of any Governmental Authority for this Agreement and the transactions contemplated hereby; and (vii) maintain a normal amount of Inventory, in each case, except (x) as may be required by applicable Law, (y) with the prior written consent of Buyer, or (z) as set forth in Section 7(b)(i) of the Seller Disclosure Schedule.

(ii) Without limiting the generality of the foregoing, in no event shall Seller (A) other than Permitted Encumbrances, create, incur, assume or suffer to exist any Lien upon the Acquired Assets; (B) cause to increase or accelerate any of the Assumed Liabilities; (C) sell, lease (as lessor), transfer or otherwise dispose of, any of the Acquired Assets outside of the Ordinary Course of Business; (D) assume or reject or amend, restate, supplement, modify, waive or terminate any material Contract, Material Permit or unexpired Lease or enter into any settlement of any claim that (1) is outside the Ordinary Course of Business, (2) delays the Closing, (3) relates to a material Contract or (4) subjects Seller to any material non-compete or other similar material restriction on the conduct of its Business that would be binding following the Closing;

(c) Access.

(i) For purposes of furthering the transactions contemplated hereby, Seller shall afford Buyer, and its Affiliates and its and their respective officers, directors, managers, equity owners, members, employees, accountants, consultants, legal counsel bankers, advisors, representatives and authorized agents (collectively, "Representatives"), reasonable access during normal business hours upon reasonable advance notice to Seller, throughout the period from the Execution Date until the earlier of the termination of this Agreement and the date that is two years after the Closing Date, to Seller's personnel, properties, contracts, commitments, books and records and such other information concerning the business, properties and personnel of the Business as Buyer may reasonably request; provided that Seller shall not be obligated to provide or give access to any minutes of meetings or resolutions of Seller's board of directors (or similar governing body) or any committees thereof or any other business records or reports of or communication with any of its advisors relating to the evaluation or negotiation of this Agreement or the transactions contemplated hereby or any alternatives thereto. Notwithstanding anything to the contrary contained in this Section 7(c), any document, correspondence or information or other access provided pursuant to this Section 7(c) may be redacted or otherwise limited to prevent disclosure of information concerning the valuation of Seller and/or the Business and the purchase of the Acquired Assets or other similarly confidential or competitively sensitive information. All access pursuant to this Section 7(c) shall be conducted in such a manner as not to interfere unreasonably with the normal operations of Seller.

- (ii) Seller shall, and shall cause its Affiliates to, provide Buyer with full access (including after normal working hours and on non-Business Days and other days on which Seller's operations are customarily closed) to each of the real properties owned or leased by Seller or any of its Affiliates at which any of the Acquired Assets are physically located in order to allow Buyer to inspect such tangible Acquired Assets and take Inventory.
- (iii) In order to facilitate Seller's efforts to administer and close the Bankruptcy Case, for a period of two years following the Closing, Buyer shall permit Seller and Seller's Representatives (collectively, "**Permitted Access Parties**") during regular business hours and subject to agreeing to customary confidentiality obligations, with reasonable notice, and subject to reasonable rules and regulations, reasonable access to the financial and other books and records which comprised part of the Acquired Assets that are required to administer and close the Bankruptcy Case, which access shall include (A) the right of such Permitted Access Parties to copy, at such Permitted Access Parties' expense, such required documents and records and (B) Buyer's copying and delivering to the relevant Permitted Access Parties such documents or records as they require, but only to the extent such Permitted Access Parties furnish Buyer with reasonably detailed written descriptions of the materials to be so copied and applicable Permitted Access Party reimburses Buyer for the reasonable costs and expenses thereof; provided, however, that the foregoing rights of access shall not be exercisable in such a manner as to interfere with the normal operations of Buyer's business. Notwithstanding anything contained in this Section 7(c) to the contrary, in no event shall Seller have access to any information that, based on advice of Buyer's counsel, could (i) reasonably be expected to create liability under applicable Law, or waive any legal privilege, (ii) result in the discharge of any Trade Secrets of Buyer, its affiliates or any third parties or (iii) violate any obligation of Buyer with respect to confidentiality.
- (d) Notice of Developments. At any time prior to Closing, Seller shall provide Buyer prompt, due and sufficient notice of (i) material developments relating to the Business, including any development causing a breach of any of their representations and warranties hereunder and, except for litigations or other Actions commenced, filed or pending in the Bankruptcy Court, any litigation or other Action brought or threatened in writing against Seller or its directors or executive officers or other Representatives relating to this Agreement, the Asset Purchase and/or the other transactions contemplated hereby; (ii) the occurrence, or failure to occur, of any event which occurrence or failure to occur would cause any representation or warranty contained in this Agreement to be untrue or inaccurate at any time from the date hereof to the Closing Date; and (iii) any failure to comply with or satisfy in any material respect any covenant, condition or agreement to be complied with or satisfied by it hereunder.
- (e) Regulatory Approvals; Efforts. Prior to the Closing, Buyer and Seller shall, and shall cause their respective Affiliates to, use their respective commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under any applicable Laws to consummate the Asset Purchase as promptly as practicable, including (i) preparing and filing all forms, registrations and notifications with any Governmental Authorities or third parties required to be filed to consummate the Asset Purchase, (ii) using commercially reasonable efforts to satisfy the conditions to consummating the Asset Purchase, (iii) using commercially reasonable efforts to obtain (and to cooperate with each other in obtaining) any consent, authorization, permit, Order or approval of, waiver or any exemption by, any Governmental Authority required to be obtained or made by Buyer, Seller or any of their respective Affiliates in connection with the Asset Purchase or the taking of any action contemplated hereby, (iv) defending any lawsuits or other Actions, whether judicial or administrative, challenging this Agreement or the consummation of the Asset Purchase, and (v) using commercially reasonable efforts with respect to the execution and delivery of all such instruments, deeds, assignments or assurances and do all other things reasonably necessary or desirable to consummate the Asset Purchase and to fully carry out the purposes or intent of this Agreement.
- (f) Confidentiality. Seller acknowledges that the success of the Business after the Closing depends upon the continued preservation of the confidentiality of certain information possessed by Seller and its Affiliates, that the preservation of the confidentiality of such information by Seller and its Affiliates is an essential premise of the bargain between Seller, on the one hand, and Buyer, on the other hand, and that Buyer would be unwilling to enter into this Agreement in the absence of this Section 7(f). Accordingly, from and after the Closing Date, Seller shall not, and shall cause its Affiliates and its and their Affiliates' Representatives to not, at any time after Closing, directly or indirectly, without the prior written consent of Buyer, disclose to any third party (other than Seller's Affiliates and Representatives who need to know such information) or use any Confidential Information involving or relating to the Business or the Acquired Assets. For the purposes of this Section 7(f), "**Confidential Information**" means any confidential or proprietary information related to the Business or any Acquired Assets, including personnel information, know-how, data, databases, advertising and marketing plans or systems, distribution and sales methods or systems, sales and profit figures, customer and client lists, and customer and client information or other information received by the Business from any Person with any express understanding that it will not be disclosed, but not including information that is or becomes generally available to the public (other than through a breach of the obligations of Seller, its Affiliates or its or their respective Representatives' hereunder or under any other agreement with Buyer or any of its Affiliates). Should Seller or any of its Affiliates or Representatives be required to disclose any such information in response to a court order or as otherwise required by Law or administrative process, to the extent permitted by applicable Law, subpoena or other court process, Seller will inform Buyer in writing of such request or obligation as soon as possible after Seller is informed of it and, if possible, before any information is disclosed, so that a protective order or other appropriate remedy may be obtained by Buyer. Seller agrees that it shall be responsible for any breach or violation of the provisions of this Section 7(f) by any of its Affiliates or its or their Affiliates' Representatives. The provisions of this Section 7(f) shall expressly survive Closing.
- (g) Notification. Except for litigations or other Actions commenced, filed or pending in the Bankruptcy Court, each Party shall promptly (and in any event, within two (2) Business Days) notify the other Parties in writing of any litigation or other Action brought or threatened in writing against it or its directors or executive officers or other Representatives relating to this Agreement, the Asset Purchase and/or the other transactions contemplated hereby and shall keep the other Parties informed on a reasonably current basis with respect to the status thereof (including by promptly furnishing to the other Parties and their respective Representatives such information relating to such litigation or other Action as may be reasonably requested). Each Party shall, subject to the preservation of the attorney-client and similar privileges and confidential information, give the other Parties the opportunity to participate in (but not control) the defense or

settlement of any litigation or other Action against it and/or its directors or executive officers or other Representatives relating to this Agreement, the Asset Purchase or the other transactions contemplated hereby and shall give due consideration to such other Parties' advice with respect to such litigation or other Action.

(h) Insurance. Seller shall maintain through the Closing Date all insurance policies that provide coverage to insure the Acquired Assets against such risks and in such amounts as are prudent and customary in the industry in which Seller operate and all such policies shall remain in full force and effect through the Closing Date.

(i) Public Announcements. Neither Sellers, on the one hand, nor Buyer, on the other hand, shall, without the approval of the other Parties, make any press release or other public announcement concerning the transactions contemplated hereby, except (a) as and to the extent that any such Party shall be so obligated by Law, including as may be required by the Bankruptcy Case, securities laws, or the rules of any stock exchange, in which case, each Party shall be advised prior to such disclosure, consult with each other before issuing such press release or public announcement and consider in good faith any comments received from the other Party at least two (2) Business Days prior to such issuance and (b) solely with respect to Buyer, any announcement to its members, stockholders, partners or other equity owners or financing sources. The provisions of this Section 7(i) shall expressly survive Closing or any earlier termination of this Agreement.

(j) Customer Inquiries. Neither Seller nor any of its Affiliates shall take any action that is designed or intended to have the effect of discouraging any lessor, licensor, supplier, distributor or customer of the Business from maintaining the same relationship with the Business after the Closing as it maintained prior to the Closing. Seller shall refer all customer inquiries relating to the Business to Buyer from and after the Closing.

(k) Consents; Notices. At or prior to the Closing, Buyer and Seller shall, and Seller shall cause its Affiliates to, use commercially reasonable efforts to obtain all Consents and give all notices required for Seller to assign the Acquired Agreements to Buyer to the extent not assignable without any such approval, consent, or notice pursuant to Section 363 or Section 365 of the Bankruptcy Code. If any Consent is not obtained prior to the Closing or to the extent that any Acquired Agreement or any other Acquired Asset (each, a "***Non-Assigned Asset***") has not been assigned, transferred or conveyed from Seller or any of its Affiliates to Buyer prior to the Closing, then (i) Seller shall, and shall cause its Affiliates to, continue to use commercially reasonable efforts after the Closing to obtain the Consents and effect the assignment, transfer or conveyance of such Non-Assigned Asset to Buyer or its designee, free and clear of all Liens (other than Permitted Encumbrances), as soon as practicable following the Closing Date and for no additional consideration, and (ii) until any such assignment, transfer or conveyance has been completed, to the extent permitted by any applicable Law, Seller and Buyer shall, and shall cause their respective Affiliates to, take such other actions as may be necessary to place the Parties in the position that the Parties would have been in had the Non-Assigned Assets been assigned, transferred or conveyed to Buyer at or prior to the Closing such that all of the benefits and burdens relating to such Non-Assigned Assets, including expenses, risk of loss, potential for gain and control of such Non-Assigned Assets inure from and after the Closing to Buyer, including by establishing an agency type or other similar arrangement reasonably satisfactory to Seller and Buyer. Seller shall consult with Buyer in connection with the Post-Closing Transfers, including (x) at the request of Buyer, providing updates and information regarding the status thereof, including copies of documents related to the Post-Closing Transfers and (y) providing Buyer with a reasonable opportunity in advance of effecting any Post-Closing Transfer to review and comment on all documentation relating thereto and reasonably cooperating with Buyer and its counsel in respect of the form thereof such documentation it is in a form and substance reasonably acceptable to Buyer and its counsel.

8. BANKRUPTCY COVENANTS.

(a) Bankruptcy Court Approval. Seller and Buyer acknowledge that this Agreement and the sale of the Acquired Assets are subject to Bankruptcy Court approval and the consideration by Seller of Alternative Bids (if any). Seller and Buyer acknowledge that (i) to obtain such approval, Seller must demonstrate that it has taken reasonable steps to obtain the highest or otherwise best offer possible for the Acquired Assets, including, but not limited to, giving notice of the transactions contemplated hereby to creditors and certain other interested parties as ordered by the Bankruptcy Court, and, to the extent Seller receives more than one qualified bid (other than this Agreement) with respect to the Acquired Assets, conducting an auction (the "***Auction***") in respect of the Acquired Assets pursuant to the Bid Procedures Order, and (ii) Buyer must provide adequate assurance of future performance under the Acquired Agreements.

(b) Non-Solicitation. Except in connection with marketing the sale of the Acquired Assets to Potential Bidders/Qualified Bidders (as shall be defined in the Bid Procedures) in accordance with the Bid Procedures Order after such Order is entered by the Bankruptcy Court, Seller shall not, and shall cause its Representatives and Affiliates, and its Affiliates' Representatives not to, (i) solicit, negotiate, or discuss with any Person, other than Buyer and its Affiliates, agents, and Representatives (and Seller shall, and shall cause its Representatives and Affiliates, and its Affiliates' Representatives to, immediately cease any such ongoing activity), or enter into any agreement or understanding with respect to, or approve or recommend, or knowingly facilitate, any Alternative Transaction or (ii) provide any Person, other than Buyer and its Affiliates, agents, and Representatives, with access to the books, records, operating data, contracts, documents, or other information relating to Seller except to the extent required by Bankruptcy Court order. Seller shall promptly (and in any event within twenty-four (24) hours) notify Buyer of any inquiry, indication of interest, proposal, or offer from a third party with respect to an Alternative Transaction received by Seller or any of its Affiliates or its or their employees or Representatives after the date hereof until the Bankruptcy Court shall have entered the Bid Procedures Order, and Seller shall communicate to Buyer the material terms of (including the identity of the Person or Persons making) any such inquiry, indication of interest, proposal, or offer. Seller shall immediately cease to provide access to confidential information about Seller or the Business in connection with any actual or potential Alternative Transaction until the entry of the Bid Procedures Order and shall immediately instruct any Person who does not become a "Qualified Bidder" (as shall be defined in the Bid Procedures) by the Bidding Deadline (as defined in the Bid Procedures), or if so qualified, is not designated the "Winning Bidder" or the "Back-up Bidder" (each as shall be defined in the Bid Procedures) at the Auction, in possession of confidential information about Seller or the Business that was furnished by or on behalf of Seller in connection with any actual or potential Alternative Transaction to return or destroy all such information or documents or material incorporating such information in accordance with the confidentiality or similar agreement governing treatment of such confidential information. Seller shall not be deemed to have violated or breached their obligations set forth in the first sentence of this Section 8(b) solely as a result of its receipt, without engaging in any of the conduct prohibited by such sentence, of an unsolicited Alternative Transaction proposal.

(c) Requirements for Competing Bid to be a Qualified Bid. The Parties agree that the Debtor's Motion for the entry of the Bid Procedures Order shall, among other things, seek: (i) approval of the Expense Reimbursement as an administrative priority claim under Bankruptcy Code Sections 503(b) and 507(a) and the Break-Up Fee; and (ii) approval of the procedures for the sale of the Acquired Assets, including the requirement that any competing Bid by bidders other than Buyer, in order to be a "Qualified Bid", must (A) exceed the Purchase Price (excluding, solely for the purpose of this subclause (A), the Expense Reimbursement) by an aggregate amount (the "**Overbid Amount Requirement**") equal to (x) at least \$50,000, *plus* (y) the Break-Up Fee, *plus* (z) the Expense Reimbursement Cap; (B) provide that for any Person other than Buyer to be considered a "Qualified Bidder" (as shall be defined in the Bid Procedures), such Person shall provide sufficient evidence to Seller of its financial ability to consummate a closing of the transactions contemplated hereby and such Person's bid shall at a minimum (1) meet the Overbid Amount Requirement, (2) not be conditioned on the outcome of such bidder's due diligence, (3) not be conditioned on such bidder's ability to obtain financing, (4) include a commitment to close the transactions within the timeframe contemplated by this Agreement, (5) provide as good as or better terms as contained in this Agreement, with any proposed changes to be provided via a redlined agreement marked against this Agreement, and (6) be accompanied by a good faith deposit in an amount equal to the Security Deposit in cash by wire transfer to an account designated by Seller; (C) provide that, if Buyer is not the Successful Bidder at the Auction but is the next highest or best bidder, as determined by the Debtor in its discretion, Buyer shall be deemed to be the Back-Up Bidder (as shall be defined in the Bid Procedures); and (D) provide that, if Buyer is the Back-Up Bidder (as shall be defined in the Bid Procedures) and Seller fails to consummate a closing with a Qualifying Bidder thereafter, Seller shall give Buyer ten (10) Business Days' written notice in order to allow Buyer and Seller to consummate a closing of the sale of the Acquired Assets.

(d) Notice of Filings, Notices and Requests. Seller shall consult with Buyer and its Representatives concerning the Bid Procedures Order, the Sale Order, any other orders of the Bankruptcy Court and the bankruptcy proceedings in connection therewith and provide Buyer with copies of requested applications, pleadings, notices, proposed orders and other documents relating to such proceedings as soon as reasonably practicable prior to any submission thereof to the Bankruptcy Court, as applicable. Seller further covenants and agrees that, after the Closing, the terms of any reorganization plan it submits to the Bankruptcy Court for confirmation or sanction shall not conflict with, supersede, abrogate, nullify or restrict the terms of this Agreement, or in any way prevent or interfere with the consummation or performance of the transactions contemplated by this Agreement, including, without limitation, any transaction contemplated by or approved pursuant to the Sale Order.

9. CONDITIONS TO CLOSING.

(a) Condition to Each Party's Obligation to Close. The respective obligations of each Party to effect the Asset Purchase shall be subject to the fulfillment (or waiver in a writing signed by the waiving party, to the extent permissible under applicable Law and provided that such waiver shall only be effective as to the conditions of the waiving party) at or prior to the Closing of each of the following conditions:

- (i) no injunction by any court or other tribunal of competent jurisdiction shall have been entered and shall continue to be in effect and no Law shall have been adopted that remains in effect or be effective, in each case, that prevents, enjoins, prohibits or makes illegal the consummation of the Asset Purchase; and
- (ii) all material consents, licenses, registrations, or declarations of, or filings with, any Governmental Authorities in any such jurisdictions required under any Laws for the Asset Purchase to be completed have been obtained or made on a basis acceptable to Seller and Buyer, such acceptance not to be unreasonably withheld, delayed or conditioned.

(b) Conditions to Obligation of Buyer. The obligation of Buyer to pay the Purchase Price and consummate the transactions to be performed by it in connection with Closing is subject to satisfaction, or waiver by Buyer at its sole discretion, of the following conditions:

- (i) (A) each of the representations and warranties of Seller contained in Sections 5(a), 5(b), 5(c)(ii), (B) and 5(i) shall be true and correct as of the Execution Date and as of the Closing as though made on and as of the Closing (except to the extent such representations and warranties expressly relate to an earlier date, in which case, such representations and warranties shall be true and correct in all material respects as of such earlier date) in all respects except for de minimis inaccuracies, and (B) each of the other representations and warranties of Seller herein that are qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, in each case as of the Execution Date and as of the Closing as though made at and as of the Closing (except to the extent such representations and warranties expressly relate to an earlier date, in which case, such representations and warranties shall be true and correct in all material respects as of such earlier date);
- (ii) Seller shall have performed and complied in all material respects with all covenants required by this Agreement to be performed or complied with by Seller prior to Closing;
- (iii) Seller shall have delivered to Buyer a certificate, dated the Closing Date and signed by a duly authorized executive officer (in such officer's capacity as such and not individually) of Seller, certifying to the effect that the conditions set forth in Section 9(b)(i) and Section 9(b)(ii) have been satisfied;
- (iv) the Sale Order shall have been entered and become a Final Order;

- (v) Seller shall be prepared to deliver, or cause to be delivered, the items set forth in Section 4(b);
- (vi) from the Execution Date until the Closing, there shall not have been any change, effect, event, condition, circumstance, occurrence or development that, individually or in the aggregate, has, or would reasonably be expected to have, a material adverse effect on (a) the assets, properties, Liabilities, business, operations or condition (financial or otherwise) of Seller in respect of the Business or (b) the ability of Seller to consummate the transactions contemplated hereby;
- (vii) Francisco Silva shall have entered into a written agreement for employment with Buyer in form and substance satisfactory to Buyer; and
- (viii) all Consents, in form and substance reasonably satisfactory to Buyer, shall have been obtained.

(c) Conditions to Obligation of Seller to Close. The obligation of Seller to sell the Acquired Assets at Closing is further subject to the fulfillment (or waiver in a writing signed by Seller, to the extent permissible under applicable Law) at or prior to the Closing of the following conditions:

- (i) the representations and warranties of Buyer contained herein that are qualified as to materiality shall be true and correct, and those not so qualified shall be true and correct in all material respects, in each case as of the Execution Date and as of the Closing as though made at and as of the Closing (except to the extent such representations and warranties expressly relate to an earlier date, in which case, such representations and warranties shall be true and correct in all material respects as of such earlier date);
- (ii) Buyer shall have performed and complied in all material respects with all covenants required by this Agreement to be performed or complied with by Buyer prior to Closing;
- (iii) Buyer shall have delivered to Seller a certificate, dated the Closing Date and signed by a duly authorized executive officer (in such officer's capacity as such and not individually) of Buyer, certifying to the effect that the conditions set forth in Section 9(c)(i) and Section 9(c)(ii) have been satisfied;
- (iv) the Sale Order shall have been entered; and
- (v) Buyer shall be prepared to deliver, or cause to be delivered, the items set forth in Section 4(c).

10. TERMINATION; FEES AND EXPENSES.

(a) Termination. Notwithstanding anything in this Agreement to the contrary, this Agreement may be terminated, and the transactions contemplated hereby may be abandoned, at any time prior to the Closing, as follows:

- (i) by the mutual written consent of Seller and Buyer;
- (ii) by either Seller or Buyer, if the transactions contemplated hereby, including the Asset Purchase, shall not have been consummated on or prior to 5:00 p.m. New York City Time, on June 15, 2020 (the "**Termination Date**"); provided that, if as of the Termination Date any of the conditions set forth in Section 9(a) shall not have been satisfied or waived, the Termination Date may be extended on one occasion by either Buyer or Seller for a period of up to sixty (60) calendar days by written notice to the other Party, and such date, as so extended, shall thereafter be the "Termination Date"; provided, further that the right to terminate this Agreement pursuant to this Section 10(a)(ii) shall not be available to a Party if the failure of the transactions contemplated hereby to be consummated by such date shall be due to the breach by such Party of any covenant or other agreement of such Party set forth in this Agreement;
- (iii) by either Seller or Buyer, if an Order by a Governmental Authority shall have been issued permanently restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated hereby and such order shall have become final and nonappealable; provided that the right to terminate this Agreement pursuant to this Section 10(a)(iii) shall not be available to a Party if such Order resulted from, or could have been avoided but for, the breach by such Party of any covenant or other agreement of such Party set forth in this Agreement;
- (iv) by Seller, if Buyer shall have breached or there is any inaccuracy in any of its representations or warranties, or shall have breached or failed to perform any of its covenants or other agreements contained in this

Agreement, which breach, inaccuracy or failure to perform (i) if it occurred or was continuing to occur on the Closing Date, would result in a failure of a condition set forth in Section 9(a) or Section 9(b) and (ii) is either not curable or is not cured by the earlier of (A) the Termination Date and (B) the date that is 15 days following written notice from Seller to Buyer of such breach, inaccuracy or failure, provided that Seller is not then in material breach of any of its covenants, agreements, representations, or warranties under this Agreement;

- (v) by Buyer, if Seller shall have breached or there is any inaccuracy in any of its representations or warranties, or shall have breached or failed to perform any of its covenants or other agreements contained in this Agreement, which breach, inaccuracy or failure to perform (i) if it occurred or was continuing to occur on the Closing Date, would result in a failure of a condition set forth in Section 9(a) or Section 9(c) and (ii) is either not curable or is not cured by the earlier of (A) the Termination Date and (B) the date that is 15 days following written notice from Buyer to Seller of such breach, inaccuracy or failure, provided that Buyer is not then in material breach of any of its covenants, agreements, representations, or warranties under this Agreement;
- (vi) by Buyer, if the Sale Motion has not been filed with the Bankruptcy Court on or prior to the date that is three Business Days following the Filing Date;
- (vii) by Buyer, if the Bid Procedures Order has not been entered by the Bankruptcy Court on or prior to the date that is 14 days following the Filing Date;
- (viii) by Buyer, if the Sale Order has not been entered by the Bankruptcy Court on or prior to the date that is 44 days following the date that the Sale Motion is filed with the Bankruptcy Court;
- (ix) by Buyer, if the Bid Procedures Order (including the Bid Procedures, Break-Up Fee, or Expense Reimbursement) or the Sale Order is modified in any respect without the consent of Buyer;
- (x) by either Seller or Buyer upon the earlier to occur of (i) Seller's entry into an Alternative Transaction and (ii) the Bankruptcy Court's approval of Seller's entry into or pursuit of an Alternative Transaction; provided that Seller shall have the right to terminate this Agreement pursuant to this Section 10(a)(x) only if it has complied in all material respects with the requirements of Section 8(b) hereof;
- (xi) by either Seller or Buyer if Buyer is not the Successful Bidder or the Back-Up Bidder at the Auction;
- (xii) by Buyer, if the Bankruptcy Court enters an order pursuant to Section 362 of the Bankruptcy Code lifting or modifying the automatic stay with respect to any material portion of the Purchased Assets;
- (xiii) by Buyer, if the Bankruptcy Case is dismissed or converted to a case under Chapter 7 of the Bankruptcy Code for any reason or if a trustee or examiner with expanded powers is appointed in the Bankruptcy Case; or
- (xiv) by Buyer, if the Filing Date shall not have occurred on or prior to the date that is one Business Day after the Execution Date.

(b) Effect of Termination. In the event of termination of this Agreement pursuant to Section 10(a), this Agreement shall terminate (except that Sections 3(a), 7(f), 7(i), this 10(b), 10(c) and 11 shall survive any such termination), and there shall be no other Liability on the part of Seller or Buyer to the other Party, other than as set forth in Section 3(a) or this Section 10.

(c) Fees and Expenses.

- (i) Seller acknowledges (A) that Buyer has made a substantial investment in time and incurred substantial out-of-pocket expenses in connection with the negotiation and execution of this Agreement, its due diligence with respect to the Acquired Assets, and its efforts to consummate the transactions contemplated hereby, and (B) that Buyer's efforts have substantially benefited Seller and will benefit Seller and will benefit the bankruptcy estate of Seller through the submission of the offer reflected in this Agreement which will, among other things, serve as a minimum bid on which other potentially interested bidders can rely. Therefore, as compensation for entering into this Agreement, taking action to attempt to consummate the transactions contemplated hereby and incurring the costs and expenses related thereto and other losses and damages, including forgoing other opportunities, Seller agrees to pay to Buyer (1) an amount (the "**Break-Up Fee**") equal to two percent (2%) of the sum of (x) the Cash Component, *plus* (y) the Credit Bid Amount (exclusive of the Tuxis Note (as defined in the DIP Loan Agreement) and the Desmarais Note (as defined in the DIP Loan Agreement)), *plus* (z) the Cure Amounts, and/or (2) the Expense Reimbursement, in each case, as required under, and in accordance with, the provisions of this Section 10(c). Any obligation to pay the Break-Up Fee and/or Expense Reimbursement hereunder shall be absolute and unconditional.

- (ii) Seller shall pay to Buyer the Break-Up Fee in the event that this Agreement is validly terminated either (A) pursuant to Sections 10(a)(v), (x) or (xi), in which case the Break-Up Fee shall be due and payable to Buyer within two (2) Business Days following the date of such termination, or (B) pursuant to Sections 10(a)(ii), (iii), (vi), (vii), (viii), (ix), (xii) or (xiii), and within nine months following such termination, Seller enters into a definitive agreement with respect to an Alternative Transaction or an Alternative Transaction shall have been consummated, in which case the Break-Up Fee shall be due and payable to Buyer within two Business Days following consummation of such Alternative Transaction. The Break-Up Fee shall, subject to Bankruptcy Court approval, constitute an administrative expense against Seller and its estate in the Bankruptcy Case under sections 503(b)(1)(A) and 507(a)(2) of the Bankruptcy Code. For the avoidance of doubt, the Break-Up Fee, if payable pursuant to this Section 7.3, shall be in addition to the payment of the Expense Reimbursement and the return of the Security Deposit, in each case, to the extent payable to Buyer pursuant to this Section 10(c) and Section 3(a), respectively.
- (iii) Upon any termination of this Agreement, other than any termination by Seller pursuant to Sections 10(a)(i), (ii) (solely to the extent that the Closing does not occur on or prior to the Termination Date as a result of Buyer's material breach of its obligations under this Agreement), (iii) (solely to the extent that such Order resulted from, or could have been avoided but for, the material breach by Buyer of the covenants or other agreements of Buyer set forth in this Agreement), or (iv), Seller shall pay to Buyer the Expense Reimbursement within two Business Days after the date of the termination of this Agreement. The Expense Reimbursement shall, subject to Bankruptcy Court approval, constitute an administrative expense against Seller and its estate in the Bankruptcy Case under sections 503(b)(1)(A) and 507(a)(2) of the Bankruptcy Code. For the avoidance of doubt, the Expense Reimbursement, if payable pursuant to this Section 10(c), shall be in addition to the payment of the Break-Up Fee and the return of the Security Deposit, in each case, to the extent payable to Buyer pursuant to this Section 10(c) and Section 3(a), respectively.
- (iv) Upon any termination of this Agreement, other than any termination by Seller pursuant to Section 10(a)(ii), solely to the extent that the Closing does not occur on or prior to the Termination Date as a result of Buyer's material breach of its obligations under this Agreement, or Section 10(a)(iv), the Escrow Agent shall promptly, and in no event more than one Business Day thereafter, disburse to Buyer the Security Deposit and all income or interest accrued thereon by wire transfer of immediately available funds to the account(s) provided by Buyer to the Escrow Agent. Upon any termination by Seller pursuant to Section 10(a)(ii), solely to the extent that the Closing does not occur on or prior to the Termination Date as a result of Buyer's material breach of its obligations under this Agreement, or Section 10(a)(iv), the Security Deposit shall be nonrefundable and paid to Seller and the Escrow Agent shall immediately disburse to Seller the Security Deposit and all interest or income accrued thereon by wire transfer of immediately available funds to the account(s) provided by Seller to the Escrow Agent.
- (v) Seller acknowledges and agrees that (A) the approval of the Break-Up Fee and the Expense Reimbursement is an integral part of the transactions contemplated by this Agreement, (B) in the absence of Seller's obligation to pay the Break-Up Fee and the Expense Reimbursement as set forth herein, Buyer would not have entered into this Agreement, (C) the entry of Buyer into this Agreement is necessary for preservation of Seller's estate and is beneficial to Seller because it will enhance Seller's ability to maximize the value of its assets for the benefit of its creditors and other stakeholders, (D) the Break-Up Fee and Expense Reimbursement are reasonable in relation to Buyer's costs and efforts and to the magnitude of the transactions contemplated hereby and Buyer's lost opportunities resulting from the time spent pursuing the transactions contemplated hereby, and the damages resulting from termination of this Agreement under circumstances where Buyer is entitled to the Break-Up Fee and/or Expense Reimbursement are uncertain and incapable of accurate calculation and that payment of the Break-Up Fee and/or Expense Reimbursement to Buyer is not a penalty, but rather shall constitute a reasonable amount that will compensate Buyer for the efforts and resources expended and opportunities forgone while negotiating and pursuing this Agreement and in reliance on this Agreement and on the expectation of the consummating of the transactions contemplated hereby, and (E) time is of the essence with respect to the entry of the Bid Procedures Order by the Bankruptcy Court, approving, among other things, the process by which bids may be solicited, including the Bid Procedures.
- (vi) If Seller fails to take any action necessary to pay the Break-Up Fee and/or the Expense Reimbursement under circumstances where Buyer is entitled to the Break-Up Fee and/or the Expense Reimbursement and, in order to obtain such Break-Up Fee and/or Expense Reimbursement, Buyer commences a suit or other action or proceeding which results in a judgment or award in favor of Buyer, Seller shall pay to Buyer, in addition to the Break-Up Fee and/or the Expense Reimbursement, an amount in cash equal to the costs and expenses (including reasonable attorney's fees) incurred by Buyer in connection with such suit, action, or proceeding, plus interest on the Break-Up Fee and/or Expense Reimbursement calculated from the date due and payable hereunder at the prevailing prejudgment rate of interest.

11. MISCELLANEOUS.

(a) Survival of Representations and Warranties. The representations, warranties, covenants and agreements in this Agreement or in any instrument delivered pursuant to this Agreement shall not survive the Closing and shall be extinguished by the Closing and the consummation of the transactions contemplated hereby, except for covenants and agreements that, by their terms, contemplate performance after, or otherwise expressly by their terms survive, the Closing.

(b) Transfer Taxes. Any federal, state, provincial or local transfer Taxes, including transfer, conveyance, sales, documentary stamp and similar Taxes, payable as a result of the purchase and sale of the Acquired Assets, the assignment of Acquired Agreements or any other action contemplated by this Agreement shall be paid by Buyer. Buyer and Seller will cooperate in the preparation, execution and filing of all Tax Returns, questionnaires, applications or other like documents regarding any such Taxes.

(c) Expenses. Except as otherwise provided in this Agreement, whether or not the Asset Purchase is consummated, all costs and expenses incurred in connection with the Asset Purchase, this Agreement and the transactions contemplated hereby shall be paid by the Party incurring or required to incur such expenses.

(d) Waiver. No terms or provisions hereof, including the terms and provisions contained in this sentence, shall be waived, modified or altered so as to impose any additional obligations or liability or grant any additional right or remedy, and no custom, payment, act, knowledge, extension of time, favor or indulgence, gratuitous or otherwise, or words or silence at any time, shall impose any additional obligation or liability or grant any additional right or remedy or be deemed a waiver or release of any obligation, liability, right or remedy except as set forth in a written instrument properly executed and delivered by the Party sought to be charged, expressly stating that it is, and the extent to which it is, intended to be so effective. No assent, express or implied, by either Party, or waiver by either Party, to or of any breach of any term or provision of this Agreement or of the Schedules shall be deemed to be an assent or waiver to or of such or any succeeding breach of the same or any other such term or provision.

(e) No Third-Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any Person other than the parties and their respective successors and permitted assigns.

(f) Entire Agreement; Amendment. This Agreement, the Exhibits and Schedules referred to herein and the Transaction Documents contain the entire understanding of the parties with respect to the subject matter contained herein or therein and supersede in their entirety all prior or concurrent oral or written agreements, offers, proposals and understandings between the parties with respect to such subject matter. This Agreement may not be amended in any respect whatsoever except by a further agreement, in writing, fully executed by each of the parties; *provided, however, that* this Agreement may not be amended in any material manner after entry of a Sale Order without Bankruptcy Court approval.

(g) Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties named herein and their respective successors and permitted assigns. No Party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written approval of the other party; provided that Buyer may (i) assign any or all of its rights and interests hereunder to one or more of its Affiliates ("**Permitted Designees**") and (ii) designate one or more Permitted Designees to perform its obligations hereunder, in any or all of which cases Buyer shall remain responsible for the performance of all of its obligations hereunder.

(h) Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument.

(i) Headings. The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

(j) Notices. All notices, demands, requests, consents, approvals or other communications required or permitted to be given with respect to this Agreement shall be in writing and shall be delivered by hand, by nationally-recognized overnight courier service, or by email transmission, addressed as set forth below or to such other address as such party shall have specified most recently by written notice. Notice shall be deemed given and effective (i) if delivered by hand, when so delivered, (ii) if by nationally-recognized overnight courier service, on the next Business Day after the date when sent (with confirmation of delivery, such as customary signature receipt), or (iii) if by email transmission, upon receipt; provided that notice given by email shall not be effective unless either (x) a duplicate copy of such email notice is promptly given by one of the other methods described in this Section 11(j) or (y) the receiving Party delivers a written confirmation of receipt for such notice either by email or any other method described in this Section 11(j)).

If to Buyer:

Phoenix Cell Group Holdings LLC
c/o Desmarais LLP
230 Park Avenue
New York, NY 10169
Attn: John Desmarais
Email: JDesmarais@desmaraisllp.com

with copies to (which shall not constitute notice):

Pryor & Mandelup, LLP
675 Old Country Rd
Westbury, NY 11590
Attention: Scott Mandelup; Neil Ackerman
Email: asm@pryormandelup.com; na@pryormandelup.com

and

Ropes & Gray LLP
1211 Avenue of the Americas
New York, New York 10036
Attention: Jonathan P. Gill
Email: Jonathan.Gill@ropesgray.com

If to Seller:

BioRestorative Therapies, Inc.
40 Marcus Drive
Melville, NY 11747
Attention: Chief Executive Officer
Email: mweinreb@biorestorative.com

with a copy to (which shall not constitute notice):

Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue
East Meadow, NY 11554
Attention: Fred Skolnik, Esq.
Email: fskolnik@certilmanbalin.com

Each Party may designate by notice in writing a new or additional address to which any notice, request, demand or communication may thereafter be so given, served or sent. Notices, requests, demands and other communications hereunder may be given by the attorney of any Party.

(k) Governing Law; Jurisdiction. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO THE CONFLICTS OF LAWS PRINCIPLES THEREOF EXCEPT WHERE THE BANKRUPTCY CODE REQUIRES OTHERWISE. FOR THE DURATION OF THE PERIODS IN WHICH SELLER IS A DEBTOR OR DEBTOR-IN-POSSESSION IN THE BANKRUPTCY CASE, THE BANKRUPTCY COURT WILL HAVE EXCLUSIVE JURISDICTION OVER ANY DISPUTES ARISING OUT OF OR RELATING TO THIS AGREEMENT, AND EACH PARTY AGREES NOT TO ASSERT, BY WAY OF MOTION, AS A DEFENSE, OR OTHERWISE, IN ANY SUCH ACTION, SUIT OR PROCEEDING, ANY CLAIM THAT IT IS NOT PERSONALLY SUBJECT TO THE JURISDICTION OF SUCH COURT IN AN INCONVENIENT FORUM, THAT THE VENUE OF THE ACTION, SUIT OR PROCEEDING IS IMPROPER OR THAT THIS AGREEMENT OR THE SUBJECT MATTER HEREOF MAY NOT BE ENFORCED IN OR BY SUCH COURT. EACH PARTY FURTHER IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUCH ACTION, SUIT OR PROCEEDING.

(l) Severability. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction; *provided, however*, that the Parties may agree to either terminate or amend this Agreement as necessary should such invalid or unenforceable term or provision be essential to the consummation of the transactions contemplated by this Agreement.

(m) Incorporation of Exhibits and Schedules. The Exhibits and Schedules identified in this Agreement are incorporated herein by reference and made a part hereof.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

The parties, intending to be legally bound hereby, have executed this Asset Purchase Agreement as of the date first above written.

Seller:

BIORESTORATIVE THERAPIES, INC.

By:
Name:
Title:

Buyer:

PHOENIX CELL GROUP HOLDINGS LLC

By:

Name: John M. Desmarais

Title: President

DIP LOAN AND SECURITY AGREEMENT

By and Between

BIORESTORATICE THERAPIES, INC., as Borrower

And

PHOENIX CELL GROUP HOLDINGS, LLC, as Lender

Dated: March 19, 2020

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DIP LOAN AND SECURITY AGREEMENT

THIS DIP LOAN AND SECURITY AGREEMENT (the “**Loan Agreement**” or “**DIP Loan Facility**”) is made effective as of March 19, 2020, by and between BIORESTORATIVE THERAPIES, INC., as “**Borrower**” or “**Company**”, and PHOENIX CELL GROUP HOLDINGS, LLC, as “**Lender**” or “**DIP Lender**”.

WITNESSETH

WHEREAS, Lender is the owner and holder of the Existing Loans (defined below) executed and delivered by Borrower, which Existing Loans are secured by the Existing Liens (defined below);

WHEREAS, on within one Business Day of the date hereof (such date, the “**Filing Date**”), Borrower shall commence a voluntary Chapter 11 bankruptcy case under the Bankruptcy Code (as defined below) (the “**Chapter 11 Case**”), in the United States Bankruptcy Court for the Eastern District of New York (the “**Bankruptcy Court**”);

WHEREAS, in connection with the Chapter 11 Case, Borrower has retained possession of its assets and is authorized under the Bankruptcy Code to continue the operation of its business as a debtor-in-possession;

WHEREAS, Borrower has requested that Lender lend to Borrower the New Money DIP Loan (as defined below), subject to and upon the terms and conditions hereinafter contained, which Loan shall be evidenced by the Note (as defined herein);

WHEREAS, the parties desire, in connection with the New Money DIP Loan, for the Existing Loans (as defined below) to be converted hereunder into a term loan facility comprised of the (i) the New Money DIP Loan and (ii) the aggregate amount of the Existing Loans plus accrued interest and fees due thereunder (collectively, and together with all Costs and Expenses (as defined below), the “**Loan**”);

WHEREAS, the Loan is to be secured by the Collateral, all as more particularly defined in Section 5 herein;

WHEREAS, the proceeds of the New Money DIP Loan shall be used for (a) working capital and general corporate purposes of Borrower in accordance with the DIP Budget, which for the avoidance of doubt, shall include the purchase of a customary director’s and officer’s liability insurance tail policy in amounts specified in the DIP Budget, (b) United States Trustee fees, (c) Bankruptcy Court approved professional fees and other administrative expenses arising in the Chapter 11 Case, in accordance with the DIP Budget, (d) costs related to the Sale in accordance with the DIP Budget, and (e) interest, fees, costs and expenses incurred in connection with the DIP Loan Facility (including professional fees) due under this DIP Loan Facility and the Note, and expenses incurred by the DIP Lender as provided by this DIP Loan Facility and the Note (in each case under this subsection, whether or not such amounts are reflected in the DIP Budget);

WHEREAS, Lender has agreed to make the New Money DIP Loan to Borrower on the terms and conditions hereinafter set forth; and

WHEREAS, capitalized terms used herein will have the meanings set forth in Section 1 of this Loan Agreement.

NOW, THEREFORE, in consideration of the terms and conditions contained herein, and of any extensions of credit now or hereafter made to or for the benefit of Borrower by Lender, the parties hereto, intending to be legally bound hereby, agree as follows:

1. DEFINITIONS.

1.1 Defined Terms. The following words and phrases as used in capitalized form in this Loan Agreement, whether in the singular or plural, shall have the meanings indicated:

- (a) **"Affiliate"** means, with respect to any Person, (i) a spouse or member of the immediate family of such Person, (ii) any member, manager, director, officer or partner of such Person, (iii) any corporation, partnership, business, association, limited liability company, firm or other entity of which such Person is a member, manager, director, officer or partner or owns or controls, directly or indirectly, more than twenty percent (20%) of the voting stock or other equity interests; (iv) any Trust in which such Person is a Beneficiary or the Trustee, and (v) any other Person that directly or indirectly controls, is controlled by or is under direct or indirect common control with such first Person.
 - (b) **"Bankruptcy Code"** means Title 11 of the United States Code (11 U.S.C. § 101 et seq.), as the same now exists or may from time to time hereafter be amended, modified, recodified or supplemented, together with all official rules and regulations thereunder.
 - (c) **"Bankruptcy Court Order"** shall have the meaning given such term in Section 8.6 hereof.
 - (d) **"Borrower"** shall have the meaning given such term in the introductory paragraph of this Loan Agreement and shall include all permitted successors and assigns of such Person.
 - (e) **"Business Day"** means any day except a Saturday, Sunday or other day on which banks in New York, New York are authorized by law to close.
-

- (f) **“Carve-Out”** shall mean the carve-out from the security interest being granted hereunder to Lender securing the Collateral, which shall be comprised of the following: (i) fees payable to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6) or to the Clerk of the Bankruptcy Court (collectively, the **“Case Administration Fees”**), (ii) unpaid professional fees and expenses (**“Professional Fees”**) payable to each legal or financial advisor retained by the Debtor and the Creditors’ Committee that are incurred or accrued prior to the date of the occurrence of an Event of Default, but in all events in an amount not to exceed the aggregate amount(s) allocated to each such professional in the DIP Budget as approved by the Bankruptcy Court, and ultimately allowed by the Bankruptcy Court pursuant to sections 330, 331 and 503 of the Bankruptcy Code or any other order of the Bankruptcy Court (whenever such fees may be actually incurred prior to an Event of Default, which shall remain unaltered after payment of interim fees made before an Event of Default, except as set forth below; (iii) \$7,500 (earmarked for use by a Chapter 7 Trustee in the event of conversion), (iv) up to an additional \$10,000 for Professional Fees following an Event of Default, and (v) the Case Administration Fees accrued and unpaid on or after the occurrence of an Event of Default, in each case of the foregoing (i) through (v), solely to the extent the amount of each such item does not exceed the applicable amount set forth for such item in the DIP Budget; *provided, however*, that nothing herein shall be construed to impair the ability of Lender or any other party to object to the fees, expenses, reimbursement or compensation described above.
- (i) **“Chapter 11 Case”** shall have the meaning given in the Recitals.
- (j) **“Collateral”** shall have the meaning given such term in Section 5.3 of this Loan Agreement.
- (k) **“Conditions Precedent to Closing”** shall have the meaning given such term in Section 8.18 of this Loan Agreement.
- (l) **“Conditions Subsequent to Closing”** shall have the meaning given such term in Section 8.20 of this Loan Agreement.
- (m) **“Copyrights”** means all of Borrower’s and Borrower’s subsidiaries’ rights, title and interests (and all related IP Ancillary Rights) arising under any law in or relating to copyrights and all mask work, database and design rights, whether or not registered or published, all registrations and recordings thereof and all applications in connection therewith.
- (n) **“Corporation”** means a corporation, partnership, limited liability company, trust, unincorporated organization, association, joint stock company or joint venture.
- (o) **“Costs and Expenses”** shall have the meaning given such term in Section 4.2 of this Loan Agreement.
- (p) **“Default”** means any event which with the giving of notice, passage of time or both, would constitute an Event of Default.
- (q) **“Default Rate”** shall have the meaning given such term in Section 3.2 hereof.
-

- (r) **"DIP Budget"** shall mean that certain budget attached hereto as Exhibit B, that covers the 13 calendar weeks including and following the date of such Budget and that sets forth on a weekly basis the anticipated receipts and disbursements of Borrower and the anticipated sources and uses of cash, including the proceeds of this DIP Loan Facility (the **"Cash Flow Projection"**), setting forth Borrower's necessary expenses for the period from the Petition Date. During Borrower's Chapter 11 Case, no later than two weeks prior to the end of the current 13 week budget, Borrower shall present a proposed 13 week budget for the following 13 weeks, which must be satisfactory to Lender. The DIP Budget shall provide for permitted budget variances of 10% per line item or an aggregate budget variance in excess of an amount to be determined with respect to each calendar month (the **"Permitted Variances"**).
- (s) **"Entry Date"** shall have the meaning given such term in Section 8.6 of this Loan Agreement.
- (t) **"Event of Default"** means each of the events specified in Section 9.1 of this Loan Agreement.
- (u) **"Existing Loans"** shall mean all monies due and owing from Borrower under, collectively, (i) that certain Promissory Note in the principal sum of \$500,000.00 dated June 30, 2016 (as amended on July 5, 2017, as further amended on November 17, 2018, as further amended on November 20, 2018, and as further amended on December 17, 2019, the **"Tuxis Note"**), issued by Borrower to Tuxis Trust, (ii) that certain Promissory Note in the principal sum of \$175,000.00, dated July 13, 2017 (as amended on November 17, 2018, as further amended on November 20, 2018, and as further amended on December 17, 2019), issued by Borrower to Lender (the **"Desmarais Note"**), (iii) that certain Promissory Note in the principal sum of \$320,200.49, dated February 20, 2020, issued by Borrower to Lender (the **"First February Bridge Note"**), and (iv) that certain Promissory Note in the principal sum of \$33,561.50, dated February 26, 2020 (the **"Second February Bridge Note"**), and, together with the Tuxis Note, the Desmarais Note, and the First February Bridge Note, the **"Existing Secured Notes"**), issued by Borrower to Lender, or such lesser amount as may be authorized pursuant to an interim or final order of the Bankruptcy Court.
- (i) **"Existing Liens"** shall mean, collectively, the liens against the Property created by (i) that certain Security Loan Agreement dated July 13, 2017 and recorded with the Delaware Department of State and with the United States Patent and Trademark Office, securing the Tuxis Note and the Desmarais Note; and (ii) that certain Security Loan Agreement dated February 20, 2020 (as amended February 26, 2020) and recorded with the Delaware Department of State, and with the United States Patent and Trademark Office, securing the First February Bridge Note and the Second February Bridge Note (said Security Loan Agreements, together with the Loan Agreements between Borrower and Lender with respect to the Existing Loans, the Existing Secured Notes evidencing the Existing Loans and any and all other documents or instruments by Borrower in favor of Lender evidencing and/or securing all or any part of the Existing Loans, are collectively referred to herein as the **"Existing Loan Documents"**).
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- (j) **"Filing Date"** shall have the meaning given to such term in the Recitals hereto.
- (k) **"Final Order"** shall have the meaning given such term in the definition of "Maturity Date" in this Section 1.1.
- (l) **"Final Financing Order"** shall have the meaning given such term in Section 8.6 hereof.
- (m) **"Financing Order"** means the Interim Financing Order and such other interim, final, permanent and/or supplemental orders entered by the Bankruptcy Court after notice pursuant to Section 364 of the Bankruptcy Code relating thereto or authorizing the granting of credit by Lender to Borrower, including the Final Financing Order.
- (n) **"GAAP"** means generally accepted accounting principles in the United States of America, in effect from time to time, consistently applied and maintained.
- (o) **"Intellectual Property"** means all of Borrower's or any of Borrower's subsidiaries' rights, title and interests in or relating to (a) intellectual property and industrial property arising under any law, including all Copyrights, Patents, Software, Trademarks, Internet Domain Names and Trade Secrets, (b) all IP Ancillary Rights relating thereto and (c) IP Licenses.
- (p) **"IP Ancillary Rights"** means, with respect to any Intellectual Property (of the type described in clauses (a) and (c) of the definition of Intellectual Property), as applicable, all foreign counterparts to, and all divisionals, reversions, continuations, continuations-in-part, reissues, reexaminations, renewals and extensions of, such Intellectual Property and all income, royalties, proceeds and liabilities at any time due or payable or asserted under or with respect to any of the foregoing or otherwise with respect to such Intellectual Property, including all rights to sue or recover at law or in equity for any past, present or future infringement, misappropriation, dilution, violation or other impairment thereof, and, in each case, all rights to obtain any other IP Ancillary Right.
- (q) **"IP License"** means all contractual obligations (and all related IP Ancillary Rights), whether written or oral, granting any right, title and interest in or relating to any Intellectual Property of the type described in clause (a) of the definition of Intellectual Property.
- (r) **"Internet Domain Name"** means all right, title and interest (and all related IP Ancillary Rights) arising under any law in or relating to internet domain names.
- (s) **"Interest Rate"** shall have the meaning given such term in Section 3.1 hereof.
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(i) **“Interim Financing Order”** shall have the meaning given such term in Section 8.6 hereof.

(j) **“Legal Requirements”** shall mean all statutes, laws, rules, orders, regulations, ordinances, judgments, decrees and injunctions of governmental authorities affecting the Property or any part thereof, or the construction, use, alteration, ownership or operation thereof, whether now or hereafter enacted and in force, and all permits, licenses, authorizations and regulations relating thereto, and all covenants, Existing Loan Agreements, restrictions and encumbrances contained in any instruments, either of record or known to Borrower, at any time in force affecting the Property or any part thereof, including, without limitation, any which may (a) require repairs, modifications or alterations in or to the Property or any part thereof, or (b) in any way limit the use and enjoyment thereof.

(k) **“Lender”** shall have the meaning given such term in the introductory paragraph of this Loan Agreement and shall include all permitted successors and assigns of such Person.

(l) **“Lender’s Liens”** shall have the meaning given such term in Section 5.2 hereof.

(m) **“Lender Indebtedness”** shall mean all obligations and Indebtedness of Borrower to Lender or any Affiliate of Lender, whether now or hereafter owing or existing, including, without limitation, all obligations under the Existing Loan Documents, this Loan Agreement, all other obligations or undertakings now or hereafter made by or for the benefit of Borrower to or for the benefit of Lender or any Affiliate of Lender under any other Loan Agreement, promissory note or undertaking now existing or hereafter entered into by Borrower with Lender or any such Affiliate, together with all interest and other sums payable in connection with any of the foregoing.

(n) **“Loan”** shall have the meaning given such term in the recitals hereto.

(o) **“Loan Documents”** means this Loan Agreement and the Note, the Existing Secured Notes, and all other documents executed or delivered by Borrower or any other Person pursuant to the Existing Secured Notes, this Loan Agreement or in connection therewith, as they may be amended, modified or restated from time to time.

(p) **“Material Adverse Effect”** means a material adverse effect (i) on the business, operations, assets, revenues, management, liabilities, prospects or financial condition of Borrower, (ii) in the value of or the perfection or priority of Lender's Liens upon the Collateral, or (iii) in the ability of Borrower to perform its obligations under the Loan Documents, or (iv) on the rights and remedies of Lender under this Loan Agreement, any security document, any other Loan Document or any Financing Order.

(q) **“Maturity Date”** shall mean, unless otherwise accelerated pursuant to Section 9 hereof, the earliest to occur of (a) September 30, 2020, (b) the date that is 30 days after entry of the Interim Financing Order if the final order approving the DIP Loan Facility (the **“Final Order”**) has not been entered by the Bankruptcy Court, (c) the date of Bankruptcy Court approval of, or acceptance by Borrower (following the Sale or otherwise) of any bid for all or a material portion of the assets of Borrower other than a bid by the DIP Lender, which does not provide that all obligations under the DIP Loan Facility are paid in full in cash upon consummation of such sale transaction, (d) the termination by the DIP Lender upon the occurrence of an Event of Default under the DIP Loan Facility and (e) the closing of the Sale.

(r) **“New Money DIP Loan”** shall have the meaning given such term in Section 2.1.

(s) **“Note”** shall have the meaning given such term in Section 2.1 hereof.

(t) **“Patents”** means all of such Borrower’s right, title and interest in and to (a) any and all patents and patent applications; (b) all inventions described and claimed therein; (c) all reissues, reexaminations, substitutions, divisions, continuations, renewals, extensions and continuations in part thereof; (d) all income, royalties, damages, claims, and payments now or hereafter due or payable under and with respect thereto, including, without limitation, damages and payments for past, present and future infringements thereof; (e) all rights to sue for past, present, and future infringements thereof; and (f) all rights corresponding to any of the foregoing.

(u) **“Person”** means an individual, corporation, partnership, limited liability company or any other Entity as that term is defined in the Bankruptcy Code.

(v) **“Sale”** shall have the meaning given such term in Section 9.1 hereof.

(w) **“Software”** means (a) all computer programs, including source code and object code versions, (b) all data, databases and compilations of data, whether machine readable or otherwise, and (c) all documentation, training materials and configurations related to any of the foregoing.

(x) **“Subsidiary”** means a Corporation (i) which is organized under the laws of the United States or any State thereof, or any other county or jurisdiction, (ii) which conducts substantially all of its business and has substantially all of its assets within the United States and (iii) of which more than fifty percent (50%) of its outstanding voting stock of every class (or other voting equity interest) is owned by Borrower or one or more of its Subsidiaries.

(y) **“Trade Secrets”** means all right, title and interest (and all related IP Ancillary Rights) arising under any law in or relating to trade secrets.

(z) **“Trademark”** means all rights, title and interests (and all related IP Ancillary Rights) arising under any law in or relating to trademarks, trade names, corporate names, company names, business names, fictitious business names, trade styles, service marks, logos and other source or business identifiers and, in each case, all goodwill associated therewith, all registrations and recordations thereof and all applications in connection therewith.

1.2 Accounting Terms. As used in this Loan Agreement, or any certificate, report or other document made or delivered pursuant to this Loan Agreement, accounting terms not defined elsewhere in this Loan Agreement shall have the respective meanings given to them under GAAP.

1.3 UCC Terms. All terms used herein and defined in the Uniform Commercial Code as in effect in the State of New York from time to time shall have the meanings given therein unless otherwise defined herein.

2. THE LOAN; USE OF PROCEEDS

2.1 New Money DIP Loan. Provided all conditions in Section 8 are satisfied, Lender agrees, subject to the terms and conditions hereinafter set forth, to advance to Borrower up to One Million Four Hundred Twenty-Four Thousand and Two Hundred Seventy-Three Dollars (\$1,424,273.37) (the “**New Money DIP Loan**”). Borrower's obligation to repay the Loan (including, for the avoidance of doubt, the Existing Loans) shall be evidenced by that certain promissory note made and issued by Borrower in favor of Lender, substantially in the form attached hereto as **Exhibit A** (the “**Note**”). The maximum Principal Balance (as defined below) of the Loan and the amount of the Note is \$2,775,628.12.

2.2 Disbursement at Closing. Lender shall disburse Seven Hundred Fifty Thousand Dollars (\$750,000.00) of the New Money DIP Loan proceeds at the Closing (the “**Closing Disbursement**”) into an account for the benefit of Borrower (the “**Funding Account**”).

2.3 Advances of the Remaining New Money DIP Loan. The remainder of the New Money DIP Loan (“**Remaining New Money DIP Loan**”) shall be in the form of multiple advances (each, an “**Advance**” and all Advances, collectively, the “**Advances**”), as may be made from time to time as follows:

- (a) Each Advance shall be in the minimum sum of at least \$60,000.00 and in denominations of \$60,000.00; *provided* that if the difference between the amount remaining at the time of the Advance of the Remaining New Money DIP Loan is less than \$60,000.00, an Advance may be made for the amount of such difference.
 - (b) To request an Advance, Borrower shall notify Lender by delivering to Lender an executed advance request in the form attached to the Note as Exhibit A thereto (an “**Advance Request**”) at the Lender's address as set forth in this Loan Agreement or by electronic mail sent to Lender at his email address set forth in this Loan Agreement in portable document format (PDF), identifying the amount of the requested Advance, by not later than two (2) Business Days before the Business Day that the Advance is to be funded by the Lender. Upon receipt of an Advance Request, the Lender shall, subject to the terms and conditions of the Note and this Loan Agreement, reasonably promptly disburse the amount requested in such Advance Request on the date set forth by Borrower in such Advance Request into the Funding Account; *provided*, that the Lender shall not be obligated to disburse any Advances in respect of an Advance Request if (i) an Event of Default shall have occurred as of such time (or would occur as the result of making such Advance), or (b) making such Advance would, in the Lender's reasonable discretion, violate any provision of the Note, this Loan Agreement, any Bankruptcy Court Order or applicable law.
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- (c) Contemporaneously with the disbursement of each Advance, the Lender shall provide a statement of account to the Company by electronic mail at the Company's address as set forth in the Loan Agreement, which statement shall include the current Principal Balance (after giving effect to the requested Advance) together with any interest or other fees accrued and payable thereunder.
- (d) At no time will the Company request any Advances if the requested Advances would cause the outstanding Principal Balance to exceed the Maximum Principal Balance.

2.4 **Use of Proceeds.** Withdrawals from the Funding Accounts shall be used to fund the DIP Budget and used only for the following purposes, subject to the Bankruptcy Court Order: (a) working capital and general corporate purposes of Borrower in accordance with the DIP Budget, which for the avoidance of doubt, shall include the purchase of a customary director's and officer's liability insurance tail policy in amounts specified in the DIP Budget, (b) United States Trustee fees, (c) Bankruptcy Court approved professional fees and other administrative expenses arising in the Chapter 11 Case, in accordance with the DIP Budget, (d) costs related to the Sale in accordance with the DIP Budget, and (e) interest, fees, costs and expenses incurred in connection with the DIP Loan Facility (including professional fees) due under this DIP Loan Facility and the Note, and expenses incurred by the DIP Lender as provided by this DIP Loan Facility and the Note (in each case under this subsection, (e), whether or not such amounts are reflected in the DIP Budget); *provided, however*, that nothing herein shall be construed to impair the ability of Lender or any other party to object to the fees, expenses, reimbursement or compensation described above.

2.5 **Conditions to Withdrawal from Funding Account.** Each withdrawal by Borrower from the Funding Account shall be conditioned upon (i) the accuracy in all material respects of all representations and warranties contained in this Loan Agreement, (ii) there being no default or Event of Default in existence at the time of, or after giving effect to, such withdrawal (including, but not limited to, with respect to the DIP Budget), and (iii) substantial compliance by the Borrower of all material orders of the Bankruptcy Court. Further, the use of cash and the proceeds under the DIP Facility shall be consistent with projected line items as reflected in the DIP Budget as of the time of such use of proceeds or cash, as applicable, subject to Permitted Variances.

2.6 **Closing.** The closing hereunder will take place at the offices of Ropes & Gray LLP, 1211 Avenue of the Americas, New York, NY 10036, or by telephone if the Parties so agree, upon the satisfaction of the Conditions Precedent to Closing set forth in Section 8 herein, within no more than twenty-four (24) hours of the entry of an Interim Financing Order by the Bankruptcy Court approving the DIP Loan Facility, unless otherwise extended in writing by Lender and Borrower (the "**Closing Date**").

Rollup of the Existing Loans.

- 2.7.1 **Acknowledgement of the Validity and Amount of Lender's Existing Loans.** Borrower acknowledges and agrees that (i) each of the Existing Loans is a valid and enforceable obligation of Borrower to Lender without defense, offset or counterclaim of any kind and (ii) as of March 6, 2020, Borrower is indebted to Lender as evidenced by the Existing Loans in the amount aggregating not less than \$1,351,354.75. Lender and Borrower agree that, at the Closing (a) the Existing Loans shall be converted hereunder into a term loan facility comprised of the aggregate amount of the Existing Loans plus accrued interest and fees due thereunder, and that such amounts, collectively with the New Money DIP Loan, shall constitute the Loan made hereunder (such transactions, the "**Rollup**"); and (b) that the maturity date of each of the Existing Loans is hereby extended until the Maturity Date set forth below, unless accelerated by an Event of Default or otherwise as described herein.
- 2.7.2 **Balance of the Loan; Cancellation of Previously-Issued Promissory Notes.** Borrower and Lender hereby agree that, at the Closing and in connection with the Rollup: (i) the principal balance of the Existing Loans, together with any and all accrued interest and fees due and payable thereunder, shall be added to the principal amount of the New Money DIP Loan and evidenced by the Note; (ii) all existing promissory notes or other evidence of indebtedness in respect of the Existing Loans shall be marked cancelled, with the Note evidencing all amounts due and payable under the Loan and this Loan Agreement (provided, for the avoidance of doubt, that all of the Existing Liens and other security shall remain in full force and effect as provided in Section 5 hereof); (iii) that any rights and obligations under any cancelled promissory notes or other evidence of indebtedness described by clause (ii) shall, from and after the Closing, be governed by this Loan Agreement and the Note; and (iv) that, for the avoidance of doubt, though the Lender shall only disburse funds in respect of the New Money DIP Loan at the Closing as described by Section 2.2, the Borrower's obligations under this Loan Agreement and the Note shall reflect the aggregate amount of the Loan (including the Existing Loans and the New Money DIP Loan) as described in this Section 2.5.2 and be governed by this DIP Loan Facility.
- 2.7.3 **Material Component of New Money DIP Loan.** Borrower hereby acknowledges and agrees that the Rollup is a material inducement to Lender's furnishing of the New Money DIP Loan and performance of its obligations under this DIP Loan Facility, and that the Lender's willingness to provide the New Money DIP Loan is contingent upon the consummation of the Rollup in connection therewith.

3. **INTEREST RATE.**

- 3.1 **Interest on the Loan.** Interest shall accrue on the entire outstanding Rollup in the principal sum of \$1,351,354.75 plus (i) the \$750,000.00 Closing Disbursement and (ii) such additional amounts as are advanced pursuant to the Note (the Rollup, together with the Closing Disbursement and all such advances made hereunder, the "**Principal Balance**") at a rate of eight percent (8%) per annum, payable quarterly in arrears or upon the Maturity Date, except that Borrower has the option, upon written notice to Lender to PIK up to 4% of such interest, in each period, by adding it to the principal amount of the DIP Loan Facility (the "**Interest Rate**").
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- 3.2 **Default Interest.** Interest will accrue on the principal balance of the Loan upon the occurrence of an Event of Default or expiration of the Loan at a rate equal to the Interest Rate plus two percent (2%) per annum (the “**Default Rate**”).
- 3.3 **Post Judgment Interest.** Any judgment obtained for sums due hereunder or under the Loan Documents will accrue interest at the applicable Default Rate set forth in Section 3.2 above until Lender is fully paid all monies due to it.
- 3.4 **Limitation of Interest to Maximum Lawful Rate.** In no event will the rate of interest payable hereunder exceed the maximum rate of interest permitted to be charged by applicable law in the State of New York and any interest paid in excess of the permitted rate will be refunded to Borrower. Such refund will be made by application of the excessive amount of interest paid against any sums outstanding hereunder and will be applied in such order as Lender may determine. If the excessive amount of interest paid exceeds the sums outstanding, the portion exceeding the sums outstanding will be refunded in cash by Lender. Any such crediting or refunding will not cure or waive any default by Borrower. Borrower agrees, however, that in determining whether or not any interest payable hereunder exceeds the highest rate permitted by law, any non-principal payment, including without limitation prepayment fees and late charges, will be deemed to the extent permitted by law to be an expense, fee, premium or penalty rather than interest.
4. **PAYMENTS, FEES, REPORTING AND INDEMNITY.**
- 4.1 **Payments on the Loan.** The entire outstanding principal amount of the Loan, together with all accrued and unpaid interest, Costs and Expenses, and other charges and sums due hereunder and under the other Existing Loan Documents (to the extent not governed by this DIP Loan Facility following the Closing), shall be due and payable in cash at the earliest to occur of the Maturity Date, acceleration under Section 9.2 of this Loan Agreement, or prepayment.
- 4.2 **Costs and Expenses.** All reasonable and documented fees, costs, expenses, and disbursements, including reasonable attorneys’ fees and expenses, and financial advisory fees and expenses, incurred by Lender in connection with the negotiation, preparation, documentation, and obtaining Bankruptcy Court approval of this Loan Agreement and of the Loan (including any modifications to such Existing Loan Documents as may be reasonably necessary, at the discretion of the Lender, to effect the Loan), and all those in specified Section 9.5 of this Loan Agreement (“**Costs and Expenses**”) shall be accrued and added to and become part of the principal amount of the Loan.
- 4.3 **Prepayment of Loan.** Borrower may not prepay any principal amount of any Lender Indebtedness prior to the Maturity Date.
- 4.4 **Payment Method.** Payments shall be paid by Borrower, without any counterclaim, setoff or deduction whatsoever, by bank check addressed to Lender at 26 Deer Creek Lane, Mt. Kisco, NY 10549, or by wire transfer to Lender pursuant to wire instructions provided by Lender to Borrower, or to such other location as Lender may specify to Borrower from time to time, in immediately available funds, in lawful money of the United States of America.
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- 4.5 **Application of Payments.** Any and all payments on account of the Loan will be applied first, to pay any accrued but unpaid fees of Lender and any Costs and Expenses and other sums due under the Loan; second to pay Interest on the Loan; and third, to repay the principal amount of the Loan; provided, however, that upon an Event of Default, such payments may be applied in such order as Lender, in its sole discretion, elects. If Borrower makes a payment or payments and such payment or payments, or any part thereof, are subsequently invalidated, declared to be fraudulent or preferential, set aside or are required to be repaid to a trustee, receiver, or any other Person under the Bankruptcy Code, or any other federal state or local law, rule or regulation, common law or equitable cause, then to the extent of such payment or payments, the obligations or part thereof hereunder intended to be satisfied shall be revived and continued in full force and effect as if said payment or payments had not been made.
- 4.6 **Reporting.** Borrower will provide Lender with periodic financial reporting, including, reconciliations of the DIP Budget every four weeks; monthly operating reports required to be filed in the Chapter 11 Case; notice of material events; and all other information reasonably requested by Lender.
- 4.7 **Indemnity.** Borrower will indemnify Lender against any loss or expense which Lender sustains or incurs as a consequence of a claim from any third party or as a consequence of an Event of Default, including, without limitation, any failure of Borrower to pay when due (at maturity, by acceleration under Section 9.2 of this Loan Agreement or otherwise) any principal, interest, Costs and Expenses, and any other amount due under this Loan Agreement or the Existing Loan Documents (to the extent not also due and payable hereunder). If Lender sustains or incurs any such loss or expense, it will from time to time notify Borrower in writing of the amount determined in good faith by Lender to be necessary to indemnify Lender for such loss or expense. Such amount will be due and payable by Borrower to Lender within ten (10) days after presentation by Lender of a statement setting forth a brief explanation of and Lender's calculation of such amount, which statement shall be conclusively deemed correct, subject to Borrower's right to reasonably and promptly contest such amount in good faith. Any amount payable to Lender under this Section will bear interest at the highest default rate payable hereunder from the due date until paid, both before and after judgment.

5. **SECURITY; COLLECTION OF RECEIVABLES AND PROCEEDS OF** **COLLATERAL.**

- 5.1 **Acknowledgement of the Priority and Security of Lender's Existing Loans and the Loan.** Borrower acknowledges and agrees that, with respect to the Existing Loans and immediately prior to the Filing Date, Lender holds a valid, enforceable and properly perfected first priority security interest in all of Borrower's Collateral, whether now existing or hereafter acquired, as evidenced by the Existing Liens, without defense, offset or counterclaim of any kind. In addition to continuing to secure the Existing Loans, the Existing Liens shall also secure the New Money DIP Loan without the necessity of any additional recording; provided, that Borrower hereby authorizes the Lender to make such any and all such additional recordings, or amendments to the Existing Liens, as may be reasonably necessary, determined at the discretion of the Lender, in connection with the Loans. The Lender's Liens, Existing Liens and the other security interests referred to herein shall be deemed valid and perfected by entry of the Interim Financing Order and/or the Final Financing Order, as the case may be, and the Lender shall not be required to file any financing documents, mortgages, notices of liens or similar instruments in any jurisdiction or filing office, take possession or control of any Collateral, or take any other action in order to validate or perfect the Lender's Liens, Existing Liens and the other security interests granted by or pursuant to the Loan Documents, the Interim Financing Order or the Final Financing Order, as the case may be.
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Security for the Loan. The Loan shall also be secured, (i) pursuant to Section 364(c)(1) of the Bankruptcy Code, by a first priority security interest in and lien on all currently owned or hereafter acquired assets and property of the estate (as defined in the Bankruptcy Code), real and personal, of Borrower, with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of the Bankruptcy Code; and (ii) pursuant to Sections 364(c)(2) and 364(d) of the Bankruptcy Code, by a perfected first priority lien on all property of Borrower and Borrower's bankruptcy estate that, as of the Filing Date, was not subject to the liens in favor of Lender including a first priority lien on all claims and, after the entry of the final order, the proceeds of causes of actions under chapter 5 of the Bankruptcy Code and a pledge of the capital stock or other equity interests of any of Borrower's subsidiaries. In confirmation of the foregoing, as further security for the full and timely payment and performance of the Loan and all other Lender Indebtedness, Borrower hereby grants to Lender a lien and security interest in all existing and after-acquired property of Borrower of any nature including, without limitation:

- (a) All present and future accounts, contract rights, chattel paper, deposit accounts, instruments and documents and all other rights to the payment of money whether or not yet earned, whether for services rendered or goods sold, consigned, leased or furnished by Borrower or otherwise (and including, the avoidance of doubt, any receivables payable or paid to Borrower under research grants or similar agreements), together with (i) all goods (including any returned, rejected, repossessed or consigned goods), the sale, consignment, lease or other furnishing of which shall be given or may give rise to any of the foregoing, (ii) all of Borrower's rights as a consignor, consignee, unpaid vendor or other lienor in connection therewith, including stoppage in transit, set-off, detinue, replevin and reclamation, (iii) all guaranties, mortgages, security interests, assignments, and other encumbrances on real or personal property, leases and other Loan Agreements or property securing or relating to any accounts, (iv) choses-in-action, claims and judgments, and (v) any returned or unearned premiums, which may be due upon cancellation of any insurance policies.
 - (b) All present and future inventory of Borrower (including but not limited to goods held for sale or lease or furnished or to be furnished under contracts for service, raw materials, work-in-process, finished goods and goods used or consumed in Borrower's business) whether owned, consigned or held on consignment, together with all merchandise, component materials, supplies, packing, packaging and shipping materials, and all returned, rejected or repossessed goods sold, consigned, leased or otherwise furnished by such Borrower and all embedded software related thereto.
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- (c) All present and future general intangibles including, but not limited to, all of Borrower's payment intangibles, tax refunds and rebates, manufacturing and processing rights, Intellectual Property, Copyrights, IP Ancillary Rights, IP Licenses, Internet Domain Names, Patents, Software, Trade Secrets, Trademarks, designs, service marks, business names, trade dress, slogans, utility models, websites, telephone numbers, patent rights and applications therefor, trademarks and registration or applications therefor, tradenames, brand names, logos, inventions, copyrights and all applications and registrations therefore, licenses, permits, approvals, software and computer programs and software, including all source code, object code, firmware, development tools, files, records, data and all media on which the foregoing is recorded, license and/or franchise rights, royalties, trade secrets, methods, processes, know-how, formulas, techniques, customer lists, databases and other know-how, drawings, specifications, descriptions, label designs, plans, blueprints, patterns and all memoranda, notes and records with respect to any research and development.
- (d) All present and future machinery, equipment, furniture, fixtures, motor vehicles, tools, dies, jigs, molds and other articles of tangible personal property of every type, whether tangible or intangible and wherever located, together with all parts, substitutions, accretions, accessions, attachments, accessories, additions, components and replacements thereof, and all manuals of operation, maintenance or repair, and all embedded software related thereto.
- (e) All present and future general ledger sheets, files, books and records, customer lists, books of account, invoices, bills, certificates or documents of ownership, bills of sale, business papers, correspondence, credit files, tapes, cards, computer runs and all other data and data storage systems whether in the possession of Borrower or any service bureau.
- (f) All present and future letter of credit rights and supporting obligations, including without limitation, all letters of credit and letter of credit rights now existing or hereafter issued naming Borrower as a beneficiary or assigned to Borrower, including the right to receive payment thereunder, and all documents and records associated therewith.
- (g) All present and future deposit accounts of Borrower.
- (h) All present and future financial assets and investment property of Borrower.
- (i) All of Borrower's commercial tort claims.
- (j) All property of any Grantor held by any Secured Party, including all property of every description, in the custody of or in transit to such Secured Party for any purpose, including safekeeping, collection or pledge, for the account of any Grantor or as to which any Grantor may have any right or power, including but not limited to cash;
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- (k) All funds instruments, documents, policies and evidence and certificates of insurance and rights thereunder, securities, chattel paper and other assets of Borrower or in which Borrower has an interest and all proceeds thereof, now or at any time hereafter on deposit with or in the possession or control of Lender or owing by Lender to Borrower or in transit by mail or carrier to Lender or in the possession of any other Person acting on Lender's behalf, without regard to whether Lender received the same in pledge, for safekeeping, as agent for collection or otherwise, or whether Lender has conditionally released the same, and in all assets of Borrower in which Lender now has or may at any time hereafter obtain a lien, mortgage, or security interest for any reason.
- (l) All products and proceeds of each of the items described in the foregoing **subparagraphs (a)-(k)** and all supporting obligations related thereto.

All of the security interests and liens granted to Lender pursuant hereto ("**Lender's Liens**") shall be first priority security interests and liens except that Lender's Liens are subject and subordinate to the Carve-Out. Further, it is agreed and understood that (i) the Carve-Out shall not reduce or affect the full amount that is due and owing to Lender under this Loan Agreement, and (ii) nothing herein shall be construed to require Lender, in the event that Borrower's assets are insufficient to pay any portion of the Carve-Out, to infuse any money in excess of any unfunded amount of the DIP Budget as approved by a Financing Order to pay any portion of the Carve-Out.

5.3 **General.**

- (a) The collateral described above in **Sections 5.1 and 5.2** is collectively referred to herein as the "**Collateral**". The above-described security interests, assignments and liens shall continue in full force and effect until all Lender Indebtedness has been repaid, Lender has no Loan Agreement or commitment outstanding pursuant to which Lender may extend credit to or on behalf of Borrower and Lender has executed termination statements or releases with respect thereto. **IT IS THE EXPRESS INTENT OF BORROWER THAT ALL OF THE COLLATERAL SHALL SECURE NOT ONLY THE OBLIGATIONS UNDER THE EXISTING LOAN DOCUMENTS AND THIS LOAN AGREEMENT, BUT ALSO ALL OTHER PRESENT AND FUTURE INDEBTEDNESS.**
- (b) Borrower agrees that the obligations hereunder shall be entitled to superpriority administrative expense claim status in the Chapter 11 Case pursuant to Section 364(c)(1) of the Bankruptcy Code, superior to and having priority of payment over all administrative expenses of and unsecured claims against Borrower now existing or hereafter arising, of any kind or nature whatsoever, including without limitation all administrative expenses of the kind specified in, or arising or ordered under, Sections 105, 326, 328, 503(b), 506(c), 507(a), 507(b), 546(c), 726 and 1114 of the Bankruptcy Code (whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment), with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of the Bankruptcy Code, subject only to the Carve-Out.
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- (c) The liens and security interests and the administrative priority granted pursuant hereto may be independently granted by the Loan Documents and by other Loan Documents hereafter entered into. This Loan Agreement, the Bankruptcy Court Order and such other Loan Documents supplement each other, and the grants, priorities, rights and remedies of Lender hereunder and thereunder are cumulative.
- (d) The liens and security interests referred to in this Loan Agreement shall be deemed valid and perfected by entry of the Bankruptcy Court Order, and entry of the Bankruptcy Court Order shall have occurred on or before the date of the Loan made hereunder. Lender shall not be required to file any financing statements, mortgages, notices of lien or similar instruments in any jurisdiction or filing office or to take any other action in order to validate or perfect the lien and security interest granted by or pursuant to this Loan Agreement, the Bankruptcy Order or any other Loan Document.

6. REPRESENTATIONS AND WARRANTIES. Borrower

represents and warrants as follows:

6.1 Valid Organization, Good Standing and Qualification. Borrower is duly formed and in good standing under the laws of the state of its formation, is qualified to do business and is in good standing in each jurisdiction in which it is required to be qualified, has full power and authority to execute, deliver and comply with this Loan Agreement and the other Loan Documents, and to carry on its business as it is now being conducted

6.2 Licenses. Borrower and its respective employees and agents have all rights, licenses, registrations, approvals and other authority as may be necessary to enable Borrower to own its properties and to transact the businesses in which it is now engaged.

6.3 Liens. Except for the Carve-Out, there are no liens, mortgages, security interests or encumbrances against any asset of Borrower, or against any of the Collateral, other than Lender's Liens held by Lender.

6.4 Due Authorization; No Legal Restrictions. The execution and delivery by Borrower of the Loan Documents, the consummation of the transactions contemplated by the Loan Documents and the fulfillment and compliance with the respective terms, conditions and provisions of the Loan Documents have been duly authorized by all action of Borrower and, after entry of the Bankruptcy Court Order, there will be no legal restrictions on Borrower's authority or power to enter into this Loan Agreement or consummate the transactions contemplated hereby.

6.5 Enforceability. The Loan Documents have been duly executed by Borrower and delivered to Lender and, upon entry of the Bankruptcy Court Order, shall constitute legal, valid and binding obligations of Borrower, enforceable in accordance with their terms, except as enforceability may be limited by any bankruptcy, insolvency, reorganization, moratorium or other laws or equitable principles affecting creditors' rights generally.

6.6 Title to Collateral. The Collateral is and will be owned by Borrower free and clear of all liens and other encumbrances of any kind (including liens or other encumbrances upon properties acquired or to be acquired under conditional sales Loan Agreements or other title retention devices), excepting only liens in favor of Lender.

6.7 Current Compliance. Borrower is currently in compliance with all of the terms and conditions of the Loan Documents.

6.8 Intellectual Property. Except as otherwise disclosed in writing to Lender, Borrower owns or possesses the irrevocable right to use all of those items constituting the Intellectual Property including, but not limited to all Patents, Trademarks, service marks, trade names, Internet Domain Names, Copyrights, websites, licenses, franchises and permits and rights with respect to the foregoing necessary to own and operate Borrower's properties and to carry on its business as presently conducted and presently planned to be conducted without conflict with the rights of others.

6.9 Characterization of Obligations Post Entry Date. After the Entry Date, the obligations of Borrower pursuant hereto will constitute allowed administrative expenses in the Chapter 11 Case, having priority in payment over all other administrative expenses and unsecured claims against Borrower now existing or hereafter arising, of any kind or nature whatsoever, including without limitation all administrative expenses of the kind specified in, or arising or ordered under, Sections 105, 326, 328, 503(b), 506(c), 507(a), 507(b), 546(c), 726 and 1114 of the Bankruptcy Code (whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment) subject only to the Carve-Out. Upon entry of the Bankruptcy Court Order, Lender's Liens shall be valid, perfected and of first priority except that Lender's Liens are subject and subordinate to the Carve-Out. However, it is agreed and understood that (i) the Carve-Out shall not reduce or affect the full amount that is due and owing to Lender under this Loan Agreement, and (ii) nothing herein shall be construed to require Lender, in the event that Borrower's assets are insufficient to pay any portion of the Carve-Out, to infuse any money in excess of any unfunded amount of the DIP Budget as approved by a Financing Order to pay any portion of the Carve-Out. After the Entry Date, the Bankruptcy Court Order is in full force and effect, and has not been appealed, reversed, stayed, modified or amended absent the written consent of Lender and Borrower.

6.10 Bankruptcy Order. No order has been entered in the Chapter 11 Case (i) for the appointment of a Chapter 11 trustee, (ii) for the appointment of an examiner with enlarged powers (beyond those set forth in Sections 1106(a)(3) and (4) of the Bankruptcy Code) under Section 1106(b) of the Bankruptcy Code, or (iii) to convert the Chapter 11 Case to a Chapter 7 case or to dismiss the Chapter 11 Case.

6.11 Accuracy of Representations and Warranties. All information submitted by Borrower or its agents to Lender and in all financial statements, reports, certificates and other documents submitted in connection with the Loan or in satisfaction of the terms thereof and all statements of fact made by Borrower in this Loan Agreement or in any other Loan Document, are accurate, complete and correct in all material respects. No representation or warranty by Borrower contained herein or in any certificate or other document furnished by Borrower pursuant hereto or in connection herewith contains any untrue statement of material fact or fails to contain any statement of material fact necessary to make such representation or warranty not misleading in light of the circumstances under which it was made. There is no material fact presently known to Borrower which has not been disclosed to Lender which adversely affects, nor as far as Borrower can reasonably foresee, might adversely affect the business, operations or condition (financial or otherwise) of Borrower.

6.12 **Survival; Reliance.** Borrower agrees that, unless expressly provided otherwise, all of the representations and warranties of Borrower set forth in this Section 6 and elsewhere in this Loan Agreement and in the other Loan Documents shall survive for so long as any portion of the Loan remains owing to Lender. All representations, warranties, covenants and Loan Agreements made in this Loan Agreement or in the other Loan Documents by Borrower shall be deemed to have been relied upon by Lender notwithstanding any investigation heretofore or hereafter made by Lender or on its behalf.

7. **GENERAL COVENANTS.** Borrower will comply with the following:

7.1 **Payment of Principal, Interest and Other Amounts Due.** Borrower will pay when due all Lender Indebtedness and all other amounts payable by Lender hereunder.

7.2 **Disposition of Assets.** Borrower will not sell, lease, transfer or otherwise dispose of any of its property or assets, except for sales, leases, transfers and other dispositions pursuant to an Order of the Bankruptcy Court on not less than ten business days' prior notice to Lender.

7.3 **Merger; Consolidation; Business Acquisitions; Subsidiaries.** Borrower will not merge into or consolidate with any Person, acquire any material portion of the stock, ownership interests, assets or business of any Person, permit any Person to merge into it, or form any new Subsidiaries, except pursuant to an Order of the Bankruptcy Court on prior notice to Lender.

7.4 **Taxes; Claims for Labor and Materials.** Borrower will pay or cause to be paid when due all taxes, assessments, governmental charges or levies imposed upon it or its income, profits, payroll or any property belonging to it, including without limitation all withholding taxes.

7.5 **Liens.**

a. Borrower will not create, incur or permit to exist any mortgage, pledge, encumbrance, lien, security interest or charge of any kind (including liens or charges upon properties acquired or to be acquired under conditional sales Loan Agreements or other title retention devices) on its property or assets, whether now owned or hereafter acquired, or upon any income, profits or proceeds therefrom, except by Order of the Bankruptcy Court on notice to Lender; and

b. Borrower shall not enter into any Loan Agreement with any other Person which shall prohibit Borrower from granting, creating or suffering to exist, or otherwise restrict in any way (whether by covenant, by identifying such event as a default under such Loan Agreement or otherwise) the ability of Borrower to grant, create or suffer to exist, any lien, security interest or other charge or encumbrance upon or with respect to any of its assets in favor of Lender.

7.6 Existence; Approvals; Qualification; Business Operations; Compliance with Laws. Borrower will (a) obtain, preserve and keep in full force and effect its separate existence and all rights, licenses, registrations and franchises necessary to the proper conduct of its business or affairs; and (b) continue to operate its business as presently operated and will not engage in any new businesses without the prior written consent of Lender. Borrower will comply and cause the Property to comply with the requirements of all applicable laws and all rules, regulations (including environmental regulations) and orders of regulatory agencies and authorities having jurisdiction over it.

7.7 Maintenance of Collateral. Borrower shall cause the Collateral to be maintained in a good, safe and insurable condition and in compliance with all applicable Legal Requirements. Borrower will maintain, preserve, protect and keep or cause to be maintained, preserved, protected and kept its real and personal property used or useful in the conduct of its business in good working order and condition, reasonable wear and tear excepted, and will pay and discharge when due the cost of repairs to and maintenance of the same. Borrower shall not commit or suffer any waste of the Collateral or take any action that might invalidate or give cause for cancellation of any insurance covering the Collateral, or do or permit to be done thereon anything that may in any way impair the value of the Collateral or the security for the Loan.

7.8 Insurance. Borrower will carry adequate insurance issued by an insurer acceptable to Lender, which in all cases shall not be less than the insurance required by the Existing Loan Documents and shall comply with all requirements set forth in the Existing Loan Documents. Borrower shall not take out any insurance without having Lender named as loss payee or additional insured thereon. Borrower shall bear the full risk of loss from any loss of any nature whatsoever with respect to the Collateral.

7.9 Amendment to Certificate or Formation. Borrower shall not make any amendment to its Operating Agreement, by-laws, or other formation or operating documents without providing Lender with thirty (30) day's prior notice thereof and obtaining Lender's prior written approval thereof.

7.10 Transactions with Affiliates. Borrower will not enter into or conduct any transaction with any Affiliate except on terms that would be usual and customary in a similar transaction between Persons not affiliated with each other and except as disclosed to Lender or as set forth in the DIP Budget. Borrower will not make any loans or extensions of credit to any of its Affiliates, members, shareholders, directors or officers.

7.11 Restrictions on Transfer. Borrower will not directly or indirectly issue, transfer, sell or otherwise dispose of, or part with control of, or permit the transfer of, any Collateral or equity interests in Borrower, except with Lender's prior written consent and by Order of the Bankruptcy Court on notice to Lender.

7.12 Name; Address or State of Organization Change. Borrower will not change its name or change or add any address or location except upon thirty (30) days prior written notice to Lender and delivery to Lender of any items requested by Lender to maintain perfection and priority of Lender's security interests in and access to the Collateral. Borrower shall not change its state of organization or take any action which would result in a change in Borrower's state of organization without Lender's prior written consent.

7.13 Notices. Borrower will promptly notify Lender of (a) any action or proceeding brought against Borrower wherein such action or proceeding could, if determined adversely to Borrower have a Material Adverse Effect, or (b) the occurrence of any Default or Event of Default.

7.14 Additional Documents and Future Actions. Borrower will, at its sole cost, take such actions and provide Lender from time to time with such Loan Agreements, financing statements and additional instruments, documents or information as Lender may deem necessary or advisable to perfect, protect, maintain or enforce the security interests in the Collateral, to permit Lender to protect or enforce its interest in the Collateral, or to carry out the terms of the Loan Documents. Borrower shall at Borrower's expense cooperate fully with Lender with respect to any proceedings before any court, board or other governmental authority which may in any way affect the rights of Lender hereunder or any rights obtained by Lender under any of the other Loan Documents and, in connection therewith, permit Lender, at its election, to participate in any such proceedings. Borrower hereby authorizes and appoints Lender as its attorney-in-fact, with full power of substitution, to take such actions as Lender may deem advisable to protect the Collateral and its interests thereon and its rights hereunder, to file at Borrower's expense financing statements, and amendments thereto, in those public offices deemed necessary or appropriate by Lender to establish, maintain and protect a continuously perfected security interest in the Collateral, and to execute on Borrower's behalf such other documents and notices as Lender may reasonably deem advisable to protect the Collateral and its interests therein and its rights hereunder. Such power being coupled with an interest is irrevocable.

7.15 Material Adverse Contracts. Borrower will not become or be a party to any contract or Loan Agreement which has or could have a Material Adverse Effect. Borrower will deliver to Lender promptly after execution, copies of each new material lease, contract Loan Agreement or commitment to which it is a party and any amendment to any material lease, contract, commencement or Loan Agreement to which Borrower is a party, but nothing herein shall be deemed to constitute Lender's consent to any lease, contract, Loan Agreement or commitment which is not expressly permitted by the Existing Loan Documents.

7.16 Restrictions on Use of Proceeds. Borrower will not carry or purchase with the proceeds of any of the Loans any "margin security" within the meaning of Regulations U, G, T or X of the Board of Governors of the Federal Reserve System.

7.17 Bankruptcy Court Order. Borrower shall not at any time: (a) seek, consent to or suffer to exist any modification, stay, vacation or amendment of the Bankruptcy Court Order, except for modifications and amendments agreed to by Lender, and (b) at any time suffer to exist a secured claim or priority for any administrative expense or unsecured claim against Borrower (now existing or hereafter arising of any kind or nature whatsoever, including, without limitation,, any administrative expenses of the kind specified in, or arising or ordered under, Sections 105, 326, 328, 503(b), 506(c), 507(a), 507(b), 546(c) 726 and 1114 of the Bankruptcy Code (whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment)) equal or superior to the priority of Lenders in respect of the obligations hereunder, subject only to the Carve-Out.

7.18 Cooperation and Access. Borrower and its agents and representatives shall cooperate and provide information and documentation reasonably requested by Lender, including those related to the business and financial operations of Borrower. Lender, or such Persons as Lender may designate, may examine (either by Lender or by independent accountants) any of the Collateral or other assets of Borrower, including the books of account of Borrower, and discuss the affairs, finances and accounts of Borrower with its officers and with its independent accountants, at such times as Lender may reasonably request.

7.19 Sole Purpose. Borrower has not and will not:

- (i) merge into or consolidate with any Person, or dissolve, terminate, liquidate in whole or in part, transfer or otherwise dispose of all or substantially all of its assets or change its legal structure;
 - (ii) fail to observe all organizational formalities, or fail to preserve its existence as an entity duly organized, validly existing and in good standing (if applicable) under the applicable Legal Requirements of the jurisdiction of its organization or formation, or amend, modify, terminate or fail to comply with the provisions of its organizational documents;
 - (iii) make any investment in, any Person;
 - (iv) commingle its assets with the assets of any other Person, or permit any Affiliate or constituent party independent access to its bank accounts;
 - (v) incur any debt, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (A) the Loan and the Existing Loans, or (B) trade and operational indebtedness incurred in the ordinary course of business with trade creditors, provided such indebtedness is (1) unsecured, (2) not evidenced by a note, (3) on commercially reasonable terms and conditions, and (4) due not more than sixty (60) days past the date incurred and paid on or prior to such date;
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(vi) fail to maintain its records, books of account, bank accounts, financial statements, accounting records and other entity documents separate and apart from those of any other Person;

(vii) enter into any contract or Loan Agreement with any general partner, member, shareholder, principal, guarantor of the obligations of Borrower, or any Affiliate of the foregoing, except upon terms and conditions that are intrinsically fair, commercially reasonable and substantially similar to those that would be available on an arm's-length basis with unaffiliated third parties;

(viii) maintain its assets in such a manner that it will be costly or difficult to segregate, ascertain or identify its individual assets from those of any other Person;

(ix) assume or guaranty the debts of any other person, hold itself out to be responsible for the debts of any other person, or otherwise pledge its assets to secure the obligations of any other person or hold out its credit as being available to satisfy the obligations of any other person;

(x) make any loans or advances to any Person;

(xi) fail to (A) file its own tax returns separate from those of any other Person, except to the extent that Borrower is treated as a "disregarded entity" for tax purposes and is not required to file tax returns under applicable Legal Requirements, and (B) pay any taxes required to be paid under applicable Legal Requirements;

(xii) fail either to hold itself out to the public as a legal entity separate and distinct from any other Person or to conduct its business solely in its own name or fail to correct any known misunderstanding regarding its separate identity;

(xiii) fail to maintain adequate capital for the normal obligations reasonably foreseeable in a business of its size and character and in light of its contemplated business operations, taking into account its existence as a debtor in possession and recognition that the funding provided under the DIP Budget constitutes adequate capital;

(xiv) fail to allocate shared expenses (including, without limitation, shared office space and services performed by an employee of an Affiliate) among the Persons sharing such expenses and to use separate stationery, invoices and checks;

(xv) fail to remain solvent or pay its own liabilities (including, without limitation, salaries of its own employees), subject to the Lender's timely furnishing of such Advances which are made pursuant to Advance Requests made by the Borrower in connection with the DIP Budget;

(xvi) acquire obligations or securities of its partners, members, shareholders or other affiliates, as applicable; or

7.20 Environmental Matters. Borrower covenants and agrees that so long as Borrower owns, manages, is in possession of, or otherwise controls the operation of the Property: (a) all uses and operations on or of the Property, whether by Borrower or any other Person, shall be in compliance with all Environmental Laws and permits issued pursuant thereto; (b) there shall be no releases of Hazardous Materials in, on, under or from the Property; (c) there shall be no Hazardous Materials in, on, or under the Property, except those that are both (i) in compliance with all Environmental Laws and with permits issued pursuant thereto, if and to the extent required, and (ii) (A) in amounts not in excess of that necessary to operate the Property for the purposes set forth herein, or (B) fully disclosed to and approved by Lender in writing. For purposes hereof, “**Environmental Law**” means any present and future federal, state and local laws, statutes, ordinances, rules, regulations, standards, policies and other government directives or requirements, as well as common law, including but not limited to the Comprehensive Environmental Response, Compensation and Liability Act and the Resource Conservation and Recovery Act, that apply to Borrower or the Property and relate to Hazardous Materials or protection of human health or the environment; “**Hazardous Materials**” shall mean petroleum and petroleum products and compounds containing them, including gasoline, diesel fuel and oil; explosives, flammable materials; radioactive materials; polychlorinated biphenyls and compounds containing them; lead and lead-based paint; asbestos or asbestos-containing materials in any form that is or could become friable; underground or above-ground storage tanks, whether empty or containing any substance; any substance the presence of which on the Property is prohibited by any federal, state or local authority; any substance that requires special handling; and any other material or substance now or in the future defined as a “hazardous substance,” “hazardous material,” “hazardous waste,” “toxic substance,” “toxic pollutant,” “contaminant,” or “pollutant” within the meaning of any Environmental Law.

7.21 Bankruptcy. Borrower shall not seek or consent to, any of the following:

- (a) Without the prior written consent of Lender, any modification, stay, vacation or amendment to any Bankruptcy Court Order;
 - (b) A priority claim or administrative expense or unsecured claim against Borrower (now existing or hereafter arising of any kind or nature, including any administrative expense of the kind specified in Section 105, 326, 330, 331, 503(a), 503(b), 506(c), 507(b), 546(c), 546(d) or 1114 of the Bankruptcy Code) equal or superior to the priority claim of Lender, except for the Carve-Out;
 - (c) Any security interest or lien on any Collateral having a priority equal or superior to the security interest or lien of Lender other than as permitted hereunder;
 - (d) Any order seeking authority to take any action prior to the effectiveness of a plan of reorganization that is prohibited by the terms of this Loan Agreement or the other Loan Documents or refrain from taking any action that is required to be taken by the terms of this Loan Agreement or any of the other Loan Documents; or
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(e) Any sale other than to Lender unless all of the Lender Indebtedness is to be paid in full in cash, or other immediately available funds and the arrangements provided for herein terminated pursuant thereto.

8. **CONDITIONS PRECEDENT TO CLOSING.** The obligation of Lender to make available the Loan, pursuant to either the Interim Financing Order and/or the Final Financing Order, is subject to the performance by Borrower of all of its Loan Agreements to be performed hereunder and to the following further conditions (any of which may be waived by Lender):

- 8.1 **Loan Documents.** Borrower and all other required persons shall have executed and delivered to Lender the executed Loan Documents in form satisfactory to Lender.
- 8.2 **Compliance with DIP Budget.** Borrower is in compliance with, the DIP Budget, subject to the Permitted Variances.
- 8.3 **Filing of Petition.** The Borrower shall have filed the Chapter 11 Case within one Business Day of the date hereof.
- 8.4 **Representations and Warranties.** All representations and warranties of Borrower set forth in the Loan Documents and in this Loan Agreement will be true in all material respects at and as of the date hereof and at and as of the date of any funding of the Loan.
- 8.5 **No Default.** No condition or event shall exist or have occurred which would constitute a Default or Event of Default hereunder.

8.6 **Bankruptcy Court Order.** The entry of an “interim” order of the Bankruptcy Court with respect to the making of the Loan or any portion of it to Borrower in the form of Exhibit C attached hereto (the “**Interim Financing Order**”), as the same may be amended, modified, or supplemented from time to time with the express written joinder or consent of Lender and Borrower (the “**Entry Date**”), and the entry of a “final” order at the final financing hearing before the Bankruptcy Court with respect to the making of any further advances under the Loan (the “**Final Financing Order**”, and together with the Interim Financing Order, the “**Bankruptcy Court Order**”), and Lender shall have received a certified copy of such order, and such order shall be in full force and effect and shall not have been reversed, stayed, modified or amended absent the prior written consent of Lender and Borrower. The Final Order shall (a) approve all aspects of the Loan and Loan Documents including, without limitation, confirmation of the Existing Liens in the amount of \$1,351,354.75, the New Money DIP Loan, the Rollup, the administrative expense superpriority of and the existence and priority of all liens securing the Loan (including, without limitation, a lien on Avoidance Actions), and the rights, remedies and obligations thereunder; (b) provide for such other protections in favor of Lender and the liens securing the Loan as Lender deems necessary; and (c) acknowledge Lender’s right to credit bid up to the full amount of all obligations, liens, claims, and interests under the Loan (including, for the avoidance of doubt, the New Money DIP Loan, the Existing Loans, any unpaid reasonable fees and expenses of Lender thereunder) and in the sale of any of the Collateral, including, without limitation, (x) pursuant to Bankruptcy Code section 363, (y) a plan of reorganization or a plan of liquidation under Bankruptcy Code section 1129, or (z) a sale or disposition by a chapter 7 trustee of the Borrower under Bankruptcy Code section 725.

8.7 **Review of Material.** Receipt and review, with results satisfactory to Lender and its counsel, of information regarding the Chapter 11 Case, litigation, tax, accounting, labor, insurances, pension liabilities (actual or contingent), real estate leases, environmental matters, material contracts, debt Loan Agreements, property ownership, contingent liabilities and management of Borrower.

8.8 **Entry of Orders.** Entry of the Interim Financing Order and any other appropriate order(s) of the Bankruptcy Court, in form and substance satisfactory to Lender and counsel for Lender, which shall provide, among other provisions: (a) approval of this Loan Agreement; (b) the grant of first priority security interests in and liens upon all the Collateral (subject only to the Carve-Out exceptions set forth in Section 5.1) pursuant to Sections 364(c) and 364(d)(1) of the Bankruptcy Code, and the grant to Borrower of an allowed superpriority administrative expense in accordance with Section 364(c)(1) of the Bankruptcy Code, with priority over all other administrative expenses and claims against Borrower (except for the amount in the Carve-Out, or professional fees and expenses in an amount not to exceed amounts approved by the Bankruptcy Court and acceptable to Lender; it is agreed and understood that the Carve-Out shall not reduce the full amount that is due and owing to Lender under this Loan Agreement, nor shall Lender be required in the event that Borrower's assets are insufficient to pay any portion of the Carve-Out, to infuse any money in excess of any unfunded amount of the DIP Budget as approved by a Financing Order to pay any portion of the Carve-Out. Unless otherwise agreed to in writing by Lender and Borrower, application for an order of the Court approving this Loan Agreement shall be made and filed within three (3) Business Days following the Filing Date, the Bankruptcy Court shall have entered the Interim Financing Order in form satisfactory to Lender on before the tenth (10th) day after the Filing Date, and such Interim Financing Order shall be in full force and effect and shall not have been vacated, reversed, modified, amended or stayed or the subject of an appeal.

8.9 **Consents.** All governmental, shareholder, member, and third party consents and approvals necessary or desirable in connection with this Loan Agreement and the other transactions contemplated hereby shall have been obtained; all such consents and approvals shall be in force and effect; and all applicable waiting periods shall have expired without any action being taken by any authority that could restrain, prevent, or impose any material adverse conditions on this Loan Agreement or such other transactions or that could seek or threaten any of the foregoing, and no law or regulation shall be applicable which in the judgment of Lender could have such effect.

8.10 **No Restriction.** There shall not exist (a) any order, decree, judgment, ruling or injunction which restrains the consummation of this Loan Agreement in the manner contemplated, or (b) any pending or threatened action, suit, investigation or proceeding, which, if adversely determined would materially and adversely affect Borrower, any transaction contemplated hereby or the ability of Lender to exercise its rights thereunder.

- 8.11 **Costs and Expenses.** Payment to Lender of the Costs and Expenses set forth herein as provided herein.
- 8.12 **No Material Adverse Change.** No Material Adverse Changes in the business assets, liabilities, operations or financial condition of Borrower after the date of this Loan Agreement.
- 8.13 **Cash Collateral.** Approval by the Bankruptcy Court of Borrower's use of cash collateral upon terms and conditions acceptable to Lender, in accordance with Borrower's approved budget.
- 8.14 **Insurance.** Borrower shall have delivered evidence of all insurance required under Section 7.8 of this Loan Agreement.
- 8.15 **No Trustee or Examiner.** No trustee or examiner with expanded powers relating to the operation of the business of Borrower shall have been appointed with respect to its business, properties or assets, including, without limitation, the Collateral and any other property which is security for any Lender Indebtedness.
- 8.16 **Full Compliance With Bankruptcy Court Orders.** Borrowers shall have complied in full with all other requirements as provided for under the Interim Financing Order and/or Final Financing Order.
- 8.17 **Priority of Security Interests.** All the liens granted to Lender in the Collateral are, subject to the entry of the Interim and/or Final Financing Order, first priority security interests and no Liens exist or any of the Collateral other than the Liens created in favor of Lender.
- 8.18 **Definition.** The conditions set forth in Sections 8.1 through 8.17 are the "**Conditions Precedent to Closing**".
- 8.19 **Conditions Subsequent to Closing.** The conditions which must be satisfied in order for Borrower to receive any portion of the proceeds of the Loan in addition to all conditions set forth in Section 2.3 are as follows (the "**Conditions Subsequent to Closing**"):
- (a) By the seventieth (70th) day following Borrower's Filing Date, Borrower shall have complied with its obligations, if any, under section 365(d)(3) of the Bankruptcy Code.
- (b) **Final Financing Order.** Before the expiration of the Interim Financing Order but in any event no later than the date which is sixty (60) days following the date of the commencement of the Chapter 11 Case, a hearing is held by the Bankruptcy Court to consider the entry of the Final Financing Order, and such Final Financing Order shall have been entered by the Bankruptcy Court in form and substance satisfactory to Lender, and as provided in the definition thereof shall be a Final Order, except as otherwise consented to by Lender.
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9. **DEFAULT AND REMEDIES.**

9.1 **Events of Default.** The occurrence of any one or more of the following events shall constitute an Event or Events of Default hereunder:

- (a) The Company fails to commence the Chapter 11 Case (the “**Filing Date**”) within 1 Business Day of the execution of this Loan Agreement or the Note;
 - (b) The Company fails to file with the Bankruptcy Court one or more motions, each in form and substance reasonably acceptable to the Lender seeking approval of the stalking horse asset purchase agreement, dated as of the date hereof, between Borrower and Lender (or an affiliate thereof) (the “**Stalking Horse Purchase Agreement**”), subject only to higher and/or otherwise better bids through a Court-approved sale process (the “**Sale Motion**”), and (b) bidding procedures and the Break-Up Fee (as defined in the Stalking Horse Purchase Agreement) (the “**Bid Procedures Motion**”), within 3 Business Days following the Filing Date;
 - (c) The Company fails to obtain entry of a Bankruptcy Court order, in form and substance reasonably satisfactory to the DIP Lender approving the Sale Motion and the Bid Procedures Motion (the “**Bid Procedures Order**”) within 14 days of the Filing Date;
 - (d) The Company fails to hold an auction for the sale of substantially all of Borrower’s assets pursuant to the Stalking Horse Purchase Agreement (such auction process, the “**Auction**” and the consummation such transactions, the “**Sale**”) within 30 days after the entry of the Bid Procedures Order;
 - (e) If the DIP Lender is the successful bidder at the Auction, the Company fails to obtain entry of a Bankruptcy Court order, in form and substance reasonably satisfactory to the DIP Lender approving (a) the Stalking Horse Purchase Agreement, including any related credit bid of the DIP Lender’s claims under the Loan Agreement and (b) the sale of substantially all the Borrower’s assets pursuant to sections 363(f) and 363(m) of the Bankruptcy Code (free and clear of all liens, claims, interests and encumbrances) (the “**DIP Lender Sale Approval Order**”) within 3 Business Days of the conclusion of the Auction;
 - (f) If a party other than the DIP Lender is the successful bidder at the Auction, the Company fails to obtain entry of a Bankruptcy Court order, in form and substance reasonably satisfactory to the DIP Lender approving (a) the applicable purchase agreement in an amount sufficient to pay in cash all outstanding obligations of Borrower under the DIP Loan Facility (including interest, fees, and expenses) and the Stalking Horse Purchase Agreement (including any expense reimbursement or break-up fees) and (b) the sale of substantially all the Borrower’s assets pursuant to sections 363(f) and 363(m) of the Bankruptcy Code (free and clear of all liens, claims, interests and encumbrances) (the “**Third- Party Sale Approval Order**”, and together with the DIP Lender Sale Approval Order, the “**Sale Approval Order**”) within 3 Business Days of the conclusion of the Auction;
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- (g) The Company fails to close the Sale within 10 days of the entry of Sale Approval Order, subject to the satisfaction of the conditions precedent to closing set forth in the winning bidder's Bankruptcy Court approved asset purchase agreement;
 - (h) The Company's Budget varies in excess of Permitted Variances as set forth in the DIP Budget;
 - (i) A trustee is appointed, the Company's Chapter 11 Case is dismissed, or the Chapter 11 Case is converted to a case under Chapter 7 without the consent of the DIP Lender;
 - (j) Any Person or entity is granted relief from stay with respect to any portion of the Collateral securing the DIP Loan Facility;
 - (k) An order of the Bankruptcy Court in the Company's Chapter 11 case is entered or modified in a manner materially adverse to the DIP Lender; a motion, pleading or proceeding is filed by the Company that could reasonably be expected to result in a material impairment of the rights, remedies or interests of the DIP Lender; or there is a determination by the Bankruptcy Court with respect to any motion, pleading or proceeding brought by another party which results in any material impairment of the rights, remedies or interests of the DIP Lender;
 - (l) The Company files a motion or proceeding, takes any action or files any plan of reorganization or disclosure statement attendant thereto by Borrower: (i) to obtain additional financing under Section 364(c) or (d) of the Bankruptcy Code not otherwise permitted under the DIP Loan Facility; (ii) to grant any lien upon or affecting any Collateral; or (iii) except as provided in the Interim Order and/or the Final Order, as the case may be, to use cash collateral under Section 363(c) of the Bankruptcy Code without the prior written consent of the DIP Lender, unless such additional funding, whether sought by motion or plan of reorganization, provides for both (i) termination of the commitments and (ii) repayment in full in cash of all of the obligations under the DIP Facility (or other treatment of such obligations acceptable to the DIP Lender) on or before the effective date of such plan(s);
 - (m) Except as otherwise provided for in the DIP Budget, as applicable, the Company pays or applies for authority to pay pre-petition indebtedness or payables without the prior consent of the DIP Lender;
 - (n) An order is entered by the Bankruptcy Court amending, supplementing, staying, vacating, rescinding or otherwise modifying any documents implementing the DIP Loan Facility or the Interim Order or the Final Order, or any provision thereof ceases to be effective or is contested by any Loan Party, without the written consent of the DIP Lender;
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- (o) An order is entered confirming a plan(s) of reorganization that, unless otherwise approved by the DIP Lender, does not provide for both (i) termination of the commitments and (ii) repayment in full in cash of all of the obligations under the DIP Loan Facility (or other treatment of such obligations acceptable to the DIP Lender) on or before the effective date of such plan(s);
- (p) An order is entered by the Bankruptcy Court granting relief from or modifying the automatic stay for any creditor or party (other than the DIP Lender) holding a security interest to execute upon, foreclose (or grant a deed in lieu of foreclosure or the like), take possession of, exercise set-off or any similar remedy against, or otherwise enforce a lien on any Collateral or any assets of the Company;
- (q) The Company objects or supports an objection, whether in a writing or otherwise, to the DIP Lender's right to credit bid its claim under the DIP Loan Facility in the Sale.
- (r) The Company fails to pay any amount of principal or interest on the Notes, or any fee or other sums payable hereunder, or any other Lender Indebtedness on the date on which such payment is due, at the stated maturity or due date thereof, or by reason of any requirement for the prepayment thereof, by acceleration or otherwise; and
- (s) The Company fails to duly perform or observe any obligation, covenant or agreement on its part contained herein or in any other Loan Document not otherwise specifically constituting an Event of Default under the Note or the Loan Agreement and such failure continues uncured for a period of ten (10) days after the earlier of (i) notice from the DIP Lender to the Company of the existence of such failure, or (ii) any officer or principal of the Company knows or should have known of the existence of such failure, provided that, in the event such failure is incapable of remedy, or was willfully caused or permitted by the Company, the Company shall not be entitled to any notice or grace hereunder.

9.2 Remedies. Subject to the terms and conditions of the Financing Orders, at the option of Lender, upon the occurrence of an Event of Default, or at any time thereafter, following delivery of a notice of default to the Company, with a copy to the Creditors Committee, if any, and the Office of the United States Trustee:

- (a) The entire outstanding principal amount of the Loan, together with all accrued and unpaid interest, Costs and Expenses, and other charges and sums due hereunder and under the other Existing Loan Documents, and all other obligations of Borrower to Lender hereunder or under any other Loan Agreement, note or otherwise arising will become immediately due and payable without any further demand or notice;
 - (b) Lender may increase the interest rate on the Loan to the applicable default rate set forth herein, without notice;
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- (c) Subject to the Approval of the Bankruptcy Court in the Financing Order, Lender, after providing seven (7) days prior written notice to counsel for the Borrower, the US Trustee, and counsel for any Committee retained in the Chapter 11 Case, Lender shall be automatically and completely relieved from the effect of any stay under section 362 of the Bankruptcy Code, any other restriction on the enforcement of its Liens upon and security interests in the Collateral or any other rights granted to Lender pursuant to the terms and conditions of this Agreement and the Existing Loans, and Lender shall be authorized, in its sole discretion, to take any and all actions and remedies provided to it in this Interim Order, the Financing Agreements or applicable law which Lender may deem appropriate and to proceed against and realize upon the Collateral or any other property of the Debtor's Estate, including the taking possession of the Collateral and any records relating thereto;
- (d) Lender may exercise each and every right and remedy granted to it under the Loan Documents and/or the Existing Loan Documents, under the Uniform Commercial Code and under any other applicable law or at equity; and/or
- (e) Lender may, if such Event of Default is due to the Borrower's failure to satisfy the condition set forth in Section 9.1(a) and the Closing has not occurred, terminate this Agreement and all rights and obligations hereunder upon notice to the Borrower.

9.3 Delay or Omission Not Waiver. Neither the failure nor any delay on the part of Lender to exercise any right, remedy, power or privilege under the Loan Documents upon the occurrence of any Event of Default or otherwise shall operate as a waiver thereof or impair any such right, remedy, power or privilege. No waiver of any Event of Default shall affect any later Event of Default or shall impair any rights of Lender. No single, partial or full exercise of any rights, remedies, powers and privileges by Lender shall preclude further or other exercise thereof. No course of dealing between Lender and Borrower shall operate as or be deemed to constitute a waiver of Lender's rights under the Loan Documents or affect the duties or obligations of Borrower.

9.4 Remedies Cumulative; Consents. The rights, remedies, powers and privileges provided for herein shall not be deemed exclusive, but shall be cumulative and shall be in addition to all other rights, remedies, powers and privileges in Lender's favor at law or in equity. Lender's rights, powers and remedies may be pursued singularly, concurrently or otherwise at such time and in such order as Lender may determine in Lender's sole discretion. Whenever Lender's consent or approval is required, such consent or approval shall be at the sole and absolute discretion of Lender.

9.5 Certain Fees, Costs, Expenses, Expenditures and Indemnification. Borrower agrees to pay on demand all costs and expenses of Lender, including without limitation:

- (a) all losses, costs and expenses in connection with the enforcement, protection and preservation of Lender's rights or remedies under the Loan Documents, or any other Loan Agreement relating to any Lender Indebtedness, or in connection with legal advice relating to the rights or responsibilities of Lender (including without limitation court costs, reasonable attorney's fees and expenses of accountants and appraisers);
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- (b) all losses, costs and expenses in connection with Lender's defense of any action or proceeding commenced or threatened by a third party against Lender's rights in and to the Collateral, provided, however, that if such action or proceeding is commenced by the Creditors Committee, if any, or a Trustee appointed by the Court in the Chapter 11 Case, and Lender is unsuccessful in defending the same, the Borrower shall have no obligation to pay any resulting losses, costs and expenses in or from such action or proceeding; and
- (c) any and all stamp and other taxes payable or determined to be payable in connection with the execution and delivery of the Loan Documents, and all liabilities to which Lender may become subject as the result of delay in paying or omission to pay such taxes.

In the event Borrower shall fail to pay taxes, insurance, assessments, costs or expenses which it is required to pay hereunder, or fails to keep the Collateral free from security interests or liens (except as expressly permitted herein), or fails to maintain or repair the Collateral as required hereby, or otherwise breaches any obligations under the Loan Documents, Lender in its discretion, may make expenditures for such purposes and the amount so expended (including reasonable attorney's fees and expenses, filing fees and other charges) shall be payable by Borrower on demand and shall constitute part of Lender Indebtedness.

With respect to any amount required to be paid by Borrower under this Section, in the event Borrower fails to pay such amount on demand, Borrower shall also pay to Lender interest thereon at the highest default rate set forth herein.

Borrower agrees to indemnify and hold harmless Lender and Lender's officers, directors, shareholders, employees and agents, from and against any and all claims, liabilities, losses, damages, costs and expenses (whether or not such Person is a party to any litigation), including reasonable attorney's fees and costs and costs of investigation, document production, attendance at depositions or other discovery with respect to or arising out of this Loan Agreement or any of the other Loan Documents, the use of any proceeds advanced hereunder, the transactions contemplated hereunder, or any claim, demand, action or cause of action being asserted against Borrower or any of its Affiliates.

Borrower's obligations under this Section shall survive termination of this Loan Agreement and repayment of Lender Indebtedness.

9.6 **Time is of the Essence.** Time is of the essence in Borrower's performance of its obligations under the Loan Documents.

9.7

Sale or Other Disposition of Collateral. The sale, lease or other disposition of the Collateral, or any part thereof, by Lender after an Event of Default may be for cash, credit or any combination thereof, and Lender may purchase all or any part of the Collateral at public or, if permitted by law, private sale, and in lieu of actual payment of such purchase price, may set-off the amount of such purchase price against Lender Indebtedness then owing. Any sales of the Collateral may be adjourned from time to time with or without notice. Lender may cause the Collateral to remain on Borrower's premises or otherwise or to be removed and stored at premises owned by other persons, at Borrower's expense, pending sale or other disposition of the Collateral. Borrower, at Lender's request, shall assemble the Collateral consisting of inventory and tangible assets and make such assets available to Lender at a place to be designated by Lender. Lender shall have the right to conduct such sales on Borrower's premises, at Borrower's expense, or elsewhere, on such occasion or occasions as Lender may see fit. Any notice required to be given by Lender of a sale, lease or other disposition or other intended action by Lender with respect to any of the Collateral which is deposited in the United States mail, postage prepaid and duly addressed to Borrower at the address specified in Section 10.1 below, at least ten (10) business days prior to such proposed action, shall constitute fair and reasonable notice to Borrower of any such action. The net proceeds realized by Lender upon any such sale or other disposition, after deduction for the expenses of retaking, holding, storing, transporting, preparing for sale, selling or otherwise disposing of the Collateral incurred by Lender in connection therewith and all other costs and expenses related thereto including attorney fees, shall be applied in such order as Lender, in its sole discretion, elects, toward satisfaction of Lender Indebtedness. Lender shall account to Borrower for any surplus realized upon such sale or other disposition, and Borrower shall remain liable for any deficiency. The commencement of any action, legal or equitable, or the rendering of any judgment or decree for any deficiency shall not affect Lender's security interest in the Collateral. Borrower agrees that Lender has no obligation to preserve rights to the Collateral against any other parties. Subject to the approval of the Bankruptcy Court, Lender is hereby granted a license or other right to use, after an Event of Default, without charge, Borrower's labels, general intangibles, intellectual property, equipment, real estate, patents, copyrights, rights of use of any name, trade secrets, trade names, domain names, trademarks, service marks and advertising matter, or any property of a similar nature, as it pertains to the Collateral, in completing production of, advertising for sale and selling any inventory or other Collateral and Borrower's rights under all contracts, licenses, approvals, permits, leases and franchise Loan Agreements shall inure to Lender's benefit. Lender shall be under no obligation to marshal any assets in favor of Borrower or any other party or against or in payment of any or all of Lender Indebtedness.

9.8

Set-Off. Without limiting the rights of Lender under applicable law, Lender has and may exercise a right of set-off, a lien against and a security interest in all property of Borrower now or at any time in Lender's possession in any capacity whatsoever, including but not limited to any balance of any deposit, trust or agency account, or any other bank account with Lender, as security for all Lender Indebtedness. At any time and from time to time following the occurrence of an Event of Default, or an event which with the giving of notice or passage of time or both would constitute an Event of Default, Lender may without notice or demand, set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by Lender to or for the credit of Borrower against any or all of Lender Indebtedness and Borrower's obligations under the Loan Documents.

Turnover of Property Held by Lender. Borrower irrevocably authorizes any Affiliate of Lender, upon and following the occurrence of an Event of Default, at the request of Lender and without further notice, to turn over to Lender any property of Borrower held by such Affiliate, including without limitation, funds and securities for such Borrower's account and to debit, for the benefit of Lender, any deposit account maintained by Borrower with such Affiliate (even if such deposit account is not then due or there results a loss or reduction of interest or the imposition of a penalty in accordance with law applicable to the early withdrawal of time deposits), in the amount requested by Lender up to the amount of Lender Indebtedness, and to pay or transfer such amount or property to Lender for application to Lender Indebtedness.

10. COMMUNICATIONS AND NOTICES.

10.1 **Communications and Notices.** All notices, requests and other communications made or given in connection with the Loan Documents shall be in writing and, unless receipt is stated herein to be required, shall be deemed to have been validly given if delivered personally to the individual or division or department to whose attention notices to a party are to be addressed, or by private carrier, or registered or certified mail, return receipt requested, or by telecopy with the original forwarded by first-class mail, in all cases, with charges prepaid, addressed as follows, until some other address (or individual or division or department for attention) shall have been designated by notice given by one party to the other:

To Borrower:

BioRestorative Therapies, Inc.
40 Marcus Drive, Suite One
Melville, NY 11747
Facsimile No.: (631) 760-8414
Attention: Chief Executive Officer
Email: mweinreb@biorestorative.com

With a copy to:

Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue
East Meadow, NY 11554
Facsimile No.: (516) 296-7111
Attention: Fred Skolnik, Esq.
Email: fskolnik@certilmanbalin.com

To Lender:

John M. Desmarais
26 Deer Creek Lane
Mt. Kisko, NY 10549
Attention: John M. Desmarais
Email: JDesmarais@desmaraisllp.com

With a copy to:

Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036
Tel: (212) 596-9514
Attention: Jonathan P. Gill
Email: Jonathan.Gill@ropesgray.com

11. WAIVERS.

11.1 Waivers. In connection with any proceedings under the Loan Documents, including without limitation any action by Lender in replevin, foreclosure or other court process or in connection with any other action related to the Loan Documents or the transactions contemplated hereunder, Borrower waives:

- (a) all errors, defects and imperfections in such proceedings;
- (b) all benefits under any present or future laws exempting any property, real or personal, or any part of any proceeds thereof from attachment, levy or sale under execution, or providing for any stay of execution to be issued on any judgment recovered under any of the Loan Documents or in any replevin or foreclosure proceeding, or otherwise providing for any valuation, appraisal or exemption;
- (c) presentment for payment, demand, notice of demand, notice of non-payment, protest and notice of protest of any of the Loan Documents, including the Note;
- (d) any requirement for bonds, security or sureties required by statute, court rule or otherwise; and
- (e) any demand for possession of Collateral prior to commencement of any suit.

11.2 Forbearance. Lender may release, compromise, forbear with respect to, waive, suspend, extend or renew any of the terms of the Loan Documents, without notice to Borrower.

11.3 Limitation on Liability. Borrower shall be responsible for and Lender, solely in its capacity as Lender, is hereby released from any claim or liability in connection with:

- (a) Safekeeping any Collateral;
 - (b) Any loss or damage to any Collateral;
 - (c) Any diminution in value of the Collateral; or
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- (d) Any act or default of another Person.

Lender, solely in its capacity as Lender, shall only be liable for any act or omission on its part constituting willful misconduct. In the event that Lender breaches its required standard of conduct, Borrower agrees that its liability shall be only for direct damages suffered and shall not extend to consequential or incidental damages. In the event Borrower brings suit against Lender in connection with the transactions contemplated hereunder and Lender is found not to be liable, Borrower will indemnify and hold Lender harmless from all costs and expenses, including reasonable attorney's fees, including, without limitation, reasonable attorney's fees incurred post-judgment incurred by Lender in connection with such suit. This Loan Agreement is not intended to obligate Lender to take any action with respect to the Collateral or to incur expenses or perform any obligation or duty of Borrower.

12. SUBMISSION TO JURISDICTION.

12.1 **Submission to Jurisdiction.** The Bankruptcy Court shall have exclusive jurisdiction with regard to all actions and proceedings related to the Loan Documents and/or the transactions contemplated hereby. With respect to any actions that are not subject to the jurisdiction of the Bankruptcy Court, Borrower hereby consents to the exclusive jurisdiction of any state or federal court located within the State of New York, and irrevocably agrees that, subject to Lender's election, all actions or proceedings relating to the Loan Documents or the transactions contemplated hereunder shall be litigated in such courts, and Borrower waives any objection which it may have based on lack of personal jurisdiction, improper venue or forum non conveniens to the conduct of any proceeding in any such court and waives personal service of any and all process upon it, and consents that all such service of process be made by mail or messenger directed to it at the address set forth in Section 10.1. Nothing contained in this Section 12.1 shall affect the right of Lender to serve legal process in any other manner permitted by law or affect the right of Lender to bring any action or proceeding against Borrower or its property in the courts of any other jurisdiction.

13. USA PATRIOT ACT PROVISIONS.

13.1 **USA Patriot Act Notice.** Lender hereby notifies Borrower that pursuant to the requirements of the USA Patriot Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "**Patriot Act**"), it is required to obtain, verify and record information that identifies Borrower, which information includes the name and address of Borrower and other information that will allow Lender to identify Borrower in accordance with the Patriot Act.

14. MISCELLANEOUS.

14.1 **Brokers.** The transaction contemplated hereunder was brought about and entered into by Lender and Borrower acting as principals and without any brokers, agents or finders being the effective procuring cause hereof. Borrower represents to Lender that Borrower has not committed Lender to the payment of any brokerage fee or commission in connection with this transaction. If any such claim is made against Lender by any broker, finder or agent or any other Person, Borrower agrees to indemnify, defend and hold Lender harmless against any such claim, at Borrower's own cost and expense, including Lender's attorneys' fees. Borrower further agrees that until any such claim or demand is adjudicated in Lender's favor, the amount claimed and/or demanded shall be deemed part of Lender Indebtedness secured by the Collateral.

- 14.2** **Use of Lender's Name.** Borrower shall not use Lender's name or the name of any of Lender's Affiliates in connection with any of its business or activities except as may otherwise be required by the rules and regulations of the Securities and Exchange Commission or any like regulatory body and except as may be required in its dealings with any governmental agency.
- 14.3** **No Joint Venture.** Nothing contained herein is intended to permit or authorize Borrower to make any contract on behalf of Lender, nor shall this Loan Agreement be construed as creating a partnership, joint venture or making Lender an investor in Borrower.
- 14.4** **Survival.** All covenants, Loan Agreements, representations and warranties made by Borrower in the Loan Documents or made by or on its behalf in connection with the transactions contemplated herein shall be true at all times this Loan Agreement is in effect and shall survive the execution and delivery of the Loan Documents, any investigation at any time made by Lender or on its behalf and the making by Lender of the loans or advances to Borrower. All statements contained in any certificate, statement or other document delivered by or on behalf of Borrower pursuant hereto or in connection with the transactions contemplated hereunder shall be deemed representations and warranties by Borrower.
- 14.5** **No Assignment by Borrower.** Borrower may not assign any of its rights hereunder without the prior written consent of Lender and any such assignment shall be void and of no force or effect. Lender shall not be required to lend hereunder except to Borrower as it presently exists.
- 14.6** **Assignment or Sale by Lender.** Lender may sell, assign or participate all or a portion of its interest in the Loan Documents, and, in connection therewith, may make available to any prospective purchaser, assignee or participant any information relative to Borrower in its possession.
- 14.7** **Binding Effect.** This Loan Agreement and all rights and powers granted hereby will bind and inure to the benefit of the parties hereto and their respective permitted successors and assigns.
- 14.8** **Severability.** The provisions of this Loan Agreement and all other Loan Documents are deemed to be severable, and the invalidity or unenforceability of any provision shall not affect or impair the remaining provisions which shall continue in full force and effect.
- 14.9** **No Third Party Beneficiaries.** The rights and benefits of this Loan Agreement and the Loan Documents shall not inure to the benefit of any third party.
- 14.10** **Modifications.** No modification of this Loan Agreement or any of the Loan Documents shall be binding or enforceable unless in writing and signed by or on behalf of the party against whom enforcement is sought. No modification shall constitute, or be constitute to constitute, a novation of this Loan Agreement, and all terms contained herein not expressly modified in such writing shall continue in full force and effect.
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14.11 **Holidays.** If the day provided herein for the payment of any amount or the taking of any action falls on a Saturday, Sunday or public holiday at the place for payment or action, then the due date for such payment or action will be the next succeeding Business Day.

14.12 **Law Governing.** This Loan Agreement has been made, executed and delivered in the State of New York and will be construed in accordance with and governed by the laws of such State without regard to conflict of law principles.

14.13 **Integration.** The Loan Documents shall be construed as integrated and complementary of each other, and as augmenting and not restricting Lender's rights, powers, remedies and security. The Loan Documents contain the entire understanding of the parties thereto with respect to the matters contained therein and supersede all prior Loan Agreements and understandings between the parties with respect to the subject matter thereof and do not require parol or extrinsic evidence in order to reflect the intent of the parties. In the event of any inconsistency between the terms of this Loan Agreement and the terms of the other Loan Documents, the terms of this Loan Agreement shall prevail.

14.14 **Exhibits and Schedules.** All exhibits and schedules attached hereto are hereby made a part of this Loan Agreement.

14.15 **Headings.** The headings of the Articles, Sections, paragraphs and clauses of this Loan Agreement are inserted for convenience only and shall not be deemed to constitute a part of this Loan Agreement.

14.16 **Counterparts.** This Loan Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument, and any of the parties hereto may execute this Loan Agreement by signing any such counterpart.

14.17 **Effect of Financing Orders.**

(a) The liens and security interests referred to in this Loan Agreement, any Security Document and any other Loan Documents with respect to Borrower shall be deemed valid and perfected by entry of the Interim Financing Order and/or Final Financing Order, subject only to the terms and conditions of the Financing Orders.

(b) The liens, security interests, lien priorities, administrative priorities and other rights and remedies granted to Lender, pursuant to this Loan Agreement, the other Loan Documents and the Financing Orders (specifically including but not limited to the existence, perfection and priority of the liens and security interests provided herein and therein, and the administrative priority provided herein and therein) shall not be modified, altered or impaired in any manner by any other financing or extension of credit or incurrence of debt by Borrower (pursuant to Section 364 of the Bankruptcy Code or otherwise), or by any dismissal or conversion of the Chapter 11 Cases, or by any other act or omission whatever. Without limitation, notwithstanding any such order, financing, extension, incurrence, dismissal, conversion, act or omission:

- (i) except for the amounts included in the Carve-Out (however, it is agreed and understood that the Carve-Out shall not reduce the full amount that is due and owing to Lender under this Loan Agreement);
 - (ii) the liens and security interests in favor of Lender set forth herein, in the Security Documents and in the other Loan Documents, shall constitute valid and perfected first priority liens and security interests and shall be prior to all other liens and interests, now existing or hereafter arising, in favor of any other creditor or any other Person whatsoever, and
 - (iii) the security interests and liens upon the Collateral in favor of Lender as set forth in this Loan Agreement, the Security Documents and in the other Loan Documents shall constitute valid and perfected first priority security interests, without the necessity that Lender file financing statements or otherwise perfect its liens and security interests in the Collateral under applicable non-bankruptcy law.
- (c) The security interests and other liens of Lender hereunder and under the other Loan Documents shall be subordinate to the payment of the following: (i)(x) allowed and unpaid fees pursuant to Section 1930 of Title 28 of the United States Code and to the Clerk of the Bankruptcy Court and any fees payable to the Office of the United States Trustee, (ii) allowed and unpaid claims of professionals whose retention is approved by the Bankruptcy Court during the Chapter 11 Cases pursuant to Sections 327 and 1103 of the Bankruptcy Code for unpaid fees and expenses that are approved by order of the Bankruptcy Court pursuant to Sections 326, 328, 330 or 331 of the Bankruptcy Code; provided, that, (A) the Carve-Out shall not include, apply to, or be available for any fees or expenses incurred by any party, including Borrower, any committee or any professional, in connection with (1) the initiation or prosecution of any claims or defenses against Lender, or preventing, hindering or delaying the assertion of enforcement of any lien, claim, right or security interest or realization upon any Collateral by Lender, (2) a request to use cash collateral (as such term is defined in Section 363 of the Bankruptcy Code) without the prior written consent of Lender, (3) a request, without the prior written consent of Lender, for authorization to obtain debtor-in-possession financing or other financial accommodations pursuant to Section 364(c) or (d) of the Bankruptcy Code that does not indefeasibly repay in full in cash Lender Indebtedness on terms and conditions acceptable to Lender or (4) any act which has the effect of materially or adversely modifying or compromising the rights and remedies of Lender as set forth herein, in the other Loan Documents and in the Financing Orders, or which results in the occurrence of an Event of Default, and (B) in the event of any inconsistency in the definition of Carve-Out between the provisions of this Loan Agreement and any Financing Order, the provisions of this Loan Agreement shall govern unless Lender consents to such Financing Order. The foregoing shall not be construed as a consent to the allowance of any fees and expenses referred to above and shall not affect the right of Lender to object to the allowance and payment of such amounts. Further, it is agreed and understood that (i) the Carve-Out shall not reduce or affect the full amount that is due and owing to Lender under this Loan Agreement, and (ii) nothing herein shall be construed to require Lender, in the event that Borrower's assets are insufficient to pay any portion of the Carve-Out, to infuse any money in excess of any unfunded amount of the DIP Budget as approved by a Financing Order to pay any portion of the Carve-Out.
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Waiver of Right to Trial by Jury. BORROWER AND LENDER WAIVE ANY RIGHT TO TRIAL BY JURY ON ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION (a) ARISING UNDER ANY OF THE LOAN DOCUMENTS OR (b) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF BORROWER OR LENDER WITH RESPECT TO ANY OF THE LOAN DOCUMENTS OR THE TRANSACTIONS RELATED HERETO OR THERETO, IN EACH CASE WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE. BORROWER AND LENDER AGREE AND CONSENT THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY, AND THAT ANY PARTY TO THIS LOAN AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF BORROWER AND LENDER TO THE WAIVER OF THEIR RIGHT TO TRIAL BY JURY. BORROWER ACKNOWLEDGES THAT IT HAS HAD THE OPPORTUNITY TO CONSULT WITH COUNSEL REGARDING THIS SECTION, THAT IT FULLY UNDERSTANDS ITS TERMS, CONTENT AND EFFECT, AND THAT IT VOLUNTARILY AND KNOWINGLY AGREES TO THE TERMS OF THIS SECTION.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have executed this Loan Agreement as of the date first above written.

BORROWER:

BIORESTORATIVE THERAPIES, INC.

By: _____

Name: _____

Title: _

LENDER:

PHOENIX CELL GROUP HOLDINGS, LLC

By: _____

Name: _____

Title:

BioRestorative Therapies, Inc.
40 Marcus Drive
Melville, New York 11747

March 16, 2020

Mark Weinreb
9 Colgate Lane
Woodbury, New York 11797

Dear Mr. Weinreb:

Reference is made to the Executive Employment Agreement, dated as of March 9, 2015, between BioRestorative Therapies, Inc. (the "Company") and Mark Weinreb (the "Executive"), as amended (the "Employment Agreement"). All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Employment Agreement.

The parties hereby agree that the reference in Section 5(a)(iv) of the Employment Agreement to "December 31, 2019" is amended to read "the effective date of a plan of liquidation of the Company, as confirmed by the United States Bankruptcy Court."

In addition, Section 5(a)(v) is added to the Employment Agreement as follows: "(v) September 30, 2020 (the earlier of (iv) or (v) being referred to as the "Expiration Date")".

Further, Section 5(d) of the Employment Agreement is amended to read as follows:

"(d) In the event that the Executive's employment with the Company is not terminated by the Company on or prior to the Expiration Date, and the Executive does not resign his employment on or prior to the Expiration Date, then, if, within three (3) months following the Expiration Date, the Company terminates the Executive's employment without Cause or the Executive resigns for any reason, the provisions of Section 5(b) shall apply."

The parties agree that (i) notwithstanding that the Executive's employment with the Company may terminate following the filing by the Company of a petition in bankruptcy (the "Bankruptcy Filing"), any claim that the Executive may make in connection with the Bankruptcy Filing for amounts payable pursuant to Section 5 of the Employment Agreement shall be considered a pre-petition claim, except that \$25,000 of such claim shall be deemed to have been post-petition and shall be accorded administrative expense treatment and (ii) any Sale shall be deemed not to result in a Change in Control for purposes of the Employment Agreement.

Except as amended hereby, the Employment Agreement shall continue in full force and effect in accordance with its terms.

This letter agreement constitutes the entire agreement between the parties with regard to the subject matter hereof. This letter agreement supersedes all prior negotiations, understandings and agreements between the parties hereto with respect to the subject matter hereof, and each party acknowledges and agrees that it has not relied on any representations or promises in connection with this letter agreement not contained herein.

This letter agreement may not be amended, modified, waived or canceled, in part or in full, except in a writing signed by both parties.

This letter agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

This letter agreement shall be governed by, and construed in accordance with, the laws of the State of New York, excluding choice of law principles thereof.

Very truly yours,

BIORESTORATIVE THERAPIES, INC.

By: /s/ Mandy Clyde
Mandy Clyde
Vice President of Operations

Agreed:

/s/ Mark Weinreb
Mark Weinreb