

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

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*In re:* : Chapter 11  
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**VION PHARMACEUTICALS, INC.,** : Case No. 09-14429 (CSS)  
:  
Debtor.<sup>1</sup> :  
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**DECLARATION OF ALAN KESSMAN IN SUPPORT  
OF CHAPTER 11 PETITION AND FIRST DAY PLEADINGS**

ALAN KESSMAN, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am the Chief Executive Officer of Vion Pharmaceuticals, Inc., the debtor and debtor-in-possession herein (the “Debtor”).
2. In accordance with the relevant resolutions filed simultaneously with the Debtor’s Chapter 11 petition, I have been authorized to submit this Declaration in support of the application and motions (collectively, the “First Day Pleadings”),<sup>2</sup> which have been or will be filed with the Court in connection with the commencement of this Chapter 11 case and to assist the Court and other parties in interest in understanding the circumstances that precipitated the commencement of this Chapter 11 case.
3. Except as otherwise indicated, all facts set forth in this Declaration are based upon my personal knowledge, my review of relevant documents or my opinion based upon

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<sup>1</sup> The Debtor in this case, along with the last four digits of the federal tax identification number for the Debtor, is Vion Pharmaceuticals, Inc. (1221). The Debtor’s corporate offices are located at 4 Science Park, New Haven, Connecticut 06511.

<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the applicable First Day Pleading.

my experience, knowledge and information concerning the Debtor's operations, financial condition and the industry as a whole. If I were called upon to testify, I would testify competently to the facts set forth herein.

4. In my capacity as Chief Executive Officer, I am responsible for the oversight of all of the Debtor's affairs, and, as a consequence, I have detailed knowledge of all aspects of the Debtor's operations.

5. On December 17, 2009 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware.

6. The Debtor intends to operate its business and manage its property as a debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

7. The Debtor intends to file several motions on or soon after the Petition Date necessary to continue operations of its business, preserve its assets and allow for the effective administration of its estate. The Debtor has already taken a number of steps pre-petition to reduce its operating expenses and will continue to do so during its Chapter 11 case.

8. The Debtor intends to continue to operate its business while pursuing efforts either to find a buyer for its assets through the Section 363 process, to restructure, obtain additional financing, or to engage in another transaction, such as a reverse merger, designed to optimize the value of its enterprise for the benefit of all parties in interest entitled to share in such value under the Bankruptcy Code. The Debtor intends to move as quickly as possible through this Chapter 11 process and anticipates over the next 45 to 60 days to use the protections and rights provided by the Bankruptcy Code to realize its Chapter 11 goals, and at the end of that time, file its disclosure statement and plan of reorganization, or just a plan of liquidation, if no buyer or source of financing has been found.

## **I. INTRODUCTION**

### **A. The Debtor's Business Operations**

9. The Debtor is a corporation organized under the laws of the State of Delaware.

10. The Debtor is a development-stage pharmaceutical company that develops therapeutics for the treatment of cancer. The Debtor's research and product development activities to date have consisted primarily of conducting preclinical trials of product candidates, obtaining regulatory approval for human clinical trials, conducting human clinical trials, preparing to file and filing for regulatory approval of the Debtor's lead product candidate, Onrigin™ (laromustine) Injection, conducting pre-commercialization activities, negotiating and obtaining collaborative agreements and obtaining financing in support of these activities.

11. Since inception, the Debtor has generated minimal revenues and has incurred substantial operating losses from its activities. The Debtor currently has no material source of revenue.

12. The Debtor ended its third fiscal quarter, September 30, 2009, with cash and cash equivalents totaling approximately \$18.9 million and as of the Petition Date had approximately \$14.4 million on hand. As set forth herein, the Debtor has recently significantly reduced its staffing and taken other steps to curtail its expenses, and, accordingly, the Debtor believes it will have adequate cash and cash equivalents to fund its substantially reduced operations through confirmation of its plan.

13. The Debtor has two small molecule anticancer agents in clinical development:<sup>3</sup> Onrigin™ and Triapine®.

14. Nearly all of the Debtor's resources have been focused on, and continue to be focused on, the development of Onrigin™ for the treatment of acute myeloid leukemia ("AML").<sup>4</sup> The Debtor provides Triapine® drug product for human clinical trials sponsored by the National Cancer Institute's Cancer Therapy Evaluation Program, but does not otherwise devote resources to the development of Triapine®, other than maintaining its Triapine®-related intellectual property portfolio.

15. The Debtor has two additional anti-cancer technologies in the preclinical development stage: a small molecule that targets hypoxic or low-oxygen areas of tumors, known as "VNP40541," and a drug delivery technology, known as TAPET®. The Debtor is not developing these technologies with its own resources at this time, and has sought, and continues to seek, development partners for such product candidates.

#### B. History of the Company

16. The Debtor was formed in Delaware on March 27, 1992 under the name "MelaRx Pharmaceuticals, Inc." and began operations on May 1, 1994. The Debtor was originally formed to engage in research and development pursuant to a collaborative research and development agreement and subsequently a license agreement with Yale University on

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<sup>3</sup> Clinical development of a product candidate generally involves a three-phase process in human patients. In Phase I, clinical trials are conducted with a small number of patients or human volunteers to determine the tolerated drug dose, early safety profile, proper scheduling and the pattern of drug distribution, absorption and metabolism. In Phase II, clinical trials are conducted with groups of patients afflicted with a specific disease in order to determine efficacy, dose-response relationships and expanded evidence of safety. In Phase III, large-scale, multi-center, controlled clinical trials are conducted in patients in order to: (i) provide enough data for statistical proof of safety and efficacy; (ii) compare the experimental therapy to existing therapies; (iii) uncover unexpected safety problems, such as previously unobserved side-effects; and (iv) generate product labeling.

<sup>4</sup> Acute myeloid leukemia is a blood cell cancer characterized by the rapid growth of abnormal white blood cells that accumulate in the bone marrow and interfere with the production of normal blood cells.

therapeutic, cosmetic and other products which would be derived from technology relating to melanin and the control of the effect of ultraviolet radiation upon the skin and related systems.

17. The Debtor changed its name to "OncoRx, Inc." on April 20, 1995 to reflect a change in focus to the development of anti-cancer therapies also based on compounds licensed from Yale University, including Onrigin™ and Triapine®, which were developed in the laboratory of Dr. Alan Sartorelli, one of the Debtor's directors, through research funded in part by the Debtor. The Debtor also licenses TAPET® from Yale University.

18. The license agreements with Yale grant to the Debtor the exclusive licenses to make, use, sell and practice the inventions covered by various patents and patent applications relating to the Debtor's product candidates described above. Each license agreement requires the Debtor to pay royalties and, in some cases, milestone payments to Yale. Yale has retained the right to make, use and practice the inventions for non-commercial purposes. Under the license agreements with Yale, the Debtor is required to exercise due diligence in commercializing the licensed technologies. In accordance with their terms, the licenses may be terminated by Yale in the event that the Debtor fails to make a payment when due, materially breaches the license, becomes insolvent or files a petition in bankruptcy, or fails to exercise due diligence in commercializing the licensed products, subject to certain cure periods and cross defaults.

19. The Debtor took its present name, Vion Pharmaceuticals, Inc., on April 18, 1996. As mentioned above, although the Debtor has developed, or attempted to develop, several technologies since its inception, during the last three years nearly all of the Debtor's resources have been focused on the development of Onrigin™.

20. In May 2007, the Debtor's Phase III human clinical trial of Onrigin™ in combination with Ara-C (also known as cytarabine) in patients that had suffered a relapse of AML was put on clinical hold by the U.S. Food and Drug Administration (the "FDA"). The FDA's decision was based on an interim analysis of clinical data by the trial's data safety monitoring board ("DSMB") that resulted in a recommendation that enrollment and further treatment of patients on study be suspended. The DSMB's recommendation was based on its evaluation that any advantage in the overall response rate was being compromised by the mortality observed on the study.

21. In January 2008, the Debtor announced that the FDA had lifted the clinical hold on this clinical trial, and that the Debtor had reached initial agreement with the FDA on modifications to the Debtor's original Phase III study protocol resulting in the requirement to conduct a new Phase III trial if the Debtor were to pursue regulatory approval of Onrigin™ as a treatment for relapsed AML. The original Phase III trial is now closed.

22. Subsequent to the trial being put on hold, the Debtor's stock price as quoted on the Nasdaq Stock Market™ plummeted, eventually contributing to the Debtor being delisted in August 2008 for failure to meet the Nasdaq's listing requirements.

23. In part as a result of the Phase III trial being put on hold, as described above, the Debtor reoriented its regulatory approval strategy for Onrigin™, and in February 2009 filed a New Drug Application (a "NDA") for Onrigin™ with the FDA as a single agent in elderly *de novo* poor-risk AML patients based on the results of an international multi-center pivotal Phase II trial of 85 such patients 60 years of age or older with *de novo* poor-risk AML, supplemented by data from 55 patients in a previous Phase II trial. The NDA for Onrigin™ was accepted for standard review by the FDA in April 2009.

24. In connection with its filing of the NDA for Onrigin™, the Debtor made a presentation to the Oncologic Drugs Advisory Committee (the “ODAC”) of the FDA on September 1, 2009. The ODAC reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of cancer and makes appropriate recommendations to the FDA. The ODAC voted 13-0 to require a new randomized Phase III study defining the efficacy and safety of Onrigin™ be completed *prior* to regulatory approval of Onrigin™ by the FDA.

25. On November 16, 2009, the Debtor submitted a Special Protocol Assessment (“SPA”) to the FDA regarding a new Phase III randomized trial of Onrigin™ sponsored by the Dutch-Belgian Cooperative Trial Group for Hematology (known as “HOVON”), which has already been engaging in a feasibility study for the drug.

26. The SPA process provides for an official FDA evaluation of Phase III clinical study protocols. The SPA provides trial sponsors with a written agreement with the FDA that the design and analysis of the studies are adequate to support a license application submission if the study is performed according to the SPA and the results are successful. The SPA agreement may only be changed by the sponsor company or the FDA by a written agreement, or if the FDA becomes aware of a substantial scientific issue essential to product efficacy or safety. Representatives of the Debtor are scheduled to have a telephonic meeting with the FDA regarding the SPA on December 30, 2009, from 3:30 to 4:30 p.m.

27. If the SPA process for the HOVON trial were completed successfully, the Debtor would have additional assurance that the trial sponsored by HOVON will be acceptable to the FDA for regulatory approval, assuming positive data from the trial. There is no assurance,

however, as to: (i) whether the FDA will agree with the terms of the SPA or (ii) the time that it takes to complete the SPA.

28. On December 11, 2009, the Debtor received a complete response letter from the FDA related to its NDA for Onrigin™ (laromustine) injection submitted in February 2009. The letter was consistent with the ODAC's previous recommendations and indicated that the FDA could not approve the Debtor's NDA in its present form and provided recommendations to address remaining issues. The letter advised that the Debtor complete a randomized trial or trials to define the efficacy and safety of Onrigin™ in the patient population proposed for the indication and that any trial should be designed to demonstrate a survival benefit that was clearly attributable to Onrigin™ with an acceptable safety profile in a well-characterized patient population. In addition to clinical and statistical recommendations, the letter also addressed clinical pharmacology and manufacturing issues. The complete response letter further requested that the Debtor provide an update on Onrigin™ safety information when the other issues had been addressed.

29. The FDA's determination requiring a successful Phase III randomized trial of Onrigin™ prior to receiving regulatory approval means that the Debtor will not have a marketable commercial product to generate revenues at any time in the near future. Moreover, the Debtor does not have sufficient funds to conduct a new randomized trial of Onrigin™. Therefore, the Debtor would need to raise additional capital to conduct the additional randomized trial of Onrigin™, fund its operations and complete its product development.

30. However, if the SPA process can be concluded successfully for the HOVON trial, the Debtor expects that a trial conducted by HOVON would cost approximately \$15 million, almost one-half of the cost of a similar study sponsored solely by the Debtor (where

the costs associated with a contract research organization would also be required). The Debtor believes that the relatively low cost of the HOVON trial in conjunction with the additional regulatory assurance that comes with an approved SPA would serve to increase the value and attractiveness of the Debtor's lead pharmaceutical asset Onrigin™ to prospective purchasers and investors.

## **II. DEBTOR'S DEBT STRUCTURE**

### **A. Convertible Senior Notes due 2012**

31. On February 20, 2007, the Debtor completed the sale of \$60 million 7.75% convertible senior notes due 2012 (the "Notes") and related warrants to purchase up to 780,000 additional shares of its common stock to CRT Capital Group, LLC as the initial purchaser for resale in a private placement to qualified institutional buyers pursuant to Rule 144A promulgated under the Securities Act of 1933, as amended (the "Securities Act"), to persons outside the United States under Regulation S under the Securities Act and to institutional investors that are accredited investors within the meaning of Rule 501 of Regulation D under the Securities Act.

32. The Debtor is obligated to pay the principal amount of the Notes in cash on the maturity date, February 15, 2012.

33. The Notes bear interest at a rate of 7.75% per year, payable on February 15 and August 15 of each year. Interest may be paid, at the Debtor's option, in cash or registered shares of its common stock or some combination of cash and registered shares of its common stock having a fair market value equal to the interest payment due, in each case at the Debtor's option from the date of issuance until repayment in full or until an earlier conversion, redemption or repurchase. Because of the Debtor's low stock price, the dilution associated with an issuance of shares in payment of interest is substantial. For example, assuming the next interest payment

on the Notes due on February 15, 2010 was paid at a stock price of approximately \$0.60 (similar to the current market price of the Debtor's common stock), the associated dilution would be approximately 32%.

34. The Notes and the Indenture under which they were issued limit the Debtor's ability to incur certain indebtedness and other obligations in the future, including senior secured indebtedness or other secured obligations in excess of \$5 million. Subject to certain conditions, the Notes shall automatically convert at any time prior to maturity if the closing price per share of the Debtor's common stock has exceeded 150% of the conversion price then in effect for at least 20 trading days within any 30-consecutive-trading day-period. The conversion price per share currently in effect is \$19.00 per share, while the current bid price for the Debtor's common stock on the OTC Bulletin Board is approximately \$0.60. Accordingly, while the Notes are theoretically convertible, the prospect of automatic conversion is unlikely, and given the current market price of the Debtor's common stock, conversion at the option of the noteholder would be economically unattractive for such holder.

35. On or after February 15, 2010, the Debtor has the right to redeem some or all of the Notes for cash at any time, at a redemption price equal to 100% of the principal amount plus accrued and unpaid interest to, but not including, the redemption date. Upon certain fundamental changes, holders of Notes will have the right, subject to various conditions and restrictions, to require the Debtor to repurchase their notes, in whole or in part, at 100% of the principal amount plus accrued and unpaid interest up to, but not including, the repurchase date.

36. In connection with the issuance of the Notes, the Debtor became party to a registration rights agreement, which requires it to use its best efforts to maintain the effectiveness of its registration statement relating to the resale of the Notes and shares of common stock

issuable upon the exercise of outstanding warrants issued in connection with the Notes and upon conversion of the outstanding Notes by holders of such warrants and Notes. To remain current with such obligations, the Debtor will need to maintain such registration until at least February 15, 2010 (the date the warrants issued in connection with the Notes expire). The cost to maintain such registration has been substantial, in particular after the Debtor lost its eligibility (in connection with its delisting from the Nasdaq Stock Market™) to incorporate information by reference into its SEC filings, and thus requiring it to file many amendments and supplements to the above described registration statement. Under the terms of the registration rights agreement, if the Debtor fails to maintain an effective registration statement through February 15, 2010, the Debtor will be subject to certain liquidated damages in the form of additional interest on the principal amount of the Notes outstanding, subject to a maximum rate of 8.25% per annum for the duration of such failure until the event giving rise to the additional interest has been cured.

37. As of the Petition Date, the Debtor owed \$60 million under the Notes and accrued interest of approximately \$1,563,000.

B. Other Indebtedness or Liabilities

38. Other than the Notes, the Debtor does not have any other indebtedness other than trade payables and other liabilities totaling approximately \$4,453,000 as of September 30, 2009, including accrued expenses, accounts payable and accrued payroll incurred in the ordinary course of its business.

**III. EVENTS LEADING TO DEBTOR'S CHAPTER 11 FILINGS**

39. As noted above, the FDA has required that a new Phase III randomized study be conducted prior to any decision regarding approval of Onrigin™, and the Debtor does not have sufficient funds to conduct such a trial.

40. The current state of the global economy and capital markets have made it exceedingly difficult to raise capital through public offerings or private placements of securities, particularly in the small capitalization biotech sector in which the Debtor operates. This situation has made the timing and potential for equity or debt financing highly uncertain.

41. It is also more difficult for the Debtor to raise capital now that its shares are no longer listed on the Nasdaq. The Debtor believes that its capital structure has hampered its ability to seek equity financing due to the senior position of the debt and the great disparity between the amount outstanding under the Notes and the market value of the Debtor.

42. Against this backdrop, on October 12, 2009, the Debtor announced that it had hired the investment banking firm Merriman Curhan Ford & Co. ("Merriman") to assist in evaluating its strategic alternatives, including any combination of a restructuring of the Debtor and its outstanding indebtedness, a sale of the Debtor or its assets and financing options. On December 9, 2009, the Debtor terminated its agreement with Merriman and engaged Roth Capital Partners, LLC ("Roth Capital") on December 11, 2009 to assist in evaluating strategic alternatives after John W. Chambers and Michael A. Margolis, the leaders of the Debtor's efforts at Merriman, left Merriman to join Roth Capital. As part of the relief requested, the Debtor will also seek to continue its retention of Roth Capital to assist in the Chapter 11 process; and each of Roth Capital and the Debtor believe the filing of the petition may help to bring potential purchasers or sources of financing to the negotiating table.

43. On November 23, 2009, in an effort to reduce operating costs, the Debtor notified approximately one half of its work force that they would be terminated on December 7, 2009, without payment of severance pursuant to the Debtor's retention plan adopted in July 2008. In addition, three employees resigned in November, leaving the Debtor with only 19 full-

time and two part-time employees as of the Petition Date. One additional employee has resigned in December and another employee has been notified that her last date of employment will be December 31, 2009. The Debtor anticipates that these reductions will result in monthly savings of approximately \$249,000. Further staff reductions are planned if the SPA is not approved by the FDA and as the Debtor winds down its clinical operations and lab and drug storage facilities.

44. Notwithstanding its cost savings, the Debtor has concluded that it cannot continue operations in the ordinary course without unnecessarily depleting its estate, all the while remaining unable to execute on the strategy for approval required by the FDA due to its inability to raise additional capital to fund a new randomized trial.

#### **IV. VION'S OBJECTIVES IN CHAPTER 11**

45. The Debtor's main objectives in this Chapter 11 case are to: (i) preserve and maximize the value of its assets, including its drug assets (Onrigin™, Triapine®, TAPET® and VNP40541), for the benefit of all stakeholders through a sale of its assets utilizing the Section 363 process, restructuring, obtaining additional financing or engaging in another related transaction and/or (ii) ensure an orderly wind-up or liquidation of its business consistent with Federal regulations and International Conference for Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use ("ICH") guidelines relating to termination of human clinical trials and drug disposal.

46. The Debtor anticipates that its efforts to preserve and maximize the value of its assets will be substantially concluded by February 28, 2010. From the Petition Date until February 28, 2010, the Debtor will continue: (i) to support its ongoing investigator-initiated human clinical trials of its lead pharmaceutical agent Onrigin™ and its trials of its second agent Triapine® sponsored by the NCI; (ii) to seek to complete the SPA process for the HOVON trial of Onrigin™ with the FDA; (iii) its efforts, with the assistance of Roth Capital, to sell assets,

restructure, obtain additional financing or engage in another transaction, such as a reverse merger; and (iv) to file and maintain all necessary regulatory documents to preserve the value of its assets.

47. If these efforts have not resulted in an asset sale or other transaction by February 28, 2010, the Debtor anticipates that it will further reduce the number of clinical and regulatory employees and retain only such employees required for an orderly wind-up or liquidation of its business consistent with Federal regulations and ICH guidelines. In such event, the Debtor anticipates that its efforts to ensure an orderly wind-up or liquidation will be substantially concluded by April 30, 2010, which would include (w) closing all ongoing Onrigin™ clinical trials, (x) closing the Debtor's laboratories, (y) ensuring for the proper disposal of drug product and other potentially hazardous chemical, biological and radioactive materials in the Debtor's laboratories, and (z) filing all appropriate final regulatory documentation.

48. As described above, during this time period, the Debtor will seek to complete the SPA process for the HOVON Phase III human clinical trial. If the FDA approves the SPA, the Debtor believes the value of the Debtor's lead drug asset Onrigin™ should be enhanced because a potential buyer will then have certain assurances from U.S. regulatory authorities as to the scientific and regulatory goals of the HOVON trial and therefore a clearer pathway, timeline and cost for potential regulatory approval for the drug. These assurances, in combination with the expected cost of the HOVON trial, which is approximately half of any other Phase III trial that could be sponsored by the Debtor or any acquiror of the Onrigin™ assets, may significantly increase the value of the Debtor's Onrigin™ assets to a prospective purchaser.

49. The Debtor has retained six clinical and regulatory employees to complete the SPA process and other clinical and regulatory tasks. Further staff reductions are anticipated if the FDA does not approve the SPA.

50. The Debtor also seeks to ensure, if necessary, an orderly wind-up or liquidation of its business under Federal regulations and ICH guidelines for pharmaceutical companies relating to drug disposal and termination of human clinical trials. In addition to their work on the SPA, the clinical and regulatory employees will also be responsible for (i) supporting the Debtor's ongoing human clinical trials of Onrigin™ by providing clinical and safety oversight and providing drug and clinical and safety oversight if requested by the National Cancer Institute ("NCI") on four ongoing trials of Triapine® sponsored by the NCI, and filing all necessary regulatory documents related to ongoing human clinical trials of Onrigin™ and Triapine®, and maintaining all regulatory documents and files related to the Company's Investigational New Drug ("IND") applications for Onrigin™ and Triapine®; and (ii) if appropriate upon completion of the sale process of the Debtor's assets or upon the winding down of its business, (A) closing the trials in compliance with Federal regulations and ICH guidelines; (B) closing certain of the Debtor's previous Onrigin™ human clinical trials in conjunction with the Debtor's contract research organizations, including following up with remaining patients, closing down remaining clinical sites, and completing proper documentation of the data from these trials; and (C) ensuring proper disposal of drug product from clinical sites in the United States and Europe and ensuring proper closure of trials and disposal of drug product by the NCI.

51. In addition, the Debtor has retained three research and manufacturing employees responsible during this period for ensuring that during the Chapter 11 process (i) relationships with the Debtor's single source contract manufacturing companies for Onrigin™

and Triapine<sup>®</sup> are preserved, and (ii) supplies of Onrigin<sup>™</sup> and Triapine<sup>®</sup> are properly maintained and shipped to clinical sites under Federal regulations and ICH guidelines and properly disposed of by clinical sites upon completion or termination of human clinical trials. If applicable, at the conclusion of the Chapter 11 process, such employees will also assist with the ensuring of proper disposal of drug product from warehouses in the United States and Europe and closing of the Debtor's laboratories including disposal of potentially hazardous chemical, biological and radioactive materials.

#### **V. FIRST DAY PLEADINGS**

52. As a result of my first-hand experience, and through my review of various materials and information, discussions with other members of the Debtor's management, and discussions with the Debtor's outside advisors, I have formed opinions as to (i) the necessity of obtaining the relief sought by the Debtor in its First Day Pleadings, (ii) the need for the Debtor to continue to operate effectively, (iii) the deleterious effects upon the Debtor of not obtaining such relief, and (iv) the immediate and irreparable harm to which the Debtor and its estate will be exposed immediately following the Petition Date unless the relief requested in the First Day Pleadings is granted without delay.

53. The relief sought in the First Day Pleadings will minimize the adverse effects of the instant Chapter 11 case on the Debtor and its estate. I believe that the relief sought in each of the First Day Pleadings is necessary to enable the Debtor to operate effectively in Chapter 11 as a debtor-in-possession.

54. As described more fully below, the relief requested in the First Day Pleadings was carefully tailored by the Debtor, in consultation with its professional advisors, to ensure that the Debtor's immediate operational needs are met and that the Debtor suffers no immediate and irreparable harm. I personally participated in the analysis that lead to the creation

of each of the First Day Pleadings and assisted in the drafting and development of the relief requested therein. At all times, the Debtor's management and professionals remained cognizant of the limitations imposed on a debtor-in-possession, and in light of those limitations, the Debtor narrowed the relief requested at the outset of this case to those issues that require urgent relief to sustain the Debtor's operability during this Chapter 11 process.

A. Motion to Honor Employee Benefits and Related Items

55. Pursuant to this motion, the Debtor is seeking authority to (a) honor and pay any prepetition wages, salaries and other accrued compensation, and to continue to honor certain other policies, programs and benefits the Debtor provides to its remaining employees in the ordinary course of business; (b) direct all banks to honor prepetition checks for payment of pre-petition employee obligations; and (c) honor workers' compensation obligations. The Debtor estimates that, as of the Petition Date, it currently owes approximately \$17,650 on account of accrued prepetition compensation, expenses and benefits obligations.

56. The vast majority of the Debtor's employees rely exclusively on their full compensation to pay their daily living expenses, and these individuals could be exposed to significant financial difficulties if the Debtor is not permitted to pay the unpaid obligations owing to them. I believe that if the Debtor is unable to honor all such obligations immediately, morale and loyalty will be jeopardized at a time when such support is critical to the Debtor's Chapter 11 efforts.

57. The uninterrupted continuation of the Debtor's business operations is critically dependent on the employees that remain in its employ. The Debtor believes that any departure or deterioration in morale at this time will have an immediate and substantial adverse impact on the Debtor's business and will result in immediate and irreparable harm to the Debtor's estate and its creditors. There is a real, immediate risk that if the Debtor is not

authorized to continue to honor its prepetition employee obligations in the ordinary course, the employees would not support and maintain the Debtor's business operations, thereby crippling such operations and destroying the Debtor's prospects of successfully prosecuting this Chapter 11 case.

58. Consequently, the Debtor strongly believes that it is essential that it be permitted to pay its employees their prepetition wages and fees and continue with its ordinary course personnel policies, programs and procedures that were in effect prior to the Petition Date.

59. For the foregoing reasons, the Debtor submits, and I believe, that the relief requested in this motion is in the best interest of the Debtor, its estate and creditors, and therefore should be approved.

B. Motion to Approve Continued Use of Cash Management System

60. By this motion, the Debtor seeks entry of an order authorizing the continued use of its existing cash management system and bank accounts and business forms. In connection therewith, the Debtor respectfully requests relief from certain of the operating guidelines established by the Office of the United States Trustee for the District of Delaware that require the Debtor to close all prepetition bank accounts, open new accounts designated as debtor-in-possession accounts and provide new business forms and stationery. The Debtor also requests that the Court grant the Debtor interim relief – and to the extent no objection is received after proper notice, final relief – from the requirements of Bankruptcy Code § 345(b), thus authorizing the Debtor to maintain its deposits in its accounts in accordance with its existing deposit practices until such time as the Debtor may obtain the Court's final approval to deviate from the guidelines imposed under Bankruptcy Code § 345(b).

61. As described in detail in the motion, the Debtor maintains a cash management and disbursement system in the ordinary course of its operations (the "Cash

Management System”). To lessen the disruption caused by the bankruptcy filings and to maximize the value of the estate in this Chapter 11 proceeding, it is vital to the Debtor that it maintains its Cash Management System.

62. The Debtor maintains current and accurate accounting records of daily cash transactions and submits that maintenance of this Cash Management System is vital to prevent undue disruption to the Debtor’s business operations while protecting the Debtor’s cash for the benefit of the bankruptcy estate. Substantially disrupting its current cash management procedures would impair the Debtor’s operations and its ability to optimize its business performance.

63. In light of the foregoing, the Debtor submits, and I believe, that the relief requested in this motion is in the best interest of the Debtor, its estate and creditors, and therefore should be granted.

C. Motion for Interim Order Deeming Utilities Adequately Assured

64. By this motion, the Debtor seeks entry of interim and final orders prohibiting utility companies (the “Utility Companies”) from terminating services on account of the non-payment of prepetition invoices, deeming the Utility Companies to be adequately assured of future payment and establishing procedures to determine additional adequate assurance.

65. The Debtor proposes to deposit a sum equal to fifty percent (50%) of the Debtor’s estimated monthly cost of utility service (the “Utility Deposit”) into an interest-bearing, newly created segregated account, with such Utility Deposit to be held in escrow, pending further order of the Court.

66. In the operation of its business, the Debtor incurs utility expenses in the ordinary course of business for, among other things, water, sewer service, trash service,

electricity, gas, propane, and telephone service. Prior to the Petition Date, on an annual basis, the Debtor spent approximately \$104,800 for various utility services, with an average monthly cost of approximately \$8,735.

67. Uninterrupted utility services are essential to the Debtor's ongoing operations and, therefore, to the success of the Debtor's Chapter 11 efforts. Indeed, any disruption to the Debtor by virtue of the cessation of utility services by the Utility Companies could bring the Debtor's operations to a grinding halt. Should one or more of the Utility Companies refuse or discontinue service even for a brief period, the Debtor's operations would be severely disrupted. Such an interruption would damage the Debtor's Chapter 11 efforts, to the detriment of its estate, creditors, and employees. It is therefore critical that utility services provided to the Debtor continue uninterrupted.

68. For the foregoing reasons, the Debtor submits, and I believe, that the relief requested in this motion is in the best interest of the Debtor, its estate and creditors, and therefore should be approved.

D. Motion to Pay Prepetition Taxes and Fees

69. Pursuant to this motion, the Debtor is seeking an order authorizing, but not directing, the Debtor to remit and pay certain use, income/franchise, real and personal property, business and occupation taxes, and other similar taxes as the Debtor deems necessary, as well as fees for licenses, and other similar charges and assessments; and authorizing and directing banks and other financial institutions to receive, process, honor and pay checks presented for payment and electronic payment requests relating to the foregoing.

70. In the ordinary course of the Debtor's business, the Debtor incurs taxes, including, but not limited to use, income/franchise, real and personal property, business and occupation and other similar taxes in conducting its business (collectively, the "Taxes") payable

to various taxing, licensing, and regulatory authorities (collectively, the “Authorities”), and pays fees to such Authorities for licenses required to conduct the Debtor’s business (“Fees”). The Taxes and Fees are paid to the respective Authorities in accordance with applicable state and federal laws and regulations.

71. The Debtor seeks the relief requested to the extent that any Taxes and Fees that accrued prepetition were not in fact paid or processed prepetition, or were paid in an amount that was less than is actually owed, or in the event that any payments made prepetition were rejected, lost, or otherwise not received in full by any of the Authorities. Further, there may be Taxes and Fees incurred or collected from sales and services provided prepetition that will come due after the commencement of this Chapter 11 case. The Debtor believes it will need to pay approximately \$24,781 in prepetition amounts to the Authorities in the first 20 days of this Chapter 11 case (the “Interim Amount”). Ultimately, the Debtor believes it will need to pay no more than \$75,000 in prepetition amounts to the Authorities inclusive of the Interim Amount.

72. The Debtor submits, and I believe, that if the Debtor does not pay the Taxes or Fees in a timely manner, the respective Authorities may take actions that could have a wide-ranging and adverse effect on the Debtor’s operations as a whole. The Debtor’s failure to pay the Taxes and Fees could have a material adverse impact on the Debtor’s business operations in several ways: (i) the Authorities may initiate audits of the Debtor, which would divert unnecessarily its attention away from the Chapter 11 process; (ii) the Authorities may attempt to suspend the Debtor’s operations, file liens, seek to lift the automatic stay, or pursue other remedies that will harm the estates; and (iii) certain directors and officers might be subject to personal liability, which would likely distract those key employees from their duties related to the Debtor’s restructuring. In addition, unpaid taxes may result in penalties, accrual of interest,

or both. In all cases, the Debtor's failure to pay the Taxes and Fees could have a material adverse impact on its ability to operate its business in the ordinary course.

73. For the foregoing reasons, the Debtor submits, and I believe, that the relief requested in this motion is in the best interest of the Debtor, its estate and creditors, and therefore should be approved.

E. Application to Retain Delaware Claims Agency, LLC

74. By this application, the Debtor seeks entry of an order authorizing the Debtor to retain Delaware Claims Agency, LLC ("DCA") as its claims and noticing agent ("Agent"). Upon information and belief, DCA is an experienced Agent and is frequently used by debtors in Chapter 11 cases of comparable size to this case, and I believe DCA is well qualified to serve as Agent in this case. The employment of DCA will also provide the Debtor with efficient management of the claims and noticing processes in this case, leaving the Debtor's management and professionals to focus on the Debtor's efforts to maximize the value of its estate.

**CONCLUSION**

75. For the reasons stated herein and in each of the First Day Pleadings filed concurrently or in connection with the commencement of this case, I respectfully request that each of the First Day Pleadings be granted in their entirety, together with such other and further relief as this Court deems just and proper.

I certify under penalty of perjury that, based upon my knowledge, information and belief as set forth in this Declaration, the foregoing is true and correct.

Executed this 17<sup>th</sup> day of December 2009 at New Haven, Connecticut.



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Alan Kessman  
Chief Executive Officer