

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

| | | |
|---|---|--|
| IN RE: | § | |
| | § | |
| INTROGEN THERAPEUTICS, INC., | § | CASE NO. 08-12442-FRM |
| INTROGEN TECHNICAL SERVICES, INC., | § | CASE NO. 08-12443-FRM |
| TMX REALTY CORPORATION, | § | CASE NO. 08-12444-FRM |
| | § | CHAPTER 11 |
| DEBTORS | § | |
| | § | <i>JOINTLY ADMINISTERED UNDER</i> |
| 301 CONGRESS AVENUE, SUITE 1850 | § | CASE NO. 08-12442-FRM |
| AUSTIN, TEXAS 78701 | § | |
| | § | |
| TAXPAYER IDENTIFICATION NOS.: | § | |
| 74-2704230, 35-2340711, 74-2896565 | § | |

**DEBTORS' MOTION FOR ORDER APPROVING THE
ASSUMPTION OF THE EL RIO LEASE, AS MODIFIED,
AND TO PROVIDE ADEQUATE PROTECTION**

TO THE HONORABLE FRANK R. MONROE, UNITED STATES BANKRUPTCY JUDGE:

COME NOW Introgen Therapeutics, Inc. (“Introgen”), a Texas Corporation and its wholly owned debtor and debtor in possession subsidiaries Introgen Technical Services, Inc. (“ITS”) and TMX Realty Corporation (“TMX”), collectively debtors and debtors-in-possession in the above-captioned Chapter 11 cases (collectively the “Debtors”), and file this their Motion for Order Approving the Assumption of the El Rio Lease, as Modified, and to Provide Adequate Protection (the “Motion to Assume”) pursuant to 11 U.S.C. § 365(a). In support, the Debtors would show:

**I.
Jurisdiction And Venue**

1. This Court has jurisdiction over the subject matter of the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O). The relief requested in this Motion is sought pursuant to 11 U.S.C. § 365(a).

II.
Factual Background

2. On December 4, 2008 (the “Petition Date”), the Debtors commenced their cases under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”). The Debtors continue to operate their businesses and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No committee has been appointed.

3. At the inception of these related cases, Introgen and ITS occupied two leased spaces. The “Holcombe Facility” is a two-building complex located on Holcombe Boulevard in Houston, Texas with office and clean-room lab space that is held by TMX through a ground lease from Amelang Partners, Inc. (“Amelang”) and a construction mortgage currently through Compass Bank (“Compass”). The Debtors utilize additional offices and clean room facilities in specially-constructed leased facilities on El Rio Street, Houston, Texas (the “El Rio Location”). As part of their efforts to reduce costs, the Debtors determined to consolidate operations in the El Rio location because the space is more efficient from both a facilities and utilities costs perspective. The Holcombe Facility is largely vacated save for a small lab space being used for an ongoing project.

4. Consolidation in the El Rio Location is also consistent with the Debtors’ reorganization strategy to focus on near-term revenues available for its unique contract manufacturing capabilities in the adenovirus and biologics arena under the ITS umbrella while drastically reducing the structure and expense surrounding the pursuit of regulatory approval for its therapeutics assets owned by Introgen for the time being.

III.
Relief Requested

5. Pursuant to this Motion, Debtors seek an order from the Court approving the assumption of the Assignment, Extension and Amendment of Lease dated February 1, 2009 (the “Modified Lease”), between WGH Plaza DE Oro LLC (“WGH Plaza”), as lessor, Introgen as the

original lessee, and ITS, as lessee for the El Rio Location. On February 6, 2004, WGH Plaza and Introgen executed a Standard Industrial Lease Agreement (the "Original Lease") that covered approximately 8,824 square feet of office and warehouse space in the building located at 8066 El Rio Street, Houston, Texas 77054 (the "Premises"). Both the Original Lease and the Modified Lease are attached hereto as Exhibits "A" and "B," respectively.

6. The Modified Lease extended the term of the Original Lease for an additional three (3) year renewal term. The Original Lease expired on February 1, 2009. The Modified Lease expires January 31, 2012. However, to ameliorate the potentially outsized administrative claim that would occur in the event that ITS is unable to perform the assumed lease, the Debtors have negotiated a termination option that allows ITS to terminate the Modified Lease on August 31, 2009, for a payment of \$75,000.00. This termination option allows ITS to obtain the necessary lease terms to operate its business going forward while avoiding a \$542,500.00 administrative claim if the Debtors were unsuccessful in their reorganization efforts. The lease rates of \$12,500, \$17,500, and \$22,500 per year for each of the next three years are at or below comparable market rates.

7. Further, pursuant to the Modified Lease, Introgen will assign all of its interests, rights, duties and obligations under the Original Lease to ITS. The Original Lease, having a termination date of January 31, 2009, has no value to Introgen because Introgen's operations are severely limited and the lease has no economic value past its stated term.

WHEREFORE, Debtors pray that the assumption of the Original Lease as modified by the Modified Lease identified in the attached Exhibits "A" through "B" be approved, and that the Debtors have such other relief as is just and equitable.

Respectfully submitted,

BROWN MCCARROLL, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701
(512) 479-1141
(512) 226-7320 (fax)

By: /s/ Patricia B. Tomasco

Patricia B. Tomasco
State Bar No. 01797600
Kell C. Mercer
State Bar No. 24007668

ATTORNEYS FOR DEBTORS

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2009, a true and correct copy of the foregoing document was served via the Court's CM/ECF notification system, facsimile transmission, e-mail transmission, and/or regular first class mail, on all parties set forth on the attached Master Service List and the parties listed below:

WGH Plaza Del Oro LLC
c/o InSite Realty Partners, L.P.
1502 Augusta, Suite #100
Houston, Texas 77057

WGH Plaza Del Oro LLC
c/o InSite Realty Partners, L.P.
2401 Fountainview, Suite 510
Houston, Texas 77057

/s/ Patricia B. Tomasco

Patricia B. Tomasco

STANDARD INDUSTRIAL LEASE AGREEMENT

8,824 Square Feet

Facility Address: 8066 El Rio

Houston, Texas 77054

LEASE AGREEMENT

THIS LEASE AGREEMENT, ("Lease") made and entered into by and between WGH PLAZA DEL ORO LLC hereinafter referred to as "Lessor", and Introgen Therapeutics, Inc. a Delaware Corporation, hereinafter referred to as "Lessee";

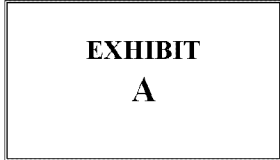
WITNESSETH:

1. PREMISES AND TERM. In consideration of the mutual obligations of Lessor and Lessee set forth herein, Lessor leases to Lessee, and Lessee hereby takes from Lessor the Premises situated within the County of Harris, State of Texas, more particularly described in Paragraph 26A below and on EXHIBITS "A", "B" and "C" attached hereto and incorporated herein by reference (the "Premises"), together with all rights, privileges, easements, appurtenances, and amenities belonging to or in any way pertaining to the Premises, to have and to hold, subject to the terms, covenants and conditions in this Lease. The term of this Lease shall commence on the commencement date hereinafter set forth and shall end on the last day of the month that is sixty (60) months after the commencement date. If this Lease is executed before the Premises become vacant or otherwise available and ready for occupancy, or if any present lessee or occupant of the Premises holds over, and Lessor cannot acquire possession of the Premises prior to the date recited as the commencement date of this Lease, Lessor shall not be deemed to be in default hereunder, and Lessee agrees to accept possession of the Premises at such time as Lessor is able to tender the same, which date shall thenceforth be deemed the "commencement date", and Lessor hereby waives payment of rent covering any period prior to the tendering of possession to Lessee hereunder.

A. EXISTING BUILDING. Lessee acknowledges that (i) it has inspected and accepts the Premises "AS IS," "WHERE IS," and "WITH ALL FAULTS", (ii) the buildings and improvements comprising the same are suitable for the purpose for which the Premises are leased, (iii) the Premises are in good and satisfactory condition, and (iv) the Premises shall be leased on an "AS IS," "WHERE IS," and "WITH ALL FAULTS" basis, and no representations as to the repair of the Premises, nor promises to alter, remodel or improve the Premises have been made by Lessor except those expressly set forth in Paragraph 26C and Exhibit "C" of this Lease. Unless mutually altered in writing by Lessee and Lessor or pursuant to the provisions of Paragraph 1 hereinabove, or Paragraphs 1.B or 1.C, hereinbelow, the commencement date shall be February 1, 2004. Upon request by Lessor, Lessee shall execute and deliver to Lessor a Letter of Acceptance of delivery of the Premises.

B. BUILDING TO BE CONSTRUCTED OR SHELL SPACE. If the Premises or a major portion thereof is to be constructed, the commencement date shall be deemed to be the date upon which the Premises and other improvements to be erected in accordance with the plans and/or specifications (the "Plans") described both in Paragraph 26C of this Lease and on Exhibit "C" attached hereto and incorporated herein by reference (the "Plans") have been substantially completed. As used herein, the term "substantially completed" shall mean, that in the reasonable opinion of Lessor, such improvements have been completed in accordance with the Plans and, the Premises are in good and satisfactory condition, subject only to completion of minor punch list items. As soon as such improvements have been substantially completed, Lessor shall notify Lessee in writing that the commencement date has occurred. Within ten (10) days thereafter, Lessee shall submit to Lessor in writing a punch list of items needing completion or correction. Lessor shall use reasonable efforts to complete such items within thirty (30) days after the receipt of such notice. In the event Lessee, its employees, agents or contractors cause construction of such improvements to be delayed, the commencement date shall be deemed to be the date that, in the opinion of the architect or space planner that prepared the Plans, substantial completion would have occurred if such delays had not taken place. The taking of possession by Lessee shall be deemed to conclusively establish that the buildings and other improvements had been completed in accordance with the Plans, that the Premises are in good and satisfactory condition as of when possession was taken, and that Lessee has accepted such buildings and other improvements "AS IS," "WHERE IS," and "WITH ALL FAULTS" without representation or warranty from Lessor. Upon Lessor's request, Lessee shall

Lessor: Initials
Lessee: [Signature]



execute and deliver to Lessor a Letter of Acceptance of delivery of the Premises. Notwithstanding anything in the Lease to the contrary, if the Plans are not attached to this Lease as Exhibit "C", Lessor will deliver the Plans to Lessee which in Lessor's opinion are reasonably necessary for the construction and space planning of the buildings or improvements contemplated to be constructed on the Premises. Upon Lessee's receipt of the Plans, Lessee shall have three (3) days to approve them or to make specific suggestions to them. Lessee's failure to expressly approve the Plans and return them to Lessor within such three (3) day period shall contractually bind Lessee to reimburse Lessor for all of Lessor's expenses in connection with the obtainment and preparation of the Plans and all other expenses incurred by Lessor resulting from Lessee's request to lease space on the Premises. Lessor and Lessee agree that it would be impracticable and extremely difficult to estimate the damages which Lessor may suffer in the event that the Plans are not approved within such three (3) day period; therefore, Lessor and Lessee do hereby agree that a reasonable estimate of such damages is and shall be an amount equal to one day's rental on the Premises for each day that the Plans are not approved. Lessee shall remit payment of such damages to Lessor within ten (10) days after receipt by Lessee of an invoice therefor from Lessor.

C. GENERAL CONDITIONS. Lessor and Lessee further agree that Lessee's obligations, privileges, covenants and agreements contained in this Lease shall be operative and effective regardless of whether the Premises are ever occupied by Lessee and whether or not this Lease is fully exhibited. If Lessee fails to occupy the Premises for any reason after substantial completion of any building or improvements constructed in accordance with the Plans, or if Lessee, whether constructively or actively prevents or hinders Lessor from constructing the improvements contemplated herein in accordance with the Plans, this Lease shall be deemed to have commenced automatically and the "commencement date" shall be deemed to be the date on which the improvements would have been completed in Lessor's sole, but reasonable judgment, but for such hindrance or prevention by Lessee.

2. BASE RENT, SECURITY DEPOSIT AND OPERATING EXPENSES.

A. Lessee agrees to pay to Lessor base rent ("Base Rent") for the Premises, in advance, without demand, deduction or set off, at the rate of (see Paragraph 26B) Dollars (\$---) per month during the term hereof. One such monthly installment, plus the other monthly charges set forth in Paragraph 2C below shall be due and payable on the date hereof and a like monthly installment shall be due and payable on or before the first day of each calendar month succeeding the commencement date, except that all payments due hereunder for any fractional calendar month shall be prorated.

B. In addition, Lessee agrees to deposit with Lessor on the date hereof, the sum of Eight Thousand One Hundred and No/100 Dollars (\$8,100.00) which shall be held by Lessor, without obligation for interest, as security for the performance of Lessee's obligations under this Lease, it being expressly understood and agreed that this deposit is not an advance rental deposit or a measure of Lessor's damages in case of Lessee's default. Upon each occurrence of an event of default, Lessor may use all or part of the deposit to pay past due rent or other payments due Lessor under this Lease, and the cost of any other damage, injury, expense or liability caused by such event of default without prejudice to any other remedy provided herein or provided by law. On demand, Lessee shall pay Lessor the amount that will restore the security deposit to its original amount. The security deposit shall be deemed the property of Lessor, but any remaining balance of such deposit shall be returned by Lessor to Lessee thirty (30) days after Lessee's obligations under this Lease have been fulfilled; provided, however, Lessor shall have the right to retain and expend such remaining balance (a) to reimburse Lessor for any and all rent or other sums due hereunder that have not been paid in full by Lessee and/or (b) for cleaning and repairing the Premises if Lessee shall fail to deliver same at the termination of this Lease in a neat and clean condition and in as good a condition as existed at the date of possession of same by Lessee, ordinary wear and tear only excepted. No interest shall be paid to Lessee on the security deposit and Lessor shall not be required to hold the security deposit in a separate or segregated account but rather may commingle the security deposit with other monies held by or belonging to Lessor.

C. Lessee agrees to pay as additional rental its proportionate share (as defined in Paragraph 24B below) of operating expenses which include (i) taxes (hereinafter defined) payable by Lessor pursuant to Paragraph 3A below, (ii) the cost of maintaining insurance covering the buildings situated on the Premises or of which the Premises are a part, (iii) the cost of utilities payable pursuant to Paragraph 8 below, and the cost of any common area charges payable by Lessor in accordance with Paragraph 4 below and (iv) any other charges which Lessor is entitled to collect under the terms of this Lease. During each month of the term of this Lease, on the same day that rent is due hereunder, Lessee shall escrow with Lessor an amount equal to 1/12 of the estimated annual cost of its proportionate share of such operating expenses. Lessee authorizes Lessor to use the funds deposited with Lessor under this Paragraph 2C to pay such costs. The initial monthly escrow payments are based upon the estimated amounts and shall be increased or decreased annually to reflect the then current projected cost of all such operating expenses. Lessor shall total all operating expenses annually, and reconcile Lessee's actual proportionate share of such expenses against Lessee's total escrow payments. If Lessee's total escrow payments are less than

Initially
Lessor:
Lessee:

Lessee's actual proportionate share of all such operating expenses, Lessee shall pay the difference to Lessor within ten (10) days after demand. If the total escrow payments of Lessee are more than Lessee's actual proportionate share of all such operating expenses, Lessor shall retain such excess and credit it against Lessee's future liabilities for operating expenses; provided that, upon termination of this Lease, Lessor shall refund any such excess to Lessee. The amount of the initial monthly Base Rent and the initial monthly operating expenses escrow payments are as follows:

| | |
|--|----------------|
| (1) Initial Base Rent as set forth in Paragraph 2A | \$3,955.80 |
| (2) Tax Escrow | \$ 845.63 |
| (3) Insurance Escrow | \$ 125.01 |
| (4) Common Area Escrow | \$ 573.56 |
| Total Initial Monthly Rental Payment | \$5,500.00 |

3. TAXES.

A. Lessor agrees to pay all taxes, assessments and governmental charges of any kind and nature (collectively referred to herein as "Taxes") that accrue against the Premises, and/or the land and/or improvements of which the Premises are a part and Lessee shall be liable for its proportionate share of the same. ~~If at any time during the term of this Lease, there shall be levied, assessed or imposed on Lessor a capital levy or other tax based directly on the gross rents received therefrom and/or a franchise tax, assessment, levy or charge measured by or based, in whole or in part, upon such rents from of the Premises (but not an income tax), and/or the land and improvements of which the Premises are a part, then all such taxes, assessments, levies or charges, or the part thereof so measured or based, shall be deemed to be included within the term "Taxes" for the purposes hereof. The Lessor shall have the right to employ a tax consulting firm to attempt to assure a fair tax burden on the building and grounds within the applicable taxing jurisdiction. Lessee agrees to pay its proportionate share of the cost of such consultant. In no event shall Lessee challenge, directly or indirectly, by suit, intervention or otherwise, the amount of any such tax, assessment, levy or charge.~~



B. Lessee shall be liable for all taxes levied or assessed against any personal property or fixtures placed in the Premises. If any such taxes are levied or assessed against Lessor or Lessor's property and (i) Lessor pays the same or (ii) the assessed value of Lessor's property is increased by inclusion of such personal property and fixtures and Lessor pays the increased taxes, then, upon demand, Lessee shall pay to Lessor such taxes.

4. LESSOR'S REPAIRS AND MAINTENANCE.

A. Lessor shall maintain the roof, foundation and the ~~structural soundness~~ of the exterior walls of the building of which the Premises are a part in good repair, reasonable wear and tear excepted, and Lessee shall be liable for its proportionate share of the cost of such maintenance or repair, provided, however, Lessee shall promptly, upon demand, reimburse Lessor for any damage to the same caused by ~~the Lessee's act, neglect, fault or omission of Lessee or Lessee's agents.~~ The term "walls" as used herein shall not include windows, glass or plate glass (but does include window frames and seals), doors, special storefronts or office entries. ~~Lessor will not be responsible for the replacement of broken glass unless caused by the act, neglect, fault or omission of Lessor, or Lessor's agents or contractors.~~ Lessee shall immediately give Lessor written notice of defect or need for repairs, after which Lessor shall have reasonable opportunity to repair the same or cure such defect. Lessor's obligation to maintain the aforementioned items shall be limited solely to the cost of such repairs or maintenance or the curing of any defect in the same.

B. Lessor shall perform the paving maintenance, common area and landscape replacement and maintenance, exterior painting, common water and sewage line plumbing and connections, common electric and telephone lines and connections, cleaning and refuse removal for the front parking areas, and any other common maintenance items and Lessee shall be liable for its proportionate share of the cost and expense of such repair, replacement, and maintenance. Lessor reserves the right to perform any obligations that are otherwise Lessee's obligations in Paragraph 5, in which event Lessee shall promptly reimburse Lessor for the entirety of the reasonable and customary costs of such performance.

C. Lessor reserves the right to alter or modify the building of which the Premises are a part and/or common areas associated therewith, when such alterations or modifications are required by governmental laws, codes, ordinances, regulations, or any other applicable authorities, including, without limitation, the Americans with Disabilities Act of 1990 (the "ADA"), in which event Lessee shall be liable for its proportionate share up to a maximum of Fifteen Thousand Dollars (\$15,000.00) of such

Initials
Lessor: 
Lessee: 

cost for all such alterations and modifications. If such modification is a capital modification for the general benefit of the project, and is required regardless of Lessee's particular use of the Premises, then the cost shall be an operating expense allocated over the lesser of five (5) years or the useful life of modification. Notwithstanding the foregoing, if such modification is necessitated and/or predicated by Lessee's particular use of the Premises or is principally for the benefit of Lessee (and not other lessees of the building) the cost shall be borne entirely by Lessee, and Lessee shall reimburse Lessor for same promptly upon demand.


D. Lessee agrees to pay its proportionate share of the cost of (i) maintenance and/or landscaping of any property that is a part of the building and/or project of which the Premises are a part, (ii) maintenance and/or landscaping of any property that is maintained or landscaped by any property owner or community owner association to which the Premises are subject, (iii) property management fee, staff salary and benefits allocated to the building and/or project of which the Premises are a part, and (iv) operating and maintaining any property, facilities or services, including, but not limited to, the cost of the monitoring, repair and maintenance of water systems or sewer plants, and security systems and service, if any, provided for the common use or benefit of Lessee and other lessees of the project or building of which the Premises are a part.

All such expenses of Lessor for maintaining and operating the building and/or project of which the Premises are a part, including, but not limited to, the items set forth in Paragraphs 4A, 4B, 4C, and 4D, shall be included as additional rental under the provisions of Paragraph 2C. Lessor agrees that such costs do not include any capital costs for roof, foundation, building structural, or parking lot replacement, restoration or other work occasioned by fire, windstorm or other casualty to the extent of net insurance proceeds received by Lessor with respect thereto, income and franchise taxes of Lessor (except as provided in Paragraph 3A), expenses incurred in leasing to or procuring of lessees, leasing commissions, advertising expenses, expenses for the renovating of space for new lessees, interest or principal payments on any mortgage or other indebtedness of Lessor, nor depreciation allowance or expense.

E. Lessee may from time to time audit in the office of Lessor's or Lessor's agent Lessor's books relevant to the operating expenses upon reasonable notice to Lessor; provided however, Lessee agrees to pay all reasonable costs associated with or resulting from such audit, including reimbursement to Lessor or Lessor's agents for time or costs incurred; provided, in the event such audit reveals that any statement for Lessee's "proportionate share" was overstated by more than five percent (5%), then Lessor shall pay all reasonable costs associated with or resulting from such audit, including reimbursement to Lessee and Lessee's agents for time or cost incurred. Lessee shall pay to Lessor, within thirty (30) days of receipt of such audit, the amount that Lessee's actual proportionate share as established by such audit exceeds the amount of Lessee's actual proportionate share actually paid by Lessee, and if the amount by which the amount that Lessee's actual proportionate share established by such audit is less than the amount of Lessee's total escrow payments of all such operating expenses, Lessor shall within thirty (30) days of receipt of such audit refund such excess to Lessee.

5. LESSEE'S REPAIRS AND MAINTENANCE.

A. Lessee, at its own cost and expense, shall (i) maintain all parts of the Premises (except for those items for which Lessor is responsible under Paragraph 4) in good condition; (ii) promptly make all necessary repairs and replacements, including, but not limited to, ~~windows, glass and plate glass, exterior doors, any special office entry, interior walls and finish work, interior doors and floor covering, utility connections, downspouts, gutters, heating and air conditioning systems, light bulbs and ballasts, dock boards, truck doors, dock bumpers, paving,~~ plumbing work and fixtures, termite and pest extermination, regular removal of trash and debris, ~~dedicated sewer lines serving only the Premises,~~ and any damage (other than damage to the roof, foundation and exterior walls as defined herein of the building of which the Premises are a part) due to vandalism or malicious mischief; (iii) use reasonable efforts to keep the parking areas, driveways, truck aprons, and grounds surrounding the Premises in a clean and sanitary condition, provided, however, Lessee shall have no obligation or liability for the failure of other tenants in the building of which the Premises are a part to maintain the parking areas, driveways, truck aprons and grounds surrounding the Premises; and (iv) repair all wind damage to glass except with respect to tornado or hurricane damage; and (v) maintain any spur track serving the Premises. If there is a track servicing the Premises, Lessee agrees to sign a joint maintenance agreement with the railroad company servicing the Premises if requested by the railroad company. Lessor shall have the right to coordinate all repairs and maintenance of any rail tracks serving or intended to serve the Premises and, if Lessee uses or causes the use of such rail tracks, Lessee shall reimburse Lessor from time to time, upon demand, for its proportionate share, (based on the total area of the Premises relative to the total area of leased space of rail users in the building of which the Premises are a part) of the costs of such repairs and maintenance and any other sums specified in any agreement respecting such tracks to which

Lessor: 
Lessee: 