

**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 TO
MAINTAIN AND USE PREPETITION BANK ACCOUNTS**

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

COME NOW Introgen Therapeutics, Inc. ("ITP"), Introgen Technical Services, Inc. ("ITS"), and TMX Realty Corporation ("TMX") (collectively, the "Debtors"), the Debtors-In-Possession in this Case, and file this their Motion to Maintain and Use Prepetition Bank Accounts ("Motion"), pursuant to Bankruptcy Code § 105. In support thereof, the Debtors would respectfully show as follows:

**I.
Jurisdiction**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue of the Debtors' Chapter 11 case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The Court has the authority to enter the requested relief under Bankruptcy Code § 105.

II. **Background**

A. Introgen Therapeutics, Inc.

2. Debtor ITI is a biopharmaceutical company focused on the discovery, development and commercialization of targeted molecular therapies for the treatment of cancer and other diseases. ITI develops product candidates to treat a wide range of cancers using tumor suppressors, cytokines and other targeted molecular agents. ITI's products are designed to increase production of normal cancer-fighting proteins that act to overpower cancerous cells, stimulate immune activity, or directly kill cancer cells. ITI's therapies can be used alone, but also enhance conventional cancer therapies such as surgery, chemotherapy, radiation and monoclonal antibodies.

3. ITI's drug discovery and development programs have resulted in innovative approaches by which physicians may use targeted molecular agents to more precisely treat cancer. ITI's low-toxicity approach to cancer treatment has drawn global interest from oncologists.

4. ITI's development program includes five clinical-stage product candidates. Two of the Company's products, ADVEXIN and INGN 241 are in Phase 3 clinical trials. INGN 225, a therapeutic p53 vaccine, is in Phase 1-2 clinical development for lung and breast cancer. INGN 234, a topical formulation for oral cancer prevention and treatment of oral pre-malignancies, is in Phase 1-2 clinical development. INGN 401, a systemic nanoparticle tumor suppressor is in Phase 1-2 clinical trials for metastatic lung cancer. ITI's products have been used in more than 30 worldwide clinical studies involving hundreds of patients.

5. In June of 2008, ITI submitted a Biologics License Application to the United States Food and Drug Administration ("USFDA") requesting marketing approval for ADVEXIN p53 therapy to treat recurrent, refractory head and neck cancer. Also in June, Gendux Molecular Limited, a non-

debtor European based Introgen subsidiary, submitted a Marketing Authorization Application to the European Medicines Evaluation Agency for the same indication.

6. ITI also controls a broad intellectual property portfolio that includes more than 400 patent applications and issued patents for a variety of molecular therapy technologies and adenovirus production, purification and formulation. ITI actively collaborates with numerous academic centers of excellence and biotechnology industry partners.

B. Introgen Technical Services, Inc.

7. With over twelve years of biologics development and manufacturing experience, the industry has turned to experts at Debtor ITS for process development, manufacturing, quality systems, regulatory affairs, and clinical trial design. To get its customer's products ready for production, ITS has developed a line of services to ensure that its customer's products being tested in cell culture or animal studies can be made in sufficient quantity to supply future needs in clinical trials and ultimately for commercial introduction. ITS controls many pending and issued patents for proprietary production processes, purification and formulation of gene-based biopharmaceuticals. ITS has developed large scale methodologies for upstream and downstream production processes, formulations that are safe and stable, and product release assays that support product quality at a large scale. ITS has produced substantial lots of clinical grade biologics.

8. ITS owns and operates state of the art cGMP manufacturing facilities that have been selected by the Adenovirus Reference Material Working Group to produce adenovirus used by researchers worldwide. Major pharmaceutical and biotechnology companies are using this reference material to aid in developing their own products. ITS has participated in over 30 clinical trials worldwide with five clinical stage gene based product candidates, including two Phase 3 product programs.

9. ITS has developed industrial production processes for consistent manufacture of biological products that are transferable to the products of its customers. ITS can produce at scales for preclinical and clinical testing as well as commercial scales. Production capabilities developed over 10 years include both adherent and suspension cell processes. ITS has established product & technology capabilities in adenovirus and other viral vector systems, non-viral approaches, adherent and suspension cell culture systems up to 100L scale, large scale ultra/diafiltration, chromatographic purification and formulation and lyophilization. In addition, ITS offers fill and finish services such as stopper and vial procurement, sterile fill, and labeling. Once a customer's product is ready for use, ITS also provides materials management services including storage, shipping and logistics support.

10. Developers of new biopharmaceuticals often times find the manufacturing process competing with the necessary focus needed on research studies. These challenges can delay getting promising products into the clinic because they cannot be made in sufficient amounts to meet commercial needs. Through ITS' own product development experience, ITS has assembled an experienced and knowledgeable team to overcome the regulatory and clinical challenges to ensure its customer's products receive the best opportunity for success.

C. The Bankruptcies

11. After a regulatory setback earlier this year before the USFDA harmed the prospects for a speedy approval of ITI's experimental cancer drug, Advexin, in light of the Debtors' current financial state and the well publicized current market conditions, to benefit all creditors, shareholders and other stakeholders, the Debtors filed these Chapter 11 cases to pursue a reorganization. The Debtors expect to continue core activities pertaining to each of its business units during the reorganization process, including focusing upon its contract manufacturing business and anticipates emerging successfully from Chapter 11. As part of the reorganization process, the Debtors have sought to retain Torrey

Partners, L.L.C. (“Torreya Partners”) as investment bankers to aid the Debtors in advertising and marketing for sale, portions of the Debtors’ businesses and assets. The instant Motion is directed at Debtors’ ability to maintain and use their prepetition bank accounts.

III.
Relief Requested and Supporting Authorities

12. The United States Trustee (the “Trustee”) has established certain operating guidelines for debtors that operate their business as debtors-in-possession. One such provision requires a Chapter 11 debtor-in-possession to open new bank accounts and close all existing accounts. This requirement, designed to provide a clear line of demarcation prepetition and postpetition claims and payments, helps to protect against the inadvertent payment of prepetition claims by preventing banks from honoring checks drawn before the petition date.

13. Prior to the Petition Date, Debtors maintained, in the ordinary course of their businesses, various bank accounts (“Bank Accounts”). The Bank Accounts are designated as follows:

<u>ACCOUNT NO.</u>	<u>DESCRIPTION</u>	<u>INSTITUTION</u>
000009922255665	ITI Operating	JPMorgan Chase
000001600063339	ITI Payroll	JPMorgan Chase
000001600063347	ITI Hou-Imprest	JPMorgan Chase
000009922838718	TMX Operating	JPMorgan Chase
00000789664166	ITS Operating	JPMorgan Chase
00000789664174	ITS Payroll	JPMorgan Chase

14. The Debtors seek a waiver of the Trustee’s requirements that Bank Accounts be closed and new postpetition bank accounts be opened. If enforced in this case, the Trustee’s requirements would cause enormous disruption in the Debtors’ business. The maintenance of the Bank Accounts would greatly facilitate the Debtors’ “seamless transition” to postpetition operations and would allow Debtors to avoid delays in payment of debts incurred on a postpetition basis, while alienating as few of

Debtors' vendors and creditors as possible. In furtherance of these goals, and for the benefit of Debtors' bankruptcy estates, Debtors should be permitted to continue to maintain the existing Bank Accounts and, if Debtors reach the FDIC limit, to open new accounts. Otherwise, the transfer of the Bank Accounts will be enormously disruptive and time consuming, distracting Debtors from carrying out the fiduciary duties owed as debtors-in-possession.

15. If the relief requested herein is granted, Debtors will not intentionally pay, and each of the banks where the Bank Accounts are maintained (the "Banks") will be specifically directed not to pay, any debts incurred by Debtors prior to the Petition Date, other than as expressly authorized by this Court.

16. Bankruptcy Code § 105 provides in pertinent part:

The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this Title.

17. In the past, this Court has authorized debtors to maintain their existing bank accounts under the authority of § 105. *See, e.g., In re Advanced Living Technologies*, Chapter 11 Case No. 08-50040 (Bankr. W.D. Tex. Jan. 10, 2008); *In re Costilla Energy, Inc.*, Chapter 11 Case No. 99-70653 (Bankr. W.D. Tex. Sept. 09, 1999). In addition, other courts within the Fifth Circuit have granted similar relief. *See e.g., In re Encompass Svcs. Corp.*, Case No. 02-43582-H4-11 (Bankr S.D. Tex. Nov. 20, 2002); *In re Sterling Chem. Holdings, Inc.*, Case No. 01-37805-H4-11 (Bankr. S.D. Tex. Aug. 22, 2001).

18. Each of the Debtors maintain a separate account for their operation. In addition, each of the Debtors maintain a separate account for their payroll. Restructuring and modifying the existing accounts and cash management system would cause a material, significant and negative interruption of the Debtors' operations. Setting up new accounts for each of the Debtors would be unduly

burdensome and would interfere with the Debtors' continued operations. A waiver of the account closing requirement is necessary here.

IV.
Immediate and Irreparable Harm

19. New Rule 6003 to the Federal Rules of Bankruptcy Procedure, which became effective December 1, 2007, generally precludes the Court from authorizing certain relief until 20 days after the petition is filed, except to the extent necessary to prevent "immediate and irreparable harm." Specifically, Rule 6003 provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:

- (a) an application under Rule 2014
- (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and
- (c) a motion to assume, assign, or reject an executory contract or unexpired lease in accordance with Rule § 365.

20. Without the ability to use and maintain their prepetition Bank Accounts, the Debtors will suffer immediate and irreparable harm. In fact, without such relief, the Debtors will be forced to drastically alter their ordinary-course business practices. As such, the Debtors face the risk that their operations may be severely impaired if authority is not granted immediately.

21. In light of the foregoing, the Debtors respectfully submit that the relief requested represents an exercise of the Debtors' sound business judgment, is in the best interests of the Debtors' estates and creditors, and is necessary to prevent immediate and irreparable harm to these estates.

22. Following the adoption of Rule 6003, relief similar to the relief requested herein has been granted in this District. *See, e.g., In re Advanced Living Technologies*, Chapter 11 Case No. 08-50040 (Bankr. W.D. Tex. Jan. 10, 2008). Prior to the adoption of Rule 6003, relief similar to the relief requested herein has been granted elsewhere in other Chapter 11 cases. *See, e.g., In re Nexpak Corp.*, No. 04-63816 (RK) (Bankr. N.D. Ohio July 19, 2004) (authorizing the debtors to pay prepetition employee obligations); *In re Am. Way Invs. Corp.*, No. 04-42629 (RB) (Bankr. N.D. Ohio June 9, 2004) (same); *In re Summitville Tiles, Inc.*, No. 03-46341 (WTB) (Bankr. N.D. Ohio Dec. 12, 2003) (same); *In re Waving Leaves, Inc.*, No. 03-66524 (RK) (Bankr. N.D. Ohio Dec. 5, 2003) (same); *In re Republic Engineered Prods. LLC*, No. 03-55118 (MSS) (Bankr. N.D. Ohio Oct. 8, 2003); *In re Harry London, Inc.*, No. 03-60137 (RK) (Bankr. N.D. Ohio Jan. 15, 2003) (same); *In re LTV Steel Co.*, No. 00-43866 (WTB) (Bankr. N.D. Ohio Dec. 29, 2000) (same); *accord In re Dana Corp.*, No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 2006) (same); *In re Musicland Holding Corp.*, No. 06-10064 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2006) (same); *In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21, 2005) (same). Debtors submit that because they meet the standards required by Rule 6003, the above- listed cases serve as persuasive authority in this instance.

WHEREFORE, PREMISES CONSIDERED, Introgen Therapeutics, Inc., Introgen Technical Services, Inc., and TMX Realty Corporation, the Debtors-In-Possession in this Case, move the Court for an order authorizing the Debtors to maintain and use their prepetition bank accounts as the Debtors-in-Possession accounts during the Debtors' Chapter 11 case and granting such other relief to which the Debtors may show themselves entitled.

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 Baron Tomasco
State Bar No. 01797600
Kell C. Mercer
State Bar No. 24007668

ATTORNEYS FOR DEBTORS

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2008, 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.

/s/ Patricia B. Tomasco

Patricia B. Tomasco