

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

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

**DEBTORS' MOTION FOR ORDER ESTABLISHING  
MONTHLY FEE AND EXPENSE REIMBURSEMENT PROCEDURES**

**THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS.**

**IF NO TIMELY RESPONSE IS FILED WITHIN TWENTY (20) DAYS FROM THE DATE OF SERVICE, THE RELIEF REQUESTED HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD.**

**A TIMELY FILED RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COME NOW Introgen Therapeutics, Inc. ("ITI"), 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 Establishing Monthly Fee and Expense Reimbursement Procedures (the "Motion") pursuant to 11 U.S.C. § 331 and FED. R. BANKR. P. 2016. 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). Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

**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. In connection with the administration of the Debtors’ estates, pursuant to orders entered by this Court and Bankruptcy Code provisions relating to the employment and compensation of professionals, the Debtors have moved to employ Brown McCarroll, L.L.P. (“Brown McCarroll”) as counsel for the Debtors. Debtors plan to employ Torrey Partners, L.L.C. as financial advisor for the Debtors. Debtors also plan to employ Fulbright & Jaworski, L.L.P., Wilson Sonsini Goodrich & Rosati, P.C., and Wilson & Varner, L.L.P as special counsel (collectively, those persons or entities currently retained by the Debtors or who may be retained by the Debtors in the future and who are subject to the Bankruptcy Code provisions relating to the employment and compensation of professionals, are described herein as the “Professionals”).

**III.**  
**Relief Requested**

**A. Monthly Interim Compensation and Reimbursement**

4. Pursuant to section 331 of the Bankruptcy Code, the Local Rules of this Court, including the Guidelines for Compensation and Expense Reimbursement of Professionals, and the United States Trustee Fee Guidelines-Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330, Appendix A to 28 C.F.R. § 58 (the “Guidelines”), all professionals are required to submit applications to the Court for interim compensation and reimbursement of expenses every 120 days, or more often if the Court permits.

5. By this Motion, the Debtors request the entry of an order authorizing and establishing procedures for compensating and reimbursing court-approved professionals on a monthly basis, comparable to those procedures established in this Court and District in other Chapter 11 cases. Such an order will enable the Court, the United States Trustee for the Western District of Texas (the “U.S. Trustee”) and all other creditors and parties in interest to effectively monitor the professionals’ fees and expenses as they are incurred in this case.

6. The Debtors propose that the payment of compensation and reimbursement of the Professionals on a monthly basis be structured as follows:

- (a) Each court-approved professional shall serve a fee request (the “Request”) to the Debtors, counsel for Debtors, the U.S. Trustee, Counsel for any committee appointed under Bankruptcy Code section 1102 or, before the appointment of any such committee, each of the creditors that the Debtors, in compliance with FED. R. BANKR. P. 1007(d), included on the filed lists of 20 largest unsecured creditors (to the extent the applicable Debtors could identify such creditors), as those lists may subsequently be amended, and any other creditor or party in interest that requests notice (collectively, the “Notice Parties”). The Request should be a detailed statement of services rendered and expenses incurred by each professional for the month. The Request shall be filed and served within thirty (30) days after the end of the month for which compensation is sought, except that the first Request shall include fees and expenses from the effective date of employment.

- (b) The Request shall relate to services rendered and expenses incurred during the prior month; shall seek payment of monthly compensation in an amount equal to eighty percent (80%) of the fees sought and one hundred (100%) of the expenses incurred during the prior month; and shall indicate the amount requested, the total time expended, the names of the Professionals who performed the services, and the hourly billing rate for each Professional. The Request shall be accompanied by a detailed listing of the time expended by the Professionals who performed the services and the costs incurred during the month.
- (c) Each Professional electing to file a Request shall serve a copy of said Request on the Notice Parties or on any party who has specifically requested notice of the monthly fee requests by making said request in writing, filing it with the Court and serving it on the Notice Parties.
- (d) Any objection to the payment of fees or reimbursement of expenses in a Request must be filed with the Court and served on the Notice Parties within ten (10) days of the date the Request was mailed. If no objection is timely filed and served, the Debtors shall be authorized to make payment as requested therein within ten (10) days. If an objection is timely filed and served, then the Debtors shall be authorized to make payment within ten (10) days as requested in the Request only of the appropriate percentage of those amounts that are not in dispute. The disputed amounts in the Request shall be heard and resolved by the Court at the hearing on the Interim Application for such period.
  - (i) Any disputed amount must have a description of the objection to each line item in dispute; it shall not be sufficient to simply object to all fees and expenses.
  - (ii) If there are no objections to any line item, then the fee that accompanies that line item shall be paid as set forth herein above.
- (e) Professionals may be paid from a segregated bank account, reserved for the benefit of Professionals, established by the Debtors and designated as the "Professionals Account" or from other assets of the Debtors. The Debtors shall transfer sufficient funds into the Professionals Account on a regular basis, subject to the entry of applicable cash collateral orders establishing the necessary amount for transfer. Funds deposited in the Professionals Account shall be held in trust by the Debtors for the benefit of the Professionals and, except as modified by further orders of the Court, if any, shall not be subject to the claims or liens of any creditor (whether pre-petition or post-petition claims or liens) of the Debtors, except claims of Professionals for post-petition services rendered. Payments made to Professionals from the Professionals Account shall not be subject to disbursement unless the fees or expenses of such Professional are disallowed under Bankruptcy Code §§ 330 or 331.

- (f) Commencing with the period that ends March 3, 2009, each Professional who has filed a Request or is otherwise seeking interim compensation shall file with the Court and serve on the Notice Parties an interim fee application with a summary of the activities of the Professional (the "Interim Application"), in accordance with Bankruptcy Code § 331, FED. R. BANKR. P. 2016 and 2002(a)(7). The Interim Application shall seek approval of one hundred percent (100%) (including the twenty percent (20%) held back from monthly payments) of the requested interim compensation and reimbursement of expenses, including any compensation and reimbursement made pursuant to a Request, during the prior 120-day period.
- (g) Each Request, any objection to a Request, and any response to an objection shall be delivered by U.S. mail and e-mail to the following:
  - (i) Introgen Therapeutics, Inc., 301 Congress Avenue, Suite 1850, Austin, Texas 78701 (Attn: David Enloe, Chief Operating Officer and Chief Financial Advisor);
  - (ii) Counsel to the Debtors, Brown McCarroll, L.L.P., 111 Congress Avenue, Suite 1400, Austin, Texas 78701 (Attn: Patricia Tomasco, ptomasco@mailbmc.com, and Kell C. Mercer, kmercer@mailbmc.com);
  - (iii) Office of the United States Trustee, 903 San Jacinto Blvd., Suite 230, Austin, Texas 78701 (Attn: Valerie L. Wenger);
  - (iv) Counsel for any committee appointed under Bankruptcy Code § 1102 or, before the appointment of any such committee, each of the creditors that the Debtors, in compliance with FED. R. BANKR. P 1007(d), included on the filed lists of 20 largest unsecured creditors (to the extent the applicable Debtors could identify such creditors), as those lists may subsequently be amended; and
  - (v) Any other creditor or party in interest who requests notice.

7. The procedures suggested in this Motion will enable all parties to closely monitor costs of administration, maintain a more level cash flow availability, and implement efficient cash management procedures.

## **B. Applicable Authority**

8. Section 331 of the Bankruptcy Code provides in relevant part:

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 321 or 1103 of this title may apply to the Court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits,

for such compensation for services rendered before the date of such application or reimbursement for expenses incurred before such date as is provided under section 330 of this title.

Congress' intent in enacting Bankruptcy Code § 331 is expressed unequivocally in the house and senate reports accompanying enactment of the Bankruptcy Code:

The court may permit more frequent applications if the circumstances warrant, such as in very large cases where the legal work is extensive and merits more frequent payments. The court is authorized to allow and order disbursement to the applicant of compensation and reimbursement that is otherwise allowable under section 330.

H.R. Rep. No. 595, 95th Cong., 1<sup>st</sup> Sess. 330 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 41-42 (1978).

9. Section 105(a) of the Bankruptcy Code provides in relevant part: “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105.

10. The Debtors believe that the relief requested herein is appropriate to carry out the provisions of the Bankruptcy Code. Similar procedures have been authorized in other complex chapter 11 cases in Texas. *See, e.g., In re Advanced Living Technologies*, chapter 11 Case No. 08-50040 (Bankr. W.D. Tex. Feb. 26, 2008); *In re nLine Corp.*, chapter 11 Case No. 03-13779 (Bankr. W.D. Tex. Sept. 3, 2003); *In re Electrosorce, Inc.*, chapter 11 Case No. 01-14283 (Bankr. W.D. Tex. Sept. 12, 2002); *In re Radiant Photonics*, chapter 11 Case No. 01-13967 (Bankr. W.D. Tex. Jan. 14, 2002); *In re PointOne Operating Co.*, chapter 11 Case No. 01-12978 (Bankr. W.D. Tex. Nov. 07, 2001); *In re Costilla Energy, Inc.*, chapter 11 Case No. 99-70653 (Bankr. W.D. Tex. Sept. 13, 1999); *In re Manchester, Inc.*, chapter 11 Case No. 08-30703-BJH (Jointly Administered) (Bankr. N.D. Tex. Feb. 19, 2008). *See also In re Asarco LLC et al.*, Case No. 05-21207 (Jointly Administered) (Bankr. S.D. Tex. Dec. 15, 2005); *In re Encompass Services Corp.*

*et al.*, Case No. 02-43582 (Jointly Administered) (Bankr. S.D. Tex. Dec. 19, 2002); *In re Retail Concepts, Inc.*, Case No. 02-41016 (Bankr. S.D. Tex. Nov 6, 2002); *In re EOTT Energy Partners, L.P., et al.*, Case No. 02-21730 (Jointly Administered) (Bankr. S.D. Tex. Oct. 9, 2002).

11. The proposed fee procedures are consistent with Section 331, which provide that professionals may be paid after “notice and a hearing,” because the Court will have the final approval of all fees when both the Interim and Final Fee Applications are considered. Therefore, the Court should permit professionals in these cases to file both Applications and Interim Applications as provided herein.

#### **IV. Conclusion**

12. The Debtors believe that the adoption of the interim fee and expense reimbursement procedures set forth herein is fair and reasonable and in the best interests of the Debtors’ estates and their creditors. Pursuant to the Court’s authority under Bankruptcy Code § 102(1), compliance with the interim fee procedures set forth herein will be deemed to satisfy FED. R. BANKR. P. 2016 and Bankruptcy Code § 330.

13. Nothing in this Motion or in the monthly procedures set forth herein shall relieve any Professional from the obligation to file Final Applications for Allowance of Fees pursuant to Bankruptcy Code § 330.

WHEREFORE, the Debtors respectfully request that the Court enter an order establishing a monthly fee and expense reimbursement procedure as detailed above. The Debtors also request any such other and further relief to which they may be justly 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 11<sup>th</sup> 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 Service List.

/s/ Patricia B. Tomasco

Patricia B. Tomasco