

**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 INTERIM AND FINAL ORDERS  
ESTABLISHING ADEQUATE ASSURANCE FOR PAYMENT OF UTILITIES**

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

COME NOW Introgen Therapeutics, Inc. ("ITI"), Introgen Technical Services, Inc. ("ITS"), TMX Realty Corporation ("TMX") (collectively, the "Debtors") and hereby seek interim and final orders from the Court, pursuant to 11 U.S.C. §§ 105(a), 361 and 366, Establishing Adequate Assurance for Payment of Utilities, and as grounds therefore show as follows:

**I.  
Jurisdiction & Venue**

1. This Court (the "Bankruptcy Court") has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue is proper pursuant to 11 U.S.C. § 1409(a) and the Standing Order of Reference. This matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (E), (G) and (O). The relief requested in this Motion is sought pursuant to 11 U.S.C. §§ 105, 361 and 366.

## **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 Introgen Technical Services, Inc. (“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 and 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, on December 3, 2008, (the "Petition Date"), the Debtors filed with the Clerk of this Court petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"). On December 12, 2008, the Court entered an order authorizing the joint administration of the Debtors' Chapter 11 cases. The Debtors are now operating their businesses and managing their property as a

Debtors-in-Possession pursuant to 11 U.S.C. §§ 1107 and 1108. No official committee has yet been established in these cases.

### **III. Relief Requested**

12. As a result of the commencement of Debtors' Chapter 11 case, the Debtors are unable to pay their utility providers for invoiced but unpaid prepetition services. In connection with the operation of their businesses, the Debtors obtain gas, electricity, water, waste and telephone service from certain utilities. The utilities subject to this Motion ("Utilities") are identified in *Exhibit "A"* attached hereto.<sup>1</sup> Any interruption in these services would cause potentially irreparable harm to the reorganization of the Debtors.

13. Prior to the Petition Date, the Debtors generally maintained satisfactory payment histories with these Utilities. The Debtors were diligent in paying their accounts, except for those bills that had accrued immediately prepetition which cannot be paid due to the Chapter 11 filing.

14. Although the Debtors posted deposits to connect and/or continue service in limited circumstances, in the normal course of business, the Utilities have not required the Debtors to post additional deposits. Currently, the Debtors do not have any deposits with any of their utilities.

15. Bankruptcy Code § 366 governs the rights and obligations of utility companies providing services to the Debtors. Section 366 provides as follows:

- (a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to the utility for service rendered before the order for relief was not paid when due.

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<sup>1</sup> The Debtors do not hereby represent or admit that all companies identified on *Exhibit "A"* qualify as utilities as that term is used in Bankruptcy Code § 363. However, all companies identified on *Exhibit "A"* will be provided the proposed adequate protection.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

(c) (1) (A) For purposes of this subsection, the term “assurance of payment” means—

- (i) a cash deposit;
- (ii) a letter of credit;
- (iii) a certificate of deposit;
- (iv) a surety bond;
- (v) a prepayment of utility consumption; or
- (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee.

(B) For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.

(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.

(3) (A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

(B) In making a determination under this paragraph whether an assurance of payment is adequate, the court may not consider—

- (i) the absence of security before the date of the filing of the petition;
- (ii) the payment by the debtor of charges for utility service in a timely manner before the date of the filing of the petition; or
- (iii) the availability of an administrative expense priority.

- (4) Notwithstanding any other provision of law, with respect to a case subject to this subsection, a utility may recover or set off against a security deposit provided to the utility by the debtor before the date of the filing of the petition without notice or order of the court.

11 U.S.C. § 366.

16. In accordance with 11 U.S.C. § 366, the Debtors request by this Motion that the Court order on an interim basis, and on a final basis after notice and hearing, that the following offer to provide adequate assurance of payment to the Utilities is sufficient to preclude unilateral termination by a utility under § 366(b):

(a) The Debtors shall timely pay for all post-petition services provided by the Utilities pursuant to the terms of the invoices and billing statements generated by the such companies in the ordinary course of their businesses;

(b) The Debtors shall pay each Utility bi-weekly, pre-payments for post-petition services provided by the Utility in the ordinary course of business starting the day the order granting this Motion is entered or twenty (20) days after the Petition Date, whichever date is later;

(c) In the event that the Debtors fail to timely pay for post-petition service per an invoice, the Debtors shall have a ten (10) day period to cure such non payment, which ten (10) day period shall begin to run automatically from the date of a non payment notice (the “Notice of Default”) from the Utility;

(d) Should the Debtors fail to pay the invoice within the ten (10) day time period after receipt of the Notice of Default, the Utility shall be entitled to alter, refuse or discontinue service, upon notice to the Debtor and without necessity of Court order.

(e) If a Utility maintains more than one account for the Debtors, the failure to pay for post-petition services with respect to one account shall not be deemed a failure to pay or “cross-default” with respect to any other account, provided that such other account is being paid. Each failure to pay, and the ability to alter, refuse or discontinue service shall arise on a per account basis;

(f) Existing prepetition deposits held by a Utility may be offset against any past due prepetition invoice upon notice of such offset to the Debtors and without necessity of Court order or prior notice to creditors; and

(g) To the extent that a Utility provides post-petition services that are unpaid, such Utility shall be entitled to an administrative claim, pursuant to 11 U.S.C. §§ 503(b)(1) and 507(a)(1), payable upon confirmation of a plan or reorganization or such other date as determined by the Court. Further, existing deposits held by a Utility may be offset against any past due prepetition invoice upon notice of such offset to the Debtors and without necessity of Court order or prior notice to creditors.

17. The Debtors hereby represent that they will pay the post-petition Utilities' invoices when due. Nonetheless, the Debtors assert that the aforementioned provisions provide the Utilities with "adequate assurance" of payment. Specifically, the granting of bi-weekly pre-payments of utility consumption provides additional assurance under § 366(c)(1)(A). If any delay in payment occurs, the protections proposed herein will more than provide sufficient protection to the Utilities providing post-petition services.

WHEREFORE, the Debtors requests that the Court enter an order:

- (1) on an interim basis, approving the method of providing adequate assurance of payment for post-petition services provided by the Utilities as proposed by Debtors herein;
- (2) prohibiting any Utility from unilaterally altering, refusing or discontinuing services to the Debtors so long as the Debtors are complying with this procedure;
- (3) set this Motion for a final hearing, and upon such final hearing, approving the method of providing adequate assurance of payment for post-petition services provided by the Utilities as proposed by Debtors herein; and
- (4) granting such other and further relief to which the Debtors may be justly entitled.

Respectfully submitted,

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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

**EXHIBIT A**

**Companies Subject to Motion**

<b><u>Vendor Name</u></b>	<b><u>Account Number</u></b>	<b><u>Address</u></b>	<b><u>City</u></b>	<b><u>State</u></b>	<b><u>Zip Code</u></b>	<b><u>Type of Utility</u></b>
Allied Waste	3-0852-0713693					Waste
Allied Waste	3-0852-0713701					Waste
Allied Waste	3-0852-0713719	P.O. Box 78829	Phoenix	Arizona	85062-8829	Waste
AT&T Mobility	2470529	P.O. Box 78405	Phoenix	Arizona	85062-8405	Telephone
Centerpoint Energy	3799424-1	P.O. Box 4981	Houston	Texas	77030-4224	Gas
Centerpoint Energy	3799439-9	P.O. Box 4981	Houston	Texas	77030-4224	Gas
Centerpoint Energy	3803510-1	P.O. Box 4981	Houston	Texas	77030-4224	Gas
City of Houston	4327-7491-6014	P.O. Box 1560	Houston	Texas	77251	Water
City of Houston	4327-7823-0016	P.O. Box 1560	Houston	Texas	77251	Water
Comcast	8777 70 122 3856664	P.O. Box 660618	Dallas	Texas	75266-0618	Internet
Reliant Energy	119 336 6	P.O. Box 120954	Dallas	Texas	75312-0954	Electricity
Reliant Energy	189 000 457 969 7					Electricity
Reliant Energy	189 000 457 970 5					Electricity
Reliant Energy	189 000 457 973 9					Electricity
Reliant Energy	193 000 137 988 9	P.O. Box 120954	Dallas	Texas	75312-0954	Electricity
Sprint	686188000					Telephone
Time Warner	1080501	P.O. Box 660097	Dallas	Texas	75266-0064	Internet
Verizon Wireless	919933557-00001					Telephone
Westel, Inc.	104514	P.O. Box 203130	Austin	Texas	78702-3130	Telephone
Westel, Inc.	105055	P.O. Box 203130	Austin	Texas	78702-3130	Telephone

\*\*The Debtors do not hereby represent or admit that all the companies identified above qualify as "utilities" as that term is used in Bankruptcy Code § 363. However, all companies identified above will be provided the proposed adequate protection.