IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	
Laboratory Partners, Inc., *et al.*,[1]	:	Case No. 13-12769 ( )
	:	
Debtors.	:	(Joint Administration Pending)

DEBTORS' MOTION FOR AN ORDER UNDER SECTIONS 105, 365(a) AND 554(a) OF THE BANKRUPTCY CODE: (I) ESTABLISHING PROCEDURES FOR THE REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY AND THE ABANDONMENT OF RELATED PERSONAL PROPERTY; AND (II) AUTHORIZING THE DEBTORS TO REJECT CERTAIN UNEXPIRED LEASES OF REAL PROPERTY AND CERTAIN CONTRACTS

The above-captioned debtors and debtors in possession (the "Debtors") file this motion (the "Motion") for entry of an order, pursuant to sections 105(a), 365(a) and 554(a) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended (the "Bankruptcy Code") and Rules 3002 and 6006 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), (i) establishing procedures for the rejection of executory contracts and unexpired leases of nonresidential real property and abandonment of related personal property, and (ii) authorizing the Debtors to reject certain unexpired leases of real property and certain contracts. In support of the Motion, the Debtors rely upon and incorporate by reference the *Declaration of William A. Brandt, Jr., In Support of First Day Relief* (the "Brandt Declaration"), which was filed with the

[1] The Debtors and the last four digits of their taxpayer identification numbers are as follows: Laboratory Partners, Inc. (3376), Kilbourne Medical Laboratories, Inc. (9849), MedLab Ohio, Inc. (9072), Suburban Medical Laboratory, Inc. (0859), Biological Technology Laboratory, Inc. (4370), Terre Haute Medical Laboratory, Inc. (1809), and Pathology Associates of Terre Haute, Inc. (6485). Certain of the Debtors do business as MEDLAB. The Debtors' mailing address for notice in these cases is: 671 Ohio Pike, Suite K, Cincinnati, OH 45245.

Court concurrently herewith. In further support of the Motion, the Debtors, by and through their undersigned proposed co-counsel, respectfully state as follows:

BACKGROUND

1. The Court has jurisdiction over the motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue of these proceedings and the Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a), 365(a) and 554(a) of the Bankruptcy Code.

JURISDICTION

3. On the date hereof (the "Petition Date"), the Debtors commenced their bankruptcy cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. No trustee, examiner, or official committee has been appointed in these cases. The Debtors are operating their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. The Debtors, headquartered in Cincinnati, Ohio and doing business primarily as MEDLAB, provide clinical diagnostic laboratory services to long-term care facilities, hospitals and physician offices through a network of clinical laboratories.

5. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are set forth in the Brandt Declaration.

EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6. The Debtors have a significant number of unexpired nonresidential real property leases (the "Leases") and executory contracts (the "Contracts").[2] The Debtors intend to maximize the value of their estates through sales of the Debtors' assets and assumption and assignment of certain of their Leases and Contracts. However, to ensure that the value of the estates' assets are maximized, the Debtors anticipate that they will seek to reject certain Leases and Contracts that are not expected to be part of any sale or other restructuring or liquidation of the Debtors and, therefore, are an administrative burden to the estates.

RELIEF REQUESTED

7. To minimize (a) any potential administrative expense claims associated with Contracts and Leases the Debtors do not need to retain and/or cannot assign to third parties for value, and (b) administrative expenses and delay associated with rejecting such Contracts and Leases by separate motions, the Debtors seek approval of the following procedures (the "Rejection Procedures") to effect the expedited rejection of any Contracts and Leases:

a. Any Lease or Contract determined by the Debtors, in the exercise of their business judgment, to be unnecessary and/or burdensome to the Debtors' ongoing operations may be rejected upon fourteen (14) calendar days' written notice (a "Rejection Notice"), via electronic mail, facsimile, or overnight mail, to: (i) the non-Debtor party (and its counsel, if known) to the applicable Lease or Contract at the last known address available to the Debtors; (ii) counsel to any official committee appointed in these cases (or in the absence of any such committee to the creditors on the Debtors' Consolidated List of Creditors Holding the 30 Largest Unsecured Claims filed with the

[2] Nothing contained herein shall be construed as an admission by the Debtors as to the character of any document denominated as a Lease or Contract as executory contracts or unexpired leases or to the rights of the non-debtor parties thereto. The Debtors reserve their rights to challenge any Lease or Contract on any grounds they deem appropriate, and to assert against counterparties to Leases or Contracts any claims, counter-claims or defenses to a claim(s) by the non-debtor party against the Debtors, including, without limitation, preference actions.

Debtors' petitions pursuant to Federal Bankruptcy Rule 1007(d)); (iii) counsel to the Debtors' postpetition lender; and (iv) the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") (collectively, the "Notice Parties").

b. Each Rejection Notice shall be substantially in the form attached as **Exhibit A** to the Motion, and shall be accompanied by a copy of the Order granting this Motion. The Rejection Notice shall be filed with this Court by the Debtors.

c. If an objection to a Rejection Notice is filed with the Bankruptcy Court by a Notice Party, and is served upon, and actually received by, (i) counsel to the Debtors; and (ii) all Notice Parties, prior to the expiration of the fourteen (14) calendar-day notice period, the applicable Rejection Notice and the objection shall be considered at the next regularly scheduled omnibus hearing date in these cases or as agreed to by the Debtors and the non-Debtor party to the applicable Lease or Contract.

d. If no objection to a Rejection Notice is timely received, the applicable Lease or Contract shall, without any further order of the Court or action of any party, be deemed rejected and the Related Property (defined below), if any, shall be deemed abandoned on the later of: (i) the date of the Rejection Notice; (ii) the date set forth in the Rejection Notice for such rejection and/or abandonment; (iii) a date to which the Debtors and the counter-party to the applicable Lease or Contract have, after the date of the Rejection Notice, agreed in writing, as reflected in a notice filed with the Court; or (iv) the date, as determined by the Debtors, of the surrender of the property governed by the applicable Lease or Contract to the affected non-Debtor contract party, as reflected in a notice filed with the Court.

e. If a timely objection to a Rejection Notice is received and the Court ultimately approves the rejection of the applicable Lease or Contract, then the applicable Lease or Contract shall be deemed rejected and the Related Property, if any, shall be deemed abandoned as of the date determined by the Bankruptcy Court and/or as set forth in any Order overruling such objection.

f. Proofs of any claims arising out of the rejection of any Lease or Contract, or the abandonment of Related Property, shall be filed on or before the later of: (i) thirty (30) days after the date of service of the Rejection Notice; or (ii) any bar date for the filing of proofs of claim established by this Court, or shall be deemed waived by the claimant with BMC Group Inc. at:

(i) If by regular mail: BMC Group, Inc.,
P.O. Box 3020
Chanhassen, MN 55317-3020
(Attn: Laboratory Partners Claims Processing); and

(ii) If by messenger
or overnight delivery: BMC Group Inc.,
18675 Lake Drive East
Chanhassen, MN 55317
(Attn: Laboratory Partners Claims Processing)

8. In connection with the Rejection Procedures, the Debtors also request authority to abandon certain personal property, furniture, fixtures and/or equipment remaining at the premises subject to a rejected Lease (the "Related Property") as of the effective date of the rejection of such Lease. In the event that the Debtors determine that any interest of the Debtors in such property has little or no value, or that the preservation thereof will be burdensome to their estates, compared with the expense of removing and storing such property, the Debtors will seek to abandon the Related Property and the Rejection Procedures will equally apply to such abandonment. Such a Rejection Notice will set forth a description of the property to be abandoned, state the reason for the proposed abandonment, and identify the entity to whom the property is proposed to be abandoned.

9. In addition and contemporaneous with filing the Rejection Notice, in the event that the net value of any Related Property to be abandoned exceeds $10,000 (after deducting costs of removal and storage), the Debtors will provide notice of the proposed abandonment to the Prepetition Lenders and DIP Lender (the "Abandonment Notice") by electronic mail. The Abandonment Notice shall include (a) a description of the property to be abandoned, and pictures if available, (b) the location of the property to be abandoned, (c) the expected value of the property, and (d) the expected cost of preserving or selling the property.

The Prepetition Lenders and DIP Lender will have five (5) business days to object to the Abandonment Notice in writing sent to the Debtors' counsel by electronic mail. If any such objection cannot be resolved, the Debtor will follow the Rejection Procedures for the relevant property.

10. The Debtors request that they be authorized to execute and deliver all instruments and documents and take such other actions as may be necessary or appropriate to implement and effectuate the Rejection Procedures as approved by this Court, and the entry of the requested order be without prejudice to the Debtors' right to seek further, other or different relief regarding the Leases and Contracts.

11. Lastly, the Debtors request that they be authorized to reject the Contracts and Leases listed on **Exhibit B** ("Initial Rejected Contracts") attached hereto, effective as of the date of this Motion. The Debtors have determined, in their business judgment, that the Initial Rejected Contracts are a burden to these estates and will not be marketable as part of the Debtors' ongoing sales process.

BASIS FOR RELIEF

12. Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a). Courts routinely approve motions to assume, assume and assign or reject executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment. *See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (stating that section 365 of the Bankruptcy Code "permits the trustee or debtor in possession, subject to the approval of the bankruptcy court, to go through the inventory of

executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject."); *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1075 (3d Cir. 1992); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (stating that the traditional standard applied by courts to authorize the rejection of an executory contract is that of "business judgment"); *In re Gucci*, 193 B.R. 411, 415 (S.D.N.Y. 1996) ("A bankruptcy court reviewing a trustee's decision to assume or reject an executory contract should apply its best 'business judgment' to determine if it would be beneficial or burdensome to the estate to assume it.").

13. Courts generally will not second-guess a debtor's business judgment concerning the assumption or rejection of an executory contract or unexpired lease. *See In re Riodizio, Inc.*, 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) ("[A] court will ordinarily defer to the business judgment of the debtor's management"); *accord Phar-Mor, Inc. v. Strouss Bldg. Assocs.*, 204 B.R. 948, 951-52 (N.D. Ohio 1997) ("Whether an executory contract is 'favorable' or 'unfavorable' is left to the sound business judgment of the debtor . . . . Courts should generally defer to a debtor's decision whether to reject an executory contract."). The "business judgment" test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor's estate. *See, e.g., In re Trans World Airlines, Inc.*, 261 B.R. 103, 120 (Bankr. D. Del. 2001) ("A debtor's determination to reject an executory contract is governed by the business judgment standard."); *In re Meehan*, 59 B.R. 380, 385 (E.D.N.Y. 1986) ("The business judgment test is a flexible one . . . . The primary issue under the business judgment test is whether rejection of the contract would benefit general unsecured creditors"); *In re Helm*, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) ("To meet the

business judgment test, the debtor in possession must 'establish that rejection will benefit the estate'").

14. Courts considering the issue of whether a bankruptcy court is authorized to assign a retroactive rejection date under section 365(a) have held that it may do so "when principles of equity so dictate." *Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1*, 67 F.3d 1021, 1028 (1st Cir. 1995); *see also In re At Home Corp.*, 392 F.3d 1064, 1071 (9th Cir. 2004) ("We therefore hold that a bankruptcy court, in exercising its equitable powers under 11 U.S.C. § 105(a), may approve the retroactive rejection of a nonresidential lease when 'necessary or appropriate to carry out the provisions of' § 365(d)"). Courts have authorized the retroactive rejection of real property leases effective as of the date of the motion requesting the lease rejection. *See, e.g.*, *In re Jamesway Corp.*, 179 B.R. 33, 38 (S.D.N.Y. 1995) ("[A] court can, where appropriate, approve rejection retroactively"); *accord In re South Lincoln Med. Group, P.C.*, 2008 Bankr. LEXIS 468, at *7 (Bankr. D. Neb. Feb. 21, 2008) (finding rejection effective as of the date the debtor filed motion for approval of lease rejection); *In re CCI Wireless, LLC*, 279 B.R. 590, 595 (Bankr. D. Colo. 2002) ("[T]his Court may -- and in this instance, should -- approve the rejection of a non-residential lease retroactive to the filing date of the motion to reject the lease"); *In re Joseph C. Spiess Co.*, 145 B.R. 597, 606 (N.D. Ill. 1992) (rejection is effective when landlord receives notice of debtor's intent to reject).

15. Because the Debtors' decision to reject any of the Contracts and Leases will be made in connection with the marketing of the Debtors' assets, the Debtors believe that any such rejection decision will fall squarely within their business judgment and will be made in the best interest of their estates and creditors. Given that the Debtors seek to sell their assets either as a going concern or through an orderly liquidation, there will be no need for the

Contracts and Leases that are not part of any sale or otherwise valuable. The Debtors believe that, due to their financial condition and the need to reduce immediately unnecessary administrative claims against their estates, the equities under the circumstances weigh in favor of permitting the Debtors to reject expeditiously the Contracts and Leases they determine are of little or no value to their estates, including the Initial Rejected Contracts. Accordingly, rejection of these Contracts and Leases, pursuant to the procedures described herein, should be approved pursuant to section 365 of the Bankruptcy Code.

16. As to the Initial Rejected Contracts to be rejected initially by this Motion, retroactive rejection to the Petition Date is appropriate because either (i) the contract-counter party is not providing current services or (ii) the Debtors never occupied the premises and have returned the keys to the landlord. As a result, retroactive rejection to the Petition Date is justified.

17. The Debtors further request that pursuant to Bankruptcy Rule 3002, the Court require that:

> (a) proofs of any claims arising out of the rejection of any Lease or Contract, or the abandonment of Related Property pursuant to a Rejection Notice, shall be filed on or before the later of: (i) thirty (30) days after the date of service of the Rejection Notice; or (ii) any bar date for the filing of proofs of claim established by this Court, or shall be deemed waived by the claimant, with BMC Group, Inc. at:
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> (i) If by regular mail: BMC Group, Inc.,
> P.O. Box 3020
> Chanhassen, MN 55317-3020
> (Attn: Laboratory Partners Claims Processing); and
>
> (ii) If by messenger
> or overnight delivery: BMC Group Inc.,
> 18675 Lake Drive East
> Chanhassen, MN 55317
> (Attn: Laboratory Partners Claims Processing)
>
> and

(b) proofs of claim related to rejection of the Initial Rejected Contracts be filed, on or before the later of: (i) thirty (30) days after the date of service of the Motion; or (ii) any bar date for the filing of proofs of claim established by this Court, with BMC Group, Inc. at:

(i) If by regular mail: BMC Group, Inc.,
P.O. Box 3020
Chanhassen, MN 55317-3020
(Attn: Laboratory Partners Claims Processing); and

(ii) If by messenger
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18. With respect to the Debtors' request for authority to abandon the Related Property, the Debtors submit that the standard set forth in section 554(a) of the Bankruptcy Code is satisfied. Section 554(a) of the Bankruptcy Code provides that a debtor in possession may abandon, subject to Court approval, "property of the estate that . . . is of inconsequential value and benefit to the estate." Before authorizing abandonment of property, the bankruptcy court must find either: (i) the property is burdensome to the estate or (ii) the property is both of inconsequential value and inconsequential benefit to the estate. *See, e.g., Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 497 (1986), *reh'g denied*, 475 U.S. 1091 (1986); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 882 n.7 (Bankr. S.D.N.Y. 1990). Here, the personal property proposed to be abandoned may primarily consist of office materials and obsolete fixtures or equipment that are (a) of no value or benefit to the Debtors' estates and/or (b) burdensome insofar as the costs of removal and storage of such property is likely to exceed the net proceeds realizable from their sale.

19. Courts in this district have previously approved rejection procedures in other large chapter 11 cases. *See, e.g.*, *In re WP Steel Venture LLC*, Case No. 12-11661 (KJC); *In re Nortel Networks Inc., et al.*, Case No. 09-10138 (KG); *In re Verasun Energy Corporation*,

Case No. 08-12606 (BLS); *In re Hancock Fabrics, Inc.*, Case No. 07-10353 (BLS); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (KJC).

20. Finally, section 105 of the Bankruptcy Code provides in relevant part that "[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(a). The Debtors submit that authority to implement the proposed procedures are appropriate in these chapter 11 cases and are well within the Court's equitable powers under section 105 of the Bankruptcy Code.

NOTICE

21. Notice of this Motion will be given to: (a) the Office of the United States Trustee for the District of Delaware; (b) the entities listed on the Consolidated List of Creditors Holding the 30 Largest Unsecured Claims; (c) counsel to the Debtors' postpetition lender; (d) the non-Debtor parties to the Initial Rejected Contracts (and their counsel, if known); and (e) all parties who have requested notice in these cases pursuant to Bankruptcy Rule 2002. The Debtors submit that, under the circumstances, no other or further notice is required.

22. No previous motion for the relief sought herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form annexed hereto as **Exhibit C**, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: October 25, 2013
Wilmington, Delaware

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