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11  
12 **UNITED STATES BANKRUPTCY COURT**  
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 In re

15 SERACARE LIFE SCIENCES, INC.,  
16 a California Corporation (d/b/a  
17 Therasource International; f/k/a The  
18 Western States Group, Inc.; d/b/a  
19 Biomedical Resources, a division of  
20 SeraCare Life Sciences, Inc.; d/b/a  
21 Genomics Collaborative, a division of  
22 SeraCare Life Sciences, Inc.; f/k/a  
23 Southwest Biological Services Western  
24 States Plasma Co., Inc.; d/b/a Boston  
25 Biomedica, Inc.; d/b/a SeraCare  
26 Bioservices; and d/b/a SeraCare  
27 Diagnostics),

28 Debtor and Debtor-in-  
Possession.

Case No. SD 06-00510 LA11

Chapter 11 Proceeding

**DEBTOR'S MOTION FOR ORDER**  
**(1) APPROVING BREAKUP FEE, (2) PAYMENT**  
**OF LEGAL FEES AND DUE DILIGENCE**  
**EXPENSES, AND (3) SETTING HEARING ON**  
**MOTION FOR APPROVAL OF SECURED**  
**FINANCING PURSUANT TO SECTION 364;**  
**MEMORANDUM OF POINTS AND**  
**AUTHORITIES; DECLARATIONS IN SUPPORT**  
**THEREOF**

DATE: \_\_\_\_\_, 2006

TIME:

PLACE: Courtroom 2

1           **TO THE HONORABLE LOUISE DECARL ADLER, UNITED STATES BANKRUPTCY**  
2 **JUDGE; AND PARTIES IN INTEREST:**

3           SeraCare Life Sciences, Inc., the debtor and debtor in possession in the above entitled  
4 Chapter 11 proceeding (the “Debtor”), hereby moves the Court for an Order (1) Approving Breakup  
5 Fee, (2) Payment of Legal Fees and Due Diligence Expenses, and (3) Setting Hearing on a Motion for  
6 Approval of Secured Financing pursuant to Section 364 (the “Motion”) pursuant to that certain letter  
7 of intent and term sheet (collectively, the “LOI”) between the Debtor and a syndicate of investors  
8 consisting of funds managed by Cohanzick Management, LLC, Robeco Investment Management,  
9 Fairfield Greenwich Group, Foxhill Capital Partners, LLC, Gruber & McBain Capital Management,  
10 Seven Bridges and Triage Capital Management, LP (collectively, the “Investor Group”).

11           This Motion is based upon the Memorandum of Points and Authorities set forth hereinbelow,  
12 the Declarations of Robert Cresci (“Cresci Declaration”) and Paul J. Couchot (“Couchot Declaration”)  
13 attached hereto, all pleadings, papers and records on file with the Court, and such other evidence, oral  
14 or documentary, as may be presented to the Court prior to or at the time of any hearing on the Motion,  
15 should a hearing be requested.

16           Based on the foregoing, the Debtor requests that this Court enter its order granting the relief  
17 requested.

18 DATED: August 17, 2006

**WINTHROP COUCHOT**  
**PROFESSIONAL CORPORATION**

21 By: \_\_\_\_\_ /s/  
22           Paul J. Couchot  
23           Peter W. Lianides  
24           General Insolvency Counsel for SeraCare Life  
25           Sciences, Inc., Debtor and Debtor-in-Possession

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 For the last several months in this Chapter 11 case, the Debtor has been actively seeking  
5 financing that would allow the Debtor to refinance its debt with its senior secured lenders and form the  
6 basis for a Chapter 11 Plan. For the last several weeks, the Debtor has focused its negotiations on the  
7 several potential financing sources that the Debtor considered to be its most serious prospects.

8 As a result of these negotiations, on August 16, 2006, the Debtor entered into a letter of intent  
9 and accompanying term sheet (collectively, the "LOI") with a syndicate of investors consisting of  
10 funds managed by Cohanzick Management, LLC, Robeco Investment Management, Fairfield  
11 Greenwich Group, Foxhill Capital Partners, LLC, Gruber & McBain Capital Management, Seven  
12 Bridges and Triage Capital Management, LP (collectively, the "Investor Group"). The LOI is  
13 expressly subject to Bankruptcy Court approval. Among other provisions, the LOI provides for the  
14 Investor Group to initially fund a \$15,000,000 post-petition secured loan to the Debtor pursuant to  
15 Bankruptcy Code Section 364. The LOI provides for an initial \$15 million secured loan for the  
16 purpose of, among other things, paying off the Debtor's senior secured loans. The LOI contemplates  
17 that the initial \$15 million secured loan could be increased to \$25 million and would be retired at plan  
18 confirmation with a convertible loan up to the amount of the secured loan. The convertible notes  
19 would be convertible into common stock of the Debtor based on a conversion rate of \$5.50 per share.  
20 The conversion price of \$5.50 per share represents a premium from the current market price of the  
21 Debtor's common stock. The loans will bear interest at 9% per annum and have 60-month maturity  
22 dates. Of the various written offers received to date, the Debtor believes the LOI with the Investor  
23 Group to be the best proposal for the Debtor and its stakeholders, both in terms of the overall  
24 economic package as well as likelihood of consummation.

25 Consummation of the transactions contemplated by the LOI would allow the Debtor to  
26 immediately refinance the secured claims of its senior secured lenders and allow the Debtor to propose

1 a Chapter 11 Plan of Reorganization that would provide a 100% distribution to all holders of allowed  
2 claims that are not subject to subordination. The conversion price of \$5.50 per share represents a  
3 premium to the current market price of the Debtor's common stock and accordingly will minimize the  
4 dilution to the Debtor's shareholders.

5 In connection with the LOI, subject to Bankruptcy Court approval, the Investor Group would  
6 be entitled to a breakup fee in the amount of \$1,250,000 (or 5% of the \$25 million potential financing),  
7 if the Debtor accepts a superior proposal to that contemplated by the LOI. The breakup fee will be  
8 payable by the Debtor only out of the proceeds of such superior proposal (only in the event that the  
9 closing contemplated by such superior proposal occurs). Furthermore, the breakup fee would not be  
10 payable if definitive loan documents are not executed by September 30, 2006 unless the failure to do so  
11 is because the Debtor accepted a superior proposal. The Investor Group has also confirmed the  
12 Debtor's understanding that no breakup fee would apply if the Investor Group did not negotiate in  
13 good faith or otherwise discontinued negotiations with the Debtor, irrespective of whether the Debtor  
14 subsequently accepted a superior offer.

15 In addition to the breakup fee, subject to Bankruptcy Court approval, the Debtor has agreed to  
16 pay certain legal fees and due diligence expenses of the Investor Group. However, in the event that the  
17 initial \$15 million loan does not close, the attorneys' fee obligation will be capped at \$100,000 and the  
18 due diligence expenses capped at \$35,000.

19 The instant Motion requests Court approval of both the Investor Group's breakup fee and the  
20 Debtor's payment of the Investor Group's reasonable attorneys' fees and due diligence expenses as  
21 provided for in the LOI. The Motion also requests the Court set a final hearing on a motion to approve  
22 the initial \$15 million loan.

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**II.**

**BACKGROUND**

**A. The Debtor.** On March 22, 2006, (the “Petition Date”), the Debtor filed its petition under Chapter 11 of the Bankruptcy Code. The Debtor is continuing in the operation and management of its business pursuant to § 1107 and § 1108 of the United States Bankruptcy Code.

The Debtor is a manufacturer and supplier of biological materials and services essential for the use and manufacture of diagnostic tests and the discovery, development and commercial production of pharmaceuticals. Its diverse customer base includes clinical and government laboratories, pharmaceutical and biotechnology companies and research organizations in industry and academia. Many of its customers operate in highly regulated segments of the life sciences industry with strict quality standards, such as blood testing, biopharmaceutical manufacturing and clinical diagnostic laboratories.

The Debtor's business has two primary segments: Diagnostic Products, which include laboratory products and diagnostic intermediates, and Biopharmaceutical Products, which include discover products and services and bioprocessing products. Its laboratory products include reference tests used to monitor the performance of laboratory tests for viruses that cause serious infectious diseases, in order to detect errors and thereby lower the risk of reporting inaccurate results. Its diagnostics intermediates are the materials used to produce diagnostic test kits, such as human and animal plasma-based components and biological products. Its diagnostic products are sold to hospital laboratories, independent clinical laboratories, public health laboratories, blood banks, manufacturers of diagnostic test kits and regulatory agencies that oversee the manufacture and use of such test kits.

The Debtor is a publicly held entity whose shares are traded on the Pink Sheets under the symbol (SRLSQ.PK). At the present time the Debtor has approximately 222 employees.

**B. The LOI.**

As previously stated, the Debtor has been actively negotiating with various investor groups with respect to selecting a plan sponsor. After several weeks of negotiations, on Wednesday,

1 August 9, 2006, the Debtor requested the most serious potential bidders to submit their best written  
2 offer by 9:00 a.m. Pacific Time on Monday, August 14, 2006. This process culminated with the  
3 execution, on August 16, 2006, of the LOI with the Investor Group, a copy of which is attached as  
4 Exhibit "1" to the Cresci Declaration. Of the various written offers received to date, the Debtor  
5 believes the LOI with the Investor Group to be the best proposal for the Debtor and its stakeholders,  
6 both in terms of the overall economic package as well as likelihood of consummation. The following  
7 are the material terms of the LOI:

- 8 Amount: Up to \$25 million, to be advanced in two tranches at up to three closings,  
9 as follows:
- 10 • Tranche A – up to \$25 million, of which \$15 million shall be  
11 made available upon satisfaction of the closing conditions for the  
12 first Tranche A closing and up to \$10 million shall be made  
13 available at any time up to six months following the first Tranche  
14 A closing but, in any event, prior to confirmation of Debtor's plan  
15 of reorganization
  - 16 • Tranche B – in an aggregate principal amount equal to the  
17 aggregate principal amount of Tranche A Notes outstanding at the  
18 time of confirmation of Debtor's plan of reorganization, to be  
19 issued in exchange for the claims represented by the Tranche A  
20 Notes. The definitive financing agreement would include a  
21 contractual right (exercisable at the time of confirmation of  
22 Debtor's plan of reorganization) in favor of the Investor Group to  
23 exchange the Tranche B Notes for the claims represented by the  
24 Tranche A Notes.
- 25 Securities: Tranche A - Senior Secured Notes (the "Tranche A Notes")  
26 Tranche B - Senior Secured Convertible Notes (the "Tranche B Notes")
- 27 Interest Rate: 9% monthly in cash, in arrears
- 28 Facility Fee: \$200,000, payable in full at the first closing of issuance of the Tranche A  
Notes
- Maturity: 60 months from the first Tranche A closing (i.e. Tranche A Notes held by  
any member of the Investor Group who does not elect to complete the  
Tranche B closing survive confirmation of the Debtor's plan of  
reorganization).

1 Conversion: Tranche B Notes will be convertible into common stock of the Debtor at  
2 any time prior to maturity at the option of the Investor Group at an initial  
3 conversion price of \$5.50 per share. Tranche A Notes are not  
4 convertible.

5 Antidilution  
6 Protection: Direct ratchet to the price of any equity or equity-related securities issued  
7 or sold at any time prior to maturity of the Tranche B Notes, with  
8 standard carveout for equity incentive awards to employees and  
9 consultants (i.e. options or restricted stock) approved by the Debtor's  
10 Board of Directors. This price protection would also apply to the time  
11 period between the first closing of Tranche A and confirmation of the  
12 Debtor's plan of reorganization and would be effected through a  
13 reduction of the conversion price of the Tranche B Notes at the time of  
14 issuance.

15 Redemption: The Tranche B Notes will be non-callable for the first three years after  
16 issuance. Thereafter, the Tranche B Notes will be redeemable at any time at  
17 the option of the Debtor at a redemption price equal to the outstanding  
18 principal amount thereof, together with interest at the coupon rate to the  
19 redemption date, plus a make-whole premium to be agreed. The Tranche  
20 A Notes are not callable by the Debtor.

21 Security: Notes will be issued pursuant to Section 364(b)(3) of the Bankruptcy  
22 Code and will be secured by a perfected senior lien on all assets of the  
23 Debtor other than Debtor's West Bridgewater MA facility

24 Priority: Notes will be senior in right of payment to all indebtedness of the Debtor  
25 except (i) up to \$10 million of senior term debt incurred by Debtor in lieu  
26 of issuing Tranche A Notes at a second Tranche A closing, (ii) mortgage  
27 debt on Debtor's West Bridgewater, MA facility and (iii) capital lease  
28 obligations of Debtor currently in effect; provided, however, that as the  
obligations referred to in clauses (ii) and (iii) of this section are paid by  
Debtor, any reborrowings with respect to those obligations would be  
subordinated to the Notes.

Limit on Senior  
Debt: Prior to consummation of the Debtor's plan of reorganization, and after  
giving effect to the draw down on Tranche A, Debtor's senior funded  
debt (i.e. excluding (i) mortgage debt on the Debtor's West Bridgewater,  
MA facility, (ii) capital lease obligations of Debtor currently in effect and  
(iii) existing sub debt of \$4.0 million) shall not exceed the excess of \$10  
million over the aggregate amount of Tranche A Notes (if any) issued at  
the second Tranche A closing. Subsequent to consummation of Debtor's  
plan of reorganization, the sum of Debtor's senior funded indebtedness  
(i.e. excluding (i) mortgage debt on the Debtor's West Bridgewater, MA  
facility, (ii) capital lease obligations of Debtor currently in effect and (iii)  
existing sub debt of \$4.0 million) plus the aggregate outstanding  
principal amount of the Notes shall not exceed \$25 million.

1 Use of  
2 Proceeds: General working capital purposes, including payment of existing bank  
3 debt, payment of allowed administrative claims, payment of allowed pre-  
4 petition unsecured creditor claims and payment of existing allowed  
5 subordinated debt; provided, however that the proceeds from the first  
6 Tranche A closing would first be applied (concurrently with the first  
7 Tranche A closing) to the repayment in full of the senior bank facilities  
8 existing at the time of the first Tranche A closing, with release of all liens  
9 and return of any excess cash collateral securing such facilities

6 Preemptive  
7 Rights: Holders of the Notes will have the preemptive right exercisable pro rata  
8 in accordance with their holdings of the Notes, to purchase any debt  
9 (other than debt obtained by Debtor in lieu of issuing additional Tranche  
10 A Notes at a second Tranche A closing), equity or equity-related  
11 securities offered for sale by the Debtor, with standard carveout for  
12 equity incentive awards to employees and consultants (i.e. options or  
13 restricted stock) approved by the Debtor's Board of Directors. The  
14 preemptive rights would also apply to the time period between the first  
15 closing of Tranche A and confirmation of the Debtor's plan of  
16 reorganization.

12 Return on Sale: In the event that the Debtor consummates a sale of all or substantially all  
13 of its assets or common stock during the period of time between the first  
14 closing of Tranche A and confirmation of the Debtor's plan of  
15 reorganization at an effective price per share of common stock of at least  
16 \$5.50, then concurrently with the closing of such transaction, the Investor  
17 Group would, in the aggregate receive a cash payment determined by the  
18 following formula:  $(A/B) \times (C-B)$

16 Where A = the aggregate principal amount of Tranche A Notes then  
17 outstanding;

18 B = \$5.50; and

19 C = the effective price per share of common stock in the sale.

20 As an example, if a sale of the Debtor occurs at an effective price per  
21 common share of \$7, and at the time of sale Debtor has \$16m of Tranche  
22 A Notes outstanding, then concurrently with the closing of the sale  
23 transaction, Debtor would make an aggregate cash payment to the  
24 Investor Group of approximately \$4.4 million.

23 Management  
24 Rights: The Investor Group will be entitled to designate one person for election  
25 to the Debtor's board of directors

1 Conditions to  
2 First Closing  
(Tranche A):

The closing of Tranche A would be subject to the following conditions:

- Completion of due diligence to the satisfaction of the Investor Group
- Completion of definitive transaction documents satisfactory in form and substance to the Investor Group
- Entry of a final order authorizing the issuance and sale of the Notes, and absence of pending appeals of same
- Accuracy of the Debtor's representations and warranties
- Entry of a customary Financing Order containing a full waiver under Section 506(c) of the Bankruptcy Code for the Investor Group as DIP lenders
- Debtor shall have developed a plan of reorganization to be funded, in part, with the proceeds of the Notes and otherwise acceptable to the Investor Group

All of the conditions to closing to First Closing must be satisfied or waived by the parties as of immediately prior to the bankruptcy court hearing to approve the financing, with the only remaining condition to the First Closing (including draw of Tranche A) being approval by the bankruptcy court.

15 Conditions to  
16 Second Closing  
(Tranche A):

- Continued satisfaction of all conditions to the First Closing
- Absence of a material adverse change to the business, operations or financial condition of the Debtor subsequent to the First Closing

17 Conditions to  
18 Tranche B  
19 Closing:

- Continued satisfaction of all conditions to the First Closing
- Absence of a material adverse change to the business, operations or financial condition of the Debtor subsequent to the First Closing
- Confirmation of Debtor's plan of reorganization

21 Securities Act  
22 Exemption or  
Registration:

Debtor and Investor Group to work collaboratively to structure the financing in order to obtain an exemption from registration under the Securities Act for the public offer and sale of the shares of common stock issuable upon conversion of the Tranche B Notes. Accordingly, Debtor will seek a bankruptcy court determination that the Tranche B Notes issued in connection with the Debtor's plan of reorganization (as well as the shares of common stock issuable upon conversion of the Tranche B Notes) are exempt from registration under the Securities Act of 1933, as amended (the "1933 Act") pursuant to Bankruptcy Code Section 1145.

1 In the event that Debtor is not able to obtain such bankruptcy court  
2 determination, or if the Investors determine that the resale by the Investor  
3 Group of the Tranche B Notes and/or the shares of common stock  
4 issuable upon exercise of the Tranche B Notes must be registered under  
5 the 1933 Act, Debtor shall, promptly at such time that Debtor is once  
6 again current in its periodic filings with the Securities and Exchange  
7 Commission, file a registration statement under the 1933 Act for the  
8 registration of the resale of the Tranche B Notes and the shares of  
9 common stock issuable upon conversion of the Tranche B Notes, and  
10 shall comply with all other applicable laws relating to such registration  
11 (including, if required, qualification of an indenture with respect to the  
12 Tranche B Notes under the Trust Indenture Act of 1939, as amended),  
13 and shall use its best efforts to cause such registration statement to be  
14 declared effective by the Securities and Exchange Commission within  
15 ninety days following the date of consummation of Debtor's plan of  
16 reorganization but in no event later than February 27, 2007. If a required  
17 registration statement has not been declared effective by the earlier of  
18 such date or February 28, 2007, or if a required indenture has not been  
19 qualified by the earlier of such date or February 28, 2007, Debtor shall  
20 pay liquidated damages to the Investors in the form of additional interest  
21 on the Tranche B Notes, the interest rate on which shall be increased by  
22 0.50% for each month after such date, effective on the first day of each  
23 such month, until a registration statement has been declared effective  
24 and, if required, an indenture has been qualified, until the interest rate on  
25 the notes is equal to 15%. At such time the interest rate on the Tranche B  
26 Notes shall be fixed at 15% for the remaining term of the Tranche B  
27 Notes, except as provided below. In addition, if at the time the interest  
28 rate on the Tranche B Notes becomes fixed at 15%, a required  
registration statement or a required indenture has not been declared  
effective, the Investor Group shall have the right to require that Debtor  
repurchase their Tranche B Notes at a purchase price equal to the  
principal amount thereof plus interest (including additional interest) to  
the purchase date. Upon effectiveness of a required registration  
statement and, if required, qualification of an indenture, the foregoing  
redemption right shall terminate and the interest rate on the Tranche B  
Notes shall be reduced to 9% for the remainder of the term of the  
Tranche B Notes.

23 Representations  
24 , Warranties,  
25 Covenants and  
26 Events of  
27 Default:

Customary for financings of this type (no covenants which would cause  
acceleration prior to confirmation of the Debtor's plan of reorganization  
(other than payment default))

1 Legal Fees and  
2 Due Diligence  
3 Expenses:

4 Upon acceptance of this Term Sheet, subject only to entry by the  
5 bankruptcy court of an order approving the payments and procedures  
6 contemplated by this Term Sheet (such order to be sought by Debtor on a  
7 time-shortened basis), the Debtor will be obligated to pay the reasonable  
8 and actual out-of-pocket expenses of Investor Group's counsel in  
9 connection with the negotiation, documentation, issuance and sale of the  
10 Notes. Such legal expenses shall be subject to a payment (not accrual)  
11 cap of \$50,000 per month, provided that no such cap shall apply to  
12 reasonable legal fees and expenses of one law firm and other reasonable  
13 due diligence expenses incurred by the Investor Group in connection  
14 with their due diligence and negotiations prior to the First Closing.  
15 Notwithstanding the foregoing, in the event that the First Closing does  
16 not occur, the Debtor's obligations under this section will be limited to  
17 the payment of (i) up to \$100,000 of the reasonable and actual fees (plus  
18 all reasonable and actual out-of-pocket expenses, without reference to the  
19 \$100,000 cap) of Investor Group's counsel in connection with the  
20 negotiation, documentation, issuance and sale of the Notes, and (ii) up to  
21 \$35,000 of the reasonable and actual out-of-pocket due diligence  
22 expenses incurred by the Investor Group in connection with their due  
23 diligence and negotiations.

24 Cooperation:

25 Debtor will work with the Investor Group to optimize the bankruptcy  
26 process, will provide the Investor Group, their counsel and other  
27 representatives with full access to Debtor's properties, personnel,  
28 contracts, books, records, and other documents and data to enable the  
Investor Group to conduct their due diligence examination of Debtor and  
will develop its plan of reorganization in consultation with and with the  
participation of the Investor Group

Breakup Fee:

\$1.25 million, payable if Debtor accepts a superior proposal to that  
contemplated by this Term Sheet. The breakup fee will be payable by  
Debtor out of the proceeds of such superior proposal (only in the event  
that the closing contemplated by such superior proposal occurs).

**C. The Debtor's Proposed Plan and Refinance of the Senior Secured Lenders' Claim.**

It has been the Debtor's objective from the inception of this case to propose a Chapter 11 plan that provides for a 100% distribution to all of its holders of allowed claims that are not subject to subordination. The Debtor has acknowledged from case inception that financing transactions would be required to accomplish this goal. The Debtor has also agreed with its senior secured lenders to use its best efforts to refinance their debt by the end of September 2006. The Debtor believes that the

1 proposed financing will enable the Debtor to achieve both of these goals and also minimize the  
2 dilution to its shareholders.

3 **III.**

4 **THE BREAKUP FEE, LEGAL FEES AND DUE**

5 **DILIGENCE EXPENSES SHOULD BE APPROVED**

6 **A. Legal Fees and Due Diligence Expenses**

7 As stated, the LOI requires that the Debtor pay the reasonable and actual out-of-pocket legal  
8 and due diligence expenses of the Investor Group's counsel in connection with the negotiation,  
9 documentation, issuance and sale of the notes contemplated by the LOI . In the event that the  
10 transaction does not close, the reasonable and actual legal fees will be limited to \$100,000 and the  
11 reasonable and actual due diligence expenses will be limited to \$35,000. The Debtor hereby requests  
12 that the Court allow the Debtor to pay these legal fees and due diligence expenses pursuant to the terms  
13 of the LOI.

14 Courts have approved of a bidder's actual attorney fees and due diligence expenses as an  
15 administrative expense under Bankruptcy Code Section 503(b)(1). In In re Tama Beef Packing, Inc.,  
16 290 B.R. 90 (8th Cir. BAP 2003) (Tama I), the trustee had agreed to pay the attorney fees and expenses  
17 of the initial stalking-horse bidder in connection with sale of debtor's rights under a commercial lease.  
18 The Panel held that the attorney fees and expenses of the bidder conferred benefit on the estate and  
19 should have been allowed as administrative expense claim against estate. The panel held that the  
20 bidder's initiation of and participation in competitive bidding for the purchase of a bankruptcy estate  
21 asset (an unexpired lease) conferred a benefit to the estate under the terms of 11 U.S.C. § 503(b)(1),  
22 and, therefore, such bidder was entitled to an administrative expense claim for its actual and necessary  
23 expenses, *i.e.*, attorney's fees and due diligence expenses.

24 In a subsequent appeal, In re Tama Beef Packing, Inc., 321 B.R. 496, 498 (8th Cir.BAP 2005)  
25 (Tama II), the Panel clarified that the claim of an unsuccessful stalking horse bidder (AgriProcessors)  
26 for attorney fees and costs was distinguished from a "breakup fee." Rather, an unsuccessful stalking  
27

1 horse bidder's claim for attorney fees and costs should merely be analyzed under Section 503(b) as an  
2 administrative claim.

3 The essential basis for our holding in *Tama I* was that the fees and expenses  
4 AgriProcessors incurred through its participation in the competitive purchase of an estate  
5 asset qualified as administrative expenses because they met the requirements of § 503(b).  
6 AgriProcessors's claim for those expenses arose from a transaction with the estate and that  
7 transaction conferred a benefit to the estate. *Tama I*, 290 B.R. at 98-100. The Panel also-  
8 unfortunately-discussed AgriProcessors's fee in terms of a "break-up fee" and found that  
9 AgriProcessors's claim met the nine factors set forth in *Calpine Corp. v. O'Brien*  
10 *Environmental Energy, Inc.* ( *In re O'Brien Environmental Energy, Inc.*), 181 F.3d 527,  
11 527-29 (3rd Cir.1999), used to determine the allowance of break-up fees as administrative  
12 expenses. *Tama I*, 290 B.R. at 98-100.

13 With this appeal, however, the Panel has an opportunity to revise its analysis, and we  
14 conclude that the break-up fee discussion was superfluous. AgriProcessors's claim was not  
15 a break-up fee; rather, it was simply a claim for an administrative expense which occurred  
16 in the context in which break-up fees often surface, *i.e.*, in conjunction with a "stalking  
17 horse's" unsuccessful bid. \*\*\*

18 Consequently, the court's analysis on remand of AgriProcessors's claim as a break-up  
19 fee was unnecessary, and, unfortunately, led to an erroneous ruling limiting  
20 AgriProcessors's claim. Further remand at this juncture is unnecessary, though, inasmuch  
21 as the court did find on remand that AgriProcessors had incurred reasonable fees and  
22 expenses of \$45,014.99. (App. at 519) The U.S. Trustee does not dispute that finding, and  
23 thus AgriProcessors Inc., is entitled to an administrative expense claim in the amount of  
24 \$45,014.99.

25 Tama II, 321 B.R. at 497-498.

26 Thus, an unsuccessful stalking horse bidder's claim for attorney fees and costs is analyzed  
27 under Section 503(b), *i.e.*, "whether (1) the expense arose from a transaction with the estate, and (2)  
28 whether it benefited the estate in some demonstrable way." Tama I, 290 B.R. at 96. The court found  
that the attorney fees and costs met both of these standards and therefore should be allowed as an  
administrative expense.

The Ninth Circuit employs effectively the same test for the determination of an administrative  
claim. "To be deemed an administrative expense, the claim must have arisen from a transaction with  
the debtor in possession, and directly and substantially benefited the estate." In re Ybarra, 424 F.3d  
1018, 1025 (9<sup>th</sup> Cir. 2005). The purpose of administrative priority status is to encourage third parties to  
contract with the bankruptcy estate for the benefit of the estate as a whole. Ybarra, 424 F.3d at 1026.

1 Here, the “reasonable legal fees and expenses of one law firm and other reasonable due  
2 diligence expenses incurred by the Investor Group in connection with their due diligence and  
3 negotiations easily meets the Ybarra test. First, the LOI constitutes a post-petition transaction with the  
4 debtor-in-possession. The LOI specifically provides that the “Legal Fees and Due Diligence  
5 Expenses” section of the Term Sheet is intended to be binding agreement of the Investor Group and the  
6 Debtor.

7 Second, the claim arises from a transaction which directly benefits the estate. The transaction  
8 provides for financing in the amount of \$25 million, the proceeds of which will be used *inter alia* to  
9 pay existing bank debt, payment of allowed administrative claims, payment of allowed pre-petition  
10 unsecured creditor claims and payment of existing allowed subordinated debt. The transaction will in  
11 part form the basis of a Chapter 11 Plan and the Debtor’s exit from bankruptcy. Clearly, the  
12 transaction directly and substantially benefits the estate, and therefore meets the requirements of  
13 Section 503(b)(1) and Ybarra.

14 Based on the above, the Debtor requests that the Court approve the provisions of the LOI with  
15 respect to the “Legal Fees and Due Diligence Expenses.”

16 **B. The “Breakup Fee” Is Within the Debtor’s Business Judgment.**

17 The LOI also provides for the payment of a \$1.25 million breakup fee to the Investor Group.  
18 The Debtor understands that this breakup fee, which represents 5% of the proposed financing, reflects  
19 the high end of the accepted range of breakup fees for financing and sale transactions. The Debtor’s  
20 Board of Directors determined to approve the breakup fee only after its representatives had actively  
21 and aggressively negotiated this and the other deal protection provisions until the point where it  
22 concluded that (i) the terms it had negotiated represented the best terms that it would be able to obtain  
23 through negotiations with the Investor Group before submission of the LOI to the Bankruptcy Court,  
24 and (ii) the terms offered by the Investor Group, taken as a whole, represented the best financing  
25 proposal for the Debtor and all of its stakeholders, both in terms of the overall economic package as  
26 well as likelihood of consummation.

1 In the proper circumstances, an unsuccessful “stalking horse” bidder should be entitled to  
2 something more than reimbursement of actual costs and expenses that resulted in a demonstrable  
3 benefit to the estate. In re President Casinos, Inc. 314 B.R. 786, 788 (Bankr.E.D.Mo. 2004). “A  
4 break-up fee that is greater than the actual cost and expenses of the prospective purchaser should  
5 constitute a fair and reasonable percentage of the proposed purchase price, and should be reasonably  
6 related to the risk, effort, and expenses of the prospective purchaser.” President Casinos, 314 B.R.  
7 at 789.

8 The Debtor is unaware of any controlling authority in the Ninth Circuit establishing the  
9 standard for the approval of breakup fees. Furthermore, outside the Ninth Circuit, there is no single  
10 established test.

11 In In re Integrated Resources, Inc., 147 B.R. 650, 657 (S.D.N.Y. 1992) *appeal dismissed* 3 F.3d  
12 49 (2d Cir. 1993), the District Court adopted the “business judgment” rule that was also applicable  
13 outside of bankruptcy. The Court observed that “Break-up fee arrangements outside bankruptcy are  
14 presumptively valid under the business judgment rule.” In re Integrated Resources, Inc., 147 B.R. at  
15 657 *citing* Cottle v. Storer Communications, Inc., 849 F.2d 570 (11th Cir. 1988) (\$29 million  
16 termination fee protected by business judgment rule); Samjens Partners I v. Burlington Indus., 663  
17 F.Supp. 614 (S.D.N.Y.1987) (break-up fee protected by business judgment rule). See also, Mark F.  
18 Hebbeln, The Economic Case For Judicial Deference To Break-Up Fee Agreements In Bankruptcy, 13  
19 Bankr. Dev. J. 475, 502-505 (1997) (unless the court determines that a break-up fee arrangement is  
20 tainted with self-dealing, fraud, or bad faith, courts should accord “substantial deference” to the  
21 fiduciary duty of the debtor’s board members who approved the terms of the break-up fee).

22 Courts have approved a wide range of breakup fees, as a percentage of the purchase price. See  
23 e.g., In re Paging Network, Inc., Case No. 00-3098(GMS) (D.Del) (7.24% break-up fee is reasonable);  
24 In re Philip Servs. Corp., Case No. 03-37718 (Bankr.S.D. Tex. June 2003) (14.29% break-up fee of \$5  
25 million for a \$35 million purchase price is reasonable); In re Hupp Indus., Inc., 140 B.R. 191, 193-94  
26 (Bankr.N.D.Ohio 1992) (3.16% break-up fee of \$150,000 for a \$4.75 million purchase price is  
27

1 reasonable); Gey Associates General Partnership v. 310 Assocs., L.P., No. 02 Civ.0710 (SHS), 2002  
2 WL 31426344 (S.D.N.Y. Oct.29, 2002) (3.23% break-up fee of \$100,000 for a \$3.1 million purchase  
3 price is reasonable); In re FSC Corp., Case No. 00-B-04659 (Bankr.N.D.Ill.2000) (3.4% break-up fee  
4 is reasonable); In re O'Brien Envtl. Energy, Inc., 181 F.3d 527, 536 (3d Cir.1999) (break-up fee of  
5 approximately 4% is reasonable in relation to the purchase price).

6 The proposed topping fee of \$1.25 million represents approximately 5 percent of the \$25  
7 million deal and is therefore within the range of topping fees approved by the cases cited above. Based  
8 upon the foregoing, the Debtor respectfully requests that the Court approve the breakup fee as set forth  
9 above.

10 **IV.**

11 **CONCLUSION**

12 For the reasons set forth herein, the Debtor requests that the Court enter an order (1) approving  
13 the proposed breakup fee as provided in the LOI, (2) approving the payment of legal fees and due  
14 diligence expenses of The Investor Group as provided in the LOI, and (3) setting a final hearing on the  
15 Debtor's financing motion.

16 DATED: August 17, 2006

**WINTHROP COUCHOT  
PROFESSIONAL CORPORATION**

17 By: \_\_\_\_\_ /s/  
18 Paul J. Couchot  
19 Peter W. Lianides  
20 General Insolvency Counsel for SeraCare Life  
21 Sciences, Inc., Debtor and Debtor-in-Possession

1 **DECLARATION OF ROBERT CRESCI**

2 I, Robert Cresci, declare and state as follows:

3 1. I am the Chairman of the Board of Directors of SeraCare Life Sciences, Inc., the debtor  
4 in possession herein (the "Debtor"). I am also a member of the committee of independent directors  
5 that was formed by a vote of the full board of directors at the same time that the board asked certain  
6 members of its former management team to resign their positions as board members in connection  
7 with the termination of their employment or consulting relationships with the Debtor. I am over the  
8 age of eighteen and I am a resident of New York. The facts stated herein are within my personal  
9 knowledge and if called upon to testify to the same I could and would testify competently thereto.

10 2. I have more than 33 years of direct investment and management experience including  
11 investment and valuation analysis, turnaround work and development of corporate strategies as well as  
12 merger and acquisitions. I have served as a company director, lead director or chairman of the board  
13 of more than 25 companies. My current position is Managing Director of Pecks Management Partners  
14 Ltd. where I am directly responsible for the selection, valuation and negotiation of investments, and  
15 the monitoring of those investments for portfolios totaling approximately \$150 million. I hold an  
16 MBA in finance from Columbia University and a BS in Engineering from the United States Military  
17 Academy at West Point. I served four years on active duty as an infantry officer, two of them in  
18 Vietnam.

19 3. I have completed financings and mergers in a broad range of industries. They include  
20 manufacturing, airlines, financial services, healthcare, biotech, steel, education, electronics,  
21 entertainment and restaurant industries among others. Frequently I have had to oversee a  
22 recapitalization or "turnaround" of portfolio companies to include replacement of key operating  
23 personnel, developing an exit strategy, or, in more than one instance, serving as interim CEO while the  
24 Company was restructured or a suitable buyer located.

25 4. I have been personally responsible for and involved in the negotiations with parties that  
26 have expressed an interest in becoming the financial sponsor for the Debtor's Chapter 11 plan (the  
27

1 “Plan Sponsor”). I have engaged in good faith and arm’s-length negotiations with several potential  
2 financing sources, including with representatives of the Ad Hoc Equity Committee (“AHEC”) and  
3 representatives of Cohanzick Management, LLC, Robeco Investment Management, Fairfield  
4 Greenwich Group, Foxhill Capital Partners, LLC, Gruber & McBain Capital Management, Seven  
5 Bridges and Triage Capital Management, LP (the “Investor Group”), .

6 5. As a result of my negotiations with the above parties, on August 16, 2006, the Debtor  
7 entered into that certain letter of intent and term sheet with the Investor Group (collectively, the  
8 “LOI”) providing for up to a \$25 million convertible loan with a conversion price of \$5.50 per share.  
9 A true and correct copy of the LOI is attached hereto as exhibit “1” and incorporated herein. This  
10 conversion price represents a premium to the current market price of the Debtor’s common stock. Of  
11 the various written offers received to date, I believe the LOI with the Investor Group represents the  
12 best financing proposal for the Debtor and all of its stakeholders, both in terms of the overall economic  
13 package as well as likelihood of consummation. The LOI provides for an initial secured loan of  
14 \$15,000,000 for the purpose of, among other things, paying off the remaining balance of the Debtor’s  
15 senior secured lenders loans. The LOI contemplates that the initial \$15 million secured loan could be  
16 increased to up to \$25 million and would be retired at plan confirmation with a convertible loan of up  
17 to the amount of the secured loan. Both loans will have an interest rate of 9% per annum and a  
18 60-month maturity date. Based on my research, I believe the Investor Group has funds under its  
19 management to easily consummate the transactions contemplated by the LOI.

20 6. I believe that the \$25 million proposal set forth in the LOI would, if consummated,  
21 allow the Debtor to propose a plan of reorganization that would provide a 100% distribution to all  
22 holders of allowed non-subordinated claims and also allow its existing shareholders to retain their  
23 interest subject to the dilution that would result by the securities issued to the Investor Group. I also  
24 believe the \$5.50 conversion price will minimize the dilution to the Debtor’s existing shareholders, as  
25 such price represents a premium to the current market price of the Debtor’s common stock.



1 **DECLARATION OF PAUL J. COUCHOT**

2 I, Paul Couchot, declare and state:

3 1. I am an attorney and shareholder with the law firm of Winthrop Couchot Professional  
4 Corporation, general insolvency counsel to SeraCare Life Sciences, Inc., a California Corporation, the  
5 debtor and debtor-in-possession herein (the "Debtor").

6 2. On March 22, 2006, the Debtor filed a petition for relief under Chapter 11 of the  
7 Bankruptcy Code. On August 16, 2006, the Debtor entered into a letter of intent and accompanying  
8 term sheet (collectively, the "LOI") with a syndicate of investors consisting of funds managed by  
9 Cohanzick Management, LLC, Robeco Investment Management, Fairfield Greenwich Group, Foxhill  
10 Capital Partners, LLC, Gruber & McBain Capital Management, Seven Bridges and Triage Capital  
11 Management, LP (collectively, the "Investor Group").

12 3. The Debtor has been actively negotiating with various investor groups with respect to  
13 selecting a plan sponsor. After several weeks of negotiations, on Wednesday, August 9, 2006, the  
14 Debtor requested the most serious potential bidders to submit their best written offer by 9:00 a.m.  
15 Pacific Time on Monday, August 14, 2006. This process culminated with the execution, on August 16,  
16 2006, of the LOI with the Investor Group. Of the various written offers received to date, the Debtor  
17 believes the LOI with the Investor Group to be the best proposal for the Debtor and its stakeholders,  
18 both in terms of the overall economic package as well as likelihood of consummation.

19 4. The LOI provides for the payment of a \$1.25 million breakup fee to the Investor Group.  
20 The Debtor understands that this breakup fee, which represents 5% of the proposed financing, reflects  
21 the high end of the accepted range of breakup fees for financing and sale transactions. The Debtor's  
22 Board of Directors determined to approve the breakup fee only after its representatives had actively and  
23 aggressively negotiated this and the other deal protection provisions until the point where it concluded  
24 that (i) the terms it had negotiated represented the best terms that it would be able to obtain through  
25 negotiations with the Investor Group before submission of the LOI to the Bankruptcy Court, and (ii) the  
26 terms offered by the Investor Group, taken as a whole, represented the best financing proposal for the  
27

1 Debtor and all of its stakeholders, both in terms of the overall economic package as well as likelihood  
2 of consummation.

3 5. The breakup fee will be payable if Debtor accepts a superior proposal to that  
4 contemplated by the Term Sheet. The breakup fee will be payable by Debtor out of the proceeds of  
5 such superior proposal (only in the event that the closing contemplated by such superior proposal  
6 occurs). Furthermore, the breakup fee would not be payable if definitive loan documents are not  
7 executed by September 30, 2006 unless the failure to do so is because the Debtor accepted a superior  
8 proposal. The Investor Group has also confirmed the Debtor's understanding that no breakup fee  
9 would apply if the Investor Group did not negotiate in good faith or otherwise discontinued  
10 negotiations with the Debtor, irrespective of whether the Debtor subsequently accepted a superior offer.

11 I declare that the foregoing is true and correct under the penalty of perjury.

12 Executed this 17th day of August 2006, in Newport Beach, California.

13 \_\_\_\_\_ /s/  
14 Paul J. Couchot

1 **CERTIFICATE OF SERVICE**

2 I, Nadine Lorenzo, declare as follows:

3 I am employed in the County of Orange, State of California; I am over the age of eighteen years  
4 and am not a party to this action; and my business address is 660 Newport Center Drive, Fourth Floor,  
Newport Beach, California 92660, in said County and State.

5 On **August 17, 2006**, I served the following document:

6 **DEBTOR’S MOTION FOR ORDER (1) APPROVING BREAKUP FEE, (2) PAYMENT**  
7 **OF LEGAL FEES AND DUE DILIGENCE EXPENSES, AND (3) SETTING HEARING**  
8 **ON MOTION FOR APPROVAL OF SECURED FINANCING PURSUANT TO**  
9 **SECTION 364; MEMORANDUM OF POINTS AND AUTHORITIES;**  
10 **DECLARATIONS IN SUPPORT THEREOF**

11 on each of the interested parties (stated on the attached service list/as follows):

12 **SEE ATTACHED SERVICE LIST**

13 by the following means of service:

14 <input checked="" type="checkbox"/>	15 <b>BY FACSIMILE:</b> On the above-mentioned date, from Newport Beach, California, I caused 16 each such document to be transmitted by facsimile machine to the parties and numbers 17 indicated above. To the best of my knowledge, the transmission was reported as complete, 18 and no error was reported by the facsimile machine. A copy of the transmission record is 19 maintained by our office.
20 <input checked="" type="checkbox"/>	21 <b>BY ELECTRONIC MAIL:</b> On the above-mentioned date, from Newport Beach, 22 California, I caused each such document to be transmitted electronically to the parties at the 23 e-mail address indicated above. To the best of my knowledge, the transmission was reported 24 as complete, and no error was reported that the electronic transmission was not completed. 25 A return receipt was requested at the time of the transmission of each such document and I 26 did not receive a notice of failure of receipt of each such document.
27 <input checked="" type="checkbox"/>	28 I am employed in the office of Winthrop Couchot Professional Corporation. Peter W. Lianides is a member of the bar of this Court.
29 <input checked="" type="checkbox"/>	30 <b>(FEDERAL)</b> I declare under penalty of perjury that the foregoing is true and correct.

Executed on **August 17, 2006**, at Newport Beach, California.

31  
32 \_\_\_\_\_/s/  
33 Nadine Lorenzo

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