

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

Dex Liquidating Co. (f/k/a Dextera  
Surgical Inc.),<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-12913 (KJC)

**Hearing Date: August 22, 2018 at 10:00 a.m. (ET)**

**Objection Deadline: July 19, 2018 at 4:00 p.m. (ET)**

**MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER FURTHER  
EXTENDING THE DEBTOR'S EXCLUSIVE PERIODS TO FILE  
A CHAPTER 11 PLAN AND SOLICIT VOTES THEREON**

The above-captioned debtor and debtor-in-possession (the "Debtor"), by and through its undersigned counsel, hereby files this motion (the "Motion"), pursuant to section 1121(d) of title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (the "Bankruptcy Code"), for entry of an order: (a) further extending the period in which the Debtor has the exclusive right to file a chapter 11 plan (the "Exclusive Filing Period") by 91 days, through and including October 8, 2018; and (b) extending the period in which the Debtor has the exclusive right to solicit acceptances of the chapter 11 plan (the "Exclusive Solicitation Period," and together with the Exclusive Filing Period, the "Exclusive Periods") by 91 days, through and including December 10, 2018. In support of this Motion, the Debtor respectfully represents as follows:

**Jurisdiction and Venue**

1. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This matter is a core proceeding within

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<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 7832. The Debtor's address is 900 Saginaw Drive, Redwood City, CA 94063.

the meaning of 28 U.S.C. § 157(b)(2). Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105(a) and 1121(d) of the Bankruptcy Code.

### **Background**

3. On December 11, 2017 (the “Petition Date”), the Debtor filed a voluntary petition for relief with the Court under chapter 11 of the Bankruptcy Code, commencing this bankruptcy proceeding (the “Chapter 11 Case”). The Debtor continues to operate its business and manage its property as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in the Chapter 11 Case and no official committees have been appointed.

4. As of the Petition Date, the Debtor was an innovative medical device company that designed and manufactured proprietary stapling devices that enable the advancement of minimally invasive surgical procedures.

5. Additional information regarding the Debtor’s business and the reasons for filing the Chapter 11 Case is set forth in the *Declaration of Julian Nikolchev in Support of Dextera Surgical Inc.’s First Day Motions* [Docket No. 2]

6. On December 11, 2017, the Debtor entered into an asset purchase agreement to sell substantially all of its assets (the “Sale”) to Aesculap, Inc. or its designee (the “Buyer”).

7. On January 24, 2018, the Court approved the Sale and entered the *Order (WITH REVISIONS) (A) Approving Asset Purchase Agreement With Aesculap, Inc., (B) Authorizing Sale of Debtor’s Assets Free and Clear of Interests; (C) Authorizing Assumption and Assignment of Certain of the Debtor’s Executory Contracts; (D) Granting Related Relief* [Docket No. 160] (the

“Sale Order”). The closing of the Sale to the Buyer pursuant to the Sale Order occurred on February 20, 2018.

8. On February 14, 2018, the Court entered the *Order (I) Establishing Deadlines for Filing Proofs of Claim, Including 503(b)(9) Claims, and (II) Approving the Form and Manner of Notice Thereof* [Docket No. 181], pursuant to which the Court established, *inter alia*, a general claims bar date of April 11, 2018 (the “General Bar Date”).

9. Approximately 132 proofs of claim (“Proofs of Claim”) were filed in this Chapter 11 Case.

10. On April 18, 2018, the Debtor filed the *Debtor’s Chapter 11 Plan of Liquidation* (as may be amended, the “Plan”) and the *Disclosure Statement Relating to Debtor’s Chapter 11 Plan of Liquidation* (as may be amended, the “Disclosure Statement”) [Docket Nos. 249 and 250, respectively].

11. The proposed Plan is a liquidating plan that provides for the following eight (8) Classes of Claims or Interests: (i) Class 1 (Priority Non-Tax Claims); Class 2 (Secured Claims); Class 3 (General Unsecured Claims); Class 4 (Series B Convertible Preferred Stock); Class 5 (Common Stock); Class 6 (Series 1 and 2 Warrants)); Class 7 (Restricted Stock Units); and Class 8 (Employee Stock Options). Under the Plan, Classes 1, 2 and 3 are unimpaired and deemed to accept the Plan; Classes 6, 7 and 8 are impaired and deemed to not accept the Plan; and Classes 4 and 5 are impaired and entitled to vote on the Plan.

12. At the time the Plan was drafted, the Debtor expected to have sufficient estate funds to fund the plan reserves, pay all allowed claims in full and reserve the full amount of any disputed claims. The Debtor had planned to seek Court approval of its Disclosure Statement at a hearing on May 23, 2018.

13. Unfortunately, three holders of Series 1 Warrants filed claims against the Debtor and its estate in the collective amount of approximately \$2.86 million (the “Warrant Claims”).

14. The Debtor disputes the validity and amount of the Warrant Claims and expected to reserve for the full amount of the Warrant Claims and to negotiate, or if necessary litigate, a resolution of the Debtor’s objections to the Warrant Claims. Unfortunately, the holders of the Warrant Claims filed their claims in such grossly excessive amounts that the Debtor is unable to move forward with the Plan in its current form, so the hearing on the Disclosure Statement has been continued.

15. The Debtor is currently in discussion with the holders of the Warrant Claims in an attempt to consensually resolve the Debtor’s objections to the Warrant Claims. If the Debtor is able to consensually resolve its objections to the Warrant Claims, it will pursue its Plan as drafted. If not, the Debtor will modify the current Plan so that it can move forward to confirm a liquidating plan, but reserve the parties’ respective positions as to the Warrant Claims.

16. Currently, the Debtor’s Exclusive Filing Period is scheduled to expire on July 9, 2018 and the Debtor’s current Exclusive Solicitation Period is scheduled to expire on September 10, 2018. To ensure that this Chapter 11 Case continues to progress in an effective and efficient manner, the Debtor seeks the requested extensions so that it can continue its negotiations with the holders of the Warrant Claims; or if necessary, amend and pursue confirmation of a modified Plan which preserves the parties respective issues as to the Warrant Claims.

**Relief Requested**

17. By this Motion, the Debtor seeks the entry of an Order, pursuant to sections 105(a) and 1121(d) of the Bankruptcy Code, (a) extending the Exclusive Filing Period by 91

days, through and including October 8, 2018 and (b) extending the Exclusive Solicitation Period by 91 days, through and including December 10, 2018.

**Basis for Relief Requested**

18. Section 1121(b) of the Bankruptcy Code provides that “only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.” 11 U.S.C. § 1121(b). Sections 1121(c)(2) and (3) further provide, in relevant part, that a party in interest may file a plan if and only if “the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter” or “the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief.” See 11 U.S.C. § 1121(c)(2)-(3).

19. Section 1121(d)(1) provides, in relevant part:

[O]n request of a party in interest made within the respective periods in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

11 U.S.C. § 1121(d)(1).

20. Pursuant to section 1121(d)(2), the 120-day Exclusive Filing Period may not be extended beyond a date that is 18 months after the Petition Date, and the 180-day Exclusive Solicitation Period may not be extended beyond a date that is 20 months after the Petition Date. See 11 U.S.C. § 1121(d)(2). In the present case, the requested extensions of the Exclusive Periods, if granted, do not extend beyond these deadlines. Thus, this Motion is consistent with the requirements of Bankruptcy Code section 1121(d)(2).

**I. A Court May Extend the Exclusive Periods for “Cause” under Section 1121(d) of the Bankruptcy Code**

21. As indicated above, section 1121(d)(1) of the Bankruptcy Code provides that a court may extend Exclusive Periods for “cause” shown. See 11 U.S.C. § 1121(d); In re Pine Run

Trust, Inc., 67 B.R. 432, 433 (Bankr. E.D. Pa. 1986). The term “cause” is not defined in the Bankruptcy Code; rather, courts have broad discretion to determine “cause” based on the facts and circumstances of each case. See First Am. Bank of N.Y. v. Southwest Gloves & Safety Equip., Inc., 64 B.R. 963, 965 (D. Del. 1986) (stating that section 1121(d)(1) provided bankruptcy court with flexibility to increase the period of exclusivity in its discretion); see also In re Burns and Roe Enters., Inc., No 00-41610 (RG), 2005 WL 6289213, at \*3-4 (D.N.J. Nov. 2, 2005); In re Sharon Steel Corp., 78 B.R. 762, 763-65 (Bankr. W.D. Pa. 1987).

22. Legislative history also makes clear that the term “cause” is intended to be a flexible standard aimed at balancing the competing interests of a debtor and its creditors. See H.R. Rep. No. 95-595 at 231-32 (1978). The purpose of exclusivity is to “promote an environment in which the debtor’s business may be rehabilitated and a consensual plan may be negotiated.” See H.R. Rep. No. 95-595, at 36 (1994); Burns and Roe, 2005 WL 6289213, at \*4. Accordingly, to fulfill Congress’ legislative intent, debtors should be granted a reasonable opportunity to remain in control for a period of time to prepare adequate financial and non-financial information regarding the outcome of any proposed plan for disclosure to creditors. See In re Mclean Indus., Inc., 87 B.R. 830, 833-34 (Bankr. S.D.N.Y. 1987); see also In re All Seasons Indus., Inc., 121 B.R. 1002, 1006 (Bankr. N.D. Inc. 1990) (“One of the most important reasons for extending the debtor’s period of exclusivity is to give the chapter 11 process of negotiation and compromise an opportunity to be fulfilled, so that a consensual plan can be proposed and confirmed without opposition.”).

23. To determine whether cause exists to extend the Exclusive Periods, courts consider several non-exclusive factors, including: (i) the size and complexity of a case; (ii) the debtor’s need for sufficient time to negotiate a plan and prepare adequate information; (iii) the

existence of good faith progress toward reorganization; (iv) whether the debtor is paying its bills as they come due; (v) whether the debtor has shown a reasonable likelihood of proposing a viable plan; (vi) the progress the debtor has made in negotiating with its creditors; (vii) the amount of time that has elapsed in the case; (viii) whether the debtor is seeking an extension of the exclusive periods to pressure creditors to submit to the debtors' reorganization demands; and (ix) whether any unresolved contingencies exist. See, e.g., In re Adelpia Comm. Corp., 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006); In re Dow Corning Corp., 208 B.R. 661, 664-65 (Bankr. E.D. Mich. 1997); In re Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996). No single factor is dispositive in determining whether to extend exclusivity; rather, courts can choose to rely on only a few factors or even altogether differing factors. See In re Elder-Beerman Stores Corp., No. C-3-97-175, 1997 WL 1774880, at \*4 (S.D. Ohio June 23, 1997); Dow Corning, 208 B.R. at 669-70 (noting that sometimes certain factors are more important or relevant than others).

24. As set forth below, an application of the relevant foregoing factors to the present case demonstrates that ample cause exists to grant the Debtor's requested extensions of the Exclusive Periods.

## **II. Cause Exists to Extend the Exclusive Periods**

### **A. The Debtor Has Made Good Faith Progress Towards a Plan**

25. Since the Petition Date, the Debtor has made significant progress in this Chapter 11 Case. Indeed, although this Chapter 11 Case has been pending for just over six months, the Debtor has, *inter alia*: (i) obtained significant first day relief; (ii) obtained interim and final approval of its debtor in possession financing facility, and thereafter repaid in full all principal and interest on such facility; (iii) obtained Court approval of, and consummated, the Sale to the

Buyer, and in connection therewith, assumed and assigned numerous executory contracts and unexpired leases; (iv) repaid its prepetition secured creditor, Century Medical, Inc., in full; (v) prepared and filed Schedules of Assets and Liabilities and a Statement of Financial Affairs; (vi) established bar dates for the filing of proofs of claim; (vii) filed a Plan and Disclosure Statement; and (viii) filed and prosecuted one omnibus objection to claims.

26. The Debtor was prepared to move forward with its current Plan in May, but was precluded from doing so only because of the inflated Warrant Claims. At this point, the Debtor seeks to extend the Exclusive Periods to see if it can attempt to resolve its disputes with the holders of the Warrant Claims, but if not, to pursue an amended Plan that will permit distributions to allowed claims as soon as possible, and at the same time, reserve the parties' respective positions on the Warrant Claims.

**B. The Debtor is Paying its Postpetition Obligations as They Become Due**

27. Next, the fact that the Debtor continues to pay its postpetition obligations as such obligations become due supports an extension of the Debtor's Exclusive Periods. The Debtor has sufficient liquidity and is paying its bills as they become due in the ordinary course of business. Indeed, through prudent business decisions and cash management, the Debtor currently has sufficient resources to meet required post-petition payment obligations and manage the Debtor's estate effectively through the effective date of any plan.

**C. The Debtor Has Demonstrated Reasonable Prospects for Filing a Viable Plan**

28. As set forth above, the Debtor filed a viable Plan. If the Debtor is able to quickly resolve its disputes with the holders of the Warrant Claims, the Debtor will move forward with the Plan as currently drafted. If not, the Debtor will modify the current Plan to accommodate for the existence of the disputed, excessive Warrant Claims. Either way, the Debtor will be able to

satisfy the requirements of sections 1129 of the Bankruptcy Code and there is no question that the Debtor can, and will, pursue a viable plan.

**D. The Chapter 11 Case Has Been Pending for a Short Period of Time**

29. The fact that the Chapter 11 Case has been pending for a little over six months, during which time the Debtor has made significant progress, including the consummation of a sale that is expected to provide a recovery not only to creditors but also to equity holders, further supports the requested extension of the Exclusive Periods.

**E. No Prejudice to Creditors or Equity Holders**

30. The Debtor does not believe that the requested extension of the Exclusive Periods will harm the Debtor's creditors or other parties in interest. On the contrary, the Debtor has conducted this Chapter 11 Case in a manner intended to maximize the recoveries of creditors and equity holders. In addition, the Debtor is not seeking this extension to prejudice parties in interest or otherwise pressure parties to submit to reorganization demands. Instead, the Debtor seeks the requested extension so that it can maintain the status quo in this Chapter 11 Case while it attempts to negotiate with the holders of the Warrant Claims. If the Debtor are unable to reach peace with the holders of the Warrant Claims, it intends to modify the Plan as discussed above, so that a plan can be confirmed while the parties' respective positions with respect to the Warrant Claims are fully preserved.

31. Lastly, although the Debtor fully expects to confirm a plan within the extended Exclusive Filing Period, as a precautionary measure, the Debtor reserves the right to request further extensions of the Exclusive Periods for cause.

**Notice**

32. Notice of this Motion will be given to the following parties, or in lieu thereof, to their counsel: (a) the Office of the U.S. Trustee; (b) the holders of the twenty (20) largest unsecured claims against the Debtor; (c) the Securities & Exchange Commission; (d) the Office of the United States Attorney General for the District of Delaware; (e) the offices of the attorneys general for the State of California where the Debtor is located; (f) the Internal Revenue Service; (g) the U.S. Department of Justice; (h) counsel to Aesculap Inc.; (i) the United States Environmental Protection Agency; (j) counsel to the holders of the Warrant Claims; and (k) parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

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WHEREFORE, the Debtor respectfully requests the entry of an order, substantially in the form annexed hereto at **Exhibit A**: (i) extending the Debtor's Exclusive Filing Period by 91 days, through and including October 8, 2018; (ii) extending the Debtor's Exclusive Solicitation Period by 91 days, through and including December 10, 2018; and (iii) granting the Debtor such other and further relief as is just and proper.

Dated: July 2, 2018  
Wilmington, Delaware

/s/ Mark Minuti  
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*Counsel for Debtor and Debtor-in-Possession*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

Dex Liquidating Co. (f/k/a Dextera  
Surgical Inc.),<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-12913 (KJC)

**Hearing Date: August 22, 2018 at 10:00 a.m. (ET)**

**Objection Deadline: July 19, 2018 at 4:00 p.m. (ET)**

**NOTICE OF MOTION**

**PLEASE TAKE NOTICE** that on July 2, 2018, the above-captioned debtor and debtor in possession (the “Debtor”) filed the **Motion of the Debtor for Entry of an Order Further Extending the Debtor’s Exclusive Periods to File a Chapter 11 Plan and Solicit Votes Thereon** (the “Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that objections, if any, to the entry of an order approving the Motion must be (a) in writing and served on or before **July 19, 2018 at 4:00 p.m.** (prevailing Eastern Standard Time) (the “Objection Deadline”); (b) filed with the Clerk of the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3<sup>rd</sup> Floor, Wilmington, Delaware 19801; and (c) served as to be received on or before the Objection Deadline by the undersigned attorneys for the Debtor.

PLEASE TAKE FURTHER NOTICE THAT only objections made in writing and timely filed and received, in accordance with the procedures above, will be considered by the Bankruptcy Court at such hearing.

PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE MOTION WILL BE HELD ON **AUGUST 22, 2018 AT 10:00 A.M. (PREVAILING EASTERN TIME)** BEFORE THE HONORABLE KEVIN J. CAREY, AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 5<sup>th</sup> FLOOR, COURTROOM 5, WILMINGTON, DELAWARE 19801.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

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<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are 7832. The Debtor’s address is 900 Saginaw Drive, Redwood City, CA 94063.

Dated: July 2, 2018  
Wilmington, Delaware

/s/ Mark Minuti  
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# **EXHIBIT “A”**

## **Proposed Order**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

Dex Liquidating Co. (f/k/a/ Dextera  
Surgical Inc.),<sup>1</sup>

Debtor.

Chapter 11

Case No. 17-12913 (KJC)

**Related to Docket No. \_\_**

**ORDER PURSUANT TO 11 U.S.C. § 1121 FURTHER  
EXTENDING THE DEBTOR'S EXCLUSIVE PERIODS TO FILE  
A CHAPTER 11 PLAN AND SOLICIT VOTES THEREON**

Upon the motion (the "Motion")<sup>2</sup> of the above-captioned debtor and debtor-in-possession (the "Debtor") for entry of an order, pursuant to section 1121(d) of the Bankruptcy Code (a) further extending the Debtor's Exclusive Filing Period by 91 days, through and including October 8, 2018, and (b) further extending the Debtor's Exclusive Solicitation Period by 91 days, through and including December 10, 2018; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this matter being a "core" proceeding under 28 U.S.C. § 157(b); and venue being proper before this Court under 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the parties listed therein, and it appearing that no other or further notice need be provided; and the Court being satisfied that the relief sought in the Motion is in the best interests of the Debtor, its creditors and all parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon review of the Motion and all the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 7832. The Debtor's address is 900 Saginaw Drive, Redwood City, CA 94063.

<sup>2</sup> Any and all terms not defined herein shall have the meaning ascribed to them in the Motion.

IT IS HEREBY ORDERED THAT:

1. Pursuant to section 1121(d) of the Bankruptcy Code, the period in which the Debtor has the exclusive right to file a chapter 11 plan is extended through and including October 8, 2018.

2. Pursuant to section 1121(d) of the Bankruptcy Code, the period in which the Debtor has the exclusive right to solicit acceptances of the chapter 11 plan is extended through and including December 10, 2018.

3. The entry of this Order is without prejudice to the Debtor's right to seek a further extension of the Exclusive Periods under section 1121 of the Bankruptcy Code.

4. This Court shall retain jurisdiction to hear and determine all matters arising from, or related to, the interpretation or implementation of this Order.

Dated: \_\_\_\_\_, 2018

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Honorable Kevin J. Carey  
United States Bankruptcy Judge