

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

In re:

INVIVO THERAPEUTICS CORPORATION, *et al.*,¹

Debtors.

Chapter 11

Case No. 24-10137 (MFW)

(Joint Administration Pending)

**MOTION OF THE DEBTORS FOR ENTRY OF INTERIM AND
FINAL ORDERS AUTHORIZING THE DEBTORS TO
PAY PREPETITION WAGES, COMPENSATION, EMPLOYEE
BENEFITS AND OTHER ASSOCIATED OBLIGATIONS**

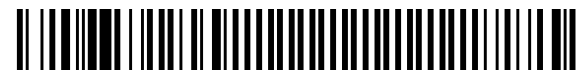
The above-captioned debtors and debtors-in-possession (the “Debtors”) by and through their proposed undersigned counsel, hereby submit this *Motion of the Debtors for Entry of Interim and Final Orders Authorizing the Debtors to Pay Prepetition Wages, Compensation, Employee Benefits and Other Associated Obligations* (the “Motion”). In support of the Motion, the Debtors rely on the *Declaration of Richard Christopher in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”),² and respectfully state as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this Motion 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 the meaning of 28 U.S.C.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: InVivo Therapeutics Corporation (6670) and InVivo Therapeutics Holdings Corp. (8166). The Debtors’ mailing address is 1500 District Avenue, Burlington, MA 01803.

² Except where otherwise indicated, capitalized terms used but not defined in this Motion have the meanings ascribed to them in the First Day Declaration.



§ 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution.³

2. The statutory predicates for the relief sought herein are sections 105(a), 363, 507(a), and 541 of title 11 of chapter 11 of the United States Code (as amended or modified, the “Bankruptcy Code”) and rules 6003 and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

3. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

GENERAL BACKGROUND

4. On the date hereof (the “Petition Date”), the Debtors commenced the above-captioned chapter 11 cases (the “Chapter 11 Cases”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the Court.

5. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession, pursuant to Bankruptcy Code sections 1107(a) and 1108. As of the date of this Motion, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases.

6. Additional information regarding the circumstances leading to the commencement of these Chapter 11 Cases and information regarding the Debtors’ businesses and capital structure is set forth in detail in the First Day Declaration filed contemporaneously with this Motion and incorporated herein by reference.

³ Pursuant to rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtors hereby confirm their consent to entry of a final order by this Court in connection with this Motion if it is later determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

RELIEF REQUESTED

7. By this Motion, the Debtors seek entry of an order, substantially in the form attached hereto as **Exhibits A** and **B** (a) authorizing the Debtors to: (i) pay and/or perform, as applicable, prepetition obligations to current employees and the independent contractors including accrued prepetition wages, salaries and other cash and non-cash compensation claims (collectively, the “Employee Wage Obligations”); (ii) maintain and continue to honor their practices, programs and policies for their Employees (defined herein) that were in effect as of the Petition Date, as such may be modified, amended or supplemented from time to time in the ordinary course, including without limitation, the continuation and maintenance of the Debtors’ various employee benefit and savings plans and programs (and to pay all fees and costs in connection therewith, including those that arose prepetition) (collectively, the “Employee Benefit Obligations”); and (iii) pay all related prepetition withholdings and payroll-related taxes and deductions (the “Employer Taxes and Deductions” and collectively with the Employee Wage Obligations and Employee Benefit Obligations, the “Employee Obligations”) associated with the Employee Wage Obligations and Employee Benefit Obligations (each, as described herein) and (b) authorizing and directing financial institutions to receive, process, honor, and pay all related checks and electronic payment requests for payment of any prepetition Employee Obligations.

THE DEBTORS’ EMPLOYEE OBLIGATIONS

A. Overview of the Debtors’ Workforce

8. As explained in the First Day Declaration, the Debtors the Debtors develop novel, clinical-stage biomaterials for individuals with traumatic spinal cord injuries. As of the Petition Date, the Debtors employs three (3) full-time employees (the “Employees”) and three (3) part-time independent contractors (the “Independent Contractors”). The full-time Employees are paid a salary, and the Independent Contractors are paid an hourly wage. As of the Petition Date, all of

the Debtors' Employees and Independent Contractors work remotely.

9. The Debtors' Employees perform a variety of critical functions, including performing general and administrative services, providing financial and human resource services, and other related tasks. The Debtors' Employees' skills, knowledge, and understanding of the Debtors' infrastructure, operations and business relations are essential to the Debtors' efforts in these Chapter 11 Cases.

10. In addition to the Employees, the Debtors retain Independent Contractors who provide the Debtors, among other essential services, bookkeeping, manuscript preparation for the Debtors' medical and technical publications, and clinical consulting. The Employees rely on the support of the Independent Contractors to complete certain tasks in furtherance of the Debtors' businesses. All of the Independent Contractors are engaged directly by the Debtors.

11. Just as the Debtors depend on the Employees and the Independent Contractors to operate their businesses on a daily basis, these individuals also depend on the Debtors. Indeed, the vast majority of these individuals rely exclusively on payments received from the Debtors for their basic living necessities. The Debtors must take all necessary steps to retain their Employees and Independent Contractors and bolster their morale to preserve and maximize the value of the Debtors' estates.

B. Employee Wage Obligations⁴

i. Wages and Salaries

12. In the ordinary course of business, the Debtors incur payroll obligations for wages owed to the Employees and Independent Contractors. The Debtors compensate all Employees on

⁴ In the ordinary course of business, the Debtors paid certain of their expenses and obligations in the days leading up to the bankruptcy filing. Because it is unclear whether such amounts cleared prior to the Petition Date, the Debtors have included such amounts in the estimates contained herein.

a bi-weekly or monthly pay cycle and employ ADP to process payroll distributions via direct deposit. All Employees and Independent Contractors are paid current as of the Petition Date. The Debtors' average monthly payroll obligations are approximately \$192,000.00 for Employees and \$10,000.00 for Independent Contractors.

13. The Debtors administer their payroll and the disbursements of payroll funds through the services of ADP, Inc., who issues distributions to the Employees and Independent Contractors via direct deposit.

14. As of the Petition Date, the Debtors estimate that \$26,500.00 is owed to the Employees for prepetition Employee Wage Obligations (collectively, the "Prepetition Wage Obligations"). All of the Prepetition Wage Obligations will come due within the first twenty-one (21) days of the Chapter 11 Cases, but in no case is any individual Employee owed in excess of \$15,150.00 for Prepetition Wage Obligations:

| WAGE TYPE | ESTIMATED AMOUNT |
|---------------------|------------------|
| Full-Time Employees | \$26,500.00 |

15. By this Motion, the Debtors seek authority to pay and honor Prepetition Wage Obligations in an amount not to exceed the \$15,150.00 cap under Bankruptcy Code section 507(a)(4) per eligible Employee and Independent Contractors and not to exceed \$26,500.00 in the aggregate, and to continue to honor the Employee Wage Obligations on a postpetition basis in the ordinary course of business.

ii. Paid Time Off

16. The Debtors offer their Employees paid time off, which may be used at each Employee's discretionary purposes, including for vacation, personal time, or sick time ("Paid Time Off"). These benefits are usual and customary, and they are necessary to enable the Debtors to retain qualified employees. An Employee may use Paid Time Off at his or her

discretion, subject to business demands and coverage needs.

17. With the exception of one Employee whose Paid Time Off is governed by his employment contract, each of the Debtors' Employees accrue Paid Time Off based on the Employee's length of employment as follows:

| Year of Employment | Monthly Accrual* (based on 40-hour wk) | Maximum Monthly Accrual Amount |
|-------------------------------|--|---|
| Year 1 through end of 2 | 1.34 | 16 Days |
| Years 2+ through end of 4 | 1.5 | 18 Days |
| Years 5+ through end of 10 | 1.67 | 20 Days |
| Years 10+ | 2.08 | 25 Days |

18. Paid Time Off begins accruing on the date of hire. Employees accrue their proportionate, monthly allotment of Paid Time Off on the first day of each calendar month of employment. Employees may carry over up to five (5) days of accrued Paid Time Off from the prior calendar year, which must be used in the first quarter of the following calendar year. It is the Debtors' policy to pay the value of any accrued, unused Paid Time Off upon an Employee's resignation or termination. Alternatively, it is the Debtors' policy upon an Employee's resignation or termination to deduct any Paid Time Off used in advance of the accrual from the employee's final paycheck as permitted by applicable laws.

19. The Debtor provides all Employees with up to three days (3) days of paid bereavement leave in the event of the death of an immediate family member.

20. As of the Petition Date, the Debtors estimate that they are responsible for unused Paid Time Off totaling approximately \$9,400.00 (the "Prepetition Paid Time Off Obligations"). These amounts, however, are not a current cash obligation as the Employees are only entitled to

be paid for accrued but unused Vacation Time upon resignation or termination.⁵

21. In total, the Debtors estimate that approximately \$9,400.00 in Paid Time Off has accrued, but not been used as of the Petition Date. Accruals of Paid Time Off, however, are not a current cash payment obligation. By this Motion, the Debtors seek authority to pay any “cash out” amounts required under applicable law with respect to earned but unused Paid Time Off in a total amount not to exceed \$9,400.00 (the “Prepetition Paid Time Off”) and to continue their Paid Time Off policies in the ordinary course of business on a postpetition basis. For the avoidance of doubt, the Debtors seek authority to pay any “cash out” amounts required under applicable law with respect to earned but unpaid Paid Time Off in excess of the statutory cap of \$15,150.00 solely pursuant to the final order.

C. Employee Benefit Obligations

22. The Debtors provide their eligible Employees with the opportunity to participate in medical, dental, vision, disability insurance, life insurance (including accidental death and dismemberment), and retirement plans (collectively, the “Employee Benefit Plans”) the first day of full-time employment for Employees. The Debtors utilize the services of the Hilb Group as their insurance broker with respect to the Employee Benefit Plans. An Employee’s contribution for coverage under the Employee Benefit Plans is deducted directly from his or her paycheck and are remitted to the plan providers by the Debtors.

i. Medical, Dental and Vision Plans

23. The Debtors offer eligible Employees and their dependents medical benefits through medical plans (including a health savings plan option administered by Heath Equity)

⁵ Most state laws require Employees be paid certain Paid Time Off upon termination of their employment. Massachusetts requires the Debtors to pay any employees terminated through no fault or delinquency of their own “at the regular rate of compensation payable to him at the termination of his employment, an amount in lieu of such vacation; provided, that no monetary or other allowance has already been made therefor. MASS. GEN. LAWS CH. CHAPTER, § 111E.

(collectively, the “Medical Plans”) administered by Blue Cross/Blue Shield of Massachusetts (“BCBS”). The Debtors provide dental coverage to Employees (the “Dental Plan”) through a plan administered by Blue Cross/Blue Shield (“BCBS Dental”). The Debtors also offer their Employees vision coverage (the “Vision Plan” and together with the Medical Plans and the Dental Plan, the “Health Plans”) through a plan administered by Vision Service Plan (“VSP”). As of the Petition Date, a total of nine (9) Employees and their dependents obtain coverage through the Health Plans.

24. The Debtors estimate that they pay approximately \$7,600.00 per month in fixed premiums to BCBS, BCBS Dental, VSP, and Aflac (collectively, the “Health Insurance Companies”) for coverage under the Health Plans. As of the Petition Date, the Debtors are current on their obligations in connection with the Health Plans.

25. All Employees have the right under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) to elect to receive COBRA coverage, which extends Health Plan benefits to which an Employee was entitled immediately prior to a qualifying event such as resignation, termination, or death of the employee (for surviving dependents) for a specified period. Employees who elect to receive COBRA coverage are required to pay a certain percentage of the elected premiums, with the Debtors paying the remaining percentage. As of the Petition Date, no former employees are utilizing COBRA.

26. By this Motion, the Debtors seek authority to continue to offer the Health Plans to their Employees and to pay the Health Insurance Companies as amount become due in the ordinary course of business.

ii. Employee Life & Optional Insurance

27. The Debtors provide all of the Employees certain insurance coverages administered by The Lincoln National Life Insurance Company, including basic life insurance,

accidental death and dismemberment insurance, long-term disability, and short-term disability (collectively, the “Additional Insurance Programs”). Each participating Employee receives a multiple of their salary up to certain capped amounts in basic life insurance coverage based on their position within the company. The Debtors pay one hundred percent (100%) of the premiums associated with the Additional Insurance Programs. As of the Petition Date, the Debtors estimate that the total cost per month for the Additional Insurance Programs is approximately \$710.00. By this motion, the Debtors seek authority to pay \$710.00 on account of their obligations in connection with the Additional Insurance Programs, and to continue such programs to their Employees on a postpetition basis.

iii. 401(k) Plans and FSA Plans

28. In the ordinary course of business, the Debtors maintain certain 401(k) savings plans for the benefit of their Employees (the “401(k) Plans”), which are administered by CMC Interactive, LLC. The 401(k) Plans generally provide for the pre-tax deduction (subject to certain statutory limits) of compensation automatically from a participating Employee’s paycheck at his or her election. As of the Petition Date, all three (3) Employees participate in the 401(k) Plans. The monthly amount withheld from Employee paychecks on account of the 401(k) Plans is approximately \$7,100.00 in the aggregate. As of the Petition Date, the Debtors estimate that they hold \$1,000.00 for contributions made by Salary Employees related to the 401(k) Plans (the “Unremitted 401(k) Contributions”).

29. By this Motion, the Debtors seek authority to release any Unremitted 401(k) Contributions in an amount not to exceed \$1,000.00 on account of prepetition obligations. The Debtors also seek authority to continue operating the 401(k) Plans in the ordinary course of business on a postpetition basis.

30. The Debtors also provide eligible Employees with the option of having specified

amounts automatically deducted from their paychecks to fund certain dependent and healthcare related costs (the “FSA Plans”). The FSA Plans are administered by WageWorks. As of the Petition Date, the Debtors estimate that they hold \$1,300.00 in trust for contributions made by eligible Employees related to the FSA Plans (the “Unremitted FSA Contributions”).

31. By this Motion, the Debtors seek the authority to release any Unremitted FSA Contributions in an amount not to exceed \$1,300.00 on account of prepetition obligations. The Debtors also seek authority to continue operating the FSA Plans in the ordinary course of business on a postpetition basis.

32. Additionally, the Debtors offer a health reimbursement arrangement to Employees for reimbursement of deductibles paid for medical care (the “HRA Program”). Health Equity and Blue Cross Blue Shield of Massachusetts have an integrated claims feed, which facilitates the administration of the HRA Program. The Debtors pay the first half of an Employee’s annual deductible, and the Employee pays the second half of the deductible, which is then reimbursed through the HRA Program. As of the Petition Date, the Debtors estimate that \$3,750.00 has accrued and is outstanding on account of the HRA Program. By this Motion, the Debtors seek authority to pay up to \$3,750.00 on account of the HRA Program and to continue offering the HRA Program on a postpetition basis in the ordinary course of business.

iv. Other Miscellaneous Benefits

33. The Debtors also provide their Employees with paid family medical leave (“Medical Leave Program”). Under the Medical Leave Program, Employees are eligible to take specific amounts of paid leave within any rolling 12-month period (the amount depending on the qualifying event), and will be restored to the same or an equivalent position upon their return from leave. Payment during such leave is based the Employee’s earnings, with a maximum benefit of the employee’s full salary per week. Qualifying events include the birth, adoption

or foster care placement of a child, care for a family member due to another family member's active-duty service in the military or injuries related thereto, or a serious health condition that incapacitates the Employee from work. The Medical Leave Program is administered by a combination of the state of Massachusetts, Lincoln Life Group (disability insurance), and the Debtors. The Debtors pay 100% of the premium for the Medical Leave Program. As of the Petition Date, the Debtors' total cost per month for the Medical Leave Program is approximately \$839.88. The Debtors are invoiced and then pay this expense every month, with each payment at the start of the monthly period covered by the invoice. As of the Petition Date, the Debtors estimate that they have no outstanding payments owed for The Medical Leave Program (the "Unpaid Medical Leave Program Premiums"). As of the Petition Date there are no Employees utilizing the Medical Leave Programs.

34. By this Motion, the Debtors seek authority to continue offering the Medical Leave Program in the ordinary course of business postpetition.

D. Employer Taxes and Deductions

35. The Debtors routinely withhold from Employee paychecks and transmit to third parties the Employer Taxes and Deductions for social security, Medicare and Medicaid, federal, state, and local income taxes, and employment insurance. As noted above, the Debtors administer their payroll in-house as a function of their accounting department, including administering the withholdings and the necessary disbursements to the relevant taxing or other authorities for the Employer Taxes and Deductions.

36. As of the Petition Date, the Debtors estimate that they hold approximately \$12,600.00 in accrued but unremitted Employer Taxes and Deductions for their Employees (the "Unremitted Employer Taxes and Deductions"). By this Motion, the Debtors seek authority to remit any Unremitted Employer Taxes and Deductions in an amount not to exceed \$12,600.00

for Employees on account of prepetition obligations and to continue collecting and disbursing the Employer Taxes and Deductions in the ordinary course of business on a postpetition basis.

E. Payroll Processing

37. The Debtors pay ADP, Inc. ("ADP") approximately \$700.00 per month for such the payroll processing and Employer Taxes and Deductions related services (the "Payroll Processing Expenses"). ADP automatically deducts the cost of its services along with the funds necessary to cover payroll from the Debtors' account every pay period. Thus, as of the Petition Date, the Debtors have no outstanding payments due to ADP for its services. By this motion the Debtors seek authority to continue paying the Payroll Processing Expenses in the ordinary course during the administration of these Chapter 11 Cases.

BASIS FOR RELIEF

38. The Debtors seek the relief requested in this Motion because any delay in paying any of the Employee Obligations described herein could severely disrupt the Debtors' relationship with their Employees, and irreparably impair their Employees' morale at the very time their dedication, confidence and cooperation are most critical to the success of the Debtors' businesses and the sale of their assets for maximum value. Accordingly, the Debtors face the risk that their operations may be severely impaired if the Debtors are not immediately granted authority to pay any prepetition Employee Obligations all of which (with the exception of Prepetition Paid Time Off that is only payable upon termination for certain Employees) is estimated to come due within twenty-one (21) days of the Petition Date. At this critical stage of these Chapter 11 Cases, the Debtors simply cannot risk the substantial disruption of their business operations that would accompany any decline in workforce morale resulting from the Debtors' failure to pay the Employee Obligations in the ordinary course of their business. Further, many of the requests are regarding funds of employees that the Debtors process and

remit to third parties.

39. If the relief requested herein is not granted, the Debtors' Employees would suffer hardship and, in many instances, financial difficulties, since these monies and benefits are needed to enable them to meet their personal obligations. Additionally, without the requested relief, the Debtors' stability would be undermined by the potential threat that otherwise loyal employees would seek other employment.

40. Bankruptcy Code sections 507(a)(4) and (a)(5) provide that the Debtors' Employees have priority claims for accrued wages, salaries, commissions, vacation, severance, sick leave and contributions to employee benefit plans. 11 U.S.C. §§ 507(a)(4) and (a)(5). Each Employee's aggregate priority claim is limited to \$15,150.00 under the Bankruptcy Code. *Id.* The Debtors believe that the Prepetition Wage Obligations and other benefits earned within one hundred and eighty (180) days of the Petition Date that the Debtors seek to pay are entitled to priority status under Bankruptcy Code sections 507(a)(4) and (a)(5)⁶ and, with certain exceptions related to potential Paid Time Off amounts, do not exceed the statutory cap of \$15,150.00 per Employee.

41. Additionally, the Court has the authority under Bankruptcy Code sections 105(a), 1107(a) and 1108, 363(b) and the "necessity of payment" doctrine to grant the relief requested herein. The payments to Employees are vital to the Debtors' ability to transition smoothly into Chapter 11 and preserve their going concern value.

⁶ For the purposes of the priority treatment of wages, salaries, and related benefits under Bankruptcy Code section 507(a)(4), courts recognize that individuals who are "independent contractors" are entitled to the same priority as "employees." *See, e.g., In re Corcoran*, 2010 Bankr. LEXIS 4721, at *2-3 (Bankr. D. Haw. Dec. 16, 2010) (" . . . Congress has steadily broadened the scope of the 'wage priority' provisions, in part expressly to overrule court decisions that independent contractors were not entitled to priority. . . . Recent cases hold that independent contractors can assert wage priority claims."); *In re Wang Lab.*, 164 B.R. 404, 408 (Bankr. D. Mass. 1994) ("the term "'wages' [is intended by Congress] to include compensation paid to [all natural] persons, whether employees or independent contractors").

42. Courts generally acknowledge that it is appropriate to authorize the payment (or other special treatment) of prepetition employee obligations in appropriate circumstances. Pursuant to Bankruptcy Code sections 1107(a) and 1108, debtors-in-possession are authorized to operate the business while maintaining a “fiduciary duty to act in the best interest of the estate as a whole, including its creditors, equity interest holders and other parties in interest.” *LaSalle Nat’l Bank v. Perelman*, 82 F.Supp.2d 279, 292 (D. Del. 2000). Implicit in the fiduciary duties of any debtor-in-possession is the obligation to “protect and preserve the estate, including an operating business’s going-concern value.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Some courts have noted there are instances in which a debtor can fulfill this fiduciary duty “by the preplan satisfaction of a prepetition claim.” *Id.* The *CoServ* court specifically noted that preplan satisfaction of prepetition claims would be a valid exercise of the debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” *Id.* In the instant cases, the Debtors are operating as debtors-in-possession consistent with Bankruptcy Code sections 1107(a) and 1108 and payment of the Employee Obligations is necessary to protect and preserve the Debtors’ business operations and going concern value. Thus, the Court should authorize the relief requested in this Motion.

43. Additionally, Bankruptcy Code section 363(b)(1) states in pertinent part that: “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” If the debtor’s determination to use estate assets represents a reasonable business judgment, the bankruptcy court should approve such use. Moreover, this Court has approved the payment of prepetition claims of employees for wages, salaries, expenses, and benefits on the ground that the payment of such claims was necessary to effectuate a successful reorganization or liquidation. *See, e.g., In re Allena Pharmaceuticals, Inc.*, Case

No. 22-10842 (KBO) (Bankr. D. Del. Sept. 26, 2022); *In re American Eagle Delaware Holding Company LLC*, Case No. 22-10028 (JKS) (Bankr. D. Del. Feb. 8, 2022); *In re Riverbed Technology, Inc.*, Case No. 21-11503 (CTG) (Bankr. D. Del. Nov. 18, 2021); *In re Gulf Coast Health Care, LLC*, Case No. 21-11336 (KBO) (Bankr. D. Del. Nov. 12, 2021); *In re The Collected Group, LLC, et al.*, Case No. 21-10663 (LSS) (Bankr. D. Del. Apr. 28, 2021); *In re SFP Franchise Corp.*, Case No. 20-10134 (JTD) (Bankr. D. Del. Feb. 13, 2020); *In re HRI Holding Corp.*, Case No. 19-12415 (MFW) (Bankr. D. Del. Dec. 5, 2019); *In re EdgeMarc Energy Holdings, LLC*, Case No. 19-11104 (BLS) (Bankr. D. Del. June 13, 2019); *In re Pernix Sleep, Inc.*, Case No. 19-10323 (CSS) (Bankr. D. Del. Mar. 22, 2019); *In re Things Remembered, Inc.*, Case No. 19-10234 (KG) (Bankr. D. Del. Feb. 26, 2019); *In re Argos Therapeutics, Inc.*, Case No. 18-12714 (KJC) (Bankr. D. Del. Jan. 22, 2019). Bankruptcy Code section 105(a) further provides, in pertinent part, that a “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 “necessity of payment” doctrine also authorizes the relief requested in this Motion because the Employees are indispensable to both the Debtors’ operations and the successful resolution of these Chapter 11 Cases.

44. As set forth herein and in the First Day Declaration, the Employees are essential to the continued operation of the Debtors’ businesses, and the Employees’ morale directly affects their effectiveness and productivity. Consequently, it is critical that the Debtors continue, in the ordinary course, those personnel policies, programs and procedures that were in effect prior to the Petition Date. If the checks issued and electronic fund transfers requested in payment of any of the compensation or other Employee Obligations are dishonored, or if such obligations are not timely paid postpetition, the Employees may likely suffer extreme personal hardship and may be

unable to pay their daily living expenses. A loss of employee morale and goodwill at this critical juncture would undermine the Debtors' stability, and undoubtedly would have an adverse effect on the Debtors, their customers, the value of their assets and businesses, and their ability to achieve their objectives in chapter 11. As noted by the court in *In re Equalnet Communications Corp.*, 258 B.R. 368 (Bankr. S.D. Tex. 2000), "the need to pay pre-petition employee wage claims in an ordinary course of business time frame is simple common sense. Employees are more likely to stay in place and to refrain from actions which could be detrimental to the case and/or the estate if their pay and benefits remain intact and uninterrupted." *Id.* at 370.

45. As part of the foregoing relief, the Debtors also seek authority to pay all Employer Taxes and Deductions. The failure to make such payments may also subject the Debtors and their officers to federal or state liability. *See City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92 (3d Cir. 1994) (state law requiring debtor to withhold city income tax from its employees' wages created trust relationship between debtor and city for payment of withheld taxes); *DuCharmes & Co. v. Michigan (In re DuCharmes & Co.)*, 852 F.2d 194 (6th Cir. 1988) (noting the special liabilities for failure to pay trust fund taxes). Moreover, the monies payable for amounts held in trust like the Employer Taxes and Deductions generally are not property of a debtor's estate. *See Begier v. IRS*, 496 U.S. 53, 59 (1990) (because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not "property of the estate"). The failure to transfer these withheld funds could result in hardship to certain Employees or others. Furthermore, if the Debtors cannot remit these amounts, the Employees may face legal action due to the Debtors' failure to submit these payments.

46. Additionally, payment of Employer Taxes and Deductions that constitute "trust fund" taxes will not prejudice general unsecured creditors of the Debtors' estates as the relevant

taxing authorities would hold priority claims under Bankruptcy Code section 507(a)(8) in respect of such obligations. Moreover, the monies payable for trust fund taxes, as well as the other funds that are held in trust for the benefit of third parties, such as withheld funds with respect to the Debtors' 401k plans, are not property of the Debtors' estates.

47. With respect to certain Employees, such as those working in the state of Massachusetts, applicable labor law requires the Debtors to honor certain unused Paid Time Off as wages for such Employees in the event of termination. The Debtors propose to pay Employees such unused Paid Time Off in an amount not to exceed the statutory cap of \$15,150.00 on account of all Employee Obligations; provided, however, that such obligations can be paid in excess of the limitations contained in Bankruptcy Code section 507(a) to the extent that such payments are required to be made pursuant to applicable state law. *See, e.g., In re Mervyn's Holdings, LLC*, Case No. 08-11586 (KG) (Bankr. D. Del. Aug. 26, 2008).

48. The relief requested in this Motion is necessary to the viability of the Debtors' businesses and maximization of the value of the Debtors' assets. Accordingly, the Debtors submit that the relief sought herein is consistent with Bankruptcy Code sections 105(a), 507(a) and 541.

49. Nothing in this Motion, nor any payments made by the Debtors pursuant to this Motion, shall be deemed an assumption or rejection of any Employee Benefit Plan, employment agreement, other program or contract, or otherwise affect the Debtors' rights under Bankruptcy Code section 365 to assume or reject any executory contract between the Debtors and any Employee, plan administrator or service provider.

**BANKRUPTCY RULE 6003 SATISFIED AND
REQUEST FOR WAIVER OF STAY**

50. The Debtors further submit that because the relief requested in this Motion is

necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein and in the First Day Declaration, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

51. Specifically, Bankruptcy Rule 6003 provides:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following: . . . (b) a Motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a Motion to pay all or part of a claim that arose before the filing of the petition, but not a Motion under Rule 4001.

Fed. R. Bankr. P. 6003.

52. The Third Circuit Court of Appeals has interpreted language similar to that used in Bankruptcy Rule 6003 in the context of preliminary injunctions. In that context, irreparable harm has been interpreted as a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 Fed. Appx. 907, 910 (3d Cir. 2007) (citing *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Further, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle County*, 40 F.3d 645, 655 (3d Cir. 1994).

53. The Debtors' Employees are integral to the Debtors' operations. Failure to satisfy obligations to Employees in the ordinary course of business will jeopardize Employee loyalty and trust, possibly causing Employees to leave the Debtors' employ and thereby disrupting the Debtors' operations to the detriment of all parties in interest. Moreover, the Debtors' Employees rely on the Debtors' timely payment of their compensation and provision of benefits. Accordingly, the Debtors respectfully submit that it has satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 and seeks authority to pay and honor the Employee

Obligations described herein.

54. The Debtors further seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[an] order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” As set forth above, the relief requested herein is essential to prevent irreparable damage to the Debtors’ operations and going-concern value.

55. Accordingly, the relief requested herein is appropriate under the circumstances and under Bankruptcy Rules 6003 and 6004(h).

RESERVATION OF RIGHTS

56. Nothing contained in this Motion or any actions taken by the Debtors pursuant to any order granting the relief requested by this Motion is intended or should be construed as: (a) an admission as to the validity, priority or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors’ right to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion; (e) a request or authorization to assume any agreement, contract or lease pursuant to Bankruptcy Code section 365; (f) a waiver or limitation of the Debtors’ rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party-in-interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Motion are valid and the Debtors and all other parties-in-interest expressly reserve their rights to contest the extent, validity, or perfection, or to seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court’s order is not intended and should not be construed as an admission as to the validity,

priority or amount of any particular claim or a waiver of the Debtors' or any other party-in-interest's rights to subsequently dispute such claim.

NOTICE AND NO PRIOR REQUEST

57. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the District of Delaware; (b) each of the Debtors' creditors holding the twenty (20) largest unsecured claims as set forth in the consolidated list filed with the Debtors' petitions; (c) the Internal Revenue Service; (d) the United States Attorney's Office for the District of Delaware; (e) the United States Securities and Exchange Commission; (f) the United States Food and Drug Administration; and (g) all parties who have requested notice in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested in this Motion, the Debtors respectfully submit that no further notice is necessary.

58. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, for the reasons set forth herein and in the First Day Declaration, the Debtors respectfully request that this Court enter an order, substantially in the forms attached hereto as **Exhibits A** and **B**, (a) authorizing the Debtors, in their discretion, to pay and remit in the ordinary course of business amounts due and owing on account of (i) Prepetition Wage Obligations, (ii) Prepetition Paid Time Off, (iii) Unpaid Employee Benefit Premiums, (v) Additional Insurance Programs, (vi) Unremitted 401(k) Contributions, (vii) Unremitted FSA & HSA Plan Contributions, (viii) the HRA Program, (ix) Unremitted Employer Taxes and Deductions; (b) authorizing, but not directing, the Debtors to continue in the ordinary course of business on a postpetition basis their (i) Employee Wage Obligations, (ii) Employee Benefit

Obligations, and (iii) Employer Taxes and Deductions; (c) authorizing and directing financial institutions to receive, process, honor, and pay all related checks and electronic payment requests related to the foregoing; and (d) granting such other relief as is just and proper.

Dated: February 1, 2024
Wilmington, Delaware

LANDIS RATH & COBB LLP

/s/ Joshua B. Brooks

Matthew B. McGuire (No. 4366)

Joshua B. Brooks (No. 6765)

919 Market Street, Suite 1800

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*Proposed Counsel for the Debtors
and Debtors-In-Possession*

EXHIBIT A

Proposed Interim Order

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

In re:

INVIVO THERAPEUTICS CORPORATION, *et al.*,¹

Debtors.

Chapter 11

Case No. 24-10137 (MFW)

(Jointly Administered)

Ref. No. ____

**INTERIM ORDER GRANTING MOTION OF THE DEBTORS FOR ENTRY OF
AN ORDER AUTHORIZING THE DEBTOR TO PAY PREPETITION WAGES,
COMPENSATION, EMPLOYEE BENEFITS, AND OTHER
ASSOCIATED OBLIGATIONS**

Upon the *Motion of the Debtors for Entry of Interim and Final Orders Authorizing the Debtors to Pay Prepetition Wages, Compensation, Employee Benefits, and Other Associated Obligations* (the “Motion”)² and upon the First Day Declaration; and it appearing that this Court has jurisdiction over 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; and it appearing that the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that the Court may enter a final order consistent with Article III of the United States Constitution; and it appearing that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that sufficient notice of the Motion has been given; and it appearing that the relief requested by the Motion is in the best interests of the Debtors’ estates; and good and sufficient cause appearing therefor;

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: InVivo Therapeutics Corporation (6670) and InVivo Therapeutics Holdings Corp. (8166). The Debtors’ mailing address is 1500 District Avenue, Burlington, MA 01803.

² Capitalized terms not otherwise defined herein shall have the same meanings ascribed to them in the Motion.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.
2. The final hearing (the “Final Hearing”) on the Motion will be held on _____, 2024 at _____.m. (prevailing Eastern Time). Any objections or responses to entry of a final order on the Motion must be filed on or before 4:00 p.m. (prevailing Eastern Time) on _____, 2024 and served on the following parties: (i) the Office of the United States Trustee for the District of Delaware, Attn: Joseph Cudia, Esq., (joseph.cudia@usdoj.gov), J. Caleb Boggs Federal Building, 844 North King Street, Suite 2207, Wilmington, Delaware 19801; (ii) Landis Rath & Cobb LLP, 919 Market Street, Suite 1800, Wilmington, Delaware 19801, Attn: Matthew B McGuire, Esq. (mcguire@lrclaw.com) and Joshua B. Brooks, Esq. (brooks@lrclaw.com); and (iii) counsel to any statutory committee appointed in these chapter 11 cases. In the event no objections to entry of a final order on the Motion are timely received, this Court may enter such final order without need for the Final Hearing.
3. The Debtors are authorized, except to the extent provided in the paragraphs below, to continue to honor, in their discretion, in the ordinary course of business, the Employee Obligations; provided, however, that the Debtors shall seek court approval, upon a motion on notice, of any modification that would implicate any portion of section 503(c) of the Bankruptcy Code.
4. The Debtors are authorized, in their discretion, to pay and remit in the ordinary course of business and in accordance with the Debtors’ prepetition Employee Obligations set forth in the Motion, in an amount not to exceed \$1,300.00 in the aggregate.
5. The Debtors shall not pay any Employee or Independent Contractor (or make payments on behalf of any Employee or Independent Contractor) in excess of the statutory caps

set forth in Bankruptcy Code sections 507(a)(4) and 507(a)(5) on account of any prepetition obligation to such Employee or Independent Contractor.

6. The Debtors are authorized, but not directed, to continue the Employee Benefit Plans in the ordinary course of business on a postpetition basis, in accordance with the Debtors' prepetition practices, policies and programs and in the Debtors' discretion, and to pay and honor Employee Obligations related thereto.

7. The Debtors are authorized, but not directed, to pay all postpetition costs and expenses incidental to payment of the obligations described above, including all administrative and processing costs and payments to outside professionals identified in the Motion in the ordinary course of business, such as any payroll processing expenses.

8. Notwithstanding anything to the contrary herein or in the Motion, nothing herein authorizes the Debtors to pay any amounts or make any transfers under this Interim Order that may implicate the provisions of Bankruptcy Code section 503(c); provided, however, that nothing herein shall impair or otherwise affect any of the Debtors' rights to seek relief under Bankruptcy Code section 503(c) or otherwise in the future.

9. The relief granted herein shall not constitute or be deemed to be an assumption or an authorization to assume, pursuant to Bankruptcy Code section 365, any executory contract or unexpired lease to which the Debtors are a party and all such rights are hereby expressly reserved.

10. All applicable banks and other financial institutions are hereby authorized to receive, process, honor, and pay any and all checks and funds transfers evidencing amounts paid by the Debtors pursuant to the Motion, whether presented or issued prior to or after the Petition Date. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order.

11. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.

12. Bankruptcy Rule 6003 has been satisfied.

13. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

14. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Interim Order.

Dated: _____, 2024
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Proposed Final Order

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

In re:

INVIVO THERAPEUTICS CORPORATION, *et al.*,¹

Debtors.

Chapter 11

Case No. 24-10137 (MFW)

(Jointly Administered)

Ref. Nos. ___ & ___

**FINAL ORDER GRANTING MOTION OF THE DEBTORS FOR ENTRY OF
AN ORDER AUTHORIZING THE DEBTORS TO PAY PREPETITION WAGES,
COMPENSATION, EMPLOYEE BENEFITS, AND OTHER
ASSOCIATED OBLIGATIONS**

Upon the *Motion of the Debtors for Entry of Interim and Final Orders Authorizing the Debtors to Pay Prepetition Wages, Compensation, Employee Benefits, and Other Associated Obligations* (the “Motion”)² and upon the First Day Declaration; and it appearing that this Court has jurisdiction over 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; and it appearing that the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and that the Court may enter a final order consistent with Article III of the United States Constitution; and it appearing that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that sufficient notice of the Motion has been given; and it appearing that the relief requested by the Motion is in the best interests of the Debtors’ estate; and good and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: InVivo Therapeutics Corporation (6670) and InVivo Therapeutics Holdings Corp. (8166). The Debtors’ mailing address is 1500 District Avenue, Burlington, MA 01803.

² Capitalized terms not otherwise defined herein shall have the same meanings ascribed to them in the Motion.

2. The Debtors are authorized, except to the extent provided in the paragraphs below, to continue to honor, in their discretion, in the ordinary course of business, the Employee Obligations; provided, however, that the Debtors shall seek court approval, upon a motion on notice, of any modification that would implicate any portion of section 503(c) of the Bankruptcy Code.

3. The Debtors are authorized, in their discretion, to pay and remit in the ordinary course of business and in accordance with the Debtors' prepetition policies and programs, prepetition amounts outstanding on account of prepetition Employee Obligations set forth in the Motion in an amount not to exceed \$1,300.00 in the aggregate. The Debtors are also authorized, but not directed, to continue to honor in the ordinary course of business, all Paid Time Off discharge payments in accordance with their policies and past practices as well as applicable state law.

4. The Debtors shall not pay any Employee or Independent Contractor (or make payments on behalf of any Employee or Independent Contractor) in excess of the statutory caps set forth in Bankruptcy Code sections 507(a)(4) and 507(a)(5) on account of any prepetition obligation to such Employee or Independent Contractor.

5. The Debtors are authorized, but not directed, to continue the Employee Benefit Plans in the ordinary course of business on a postpetition basis, in accordance with the Debtors' prepetition policies and practices and in the Debtors' discretion, and to pay and honor Employee Obligations related thereto.

6. The Debtors are authorized, but not directed, to pay all postpetition costs and expenses incidental to payment of the obligations described above, including all administrative

and processing costs and payments to outside professionals identified in the Motion in the ordinary course of business.

7. Notwithstanding anything to the contrary herein or in the Motion, nothing herein (1) authorizes the Debtors to pay any amounts or make any transfers under this Order that may implicate the provisions of Bankruptcy Code section 503(c) or which are bonus or severance obligations; or (2) authorize the Debtors to cash out unpaid vacation/leave time except upon termination of an employee, if applicable state law requires such payment; provided, however, that nothing herein shall impair or otherwise affect any of the Debtors' rights to seek relief under Bankruptcy Code section 503(c) or otherwise in the future.

8. The relief granted herein shall not constitute or be deemed to be an assumption or an authorization to assume, pursuant to Bankruptcy Code section 365, any executory contract or unexpired lease to which any Debtors are a party and all such rights are hereby expressly reserved.

9. All applicable banks and other financial institutions are hereby authorized to receive, process, honor, and pay any and all checks and funds transfers evidencing amounts paid by the Debtors pursuant to the Motion, whether presented or issued prior to or after the Petition Date. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order.

10. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

11. Bankruptcy Rule 6003 has been satisfied.

12. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

13. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: _____, 2024
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE