IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: DNIB UNWIND, INC. (f/k/a BIND THERAPEUTICS, INC.),[1] Post-Effective Date Debtor.	Chapter 11 Case No. 16-11084 (BLS) **Hearing Date: Nov. 6, 2017 at 11:00 a.m. (ET)** **Obj. Deadline: Oct. 30, 2017 at 4:00 p.m. (ET)**

B.E. CAPITAL MANAGEMENT FUND LP'S MOTION
TO CONVERT CHAPTER 11 CASES TO CHAPTER 7

B.E. Capital Management Fund LP, by and through its undersigned counsel, hereby moves this Court for an order converting the Debtor's chapter 11 case to chapter 7 of the Bankruptcy Code, and in support thereof respectfully states as follows:

RELEVANT BACKGROUND

1. On May 1, 2016 (the "Petition Date"), the above-captioned debtor filed a voluntary petition in this Court under Chapter 11 of the Bankruptcy Code.

2. On July 27, 2016, the Court entered an order authorizing the sale of substantially all of the Debtor's assets to Pfizer Inc.

3. On September 14, 2016, the Debtor filed the *Debtors' Amended Combined Disclosure Statement and Chapter 11 Plan of Liquidation* [D.I. 415] (the "Plan").

4. On October 11, 2016, the Plan went effective, and Geoffrey L. Berman was appointed as liquidating trustee (the "Trustee") of the trust (the "Trust") established under Plan. The Trustee is in charge of liquidating and distributing the Debtor's remaining assets, which at this point appear to consist of cash sitting in a bank account.

[1] The Post-Effective Date Debtor's address is c/o Development Specialists, Inc., 333 South Grand Avenue, Suite 4070, Los Angeles, California 90071. The last four digits of its Federal tax ID number are 6148.

5. On December, the Trustee made an initial distribution of $8,000,000. That distribution was made to former DNIB stockholders who held such shares in street (the "OTC DNIB Shareholders") name through the Debtor's transfer agent.

6. On September 21, 2017, the Trustee filed the *Motion to Approve Second Amended Post-Confirmation Liquidation Budget* (the "Budget Motion") [Bankr. D.I. 726]. The Budget Motion seeks to almost double the Trustee's original budget for making distributions, from $1,095,000 to $2,027,500. The Budget Motion states: "The Trustee did not receive required tax information from 100% of the DNIB shareholders and, therefore, […] the Depository Trust Company has declined to process any subsequent shareholder distributions. ***The costs of processing future shareholder distributions*** (i.e., building a shareholder registry and making manual distributions to OTC DNIB Shareholders) ***was not included in the budget that was previously approved by the Court.***" Budget Motion ¶ 10 (***emphasis*** added).[2]

[2] It is clear from reading the Budget Motion that neither manual distributions to holders of DNIB stock in street name nor the collection of their Tax Forms was intended at the time the Plan was proposed and confirmed. Mr. Berman, according to his counsel "served, and continues to serve, as the sole officer of the Debtors and, in that role, he was involved in drafting and negotiating the Plan." Answering Brief of Appellee p. 11 [Del. Dist. Ct. C.A. No. 17-945 D.I. 25; filed 9/27/17]. He was advised by professionals at the time he was involved in drafting and negotiating the Plan. If a manual distribution had been contemplated at the time, Mr. Berman would have asked the following questions: Will we need OCT DNIB stockholders' W-9 forms in connection with Plan distributions? What if someone does not return their W-9 form and they will be disqualified from distributions by not turning them in–will the DTC make a distribution to less than all OCT DNIB stockholders? And if the DTC will not, how much will it cost the estate, i.e., me and my retained professionals, to make the distribution ourselves?

Those questions clearly were *not* asked. The Trustee's accountant did not inform the Trustee of the alleged need for W-9 Forms until "early 2017" (Pullo Decl. ¶ 3). The Trustee did not look into whether, and was not informed of DTC's position that it would not make a distribution to a sub-set of shareholders until the early summer of 2017 (5/31/17 Hr'g Tr. 29:7-8). And it was not until the early fall of 2017 that the Trustee assessed the estimated cost of a manual distribution (as opposed to a computerized distribution through the DTC and nominees), as is evidenced by the Budget Motion. Why were those questions not asked at the time the Plan was discussed, negotiated, and solicited? The only logical conclusion is that nobody, including the Trustee, anticipated that distributions to holders of DNIB stock in street name would be made other than through the Debtor's transfer agent and without requiring the Tax Forms.

7. On September 25, the Trustee filed three documents with the Delaware Bankruptcy Court: A *Notice of Distribution* [Bankr. D.I. 729], the *Status Report (Second) Regarding Distributions to Holders of DNIB Stock Pursuant to the Debtors' Plan of Liquidation* (the "Status Report") [Bankr. D.I. 730], and the *Declaration of Christina Pullo on Behalf of Prime Clerk LLC Regarding Service of Equity Distribution Forms and Tabulations of Completed Equity Certification Forms and Tax Forms Received* (the "Pullo Decl.") [Bankr. D.I. 731]. In essence, these three documents provide the public with notice that the Trustee will make another partial distribution in the amount of $8,000,000, that about 25% of DNIB Distribution Record Date shareholders will not participate in this distribution for failure to turn in the Tax Forms, Pullo Decl. ¶ 8, and that, even though those latter shareholders will not (and did not) participate in the distribution, the Trustee wants them to send him the Tax Forms anyway, so he can make the Trust retroactively tax-compliant in connection with the Initial Equity Distribution. Status Report ¶¶ 7-8.

8. On October 16, the Trustee filed the Debtor's Post-Confirmation Report for the third quarter of 2017 [D.I. 743], which indicates that the Estate, as of the end of the end of September 2017 held approximately $16 million in cash. Given that the $8 million October distribution consequently only amounted to a partial distribution of the Debtor's remaining assets,[3] another distribution will have to be made to estate creditors.

[3] Some distribution checks were made out to the wrong payee, namely the beneficial interest holder rather than the Distribution Record Date owner of the stock on account of which the October distribution was intended to be made. As predicted, other checks were made out incorrectly so that what was a non-taxable event in connection with the Initial Equity Distribution (Roth IRA distribution re-invested tax free in another retirement account) now results in a taxable event.

ARGUMENT

9. Bankruptcy Section 1112(b) provides for mandatory conversion of a chapter 11 case to chapter 7 upon a showing of cause:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1). *See In re Riverbend Community*, 2012 Bankr. LEXIS 1275, *3 (Bankr. D. Del. Mar. 23, 2012) (once cause is established, conversion is "necessary"); *see also In re Midwest Props. of Shawano, LLC*, 442 B.R. 278, 283 (Bankr. D. Del. 2010) (stating that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) changed the statutory language such that the previously "permissive" conversion was converted into a mandatory conversion if one of the §1112(b) "for cause" elements are met); *In re Reserves Resort, Spa & Country Club LLC*, 2013 Bankr. LEXIS 2808, *5 (Bankr. D. Del. July 12, 2013) ("The Court does not have discretion.").

10. Section 1112(b)(4) provides for a non-exhaustive list of factors that constitute "cause" for purposes of section 1112(b)(1). Cause exists where there is a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

I. CAUSE EXISTS UNDER SECTION 1112(b)(4)(A)

11. Cause exists to convert the Debtor's chapter 11 case to chapter 7 because the administrative expenses associated with liquidating its estate are sky-rocketing, and there is no reasonable likelihood that the Debtor will "rehabilitate." According to the Trustee's own present estimates, distributing the Debtor'' cash will cost twice the amount anticipated by the Plan, and

those funds are coming directly out of the Estate's creditors' pockets. *See Loop Corp. v. United States Tr.*, 379 F.3d 511, 516 (8th Cir. 2004) ("In the context of a debtor who has ceased business operations and liquidated virtually all of its assets, any negative cash flow-including that resulting only from administrative expenses-effectively comes straight from the pockets of the creditors. This is enough to satisfy the first element of § 1112(b)(1).").

A. The Debtor's Estate Is Experiencing Substantial and Continuing Loss

12. The relevant inquiry under 1112(b)(4)(A) is whether the Estate is "suffering losses or making gains." *Nester v. Gateway Access Sols., Inc*. (*In re Gateway Access Sols., Inc*.), 374 B.R. 556, 562 (Bankr. M.D. Pa. 2007) (considering the Debtor's "track record" in this regard). Here, the Debtor no longer is operating and is not generating any income or have any assets to sell. By contrast, the Budget Motion (which is the Trustee's second request to amend the original budget) demonstrates that the expenses associated with liquidating the Debtor's assets continue to substantially mount and are now disproportionately high when compared to the associated benefit to the Estate. According to Budget Motion, the cost to the Estate associated with an $8 million distribution is $1million – or 12.5% of the distribution itself – the majority of which are compensation for the Trustee's Los Angeles counsel and the claims agent charged with tallying the Equity Distribution Forms and fielding creditors' questions about them. And there is yet at least one more distribution to be made.

13. The costs of administering and winding up an estate always factor into the section 1112(b)(4)(A) gains/loss analysis. *See, e.g., In re Brutsche*, 476 B.R. 298, 305 (Bankr. D.N.M. 2012) ("professional services come at a cost, obviously, which cost needs to be factored in the calculation of gains and losses. And the hard fact is that these costs are rapidly mounting expenses for the estate that help put the estate in the position of continuing substantial losses."); *Nester*, 374

B.R. at 564 (evidence of "extensive administrative costs from professional fees that are accumulating" supported a finding of "substantial and continuing diminution of the estate"); *Morreale v. 2011-SIP-1 CRE/CADC Venture, LLC*, 533 B.R. 320, 324 (D. Colo. 2015) ("To determine the existence of a continuing loss to, or diminution of, the estate, the bankruptcy court must . . . fully evaluate the present condition of a debtor's estate. [This] surely involves looking at accruing liabilities, even if the exact amount of those liabilities has yet to be determined.") (internal citation and quotation omitted). Here, there is no denying that administrative costs result in a substantial loss to the Estate, with no corresponding gains to offset.

14. The Trustee and his professionals (including two major law firms and a claims agent) may be providing legitimate services, but it does not appear they are providing services that a chapter 7 trustee would not be willing and capable to provide at a substantially lesser cost. The sheer administrative costs associated with the chapter 11 Trustee cutting distribution checks, all of which costs come directly out of the Estate's creditors' pockets, are a prime example of why conversion is mandatory under section 1112(b)(1) upon a showing of substantial and continuing loss under 1112(b)(4)(A). Estate creditors would not have to bear the immense proposed administrative costs were the case converted to chapter 7. A chapter 7 trustee could then retain, if need be, one law firm to assist with making the final distribution and winding up the Debtor's affairs (many Delaware chapter 7 trustees come with, or are, a CPA).

B. The Debtor Has No Reasonable Likelihood of Rehabilitation

15. The second part of section 1112(b)(4)(A) also is easily met here, because the Debtor is being liquidated and their rehabilitation is neither envisioned nor possible. The concept of rehabilitation has been explained by one bankruptcy court as follows:

> Section 1112(b)(4)(A) requires that a Debtor who has incurred substantial or continuing losses to have a reasonable likelihood of

> rehabilitation. 'Rehabilitation' is a different and, unfortunately for Debtor, much more demanding standard than 'reorganization.'
>
> "Significantly, the second part of the test under section 1112(b)(4)(A) requires a reasonable likelihood of 'rehabilitation,' not 'reorganization.' Thus, the standard under section 1112(b)(4)(A) is not the technical one of whether the debtor can confirm a plan, but, rather, whether the debtor's business prospects justify continuance of the reorganization effort. Rehabilitation is not another word for reorganization. Rehabilitation means to reestablish a business. Whereas confirmation of a plan could include a liquidation plan, rehabilitation does not include liquidation."

In re Brutsche, 476 B.R. at 301-02 (citing 7 Collier on Bankruptcy ¶ 1112.04[6][a][ii]); *see also Moody v. Sec. Pac. Bus. Credit, Inc*., 85 B.R. 319, 344 (W.D. Pa. 1988) ("Rehabilitation [. . .] may not include liquidation. As the term is used in § 1112(b)(1), it means to put back in good condition: re-establish on a firm, sound basis") (internal citation and quotation omitted). The Debtor here is liquidating; there is no plan or basis for their being re-established as a going business. It has no prospect of rehabilitation.

II. CONVERSION IS AVAILABLE POST-CONFIRMATION

16. The conversion remedy contained in section 1112(b)(1) also is available in cases where a plan has been confirmed and the estate, as here, is administered by a Trustee post-confirmation. *See, e.g., In re D & D Furniture, Inc*., 239 B.R. 54, 57 (Bankr. E.D. Pa. 1999) (opining on what constitutes assets of an estate that converted to chapter 7 after Plan confirmation, and noting that case law is split on this issue, concluding that "claims arising from conduct of a debtor's principals in the course of administration of a bankruptcy case clearly can be claims which are property of the Chapter 7 estate if that case is converted from Chapter 11 to Chapter 7 post-confirmation"); *Pioneer Liquidating Corp. v. United States Tr*. (*In re Consol. Pioneer Mortg. Entities*), 248 B.R. 368, 379–80 (B.A.P. 9th Cir. 2000) (weighing in on the discussion of what constitutes post-confirmation conversion estate property); *In re Benjamin Coal Co*., 978 F.2d 823,

826 (3d Cir. 1992) (analyzing effect of post-confirmation conversion on creditor's proof of claim); *see generally* Sam Della Fera & Andrea Dobin, *Post-Confirmation Conversion Confusion: What is Property of the Chapter 7 Estate?*, American Bankruptcy Trustee Journal Vol. 33, 1 (Winter 2017).

17. In fact, both the Plan and the Confirmation Order contain provisions that require the quarterly payment of US Trustee fees "until the earliest of that particular ***Debtor's case being*** closed, dismissed, or ***converted to a case under chapter 7 of the Bankruptcy Code***." Confirmation Order ¶¶ CC & 5; Plan Art. IV.C (***emphasis*** added). This language indicates that the parties drafting and negotiating the Plan were aware of the possibility of a conversion of this case to chapter 7.

CONCLUSION

For the foregoing reasons, B.E. Capital respectfully requests that the Court convert these cases to chapter 7 and grant such other and further relief warranted under the circumstances.

Respectfully submitted,

Dated: October 16, 2017
Wilmington, Delaware

KLEIN LLC

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: DNIB UNWIND, INC. (f/k/a BIND THERAPEUTICS, INC.),[1] Post-Effective Date Debtor.	Chapter 11 Case No. 16-11084 (BLS) **Hearing Date: Nov. 6, 2017 at 11:00 a.m. (ET)** **Obj. Deadline: Oct. 30, 2017 at 4:00 p.m. (ET)**

NOTICE OF HEARING

PLEASE TAKE NOTICE that on October 16, 2017 B.E. Capital Management Fund LP (the "Movant") filed the *Motion to Convert Chapter 11 Cases to Chapter 7* (the "Motion") with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801. A copy of the Motion is attached hereto.

PLEASE TAKE FURTHER NOTICE that an objection, if any, to the Motion must be in writing, filed with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon the undersigned counsel for Movant, so that it is received on or before 4:00 p.m. (ET) on October 30, 2017.

PLEASE TAKE FURTHER NOTICE that, to the extent oppositions to the Motion are timely filed and not resolved, the Motion shall be considered at a hearing before the Honorable Brendan L. Shannon, United States Bankruptcy Judge for the District of Delaware, at the Bankruptcy Court, 824 Market Street, 6th Floor, Courtroom 1, Wilmington, Delaware 19801, on **November 6, 2017 at 10:00 a.m.** (ET).

[1] The Post-Effective Date Debtor's address is c/o Development Specialists, Inc., 333 South Grand Avenue, Suite 4070, Los Angeles, California 90071. The last four digits of its Federal tax ID number are 6148.

PLEASE TAKE FURTHER NOTICE that, if you fail to respond in accordance with this notice, the Court may grant the relief requested by the Motion without further notice or hearing.

Dated: October 16, 2017
Wilmington, Delaware

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FOR THE DISTRICT OF DELAWARE

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DNIB UNWIND, INC. (f/k/a BIND THERAPEUTICS, INC.),[1]	Case No. 16-11084 (BLS)
Post-Effective Date Debtor.	

CERTIFICATE OF SERVICE

I, Julia B. Klein, hereby certify that, on October 16, 2017, I served a copy of the foregoing *Motion* upon all counsel of record registered to receive electronic notifications in these cases via the Court's CM/ECF filing system.

Dated: October 16, 2017
Wilmington, Delaware

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