

**Business Lease Agreement**

between

**Merck Performance Materials Germany GmbH, Darmstadt, Germany,  
an affiliated company of Merck KGaA, Darmstadt, Germany,**

as the lessor

and

**Merck KGaA, Darmstadt, Germany**

as the lessee

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## Preamble

- (1) Merck Kommanditgesellschaft auf Aktien, Darmstadt, Germany, headquartered in Darmstadt, Germany, registered in the commercial register of the Darmstadt local court under HRB 6164 (*KGaA* or *Merck KGaA, Darmstadt, Germany*) is, together with its German and foreign subsidiaries (*Group*), a globally operating science and technology company and divided into the three group-wide Business Sectors Healthcare, Life Science, and Performance Materials.
- (2) KGaA is the sole shareholder of Merck Performance Materials Holding GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany, headquartered in Darmstadt, registered in the commercial register of the Darmstadt local court under HRB 97192, and of Merck Performance Materials Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany, headquartered in Darmstadt, registered in the commercial register of the Darmstadt local court under HRB 93768 (*PM OpCo*). KGaA as the controlling company and PM OpCo as the controlled company have entered into a domination and profit and loss transfer agreement within the meaning of Sec. 291 (1) s. 1 German Stock Corporations Act (*Aktiengesetz – AktG*). KGaA and PM OpCo are hereinafter also individually referred to as *Party* and collectively as *Parties*.
- (3) The operational activities of the Healthcare, Life Science, and Performance Materials Business Sectors operated within KGaA in Darmstadt and Gernsheim along with the associated assets and liabilities (hereinafter the *Operating Unit KGaA Healthcare*, the *Operating Unit KGaA Life Science*, and/or the *Operating Unit KGaA Performance Materials* and, regardless of the Business Sector, an *Operating Unit* or collectively *Operating Units*), shall be, in accordance with Sec. 20 of the German Reorganization Tax Act (*Umwandlungssteuergesetz – UmwStG*), hived down to three separate subsidiaries via a hive down by absorption pursuant to Sec. 123 (3) (1) German Reorganization Act (*Umwandlungsgesetz – UmwG*) by way of partial universal legal succession, as well as in part by measures transferring or granting beneficial ownership (the *Operational Hive-down*; and the Agreement in Part A of this notarial deed entered into for its implementation, the *Operational Hive-down Agreement*). The Operating Unit KGaA Performance Materials shall be hived down to PM OpCo. Immediately after the completion of the Operational Hive-down, all company shares in PM OpCo held by KGaA shall be hived down by way of a hive-down for the purpose of transfer to Merck Performance Materials Holding GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany (the *Holding Hive-down*; the Agreement entered into for its implementation in Part B of this notarial deed, the *Holding Hive-down*

**Agreement**). The Operational Hive-down and the Holding Hive-down shall each take place with economic effect as of January 1, 2018.

- (4) The Operational Hive-down and the related separation of the operational activities of the Healthcare, Life Science, and Performance Materials Business Sectors operated within KGaA in Darmstadt and Gernsheim to three subsidiaries support the introduction of global, Business Sector-specific company management systems (*Enterprise Resource Planning systems* or *ERP systems*) for the German business. At the same time, the business activities of the Operating Units thus far operated within KGaA can be integrated more efficiently into the management of the global Business Sectors. In addition, the Operational Hive-Down, in conjunction with the subsequent Holding Hive-Down, serves to align the structure of the German business, which is currently managed within KGaA as “operational parent company” (*Stammhauskonzern*), with the globally applicable structural principles of the Group. These strengthen the Group’s ability to respond quickly and flexibly to available strategic development options as well as the adaptability of the Business Sectors to changes in the market environment. The Group’s global innovation and growth strategy is in this way also implemented in Germany.
- (5) The remaining German and foreign subsidiaries of KGaA – and thus the majority of its assets – will not be subject to the hive-down measures. The hive-down measures also do not aim at establishing “global sub-groups” under separate Business Sector holdings. The strategic management of the global Business Sectors Healthcare, Life Science, and Performance Materials shall continue to be carried out directly by KGaA.
- (6) Since the technical requirements for introducing the ERP systems at PM OpCo currently do not exist, the business operation of the Operating Unit KGaA Performance Materials shall be leased back temporarily from PM OpCo to KGaA immediately after the legal effective date of the Operational Hive-down until the introduction of the ERP system, planned to take place in the course of 2020. This temporary lease(back) of the operation is subject to this Business Lease Agreement pursuant to Sec. 292 (1) (3) German Stock Corporations Act (the **Business Lease Agreement**). Corresponding Business Lease Agreements shall also be concluded by Merck Healthcare Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany, and Merck Life Science Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany, (collectively with PM OpCo, regardless of the Business Sector, the **OpCos**, and each individually an **OpCo**) with KGaA. The overall management of the Operating Units by KGaA in its own name and for its own account, accompanied by the leaseback of operations by the OpCos, makes the separate operational control as well as mapping of the operational income and expenses for the OpCos in separate ERP sys-

tems temporarily obsolete. Upon introduction of the ERP system at PM OpCo, the Business Lease as it relates to the Leased Operation Performance Materials shall be terminated. The OpCos shall then conduct their business activity in their own name and for their own account.

- (7) The measures described above are part of a joint entrepreneurial concept and shall be presented to the Annual General Meeting of KGaA as a single transaction on April 27, 2018 for its approval. When registering the measures with the commercial register, the Parties will work to ensure that this Business Lease Agreement and the Holding Hive-down will be registered in the commercial register only after the Operational Hive-down has become effective.
- (8) If and to the extent that the Parties refer to the Operational Hive-down Agreement or its annexes (Annex A to this notarial deed) in this Business Lease Agreement, the content of the provisions to which reference is made and the annexes shall become an integral part of this Business Lease Agreement. The terms defined in the Operational Hive-down Agreement are used in the same meaning in this Business Lease Agreement.

NOW THEREFORE, the Parties conclude the following Business Lease Agreement:

### **A. Agreeing on the Business Lease**

#### **§ 1**

#### **Leased Operation**

- 1.1 PM OpCo shall lease, according to the stipulations of this Agreement, the entire operations of its company to KGaA (***Leased Operation***). KGaA shall manage the Leased Operation during the term of this Agreement in its own name and for its own account. Unless otherwise governed herein, the provisions of Sec. 581 et seq. German Civil Code (***BGB***) shall apply.
- 1.2 The domination and profit and loss transfer agreement existing between PM OpCo and KGaA shall remain unaffected by this Business Lease Agreement.

#### **§ 2**

#### **Legal Effective Date, Beginning Of The Lease**

The Agreement shall become effective upon registration in the commercial register of PM OpCo (***Legal Effective Date***). Notwithstanding the aforesaid, the lease shall become effective with retroactive economic effect as of January 1, 2018, 0:00 hours (***Beginning Of The Lease***). Hence, the Parties shall deem themselves in such position internally – in particular as regards the

payment of the rent and the usufruct from the Leased Operation – as if the lease was already in effect at this time.

## **B. Subject Of The Lease**

### **§ 3**

#### **Description of the Leased Items, general principles, granting possession**

- 3.1 As described in more detail or referenced in § 27 to § 38 of the Operational Hive-down Agreement and in § 48 to § 51 of the Operational Hive-down Agreement, the subject of the lease includes all items and legal relationships of the assets and legal relationships of PM OpCo required to manage the Leased Operation. Excluded from the Lease shall be the receivables and legal relationships of the assets and liabilities of PM OpCo that shall be sold and transferred by PM OpCo to KGaA at the Beginning Of The Lease and sold back by KGaA to PM OpCo at the Lease End. Receivables from and liabilities to employees assigned to the Leased Operation shall be subject to § 20 and § 21. The items of the lease and legal relationships are referred to as ***Leased Items*** and the items and legal relationships transferred to KGaA are referred to as ***Transferred Items***.
- 3.2 If the Leased Items and the Transferred Items can be recognized in the balance sheet, they are included in the segment balance sheet of the Operating Unit KGaA Performance Materials as of January 1, 2018, 0:00 hours, derived from the audited financial statements of KGaA as of December 31, 2017, 24:00 hours, which is attached to the Operational Hive-down Agreement as Annex 27.3 (***Performance Materials Hive-down Balance Sheet***). The subject of the lease and transfer also includes – subject to the special provisions of this Agreement, and if not excluded from the lease or the transfer – all items that are not required to be recorded in the balance sheet, that cannot be disclosed in the balance sheet, or that are actually not disclosed in the balance sheet attributable to the Leased Operation.
- 3.3 The additions and disposals of Leased Items and Transferred Items as well as other rights and obligations (including surrogates *in rem* or under the law of obligations of a Leased Item) during the period between the Beginning Of The Lease and the Legal Effective Date shall be taken into account for the lease or transfer according to the provisions below.
  - a) PM OpCo shall lease or transfer to KGaA the Assets and Liabilities Items in the broadest sense attributable to the Leased Operation which arise during the period from the Beginning Of The Lease to the Legal



Effective Date or were generated during said period and still exist at the Legal Effective Date.

- b) The Assets and Liabilities Items attributable in the broadest sense in terms of origin and intended purpose to the Leased Operation which were terminated, sold, or otherwise transferred during the period from the Beginning Of The Lease to the Legal Effective Date or that no longer exist on the Legal Effective Date shall not be leased or transferred to KGaA. Instead, they shall be substituted by the surrogates in rem or under the law of obligations existing as at the Legal Effective Date.
- 3.4 PM OpCo shall grant KGaA, at the Legal Effective Date, possession and/or physical control of the Leased Items and the Transferred Items and ensure that KGaA can obtain the benefits from the Leased Items in its own name and for its own account. Thus, KGaA shall obtain the agency implied in fact (*Schlüsselgewalt*) over the Leased Items.
- 3.5 If for individual Leased Items a lease is not legally permissible or is not feasible for any other reasons, PM OpCo shall exercise its rights arising from these Leased Items only as per the instructions of KGaA in its capacity as the lessee, and apart from that treat KGaA internally as a lessee of these Leased Items.

#### § 4

##### **Intangible assets and know-how**

- 4.1 PM OpCo shall lease to KGaA all Transferred Patent Rights Performance Materials and Transferred Rights Of Use Performance Materials described in detail in § 28.2 of the Operational Hive-down Agreement attributable to the Leased Operation and all know-how attributable only to the Performance Materials Business Sector within the meaning of § 29 of the Operational Hive-down Agreement (collectively, the **Leased IP**), in particular the intangible assets listed in Annex 28.2.a and Annex 28.2.b to the Operational Hive-down Agreement.
- 4.2 Unless otherwise governed in § 4.3 and § 4.6, the lease of the Leased IP shall be carried out in accordance with the following licensing terms:
- a) PM OpCo shall grant KGaA a non-exclusive, worldwide, non-transferrable license restricted to the term of this Business Lease Agreement to use the Leased IP only within the scope of ordinary business operations of the Leased Operation.

- b) KGaA shall be authorized to grant sub-licenses for the Rights Of Use granted to it pursuant to § 4.2 lit. a) only within the scope of ordinary business operations of the Leased Operation.
  - c) The license granted pursuant to § 4.2 lit. a) shall lapse when the Business Lease Agreement is terminated. It can apart from that only be terminated insofar as the right of termination cannot be waived under the applicable laws.
  - d) The Rights Of Use granted pursuant to § 4.2 lit. a) shall lapse upon termination of the Business Lease Agreement. In this case, KGaA is obligated to immediately cease use of the licensed Leased IP pursuant to § 4.2 lit. a).
  - e) The Rights Of Use granted pursuant to § 4.2 lit. a) shall always apply only to the extent to which PM OpCo is authorized to dispose of them at the Legal Effective Date. The Rights Of Use granted pursuant to § 4.2 lit. a) shall have no impact on the licenses granted under the Leased IP to third parties and the rights and obligations of third parties or of PM OpCo governed therein.
  - f) § 17 of this Business Lease Agreement shall remain unaffected.
- 4.3 During the term of the business lease, KGaA shall be entitled to the trustor's rights and obligations resulting from the Trust Agreement (including the rights of use governed therein) established in § 28.3 lit. b) of the Operational Hive-down Agreement between KGaA and PM OpCo in respect of registered property rights, and shall fulfill these rights and obligations.
- 4.4 The Parties agree that, during the term of the business lease, the obligation of PM OpCo to cover the costs and to indemnify KGaA pursuant to § 28.6 and § 28.7 of the Operational Hive-down Agreement shall not apply.
- 4.5 The Parties agree that the Transferred Rights Of Use Performance Materials as well as the Trust Agreements transferred as per § 28.3 lit. a) of the Operational Hive-down Agreement shall be transferred to KGaA for the term of the business lease by transferring the relevant contracts pursuant to § 9.
- 4.6 As far as PM OpCo has been granted rights of use in Shared IP Performance Materials in accordance with § 28.4 of the Hive-down Agreement and know-how attributable not exclusively to the Performance Materials Business Sector in accordance with § 29.2 of the Hive-down Agreement, KGaA shall exercise such rights for the duration of the business lease in its own right.

## § 5

### Tangible assets

- 5.1 PM OpCo shall lease to KGaA all tangible assets described in detail in § 30.1 to § 30.3 of the Operational Hive-down Agreement attributable to the Leased Operation and those tangible assets described in Annex 30.1 to the Operational Hive-down Agreement, including the low-value assets. This shall also apply if third-party title of ownership in the assets is reserved or PM OpCo has assigned such title to third parties as collateral.
- 5.2 As regards tangible assets of KGaA for which an intercompany service agreement pursuant to § 30.5 of the Operational Hive-down Agreement was concluded between PM OpCo and KGaA or another OpCo, KGaA shall be entitled to any and all rights arising from this service agreement during the term of the business lease.

## § 6

### Receivables

- 6.1 PM OpCo shall sell to KGaA all receivables attributed to the Leased Operation at the Beginning Of The Lease and described in § 31 of the Operational Hive-down Agreement, specifically those listed in Annex 31.2 to the Operational Hive-down Agreement, and shall assign them to KGaA. KGaA hereby accepts the sale and assignment. The sale of the receivables shall take economic effect at the Beginning Of The Lease at the carrying amounts disclosed in the commercial-law Performance Materials Hive-down Balance Sheet for the overall item "Receivables and other assets." The purchase price shall be due within four weeks of the Legal Effective Date of the business lease.
- 6.2 If an assignment of the receivables is not permissible or feasible, PM OpCo shall herewith grant KGaA the power to collect the relevant receivables, and the Parties shall be treated internally as if the relevant receivable had been effectively assigned (Trust Agreement as set out in § 1.4 of the Operational Hive-down Agreement).
- 6.3 After the termination of this Business Lease Agreement, KGaA shall be authorized and, at the request of PM OpCo, obligated, with effect from the termination of the agreement (**Lease End**), to sell to PM OpCo the receivables existing at the Lease End that are attributable to the Leased Operation in a corresponding application of the above stipulations, at the effective carrying amount at Lease End (to be determined according to the same principles as relate to sale under § 6.1). The purchase price shall be due within four weeks of the Lease End.

- 6.4 Any prepaid expenses existing at the Beginning Of The Lease or at the Lease End shall be settled upon payment of the purchase prices pursuant to § 6.1 and § 6.3 on the basis of the respective carrying amount.
- 6.5 In deviation from § 6.1, the provisions in § 20 and § 21 shall apply to employees' receivables.

## § 7

### **Inventories**

- 7.1 PM OpCo shall sell to KGaA all inventories and other current assets attributable in full or on a prorated basis to the Leased Operation, in particular raw materials, consumables and supplies, work in process and finished products and merchandise, irrespective of whether they are at sites, in transit or on consignment, particularly those described in detail in § 32 of the Operational Hive-down Agreement, and specifically those listed in Annex 32.3 to the Operational Hive-down Agreement. Inventories shall be sold on the Legal Effective Date with retroactive economic effect as of the Beginning Of The Lease at the carrying amounts disclosed in the commercial-law Performance Materials Hive-down Balance Sheet for the overall item "Inventories." The purchase price shall be due within four weeks of the Legal Effective Date of the business lease.
- 7.2 The Parties agree that the title, possession, and all other rights to the inventory items sold in accordance with § 7.1 shall be transferred to KGaA at the Legal Effective Date. As far as, at the time of the transfer of the inventory items, third parties have rights reserved in these items or these items are transferred as collateral to third parties, PM OpCo shall transfer to KGaA at the Legal Effective Date the entitlement right in these items, its claims for surrender, if such claim exists, and all other claims to which it is entitled in this context.
- 7.3 If certain inventory items are in the possession of third parties at the Legal Effective Date, PM OpCo shall assign to KGaA its respective repossession rights.
- 7.4 If additional actions or declarations are required for the transfer of title or for granting possession, the Parties shall immediately arrange for what is necessary or required.
- 7.5 After the termination of this Business Lease Agreement, KGaA shall be authorized and, at the request of PM OpCo, obligated, with effect as of the Lease End, to sell to PM OpCo the inventories existing at the Lease End that are attributable to the Leased Operation in a corresponding application of the above stipulations, at the carrying amount then applicable (to be determined accord-

ing to the same principles as relate to sale under § 7.1). The purchase price shall be due within four weeks of the Lease End. PM OpCo shall have the right to limit the sale to such quantities as are necessary to continue the Leased Operation. Items from inventories whose resale PM OpCo has waived may be used or exploited by KGaA at the Lease End at its own discretion.

- 7.6 Both the inventories to be sold hereunder and the inventories to be sold back upon termination of this Business Lease Agreement shall be sold in each case in the condition in which they are at the time of sale to the respective other Party, without any warranty for defects. Warranty claims, regardless of their nature and regardless of the legal basis, shall herewith be excluded to the extent legally permissible.

## § 8

### Liabilities and provisions

- 8.1 KGaA shall take over from PM OpCo, with economic effect as of the Beginning Of The Lease, all liabilities and/or contingent and uncertain liabilities that are attributable to the Leased Operation and that are described in detail in § 33 of the Operational Hive-down Agreement, specifically those listed in detail in Annex 33.4.a and Annex 33.4.b to the Operational Hive-down Agreement.
- 8.2 Such assignment pursuant to § 8.1 excludes liabilities or contingent and uncertain liabilities that would be subject to prohibitions, restrictions, or assessment restrictions on the disclosure of certain items in the financial statements as set forth in Sec. 4f (1) s. 1 German Income Tax Code (*Einkommensteuergesetz - EStG*). If the legal ground on which such a liability is based is transferred to KGaA on the basis of a provision in this Agreement or by law, PM OpCo hereby, with economic effect as of the Beginning Of The Lease, enters into the liability according to the criteria established by the Federal Fiscal Court (*Bundesfinanzhof*) (decision dated April 25, 2012 - Case No. IV R 43/09, Federal Tax Gazette (*BStBl.*) II 2017, 1228) and the tax administration (German Federal Ministry of Finance (*BMF*) on November 30, 2017 - Case No. IV C 6-S 2133/14/10001, *BStBl.* I 2017, 1619) and takes over the fulfilment thereof in the internal relationship with KGaA (Sec. 329 *BGB*).
- 8.3 For the liabilities to be assigned to and accepted by KGaA pursuant to § 8.1, taking § 8.2 into account, PM OpCo shall pay to KGaA a compensation that corresponds to the commercial-law carrying amounts disclosed in the Performance Materials Hive-down Balance Sheet for these overall items (*negative purchase price*). The negative purchase price is due within four weeks of the Legal Effective Date of the business lease.

- 8.4 After the termination of this Business Lease Agreement, KGaA shall be authorized and, at the request of PM OpCo, obligated, with effect as of the Lease End, to sell to PM OpCo the liabilities existing at the Lease End that are attributable to the Leased Operation under § 8.1 and § 8.2, in a corresponding application of the above stipulations (with determination of the effective carrying amount according to the same principles as relate to sale under § 8.3). The negative purchase price falls due within four weeks of the Lease End.
- 8.5 Any deferred income existing at the Beginning Of The Lease or at the Lease End shall be settled upon payment of the purchase prices pursuant to § 8.3 and § 8.4 on the basis of the respective carrying amount.
- 8.6 In deviation from § 8.1, the provisions in § 20 and § 21 shall apply to liabilities due to employees.

## § 9

### **Entering into contracts and contract offers**

- 9.1 Within the scope of the business lease, KGaA shall assume all Transferred Contractual Relationships Performance Materials attributable to the Leased Operation and described in more detail in § 34 of the Operational Hive-down Agreement, in particular those listed in Annex 34.2 to the Operational Hive-down Agreement, by way of assumption of contract with discharging effect. The assumption of contract takes place with economic effect as of the Beginning Of The Lease, but in each case in the form and with the content of the contractual relationships existing at the Legal Effective Date. The retransfer of the contractual relationships attributable to the Leased Operation at the Lease End shall take place in accordance with § 9.5 of this Agreement.
- 9.2 Contractual relationships that are not attributable to the Leased Operation, particularly partnership agreements, domination and profit and loss transfer agreements, or agreements about silent partnerships shall not be transferred.
- 9.3 To the extent that the transfer of the contractual relationships requires the consent of a third party, in particular the respective contractual partner in the transferred contracts, PM OpCo and KGaA shall make their best efforts to obtain such consent immediately.
- 9.4 If and to the extent that a transfer of the contracts, contract offers, entitlements, or similar legal matters with discharging effect is not feasible or is not feasible in such manner that it becomes effective at the Beginning Of The Lease, KGaA shall assume any and all obligations resulting from such contracts, contract offers, entitlements, or similar legal matters. PM OpCo shall assign all claims and rights resulting from these contracts, contract offers, enti-

lements, or similar matters to KGaA. In addition, the Parties shall treat each other internally as if the assumption with discharging effect of the contracts, contract offers, entitlements, and similar legal matters had occurred externally with effect as of the Beginning Of The Lease; in particular, risks, benefits, and obligations are considered transferred as of the Beginning Of The Lease. If and to the extent required, PM OpCo shall continue the relevant contractual relationship on a trust basis in its own name for the account of KGaA and, as far as legally possible, assign to KGaA the contractual relationship or the benefit resulting from the contractual relationship during the term of the business lease. In addition, PM OpCo is obligated, as far as legally possible, to grant to KGaA the power of attorney to exercise rights as they relate to the respective contractual relationship or to assign the corresponding rights to KGaA for exercise. Insofar as KGaA cannot exert a legal position effectively in external relationships, PM OpCo shall act as agent and trustee for KGaA (*Trust Agreement*).

- 9.5 Upon termination of this Business Lease Agreement, PM OpCo shall assume from KGaA, with economic effect as of the Lease End, the contractual relationships existing at the Lease End that can be functionally assigned to the Leased Operation, within the scope legally permissible. § 9.3 and § 9.4 shall apply accordingly.
- 9.6 When obtaining consent pursuant to § 9.3, the Parties shall endeavor, to the extent appropriate, to obtain consent for the retransfer of the contract to PM OpCo upon termination of the business lease pursuant to § 9.5 at the same time. In addition, KGaA shall, for all contracts newly concluded during the business lease, to the extent appropriate, undertake to obtain consent from the contractual partner for the transfer of the contract to PM OpCo upon termination of the business lease pursuant to § 9.5.
- 9.7 During the term of the business lease, KGaA shall be entitled to the trustor's rights and obligations resulting from the Trust Agreement between KGaA and PM OpCo in the meaning of § 49.2 of the Operational Hive-down Agreement ("Shared Agreements").

## § 10

### Litigation and legal proceedings

- 10.1 To the extent that the Leased Items or Transferred Items under this Agreement relate to litigation and legal proceedings specified in § 36.1 to § 36.4 of the Operational Hive-down Agreement, listed in particular in Annex 36.3 to the Operational Hive-down Agreement, are transferred to PM OpCo in the course of the hive-down, PM OpCo shall retransfer such litigation and legal proceedings to KGaA for the duration of the business lease.

- 10.2 With the litigation and other legal proceedings subject to § 10.1, the advisory and contractual relationships with third parties related thereto shall also be transferred to KGaA.
- 10.3 To the extent that, according to the provisions of the applicable procedural rules, the transfer of party status from PM OpCo to KGaA in full depends on other circumstances, such as the consent of the other participant(s) in the proceedings, the Parties shall work towards these steps being taken and towards KGaA replacing PM OpCo as a party in the litigation and other procedural legal relationships subject to this provision.
- 10.4 If no change of party pursuant to § 10.1 or § 10.3 occurs, PM OpCo shall continue the proceedings as the institution of legal standing. Proceedings shall be conducted for the account of KGaA. Internally, the ongoing management of proceedings shall be assumed by KGaA. PM OpCo shall thus not conduct any procedural acts (in particular agree on any settlement, waiver, acknowledgement, confession, withdrawal, or amendment of actions) without the prior consent of KGaA. KGaA shall indemnify PM OpCo with regard to any liabilities and costs resulting from any litigation and other procedural legal relationships that are subject to this provision. PM OpCo shall support KGaA in such proceedings with the objective of minimizing the economic damage resulting from the proceedings.
- 10.5 KGaA hereby undertakes already to transfer the litigation and legal proceedings assigned to the Operating Unit KGaA Performance Materials pursuant to § 10.1 and such litigation and legal proceedings in the meaning of § 10.1 that are re-established until the Lease End to PM OpCo with effect as of the termination date of this Business Lease Agreement. § 10.2 to 10.4 shall apply *mutatis mutandis* to the rescission of the Lease.

## § 11

### Memberships

- 11.1 PM OpCo shall transfer to KGaA any memberships that are transferred to PM OpCo as part of the Operational Hive-down as set out in § 37 of the Operational Hive-down Agreement, taking into account any terminations or re-establishments during the period between the Beginning Of The Lease and the Legal Effective Date.
- 11.2 Insofar as a membership to be transferred (in part) to PM OpCo under § 37 of the Operational Hive-down Agreement has not been assigned or transferred to PM OpCo in the course of the hive-down, it shall remain with KGaA for the term of the business lease and shall be transferred to PM OpCo upon termination of the business lease. If a transfer of such memberships is not possible



even after termination of the business lease, KGaA shall support PM OpCo in re-applying for these memberships, assuming that such a membership is required and desired.

## § 12

### **Permits and approvals required under public law, operator responsibility**

- 12.1 As part of the Operational Hive-down, KGaA and PM OpCo have entered into a Trust Agreement in the meaning of § 1.4 of the Operational Hive-down Agreement with respect to the permits relating to the operations of PM OpCo and specified in Annex 48.2 of the Operational Hive-down Agreement, under which KGaA holds the permits as a trustee exclusively for or also for the PM OpCo. KGaA shall be entitled to the trustor's rights and obligations resulting from this Trust Agreement during the term of this Business Lease Agreement.
- 12.2 During the term of the business lease, KGaA shall remain the operator and owner of the permits for the facilities, land, and equipment of the Leased Operations with all associated rights and obligations, and shall exercise in its previous scope unrestricted physical control and right of disposal over all facilities, land, and equipment of the Leased Operation. During the term of the business lease, KGaA shall be responsible for complying with all environmental and public law provisions and requirements of the respective approvals that are associated with its position as operator (including such requirements as are relevant for supplying leased plants or for removing waste water and waste and, if relevant, legal requirements regarding incidents). KGaA shall also continue to be the sole contact in this context for the competent authorities and third parties and to conduct proceedings and consultations under environmental and approval-related law with authorities and third parties as the responsible party and in its own name. KGaA remains during the term of the business lease the legal owner of all permits under product law in the meaning of § 48.7 of the Operational Hive-down Agreement. KGaA shall continue to fulfill all obligations associated with these permits and shall ensure quality management.
- 12.3 The transfer or re-application for approvals after the termination of the business lease shall be based on the provisions in § 48.8 and § 48.9 of the Operational Hive-down Agreement.

## **C. Legal position of KGaA**

### **§ 13**

#### **General rights and obligations of KGaA**

- 13.1 KGaA shall have the right and obligation to continue to manage and operate the Leased Operation according to the detailed provisions of this Agreement from the Legal Effective Date in its own name and for its own account. KGaA shall be entitled to all products from the Leased Operation and may dispose of them freely. KGaA shall be responsible for procuring all media necessary to operate the Leased Items at its own expense.
- 13.2 KGaA shall be solely responsible for managing and operating the Leased Operation with the due diligence of a responsible and prudent manager. KGaA shall in so doing comply with and take into account in particular the statutory provisions, the official permits, including the requirements and conditions contained therein, as well as codes of practice. As far as impairments of third parties originate from the Leased Operation, KGaA shall indemnify PM OpCo from all claims brought forward against it. If other licenses, permits, approvals, or permissions are required under public law, KGaA shall obtain such documents in coordination with PM OpCo unless otherwise agreed; PM OpCo shall make their best efforts to support KGaA in doing so.
- 13.3 KGaA shall be responsible for all measures necessary to ensure the legal obligation to maintain safety and all other obligations associated with the possession of the Leased Operation as regards public traffic. KGaA shall also indemnify PM OpCo in this respect from all claims of third parties. Administrative orders shall be satisfied by KGaA promptly. § 12.2 and § 12.3 of this Agreement shall remain unaffected.
- 13.4 All non-recurring or recurring public law or private law charges, levies, and dues arising from the Leased Operation shall be borne by KGaA for the term of this Agreement.
- 13.5 The shareholder rights arising from financial assets transferred from KGaA to PM OpCo pursuant to § 31.1 and § 31.2 of the Operational Hive-down Agreement will be exercised by PM OpCo on instructions from KGaA during the term of the business lease.
- 13.6 The Leased Operation may only be sublet with the prior written consent of PM OpCo.

## § 14

### **Maintenance and repair, alterations**

- 14.1 KGaA is obligated to treat the leased items with due care, to service, maintain, and repair them at their own expense.
- 14.2 KGaA may only modify the leased items if such modifications are in compliance with the principles of proper management. In particular, it may take, within the scope of the purpose of this Agreement, all measures necessary for rationalization. Within the scope of proper management, KGaA shall be authorized to decommission or dismantle individual Leased Items.
- 14.3 PM OpCo shall authorize KGaA to undertake legal dispositions relating to the leased items for use that are within the scope of proper management, taking into account the purpose of this Agreement.
- 14.4 Measures of material economic significance that are taken in accordance with § 14.2 and § 14.3, such as the demolition or not only temporary decommissioning of plants or major changes in the business structure of the Leased Operation, shall require the consent of PM OpCo.
- 14.5 With regard to the other provisions and uncertain liabilities that are transferred from PM OpCo to KGaA pursuant to § 8, the Parties agree that, in case of unscheduled and considerable changes in the value of the legal positions or circumstances on which they are based, an equalization should be effected between the Parties. A claim for equalization exists if, (i) according to the applicable provisions set forth in the German Commercial Code (*Handelsgesetzbuch - HGB*), the amount of the other provisions and uncertain liabilities shall be corrected in an individual case by at least EUR 100,000.00 compared to the respective value on which it was based at the Beginning Of The Lease, and, (ii) when netting all value changes as per the preceding clause (i) in a financial year in favor of one of the contractual parties, a positive balance totaling EUR 2,000,000.00 or more results. The party that is the beneficiary of the other contractual party is obligated to pay a compensation (equalization) in the amount of this positive balance. The settlement for each lease year shall take place by March 31<sup>st</sup> of the following year.
- 14.6 § 17 of this Agreement shall prevail in respect of changes during the term of the lease as regards the Leased IP.

## § 15

### Investments

- 15.1 Investments in terms of the provisions below include any and all expenses which, in consideration of the accounting principles of PM OpCo, constitute acquisition costs or costs of production to be capitalized as set forth in Sec. 255 (1) or (2) *HGB* with regard to the fixed assets of PM OpCo. KGaA shall be authorized, as specified in the provisions below, to make investments (replacement and expansion investments) for PM OpCo for the account of PM OpCo.
- 15.2 Replacement investments shall be made according to the principles of proper management. The decision on expansion investments shall be made at the reasonable discretion of KGaA subject to the sentence below. Major expansion investments shall require the consent of PM OpCo.
- 15.3 The Parties agree that the title of ownership in the items acquired by way of replacement and expansion investments for the account of PM OpCo as specified above shall appertain to PM OpCo (and they thus, at the same time, become a surrogated or new integral part of the Leased Item as specified in this Business Lease Agreement). If PM OpCo does not directly obtain the title of ownership in the investment objects, the Parties agree that ownership passes to PM OpCo at the time of acquisition/production (agreeing on anticipated constructive possession and proxy purchase by way of an anticipated in rem agreement). For the purpose of such transfer of title, KGaA shall document the investment and record the acquired items in a list format, taking into account the principle of legal certainty under property law.
- 15.4 The rent shall increase accordingly by the depreciation amounts determined in accordance with the *HGB* calculated on a monthly basis at PM OpCo resulting from the capitalization of the newly capitalized and, as scheduled, cumulatively depreciated replacement and expansion investments and the depreciation on low-value items.
- 15.5 If further explanations or actions are required to make the investments described above, the Parties shall undertake to obtain and do what is necessary without any undue delay. As a purely precautionary measure, PM OpCo hereby revocably authorizes KGaA to represent it when making replacement or expansion investments, as is necessary or appropriate for any direct transfer of the title of ownership in the acquired items to PM OpCo.

**§ 16**  
**Goodwill**

- 16.1 The Parties make clear that PM OpCo shall at all times remain the sole beneficial owner of any goodwill attributable to the Leased Operation (*Goodwill*) in its individual form during the entire term of the lease and even after termination of the lease, and is leased for use to KGaA as part of the Leased Item for the term of the lease only for a limited period of time. This shall apply in particular even if the existing goodwill increases in full or in part or is replaced by new goodwill during the term of the lease as a result of activities or outlays by KGaA.
- 16.2 Even if the amount of the goodwill was affected by the activities of KGaA during the term of the lease, the Parties agree – in accordance with the statutory fundamental classification of the lease as a lease of use for a limited period of time – that KGaA, upon termination of the lease, shall not be required to pay any compensation whatsoever for any increases in value of the Leased Items, including goodwill, and PM OpCo may utilize the Leased Items including goodwill immediately and without any restrictions, in particular, without any obligation to pay any compensation (cf. also Federal Court of Justice (*BGH*) dated May 12, 1986 – Case No. II ZR 11/86; Federal Fiscal Court (*BFH*) dated January 30, 2002 – Case No. X R 56/99).

**§ 17**  
**IP rights**

- 17.1 The Parties make clear that PM OpCo shall at all times remain the sole beneficial owner of the entire Leased IP during the entire term of the lease and even after its termination and that the Leased IP is leased for use to KGaA as part of the Leased Operation for the term of the lease only for a limited period of time.
- 17.2 KGaA shall be authorized and obligated to maintain, manage, monitor, defend, and enforce against any infringers the Leased IP during the term of the lease at its own expense within the scope of proper management. It may also commission third parties for this purpose (e.g., Merck Patent GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany). A sale or pledging, encumbrance or renunciation of Leased IP shall only be admissible with the prior written consent of PM OpCo. KGaA shall be responsible during the term of the lease for the periodic review of the countries in which Leased IP is registered or maintained; KGaA shall manage the Leased IP in such manner that the business is protected in an economically reasonable and appropriate manner. In the event of contradictions between the Trust Agreement

PM OpCo and KGaA entered into and this Agreement in respect of certain items of the Leased IP, the provisions in this Agreement shall prevail.

- 17.3 All findings, inventions, materials, items, procedures, software codes or programs, data, know-how, or other development results that arise or are created during the term of the lease within the scope of the Leased Operation, including all existing rights therein, particularly all intellectual property (hereinafter **Foreground IP**), are subject to the sole beneficial ownership of PM OpCo as of emergence, during the entire term of the lease, and also after termination of the lease, and become part of the Leased IP without KGaA having to pay any compensation during or after the termination of the lease (cf. also *BGH* dated May 12, 1986 – Case No. II ZR 11/86; *BGH* dated March 4, 1964 – Case No. VIII ZR 155/62). For Foreground IP that, at the same time, meet the prerequisites of a replacement or expansion investment as defined in § 15.1 and that require capitalization pursuant to Sec. 246 (1) s. 1 and 2, Sec. 248 (2) s. 1, Sec. 255 *HGB* at PM OpCo if the replacement or expansion investment was made by PM OpCo itself (particularly, the acquisition of Foreground IP for consideration), § 15 shall apply accordingly. The rent shall increase accordingly by the depreciation amounts determined in accordance with the *HGB* calculated on a monthly basis at PM OpCo resulting from the capitalization of the newly capitalized and, as scheduled, cumulatively depreciated replacement and expansion investments.
- 17.4 The Parties agree that sole beneficial ownership of inventions as specified in the German Employee Invention Act (*Gesetz über Arbeitnehmererfindungen - ArbnerfG*) that are used during the term of the lease within the scope of the Leased Operation pursuant to Sec. 6 *ArbnerfG* appertains to PM OpCo (and that such inventions thus become part of the Foreground IP as well). The provision in § 17.3 regarding employee inventions shall apply accordingly.
- 17.5 Trademarks and brands that arise or are created during the term of the lease within the scope of the Leased Operation and that are used exclusively within that scope shall also appertain to PM OpCo for sole beneficial ownership from its emergence during the entire term of the lease and also after the termination of the lease and become part of the Leased IP, without KGaA having to pay any compensation during or after the termination of the lease. The provisions in § 17.3 shall apply accordingly.
- 17.6 KGaA shall take all actions necessary in order that PM OpCo or a trustee appointed by PM OpCo is able to exercise the legal ownership rights in the Foreground IP and the trademarks and brands designated in § 17.5 and, in particular, conduct registration of any industrial property rights. § 17.2 applies accordingly.

## § 18

### Insurance policies

- 18.1 During the term of the lease, KGaA shall bear the costs incurred for insurance coverage for PM OpCo and the Leased Operation pursuant to § 38 of the Operational Hive-down Agreement. KGaA is obligated to maintain the insurance coverage during the entire term of the Agreement to the extent economically corresponding to the amount of coverage of the insurance policies at the Beginning Of The Lease. If circumstances arise during the term of the Agreement that result in an increase in the insurance coverage, e.g., due to any changes in risks or increases in value of the Leased Items, the insurance policies shall be modified accordingly.
- 18.2 As for direct insurance policies and obligations to pension schemes, the provisions in § 21 shall apply.

## § 19

### Warranties and liability

KGaA is aware of the condition of the Leased Operation and the items attributable to it. It shall assume the Leased Operation, Leased Items, and Transferred Items (§ 3.1) in the condition in which they are at the Legal Effective Date. Warranty claims, regardless of their nature and regardless of the legal basis, shall be excluded, to the extent legally permissible. This shall also apply in particular to any claims under pre-contractual breaches of duty, violations of contractual duties, and/or breaches of contractual, pre-contractual or statutory obligations. Any rights of revocation shall be excluded as well.

### D. Employment relationships and pension obligations

## § 20

### Transfer of the employment relationships

- 20.1 With economic effect as of the Beginning Of The Lease, the employment relationship of the employees transferred to PM OpCo pursuant to § 35.1 s. 1 of the Operational Hive-down Agreement shall be retransferred to KGaA as set out in Sec. 613a *BGB* with all rights and obligations (*Transitioning Employees*).
- 20.2 KGaA is responsible vis-à-vis PM OpCo for indemnifying PM OpCo from any obligations entered into before the Beginning Of The Lease or obligations arising during the lease from the employment relationships of the Transitioning Employees, unless expressly governed otherwise in this Agreement. If Transi-

tioning Employees bring forward any claims against PM OpCo created before the Beginning Of The Lease and/or during the lease, KGaA shall indemnify PM OpCo against such claims.

- 20.3 PM OpCo shall reimburse KGaA for any obligations transferred to KGaA resulting from the Transitioning Employees' employment relationships that arose before the Beginning Of The Lease in accordance with § 8, unless otherwise set forth in the provisions below. If the transferred obligations resulting from the Transitioning Employees' employment relationships do not arise until after the Beginning Of The Lease, yet relate to a time period in part before and in part after the Beginning Of The Lease, reimbursement shall relate to the assessment period prior to the Beginning Of The Lease. As regards the financial compensation for assuming the pension commitments, time accounts and HR-related provisions (specifically, for anniversary bonus payments and vacation provisions) due to the Transitioning Employees, the provisions in § 21 shall prevail.
- 20.4 Upon termination of this Business Lease Agreement, the employment relationships of the employees who at the effective date of the termination of the agreement are assigned to the Leased Operations shall transfer with all rights and obligations to PM OpCo as detailed in Sec. 613a *BGB*. As regards the compensation for the obligations to be assumed by PM OpCo resulting from the employment relationships transferring pursuant to Sec. 613a *BGB*, the reimbursement mechanism set forth in § 20.2 and § 20.3 shall apply accordingly.

## § 21

### **Pension obligations, time account agreements, and Assumption of Joint Liability**

- 21.1 Upon KGaA's assuming the employment contracts of the Transitioning Employees in accordance with § 20.1, all rights and obligations arising from the pension commitments into which PM OpCo entered (***Pension Commitments***), as defined in the German Company Pension Act (*Betriebsrentengesetz*), shall be transferred to KGaA. Not included in the transition to KGaA are the pension commitments from terminated employment relationships pursuant to § 35.2 of the Operational Hive-down Agreement, which remain with PM OpCo even during the existence of the Business Lease Agreement.
- 21.2 For the Pension Commitments assumed from PM OpCo which arise from the Transitioning Employees' employment relationships that were agreed upon before the Beginning Of The Lease, KGaA shall receive compensation according to the following provisions.



- 21.3 PM OpCo hereby declares an assumption of joint liability (*Schuldbeitritt*) in respect of all direct commitments to the Transitioning Employees (***Secured Direct Commitments***) in accordance with the agreement on the assumption of joint liability in **Annex 21.3** with the full obligation to perform internally (***Assumption Of Joint Liability Performance Materials***) with economic effect as of the Beginning Of The Lease according to the criteria established by the *Bundesfinanzhof* (decision dated April 25, 2012 – Case No. IV R 43/09 *BStBl. II* 2017, 1228) and the tax administration (German Federal Ministry of Finance (*BMF*) on November 30, 2017 - Case No. IV C 6-S 2133/14/10001, *BStBl. I* 2017, 1619). The Secured Direct Commitments shall be secured by way of a Contractual Trust Arrangement (***CTA***) of PM OpCo. The CTA Trust Agreement is attached as Annex 11.8.a to the Operational Hive-down Agreement. The rights and obligations arising from the Assumption Of Joint Liability Performance Materials and the CTA shall be governed exclusively by the assumption of joint liability agreement and the CTA trust agreement.
- 21.4 As a consequence of the Assumption Of Joint Liability Performance Materials, the Secured Direct Commitments shall remain the sole financial responsibility of PM OpCo even after the Beginning Of The Lease, and shall continue to be recorded there and secured by way of the CTA of PM OpCo. Given these facts, no assignment or reclassification of trust assets arising from the CTA of PM OpCo to the CTA of KGaA shall be made and no compensation payments shall be due payable to KGaA by PM OpCo. As a result of the joint and several liability of PM OpCo externally arising from the Assumption Of Joint Liability Performance Materials and the indemnification of KGaA by PM OpCo as relates to the obligation to perform internally, the financial compensation between the Parties is deemed settled in full.
- 21.5 As regards the pension commitments that are handled by an external pension provider (***External Pension Entitlements***), no financial resources shall be transferred upon KGaA assuming the Transitioning Employees' employment relationships pursuant to § 20.1. Instead, KGaA and PM OpCo entered into a trust agreement within the meaning of § 1 (4) of the Operational Hive-down Agreement regarding the legal positions in respect of the external pension providers in accordance with Annex 35.9 of the Operational Hive-down Agreement, according to which KGaA holds the legal positions vis-à-vis the external pension providers in trust for PM OpCo. The Transitioning Employees shall remain beneficiaries or employees entitled to pension benefits by the external pension provider, respectively. During the term of the business lease, KGaA shall be entitled to the trustor's rights and obligations (including the rights of use governed there) resulting from the collective Trust Agreement established in § 35.9 of the Operational Hive-down Agreement between KGaA and PM OpCo in respect of the External Pension Entitlements, and shall fulfill these rights and obligations. The Parties agree that, during the term of the business

lease, the obligation of PM OpCo to cover the costs and to indemnify KGaA pursuant to the Trust Agreement shall not apply.

- 21.6 Upon termination of the Business Lease Agreement, PM OpCo shall continue the External Pension Entitlement for the employees transferring to PM OpCo according to § 20.4. For this purpose, upon consent of the external pension provider, it shall take the further steps necessary. Insofar as legal positions vis-à-vis external pension providers transition to PM OpCo in this context that are the subject of the Trust Agreement referred to in § 21.5, KGaA and PM OpCo shall terminate the Trust Agreement in accordance with the stipulations in the Trust Agreement and transfer the legal positions to PM OpCo - subject to consent of the respective external pension provider. § 5 of the Trust Agreement referred to in § 21.5 shall remain unaffected. As far as such an agreement is not reached with the external pension provider, KGaA shall ensure that PM OpCo is placed in a position as if such an agreement had been concluded, namely by providing a position as insured party towards the direct insurance companies and providing a status as treasury entity (*Kassenfirma*) at the Pension Fund for German Business (*Pensionskasse für die Deutsche Wirtschaft VVaG, PKDW*).
- 21.7 Liabilities and funds for financing Pension Commitments relating to active or former employees of PM OpCo who are not Transitioning Employees shall remain with PM OpCo unless expressly agreed otherwise in this Agreement, and no payment, compensation, or indemnification of any kind shall be made.
- 21.8 The provisions of this § 21 shall apply accordingly to employees who were hired by KGaA after the Legal Effective Date, who are assigned to the Leased Operation, and who have been granted a Pension Commitment, in particular a Direct Commitment within the meaning of § 21.3 of this Business Lease Agreement. If the employees in the meaning of s. 1 receive a Pension Commitment that is performed by an external pension provider, the associated legal positions shall be included in the Trust Agreement in the meaning of § 35.9 of the Operational Hive-down Agreement. The instruction in the meaning of § 1.2 of the Trust Agreement is hereby granted by PM OpCo.
- 21.9 In respect of the obligations from time accounts, PM OpCo also declares an Assumption Of Joint Liability together with an obligation to perform according to the provisions of **Annex 21.3**, which is thus covered by the Assumption Of Joint Liability Performance Materials. These obligations from time accounts are also secured against insolvency via a CTA of PM OpCo. There shall be no further compensation for the obligations from time accounts. Apart from that, the provisions regarding the Assumption Of Joint Liability Performance Materials in this § 21 shall apply *mutatis mutandis* to securing the time accounts.

21.10 In addition, PM OpCo declares an assumption of joint liability with an obligation to perform for other personnel-related provisions (in particular, anniversary bonus payments and vacation provisions) according to the provisions in **Annex 21.3**, which are thus also covered by the Assumption Of Joint Liability Performance Materials. The provisions regarding this Assumption Of Joint Liability Performance Materials shall also apply accordingly to safeguard these other personnel-related provisions, however, with the particularity that there is currently no CTA guarantee for these obligations and there is also no obligation to initiate such a CTA guarantee.

## **E. Consideration and term**

### **§ 22 Rent**

- 22.1 KGaA shall pay PM OpCo an annual rent for the lease of the Leased Items; this rent is made up of
- a) the total of the depreciation of the Leased Items for the corresponding year of lease pursuant to the *HGB*;
  - b) plus interest on the average bound equity on the commercial balance sheet of PM OpCo (i.e., equity at the beginning of the year plus equity at the end of the year, divided by two) totaling 7% p.a.; and
  - c) as far as legally owed, the value-added tax due on this rent.
- 22.2 The provisions in this Business Lease Agreement regarding the assumptions of joint liability or obligations to perform (e.g., pension provisions) and adjustment of the rent for investments shall remain unaffected by the provision in § 22.1.
- 22.3 KGaA shall pay monthly advance payments on the 15<sup>th</sup> of each following month. The final settlement for each lease year shall be determined by March 31<sup>st</sup> of the following year. The amount of the installments shall be determined *pro rata temporis* based on the amount of the last agreed annual fee. During the period until the advance payments are calculated in accordance with sentence 3 above, the monthly advance payments shall be jointly determined by the Parties using a forecast based on the comparative 2017 values or the prognostic estimate for 2018.

## § 23

### **Effective date of the Agreement**

- 23.1 The Business Lease Agreement shall become effective upon registration in the commercial register of PM OpCo. The Parties to this Agreement shall ensure that this Agreement becomes effective in direct time proximity to but only after the Operational Hive-down. The contract is also subject to the condition precedent of the Operational Hive-down becoming effective by way of registration in the commercial register of KGaA.
- 23.2 Each Party may revoke this Agreement effective immediately if the Business Lease Agreement has not come into effect by the end of the day on February 28, 2019 by way of registration in the commercial register of PM OpCo.

## § 24

### **Term of contract and termination**

- 24.1 The Business Lease Agreement is concluded indefinitely. The Business Lease Agreement may be terminated by each Party in writing giving two-month notice as per the end of the month.
- 24.2 This Agreement may be also terminated by each Party without prior notice for cause. A termination without notice must also be in writing. Cause with regard to the termination without prior notice by PM OpCo shall be given, in particular, if
- a) KGaA sustainably exceeds its right of use pursuant to § 13,
  - b) KGaA is three months in arrears with a payment to be made pursuant to § 22, or
  - c) insolvency proceedings are opened in respect to the assets of KGaA.

## § 24a

### **Premature termination as regards the Performance Materials Distribution And Sales Function**

- 24a.1 The PM OpCo may partially terminate the Business Lease in respect of the distribution and sales functions for the finished products produced in Darmstadt and Gernsheim in the Operating Unit KGaA Performance Materials (products that are produced by KGaA and are not subject to any further processing step within the Group) and selected merchandise (products intended for resale, purchased from external third parties or from other Group companies) of the three business units “Display Materials,” “Pigments & Functional

Materials,” and “Advanced Technologies” (which, according to current information, will be consolidated in the course of 2018 into the three new business units “Display Solutions,” “Semiconductor Solutions,” and “Surface Solutions”) (the ***PM Distribution And Sales Function***) even before termination of this Business Lease Agreement. The possibility of premature partial termination of the Business Lease Agreement is closely related to a project on setting up a central sales company for finished products and merchandise of the Operating Unit KGaA Performance Materials that is hived down to PM OpCo in the scope of the Operational Hive-down and then leased back in the scope of this Lease Agreement. After transferring the PM Distribution And Sales Function to PM OpCo, it shall assume the role of a global distributor for finished products and merchandise of the Operating Unit KGaA Performance Materials with all related processing stages (demand planning, ordering of the products to be distributed, acquisition of title of ownership in the products to be sold, sales, customer service and support).

- 24a.2 Partial termination pursuant to § 24a.1 shall be declared in writing addressed to KGaA giving one month’s notice as per the month end. As of the partial termination becoming effective, the business activities of the PM Distribution And Sales Function shall no longer be part of the Leased Operation (§ 1) and the finished goods allocated to this function based on article numbers (*Stock Keeping Units – SKUs*) shall no longer be part of the Leased Operation.
- 24a.3 In order to be able to perform the PM Distribution And Sales Function, in the course of the partial termination pursuant to § 24a.1, the employment relationships of executives within the established Operating Unit KGaA Performance Materials functions Supply Chain Surface Solutions, Supply Network Planning Surface Solutions, Performance Materials Logistics, and Performance Materials Customer Service shall be transferred to PM OpCo by way of individual agreements. Apart from that, all other employment relationships between KGaA and employees of the PM Distribution And Sales Function (the ***Sales Employees***) shall remain with KGaA even after the partial termination of the business lease pursuant to § 24a.1 until the termination of the business lease at KGaA, unless the employment relationships were transferred from KGaA to PM OpCo as per individual contracts. § 20.4, § 25.1, § 25.2 shall not apply regarding the Sales Employees upon partial termination of the business lease.
- 24a.4 In order to provide further operational support to the PM Distribution And Sales Function, PM OpCo shall make use of services from KGaA after the partial termination and provide services to KGaA. In this context, the Parties shall conclude agreements governing the provision of services between the parties (*service level agreements*).

- 24a.5 The provisions relating to the termination of the business lease pursuant to § 25.1, § 25.2 and § 25.4 shall apply accordingly, unless this § 24a specifies otherwise. The provisions in this § 24a shall not affect any of the remaining provisions of the Business Lease Agreement, including the provision on the assessment of the rent.

## § 25

### **Consequences of termination of the Agreement, unwinding**

- 25.1 Upon termination of this Business Lease Agreement, KGaA shall transfer to PM OpCo the Leased Operation together with the Leased Items attributable to it at the time of the Lease End, including Leased Items acquired or created by way of maintenance, replacement, and expansion investments, in such condition that corresponds to the condition under proper management continued until the Lease End. In addition, KGaA shall transfer the Leased Items to PM OpCo in functional condition. PM OpCo shall, upon termination of the Business Lease Agreement, assume operational management of the Leased Operation and from then on exercise such power in its own name.
- 25.2 The assumption of the contracts and contract offers by PM OpCo upon termination of this agreement shall be subject to § 9.5 and § 9.6; the transfer or re-application for permits and approvals under public law to or for PM OpCo shall be governed by § 12.3. Any resale of the inventories to PM OpCo shall be subject to § 7.5 and § 7.6; the resale of the liabilities and assets (including uncertain liabilities, regardless of whether provisions were recorded for them or not) shall be subject to § 6.3 and § 8.4. As for Goodwill and the Foreground IP, the provisions in § 16 and § 17 shall apply. § 10.5 shall apply to litigation and legal proceedings. The transfer of the employment relationships from KGaA to PM OpCo associated with the termination of the Business Lease Agreement attributable to the Leased Operation upon termination of the Business Lease Agreement shall be governed by § 20.4.
- 25.3 For the purpose of unwinding the business lease, including settlement of rent in line with the duration of the lease, KGaA and PM OpCo shall compile closing accounts of PM OpCo and a pro forma balance sheet for the Leased Operation as at the Lease End.
- 25.4 Moreover, the provisions of this agreement regarding the implementation of the lease shall apply *mutatis mutandis* to its unwinding. The Parties shall support each other in implementing the necessary steps for the unwinding of this Agreement.

## **F. Final provisions**

### **§ 26**

#### **Third-party notifications, collaboration, and support**

- 26.1 PM OpCo and KGaA shall notify third parties, in particular customers and suppliers of PM OpCo, as far as it has not already done so, about the lease of the operation of PM OpCo to KGaA and the changed service relationships in an appropriate manner.
- 26.2 PM OpCo and KGaA shall collaborate in ensuring transfer of the Leased Items without interrupting operations and, in particular, shall submit any necessary or reasonable notifications to third parties and authorities.
- 26.3 PM OpCo shall make available to KGaA any documents, deeds, and evidence necessary for operating the Leased Items in physical or electronic form. Trade and operating secrets, as well as any other statutory requirements, in particular the provisions of the German data protection and privacy law, shall be adhered to.
- 26.4 KGaA shall inform PM OpCo promptly about business transactions or events materially affecting the Leased Operation. This includes, *inter alia*, entering into and ending litigation materially affecting the Leased Operation, or the revocation or imminent revocation of product approvals.

### **§ 27**

#### **Severability; scope of contract**

- 27.1 If individual provisions in this Agreement are ineffective or unenforceable, the effectiveness of the remaining provisions shall remain unaffected. The ineffective or unenforceable provision shall be replaced by such provision which the Parties mutually agree on coming closest to the economic purpose pursued with the ineffective or unenforceable provision. The same shall apply in regard to any omissions in this Agreement.
- 27.2 If circumstances arise after concluding this Agreement as a result of which the purpose of the Agreement cannot be achieved to a substantial and sustainable extent, in particular if new statutory provisions render it permanently impossible to execute the Agreement, the Parties shall make all efforts to find another solution which serves to achieve the purpose of the Agreement.
- 27.3 The preamble and the annexes shall be integral parts of this Agreement.

## **§ 28**

### **Loyalty Clause**

- 28.1 Upon conclusion of this Agreement, not all factual and legal aspects that may arise, in particular from future technical and economic developments, from any changes in statutory regulations, or other circumstances essential for the contractual relationship can be predicted and covered exhaustively. The Parties agree that the principles of commercial loyalty shall apply to their collaboration. They mutually represent to fulfill the contractual agreements in this spirit and to take into account accordingly any changes in the situation that may become necessary in the future.
- 28.2 If there are doubts regarding the allocation of the Leased Items as regards their attribution in individual cases, such situation shall be resolved based on the purpose of the Agreement.
- 28.3 In the event that in executing this Agreement under the conditions mentioned above undue hardship occurs for one Party or the other, both Parties shall bring about an amicable understanding that takes into account the economic purpose of this Agreement according to the principles of reason and fairness.

## **§ 29**

### **Obligations to cooperate**

PM OpCo and KGaA shall make all declarations, execute all deeds, and perform any other acts that may be necessary or appropriate in connection with the lease of the Leased Operation described in this Agreement.

## **§ 30**

### **Written form requirement**

Any modifications to or amendments of this Business Lease Agreement, including the waiver of this written form requirement, shall be in writing, except where a stricter form is required.

## **§ 31**

### **Costs**

The costs of preparing, notarizing, and implementing this Business Lease Agreement shall be borne by KGaA. The costs of the meeting of shareholders of PM OpCo as well as the costs of applying for registration and registration of this Business Lease Agreement in the commercial register shall be borne by PM OpCo.



**§ 32**

**Applicable law; jurisdiction**

- 32.1 This Business Lease Agreement is governed by German law.
- 32.2 The place of jurisdiction for all disputes arising from this Business Lease Agreement is Darmstadt.

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**Table of Annexes**

Annex 21.3	Declaration of Assumption of Joint Liability and Obligation to Perform of PM OpCo
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**Annex 21.3**

Terms of the Debt Assumption and Indemnification Agreement

**Terms of the Debt Assumption and Indemnification Agreement  
according to Sec. 21.3.  
of the Business Lease Agreement between  
KGaA and PM OpCo**

**Preamble**

- (1) Upon the hive-down of the Performance Materials sectors becoming effective, KGaA, pursuant to sec. 35.1 of the hive-down and transfer agreement between KGaA, HC OpCo, PM OpCo and LS OpCo (*Hive Down and Transfer Agreement*), inter alia transfers the employment relationships of the employees who,
- in accordance with the „Gauss HR“ system were allocated to the divisions „KGaA Performance Materials Darmstadt“ and/or „KGaA Performance Materials Gernsheim“ on the Closing Balance Effective Date within the meaning of the Hive Down and Transfer Agreement (except for employees who were already in the passive phase of partial retirement at that time) (*Employees of Performance Materials*) provided that they were also allocated on the Legal Effective Date within the meaning of the Hive Down and Transfer Agreement to the divisions „KGaA Performance Materials Darmstadt“ and/or „KGaA Performance Materials Gernsheim“ and those who,
  - in the period between the Closing Balance Effective Date within the meaning of the Hive Down and Transfer Agreement and the Legal Effective Date within the meaning of the Hive Down and Transfer Agreement, establish an employment relationship with the KGaA in the division „KGaA Performance Materials Darmstadt and/or „KGaA Performance Materials Gernsheim“ or have been assigned or have been allocated to this part of the business according to the “Gauss HR” system, provided that they are still assigned to the business division „KGaA Performance Materials Darmstadt“ and/or „KGaA Performance Materials Gernsheim“ on the Legal Effective Date (*Newly Entering Employees Performance Materials*)
- (hereinafter together referred to as *Transferring Employees Performance Materials*).
- (2) The transfer of the Transferring Employees Performance Materials also includes all rights and obligations arising from pension provisions within the meaning of the German Company Pensions Act [*Betriebsrentengesetz*], which KGaA has granted to the Transferring Employees Performance Materials or into which it has entered. The pension provisions entered into by KGaA as direct commitments are also secured by a Contractual Trust Arrangement (hereinafter referred to as *CTA*) with plan assets. To the extent that the plan assets relate to the direct commitments that will be transferred as part

of the hive-down of the Performance Materials sector, the pro rata plan assets will be allocated to a CTA of the PM OpCo. The same applies to claims arising from agreements on value account credit balances, which will also be transferred to PM OpCo when the hive-down of the Performance Materials sector becomes effective and is secured via a CTA using plan assets.

- (3) Upon the hive down becoming effective, the employment relationships of Transferring Employees Performance Materials are retransferred to KGaA with all rights and obligations in accordance with section 613a BGB. This does not only include the claims arising from the employment relationship, but also claims arising from agreements on time value account balances (hereinafter referred to as *Time Account Entitlements*), all rights and obligations arising from the Pension Commitments as defined by the German Company Pensions Act (hereinafter referred to as *Pension Commitments*). In principle, this also applies to the pension provisions that are made by way of a direct commitment.
- (4) For the purposes set out in para. II of this Agreement
- Direct commitments (hereinafter referred to as *Secured Direct Commitments*),
  - Time Account Entitlements and
  - any other personnel-related commitments, consisting in particular of
    - claims regarding freelancers to the extent such freelancers have to be qualified either as Employees of Performance Materials or as Newly Entering Employees Performance Materials
    - Long Term Incentive Plans (*LTIP*) (*langfristige Incentivierungspläne*)
    - payments for a default liability pursuant to section 1 (1) sentence 3 BetrAVG
    - death benefits,
    - benefits for the Demography Fund,
    - benefits for deferred compensation,
    - benefits for vacation and flexitime,
    - benefits for old-age part-time programs, and
    - anniversary bonuses,

to the extent however, that that aforementioned other personnel-related commitments are not already secured as Secured Direct Commitments or Time Account Entitlements (hereafter referred to as *Other Personnel-related Obligations*), this Agreement is intended to declare a debt assumption and entire obligation to perform by PM OpCo in

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accordance with the criteria laid down by the Federal Fiscal Court (judgment of 25 April 2012 – file number IV R 43/09, Federal Statistical Gazette II 2017,1228) and the criteria laid down by the tax authorities (BMF circular of 30 November 2017 – file number IV C 6-S 2133/14/10001, Federal Statistical Gazette I 2017,1619) whereby the aforementioned obligations are the sole economic responsibility of PM OpCo. Accession to the debt together with acceptance of performance serves the purpose to passivate the pension obligations, Time Account Entitlements, and any Other Personnel-related Obligations previously transferred to PM OpCo after the Legal Effective and with economic effect as of the Beginning of the Lease as set out in the Business Lease Agreement as liabilities of PM OpCo as of the Transfer Date for Tax Purposes (sec. 2.1 of the Hive Down and Transfer Agreement), irrespective of the transfer of the employment relationships.

Given these facts, the Parties agree on the following Debt Assumption and Indemnification Agreement:

**I.****Beneficiaries**

- (1) Beneficiaries as set forth in this Agreement are Transferring Employees Performance Materials with Time Account Entitlements, claims arising from Other Personnel-related Obligations or secured direct commitments whose employment relationship is transferred from PM OpCo to KGaA on the Legal Effective Date as set forth in the Business Lease and their survivors, to the extent that a survivor's pension is also granted as part of the secured direct commitments, and any persons entitled to compensation with rights deriving from the transferring employees in the context of pension compensation (hereinafter referred to as **Beneficiaries**). The Employees of Performance Materials within the meaning of the Hive-Down and Transfer Agreement assigned to the Performance Materials sector of KGaA as of the Closing Balance Effective Date within the meaning of the Hive-Down and Transfer Agreement are listed in Annex 35.1 of the Hive-down and Transfer Agreement.
- (2) The provisions of this Agreement shall apply *mutatis mutandis* to employees who are recruited directly by KGaA after the Legal Effective Date set forth in the Business Lease, were granted a commitment according to Clause II of this Agreement, or any other form of direct pension commitment and are assigned to the Performance Materials sector.

## II. Secured Obligations

- (1) The following direct commitments within the meaning of the Company Pensions Act (BetrAVG) of the Transferring Employees Performance Materials are recognized as secured direct commitments as a result of debt accession, which are transferred from PM OpCo to Merck KGaA on the Beginning of the Lease within the meaning of the operating lease agreement. These include in particular:
  - Merck Pension Plan 2005,
  - Company Pension Scheme 1985,
  - Company Pension Directive 1976,
  - Operating Agreement on pensions for former Biotest employees.
- (2) The debt assumption also includes Time Account Entitlements and Other Personnel-related Obligations within the meaning of paragraph 4 of the preamble.
- (3) This shall apply irrespective of whether the transfer of commitments and claims occurs as a result of a transfer of the respective employment relationship based on an individual contract agreement or in accordance with sec. 613a BGB.
- (4) The extent of the security is determined in accordance with Clauses III and IV of this Agreement.

## III. Debt Assumption

- (1) PM OpCo hereby assumes the secured direct commitments, time account claims, and Other Personnel-related Obligations upon the Business Lease Agreement becoming effective as of the Legal Effective Date within the meaning of the Business Lease Agreement and with economic effect from the Beginning of the Lease within the meaning of the Business Lease Agreement at midnight (hereafter referred to as *Secured Claims*) in such manner that, in accordance with the principles of a contract in favor of third parties, the beneficiaries may assert a full direct claim against PM OpCo for the fulfillment of their secured claims within the existence of this debt accession and indemnity agreement. This debt assumption shall not only apply to the secured claims already accrued until the Beginning of the Lease as set forth in the Business Lease Agreement, but also to the secured claims still accrued after the Beginning of the Lease set forth in the Business Lease Agreement for the duration of the Business Lease,

including such secured claims which are only established after the Beginning of the Lease (e. g. LTIP or benefits for vacation and flexitime from financial years commencing after the Beginning of the Lease) (hereinafter referred to as *Secured Claims To Be Earned*).

- (2) If KGaA is obliged to adjust existing pensions from secured direct commitments based on an adjustment audit in accordance with section 16 BetrAVG, debt assumption shall also include the adjustment amount.
- (3) PSV premiums payable by KGaA to the Pension Assurance Association (Pensionssicherungsverein – PSV) for the secured direct commitments shall also be borne by PM OpCo either by direct payment or by way of reimbursement.
- (4) The KGaA must compensate PM OpCo for the Secured Claims To Be Earned. This is to be measured on the basis of the annual allocations to provisions and liabilities in the commercial balance sheet of PM OpCo in connection with the secured claims insofar as the allocations relate to the secured claims still to be earned; in the case of retirement benefit obligations or comparable long-term obligations due in Section 246 (2) sentence 2 of the German Commercial Code (HGB) is based on the value which results without offsetting in accordance with Section 246 (2) sentences 2,3 of the German Commercial Code (HGB). PM OpCo will determine the compensation amount annually on the respective balance sheet date of PM OpCo (December 31) as part of the preparation of the annual financial statements in accordance with German commercial law and communicate this amount to the KGaA. The settlement amount is due four weeks after the preparation of the annual financial statements of PM OpCo in accordance with commercial law and notification to the KGaA.
- (5) If there is an obligation with regard to a secured claim (such as because of a (partial) operation transfer within the meaning of section 613a BGB, a single contractual transfer of the employment relationship, measures according to the German Reorganization Act [*UmwG*], shall be transferred pursuant to section 4 BetrAVG, etc.) by individual contract, by law or universal succession from KGaA to another debtor, the securing rights from the debt assumption expire with effect from the time of the transfer. In the event of a possible continuing joint and several liability of the KGaA, the assumption of liability shall continue to apply with respect to the liability debt to the extent and for the duration of the joint and several liability.



**IV.****Indemnification / Fulfillment / Refund**

- (1) KGaA as well as PM OpCo assume that KGaA directly fulfills the secured claims upon occurrence of the respective benefit claim. In this case, PM OpCo of KGaA shall reimburse all benefits upon submission of the corresponding supporting evidence, as well as the debt assumption according to Clause III of this Agreement. KGaA shall have the right to demand reasonable advance payments at its reasonable discretion; in particular, the costs and expenses expected to be incurred by KGaA in the respective year are determined based on the annual payment budgets, for which PM OpCo shall make advance payments to KGaA upon request. In each of the aforementioned cases, a claim for compensation of KGaA against PM OpCo with regard to and in the amount of the advance already paid shall be excluded.
- (2) Payments by KGaA or by third parties to fulfill the secured claims owed to the beneficiaries shall reduce the obligation arising from this debt assumption to the corresponding extent.
- (3) Clause III paragraph 5 shall apply accordingly to the indemnification and reimbursement.
- (4) Insofar as claims are brought forward against PM OpCo by beneficiaries directly based on the debt assumption agreed on in Clause III, the payments shall be made by PM OpCo, to the extent described in Clause III of this Agreement. This also applies to the secured claims. In such a case, KGaA shall provide PM OpCo with all necessary documents and data in compliance with data protection regulations.
- (5) In the amount attributable to the Secured Claims, KGaA will transfer to PM OpCo the economic ownership of the trust assets held by Merck Pensionstreuhand e. V. and the Metzler Trust e. V. (the *Trustees*) based on respective agreements with the respective Trustees. Within the scope of these trust arrangements, PM OpCo may also make funding contributions with regard to the Secured Claims To Be Earned. An obligation to make an endowment for these claims only exists if there is a legal obligation to do so.

**V.****Term, Termination, and Other Provisions**

- (1) The ordinary termination of this Debt Assumption and Indemnity Agreement shall be excluded during the duration and scope of the Business Lease. The amicable cancellation and sec. V paragraph 2 of this Agreement shall remain unaffected.

- (2) This Debt Assumption and Indemnification Agreement shall be terminated to the extent that the PM OpCo becomes the direct debtor of the secured claims, especially in the case of a (partial) operation transfer to PM OpCo according to section 613a BGB. This shall also apply in the event of a full or partial termination of the Business Lease insofar as such termination results in a (partial) transfer to PM OpCo with regard to the beneficiaries concerned or if other employment relationships are transferred from Merck KGaA to PM OpCo. This partial or complete termination of the Business Lease results in the expiration of the claims of KGaA and the beneficiaries from this Debt Assumption and Indemnification Agreement with effect for the future without a separate notice to the beneficiaries being required, so that from that date payments may no longer be required from PM OpCo after the termination date of this Agreement.
- (3) Moreover, both Parties may terminate this Debt Assumption and Indemnification Agreement either after the Business Lease has expired by mutual consent or unilaterally, giving notice of 6 months as per the end of the calendar year. Otherwise, the right to terminate the Agreement for due cause shall remain unaffected.
- (4) In the event of a mutual termination of the Debt Assumption and Indemnification Agreement pursuant to sec. V. paragraph 1 or a termination pursuant to sec. V paragraph 3, the Parties shall agree to compensate the adverse economic effects for KGaA arising from the termination of the Debt Assumption and Indemnification Agreement as compared to the continuation of the Debt Assumption and Indemnification Agreement to the extent that KGaA has to bear economic burdens from the secured claims as a result of terminating this Agreement. Such compensation shall be made with regard to the secured claims to the extent that they have already been fully earned by the Beneficiaries by the termination of the Debt Assumption and Indemnification Agreement. When assessing these adverse economic effects and the necessary compensation, the accepted actuarial principles and recognized accounting principles of German GAAP must be taken into account. Insofar as the termination of the debt assumption results in the collateral via the CTA of PM OpCo for the beneficiaries being cancelled, KGaA undertakes to again ensure the security with regard to the secured direct commitments and the Time Account Entitlements of the beneficiaries via their CTA. Pro rata trust assets, which are again made available to KGaA in this context, must be taken into account when determining the compensation of the adverse economic effects on KGaA pursuant to this paragraph 4. The conclusion of an agreement to compensate for the adverse effects arising from the termination shall be prerequisite for the effectiveness of the termination of the Debt Assumption and Indemnification Agreement.
- (5) The parties also reserve the right to make adjustments to the existing agreement. This applies in particular in the case of a change of the procedure for the implementation of

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the secured direct commitments. Neither any notification nor consent of the beneficiaries is required in this regard.

- (6) As far as employment relationships of the Transferring Employees Performance Materials should not transfer to PM OpCo as part of the hive down of the sector KGaA Performance Materials, the deposit of the Secured Claims within the meaning of § 20 UmwStG is performed by way of an debt assumption and indemnification, effective as of the Closing Balance Effective Date (sec. 2.2 of the Hive Down and Transfer Agreement).
- (7) To the extent that currently or in the future, contrary to expectations, there should be obstacles to the transfer of the economic ownership to PM OpCo as stipulated in sec. IV.5 or in the event that KGaA would have continue to provide for the endowment concerning the Secured Claims or the Secured Claims to Be Earned, sec. 56.3 of the Hive Down and Transfer Agreement shall apply accordingly.
- (8) Should one or more provisions of this Agreement be or become invalid, either as a whole or in part, the remaining provisions of this Agreement shall remain unaffected. KGaA as well as PM OpCo agree to replace the ineffective provision with an effective provision that comes as close as possible to the purpose pursued by the ineffective provisions. The same applies to any omissions in the Agreement. In the event of void or invalid provisions relating to deadlines or periods, those deadlines or time periods shall be deemed to be agreed which, depending on the will of the Parties of this Agreement, shall be at least or at most compatible with mandatory law.
- (9) This Agreement shall be governed by German law.

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