

Report on the audit of the
business lease agreement between

Merck Healthcare Germany GmbH,
Darmstadt, Germany, an affiliated company of
Merck KGaA, Darmstadt, Germany,

and

Merck KGaA
Darmstadt, Germany,

pursuant to section 292 (1) no. 3 AktG in conjunction with
section 293b AktG

March 2018

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Annex 2	Copy of the Business lease agreement between Merck Healthcare Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany, as lessor and Merck KGaA, Darmstadt, Germany, as lessee notarized on March 2, 2018 (UR 92/2018, Annex C)
Annex 3	General Terms of Engagement for German Public Accountants and Firms of Public Accountants as amended on January 1, 2017

List of Abbreviations

AktG	German Stock Corporations Act [<i>Aktiengesetz</i>]
BFH	German Federal Fiscal Court [<i>Bundesfinanzhof</i>]
BGB	German Civil Code [<i>Bürgerliches Gesetzbuch</i>]
BGH	German Federal Supreme Court [<i>Bundesgerichtshof</i>]
ERP systems	Enterprise Resource Planning systems
e.g.	for example
et seq.	and what follows
GmbH	Gesellschaft mit beschränkter Haftung [<i>Limited Liability Company</i>]
HC OpCo GmbH	Merck Healthcare Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany
HGB	German Commercial Code [<i>Handelsgesetzbuch</i>]
i.e.	that is
IP	intellectual property
KGaA	Merck Kommanditgesellschaft auf Aktien, Darmstadt, Germany
LS OpCo GmbH	Merck Life Science Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany
no.	number
PM OpCo GmbH	Merck Performance Materials Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany

1. Engagement and Performance of the Engagement

1

Merck Healthcare Germany GmbH, Darmstadt, Germany
(previously Merck 23. Allgemeine Beteiligungs-GmbH),
an affiliated company of Merck KGaA, Darmstadt, Germany¹
(hereinafter also referred to as “HC OpCo GmbH”)

as lessor and

Merck Kommanditgesellschaft auf Aktien,
Darmstadt, Germany
(hereinafter also referred to as “KGaA”)

as lessee, intend to enter into a business lease agreement as defined in section 292 (1) no. 3 AktG. This business lease agreement shall, following its notarization, be submitted for approval to the KGaA’s annual general meeting on April 27, 2018.

2 At the request of the KGaA executive board and HC OpCo GmbH management, the Frankfurt am Main Landgericht (District Court) appointed us as the joint court-appointed auditor of the envisaged business lease agreement (Annex 1) by way of resolution dated October 10, 2017 pursuant to section 293c AktG.

3 Our audit concerns the business lease agreement, attached as Annex 2, between KGaA and HC OpCo GmbH, (“Business Lease Agreement”), which was signed by the contract parties in notarized form on March 2, 2018.

4 In particular, the following documents were available for our review:

- Business Lease Agreement;
- Hive-Down and Transfer Agreement between KGaA as the Transferring Entity and HC OpCo GmbH, Merck Life Science Germany GmbH, Darmstadt, Germany (“LS OpCo GmbH”), and Merck Performance Materials Germany GmbH, Darmstadt, Germany (“PM OpCo GmbH”), each affiliated companies of Merck KGaA, Darmstadt, Germany, as the acquiring entities as of March 2, 2018;
- Joint Report of the executive board of KGaA and the respective management boards of HC OpCo GmbH, LS OpCo GmbH, PM OpCo GmbH as well as the management board of

¹ In the USA and Canada, Merck & Co., Inc., which is independent of Merck KGaA, Darmstadt, Germany and its subsidiaries, Kenilworth, NJ, holds all rights to the name “Merck”. Therefore, in these countries, Merck KGaA Darmstadt, Germany, is presented with the addition “Darmstadt, Germany,” meaning under “Merck KGaA, Darmstadt, Germany”. Since this report is also available in the United States and Canada via the Internet site of Merck KGaA, Darmstadt, Germany, the use of the term “Merck” (which is subject to restricted rights of use) is to be taken into account by consistently designating companies in this report, also in its German version. However, any additions or abbreviations do not constitute part of the company name under commercial law of the companies referred to.

Merck Healthcare Holding GmbH, Darmstadt, Germany, the management board of Merck Life Science Holding GmbH, Darmstadt, Germany, and the management board of Merck Performance Materials Holding GmbH, Darmstadt, Germany, each affiliated companies of Merck KGaA, Darmstadt, Germany, on the reorganization measures intended by KGaA (overall report), containing the joint report of the KGaA executive board and HC OpCo GmbH management board in accordance with section 293a AktG on the conclusion of a Business Lease Agreement between HC OpCo GmbH as the lessor and KGaA as the lessee on March 5, 2018 ("Contract Report");

- domination and profit and loss transfer agreement between KGaA, Darmstadt, Germany, and HC OpCo GmbH dated February 8., 2017;
- closing balance of KGaA as of December 31, 2017;
- balance sheet of operating unit KGaA Healthcare as of January 1, 2018 ("Hive-Down Balance Sheet Healthcare"), derived from the closing balance of KGaA as of December 31, 2017 at midnight (24:00 hours);
- annual reports of KGaA for the years 2014 to 2016;
- commercial register excerpts of KGaA (as of January 4, 2018) and of HC OpCo GmbH (as of January 15, 2018);
- articles of association of KGaA dated July 6, 1995, last revised by resolution dated April 28, 2017, and articles of association of HC OpCo GmbH in the version of December 19, 2016, last revised by resolution dated December 4, 2017.

5 In addition, we used publicly available information as well as capital market data.

6 We have been provided with all requested information and evidence. The executive board of KGaA and the management board of HC OpCo GmbH have each submitted to us a letter of representation to the effect that the documents and information provided to us are complete and accurate.

7 We, the responsible public accountants Prof. Dr. Martin Jonas and Silke Jacobs, commenced our audit in November 2017 after our court appointment dated October 10, 2017 and conducted it through March 7, 2018 at the business premises of KGaA in Darmstadt and at our offices in Düsseldorf.

8 Should significant changes occur in the period between the conclusion of our audit on March 7, 2018 and the date of the resolution at KGaA's annual general meeting on April 27, 2018, which affect the Business Lease Agreement, such changes would have to be taken into account retroactively.

9 We expressly point out that we did not audit the accounting, consolidated or financial statements, or the management of the companies involved, nor the Hive-Down Balance Sheet Healthcare. Such audits are not part of our contract audit. The hive-down balance sheet for the operating unit KGaA Healthcare was derived from audited financial statements; we therefore assume that the documents submitted to us are accurate.

10 The General Terms and Conditions for Public Accountants and Firms of Public Accountants as amended on January 1, 2017 attached as Annex 3 shall apply to the execution of our engagement and our responsibilities, also vis-à-vis third parties. Our liability is set out in No. 9 of the General Terms and Conditions. In relation to third parties, no. 1 paragraph 2 and no. 9 of the General

Terms and Conditions shall prevail. When using our report for purposes other than those underlying our engagement, care must be taken to ensure that the aforementioned General Terms and Conditions apply in these cases as well.

2. Reasons for the conclusion of the Business Lease Agreement

- 11 The operational activities of the business sectors Healthcare, Life Science and Performance Materials and related assets and liabilities within KGaA at the Darmstadt and Gernsheim sites shall be transferred to separate subsidiaries by way of a hive-down from KGaA (hereafter referred to as “Operational Hive-down”).
- 12 The purpose of the Operational Hive-down is primarily to support the integration of KGaA’s local operating activities into the global structures of the respective business sectors, in particular as part of the introduction of new, segment-specific enterprise resource planning (ERP) systems for the respective areas. The introduction of the ERP Systems is planned for the period beginning of year 2019 to the year 2020, depending on the sector.
- 13 Since the technical requirements for introducing the ERP systems currently do not exist at the subsidiaries, it is intended that business activities hived down to the subsidiaries be temporarily leased back to Merck KGaA until the introduction of the ERP systems by the respective subsidiaries. This temporary lease(-back) of the business operations is subject to separate business lease agreements within the meaning of section 292 (1)(3) AktG between the respective subsidiaries and KGaA which shall be concluded with retroactive economic effect as of January 1, 2018. One of these agreements is the Business Lease Agreement between KGaA and HC OpCo GmbH. Upon introduction of the ERP system for the business activities of a subsidiary the respective Business Lease Agreement shall be dissolved. The subsidiaries shall then conduct their business activities in their own name and on their own account.

3. Contract Review

3.1. Subject and Scope of the Contract Review

- 14 The subject matter and scope of the contract review result from section 293b AktG and section 293e AktG. Pursuant to section 293b (1) AktG, the subject of our audit is the Business Lease Agreement. Details of the content of the contract audit report are laid out in section 293e (1) AktG. Accordingly, the court-appointed auditor must report in writing on the result of their audit. In contrast to other enterprise agreement pursuant to section 292 (1) AktG, business lease agreements do not require any compensation (section 304 AktG) or severance payments (section 305 AktG). The draft Business Lease Agreement does not contain any such provisions. Therefore, the review of compensation and severance payment provided for in section 293e (1) AktG is obsolete.
- 15 As far as the approval of the annual general meeting is required, the executive board of each stock corporation or partnership limited by shares must, pursuant to section 293a (1) AktG, submit a detailed written report in which the conclusion of the enterprise agreement and the agreement in question are legally and individually economically explained and justified. The KGaA executive board and HC OpCo GmbH management board will prepare a joint contract report on the business lease pursuant to section 293a AktG. This contract report is part of an overall report in which the other restructuring measures intended by KGaA are explained.
- 16 The completeness and accuracy of the Contract Report, as well as the expediency of the Business Lease Agreement, were not subject of our audit. However, insofar as the joint report explains the content of the agreement, we have consulted it as an important document in the scope of our audit.

3.2. Audit of the Business Lease Agreement

- 17 We audited the Business Lease Agreement according to section 293b AktG. In doing so, we also took into account the explanations of the content of the agreement contained in sections E of the contract report.
- 18 As a court-appointed auditor, we have to examine whether the necessary arrangements for a business lease agreement have been made by the KGaA executive board and HC OpCo GmbH management board and whether the contract provides for the obligations and considerations [*Leistungen und Gegenleistungen*] which are typical for the enterprise agreement in question.
- 19 Specifically, the Business Lease Agreement includes:
- 1. Participating Companies**
- 20 The company names and registered offices of the companies involved are named in the agreement and correspond to the entries in the commercial register maintained at the Darmstadt Local Court [*Amtsgericht*].

2. Agreement on the Business Lease

21 Pursuant to Sec. 1 of the agreement, HC OpCo GmbH leases the entire operation of its business to KGaA in accordance with the provisions of the agreement (hereinafter “Leased Operation”). KGaA shall manage the Leased Operation during the term of the agreement in its own name and for its own account. Unless otherwise provided in the agreement, the provisions of section 581 et seq. BGB, which define the typical contractual obligations in the case of a lease agreement, apply.

22 Thus, an enterprise agreement exists, or, more precisely, a business lease agreement within the meaning of section 292 (1) no. 3 AktG.

23 A domination and profit and loss transfer agreement exists between KGaA as the controlling company and HC OpCo GmbH as the controlled company in terms of section 291 (1) sentence 1 AktG. The domination and profit and loss transfer agreement between HC OpCo GmbH and KGaA remains unaffected by the Business Lease Agreement, pursuant to Sec. 1.2 of the agreement.

3. Effective Date, Duration, and Termination

24 In accordance with Sec. 2 and Sec. 23 of the agreement, the agreement becomes effective in accordance with section 294 AktG upon registration in the commercial register of HC OpCo GmbH (Legal Effective Date). Notwithstanding the aforesaid, the lease takes place with retroactive economic effect as of January 1, 2018, 0:00 a.m. (0:00 hours) (Beginning of the Lease). The parties will accordingly deem themselves in such position internally—in particular as regards the payment of the rent and the usufruct from the Leased Operation—that the lease is already in effect at this time.

25 The parties to this agreement shall ensure, in accordance with Sec. 23.1 of the agreement, that the agreement becomes effective in close connection with, but only after the Operational Hive-down has become effective. 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.

26 According to Sec. 23.2 of the agreement, each contracting party can withdraw from the agreement with immediate effect if the Business Lease Agreement has not become effective by the end of February 28, 2019 through registration in the commercial register of HC OpCo GmbH.

27 Pursuant to Sec. 24.1 of the Business Lease Agreement, the Business Lease Agreement is concluded for an indefinite period of time. The Business Lease Agreement may be ordinarily terminated by each Party in writing giving two months’ notice as per the end of the month.

28 Sec. 24.2 governs the termination without notice of the agreement for due cause. Termination without notice must also be in writing. An important cause for termination without prior notice by HC OpCo GmbH shall exist, in particular, if

- a) KGaA exceeds permanently its right of use pursuant to Sec. 13,
- b) KGaA is three months past due with a payment to be made pursuant to Sec. 22, or
- c) insolvency proceedings are opened over the assets of KGaA.

29 The provisions on the effective date, duration, and termination of the agreement are not in contradiction with the legal regulations.

4. Subject of the Lease

30 The subject of the lease is specified in Sec. 3 to 12 of the agreement.

31 According to Sec. 3.1 of the Agreement, the subject of the lease comprises all Assets and Liabilities Items and legal relationships necessary to manage the Leased Operation of HC OpCo GmbH, described in more detail or referred to in § 3 to § 14 as well as in § 48 to § 51 of the Operational Hive-down agreement (hereinafter referred to as “Leased Items”). Reference is made to the Hive-down agreement since the Leased Operation as specified in Sec. 1.1 of the agreement corresponds to the operating unit KGaA Healthcare hived down to HC OpCo GmbH.

32 Assets and liabilities, as well as legal relationships, which HC OpCo GmbH sells and transfers to KGaA at the Beginning Of The Lease and which are sold back to HC OpCo GmbH by KGaA at Lease End (hereinafter referred to as “Transferred Items”), are excepted from the lease pursuant to Sec. 3.1.

33 Insofar as the Leased Items and the Transferred Items can be accounted for in the balance sheet, they are, pursuant to Sec. 3.2 of the agreement, included in the Hive-Down Balance Sheet Healthcare which is attached to the Operational Hive-Down Agreement as Annex 3.3. The subject of the lease and the transfer also include as a general rule all items that are not required to be recorded in the balance sheet, all items that cannot be disclosed in the balance sheet, or that are actually not disclosed in the balance sheet, attributable to the Leased Operation.

34 Sec. 4 of the Business Lease Agreement governs the lease of *intangible assets* and of *know-how*.

35 The provisions relating to the lease of *fixed assets* are set out in Sec. 5.

36 The sale by HC OpCo GmbH to KGaA of the *receivables* attributable to the Leased Operation at the Beginning Of The Lease is described in more detail in Sec. 6. Sec. 6.1 states that the sale shall become legally effective at the Beginning Of The Lease at the carrying amounts under German commercial law reported in the Healthcare 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.

37 After the termination of this Business Lease Agreement, KGaA shall be authorized and, upon request of HC OpCo GmbH, obligated, pursuant to Sec. 6.3, to sell to KGaA the receivables existing at Lease End attributable to the Leased Operation at the effective carrying amount at Lease End. The purchase price falls due within four weeks of the Lease End.

38 Sec. 6.4 of the agreement stipulates that any accrued income existing at the Beginning of the Lease or Lease End shall be compensated in connection with the payment of the purchase prices pursuant to Sec. 6.1 and 6.3 on the basis of the respective carrying amounts.

39 In deviation from Sec. 6.1 of the agreement, the provisions in § 20 and § 21 of the Business Lease Agreement shall apply to receivables from employees according to Sec. 6.5 of the agreement, cf. below under marginal no. 79 et seq.

40 In the event that an assignment of receivables is not permitted or is not feasible, provisions are made in Sec. 6.2 of the agreement according to which the Parties, in respect of their internal relationship, deem the receivable in question effectively assigned.

- 41 The sale of *inventories* and of *other current assets* is governed by Sec. 7 of the agreement. Inventories, the disposal of which is defined in Sec. 7.1, are disposed pursuant to Sec. 7.2 with retroactive economic effect from the Beginning of the Lease at carrying amounts stated in the Healthcare Hive-Down Balance Sheet pursuant to German Commercial Law for the overall item "Inventories." The purchase price shall be due within four weeks of the Legal Effective Date of the Business Lease.
- 42 After the termination of the Business Lease Agreement, KGaA shall be authorized and, upon request of HC OpCo GmbH, obligated, pursuant to Sec. 7.5 of the agreement, with effect from Lease End to sell the inventories existing at Lease End and attributable to the Leased Operation in a corresponding application of the stipulations on sale at the Beginning Of The Lease at the carrying amount then effective (to be determined based on the same principles as for sale under Sec. 7.1). The purchase price falls due within four weeks of the Lease End.
- 43 According to Sec. 7.5, HC OpCo GmbH has the right to limit the sale to such quantities as are necessary to continue the Leased Operation. Inventories whose sale-back HC OpCo GmbH has waived may be used or exploited by KGaA at Lease End at their own discretion.
- 44 Sec. 7.6 stipulates that the inventories to be sold, as well as the inventories to be resold upon termination of the Business Lease Agreement, shall be sold without any warranty for defects, to the extent legally permissible.
- 45 The assumption of the liabilities or contingent liabilities as well as uncertain liabilities to be assigned to the Leased Operation is governed in Sec. 8; this also includes the handling of liabilities excluded from the transfer.
- 46 For the liabilities to be assigned to KGaA pursuant to Sec. 8.1, Sec. 8.3 requires that HC OpCo GmbH shall pay to KGaA a compensation that corresponds to the carrying amounts for these liabilities under German commercial law reported in the Healthcare Hive-Down Balance Sheet for these overall items (Negative Purchase Price). The Negative Purchase Price falls due within four weeks of the Legal Effective Date of the Business Lease.
- 47 After the termination of this Business Lease Agreement, KGaA shall be authorized and, at the request of HC OpCo GmbH, obligated to, with effect from Lease End, sell it the liabilities existing at Lease End and attributable to the Leased Operation under Sec. 8.1 and Sec. 8.2, in a corresponding application of the applicable stipulations (with determination of the effective carrying amount according to the same principles as for sale under Sec. 8.3), in accordance with Sec. 8.4. The negative purchase price falls due within four weeks of the Lease End.
- 48 According to Sec. 8.5 of the agreement, any deferred income and accrued expenses existing at the Beginning Of The Lease or Lease End shall be settled in connection with the payment of the purchase prices pursuant to Sec. 8.3 and Sec. 8.4 on the basis of the respective carrying amounts.
- 49 In deviation from Sec. 8.1, the provisions in Sec. 20 and Sec. 21 shall apply in accordance with Sec. 8.6 of the agreement for liabilities to employees, cf. below marginal no. 79 et seq.
- 50 Details relating to the entering into contracts and contract offers at the beginning of the agreement or for retransfer at Lease End are described in Sec. 9 of the agreement. Contractual relationships that are not attributable to the Leased Operation, particularly partnership agreements, control and profit and loss transfer agreements, or agreements about silent partnerships shall not be transferred according to Sec. 9.2.

- 51 The transfer or retransfer of litigations and procedural relationships is defined in Sec. 10 of the agreement. This also includes the retransfer for such process and procedural relationships upon the termination of the Business Lease Agreement which were newly established until the termination of the Business Lease Agreement.
- 52 The transfer of memberships of HC OpCo GmbH to KGaA is covered in Sec. 11 of the agreement. Sec. 12 of the agreement addresses public-law permits and approvals.
- 53 A sale of receivables, inventories and other current assets which are attributable to the Leased Operation at the Beginning Of The Lease by HC OpCo GmbH to KGaA, as well as the corresponding resale by KGaA to HC OpCo GmbH at Lease End, shall be done at carrying amounts. The takeover of liabilities and/or contingent liabilities and uncertain liabilities attributable to the Leased Operation at the Beginning Of The Lease, as well as their resale at Lease End, shall also be treated so. When both the respective sale and the respective resale are consistently carried out at carrying amounts, equivalent and plausible arrangements have been made.
- 54 The provisions on the subject of the lease are not in contradiction of any legal provisions.

5. KGaA's Legal Position

- 55 § 13 of the agreement serves to define the *general rights and obligations* of KGaA for the continuation of the Leased Operation. It follows that, in accordance with Sec. 13.1, KGaA shall have the right to continue to manage and operate the Leased Operation according to the detailed provisions of this Business Lease 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 subject of the lease at its own expense.
- 56 According to Sec. 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.
- 57 Details with regard to *traffic safety obligations* (Sec. 13.3) as well as *charges under public law and civil law* (Sec. 13.4) are also specified in Sec. 13. In addition, Sec. 13.6 of the agreement stipulates that sublease is only permitted with the prior written consent of HC OpCo GmbH.
- 58 Sec. 14 covers KGaA's obligations and rights with regard to *maintenance* and alterations and modifications of the objects provided for use.
- 59 According to Sec. 14.1, KGaA is obligated to treat the objects assigned for use with due care, maintain and repair them at their own expense.
- 60 KGaA may only modify the objects assigned for use pursuant to Sec. 14.2 if such modifications are in compliance with the principles of proper management. In particular, they may take, within the scope of the object of this agreement, all measures necessary for economization. Within the scope of proper management, KGaA shall be authorized to decommission or dismantle individual Leased Items.
- 61 Sec. 14.3 and Sec. 14.4 set out the framework and extent to which KGaA can make legal dispositions on its own or only with the consent of HC OpCo GmbH.

- 62 With regard to the other provisions and contingent liabilities that are transferred or transfer from HC OpCo GmbH to KGaA pursuant to Sec. 8, the Parties define in Sec. 14.5 of the agreement that, in case of unscheduled and considerable changes in the value of the legal positions or circumstances on which they are based, a compensation should be effected between the Parties. A claim for compensation exists if (i) according to the applicable provisions in commercial law, the measurement of the other provisions and contingent 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 offsetting all value changes as per the preceding clause in (i) in a financial year a positive balance in favor of one of the Parties totaling EUR 2,000,000.00 or more results. The Party that benefits from such a difference shall then be obliged to the other Party to pay a compensation (equalization) in the amount of this positive balance. The settlement for each lease year shall take place by March 31st of the following year.
- 63 According to Sec. 14.6, special provisions apply to the leased intellectual property rights (hereinafter "Leased IP"). In this regard, Sec. 17 of the agreement shall have precedence.
- 64 The authorization or obligation of KGaA to carry out *replacement and expansion investments* on account of HC OpCo GmbH is laid down in Sec. 15 of the agreement. Replacement investments shall be made based on the principles of proper management. The decision on expansion investments shall be made at the reasonable discretion of KGaA unless they are major expansion investments. These require the approval of HC OpCo GmbH (Sec. 15.2).
- 65 According to Sec. 15.3, the title of ownership in the items procured by way of replacement and expansion investments as specified above shall be vested in HC OpCo GmbH (and thus at the same time become a surrogated or new integral part of the Leased Item in terms of the Business Lease Agreement). The rent shall increase accordingly by the depreciation amounts determined in accordance with the HGB calculated on a monthly basis at HC OpCo GmbH resulting from the capitalization of the newly capitalized and, as scheduled, cumulatively depreciated replacement and expansion investments and the depreciation on low-value items (Sec. 15.4).
- 66 In Sec. 15.5, as a mere precautionary measure, HC OpCo GmbH (revocably) authorizes KGaA to represent them when making replacement or expansion investments, as is necessary or appropriate for any direct transfer of the title of ownership in the items purchased to HC OpCo GmbH.
- 67 The Business Lease relates to the Leased Operations including the assets necessary for operation. The agreement is concluded with the objective of terminating it after the introduction of the ERP systems. After the Business Lease has been terminated, the leased assets shall be returned to HC OpCo GmbH. We therefore believe that it is useful to make investments directly on behalf of the Lessor and provide a compensation in the Business Lease Agreement to compensate for the loss of value associated with the depreciation of replacement and expansion investments.
- 68 Sec. 16 clarifies that HC OpCo GmbH shall remain the beneficial owner of any goodwill attributable to the Leased Operation in its individual form at all times during the entire term of the Lease and even after termination of the Lease, and is provided for use to KGaA as part of the Leased Object for the term of the Lease only for a limited period of time. This shall apply in particular according to Sec. 16.1 if the accumulated 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 use by KGaA.
- 69 According to Sec. 16.2, 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 transfer for 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 Subject of the Lease including goodwill, and HC OpCo GmbH may utilize the Subject of the Lease 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; BFH dated January 30, 2002 – Case No. X R 56/99).

- 70 Sec. 17 comprises the provisions governing IP rights. The Parties clarify in Sec. 17.1 that HC OpCo GmbH 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 is deemed transferred for use to KGaA as part of the Leased Operation for the term of the Lease for a limited period of time. 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 (Sec. 17.2).
- 71 Pursuant to Sec. 17.3 of the agreement, 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), when they arise during the entire term of the Lease and also after its termination, shall be vested in HC OpCo GmbH as its sole beneficial ownership and become part of the Leased IP, without having to pay to KGaA any compensation during or after the termination of the Lease (cf. also Federal Court of Justice [BGH] dated May 12, 1986 – Case No. II ZR 11/86; BGH dated March 4, 1964 – Case No. VIII ZR 155/62).
- 72 For Foreground IP that, at the same time, meet the prerequisites of a replacement or expansion investment as defined in Sec. 15.1 and that require capitalization pursuant to section 246 (1) (1) and (2), section 248 (2)(1), section 255 HGB at HC OpCo GmbH if they were replacement or expansion investment made by HC OpCo GmbH themselves directly (particularly, the acquisition of Foreground IP for consideration); Sec. 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 HC OpCo GmbH resulting from the capitalization of the newly capitalized and, as scheduled, cumulatively depreciated replacement and expansion investments.
- 73 Sec. 17.4 stipulates that the provisions in Sec. 17.3 shall apply accordingly to employee inventions.
- 74 According to Sec. 17.5, trademarks that arise or are created during the term of the Lease within the scope of the Leased Operation and are used exclusively in it shall also appertain to HC OpCo GmbH for exclusive beneficial ownership from the date they arise 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 of Sec. 17.3 shall apply accordingly to this compensation mechanism.
- 75 Sec. 17.6 states that KGaA shall take all actions necessary for HC OpCo GmbH or a trustee appointed by KGaA to be able to exercise the legal ownership rights in the Foreground IP and the trademarks designated in Sec. 17.5 and, in particular, undertake to register any industrial property rights, with Sec. 17.2 applying accordingly.
- 76 § 18 of the agreement stipulates that KGaA shall bear the costs of the insurance coverage required under § 14 of the Operational Hive-Down Agreement for HC OpCo GmbH for the duration of the business lease. As for direct insurance policies and commitments to pension schemes, the provisions in § 21 of the agreement shall apply.

77 Sec. 19 of the agreement covers warranties and liability. Warranty claims, regardless of their nature and regardless of the legal basis, shall be excluded to the extent legally permissible. Any rights of withdrawal shall be excluded as well.

78 The provisions relating to KGaA's legal status are not contradictory to any legal regulations.

6. Employment Relationships and Pension Obligations

79 Sec. 20 and 21 of the agreement cover employment relationships and pension obligations.

80 Pursuant to Sec. 20.1, the employment relationships transferred to HC OpCo pursuant to Sec. 11.1 (1) of the Hive-down Agreement shall be retransferred to KGaA as set out in section 613a *BGB* with all rights and obligations, and this shall have economic effect as from the Beginning Of The Lease.

81 In addition, details regarding the claims arising from the employment relationships of the Transitioning Employees and the compensation mechanism for obligations assumed are set out in Sec. 20.2 and Sec. 20.3.

82 Sec. 20.4 stipulates that, upon termination of the Business Lease Agreement, the employment contracts 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 HC OpCo GmbH, in accordance with section 613a *BGB*. As regards the settlement of the obligations to be assumed by HC OpCo resulting from the employment relationships transferring pursuant to section 613a *BGB*, the reimbursement mechanism set forth in Sec. 20.2 and Sec. 20.3 shall apply accordingly.

83 Upon KGaA assuming the employment contracts of the Transitioning Employees in accordance with Sec. 20.1, all rights and obligations arising from the pension commitments as defined in the German Company Pension Act [*Betriebsrentengesetz*] into which HC OpCo GmbH has entered (pension commitments) shall transfer to KGaA (Sec. 21.1). Not comprised in the transition to KGaA are the pension commitments from terminated employment relationships pursuant to Sec. 11.2 of the Hive-down Agreement, which remain with HC OpCo even during the existence of the Business Lease Agreement.

84 The compensation mechanism for the pension commitments assumed from HC 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 provisions of Sec. 21.2 to 21.8. The mechanism with regard to the obligations arising from time accounts is governed by Sec. 21.9, the mechanism for other personnel-related provisions (especially anniversary bonuses and compensated vacation provisions) are set out in Sec. 21.10.

85 For secured claims that are still to be served, KGaA shall pay compensation to HC OpCo GmbH. This compensation mechanism is provided for in Annex 21.3 to the Business Lease Agreement in Sec. III. (4). A compensation for additions to pension liabilities is a consequence of the fact that the addition to provision is accounted for at the level of the lessor's company even though the respective employees who earned the additional pension entitlements in fact worked for the lessee.

86 The provisions relating to employment relationships and pension commitments do not contradict any legal provisions.

7. Compensation

87 Sec. 22 covers the consideration, i.e., the rent.

88 Sec. 22.1 sets out that KGaA shall pay HC OpCo GmbH an annual rent for ceding the Leased Items, to be comprised of

- a) the total of the scheduled depreciation of the Leased Items for the corresponding lease year pursuant to the HGB;
- b) plus interest on the average bound equity on the commercial balance sheet [*durchschnittlich gebundenen handelsbilanziellen Eigenkapitals*] of HC OpCo GmbH (equity at the beginning of the year plus equity at the year's end, divided by two)) totaling 7.0 % annually; and
- c) if legally owed, the sales tax due on this rent.

89 According to Sec. 22.2, the provisions in this Business Lease Agreement regarding the debt assumptions or obligations to perform (e.g., pension commitments) and adjustment of the rent for investments shall remain unaffected by the provision in Sec. 22.1.

90 Payment modalities are regulated in Sec. 22.3 of the contract. Accordingly, KGaA shall pay monthly instalments on the 15th of each following month. The final settlement for each lease year shall be determined by March 31st of the following year. The amount of the instalments shall be determined *pro rata temporis* based on the amount of the last agreed annual fee. For the period until the advance payments are calculated in accordance with the sentence above, the monthly down-payments shall be jointly determined by the Parties using projections based on the comparative 2017 values or the projections for 2018.

91 As a contract auditor, we dealt with whether the obligations (leasing the Leased Items) and considerations (payment of the rent) are in a reasonable proportion to each other. The amount of the consideration can basically be freely determined within the limits of section 138 *BGB*, but there shall not be a noticeable discrepancy between the obligations and the considerations. The provision of § 22.1 specifies that HC OpCo GmbH shall receive a consideration for the operation leased to KGaA which includes, as material elements, a consideration in the amount of the scheduled depreciation of the leased assets and an interest on the average bound equity on the commercial balance sheet of HC OpCo GmbH. The regulatory concept of a compensation for scheduled depreciation according to German commercial law on the Leased Assets plus a return on capital is a customary concept for business lease agreements. The specific determination of the consideration as a return on the average employed balance sheet equity of 7.0% is also within a normal range for returns on capital in the chemicals and pharmaceuticals industries and no objection can be raised from the perspective of appropriateness.

92 In addition, from our perspective, there are no objections to the obligations and consideration in the agreement because a parent-subsidiary relationship exists between the Parties, so that, from the Group perspective, the cash flows are set off. In addition, there is a domination and profit and loss transfer agreement between the Parties so that the rent paid by KGaA to HC OpCo GmbH flows back to KGaA via profit transfer.

93 The deliberations set out by the executive board and the management board in the joint report (section 293a AktG) on determining the consideration are plausible, whereby in order to determine the respective rent the basis shall be interest on the commercial balance sheet equity plus a compensation for certain expenditures associated with the Leased Operation (plus the reimbursement of expenses for certain expenses in connection with the Leased Operation e.g. additions to provisions for pensions). The concrete determinations regarding the rationale for the determination and calculation of the interest of 7.0% annually on the average bound commercial balance sheet equity of the respective OpCo as a "compensation" for cashing in the benefits of the related leased operation by KGaA are not objectionable.

8. Consequences of Termination of the Agreement, Unwinding

94 The consequences of the termination are set forth in Sec. 25 of the agreement. Upon termination of the Business Lease Agreement, KGaA shall transfer to HC OpCo GmbH the Leased Operations together with the Leased Items attributable to it at the time of the Lease End, including Subjects of the Lease acquired or created with maintenance, replacement and expansion investments in such condition that corresponds to the condition under proper management continued until the end of the lease. In addition, KGaA shall transfer the Leased Items to HC OpCo GmbH in functional condition. HC OpCo GmbH shall, upon termination of the Business Lease Agreement, assume operational management of the Leased Operations and from then on exercise such power in its own name.

95 Sec. 25.2 refers to the provisions of the agreement for rescission, which govern the particular details, such as the resale of the inventories which takes place in accordance with Sec. 7.5 and Sec. 7.6 of the agreement.

96 Sec. 25.3 stipulates that for the purpose of unwinding the business lease, including the calculation of rent appropriate for the term of the lease, KGaA and HC OpCo GmbH shall compile financial statements of HC OpCo GmbH at the effective date, as well as a pro forma balance sheet for the Leased Operation at Lease End.

97 Sec. 25.4 sets out that the parties shall support each other in implementing the necessary steps for the unwinding procedure of this Agreement.

98 The provisions relating to the termination of the agreement or the unwinding procedure do not contradict legal provisions.

9. Final Provisions

99 Obligations to inform third parties about the lease of the operations and the cooperation of the Parties and any other information obligations are set out in § 26 of the agreement.

100 § 27 of the agreement contains provisions in the event that individual provisions of the contract are invalid or unenforceable, in order to ensure the economic purpose of the Business Lease Agreement (Sec. 27.1, Sec. 27.2). Sec. 27.3 of the agreement stipulates that the Preamble and the annexes are an integral part of the agreement.

101 Sec. 28 states that the contracting parties agree that the principles of commercial loyalty apply to their cooperation. 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 ("loyalty clause").

102 The obligations of the parties to cooperate are set out in Sec. 29 of the agreement. Changes and amendments to the Agreement must be in writing in accordance with Sec. 30 of the agreement. The costs of the preparation, notarizing and implementation of the Business Lease Agreement shall, pursuant to Sec. 31, be borne by KGaA. HC OpCo bears the costs relating to the annual general meeting of HC OpCo GmbH and the costs incurred for the application and registration of the Business Lease Agreement in the commercial register. Sec. 32 of the agreement provides that the place of jurisdiction for all disputes arising from the Business Lease Agreement shall be Darmstadt and that the Business Lease Agreement is subject to German Law.

103 Sec. 26 to 32 of the agreement constitute contractual provisions which are not required by law.

10. Result

104 As contract auditor, we examined whether the necessary arrangements for a business lease agreement were made by the KGaA executive board and HC OpCo GmbH management Board and the obligations and considerations typical for such an intercompany agreement are provided for.

105 We have established that the agreement contains the required components prescribed in section 292 et seq. AktG and thus complies with statutory provisions. The obligations and considerations are contained in the agreement, as are the duties of the lessor and lessee.

106 In our audit of the Business Lease Agreement, we also did not find any indications that argue against the admissibility of the optional provisions within the agreement.

4. Final Statement

107 As the auditor appointed by the court, we have reviewed the Business Lease Agreement between
108 HC OpCo GmbH and KGaA, Darmstadt, Germany, dated March 2, 2018.

108 We issue the final statement in analogous application of section 293e AktG as follows:

109 "The Provisions of the Business Lease Agreement are in accordance with the Law and are not con-
110 trary to any legal provisions."

110 We prepared this report to the best of our knowledge and ability based on the documents and infor-
mation provided to us in accordance with the professional principles as laid down in sections 2 and
43 of the German Public Accountants Regulations [*Wirtschaftsprüferordnung*].

Duesseldorf, March 7, 2018

Warth & Klein Grant Thornton AG
Wirtschaftsprüfungsgesellschaft

Prof. Dr. Martin Jonas
Wirtschaftsprüfer [Public Accountant]

Silke Jacobs
Wirtschaftsprüferin [Public Accountant]

Annexes

Annex 1

3-05 O 89/17

LANDGERICHT FRANKFURT AM MAIN BESCHLUSS

In dem Verfahren

auf Bestellung eines sachverständigen Prüfers nach § 293c Abs. 1 AktG
der

1. Merck Kommanditgesellschaft auf Aktien,
2. Merck 23. Allgemeine Beteiligungs-GmbH,
3. Merck 19. Allgemeine Beteiligungs-GmbH,
4. Merck 18. Allgemeine Beteiligungs-GmbH, ,

Antragstellerinnen

Zustellungsbevollmächtigte zu 1, 2, 3, 4: Rechtsanw. Freshfields Bruckhaus Deringer LLP,
Rechtsanwalt Dr. Bucker, Bockenheimer Anlage 44, 60322 Frankfurt am Main,

betreffend der vorgesehenen Betriebspachtverträge zwischen der Antragstellerin zu 1) und
jeweils den Antragstellerinnen zu 2) – 4)

hat die 5. Kammer für Handelssachen des Landgerichts Frankfurt am Main
durch den Vorsitzenden Richter am Landgericht Dr. M. Müller am 10.10.2017 beschlossen:

Für die Prüfung der des vorgesehenen Betriebspachtverträge wird die

Warth & Klein Grant Thornton
Wirtschaftsprüfungsgesellschaft
Johannstraße 39
40476 Düsseldorf

zur jeweiligen sachverständigen gemeinsamen Prüferin bestellt.

Die Antragstellerinnen haben die Kosten des Bestellungsverfahrens als Gesamtschuldner zu
tragen.

Der Geschäftswert wird auf EUR 60.000,-- festgesetzt.

Gründe

Anhaltspunkte einem Vorschlag der Antragstellerin für den sachverständigen Prüfer nicht zu folgen sind nicht ersichtlich, so dass das Gericht bei seiner Auswahl der in Frage kommenden sachverständigen Prüfer auf einen Vorschlag der Antragstellerin zurückgreifen kann.

Gesetzliche Hinderungsgründe bestehen nach der Erklärung der benannten Prüferin vom 28.9.2017 nicht.

Im Interesse der Steigerung der Transparenz und Akzeptanz wird der Prüferin aufgegeben, im Prüfbericht darzulegen, von welcher Person, an welchem Ort, in welcher Weise und zu welcher Zeit die Prüfung erfolgt ist. Wenn über den Einsatz der mit der Prüfung befassten Mitarbeiter ein (aussagekräftiges) Journal u. ä. geführt wurde, reicht es, wenn der Bescheinigung Ablichtungen beigelegt werden.

Der Prüferin wird aufgegeben, ein Exemplar ihres Prüfberichts für das Gericht zu den Akten zu reichen.

Sofern nicht ohnehin die Festsetzung der Vergütung durch das Gericht beantragt wird (§ 318 Abs. 5 HGB) soll der Sachverständige seine Vergütungsvereinbarung mit der Antragstellerin und seine endgültige Honorarabrechnung nach Ende seiner Arbeiten dem Gericht gegenüber offen legen.

Die Kostenentscheidung ergibt sich aus § 22 GNotKG.

Der Geschäftswert bestimmt sich nach § 67 GNotKG.

Rechtsmittelbelehrung:

Gegen diese Entscheidung ist das Rechtsmittel der Beschwerde gegeben, die binnen eines Monats nach Zustellung beim Landgericht Frankfurt am Main durch Einreichung einer Beschwerdeschrift oder zur Protokoll der Geschäftsstelle einzulegen ist. Die Beschwerde muss die Bezeichnung des angefochtenen Beschlusses, sowie die Erklärung enthalten, dass Beschwerde gegen diesen Beschluss eingelegt wird. Die Beschwerdeschrift ist vom Beschwerdeführer oder seinem Bevollmächtigten zu unterzeichnen.

Dr. M. Müller



Annex 2

Annex C

Business Lease Agreement Healthcare

(Non-binding convenience translation)

Business Lease Agreement

between

**Merck Healthcare 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 Healthcare 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 97141, and of Merck Healthcare 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 96240 (**HC OpCo**). KGaA as the controlling company and HC 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 HC 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 Healthcare shall be hived down to HC OpCo. Immediately after the completion of the Operational Hive-down, all company shares in HC OpCo held by KGaA shall be hived down by way of a hive-down for the purpose of transfer to Merck Healthcare 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 Opera-

tional 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 HC OpCo currently do not exist, the business operation of the Operating Unit KGaA Healthcare shall be leased back temporarily from HC 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 beginning of 2019. 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 Life Science Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany, and Merck Performance Materials Germany GmbH, Darmstadt, Germany, an affiliated company of Merck KGaA, Darmstadt, Germany, (collectively with HC 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

systems temporarily obsolete. Upon introduction of the ERP system at HC OpCo, the Business Lease as it relates to the Leased Operation Healthcare 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 HC 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 HC 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 HC 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 § 3 to § 14 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 HC OpCo required to manage the Leased Operation. Excluded from the Lease shall be the receivables and legal relationships of the assets and liabilities of HC OpCo that shall be sold and transferred by HC OpCo to KGaA at the Beginning Of The Lease and sold back by KGaA to HC 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 Healthcare 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 3.3 (***Healthcare 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) HC 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 HC 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, HC 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 HC OpCo shall lease to KGaA all Transferred Patent Rights Healthcare and Transferred Rights Of Use Healthcare described in detail in § 4.2 of the Operational Hive-down Agreement attributable to the Leased Operation and all know-how attributable only to the Healthcare Business Sector within the meaning of § 5 of the Operational Hive-down Agreement (collectively, the **Leased IP**), in particular the intangible assets listed in Annex 4.2.a and Annex 4.2.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) HC 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 HC 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 HC 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 § 4.3 lit. b) of the Operational Hive-down Agreement between KGaA and HC 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 HC OpCo to cover the costs and to indemnify KGaA pursuant to § 4.6 and § 4.7 of the Operational Hive-down Agreement shall not apply.
- 4.5 The Parties agree that the Transferred Rights Of Use Healthcare as well as the Trust Agreements transferred as per § 4.3 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 HC OpCo has been granted rights of use in Shared IP Healthcare in accordance with § 4.4 of the Hive-down Agreement and know-how attributable not exclusively to the Healthcare Business Sector in accordance with § 5.2 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 HC OpCo shall lease to KGaA all tangible assets described in detail in § 6.1 to § 6.3 of the Operational Hive-down Agreement attributable to the Leased Operation and those tangible assets described in Annex 6.1 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 HC 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 § 6.5 of the Operational Hive-down Agreement was concluded between HC 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 HC OpCo shall sell to KGaA all receivables attributed to the Leased Operation at the Beginning Of The Lease and described in § 7 of the Operational Hive-down Agreement, specifically those listed in Annex 7.2 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 Healthcare 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, HC 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 HC OpCo, obligated, with effect from the termination of the agreement (***Lease End***), to sell to HC 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 HC 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 § 8 of the Operational Hive-down Agreement, and specifically those listed in Annex 8.3 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 Healthcare 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, HC 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, HC 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 HC OpCo, obligated, with effect as of the Lease End, to sell to HC 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 according to the same principles as relate to sale under § 7.1). The purchase price

shall be due within four weeks of the Lease End. HC 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 HC 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 HC 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 § 9 of the Operational Hive-down Agreement, specifically those listed in detail in Annex 9.4.a and Annex 9.4.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, HC 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, HC OpCo shall pay to KGaA a compensation that corresponds to the commercial-law carrying amounts disclosed in the Healthcare 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 HC OpCo, obligated, with effect as of the Lease

End, to sell to HC 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 Healthcare attributable to the Leased Operation and described in more detail in § 10 of the Operational Hive-down Agreement, in particular those listed in Annex 10.2 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, HC 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. HC OpCo shall assign all claims and rights resulting from these contracts, contract offers, entitlements, 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, HC 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, HC 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, HC OpCo shall act as agent and trustee for KGaA (*Trust Agreement*).

- 9.5 Upon termination of this Business Lease Agreement, HC 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 HC 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 HC 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 HC 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 § 12.1 to § 12.4 of the Operational Hive-down Agreement, listed in particular in Annex 12.3 to the Operational Hive-down Agreement, are transferred to HC OpCo in the course of the hive-down, HC 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 HC 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 HC 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, HC 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. HC OpCo shall thus not conduct any procedural acts (in particular agree on any settlement, waiver, acknowledgment, confession, withdrawal, or amendment of actions) without the prior consent of KGaA. KGaA shall indemnify HC OpCo with regard to any liabilities and costs resulting from any litigation and other procedural legal relationships that are subject to this provision. HC 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 Healthcare 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 HC 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 HC OpCo shall transfer to KGaA any memberships that are transferred to HC OpCo as part of the Operational Hive-down as set out in § 13 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 HC OpCo under § 13 of the Operational Hive-down Agreement has not been assigned or transferred to HC 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 HC 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 HC 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 HC 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 HC 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 HC 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 HC 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 HC OpCo unless otherwise agreed; HC 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 HC 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 HC OpCo pursuant to § 7.1 and § 7.2 of the Operational Hive-down Agreement will be exercised by HC 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 HC 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 HC 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 HC OpCo.
- 14.5 With regard to the other provisions and uncertain liabilities that are transferred from HC 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 31st 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 HC 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 HC OpCo. KGaA shall be authorized, as specified in the provisions below, to make investments (replacement and expansion investments) for HC OpCo for the account of HC 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 HC 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 HC OpCo as specified above shall appertain to HC 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 HC OpCo does not directly obtain the title of ownership in the investment objects, the Parties agree that ownership passes to HC 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 HC 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, HC 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 HC OpCo.

§ 16

Goodwill

- 16.1 The Parties make clear that HC 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 HC 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 HC 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 HC 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

HC 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 HC 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 HC OpCo if the replacement or expansion investment was made by HC 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 HC 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 HC 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 HC 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 HC OpCo or a trustee appointed by HC 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 HC OpCo and the Leased Operation pursuant to § 14 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 HC OpCo pursuant to § 11.1 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 HC OpCo for indemnifying HC 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 HC OpCo created before the Beginning Of The Lease and/or during the lease, KGaA shall indemnify HC OpCo against such claims.

- 20.3 HC 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 HC OpCo as detailed in Sec. 613a *BGB*. As regards the compensation for the obligations to be assumed by HC 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 HC 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 § 11.2 of the Operational Hive-down Agreement, which remain with HC OpCo even during the existence of the Business Lease Agreement.
- 21.2 For the Pension Commitments assumed from HC 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 HC 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 Healthcare***) 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 HC 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 Healthcare 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 Healthcare, the Secured Direct Commitments shall remain the sole financial responsibility of HC OpCo even after the Beginning Of The Lease, and shall continue to be recorded there and secured by way of the CTA of HC OpCo. Given these facts, no assignment or reclassification of trust assets arising from the CTA of HC OpCo to the CTA of KGaA shall be made and no compensation payments shall be due payable to KGaA by HC OpCo. As a result of the joint and several liability of HC OpCo externally arising from the Assumption Of Joint Liability Healthcare and the indemnification of KGaA by HC 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 HC 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 11.9 of the Operational Hive-down Agreement, according to which KGaA holds the legal positions vis-à-vis the external pension providers in trust for HC 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 § 11.9 of the Operational Hive-down Agreement between KGaA and HC 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 HC 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, HC OpCo shall continue the External Pension Entitlement for the employees transferring to HC 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 HC OpCo in this context that are the subject of the Trust Agreement referred to in § 21.5, KGaA and HC OpCo shall terminate the Trust Agreement in accordance with the stipulations in the Trust Agreement and transfer the legal positions to HC 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 HC 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 HC OpCo who are not Transitioning Employees shall remain with HC 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 § 11.9 of the Operational Hive-down Agreement. The instruction in the meaning of § 1.2 of the Trust Agreement is hereby granted by HC OpCo.
- 21.9 In respect of the obligations from time accounts, HC 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 Healthcare. These obligations from time accounts are also secured against insolvency via a CTA of HC OpCo. There shall be no further compensation for the obligations from time accounts. Apart from that, the provisions regarding the Assumption Of Joint Liability Healthcare in this § 21 shall apply *mutatis mutandis* to securing the time accounts.

- 21.10 In addition, HC 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 Healthcare. The provisions regarding this Assumption Of Joint Liability Healthcare 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 HC 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 HC 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 15th of each following month. The final settlement for each lease year shall be determined by March 31st 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 HC 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 HC 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 HC 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.

§ 25

Consequences of termination of the Agreement, unwinding

- 25.1 Upon termination of this Business Lease Agreement, KGaA shall transfer to HC 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 HC OpCo in functional condition. HC OpCo shall, upon termination of the Busi-

ness 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 HC 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 HC OpCo shall be governed by § 12.3. Any resale of the inventories to HC 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 HC 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 HC OpCo shall compile closing accounts of HC 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 HC OpCo and KGaA shall notify third parties, in particular customers and suppliers of HC OpCo, as far as it has not already done so, about the lease of the operation of HC OpCo to KGaA and the changed service relationships in an appropriate manner.
- 26.2 HC 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 HC 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 HC 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

HC 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 HC 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 HC 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.

Table of Annexes

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

Preamble

- (1) Upon the hive-down of the Healthcare sectors becoming effective, KGaA, pursuant to sec. 11.1 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 Healthcare Darmstadt“ 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 Healthcare***) 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 Healthcare Darmstadt“ 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 Healthcare Darmstadt“ 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 Healthcare Darmstadt“ on the Legal Effective Date (***Newly Entering Employees Healthcare***)
- (hereinafter together referred to as ***Transferring Employees Healthcare***).
- (2) The transfer of the Transferring Employees Healthcare 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 Healthcare 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 Healthcare sector, the pro rata plan assets will be allocated to a CTA of the HC OpCo. The same applies to claims arising from agreements on value account credit balances,

which will also be transferred to HC OpCo when the hive-down of the Healthcare 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 Healthcare 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 Healthcare or as Newly Entering Employees Healthcare
 - 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 HC OpCo in 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

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6-S 2133/14/10001, Federal Statistical Gazette I 2017,1619) whereby the aforementioned obligations are the sole economic responsibility of HC 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 HC 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 HC 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 Healthcare with Time Account Entitlements, claims arising from Other Personnel-related Obligations or secured direct commitments whose employment relationship is transferred from HC 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 Healthcare within the meaning of the Hive-Down and Transfer Agreement assigned to the Healthcare sector of KGaA as of the Closing Balance Effective Date within the meaning of the Hive-Down and Transfer Agreement are listed in Annex 11.1 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 Healthcare sector.

II.**Secured Obligations**

- (1) The following direct commitments within the meaning of the Company Pensions Act (BetrAVG) of the Transferring Employees Healthcare are recognized as secured direct commitments as a result of debt accession, which are transferred from HC OpCo to

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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) HC 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 HC 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***).

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- (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 (*Pensionsversicherungsverein – PSV*) for the secured direct commitments shall also be borne by HC OpCo either by direct payment or by way of reimbursement.
- (4) The KGaA must compensate HC 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 HC 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). HC OpCo will determine the compensation amount annually on the respective balance sheet date of HC 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 HC 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 HC OpCo assume that KGaA directly fulfills the secured claims upon occurrence of the respective benefit claim. In this case, HC 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,

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the costs and expenses expected to be incurred by KGaA in the respective year are determined based on the annual payment budgets, for which HC OpCo shall make advance payments to KGaA upon request. In each of the aforementioned cases, a claim for compensation of KGaA against HC 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 HC OpCo by beneficiaries directly based on the debt assumption agreed on in Clause III, the payments shall be made by HC 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 HC 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 HC 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, HC 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 HC OpCo becomes the direct debtor of the secured claims, especially in the case of a (partial) operation transfer to HC 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 HC OpCo with regard to the beneficiaries concerned or if other employment relationships are transferred from Merck KGaA to HC 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

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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 HC 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 HC 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 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 Healthcare should not transfer to HC OpCo as part of the hive down of the sector KGaA Healthcare, 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).

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- (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 HC 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 HC 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.

Annex 3

Allgemeine Auftragsbedingungen

für

Wirtschaftsprüfer und Wirtschaftsprüfungsgesellschaften

vom 1. Januar 2017

1. Geltungsbereich

(1) Die Auftragsbedingungen gelten für Verträge zwischen Wirtschaftsprüfern oder Wirtschaftsprüfungsgesellschaften (im Nachstehenden zusammenfassend „Wirtschaftsprüfer“ genannt) und ihren Auftraggebern über Prüfungen, Steuerberatung, Beratungen in wirtschaftlichen Angelegenheiten und sonstige Aufträge, soweit nicht etwas anderes ausdrücklich schriftlich vereinbart oder gesetzlich zwingend vorgeschrieben ist.

(2) Dritte können nur dann Ansprüche aus dem Vertrag zwischen Wirtschaftsprüfer und Auftraggeber herleiten, wenn dies ausdrücklich vereinbart ist oder sich aus zwingenden gesetzlichen Regelungen ergibt. Im Hinblick auf solche Ansprüche gelten diese Auftragsbedingungen auch diesen Dritten gegenüber.

2. Umfang und Ausführung des Auftrags

(1) Gegenstand des Auftrags ist die vereinbarte Leistung, nicht ein bestimmter wirtschaftlicher Erfolg. Der Auftrag wird nach den Grundsätzen ordnungsmäßiger Berufsausübung ausgeführt. Der Wirtschaftsprüfer übernimmt im Zusammenhang mit seinen Leistungen keine Aufgaben der Geschäftsführung. Der Wirtschaftsprüfer ist für die Nutzung oder Umsetzung der Ergebnisse seiner Leistungen nicht verantwortlich. Der Wirtschaftsprüfer ist berechtigt, sich zur Durchführung des Auftrags sachverständiger Personen zu bedienen.

(2) Die Berücksichtigung ausländischen Rechts bedarf – außer bei betriebswirtschaftlichen Prüfungen – der ausdrücklichen schriftlichen Vereinbarung.

(3) Ändert sich die Sach- oder Rechtslage nach Abgabe der abschließenden beruflichen Äußerung, so ist der Wirtschaftsprüfer nicht verpflichtet, den Auftraggeber auf Änderungen oder sich daraus ergebende Folgerungen hinzuweisen.

3. Mitwirkungspflichten des Auftraggebers

(1) Der Auftraggeber hat dafür zu sorgen, dass dem Wirtschaftsprüfer alle für die Ausführung des Auftrags notwendigen Unterlagen und weiteren Informationen rechtzeitig übermittelt werden und ihm von allen Vorgängen und Umständen Kenntnis gegeben wird, die für die Ausführung des Auftrags von Bedeutung sein können. Dies gilt auch für die Unterlagen und weiteren Informationen, Vorgänge und Umstände, die erst während der Tätigkeit des Wirtschaftsprüfers bekannt werden. Der Auftraggeber wird dem Wirtschaftsprüfer geeignete Auskunftspersonen benennen.

(2) Auf Verlangen des Wirtschaftsprüfers hat der Auftraggeber die Vollständigkeit der vorgelegten Unterlagen und der weiteren Informationen sowie der gegebenen Auskünfte und Erklärungen in einer vom Wirtschaftsprüfer formulierten schriftlichen Erklärung zu bestätigen.

4. Sicherung der Unabhängigkeit

(1) Der Auftraggeber hat alles zu unterlassen, was die Unabhängigkeit der Mitarbeiter des Wirtschaftsprüfers gefährdet. Dies gilt für die Dauer des Auftragsverhältnisses insbesondere für Angebote auf Anstellung oder Übernahme von Organfunktionen und für Angebote, Aufträge auf eigene Rechnung zu übernehmen.

(2) Sollte die Durchführung des Auftrags die Unabhängigkeit des Wirtschaftsprüfers, die der mit ihm verbundenen Unternehmen, seiner Netzwerkunternehmen oder solcher mit ihm assoziierten Unternehmen, auf die die Unabhängigkeitsvorschriften in gleicher Weise Anwendung finden wie auf den Wirtschaftsprüfer, in anderen Auftragsverhältnissen beeinträchtigen, ist der Wirtschaftsprüfer zur außerordentlichen Kündigung des Auftrags berechtigt.

5. Berichterstattung und mündliche Auskünfte

Soweit der Wirtschaftsprüfer Ergebnisse im Rahmen der Bearbeitung des Auftrags schriftlich darzustellen hat, ist alleine diese schriftliche Darstellung maßgebend. Entwürfe schriftlicher Darstellungen sind unverbindlich. Sofern nicht anders vereinbart, sind mündliche Erklärungen und Auskünfte des Wirtschaftsprüfers nur dann verbindlich, wenn sie schriftlich bestätigt werden. Erklärungen und Auskünfte des Wirtschaftsprüfers außerhalb des erteilten Auftrags sind stets unverbindlich.

6. Weitergabe einer beruflichen Äußerung des Wirtschaftsprüfers

(1) Die Weitergabe beruflicher Äußerungen des Wirtschaftsprüfers (Arbeitsergebnisse oder Auszüge von Arbeitsergebnissen – sei es im Entwurf oder in der Endfassung) oder die Information über das Tätigwerden des Wirtschaftsprüfers für den Auftraggeber an einen Dritten bedarf der schriftlichen Zustimmung des Wirtschaftsprüfers, es sei denn, der Auftraggeber ist zur Weitergabe oder Information aufgrund eines Gesetzes oder einer behördlichen Anordnung verpflichtet.

(2) Die Verwendung beruflicher Äußerungen des Wirtschaftsprüfers und die Information über das Tätigwerden des Wirtschaftsprüfers für den Auftraggeber zu Werbezwecken durch den Auftraggeber sind unzulässig.

7. Mängelbeseitigung

(1) Bei etwaigen Mängeln hat der Auftraggeber Anspruch auf Nacherfüllung durch den Wirtschaftsprüfer. Nur bei Fehlschlägen, Unterlassen bzw. unberechtigter Verweigerung, Unzumutbarkeit oder Unmöglichkeit der Nacherfüllung kann er die Vergütung mindern oder vom Vertrag zurücktreten; ist der Auftrag nicht von einem Verbraucher erteilt worden, so kann der Auftraggeber wegen eines Mangels nur dann vom Vertrag zurücktreten, wenn die erbrachte Leistung wegen Fehlschlagens, Unterlassung, Unzumutbarkeit oder Unmöglichkeit der Nacherfüllung für ihn ohne Interesse ist. Soweit darüber hinaus Schadensersatzansprüche bestehen, gilt Nr. 9.

(2) Der Anspruch auf Beseitigung von Mängeln muss vom Auftraggeber unverzüglich in Textform geltend gemacht werden. Ansprüche nach Abs. 1, die nicht auf einer vorsätzlichen Handlung beruhen, verjähren nach Ablauf eines Jahres ab dem gesetzlichen Verjährungsbeginn.

(3) Offenbare Unrichtigkeiten, wie z.B. Schreibfehler, Rechenfehler und formelle Mängel, die in einer beruflichen Äußerung (Bericht, Gutachten und dgl.) des Wirtschaftsprüfers enthalten sind, können jederzeit vom Wirtschaftsprüfer auch Dritten gegenüber berichtigt werden. Unrichtigkeiten, die geeignet sind, in der beruflichen Äußerung des Wirtschaftsprüfers enthaltene Ergebnisse infrage zu stellen, berechtigen diesen, die Äußerung auch Dritten gegenüber zurückzunehmen. In den vorgenannten Fällen ist der Auftraggeber vom Wirtschaftsprüfer tunlichst vorher zu hören.

8. Schweigepflicht gegenüber Dritten, Datenschutz

(1) Der Wirtschaftsprüfer ist nach Maßgabe der Gesetze (§ 323 Abs. 1 HGB, § 43 WPO, § 203 StGB) verpflichtet, über Tatsachen und Umstände, die ihm bei seiner Berufstätigkeit anvertraut oder bekannt werden, Stillschweigen zu bewahren, es sei denn, dass der Auftraggeber ihn von dieser Schweigepflicht entbindet.

(2) Der Wirtschaftsprüfer wird bei der Verarbeitung von personenbezogenen Daten die nationalen und europarechtlichen Regelungen zum Datenschutz beachten.

9. Haftung

(1) Für gesetzlich vorgeschriebene Leistungen des Wirtschaftsprüfers, insbesondere Prüfungen, gelten die jeweils anzuwendenden gesetzlichen Haftungsbeschränkungen, insbesondere die Haftungsbeschränkung des § 323 Abs. 2 HGB.

(2) Sofern weder eine gesetzliche Haftungsbeschränkung Anwendung findet noch eine einzelvertragliche Haftungsbeschränkung besteht, ist die Haftung des Wirtschaftsprüfers für Schadensersatzansprüche jeder Art, mit Ausnahme von Schäden aus der Verletzung von Leben, Körper und Gesundheit, sowie von Schäden, die eine Ersatzpflicht des Herstellers nach § 1 ProdHaftG begründen, bei einem fahrlässig verursachten einzelnen Schadensfall gemäß § 54a Abs. 1 Nr. 2 WPO auf 4 Mio. € beschränkt.

(3) Einreden und Einwendungen aus dem Vertragsverhältnis mit dem Auftraggeber stehen dem Wirtschaftsprüfer auch gegenüber Dritten zu.

(4) Leiten mehrere Anspruchsteller aus dem mit dem Wirtschaftsprüfer bestehenden Vertragsverhältnis Ansprüche aus einer fahrlässigen Pflichtverletzung des Wirtschaftsprüfers her, gilt der in Abs. 2 genannte Höchstbetrag für die betreffenden Ansprüche aller Anspruchsteller insgesamt.

(5) Ein einzelner Schadensfall im Sinne von Abs. 2 ist auch bezüglich eines aus mehreren Pflichtverletzungen stammenden einheitlichen Schadens gegeben. Der einzelne Schadensfall umfasst sämtliche Folgen einer Pflichtverletzung ohne Rücksicht darauf, ob Schäden in einem oder in mehreren aufeinanderfolgenden Jahren entstanden sind. Dabei gilt mehrfaches auf gleicher oder gleichartiger Fehlerquelle beruhendes Tun oder Unterlassen als einheitliche Pflichtverletzung, wenn die betreffenden Angelegenheiten miteinander in rechtlichem oder wirtschaftlichem Zusammenhang stehen. In diesem Fall kann der Wirtschaftsprüfer nur bis zur Höhe von 5 Mio. € in Anspruch genommen werden, die eine Ersatzpflicht des Herstellers nach § 1 ProdHaftG begründen. Das Recht, die Einrede der Verjährung geltend zu machen, bleibt unberührt.

(6) Ein Schadensersatzanspruch erlischt, wenn nicht innerhalb von sechs Monaten nach der schriftlichen Ablehnung der Ersatzleistung Klage erhoben wird und der Auftraggeber auf diese Folge hingewiesen wurde. Dies gilt nicht für Schadensersatzansprüche, die auf vorsätzliches Verhalten zurückzuführen sind, sowie bei einer schuldhaften Verletzung von Leben, Körper oder Gesundheit sowie bei Schäden, die eine Ersatzpflicht des Herstellers nach § 1 ProdHaftG begründen. Das Recht, die Einrede der Verjährung geltend zu machen, bleibt unberührt.

10. Ergänzende Bestimmungen für Prüfungsaufträge

(1) Ändert der Auftraggeber nachträglich den durch den Wirtschaftsprüfer geprüften und mit einem Bestätigungsvermerk versehenen Abschluss oder Lagebericht, darf er diesen Bestätigungsvermerk nicht weiterverwenden.

Hat der Wirtschaftsprüfer einen Bestätigungsvermerk nicht erteilt, so ist ein Hinweis auf die durch den Wirtschaftsprüfer durchgeführte Prüfung im Lagebericht oder an anderer für die Öffentlichkeit bestimmter Stelle nur mit schriftlicher Einwilligung des Wirtschaftsprüfers und mit dem von ihm genehmigten Wortlaut zulässig.

(2) Widerruft der Wirtschaftsprüfer den Bestätigungsvermerk, so darf der Bestätigungsvermerk nicht weiterverwendet werden. Hat der Auftraggeber den Bestätigungsvermerk bereits verwendet, so hat er auf Verlangen des Wirtschaftsprüfers den Widerruf bekanntzugeben.

(3) Der Auftraggeber hat Anspruch auf fünf Berichtsausfertigungen. Weitere Ausfertigungen werden besonders in Rechnung gestellt.

11. Ergänzende Bestimmungen für Hilfeleistung in Steuersachen

(1) Der Wirtschaftsprüfer ist berechtigt, sowohl bei der Beratung in steuerlichen Einzelfragen als auch im Falle der Dauerberatung die vom Auftraggeber genannten Tatsachen, insbesondere Zahlenangaben, als richtig und vollständig zugrunde zu legen; dies gilt auch für Buchführungsaufträge. Er hat jedoch den Auftraggeber auf von ihm festgestellte Unrichtigkeiten hinzuweisen.

(2) Der Steuerberatungsauftrag umfasst nicht die zur Wahrung von Fristen erforderlichen Handlungen, es sei denn, dass der Wirtschaftsprüfer hierzu ausdrücklich den Auftrag übernommen hat. In diesem Fall hat der Auftraggeber dem Wirtschaftsprüfer alle für die Wahrung von Fristen wesentlichen Unterlagen, insbesondere Steuerbescheide, so rechtzeitig vorzulegen, dass dem Wirtschaftsprüfer eine angemessene Bearbeitungszeit zur Verfügung steht.

(3) Mangels einer anderweitigen schriftlichen Vereinbarung umfasst die laufende Steuerberatung folgende, in die Vertragsdauer fallenden Tätigkeiten:

- a) Ausarbeitung der Jahressteuererklärungen für die Einkommensteuer, Körperschaftsteuer und Gewerbesteuer sowie der Vermögensteuererklärungen, und zwar auf Grund der vom Auftraggeber vorzulegenden Jahresabschlüsse und sonstiger für die Besteuerung erforderlicher Aufstellungen und Nachweise
- b) Nachprüfung von Steuerbescheiden zu den unter a) genannten Steuern
- c) Verhandlungen mit den Finanzbehörden im Zusammenhang mit den unter a) und b) genannten Erklärungen und Bescheiden
- d) Mitwirkung bei Betriebsprüfungen und Auswertung der Ergebnisse von Betriebsprüfungen hinsichtlich der unter a) genannten Steuern
- e) Mitwirkung in Einspruchs- und Beschwerdeverfahren hinsichtlich der unter a) genannten Steuern.

Der Wirtschaftsprüfer berücksichtigt bei den vorgenannten Aufgaben die wesentliche veröffentlichte Rechtsprechung und Verwaltungsauffassung.

(4) Erhält der Wirtschaftsprüfer für die laufende Steuerberatung ein Pauschalhonorar, so sind mangels anderweitiger schriftlicher Vereinbarungen die unter Abs. 3 Buchst. d) und e) genannten Tätigkeiten gesondert zu honorieren.

(5) Sofern der Wirtschaftsprüfer auch Steuerberater ist und die Steuerberatervergütungsverordnung für die Bemessung der Vergütung anzuwenden ist, kann eine höhere oder niedrigere als die gesetzliche Vergütung in Textform vereinbart werden.

(6) Die Bearbeitung besonderer Einzelfragen der Einkommensteuer, Körperschaftsteuer, Gewerbesteuer, Einheitsbewertung und Vermögensteuer sowie aller Fragen der Umsatzsteuer, Lohnsteuer, sonstigen Steuern und Abgaben erfolgt auf Grund eines besonderen Auftrags. Dies gilt auch für

- a) die Bearbeitung einmalig anfallender Steuerangelegenheiten, z.B. auf dem Gebiet der Erbschaftsteuer, Kapitalverkehrsteuer, Grunderwerbsteuer,
- b) die Mitwirkung und Vertretung in Verfahren vor den Gerichten der Finanz- und der Verwaltungsgerichtsbarkeit sowie in Steuerstrafsachen,
- c) die beratende und gutachtliche Tätigkeit im Zusammenhang mit Umwandlungen, Kapitalerhöhung und -herabsetzung, Sanierung, Eintritt und Ausscheiden eines Gesellschafters, Betriebsveräußerung, Liquidation und dergleichen und
- d) die Unterstützung bei der Erfüllung von Anzeige- und Dokumentationspflichten.

(7) Soweit auch die Ausarbeitung der Umsatzsteuerjahreserklärung als zusätzliche Tätigkeit übernommen wird, gehört dazu nicht die Überprüfung etwaiger besonderer buchmäßiger Voraussetzungen sowie die Frage, ob alle in Betracht kommenden umsatzsteuerrechtlichen Vergünstigungen wahrgenommen worden sind. Eine Gewähr für die vollständige Erfassung der Unterlagen zur Geltendmachung des Vorsteuerabzugs wird nicht übernommen.

12. Elektronische Kommunikation

Die Kommunikation zwischen dem Wirtschaftsprüfer und dem Auftraggeber kann auch per E-Mail erfolgen. Soweit der Auftraggeber eine Kommunikation per E-Mail nicht wünscht oder besondere Sicherheitsanforderungen stellt, wie etwa die Verschlüsselung von E-Mails, wird der Auftraggeber den Wirtschaftsprüfer entsprechend in Textform informieren.

13. Vergütung

(1) Der Wirtschaftsprüfer hat neben seiner Gebühren- oder Honorarforderung Anspruch auf Erstattung seiner Auslagen; die Umsatzsteuer wird zusätzlich berechnet. Er kann angemessene Vorschüsse auf Vergütung und Auslagenersatz verlangen und die Auslieferung seiner Leistung von der vollen Befriedigung seiner Ansprüche abhängig machen. Mehrere Auftraggeber haften als Gesamtschuldner.

(2) Ist der Auftraggeber kein Verbraucher, so ist eine Aufrechnung gegen Forderungen des Wirtschaftsprüfers auf Vergütung und Auslagenersatz nur mit unbestrittenen oder rechtskräftig festgestellten Forderungen zulässig.

14. Streitschlichtungen

Der Wirtschaftsprüfer ist nicht bereit, an Streitbeilegungsverfahren vor einer Verbraucherschlichtungsstelle im Sinne des § 2 des Verbraucherstreitbeilegungsgesetzes teilzunehmen.

15. Anzuwendendes Recht

Für den Auftrag, seine Durchführung und die sich hieraus ergebenden Ansprüche gilt nur deutsches Recht.

General Engagement Terms

for Wirtschaftsprüfer and Wirtschaftsprüfungsgesellschaften [German Public Auditors and Public Audit Firms] as of January 1, 2017

1. Scope of application

(1) These engagement terms apply to contracts between German Public Auditors (*Wirtschaftsprüfer*) or German Public Audit Firms (*Wirtschaftsprüfungsgesellschaften*) – hereinafter collectively referred to as "German Public Auditors" – and their engaging parties for assurance services, tax advisory services, advice on business matters and other engagements except as otherwise agreed in writing or prescribed by a mandatory rule.

(2) Third parties may derive claims from contracts between German Public Auditors and engaging parties only when this is expressly agreed or results from mandatory rules prescribed by law. In relation to such claims, these engagement terms also apply to these third parties.

2. Scope and execution of the engagement

(1) Object of the engagement is the agreed service – not a particular economic result. The engagement will be performed in accordance with the German Principles of Proper Professional Conduct (*Grundsätze ordnungsmäßiger Berufsausübung*). The German Public Auditor does not assume any management functions in connection with his services. The German Public Auditor is not responsible for the use or implementation of the results of his services. The German Public Auditor is entitled to make use of competent persons to conduct the engagement.

(2) Except for assurance engagements (*betriebswirtschaftliche Prüfungen*), the consideration of foreign law requires an express written agreement.

(3) If circumstances or the legal situation change subsequent to the release of the final professional statement, the German Public Auditor is not obligated to refer the engaging party to changes or any consequences resulting therefrom.

3. The obligations of the engaging party to cooperate

(1) The engaging party shall ensure that all documents and further information necessary for the performance of the engagement are provided to the German Public Auditor on a timely basis, and that he is informed of all events and circumstances that may be of significance to the performance of the engagement. This also applies to those documents and further information, events and circumstances that first become known during the German Public Auditor's work. The engaging party will also designate suitable persons to provide information.

(2) Upon the request of the German Public Auditor, the engaging party shall confirm the completeness of the documents and further information provided as well as the explanations and statements, in a written statement drafted by the German Public Auditor.

4. Ensuring independence

(1) The engaging party shall refrain from anything that endangers the independence of the German Public Auditor's staff. This applies throughout the term of the engagement, and in particular to offers of employment or to assume an executive or non-executive role, and to offers to accept engagements on their own behalf.

(2) Were the performance of the engagement to impair the independence of the German Public Auditor, of related firms, firms within his network, or such firms associated with him, to which the independence requirements apply in the same way as to the German Public Auditor in other engagement relationships, the German Public Auditor is entitled to terminate the engagement for good cause.

5. Reporting and oral information

To the extent that the German Public Auditor is required to present results in writing as part of the work in executing the engagement, only that written work is authoritative. Drafts are non-binding. Except as otherwise agreed, oral statements and explanations by the German Public Auditor are binding only when they are confirmed in writing. Statements and information of the German Public Auditor outside of the engagement are always non-binding.

6. Distribution of a German Public Auditor's professional statement

(1) The distribution to a third party of professional statements of the German Public Auditor (results of work or extracts of the results of work whether in draft or in a final version) or information about the German Public Auditor acting for the engaging party requires the German Public Auditor's written consent, unless the engaging party is obligated to distribute or inform due to law or a regulatory requirement.

(2) The use by the engaging party for promotional purposes of the German Public Auditor's professional statements and of information about the German Public Auditor acting for the engaging party is prohibited.

7. Deficiency rectification

(1) In case there are any deficiencies, the engaging party is entitled to specific subsequent performance by the German Public Auditor. The engaging party may reduce the fees or cancel the contract for failure of such subsequent performance, for subsequent non-performance or unjustified refusal to perform subsequently, or for unconscionability or impossibility of subsequent performance. If the engagement was not commissioned by a consumer, the engaging party may only cancel the contract due to a deficiency if the service rendered is not relevant to him due to failure of subsequent performance, to subsequent non-performance, to unconscionability or impossibility of subsequent performance. No. 9 applies to the extent that further claims for damages exist.

(2) The engaging party must assert a claim for the rectification of deficiencies in writing (*Textform*) [Translators Note: The German term "*Textform*" means in written form, but without requiring a signature] without delay. Claims pursuant to paragraph 1 not arising from an intentional act expire after one year subsequent to the commencement of the time limit under the statute of limitations.

(3) Apparent deficiencies, such as clerical errors, arithmetical errors and deficiencies associated with technicalities contained in a German Public Auditor's professional statement (long-form reports, expert opinions etc.) may be corrected – also versus third parties – by the German Public Auditor at any time. Misstatements which may call into question the results contained in a German Public Auditor's professional statement entitle the German Public Auditor to withdraw such statement – also versus third parties. In such cases the German Public Auditor should first hear the engaging party, if practicable.

8. Confidentiality towards third parties, and data protection

(1) Pursuant to the law (§ [Article] 323 Abs 1 [paragraph 1] HGB [German Commercial Code: *Handelsgesetzbuch*], § 43 WPO [German Law regulating the Profession of Wirtschaftsprüfer: *Wirtschaftsprüferordnung*], § 203 StGB [German Criminal Code: *Strafgesetzbuch*]) the German Public Auditor is obligated to maintain confidentiality regarding facts and circumstances confided to him or of which he becomes aware in the course of his professional work, unless the engaging party releases him from this confidentiality obligation.

(2) When processing personal data, the German Public Auditor will observe national and European legal provisions on data protection.

9. Liability

(1) For legally required services by German Public Auditors, in particular audits, the respective legal limitations of liability, in particular the limitation of liability pursuant to § 323 Abs. 2 HGB, apply.

(2) Insofar neither a statutory limitation of liability is applicable, nor an individual contractual limitation of liability exists, the liability of the German Public Auditor for claims for damages of any other kind, except for damages resulting from injury to life, body or health as well as for damages that constitute a duty of replacement by a producer pursuant to § 1 ProdHaftG [German Product Liability Act: *Produkthaftungsgesetz*], for an individual case of damages caused by negligence is limited to € 4 million pursuant to § 54 a Abs. 1 Nr. 2 WPO.

(3) The German Public Auditor is entitled to invoke demurs and defenses based on the contractual relationship with the engaging party also towards third parties.

(4) When multiple claimants assert a claim for damages arising from an existing contractual relationship with the German Public Auditor due to the German Public Auditor's negligent breach of duty, the maximum amount stipulated in paragraph 2 applies to the respective claims of all claimants collectively.

(5) An individual case of damages within the meaning of paragraph 2 also exists in relation to a uniform damage arising from a number of breaches of duty. The individual case of damages encompasses all consequences from a breach of duty regardless of whether the damages occurred in one year or in a number of successive years. In this case, multiple acts or omissions based on the same source of error or on a source of error of an equivalent nature are deemed to be a single breach of duty if the matters in question are legally or economically connected to one another. In this event the claim against the German Public Auditor is limited to € 5 million. The limitation to the fivefold of the minimum amount insured does not apply to compulsory audits required by law.

(6) A claim for damages expires if a suit is not filed within six months subsequent to the written refusal of acceptance of the indemnity and the engaging party has been informed of this consequence. This does not apply to claims for damages resulting from scienter, a culpable injury to life, body or health as well as for damages that constitute a liability for replacement by a producer pursuant to § 1 ProdHaftG. The right to invoke a plea of the statute of limitations remains unaffected.

10. Supplementary provisions for audit engagements

(1) If the engaging party subsequently amends the financial statements or management report audited by a German Public Auditor and accompanied by an auditor's report, he may no longer use this auditor's report.

If the German Public Auditor has not issued an auditor's report, a reference to the audit conducted by the German Public Auditor in the management report or any other public reference is permitted only with the German Public Auditor's written consent and with a wording authorized by him.

(2) If the German Public Auditor revokes the auditor's report, it may no longer be used. If the engaging party has already made use of the auditor's report, then upon the request of the German Public Auditor he must give notification of the revocation.

(3) The engaging party has a right to five official copies of the report. Additional official copies will be charged separately.

11. Supplementary provisions for assistance in tax matters

(1) When advising on an individual tax issue as well as when providing ongoing tax advice, the German Public Auditor is entitled to use as a correct and complete basis the facts provided by the engaging party – especially numerical disclosures; this also applies to bookkeeping engagements. Nevertheless, he is obligated to indicate to the engaging party any errors he has identified.

(2) The tax advisory engagement does not encompass procedures required to observe deadlines, unless the German Public Auditor has explicitly accepted a corresponding engagement. In this case the engaging party must provide the German Public Auditor with all documents required to observe deadlines – in particular tax assessments – on such a timely basis that the German Public Auditor has an appropriate lead time.

(3) Except as agreed otherwise in writing, ongoing tax advice encompasses the following work during the contract period:

- a) preparation of annual tax returns for income tax, corporate tax and business tax, as well as wealth tax returns, namely on the basis of the annual financial statements, and on other schedules and evidence documents required for the taxation, to be provided by the engaging party
- b) examination of tax assessments in relation to the taxes referred to in (a)
- c) negotiations with tax authorities in connection with the returns and assessments mentioned in (a) and (b)
- d) support in tax audits and evaluation of the results of tax audits with respect to the taxes referred to in (a)
- e) participation in petition or protest and appeal procedures with respect to the taxes mentioned in (a).

In the aforementioned tasks the German Public Auditor takes into account material published legal decisions and administrative interpretations.

(4) If the German Public auditor receives a fixed fee for ongoing tax advice, the work mentioned under paragraph 3 (d) and (e) is to be remunerated separately, except as agreed otherwise in writing.

(5) Insofar the German Public Auditor is also a German Tax Advisor and the German Tax Advice Remuneration Regulation (*Steuerberatungsvergütungsverordnung*) is to be applied to calculate the remuneration, a greater or lesser remuneration than the legal default remuneration can be agreed in writing (*Textform*).

(6) Work relating to special individual issues for income tax, corporate tax, business tax, valuation assessments for property units, wealth tax, as well as all issues in relation to sales tax, payroll tax, other taxes and dues requires a separate engagement. This also applies to:

- a) work on non-recurring tax matters, e.g. in the field of estate tax, capital transactions tax, and real estate sales tax;
- b) support and representation in proceedings before tax and administrative courts and in criminal tax matters;
- c) advisory work and work related to expert opinions in connection with changes in legal form and other re-organizations, capital increases and reductions, insolvency related business reorganizations, admission and retirement of owners, sale of a business, liquidations and the like, and
- d) support in complying with disclosure and documentation obligations.

(7) To the extent that the preparation of the annual sales tax return is undertaken as additional work, this includes neither the review of any special accounting prerequisites nor the issue as to whether all potential sales tax allowances have been identified. No guarantee is given for the complete compilation of documents to claim the input tax credit.

12. Electronic communication

Communication between the German Public Auditor and the engaging party may be via e-mail. In the event that the engaging party does not wish to communicate via e-mail or sets special security requirements, such as the encryption of e-mails, the engaging party will inform the German Public Auditor in writing (*Textform*) accordingly.

13. Remuneration

(1) In addition to his claims for fees, the German Public Auditor is entitled to claim reimbursement of his expenses; sales tax will be billed additionally. He may claim appropriate advances on remuneration and reimbursement of expenses and may make the delivery of his services dependent upon the complete satisfaction of his claims. Multiple engaging parties are jointly and severally liable.

(2) If the engaging party is not a consumer, then a set-off against the German Public Auditor's claims for remuneration and reimbursement of expenses is admissible only for undisputed claims or claims determined to be legally binding.

14. Dispute Settlement

The German Public Auditor is not prepared to participate in dispute settlement procedures before a consumer arbitration board (*Verbraucherschlichtungsstelle*) within the meaning of § 2 of the German Act on Consumer Dispute Settlements (*Verbraucherstreitbeilegungsgesetz*).

15. Applicable law

The contract, the performance of the services and all claims resulting therefrom are exclusively governed by German law.