

TOBIRA THERAPEUTICS, INC.

FORM SC 14D9/A (Amended Statement of Ownership: Solicitation)

Filed 10/14/16

Address	701 GATEWAY BLVD SUITE 300 SOUTH SAN FRANCISCO, CA 94080
Telephone	650-741-6625
CIK	0001311596
Symbol	TBRA
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Industry	Biotechnology & Medical Research
Sector	Healthcare
Fiscal Year	12/31

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE 14D-9

(Rule 14d-101)

**Solicitation/Recommendation Statement
Under Section 14(d)(4) of the Securities Exchange Act of 1934
(Amendment No. 2)**

Tobira Therapeutics, Inc.

(Name of Subject Company)

Tobira Therapeutics, Inc.

(Name of Persons Filing Statement)

**Common Stock, par value \$0.001 per share
(Title of Class of Securities)**

88883P 10 1

(CUSIP Number of Class of Securities)

**Laurent Fischer, M.D.
President and Chief Executive Officer
701 Gateway Boulevard, Suite 300
South San Francisco, CA 94080
(650) 741-6625**

(Name, address, and telephone numbers of person authorized to receive notices and communications
on behalf of the persons filing statement)

Copies to:

**Jay K. Hachigian
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**Graham Robinson
Laura Knoll
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500 Boylston Street, 23rd Floor
Boston, Massachusetts, 02116
(617) 573-4800**

Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

This Amendment No. 2 (this “*Amendment No. 2*”) amends and supplements the Solicitation/Recommendation Statement on Schedule 14D-9 filed by Tobira Therapeutics, Inc., a Delaware corporation (“*Tobira*” or the “*Company*”), with the Securities and Exchange Commission (the “*SEC*”) on October 3, 2016 (together with any subsequent amendments and supplements thereto, including this Amendment No. 2, the “*Schedule 14D-9*”). The Schedule 14D-9 relates to the tender offer by Sapphire Acquisition Corp., a Delaware corporation (“*Purchaser*”), a wholly owned subsidiary of Allergan Holdco US, Inc., a Delaware corporation (“*Parent*”), and an indirect wholly owned subsidiary of Allergan plc, an Irish public limited company (“*Allergan*”), for all of the outstanding shares of common stock, par value \$0.001 per share (“*Shares*”), of Tobira at a price of (x) \$28.35 per Share, net to the seller in cash, without interest and less any applicable withholding taxes, plus (y) one contractual contingent value right per Share, which represents the right to receive contingent payments of up to \$49.84 in cash in the aggregate, if any, if certain specified milestones are achieved, upon the terms and subject to the conditions set forth in the offer to purchase dated October 3, 2016 (the “*Offer to Purchase*”) and in the related letter of transmittal (the “*Letter of Transmittal*”), which, as each may be amended or supplemented from time to time, collectively constitute the “*Offer*.” The Offer is described in a Tender Offer Statement on Schedule TO filed by Purchaser, Parent and Allergan with the SEC on October 3, 2016. Copies of the Offer to Purchase and form of Letter of Transmittal are filed as Exhibit (a)(1)(A) and (a)(1)(B) to the Schedule 14D-9, respectively, and are incorporated herein by reference.

Except to the extent specifically provided in this Amendment No. 2, the information set forth in the Schedule 14D-9 remains unchanged and is incorporated herein by reference as relevant to the items in this Amendment No. 2. Capitalized terms used but not defined herein have the meanings ascribed to them in the Schedule 14D-9.

ITEM 3. PAST CONTACTS, TRANSACTIONS, NEGOTIATIONS AND AGREEMENTS

Item 3 of the Schedule 14D-9 is hereby amended and supplemented as follows:

The third and fourth sentences in “*Item 3. Past Contracts, Transactions, Negotiations and Agreements—Arrangements Between Tobira and its Executive Officers, Directors and Affiliates—Golden Parachute Excise Tax Gross-Up*” on page 11 of the Schedule 14D-9 are amended and restated in their entirety to read as follows:

“On October 11, 2016, Tobira entered into a letter agreement with each of Laurent Fischer, M.D., Eric Lefebvre, M.D., Helen Jenkins and Christopher Peetz setting forth each such executive officer’s right to receive the Excise Tax Gross-Up Payment. These letter agreements are filed as Exhibits (e)(24), (e)(25), (e)(26) and (e)(27) hereto and are incorporated herein by reference.”

ITEM 8. ADDITIONAL INFORMATION

Item 8 of the Schedule 14D-9 is hereby amended and supplemented as follows:

The final row and footnote number seven of the table below the second paragraph in “*Item 8. Additional Information — Golden Parachute Compensation*” on pages 49 and 50 of the Schedule 14D-9 are amended and restated in their entirety to read as follows:

<u>Name</u>	<u>Cash</u> <u>(\$)(1)</u>	<u>Equity</u> <u>(\$)(2)</u>	<u>Perquisites/ Benefits</u> <u>(\$)(3)</u>	<u>Estimated Golden Parachute Tax Reimbursement</u> <u>(\$)(4)(5)</u>	<u>Other</u> <u>(\$)(6)</u>	<u>Total (\$)</u>
Michael A. Metzger	—	445,381(7)	—	—	—	445,381

(7) In addition to the Company Option described in the table above, Mr. Metzger holds a vested In the Money Option to purchase 93,059 Shares at \$7.56 per Share and vested Out of the Money Options to purchase 13,778 Shares at \$42.93 per Share and 48,223 Shares at \$43.29 per Share, which will be entitled to the same payments described above in *Item 3. Past Contracts, Transactions, Negotiations and Agreements—Arrangements Between Tobira and its Executive Officers, Directors and Affiliates—Treatment of Options*.

Except to the extent specifically provided above, the table below the second paragraph in “*Item 8. Additional Information — Golden Parachute Compensation*” on page 49 of the Schedule 14D-9 (such table, the “*Golden Parachute Table*”) remains unchanged and is incorporated herein by reference. Footnotes numbered one through six, which appear on pages 49 and 50 of the Schedule 14D-9, to the Golden Parachute Table remain unchanged and are incorporated herein by reference.

ITEM 9 . EXHIBITS

Item 9 of the Schedule 14D-9 is hereby amended and supplemented by adding the following exhibits:

<u>Exhibit No.</u>	<u>Description</u>
(e)(24)	Letter Agreement dated October 11, 2016, between Laurent Fischer, M.D. and Tobira Therapeutics, Inc.
(e)(25)	Letter Agreement dated October 11, 2016, between Eric A. Lefebvre, M.D. and Tobira Therapeutics, Inc.
(e)(26)	Letter Agreement dated October 11, 2016, between Helen Jenkins and Tobira Therapeutics, Inc.
(e)(27)	Letter Agreement dated October 11, 2016, between Christopher Peetz and Tobira Therapeutics, Inc.

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Date: October 14, 2016

Tobira Therapeutics, Inc.

By: /s/ Laurent Fischer, M.D.

Name: Laurent Fischer, M.D.

Title: Chief Executive Officer

T OBIRA T HERAPEUTICS , I NC .

October 11, 2016

Laurent Fischer, M.D.
[Address]
[Address]

Dear Laurent Fischer, M.D.:

Tobira Therapeutics, Inc. (the "Company") is pleased to inform you of the following enhancements in your compensation:

1. Parachute Payments .

(a) Gross-Up Payment. If it is determined that any Payment constitutes a parachute payment within the meaning of Section 280G of the Code and is subject to the excise tax imposed by Section 4999 of the Code or any interest or penalties with respect to such excise tax (such excise tax and any such interest or penalties are collectively referred to as the "Excise Tax"), then you shall be entitled to receive from the Company an additional payment (a "Gross-Up Payment") in an amount calculated to ensure that after you pay all taxes (and any interest or penalties imposed with respect to such taxes), including any Excise Tax, imposed upon the Gross-Up Payment, you retain an amount of the Gross-Up Payment equal to the Excise Tax imposed upon the Payment(s).

"Payment" means any payment or distribution to you, or provision of benefits to you or for your benefit, by the Company or any person who acquires ownership or effective control of the Company or ownership of a substantial portion of the Company's assets (within the meaning of Section 280G of the Code) or any affiliate of the Company or of such person, howsoever paid or payable or distributed or distributable.

"Code" means the U.S. Internal Revenue Code of 1986, as amended, the regulations and other applicable guidance promulgated thereunder.

(b) Determination by Accountants. Any determination required under this Section 1 shall be made in writing by a nationally recognized independent public accounting firm designated by the Company (the "Accountants"). For purposes of making the calculations required by this Section 2, the Accountants may make reasonable assumptions and approximations concerning applicable taxes and may rely on reasonable, good-faith interpretations concerning the application of Sections 280G and 4999 of the Code. You and the Company shall furnish to the Accountants such information and

documents as the Accountants may reasonably request in order to make a determination under this Section 1(b). The Company shall bear all costs the Accountants may reasonably incur in connection with any calculations contemplated by this Section 1(b). The Accountants shall provide their determination (the "Determination"), together with detailed supporting calculations regarding the amount of any Gross-Up Payment and any other relevant matter, to you and the Company within ten (10) business days after you or the Company made a request (if you reasonably believes that the Payment(s) may be subject to the Excise Tax). Any Determination by the Accountants shall be binding upon you and the Company, absent manifest error.

(c) Time of Payment. If a Gross-Up Payment is determined to be payable, it shall be paid to you no later than the time that the Excise Tax is required to be paid by you or withheld by the Company. Any Gross-Up Payment shall in any event be made prior to the close of the calendar year next following the calendar year in which the Excise Tax was paid.

(d) Over- and Underpayments. As a result of uncertainty in the application of Section 4999 of the Code at the time of the initial determination by the Accountants hereunder, it is possible that Gross-Up Payments not made by the Company should have been made ("Underpayment") or that Gross-Up Payments will have been made by the Company that should not have been made ("Overpayment"). In either event, the Accountants shall determine the amount of the Underpayment or Overpayment that has occurred. In the case of an Underpayment, the Company shall promptly pay you the amount of such Underpayment. In the case of an Overpayment, you shall, at the direction and expense of the Company, take such steps as are reasonably necessary (including the filing of returns and claims for refund), follow reasonable instructions from, and procedures established by, the Company, and otherwise reasonably cooperate with the Company to correct such Overpayment, provided, however, that (i) you shall in no event be obligated to return to the Company an amount greater than the net after-tax portion of the Overpayment that you have retained or have recovered as a refund from the applicable taxing authorities and (ii) this provision shall be interpreted in a manner consistent with the intent of Subsection (a) above, which is to make you whole, on an after-tax basis, from the application of the Excise Tax, it being understood that the correction of an Overpayment may result in your repayment of an amount that is less than the Overpayment.

2. **At Will Employment**. Your employment with the Company remains "at will," meaning that either you or the Company may terminate your employment at any time and for any reason, with or without cause.

3. **Entire Agreement; Termination**. This agreement supersedes all prior agreements (verbal or written) between you and the Company relating to the subject matter hereof. The benefits provided under this agreement will terminate on the earlier of the date on which (x) all payments hereunder have been made in full and (y) that certain Agreement and Plan of Merger,

Laurent Fischer, M.D.
October 11, 2016
Page 3

dated September 19, 2016, by and among Tobira, Sapphire Acquisition Corp. and Allergan Holdco US, Inc. (as it may be amended from time to time, the "Merger Agreement") terminates pursuant to its terms without the Merger (as such term is defined in the Merger Agreement) having closed.

4. **Miscellaneous** . This Agreement shall be construed and interpreted under the laws of the State of California, excluding laws relating to conflicts or choice of law.

* * * *

You may indicate your acceptance of the foregoing by signing the enclosed copy of this letter and returning it to me.

Very truly yours,

T OBIRA T HERAPEUTICS , I NC .

/s/ Dennis Podlesak

Title: Chairman of the Board

Accepted and Agreed to:

/s/ Laurent Fischer, M.D.

Signature

Dated: October 11, 2016

T OBIRA T HERAPEUTICS , I NC .

October 11, 2016

Eric Lefebvre, M.D.
[Address]
[Address]

Dear Eric Lefebvre, M.D.:

Tobira Therapeutics, Inc. (the “Company”) is pleased to inform you of the following enhancements in your compensation:

1. Parachute Payments .

(a) Gross-Up Payment. If it is determined that any Payment constitutes a parachute payment within the meaning of Section 280G of the Code and is subject to the excise tax imposed by Section 4999 of the Code or any interest or penalties with respect to such excise tax (such excise tax and any such interest or penalties are collectively referred to as the “Excise Tax”), then you shall be entitled to receive from the Company an additional payment (a “Gross-Up Payment”) in an amount calculated to ensure that after you pay all taxes (and any interest or penalties imposed with respect to such taxes), including any Excise Tax, imposed upon the Gross-Up Payment, you retain an amount of the Gross-Up Payment equal to the Excise Tax imposed upon the Payment(s).

“Payment” means any payment or distribution to you, or provision of benefits to you or for your benefit, by the Company or any person who acquires ownership or effective control of the Company or ownership of a substantial portion of the Company’s assets (within the meaning of Section 280G of the Code) or any affiliate of the Company or of such person, howsoever paid or payable or distributed or distributable.

“Code” means the U.S. Internal Revenue Code of 1986, as amended, the regulations and other applicable guidance promulgated thereunder.

(b) Determination by Accountants. Any determination required under this Section 1 shall be made in writing by a nationally recognized independent public accounting firm designated by the Company (the “Accountants”). For purposes of making the calculations required by this Section 2, the Accountants may make reasonable assumptions and approximations concerning applicable taxes and may rely on reasonable, good-faith interpretations concerning the application of Sections 280G and 4999 of the Code. You and the Company shall furnish to the Accountants such information and

documents as the Accountants may reasonably request in order to make a determination under this Section 1(b). The Company shall bear all costs the Accountants may reasonably incur in connection with any calculations contemplated by this Section 1(b). The Accountants shall provide their determination (the "Determination"), together with detailed supporting calculations regarding the amount of any Gross-Up Payment and any other relevant matter, to you and the Company within ten (10) business days after you or the Company made a request (if you reasonably believes that the Payment(s) may be subject to the Excise Tax). Any Determination by the Accountants shall be binding upon you and the Company, absent manifest error.

(c) Time of Payment . If a Gross-Up Payment is determined to be payable, it shall be paid to you no later than the time that the Excise Tax is required to be paid by you or withheld by the Company. Any Gross-Up Payment shall in any event be made prior to the close of the calendar year next following the calendar year in which the Excise Tax was paid.

(d) Over- and Underpayments . As a result of uncertainty in the application of Section 4999 of the Code at the time of the initial determination by the Accountants hereunder, it is possible that Gross-Up Payments not made by the Company should have been made ("Underpayment") or that Gross-Up Payments will have been made by the Company that should not have been made ("Overpayment"). In either event, the Accountants shall determine the amount of the Underpayment or Overpayment that has occurred. In the case of an Underpayment, the Company shall promptly pay you the amount of such Underpayment. In the case of an Overpayment, you shall, at the direction and expense of the Company, take such steps as are reasonably necessary (including the filing of returns and claims for refund), follow reasonable instructions from, and procedures established by, the Company, and otherwise reasonably cooperate with the Company to correct such Overpayment, provided, however, that (i) you shall in no event be obligated to return to the Company an amount greater than the net after-tax portion of the Overpayment that you have retained or have recovered as a refund from the applicable taxing authorities and (ii) this provision shall be interpreted in a manner consistent with the intent of Subsection (a) above, which is to make you whole, on an after-tax basis, from the application of the Excise Tax, it being understood that the correction of an Overpayment may result in your repayment of an amount that is less than the Overpayment.

2. **At Will Employment** . Your employment with the Company remains "at will," meaning that either you or the Company may terminate your employment at any time and for any reason, with or without cause.

3. **Entire Agreement; Termination** . This agreement supersedes all prior agreements (verbal or written) between you and the Company relating to the subject matter hereof. The benefits provided under this agreement will terminate on the earlier of the date on which (x) all payments hereunder have been made in full and (y) that certain Agreement and Plan of Merger,

Eric Lefebvre, M.D.

October 11, 2016

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dated September 19, 2016, by and among Tobira, Sapphire Acquisition Corp. and Allergan Holdco US, Inc. (as it may be amended from time to time, the "Merger Agreement") terminates pursuant to its terms without the Merger (as such term is defined in the Merger Agreement) having closed.

4. **Miscellaneous** . This Agreement shall be construed and interpreted under the laws of the State of California, excluding laws relating to conflicts or choice of law.

* * * *

You may indicate your acceptance of the foregoing by signing the enclosed copy of this letter and returning it to me.

Very truly yours,

T OBIRA T HERAPEUTICS , I NC .

/s/ Dennis Podlesak

Title: Chairman of the Board

Accepted and Agreed to:

/s/ Eric Lefebvre, M.D.

Signature

Dated: October 11, 2016

T OBIRA T HERAPEUTICS , I NC .

October 11, 2016

Helen Jenkins
[Address]
[Address]

Dear Helen Jenkins:

Tobira Therapeutics, Inc. (the "Company") is pleased to inform you of the following enhancements in your compensation:

1. Parachute Payments .

(a) Gross-Up Payment. If it is determined that any Payment constitutes a parachute payment within the meaning of Section 280G of the Code and is subject to the excise tax imposed by Section 4999 of the Code or any interest or penalties with respect to such excise tax (such excise tax and any such interest or penalties are collectively referred to as the "Excise Tax"), then you shall be entitled to receive from the Company an additional payment (a "Gross-Up Payment") in an amount calculated to ensure that after you pay all taxes (and any interest or penalties imposed with respect to such taxes), including any Excise Tax, imposed upon the Gross-Up Payment, you retain an amount of the Gross-Up Payment equal to the Excise Tax imposed upon the Payment(s).

"Payment" means any payment or distribution to you, or provision of benefits to you or for your benefit, by the Company or any person who acquires ownership or effective control of the Company or ownership of a substantial portion of the Company's assets (within the meaning of Section 280G of the Code) or any affiliate of the Company or of such person, howsoever paid or payable or distributed or distributable.

"Code" means the U.S. Internal Revenue Code of 1986, as amended, the regulations and other applicable guidance promulgated thereunder.

(b) Determination by Accountants. Any determination required under this Section 1 shall be made in writing by a nationally recognized independent public accounting firm designated by the Company (the "Accountants"). For purposes of making the calculations required by this Section 2, the Accountants may make reasonable assumptions and approximations concerning applicable taxes and may rely on reasonable, good-faith interpretations concerning the application of Sections 280G and 4999 of the Code. You and the Company shall furnish to the Accountants such information and

documents as the Accountants may reasonably request in order to make a determination under this Section 1(b). The Company shall bear all costs the Accountants may reasonably incur in connection with any calculations contemplated by this Section 1(b). The Accountants shall provide their determination (the "Determination"), together with detailed supporting calculations regarding the amount of any Gross-Up Payment and any other relevant matter, to you and the Company within ten (10) business days after you or the Company made a request (if you reasonably believes that the Payment(s) may be subject to the Excise Tax). Any Determination by the Accountants shall be binding upon you and the Company, absent manifest error.

(c) Time of Payment. If a Gross-Up Payment is determined to be payable, it shall be paid to you no later than the time that the Excise Tax is required to be paid by you or withheld by the Company. Any Gross-Up Payment shall in any event be made prior to the close of the calendar year next following the calendar year in which the Excise Tax was paid.

(d) Over- and Underpayments. As a result of uncertainty in the application of Section 4999 of the Code at the time of the initial determination by the Accountants hereunder, it is possible that Gross-Up Payments not made by the Company should have been made ("Underpayment") or that Gross-Up Payments will have been made by the Company that should not have been made ("Overpayment"). In either event, the Accountants shall determine the amount of the Underpayment or Overpayment that has occurred. In the case of an Underpayment, the Company shall promptly pay you the amount of such Underpayment. In the case of an Overpayment, you shall, at the direction and expense of the Company, take such steps as are reasonably necessary (including the filing of returns and claims for refund), follow reasonable instructions from, and procedures established by, the Company, and otherwise reasonably cooperate with the Company to correct such Overpayment, provided, however, that (i) you shall in no event be obligated to return to the Company an amount greater than the net after-tax portion of the Overpayment that you have retained or have recovered as a refund from the applicable taxing authorities and (ii) this provision shall be interpreted in a manner consistent with the intent of Subsection (a) above, which is to make you whole, on an after-tax basis, from the application of the Excise Tax, it being understood that the correction of an Overpayment may result in your repayment of an amount that is less than the Overpayment.

2. **At Will Employment**. Your employment with the Company remains "at will," meaning that either you or the Company may terminate your employment at any time and for any reason, with or without cause.

3. **Entire Agreement; Termination**. This agreement supersedes all prior agreements (verbal or written) between you and the Company relating to the subject matter hereof. The benefits provided under this agreement will terminate on the earlier of the date on which (x) all payments hereunder have been made in full and (y) that certain Agreement and Plan of Merger,

Helen Jenkins
October 11, 2016
Page 3

dated September 19, 2016, by and among Tobira, Sapphire Acquisition Corp. and Allergan Holdco US, Inc. (as it may be amended from time to time, the "Merger Agreement") terminates pursuant to its terms without the Merger (as such term is defined in the Merger Agreement) having closed.

4. **Miscellaneous** . This Agreement shall be construed and interpreted under the laws of the State of California, excluding laws relating to conflicts or choice of law.

* * * *

You may indicate your acceptance of the foregoing by signing the enclosed copy of this letter and returning it to me.

Very truly yours,

T OBIRA T HERAPEUTICS , I NC .

/s/ Dennis Podlesak

Title: Chairman of the Board

Accepted and Agreed to:

/s/ Helen Jenkins

Signature

Dated: October 11, 2016

TOBIRA THERAPEUTICS, INC.

October 11, 2016

Chris Peetz
[Address]
[Address]

Dear Chris Peetz:

Tobira Therapeutics, Inc. (the "Company") is pleased to inform you of the following enhancements in your compensation:

1. Parachute Payments .

(a) Gross-Up Payment. If it is determined that any Payment constitutes a parachute payment within the meaning of Section 280G of the Code and is subject to the excise tax imposed by Section 4999 of the Code or any interest or penalties with respect to such excise tax (such excise tax and any such interest or penalties are collectively referred to as the "Excise Tax"), then you shall be entitled to receive from the Company an additional payment (a "Gross-Up Payment") in an amount calculated to ensure that after you pay all taxes (and any interest or penalties imposed with respect to such taxes), including any Excise Tax, imposed upon the Gross-Up Payment, you retain an amount of the Gross-Up Payment equal to the Excise Tax imposed upon the Payment(s).

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documents as the Accountants may reasonably request in order to make a determination under this Section 1(b). The Company shall bear all costs the Accountants may reasonably incur in connection with any calculations contemplated by this Section 1(b). The Accountants shall provide their determination (the "Determination"), together with detailed supporting calculations regarding the amount of any Gross-Up Payment and any other relevant matter, to you and the Company within ten (10) business days after you or the Company made a request (if you reasonably believes that the Payment(s) may be subject to the Excise Tax). Any Determination by the Accountants shall be binding upon you and the Company, absent manifest error.

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2. **At Will Employment**. Your employment with the Company remains "at will," meaning that either you or the Company may terminate your employment at any time and for any reason, with or without cause.

3. **Entire Agreement; Termination**. This agreement supersedes all prior agreements (verbal or written) between you and the Company relating to the subject matter hereof. The benefits provided under this agreement will terminate on the earlier of the date on which (x) all payments hereunder have been made in full and (y) that certain Agreement and Plan of Merger,

dated September 19, 2016, by and among Tobira, Sapphire Acquisition Corp. and Allergan Holdco US, Inc. (as it may be amended from time to time, the "Merger Agreement") terminates pursuant to its terms without the Merger (as such term is defined in the Merger Agreement) having closed.

4. **Miscellaneous** . This Agreement shall be construed and interpreted under the laws of the State of California, excluding laws relating to conflicts or choice of law.

* * * *

You may indicate your acceptance of the foregoing by signing the enclosed copy of this letter and returning it to me.

Very truly yours,

T OBIRA T HERAPEUTICS , I NC .

/s/ Dennis Podlesak

Title: Chairman of the Board

Accepted and Agreed to:

/s/ Christopher Peetz

Signature

Dated: October 11, 2016