

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:

NOVAN, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 23-10937 (LSS)

(Joint Administration Requested)

Re: Docket No. 16

MAYNE PHARMA GROUP LIMITED’S LIMITED OBJECTION TO MOTION OF DEBTORS FOR ENTRY OF ORDERS (I)(A) APPROVING BIDDING PROCEDURES FOR SALE OF SUBSTANTIALLY ALL OF DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES AND DESIGNATING LIGAND PHARMACEUTICALS AS A STALKING HORSE BIDDER, (B) SCHEDULING AN AUCTION AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF, (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES, AND (D) SCHEDULING A SALE HEARING AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF; (II)(A) APPROVING THE SALE OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES AFTER THE AUCTION AND (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) IN THE ALTERNATIVE, APPROVING THE SALE OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES TO LIGAND PHARMACEUTICALS IF NOT APPROVED AS THE STALKING HORSE BIDDER

Mayne Pharma Group Limited (“**Mayne Pharma**”), by and through its undersigned counsel, hereby files this limited objection (the “**Objection**”) to the *Motion of Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Substantially All of Debtors’ Assets Free And Clear of Liens, Claims, Interests, and Encumbrances and Designating Ligand Pharmaceuticals as a Stalking Horse Bidder, (B) Scheduling an Auction and Approving the Form*

¹ The Debtors in these Chapter 11 cases, along with the last four digitals of the Debtors’ federal tax identification number (if applicable), are: Novan, Inc. (7682) and EPI Health, LLC (9118). The corporate headquarters and the mailing address for the Debtors is 4020 Stirrup Creek Drive, Suite 110, Durham, NC 27703.



*and Manner of Notice Thereof, (C) Approving Assumption and Assignment Procedures and (D) Scheduling a Sale Hearing and Approving the Form and Manner of Notice Thereof; (II)(A) Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances After the Auction and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) in the Alternative, Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances to Ligand Pharmaceuticals if Not Approved as the Stalking Horse Bidder (the "Bidding Procedures Motion")*² [ECF No. 16] filed by the Debtors.

The Bidding Procedures Motion appears to include a requirement that to be designated a Qualified Bidder, a party must assume the Royalty Agreement or, at best, contains inconsistent provisions regarding the Royalty Assumption, that will chill the interest of potential bidders in submitting bids because of the risk of disqualification, and which could undermine the bidding process at an auction if approved. In support of this Objection, Mayne Pharma respectfully represents as follows:

LIMITED OBJECTION

1. The Debtors claim that the Bidding Procedures are "*designed to promote a competitive, fair and efficient Sale process that will maximize the value of the Debtors' estates.*"³ Yet the Bidding Procedures, as proposed, require a potential bidder to take assignment of the Royalty Agreement relating to the Stalking Horse Bidder's funding of the Debtors' R&D Assets for that party's bid to be deemed a Qualified Bid. Further, the Bidding Procedures contain preferential provisions that vest the Stalking Horse Bidder with the right to pivot to a private sale

² Capitalized words used in this Objection, but not defined, have the meaning ascribed to such terms in the Bidding Procedures Motion.

³ Bidding Procedures Motion, at 8, ¶ 17.

unilaterally. Both provisions necessarily chill interest in participation in the bidding process and thereby are designed to discourage a competitive, fair and efficient process.

2. The Debtors have a duty in soliciting and considering offers for the purchase of their Assets to ensure that the sale maximizes the value of the assets sold for the benefit of their creditors. See *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 128-29 (3d Cir. 2004) (“[T]he purposes of the Code are to preserve going concerns and to maximize the value of the debtor’s estate.”) (citing *Bank of Am. Nat’l Trust Sav. Ass’n v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 453, 119 S. Ct. 1411, 143 L. Ed. 2d. 607 (1999); accord *Toibb v. Radloff*, 501 U.S. 157, 163-64, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991) (discussing “congressional purpose of deriving as much value as possible from the debtor’s estate.”); *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998) (“The purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.”).

The Bidding Procedures Contain Inconsistent Provisions with Respect to the Requirement of the Assumption and Assignment of the Royalty Agreement.

3. The Bidding Procedures Motion requires a bidder to accept assignment of the Royalty Agreement in connection with the purchase of *any* asset to be deemed a Qualified Bidder.⁴

4. The Qualified Bid requirements are restated in the relevant provisions of the Stalking Horse APA attached as Exhibit B to the Bidding Procedures Motion, which similarly states that “under no circumstance may a bid, other than the Stalking Horse Bid, qualify as a

⁴ Bidding Procedures Motion, p. 10, ¶ (c) (“provided further, however, that under no circumstances may any bid of any bidder other than the Stalking Horse Bid be deemed a Qualified Bid if it does not provide for the unaltered assumption and assignment (the “Royalty Assumption”) to the bidder of that certain Development Funding and Royalties Agreement, dated as of May 4, 2019 (as amended from time to time), to which the Stalking Horse Bidder and Novan, Inc. are each a party (the “Royalty Agreement”).

Qualified Bid if it does not provide for the unaltered assumption and assignment of the Royalty Agreement.”⁵

5. However, ¶ 50 of the Bidding Procedures Motion states that the Royalty Agreement must be assumed and assigned “to a purchaser in connection with any Sale of Assets *related to the R&D Assets*.”⁶

6. The requirement described in ¶ 50 of the Bidding Procedures Motion that the Royalty Agreement must be assumed and assigned “to a purchaser in connection with any Sale of Assets *related to the R&D Assets*” implies that no such assumption and assignment provision would apply to a purchaser of some or all of the Commercial Assets. Likewise, the general concept described in the Bidding Procedures Motion that separate parties may bid on the R&D Assets and the Commercial Assets⁷ implies that a successful bidder for some or all of the Commercial Assets that was not also the successful bidder for the R&D Assets would not be required to take assignment of the Royalty Agreement since the Royalty Agreement could not be assigned to multiple distinct parties. However, a plain reading of ¶ (c) on page 10 of the Bidding Procedures Motion suggests that no bid may be considered a Qualified Bid unless it provides for the unaltered assumption and assignment of the Royalty Agreement in connection with the purchase of *any* Asset. Thus, the Qualified Bid requirements are unclear. That lack of clarity will necessarily chill bidding and interest in the Commercial Assets.

7. A clarification of the Royalty Assumption requirement is necessary to determine whether: (i) assumption of the Royalty Agreement is required only in connection with a bid that

⁵ Stalking Horse APA, ¶ 6.

⁶ Bidding Procedures Motion, at 34, ¶ 50 (emphasis added).

⁷ See Bidding Procedures Motion, at 10, ¶ (c), describing determination of higher bids, “which determination with respect to the Commercial Assets and the R&D Assets may be made by considering bids submitted by more than one Qualified Bidder in combination.”

includes the R&D Assets or (ii) assumption of the Royalty Agreement is required in connection with the purchase of *any* Asset.

**The Requirement that a Bidder must Accept Assignment
of the Royalty Agreement is “Bid Chilling.”**

8. On July 31, Mayne Pharma submitted a confidential non-binding proposal for a portion of the Debtors’ Commercial Assets at a cash price that is greater than 50% of the cash offer proposed for all of the Debtors’ Assets by the Stalking Horse Bidder.

9. Because the Royalty Agreement is unrelated to the subject of Mayne Pharma’s offer, Mayne Pharma would be unable to submit a Qualified Bid if the Court requires the unaltered assumption and assignment of the Royalty Agreement in connection with the purchase of *any* Asset.

10. Mayne Pharma hopes, should diligence justify doing so, to either become a Stalking Horse Bidder with respect to certain Commercial Assets or to submit a Qualified Bid for those assets. However, if it must assume the Royalty Agreement to do so, it will simply discontinue its diligence now and will not bid at all.

11. Thus, the requirement that the Royalty Agreement be assumed in connection with the purchase of *any* Asset is at odds with the Debtors’ obligation and stated objective to utilize the Sale process to maximize the value of the Debtors’ estates. *See In Re Trans World Airlines, Inc.*, 2001 WL 1820326, at *11 (Bankr. D. Del. Apr. 2, 2001) (“The purpose of a § 363(b) sale is to *maximize* the benefit to the debtor’s entire estate.”) (emphasis added). The coercive nature of the Royalty Assumption provision plainly contravenes that goal by discouraging bidder participation.

12. Bankruptcy courts have historically rejected bidding procedures motions that chill the bidding process. *See In re Joshua Slocum, Ltd.*, 99 B.R. 261, 264 (Bankr. E.D. Pa. 1989) (“The courts have frowned upon procedures which have a chilling effect upon a bidding process.”) (citing

In re Stanley Engineering Corp., 164 F.2d 316, 319 (3d. Cir. 1947); *In re 9 Hous. LLC*, 578 B.R. 600, 618 n.14 (Bankr. S.D. Tex. 2017) (declining to approve a bid procedures motion that required the winning bidder to forego due diligence, finding it would “chill the bidding and not maximize the value of the Property.”).

13. As such, this Court should require the Debtors and the Stalking Horse Bidder to revise the proposed Bidding Procedures by amending or striking the Royalty Assumption provision.

The “Private Sale” Is Bid Chilling.

14. Finally, the Bidding Procedures Motion seeks to vest the Stalking Horse Bidder with too much control by granting it the option to purchase the entirety of the Debtors’ Assets if the DIP Order or the Bidding Procedures Order have not been entered twenty-five (25) days after the Petition Date (the “**Private Sale**”).

15. The ability of the Stalking Horse Bidder to pivot to the Private Sale if its proposed Bidding Procedures are not entered without alteration effectively guaranties that there will be no auction for the assets at all. Once again, Mayne Pharma could not continue to invest its resources in this process only to learn that the auction was an illusion.

CONCLUSION

For the foregoing reasons, Mayne Pharma respectfully requests that the Court consider this limited objection and decline to approve the Bidding Procedures Order unless the Royalty Assumption and Private Sale provisions are struck or modified, as this Court deems appropriate.

Dated: August 1, 2023

K&L GATES LLP

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FOR THE DISTRICT OF DELAWARE**

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NOVAN, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 23-10937 (LSS)

(Joint Administration Requested)

CERTIFICATE OF SERVICE

I, Megan E. O'Connor, certify that I caused a true and correct copy of the foregoing *Mayne Pharma Group Limited's Limited Objection to Motion of Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Substantially All of Debtors' Assets Free And Clear of Liens, Claims, Interests, and Encumbrances and Designating Ligand Pharmaceuticals as a Stalking Horse Bidder, (B) Scheduling an Auction and Approving the Form and Manner of Notice Thereof, (C) Approving Assumption and Assignment Procedures and (D) Scheduling a Sale Hearing and Approving the Form and Manner of Notice Thereof; (II)(A) Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances After the Auction and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) in the Alternative, Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances to Ligand Pharmaceuticals if Not Approved as the Stalking Horse Bidder* to be filed and served via CM/ECF on all parties

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requesting electronic notification in this case and via electronic mail to the parties set forth on the attached service list.

Dated: August 1, 2023

K&L GATES LLP

/s/ Megan E. O'Connor

Megan O'Connor (Bar No. 6569)

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