

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:) Chapter 11
)
NOVAN, INC., *et al.*,¹) Case No. 23-10937 (LSS)
)
) (Jointly Administered)
Debtors.)
) Related Doc. Nos. 16, 60, 166, 168

**REEDY CREEK INVESTMENTS LLC’S LIMITED OBJECTION TO SALE
AND RESERVATION OF RIGHTS**

Reedy Creek Investments LLC (“Reedy Creek”) by and through its undersigned counsel, hereby submits this limited objection and reservation of rights (the “Objection and Reservation of Rights”) with respect to the proposed Sale.² In support of this Objection and Reservation of Rights, Reedy Creek incorporates by reference its preliminary objection and reservation of rights [Dkt. No. 98] (the “Preliminary Objection”), filed with respect to the (1) *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)*

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.

² Capitalized terms used but not otherwise defined in this Objection and Reservation of Rights shall have the meanings ascribed to such terms in the *Order (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, and (II) Granting Related Relief* [Dkt. No. 166] (the “Bidding Procedures Order”).



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 [Dkt. No. 16] and (2) Initial Notice of Possible Assumption and Assignment of Certain Executory Contracts and Unexpired Leases [Dkt. No. 60], and further respectfully states as follows.

BACKGROUND

1. As set forth in Reedy Creek's Preliminary Objection, Reedy Creek and Novan are parties to that certain Royalty and Milestone Payments Purchase Agreement dated April 29, 2019 (the "Reedy Creek Purchase Agreement"), pursuant to which Reedy Creek purchased certain royalty rights generated in connection with three products in Novan's portfolio: SB204, a once-daily, topical monotherapy being developed for the treatment of acne vulgaris; SB206, a topical anti-viral gel being developed for the treatment of molluscum contagiosum, a contagious skin infection caused by the molluscipoxvirus; and SB214, a topical cream-based product candidate being developed for the treatment of atopic dermatitis (a type of eczema) (collectively, the "Products").

2. The assets purchased by Reedy Creek consist of a royalty stream, based on an applicable percentage per Product consisting of certain upfront fees, milestone payments, royalty payments or equivalent payments received by Novan pursuant to any out-license agreement for the Products in the United States, Mexico or Canada, net of any upfront fees, milestone payments, royalty payments or equivalent payments paid by Novan to third parties pursuant to any

agreements under which Novan has in-licensed intellectual property with respect to the Products in the same territory (the “Purchased Rights”).

3. The Reedy Creek Purchase Agreement authorized Reedy Creek to file an Article 9 Financing Statement notifying other parties of the purchase. Reedy Creek recorded the form UCC-1 Financing Statement with the Delaware Secretary of State on June 25, 2020. *See* Ex. to Prelim. Obj., Dkt. No. 98-1 at 2.

4. Additional background information relating to the Reedy Creek Purchase Agreement and the Purchased Rights is set forth in the Preliminary Objection. *See* Dkt. No. 98.

5. On August 1, 2023, the Court entered the Bidding Procedures Order, which, among other things, approved the Bidding Procedures to be used in connection with any Sale of the Debtors’ assets and authorized the Debtors to designate Ligand as the Stalking Horse Bidder for such assets. *See* Dkt. No. 166.

6. The Bidding Procedures Order provides that the Stalking Horse Bidder shall designate the Reedy Creek Purchase Agreement as an Assumed Contract and/or Assumed Liability, as applicable. Bid. Proc. Order, Dkt. 166 at 16.³

7. The Bidding Procedures do not require that Qualified Bids submitted by Qualified Bidders other than the Stalking Horse Bidder include the Reedy Creek Purchase Agreement as an Assumed Contract and/or Assumed Liability. However, the Bidding Procedures state that the Debtors “will ascribe value to the Stalking Horse Bidder’s assumption of the Reedy Creek Royalty Agreement and will provide the amount of such value to all parties seeking to become Qualified bidders.” Ex. 1 to Bid. Proc. Order, Dkt. 166 at 29. Moreover, the Debtors’ valuation of any

³ The Bidding Procedures Order uses the defined term “Reedy Creek Royalty Agreement” to refer to the Reedy Creek Purchase Agreement.

Qualified Bid (other than the Stalking Horse Bid), including their ultimate selection of a Winning Bid, will be based upon, among other factors, whether or not such Qualified Bid assumes the Reedy Creek Purchase Agreement.

LIMITED OBJECTION AND RESERVATION OF RIGHTS

8. For the avoidance of doubt and as a preliminary matter, Reedy Creek does not object to the Stalking Horse Bidder being the Winning Bidder or the ultimate Purchaser, so long as the Stalking Horse Bidder designates the Reedy Creek Purchase Agreement as an Assumed Contract and/or Assumed Liability as required by the Bidding Procedures Order.

9. However, Reedy Creek objects to the Sale to extent the Debtors seek to sell any assets purchased by Reedy Creek in connection with the Reedy Creek Purchase Agreement or otherwise interfere with Reedy Creek's related rights, including by way of a sale free and clear of Reedy Creek's interests in such assets.

10. A debtor may not sell an asset that is not property of the estate in a Section 363 sale. *See In re Whitehall Jewelers Holdings, Inc.*, 2008 WL 2951974, *4 (Bankr. D. Del. July 28, 2008) ("A bankruptcy court may not allow the sale of property as 'property of the estate' without first determining whether the property is property of the estate"). Further, a debtor may not utilize a short form sale proceeding to make a determination of ownership. *Id.* at *6 (requiring adversary proceedings against each consignor of goods prior to their sale in the bankruptcy); *In re TSAWD Holdings, Inc.*, 565 B.R. 292 (Bankr. D. Del. 2017) (same). Without waiving any other right or objection raised by Reedy Creek, to the extent the Court ultimately determines that the Debtors have any interest in the assets purchased by Reedy Creek, Reedy Creek demands adequate protection of that interest pursuant to 11 U.S.C. §§ 363 and 361.

11. For the same reason, among others, Reedy Creek objects to any Sale that purports to exclude the obligations under the Reedy Creek Purchase Agreement. As set forth in the

Preliminary Objection, the Reedy Creek Purchase Agreement is not an optional obligation that the Debtors, or any Purchaser, can “take or leave.” Reedy Creek objects to any attempted designation of the Reedy Creek Purchase Agreement as an executory contract subject to rejection. Without waiving the foregoing, Reedy Creek further objects to any assignment without the consent of Reedy Creek to the extent it is required under the Reedy Creek Purchase Agreement.⁴

12. Reedy Creek reserves all rights with respect to the Sale, including, without limitation, Reedy Creek’s right to object, be heard, and present evidence at the Sale Hearing, object to any value ascribed by the Debtors to the Reedy Creek Purchase Agreement in connection with any Qualified Bid, object to any proposed treatment of the Reedy Creek Purchase Agreement or any other agreement with the Debtors, object to the conduct at and outcome of any Auction, and such other or further matters as may be heard and considered by the Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Reedy Creek requests that the Court (a) decline to approve the proposed Sale to the extent set forth herein, and (b) grant such other relief as may be just and proper.

⁴ Reedy Creek consents to the Reedy Creek Purchase Agreement being assigned to the Stalking Horse Bidder.

Dated: August 28, 2023

K&L GATES LLP

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NOVAN, INC., <i>et al.</i> , ¹)	Case No. 23-10937 (LSS)
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)	(Jointly Administered)
Debtors.)	
_____)	Related Doc. Nos. 16, 60, 166, 168

CERTIFICATE OF SERVICE

I, Matthew B. Goeller, certify that I am not less than 18 years of age, and that on the date set forth below, I caused a true and correct copy of the foregoing *Reedy Creek Investments LLC's Limited Objection to Sale and Reservation of Rights* to be filed and served via CM/ECF on all parties requesting electronic notification in this case and via first class United States mail or electronic mail, as applicable, to the parties set forth on the attached service list.

Under penalty of perjury, I declare the foregoing is true and correct.

Dated: August 28, 2023

/s/ Matthew B. Goeller
Matthew B. Goeller

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.

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Via US Mail

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Durham, NC 27703

Via Electronic Mail

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