

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

In re:

NOVAN INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 23-10937 (LSS)

(Jointly Administered)

Ref. Nos. 16, 60, 166, 242

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF
ALLERGAN, INC. AND ALLERGAN SALES, LLC TO THE SALE OF
THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS,
INTERESTS, AND ENCUMBRANCES**

Allergan, Inc. and Allergan Sales, LLC (together, "Allergan") hereby file this limited objection and reservation of rights (the "Limited Objection")² to the motion of the above-captioned debtors and debtors in possession (the "Debtors") motion seeking authority to, among other things, sell substantially all their assets and to assume and assign certain executory contracts in connection therewith free and clear of all liens, claims, interests, and encumbrances [D.I. 16] (the "Sale Motion") and to the *Notice of Debtors' Designation of Mayne Pharma LLC as Winning Bidder and the Mayne APA as the Winning Bid for Certain of the Debtors' Assets* [D.I. 242] (the "Designation Notice") and the Mayne APA (defined below) contained therein.

As discussed more fully below, in general, Allergan does not object to the assumption or assignment of its contracts by the Debtors to Mayne Pharma LLC ("Mayne") as listed in the

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 defined in this Limited Objection 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* [D.I. 166] (the "Bidding Procedures Order").



Designation Notice. However, Allergan files this objection in response to Mayne advising that it does not intend for the Vicept Agreement (defined below) to be included as part of any such assumption and assignment, despite the fact that the Vicept Agreement is an inseparable component from the Allergan APA. In further support of this Limited Objection, Allergan respectfully states as follows:

FACTUAL BACKGROUND

1. On October 15, 2018, Allergan Sales, LLC and Aclaris Therapeutics, Inc. (“Aclaris”) entered into that certain Asset Purchase Agreement (the “Allergan APA”).³ Through the Allergan APA, among other things, Allergan conveyed to Aclaris its rights and interests in various assets, primarily relating to the Rhofade Assets and the Rhofade Contracts. These assets included, without limitation, certain assigned contracts, patents, trademarks, domain names and inventory. Specifically, the Allergan APA also incorporated the Agreement and Plan of Merger, dated as of July 18, 2011, among Allergan, Inc., Erythema Acquisition, Inc., Vicept Therapeutics, Inc. and Neal Walker, as Shareholders’ Representative (the “Vicept Agreement”).⁴

2. On July 17, 2023 (the “Petition Date”), the Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). On the Petition Date, the Debtors filed the Sale Motion.

3. On July 25, 2023, the Debtors filed the *Initial Notice of Possible Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* [D.I. 60] (the “Cure Notice”),

³ The Allergan APA is attached as Exhibit A to the Notice of Exhibits filed contemporaneously herewith under seal due to certain confidentiality restrictions.

⁴ Albert Cha subsequently replaced Neal Walker as the Shareholder Representative and, therefore, the Vicept Agreement may alternatively list him as such.

which identified the Allergan APA as well as the Vicept Agreement as possible contracts available for assumption and assignment to a purchaser.

4. On August 15, 2023, the Bankruptcy Court entered the Bidding Procedures Order, approving the Debtors proposed bidding procedures and auction process.

5. On August 31, 2023, the Debtors filed the Designation Notice, which identified Mayne as the winning bidder for certain of the Debtors' Commercial Assets related to Rhofade. The Designation Notice attached a copy of the executed Amended and Restated Asset Purchase Agreement, dated as of August 31, 2023, by and among Novan, Inc., EPI Health, LLC, and Mayne Pharma LLC (the "Mayne APA"). Schedule 2.6(a) to the Mayne APA lists the Allergan APA as an assumed contract but notably omits the Vicept Agreement.

6. The Vicept Agreement is inseparable from and an integral component of the Allergan APA. The Allergan APA provides that "[f]rom and after the Closing, Buyer shall assume, and be liable for and pay, perform and discharge when due, the Assumed Liabilities." *See* Allergan APA, Section 2.3. The Allergan APA defines "Assumed Liabilities," in relevant part, as: "all Liabilities (other than the Excluded Liabilities) to the extent arising out of, in respect of or relating to: ... (c) the Liabilities of Seller or its Affiliates under the Rhofade Contracts that arise from and after the Closing (including any diligence obligations and any obligations to make milestone, royalty, earnout or other payments under the Rhofade Contracts from and after the Closing)...." *See* Allergan APA, Section 1.1.

7. The Allergan APA defines the "Rhofade Contracts" as "the Contracts listed on Schedule 1.1(g) of the Seller Disclosure Letter."⁵ *Id.* Schedule 1.1(g) of the Seller Disclosure

⁵ The Seller Disclosure Schedule is attached as Exhibit B to the Notice of Exhibits filed contemporaneously herewith under seal due to certain confidentiality restrictions.

Letter lists the Vicept Agreement as one of the Rhofade Contracts. *See* Seller Disclosure Letter. Thus, the Vicept Agreement is a Rhofade Contract, and therefore any liability arising thereunder is an explicitly Assumed Liability pursuant to the Allergan APA. If a subsequent purchaser assumes the Allergan APA, the Vicept Agreement, and its liabilities, must be assumed as well as part of the liabilities expressly set forth thereunder.

8. Prior to submitting this Limited Objection, counsel to Allergan conferred with counsel to the Debtors and counsel to Mayne to determine their intentions with respect to the Allergan APA and the Vicept Agreement. Allergan's counsel was advised that the Debtors intend to assume the Allergan APA as set forth in the Designation Notice and assign it to Mayne, but were not assuming and assigning the Vicept Agreement as part of the transaction either as part of the Allergan APA or otherwise.

OBJECTION

9. If the Debtors assume the Allergan APA and assign it to Mayne (or any other purchaser), they necessarily must assume the entirety of the agreement, including the Vicept Agreement that is a Rhofade Contract and assumed liability thereunder. It is well settled law that contracts must be assumed *cum onere* without any change. *See In re ANC Rental Corp.*, 277 B.R. 226, 238 (Bankr. D. Del. 2002). The Bankruptcy Court, reiterating the position of the 3rd Circuit, has explained that a debtor “may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.” *Id.* (quoting *In re Italian Cook Oil Corp.*, 190 F.2d 994, 997 (3d Cir. 1951)). “[A]n assignment is intended to change only who performs an obligation, not the obligation to be performed.” *In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007) (quoting *Medtronic Ave., Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 60 (3d Cir. 2001)).

10. As detailed above, the Vicept Agreement is an integral component of the Allergan APA and an assumed liability thereunder. If the Debtors assume and assign the Allergan APA, they must assume and assign it in its entirety including all liabilities and obligations thereunder, which, pursuant to section 2.3 of the Allergan APA, expressly includes the Vicept Agreement. However, based on Mayne's statements to Allergan's counsel that it does not intend for the Vicept Agreement to be assumed as part of the Allergan APA, it is clear that Mayne seeks to separate the Allergan APA's benefits from certain of its burdens in violation of well settled bankruptcy law.

11. "[I]n order to assume or reject an unexpired lease or executory contract, the trustee must deal with the agreement as a whole—*cum onere*—rather than assuming only the beneficial aspects and rejecting the burdensome ones." *United Air Lines, Inc. v. U.S. Bankr. Trust Nat'l Ass'n as Tr. (In re UAL Corp.)*, 346 B.R. 456, 467 (Bankr. N. D. Ill. 2006) (citing *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 532, (1984)). Thus, if the Debtors assume the Allergan APA and assign it to Mayne (or any other purchaser), they must do so *cum onere* and not cherry-pick the benefits from the burdens of the Allergan APA. Any assumption and assignment of the Allergan APA must include the Vicept Agreement as an inseparable obligation thereunder.

12. Accordingly, the Debtors' proposed assumption and assignment of the Allergan APA necessarily must include the Vicept Agreement as part of any such assumption and assignment.

RESERVATION OF RIGHTS

13. Allergan expressly reserves all rights and remedies, in law or equity, under state or federal law, including the Bankruptcy Code, related to, without limitation, the Debtors' bankruptcy cases and any related adversary proceedings, the Sale Motion, Cure Notice, the sale order, the Designation Notice, the Mayne APA, and any proposed assumption and assignment of Allergan's

contracts. Allergan reserves all rights in regard to proof of adequate assurance and expressly reserves the right to amend and supplement this Objection for any reason at the appropriate time and in the appropriate context, including without limitation, to increase or further reconcile the cure amounts. Nothing in this Objection is intended to or should be construed as an admission of any fact. Allergan retains all rights, claims, counterclaims, defenses, and arguments as to the Debtors and as to all third parties.

CONCLUSION

WHEREFORE, Allergan respectfully requests that entry of any order approving the proposed sale of the Debtors' assets be consistent with the above and specifically (i) preclude the Debtors from assuming and assigning the Allergan APA to Mayne without Mayne either listing the Vicept Agreement on Schedule 2.6(a), the Assumed Contract List of the Mayne APA, or adding clarifying language to the Sale Order that through the assumption and assignment of the Allergan APA Mayne shall be bound by all of its terms, including, but not limited to, the Vicept Agreement and all other liabilities assumed thereunder; (ii) preserve all of Allergan's rights, claims, counterclaims, defenses, and arguments; and (iii) grant such additional relief as the Court deems proper and just.

Dated: September 9, 2023
Wilmington, Delaware

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