UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

Laurie Selber Silverstein
Chief Judge

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April 8, 2024

VIA CM/ECF

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Re: **NVN Liquidation, Inc., 23-10937 (LSS)**
Application of WE2 Acquisition Holdings, LLC Pursuant to 11 U.S.C. §§ 503(b)(3) and 503(b)(4) For Allowance of Fees and Expenses Incurred In Making a Substantial Contribution as an Administrative Expense Claim, Docket No. 333

Dear Counsel:

This letter resolves WE2 Acquisition Holdings, LLC's Application[1] for payment of certain fees and expenses as a substantial contribution in the Novan Inc. bankruptcy case. WE2's

[1] Appl. of WE2 Acquisition Holdings, LLC Pursuant to 11 U.S.C. §§ 503(b) and 503(b)(4) for Allowance of Fees and Expenses Incurred in Making a Substantial Contribution as an Administrative Expense Claim, ECF No. 333.

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application seeks a total of $353,752 in fees and $2,338.20 in expenses for its role in providing Debtors with the potential for an alternate DIP/Stalking Horse bid.[2] After the Application was filed, Debtors negotiated the requested fees and expenses down to $185,000 and filed a Statement in Support of the Application.[3] The Official Committee of Unsecured Creditors made a cost/benefit analysis and decided not to object to the lowered fee request. The Office of the United States Trustee ("UST") objected.[4] WE2 filed a Reply and a Supplement to its Application.[5]

A hearing was held on November 2, 2023. At the hearing, the Canole Declaration[6] without the final sentence of paragraph 9 was admitted into evidence without objection. WE2 also sought to admit the declarations of Paula Brown Stafford and Simon Wein into evidence. The UST objected because both were out of court statements made in other contexts and the witnesses were not in court for cross-examination.[7] These objections was sustained. At the conclusion of argument, I took the matter under advisement.

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[2] The amount sought included $290,849 in fees for the DIP/Stalking Horse work and $62,903 in fees and $2,338.20 in expenses related to filing of the Application.

[3] Debtors' Statement in Supp. of the Appl. of WE2 Acquisition Holdings, LLC Pursuant to 11 U.S.C. §§ 503(b) and 503(b)(4) for Allowance of Fees and Expenses Incurred in Making a Substantial Contribution as an Administrative Expense Claim, ECF No. 395.

[4] United States Trustee's Obj. to Appl. of WE2 Acquisition Holdings, LLC Pursuant to 11 U.S.C. §§ 503(b) and 503(b)(4) for Allowance of Fees and Expenses Incurred in Making a Substantial Contribution as an Administrative Expense Claim, ECF No. 378.

[5] Reply in Supp. of Appl. of WE2 Acquisition Holdings, LLC Pursuant to 11 U.S.C. §§ 503(b) and 503(b)(4) for Allowance of Fees and Expenses Incurred in Making a Substantial Contribution as an Administrative Expense Claim, ECF No. 393; Suppl. to Appl. of WE2 Acquisition Holdings, LLC Pursuant to 11 U.S.C. §§ 503(b) and 503(b)(4) for Allowance of Fees and Expenses Incurred in Making a Substantial Contribution as an Administrative Expense Claim, ECF No. 394.

[6] Decl. of Raymond Canole in Supp. of Appl. of WE2 Acquisition Holdings, LLC Pursuant to 11 U.S.C. §§ 503(b) and 503(b)(4) for Allowance of Fees and Expenses Incurred in Making a Substantial Contribution as an Administrative Expense Claim, ECF No. 334.

[7] The Declaration of Paula Brown Stafford in Support of Debtors' Chapter 11 Petitions and First Day Motions, ECF No. 4, supported Debtors' filings. The Declaration of Simon Wein in Support of Entry of Orders Authorizing Sale of Substantially All of the Debtors' Assets Free and Clear of All Encumbrances, ECF No. 273, was filed in support of Debtors' sale motions. As noted at the hearing, even assuming the truth of the statements in the Wein Declaration does not necessarily work in WE2's favor. Counsel pointed to paragraph 22, which provides that "[t]hese concessions [by Ligand] resulted from creating the competitive tension via the Alternative Stalking Horse Proposal." But Mr. Wein also declares that the objections filed by Mayne, Reedy Creek and the UST "catalyzed ongoing discussions" with various counterparties to submit competing bids and "these efforts generated competitive tension in the process and unlocked meaningful value." Wein Decl. ¶ 16. *See also* Wein Decl. ¶ 17, 19.

Facts

Prior to filing its case, Debtors were facing liquidity constraints. Woodward Pharma Services, LLC[8] initiated discussions with Debtors when it learned of the situation. On June 6, 2023, Woodward executed a non-disclosure agreement to obtain non-public information and gain access to Debtors' data room so that it could perform due diligence on a possible transaction. On June 22, 2023, Raymond James (Debtors' investment banking firm) contacted Colbeck Capital Management LLC, Woodward's strategic lending partner, to solicit proposals for DIP financing or to serve as a stalking horse bidder. On July 11, 2023, Woodward submitted a stalking horse proposal to Debtors.

Debtors filed their bankruptcy case on July 17, 2023. The Woodward proposal was not accepted by Debtors or proposed to the Court. Rather, contemporaneously with the filing of their petitions, Debtors filed a sale motion to approve a proposal from Ligand Pharmaceuticals, Inc. to (x) provide DIP financing of up to $15 million (which included $3 million of a bridge loan) and (y) serve as a stalking horse bidder for all Debtors' assets for a purchase price of $15 million.[9] The Ligand transactions included an exit fee, a break-up fee and the requirement that any purchaser assume a prepetition royalty agreement between Debtors and Ligand. At the first day hearing, the Court and the UST expressed skepticism about the need for such fees as well as the requirement for assignment and assumption of the prepetition agreement as part of a sale process. Once the Committee was formed, it, too, focused on the DIP financing and sales process with the objective of modifying the then-current arrangements to enhance creditor recoveries.

After the commencement of the case, Raymond James was retained as investment banker to the debtor-in-possession and continued its prepetition marketing efforts. Raymond James continued discussions with both Woodward and Colbeck regarding an alternative DIP and stalking horse package and urged them to submit a proposal. Woodward and Colbeck presented a proposal to Raymond James on August 1, 2023. This "Alternative Stalking Horse/DIP Proposal" eliminated the need for potential bidders to assume the Ligand royalty agreement, made the sale public, subject to a competitive auction process and relaxed certain milestones. Shortly thereafter, Raymond James indicated that Debtors "wanted to pursue" the Alternative

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[8] WE2 is the investment vehicle Woodward created for a proposed transaction.

[9] Mot. 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, ECF No. 16.

Stalking Horse/DIP Proposal and Woodward retained Paul Hastings to negotiate with Debtors and draft definitive documentation.[10] Paul Hastings worked extensively in a compressed timeframe to negotiate near complete documentation ahead of a hearing on Bid Procedures.

Ultimately, Debtors did not present the Alternative Stalking Horse/DIP Proposal to the Court. Rather, at the Bid Procedures hearing, Debtors presented a modified Ligand transaction for approval as the Stalking Horse bidder. That transaction allocated the $15 million purchase price $12 million to the R&D Assets (as defined in the Application) and $3 million to the Commercial Assets (as defined in the Application), eliminated the break-up fee and eliminated the fee associated with exit financing; the deal still included the assumption of the Ligand royalty agreement and also a separate royalty agreement with Reedy Creek. The Court approved the Bid Procedures with the revised transactions, which was supported by the Creditors Committee.[11]

Debtors held an auction at which there were multiple qualified bidders. At the conclusion of the auction, Debtors selected Ligand as having made the highest and best bid for the R&D Assets and Mayne as having made the highest and best bid for the Commercial Assets. Ultimately, the sale realized $5 million in additional cash recoveries over and above the initial Ligand deal.

WE2 did not participate in the auction. WE2 is neither a creditor nor an equity security holder.

Discussion

WE2 brings its application pursuant to sections 503(b)(3)(D) and 503(b)(4). The pertinent part of these subsections provide:

> (b) After notice and a hearing, there shall be allowed, administrative expenses other than claims allowed under section 502(f) of this title, *including*—

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[10] Canole Decl. ¶ 8.

[11] Mayne Pharma Group Limited objected to the Bid Procedures which arguably required bids for any portion of the assets to include the assumption of the Ligand royalty agreement. Mayne Pharma Group Limited's Limited Obj. to Mot. 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, ECF No. 100. Mayne Pharma sought only to bid on the Commercial Assets. Mayne Limited Obj. ¶ 8. Reedy Creek also filed an objection to Bid Procedures. Reedy Creek Investments LLC's Limited Obj. to Sale and Reservation of Rights, ECF No. 232.

* * *

> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection incurred by—
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> (D) *a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title*, in making a substantial contribution in a case under chapter 9 or 11 of this title[12]

as well as "reasonable compensation" for services rendered by an attorney "to an entity whose expense is allowable" under that section.[13] Because WE2 is not one of the entities listed in § 503(b)(3)(D), the UST's first argument is that WE2 lacks standing to bring a substantial contribution motion. Relying primarily on *S & Y Enterprises*,[14] WE2 argues for an expansive reading of § 503(b)(3)(D) based on the use of the term "including" in the introduction to § 503(b). The UST relies on *Mountain Creek Resort*[15] and a bench ruling in *In re Cred*[16] that both hold that the enumerated categories of claimants limits those who can assert claims for substantial contribution.

I find *Mountain Creek Resort* more persuasive. As shown in the italics above, the introductory paragraph to § 503(b) does use the word "including." In the Bankruptcy Code, this word, is not limiting.[17] Because of that, the ten enumerated categories of administrative claims listed in § 503(b)(1) through § 503(b)(10) are not exclusive. In contrast, subsection (b)(3)(D) does not use the term "including" and so its list of those who can bring a substantial contribution claim is exclusive. As the *Mountain Creek Resort* court points out, had Congress intended the list of entities that could bring substantial contribution claims to be non-exclusive, it could have qualified the list by using the term "including" in subsection (b)(3)(D) as it did in (b)(1)(A).[18] It did not do so.

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[12] 11 U.S.C. § 503(b)(3)(D) (emphasis supplied).

[13] 11 U.S.C. § 503(b)(4).

[14] *In re S & Y Enters., LLC*, 480 B.R. 452 (Bankr. E.D.N.Y. 2012).

[15] *In re Mountain Creek Resort, Inc.*, 616 B.R. 45 (Bankr. D.N.J. 2020).

[16] 4/21/21 Hr'g Tr. 39:24-43:11, *In re Cred Inc.*, No. 20-12836 (JTD) (Bankr. D. Del. Apr. 22, 2021), ECF No. 737.

[17] 11 U.S.C. § 102(3) ("In this title – (3) 'includes' and 'including' are not limiting. . . .").

[18] 11 U.S.C. § 503(b)(1)(A) provides:

> (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including–

But, even if WE2 could seek a substantial contribution claim, I conclude that it has not met the standard for approval of such a claim. I recently set out the standard for evaluating a substantial contribution claim.

> A party may be entitled to reimbursement of its fees and expenses under § 503(b)(4) if its efforts resulted in "an actual and demonstrable benefit to the debtor's estate and its creditors." *Lebron v. Mechem Financial Inc.*, 27 F.3d 937, 944 (3d Cir. 1994) (citation omitted). Even so, because a creditor is presumed to be acting in his own self-interest, the court must conclude that the creditor's actions were "designed to benefit others" in order to award fees as a substantial contribution. *Id.* at 946. This standard is a compromise between the "twin objectives" of encouraging "meaningful participation by creditors in the reorganization process" and minimizing administrative expenses to preserve assets for creditor recoveries. *Id.* at 944 (citation omitted). Accordingly, § 503(b)(4) is narrowly construed. *In re Worldwide Direct, Inc.*, 334 B.R. 112, 122 (Bankr. D. Del. 2005).
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> Courts applying the standard consider multiple factors, including: "1) whether the services were rendered solely to benefit the client or to benefit all parties in the case; 2) whether the services provided direct, significant and demonstrable benefit to the estate; and, 3) whether the services were duplicative of services rendered by attorneys for the committee, the committees themselves, or the debtor and its attorneys." *In re Buckhead Amer. Corp.*, 161 B.R. 11, 15 (Bankr. D. Del. 1993) (citing *In re Jack Winter Apparel, Inc.*, 119 B.R. 629, 633 (E.D. Wis. 1990) (internal citation omitted)). Further, "[r]eimbursement is improper where the activities of the interested

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(1) (A) the actual, necessary costs and expenses of preserving the estate, including–

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title. . . .

> parties are designed to serve primarily their own interests and would have been undertaken without an expectation of reimbursement from the estate." *Worldwide Direct*, 334 B.R. at 121 (quoting *In re Essential Therapeutics, Inc.*, 308 B.R. 170, 174 (Bankr. D. Del. 2004)). The creditor has the burden of making its case by a preponderance of the evidence.[19]

Here, as the UST points out, Woodward was a stranger to this bankruptcy proceeding prior to engaging with Debtors' investment banker after learning of Debtors' financial straits. Woodward determined to diligence Debtors' assets and consider (with Colbeck) a potential DIP financing/purchase package. Woodward re-engaged post-bankruptcy at Raymond James' urging. Woodward's interests, therefore, were directly adverse to the interests of Debtors, its estate and creditors. Woodward (through WE2) sought to obtain Debtors' assets at the lowest possible price and to provide financing at the highest, market-based price. This is quintessential self-interest; any benefit to Debtors and their estates was merely incidental. There is no evidence suggesting Woodward would not have sought to do their deal "without an expectation of reimbursement from the estate." The evidence shows that Woodward hoped to profit by offering a DIP and buying Debtors' assets.

WE2 argues that Woodward was encouraged by Raymond James to make a competing bid and that its competing bid changed the structure of the Ligand transaction such that the $5 million in value was generated. This analysis ignores the simple truth that Raymond James' charge as Debtors' investment banker was to encourage any and all competing offers and to work with all interested parties to put forth their best offers. This included Woodward.

Woodward had three opportunities to participate in the marketing process: prepetition, at the Stalking Horse stage of the case and at the auction. Woodward was not successful in providing enough value at any stage. Debtors came into bankruptcy with Ligand. Debtors then chose Ligand to be their Stalking Horse bidder. Finally, WE2 chose not to bid at the auction. A loss at each of these stages shows that the alternative value WE2 was offering to the estate was less than what Ligand, together with Mayne, ultimately offered at the auction.[20] The logical

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[19] *In re Boy Scouts of America*, Case No. 20-10343 (LSS), 2023 WL 8449557, at *8 (Bankr. D. Del. Dec. 5, 2023) *appeal docketed sub nom. The Coalition of Abused Scouts for Justice v. Office of the United States Trustee*, Case No. 23-cv-01443-RGA (D. Del. Dec. 19, 2023). Even assuming non-listed parties can bring a claim for substantial contribution, "the standard may be even higher. *S & Y Enters.*, 480 B.R. at 461.

[20] WE2 presented no evidence on the value of the Alternative Stalking Horse/DIP Proposal. But had it been of more value than the modified Ligand proposal, Debtors would have presented it as the Stalking Horse bidder. The assumption of the two royalty agreements removed significant claims from the creditors' pool. Ultimately, Debtors and the Committee agreed this brought significant (and more) value to the estate.

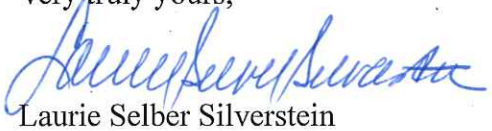
extension of WE2's argument is that any failed bidder who was courted by a debtor's investment banker should be reimbursed for their expenditures. This is not the law.

WE2's analysis also ignores the role others played in the bankruptcy and marketing process. There were multiple objections to the original Ligand proposal, including by third parties interested in certain assets. The Court and the UST were skeptical of the initial transaction and the Committee was as well when it came on board. The combination of factors (as reflected the Wein Declaration that WE2 sought to introduce) contributed to the modified Ligand proposal. I cannot conclude, on the evidence presented, that WE2's actions led to the modified Ligand proposal though it may have been a contributing factor.

Finally, WE2 did not object to approval of the Bid Procedures. The Order approving the Bid Procedures specifically provides that "No bidder or any other party shall be entitled to any termination or 'break-up' fee, expense reimbursement, or any other bid protections in connection with the submission of a bid for any Assets, or for otherwise participating in the Auction or the sale process."[21] If WE2 believed it was entitled to reimbursement of its expenses for participation in the marketing process, it should have preserved the right to request reimbursement. It failed to do so. WE2 should not be able to come in now and seek reimbursement. It would be anomalous if a party participating in the process after approval of the Bid Procedures could not seek reimbursement, but a party who did not participate in the auction and was not the Stalking Horse bidder could.

For these reasons, the Application is denied. A separate order will enter.

Very truly yours,



LSS/cmb

Laurie Selber Silverstein

[21] Bidding Procedures 7, Ex. 1 to 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; (II) Granting Related Relief, ECF No. 166.