

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

In re:

OREXIGEN THERAPEUTICS, INC.,

Debtor.<sup>1</sup>

Chapter 11

Case No. 18-10518 (KJC)

Hearing Date: 05/17/19 at 11:00 p.m. (ET)

Obj. Deadline: 05/06/19 at 4:00 p.m. (ET)

Re: D.I. 1001, 1007 & 1034

**LIMITED OBJECTION AND RESERVATION OF RIGHTS  
OF TAKEDA PHARMACEUTICAL COMPANY LIMITED  
REGARDING THE DEBTOR'S AMENDED PLAN OF LIQUIDATION**

Takeda Pharmaceutical Company Limited (“Takeda”), through its undersigned counsel, submits this limited objection (the “Objection”) to confirmation of the Debtor’s Amended Plan of Liquidation [D.I. 1001] (the “Plan”)<sup>2</sup> under sections 105(a), 553(a), and 1129(a) of title 11 of the United States Code (the “Bankruptcy Code”) because the Plan could be construed to bar Takeda from asserting its rights of setoff and recoupment in response to any claims that may be brought by the Wind Down Entity. In support of this Objection, Takeda states the following:

**BACKGROUND**

1. On March 12, 2018 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy code (this “Chapter 11 Case”). On March 29, 2019, the Debtor filed the Plan. Pursuant to the Plan, on the Effective Date, the Debtor will transfer its remaining assets to the Wind Down Entity, which will liquidate assets and pursue certain of the

<sup>1</sup> The last four digits of the Debtor’s federal tax identification number are 8822. The Debtor’s mailing address for purposes of this Chapter 11 Case is 3344 North Torrey Pines Court, Suite 200, La Jolla, CA, 92037.

<sup>2</sup> Capitalized terms used but not otherwise defined herein have the meanings assigned to such terms in the Plan.



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Debtor's causes of action. The Plan specifically identifies the Takeda Reconciliation Claim as a cause of action that the Wind Down Entity may pursue following the Effective Date.

2. The Disclosure Statement defines the Takeda Reconciliation Claim as "any Cause of Action arising from the Takeda Reconciliation." *See* Disclosure Statement (D.I. 1007) Art. 1.2.187. The Disclosure Statement defines the Takeda Reconciliation as "the determination of the contractual payment obligations owed to the Debtor, if any, in connection with the business operations or termination of its former business relationship with Takeda Pharmaceuticals U.S.A., Inc." *See id.* at 1.2.186. Thus, the Plan specifically states that the Wind Down Entity may pursue any cause of action arising from any alleged contractual payment obligations the Debtor believes it is owed in connection with its business relationship with Takeda.

3. Prior to the Petition Date, Takeda and the Debtor entered into several commercial agreements relating to the development and commercialization of the anti-obesity drug Contrave®, including the Collaboration Agreement dated as of September 1, 2010, as amended and restated on July 31, 2015 (the "Amended and Restated Collaboration Agreement"), the Transition Services Agreement dated March 15, 2015 (the "Transition Services Agreement"), and the Separation Agreement dated March 15, 2015 (the "Separation Agreement").

4. As of the Petition Date, the Debtor and Takeda owed each other certain amounts pursuant to such agreements. Takeda believes it is owed approximately \$1,986,207.68 on account of rebates and chargebacks under the Transition Services Agreement, returned product, certain validation costs, and certain study costs that were paid to the Debtor in error. The Debtor, on the other hand, believes that it is owed approximately \$1,648,556.21 by Takeda on account of certain post-marketing studies, clinical trial costs, and certain chargebacks that the Debtor believes were erroneously paid to Takeda. Takeda disputes that it erroneously received any chargebacks from

the Debtor. The Debtor further claims it is owed approximately \$5,681,952 on account of Contrave® savings cards that were redeemed in August 2016. *See* Debtor’s Schedules of Assets and Liabilities and Statement of Financial Affairs, Part 11, Exhibit 75, D.I. 287, which lists a “Trade Claim” due from Takeda in the amount of \$5,681,952.00.<sup>3</sup> Takeda disputes that the Debtor has any contractual or equitable right to recover savings card costs from August 2016.

5. Takeda has not filed a proof of claim in this Chapter 11 Case and has not received a ballot for voting on the Plan. Because Takeda has not received a ballot, it has not been given the opportunity to opt out of the third-party release that is set forth in Section 6.2(b) of the Plan.

**LIMITED OBJECTION AND RESERVATION OF RIGHTS**

6. Certain provisions of the Plan, in particular Section 6.2(g), could be construed as barring or limiting Takeda’s setoff and recoupment rights. Out of an abundance of caution, Takeda objects to confirmation of the Plan to (i) ensure that its setoff and recoupment rights, which Takeda intends to assert solely as affirmative defenses to the extent the Takeda Reconciliation Claim or any other claims against Takeda are pursued by the Wind Down Entity, are not prejudiced, and (ii) affirmatively opt out of the third-party release under Section 6.2(b) of the Plan.

7. Section 553(a) of the Bankruptcy Code provides:

Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case....

As a general rule, “any right of setoff that a creditor possessed prior to the debtor’s filing for bankruptcy is not affected by the Bankruptcy Code.” *Citizens Bank of Maryland v. Strumpf*, 516

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<sup>3</sup> The Debtor’s schedules also include a claim payable to Takeda in the amount of \$1,053,876.07. The Debtor stated the basis for the claim as “Contract Dispute” and identified Takeda’s claim as subject to setoff.

U.S. 16, 20 (1995); *In re Commc'n Dynamics, Inc.*, 382 B.R. 219, 227 (Bankr. D. Del. 2008) (“a creditor’s right of setoff may be denied only if there is some basis in equity to do so”).

8. The Debtor has not disputed that Takeda has prepetition claims in this Chapter 11 Case, although the parties have not agreed on the amount of such claims. If the Wind Down Entity (as the successor in interest to the Debtor) pursues any prepetition claims against Takeda, Takeda must be allowed to setoff its prepetition claims against the Debtor against any such claims.

9. Takeda also specifically reserves its rights of recoupment with respect to any claims that the Wind Down Entity may assert against Takeda. *See Lee v. Schweiker*, 739 F.2d 870, 875 (3d Cir. 1984) (finding recoupment an available defense to a creditor in bankruptcy to extinguish certain mutual claims that could not be setoff under section 553 of the Bankruptcy Code) (citing *In re Monongahela Rye Liquors*, 141 F.2d 864 (3d Cir. 1944)). Recoupment is unaffected by discharge. *Megafoods Stores, Inc. v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.)*, 60 F.3d 1031, 1035-36 (3rd Cir. 1995) (holding that recoupment survives discharge following confirmation and implementation of chapter 11 plan even if creditor did not object to plan or seek a stay pending appeal); *see also Beaumont v. Dep’t of Veteran Affairs (In re Beaumont)*, 586 F.3d 776 (10th Cir. 2009); *Saif Corp. v. Harmon (In re Harmon)*, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995) (“Because recoupment only reduces a debt as opposed to constituting an independent basis for a debt, it is not a claim in bankruptcy, and is therefore unaffected by the debtor’s discharge.”); *Lunt v. Peoples Bank (In re Lunt)*, 500 B.R. 9, 16 (D. Kan. 2013); *Mercy Hosp. of Watertown v. New York*, 171 B.R. 490, 495 (N.D.N.Y. 1994); *Brown v. General Motors Corp.*, 152 B.R. 935, 938 (W.D. Wis. 1993) (right of recoupment not a claim or debt to be discharged). Accordingly, Takeda’s recoupment rights cannot be impaired by the Plan.

10. Confirmation of a plan of reorganization does not extinguish setoff rights when those rights are timely asserted. *In re Continental Airlines*, 134 F.3d 536, 541-42 (3d Cir. 1998). The Debtor has not pursued the recovery of any disputed amounts from Takeda. Takeda, therefore, has had no reason to exercise its setoff and recoupment rights to this point in the Chapter 11 Case. By this Objection, Takeda makes clear its intention to exercise its setoff and recoupment rights, solely as an affirmative defense, if the Wind Down Entity pursues any claims against it.

11. Although the Debtor expressly preserves its own rights to setoff and recoupment under the Plan (*see* Plan at Art. 1.3), the Plan may be construed to bar or limit Takeda's setoff and recoupment rights. Section 6.2(g) states that each Person that holds a Claim or Interest relating to the Debtor is, and shall be, "permanently, forever, and completely stayed, restrained, prohibited, barred and enjoined from...setting off (to the extent a request for setoff is pending as of the Effective Date), seeking reimbursement or contributions from, or subrogation against, in any manner, directly or indirectly, any amount against any liability or obligation owed to any Person discharged, released, or exculpated under Sections 6.1 or 6.2 of this Plan." *See* Plan at Section 6.2(g). The Debtor is included in the list of parties to be "discharged, released or exculpated" under Sections 6.1 and 6.2 of the Plan. *See* Disclosure Statement Section 1.2.82 (defining Exculpated Parties) and Section 1.2.164 (defining Released Party).

12. Section 1129(a)(1) prohibits the confirmation of a Plan that fails to comply with the provisions of the Bankruptcy Code. Because setoff and recoupment rights are preserved in bankruptcy, the Plan cannot be confirmed if it eliminates Takeda's setoff and recoupment rights. *See, e.g., In re Lund*, 136 B.R. 237, 241 (Bankr. D.N.D. 1990) (Chapter 12 plan that failed to preserve creditor's right of setoff as a secured claim could not be confirmed). At best, the Plan is unclear regarding the ability of creditors to assert their setoff and recoupment rights against the

Debtor (or the Wind Down Entity), and the injunction provision in Section 6.2(g) could be interpreted to bar the assertion of such rights. The Plan and the Confirmation Order must clearly preserve these rights for Takeda and other creditors. Otherwise, the Plan cannot be confirmed.

13. Any attempt to eliminate the setoff and recoupment rights of creditors would also contravene Section 1129(a)(7) of the Bankruptcy Code. Section 1129(a)(7) requires the debtor to prove, as a requirement of confirmation, that “each holder” of a claim in an impaired class will receive at least as much under the plan as it would receive in a hypothetical chapter 7 case. *In re W.R. Grace & Co.*, 475 B.R. 34, 142 n.106 (D. Del. 2012) (class vote “may not waive an individual creditor’s right to this protection under [section 1129(a)(7) of] the Code”).

14. If the Plan eliminates the setoff and recoupment rights of creditors, Takeda will not receive equal or better recovery under the Plan than it would receive in a Chapter 7 liquidation. In the event that Takeda’s setoff and recoupment rights are eliminated, Takeda would no longer hold a secured claim on account of its setoff rights, and any claim it would be entitled to would likely be classified as a general unsecured claim. The Debtor proposes to distribute to Holders of Class 4 General Unsecured Claims only its Pro Rata share of the Plan Settlement Net Proceeds, the Plan Settlement Initial Funding Amount remaining for distribution, and any unused amounts of the Class 4 Disputed Claim Reserve and the Plan Settlement Litigation Reserve. *See* Plan at Art. 1.1(D). The Debtor projects a 2% recovery for Class 4 Claims. *See* Disclosure Statement at p.35. By contrast, in a Chapter 7 liquidation, Takeda could offset 100% of its claims against the Debtor against any claims the Wind Down Entity asserted against Takeda, resulting in a 100% recovery.

15. Takeda has not received a ballot for voting on the Plan. Without a ballot, Takeda was not given the opportunity to opt out of the third-party release under Section 6.2(b) of the Plan.

By way of this Objection, Takeda opts out of the third party release under Section 6.2(b) and objects to any attempt to impose a non-consensual third party release in this case.<sup>4</sup>

**CONCLUSION**

For the foregoing reasons, Takeda respectfully requests that the Court deny confirmation of the Plan unless it is modified to expressly preserve Takeda's rights of setoff and recoupment and grant such other and further relief as the Court deems just and proper.

Dated: May 6, 2019  
Wilmington, Delaware

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<sup>4</sup> Takeda expressly reserves, and has not waived by way of this Objection or any other filing with this Court, its right to a jury trial or any other substantive or procedural right that has not otherwise been expressly waived.