

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

In re:

VALERITAS HOLDINGS, INC., *et al.*¹,

Debtors.

Chapter: 11

Case No. 20-10290 (LSS)
(Jointly Administered)

Re: D.I. 25

**SUPPLEMENTAL RESPONSE AND RESERVATION OF RIGHTS OF THE
OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION OF
DEBTORS FOR ENTRY OF ORDER (A) APPROVING A SALE; (B)
AUTHORIZING ASSUMPTION AND ASSIGNMENT OF CERTAIN
EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION
WITH THE SALE; AND (C) GRANTING RELATED RELIEF**

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned case of Valeritas Holdings, Inc., *et al.* ("Valeritas" and/or the "Debtors"), by and through its proposed undersigned counsel, submits this supplemental response and reservation of rights (the "Response") to the Debtors' Motion for entry of an Order (i) authorizing and approving (a) certain proposed bidding and sale procedures (the "Bid Procedures"), in connection with a transaction involving a sale of substantially all of the Debtors' assets (the "Assets") pursuant to section 363 of the Bankruptcy Code (a "Sale"), (b) the proposed Bid Protections, including Break-Up Fee and Expense Reimbursement, (c) certain proposed assumption procedures in connection with the sale (the "Assumption Procedures"), and (d) the form and manner of notice of all procedures, protections, schedules, and agreements; (ii) (a) scheduling a hearing (the "Sale Hearing") to consider final approval of the Sale, (b) following the Sale Hearing, entry of an order (the "Sale Order"), (x) approving the sale to the Successful

¹ The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Valeritas Holdings, Inc. (8907); Valeritas, Inc. (1056); Valeritas Security Corporation (9654); Valeritas US, LLC (0007). The corporate headquarters and the mailing address for the debtors is 750 Route 202 South, Suite 600, Bridgewater, New Jersey 08807.



Bidder (or, if the Successful Bidder fails to consummate a sale, to the Back-Up Bidder), which sale shall be free and clear of all liens, claims, encumbrances, and other interests, (y) authorizing the assumption and assignment of certain executory contracts and unexpired leases (collectively, the "Designated Contracts"), and (z) granting related relief [Dkt. No. 25] (the "Sale Motion").² In support of this Response, the Committee respectfully states as follows:

RESPONSE

1. The Committee filed its initial objection [Dkt. No. 105] (the "Objection") to the Sale Motion on February 28, 2020, which reserved the Committee's right to supplement that response. The Committee's Objection to the Bid Procedures portion of the Sale Motion was largely resolved due to a settlement reached with the Debtors and CRG Servicing LLC, as control agent (the "Control Agent"), Capital Royalty Partners II L.P., Capital Royalty II Partners – Parallel Fund "A" L.P., Capital Royalty Partners II (Cayman) L.P., Capital Royalty Partners II – Parallel Fund "B" (Cayman) L.P. and Parallel Investment Opportunities Partners II L.P. (collectively, with the Control Agent, the "CRG"),³ as well as an agreement by Zealand Pharma A/S (or its designee "Purchaser") to amend its Asset Purchaser Agreement [Dkt. No. 67] (the "APA") to preserve certain causes of action for the benefit of the Debtors' estates. Both elements of that resolution were placed on the record during the March 6, 2020 hearing on the Bid Procedures.

2. The Committee files this Response out of three areas of concern. First, the Committee has not yet seen an amendment to the APA. Specifically, Purchaser agreed to modify section 1.1(y) of APA regarding purchased assets to read as follows:

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to such term as in the Sale Motion.

³ The amended settlement agreement and supplement to the Debtors' motion to approve the original settlement agreement between the Debtors and CRG should be filed shortly and are scheduled to be heard at the Sale Hearing. The Committee reserves all of its rights associated with same.

(y) all avoidance claims or causes of action arising under the Bankruptcy Code, including but not limited to Chapter 5 of the Bankruptcy Code, or any other causes of action under any other applicable law against (i) any vendor or service provider that is a counterparty to any Assigned Contracts or related to Assumed Liabilities; and (ii) all current officers, consultants or employees of the Debtor who continue to be employed in or otherwise under contract with the Business by the Purchaser after the Closing Date except to the extent that such claims are excluded assets under section 1.2(n) (collectively, the "Purchased Avoidance Claims").

Purchaser also agreed to add new sections 1.2(m) and (n) to excluded assets:

- (m) all claims or causes of action that are not Purchased Avoidance Claims; and
- (n) all Purchased Avoidance Claims, but only to the extent of available insurance coverage.

Additionally, Purchaser agreed to add a section that states, "Purchaser agrees to cooperate in identifying the Purchased Avoidance Claims and further agrees it shall not sue (at law, in equity, in any regulatory proceeding or otherwise) on account of the Purchased Avoidance Actions." Because the Committee has not yet seen an amendment to the APA containing the aforementioned provisions, the Committee reserves its rights to object to the APA at the Sale Hearing.

3. Second, Purchaser is purchasing all of the Debtors' cash. APA §1.1(d). As this Court is aware, the Debtors have secured expensive financing to ensure that the Debtors are able to get to a sale closing. *See, e.g.*, Final Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors to Use Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Granting Related Relief [Dkt. No. 181]. It is the Committee's understanding that the Debtors intend to spend all their cash prior to closing, such that no cash will be left to be sold to the Purchaser. The Committee objects to any sale of the Debtors' cash and therefore files this Response to preserve its rights associated with same.

4. Third, the Committee files this Response to preserve its rights to object to Purchaser's unilateral ability to impose cure costs in excess of \$1.5 million on the Debtors' estates. The APA provides that the Debtors' estates shall pay all cure in excess of \$1.5 million. APA, §1.3(c). On March 6, 2020, the Debtors filed a *Notice Of Proposed Assumption Or Assumption And Assignment Of Certain Executory Contracts* [Dkt. No. 127] (the "Assumption Notice") listing 228 contracts/leases (the "Designated Contracts") and reflecting approximately \$5.4 million in cure costs. Objections to the Assumption Notice and related cure costs are due at the Sale Hearing. Assumption Notice, ¶¶10-12. The Debtors also have the right before the date that is two (2) days prior to the Sale Hearing, to (i) supplement the list of Designated Contracts with previously omitted executory contracts, (ii) remove Designated Contracts from the list of executory contracts ultimately selected as Designated Contracts that the Purchaser proposes be assumed and assigned to it in connection with a Sale, and/or (iii) modify the previously stated Cure Amount associated with any Designated Contracts. Assumption Notice, ¶8. Additionally, Debtors may remove any executory contract or unexpired lease, as applicable, to be assumed by the Debtors and assigned to the Purchase through and including the Sale Hearing. Assumption Notice, ¶9.

5. Given the uncertainty surrounding which contracts/leases the Purchaser would like assumed and assigned to it, whether there are additional contracts/leases not yet noticed, and whether any of the counterparties listed in the Assumption Notice assert different (and possibly greater) cure amounts, the Committee reserves its rights to raise objections to the provision of the APA imposing on the Debtors' estates any cure costs in excess of \$1.5 million at the Sale Hearing.

RESERVATION OF RIGHTS

6. The Committee reserves the right to supplement this Response or to raise additional or further objections to the Sale Motion or the APA at or prior to the Sale Hearing or any other relevant hearing.

CONCLUSION

WHEREFORE, for the reasons stated above, the Committee respectfully reserves its rights, and requests that this Court grant such other and further relief as this Court deems just and proper.

Dated: March 16, 2020

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