Docket #0131 Date Filed: 04/09/2018

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
OREXIGEN THERAPEUTICS, INC.,	:	Case No. 18-10518 (KG)
Debtor.	:	**Ref. Docket No. 4**

PRELIMINARY OBJECTION OF WILMINGTON TRUST, NATIONAL ASSOCIATION, IN ITS CAPACITY AS INDENTURE TRUSTEE TO THE DEBTOR'S MOTION FOR INTERIM AND FINAL ORDERS (I) APPROVING DEBTOR-IN-POSSESSION FINANCING PURSUANT TO 11 U.S.C. §§ 105(a), 362 AND 364, FED. R. BANKR. P. 2002, 4001 AND 9014 AND LOCAL BANKRUPTCY RULE 4001-2; (II) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. §§ 105, 361, 362 AND 363; (III) GRANTING ADEQUATE PROTECTION AND SUPER-PRIORITY ADMINISTRATIVE CLAIMS; (IV) SCHEDULING A FINAL HEARING AND (V) GRANTING RELATED RELIEF

Wilmington Trust, National Association, solely in its capacity as indenture trustee, ("Wilmington Trust") under the Indenture dated as of December 6, 2013 (as amended, modified and supplemented from time to time, the "Indenture"), by and between Orexigen Therapeutics, Inc. ("Orexigen" or the "Debtor"), as issuer, and Wilmington Trust, as trustee, pursuant to which the 2.75% convertible senior notes due 2020 were issued (the "2020 Convertible Senior Notes") by and through its undersigned counsel, hereby submits this Preliminary Objection (the "Preliminary Objection") to *Debtors' Motion for Entry of Interim and Final Orders (I) Approving Debtor-in-Possession Financing Pursuant to 11 U.S.C. §§ 105(a), 362, 364, Fed. R. Bankr. P. 2002, 4001 and 9014 and Local Bankruptcy Rule 4001-2; (II) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. §§ 105, 361, 362 and 363; (III) Granting Adequate Protection and Super-priority Administrative Claims; (IV) Scheduling a Final Hearing; and (V)*

Granting Related Relief [Docket No. 4] (the "DIP Motion").[1] In support hereof, Wilmington Trust respectfully states as follows:

PRELIMINARY STATEMENT

1. Since the formation of the Committee, Wilmington Trust has had a constant dialogue with the professionals of the Debtor and the Committee in order to address or resolve the issues and concerns of Wilmington Trust. Shortly prior to the filing of this Preliminary Objection, Wilmington Trust has been advised that the Committee objections have been resolved. At this point, Wilmington Trust has not seen the proposed revised order or certification that all of its issues and concerns have been addressed, thus necessitating the filing of this Preliminary Objection.

2. Overall, Debtor does not allege, nor is there evidence, let alone evidence in admissible form, of any urgency, emergency or circumstances justifying an onerous and burdensome DIP financing package with a truncated milestone timeline whereby the prepetition 0% Noteholders (defined below) hamstring the Debtor to pursuing a single kind of sale transaction designed solely to benefit the 0% Noteholders. Indeed, the opposite appears to be true.

3. This case appears to not be the proverbial melting ice cube. Moreover, the Debtor has not demonstrated or shown any urgency here. The Debtor's business is strong and growing. At the end of 2017, the Debtor had $46 million in cash on hand. Sales in 2017 grew by approximately 60% compared to 2016. On the petition date, the Debtor had more than $21 million in cash on hand and approximately $271 million in total assets, including a $93 million intercompany balance in favor of the Debtor. Indeed, the case was commenced only because the

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the DIP Motion.

Debtor narrowly missed the $100 million Net Sales Milestone under the 2016 Indenture by $2 million triggering certain repurchase rights. *See* First Day Decl., ¶¶ 16, 52.

4. Unlocking the proposed structure reveals that the proposed DIP Facility and sale process are designed to lock in a pre-determined result for the benefit of certain prepetition holders (the "0% Noteholders") of the 0% Convertible Senior Secured Notes due 2020 (the "0% Notes") (who are also the proposed DIP Lenders), while allowing them to control the process and raid unencumbered assets, without any clear value left behind for unsecured creditors.[2]

5. Based on publicly available information, which is limited, it is not clear that there is a need for a DIP Loan or, if needed, under the terms imposed by the DIP Lenders.[3] The Committee (and other parties in interest) have only just begun the investigation into the validity, enforceability and perfection of prepetition liens, the secured creditors' prepetition conduct and whether there is a basis to challenge liens, recover certain transfers, and/or recharacterize or subordinate their secured claims. The DIP Facility, however, is premised on granting the 0% Noteholders significant and unnecessary protections including (i) a $35 million roll-up that provides a windfall to the 0% Noteholders; (ii) granting liens on and super-priority claims against unencumbered assets, (iii) requiring Orexigen Ireland to repay intercompany loans to be used to pay DIP Obligations (rather than use such payments to fund the case); (iv) imposing an unnecessarily truncated timeline for the sale of substantially all of the Debtor's assets and requiring the Debtor to pursue *only* a sale of its assets to the exclusion of other value-enhancing

[2] One group of 0% Noteholders comprised of Baupost Group Securities L.L.C., Ecori Capital Fund, L.P. and Ecori Capital Fund Qualified, L.P. has not filed a Rule 2019 disclosure. Based on the DIP Loan Agreement, Bapost, who led the offering of the 0% Notes and held 18% of outstanding common stock at that time, is scheduled to provide 60% of the DIP financing.

[3] As of the date of hereof, the Debtor has not filed a proposed Final DIP Order or an updated Budget with forecasts beyond the interim period. It is therefore unclear how the Debtor intends to justify the need for such a significant DIP Facility. Because Wilmington Trust cannot address an undisclosed Budget and the requirements thereunder, it reserves all rights to amend or supplement this Preliminary Objection.

alternatives (*i.e.*, a chapter 11 plan process or sale and plan); and (v) providing the 0% Noteholders with the right to credit bid the full amount of the DIP Obligations before completion of the Committee's investigation as to the validity of their prepetition liens.

PRELIMINARY OBJECTION

6. Wilmington Trust highlights the following provisions of the DIP Facility that are objectionable and that warrant either modification or elimination:

a. **Roll-Up**. Of the $70.35 million DIP Facility, $35 million will be used to "roll-up" of the prepetition obligations of the 0% Notes. There is a complete identity of interest between the 0% Noteholders and the DIP Lenders and thus no true priming of the prepetition obligations and no need to roll-up the prepetition obligations.[4] In fact, instead of making a substantial showing to support the roll-up, the facts and circumstances here underscore why the Court should not approve the roll-up in its current form.

- *The roll-up ratio could be greater than 1:1*: The Debtor requests that the roll-up of the entire $35 million be approved upon entry of the Final DIP Order, even if no new funds are advanced thereafter, resulting in potentially a greater than 1:1 ratio. Further, the Debtor has yet to disclose an updated Budget and provide any justification, let alone adequate justification, for the size of the DIP Facility in light of the Debtor's liquidity needs. There is no information for the proposed use of the remaining $27.5 million. If the Debtor can survive on cash collateral without the need for a significant DIP Facility,

[4] Courts are often circumspect when a prepetition secured lender seeks to roll-up prepetition debt. *See, e.g.*, *In re Saybrook Mfg. Co.*, Inc., 963 F.2d 1490, 1494–96 (11th Cir. 1992) (noting that cross-collateralization is inconsistent with bankruptcy law because it (a) is not authorized as a means of postpetition financing pursuant to section 364 and (b) is directly contrary to the fundamental priority scheme of the Bankruptcy Code); *Official Comm. of Unsecured Creditors of New World Pasta Co. v. New World Pasta Co.*, 322 B.R. 560, 569 n.4 (M.D. Pa. 2005) (noting that roll-up provisions "have the effect of improving the priority of a prepetition creditor"); *In re Tenney Vill. Co.*, 104 B.R. 562, 570 (Bankr. D.N.H. 1989) (holding that "Section 364(d) speaks only of the granting of liens as security for new credit authorized by the Court"); *In re Monach Circuit Indus., Inc.*, 41 B.R. 859, 862 (Bankr. E.D. Pa. 1984) (stating that cross-collateralization constitutes an unauthorized preference); *In re Vanguard Diversified, Inc.*, 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983) (noting that cross-collateralization is "a disfavored means of financing"). The local rules promulgated in this district reflect the general reluctance to permit prepetition debt from transforming into postpetition debt. 3 COLLIER ON BANKRUPTCY ¶ 364.04[2][e]n.35 (noting that a roll-up attracts intense scrutiny from the court and the United States Trustee, and Local Rule 4001-2(i)(E) requires these provisions be highlighted in any motion seeking approval of postpetition financing).

then the only purpose for such a large DIP Facility is to roll-up the prepetition debt to postpetition superpriority claims and bind the estate to a pre-determined sale outcome that, at this stage, does not benefit unsecured creditors.

- *The Final DIP Order should preserve the ability to unwind roll-up:* The validity of the prepetition liens is still subject to challenge under the Final DIP Order. To the extent the debt being rolled-up is not validly secured and perfected or subject to avoidance or rechacterazation, the Final DIP Order should provide that the roll-up be unwound and that any DIP Liens and Superpriority claims granted with respect to the roll-up be invalidated.

- *The interest rate on the roll-up should be reduced or eliminated*. The 0% Noteholders were not paid interest on their 0% Notes prepetition. Yet remarkably, through the roll-up, the 0% Noteholders will receive monthly interest in the amount of LIBOR (current 3 month LIBOR is 2.2%) plus 10%, plus 2% upon a default on account of the roll-up. This is a significant windfall to the 0% Noteholders who would have received no interest outside of bankruptcy.

b. **Lien and Claims on Unencumbered Assets**. The superpriority liens and superpriority claims granted to the 0% Noteholders should not attach to unencumbered assets, including the 35% interest in the Debtor's foreign subsidiaries and avoidance actions under chapter 5 of the Bankruptcy Code. *See* Interim Order, ¶¶ 15-16. The 0% Noteholders should only receive adequate protection to the extent of diminution in value of the prepetition liens, which such calculation should exclude, professional fees, the proposed KEIP and KERP, and any priming liens. *See* Interim Order, ¶ 23.

- *Granting a lien on unencumbered 35% equity interest in Orexigen Ireland and rights to 100% of proceeds from a sale of Orexigen Ireland assets is unwarranted*. Under the DIP Loan Agreement and a side letter agreement between the Debtor and Orexigen Ireland, the parties agreed that (i) Orexigen Ireland will not sell assets outside the ordinary course without approval of the 0% Noteholders in their sole discretion, and (ii) to the extent such sales occur, 100% of the proceeds will be used to repay the Debtor, which in turn will be used to repay the DIP Obligations. *See* Interim Order, ¶ 37. Such an arrangement is inappropriate and unwarranted. Such intercompany payment can be clearly used to fund the case (rather than pay down prepetition obligations). Here the 35% equity in Orexigen Ireland may also be one of the Debtor's only unencumbered asset available for unsecured creditors. As a result, it is critical that such assets be preserved for the benefit of the estate and unsecured creditors.

c. **Mandatory 363 Sale and Tight Milestones**. The DIP Loan Agreement imposes unnecessarily tight milestones and restrictive terms that limits the Debtor to a single strategic alternative – a sale of substantially all of its assets. *See* DIP Loan Agreement, § 5.3. Among other milestones, a sale must be approved and sale order entered within approximately 60 days of filing of the Bid Procedures Motion.

- *The Final DIP Order should not be used as a means to foreclose strategic alternatives*. The DIP Facility requires that the Debtor only pursue a sale transaction of substantially all of its assets to the exclusion of any strategic alternatives, including a stand-alone plan or a sale of certain assets with an accompanying stand-alone plan. The Debtor fails to provide a valid rationale for its willingness to foreclose strategic alternatives at such an early stage in the case. Indeed, the Debtor made only a single statement as to why it is not considering a chapter 11 plan: "[g]iven the Debtor's expected cash flows, a traditional debt-for-equity plan of reorganization *seems* unfeasible." DIP Motion, ¶ 34 (emphasis added). Such speculation is insufficient to support the Debtor's agreement to foreclose alternatives through the DIP Facility.

d. **Right to Credit Bid**. The Interim Order (and presumably the proposed Final DIP Order) provides the DIP Administrative Agent with the right to credit bid the DIP Collateral up to the full amount of DIP Obligations, which could be as much as $70.35 million. *See* Interim Order, ¶ 44. However, the validity, perfection and enforceability of the prepetition liens has not been determined, nor has whether such liens are subject to avoidance or re-characterization. Thus, any right to credit bid should be subject to confirmation of the amount and the validity of the 0% Noteholders' prepetition liens once there has been an adequate period to challenge the Debtor's stipulations as to the validity of such liens.

RESERVATION OF RIGHTS

7. As set forth in this Preliminary Objection, Wilmington Trust does not believe it is appropriate to permit the 0% Noteholders to co-opt the chapter 11 bankruptcy process for their sole and absolute benefit while the estate's unsecured creditors continue to bear the brunt of cost

and risks. Wilmington Trust submits that unless and until the foregoing issues are resolved, the DIP Motion should be adjourned or, alternatively, the relief modified, before it can be approved.

8. Wilmington Trust reserves its rights to supplement, modify and amend this Preliminary Objection in writing or orally at or prior to any hearing on the DIP Motion.

CONCLUSION

WHEREFORE, Wilmington Trust respectfully requests that the Court deny the DIP Motion unless the modifications described herein are made and grant other and further relief as is just and proper.

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