

COLE SCHOTZ P.C.

Ryan T. Jareck
Mark Tsukerman
1325 Avenue of the Americas, 19th Floor
New York, New York 10019
(212) 752-8000
(212) 752-8393 Fax

*Counsel for the Ad Hoc Committee of
Equity Holders*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

SYNERGY PHARMACEUTICALS, INC, *et al.*,¹

Debtors.

Chapter 11

Case No. 18-14010 (JLG)

(Jointly Administered)

**AD HOC COMMITTEE OF EQUITY HOLDERS’
OBJECTION TO THE DEBTORS’ BIDDING PROCEDURES AND JOINDER TO THE
OFFICIAL COMMITTEE OF UNSECURED CREDITORS’ OBJECTION THERETO**

The Ad Hoc Committee of Equity Holders (the “**Ad Hoc Committee**”), by its undersigned counsel, files this objection (the “**Objection**”) to the *Debtors’ Motion for (I) an Order (A) Approving the Bidding Procedures for the Sale of Substantially All of the Debtors’ Assets, (B) Establishing the Notice Procedures and Approving the Form and Manner of Notice Thereof, (C) Approving Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (D) Scheduling a Sale Hearing, and (E) Granting Related Relief and (II) an Order (A) Approving the Sale of the Debtors’ Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto, and (C)*

¹ The Debtors in these chapter 11 cases, along with the last four digits of their respective tax identification numbers, are as follows: Synergy Pharmaceuticals Inc. (5269); Synergy Advanced Pharmaceuticals, Inc. (4596). The address of the Debtors’ corporate headquarters is 420 Lexington Avenue, Suite 2012, New York, New York 10170.

Granting Related Relief [Docket No. 17] (the “**Sale Motion**”)² and joinder to the Official Committee of Unsecured Creditors’ (the “**Committee**”) objection thereto (the “**UCC Objection**”). In support of its Objection, the Ad Hoc Committee respectfully states:

PRELIMINARY STATEMENT

1. The Ad Hoc Committee believes the Debtors’ management made a terrible strategic decision by committing the Debtors to a chapter 11 sale process at this early stage of the commercialization of TRULANCE (the Debtors’ FDA-approved drug) and development of Dolcanitide (the Debtors’ valuable development-stage cancer treatment drug),³ particularly given the series of upcoming near term events (discussed below) which promise to substantially increase the Debtors’ sales. Rather than attempting to reduce the Debtors’ cash burn to capitalize on these events, however, the Debtors accepted the terms of an ultra-quick chapter 11 sale process demanded by either the prepetition lenders or the Stalking Horse Purchaser or both, which if not modified will seriously reduce the chance of having an auction and thereby undermine the Debtors’ ability to realize the fair market value of their assets.

2. The Ad Hoc Committee believes that with a properly guided process, a restructuring would have been (and may still be) possible. Since June 9, 2017, the weekly scripts for TRULANCE have been growing an average of 2.43% per week. If that trajectory continues,

² Unless otherwise defined herein, capitalized terms have the meanings assigned to them in the Sale Motion.

³ Curiously, the Debtors make only passing reference to Dolcanitide in its proposed Disclosure Statement, and provide no information about the pending study and enormous value of this drug. Furthermore, based on the current sale documents, it is not clear what value, if any, the Stalking Horse Purchaser attributed to the acquisition of Dolcanitide. Indeed, based on the current record, the Ad Hoc Committee seriously questions why Dolcanitide should not be marketed and sold separately, rather than being folded into the current APA (as defined below) for little or no apparent additional value.

the Debtors would achieve sales close to \$150 million in 2019, and with other developments would have been enough to support a restructuring.⁴

3. At this stage, however, even if it were to be assumed that these cases must proceed on a sale path, the Court should, at the very least, require a sale structure that will allow, to the greatest extent possible, significant near term events to materialize and provide more time for other prospective purchasers to bid on the Debtors' assets. There are compelling reasons to believe that a properly conducted, less rushed sale process will yield a purchase price for the Debtors' interest in TRULANCE, alone, in the range of double the Purchase Price under the proposed Stalking Horse Agreement.⁵

THE PROPOSED BIDDING PROCEDURES

4. On the Petition Date, the Debtors executed an Asset Purchase Agreement (the "**APA**" or "**Stalking Horse Agreement**") with Bausch Health Companies Inc. ("**BH**") and its wholly-owned subsidiary, Bausch Health Ireland Limited ("**Purchaser**," and together with BH, the "**Stalking Horse Bidder**"). The APA contemplates the sale, free and clear of all encumbrances pursuant to Bankruptcy Code section 363, of substantially all the Debtors' assets (*i.e.*, the Acquired Assets) to the Stalking Horse Bidder for a total Purchase Price of (i) \$185 million in cash, less various deductions and net of any deposit funds paid to BH at closing, and (ii) up to \$15 million in so-called "severance consideration."

⁴ The sales data alone also shows that the Stalking Horse purchase price is inexplicably low.

⁵ Indeed, just recently on December 24, 2018, QOL Medical, LLC ("**QOL**") filed a Notice [Docket No. 114] of its intention to acquire 40 million shares or an option for such shares of Synergy Pharmaceuticals. QOL is a pharmaceutical company that, according to its website, is interested in acquiring pharmaceutical products in the gastrointestinal space. This reflects not only a potential interest in bidding for the Debtors' assets but also recognition that there is significant upside for equity holders if a proper sale process is conducted.

5. Through the Sale Motion, the Debtors seek, *inter alia*, entry of the Bidding Procedures Order (in the form attached as Exhibit A to the Sale Motion), authorizing and approving, *inter alia*, Bidding Procedures (in the form attached as Exhibit 1 to the Bidding Procedures Order) for soliciting bids and conducting an auction for the Acquired Assets and providing for certain Bid Protections to the Stalking Horse Bidder, including a Break-Up Fee of \$7 million plus an Expense Reimbursement Amount of up to \$1.95 million.

6. The Stalking Horse Bid is proposed to be subject to higher and better offers received during the marketing process contemplated by the Debtors' proposed Bidding Procedures. But unlike the usual chapter 11 sale process, the Stalking Horse Agreement required the Debtors, in section 5.10 (the "**No-Shop Covenant**"), not to "solicit, negotiate, or discuss" any alternative bids, or provide any information regarding the Debtors and their assets or operations, to persons or entities other than BH and its affiliates until the proposed Bidding Procedures Order is entered.

7. To make matters worse, the Bidding Procedures contemplate the following timeline:

- (a) January 4, 2019 – Bidding Procedures Hearing;
- (b) February 9, 2019 – Bid Deadline;
- (c) February 12, 2019 – Auction; and
- (d) February 15, 2019 – Sale Hearing.

8. The combination of the No-Shop Covenant with the ultra-short proposed time period for submitting a bid, if permitted, would give a prospective purchaser interested in submitting a bid about one month to perform due diligence and to submit a binding bid. Such an artificially short marketing period suggests a lack of good faith on the part of the Stalking Horse

Purchaser and should not be approved. A proper sale process will surely generate sufficient funds to pay all creditors in full as well as a meaningful recovery for equity holders.

OBJECTION

A. The Proposed Bid Deadline is Too Short and Should be Extended to Permit a Reasonable Opportunity for Marketing and Submission of Competitive Bids

9. The current sale timeline contemplated by the Debtors' proposed Bidding Procedures contradicts the fundamental objective of a bankruptcy auction sale process – to generate competitive bidding and maximize value for the Debtors' estates. To accomplish this purpose, the sale process is designed to provide the debtor with sufficient time to market its assets and solicit bids from potential bidders, and at the same time, provide bidders sufficient time to conduct necessary diligence to submit their highest and best bids.

10. In this case, however, the Debtors have been forbidden by the No-Shop Covenant from pursuing any marketing efforts during the crucial period between the Debtors' execution of the Stalking Horse Purchase Agreement and the entry of the Bidding Procedures Order. If a Bidding Procedures Order is entered in some form, at the earliest, at the January 4, 2019 Bidding Procedures Hearing, that would leave a bid solicitation period of only five weeks until the February 9, 2019 Bid Deadline. The No Shop Covenant has already deprived the Debtors' estates of over three weeks of valuable marketing time. The No Shop Covenant thus has the unavoidable effect of artificially shortening the Debtors' time to solicit higher bids and reduces the chance of having an auction, without which, the Debtors cannot realize fair market value for their assets.

11. Furthermore, a five-week bid-solicitation period and Bid Deadline of February 9, 2019 is especially inadequate and inappropriate under the unique circumstances of these cases. By any objective standard, five weeks is not nearly enough time for the Debtors to first start

soliciting new bidders and then for any newly solicited bidder to get up to speed and conduct the diligence necessary to submit an irrevocable Qualified Bid.

12. In the present case, there are developments that are occurring in the next few months that should result in an enormous increase in the value of the Debtors' assets and the interest of potential purchasers to participate in the auction process. These near-term events include, among other things: (a) as of January 1, 2019, TRULANCE will be added to Express Scripts' National Preferred Formulary List, which will mean that it is covered by insurance and should result in significantly increased sales; (b) as of January 1, 2019, TRULANCE will be one of two unrestricted preferred agents on the United Healthcare Managed Medicaid formulary, which also should significantly boost sales; (c) an FDA mandated study regarding the drug Linzess, one of the main competitors for TRULANCE, is to be published by no later than March 30, 2019, and if the study proves to be unfavorable for Linzess as expected,⁶ TRULANCE will be the drug of choice for the symptoms it is designed to treat which will enormously boost sales; and (d) in April 2019 the results of a Dolcanatide study funded by the Federal government and National Cancer Institute to evaluate the drug's efficacy for treatment of colorectal cancer is due to be released.⁷ Moreover, as previously noted, since June 9, 2017, TRULANCE weekly sales

⁶ Upon information and belief, the study was mandated by the FDA due to the FDA's concern that the EColi basis of the compound used to create the drug may cause an immune response in patients that lowers the drug's effectiveness over time and may cause adverse side effects.

⁷ The Ad Hoc Committee believes, based on publicly available information from reputable sources, that Dolcanatide is a Phase 2-ready asset with proof of concept to treat ulcerative colitis. If the drug proves to also be effective to treat colorectal cancer, the value of this drug will soar. The market size for global colorectal cancer drugs is expected to reach \$10.8 billion by 2022 according to Grand View Research, Inc. This drug, therefore, offers an enormous upside potential for any purchaser.

have been growing on average of 2.43%, and if that trend continues, even without the expected boost in sales from recent developments, sales will surpass \$150 million in 2019.⁸

13. With so many significant events happening in the near term, it is appropriate to establish a Bid Deadline in March 2019, so that all parties in interest will have the benefit of more information about these upcoming events – none of which is disclosed in the Debtors’ sale papers or Disclosure Statement – or at least have sufficient opportunity to investigate their significance and assess their impact on the Debtors’ business.

B. The Ad Hoc Committee Joins the UCC Objection

14. The Ad Hoc Committee has chosen to focus its Objection on the crucial issue of extending the Debtors’ artificially truncated sale timeline, which, if permitted, would certainly be destructive of value. There are, however, other significant objectionable provisions of the Debtors’ proposed Bidding Procedures, including, but not limited to: (a) the proposed above-market Break-Up Fee and Expense Reimbursement which, in the circumstances of this case, do not appear to be necessary to solicit the Stalking Horse Bidder’s offer and should not be approved due to the Stalking Horse Purchaser requiring the No-Shop Covenant; (b) the Debtors’ improper attempt to include \$15 million in so-called “severance consideration” as part of the

⁸ Looking at comparable pharmaceutical company sale transactions, it is reasonable to expect that the fair market value of a company like Synergy Pharmaceuticals, just looking at its one FDA-approved drug TRULANCE, should yield a sale price 5-10 times annual revenues. By way of example, upon information and belief, on January 8, 2017, Merrimack Pharmaceuticals sold its single drug Onivyde to French pharmaceuticals company Ipsen for \$575 million, at a time when the drug had only \$50 million in annual sales. Another drug company, Sucampo, had annual sales of \$230 million for a drug Amitiza, which treats conditions similar to that treated by TRULANCE, and it was sold to Malinckrodt in December 2017 for \$1.2 billion, which is 5 times annual sales. With this kind of market information, which includes just a couple of examples, it is reasonable to expect Synergy Pharmaceuticals to have a value, before even considering its other drug in the pipeline not yet FDA approved, of 5-10 times peak sales. TRULANCE is only in its second year of commercialization, and upon information and belief, its annual sales are reasonably projected to reach \$84 million in the near term, which is not even peak sales. Simple math thus indicates that Synergy Pharmaceuticals’ value should be more than double the Purchase Price of the Stalking Horse Agreement.

Purchase Price, the primary beneficiaries of which would be insiders—the Debtors’ senior management—which also appears to be an improper attempt to circumvent the limitations on such compensation under the Bankruptcy Code;⁹ and (c) the lack of consultation rights for official committee(s).¹⁰

15. Taken as a whole, the Sale Motion does not suggest that the Debtors’ management is seriously committed to proceeding in this case with a genuine interest in maximizing the value of the Debtors’ assets for the benefit of all stakeholders.

16. The Ad Hoc Committee joins the Committee in its objections to the Bidding Procedures regarding the above-reference issues, and adopts any objections to the Bidding Procedures raised in the UCC Objection which are not specifically raised herein. The Ad Hoc Committee incorporates by reference any such additional objections and arguments as set forth in the UCC Objection, and expressly reserves the right to address any and all such objections and issues at the Bidding Procedures Hearing.

RESERVATION OF RIGHTS

17. The Ad Hoc Committee reserves the right to supplement and amend this Objection and to introduce evidence at any hearing on approval of the Bidding Procedures, or such other hearings as may be scheduled in these cases. Further, the Ad Hoc Committee reserves the right to respond, further object, join in, or amend any objection herein with respect to any argument or objection made by any person relating to the Bidding Procedures.

⁹ This is even more troubling given the Debtors have announced their intention to file a motion to approve a key employee incentive plan.

¹⁰ On December 26, 2018, the Ad Hoc Committee submitted a letter to the Office of the United States Trustee requesting the appointment of an official committee to represent the substantial interests of Synergy Pharmaceuticals’ equity holders. If appointed, the official equity committee should be granted consultation rights under the Bidding Procedures.

CONCLUSION

WHEREFORE, the Ad Hoc Committee respectfully requests that this Court grant the relief requested in this Objection and such other relief as the Court deems just and proper.

Dated: December 31, 2018
New York, New York

COLE SCHOTZ P.C.

By: /s/ Ryan T. Jareck
Ryan T. Jareck
Mark Tsukerman
1325 Avenue of the Americas, 19th Floor
New York, NY 10019
Telephone: (212) 752-8000
Facsimile: (212) 752-8393
rjareck@coleschotz.com

– and –

Norman L. Pernick (admitted *Pro Hac Vice*)
500 Delaware Ave. # 1410
Wilmington, DE 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117
npernick@coleschotz.com

-- and –

Irving E. Walker (admitted *Pro Hac Vice*)
300 E Lombard St. #1450
Baltimore, MD 21202
Telephone: (410) 230-0660
Facsimile: (410) 528-9400
iwalker@coleschotz.com

*Counsel for the Ad Hoc Committee of
Equity Holders*