

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

In re:

Avadel Specialty Pharmaceuticals, LLC,¹

Debtor.

Chapter 11

Case No. 19-10248 (CSS)

Hearing Date: September 30, 2021 at 2:00 p.m.

Objection Deadline: September 17, 2021 at 4:00 p.m.

**PLAN ADMINISTRATOR’S OBJECTION TO PROOF OF CLAIM OF
WHOLESALE DRUG DISTRIBUTORS PURSUANT TO BANKRUPTCY CODE
SECTIONS 502(B) AND 503(B), BANKRUPTCY RULES 3001 AND 3003,
AND LOCAL RULE 3003-1**

Karrilyn Thomas of MCA Financial Group, Ltd., solely in her capacity as the plan administrator (the “**Plan Administrator**”), as provided in the *Findings of Fact, Conclusions of Law, and Order Confirming Debtor’s First Amended Proposed Combined Disclosure Statement and Chapter 11 Plan of Liquidation and Granting Final Approval of Disclosure Statement* [Docket No. 419] (the “**Confirmation Order**”), with a copy of *Debtor’s First Amended Proposed Combined Disclosure Statement and Chapter 11 Plan of Liquidation* (the “**Plan**”) attached thereto as Exhibit A, by and through undersigned counsel, hereby submits this *Objection to Proof of Claim of Wholesale Drug Distributors Pursuant to Bankruptcy Code Sections 502(B) and 503(B), Bankruptcy Rules 3001 and 3003, and Local Rule 3003-1* (the “**Claim Objection**”) and requests entry of an order, substantially in the form attached hereto as Exhibit 2 (the “**Proposed Order**”), pursuant to section 502 of title 11 of the United States Code (the “**Bankruptcy Code**”), Rules 3001 and 3003 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 3003-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy

¹ The business address and the last four (4) digits of the Debtor’s federal tax identification number is Avadel Specialty Pharmaceuticals, LLC, 16640 Chesterfield Grove Road, Suite 200, Chesterfield, MO 63005 (8959).

Court for the District of Delaware (the “**Local Rules**”), disallowing, to the extent applicable, that certain proof of claim (the “**Claim**”) of Wholesale Drug Distributors (“**Claimant**”) served² on counsel to the above-captioned debtor and debtor-in-possession (the “**Debtor**”). In support of the Claim Objection, the Plan Administrator submits and incorporates herein the *Declaration of Karrilyn Thomas in Support of the Plan Administrator’s Objection to Proof of Claim of Wholesale Drug Distributors Pursuant to Bankruptcy Code Sections 502(B) and 503(B), Bankruptcy Rules 3001 and 3003, and Local Rule 3003-1*, a copy of which is attached hereto as **Exhibit 3** (the “**Thomas Declaration**”), and respectfully represents as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the “**Court**”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Plan Administrator, as the representative of the Debtor’s estate pursuant to section 1123(b)(3)(B) of the Bankruptcy Code and vested with the power to, among other things, contest, settle or compromise objections to claims asserted against the Debtor, as set forth in Section 8.5 of the Plan, consents, pursuant to Local Rule 9013-1(f), to the entry of a final order by the Court in connection with this Claim Objection to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

² The Claim was not filed with the Debtor’s claims agent or the Court.

4. The statutory and legal predicates for the relief requested herein are sections 502 and 503 of the Bankruptcy Code, Bankruptcy Rules 3001 and 3003 and Local Rule 3003-1.

BACKGROUND

A. The Chapter 11 Case, Bar Dates and Confirmation

5. The Debtor was a pharmaceutical company that was formed in August of 2017. Prior to the commencement of the case (the “**Chapter 11 Case**”), the Debtor engaged in the business of marketing, selling and distributing pharmaceutical products with a focus on innovative medicines for chronic urological conditions. The Debtor’s sole commercial product was NOCTIVA™, a prescription nasal spray used in adults who wake up multiple times during the night to urinate due to nocturnal polyuria, a condition that causes the kidneys to overproduce urine at night. The Debtor did not produce or distribute NOCTIVA™ itself; rather, it managed the production and distribution of NOCTIVA™ through third-party manufacturing, distribution and supply agreements.

6. On February 6, 2019 (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the Court. The Debtor commenced the Chapter 11 Case with the intent to (a) sell its assets pursuant to section 363 of the Bankruptcy Code, (b) liquidate any remaining assets, and (c) wind down its operations in an orderly manner.

7. On February 8, 2019, the Court authorized the Debtor to retain Epiq Corporate Restructuring, LLC (“**Epiq**”) to serve as the Debtor’s claims and noticing agent and provide related services for the duration of the Chapter 11 Case [Docket No. 37].

8. On February 13, 2019, in accordance with Rule 1007 and Local Rules 1007-1(a) and 1007-2(a), the Debtor filed its list of creditor names and addresses (the “**Creditor Matrix**”) [Docket No. 52].

9. On March 8, 2019, the Debtor filed its schedules of assets and liabilities and statement of financial affairs pursuant to Bankruptcy Rule 1007 and Local Rule 1007-1 [Docket Nos. 69 and 70] (collectively, the “**Schedules**”). On May 31, 2019, the Debtor filed an amendment to the Schedules [Docket No. 195], amending Schedule E/F. Additionally, in the ordinary course of business, the Debtor maintained books and records that reflected, among other things, the Debtor’s aggregate liabilities and the specific amounts owed to each of its creditors.

10. On May 29, 2019, the Court entered the *Order (I) Fixing Deadlines for Filing Proofs of Claim and Certain Administrative Expense Requests and (II) Approving the Form and Manner of Notice Thereof* [Docket No. 191] (the “**Bar Date Order**”), which, among other things, generally established the deadline for certain creditors holding a claim (as such term is defined in section 101(5) of the Bankruptcy Code) against the Debtor, to file and serve a written proof of claim for payment of any such claim.

11. Pursuant to the Bar Date Order, on May 30, 2019, the Debtor filed the *Notice of Bar Dates for Filing Proofs of Claim and Administrative Expense Requests* [Docket No. 192] (the “**Bar Date Notice**”), which, among other things, specifically established (i) July 2, 2019 (the “**General Bar Date**”) as the deadline for non-governmental claimants to file and serve proofs of claim, (ii) August 7, 2019 (the “**Government Bar Date**”) as the deadline for claimants that were governmental units to file and serve proofs of claim that arose before the Petition Date, and (iii) July 2, 2019 (the “**Initial Administrative Bar Date**”) as the deadline for all claimants to serve requests for the allowance and payment of purported administrative expenses arising between the Petition Date and May 29, 2019.

12. On October 6, 2020, the Court entered the Confirmation Order, confirming the Plan.³ The Plan became effective on October 21, 2020 (the “**Effective Date**”) [Docket No. 429].

13. Pursuant to Section 4.1.1 of the Plan, November 20, 2020 (the “**Administrative Claims Bar Date**”) was established as the last date by which any party must file a request for payment of a claim (other than professional fee claims and purported administrative expense claims that were to be asserted by the Initial Administrative Bar Date) that arose on or after May 30, 2019 through the Effective Date of the Plan under sections 503(b) and 507 of the Bankruptcy Code.

B. Background Relevant to Claimant

18. Prior to the Petition Date, the Debtor entered into an agreement with Claimant for a one-time distribution of NOCTIVA™.

19. In accordance with the agreement, on December 4, 2018, Debtor shipped 24 units of NOCTIVA™ to Claimant.

20. The amount due from Claimant for the shipment totaled \$10,200.00, subject to a two percent (2%) discount for early payment. In accordance with the terms of the agreement, in late December 2018, Claimant paid Debtor \$9,996.00 (i.e., the entire amount due after applying the two percent (2%) discount).

21. Under the terms of the agreement, half of the shipment was eligible for return through November 30, 2020 and the other half of the shipment was eligible for return through January 31, 2021. (Thomas Declaration, ¶ 8). As of the date of this Claim Objection, no product was ever returned by Claimant to Debtor.

22. Claimant is listed in the Creditor Matrix.

³ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan.

23. Pursuant to the *Affidavit of Service* filed on June 6, 2019 [Docket No. 200], on June 5, 2019, Epiq served Claimant with (i) the Bar Date Notice; (ii) a proof of claim form, substantially similar to Official Form B 410; and (iii) instructions for completing a proof of claim.

24. Claimant did not file a proof of claim by the General Bar Date.

25. Pursuant to the *Affidavit of Service* filed on October 27, 2020 [Docket No. 430], on October 21, 2020, Epiq served Claimant with the *Notice of (A) Occurrence of Effective Date of the First Amended Chapter 11 Plan of Liquidation and (B) Deadline for Filing Certain Claims*, dated October 21, 2020 [Docket No. 429] (the “**Notice of Entry of Confirmation Order and Effective Date**”).

26. In November 2020, counsel to the Plan Administrator received the Claim.⁴ A copy of the Claim is attached hereto as **Exhibit 1**.

27. For the reasons set forth in more detail below, the Plan Administrator has determined that (i) the Claim should not be considered a valid proof of claim asserted against the Debtor, and (ii) to the extent the Claim is found to be a valid proof of claim against the Debtor, it should be disallowed.

RELIEF REQUESTED

28. By this Claim Objection, the Plan Administrator requests that this Court enter the Proposed Order, pursuant to sections 502(b) of the Bankruptcy Code, Bankruptcy Rules 3001 and 3003, and Local Rule 3003-1, holding that the Claim is not a valid claim against the Debtor or, in the alternative, disallowing the Claim for the reasons set forth below.

⁴ It was only following the completion of the claims reconciliation process that counsel and the Plan Administrator discovered the Claim had not been filed with Epiq and, therefore, was not included in the claims register.

OBJECTION

29. The Plan Administrator respectfully submits that the Claim should be disallowed as it (i) was not properly filed, (ii) was submitted well past the General Bar Date and, therefore, is a late-filed claim, and (iii) does not otherwise constitute a valid proof of claim.

A. The Claim Was Not Properly Filed

30. Bankruptcy Rule 3001 provides, in relevant part, “A proof of claim shall conform substantially to the appropriate Official Form.” Fed. R. Bankr. P. 3001(a). In addition, Local Rule 3003-1(a) provides that in a case where a claims agent has been appointed, such as this case, “[a]ny entity filing a proof of claim in a chapter 11 case shall file the original and one (1) copy of the proof of claim with the claims agent and shall serve a copy on the trustee, if any, unless the claims agent accepts claims electronically, in which case only the electronically filed claim shall be submitted.” L.R. 3003-1(a) (emphasis added).

31. Claimant was served with the Bar Date Notice, a proof of claim form (which substantially conforms to Official Form B 410), and instructions for completing and submitting a proof of claim.

32. The Claim, being nothing more than a cover letter and the transaction documentation, does not conform to Official Form B 410.⁵ Furthermore, both the Bar Date Notice and the instructions for completing a proof of claim provide that proofs of claim (i) were to be submitted to Epiq and (ii) could be submitted electronically through the case website established by Epiq. In failing to use an acceptable form and in sending the Claim solely to Debtor’s counsel, Claimant failed to comply with both the instructions provided by the Debtor for submitting claims as well as the Bankruptcy Rules and the Local Rules governing proofs of claim.

⁵ Such documents would customarily be provided as supporting documentation to an asserted claim, but not suffice as the claim, itself.

B. The Claim Is a Late-Filed Claim

33. Even if deemed to be a filed proof of claim, the Claim should be disallowed as a late-filed claim. As noted above, the General Bar Date was July 2, 2019 and the Claim is dated as of November 16, 2020.

34. Bankruptcy Rule 3003(c)(2) provides, in relevant part, “[a]ny creditor . . . whose claim . . . is not scheduled . . . shall file a proof of claim . . . within the time prescribed by . . . this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of . . . distribution.” Fed. Bankr. R. 3003(c)(2). In addition, pursuant to section 502(b)(9) of the Bankruptcy Code, the Court has the authority to disallow a purported claim if “proof of such claim is not timely filed.” 11 U.S.C. § 502(b)(9).

35. Claimant was obligated to file a proof of claim against the Debtor by the General Bar Date. Claimant was provided with the applicable proof of claim form and the instructions and deadline for completing and submitting the same. Notwithstanding the foregoing, Claimant failed to properly file a proof of claim within the Court-established timeframe. Therefore, the Claim should be disallowed.

C. The Claim Is Not A Valid Claim Against The Debtor

i. The Claim Does Not Reflect a Right to Payment from Debtor

36. The Bankruptcy Code defines the term “claim” as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5)(a).

37. The Claim makes no reference to an outstanding liability owed by Debtor and makes no request for payment. As reflected in Exhibit 1, the Claim is merely a brief letter, dated November 16, 2020, that refers to an enclosure as a “requested Proof of Claim”, but only attaches

Claimant's purchase order, dated November 29, 2018, for 24 units of NOCTIVA™; Debtor's invoice, dated December 4, 2018, for the delivered product; and proof of Claimant's payment for the delivered product, as made by check number 4723. *See* Exhibit 1.

38. In July 2021, the Plan Administrator reached out to Claimant regarding the Claim and was informed that Claimant sought to return all or a portion of the NOCTIVA™ shipment. (Thomas Declaration, ¶ 7). The Claim, however, makes no reference to any request for return, and Debtor has no record of (i) any communication from Claimant regarding a request for return or (ii) any actual return of all or a portion of the NOCTIVA™ shipment. (Thomas Declaration, ¶ 8). Although the Claim is dated November 16, 2020, which is days within the return window for a portion of the NOCTIVA™ shipment, to the extent the Claim was an attempt by Claimant to pursue a return of all or a portion of the 2018 NOCTIVA™ shipment from Debtor, it was neither the proper process nor forum to complete such a transaction.⁶

39. Accordingly, the Claim does not reflect a valid claim against the Debtor.

ii. The Claim Cannot Qualify as an Administrative Expense of the Estate

40. While the Plan Administrator does not believe the Claim represents a valid claim against the Debtor, out of an abundance of caution, the Plan Administrator also objects to the Claim to the extent it purports to assert an administrative expense of the Debtor's estate.⁷

41. As an initial matter, to the extent Claimant submitted the Claim prior to November 20, 2020 attempting to qualify for an administrative expense, the Claim is untimely as the Administrative Claims Bar Date of November 20, 2020 was the deadline established for

⁶ As of the date hereof, the Claimant has not returned any portion of the shipment to Debtor and the window to return the NOCTIVA™ shipment has closed.

⁷ Claimant included with the Claim the first page of the Notice of Entry of Confirmation Order and Effective Date, which references the Administrative Claims Bar Date of November 20, 2020. To be clear, however, the Claim does not assert an administrative claim in any manner.

administrative claims that arose on or after May 30, 2019. As already noted, the transaction occurred at the end of 2018, prior to the Petition Date, and outside of any administrative claim window.

42. More substantively, administrative expenses include, among others, “actual, necessary costs and expense of preserving the estate.” 11 U.S.C. § 503(b)(1). Under section 503(b)(1) of the Bankruptcy Code, “[a]n expense is administrative only if it arises out of a transaction between the creditor and the bankrupt’s trustee or debtor in possession, and only to the extent that the consideration supporting the claimant’s right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.” *In re Bethlehem Steel Corp.*, 479 F.3d 167, 172 (2d Cir. 2007).

43. The Claim cannot qualify as an administrative expense for two main reasons: (1) the transaction at issue occurred prepetition, and (2) the Claimant did not provide the Debtor with any goods or services that were beneficial to or otherwise served to preserve the estate.

44. Finally, while an administrative expense can also be asserted for “the value of any goods received by the debtor within 20 days before the date of commencement of a case . . . [when] the goods have been sold to the debtor in the ordinary course of such debtor’s business.” 11 U.S.C. § 503(b)(9) (emphasis added), this statutory basis is not available here. To the extent Claimant sought to pursue a claim under this provision of the Bankruptcy Code, it also fails for two main reasons (in addition to being untimely). First, it was the Debtor that provided goods to Claimant, not the other way around. Second, the goods were delivered to Claimant approximately two months prior to the Petition Date, not within 20 days thereof. Accordingly, Claimant cannot assert a valid section 503(b)(9) administrative expense claim on account of the transaction.

CONCLUSION

45. The Plan Administrator respectfully requests that the Claim, to the extent the Court determines it constitutes a claim, be disallowed.

RESERVATION OF RIGHTS

46. The Plan Administrator expressly reserves the right to amend, modify or supplement this Claim Objection. Should one or more of the grounds of objection stated in this Claim Objection be dismissed, the Plan Administrator reserves the right to object on other grounds, as may be available.

NOTICE

47. The Plan Administrator has provided notice of this Claim Objection via first class mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) Claimant; and (c) any persons who have filed a request for notice in the Chapter 11 Case pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Plan Administrator respectfully submits that no further notice is necessary.

WHEREFORE, the Plan Administrator respectfully requests that this Court (i) enter the Proposed Order attached hereto as **Exhibit 2**, and (ii) grant such other and further relief as is just and proper.

[Signature on next page]

Dated: September 2, 2021

GREENBERG TRAURIG LLP

/s/ Dennis A. Meloro

Dennis A. Meloro (DE Bar No. 4435)
The Nemours Building
1007 North Orange Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 661-700
Facsimile: (302) 661-7360
Email: melorod@gtlaw.com

- and -

Sara A. Hoffman (admitted *pro hac vice*)
The MetLife Building
200 Park Avenue
New York, New York 10166
Facsimile: (212) 801-6400
Email: hoffmans@gtlaw.com

Counsel to the Plan Administrator