

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

In re:

SOLAR BIOTECH, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 24-11402 (LSS)

(Jointly Administered)

Re: Dkt. Nos. 11, 180, 181, 191 & 196

Hearing Date: September 12, 2024 at 3:00 p.m. (EST)

**DEBTORS' OMNIBUS REPLY IN SUPPORT OF THE DEBTORS' MOTION
FOR AN ORDER (A) AUTHORIZING AND APPROVING THE DEBTORS' SALE OF
SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND ENTRY INTO A
PURCHASE AGREEMENT, (B) AUTHORIZING THE SALE OF SUBSTANTIALLY
ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF ALL ENCUMBRANCES,
(C) APPROVING THE ASSUMPTION AND ASSIGNMENT OF DESIGNATED
EXECUTORY CONTRACTS, AND (D) GRANTING RELATED RELIEF**

Solar Biotech, Inc. and its affiliated debtor and debtor in possession (each a "Debtor" and collectively, the "Debtors") in the above-captioned chapter 11 cases (these "Chapter 11 Cases"), by and through the undersigned counsel, hereby submit this reply (the "Reply") to the objections to the Debtors' motion [Docket No. 11] (the "Motion")² for, *inter alia*, an order (A) authorizing and approving the Debtors' sale of substantially all of the Debtors' assets and entry into a purchase agreement, (B) authorizing the sale of substantially all of the Debtors' assets free and clear of all encumbrances, (C) approving the assumption and assignment of designated executory contracts, and (D) granting related relief. In further support of the Motion and this Reply, the Debtors incorporate by reference the *Declaration of Peter Bendoris* (the "Bendoris Declaration") and the *Declaration of Ken Yager* (the "Yager Declaration") filed concurrently herewith, and represent as follows:

¹ The Debtors in these Chapter 11 Cases are Solar Biotech, Inc. and Noblegen Inc. The location of Debtors' principal place of business is 5516 Industrial Park Rd, Norton, VA 24273, Attn: Alex Berlin.

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

PRELIMINARY STATEMENT

The Debtors filed these cases to “reboot” their business and to have a sale process to maximize the value of the Debtors’ assets. The Debtors have achieved those goals by having Pictor Biotech, Inc. (“Pictor Biotech”) submit a bid for \$20 million, which is \$4.8 million above the Stalking Horse Bid (and over 31% above the Stalking Horse Bid). Additionally, Pictor Biotech has certified that, as part of its bid, it intends on hiring 100% of the Debtors’ U.S. based employees. *See* Declaration of Peter Rosholm in support of the Motion (Docket No. 204), ¶11. Thus, the Debtors’ sale process has been a success and the sale to Pictor Biotech should be approved.

There have been objections filed relating to Ingredion Incorporated (“Ingredion”) and the Debtors, however, none of the objectors have raised an objection to consummating the sale to Pictor Biotech. As is provided in the supporting Bendoris Declaration and Yager Declaration, the Debtors’ assets were thoroughly marketed and the conduct leading up to and throughout the Auction were in accord with the Bid Procedures. Moreover, consummating the sale to Pictor Biotech is a sound exercise of the Debtors’ business judgment, as the sale proceeds are sufficient to pay secured claims and provide for a distribution to unsecured creditors while having adequate funds for a winddown.

The limited objections will be discussed in more detail below, however, the concerns raised about Ingredion being named the Backup Bidder and related issues are addressed by having the proposed sale order: (i) make no Section 363(m) finding in favor of Ingredion; and (ii) provide that, in the event Pictor Biotech does not close, there will be a supplemental sale order presented on notice with a hearing. Thus, the concerns/issues related to Ingredion are reserved and will be addressed in later proceedings, if necessary.

Accordingly, the Debtors request that the Court enter the proposed sale order designating Pictor Biotech as the Successful Bidder and designating Ingredion the Backup Bidder.

I. BACKGROUND

A. **The Chapter 11 Cases**

1. On June 24, 2024 (the "Petition Date"), each Debtor filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code. The Debtors have requested that the Chapter 11 Cases be jointly administered.

2. The Debtors are operating their business and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases.

3. On July 8, 2024, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors (the "Committee") pursuant to section 1102 of the Bankruptcy Code [Docket No. 76].

B. **The Sale Motion And Auction Results**

4. One of the Debtors' principal objectives in these Chapter 11 Cases has been to sell all or some of their assets in a competitive, value maximizing manner. In order to effectuate a competitive and thorough sale process, on the Petition Date, the Debtors filed the Motion seeking, *inter alia*, entry of an order (i) establishing bidding procedures (the "Bidding Procedures") relating to the sale of substantially all of the Debtors' assets (the "Assets"); (ii) approving Ingredion as the stalking horse purchaser (the "Stalking Horse Purchaser"), and the Debtors' entry into, and the terms of, that certain Asset Purchase Agreement, dated as of June 30, 2024 (the "Stalking Horse Purchaser Agreement"); (iii) authorizing and approving procedures for the assumption and assignment of designated executory contracts; (iv) schedule the date, time, and place for the auction for the Assets

(the "Auction"); and (v) authorizing and approving the form and manner of notice of the Bidding Procedures, the Auction, Sale Hearing, and Sale.

5. On July 23, 2024, the Court entered an order approving the Bidding Procedures [Docket No. 123] (the "Bidding Procedures Order"). Among other things, the Bidding Procedures Order allowed the Debtors to run a marketing and sale process, including soliciting additional bidders for the Assets, allowing them to conduct due diligence, interviews with Debtors' key management personnel, and inviting them to submit bids by September 4, 2024 (the "Bid Deadline").

6. The Debtors received two (2) Potential Bids seeking to be qualified as Qualified Bids pursuant to the Bid Procedures. One (1) of the Bids, provided by Pictor Biotech, was for the purchase of substantially all of the Debtors' assets, including specific assets excluded from the Stalking Horse Purchase Agreement, and was for total consideration of twenty million dollars (\$20,000,000.00). The second Bid, submitted by Gordon Brothers Canada, was received shortly after the Bid Deadline, was for the purchase of specific assets excluded from the Stalking Horse Purchase Agreement, and was for total consideration of twenty thousand dollars (\$20,000.00).

7. On September 6, 2024, the Auction was held. At the Auction, Pictor Biotech's bid was selected as the highest and best Bid, and the Stalking Horse Purchaser's Bid of fifteen million two hundred thousand dollars (\$15,200,000.00) was selected as the Backup Bid. The Bid submitted by Gordon Brothers Canada was not designated as a Backup Bid because it was viewed as insufficient.

8. On September 10, 2024, the Debtors filed the sale supplement (Docket No. 206), which includes the proposed sale order as Exhibit "A".

II. OBJECTIONS

9. The Debtors received only a few limited objections to the sale, which limited objections did not object to the sale to Pictor Biotech, but rather to the Debtors' designation of the Backup Bidder and the conduct at the Auction.

A. The U.S. Trustee's Objection (Docket No. 180) ["UST Objection"]

10. The UST Objection was based on the Stalking Horse Purchaser being the Successful Purchaser. Related to that, the UST Objection made the argument that the business judgment standard for sale approval requires more than satisfaction of lender claims. Further, the UST Objection raises questions of whether the estates will be administratively insolvent following the sale and if there will be funds available for a winddown after payment of secured claims.

B. Motif's Preliminary Sale Objection (Docket No. 181) ["Motif Sale Objection"]

11. In the Motif Sale Objection, various points are raised regarding Motif's lack of notice early in these cases.³ As for the Motion, Motif did receive notice of the Motion on July 30, 2024. *See* Docket No. 157 (Epiq Certificate of Service evidencing Motif was served with a copy of the Sale Notice). Further, the Motif Sale Objection asserts that Ingredion should not be permitted to "credit bid" its "secured claims" and Ingredion is not entitled to a Section 363(m) good faith finding.

C. Motif's Limited Objection To Designating Ingredion As Backup Bidder (Docket No. 191) ["Motif Auction Objection"]

12. Motif asserts that Ingredion should not be named the Backup Bidder because it did not show up "in person" at the Auction and confirm that it has not engaged in any collusion with

³ Motif makes various assertions regarding the conduct of Ingredion and/or the Debtors. The Debtors do not agree with many of the assertions, and do not believe that it is necessary to debate the various points in the context of the Motion. Regarding certain service issues, the Debtors did provide an email exchange between counsel regarding an explanation for the delay. *See* Debtors' Objection to Motif's Shortened Notice Application (Docket No. 197), Exhibit B.

the Debtors or any other Qualified Bidder. *See* Motif Auction Objection, ¶2.

D. Committee’s Limited Objection And Reservation of Rights (Docket No. 196) [“UCC Limited Sale Objection”]⁴

13. In the UCC Limited Sale Objection, which was filed after the Auction, the Committee states that it does not oppose the sale (to Pictor Biotech). However, the Committee opposes any sale to Ingredion unless certain protections are put in place.

III. DEBTORS’ DECLARATIONS IN SUPPORT OF ENTRY OF SALE ORDER

A. Bendoris Declaration

14. In summary, the Bendoris Declaration addresses:

- Debtors’ sale process and marketing efforts
- Description of the data room information accessed by ten (10) potential purchasers, including the opportunity to meet with the Debtors’ senior management and advisors
- The Potential Bids received in response to the sale and marketing process
- The process of determining Qualified Bids, including consulting with the Committee
- The events and conversations occurring between the Bid Deadline and the Auction, including the filing of the Notice of Auction [Docket No. 183]
- A summary of the Auction, the selection of the Successful Bidder, the selection of the Backup Bidder, and attaches a transcript of the Auction

B. Yager Declaration

15. In summary, the Yager Declaration addresses:

- Notice and relating Certificates of Service were provided/filed for the Motion, Bidding Procedures Order, Sale Notice, and Notice of Successful Purchaser
- Debtors’ entry into asset purchase agreement with Pictor Biotech for \$20 million is a reasonable and sound exercise of the Debtors' business judgement
- Debtors and Pictor Biotech have acted in good faith
- Pictor Biotech has the financial wherewithal to close the transaction
- Consummating the Pictor Biotech sale transaction benefits the estates as:
 - The \$20 million in consideration exceeds the pre-petition secured claims and will allow for a distribution to general unsecured creditors; and

⁴ The Committee makes numerous assertions that the Debtors disagree with but do not think are relevant to the Motion. For example, the Committee suggests (without any supporting declaration) that the Debtors have not complied with document requests. In fact, the Debtors have produced over 3,170 pages to the Committee and have received no follow-up from them since the Debtors’ last production on August 22, 2024. Further, the Committee’s suggestion that the Debtors and Ingredion were doing something untoward in these Chapter 11 cases lacks merit and is best debunked by the Pictor Biotech bid.

- In addition to the purchase price being sufficient to fund a winddown and make a distribution to general unsecured creditors, Pictor Biotech intends on hiring 100% of the Debtors' U.S.-based employees

IV. REPLY

A. The Proposed Sale Is Authorized by Section 363 of the Bankruptcy Code as a Sound Exercise of the Debtors' Business Judgment.

16. Under section 363(b)(1), a debtor is permitted to "use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Courts in this district approve asset sales where the sale "constitutes a reasonable and sound exercise of the Debtor's business judgment[.]" *In re Dura Automotive Systems, Inc.*, Case No. 06-11202 (KJC), 2007 WL 7728109, at *5 (Bankr. D. Del. Aug. 15, 2007); *In re Montgomery Ward Holding Co.*, 242 B.R. 147, 153 (D. Del. 1999) ("In evaluating whether a sound business purpose justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a 'business judgment test.'").

17. The Third Circuit has made clear that a debtor's business judgment is entitled to substantial deference. *See, e.g., Stanizale v. Nachtomi (In re Tower Air, Inc.)*, 416 F.3d 229, 234 (3d Cir. 2005) (indicating the "business judgment rule is a presumption that directors making a business decision, not involving self-interest, act on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest") (internal quotations omitted); *see also, In re Metaldyne Corp.*, 409 B.R. 661, 667 (Bankr. S.D.N.Y. 2009) (emphasizing that "the Court should not substitute its business judgment for that of the Debtors"). "Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task" that may only be accomplished "by showing either irrationality or inattention" so as to establish "that a decision was so egregious as to constitute corporate waste." *In re Tower Air, Inc.*, 416 F.3d at 238-39.

18. An asset purchaser is also required to act in good faith during the court-approved

sale proceedings. *In re Abbott Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3d Cir. 1986). A purchaser acts in good faith by not taking any action that "involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *Id.*

19. The Debtors have met the standard required for approval of the Pictor Biotech sale transaction and the entry of the proposed sale order. The Debtors have exercised their business judgment in a fair, reasonable and responsible manner throughout the sale process. At the beginning of the Chapter 11 Cases, the Debtors sought and obtained the entry of the Bidding Procedures Order. Thereafter, the Debtors, with the assistance of their professionals, established a data room and distributed sales materials to a large number of parties, provided diligence in a timely manner, and negotiated at arms' length and in good faith to obtain the highest and best bid possible under the circumstances. A detailed description of the Debtors' marketing activities is detailed in the Bendoris Declaration. At the conclusion of this process, it was clear that Pictor Biotech's bid was the highest and best bid.

20. Importantly, the Pictor Biotech sale transaction will generate \$20 million in proceeds for the Debtors and provides for the assumption of certain liabilities that would otherwise be owed by the Debtors.

21. Moreover, the Pictor Biotech sale transaction should be approved because the buyer intends on employing 100% of the Debtors' U.S.-based employees.

22. None of the objectors have opposed the selection of Pictor Biotech as the Successful Bidder.

23. Ingredient has been named the Backup Bidder consistent with the Stalking Horse Purchase Agreement and the Bidding Procedures Order. The Debtors believe naming Ingredient

the Backup Bidder protects the estates in the event Pictor Biotech does not close. Further, as per the paragraph in the proposed sale order described below, if Ingredion's credit bid rights are nullified in some way, Ingredion is required to pay cash.

24. The objections raised by Motif and the Committee regarding naming Ingredion the Backup Bidder should be overruled because the proposed sale order's following paragraph preserves their arguments against Ingredion if Pictor Biotech does not close its sale transaction:

Pursuant to the Bidding Procedures and Bidding Procedures Order, the Debtors have designated Ingredion as the Backup Bidder pursuant to the provisions of the Stalking Horse Purchase Agreement, none of which were modified by Ingredion prior to or at the Auction other than as set forth in paragraph 31 of the Bidding Procedures Order. Upon a determination by the Debtors that Pictor Biotech is a Defaulting Buyer, the Debtors shall apply to the Court, upon notice and a hearing, for a new sale order approving the sale of the Debtors' assets on the terms and conditions set forth in the Stalking Horse Purchase Agreement, as modified only by paragraph 31 of the Bidding Procedures Order. To the extent that Ingredion is the Successful Bidder and a final, non-appealable order of a court of competent jurisdiction results in any of the Pre-Petition Obligations or Pre-Petition Liens, as those terms are defined in the Final DIP Order [Docket No. 118], being successfully challenged pursuant to the provisions of an order of this Court, Ingredion, without prejudice to any of its rights and remedies under the Stalking Horse Purchase Agreement, Bidding Procedures Order, DIP Credit Agreement, Final DIP Order and this Sale Order, shall pay cash solely for that portion of the Debtors' assets that it can no longer purchase with a credit bid of the Pre-Petition Obligations or Pre-Petition Liens that were successfully challenged.

See proposed sale order, ¶50.

25. Lastly, the Court should overrule Motif's Auction Objection asserting that Ingredion should not be the Backup Bidder due to its attending the Auction virtually. Pursuant to the Bid Procedures, the Debtors had the discretion to modify the Bidding Procedures. *See* Bid Procedures, ¶48.⁵ As is evidenced by the transcript of the Auction (Bendoris Declaration, Exhibit A), it was

⁵ "The Bid Procedures may be modified by the Debtors, after timely consultation with the Committee, in any manner that is not inconsistent with or otherwise in contravention of the other terms of these Bid Procedures . . . including, without limitation, to . . . (c) amend the Bid Procedures as they may determine to be in the best interests of the Debtors' estates; provided that all such modifications are disclosed to all Potential Bidders . . . or Qualified Bidders . . . on the

stated on the record:

After sharing the Qualified Bids with all the Qualified Bidders the Debtors were advised by Ingredion that it would not increase its Stalking Horse Bid at the Auction and that they would not be attending the Auction in person. Similarly, Gordon Brothers advised that they did not plan to increase their bid and they will not be attending the Auction at all. After receiving that information the Debtors advised the Qualified Bidders and Creditors' Committee that Zoom observance/participation would be permitted, which modified the Bid Procedures in-person Auction language and made sense economically in light of the circumstances since the estates would bear the costs of certain parties' travel expenses, including the Creditors' Committee, for what appears to be a short Auction.

Bendoris Declaration, Exhibit "A" (Auction transcript), 7:13 - 8:2.

26. Accordingly, numerous parties, including the Committee and Ingredion, attended virtually for the twenty-three (23) minute Auction. It was appropriate and justified for the Debtors to conduct the Auction this way.

27. Further, as is shown by the Auction transcript (despite Motif's suggestion otherwise), the Debtors complied with the Bid Procedures by having the Qualified Bidders confirm at the start and at the end of the Auction that there was no collusion. *See id.*, 4:16 - 6:6 (non-collusion confirmation by Qualified Bidders at the start of the Auction) and 9:6-24 (non-collusion confirmation by Qualified Bidders at the end of the Auction).

B. Approval of the Proposed Sale, Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, Is Authorized by Section 363(f) of the Bankruptcy Code.

28. Section 363(f) of the Bankruptcy Code provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable non-bankruptcy law permits sale of such property free and clear of such

record prior to or during the Auction" *Id.* On September 5, 2024 (the day before the Auction), the Debtors contacted all Qualified Bidders and the Committee and informed them the Auction would be conducted both in-person and virtually. All parties requested virtual attendance links; no parties objected. At the Auction, the Debtors stated on the record the modification to the Bid Procedures, as set forth herein. Accordingly, the Debtors complied with the modification provisions of the Bid Procedures in all respects.

interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

29. As section 363(f) of the Bankruptcy Code is stated in the disjunctive, when proceeding pursuant to section 363(b), it is only necessary to meet one of the five conditions of section 363(f). The Debtors submit that one or more of the conditions set forth in section 363(f) of the Bankruptcy Code will be satisfied with respect to the Pictor Biotech sale. In particular, the Debtors believe that, at a minimum, section 363(f)(2) is satisfied because each of the parties holding liens on or other interests in the Assets subject to the sale transaction that has not objected to the sale transaction is deemed to have consented to the sale transaction. Further, any lienholder also will be adequately protected by having its liens attach to the proceeds of the sale transaction, in the same order of priority, with the same validity, force, and effect that such lienholder had prior to such sale transaction, subject to the proposed sale order and any claims and defenses that the Debtors and their estates may possess with respect thereto. Lastly, as provided in the Yager Declaration, the purchase price of \$20 million is greater than the aggregate value of liens on the Assets. *See* Yager Declaration, ¶24. Thus, Section 363(f)(3) is satisfied.

CONCLUSION

WHEREFORE, the Debtors respectfully request that this Court enter the proposed sale order granting the relief requested in the Motion, and granting such other and further relief as the Court may deem just and proper.

Date: September 11, 2024
Wilmington, Delaware

/s/ Cheryl A. Santaniello
Cheryl A. Santaniello, Esq. (DE Bar No. 5062)
Porzio, Bromberg & Newman, P.C.
300 Delaware Avenue, Suite 1220
Wilmington, Delaware 19801
Telephone: (302) 526-1235
Facsimile: (302) 416-6064
Email: casantaniello@pbnlaw.com

-and-

John S. Mairo, Esq. (*Pro Hac Vice*)
Christopher P. Mazza, Esq. (*Pro Hac Vice pending*)
Porzio, Bromberg & Newman, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962
Telephone: (973) 538-4006
Facsimile: (973) 538-5146
Email: jsmairo@pbnlaw.com
Email: cpmazza@pbnlaw.com

Counsel for the Debtors and Debtors in Possession