

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

*In re:*

VALERITAS HOLDINGS, INC., *et al.*<sup>1</sup>,

Debtors.

Chapter: 11

Case No. 20-10290 (LSS)

(Jointly Administered)

**Re: D.I. 25**

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION OF DEBTORS FOR ENTRY OF ORDERS (I)(A) ESTABLISHING BIDDING PROCEDURES; (B) APPROVING BID PROTECTIONS; (C) ESTABLISHING PROCEDURES RELATING TO ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, INCLUDING NOTICE OF PROPOSED CURE AMOUNTS; (D) APPROVING FORM AND MANNER OF NOTICE; (E) SCHEDULING A HEARING TO CONSIDER ANY PROPOSED SALE; AND (F) GRANTING CERTAIN RELATED RELIEF; AND (II)(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 objection (the "Objection") 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,

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<sup>1</sup> 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.

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 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 "Bid Procedures Motion").<sup>2</sup> In support of this Objection, the Committee respectfully states as follows:

**PRELIMINARY STATEMENT**

1. By the Bid Procedures Motion, the Debtors seek approval of certain procedures (the "Bid Procedures") which contemplate an expedited sale process (just a nine days from requested Order approving the Bid Procedures to the Bid Deadline) that will likely assure that substantially all of the Debtors' assets (including causes of action) are delivered to the Stalking Horse Bidder, and nearly all sale proceeds are distributed to the Debtors' DIP Lender 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").

2. The Committee<sup>3</sup> was appointed less than one (1) week ago and is comprised of three trade creditors familiar with the Debtors' business. The Committee has received some information regarding the prepetition marketing process, and it is aware that an extension of time

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<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to such term as in the Bid Procedures Motion.

<sup>3</sup> On February 21, 2019, the United States Trustee for the District of Delaware appointed the Committee in the Debtors' Chapter 11 cases. The Committee has, subject to Court approval, retained Porzio Bromberg & Newman, P.C. and Morris James LLP as counsel, and Emerald Capital Advisors as financial advisor.

comes with incremental cost to both the CRG and the Committee's constituency. Without that time, however, there can be no determination by the Committee (or by the Court) that the quick sale to the Stalking Horse Bidder proposed by the Debtors and CRG is the value maximizing path for all parties in interest. Moreover, the proposed process is uniquely concerning given that (i) the Debtors are seeking to sell all the Debtors' claims and causes of action (including those against their directors and officers), (ii) the Bid Procedures are proposed with the backdrop of the settlement agreement with CRG, which together attempt to rid the estates of any investigative rights through a truncated timeline and the sale (or settlement) of any action that could have value to the Committee before such claims are adequately exposed to the transparency that bankruptcy requires, and (iii) the process appears to have a significant likelihood of leaving the estates administratively insolvent by giving the Stalking Horse Bidder discretion to unilaterally force such status through a cure arrangement structure whereby the estates pay all cure in excess of \$1.5 million. Notably too, the proposed budget also attempts to ensure that the Committee and its professionals cannot be a meaningful part of this warp speed process.

3. The need for speed in these cases must be balanced against the obligation of the Debtors and the Committee to properly exercise their fiduciary obligations and the Committee's responsibility to shed appropriate light on the relief sought by the Debtors for the benefit of the creditors of these bankruptcy estates and the Court. Thus, the Committee requests that the process be extended by 28-days, subject to further extension if the Debtors, in consultation with the Consultation Parties, reasonably believe that an interested party is likely to submit a bid. With such an extension, the Committee would be comfortable that: (i) new and resurfaced bidders will have adequate time to complete their due diligence and join in the process; (ii) alternative bid options, including lots, can be fully explored by the Committee with existing and

new bidders; and (iii) the Committee can properly analyze the value of the assets being purchased, including the value of all the Debtors' claims and causes of action, including those against their directors and officers, in order to reach a conclusion as to whether or not fair value is being paid.

4. In addition to expanding the sale process by 28 days to give all potential bidders an opportunity to conduct requisite due diligence necessary to submit bids, the Committee requests modifications to specific components of the proposed Bid Procedures and Assumption Procedures in order to ensure a fair, transparent and value-maximizing process. These include, but are not limited to, the following requests:

- (i) reduce the initial overbid requirement, which is could be in excess of \$2,440,000, comprised of a minimum \$690,000 Break Up Fee (3.0% of \$23.0 million), Expense Reimbursement up to \$1.0 million (4.3% of \$23.0 million), and an additional \$750,000 overbid amount (3.26% of \$23.0 million);
- (ii) reduce the incremental bid requirements of \$250,000 to \$100,000;
- (iii) reduce the collective bid protections, which equate to almost 10.6%<sup>4</sup> of the cash price, comprised of a Break Up Fee of 3% of the Purchase Price and an Expense Reimbursement of up to \$1MM for expenses,<sup>5</sup> such amounts should not be entitled to super-priority administrative expense claim status, and should not be permitted to be used as a credit bid;

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<sup>4</sup> The Break-up Fee of at least \$690,000, combined with the Expense Reimbursement of \$1,000,000 (4.3% of the cash price), means that the total bid protection package is \$1,690,000, or 7.3% of the cash price (if one includes the \$750k initial overbid as a bid protection, the total protections are \$2,440,000, or 10.61% of the cash price.

<sup>5</sup> In addition to the total bid protection package being significantly over market at 10.61%, the exorbitant \$1.0 million expense reimbursement is also chilling in its own right because it signals to other bidders the potential cost of due diligence.

- (iv) eliminate Stalking Horse Bidders termination rights and closing conditions;<sup>6</sup>
- (v) equalize the due diligence period for the Stalking Horse Bidder and any other bidders by eliminating the special due diligence privileges for the Stalking Horse Bidder;<sup>7</sup>
- (vi) eliminate the CRG's veto rights on bids that contemplate non-cash consideration as part of the purchase price because non-cash consideration, such as the release of claims, stock, and operating enhancements, may have value to the estates;
- (vii) require that if bids are determined to not be Qualified, that the Debtors and/or Consultation Parties work in good faith with the bidder to get its bid qualified and that potential bidders have until the Auction to remedy any deficiencies with respect to non-conforming or not Qualified bids;
- (viii) eliminate the provision that the Bidding Procedures may not be modified except with the express prior written consent of the Debtors and the DIP Lender;

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<sup>6</sup> Specifically, the following closing conditions should be eliminated:

“Sellers shall have provided to Purchaser, no later than 5:00 pm, Eastern Time, March 13, 2020 (the “Manufacturing Deadline”), lot release testing data for the first ten (10) lots utilizing the KIS Springs consisting of the four (4) V-Go 20 Lots and the six (6) V-Go 30 Lots (provided, that the Manufacturing Deadline may be extended by the mutual written consent of the Parties), and (b) at least three (3) of the V-Go 20 Lots and at least four (4) of the V-Go 30 Lots shall have passed the lot release specifications in the applicable 510(k) currently approved by the FDA.”

“Substantially all of the Employees to whom the Purchaser (or its designee) has offered employment to prior to the Closing (such Employees to whom offers are made, the “Offered Employees”), including each Key Employee and at least seventy-five percent (75%) of the Offered Employees, shall have accepted and not rescinded offers of employment with the Purchaser (or its designee) as of the Closing on terms reasonably satisfactory to the Purchaser.”

<sup>7</sup> Under the current Bid Procedures, for all potential bidders, except for the Stalking Horse Bidder, the due diligence period will end on the Bid Deadline.

- (ix) eliminate the provision on page 11 of the Bid Procedures that provides that, "[f]ollowing closing of the Auction or termination of the Stalking Horse APA, whichever occurs first, the Debtors shall not initiate contact with, solicit, or encourage proposals from any person or entity with respect to the Assets."
- (x) require that the Debtors shall deliver to the Committee copies of any materials provided to the DIP Lender and/or CRG in connection with the sale process, including, promptly upon receipt, all draft term sheets and other documentation in connection with any Sale transaction;
- (xi) provide more than nine (9) days, for counterparties to receive, review and object to the proposed assumption of its contracts, provide more than one (1) day for counterparties to object to adequate assurance of future payment from the Successful Bidder that is not the Stalking Horse Bidder,<sup>8</sup> provide that any deadlines to object to any Supplemental Assumption Notice be set at a minimum number of days of notice;
- (xii) require that all undisputed portions of cure amounts are paid in the event that there is an unresolved cure objection;
- (xiii) modify the good faith deposit to ten (10%) of the cash consideration given that non-cash consideration may not be determined in light of the assumption procedures;<sup>9</sup>

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<sup>8</sup> Indeed, the Debtors anticipated service of the notice of successful bidder is unlikely to even reach the counterparties in time for them to file an objection. *See* Bid Procedures Motion, ¶25.

<sup>9</sup> Additionally, the Stalking Horse Bidder is required to put up only 10% of the cash consideration. *See* Notice of Filing of Asset Purchase Agreement as Exhibit to Bidding Procedures Motion [D.I. 67], §2.3.

- (xiv) permit a sale of lots (the Bid Procedures currently require the bidders to purchase substantially all of the Assets and footnote that the Debtors may waive this requirement, but the Debtors' sales force, intellectual property, and patents may be maximized by sales to different buyers; in addition, the value of the Debtors' net operating losses does not appear to have been explored);
- (xv) eliminate the requirement that bidders provide proof of financial wherewithal before receiving access to the data room and conduct due diligence; rather, the only requirement for access should be a signed confidentiality agreement;
- (xvi) permit a closing deadline that is later than April 2, 2020;
- (xvii) eliminate the payment of the Break-Up Fee and Expense Reimbursement upon a termination or from anything other than the proceeds of a sale to another bidder;
- (xviii) allow communication between Potential Bidders and Committee Professionals;
- (xix) modify the Qualified Bidder requirements to allow financing contingencies, which shall be considered in the determining the highest or otherwise best bid;
- (xx) require the Debtors to consult with the Consultation Parties (including the Committee) on certain decisions now reserved for the Debtors only;
- (xxi) modify the requested procedures to require service of all notices to be done within one (1) business day given the truncated timelines.

5. This Objection outlines the Committee's concerns with the Bid Procedures, and the Committee expressly reserves and preserves its rights to raise additional objections to the Bid Procedures prior to and at the Bid Procedures Hearing. The Committee respectfully submits that, unless the issues raised herein are adequately addressed, the Bid Procedures Motion should be denied.

### **OBJECTIONS**

6. The Debtors' request for entry of the Bid Procedures Order should be denied, unless modified as requested herein, because the Bid Procedures Order and the exhibits attached thereto, do not provide for a full and fair opportunity to maximize the value of the Debtors' assets.

#### **A. Legal Standard**

7. One of the primary purposes of the Bankruptcy Code is to maximize the value of the bankruptcy estate for the benefit of creditors. *Matter of Midway Airlines, Inc.*, 6 F.3d 492, 494 (7th Cir. 1993); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (a debtor, as a fiduciary to the estate, has a duty to maximize the value of the estate). To further this purpose, sale procedures must seek to "facilitate an open and fair public sale designed to maximize value for the estate." *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998); *see also In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-66 (8th Cir. 1997) (bankruptcy courts are given discretion and latitude in order to facilitate a fair and open public sale focused on maximizing value).

8. The Debtors submit that they have sound business justification for pursuing the relief sought in the Bid Procedures Motion. *See* Bid Procedures Motion, at ¶27. The Court, however, should not merely defer to the Debtors' "sound" business judgment; indeed, the Court



need not consider the Debtors' business judgment in matters of process under the Bankruptcy Code, but should instead assess the fairness and reasonableness of the proposed Bid Procedures. *See In re American Safety Razor Co., LLC*, Case No. 10-12351 (MFW) (Bankr. D. Del. Sept. 30, 2010) Tr. at 132-33 ("I don't think, as the debtors suggest, that my consideration of bid procedures is based on the business judgment rule. I need not accept the debtors' business judgment with respect to process. The Bankruptcy Code and Rules and the process under the Bankruptcy Code are all matters . . . for the Court's determination as to what is fair and reasonable. In fact, I think that's my only role in this case; to determine what is fair for all the parties.").

**The Bid Procedures are Neither Fair nor Reasonable and Are a Threat to Maximizing the Value of the Estates**

9. Bidding procedures must be designed to ensure that the process does not discourage potential bidders from participating in the process. *See In re O'Brien Envtl. Energy, Inc.*, 181 F.3d at 535-37 (3d Cir. 1999) (recognizing that more competitive bidding will bring greater benefit to the estate). As submitted, the Bid Procedures deter competitive bidding and provide unnecessary and unwarranted bid protections for Stalking Horse Bidder. Consequently, the Committee requests that the modifications described in paragraph 3, *supra*, be made to the Bid Procedures. Some of those requested modifications are more thoroughly discussed below:

*(a) The Timeline Requested by the Debtors Will Chill Competitive Bidding*

10. The Debtors rely heavily on the pre-petition marketing process conducted by an unnamed boutique investment banker. However, very little information regarding the pre-petition marketing process has been provided. Even if the prepetition marketing process was sufficiently robust, the timeline contemplated is untenable. The Debtors propose a process that would require Bids to be submitted no later than March 12, 2020, essentially leaving third party

potential bidders with no time to seek, obtain, review due diligence materials, let alone submit a bid. Specifically, the Debtors are seeking to set a Bid Deadline that is only thirty-two (32) days after the Petition Date, and only nine (9) days from the hearing to consider the Motion. Moreover, the Debtors are seeking up to seven (7) days to serve the Bid Procedures Order by first-class mail upon interested parties, which means it is likely that parties may not even receive a copy of the Bid Procedures Order until after the Bid Deadline. *See* Bid Procedures Motion, ¶22. As this Court is well aware, the filing of these bankruptcy cases (and its resulting publicity), by itself alone could result in new or renewed interest,<sup>10</sup> and so could the results of the lot release testing data, which must be provided to the Stalking Horse Bidder by March 13, 2020 (one day after the proposed Bid Deadline) and are a condition precedent to close. *See* Stalking Horse APA [D.I. 67-1], §9.3(l).

11. The Committee appreciates the need for an expedited sale process that minimizes expenses, but the proposed break-neck pace sought by the Debtors is simply too aggressive, and would eviscerate any meaningful opportunity to explore new and alternative purchasers, which could provide greater value to the estate. Accordingly, in order for the sale process to achieve the desired goal of maximizing value, the entire sale process should be extended by at least 28 days to provide all interested parties with a full and fair opportunity to participate in the sale process and submit bids for the Assets. Expanding the proposed sale timeline by a reasonable time will ensure that potential bidders will have sufficient time to formulate and submit Qualified Bids, which will hopefully lead to a robust Auction that will result in value to the bankruptcy estates.

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<sup>10</sup> Indeed, the Committee is aware of at least one (1) party that has signed a confidentiality agreement after the Petition Date.

12. Similarly, the Bidding Procedures cannot be fair or reasonable without a proper valuation of the Stalking Horse Bid and Debtors' claims. This further supports the need to extend the timeline. The Stalking Horse Bidder seeks to purchase substantially all of the Debtors' assets, including all causes of action, such as claims under Chapter 5 of the Bankruptcy Code or other applicable law, as well as actions against current or former officers of the Debtors without providing any analysis or information about the merit or potential value of such claims. Significantly, the Debtors have not yet filed their schedules of assets and liabilities and statements of financial affairs (collectively, the "Schedules and Statements") and have sought an extension to file same through and including April 9, 2020, i.e., one week after the proposed outside closing date for the sale. *See* Docket No. 75.

13. The Committee was formed less than one week ago, and has propounded initial diligence and discovery requests for information. Although the Debtors have begun to provide responses and due diligence information to the Committee, the Committee requires sufficient access to information (and a reasonable timeline) to be able to evaluate the value of the consideration being provided to the Debtors in exchange for these assets, which of necessity, must include an analysis of any potential causes of action, including avoidance claims and claims against the Debtors' directors and officers. Additionally, a cure analysis should be provided because it appears that the Stalking Horse Bidder is seeking to assume contracts, but will only pay cure costs up to \$1.5 million with the Debtors responsible for any excess cure costs. Moreover, an analysis/valuation of all avoidance actions and other claims intended to be included in the sale to the Stalking Horse Bidder must be provided.

(b) The Overbid Provisions Will Chill Competitive Bidding

14. Pursuant to the Bid Procedures, the Minimum Initial Overbid must be greater than the Baseline Bid that is announced by the Debtors at the commencement of the Auction, and be in an amount no less valuable than the Bid Protections (Break-Up Fee of at least \$690,000, plus Expense Reimbursement of up to \$ 1 million), plus an additional \$750,000 (i.e., the Minimum Initial Overbid must be \$2.4 +million, above the Baseline Bid). Any additional Overbid after the Minimum Initial Overbid is requested to be made in increments of at least \$250,000. Not only are these Overbid requirements unduly burdensome and will chill bidding, they are impractical and illogical when considered in the context of partial bids. All of these requirements must be substantially adjusted downward to allow for competitive bidding.

(c) The Break Up Fee and Expense Reimbursement Is Unwarranted

15. Bid protections in bankruptcy cases are not presumptively valid. *See In re O'Brien Env't'l Energy, Inc.*, 181 F.3d 527, 535 (3d Cir. 1999). Break-up fees and expenses are only appropriate where there is evidence that "the fees were actually necessary to preserve the value of the estate." *See id.* at 535.; *In re Reliant Energy Channelview LP*, 403 B.R. 308, 311 (D. Del. 2009), *aff'd*, 594 F.3d 200, 210 (3d Cir. 2010). The authority cited by the Debtors describes break-up fees in the range of 1.5% to 3%. Here, the Break Up Fee and Expense Reimbursement are in excess of 7%.<sup>11</sup> Accordingly, such protections should be reduced. Moreover, the Break-Up Fee and a Expense Reimbursement, are both payable so long as the Stalking Horse Bidder is not the Successful Bidder regardless of whether a transaction is consummated. Additionally, the Debtor propose that such protections be deemed superpriority administrative expense claims without sufficient basis.

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<sup>11</sup> *See* footnote 5.

16. Relatedly, the proposed Bidding Procedures are set up such that the Stalking Horse Bidder will benefit by being able to credit bid the Break Up Fee and Expense Reimbursement in each round of bidding after it is initially outbid, which approach chills bidding, unfairly tipping the sale process in favor of the Stalking Horse. *See* Proposed Bidding Procedures, p. 11. This approach is not favored and creates a bidding war where the new bidder must always awkwardly bid significantly more than the Stalking Horse Bidder in each and every round of bidding if the Stalking Horse Bidder chooses to re-enter the bid contest after being topped. The bidders should be required to bid the same dollars, without further credit for the Break Up fee and Expense Reimbursement.

(d) *The Perceived Restriction on Partial Bids Will Curb Competitive Bidding*

17. The Bid Procedures do not expressly permit partial bids or lot bids. Rather, the Bid Procedures require that "each bid must state that it includes an offer by the Bidder to purchase substantially all of the Assets" while footnoting that "[t]he Debtors in consultation with the Consultation Parties, may waive or modify the application of the Qualified Bid conditions in respect of any Bids for a portion of the Assets." *See* Bid Procedures, p. 6. The Bid Procedures should dispense with such confusing language and permit partial or lot bids. Partial bids do not violate the Code and should be encouraged to the extent that they may result in a larger aggregate recovery for the estate. Moreover, component bids should not be excluded solely because the combination of all component bids does not exceed the Stalking Horse Bid. In the case of partial bids, where each bidder will not know what its counterparts are bidding, flexibility and inclusion should be the rule – not gating and exclusion.

(e) *The Proposed Assumption Procedures Should Be Modified*

18. The Assumption Procedures should be modified to provide (i) more than nine (9) days, for counterparties to receive, review and object to the proposed assumption of its contracts, (ii) more than one (1) day for counterparties to object to adequate assurance of future payment from the Successful Bidder that is not the Stalking Horse Bidder,<sup>12</sup> (iii) deadlines to object to any Supplemental Assumption Notice should be set at a minimum number of days of notice.

**RESERVATION OF RIGHTS**

19. The Committee reserves the right to supplement this Objection or to raise additional or further objections to the Bid Procedures Motion, the Stalking Horse APA, or proposed Bid Procedures at or prior to the Bid Procedures Hearing, Sale Hearing or any other relevant hearing.

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<sup>12</sup> Indeed, the Debtors anticipated service of the notice of successful bidder is unlikely to even reach the counterparties in time for them to file an objection. *See* Bid Procedures Motion, ¶25.

**CONCLUSION**

WHEREFORE, for the reasons stated above, the Committee respectfully requests that the Court deny the Bid Procedures Motion as submitted, and grant such other and further relief as this Court deems just and proper.

Dated: February 28, 2020

**MORRIS JAMES LLP**

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