

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE
COMMISSION,

Civil Case No. 16-cv-6848

Plaintiff,

v.

PLATINUM MANAGEMENT (NY) LLC, *et al.*;
Defendants.

**NAVIDEA BIOPHARMACEUTICALS, INC.’S LIMITED OBJECTION TO
RECEIVER’S MOTION FOR ENTRY OF AN ORDER ESTABLISHING CLAIMS BAR
DATES AND APPROVING A PROOF OF CLAIM FORM**

Navidea Biopharmaceuticals, Inc. (“Navidea”), through undersigned counsel, objects on a limited basis to the Receiver’s Motion for Entry of an Order Establishing Claims Bar Dates and Approving a Proof of Claim Form (the “Motion”)¹. Navidea does not object to establishing a proof of claim process, but objects to the Motion, and the proposed order submitted as Exhibit D to the Motion (the “Proposed Order”), because the Motion and the Proposed Order create ambiguity about the applicability of the proof of claim process to claims against receivership entities, such as Navidea’s, which have accrued or will accrue after December 19, 2016 but which are not related to the provision of goods or services.

The Receiver, in the Memorandum of Law in Support of the Motion (the “Memorandum”)² presents authority that any person with a claim against the Receiver or the Receivership Estate must assert the claim in the court in which the Receiver was appointed. Memorandum, at 11. That is precisely why Navidea sought to raise its claim against the Receiver in this Court. *See* Navidea’s Motion for an Order Lifting the Litigation Stay (the “Motion to Lift

¹ Docket 424

² Docket 424-6

Stay”) filed June 21, 2018³. However, as explained below, neither the Motion, nor the Proposed Order, nor any of the associated filings by the Receiver, provide sufficient clarity as to whether, and how, Navidea’s claim will be addressed. This is crucially important because failing to abide by the proof of claim process bars the future assertion of a covered claim.

The Proposed Order generally provides that “[a]ny Claimant who is required to submit a Proof of Claim, but fails to do so in a timely manner or in the proper form, shall be forever barred, estopped, and enjoined to the fullest extent allowed by applicable law from asserting in any manner, such Claim against the Receivership Entities...” Proposed Order⁴, §5(xi). A Claimant is defined as anyone holding a Claim, and a Claim is broadly defined as “a claim to a right to payment...” *Id.*, § 3. The only exception is that “Creditors holding claims based on the provision of good or services to the Receivership Entities or to the Receiver after December 19, 2016 are not be required [sic] to submit proofs of claim on or before the applicable Bar Date...” *Id.*, § 5(ii). Similar language is also found in the Bar Date Publication Notice⁵, § 6. This creates ambiguity regarding the treatment of claims that accrue after December 19, 2016, but which are not for the “provision of good or services to the Receivership Entities or to the Receiver...” This ambiguity should be resolved before the Proposed Order is entered. One way to do so would be to change the first sentence of § 5(ii) of the Proposed Order to read “[c]reditors holding claims against the Receivership Entities or the Receiver which accrued after December 19, 2016 (“Administrative Claims”) are not required to submit proofs of claim on or before the applicable Bar Date and will not be subject to the Bar Dates.” Alternatively, if the intent is not to have Navidea’s claim against the Receiver be part of the proof of claims process, that could be specifically be added to the Proposed Order before the Court enters the Proposed Order.

³ Docket 342

⁴ Docket No. 424-5

⁵ Docket 424-4

Navidea's claim against the Receiver was the subject of the Motion to Lift Stay. Generally, through the Motion to Lift Stay, Navidea sought leave from this Court to assert a claim for indemnification through a Third-Party Complaint in *Platinum-Montaur Life Sciences, LLC v. Navidea Biopharmaceuticals, Inc.*, S.D.N.Y. Case No. 17-cv-9591 (the "Navidea Litigation") based on a March 2, 2017 letter from the then-Receiver, Bart Schwartz. Following briefing on the Motion to Lift Stay, the Court denied the Motion to Lift Stay, but did not reach the merits of Navidea's claim, ruling that Navidea's claim would only be actionable if Platinum-Montaur prevailed against Navidea in the Navidea Litigation, and that, with respect to Navidea's claim, "it makes more sense to wait and see the outcome of the currently pending litigation." Memorandum Decision & Order, 7/17/18⁶, at 4. As a result, Navidea's claim against the Receiver remains unresolved until there is a final resolution in the Navidea Litigation.

As of now, there is no final resolution of the Navidea Litigation, and the Navidea Litigation is unlikely to be finally resolved before whatever date the Court sets for a claims bar date. On October 31, 2018, the trial court in the Navidea Litigation granted Navidea's Motion to Dismiss Platinum Montaur's complaint. However, on November 30, 2018, Platinum-Montaur appealed the trial court's ruling to the Second Circuit. Briefing on the appeal of the Navidea Litigation has not yet begun, and the appeal of the Navidea Litigation is unlikely to be resolved until well after the claims bar date set by this Court.

For these reasons, Navidea objects to the Motion and the Proposed Order and respectfully requests that the Court, before it enters the Proposed Order or as part of entering the Proposed Order, clarify the status of claims, like Navidea's claim, against the Receiver that arise after December 19, 2016 and do not relate to providing goods or services. This will provide clarity to all potential Claimants in advance of the proof of claims process.

⁶ Docket 353

Respectfully Submitted,

/s/ Robert C. Folland

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 14th day of December, 2018, via the Court's CM/ECF electronic filing system, and served via U.S. Mail on all parties not served via the Court's CM/ECF electronic filing system.

/s/ Robert C. Folland
Robert C. Folland