

MEMORANDUM

From: Rihad

Subject: Review key clauses discovered in the due diligence process

Date: December 6, 2020

Review Customer Agreement

Using AI in the due diligence process, analyze three key customer contracts and consider their implication on the drafting of the Merger Agreement

Abstract

Hi Samira

I've had an opportunity to review the clauses Kira identified in the due diligence process. I have summarized the relevant clauses below and provided my suggestions on whether or not to disclose those agreements against the "no conflicts" representation

Let me if you have any questions

Best,
Rihad

MANUFACTURING AGREEMENT 1

In Manufacturing Agreement 1, the provision broadly restricts various forms of assignment without prior written consent of the Vendor, including in a "change of control," which is defined to include "the acquisition (directly or indirectly, whether by merger, consolidation, purchase and sale, share exchange or otherwise)." Accordingly, it seems pretty clear that the Vendor must consent to the proposed transaction before it is consummated, and thus this agreement should be included in the disclosure schedule as a disclosure against the "no conflicts" representation

MANUFACTURING AGREEMENT 2

In Manufacturing Agreement 2, there are two prongs to the termination right flagged by Kira

In the first, Manufacturer may terminate the agreement (without prior consent) if Denove ceases to be a party to the agreement. In the current proposed deal structure for Project Reno, Denove is going to survive the merger, and thus would remain a party to the agreement after the consummation of the transaction. Accordingly, based on the current deal structure, this prong would not likely trigger any obligation to disclose this agreement under the “no conflicts” representation

The second prong gives Manufacturer the right to terminate the agreement upon 30 days’ notice, presumably with or without cause. While this prong does not get triggered, per se, by the transaction, Manufacturer could always decide that they do not like the transaction, and provide notice to terminate. Taking a look at the current language of the “no conflicts” representation, the question is whether the fact that the transaction “gives rise” to a termination right. Here, even though the transaction could cause the Manufacturer to exercise his right to terminate, the right to terminate itself already exists, and so does not arise from the proposed transaction. As such, this agreement should not be included in the disclosure schedule as a disclosure against the “no conflicts” representation

MANUFACTURING AGREEMENT 3

In Manufacturing Agreement 3, the language seems to broadly permit assignments and transfers. However, it also states that “neither Denove nor any of its affiliates (nor any of their respective transferees)” shall commercialize or sell any products that target ovarian cancer in humans before or after the agreement is terminated. While we are not aware of any Denove products that would trigger that prohibition, the prohibition picks up “affiliates,” which would include Sano after the transaction. Sano is a large pharmaceutical company and may have products it is currently commercializing or may already be selling that relate to ovarian cancer in humans. Accordingly, we should ask Sano whether they have any products that would trigger that restriction (or may trigger that restriction within two years of closing), and, if so, we should include this agreement in the disclosure schedule as a disclosure against the “no conflicts” representation

Please let me know if I can be of further assistance

Best regards
Rihad