

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

In re:

KALOBIOS PHARMACEUTICALS, INC.,

Debtor.

Chapter 11

Case No. 15-12628 (LSS)

**Objection Deadline: April 11, 2016  
Related Docket No. 279**

**OBJECTION AND RESERVATION OF RIGHTS TO THE FIRST MONTHLY  
APPLICATION OF BATUTA CAPITAL ADVISORS LLC, AS FINANCIAL ADVISOR  
TO THE DEBTOR, FOR ALLOWANCE OF INTERIM COMPENSATION AND FOR  
INTERIM REIMBURSEMENT OF ALL ACTUAL AND NECESSARY EXPENSES  
INCURRED FOR THE PERIOD JANUARY 19, 2016 TO FEBRUARY 29, 2016**

Gregory Rea, RTAT LLC, Nancy Retzlaff, Armistice Capital Master Fund, Ltd.,

Andrew Pizzo, and Sabine Gritti (collectively, the “Objectors”), by and through their undersigned counsel, hereby object and reserve their rights with respect to the First Monthly Application of Batuta Capital Advisors LLC (“Batuta Capital”), as Financial Advisor to the Debtor, for Allowance of Interim Compensation and for Interim Reimbursement of All Actual and Necessary Expenses Incurred for the period January 19, 2016 to February 29, 2016 [Docket No. 279] (the “Batuta Fee Application”). In support, the Objectors respectfully state as follows:

**FACTUAL BACKGROUND**

1. On December 29, 2015, the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”). The Debtor continues to operate its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.
2. To date, no official committee of unsecured creditors has been formed.
3. On February 4, 2016, the Court entered the Order Pursuant to Bankruptcy Code Sections 105(a) and 331, Bankruptcy Rule 2016 and Local Rule 2016-2 Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals [Docket

No. 150] (the “Interim Compensation Order”). Pursuant to the Interim Compensation Order, on March 21, 2016, Batuta Capital filed the Batuta Fee Application seeking 80% payment of the compensation sought and 100% reimbursement of the expenses incurred on an interim basis.

### **OBJECTION**

4. By the Batuta Fee Application, Batuta Capital seeks approval of \$116,587.50 in fees and \$791.30 in expenses. Payment of the fees requested in the Batuta Fee Application is premature at this time. As this Court is aware, the Objectors commenced an adversary proceeding against the Debtor on January 7, 2016; and on January 29, 2016, the Objectors filed an Amended Complaint [Adv. Proc. Docket No. 15] (the “Amended Complaint”).<sup>1</sup> Thereafter, the Debtor filed a Motion to Dismiss the Amended Complaint on February 1, 2016 [Adv. Proc. Docket No. 19] (the “Motion to Dismiss”). The Objectors’ response to the Motion to Dismiss was filed on March 22, 2016 [Adv. Proc. Docket No. 27]. However, the Court has yet to hear oral argument or rule on the Motion to Dismiss. Accordingly, the Objectors have yet to have a determination on the Motion to Dismiss, as well as have the issues raised in the Amended Complaint resolved by the Court.

5. Through the Amended Complaint, the Objectors have sought a constructive or resulting trust to be established over the Debtor’s funds. Therefore, every dollar that leaves the Debtor’s accounts could very well be – and the Objectors would argue it is – the Objectors’ funds held in trust and not property of the estate. The Court has not yet heard arguments on the Amended Complaint, including the Objectors’ request. It is premature to grant

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<sup>1</sup> On April 1, 2016, the Objectors filed the Plaintiffs’ Motion for (I) Leave to File Amendment to the Amended Complaint and (II) Relief from the Automatic Stay, to the Extent Applicable [Adv. Proc. Docket No. 34] (the “Motion to Amend”) seeking to further amend the Amended Complaint. The Motion to Amend is scheduled to be heard by the Court on April 28, 2016.

the Batuta Fee Application. To do so when the Court has not yet had the opportunity to rule on the Objectors' trust arguments would be unduly prejudicial to the Objectors.

6. The Objectors further expressly reserve, and do not waive, their right to object to the Batuta Fee Application on additional bases. The Objectors specifically reserve their right to object to the reasonableness of the fees and expenses requested in the Batuta Fee Application at any hearing to approve such fees and expenses, including on a final basis.<sup>2</sup> Bankruptcy Code section 330(a)(1) provides that the Court may award to professionals retained under Bankruptcy Code section 327 "reasonable compensation for actual, necessary services" rendered by such professional and "reimbursement for actual, necessary expenses" incurred by such professional. 11 U.S.C. § 330(a)(1).

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<sup>2</sup> As this Court knows, an order allowing compensation is only interim in nature, and fees are not approved on a final basis until the end of the case. See 11 U.S.C. § 330(a)(5) ("[I]f the amount of . . . interim compensation exceeds the amount of compensation awarded under this section, [the court] may order the return of the excess to the estate."); see also S'holders v. Sound Radio, Inc., 109 F.3d 873, 881-82 (3d Cir. 1997) ("[W]e find the bankruptcy court's approach to the so-called final orders inconsistent with the procedures it should have followed prior to entering a truly final order . . . . Before awarding a final fee, the bankruptcy court should evaluate the services performed by the professional in toto to make an overall determination of the awards which are merited by the entire course of services.").

WHEREFORE, as set forth herein, the Objectors respectfully request that the Court (i) sustain the Objection, and (ii) grant the Objectors such further relief as just and proper.

Dated: April 11, 2016

**WOMBLE CARLYLE SANDRIDGE &  
RICE, LLP**

/s/ Matthew P. Ward

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