IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: KALOBIOS PHARMACEUTICALS, INC., Reorganized Debtor.	)	Chapter 11 Case No. 15-12628 (LSS)
KALOBIOS PHARMACEUTICALS, INC., Plaintiff, v. SAVANT NEGLECTED DISEASES, LLC, Defendant.	)	Adv. Proc. No. 17-50898 (LSS)

KALOBIOS PHARMACEUTICALS, INC.'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO REMAND TO THE COMPLEX COMMERCIAL LITIGATION DIVISION IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

Dated: August 22, 2017
Wilmington, Delaware

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Pursuant to 28 U.S.C. §§ 1334(c), 1447(c) and 1452(b) and Rule 9027 of the Federal Rules of Bankruptcy Procedure, Plaintiff KaloBios Pharmaceuticals, Inc. ("KaloBios") submits this reply brief in further support of its motion to remand for the reasons stated in KaloBios' Opening Brief (Docket No. 13) ("Opening Brief" or "Opening Br.") and in response to Defendant Savant Neglected Diseases LLC's Opposition Brief (Docket No. 32) ("Opposition Brief" or "Opp. Br.").[1]

PRELIMINARY STATEMENT

The Opposition Brief confirms that Savant had no basis for removal. Savant admits that it deliberately disregarded the Forum Selection Clause contained in Section 14.2 of the parties' MDC. It offers no explanation either for failing to inform the Court of the Forum Selection Clause in its Notice of Removal or for ignoring KaloBios' choice of venue. Savant also offers no legal authority that so much as suggests that its consent to venue in Section 14.2 did not preclude removal. Thus, it remains clear that Savant's failure to abide by the MDC's Forum Selection Clause is reason alone to grant KaloBios' remand motion.

Moreover, the Opposition Brief resorts to creating a straw man in an ineffective effort to overcome mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2). Savant asserts that KaloBios' Complaint raises bankruptcy issues, but it only does so by re-characterizing the claims as misrepresentation or fraud causes of action. All four of KaloBios' causes of action, however, are contractual, alleging either breach of contract or declaratory judgment claims concerning specific MDC provisions. None of these post-confirmation state law contractual claims invoke any bankruptcy right, nor could they be asserted only in a bankruptcy proceeding. They are non-core under well-established precedent. Savant's attempt to re-characterize KaloBios' claims is

[1] Except where otherwise indicated, terms shall have the meaning given to them in KaloBios' Opening Brief.

irrelevant in any event because claims based on Savant's misrepresentations would still not raise bankruptcy issues.

This action also meets each of the factors for permissive abstention pursuant to 28 U.S.C. § 1334(c)(1). KaloBios instituted this post-confirmation state law action in Delaware Superior Court. Savant removed to this Court in a blatant effort at forum shopping so as to avoid responding to KaloBios' Rule 67 motion, which would permit KaloBios to deposit disputed payments with the Court and avoid any arguable default. Instead, Savant used removal and the delay in proceedings that it created to threaten KaloBios with default and attempt to foreclose upon and sell KaloBios' assets. This Court found that KaloBios had a likelihood of success on its contract claims, issuing a temporary restraining order to prevent Savant from pursuing these activities.

Finally, because Savant had no objectively reasonable basis for removal, KaloBios is entitled to reimbursement for all costs, expenses and attorneys' fees associated with this remand motion pursuant to 28 U.S.C. § 1447(c).

STATEMENT OF SUPPLEMENTAL FACTS

In addition to the facts recited in the Opening Brief, KaloBios sets forth the following supplemental facts that failed to mention Savant in the Opposition Brief.

A. KaloBios' Rule 67 Motion and Savant's Notices of Default and Foreclosure

On July 10, 2017, at the same time it filed the Complaint, KaloBios filed a motion to deposit a disputed Milestone Payment with the Delaware Superior Court pursuant to Rule 67 of the Rules of Civil Procedure for the Superior Court of the State of Delaware (the "Rule 67 motion"). Declaration of Howard J. Kaplan in Support of KaloBios' Motion to Remand ("Kaplan Decl.") Ex. 1. Nonetheless, Savant issued its first notice of default the next day. Kaplan Decl. Ex. 2. KaloBios immediately identified several invalidating features in Savant's default notice. Kaplan Decl Ex. 3. Although Savant's counsel consented to an expedited briefing schedule on the Rule 67 motion on July 12, 2017, hours later it filed the Notice of Removal in this action. Kaplan Decl. Exs. 3; 4. On July12, 2017, Savant issued a "Notice and Request for Inspection" to KaloBios, seeking inspection of KaloBios' assets. Kaplan Decl. Ex. 5. Yet, on July 14 and 20, 2017, KaloBios indicated that it was prepared to coordinate the timing and logistics of an inspection with Savant. Kaplan Decl. Exs. 6; 7.

On July 20, 2016, KaloBios' counsel wrote Savant's counsel to confirm that, notwithstanding the notice of removal, the agreed-upon Rule 67 briefing schedule would apply, stating "your purported removal of the case has not diminished the exigent circumstances." Kaplan Decl. Ex. 8. Savant's counsel replied, however, that it would not respond to the Rule 67 motion, "nor are there any exigent circumstances." Kaplan Decl. Ex. 9.

Then, on June 21, 2017, Savant sent KaloBios a second notice of default. Kaplan Decl. Ex. 10. On July 23, 2017, KaloBios' counsel proposed that the parties enter a standstill agreement until its Rule 67 motion was decided. Kaplan Decl. Ex. 13. Savant rejected that proposal on July 24, 2017. Kaplan Decl. Ex. 12.

On August 1, 2017, KaloBios moved to remand this case to Delaware Superior Court. Late in the evening of August 2, 2017, Savant's counsel sent to KaloBios' counsel a "Notice of Foreclosure and Sale" demanding that KaloBios assemble its assets and make available to Savant by one week later, August 9, 2017, and stating that Savant would sell those assets on September 1, 2017. Kaplan Decl. Ex. 14.

B. KaloBios' Motion for a Temporary Restraining Order and Preliminary Injunction

On August 4, 2017, KaloBios moved for a temporary restraining order and a preliminary injunction, seeking to prevent Savant from foreclosing on KaloBios' assets and from taking any actions in furtherance of claiming default by KaloBios. Kaplan Decl. Ex. 15 at 1-3, 24. This Court heard argument on the motion for a temporary restraining order on August 7, 2017. Kaplan Decl. Ex. 16. The Court granted the motion for a temporary restraining order, finding that KaloBios had demonstrated both a likelihood of success on the merits and irreparable harm. *Id*. at 35:12-40:24.

Also on August 7, this Court entered an order setting out its ruling on the temporary restraining order. Kaplan Decl. Ex. 17. Among other things, this order prohibits Savant from collecting on or selling KaloBios' assets, entering KaloBios' premises, issuing any default notices to the KaloBios, or attempting to exercise any other remedies under the MDC or the parties' Security Agreement. *Id.* On August 9, 2017, the parties stipulated to continue this order's provisions until further order of the appropriate court and the Court so-ordered that stipulation that same day. Kaplan Decl. Ex. 18.

C. This Court's Findings of KaloBios' Likelihood of Success on the Merits of its Claims

At the August 7, 2017 hearing, this Court determined that KaloBios made the necessary *prima facie* showing of likelihood of success on the merits. *See* Kaplan Decl. Ex. 16 at 38:9-16. It specifically found so with respect to Section 4.8 of the MDC, the cost shifting provision, pursuant to which Savant is obligated to pay for all cost overages exceeding the Joint Development Program's budget by more than $500,000. *See id.* at 36:6-38:3.

Based on the evidentiary materials submitted by the parties, this Court rejected Savant's new argument that it had no obligation to pay for the cost overruns because it now claimed that the Joint Development Program had allegedly been terminated in September 2016. *Id.* at 37:19-38:3. As the Court stated, the evidence "suggests to the contrary," showing "that, in fact, there may be amounts owing but discussion of the budget issues in Savant's view should not take place at this time. That does not suggest to me that Savant takes the position that there could never be any amounts owing under Section 4.8 of the Agreement." *Id.* at 37:21-38:3.

The Court made this ruling after being shown two emails from June of this year in which Savant's CEO, Stephen Hurst ("Hurst") acknowledged that Savant had an obligation to pay the cost overruns but believed the discussion to be premature until there has been full FDA approval of benznidazole. *See* Kaplan Decl. Exs 16 at 31:16-32:10; 37:19-38:3; 19; 20. In addition, the September 2016 email exchange between Hurst and KaloBios' CEO Cameron Durrant that Savant referenced to assert its new argument actually *undermines* that argument because it shows only the parties' joint development "team" *i.e.* its "Joint Development Committee" was terminated, not the Joint Development Program itself. The Joint Development Program represented the ultimate goal of FDA approval for benznidazole under Section 4.1 of the MDC, and necessarily remained in effect. *See* Kaplan Decl. Ex. 16 at 33:22-34:9; Declaration of Daniel P. Goldberger Opposition to Motion for Remand (Docket No. 33) Ex. 7.[2]

D. <u>KaloBios' Ability to Pay the Milestone Payments</u>

Savant falsely intimates in the Opposition Brief that KaloBios' latest 10Q filing suggests it does not have sufficient cash to pay Savant outstanding Milestone Payments. Savant neglects to mention that the same 10Q identifies two other facts that directly refute this specious allegation. First, the 10Q states that, on July 8, 2017, KaloBios received a commitment from its existing investors providing for additional net financing proceeds of up to approximately $5.0 million. *See* Kaplan Decl. Ex. 21 at 21; Kaplan Decl. Ex. 22. Second, the 10Q also references

[2] In the Opposition Brief, Savant continues to claim that the Joint Development Program was terminated without submitting any additional evidence or even an affidavit or declaration from any Savant employee including Mr. Hurst. *See* Opposition Br. at 7-10. Savant fails to note the crucial and unambiguous difference between the Joint Development Program and the Joint Development Committee (or "team"). Kaplan Decl. Ex. 23 at 29-35, 37. Moreover, Savant's argument is nonsensical because Mr. Hurst continues to participate on plan efforts as a member of the Joint Steering Committee, which requires, under the MDC, that the Joint Development Program is ongoing. Kaplan Decl. Ex. 23 at 35.

the Rule 67 motion made when filing this action, as well as KaloBios' continued willingness to deposit both Milestone Payments with the appropriate pending the outcome of the litigation, which KaloBios has repeatedly reiterated. *See* Kaplan Decl. Exs. 16 at 10:15-25; 21 at 34.[3]

ARGUMENT

I. SAVANT IS CONTRACTUALLY BARRED FROM REMOVING PURSUANT TO THE MDC'S FORUM SELECTION CLAUSE

As KaloBios explained more fully in the Opening Brief, Section 14.2 of the MDC contains a Forum Selection Clause in which Savant consents to venue in the Delaware Superior Court during the post-Closing period, as that term is defined in the MDC. Opening Br. at 10-11; Kaplan Decl. Ex. 23 at 71. The Forum Selection Clause states that, during the post-Closing period:

> either party may bring suit exclusively in the state and federal courts of competent jurisdiction located in the State of Delaware and in no other jurisdiction[.] Each Party hereby consents to personal jurisdiction and venue in, and agrees to service of process issued by, such courts and all such actions shall first be brought before such courts.

Id. Savant provides no explanation in the Opposition Brief as to why it failed to mention the Forum Selection Clause at all in its Notice of Removal.

Savant does not dispute the fact that the Delaware Superior Court is a court of appropriate jurisdiction for this action. Savant also does not contest that this action was filed over a year after Closing and abandons its contention that this Court has exclusive jurisdiction over this dispute, despite stating as such in its Notice of Removal. *See* Opposition Br. at 18; Kaplan Decl. Ex. 5 at 1. Likewise, Savant does not—and could not—challenge the well-established Third Circuit legal principle that consent to venue in state court constitutes a waiver

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[3] There is serious concern that Savant does not have the ability to pay the cost overages. Savant has, from time to time, been a company not in good standing in Delaware. *See* Kaplan Decl. Ex. 1 at 8-9.

of the right to remove actions to federal courts and warrants remand. *See Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1217 (3d Cir. 1991) (a forum selection clause consenting to any court of competent jurisdiction in the United States constituted a waiver of removal rights); *PGT Trucking, Inc. v. Lyman*, 500 Fed. Appx. 202, 204 (3d Cir. 2012) (where "a defendant has removed a case in violation of a Forum Selection Clause, remand is the appropriate and effective remedy for the wrong."). All Savant argues, without any legal support, it that its consent to venue in Delaware Superior Court did not waive its right to remove because the clause permits cases to be brought in either state or federal courts within Delaware.

This unsupported proposition is not only directly contrary to *Foster*, but is also contrary to well-established law that, under a forum selection clause containing forum options, once a party initially selects a forum, "its decision is binding" upon the defendant, and is exclusive. *AGR Fin., L.L.C. v. Ready Staffing, Inc.*, 99 F.Supp.2d 399, 403 (S.D.N.Y. 2000) (remanding case removed in violation of a provision that any "action . . . may be brought in the courts of the State of New York in the City of New York or of the United States of America in the Southern District of New York[.]"); *Post Investors LLC v. Gribble*, 2012 WL 4466619 at *4 (S.D.N.Y. Sept. 27, 2012) (reaffirming *AGR*); *see also iNet Directories, LLC v. Developershed, Inc.*, 394 F.3d 1081, 1082 (8th Cir. 2005) (a forum selection clause stating that that the parties waived objections to venue in the federal and state courts of Missouri "unambiguously prohibited [the defendant] from objecting to venue by removing the case to federal court."); Order Granting Remand (at Kaplan Decl. Ex. 26) , *QFA Royalties LLC v. Petke*, Civil Action No. 06-cv-01633-WDM-CBS, at 2-3 (D. Colo., entered Nov. 13, 2006) (remanding based on a forum selection clause consenting to jurisdiction in the state and federal courts of Colorado, because "once a claim is asserted in whichever of the two acceptable venues is chosen by a party initiating the case, it shall be the exclusive venue for the dispute.").

Consequently, Savant has waived any right to remove an action commenced by KaloBios in Delaware state court to a Delaware federal court. Savant does not contest the validity of the Forum Selection Clause and, thus, that clause is "entitled to great weight and [is] presumptively valid." *PGT Trucking*, 500 Fed. App'x. at 204.

II. THE COURT MUST ABSTAIN UNDER 28 U.S.C. § 1334(C)(2)

In the Opposition Brief, Savant does not dispute that remand is appropriate where a court finds that mandatory abstention is warranted pursuant to 28 U.S.C. § 1334. *See Stoe v. Flaherty*, 436 F.3d 209, 215 (3d Cir. 2006). Furthermore, Savant concedes that KaloBios has established four of the five *Stoe* factors governing mandatory abstention under 28 U.S.C. § 1334(c)(2). *See* Opp. Br. at 19-20; Opening Br. at 15-19 (arguing KaloBios has met all five *Stoe* factors).

A. Mandatory Abstention is Required Because the Complaint Does not Allege Core Proceedings Claims

Savant only contests the second *Stoe* factor, by claiming that this action is somehow a "core" proceeding. Opp. Br. at 19.[4] KaloBios' post-confirmation contractual claims, however, are not "core" under the Third Circuit's well-established test: "a claim will be deemed core if (1) it invokes a substantive right provided by title 11 or (2) if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case." *In re Exide Techs.*, 544 F.3d 196, 206 (3d

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[4] Savant argues that, in the alternative, this court has non-core "related to" jurisdiction over this matter. Opp. Br. at 15-17. KaloBios reiterates its arguments made in the Opening Brief that this court does not have "related to" jurisdiction either, and must remand this case for lack of subject matter jurisdiction, *see* Opening Br. at 13-15. But this Court need not reach that issue because a claim based on "related to" jurisdiction would be subject to mandatory abstention under *Stoe* and 28 U.S.C. § 1334(c)(2).

Cir. 2008) (citations omitted); *see also* Opening Br. at 13.[5] It is fundamental that "[a] proceeding arises in title 11 if the proceeding by its nature, and not the particular factual circumstance, could arise only in the context of a bankruptcy case." *Stoe v. Flaherty*, 436 F.3d at 218.; *see also In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 621 (Bankr. D. Del. 2016). Where the claims are "garden variety" state law contract claims that could arise outside of the bankruptcy context they are not core proceedings. *See In re VeraSun Energy Corp.*, No. 08-12606 (BLS), 2013 WL 3336870, at *4 (Bankr. D. Del. 2013) (proceeding was non-core where "[a]bsent bankruptcy, the claims raised in the adversary proceeding would be typical garden-variety state law litigations.") (quoting *Berks Behavioral Health, LLC v. St. Joseph Reg'l Health Network (In re Berks Behavioral Health, LLC)*, 464 B.R. 684, 689 (Bankr. E.D. Pa. 2012)).

Nothing in KaloBios' post-confirmation state-law contract claims are unique to the bankruptcy context, and they are accordingly not core proceedings. Savant barely addresses KaloBios' actual causes of action, all of which allege breaches of the MDC that occurred post-confirmation. Savant makes little-to-no mention of three of KaloBios' four causes of action, relegating its discussion of the Section 4.8 contract and declaratory judgment claims to a footnote, and ignoring the MDC Section 14.2 dispute resolution claim altogether.

The relevant misrepresentation that Savant focuses on is that it falsely represented in Section 8.7(b) of the MDC that the Acquired Assets were "all of the assets . . . necessary to the Exploitation" of benznidazole. Kaplan Decl. Ex. 23 at 48. This is a post-confirmation misrepresentation that is not inseparable from the bankruptcy context because any claim based

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[5] To the extent that Savant suggests without argument that this action may be core under 28 U.S.C. § 157(b)(2) because it is a "matter[] concerning the administration of the estate," a "confirmation[] of plan[]" or an "adjustment of the debtor-creditor or the equity security holder relationship," these suggestions make no sense. Opp. at 12. The plan has already been confirmed, the estate has already been administered, and nothing in KaloBios' claims implicate any party's equity interests.

on this misrepresentation would necessarily arise post-confirmation. *See In re Coastal Petroleum Corp.*, 142 B.R. 177, 179 (Bankr. N.D. Ohio 1992) (post-confirmation contract and conversion action was non-core where contract was authorized by confirmation order and reached during bankruptcy proceeding, but executed post-confirmation); *In re Superior Air Parts, Inc.*, 516 B.R. 85, 94 (Bankr. N.D. Tex. 2014) (post-confirmation fraudulent concealment claims were not core proceedings, even though the parties had a pre-confirmation relationship).

Savant emphasizes that the "purported misrepresentations [that] were allegedly made ***during*** this Court's administration of KaloBios' bankruptcy case." Opp. Br. at 1 (bold and italics in original), *see id.* at 13 (asserting that the "allegations in KaloBios' Complaint . . . relate directly to statements and representations that Savant made during the bankruptcy.") It is apparent that Savant seeks to shift focus from its post-confirmation breaches to misrepresentations it made during the bankruptcy proceedings in a strained attempt to try and meet the Third Circuit requirement that a core proceeding be, as Savant describes it, "inseparable" from the bankruptcy context. *See* Opp. Br. at 13; *see also e.g. Binder v. Price Waterhouse & Co. LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154, 163 (3d Cir. 2004); *In re Nutraquest, Inc.*, No. 03-44147RTL, 2007 WL 3311725, at *4 (Bankr. D.N.J. Nov. 5, 2007).

Three of the four contract claims alleged in KaloBios' complaint are based on facts and circumstances that all occurred <u>after</u> KaloBios emerged from bankruptcy. The fourth cause of action for Savant's breach of its representation and warranties in Section 8.7(b) also did not arise in the bankruptcy proceeding, but instead was made to KaloBios in the MDC.

The Complaint, thus, focuses on conduct that arose outside the context of bankruptcy, alleging "garden variety state law claims" including claims to collect "accounts receivable after confirmation of the Plan" that are not subject to core jurisdiction. *In re VeraSun*, 2013 WL

3336870 at *4 (citing *Berks Behavioral Health,* 464 B.R. at 689). The causes of action are "not specific to bankruptcy and therefore cannot be characterized as 'core.'" *Id.*; *see also Jazz Photo Corp., ex rel. Moore v. Kaplan & Gilman, L.L.P.*, No. 06-1793, 2006 WL 2000230, at *4-6 (D.N.J. July 17, 2006) (malpractice action was not a core proceeding where it the claim originated post-confirmation).

Finally, the Confirmation Order itself underscores that KaloBios' contract claims are not inherently bankruptcy claims by providing that KaloBios was authorized to enter into and perform its agreement with Savant "without further notice or action, order, or approval of the Court or any other Person," and that all transactions contemplated by that agreement were approved "in full force and effect, and valid, binding, and enforceable immediately in accordance with their terms without further notice to or action, order, or approval of the Court or any other Person or Act or Action." Kaplan Decl. Ex. 24 at 34-35.

B. Even if the Complaint Alleged Misrepresentation Claims, This Action Would Not be a Core Proceeding

KaloBios' complaint does allege that Savant made misrepresentations to KaloBios during the bankruptcy proceedings. However, such misrepresentations, even if they were the basis of a fraud claim, would not be core, because they were made during the negotiation of an agreement that is not, by its nature, unique to the bankruptcy context. *See In re Coastal Petroleum Corp.*, 142 B.R. at 179. The alleged misrepresentations were made by, Savant, a non-fiduciary third party, and, thus, are even further removed from the bankruptcy context. *Compare Barnett v. Stern*, 909 F.2d 973, 980 (7th Cir. 1990) (Trustee's RICO claims against debtor were non-core because "same claim for the same damages over the same time period" could have been brought in another court) *with In re Southmark,* 163 F.3d 925, 931 (5th Cir. 1999) (malpractice claim against court-appointed accountant was core because "it is evident that a court-appointed professional's dereliction of duty could transgress both explicit Code responsibilities and applicable professional malpractice standards").

C. This Court's Approval of the Savant Transaction Does Not Create Core Jurisdiction

Savant also tries incorrectly to establish core jurisdiction by claiming that, "[b]ecause the MDC and the Post-Petition Letter of Intent were cornerstones of the Plan," this matter goes "to the heart of the Plan, the Confirmation Order, and KaloBios' reorganization overseen by this Court." Opp. At 16.

Where "[r]esolution of [the] matter will not require a court to construe the Plan," there is no sufficient nexus to the bankruptcy plan to confer even "related to" jurisdiction. *In re Resorts*, 372 F.3d at 170; *see also Battle Ground Plaza, LLC v. Ray (In re Ray)*, 624 F.3d 1124, 1130-33 (9th Cir. 2010) (finding no bankruptcy jurisdiction over a post-confirmation claim for breach of contract under state law even though the relevant transaction was a part of the liquidation plan and had been approved by the courts). KaloBios' complaint obviously does not require the interpretation of the Plan.

Likewise, the mere fact that this Court approved the transaction does not create "core" jurisdiction. *See Unified Data Sys., Inc. v. Alamarc Corp. (In re Almarc Corp.)*, 94 B.R. 361, 366 (Bankr. E.D. Pa. 1988) ("While it is true the court approved the agreement, that alone would not confer jurisdiction to resolve all subsequent disputes regardless of their connection to the bankruptcy case.") (citation omitted); *see also In re Ray* at 1130-33; *cf. In re Stone & Webster, Inc.*, 367 B.R. 523, 529 (Bankr. D. Del. 2007) ("[T]he settlement approval procedure does not make the settlement unique to a bankruptcy case. What took place in the bankruptcy case was a claim and a settlement that could have been effected outside of the bankruptcy court if the Debtors had not filed petitions.").

The cases Savant cites do not support a different conclusion. For example, in *Emerald Capital*, the court found post-confirmation "core" bankruptcy jurisdiction over a dispute including claims regarding an asset purchase agreement, where a trustee brought suit specifically to enforce the terms of the plan, not just the terms of the asset purchase agreement. *See Emerald Capital Advisors Corp. v. Karma Auto. LLC (In re FAH Liquidating Corp.)*, 567 B.R. 464, 467-69 (Bankr. D. Del. 2017). There, the plan itself explicitly adopted the terms of the asset purchase agreement and required that the trustee receive 20% equity in a newly created company. *Id.* at 467-68. The trustee claimed that the purchaser diluted that equity interest, in direct violation of the plan. *Id.* Here, in contrast, the Plan does not adopt any specific terms of the MDC, or the Letter of Intent, stating only that "the Reorganized Debtor . . . shall be authorized to consummate the Savant Transaction in accordance with the Savant Acquisition Agreement [*i.e.*, as defined, the post-confirmation agreement effecting the Savant Transaction, including the MDC]." Kaplan Decl. Ex. 25 at 30. Because KaloBios is not seeking to enforce the terms of the Plan, and no provision of the Plan incorporates the specific provisions of the MDC, the analysis in *Emerald Capital* does not bear on whether this court has core jurisdiction over KaloBios' claims.

In re Southmark is also inapposite. *See Id.* 163 F.3d 925; Opposition Br. at 12-15. In that case, the court found core jurisdiction over malpractice claims against a *court-appointed* accountant and fiduciary of the debtor for misconduct that occurred during the bankruptcy period, noting that "it is evident that a court-appointed professional's dereliction of duty could transgress both explicit Code responsibilities and applicable professional malpractice standards." *Id.* 163 F.3d at 931-32. The court in *In re. Southmark* held that "[a] *sine qua non* in restructuring the debtor-creditor relationship is the court's ability to police the fiduciaries . . . who are responsible for managing the debtor's estate in the best interest of creditors," and found core jurisdiction lay where a suit "like the present one inevitably involves the nature of the services performed for the debtor's estate and the fees awarded under superintendence of the bankruptcy court[.]" *Id.* at 931.

No similar issues regarding Code responsibilities or matters fundamental to this Court's supervisory role are implicated here.[6]

D. The Plan's Retention of Jurisdiction Language Does not Create Core Jurisdiction

In its Notice of Removal, the retention of jurisdiction language was, in Savant's view, a crucial basis for removal. Kaplan Decl. Ex. 5 at 5. Savant has since abandoned that position. It no longer contests fundamental Third Circuit law, which holds that unless there is a separate and independent basis for bankruptcy jurisdiction, "retention of jurisdiction provisions in a plan of reorganization or [confirmation order] are fundamentally irrelevant," and that thus "if a court lacks jurisdiction over a dispute, it cannot create that jurisdiction by simply stating it has jurisdiction in a confirmation or other order." *In re Resorts*, 72 F.3d at 161 (citations omitted).

Savant's argument now is just that the retention of jurisdiction language in the Confirmation Order is an indication that this court is "in the best position" to hear this case. Opposition Br. at 17. This court's familiarity with KaloBios bankruptcy proceeding is not in dispute, but familiarity does not create jurisdiction. Where, as here, a claim is based on "an agreement that expressly refers any dispute to other forums," a retention of jurisdiction provision will not vest bankruptcy court jurisdiction over the dispute, and even where the "court approved

[6] The remaining cases Savant cites in its argument on this point, *In re Marcus Hook* and *In re Wolverine Radio* stand only for the general propositions that a bankruptcy court has core jurisdiction over a proceeding brought by a purchaser of real property in a court-approved sale that relates to the property purchased and that a bankruptcy court has core jurisdiction over a proceeding involving the dischargeability of debts and challenges confirmation of plans respectively. *See In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 267 (3d Cir. 1991); *Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1145 (6th Cir. 1991).

the agreement, that alone would not confer jurisdiction to resolve all subsequent disputes regardless of their connection to the bankruptcy case." *In re Almarc Corp.*, 94 B.R. at 366. Thus, as KaloBios has already demonstrated in the Opening Brief, the retention of jurisdiction language itself does not invest this Court with bankruptcy jurisdiction and certainly has no bearing on whether there is core jurisdiction necessary for Savant to circumvent Section 1334(c)(2) mandatory abstention.

III. THE COURT SHOULD EXERCISE ITS DISCRETION TO ABSTAIN UNDER 28 U.S.C. § 1334(C)(1)

The permissive abstention factors of 28 U.S.C. § 1334(c)(1) also apply. None of the twelve factors Savant identified in the Opposition Brief weigh against abstention. Opposition Br. at 19-22; *see LaRoche Indus., Inc. v. Orica Nitrogen LLC (In re LaRoche Indus., Inc.)*, 312 B.R. 249, 253-54 (Bankr. D. Del. 2004).

As to the first factor, this case's outcome will have little if any effect on "the efficient administration of the estate." The estate here has been largely administered, with less than $700,000 in outstanding claims to be reconciled. Kaplan Decl. Ex. 21 at 10; *see Walnut Assocs. v. Saidel*, 164 B.R. 487, 493 n.8 (E.D. Pa. 1994) (discussing considerations as to whether a plan has been "fully administered"); 11 U.S.C. § 1101 (defining "substantial consummation" of a plan as occurring when there is, *inter alia*, "transfer of all or substantially all of the property proposed by the plan to be transferred").

The second and third factors also clearly favor abstention because KaloBios has asserted post-confirmation state law breach of contract and declaratory judgment claims. Savant's attempt at re-characterizing those claims as misrepresentation claims is incorrect but does not, in any event, enable it to refute that state law issues predominate over bankruptcy issues or that there is some difficult or unsettled issue of state law. *See In re Integrated Health Servs.*, 291

B.R. 615, 621 (Bankr. D. Del. 2003) (citations omitted) (even if matter did not involve unsettled issues of state law, fact that state law issues predominated weighed in favor of having state court decide them).

The fourth, fifth and sixth factors favor abstention for reasons specified more fully in the Opening Brief. *Id.* at 17, 19. The fourth, because a removed action is a related proceeding commenced in state court. *See Stoe*, 436 F.3d at 214. The fifth, because Savant has invoked no independent basis for federal jurisdiction other than 28 U.S.C. § 1334. The sixth, because KaloBios' post-confirmation state law contractual claims are sufficiently remote from the bankruptcy case. Opening Br. at 14-15.

The seventh and eighth factors also favor abstention because, as has been discussed *supra* at 8-15, KaloBios' claims are, in both substance and form, state law contract claims that do not implicate issues inherent to the bankruptcy context. And because the claims do not concern bankruptcy matters, there is no need to sever non-existent bankruptcy issues from state law claims. Like Savant, KaloBios is not in a position to assess the ninth factor concerning the burden the case would have on this Court's docket.

The tenth factor overwhelmingly weighs in favor of abstention insofar as Savant clearly removed in order to engage in forum shopping and delay. As the emergency relief proceedings before this Court demonstrated, Savant removed from the Delaware Superior Court to prevent the Rule 67 motion from being decided on an expedited basis in order to manufacture delay so that Savant could threaten KaloBios with default and attempt to foreclose upon KaloBios' assets. Had Savant not maneuvered this delay, the Delaware state court judge would have heard the Rule 67 motion over a month ago and the parties would have been well underway in litigating the merits.

Savant concedes that the eleventh factor, the existence of a right to a jury trial, weighs in favor of abstention. The twelfth factor, the presence or absence of non-debtor parties, also favors abstention, because "one party to this action is a former debtor and one party is a non-debtor. Merely having once been a debtor in a bankruptcy case is insufficient to require the bankruptcy court to continue to resolve all disputes involving that party. At some point the debtor has to leave the nest." *In re LaRoche Indus., Inc.*, 312 B.R. at 255. KaloBios is no longer a fledgling debtor, but is a well-functioning company that has successfully reorganized. This factor, like each of the others, weighs in favor of abstention.

Thus, the permissive abstention factors substantially weigh in favor of abstention in this case because KaloBios has alleged post-confirmation state law claims over one year after KaloBios, the reorganized debtor, emerged from bankruptcy and the alleged claims pertain to contractual misconduct that occurred in the post-confirmation period.

IV. KALOBIOS IS ENTITLED TO REIMBURSEMENT OF COSTS AND EXPENSES INCLUDING ATTORNEY'S FEES PURSUANT TO 28 U.S.C. § 1447(C)

Where a party lacks an "objectively reasonable" basis for seeking removal, attorney's fees on remand are warranted pursuant to 28 U.S.C. § 1447(c). *See Ricky Emery Kamdem Ouaffo T/A Kamdem Grp. v. Naturasource Int'l*, LLC, No. 15-6290, 2015 WL 7871168, at *2 (D.N.J. Dec. 4, 2015) (citing *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)); *see also Estate of Bearoff v. DeMedio*, 1994 WL 114890 (E.D. Pa. 1994). Here, there was no objectively reasonable basis for removal, as Savant's removal was in clear violation of the Forum Selection Clause, was plainly barred by mandatory abstention, and was filed in bad faith so that Savant could create delays it then used to issue threats of default and foreclosure to KaloBios.

Removal in violation of a valid forum selection clause, including a clause consenting to venue in "any court of competent jurisdiction" is objectively unreasonable, and supports an award of fees. *See Campo Music Shopping Ctr. Condo. Ass'n v. Evanston Ins. Co.*, No. CIV.A. 07-5449, 2007 WL 3252494, at *2 (E.D. La. Nov. 1, 2007) (awarding fees where defendant removed in violation of a forum selection clause stating that defendant "will submit to the jurisdiction of any Court of Competent Jurisdiction within the United States of America[.]") Likewise, removal to bankruptcy court where the bankruptcy court does not have jurisdiction over the removed matter will support an award of fees. *See In re Kosovska*, No. AP 14-02271, 2016 WL 3769293, at *5 (B.A.P. 9th Cir. July 7, 2016).

Attorneys' fees are particularly warranted in this case due to Savant's bad faith refusal to resolve the payment dispute through the MDC's dispute resolution mechanism and its efforts to use the removal in order to threaten KaloBios with default and its attempt to foreclose on and sell KaloBios' assets. As the court found in *In re Kosovska*, "although a finding of bad faith is not required, it is a factor which the bankruptcy court may consider since the court looks to whether [defendants] had a good reason to remove the state court action," especially where removal is "not for any broader legitimate bankruptcy purpose." *Id.* at *5 ("The clear implication is that the filings were made to obtain the benefit of the automatic stay and not for any broader legitimate bankruptcy purpose. The bankruptcy court properly considered Appellants' prior conduct when exercising its discretion to award Appellees their attorneys' fees and costs.").

CONCLUSION

For the foregoing reasons, KaloBios' motion to remand should be granted in its entirety. This action should be remanded to Delaware Superior Court, pursuant to 28 U.S.C.§§ 1334(c), 1447(c) and 1452(b) and Rule 9027 of the Federal Rules of Bankruptcy Procedure, and KaloBios should be granted attorney's fees pursuant to 28 U.S.C. § 1447(c).

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Wilmington, Delaware

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