

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

In re KALOBIOS PHARMACEUTICALS, INC.,  Debtor.	Case No. 15-12628-LSS
KALOBIOS PHARMACEUTICALS, INC.  Plaintiff/Counterclaim Defendant,  vs. SAVANT NEGLECTED DISEASES, LLC,  Defendant/Counterclaimant.	Adv. Pro. No. 17-50898-LSS

**SAVANT NEGLECTED DISEASES, LLC'S BRIEF IN OPPOSITION  
TO KALOBIOS' MOTION FOR A TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

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Dated: August 7, 2017

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Defendant and Counterclaimant Savant Neglected Diseases, LLC (“Savant”) submits this memorandum of law in response to Plaintiff and Counterclaim Defendant KaloBios Pharmaceuticals, Inc.’s (“KaloBios”) motion for a temporary restraining order and preliminary injunction [Docket No. 16].

## I. INTRODUCTION

KaloBios seeks to avoid the consequences of its own actions—consequences that it specifically bargained for when it entered into the “integral” transaction with Savant as part of KaloBios’ emergence from bankruptcy. As part of that transaction, KaloBios and Savant entered into an “Agreement for the Manufacture, Development and Commercialization of Benznidazole for Human Use” (the “MDC”), and an associated “Security Agreement” (the “Security Agreement”),<sup>1</sup> which was executed in connection with the MDC as security for the payments owed by KaloBios to Savant under the MDC.

Under the MDC, KaloBios is required to make “Milestone Payments” to Savant upon the achievement of certain regulatory milestones (each a “Milestone Event”). The Milestone Payments are secured by the intellectual property and related assets that Savant sold and licensed to KaloBios in the MDC (the “Assets”), meaning that in the event that KaloBios fails to make a Milestone Payment, Savant is entitled to foreclose upon the Assets under the Security Agreement.

After KaloBios reached the first two Milestone Events, each of which required a \$1 million payment by KaloBios to Savant, it refused to make the Milestone Payments, despite acknowledging that it is required to do so. Instead, KaloBios claims that under Section 4.8 of the MDC, Savant is responsible for cost overruns of the “Joint Development Program” and that it is

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<sup>1</sup> A copy of the Security Agreement is attached to the accompanying declaration of Daniel P. Goldberger (“Goldberger Dec.”) as Exhibit 1.

entitled to credit the Milestone Payments against those costs. While Section 4.8 does not relieve KaloBios of its Milestone Payment obligations for a number of reasons, KaloBios completely ignores the most important one: it terminated the Joint Development Program more than ten months ago and thus, any costs that could have been attributable to Savant ended when the Joint Development Program was terminated. With KaloBios in admitted breach of the MDC, triggering multiple Events of Default under the Security Agreement, it now seeks to deprive Savant of the bargained-for remedy for its breaches—foreclosure of the Assets under the Security Agreement. That is improper.

The Court should deny KaloBios' application for a TRO and preliminary injunction because KaloBios fails to make the showing required to obtain the requested relief.<sup>2</sup> First, KaloBios cannot succeed on the merits of its claims. As set forth above, KaloBios acknowledges its obligations to make the Milestone Payments, but claims that it is entitled to offset those payments against claimed cost overages from the Joint Development Program. But it cannot do so because (1) the Joint Development Program was terminated in the fall of 2016, thus relieving Savant of any obligations for "Joint Development Costs"; (2) under Section 4.8, Savant was responsible for cost overages *only if* the Assets were insufficient or inadequate and KaloBios' Chairman and CEO, Dr. Cameron Durrant, admitted in writing that the alleged cost overages were not the result of Savant; (3) any alleged cost overages under Section 4.8 must be provided to Savant in an "invoice [with] reasonable supporting detail," which to this day has not been provided, despite repeated requests for such detail; and (4) it is up to Savant, *not KaloBios*, to decide whether to credit any such cost overages against Milestone Payments and here, KaloBios

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<sup>2</sup> The Court should also deny KaloBios' accompanying motion to expedite as KaloBios fails to meet the standard.

has usurped that right. KaloBios' other claims, which are unrelated to the issues in its motion, are also doomed to fail because they are contradicted by KaloBios' own statements and actions.

KaloBios is also unable to demonstrate that it will be irreparably harmed without relief from this Court. The harm that KaloBios seeks to avoid—foreclosure on the Assets—is not irreparable for two primary reasons. First, the harm can be avoided entirely upon KaloBios' payment to Savant of the two outstanding Milestone Payments—payments that KaloBios admits it owes. Second, KaloBios cannot claim irreparable harm over the enforcement of contractual remedies to which it agreed, especially where, as here, it admits it is in breach. Indeed, if KaloBios' requested relief is granted, it will render the Security Agreement worthless because it would allow KaloBios to avoid the consequences of its breach by filing meritless claims against Savant, as it has done here.

In its brief [Docket No. 17], KaloBios claims that the balance of harms “tips decidedly” in favor of injunctive relief. It does not. Rather, Savant will suffer in the event that injunctive relief is granted because it will be deprived of the benefit of its bargain—that is, security in the event that KaloBios fails to make the required Milestone Payments. KaloBios should not benefit from its breaches and avoid the bargained-for consequences of its own decisions. Along the same lines, the public interest disfavors an injunction because it would allow breaching parties, like KaloBios, to avoid the consequences of their actions and render secured obligations illusory.

Finally, in the event the Court elects to grant KaloBios' requested relief, it should be required to post a bond to secure the Milestone Payments—which KaloBios admits it owes—but for which it continues to refuse to pay.

## II. RELEVANT FACTUAL BACKGROUND

### A. The MDC and the Security Agreement

Savant and KaloBios entered into the MDC and the Security Agreement on the same day that KaloBios emerged from bankruptcy. The MDC was an integral part of KaloBios' plan of reorganization and without Savant and the MDC, KaloBios would have been forced to liquidate its assets. In the MDC, Savant sold and licensed the Assets to KaloBios to be used for the development, manufacture and, ultimately, the commercialization of a drug to fight Chagas disease, using a compound called benznidazole (the "Product"). In consideration for the sale and license of the Assets, KaloBios made an upfront payment to Savant, agreed to make the Milestone Payments and other payments, and agreed to take the primary role in the continued development of the Product. The parties' joint efforts were conducted under the "Joint Development Program."

Under Section 3.3 of the MDC, KaloBios is required to make a Milestone Payment to Savant for each Milestone Event it achieves. Section 2 of the Security Agreement provided security for those payments, stating that to "secure the timely payment of [KaloBios'] payment obligations to pay (a) the Milestone Payments pursuant to Section 3.3 of the MDC..." KaloBios "hereby grants to [Savant] a continuing senior security interest (the 'Security Interest') in any and all right, title and interest of [KaloBios] in and to the Acquired Assets and Future Assets (collectively, the 'Collateral')." Goldberger Dec. Ex. 1. Under Section 11 of the Security Agreement, which is titled "Remedies upon Default," Savant is entitled to foreclose on the Assets (*i.e.*, the Collateral) upon KaloBios' failure to make the Milestone Payments under Section 3.3 of the MDC. *Id.*

## **B. The Joint Development Program**

The parties began working on the Joint Development Program before the MDC was even executed and continued after the MDC was signed. Under Section 4.3 of the MDC, KaloBios was responsible for all costs associated with Joint Development Program. *See Durrant Dec., Ex.*

1. Under Section 4.8 of the MDC, in the event that there were cost overruns of the *Joint Development Program* that were “due to the insufficiency or inadequacy” of the Assets, Savant would be required to pay some of those costs.<sup>3</sup>

In August 2016, KaloBios abruptly initiated the termination of the Joint Development Program, to which Savant consented. *See Goldberger Dec., Ex. 2.* The termination became effective in September 2016. Upon termination of the Joint Development Program, KaloBios became solely responsible for its operation, staffing, and costs.

## **C. KaloBios Reaches the First and Second Milestone Events**

On June 26, 2017, KaloBios announced that the first Milestone Event had been achieved as of June 25, 2017. On June 27, 2017, Savant invoiced KaloBios for the \$1 million Milestone Payment. However, on the following day, June 28, Savant received an invoice in response from KaloBios that was clearly designed to avoid making the required Milestone Payment (the

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<sup>3</sup> Section 4.8 states “if due to the insufficiency or the inadequacy of the [Assets] delivered to KaloBios ... (b) the preparation and filing of such NDA would result in costs and expenses that exceed by more than Five Hundred Thousand Dollars (\$500,000) in combined internal and external costs the Joint Development Program Costs set forth in the Joint Development Plan as of the Closing Date ... then [Savant] shall either (with such election between (i) and (ii) made in its sole discretion except as provided below), compensate KaloBios, as KaloBios’ sole and exclusive monetary remedy for any and all liability arising out of, under or in connection with this Section 4.8, by either (i) allowing KaloBios to credit the payment of any such costs and expenses above Five Hundred Thousand Dollars (\$500,000) incurred by KaloBios as a result of such insufficiency, inadequacy and/or delay against any future payments to be made by KaloBios to [Savant] under this Agreement on a Dollar-for-Dollar basis, provided that such credit shall not cause the payment of any Milestone Payments to be reduced to less than fifty percent (50%) of the total amount of all potential Milestone Payments, or (ii) pay KaloBios in cash any such costs and expenses above Five Hundred Thousand Dollars (\$500,000) incurred by KaloBios as a result of such insufficiency, inadequacy and/or delay within thirty (30) days after receipt by [Savant] of an invoice and reasonable supporting detail for such costs and expenses.”

“Retaliatory Invoice”). *See* Durant Dec., Ex. 2. The Retaliatory Invoice claimed that Savant owed KaloBios approximately \$2.7 million for cost overages associated with the Joint Development Program. However, because KaloBios owed the first Milestone Payment to Savant, KaloBios attempted (improperly) to apply that amount as a credit to the \$2.7 million cost overage, such that the Retaliatory Invoice only sought \$1.7 million.

In its brief, KaloBios claims that it elected to credit the first Milestone Payment only after Savant purportedly “made clear” it would not pay the cost overages. KaloBios Br. at 7. That is demonstrably untrue. The Retaliatory Invoice, which was the first invoice ever provided to Savant and was sent *the day after Savant invoiced KaloBios for the first Milestone Payment*, already contained the credit. Savant rejected KaloBios’ Retaliatory Invoice, as it was plainly improper. It was improper because the Joint Development Program had been terminated months ago, because KaloBios had previously admitted to Savant that the alleged cost overruns were not caused by Savant, and, in any event, the one-page invoice lacked the required reasonable supporting detail. *See* Durrant Dec., Exs. 2 and 6 (“With regard to the attached invoice to Savant, you will see that there is a significant overage in costs incurred vs. the budget from Exhibit 1 to the Agreement. Many of the overruns are due to FDA requirements or CMC issues. The subsequent work is irrespective of KaloBios or Savant’s decisionmaking.”).

On July 11, KaloBios reached the second Milestone Event. The following day, Savant sent KaloBios an invoice for the second Milestone Payment. In turn, a few days later, Savant received a second invoice in retaliation (the “Second Retaliatory Invoice”). *See* Durrant Dec., Ex. 3. The Second Retaliatory Invoice, which was sent 22 days after the initial Retaliatory Invoice, claimed that KaloBios had incurred an additional \$720,000 in overage costs in 22 days, all of which were owed by Savant. Like the initial Retaliatory Invoice, the Second Retaliatory

Invoice did not contain any “reasonable supporting detail” for the alleged costs, as required by Section 4.8. It stated only that there was a “Budget Overage.” The Second Retaliatory Invoice acknowledged KaloBios’ obligation of the second Milestone Payment, but, again, sought improperly to credit that amount against the purported cost overages that KaloBios incorrectly claims are owed by Savant.

In connection with KaloBios’ failure to make the required Milestone Payments, which are secured by the Collateral under the Security Agreement, on July 12, 2017, Savant sent KaloBios a “Notice and Request for Inspection” (the “Inspection Notice”) under Section 8 of the Security Agreement. *See* Edelman Dec., Ex. 11. In the Inspection Notice, Savant sought to inspect the Collateral at KaloBios’ headquarters and the site of their contract manufacturer where Savant believes the Collateral is stored, on July 17 and 24, respectively. Two days later, KaloBios responded to the Inspection Notice, stating without basis that it does “not believe that KaloBios has any obligation to comply with the Notice and Request for Inspection,” but that it would provide dates to allow inspection at a later date. *See* Edelman Dec., Ex. 12. The following week, on July 20, KaloBios sent another letter regarding the Inspection Notice, stating, among other things, that it is “prepared to schedule one inspection for the end of August at the California location.” *See* Edelman Dec., Ex. 14. Despite its apparent willingness to schedule an inspection, KaloBios’ July 20 letter placed several roadblocks in front of Savant’s inspection rights, refused to schedule an inspection at the manufacturing site, and improperly delayed the inspection—without a date certain—until the end of August.

Given KaloBios’ efforts to deprive Savant of its rights under the MDC and the Security Agreement, coupled with its failure to cure the Events of Default under the Security Agreement, on August 2, 2017, Savant sent KaloBios a “Notice of Foreclosure and Sale” pursuant to its

rights under the Security Agreement. Edelman Dec., Ex. 20. Savant scheduled the foreclosure sale for September 2017. KaloBios then filed this motion.

### **III. ARGUMENT**

#### **A. THE COURT SHOULD DENY KALOBIOS' APPLICATION FOR A TRO AND PRELIMINARY INJUNCTION BECAUSE IT CANNOT MEET THE HIGH STANDARDS TO OBTAIN SUCH RELIEF.**

Granting a TRO or preliminary injunction is “an extraordinary remedy which should be granted only in limited circumstances.” *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (internal citations omitted). To obtain a TRO or preliminary injunction, the moving party must demonstrate: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700 (3d Cir. 2004). In the event that a party cannot establish all four elements, the relief must be denied. *Frank's GMC Truck Center*, 847 F.2d at 102. Here, KaloBios cannot credibly establish any of the four requirements, let alone all four requirements.

##### **1. KaloBios Cannot Establish a Likelihood of Success on the Merits On its Claim for Breach of Section 4.8.**

KaloBios does not dispute that it owes \$2 million in Milestone Payment to Savant pursuant to Section 3.3 of the MDC. KaloBios likewise admits that it has not made those payments to Savant. Instead, KaloBios claims that it is entitled under Section 4.8 to credit those payments against purported cost overages for which it claims Savant is responsible. However, for the reasons set forth below, Section 4.8 does not relieve KaloBios of making the Milestone Payments under Section 3.3. KaloBios is therefore in breach of Section 3.3 and its claim that Savant breached Section 4.8 necessarily fails.

First, KaloBios claims that it is entitled under Section 4.8 to credit the Milestone Payments owed to Savant against purported Joint Development Cost overages incurred by KaloBios as part of the Joint Development Program. However, conspicuously absent from KaloBios' papers is *any mention* of the fact that it terminated the Joint Development Program in August 2016, and thus any costs that it has since incurred in connection with the development of the Product are solely the responsibility of KaloBios. *See* Goldberger Dec., Ex. 2. This fact alone undermines its entire 4.8 claim: once the Joint Development Program was terminated, Savant could not be responsible for purported overruns in Joint Development Costs. That is likely why KaloBios never mentions this fact anywhere in its papers. Because KaloBios seeks to shift Joint Development Costs to Savant that were incurred after the Joint Development Program was terminated, Savant cannot be not responsible for such costs, and thus Section 4.8 does not relieve KaloBios of its Milestone Payment obligations under 3.3.

Second, Section 4.8 is only applicable if the purported Joint Development Cost overages are due to the “insufficiency or inadequacy” of the Assets. Despite KaloBios' unsupported claims to the contrary in its brief, Durrant has admitted in writing that the purported cost overages are *not* the result of Savant, let alone due to the “insufficiency or inadequacy” of the Assets. Specifically, Durrant wrote in the email accompanying the Retaliatory Invoice that “[w]ith regard to the attached invoice to Savant, you will see that there is a significant overage in costs incurred vs. the budget from Exhibit 1 to the Agreement. Many of the overruns are due to FDA requirements or CMC issues. *The subsequent work is irrespective of KaloBios or Savant's decisionmaking.*” Durrant Dec., Ex. 6 (emphasis added). Accordingly, because the necessary prerequisite to applying Section 4.8—that cost overages are due to the “insufficiency or inadequacy” of the Assets—cannot be met, Savant cannot be in breach of 4.8.

Third, KaloBios has not supplied *any* support for its claimed cost overages—whether in the Retaliatory Invoice, the Second Retaliatory Invoice or even in support of this motion—let alone the “reasonable supporting detail” that is required under Section 4.8. *See* Durrant Dec., Exs. 2-4. Without this required detail, Savant has never been in a position to assess the reasonableness of the claimed cost overages and KaloBios cannot invoke Section 4.8 without first meeting its requirements.<sup>4</sup>

Fourth, in seeking to credit the Milestone Payments against the purported cost overages, KaloBios has failed to follow the procedure set forth in Section 4.8. As KaloBios concedes in its brief, it is Savant’s choice whether to credit the Milestone Payments against any alleged cost overages or to pay the overages themselves. However, it claims (falsely) that because Savant failed to make an election within 30 days, it was entitled automatically to credit the Milestone Payments against the purported cost overages. But that is not what happened. In KaloBios’ first Retaliatory Invoice, which was transmitted to Savant just after the first Milestone Event was achieved, it credited the Milestone Payment against the purported cost overages on its own. KaloBios did not allow Savant to make the election as Section 4.8 requires—it did so on its own to avoid making the payment. Nor did it wait the 30 days to trigger the automatic credit. In attempting to credit the Milestone Payment by its own election, KaloBios’ true plans were revealed: it never had any intention of making the Milestone Payments and the Retaliatory Invoices were just pretext to avoid making such payments.

Finally, because Section 4.8 cannot be used to excuse, avoid, or credit the Milestone Payments, KaloBios’ failure to make the Milestone Payments is a breach of Section 3.3 of the

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<sup>4</sup> On page 19 of its brief, KaloBios claims that it has submitted “detailed backup” of the purported cost overages, citing Exhibit 4 to Dr. Durrant’s declaration. Even the most cursory review of the one-page exhibit demonstrates the exhibit does not contain any detail, let alone “reasonable supporting detail.”

MDC. A breach of Section 3.3. of the MDC is in turn an Event of Default under the Security Agreement, which entitles Savant to enforce its remedies thereunder. One such remedy—the remedy KaloBios seeks to avoid on this motion—is foreclosure. Because KaloBios’ breach is indisputable, Savant is entitled to enforce the bargained-for remedies under the Security Agreement and should not be precluded from doing so because KaloBios does not like the result.

KaloBios also claims that Savant is in breach of Sections 8.7(b) and 14.2 of the MDC. While neither claim has any basis, they are both unrelated to the issues on this motion—namely whether the Milestone Payments that KaloBios admits it owes can be credited against the purported cost overages under 4.8. Savant will accordingly not waste the Court’s time arguing against such claims other than to state that it denies such allegations and discovery will demonstrate that they are meritless.

**2. KaloBios Will Not Suffer Any Irreparable Harm.**

KaloBios claims that it will be harmed irreparably if Savant is entitled to enforce the Security Agreement. While Savant does not dispute that KaloBios may suffer harm as a result of its decision to breach the MDC and its failure to make the Milestone Payments, it is not irreparable, and KaloBios has no one but itself to blame. Allowing KaloBios to avoid the bargained-for consequences of its own breaches, under the guise of irreparable harm, will render the Security Agreement, and the remedies set forth therein, illusory.

For example, in *CDE, Inc. v. Source Capital, Inc.*, 374 F. Supp. 1019, 1028 (D. Del. 1974), the court denied the plaintiff’s application for a preliminary injunction which sought to enjoin the defendant from enforcing a secured note. In *CDE*, the court refused to issue an injunction where the breaching party failed to cure a default, stating:

It makes little difference whether the party allegedly in default seeks an extension of the grace period before or after its expiration.

In either case, he asks the court to relieve him of the adverse consequence his contract has designated in the event he declines to cure within the prescribed period and, instead, litigates unsuccessfully. In *First National*, as here, the contract has squarely placed the risk of acceleration on the party who stands on his interpretation of his contract obligations and is ultimately proven wrong.

*Id.* Here, like in *CDE*, KaloBios should not be entitled to avoid “the adverse consequences of [its] contract” because it will suffer the harm the parties bargained for in the event of a breach.

*Id.*

In any event, KaloBios can avoid the result altogether by complying with MDC and making the Milestone Payments that it admits it owes. Because it is entirely within KaloBios’ power to avoid the harm, it should not be entitled to deprive Savant of the remedies that it bargained for under the MDC and the Security Agreement. *See Fleming Cos. v. Thriftway Medford Lakes*, 913 F. Supp. 837, 843 (D.N.J. 1995) (“the stability of contract obligations cannot be undermined by judicial sympathy and courts should not interfere between parties where the terms of the parties’ contract are clear”).

In its brief, KaloBios cites several cases where courts found irreparable harm due to the “potential loss or destruction of one’s business.” KaloBios Br. at 20. However, none of KaloBios’ cases are applicable because not a single case addresses the situation where, as here, a party is in admitted breach of a contract and seeks to avoid the consequences of that breach based on the alleged harm it will suffer as a result.

### **3. The Balance of Harms Will Result in Greater Harm to Savant.**

KaloBios claims that an injunction “will impose no hardship on Savant.” KaloBios Br. at 21. To the contrary, in the event that an injunction is granted, Savant will be deprived of the benefit of its bargain (*i.e.*, the Milestone Payments) *and* the secured remedy it negotiated to avoid such a result (*i.e.*, the security interest in the Assets). Moreover, multiple courts have held

that secured creditors *similarly situated to Savant* are entitled to preliminary injunctions where the breaching party refuses to allow the secured creditor to enforce its security agreement. *See Transamerica Rental Fin. Corp. v. Rental Experts*, 790 F. Supp. 378, 382 (D. Conn. 1992) (granting a creditor a preliminary injunction protecting its damages remedy by permitting the creditor to take possession of assets in which it had a security interest because such assets would lose value pending a decision on the merits); *Shearson Lehman Hutton Holdings, Inc. v. Coated Sales, Inc.*, 697 F. Supp. 639, 642 (S.D.N.Y. 1988) (granting preliminary injunction requested by a secured creditor where the defendant's refusal to transfer stock as a remedy for default under the loan agreement deprived the movant its "bargained for security"); *Alpha Capital Aktiengesellschaft v. Grp. Mgmt. Corp.*, 2002 U.S. Dist. LEXIS 22803, at \*41 n.21 (S.D.N.Y. Nov. 25, 2002) (granting a preliminary injunction to protect creditors' security interests, notwithstanding that the creditors would not be entitled to relief if the counterparties prevailed on claims against the creditor). Given that irreparable harm was a necessary element of a the preliminary injunctions granted in the above-referenced cases, KaloBios cannot credibly claim that Savant will suffer no harm in the event it is deprived of its rights under the Security Agreement.

#### **4. The Public Interest Weighs in Favor of Denying the Requested Injunction.**

The public interest weighs in favor of denying KaloBios' requested injunction. While KaloBios seeks to associate Savant with the infamous Martin Shkreli as a means to distract the Court from the merits of this dispute, it does not change the facts that are squarely before the Court. Moreover, there is a simple solution to avoid the supposed delays and harm to the public identified by KaloBios: comply with the MDC and make the Milestone Payments that it admits it owes. To hold otherwise would not only allow KaloBios it to avoid the consequences of its

actions, but it would also render the Security Agreement illusory. It would also place any secured creditor in an untenable position; that is, any party could avoid its secured obligations by manufacturing a claim of breach as pretext to avoid the bargained-for consequences of its own breaches and block the secured creditor from enforcing its security interest.

**B. IN THE EVENT THE COURT GRANTS KALOBIOS' REQUESTED INJUNCTION, IT SHOULD REQUIRE KALOBIOS TO POST A BOND.**

The Court should not waive the bond requirement under Federal Rule of Civil Procedure 65(c). In the Third Circuit, “[a]lthough the amount of the bond is left to the discretion of the court, the posting requirement is much less discretionary,” and exceptions are “exceptionally narrow” and “so rare that the requirement is almost mandatory.” *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 426 (3d Cir. 2010) (finding the district court erred in waiving the Rule 65(c) bond requirement); *In re Nat'l Credit Mgmt. Grp., L.L.C.*, 21 F. Supp. 2d 424, 463 (D.N.J. 1998) (“[t]he Third Circuit has interpreted the bond requirement pursuant to Rule 65 quite strictly”). To support KaloBios’ requested waiver, the balance of the equities would have to weigh “overwhelmingly in favor” of KaloBios, and the Court would have to make specific findings supporting any waiver of the bond requirement. *Zambelli*, 592 F.3d at 426. It cannot make that case here.

KaloBios’ assertion that the nature of the present action precludes monetary harm to Savant is disingenuous. The purpose of the bond requirement in Rule 65(c) is to protect the party against whom an injunction is sought from costs and damages in the event it is wrongfully enjoined or restrained. Fed. R. Civ. P. 65(c). KaloBios knows full well that Savant stands to suffer losses, including significant litigation costs, as a result of being restrained from exercising its foreclosure remedy under the MDC and the Security Agreement. It would be improper for the Court to consider KaloBios’ hypothetical deposit of the Milestone Payments—payments that

KaloBios undisputedly owes to Savant, in full—into this Court or any court as the equivalent of a deposit under Rule 65(c), as it does not include sums to cover “costs and damages” incurred by Savant. Indeed, KaloBios’ Rule 67 motion is on its face an improper use of Rule 67, as it seeks to use the Rule to avoid its own contractual obligations, while at the same time depriving Savant of the remedies for breach. *See Progressive Cas. Ins. Co. v. Drive Trademark Holdings LP*, 680 F. Supp. 2d 639, 641 (D. Del. 2010). In any event, KaloBios falls far short of justifying that the circumstances at hand are exceptional, and its request to waive the bond requirement imposed by Rule 65(c) should be denied.

#### **IV. CONCLUSION**

For the reasons set forth herein, the Court should deny KaloBios’ application for a TRO and preliminary injunction.

[Signature to follow.]

Dated: August 7, 2017

**DORSEY & WHITNEY (DELAWARE) LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 7, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF System and served on all parties who have electronically entered a notice of appearance, through the notice of filing generated by the Court's CM/ECF System and served on the following parties via electronic mail:

Lisa A. Schmidt  
Jeffrey L. Moyer  
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