

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE**

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

**ANSWER TO COMPLAINT**

Defendant/Counterclaimant Savant Neglected Diseases, LLC (“Savant” or “Defendant”) hereby responds<sup>1</sup> to the Complaint by Plaintiff/Counterclaim Defendant KaloBios Pharmaceuticals, Inc. (“KaloBios” or “Plaintiff”), as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Complaint, except admits that Stephen Hurst is the Chief Executive Officer of Defendant.
2. Defendant denies the allegations contained in paragraph 2 of the Complaint.
3. Defendant admits the allegations contained in paragraph 3 of the Complaint.

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<sup>1</sup> Savant consents to the entry of final orders or judgments by the Court in connection with the claims asserted in the Complaint to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

4. Defendant denies the allegations contained in paragraph 4 of the Complaint, except admits that it entered into a Letter of Intent with Plaintiff, but states that Letter of Intent was executed in December 2015, not October 2015.

5. Defendant denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in the first sentence of paragraph 5 of the Complaint, and denies the remaining allegations contained in paragraph 5 of the Complaint.

6. Defendant admits that it entered to an agreement with Plaintiff for the “Manufacture, Development and Commercialization of Benznidazole For Human Use” (the “MDC”) and denies knowledge and information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 6 of the Complaint.

7. Defendant denies the allegations contained in paragraph 7 of the Complaint.

8. Defendant denies the allegations contained in paragraph 8 of the Complaint and refers to the MDC for the true contents thereof. To the extent the allegations contained in paragraph 8 of the Complaint state legal conclusions, no response is necessary.

9. Defendant denies the allegations contained in paragraph 9 of the Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Complaint and refers to the MDC for the true contents thereof.

11. Defendant admits that a “Milestone Payment of \$1 million has now come due” to Defendant. Defendant also admits that Plaintiff sent Defendant an invoice for purported overage costs, but denies that it owes Plaintiff any such amounts. Defendant denies the remaining allegations contained in paragraph 11 of the Complaint.

12. Defendant denies the allegations contained in paragraph 12 of the Complaint, refers to the MDC for the true contents thereof, and to the extent the allegations contained in paragraph 12 state legal conclusions, no response is necessary.

13. Defendant denies the allegations contained in paragraph 13 of the Complaint, and to the extent the allegations contained in paragraph 13 state legal conclusions, no response is necessary.

14. Defendant admits that Plaintiff filed a motion pursuant to Rule 67 of the Rules of Civil Procedure for the Superior Court of the State of Delaware, denies the remaining allegations contained in paragraph 14 of the Complaint, and to the extent the allegations contained in paragraph 14 state legal conclusions, no response is necessary.

15. Defendant admits the allegations contained in paragraph 15 of the Complaint.

16. Defendant denies the allegations contained in the first sentence of paragraph 16 of the Complaint, and denies the remaining allegations.

17. Defendant denies the allegations contained in paragraph 17 of the Complaint, refers to the MDC for the true contents thereof, and to the extent the allegations contained in paragraph 17 state legal conclusions, no response is necessary.

18. Defendant admits that it is a Delaware limited liability company, refers to the MDC for the true contents thereof, and to the extent the allegations contained in paragraph 18 state legal conclusions, no response is necessary.

19. Defendant refers to the MDC for the true contents thereof, and to the extent the allegations contained in paragraph 19 state legal conclusions, no response is necessary.

20. Defendant denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 20 of the Complaint, and to the extent the allegations contained in paragraph 20 state legal conclusions, no response is necessary.

21. Defendant admits the allegations contained in paragraph 21 of the Complaint.

22. Defendant admits the allegations contained in paragraph 22 of the Complaint.

23. Defendant admits the allegations contained in paragraph 23 of the Complaint.

24. Defendant admits the allegations contained in paragraph 24 of the Complaint.

25. Defendant denies the allegations contained in paragraph 25 of the Complaint.

26. Defendant denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 26 of the Complaint.

27. Defendant denies the allegations contained in paragraph 27 of the Complaint, but admits that it entered into Letter of Intent with Plaintiff in December 2015.

28. Defendant denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 28 of the Complaint.

29. Defendant denies the allegations contained in paragraph 29 of the Complaint.

30. Defendant denies the allegations contained in paragraph 30 of the Complaint.

31. Defendant denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 31 of the Complaint, except admits that Plaintiff was required under the MDC to pay the filing fee and make an upfront payment to Defendant of \$3 million, and refers to the MDC for the true contents thereof.

32. Defendant admits the allegations contained in paragraph 32 of the Complaint.

33. Defendant admits the allegations contained in paragraph 33 of the Complaint and refers to the MDC for the true contents thereof.

34. Defendant admits that the budget was broken down by month, denies the remaining allegations contained in paragraph 34 of the Complaint and refers to the MDC for the true contents thereof.

35. Defendant admits the allegations contained in the first sentence of paragraph 35 of the Complaint, admits that the quoted language in the second sentence of paragraph 35 exists in the MDC, but denies Plaintiff's characterization thereof. Defendant refers to the MDC for the true contents thereof.

36. Defendant denies the allegations contained in paragraph 36 of the Complaint and refers to the MDC for the true contents thereof.

37. Defendant admits the allegations contained in paragraph 37 of the Complaint.

38. Defendant denies the allegations contained in paragraph 38 of the Complaint and refers to the MDC for the true contents thereof.

39. Defendant admits that the quoted language set forth in paragraph 39 of the Complaint is contained in the MDC, but denies Plaintiff's characterization of the language and refers to the MDC for the true contents thereof.

40. Defendant denies the allegations contained in paragraph 40 of the Complaint and refers to the MDC for the true contents thereof.

41. Defendant denies the allegations contained in paragraph 41 of the Complaint.

42. Defendant denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 42 of the Complaint.

43. Defendant denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 43 of the Complaint.

44. Defendant admits the allegations contained in paragraph 44 of the Complaint.

45. Defendant admits the allegations contained in paragraph 45 of the Complaint, but denies that such invoice was proper.

46. Defendant denies the allegations contained in paragraph 46 of the Complaint.

47. Defendant denies the allegations contained in paragraph 47 of the Complaint.

48. Defendant admits the allegations contained in the first sentence of paragraph 48 of the Complaint and denies the remaining allegations contained in paragraph 48.

49. Defendant admits the allegations contained in the first sentence of paragraph 49 of the Complaint and denies the remaining allegations contained in paragraph 49.

50. Defendant admits that the language quoted in paragraph 50 of the Complaint was contained in an email Hurst sent on June 15, 2017, but denies Plaintiff's characterization of that language, and refers to the email for its true contents.

51. Defendant denies the allegations contained in paragraph 51 of the Complaint and refers to the MDC for the true contents thereof.

52. Defendant admits that Hurst was contacted by Durrant on June 26, 2017 by email, and that the quoted language is contained in Durrant's email. Defendant refers to the email for its true contents.

53. Defendant admits that the language quoted in paragraph 53 of the Complaint was contained in an email Hurst sent, but denies Plaintiff's characterization of that language, and refers to the email for its true contents.

54. Defendant admits the allegations contained in paragraph 54 of the Complaint.

55. Defendant admits that the language quoted in paragraph 55 of the Complaint was contained in an email Hurst sent, but denies Plaintiff's characterization of that email, and refers to the email for its true contents.

56. Defendant denies the allegations contained in paragraph 56 of the Complaint and to the extent the allegations contained in paragraph 56 state legal conclusions, no response is necessary.

57. Defendant denies the allegations contained in paragraph 57 of the Complaint and to the extent the allegations contained in paragraph 57 state legal conclusions, no response is necessary.

58. Defendant denies the allegations contained in paragraph 58 of the Complaint and to the extent the allegations contained in paragraph 58 state legal conclusions, no response is necessary.

59. Defendant denies the allegations contained in paragraph 59 of the Complaint and to the extent the allegations contained in paragraph 59 state legal conclusions, no response is necessary.

60. Defendant denies the allegations contained in paragraph 60 of the Complaint and to the extent the allegations contained in paragraph 60 state legal conclusions, no response is necessary.

61. Defendant denies the allegations contained in paragraph 61 of the Complaint, except admits that Hurst sent an email to Durrant on June 27, 2017 that included the quoted language and refers to the email for its true contents.

62. Defendant admits the allegations contained in paragraph 62 of the Complaint.

63. Defendant denies the allegations contained in paragraph 63 of the Complaint, except admits that Hurst sent an email to Durrant on June 29, 2017 that included the quoted language and refers to the email for its true contents.

64. Defendant admits the allegations contained in paragraph 64 of the Complaint.

65. Defendant admits language quoted in paragraph 65 of the Complaint was contained in an email written by Hurst, but states that Plaintiff has quoted the language out of context to misrepresent its meaning and refers to the email for its true contents.

66. Defendant denies the allegations contained in paragraph 66 of the Complaint, except admits that Hurst sent an email to Durrant that included the quoted language and refers to the email for its true contents.

67. Defendant denies the allegations contained in paragraph 67 of the Complaint and refers to the MDC for the true contents thereof. To the extent the allegations contained in paragraph 67 state legal conclusions, no response is necessary.

68. Defendant denies the allegations contained in paragraph 68 of the Complaint and to the extent the allegations contained in paragraph 68 state legal conclusions, no response is necessary.

69. Defendant denies the allegations contained in paragraph 69 of the Complaint.

70. Defendant denies the allegations contained in paragraph 70 of the Complaint.

71. Defendant denies the allegations contained in paragraph 71 of the Complaint.

72. Defendant denies the allegations contained in paragraph 72 of the Complaint.

73. Defendant denies the allegations contained in paragraph 73 of the Complaint, except admits that the referenced email contains the quoted language, but denies Plaintiff's characterization thereof. Defendant refers to the referenced email and the MDC for the true contents thereof.

74. Defendant denies the allegations contained in paragraph 74 of the Complaint, except admits that the quoted language was contained in an email sent by Hurst to Durrant, and refers to the email for its true contents.

75. Defendant admits that it received a letter from Plaintiff's counsel that contained the quoted language, but denies the remaining allegations contained in paragraph 75 of the Complaint.

76. Defendant admits that it responded to Plaintiff's letter, but denies the remaining allegations contained in paragraph 76 of the Complaint.

77. Defendant denies the allegations contained in paragraph 77 of the Complaint and to the extent the allegations contained in paragraph 77 state legal conclusions, no response is necessary.

78. Defendant denies the allegations contained in paragraph 78 of the Complaint and to the extent the allegations contained in paragraph 78 state legal conclusions, no response is necessary.

79. In response to paragraph 79 of the Complaint, Defendant hereby incorporates its responses to paragraphs 1 through 78 of the Complaint as though fully set forth herein.

80. Defendant admits the allegations contained in paragraph 80 of the Complaint.

81. Defendant denies the allegations contained in paragraph 81 of the Complaint.

82. Defendant denies the allegations contained in paragraph 82 of the Complaint and to the extent the allegations contained in paragraph 82 state legal conclusions, no response is necessary.

83. Defendant denies the allegations contained in paragraph 83 of the Complaint, except admits that it received an invoice from Plaintiff. To the extent the allegations contained in paragraph 83 state legal conclusions, no response is necessary.

84. Defendant denies the allegations contained in paragraph 84 of the Complaint and to the extent the allegations contained in paragraph 84 state legal conclusions, no response is necessary.

85. Defendant denies the allegations contained in paragraph 85 of the Complaint and to the extent the allegations contained in paragraph 85 state legal conclusions, no response is necessary.

86. Defendant denies the allegations contained in paragraph 86 of the Complaint and to the extent the allegations contained in paragraph 86 state legal conclusions, no response is necessary.

87. Defendant denies the allegations contained in paragraph 87 of the Complaint and to the extent the allegations contained in paragraph 87 state legal conclusions, no response is necessary.

88. Defendant denies the allegations contained in paragraph 88 of the Complaint and to the extent the allegations contained in paragraph 88 state legal conclusions, no response is necessary.

89. In response to paragraph 89 of the Complaint, Defendant hereby incorporates its responses to paragraphs 1 through 88 of the Complaint as though fully set forth herein.

90. Defendant admits the allegations contained in paragraph 90 of the Complaint.

91. Defendant admits the allegations contained in paragraph 91 of the Complaint.

92. Defendant denies the allegations contained in paragraph 92 of the Complaint and to the extent the allegations contained in paragraph 92 state legal conclusions, no response is necessary.

93. In response to paragraph 93 of the Complaint, Defendant hereby incorporates its responses to paragraphs 1 through 92 of the Complaint as though fully set forth herein.

94. Defendant admits the allegations contained in paragraph 94 of the Complaint.

95. Defendant denies the allegations contained in paragraph 95 of the Complaint and to the extent the allegations contained in paragraph 95 state legal conclusions, no response is necessary.

96. Defendant denies the allegations contained in paragraph 96 of the Complaint and to the extent the allegations contained in paragraph 96 state legal conclusions, no response is necessary.

97. Defendant admits the allegations contained in paragraph 97 of the Complaint and to the extent the allegations contained in paragraph 97 state legal conclusions, no response is necessary.

98. Defendant admits the allegations contained in paragraph 98 of the Complaint.

99. Defendant admits the allegations contained in paragraph 99 of the Complaint.

100. Defendant denies the allegations contained in paragraph 100 of the Complaint.

101. Defendant denies the allegations contained in paragraph 101 of the Complaint and to the extent the allegations contained in paragraph 101 state legal conclusions, no response is necessary.

102. Defendant denies the allegations contained in paragraph 102 of the Complaint and to the extent the allegations contained in paragraph 102 state legal conclusions, no response is necessary.

103. Defendant denies the allegations contained in paragraph 103 of the Complaint and to the extent the allegations contained in paragraph 103 state legal conclusions, no response is necessary.

104. In response to paragraph 104 of the Complaint, Defendant hereby incorporates its responses to paragraphs 1 through 103 of the Complaint as though fully set forth herein.

105. Defendant admits the allegations contained in paragraph 105 of the Complaint.

106. Defendant admits the allegations contained in paragraph 106 of the Complaint and to the extent the allegations contained in paragraph 106 state legal conclusions, no response is necessary.

107. Defendant denies the allegations contained in paragraph 107 of the Complaint.

108. Defendant denies the allegations contained in paragraph 108 of the Complaint and to the extent the allegations contained in paragraph 108 state legal conclusions, no response is necessary.

### **RELIEF**

Defendant denies that Plaintiff is entitled to any of the relief as set forth in the “Prayer for Relief” section of its Complaint.

### **AFFIRMATIVE DEFENSES**

Without prejudice to Defendant’s right to plead additional defenses as discovery into the facts of this matter warrant, Defendant hereby asserts the following affirmative defenses:

#### **First Affirmative Defense**

The Complaint fails to state a claim upon which relief may be granted.

**Second Affirmative Defense**

Plaintiff's claims and requested remedies are barred by the doctrines of estoppel and unclean hands.

**Third Affirmative Defense**

Plaintiff's claims are barred, in whole or in part, because Plaintiff failed to fulfill a condition precedent to receiving a benefit.

**Fourth Affirmative Defense**

Defendant has fulfilled all of its obligations under the MDC.

## **COUNTERCLAIMS**

Defendant/Counterclaimant Savant Neglected Diseases, LLC (“Savant”), by and through its attorneys Dorsey & Whitney LLP, for its Counterclaims against Plaintiff/Counterclaim Defendant KaloBios Pharmaceuticals, Inc. (“KaloBios”), alleges as follows:

### **Introduction**

1. The Counterclaims arise out of KaloBios’s multiple breaches of (i) an “Agreement for the Manufacture, Development and Commercialization of Benznidazole for Human Use” (the “MDC”), dated June 30, 2016, between Savant and KaloBios, and (ii) an associated “Security Agreement” (the “Security Agreement”), also dated June 30, 2016, which was executed in connection with the MDC as security for the payments owed by KaloBios to Savant under the MDC.

2. In December 2015, KaloBios filed for bankruptcy under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The Honorable Laurie Selber Silverstein presided over the case.

3. As part of KaloBios’s confirmed Chapter 11 plan of reorganization and subsequent emergence from its bankruptcy proceedings, the parties entered into the MDC.

4. Under the MDC, KaloBios purchased certain assets from Savant, and also licensed associated intellectual property from Savant (collectively, the “Assets”), to be used in the development of a drug called benznidazole to combat Chagas disease (the “Product”).

5. Since March 2016 and following the execution of the MDC on June 30, 2016, the parties jointly developed the Assets toward commercialization (the “Joint Development Program”). However, in August 2016, the parties consented to the termination of the Joint Development Program as provided for in Section 13.5 of the MDC, effective on or before

September 28, 2016 and KaloBios assumed full responsibility for the further development of the Assets into the Product.

6. As with the development of any drug, there are countless regulatory requirements that must be met before the drug can be sold in the market. Under the MDC, KaloBios was obligated to make “Milestone Payments” to Savant upon the achievement of certain regulatory milestones (each a “Milestone Event”), which are specifically enumerated in the MDC, Section 3.3.

7. KaloBios has now reached the first two Milestone Events, each of which require a \$1,000,000 Milestone Payment to Savant. However, despite (i) repeatedly acknowledging, including in its Complaint in this action, that it owes Savant \$1,000,000 for the first Milestone Payment, and (ii) also acknowledging that it owes Savant the second \$1,000,000 Milestone Payment, KaloBios has refused to make these payments to Savant as the MDC requires.

8. As a result of its refusal to make these required Milestone Payments, KaloBios is in breach of its obligations under the MDC, triggering multiple Events of Default under the Security Agreement and causing damage to Savant in the amount of at least \$2,000,000, plus interest. KaloBios is also in breach of other provisions of the MDC and the Security Agreement, which has resulted in additional damage to Savant.

### **PARTIES**

9. Savant is a Delaware limited liability company, with its principal place of business at 1325 Airmotive Way, Suite 175A, Reno, NV 89502.

10. Upon information and belief, KaloBios is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 1000 Marina Boulevard, Suite 250, Brisbane, California, 94005.

### JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over these Counterclaims under Fed. R. Civ. P. 13, 28 U.S.C. § 1334, and 28 U.S.C. § 1367. The Court also has jurisdiction over the Counterclaims because they arise under, and in connection with, the MDC, over which the Bankruptcy Court in the *In re KaloBios Pharmaceuticals, Inc.* bankruptcy (Case No. 15-12628 (LSS)) retained jurisdiction (the “Bankruptcy Case”).

12. In the Bankruptcy Court’s Confirmation Order, the Bankruptcy Court retained jurisdiction (a) “over all matters arising out of or related to the Chapter 11 Case,<sup>2</sup> the Debtor, the Reorganized Debtor and the Plan after the Effective Date, to the fullest extent permitted by law, in accordance with Article XI of the Plan;” [D.I. 581 at p. 26] and (b) “over all matters arising out of or related to the Chapter 11 Case, the Debtor, the Reorganized Debtor and the Plan after the Effective Date, to the fullest extent permitted by applicable Legal Requirements, including without limitation jurisdiction over those matters set forth in Article XI of the Plan.” *Id.*, pp. 49-50.

13. In Article XI of the Plan, which concerns the Bankruptcy Court’s retention of jurisdiction, the Bankruptcy Court retained “jurisdiction over all matters arising in, arising under or related to the Chapter 11 Case and this Plan to the fullest extent permitted by law, including, among other things, jurisdiction to”

- a. “enter such orders as may be necessary or appropriate to implement or consummate the provisions of this Plan and *all contracts*, instruments,

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<sup>2</sup> Capitalized terms used and not otherwise defined in paragraphs 8 through 9 hereof shall have the meaning ascribed to them in the Confirmation Order and Plan [D.I. 434], as applicable.

releases *and other agreements or documents created in connection with this Plan, the Disclosure Statement or the Confirmation Order;*”

- b. “resolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation or enforcement of this Plan, including, without limitation, *any other contract*, instrument, release *or other agreement or document that is executed or created pursuant to this Plan*, or any Entity’s rights arising from or obligations incurred in connection with this Plan or such documents;” and
- c. “determine any other matters that may arise in connection with or related to this Plan, the Confirmation Order or *any contract*, instrument, release (including the releases in favor of the Released Parties) or *other agreement or document created in connection with this Plan or the Confirmation Order.*”

[D.I. 434, Art. XI(e), (f) & (m) (emphasis added).

14. Disputes that concern the MDC fall squarely within the Bankruptcy Court’s retention of jurisdiction under the Plan and Confirmation Order, which contemplate, among other provisions, that the Bankruptcy Court should resolve disputes arising in connection with the consummation of agreements executed or created pursuant to the Plan. [D.I. 434, Art. XI(f)].

Accordingly, this case arises under, arises in, or is related to the Bankruptcy Case.

15. As of the date hereof, no final decree has been enter in KaloBios’s Bankruptcy Case, and it is not closed.

16. This Court has personal jurisdiction over KaloBios because KaloBios is a Delaware corporation and because KaloBios consented to jurisdiction in the MDC in the “federal courts of competent jurisdiction located in the State of Delaware.”

17. Venue is proper in this Court pursuant to 28 U.S.C. § 1409 because the Counterclaims are related to KaloBios's Chapter 11 proceedings, and because the parties consented in the MDC to have any disputes under MDC resolved by courts "located in the State of Delaware and in no other jurisdiction."

18. Savant consents to the entry of final orders or judgments by the Court in connection with its Counterclaims to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

## **BACKGROUND**

### **The KaloBios Bankruptcy**

19. Savant HWP, Inc., was founded in 2009 by its current President and CEO, Stephen Hurst, to develop pharmaceutical products that improve health, maintain wellness and prevent diseases.

20. In 2012, Savant began developing a product to fight Chagas disease, using a compound called Benznidazole. After 3 years of development, in 2015, Savant began discussions with KaloBios to form a partnership for the continued development of Benznidazole into what the parties hoped would lead to the Product.

21. The parties entered into a binding Letter of Intent, but before the parties could negotiate and execute a comprehensive agreement, KaloBios filed for bankruptcy.

22. In particular, on December 29, 2015, KaloBios commenced the Bankruptcy Case.

23. As part of its Plan of Reorganization to emerge from bankruptcy in the Bankruptcy Case, KaloBios sought permission from the Bankruptcy Court to enter into the MDC with Savant, which was ultimately granted in the Confirmation Order. In the Bankruptcy Case,

KaloBios represented that its business focus after emerging from Chapter 11 was to develop and obtain approval for the Product in the United States. Accordingly, entering into the MDC with Savant was an “essential element” of KaloBios’s Plan of Reorganization; without entering into the MDC, KaloBios would have been forced to liquidate its assets.

24. The parties negotiated the MDC while the Bankruptcy Case was pending and on the same day that KaloBios was discharged from bankruptcy, it executed the MDC with Savant, along with the Security Agreement.

### **The MDC**

25. In the MDC, Savant sold and licensed the Assets to KaloBios to be used for the development, manufacture and, ultimately, the commercialization of 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.

26. Under Section 3.3 of the MDC, titled “Milestones,” KaloBios agreed to make the Milestone Payments. KaloBios was required to make each Milestone Payment “within fifteen (15) days after the first achievement of the corresponding milestone event.”

27. The first Milestone Event under Section 3.3(a) was the “Acceptance of an IND by the FDA for the Product,” which required a \$1,000,000 Milestone Payment.

28. The second Milestone Event under Section 3.3(a) was when the “FDA grants Orphan Drug Designation for the Product,” which also required a \$1,000,000 Milestone Payment.

29. Section 3.3(a) contains four additional Milestone Events, which, when combined, total \$19,000,000 in Milestone Payments to be made by KaloBios to Savant.

30. Under Section 3.5, “To secure the performance of KaloBios’ payment obligations under this Agreement, [Savant] and KaloBios shall enter into [the Security Agreement],” which they did on the same day the MDC was executed.

31. The MDC also established a “Joint Development Program,” whereby the parties, pursuant to a “Joint Development Plan,” were to work together to develop the Assets into the Product.

32. Under Section 4.3, titled “Joint Development Program Costs,” “KaloBios shall be responsible for funding the cost of the activities conducted by the Parties under the Program, including the costs of the Joint Development Program as set forth in the budget included with the Joint Development Program.”

33. Because the MDC was executed on the same day that KaloBios emerged from bankruptcy, the MDC contained certain representations and warranties by KaloBios regarding its financial health and stability. In Section 9.8, which is titled “Unencumbered Cash Balance,” KaloBios represented and warranted that “Upon the Closing, KaloBios will have a minimum balance of at least Ten Million (\$10,000,000) in cash . . . which shall not be subject to any Encumbrance or Permitted Encumbrance.”

34. The representation and warranty set forth in Section 9.8 was also a “Condition to Closing” in Section 2.7(b)(iii).

35. Under Section 3.8, Savant is entitled to conduct an audit of KaloBios’s books and records in connection with any report or payment made under Articles 3 or 4 of the MDC.

### **The Security Agreement**

36. Savant entered into the Security Agreement to “secure the timely payment of [KaloBios’s payment] obligations” under the MDC, which included the Milestone Payments. As

its security, KaloBios granted to Savant “a continuing senior security interest” in the Assets, along with other intellectual property related to the Assets. The Assets and related intellectual property are defined in the Security Agreement as the “Collateral.”

37. Under Section 4 of the Security Agreement, KaloBios is prohibited from granting to any third party a security interest in the Collateral.

38. Under Section 8 of the Security Agreement, KaloBios must permit Savant to inspect and examine the Collateral and any associated books and records.

### **The Joint Development Program**

39. The parties began working on the Joint Development Program before the MDC was even executed. At that point in time, they were working under a second Letter of Intent, which was executed in February 2016. The Joint Development Program continued after the MDC was signed.

40. Then, in August 2016, KaloBios abruptly initiated the termination of the Joint Development Program, to which Savant consented. Specifically, KaloBios’s CEO, Dr. Cameron Durrant, wrote by email to Hurst that KaloBios was terminating the Joint Development Program. The termination became effective on or about September 28, 2016.

41. Upon termination of the Joint Development Program by KaloBios, it became solely responsible its operation, staffing, and costs.

42. Upon information and belief, since terminating the Joint Development Program, KaloBios claims that its development has experienced cost overages, as the costs that arose since it took sole control of the development program exceed the budget that covered the *Joint* Development Program through the present time. As explained by Durrant to Hurst by email, “there is a significant overage in costs incurred vs. the budget from Exhibit 1 of the [MDC].”

Many of the overruns are due to FDA requirements or CMC issues. The subsequent work is irrespective of KaloBios or Savant's decision-making."

43. KaloBios has not provided any details of these alleged overages to Savant.

**KaloBios Reaches the First Milestone Event**

44. On June 26, 2017, KaloBios announced that the first Milestone Event had been achieved as of June 25, 2017.

45. The next day, on June 27, 2017, Savant invoiced KaloBios for the \$1 million Milestone Payment.

46. The day after that, on June 28, Savant received an invoice from KaloBios (the "Retaliatory Invoice"). 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 applied that amount as a credit to the \$2.7 million cost overage, such that the Retaliatory Invoice only sought \$1.7 million.

47. Savant rejected the Retaliatory Invoice by email on June 29, 2017, stating that it was improper.

48. That same day, Durrant called Hurst that to discuss the cost overages. During their conversation, Hurst asked Durrant to make a written forbearance proposal for late payment of the first Milestone Payment. KaloBios never made a forbearance proposal; instead it has pursued the meritless Retaliatory Invoice.

49. Under Section 4.8 of the MDC, "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."

50. Savant rejected KaloBios's Retaliatory Invoice because it was not responsible for any such costs under Section 4.8 (*i.e.*, the Joint Development Program). Savant was not responsible for any costs under Section 4.8 because (i) KaloBios terminated the Joint Development Program approximately nine months earlier; and (ii) the so-called cost overrun was not "due to the insufficiency or the inadequacy of the [Assets] delivered to KaloBios" as Durrant conceded in his email to Hurst.

51. Even if Savant were responsible for some portion of budget overage costs – and to be clear, it is not responsible for any such costs – the Retaliatory Invoice was nonetheless defective. That is because, under Section 4.8, it is *solely up to Savant* to elect whether to credit

the budget overages against Milestone Payments or to make those payments directly to KaloBios. By making that decision for Savant, KaloBios has failed to follow the procedure set forth in Section 4.8.

52. The Retaliatory Invoice also failed to contain the “reasonable supporting detail” for the alleged costs, as required by Section 4.8. Rather, the Retaliatory Invoice contained no detail at all, stating only that there was a “Budget Overage” of \$3,220,963.

53. KaloBios continues to refuse to make the first Milestone Payment (even though it does not dispute the obligation), and despite repeated demands from Hurst to Durrant during their many discussions in connection with their efforts to resolve the parties’ dispute over the Milestone Payment. The parties and their counsel have also exchanged multiple letters on this subject.

#### **KaloBios Reaches the Second Milestone Event**

54. On July 11, 2017, KaloBios issued a press release stating that the FDA had “granted orphan drug designation to benznidazole for the treatment of Chagas disease.” The FDA’s grant of orphan drug designation triggered the second Milestone Event and the second Milestone Payment.

55. Savant learned about the grant of orphan drug designation from the press release as no one from KaloBios informed Savant of the grant.

56. After learning of the grant, Savant sent KaloBios an invoice for the second Milestone Payment the following day, July 12.

57. The following week, on July 20, 2017, KaloBios sent a second invoice to Savant (the “Second Retaliatory Invoice”). 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.

58. 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.”

59. The Second Retaliatory Invoice acknowledged KaloBios’s 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.

60. On information and belief, the Second Retaliatory Invoice, like the initial Retaliatory Invoice, was manufactured by KaloBios to avoid making the Milestone Payments owed to Savant. For the same reasons that initial Retaliatory Invoice was defective, the Second Retaliatory Invoice was likewise defective.

61. By issuing the Second Retaliatory invoice, KaloBios has indicated that it does not intend to make the second Milestone Payment.

#### **KaloBios’s Breach of its Representation and Warranty**

62. As a condition to closing of the MDC, KaloBios represented and warranted that it “will have a minimum balance of at least Ten Million Dollars (\$10,000,000) in cash, inclusive of the Initial Payment, which shall not be subject to any Encumbrance or Permitted Encumbrance.” KaloBios’s representation and warranty is set forth in the MDC *both* in the Section 2.7(c) (“Conditions to Closing”) and in Article 9, which sets forth the “Representations and Warranties of KaloBios.”

63. In connection with its representation and warranty, at the closing, Durrant, pursuant to Section 2.8(b)(ii), delivered to Savant a “a certificate signed by the Chief Executive

Officer of KaloBios certifying that the conditions to the Company's obligations hereunder set forth in Section 2.7(c)(i), and Section 2.7(c)(ii), Section 2.7(c)(iii) and Section 2.7(c)(iv) have been fulfilled."

64. However, on September 23, 2016, KaloBios filed its Quarterly Report on Form 10-Q for the quarter ending June 30 2016 with the SEC. The Form 10-Q included KaloBios's financial statements as of June 30, 2016, the day of the closing (the "June 30 Financials"). The June 30 Financials listed KaloBios's cash balance as \$11.935 million and total liabilities as \$9.46 million. Thus, at the closing, KaloBios's *unencumbered* cash balance was far below the required \$10 million and in breach of Sections 2.7(c)(iii) and 9.8.

#### **KaloBios's Breaches of the Security Agreement**

65. Under Section 4 of the Security Agreement, KaloBios is prohibited from granting any third party any security interest in the Collateral.

66. On information and belief, on December 21, 2016, KaloBios entered into a "Credit and Security Agreement" with four third parties: Black Horse Capital Master Fund Ltd., as administrative agent and lender, Black Horse Capital LP, Cheval Holdings, Ltd. and Nomis Bay LTD (collectively, the "Junior Lenders").

67. On information and belief, in the Credit and Security Agreement, KaloBios granted to the Junior Lenders a security interest encumbering some or all of the Collateral, in violation of the express restriction in Section 4 of its Security Agreement with Savant.

68. In connection with KaloBios's 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.

69. In the Inspection Notice, Savant sought to inspect the Collateral at KaloBios's headquarters and the site of their contract manufacturer where Savant believes the inventory is stored, on July 17 and 24, respectively.

70. Two days later, KaloBios responded to the Inspection Notice, stating 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.

71. 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." Despite its apparent willingness to schedule an inspection, KaloBios's 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. KaloBios's actions are inconsistent with the plain language of the Security Agreement and appear to be taken in bad faith in order to prevent Savant from discovering the underlying facts of KaloBios's manufactured Retaliatory Invoice and Second Retaliatory Invoice.

### **FIRST COUNTERCLAIM**

#### **Breach of Contract – Section 3.3(a) of the MDC – First Milestone Payment**

72. Savant repeats and realleges each and every allegation set forth in paragraphs 1 through 71 as if fully set forth herein.

73. Savant and KaloBios are bound by the MDC, which is a valid and legally binding contract.

74. Savant has performed its obligations under the MDC.

75. KaloBios has breached its obligations under Section 3.3(a) of the MDC by failing to make the first Milestone Payment, to which it does not dispute it owes.

76. As a result of KaloBios's breach of Section 3.3(a), Savant has sustained damages of at least \$1 million, plus interest.

### **SECOND COUNTERCLAIM**

#### **Breach of Contract – Section 3.3(a) of the MDC – Second Milestone Payment**

77. Savant repeats and realleges each and every allegation set forth in paragraphs 1 through 76 as if fully set forth herein.

78. Savant and KaloBios are bound by the MDC, which is a valid and legally binding contract.

79. Savant has performed its obligations under the MDC.

80. KaloBios has breached its obligations under Section 3.3(a) of the MDC by failing to make the second Milestone Payment, to which it does not dispute it owes.

81. As a result of KaloBios's breach of Section 3.3(a), Savant has sustained damages of at least \$1 million, plus interest.

### **THIRD COUNTERCLAIM**

#### **Breach of Contract – Sections 2.7(c)(iii) and 9.8 of the MDC**

82. Savant repeats and realleges each and every allegation set forth in paragraphs 1 through 81 as if fully set forth herein.

83. Savant and KaloBios are bound by the MDC, which is a valid and legally binding contract.

84. Savant has performed its obligations under the MDC.

85. KaloBios breached its representation and warranty that it will have a minimum unencumbered cash balance of \$10 million at the time of closing because the June 30 Financials demonstrate that its unencumbered cash balance was significantly less than \$10 million.

86. As a result of KaloBios's breach of its representation and warranty regarding the unencumbered cash balance, Savant has been damaged in an amount to be proven at trial.

#### **FOURTH COUNTERCLAIM**

##### **Accounting**

87. Savant repeats and realleges each and every allegation set forth in paragraphs 1 through 86 as if fully set forth herein.

88. As set forth above, under Section 3.8 of the MDC, Savant is entitled to conduct an audit of KaloBios's books and records in connection with any report or payment made under Articles 3 or 4 of the MDC.

89. KaloBios has not provided any detail as required by Section 4.8 for reports it submitted to Savant under Article 4 of the MDC.

90. As a result, Savant is entitled to an accounting under Section 3.8 of the MDC.

#### **FIFTH COUNTERCLAIM**

##### **Breach of Contract – Section 4 of the Security Agreement**

91. Savant repeats and realleges each and every allegation set forth in paragraphs 1 through 90 as if fully set forth herein.

92. Savant and KaloBios are bound by the Security Agreement, which is a valid and legally binding contract.

93. Savant has performed its obligations under the Security Agreement, including making all of the required UCC filings.

94. Section 4 of the Security Agreement prohibits KaloBios from granting any security interest to a third party in the Collateral.

95. KaloBios granted the Junior Lenders a security interest in the Collateral.

96. In so doing, KaloBios breached the Security Agreement.

97. As a result of its breach, Savant has been damaged in an amount to be proven at trial, but likely to exceed \$100,000.

### **SIXTH COUNTERCLAIM**

#### **Breach of Contract – Section 8 of the Security Agreement**

98. Savant repeats and realleges each and every allegation set forth in paragraphs 1 through 97 as if fully set forth herein.

99. Savant and KaloBios are bound by the Security Agreement, which is a valid and legally binding contract.

100. Savant has performed its obligations under the Security Agreement.

101. Under Section 8 of the Security Agreement, Savant is entitled to inspect the Collateral upon reasonable notice.

102. KaloBios has not complied with its obligations under Section 8.

103. KaloBios is accordingly in breach Section 8 of the Security Agreement.

### **PRAYER FOR RELIEF**

WHEREFORE, Savant prays for the following relief:

- (i) An Order dismissing the Complaint in its entirety with prejudice;
- (ii) Entering judgment in Savant's favor on Savant's First Counterclaim for Breach of Section 3.3(a) of the MDC for Kalobios's failure to make the first Milestone Payment in the amount of \$1,000,000 plus interest;

- (iii) Entering judgment in Savant's favor on Savant's Second Counterclaim for Breach of Section 3.3(a) of the MDC for Kalobios's failure to make the second Milestone Payment in the amount of \$1,000,000 plus interest;
- (iv) Entering judgment in Savant's favor on Savant's Third Counterclaim for breach of Sections 2.7(c)(iii) and 9.8 of the MDC on an amount to be proven at trial;
- (v) Entering an Order requiring an immediate accounting;
- (vi) Entering judgment in Savant's favor on Savant's Fifth Counterclaim for breach of Section 4 of the Security Agreement on an amount to be proven at trial;
- (vii) Entering an Order requiring KaloBios to make the Collateral available for immediate inspection;
- (viii) An award of attorneys' fees, interests, costs, disbursements, and such other and further relief as this Court deems just and proper.

Dated: July 27, 2017

**DORSEY & WHITNEY (DELAWARE) LLP**

By /s/ Robert W. Mallard  
Eric Lopez Schnabel (DE No. 3672)  
Robert W. Mallard (DE No. 4279)  
Alessandra Glorioso (DE No. 5757)  
300 Delaware Avenue, Suite 1010  
Wilmington, DE 19801  
E-mail: schnabel.eric@dorsey.com  
mallard.robert@dorsey.com  
glorioso.alessandra@dorsey.com

**DORSEY & WHITNEY LLP**

Daniel P. Goldberger (NY #4629358) (pro hac vice  
pending)

51 W. 52nd Street  
New York, NY 10019  
Telephone: (212) 415-9200  
E-mail: goldberger.dan@dorsey.com

*Attorneys for Defendant/Counterclaimant Savant  
Neglected Diseases, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 27, 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  
Travis S. Hunter  
Richards, Layton & Finger  
One Rodney Square  
920 North King Street  
Wilmington, Delaware 19801

Howard J. Kaplan  
Daniel D. Edelman  
Kaplan Rice LLP  
142 West 57<sup>th</sup> Street, Suite 4A  
New York, NY 10019

Dated: July 27, 2017

**DORSEY & WHITNEY (DELAWARE) LLP**

By /s/ Alessandra Glorioso

Eric Lopez Schnabel (DE No. 3672)

Robert W. Mallard (DE No. 4279)

Alessandra Glorioso (DE No. 5757)

300 Delaware Avenue, Suite 1010

Wilmington, DE 19801

E-mail: schnabel.eric@dorsey.com

mallard.robert@dorsey.com

glorioso.alessandra@dorsey.com