

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

In re

KALOBIOUS PHARMACEUTICALS, INC.,

Debtor.¹

Chapter 11

Case No. 15-12628 (LSS)

Requested Interim Hearing Date:
June 15, 2016, at 10:00 a.m. (ET)
Requested Interim Objection Deadline:
At the Interim Hearing

Requested Final Hearing Date:
June 20, 2016, at 2:00 p.m. (ET)
Requested Final Objection Deadline:
June 17, 2016 at 4:00 p.m. (ET)

**DEBTOR'S MOTION PURSUANT TO 11 U.S.C. § 105(a), 363 AND 502
AND FED. R. BANKR. P. 9019 FOR ENTRY OF INTERIM AND FINAL
ORDERS APPROVING SETTLEMENT STIPULATION BY AND
BETWEEN (I) THE DEBTOR AND (II) MARTIN SHKRELI**

KaloBios Pharmaceuticals, Inc., as debtor and debtor in possession (the “Debtor” or “KaloBios”) in the above-captioned chapter 11 case hereby moves (the “Motion”), pursuant to sections 105(a), 363, and 502 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for entry of interim and final orders, substantially in the form attached hereto as **Exhibits A and B** (respectively, the “Interim Order” and the “Final Order”) approving the stipulation of settlement (the “Stipulation”) a copy of which is attached as **Exhibit C**, by and between (i) the Debtor and (ii) Martin Shkreli (“Mr. Shkreli”, and together with the Debtor, the “Parties”), resolving, among other things, the claims asserted by Mr. Shkreli in the proof of claim filed in this case, proof of Claim No. 89 (the “POC”), a copy of which is attached hereto as **Exhibit D**. In support of this Motion, the Debtor respectfully states as follows:

¹ The last four digits of the Debtor’s federal tax identification number are 7236. The Debtor’s address is 1000 Marina Blvd #250, Brisbane, CA 94005-1878.

PRELIMINARY STATEMENT

1. The Debtor and Mr. Shkreli have reached agreement on the terms of a settlement that will resolve all claims between the Debtor and Mr. Shkreli, including those asserted in the POC, and provide for a Governance Agreement (defined below) that will govern the relationship between the Debtor and Mr. Shkreli with respect to the shares of the Debtor's common stock owned or controlled by Mr. Shkreli.

2. If the Debtor's execution of the Stipulation is promptly approved by this Court, future litigation among the Parties to resolve the merits of Mr. Shkreli's POC will be avoided. The Parties and other parties in interest in the Debtor's chapter 11 case will also have certainty as to how Mr. Shkreli's claims and interests will be treated. Importantly, the Stipulation also grants the Debtor a Call Option² on Mr. Shkreli's stock following the Company's exit from chapter 11 and commits Mr. Shkreli to signing a shareholder agreement which will significantly limit the actions he can take as a shareholder for 24 months following exit. In addition, the parties will exchange mutual releases, which will free the Debtor from potential indemnification or advancement claims related to Mr. Shkreli's tenure as an officer and director of the Debtor.

3. Avoiding the burden, expense and uncertainty of litigation of the merits of Mr. Shkreli's claims and interests, and agreeing to the treatment of his claims and interests, will free the Debtor from legal expense that would otherwise be incurred post-confirmation to submit and to resolve an objection to Mr. Shkreli's POC or litigate concerning his stock holdings. If the Stipulation is approved, this effort and related expenditures will be obviated and, as a result, the feasibility of the Plan will be enhanced.

² If the Reorganized Debtor exercises its Call Option on Mr. Shkreli's stock, the Reorganized Debtor will finance this exercise with new capital, not with any funds from the exit facility or cash on hand at the Effective Date. Therefore, the Reorganized Debtor's potential exercise of this Call Option does not affect the Plan's feasibility.

4. For these reasons, and the reasons discussed herein, the Debtor submits that approving the Stipulation is the best interests of its estate, creditors, shareholders and other parties in interest.

JURISDICTION

5. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

6. The bases for the relief requested herein are sections 105(a), 363 and 502 of the Bankruptcy Code and Bankruptcy Rule 9019.

BACKGROUND

7. On December 29, 2015 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (as amended, the “Bankruptcy Code”). The Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or committee has been appointed in this chapter 11 case.

Events Leading to the Chapter 11 Case

8. The events leading to the Debtor seeking relief under chapter 11 have been well chronicled in the Parties’ papers, open court, and the press, so the Debtor will only briefly summarize them here.

9. The Debtor is a publicly traded biopharmaceutical company. In November 2015, an investor group comprised of Mr. Shkreli and others acquired more than 50% of the outstanding shares of the Debtor in open market transactions. Mr. Shkreli was appointed Chief Executive Officer and Chairman of the Board.

10. In a filing with the U.S. Securities and Exchange Commission (the “SEC”) on December 9, 2015, the Debtor announced that it had entered a Securities Purchase Agreement with certain investors for the purchase and sale of the Debtor’s common stock in a private placement in public equity transaction (the “PIPE Transaction”). In a filing with the SEC on December 16, 2015, the Debtor announced that the PIPE Transaction had been consummated.

11. On December 17, 2015, Mr. Shkreli was arrested following a federal indictment, charging him with multiple counts of securities fraud, securities fraud conspiracy, and wire fraud conspiracy. According to the U.S. Department of Justice’s press release announcing the indictment, the indictment relates to Mr. Shkreli’s tenure as CEO of Retrophin, Inc., a biopharmaceutical company that trades under the ticker symbol RTRX, and as founder and managing member of hedge funds MSMB Capital Management LP (MSMB Capital) and MSMB Healthcare Management LP (MSMB Healthcare).

12. Mr. Shkreli was terminated as CEO of the Debtor and resigned from the Board of Directors on December 17, 2015, after serving in those capacities for less than one month.

13. At the time of these events, Mr. Shkreli was a member of the Board of Directors of the Debtor.

14. On December 17, 2015, Tony Chase resigned from the Board of Directors. Also, in a filing with the SEC on December 23, 2015, the Debtor announced that its independent registered public accounting firm, Marcum LLP, resigned, and its Interim Chief Financial Officer, Christopher Thorn, submitted his resignation. On December 28, 2015, the Debtor announced that Tom Fernandez and Marek Biestek resigned as members of the Board of Directors of the Debtor on December 27, 2015.

15. On December 17, 2015, NASDAQ halted trading in the Debtor's stock. As of the date hereof, trading on NASDAQ has not resumed. On December 18, 2015, the Debtor received a letter from NASDAQ indicating that NASDAQ intended to delist the Debtor's securities under its discretionary authority. NASDAQ cited a number of reasons for its decision, including, among other things, the recent criminal indictment and arrest of Mr. Shkreli.

16. As a result of these events and other challenges facing the Debtor, the Debtor sought chapter 11 protection on December 29, 2015.

The Bar Date and Settlement of the Proof of Claim Filed by Mr. Shkreli

17. On February 16, 2016, the Court entered the Order Granting Debtor's Motion for an Order (I) Establishing Bar Dates for Filing Proofs of Claim, (II) Approving the Form and Manner of Notice Thereof and (III) Granting Related Relief (D.I. 186) (the "Bar Date Order"), which, among other things, established April 1, 2016,³ as the general bar date (the "General Bar Date") by which creditors must file proofs of claim for pre-Petition Date claims.

18. After the entry of the Bar Date Order, the Debtor served notice of the General Bar Date (D.I. 219) and appropriate claim forms pursuant to the Bar Date Order. The Debtor also published notice of the General Bar Date in the *San Francisco Chronicle* and the National Edition of *The Wall Street Journal*.

19. Mr. Shkreli timely filed his POC asserting rights to indemnification and reimbursement of fees and expenses that may be incurred in connection with various civil actions for damages in which Mr. Shkreli has been named defendant based upon his relationship with and actions regarding the Debtor.

³ The Bar Date Order set the General Bar Date as thirty days after the Service Date (as defined in the Bar Date Order). The Service Date occurred on March 1, 2016 and the General Bar Date is therefore April 1, 2016.

20. The “Attachment” to the POC contains a narrative explanation for Mr. Shkreli’s claim, and states that “pursuant to section 6 of the Debtor’s Amended and Restated Bylaws (the “Bylaws”), Shkreli is entitled to (i) indemnification for any and all losses that may arise relating to certain litigation matters for which Shkreli is a named defendant, and (ii) advances on any and all expenses associated with his defense.” The attachment to Mr. Shkreli’s POC provides a list of the actions in which Mr. Shkreli is named and the claims associated with Mr. Shkreli, as well as the parties as to whom the Debtor has named Mr. Shkreli as co-debtor. Mr. Shkreli’s POC asserts that Mr. Shkreli is entitled to indemnification with respect to liability and advances on fees and expenses associated with defense of the claims listed in the POC.

21. In the Stipulation, the Debtor and Mr. Shkreli have agreed to settle all claims held by Mr. Shkreli pursuant to the terms of a governance agreement (the “Governance Agreement”) set forth in the Stipulation and an exchange of mutual releases.

Settlement Negotiations

22. Notwithstanding the Parties’ dispute regarding Mr. Shkreli’s POC and stock interests, the Parties have been engaged in active settlement discussions since May 2016.

23. Through these settlement negotiations, the Parties were able to reach mutually agreeable terms to resolve the Mr. Shkreli’s POC and their other disputes.

The Stipulation

24. The Parties’ settlement is reflected in the Stipulation and the Term Sheet attached to the Stipulation, which provides the terms of the Parties’ Governance Agreement to be entered into in accordance with the Stipulation and Term Sheet.

25. The key terms of the Stipulation require the execution by the Parties of the Governance Agreement prior to the Effective Date of the Plan on the following terms:⁴

- (a) The provisions of the Governance Agreement will apply to all shares of capital stock of the Debtor owned beneficially or of record by Mr. Shkreli and his affiliates and associates (the “Shares”). To the extent that any of the Shares are held in the individual brokerage account at E*TRADE Securities LLC, 34 Exchange Place, 501 Plaza 2, Jersey City, New Jersey 07311, ending in the “02588,” (the “E*TRADE Account”) which is the subject of the Restraining Order dated January 7, 2016, filed in United States v. Martin Shkreli, 15 Cr. 637 (KRM) (the “Restraining Order”), no provisions of the Governance Agreement are in any way intended to violate, conflict with, or otherwise infringe upon the terms of the Restraining Order. In the event that any provision of the Governance Agreement is determined to be in conflict with any provision of the Restraining Order, the terms of the Restraining Order will control.
- (b) Prior to the sixty-first (61st) day following the Plan Effective Date (the period of time between the Plan Effective Date and the succeeding 61st day being the “60-Day Period” and the period of time after the succeeding 61st day being the “Effective Date”), Mr. Shkreli will not sell any of his Shares at a price less than the Market Discount Price as that term is defined below. For a period of 120 days following the Effective Date (the “Initial Period”), the Debtor will have the exclusive right to repurchase (the “Repurchase”) from Mr. Shkreli any or all of the Shares (the “Repurchase Right”) at a price which is a 10% discount to the previous two week volume-weighted average price (the “VWAP”) (the “Market Discount Price”). As it pertains to the Debtor’s exercise of its Repurchase Right, the Market Discount Price may not be less than \$2.50 per Share (the “Minimum Purchase Price”). The Debtor will provide written notice to Mr. Shkreli of its intent to exercise the Repurchase Right (a “Call Notice”) and will have two weeks following the delivery of such notice to fund the Repurchase (the “Funding Period”). During the Initial Period and before the Debtor’s delivery of a Call Notice, Mr. Shkreli will have the right to sell any or all of his Shares (as may be permissible under applicable securities laws) to non-affiliates at a price that is greater than the Market Discount Price (a “Permitted Sale”); *provided, however*, that (i) no Permitted Sale may occur between delivery of the Call Notice and expiration of the Funding Period; and, (ii) Mr. Shkreli will provide the Debtor with written notice of his intent to transfer the Shares in such a sale and the Debtor will have a right of first refusal at the same price. In addition, for 60 days following the Initial Period (the “Second Period”), the Debtor will have an option to exercise the Repurchase Right under the

⁴ The summary of the Stipulation described in this Motion is qualified in its entirety by the terms of the Stipulation. In the event of any inconsistency, the Stipulation controls.

same terms and conditions as during the Initial Period. During the Second Period, Mr. Shkreli will have the right to sell any or all of his Shares (as may be permissible under applicable securities laws), *provided however*, that if the Debtor provides Mr. Shkreli with a Call Notice, Mr. Shkreli will not dispose of any of his shares between delivery of the Call Notice and expiration of the Funding Period.

- (c) To the extent that the Debtor determines it to be advisable, Mr. Shkreli will seek the consent of the requisite governmental authorities and/or E*TRADE Securities LLC, or cooperate with the Debtor in seeking such consent in connection with entering into and performing the Governance Agreement.
- (d) So long as Mr. Shkreli continues to own, beneficially or of record, any or all of the Shares, at every meeting of the stockholders of the Debtor, and at every adjournment or postponement thereof, and on every action or approval by written consent of the stockholders of the Debtor, Mr. Shkreli must appear at the meeting by proxy or otherwise and cause the Shares to be present thereat for purposes of establishing a quorum. If Mr. Shkreli is the beneficial owner, but not the record owner, Mr. Shkreli will use his best efforts to cause the record owner and any nominees to comply with all of the provisions of the Governance Agreement. Mr. Shkreli will vote or act by written consent in proportion to the votes or consents of the stockholders who participate at the meeting (in person or by proxy) or by written consent on the matter (whether by voting for, against, abstain, or withhold but excluding broker non-votes) other than Mr. Shkreli.
- (e) Mr. Shkreli will not have any right to nominate directors to the Board, including with respect to any advance notice nomination provisions in the Debtor's bylaws. So long as Mr. Shkreli continues to own, beneficially or of record, any or all of the Shares, in connection with all director elections and any proposals for the removal of directors, Mr. Shkreli will agree to vote the Shares in proportion to votes of the public stockholders consistent with the quorum and voting restrictions described above.
- (f) For twenty-four months, Mr. Shkreli will agree not to, directly or indirectly: (i) purchase or acquire record or beneficial ownership of any securities, derivative instruments with respect to any securities, property or assets of the Debtor or its subsidiaries; (ii) make, or encourage any other person to make, a proposal for any tender offer, merger or other business combination involving the Debtor or its subsidiaries; (iii) make or participate in any solicitation of proxies with respect to the securities of the Debtor (other than in connection with the Board's solicitation of proxies in connection with stockholder action); (iv) form, join or participate in a "group" with respect to the securities of the Debtor; (v) make any public announcement with respect to, or submit an unsolicited proposal for, any transaction involving the Debtor; (vi) seek to control or

influence the management, Board or policies of the Debtor (acting alone or with others); (vii) submit any proposal to be considered by the stockholders of the Debtor, including pursuant to any advance notice provisions in the Debtor's bylaws; (viii) take any action that might force the Debtor to make a public announcement regarding any of the matters of the type set forth above; or (ix) enter into any discussions or arrangements with any third party with respect to any of the foregoing. Mr. Shkreli will not request that the Debtor (or its director, officers, employees or agents) waive or amend any of the standstill provisions. Any acquisition of securities of the Debtor in violation of the standstill provisions will be null and void and Mr. Shkreli will transfer any such securities to the Debtor for a nominal amount.

- (g) Subject to the terms of the Restraining Order, Mr. Shkreli will agree that, if the Board determines that a tender or exchange offer or similar transaction is in the best interests of the public stockholders, Mr. Shkreli would commit to sell the Shares in such a transaction so long as the terms in this paragraph with respect to Market Discount Price and Minimum Purchase Price are satisfied.
- (h) Mr. Shkreli will contractually agree not to consummate/enter into material transactions between the Debtor and Mr. Shkreli, including any amendments to the Governance Agreement without independent Board approval.

26. In addition, the Stipulation provides for the following mutual releases:

- (a) Except for the obligations set forth in this Stipulation, and expressly subject to the execution of the Governance Agreement by all Parties thereto, the Debtor, on behalf of itself, its bankruptcy estate, and any subsequently appointed trustee or bankruptcy estate representative, and its present, former and future principals, agents, officers, directors, employees, successors, assigns, attorneys, insurers, affiliates and subsidiaries, hereby waives, releases and discharges Mr. Shkreli from any and all demands, claims, liabilities, damages, actions, causes of action, fines, penalties, expenses, costs and fees whatsoever existing as of the Execution Date, whether now known or unknown, matured or not matured, asserted or not asserted, prior to the Petition Date or during the Bankruptcy Case and specifically including any and all claims or causes of action under Chapter 5 of the Bankruptcy Code.
- (b) Except for the obligations set forth in this Stipulation, and expressly subject to the execution of the Governance Agreement by all Parties thereto, Mr. Shkreli on behalf of himself and his present, former and future agents, successors, assigns, attorneys, insurers, affiliates and subsidiaries, hereby waives, releases and discharges the Debtor, the

Debtor's bankruptcy estate, and the Debtor's present, former and future principals, agents, successors, assigns, attorneys, insurers, affiliates and subsidiaries, from any and all demands, claims, liabilities, damages, actions, causes of action, fines, penalties, expenses, costs and fees whatsoever existing as of the Execution Date, whether now known or unknown, matured or not matured, asserted or not asserted, prior to the Petition Date or during the Bankruptcy Case.

27. The Stipulation is subject to Court approval and the Effective Date of the Plan as set forth therein. The Stipulation also contains additional customary settlement terms.

RELIEF REQUESTED

28. By this Motion, the Debtor requests that the Court enter the Interim Order and Final Order approving the Stipulation, pursuant to section 105(a), 363 and 502 of the Bankruptcy Code and Bankruptcy Rule 9019.

BASIS FOR RELIEF

29. Bankruptcy Rule 9019 governs approval of settlements by a debtor and provides that, "on motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019. In addition, section 105(a) of the Bankruptcy Code provides that the "court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

30. The starting point in analyzing any proposed settlement is the general policy of encouraging settlements and favoring compromises. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) ("Compromises are favored in bankruptcy."); *In re World Health Alternatives, Inc.*, 344 B.R. 291, 296 (Bankr. D. Del. 2006) (finding settlements "generally favored in bankruptcy"). The Third Circuit has recognized that "[i]n administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts." *In re Penn Cent. Transp. Co.*, 596 F.2d 1102, 1113 (3d Cir. 1979) (internal quotation marks omitted)

(quoting *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)).

31. To approve a settlement, a bankruptcy court must determine that such settlement is in the best interest of a debtor's estate. *Law Debenture Trust Co. of New York v. Kaiser Aluminum Corp. (In re Kaiser Aluminum Corp.)*, 339 B.R. 91, 95–96 (D. Del. 2006). In addition, a court must:

assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal in light of four factors: (1) the probability of success in the litigation, (2) the likely difficulties in collection, (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it, and (4) the paramount interests of the creditors.

Id. at 96 (quoting *Martin*, 91 F.3d at 393). The court's ultimate inquiry is whether a settlement is fair, reasonable, and in the best interest of a debtor's estate. *In re Marvel Entm't Grp., Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (quoting *In re Louise's, Inc.*, 211 B.R. 798, 801 (D. Del. 1997)).

32. The decision whether to approve a proposed compromise and settlement is committed to the sound discretion of the bankruptcy court. *See, e.g., In re Coram Healthcare Corp.*, 315 B.R. 321, 329 (Bankr. D. Del. 2004). A court need not decide the numerous issues of law and fact raised by the settlement and it need not be convinced that the proposed settlement is the best possible, rather "[t]he court need only conclude that the settlement falls within the reasonable range of litigation possibilities somewhere above the lowest point in the range of reasonableness." *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 833 (Bankr. D. Del. 2008) (quoting *In re Coram Healthcare Corp.*, 315 B.R. 321, 330 (Bankr. D. Del. 2004)).

33. In the Debtor's business judgment, the resolution of the disputed issues between the Debtor and Mr. Shkreli embodied in the Stipulation is reasonable and in the best interest of

the Debtor's estate, creditors, shareholders and other parties in interest. The Stipulation is the product of extensive good-faith, arm's-length negotiations between Mr. Shkreli and the Debtor. The terms of the Stipulation provide a resolution of the Mr. Shkreli's claims and related issues that falls well within the range of reasonable litigation outcomes.

34. Importantly, the Stipulation also provides a fair and practical resolution of disputes that will facilitate the Debtor's efforts to confirm and consummate the Debtor's Plan in a timely and efficient manner and consistent with the requirements the Savant transaction and the Debtor's exit and debtor-in-possession financings. The Debtor's goal is to confirm its Plan and exit bankruptcy with as little distractions as possible, the Stipulation including obtaining the release in the Stipulation from Mr. Shkreli goes a long way in reaching this goal. It should be noted that Mr. Shkreli was only willing to enter into the Stipulation and provide a release in exchange for a mutual release from the Debtor. The Debtor believes that under the circumstances the value given by Mr. Shkreli in the Stipulation warrants the Debtor entering into the Stipulation, including the mutual release.

35. The Debtor expects that, following its exit from bankruptcy and the dilution resulting from, among other things, the conversion into equity of the Debtor's exit financing and debtor-in-possession financing, Mr. Shkreli will own approximately 14% of the common stock of the Reorganized Debtor. The Debtor has determined, based on numerous interactions with potential investors, service providers (including significant potential hospital sponsors of future drug trials) and potential sources and partners for other drugs that the Reorganized Debtor might wish to develop, that Mr. Shkreli's post-exit retention of a significant portion of the Debtor's common equity will make it difficult to pursue otherwise beneficial transactions. Many financial institutions and pharmaceutical organizations community are not willing to engage in business

with the Debtor or the Reorganized Debtor while Mr. Shkreli holds a significant portion of its equity or has the potential to exert influence on the Debtor. For this reason, the Call Option and the Governance Agreement provided in the Stipulation are of particular value to the Debtor.

36. Moreover, as discussed below, the relevant *Martin* factors weigh in favor of approving the proposed Stipulation.

A. The Probability of Success in Litigation

37. Although the Debtor believes it has defenses to the claims asserted in Mr. Shkreli's POC under the Bankruptcy Code and applicable nonbankruptcy law, the outcome of any such dispute is uncertain. In addition, although the Debtor believes that it may be possible to subordinate or disallow Mr. Shkreli's equity interests in appropriate circumstances, the outcome of any such challenge to Mr. Shkreli's equity interests is also uncertain.

38. The Debtor further believes that, to the extent allowed, Mr. Shkreli's claims would be subordinated pursuant to section 510(b) of the Bankruptcy Code, but even if the claims were to be subordinated to the level of common stock pursuant to section 510(b) of the Bankruptcy Code, the Parties' disputes may not end. The Debtor believes, and its proposed Plan contemplates, that the Debtor is solvent and Existing Common Stock will retain their interests. As a result, even claims subordinated to the level of common stock may be entitled to a distribution. Therefore, the Parties would still need to litigate, at a minimum, the appropriate amount of Mr. Shkreli's claims and the allocation of shares of common stock on account of any such damages. The ultimate outcome of such proceedings is uncertain. *See, e.g., In re Orange Cty. Nursery, Inc.*, 2013 WL 3776320, at *6–8 (Bankr. C.D. Cal. July 17, 2013), *rev'd on other grounds*, 523 B.R. 692 (C.D. Cal. 2014).

39. Moreover, until the validity of Mr. Shkreli's equity interest in the Debtor can be litigated and resolved, the ownership stake in the Debtor currently held by Mr. Shkreli could allow Mr. Shkreli to have some influence on governance matters relating to the Debtor.⁵ The Governance Agreement allows the Debtor to take actions without risk of interference or contrary action by Mr. Shkreli, because it imposes restrictions and limitations on Mr. Shkreli's exercise of rights associated with his shares, and requires that such rights be exercised in accordance with the majority of shareholders' decisions and actions.

40. Put simply, even if the Debtor were successful in subordinating Mr. Shkreli's claims, the Debtor still might have litigation with Mr. Shkreli over the allowance, amount, and allocation of stock on account of his claims. The Stipulation proposed by this Motion avoids the burden, expense and uncertainty of such litigation. In addition, the Stipulation resolves governance issues that may arise from Mr. Shkreli's assertion of his alleged rights as shareholder.

B. The Complexity of the Litigation Involved, and the Expense, Inconvenience and Delay Necessarily Attending It

41. As described in detail above, the issues that would have to be resolved to determine Mr. Shkreli's POC include numerous disputed factual allegations and disputed legal issues the ultimate outcome of which is uncertain and may require extensive litigation to achieve. Therefore, this factor strongly militates in favor of approving the Stipulation.

⁵ This is not to say that Mr. Shkreli realistically could by himself re-acquire voting control of the Company. Following the Debtor's emergence from bankruptcy approximately 63.7% of the issued and outstanding common stock of the Debtor will be held by the Black Horse Entities and Nomis Bay Entity that are acting as the Primary Plan Sponsor.

C. The Paramount Interest of Holders of Claims and Interests

42. The interests of creditors, interest holders and other stakeholders are best served by approving the Stipulation. Absent approval of the Stipulation, Mr. Shkreli will continue to assert his claims against the Debtor and could assert shareholder rights. Although, the Debtor believes it would ultimately prevail on these issues, the Stipulation will spare the Debtor the burdens and expenses of litigation that would otherwise be encountered and will facilitate actions to be taken by the Board and other shareholders. The Governance Agreement and the Call Option will also allow the Debtor or the Reorganized Debtor to pursue beneficial transactions that may not be available to it in the absence of such arrangements. Therefore, the Debtor will be in a better position to effectuate its restructuring as contemplated by the Plan, and achieve a cleaner break from weight and burden of the past.

CONCLUSION

43. For the foregoing reasons, the Court should find that the Stipulation (i) is fair, equitable and in the best interests of the Debtor, its estate, creditors, stockholders, and other parties in interest; (ii) represents an exercise of the Debtor's sound business judgment; and (iii) should be approved pursuant to sections 105(a), 363 and 502 of the Bankruptcy Code and Bankruptcy Rule 9019.

NOTICE

44. Copies of this Motion have been served by email, hand delivery, facsimile, and/or overnight delivery upon the following: (a) the Office of the United States Trustee for the District of Delaware; (b) counsel to Mr. Shkreli; (c) the SEC; (d) Kaye Scholer LLP; (e) Chardan Capital Markets, LLC and its known counsel; (f) current and prior insurers providing directors and officers liability insurance to the Debtor; (g) the parties included on the Debtor's list of twenty (20) largest unsecured creditors; and (h) all parties who have requested notice under Bankruptcy

Rule 2002 (the “Notice Parties”). The Debtor submits that, under the circumstances, no other or further notice is required.

WHEREFORE, the Debtor respectfully requests that the Court: (i) enter the Interim Order attached hereto **Exhibit A** preliminarily approving the Stipulation; (ii) schedule and hold a final hearing on June 20, 2016, or as soon thereafter as the Debtor may be heard prior to June 30, 2016; (iii) following notice and a hearing, enter the Final Order attached hereto as **Exhibit B** approving the Stipulation on a final basis; and (iv) grant such other and further relief as is just and proper under the circumstances.

Dated: June 14, 2016
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Marcy J. McLaughlin

Eric D. Schwartz (No. 3134)
Gregory W. Werkheiser (No. 3553)
Matthew B. Harvey (No. 5186)
Marcy J. McLaughlin (No. 6184)
1201 N. Market St., 16th Floor
PO Box 1347
Wilmington, DE 19899-1347
Telephone: (302) 658-9200
Facsimile: (302) 658-3989
E-mail: eschwartz@mnat.com
gwerkheiser@mnat.com
mharvey@mnat.com
mmclaughlin@mnat.com

- and -

Peter Ivanick, Esq. (admitted *pro hac vice*)
Pieter Van Tol, Esq. (admitted *pro hac vice*)
John D. Beck, Esq. (admitted *pro hac vice*)
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
Telephone: (212) 918-3000
Facsimile: (212) 918-3100
E-mail: peter.ivanick@hoganlovells.com
pieter.vantol@hoganlovells.com
john.beck@hoganlovells.com

Counsel to the Debtor and Debtor in Possession