LEVIN-EPSTEIN & ASSOCIATES, P.C.

60 East 42nd Street • Suite 4700 • New York, New York 10165
T: 212.792.0046 • E: Joshua@levinepstein.com

April 5, 2024

Via Electronic Filing
The Hon. Judge Denise Cote
U.S. District Court, Southern District of New York (Foley Square)
500 Pearl St.
New York, NY 10007-1312

Re: *Koestler v. Shkreli*
Case No.: 1:16-cv-07175

Dear Honorable Judge Cote:

This law firm represents Akkadian Stock Partners SA ("Akkadian") and serves as the escrow agent ("Escrow Agent") under the Stock Purchase Agreement ("SPA") made between Receiver Derek C. Abbott (the "Receiver") and Akkadian.

This letter respectfully serves as an objection to the Receiver's application, dated March 12, 2024, for, *inter alia*, the authorization to distribute a portion of the proceeds for the sale of stock under the SPA (the "Application for Distribution."). [Dckt. No. 292].

I. Relevant Procedural Background

By Order dated August 16, 2021, the Court entered an Order for Turnover and Appointment of Receiver, pursuant to which Derek C. Abott (the "Receiver") was appointed as Receiver to collect certain Phoenixus stock owned by the Judgment Debtor and to sell the stock to satisfy the Judgment to the Judgment Creditor (the "Receivership Order"). [1] [Dckt. No. 120].

On May 25, 2023, the Receiver filed a duly executed copy of the Amended and Restated Stock Purchase Agreement, dated as of May 23, 2023, by and between the Receiver and Akkadian (the "Stock Purchase Agreement"). [Dckt. No. 242-1]. The Stock Purchase Agreement provided several grounds for the cancellation of the Stock Purchase Agreement and certain indemnification obligations for the Escrow Agent.

By Order dated July 25, 2023, the Court granted the Receiver's application to enter into the Stock Purchase Agreement with Akkadian (the "Sale Order"). [Dckt. No. 270]. The Sale Order directed that:

> "The Receiver shall seek further order of the Court prior to the distribution of the proceeds of the Phoenixus stock."

Id. On March 8, 2024, the Receiver filed the Application for Distribution. [Dckt. No. 291]. The Receiver's Application for Distribution provided, in relevant part, as follows:

> "[i]n the interest of remitting payment to the Judgment Creditor, and paying the Court-approved expenses of the Receiver, without any cloud or exposure to the

[1] Capitalized terms not defined herein have the meanings ascribed to them in the Receivership Order.

> Receiver in his official and individual capacities, I respectfully request that this Court enter the requested proposed order, upon notice and after an opportunity to be heard by Akkadian, if they wish. I further respectfully request that the Court set a deadline for Akkadian to respond to the notice and submit any objection it might have to the proposed order."

Id. Thus, the Receiver acknowledged that a dispute has arisen between the Receiver and Akkadian.

II. LEGAL ARGUMENT

A. To the Extent the Court Acts Favorably on the Receiver's Application for Distribution, the Court Should Respectfully Order the Receiver Not to Release All of the Proceeds Because of the Indemnification Obligations under the SPA

Section 2 of the Stock Purchase Agreement, titled "Payment of Purchase Price, Escrow; Effectiveness of Agreement", provides for certain indemnification obligations running to the Escrow Agent under subsection 2(d)(iii). [Dckt. No. 242-1]. Section 2(d)(iii) provides in relevant part that:

> "The parties represent to the Escrow Agent that they understand and acknowledge that the Escrow Agent is serving as Escrow Agent and **holding the Escrow solely as an accommodation to the parties** to allow the completion of the transaction contemplated in this Agreement. In dealing with and disbursing the Escrow and the funds held, the Escrow Agent shall not be liability for any damage, liability or loss arising out of or in connection with the services rendered by the Escrow Agreement pursuant to this Agreement, except for damage, liability or loss resulting from gross negligence or willful misconduct."

Id. (emphasis added); [Dckt. No. 242-1]. Section 2(d)(iii) further provides that:

> "In the event of any litigation between Buyer and Seller as a result of which Escrow Agent incurs any attorney's fees, costs or expenses related to his obligations under this Agreement, then such fees, costs and expenses shall be payable to the Escrow Agent **from the Escrow and may be deducted from the Escrowed Funds by the Escrow Agent**. In the event that either party proceeds to litigation over this Agreement or the Escrow, the Escrow Agent may deduct any reasonable attorneys' fees incurred as Escrow Agent".

Id (emphasis added). The Escrow Agent released the Escrow in accordance with the Receiver's and Akkadian's joint instructions, as acknowledged in the Receiver's Application for Distribution. [Dckt. No. 291].

As the immemorial cliche goes, "*no good deed goes unpunished*." As the Escrow has been released, the Escrow Agent cannot avail itself to section 2(d)(iii) of the Stock Purchase Agreement that expressly permits the Escrow Agent to deduct certain fees, expenses, and costs from the Escrowed Funds. *Id*.; [Dckt. No. 242-1]. Given that the Receiver (and Akkadian) acknowledged

in the Stock Purchase Agreement that the Escrow Agent served "solely as an accommodation to the parties" and that the Escrow Agent did not receive a for service, the Escrow Agent should respectfully not be in a position where he must advance monies for any related litigation between Akkadian and the Receiver. *Id*.; see also *Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 374–75 (1st Dept. 2007), *aff'd*, 10 N.Y.3d 25 (2008) (counseling against interpreting a contract so as not to produce unreasonable results).

Thus, to the extent that the Court acts favorably on the Receivers' Application for Distribution, it is respectfully submitted that the Court order the receiver to not distribute the amount of $150,000, until such time as the dispute between the Receiver and Akkadian has been fully and finally resolved.

B. To the Extent that the Court Acts Favorably on the Receiver's Application for Distribution, the Court Should Respectfully Order the Receiver Not to Release All of the Proceeds Because of the Legal Expenses Akkadian Incurred in the Delaware Bankruptcy Court and Other Jurisdictions

By way of relevant background, Phoenixus AG ("Phoenixus") and its affiliated debtors (the "Debtors") filed certain subchapter V cases in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). In the Bankruptcy Court, the Debtors commenced an adversary proceeding, on June 15, 2023, for injunctive relief and for a preliminary injunction against, *inter alia*, Akkadian. [Dckt. No. 258]. The Debtors sought an injunction to prevent Akkadian from replacing the Management Board and CRO of Phoenixus and from organizing an extraordinary general meeting of shareholders in Switzerland (where Phoenixus is based), which actions had been expressly contemplated under the Share Purchase Agreement. *Id*. Presumably because the Receiver had voted in favor of certain directors on the Management Board of Phoenixus, in the period prior to the commencement of the bankruptcy proceeding, the Debtors did not name the Receiver as a defendant in the adversary proceeding. Thus, Akkadian had to fend off and defend against the Debtors' adversary proceeding, which resulted in the incurrence of substantial attorneys' fees and costs in the Bankruptcy Court and in Switzerland.

Section 2(c) of the Share Purchase Agreement provided in relevant part as follows:

> "Buyer may rescind the transactions contemplated by this Agreement and cancel the transfer of the Phoenixus Shares from Seller to Buyer upon notice and documentation to that effect in, but only in, the following circumstances:
>
> (i)(a) the Company's Board of Directors has not approved the transfer of ownership of the Phoenixus Shares to Buyer in accordance with the Company's Articles of Incorporation or (b) the transfer has not become effective by operation of law, within three (3) months of the Court's Order approving this Agreement and the transactions contemplated in it, provided further that if at any time within those three months a majority of the Company's Board of Directors is comprised of persons nominated by Buyer, by Akkadian or by any investors with a beneficial interest in Akkadian at the time of the execution of the Agreement, this condition

> shall cease to apply as of the time the Company Board of Directors is comprised of such majority; . . "

Id. [Dckt. No. 242-1]. Thus, it is clear that, the Share Purchase Agreement contemplated the appointment of new directors for Phoenixus. *In re Marvel Entertainment Group, Inc.*, 209 B.R. 832, 838 (D. Del. 1997) ("It is well settled that the right of shareholders to compel a shareholders' meeting for the purpose of electing a new board of directors subsists during reorganization proceedings.").

Given that Akkadian had to step into the shoes of the Receiver, the sale price under the Escrow agreement should be modified to account for Akkadian's costs and disbursements in the Bankruptcy Court and in Switzerland. The Receiver's interpretation of the Escrow Agreement is inconsistent with well-established principles of contract construction, which require that all provisions of a contract be read together "as a harmonious whole." *Kinek v. Paramount Commc'ns, Inc.*, 22 F.3d 503, 509 (2d Cir. 1994) (internal citations and quotations omitted).

C. The Escrow Agreement Should Be Cancelled and Rescinded Because of Contractual Frustration and Impossibility

"The common law of contract excuses a party from performing his contractual obligations because of 'impossibility of performance' or 'frustration of purpose'". *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). "In general impossibility may be equated with an inability to perform as promised due to intervening events, such as an act of state or **destruction of the subject matter of the contract**." *Id*. ("emphasis added). The Second Circuit further explained the doctrine of frustration of purpose as follows:

> "Frustration of purpose . . . focuses on events which materially affect the consideration received by one party for his performance. **Both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place**. Thus frustrated, Y may rescind the contract. Discharge under this doctrine has been limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party."

United States v. Gen. Douglas MacArthur Senior Vill., Inc., 508 F.2d 377, 381 (2d Cir. 1974) (emphasis added).

As set forth more fully below, a short while ago, the Debtors had over $8 million of cash on hand to fund the development of an experimental drug that the Debtors represented had the ability to make all creditors whole and result in a distribution to shareholders. That is, ***less than half-a-year ago***, the Debtors had plenty of cash to actually fund a reorganized and operating debtor. The Debtors have squandered all of the available cash, without the Receiver having filed an objection in the Bankruptcy Court.

The Escrow Agreement should be cancelled because there is no consideration, *i.e.*, the

shares of Phoenixus have no value. The Debtors' Amended Joint Subchapter V Plan of Reorganization and Liquidation (the "Plan") provided for the development of an experimental drug called ORL-101 ("ORL") for a priority review voucher ("PRV") with the Food and Drug Administration. The Debtors stated, in the Plan, that the potential success of the ORL business could make creditors whole, paying them 100 cents on the dollars, and any remainder would flow up to Phoenixus and from there to its shareholders. The Debtors have eviscerated the value of Phoenixus in the last six (6) months.

The Debtors estimated, in the Plan, that the development cost of the ORL at approximately $7.8 million. During the bankruptcy, the Debtors squandered virtually all the cash on hand that obstructed the Debtors' development of ORL. As of July 11, 2023, the Debtors had approximately $8.1 million of cash, according to the Debtors' liquidation analysis. Since then, the Debtors have spent virtually all of the cash on hand to the extent that the Reorganized Debtor cannot develop ORL.

Thus, under the doctrine of contractual frustration and impossibility, the Court should respectfully cancel the Share Purchase Agreement because the Receiver cannot provide the contemplated consideration.

Conclusion

We thank the Court for its attention to this matter, and are available at the Court's convenience to answer any questions related to the foregoing.

LEVIN-EPSTEIN & ASSOCIATES, P.C.

By: */s/ Joshua Levin-Epstein*

Joshua Levin-Epstein
60 East 42nd Street, Suite 4700
New York, NY 10170
Tel. No.: (212) 792-0046
Email: Joshua@levinepstein.com