

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

In re:)	
)	Chapter 11
PHASEBIO PHARMACEUTICALS, INC.,)	Case No. 22-10995 (LSS)
Debtor. ¹)	Related to Docket Nos. 205, 249, 302
)	
)	
PHASEBIO PHARMACEUTICALS, INC.,)	
Plaintiff/Counterclaim Defendant,)	Adv. Proc. No. 22-50456 (LSS)
)	
v.)	
SFJ PHARMACEUTICALS X, LTD.,)	Requested Hearing Date: December 27, 2022
)	Requested Objection Deadline: <i>At or Before the Hearing</i>
Defendant/Counterclaim-Plaintiff.)	
)	

**EMERGENCY MOTION OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS FOR AN ORDER ADJOURNING THE HEARING AND
EXTENDING THE OBJECTION DEADLINES WITH RESPECT TO (A) DEBTOR’S
MOTION FOR APPROVAL OF THE SETTLEMENT/SALE TRANSACTION
BETWEEN THE DEBTOR AND SFJ PHARMACEUTICALS X, LTD.
AND (B) THE KEIP/KERP SUPPLEMENT**

The Official Committee of Unsecured Creditors (the “Committee”) of PhaseBio Pharmaceuticals, Inc., as debtor and debtor in possession (the “Debtor”) in the above-captioned chapter 11 case (the “Chapter 11 Case”), hereby moves (this “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), adjourning the hearing (the “Hearing”) and extending the objection deadlines with respect to (a) *Debtor’s Motion for Entry of an Order Pursuant to Sections 105, 363, and 365 of the Bankruptcy Code, and*

¹ The last four digits of the debtor’s federal tax identification number are 5697. The debtor’s principal office is located at 1 Great Valley Parkway, Suite 30, Malvern, Pennsylvania 19355.

Bankruptcy Rules 2002, 6004, 6006, and 9019 (A) Approving the Settlement/Sale Transaction Between the Debtor and SFJ Pharmaceuticals X, Ltd., Including, Among Other Things, the Sale and Transfer of Substantially All of the Debtor's Bentracimab Assets Free and Clear of Liens, Claims, and Encumbrances to SFJ Pharmaceuticals X, Ltd., and (B) Granting Related Relief [Docket No. 249] (the "Settlement/Sale Motion") and (b) Supplement to Motion of Debtor for Entry of an Order (I) Authorizing the Implementation of a Key Employee Retention Program, (II) Authorizing the Implementation of a Key Employee Incentive Program, (III) Approving the Terms of the Debtor's Employee Programs, and (IV) Granting Related Relief [Docket No. 302] (the "KEIP/KERP Supplement"). In support of this Motion, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. Since its formation, the Committee has engaged with the Debtor in good faith to consensually resolve various issues in the Chapter 11 Case, including negotiating resolutions with respect to the Debtor's proposed debtor in possession financing and its proposed bid procedures without filing substantive objections. The Committee was hopeful that it could continue this pattern with respect to the proposed Settlement/Sale Transaction and the proposed KEIP/KERP and attempted to engage with the Debtor and SFJ Pharmaceuticals X, Ltd. ("SFJ") to resolve various issues without Court involvement. Such efforts, however, proved unsuccessful, as both the Debtor and SFJ declined to make substantive modifications in settlement negotiations and declined to agree to a reasonable discovery schedule in advance of the Hearing, regrettably leaving the Committee no choice but to seek the relief requested herein. Without additional time to evaluate the relief requested in both the Settlement/Sale Motion and the KEIP/KERP Supplement, the Committee will be unable to make informed decisions on whether or not such relief is in the best

interest of its constituency, meriting adjournment of the Hearing and extensions of its deadline to object to the relief requested.

2. By the Settlement/Sale Motion, the Debtor seeks approval of the proposed Settlement/Sale Transaction, the terms of which were negotiated and agreed to without the involvement of or agreement from the Committee. Notwithstanding the Debtor's continued assertions that the Committee insisted on the Debtor's entry into the proposed Settlement/Sale Transaction, the Committee (a) was not consulted before the Debtor and SFJ agreed to the terms of the proposed settlement, (b) received the term sheet with respect thereto hours before the settlement was announced on the record before this Court, and (c) received the first draft of the purported Settlement Agreement between the Debtor and SFJ on December 22, 2022. Given its lack of involvement in the negotiation process and the papering of the proposed Settlement/Sale Transaction, the Committee is currently handicapped by certain informational blind spots that must be remedied prior to approval of the relief requested in the Settlement/Sale Motion.

3. In an attempt to rectify this issue, the Committee promptly requested additional information informally from both the Debtor and SFJ. When these informal requests proved unsuccessful, the Committee then submitted multiple formal requests for production and interrogatories to both the Debtor and SFJ and attempted on numerous occasions to negotiate with both parties to resolve the Committee's issues and concerns with the proposed Settlement/Sale Transaction. To date, however, while the Committee has received certain documents and limited responses from both the Debtor and SFJ, the information provided thus far is insufficient for the Committee to adequately evaluate the relief sought in the Settlement/Sale Motion on an informed basis. Moreover, the concerns raised by the Committee with respect to the proposed Settlement/Sale Transaction have not yet been addressed by the Debtor or SFJ. Accordingly, the

Committee is left with no alternative but to file this emergency Motion requesting an adjournment of the Hearing on the Settlement/Sale Motion and a corresponding extension of the deadline to file any objection with respect to the same. Such adjournment is warranted to allow the parties sufficient time to provide the requested information to the Committee such that it can evaluate the requested relief on an informed basis and fulfill its fiduciary duties to its constituents.

4. The Committee similarly tried to engage with the Debtor with respect to its proposed KEIP/KERP programs, requesting certain modifications with respect to both programs as originally proposed. Despite an ongoing colloquy between the Committee and the Debtor regarding resolution of the Committee's concerns with such programs, the Debtor, without notice to the Committee, filed the KEIP/KERP Supplement under seal on December 22, 2022 and failed to provide a copy of the unsealed version until the middle of the following morning, doing so only after the Committee requested it.² The Committee subsequently reached out to Debtor's counsel, seeking clarification as to whether the KEIP/KERP Supplement, which contains a completely revised KERP program that is tied, in part, to the closing of the Settlement/Sale Transaction, would be heard on normal or shortened notice. Notwithstanding the material changes to the proposed KEIP/KERP programs reflected in the KEIP/KERP Supplement—the unsealed version of which was not sent to the Committee until the Friday before a holiday weekend with multiple Court closures—the Debtor did not modify the Committee's original objection deadline (which was December 27, 2022 at 12:00 p.m. (prevailing Eastern time)) until the Committee requested an extension of its deadline to align with the objection deadline with respect to the Settlement/Sale Motion, subject to Court approval. In addition to the prejudicial timing of the filing of the

² As with the Settlement/Sale Transaction, the Committee was not consulted in or involved with the Debtor's development of the new KERP. Indeed, despite multiple inquiries from the Committee about the Debtor's intention to seek approval of the new KERP, the Debtor chose not to engage or reply to such inquires and instead filed the KEIP/KERP Supplement under seal (without providing a copy of the unsealed version to the Committee).

KEIP/KERP Supplement, the fact that the proposed KERP is inextricably tied to the closing of the Settlement/Sale Transaction further underscores the need for an adjournment of the KEIP/KERP Supplement. Accordingly, the Committee must request an adjournment of the Hearing on the KEIP/KERP Supplement and a corresponding extension of the deadline to file any objection with respect to the same.

JURISDICTION AND VENUE

5. This Court has jurisdiction to consider the Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of this Chapter 11 Case and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

6. The legal predicate for the relief requested herein is section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”), Rule 9006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 2002 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

7. Pursuant to Local Rule 9013-1(f), the Committee consents to the entry of a final order or judgment with respect to this Motion if it is determined that this Court lacks Article III jurisdiction to enter such final order or judgment absent consent of the parties.

BACKGROUND

I. The Chapter 11 Case

8. On October 23, 2022 (the “Petition Date”), the Debtor commenced the Chapter 11 Case by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtor continues to operate its business and manage its properties as debtor and debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

9. On November 3, 2022, the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”) appointed the Committee pursuant to Bankruptcy Code section 1102(a) [Docket No. 79]. No trustee or examiner has been appointed in the Chapter 11 Case.

II. The KEIP/KERP Motion

10. On November 29, 2022, the Debtor filed the *Motion of Debtor for Entry of an Order (I) Authorizing the Implementation of a Key Employee Retention Program, (II) Authorizing the Implementation of a Key Employee Incentive Program, (III) Approving the Terms of the Debtor’s Employee Programs, and (IV) Granting Related Relief* [Docket No. 205] (the “KEIP/KERP Motion”), seeking approval of a key employee retention program (the “KERP”) and a key employee incentive program (the “KEIP”).

11. On December 22, 2022, without notice to the Committee, the Debtor filed a sealed supplement to the KEIP/KERP Motion [Docket No. 302] (the “KEIP/KERP Supplement”), revising the terms of the requested KERP and purportedly withdrawing its request for approval of the KEIP. The Committee did not receive the unsealed version of the KEIP/KERP Supplement until December 23, 2022 at 10:23 a.m. (prevailing Eastern time) and was only provided a copy by the Debtor following the Committee’s request for the unsealed version.

12. The Committee's original objection deadline with respect to the KEIP/KERP Motion was December 27, 2022 at 12:00 p.m. (prevailing Eastern time). Given that the relief sought in the KEIP/KERP Motion is inextricably tied to the proposed Settlement/Sale Transaction, the Committee requested that the Debtor extend its objection deadline to December 28, 2022 at 4:00 p.m. (prevailing Eastern time), which corresponds with the objection deadline with respect to the Settlement/Sale Motion. The Debtor agreed to request authorization from the Court to extend the Committee's objection deadline accordingly.

III. The Settlement/Sale Motion

13. On December 13, 2022, the Debtor filed the *Notice of Proposed Transaction Term Sheet* [Docket No. 239] (the "Settlement Term Sheet"), which set forth the proposed terms of the Settlement/Sale Transaction through which the Adversary Proceeding would be resolved and the Debtor would transfer the Bentracimab Assets to SFJ.

14. On December 15, 2022, the Debtor filed the Settlement/Sale Motion, seeking approval of its settlement with and corresponding sale of its Bentracimab Assets to SFJ. *See* Docket No. 249. The Hearing is currently scheduled for December 30, 2022 at 10:00 a.m. (prevailing Eastern time) and the objection deadline with respect to the Settlement/Sale Motion is currently December 28, 2022 at 4:00 p.m. (prevailing Eastern time).

15. As described in the Settlement/Sale Motion, the proposed Settlement/Sale Transaction contemplates a number of different provisions that may provide value to unsecured creditors and the Debtor's estate, including, among other things, (a) a cash payment to the Debtor from SFJ in the amount of \$32.9 million; (b) potential assumption and assignment of certain of the Debtor's executory contracts and unexpired leases (the "Assumed and Assigned Contracts") to SFJ, along with payment of related cure costs; (c) payment to the Debtor of an assignable royalty

of 2.5% of worldwide net sales of Bentracimab, when such sales exceed \$300 million in any calendar year (the “Royalty Payment”); and (d) offers of full-time employment opportunities at SFJ to certain employees of the Debtor.

16. As of this filing, the Debtor has not yet filed the definitive documentation papering the proposed Settlement/Sale Transaction with the Court, including the Settlement Agreement and the associated Program Transfer Agreement. The Committee received a copy of the draft Settlement Agreement from the Debtor on December 22, 2022 at 3:01 p.m. (prevailing Eastern time) and received a copy of the draft Program Transfer Agreement from the Debtor on December 23, 2022 at 6:13 p.m. (prevailing Eastern time), but only after the Committee made multiple requests for such documents.

RELIEF REQUESTED

17. By this Motion, the Committee respectfully requests that the Court enter an order, substantially in the form of the Proposed Order, (a) adjourning the Hearing on the Settlement/Sale Motion and the KEIP/KERP Supplement to a date and time that the Court deems appropriate; (b) extending the deadlines for the Committee to file objections or responses to the Settlement/Sale Motion and the KEIP/KERP Supplement; and (c) granting related relief.

BASIS FOR RELIEF REQUESTED

18. Bankruptcy Code section 105(a) authorizes a court to “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). Bankruptcy Rule 9006(b) authorizes courts to enlarge the time periods within which certain actions must be taken, and states, in pertinent part, that:

when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the court, the court for cause shown may at any time in its discretion . . . with or without motion or notice

order the period enlarged if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous order . . .

Fed. R. Bankr. P. 9006(b). As set forth below, cause exists for the Court to adjourn the Hearing and extend the deadline by which the Committee can file objections or responses to the Settlement/Sale Motion and the KEIP/KERP Supplement.

I. Cause Exists to Adjourn the Settlement/Sale Motion, Given the Committee’s Current Informational Blind Spots.

19. At this juncture, the Committee simply does not have sufficient information to make an informed judgment about the relief requested in the Settlement/Sale Motion. At various points, the Debtor has insisted that the Committee “urged” the Debtor to enter into the Settlement/Sale Transaction with SFJ and that the Debtor largely agreed to settle with SFJ at the Committee’s insistence; however, to the contrary, the Committee was *not involved in or consulted with respect to the negotiations with SFJ, nor did it ever agree to the terms of the proposed Settlement/Sale Transaction*. Although the Committee attended the initial mediation session between the parties on November 28, 2022, the Committee was not involved in the material negotiations of the proposed Settlement/Sale Transaction and was only generally made aware of the ongoing negotiations via occasional phone calls from Debtor’s counsel. Indeed, the Committee first received the agreed-upon term sheet late in the evening on December 12, 2022, just hours before the parties announced their settlement in open court the following morning on December 13, 2022.

20. Since learning of the proposed Settlement/Sale Transaction, the Committee has worked quickly to try and analyze the impact of its terms on unsecured creditors; however, given that the Committee was not involved in the negotiation process, this analysis necessarily called for additional information. The Committee initially sought to obtain such information from the Debtor and SFJ informally and on a consensual basis in an effort to be collaborative and avoid unnecessary

expense, time, and effort during an already compressed timeframe. However, these informal efforts did not yield prompt results. Thus, on December 19, 2022, the Committee served targeted sets of requests for production and interrogatories upon the Debtor and SFJ, respectively. The Committee also proposed a discovery schedule to the parties and provided a draft scheduling stipulation for the parties' consideration.

21. On December 21, 2022, the parties met and conferred concerning the Committee's discovery requests and discussed the Committee's proposed discovery schedule stipulation. The Debtor and SFJ stated that they would provide certain information on a consensual basis. The parties continued their discussions on December 22, 2022 but, unfortunately, the parties were unable to resolve the Committee's concerns or come to an agreement on the proposed discovery schedule. Accordingly, later that day, the Committee served notices of deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure upon the Debtor and SFJ. On December 23, 2022, counsel to the Committee, the Debtor, and SFJ engaged in further settlement discussions, but such discussions did not result in any material resolution between the parties.

22. Although the Debtor and SFJ have provided some of the information the Committee has requested, the Committee has not received sufficient information to date to properly evaluate the proposed Settlement/Sale Transaction and is currently faced with more questions than answers with respect to several aspects of its terms, including but not limited to, (a) the proposed distribution of the SFJ Consideration based upon the Debtor's current budget and the amount of outstanding financial obligations, (b) the various contracts (if any) that will be assumed and assigned to SFJ and the related proposed Cure Amounts, (c) the value, timing, and likelihood of the Royalty Payments (and the underlying assumptions underpinning the Debtor's valuation of the Royalty Payments), (d) the number and identity of employees that will be hired by SFJ, (e) the

value of the non-Bentricimab assets that are currently being marketed for sale and which may provide a source of recovery to unsecured creditors, and (f) the risk of administrative insolvency based on the Debtor's current budget and proposed use of cash.

23. The Committee's discovery requests, interrogatories, and deposition requests go directly to these issues (and others). The Committee has requested, among others, the following categories of documents in its formal requests and has not received any such information:

- all drafts of the Settlement Agreement and the Program Transfer Agreement;
- documents and communications between Debtor and SFJ concerning the negotiation of the Settlement Agreement and the Program Transfer Agreement;
- documents and communications concerning the list of proposed Assumed and Assigned Contracts contemplated to be assigned and assumed by SFJ under the terms of the Settlement Agreement and the Program Transfer Agreement;
- documents and communications concerning the KEIP, KERP, and the transition services compensation contemplated by the Settlement Agreement and the Program Transfer Agreement, including any hurdle analyses (and all drafts of the same) conducted by the Debtor with respect to these issues; or
- documents and communications concerning the projected value of the non-Bentricimab assets.

24. Moreover, as of this filing, the Debtor has yet to file any definitive documentation with respect to the proposed Settlement/Sale Transaction, including the Settlement Agreement and the Program Transfer Agreement. Indeed, despite multiple requests for such documents, the Committee first received a draft version of the Settlement Agreement on December 22, 2022 at 3:01 p.m. (prevailing Eastern time) and first received a draft version of the associated Program Transfer Agreement on December 23, 2022 at 6:13 p.m. (prevailing Eastern time). Yet again, the Committee has not been involved in any of the drafting or negotiations of these agreements and therefore has no idea whether there were proposed alternatives that could have delivered additional value to unsecured creditors.

25. With only two business days and a holiday weekend left before the Committee's objection deadline to the Settlement/Sale Motion, there is simply not enough time for the parties to provide information sufficient for the Committee to determine whether the proposed Settlement/Sale Transaction is in the best interests of unsecured creditors and the estate, particularly when the Committee has yet to see final documentation of the proposed Settlement/Sale Transaction. Accordingly, the Committee respectfully requests that the Court adjourn the Hearing on the Settlement/Sale Motion in order to allow the Committee, the Debtor, and SFJ sufficient time to work in good faith to complete the discovery process the Committee has initiated, conclude its investigation, and determine whether an objection to the Settlement/Sale Motion is necessary to protect unsecured creditors.

II. Cause Exists to Adjourn the KEIP/KERP Supplement.

26. Following the filing of the KEIP/KERP Motion, the Committee engaged with the Debtor in an effort to understand the basis and need for the relief requested therein. The Committee also provided an issues list to the Debtor with respect to the originally proposed KEIP and KERP, flagging various issues with the proposed compensation programs. Following the announcement of the proposed Settlement/Sale Transaction, the Committee again engaged with the Debtor to understand what, if any, modifications would be made to the proposed compensation programs, given that the Debtor's proposed sale process was now significantly shorter and less complex.

27. Though discussions about such modifications were ongoing between the parties, the Debtor, without notice to the Committee, filed the KEIP/KERP Supplement under seal on December 22, 2022 and failed to provide a copy of the unsealed version until December 23, 2022 at 10:23 a.m. (prevailing Eastern time), doing so only after the Committee requested it. This leaves the Committee with a holiday weekend and a half business day prior to its original objection

deadline to evaluate and analyze the terms of a revised KERP, which is blatantly prejudicial to the Committee (along with other parties in interest) and merits adjournment until a later date to allow the Committee sufficient time to review and object as necessary on an informed basis. Moreover, the fact that the proposed KERP is inextricably tied to the closing of the Settlement/Sale Transaction further underscores the need for an adjournment of the KEIP/KERP Supplement, particularly if the Court agrees to adjourn the Settlement/Sale Motion. Accordingly, the Committee requests an adjournment of the Hearing on the KEIP/KERP Supplement and a corresponding extension of the deadline to file any objection with respect to the same in order to allow the Committee sufficient time to evaluate the terms of the revised KERP.

NOTICE

28. The Committee will provide notice of this Motion to the following parties: (a) Debtor's counsel; (b) SFJ's counsel; (c) the U.S. Trustee; and (d) all parties who have requested notice in this Chapter 11 Case pursuant to Local Rule 2002-1(b).

NO PRIOR REQUEST

29. No previous request for the relief sought herein has been made to this or any other court.

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WHEREFORE, the Committee respectfully requests that the Court enter the Proposed Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein, and such other and further relief as the Court deems just and appropriate.

Dated: Wilmington, Delaware
December 23, 2022

MCDERMOTT WILL & EMERY LLP

/s/ David R. Hurst

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*Proposed Counsel for the Official Committee of
Unsecured Creditors*

EXHIBIT A

Proposed Order

having jurisdiction over the Motion pursuant to 28 U.S.C. § 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012; and this Court having determined that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having determined that this matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court being able to issue a final order consistent with Article III of the United States Constitution; and due and sufficient notice of the Motion having been given under the particular circumstances; and it appearing that no other or further notice need be provided; and it appearing that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and all other parties in interest; and after due deliberation thereon; and good and sufficient cause appearing therefor; it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted as set forth herein.
2. Subject to further extension by agreement of the Debtor and the Committee or further order of the Court, the Hearing with respect to the Settlement/Sale Motion is hereby adjourned to January __, 2023 at __:__.m. (prevailing Eastern time).
3. Subject to further extension by agreement of the Debtor and the Committee or further order of the Court, the Hearing with respect to the KEIP/KERP Supplement is hereby adjourned to January __, 2023 at __:__.m. (prevailing Eastern time).
4. Subject to further extension by agreement of the Debtor and the Committee or further order of the Court, the Committee shall have until January __, 2023 at __:__.m (prevailing Eastern time) to file an objection (the "Objection Deadline"), if any, to the relief requested in the Settlement/Sale Motion.

5. Subject to further extension by agreement of the Debtor and the Committee or further order of the Court, the Committee shall have until January __, 2023 at __:__.m (prevailing Eastern time) to file an objection (the "Objection Deadline"), if any, to the relief requested in the KEIP/KERP Supplement.

6. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. This Court shall retain jurisdiction over all matters arising from or pertaining to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware
December 23, 2022

MCDERMOTT WILL & EMERY LLP

/s/ David R. Hurst

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