

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

In re:

MIDDLEBROOK PHARMACEUTICALS, INC.,

Debtor.

Chapter 11

Case No. 10-11485 (MFW)

Re: 320

**JOINDER OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO
THE DEBTOR'S OBJECTION TO THE CLAIM OF PAR PHARMACEUTICAL, INC.**

The Official Committee of Equity Security Holders (the "Committee") of MiddleBrook Pharmaceuticals, Inc. (the "Debtor") hereby joins in the Debtor's objection (the "Objection") to the claim of Par Pharmaceutical, Inc. ("Par"), and in support thereof, the Committee respectfully submits as follows:

1. On April 30, 2010 (the "Petition Date"), the Debtor filed a voluntary bankruptcy petition in the Bankruptcy Court for the District of Delaware.
2. On June 23, 2010, the Office of the United States Trustee appointed the Committee. The Committee has standing to be heard pursuant to 11 U.S.C. § 1109(b).
3. On August 18, 2010, Par filed its proof of claim in the amount of \$11,625,000.00 which was assigned claim number 59 by the Debtor's claims agent (the "Claim"). As more fully set forth in Par's proof of claim, Par alleges that it is owed \$11,625,000 based upon a certain Development and Commercialization Agreement dated as of May 28, 2004 (the "Development Agreement").
4. On August 30, 2010, the Debtor filed the Objection by and through which it seeks to disallow the Claim in its entirety [Docket No. 320].



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Relief Sought by the Objection and Joinder

5. The Committee fully joins in the Objection to Par's Claim, and incorporates the facts and arguments contained in the Objection as though fully contained herein, and the Committee asserts that the Claim should be disallowed and expunged.

6. Further, the Committee submits that a timely determination as to the merits of the Claim is of paramount importance to the direction of this case. Specifically, if allowed, Par's Claim would equal more than three quarters of the total pool of unsecured claims. Accordingly, the ability of the Debtor to confirm a plan of liquidation is likely tied to this Court's adjudication of the underlying merits of Par's claim.

Basis for Objection to the Claim

7. The operative provisions of the Development Agreement are Sections 4.2.2.2 and 4.2.2.3. Section 4.2.2.2 provides that Par may terminate the Development Agreement "upon 30 days' prior written notice to [MPI]" in the event that Par and MPI fail to agree to proposed changes to the plan for the implementation and funding of the research and development program. In the event the Development Agreement was rightfully terminated pursuant to Section 4.2.2.2, Par is entitled to payments under Section 4.2.2.3 of the Development Agreement only if:

- (1) the "termination occur[red] after Par ha[d] paid to [MPI] in cash at least \$20,000,000;"
- (2) there had been a "successful commercialization of the Products;" and
- (3) MPI was able to generate "net profits on sales of the Products,"¹ a percentage of which would be paid to Par in an amount up to half of Par's contribution to MPI (the "Termination Provision").

8. On July 15, 2005, the Debtor sent a letter to Par demanding the payment of \$4,750,000.00 (the "July Payment"), which the Debtor claimed was due on July 5, 2005. As of July 15, 2005, Par had only paid MPI a total of \$18,500,000, less than the \$20,000,000 required

to trigger the Debtor's duty to pay Par 15% of net profits under Section 4.2.2.3 of the Development Agreement. Par responded by requesting termination of the Development Agreement on August 3, 2005, and refusing to make the July Payment prior to receiving the Debtor's acceptance of the termination. The Debtor accepted the termination the same day, and at some point thereafter, Par made the July Payment to MPI. Accordingly, Par's Claim fails the first of these three requirements.

9. The second requirement was also not met because it requires that the "Products be successfully commercialized" in order for the profit-sharing provision to take effect. Section 1.68 of the Development Agreement clearly and unambiguously defines "Products" as Adult and Pediatric Products. Even if Par could prove that the Adult Product was "successfully commercialized,"² there is no question that the Pediatric Product was never commercialized. Accordingly, the second requirement for payment to Par has not been met.

10. Finally, the Debtor is not required to make payments to Par because the Adult Product has failed to produce a net profit. The Committee understands that the MOXATAG has generated \$16,635,000 of sales; however, the costs of MOXATAG exceeded \$160,030,000, including research and development costs but excluding general and administrative expenses. Accordingly, MOXATAG has resulted in a net loss of at least \$143 million. Therefore, there is currently no net profit to be distributed under the Development Agreement, and even if Par was able to satisfy the first two requirements under Section 4.2.2.3 of the Development Agreement, Par's claim to a percentage of the net profit is equal to zero.

The Committee further reserves and preserves its right to supplement this joinder and

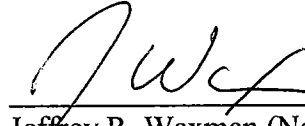
¹ The term "net profits" is not defined in the Development Agreement.

² Were it not for the other dispositive arguments in support of the disallowance of the Claim, it is possible that the Court may need to consider the issue of whether the commercialization of the Adult Product was "successful" given that the costs of production greatly exceeded the income received on account of the Adult Product. However, given the other issues contained in the Objection and herein, the Court likely will never have to address that potential issue.

further raise any objections to the Claim.

Dated: August 30, 2010

MORRIS JAMES LLP



Jeffrey R. Waxman (No. 4159)
Courtney R. Hamilton (No. 5432)
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801
Telephone: (302) 888-6800
Facsimile: (302) 571-1750
Email: jwaxman@morrisjames.com

-and-

P. David Carlebach, Esq.
Law Offices of David Carlebach, Esq.
40 Exchange Place, Suite 1306
New York, New York 10005
Tel: (212) 785-3041
Fax: (212) 785-3618

Counsel to the Official Committee
of Equity Security Holders

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

In re:) Chapter 11
)
MIDDLEBROOK PHARMACEUTICALS, INC., et al.,) Case No. 10-11485 (MFW)
)
Debtors.) Jointly Administered
----- X

AFFIDAVIT OF JAMIE DAWSON, PARALEGAL


STATE OF DELAWARE :
: SS:
NEW CASTLE COUNTY :

I, Jamie Dawson, certify that I am, and at all times during the service, have been an employee of Morris James LLP, not less than 18 years of age and not a party to the matter concerning which service was made. I certify further that on August 30, 2010, I caused to be served:

**JOINDER OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO
THE DEBTOR'S OBJECTION TO THE CLAIM OF PAR PHARMACEUTICAL, INC.**

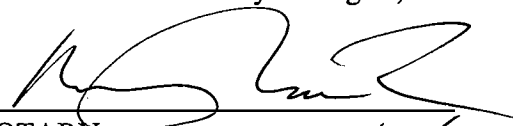
Service was completed upon the parties on the attached list as indicated thereon.

Date: August 30, 2010



Jamie Dawson

SWORN AND SUBSCRIBED before me this 30th day of August, 2010.



NOTARY
My commission expires: 8/19/11

**ROBERT WILLIAM LAIRD
Notary Public - State of Delaware
My Comm. Expires Aug. 19, 2011**

VIA HAND DELIVERY

Kenneth J. Enos, Esq.
Joel A. Waite, Esq.
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801
[Counsel to the Debtors]

GianClaudio Finizio, Esq.
Neil B. Glassman, Esq.
Bayard, P.A.
222 Delaware Avenue, 9th Floor
Wilmington, DE 19801
[Counsel to the Official Committee
of Unsecured Creditors]

Jane Leamy, Esquire
Office of the United States Trustee
J. Caleb Boggs Federal Bldg.
844 King St, Suite 2207
Wilmington DE 19801

VIA FEDERAL EXPRESS

Barry J. Gilman, Senior Director
Par Pharmaceutical Companies, Inc.
300 Tice Boulevard
Woodcliff Lake, NJ 07677

VIA FEDERAL EXPRESS & FACSIMILE

Eunice Rim, Esq.
K&L Gates
599 Lexington Avenue
New York, NY 10022
Facsimile: (212) 536-3901
[Counsel to Par Pharmaceutical]

VIA FIRST CLASS MAIL

Matthew W. Levin, Esq.
David A. Wender, Esq.
Sage M. Sigler, Esq.
Jonathan T. Edwards, Esq.
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309
[Counsel to the Debtors]

Sam J. Alberts, Esq.
Mary Kim, Esq.
Dickstein Shapiro LLP
1825 Eye Street, N.W.
Washington, D.C. 20006
[Counsel to the Official Committee
of Unsecured Creditors]