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Lending Fund I, LP*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

EIGER BIOPHARMACEUTICALS, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 24-80040 (SGJ)

(Joint Administration Requested)

**PRELIMINARY OBJECTION TO DEBTORS’ MOTION FOR
AUTHORIZATION TO USE CASH COLLATERAL**
(Related to Docket No. 16)

Innovatus Life Sciences Lending Fund I, LP (“Innovatus”) objects to the *Debtors’ Emergency Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Term Loan Secured Parties;*

¹ The Debtors in these chapter 11 cases, together with the last four digits of each Debtor’s federal tax identification number, are: Eiger BioPharmaceuticals, Inc. (1591); EBPI Merger Inc. (9986); EB Pharma LLC (8352); Eiger BioPharmaceuticals Europe Limited (N/A); and EigerBio Europe Limited (N/A). The Debtors’ service address is 2155 Park Boulevard, Palo Alto, California 94036.



(III) Modifying the Automatic Stay; and (IV) Scheduling a Final Hearing [Docket No. 16] (the “Cash Collateral Motion”)², as follows:

INTRODUCTION

Innovatus is the Debtors’ only secured lender and only creditor with an interest in the Debtors’ cash collateral. Prior to the Debtors filing for bankruptcy, Innovatus attempted to negotiate terms for the Debtors’ consensual use of cash collateral to preserve and complete the marketing and sale of the Debtors’ only FDA-approved commercial treatment, which is known as Zokinvy.

Unfortunately, the Debtors did not accept Innovatus’s proposal, and instead demanded a drawn-out and expensive bankruptcy process that depletes Innovatus’s cash collateral with no appreciable benefit to Innovatus in exchange. The Debtors refused to engage with Innovatus, provide information that supports the Debtors’ cash collateral assumptions, and generally inhibited Innovatus’s ability to analyze and approve the Debtors’ interim cash collateral budget in advance of the bankruptcy filing.

Accordingly, Innovatus must object to the Debtors’ proposed use of cash collateral. Because the Debtors cannot provide Innovatus adequate protection, the Court should deny the request to use Innovatus’s cash collateral on the terms set forth in the Cash Collateral Motion.

FACTUAL BACKGROUND

A. The Debtors.

1. The Debtors are a commercial-stage biopharmaceutical company focused on the development of innovative therapies for hepatitis delta virus (HDV) and other diseases.

² Unless otherwise defined, all capitalized terms have the meanings provided in the Cash Collateral Motion.

2. The Food and Drug Administration has approved only one of the Debtors' products, with the branded name Zokinvy, to reduce risk of mortality of Hutchinson-Gilford progeria syndrome (HGPS) and other ultra-rare and rapidly fatal genetic conditions of accelerated aging in children.

3. The Debtors have other clinical candidates that are not yet approved for commercial use, most of which are potential therapies for hepatitis delta virus, or other rare diseases, but are not actively being used in clinical trials with patients.

B. The Prepetition Term Loan.

4. On June 1, 2022, Debtors Eiger BioPharmaceuticals, Inc., EBPI Merger Inc., and EB Pharma LLC (collectively, "Borrower") entered into that certain Loan and Security (as amended, restated, or otherwise modified from time to time, the "Prepetition Term Loan Credit Agreement") with Innovatus, providing for up to \$75.0 million funded in three tranches with a maturity date of August 31, 2027 (the "Prepetition Term Loan").³

5. Innovatus is both the Collateral Agent and Lender under the Prepetition Term Loan Credit Agreement.⁴

6. Innovatus funded \$40.0 million in June 2022 under Tranche A of the Prepetition Term Loan. The remaining \$35.0 million is divided into two tranches (Tranche B and Tranche C). The \$17.5 million availability under each of Tranche B and Tranche C were available for a period commencing on the later of (i) the first date that the Borrower achieves certain development and regulatory milestones applicable to each Tranche and (ii) November 1,

³ A portion of the loan proceeds were used to repay in full the approximately \$33.5 million of aggregate principal amount, unpaid interest, and exit fees in connection with loans outstanding owed to Oxford Finance LLC by Borrower. The summary of the Prepetition Term Loan provided herein is for informational purposes and, in the event of any conflict, the provisions of the Loan Documents (as defined in the Prepetition Term Loan Credit Agreement) control.

⁴ As of the Petition Date, there are no other Lenders party to the Prepetition Term Loan Credit Agreement.

2022. Both Tranche B and Tranche C draw periods end on the earlier of (a) June 30, 2024 or (b) an event of default under the Prepetition Term Loan Credit Agreement. As a result of Borrower's defaults, including the voluntary bankruptcy petitions, Borrower is not eligible to draw further loans.

7. The floating per annum interest rate of the Prepetition Term Loan is equal to the sum of (a) the greater of (i) the Prime Rate published in the Money Rates section of the Wall Street Journal (or any successor thereto) and (ii) 3.5%, plus (b) 3.75%; provided that, at the election of Borrower, up to 2.25% of such rate shall be payable in-kind until the third anniversary of the closing date.

8. Borrower is required to make monthly interest-only payments through July 1, 2027, after which Borrower is required to make monthly amortizing payments, with the remaining balance of the principal plus accrued and unpaid interest due at maturity. Borrower may pay 2.25% of the interest in-kind for the first three years of the term by increasing the principal balance.

9. Prepayments of the Prepetition Term Loan, in whole or in part, are subject to an early prepayment fee (currently 2%) which declines each year until the third anniversary date of the closing of the Prepetition Term Loan, after which no prepayment fee is required.

10. Borrower also agreed to pay an exit fee upon any payment or prepayment equal to 6.5% of the aggregate principal amount funded under the Prepetition Term Loan.

11. As of April 1, 2024, Borrowers owe Innovatus \$45,118,730.90 on the Prepetition Term Loan, inclusive of principal, accrued interest, and the exit and prepayment fees discussed above. Interest, attorneys' fees, and other recoverable costs and expenses continue to accrue.

12. The Prepetition Term Loan is secured by perfected, non-avoidable, first-priority liens on Borrower's assets, including without limitation, Borrower's inventory, deposit accounts, accounts receivable, and intellectual property and the proceeds, products, and offspring thereof. Innovatus's liens are perfected by deposit account control agreements, financing statements recorded with the Delaware Department of State, and security interests recorded with the United States Patent and Trademark Office.

C. The Cash Collateral Motion.

13. The Debtors filed their voluntary bankruptcy petitions on April 1, 2024. Along with the petitions, the Debtors filed many first day motions, including the Cash Collateral Motion.

14. The Debtors request interim and final approval of the Debtors' use of Innovatus's cash collateral. As set forth more fully in the Cash Collateral Motion and other first day motions, the Debtors propose to use Innovatus's cash collateral to fund their bankruptcies for at least six months.

15. The Debtors' proposed cash collateral budget shows the Debtors will start with approximately \$9.9 million and have less than \$6 million remaining cash before the end of July 2024. Cash Collateral Motion, Exhibit 2. The Debtors request a budget \$3.1 million during the initial interim period of four weeks and estimate expenses of at least \$12.2 million through the course of these cases. Cash Collateral Motion ¶ 29.

16. Based on the Debtors' own projections, the only revenue producing product (Zokinvy) will be sold within the first month of these cases and there will be no further sources of regular revenue by the end of June 2024.

17. Prior to the petition date, Innovatus advised the Debtors' professionals that it does not consent to the Debtors' interim use of cash collateral beyond those operating expenses and professional fees absolutely necessary to preserve, market, and sell the Debtors' assets.

18. Innovatus does not consent to the terms of the Debtors' draft Interim Order or the initial four-week Budget.

LEGAL STANDARD

19. Bankruptcy Code section 363(c)(2) prohibits a debtor's use of cash collateral in the ordinary course of business absent the consent of each entity that has an interest in such cash collateral or court authorization. 11 U.S.C. § 363(c)(2). A debtor in possession may not use an entity's cash collateral unless the debtor in possession has provided adequate protection to that entity. *See* 11 U.S.C. § 363(e) ("on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest").

20. "Adequate protection" is not defined in the Bankruptcy Code, but section 361 enumerates three non-exclusive forms of it: (i) cash payments on account of a decrease in the value of such entity's interest in such property; (ii) additional or replacement liens to the extent that such sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or (iii) other relief that results in the realization by such entity of the indubitable equivalent of such entity's interest in such property. 11 U.S.C. § 361.

21. The purpose of adequate protection is to protect against any diminution in value of a secured creditor's collateral during the chapter 11 cases. *See Bank of New York Trust Co., NA v. Pacific Lumber Co. (In re Scopac)*, 624 F.3d 274, 278, n. 1 (5th Cir.2010) (adequate

protection has generally been interpreted to encompass “payment, replacement lien, or other relief sufficient to protect the creditor against diminution in the value of his collateral during bankruptcy”).

22. In a hearing under section 363, the debtor in possession has the burden of proof on the issue of adequate protection. *See* 11 U.S.C. § 363(p)(1). “Such protection must not be illusory and, particularly in the context of the use of cash collateral, must be ‘of the most indubitable equivalence.’” *In re Goode*, 235 B.R. 584, 589 (Bankr. E.D. Tex. 1999) (quoting *In re Waste Conversion Techs., Inc.*, 205 B.R. 1004, 1007 (D. Conn. 1997)).

23. Thus, in ruling on a debtor's motion for authority to use cash collateral, the Court should not focus on whether it is in the best interest of the debtor, but whether the debtor carried its burden to show that its use of cash collateral will not reduce the value of the creditor's interest in the cash collateral without providing adequate protection. *In re Goode*, 235 B.R. at 589.

24. Pursuant to Bankruptcy Rule 4001(b), if the Court conducts a preliminary hearing before 14 days after service of a motion for use of cash collateral, the Court “may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.”

OBJECTION

A. Innovatus only consents to limited use of cash collateral to sell Zokinvy on an interim basis.

25. As already discussed, Innovatus has offered the Debtors consensual use of cash collateral to the extent necessary to preserve, market, and sell the Debtors’ interests in Zokinvy and related assets. The Debtors are pursuing the Zokinvy sale on an expedited basis. However, the Debtors’ proposed interim four-week Budget is not limited to necessary expenses.

26. The Debtors request over \$1.12 million for a line item called “Other.” This is over one-third of the Debtors’ total budget for the initial four weeks of their bankruptcy cases. Innovatus’s counsel has requested details on this budget item without any detailed response or rationale as to how this is an essential expense to preserve the Debtors’ assets. There is no evidence that failure to pay these “Other” amounts will impair or inhibit the preservation and sale of the Debtors’ assets in any way.

27. The Debtors also propose \$400,000 of “Contingency” in the initial four-week Budget. This is over 10% of the total \$3.1 million budget for the initial period (and even more if the “Other” line item is removed). Innovatus contends this line item is excessive under the circumstances.

28. The Debtors also request \$688,000 over the first four weeks for “R&D/Post-Marketing Disbursements.” Innovatus questions what further research and development is necessary when the Debtors’ assets are being marketed for sale and there are no ongoing clinical trials with patients. Any further advancements on the Debtors’ intellectual property should be funded by a purchaser. Innovatus has requested an explanation for the necessity of further research and development, but the Debtors have not provided a substantive response.

29. Innovatus objects to payment of the “Zokinvy Commercialization Disbursements” of \$345,000 over the Interim Budget period. Innovatus does not know what this line item includes and the Debtors have provided no explanation of the necessity of such payments to avoid immediate and irreparable harm. If these “disbursements” are tied to sales they are higher than historical costs and projected monthly sales are similarly higher than historical numbers.

30. Finally, the Interim Budget shows \$9.9 million in starting cash. The budget the Debtors provided Innovatus dated March 21, 2024, disclosed a projected \$14.8 million cash balance as of April 1, 2024. Innovatus has requested that the Debtors explain the loss of close to \$5 million in cash and the Debtors have refused to provide a substantive response.

31. For these reasons, Innovatus objects to the Debtors' initial four-week Budget and demands strict proof of the necessity of these proposed payments in order to avoid immediate and irreparable harm.

B. Other preliminary objections to the Interim Order.

32. In addition to the problems with the initial four-week Budget, Innovatus objects to certain terms of the Interim Order, as summarized below:

- a. The Interim Order should clarify that the Prepetition Term Loan Secured Parties have no further commitment or obligation of any kind to extend any loan or other extensions of credit or financial accommodations to the Debtors. Interim Order ¶ E.
- b. The Interim Order should clarify the Prepetition Term Loan Secured Parties are not responsible for the Debtors' professional fees and reserve all objections to the allowance of any professional fees and the use of Cash Collateral to pay any professional fees in excess of the Reserve Amounts. Interim Order ¶ 3(d).
- c. For purposes of the initial four-week budget period, there should be no budget approval or permitted variances from such budget. Interim Order ¶ 3. To the extent any Final Order provides a budget approval process with Permitted Variances, it should be no greater than 105%. Interim Order ¶ 3(e).
- d. As an additional form of adequate protection, the Prepetition Term Loan Secured Parties should be granted a lien on the Debtors' D&O claims.
- e. As an additional form of adequate protection, the Debtors should timely pay all accrued post-petition interest to the Prepetition Term Loan Secured Parties.

- f. As an additional form of adequate protection, the Prepetition Term Loan Secured Parties should be designated as consultation parties with respect to any sale of the debtors' assets and provided all information regarding bidders and bids.
- g. The Carve Out should have a cap tied to the amounts budgeted for professional fees in approved budgets. Interim Order ¶ 5. As drafted, the Debtors' professionals are entitled to set aside the total amount of unpaid fees "without regard to whether such fees and expenses are provided for in any Approved Budget"
- h. The Debtors propose to make significant payments to prepetition unsecured creditors pursuant to their first day motions and there may be no committee appointed in this case. Innovatus objects to the inclusion of any budget items for a committee and its professionals unless and until such committee is formed and reserves all objections to any budget requests by such committee, if any.
- i. The Debtors should only have five (5) business days to cure any violation of a material term of the Interim Order. The cash collateral termination notice and cure provisions should be simplified to provide for termination of use of cash collateral prior to any hearing while reserving the Debtors right to request an expedited hearing. Interim Order ¶ 8.
- j. The only Milestones relevant to the Interim Order are approval of bidding procedures for the sale of Zokinvy and sale approval and closing before the end of April 2024. All other Milestones suggesting authorized use of cash collateral up to 180 days after the Petition Date should be removed.

33. Innovatus continues to review the terms of the proposed Interim Order and reserves all objections to the form of the Interim Order and any proposed Final Order.

C. The Debtors cannot provide Innovatus adequate protection.

34. Innovatus does not consent to the Debtors' final use of cash collateral on the terms proposed in the Cash Collateral Motion. Accordingly, to sustain their burden of proof to use cash collateral over Innovatus's objection, the Debtors must prove that Innovatus is

adequately protected. *See* 11 U.S.C. § 363(e), 363(p)(1). The Debtors cannot sustain this burden.

35. As an initial matter, the Debtors have not argued or offered any evidence that Innovatus has an equity cushion in the Debtors' assets such that additional adequate protection is not necessary for the Debtors' use of cash collateral.

36. Furthermore, the adequate protection the Debtors offer in the Cash Collateral Motion is illusory. Innovatus already has priority perfected liens on all the Debtors' assets and "replacement liens" provide Innovatus no further adequate protection.⁵ *See In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 565–67 (3rd Cir.1994) (replacement lien on assets in which creditor already has lien does not provide adequate protection); *In re Buttermilk Towne Ctr., LLC*, 442 B.R. 558 (B.A.P. 6th Cir. 2010) (same).

37. A superpriority claim against the Debtors' estates is also an illusory form of adequate protection. The Debtors' estates could only pay such superpriority claim with Innovatus's own cash collateral or Innovatus's other collateral—such as intellectual property, inventory, or accounts receivable—and the proceeds thereof.

38. The Debtors' proposed use of cash collateral appears premised on the idea that, by incurring significant professional and operating expenses, the Debtors *may potentially* sell their assets for a little higher price and therefore benefit Innovatus and other creditors.

39. The Debtors do not have free rein to use Innovatus's cash collateral to pay professional fees and other administrative expenses. *In re Nat'l/Northway Ltd. P'ship*, No. 02-

⁵ The Debtors' offer of liens on avoidance action proceeds upon entry of a final cash collateral order are adequate protection or the "indubitable equivalent" of the over \$8 million of Innovatus's cash collateral that the Debtors propose to spend in just the first four months of their chapter 11 cases. *Rocco v. J.P. Morgan Chase Bank*, 255 Fed. Appx. 638, 641 (3d Cir. 2007) ("a lawsuit is too speculative in nature to offer adequate protection").

41188-JBR, 2002 WL 32397224, at *11 (Bankr. D. Mass. Dec. 20, 2002) (“the Debtor may not use the [c]ash [c]ollateral to pay its professional fees”). Mere hopes of marginally higher returns to creditors is not adequate protection and does not justify the costs the Debtors seek to shift to Innovatus and its collateral. *See In re Sharon Steel Corp.*, 159 B.R. 165, (Bankr. W.D. Pa. 1993) (debtor could not use cash collateral to pursue speculative business plan even though lender had significant equity cushion); *In re C.F. Simonin's Sons, Inc.*, 28 B.R. 707, 714 (Bankr. E.D.N.C. 1983) (limiting use of cash collateral and holding that “it would be wrong to let the Debtor, who has nothing to lose, gamble with the bank's cash collateral”); *In re Pac. Lifestyle Homes, Inc.*, 2009 WL 688908, at *11-14 (Bankr. W.D. Wash. March 16, 2009) (debtor’s “hopes and projections of future profitability” was “speculation” that did not adequately compensate lenders for use of cash collateral).

40. For these reasons, and such reasons Innovatus may present at the interim and final hearing, the Court should deny the Debtors’ request to use Innovatus’s cash collateral on the terms set forth in the Cash Collateral Motion.

41. Innovatus will continue to negotiate the terms of consensual use of cash collateral in good faith.

CONCLUSION AND RESERVATION OF RIGHTS

42. Innovatus is willing to consent to limited use of cash collateral on an interim basis to enable the Debtors to sell their most marketable asset—the Zokinvy intellectual property. Innovatus will not, however, agree to a blank check for a drawn out and costly bankruptcy that will not enhance recoveries for Innovatus or other creditors.

43. Innovatus files this Objection without limitation or waiver of any rights, claims, or defenses against the Debtors, their creditors, or other parties asserting liens against any of the Debtors' assets.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties eligible to receive service via CM/ECF.

/s/ Jay R. Bender

OF COUNSEL