

BRADLEY ARANT BOULT
CUMMINGS LLP
Jay R. Bender (TX Bar No. 24104932)
214 North Tryon Street
Suite 3700
Charlotte, NC 28202
Telephone: 704-338-6000
Facsimile: 704-332-8858
Email: jrbender@bradley.com

BRADLEY ARANT BOULT
CUMMINGS LLP
Roger Jones (*pro hac vice* pending)
1221 Broadway
Suite 2400
Nashville, TN 37203
Telephone: 615-244-2582
Facsimile: 615-252-4714
Email: rjones@bradley.com

*Attorneys for Innovatus Life Sciences
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)

**OBJECTION OF INNOVATUS LIFE SCIENCES LENDING FUND I, LP
TO DEBTORS' MOTION FOR ENTRY OF AN ORDER
(I)(A) APPROVING THE BID PROCEDURES; (B) AUTHORIZING
THE DEBTORS TO SELECT SENTYNL THERAPEUTICS, INC. AS THE
ZOKINVY STALKING HORSE PURCHASER & APPROVING BID PROTECTIONS;
(C) APPROVING THE BID PROTECTIONS RELATING TO THE REMAINING
ASSETS STALKING HORSE PURCHASER(S), IF ANY; (D) ESTABLISHING BID
DEADLINES, AUCTION(S), AND SALE HEARING(S); (E) APPROVING THE FORM
AND MANNER OF SALE NOTICE; (F) APPROVING ASSIGNMENT AND
ASSUMPTION PROCEDURES; (G) APPROVING THE FORM AND MANNER OF
POTENTIAL ASSUMPTION AND ASSIGNMENT NOTICE; (II)(A) AUTHORIZING
THE SALE OF THE ASSETS FREE AND CLEAR; AND (B) APPROVING THE
ASSUMPTION AND ASSIGNMENT OF DESIGNATED CONTRACTS; AND
(III) GRANTING RELATED RELIEF**

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.



(Related to Docket No. 13)

Innovatus Life Sciences Lending Fund I, LP (“Innovatus”) objects to the *Debtors’ Motion for Entry of an Order (I)(A) Approving the Bid Procedures; (B) Authorizing the Debtor to Select Sentyln Therapeutics, Inc. as the Zokinvy Stalking Horse Purchaser & Approving Bid Protections; (C) Approving the Bid Protections Relating to the Remaining Assets Stalking Horse Purchaser(s), if Any; (D) Establishing Bid Deadlines, Auction(s), and Sale Hearings(s); € Approving Assignment and Assumption Procedures; (G) Approving the Form and Manner of Potential Assumption and Assignment Notice; (II)(A) Authorizing the Sale of the Assets Free and Clear; and (B) Approving the Assumption and Assignment of Designated Contracts; and (III) Granting Related Relief [Docket No. 13] (the “Bid Procedures Motion”), as follows:*

INTRODUCTION

Innovatus is the Debtors’ primary and, upon information and belief, only secured lender, holding a valid, enforceable, first-priority lien on all of the Debtors’ assets (collectively, the “Assets”). As of April 1, 2024 (the “Petition Date”),² Innovatus was owed in excess of \$45 million by the Debtors, making Innovatus the largest creditor of the Debtors’ estates. As such, Innovatus is the main stakeholder with respect to the Debtors’ sale efforts, standing to benefit – or suffer – the greatest from the manner in which the Debtors’ Assets are sold.

Despite Innovatus’ status as the largest secured creditor of the Debtors, the Debtors have excluded Innovatus from their pre-petition marketing efforts and, based on the Bid Procedures Motion, seem intent on trying to do the same post-petition. The Debtors failed and refused to provide Innovatus with material, timely information about their sale efforts; indeed, despite its repeated requests to view the agreement, the first time Innovatus saw the Zokinvy Stalking Horse APA (also referred to as the “Zokinvy Agreement” and the “Zokinvy APA” in

² Although the Bid Procedures Motion avers that the Debtors commenced their chapter 11 case on March 31, 2024, the dockets in their respective cases reflect that the Debtors actually filed their chapter 11 petitions on April 1, 2024.

the Bid Procedures Motion) was when it was filed by the Debtors with this Court as an exhibit to the Bid Procedures Motion. The Debtors now propose an expedited sale process for the Zokinvy Assets that, again, fails to include Innovatus meaningfully in the process, not even deigning to recognize Innovatus as a “Consultation Party” to the sale of its own collateral.

The Debtors’ sale efforts with respect to the Zokinvy Assets have been troublingly opaque. Innovatus has repeatedly asked the Debtors to answer fundamental questions regarding the Zokinvy Assets marketing process, including the circumstances that led to (1) the Debtors’ unilateral selection of the Zokinvy Stalking Horse Purchaser’s bid as the highest and best bid for the Zokinvy Assets, (2) the Debtors’ rejection of a higher and thus presumptively better offer made by another qualified bidder to serve as the stalking horse for such assets, and (3) the Debtors’ acquiescence to the generous Break-Up Fee (also referred to as the “Termination Fee” by the Debtors) and Expense Reimbursement contained in the Zokinvy Stalking Horse APA. The Debtors have yet to answer these questions satisfactorily. Accordingly, Innovatus objects to the approval of the Bid Procedures Motion with respect to the Zokinvy Assets.

With respect to the Bid Procedures Motion’s proposed procedures and protections relating to the Remaining Assets, Innovatus objects to the Debtors’ request to approve those procedures on an expedited, “first-day” basis. The Debtors acknowledge in their own Bid Procedures Motion that they “do not seek the same expedited relief related to the Remaining Assets.” *See* Bid Procedures Motion, ¶ 2. Notwithstanding that acknowledgment, the Debtors seem to seek first-day approval of the Remaining Assets Bid Protections. Because there is no need for expedited relief, this Court should defer consideration of the Bid Procedures Motion as it relates to the Remaining Assets until a later date.

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 serious diseases.

2. According to the Debtors' filings in this case, the Debtors have only nine employees. *See* Docket No. 8, ¶ 11.

3. According to the Debtors' filings with the Securities Exchange Commission, the Debtors have historically operated at a significant loss and projected to continue losing money. In its most recent Annual Report file with the SEC, the Debtors stated: "We have historically incurred operating losses in each year since inception and we expect to incur losses for the foreseeable future. We had a net loss of \$96.8 million, \$33.9 million and \$65.1 million for the years ended December 31, 2022, 2021 and 2020, respectively." *See Form 10-k Annual Report of Eiger BioPharmaceuticals, Inc. for Fiscal Year Ended December 31, 2022, filed on March 17, 2023*, at p.4.

4. 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.

5. 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.

6. 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

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

8. 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, 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.

9. 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

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.

discussed above. Interest, attorneys' fees, and other recoverable costs and expenses continue to accrue.

10. 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 Bid Procedures Motion.

11. In the Bid Procedures Motion, the Debtors request approval of two processes: (1) setting an expedited schedule and bid procedures, as well as approving entry into a stalking horse agreement and the provision of related bid protections, for the sale of the Zokinvy Assets, and (2) setting a longer-term schedule and bid procedures for the marketing and sale of the Debtor's Remaining Assets. *See* Bid Procedures Motion, ¶2. Due to the Debtors' lack of transparency regarding its marketing of the Zokinvy Assets, including the Debtors' unexplained unilateral selection of a stalking horse bid that was materially lower in value than a competing offer, Innovatus objects to the Bid Procedures Motion as it pertains to the Zokinvy Assets. Moreover, the Debtors have not articulated a reason why the procedures for the sale of the Remaining Assets should be considered on an expedited basis, and combining the procedures for the sale of the Zokinvy Assets and the Remaining Assets in the same document is unnecessarily confusing to prospective purchasers and will chill bidding. For the reasons set forth below, Innovatus objects to the Court's approval of the Bid Procedures Motion.

OBJECTION

A. The Sale Process Lacks Transparency, And The Debtors Have Failed To Explore All Potential Sales Options Or Demonstrate That Proposed Sales Process Is Designed to Obtain the Highest and Best Price for the Zokinvy Assets

12. It is well-settled that a debtor has a fiduciary obligation to maximize the value of their estates for the benefit of all stakeholders. *Commodity Futures Trading Com'n v. Weintraub*, 47 U.S. 343, 352 (1985) (“The trustee is accountable for all property received and has the duty to maximize the value of the estate.”)(internal quotations and citations omitted). Accordingly, when seeking approval of a sale outside the ordinary course of business, it is the debtor’s burden to demonstrate that it obtained the highest and best price for the assets to be sold, whether the sale is to be conducted privately or through an auction process. *See, e.g., In re Integrated Resources*, 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992) (“[i]n general, to receive approval of a proposed sale of assets, the debtor will need to demonstrate to the bankruptcy court that the proffered purchase price is the highest and best offer”); *In re Atlanta Packaging Products, Inc.*, 99 B.R. 124, 131 (Bankr. N.D.Ga. 1988) (“[i]t is a well-established principle of bankruptcy law that the objective of the bankruptcy sales and the trustee’s duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.”)

13. As noted above, the Debtors here are pursuing an expedited sales process for the Zokinvy Assets to the Zokinvy Stalking Horse Purchaser—complete with generous Zokinvy Bid Protections—in a manner that lacks transparency sufficient for the Court, Innovatus, or the Debtors’ other creditors to evaluate whether the process is in fact tailored to obtain the highest and best price for the assets sold. Upon information and belief, at least one other qualified bidder offered to serve as the Debtors’ stalking horse bidder on terms that are

more favorable than those proposed by the Zokinvy Stalking Horse Bidder, including a substantially higher purchase price for the Zokinvy Assets.

14. The Debtors selected its stalking horse unilaterally, without consultation of Innovatus or explanation to Innovatus of why the Debtors' board opted to reject the qualified competing bidder's higher offer as the stalking horse bid for the Zokinvy Assets in favor of the substantially lower Zovinky Stalking Horse Purchaser's bid.⁵ The Debtors still have not offered a satisfactory answer to this question, stating summarily that they "understand from Eiger's advisors that the Zokinvy Stalking Horse Purchaser is in a stronger financial position and ability to fund and close the Zokinvy Sale Transaction compared to other interested parties at this time." *See Declaration of David Apelian* [Docket No. 25], ¶ 24. Upon information and belief, the other bidder that sought to serve as the stalking horse has the financial ability to pay the higher purchase price it submitted to purchase the Zokinvy Assets. In light of this, Innovatus is at a complete loss as to why the Debtors' board opted to select the lower bid of the Zokinvy Stalking Horse Purchaser to serve as the stalking horse for the Zokinvy Assets. Accordingly, Innovatus objects to the Debtors' selection of the Zokinvy Stalking Horse Purchaser and asks the Court to deny the Bid Procedures Motion in full with respect to the Zovinky Assets.

B. The Debtors Have Not Satisfied Their Burden of Showing that the Proposed Bid Protections are Reasonable and Necessary or Supported by Sound Business Justification

15. As noted, the Zokinvy Stalking Horse APA proposes a break-up fee of 3% of the \$26 million base purchase price, as well as reimbursement of reasonable expenses of up to \$600,000.00. Taken together, the Stalking Horse Bidder may receive as much as

⁵ The Debtors further seek to marginalize Innovatus in the Zokinvy Assets sale process by proposing to condition Innovatus's statutory credit bid rights under the Bankruptcy Code with an arbitrary and non-statutory requirement that Innovatus include in any credit bid "a cash component equal to or exceeding the amount of the Bid Protections." *See Bid Procedures Motion*, ¶ 60. Innovatus objects to any effort to limit its statutory right to credit bid its debt, especially with respect to a sale process from which it has had no material input.

\$1,380,000.00, or nearly 5.31% of the purchase price. Moreover, because the Stalking Horse APA provides for a downward adjustment of the purchase price under certain circumstances, the actual percentage of break-up payments payable to the Stalking Horse Bidder may be even greater than 5.3%.

16. Because of the Debtors' lack of transparency throughout the marketing of the Zokinvy Assets, Innovatus has no way to evaluate whether the protections proposed in the Stalking Horse APA are reasonable and necessary or supported by a sound business justification. In the Fifth Circuit, depending on the procedural posture of the case, the propriety of break-up fees may be evaluated under either 11 U.S.C. § 503(b), under which estate funds may be used for "administrative expenses" if they are the "actual, necessary costs of preserving the estate," or under the "business judgment" standard of 11 U.S.C. § 363(b), which permits the payment of such fees if the debtor can provide "sound business reasons" for it. *Matter of Bouchard Transportation Company, Inc.*, 7 F.4th 743, 750 (5th Cir. 2003).

17. Here, the Debtors have failed to satisfy even the less stringent "business judgment" standard of section 363(b). The Bid Procedures Motion includes only cursory statements that the Zokinvy Bid Protections are necessary to induce the Zokinvy Stalking Horse Purchaser to serve as the stalking horse, but does not provide any justification for why payment of the proposed Zokinvy Bid Protections are reasonable, or necessary to maximize value for the Zokinvy Assets, particularly in light of the fact that it has been presented with a higher bid from an alternative qualified bidder. For these additional reasons, Innovatus objects to the Bid Procedures Motion broadly as it pertains to the Zokinvy Assets.

C. It Is Premature To Take Up Procedures For The Remaining Assets At This Time And Confusing To Bidders To Consolidate These Two Different Sales Timelines And Processes Into One Document

18. With respect to the Bid Procedures Motion's proposed procedures and protections relating to the Remaining Assets, Innovatus objects to the Debtors' request to approve those procedures on an expedited, "first-day" basis. The Debtors acknowledge in their own Bid Procedures Motion that they "do not seek the same expedited relief related to the Remaining Assets." *See* Bid Procedures Motion, ¶ 2. Notwithstanding that acknowledgment, the Debtors seem to seek first-day approval of the Remaining Assets Bid Protections. Because there is no need for expedited relief, this Court should defer consideration of the Bid Procedures Motion as it relates to the Remaining Assets until a later date.

19. Deferring consideration of the Remaining Assets Bid Procedures will also rightfully put the initial and primary focus of the Debtors' sale efforts on the Zokinvy Assets. The success of the Debtors' liquidating cases depends on the successful sale of the Zokinvy Assets for the highest and best price obtainable, as they are the only revenue-producing assets of the Debtor and the proverbial crown jewels of the Debtors' estates. By proposing consolidated, but wholly different, sale procedures for the Zokinvy Assets and the Remaining Assets in one motion, the Debtors have proposed an unnecessarily confusing sale process that has the potential to deter, rather than encourage, robust bidding for the Zokinvy Assets. The sale process for the Zokinvy Assets will be enhanced if the Debtors and this Court first focus exclusively on the appropriate sale procedures for the Zokinvy Assets, which the parties agree should be marketed on a priority basis.

CONCLUSION AND RESERVATION OF RIGHTS

20. Innovatus will continue good faith negotiations and attempt to resolve this objection prior to the first day hearing.

21. 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,

BRADLEY ARANT BOULT CUMMINGS LLP

/s/ Jay R. Bender

Jay R. Bender (TX Bar No. 24104932)
214 North Tryon Street
Suite 3700
Charlotte, NC 28202
Telephone: 704-338-6000
Facsimile: 704-332-8858
Email: jbender@bradley.com

Roger Jones (*pro hac vice* pending)
1221 Broadway
Suite 2400
Nashville, TN 37203
Telephone: 615-244-2582
Facsimile: 615-252-4714
Email: rjones@bradley.com

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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

