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**PROPOSED CONFLICTS
COUNSEL FOR THE DEBTORS**

**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)

(Jointly Administered)

(Emergency Relief Requested)

**DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER AUTHORIZING
THE DEBTORS TO FILE THE MERCK MOTION, MERCK LICENSE, AND
SUBLICENSE UNDER SEAL**

Emergency relief has been requested. Relief is requested not later than 1:30 p.m. prevailing Central Time on May 1, 2024. If you object to the relief requested or you believe that emergency consideration is not warranted, you must appear at the hearing if one is set, or file a written response prior to the date that relief is requested in the preceding paragraph. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

The Debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”) state as follows in support of this motion (the “Motion”):

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 2100 Ross Avenue, Dallas, Texas 75201.



Relief Requested

1. On April 27, 2024, the Debtors filed their Emergency Motion for Entry of an Order Determining Rights Under License Agreement (the “Merck Motion”) seeking a determination regarding certain rights under the Merck License (defined below). To comply with confidentiality provisions in the Merck License and Sublicense (defined below), the Merck Motion was redacted and the Merck License and Sublicense were not publicly filed. By this Motion, the Debtors seek entry of an order (the “Proposed Order”), substantially in the form attached hereto as Exhibit A, authorizing the Debtors to file the unredacted version of the Merck Motion and the Merck License and Sublicense under seal.

Jurisdiction and Venue

2. The United States Bankruptcy Court for the Northern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to the Court’s entry of a final order in connection with this motion.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a) and 107(b) of title 11 of the United States Code (the “Bankruptcy Code”) and rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background

5. The Debtors are a commercial-stage biopharmaceutical company focused on the development of innovative therapies for hepatitis delta virus (HDV) and other serious diseases. All five of the Debtors’ rare disease programs have FDA Breakthrough Therapy designation.

6. On April 1, 2024 (the “Petition Date”), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their business and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. These chapter 11 cases have been consolidated for procedural purposes only and are being administered jointly. No party has requested the appointment of a trustee or examiner in these cases, and no statutory committee has been appointed.

7. A comprehensive description of the Debtors’ businesses and operations, capital structure, and the events leading to the commencement of these chapter 11 cases can be found in the *Declaration of David Apelian in Support of Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”) [Docket No. 19].

Background Related to the Merck License

8. Lonafarnib (“LNF”) is an orally bioavailable, first-in-class farnesylation inhibitor originally developed by Merck & Co. (“Merck”) that the Company has an exclusive license to develop and commercialize. Sold under the brand name “Zokinvy,” the medication is the Company’s first and only product that has received FDA approval.

9. The Debtor’s right to right to develop and commercialize LNF is governed by a certain License Agreement, dated as of September 3, 2010, between Debtor Eiger Pharmaceuticals, Inc. and Schering Corporation, that was subsequently acquired by Merck. (as amended from time to time, the “Merck License”). The Merck License contains a confidentiality provision prohibiting the parties thereto from disclosing the terms of the Merck License except under certain limited circumstances.

Background of the Sale Process

10. Contemporaneously with the Petition Date, the Debtors filed a motion (the “Bid Procedures Motion”) seeking, among other things, approval of a stalking horse purchase

agreement (the “Zokinvy Stalking Horse APA”) to Sentynl Therapeutics, Inc. (“Sentynl” or the “Purchaser”) and approval of bidding procedures for the sale and sublicense of the Debtors’ Zokinvy assets, including the Merck License (the “Zokinvy Sale Transaction”). On April 5, 2024, the Court entered an order granting the relief requested in the Bid Procedures Motion (the “Bid Procedures Order”).

11. On April 21, 2024, following an auction, the Debtors filed the *Second Revised Notice of Selection of Winning Bid* (the “Notice of Winning Bid”) designating Sentynl as the winning bidder of the Zokinvy assets for the gross purchase price of \$46.1 million (the “Purchase Price”) on the terms set forth in the Zokinvy Stalking Horse APA.

12. On April 24, 2024, the Court entered the order approving, among other things, the sale and sublicense of the Zokinvy assets to Sentynl [Docket No. 162] (the “Sale Order”) under the terms of the Zokinvy Stalking Horse APA. PRF supports the sale to Sentynl and has negotiated a collaboration and supply agreement with Sentynl.

**Background of Discussions with Merck and
Interpretation of the Licensing Agreement**

13. In advance of the Petition Date, the Debtors began attempts to engage with Merck regarding the sublicense of the Merck License to a potential purchaser. These discussions were related to the potential prepetition sale of the Zokinvy Assets as well as consummating a sale through these chapter 11 cases when the prepetition sale process was no longer viable.

14. The Debtors and Sentynl have entered into a sublicense agreement with Sentynl (the “Sublicense”), that is attached to the Zokinvy Stalking Horse APA. The Debtors have repeatedly attempted to engage in discussions with Merck to reach a consensual agreement regarding the Debtors’ and Sentynl’s rights under the Sublicense, including through the execution

of a side letter agreement, which is intended to give comfort to Sentyln that it will not have future unanticipated conflicts with Merck as it exercises its rights under the Sublicense.

15. In connection with the Zokinvy Stalking Horse APA, Sentyln has required certain assurances (the “Assurances”) regarding the Sublicense, the Debtors’ rights, and subsequently their rights under the Merck License, all of which are consistent with the existing terms of the Merck License, as a condition precedent to closing of the Zokinvy Sale Transaction.

16. Time is of the essence because (1) the Debtors have identified and received approval to sell the Zokinvy Assets to Sentyln and must ensure a stable transition to the purchaser so that there is no disruption to the supply of life-preserving Zokinvy and (2) the Debtors’ estates face a \$100,000 *per diem* reduction in the purchase price for every day after April 24, 2024 that Closing occurs.

17. As of the filing of this Motion, the Debtors have struggled to get Merck to engage in conversations, despite their best effort. Given Merck’s failure to meaningfully engage, the Debtors filed the Merck Motion seeking entry of an order providing the confirmation Sentyln requires to close the Zokinvy Sale Transaction. Sentyln has agreed to accept a Court order that clearly delineates the rights under the Sublicense in the place of the Side Letter.

18. Because both the Merck License and Sublicense contain confidentiality provisions prohibiting the parties thereto from publicly disclosing the terms, the Debtors redacted certain portions of the Merck Motion and did not file the Merck License and Sublicense as exhibits.

19. The Debtors have filed the instant Motion on an emergency basis requesting authority to file an unredacted version of the Merck Motion, with the Merck License and Sublicense as exhibits, under seal. The Debtor is in the process of conferring with counsel for Merck and with the Office of the United States Trustee concerning the relief sought in this Motion.

Basis for Relief Requested

20. Section 105(a) of the Bankruptcy Code codifies the inherent equitable powers of a bankruptcy court and empowers it 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). Section 107(b) of the Bankruptcy Code provides bankruptcy courts with the power to issue orders that will protect entities from potential harm that may result from the disclosure of certain confidential information. *See In re Gen. Homes. Corp.*, 181 B.R. 898, 903 (Bankr. S.D. Tex. 1995). Bankruptcy Rule 9018 defines the procedures by which a party may move for relief under section 107(b) of the Bankruptcy Code. This section provides, in relevant part that, “[o]n request of a party in interest, the bankruptcy court shall, and on the bankruptcy court’s own motion, the bankruptcy court may—protect an entity with respect to a trade secret or confidential research, development, or commercial information.” 11 U.S.C. § 107(b)(1). Local Rule 9077-1(b) provides that parties may request to file documents under seal even if no statute or rule requires them to be filed under seal.

21. Once the Court determines that a party in interest is seeking protection of information that falls within one of the categories enumerated in section 107(b), the “court is required to protect a requesting interested party and has no discretion to deny the application.” *Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (stating that section 107(b)(1) of the Bankruptcy Code creates an exception to the general rule that court records are open to examination by the public); *see also In re Global Crossing Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003) (stating that the purpose of Bankruptcy Rule 9018 is to “protect business entities from disclosure of information that could reasonably be expected to cause the entity commercial injury”).

22. Courts have also stated that commercial information need not rise to the level of a trade secret to be protected under section 107(b) of the Bankruptcy Code. *See In re Meyrowitz*,

No. 06-31660-bjh-11, 2006 WL 6544093, at *2 (Bankr. N.D. Tex. Oct. 27, 2006); *Orion Pictures*, 21 F.3d at 28. Information is protected under section 107(b) if its disclosure would confer “an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.” *Id.* at 27.

23. Here, the information contained described by Merck Motion and contained within the Merck License and Sublicense (the “Confidential Information”) is proprietary and should not be made public. The Confidential Information warrants protection under section 107(b) of the Bankruptcy Code because the Merck License and Sublicense contain sensitive information related to the Debtors, Merck and Sentyln and the production and distribution of LNF. The Debtors assert that any disclosure of the Confidential Information would be to the detriment of the Debtors, their estates, their creditors, and their employees. Any such disclosure could have a destabilizing effect on the Debtors’ continued operation during these cases and sale processes in a time where the Debtors and their professionals are attempting to maximize the value of the Debtors’ assets. The Debtors have legitimate, competitive, and business interests in preventing disclosure of this Confidential Information.

24. Additionally, the language of the Merck License and Sublicense restrict sharing of the information to third parties. The Merck License and Sublicense contain restrictive confidentiality provisions, which the Debtors would arguably be in breach of if they were to describe or publish the contents of the licenses. The Debtors do not wish to expose these bankruptcy estates to liability, nor do they wish to distract from the ongoing efforts to maximize the value of the estates for all creditors. Further, the Debtors’ creditors and any parties-in-interest to these chapter 11 cases will not be prejudiced by allowing the Debtors to file the Confidential Information under seal.

25. Further, Merck has requested that, in accordance with the confidentiality provisions, the terms of the Merck License not be publicly disclosed in connection with the filing of the Merck Motion.

26. Accordingly, the Debtors assert that good cause exists to authorize the Debtors to file the Merck Motion, Merck License, and Sublicense under seal. Under the circumstances, the Debtors believe that the relief requested in this Motion is in the best interest of the Debtors, their estates, and all creditors.

Emergency Consideration

27. Failure to receive the relief requested herein on an emergency basis would jeopardize the Zokinvy Sale Transaction and the viability of the Debtors chapter 11 cases. The Debtors therefore request that the Court approve the relief requested on an emergency basis.

Reservation of Rights

28. Nothing contained herein or any action taken pursuant to relief requested is intended to be or shall be construed as (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any party in interest's rights to dispute any claim or interest on any grounds; (c) a promise or requirement to pay any claim; (d) a waiver of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law; (e) an implication or admission that any particular claim is of a type specified or defined in this motion or any order granting the relief requested in this motion or a finding that any particular claim is an administrative expense claim or other priority claim; (f) a request for or approval to assume, adopt, or reject any agreement, contract, program, policy, or lease under section 365 of the Bankruptcy Code; or (g) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates. Likewise, if the

Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' or any party in interest's rights to subsequently dispute such claim.

Notice

29. The Debtors will provide notice of this motion to the following: (a) the U.S. Trustee for the Northern District of Texas; (b) the holders of the thirty (30) largest unsecured claims against the Debtors (on a consolidated basis); (c) Innovatus Life Sciences Lending Fund I, LP, as agent to the Debtors' secured lenders, and counsel thereto; (d) the United States Attorney's Office for the Northern District of Texas; (e) the Food and Drug Administration; (f) the Internal Revenue Service; (g) the United States Securities and Exchange Commission; (h) the state attorneys general for the states in which the Debtors conduct business; (i) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (j) Merck and its counsel. No other or further notice is needed in light of the nature of the relief requested.

[Remainder of the page intentionally left blank]

WHEREFORE the Debtors respectfully request entry of an order substantially in the form attached hereto as **Exhibit A** granting the relief requested herein and granting such other relief as is just and proper.

Dated: April 27, 2024

Respectfully submitted,

/s/ Patrick J. Neligan, Jr. _____

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**PROPOSED SPECIAL CONFLICTS
COUNSEL FOR THE DEBTORS**

Certificate of Service

I certify that on the April 27, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas.

/s/ Patrick J. Neligan, Jr.

Patrick J. Neligan, Jr.

EXHIBIT A

Proposed Order

**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)

(Jointly Administered)

**ORDER AUTHORIZING THE DEBTORS TO FILE THE MERCK MOTION, MERCK
LICENSE, AND SUBLICENSE UNDER SEAL**

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 2100 Ross Avenue, Dallas, Texas 75201.

Upon the motion (“Motion”)¹ of the debtors and debtors in possession on the above-captioned chapter 11 cases (collectively, the “Debtors”), for entry of an order (this “Order”) authorizing the Debtors to file unredacted version of the Merck Motion, Merck License and Sublicense under seal, as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this matter being a core proceeding within the meaning of 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 venue of this proceeding and the Motion in this district being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and appropriate notice of and opportunity for a hearing on the Motion having been given; and the relief requested in the Motion being in the best interests of the Debtors’ estates, their creditors and other parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted on a final basis as set forth herein.
2. The Debtors are authorized to file unredacted versions of the Merck Motion, the Merck License, and Sublicense under seal. The Merck License, Sublicense, and references thereto shall remain confidential, and shall not be made available to anyone, other than provided in paragraph 3 of this Order, without the prior written consent of the Debtors or further order of the Court. All parties are directed to redact any Confidential Information which may be contained in any pleadings filed in these chapter 11 cases.

¹ Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to them in the Motion.

3. The Debtors are authorized to cause the unredacted Merck Motion, Merck License, and Sublicense to be served on and made available, on a confidential basis, to: (i) the Court; (ii) the Office of the United States Trustee; and (iii) Merck, in each case under appropriate confidentiality agreements reasonably satisfactory to the Debtors that preserve the confidentiality of the Merck License and Sublicense (and any information derived therefrom).

4. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion under the circumstances and the requirements of Bankruptcy Rule 6004(a) and the local rules for the Bankruptcy Court for the Northern District of Texas are satisfied by such notice.

5. Notwithstanding the applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

6. The Debtors are authorized, but not directed, to take all such actions as are necessary or appropriate to implement the terms of this Order.

7. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

Order submitted by:

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