

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

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In Re: ) **Case No. 24-80040-sgj11**  
) Chapter 11  
)  
EIGER BIOPHARMACEUTICALS, ) Dallas, Texas  
INC., ) April 23, 2024  
) 9:30 a.m. Docket  
Debtor. )  
) - ZOKINVY SALE HEARING [13]  
) - FINAL HEARING RE: MOTION TO  
) USE CASH COLLATERAL [16]  
)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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1                   DALLAS, TEXAS - APRIL 23, 2024 - 9:50 A.M.

2                   THE COURT: All right. Our other matter is a sale  
3 hearing and I guess a cash collateral hearing -- I think I saw  
4 that that's worked out -- in Eiger BioPharmaceuticals, Inc.,  
5 Case No. 24-80040. So we'll get appearances, by the Debtor  
6 first.

7                   MR. CURTIN: Good morning, Your Honor.

8                   THE COURT: Good morning.

9                   MR. CURTIN: William Curtin and Anne Wallice in the  
10 courtroom, and Tom Califano on the Zoom, for the Debtors,  
11 Sidley Austin.

12                  THE COURT: Okay. Good morning. Okay. Next we'll  
13 get more appearances in the courtroom, please.

14                  MR. MORSE: Good morning again, Your Honor. Joshua  
15 Morse from Pillsbury Winthrop Shaw Pittman, LLP on behalf of  
16 Sentynl Therapeutics, Inc., the proposed purchaser of the  
17 Zokinvy assets.

18                  THE COURT: Okay. Good morning.

19                  MR. MORSE: Good morning.

20                  THE COURT: Others?

21                  MS. YOUNG: Good morning, Your Honor. Liz Ziegler  
22 Young for the U.S. Trustee.

23                  THE COURT: Good morning. We have a few more  
24 courtroom appearances. We'll get those.

25                  MR. CARLSON: Good morning, Your Honor. Cliff

1 Carlson of Weil Gotshal on behalf of the Progeria Research  
2 Foundation.

3 THE COURT: Good morning. Others?

4 MR. JONES: Good morning, Your Honor. Roger Jones  
5 for Innovatus.

6 THE COURT: Okay. Good morning.

7 All right. Anyone on the WebEx who wishes to make an  
8 appearance?

9 All right. Well, I saw that --

10 MR. WOODARD: Good morning, Your Honor.

11 THE COURT: Oh, go ahead.

12 MR. WOODARD: Sorry, Your Honor. Kyle Woodard with  
13 Kane Russell Coleman Logan on behalf of the Thermo Fisher  
14 entities: Thermo Fisher Scientific, Inc., Fisher BioServices,  
15 Inc., Patheon, Inc., Patheon UK Limited, and Patheon  
16 Manufacturing Services, LLC. We collectively refer to those  
17 as the Thermo Fisher Entities. And I believe that Maribeth  
18 Thomas with Tucker Arensberg may also be on the line --

19 THE COURT: Okay. Thank you.

20 MR. WOODARD: -- on behalf of the Thermo Fisher  
21 Entities as well.

22 THE COURT: Okay. Got it. Thank you.

23 Any other appearances?

24 All right. Well, I don't know who's going to start us out  
25 for the Debtor, but I saw the notice regarding the auction

1 results, and that's certainly a very good report I saw. So  
2 how did you want to go forward this morning?

3 MR. CALIFANO: Your Honor, if I may. And first I  
4 want to apologize for not being there in person. I had  
5 surgery two weeks ago and I just wasn't able to travel.

6 THE COURT: Okay.

7 MR. CALIFANO: But I will be there in person for the  
8 next -- for our next hearing on May 7th.

9 THE COURT: All right.

10 MR. CALIFANO: So thank you for permitting me to  
11 appear by video.

12 OPENING STATEMENT ON BEHALF OF THE DEBTOR

13 MR. CALIFANO: Your Honor, we're in a sort of strange  
14 situation. We have a very favorable sale. We thought the  
15 auction went very well. And now, having adopted some comments  
16 that we received from the secured creditor, I do not believe  
17 we have any objections to the sale.

18 Our stalking horse, Sentynl, was the winning bidder. They  
19 are supported by PRF, the Progeria Research Foundation. And  
20 we're just working through some language on the order. I  
21 believe there will be no issues there.

22 We do, unfortunately, Your Honor, and I think this is in  
23 keeping with the way this case will go, we have an issue with  
24 Merck's consent. And, frankly, Your Honor, we have had an  
25 extremely difficult time in engaging with Merck. We don't

1 believe, frankly, that their consent is required, but Sentylnl,  
2 having made such a large investment, and because we do seek to  
3 -- we have potential buyers for another aspect of this Merck  
4 license, we sought to have some confirmatory language and a  
5 side letter with Merck.

6 We were unable to really get Merck to engage until the day  
7 before this hearing, so we do have open issues.

8 What I would ask the Court -- we're going to have  
9 testimony in support of the sale, Your Honor. What I would  
10 ask the Court is to find time to schedule on May 7th, when  
11 we'll be back here on the venue motion, and save that for any  
12 outstanding Merck issues.

13 I will -- and I've said this to Merck's counsel, and I  
14 want to make it clear -- we will be seeking, to the extent  
15 that the sale is delayed because of Merck's inability to  
16 consent, we will be seeking to surcharge any payment due to  
17 Merck for the per diem payments that will be credited against  
18 the purchase price under the stalking horse APA. And I think,  
19 you know, we've had some exchanges with Merck's counsel, and  
20 they were sort of cavalier about that payment. And we  
21 believe, and we will show if need be on this hearing on the  
22 7th, that all the delay relates to Merck. We -- I just wanted  
23 everyone to be aware that we will be seeking to surcharge any  
24 payments due to them from the, you know, from their payments.

25 So that's where we are, Your Honor. I mean, I think we

1 can go forward with the sale hearing.

2 Cash collateral, it's sort of in -- I mean, it's sort of  
3 in a nowhere -- no man's land, Your Honor, to be frank. We  
4 have consent from the lenders, which was a strange pleading,  
5 but it's a consent to an order, an interim order, when we want  
6 to go forward with the final order. But I think we can, you  
7 know, we can deal with that today, Your Honor. We filed a  
8 reply to their consent.

9 We have witnesses on both on both the sale issues and cash  
10 collateral issues that my colleagues who are in the courtroom  
11 will introduce.

12 THE COURT: Okay. I do not recall seeing a pleading  
13 filed by Merck. Did I just miss it?

14 MR. CALIFANO: No, Merck has not filed a pleading,  
15 Your Honor.

16 THE COURT: Okay. So you're going to, I guess,  
17 better educate me to the extent I need to hear about that  
18 today. I understand you're wanting to save the issues for May  
19 7th, but, again, I'm coming in cold on that one. I just  
20 didn't --

21 MR. CALIFANO: Yes.

22 THE COURT: Again, there wasn't a pleading for me --

23 MR. CALIFANO: Well, Your Honor, the asset purchase  
24 agreement -- and Merck -- there has been a sublicense with  
25 respect to the Zokinvy assets and the use of Progeria for

1 years from Merck to PRF and to the Debtors. And one of the  
2 two main licenses that the Debtors are selling to Sentynl is a  
3 license from Merck as the licensor and Eiger as the licensee.  
4 What the asset purchase agreement proposes is that Sentynl  
5 will be a sublicensee of Eiger under that Merck license. Now,  
6 the Merck license does not prohibit sublicenses. It simply  
7 gives Merck a right of first negotiation. They have not  
8 exercised that right.

9 Now, because of the years that have passed since that  
10 license was granted and the fact that there are some 15  
11 amendments to the license, Sentynl has reasonably asked for a  
12 side letter which just confirms the status quo and the rights  
13 between the parties. And, you know, we think it is very clear  
14 that what Sentynl is requesting is within its rights or within  
15 the rights of the parties.

16 However, we've gotten from Merck, finally, after they were  
17 provided with the proposed side letter back on April 2nd, we  
18 finally got yesterday a document that we believe goes far  
19 beyond what Merck's rights are. And the parties spent about  
20 an hour and a half on the phone yesterday trying to resolve  
21 this, and we were unable to.

22 And what I think we are forced to do, Your Honor, is seek  
23 an evidentiary hearing where Your Honor can determine the  
24 rights under the license and give Sentynl the comfort and  
25 finality that it deserves, having stepped up and, you know,



1 coming in at, you know, some \$20 million more than its  
2 original stalking horse bid.

3 We tried to resolve this. We've been trying to resolve  
4 this. Frankly, we first started reaching out to Merck on  
5 March 14th, and we were faced with a bureaucracy. So we're  
6 asking, Your Honor, that we be given this time to resolve it,  
7 and if we can't, we'll have to come before Your Honor on the  
8 7th and have Your Honor determine the rights and the meaning  
9 of the sublicense so that we're giving Sentynl the protection  
10 that it's paying for.

11 THE COURT: Okay. And just to make sure I  
12 understand, you're still intending to present the sale  
13 evidence today and ask the Court to approve the sale to  
14 Sentynl without any contingency or condition based on how  
15 things work out with Merck?

16 MR. CALIFANO: Right. Because, Your Honor, frankly,  
17 we believe -- I mean, we will have to deliver, I mean, it will  
18 be a condition subsequent that we deliver the order, but we  
19 think that, given the opportunity to present the case before  
20 Your Honor, it'll be very clear that what Sentynl is  
21 requesting is clearly within the Debtor's rights to grant.

22 THE COURT: Okay.

23 MR. CALIFANO: You know, frankly, what they were  
24 looking for was for Merck to acknowledge it so that there was  
25 no uncertainty. But absent that, we're going to need Your

1 Honor to make those determinations.

2 THE COURT: All right.

3 MR. CALIFANO: So the closing will be, I mean,  
4 unfortunately, will be delayed until that date, which is why I  
5 made that reference to the per diem, the per diem reduction  
6 that's in the asset purchase agreement.

7 THE COURT: Okay. All right. And I can't remember.  
8 It was a pretty steep per diem.

9 MR. CALIFANO: It's \$100,000 a day, Your Honor.

10 THE COURT: Okay. All right. So this is the only  
11 issue, as I understand it. There were a couple of limited  
12 objections to the sale. I think Mr. Woodard's client had one,  
13 Thermo Fisher Entities. And then another executory contract  
14 party. Things have been worked out, language has been worked  
15 out with these entities?

16 MR. CALIFANO: I believe so, Your Honor.

17 THE COURT: All right. Mr. Woodard, do you confirm?

18 OPENING STATEMENT ON BEHALF OF THE THERMO FISHER ENTITIES

19 MR. WOODARD: Yes, Your Honor. The Thermo Fisher  
20 Entities are basically here today to reserve the rights of the  
21 Thermo Fisher Entities. Until late last week, we understood  
22 that their contracts were being assumed as part of the sale.  
23 Now I understand that that is no longer the case.

24 I just want to get a few things on the record with respect  
25 to Thermo Fisher reserving all of its rights for (inaudible)

1 postpetition payments, contract, breach of contract claims and  
2 remedies, administrative claims for postpetition work, things  
3 of that nature.

4 Just so the Court is aware, these contracts, in order for  
5 a buyer to assume them, these contracts are subject to a lot  
6 of oversight from federal regulatory agencies, the FDA and  
7 others. And part of what Thermo Fisher wants to be sure of is  
8 that any party that is going to assume these contracts  
9 potentially in the future is able to provide quote/unquote  
10 regulatory assurance that they can comply with the  
11 requirements of those agencies.

12 And so I just want to make the Court aware that these are  
13 not typical executory contracts that just have financial  
14 obligations. There are other regulatory obligations that  
15 accompany them.

16 THE COURT: Okay. All right. Any other lawyer want  
17 to make any kind of opening statement before we go to the  
18 evidence?

19 OPENING STATEMENT ON BEHALF OF THE UNITED STATES TRUSTEE

20 MS. YOUNG: Good morning, Your Honor. Liz Ziegler  
21 Young for the U.S. Trustee.

22 As you are aware, the U.S. Trustee has filed a motion to  
23 transfer venue that is currently set for hearing on May 7th.  
24 We filed our comment late yesterday in order to reserve our  
25 rights with regard to the hearing.

1 And to be clear, my client is not objecting to the sale of  
2 Zokinvy or the use of cash collateral. We simply request --  
3 we have seen proposed forms of order that do contain the same  
4 reference to venue that we had in the prior hearing, and we  
5 would just simply ask the Court to strike those two  
6 provisions, any reference to venue in either of these two  
7 orders here today.

8 We've been in discussions with the Debtors on this point.  
9 We just feel like we do not need to have any kind of  
10 preliminary findings on venue. We don't want to prejudice our  
11 rights going forward. And we're concerned that there be made  
12 no findings here today on the record about the propriety of  
13 venue being in the Northern District of Texas. And simply by  
14 taking out that language, it would reserve all of our rights  
15 with regard to the hearing on May 7th, which will be a full  
16 evidentiary hearing where all the parties will be able to  
17 present their evidence.

18 So we would just request that be struck from the proposed  
19 orders.

20 THE COURT: Okay. I presume this is kind of the  
21 usual language we see in any order, that venue is proper --

22 MS. YOUNG: Correct.

23 THE COURT: -- in this district? Just kind of one of  
24 those early recitals?

25 MS. YOUNG: Correct. And we had negotiated some

1 language with the interim orders.

2 THE COURT: Uh-huh.

3 MS. YOUNG: Obviously, that was before we had a  
4 chance to dive into this a little bit more and get some more  
5 information.

6 My client did elect to file a motion to transfer venue  
7 based on the pleadings that have been filed to the point, and  
8 we are looking forward to having that full contested hearing  
9 on May 7th. However, we're concerned that the language that  
10 we have in those orders will really act as just a preliminary  
11 venue finding, and we don't think that at this point there  
12 needs to be a venue finding in either of these two orders here  
13 today, especially when we know venue is an issue.

14 So, while we agreed originally to kind of the footnote of  
15 saying --

16 THE COURT: Uh-huh.

17 MS. YOUNG: -- it appears venue is proper, at this  
18 point we simply can't agree to that, have that language in  
19 those two orders.

20 THE COURT: Okay. So has there been a proposal  
21 worked out as far as the language?

22 MS. YOUNG: Not to the best of my knowledge.  
23 Certainly, I think -- we had requested the Debtors just simply  
24 strike any reference to venue in either of these two orders.  
25 They say -- and they can speak for themselves -- but it's our

1 understanding that they believe that the footnote and the  
2 venue language that is currently in the interim orders, is the  
3 one that is in the proposed final orders, would be sufficient.  
4 My client is concerned that it's not sufficient now that we do  
5 have a live pleading on the motion to transfer venue.

6 THE COURT: Okay. I don't think we ought to get  
7 bogged down in this. I think there's easily language that  
8 could be crafted.

9 MS. YOUNG: Okay.

10 THE COURT: Does the Debtor have anything to say on  
11 this? I mean, I almost think --

12 MR. CALIFANO: Well, Your Honor, I think --

13 THE COURT: Yes?

14 MR. CALIFANO: I think what we can do is -- you know,  
15 we had the footnote that I thought preserved their rights in  
16 the other orders. But what we can do is incorporate in the  
17 footnote the fact that the U.S. Trustee has filed a motion to  
18 transfer venue, has put venue in issue, and that the entry of  
19 this order should not be -- should not prejudice their rights  
20 under the pending motion.

21 Does that -- I think that would satisfy their concerns.

22 THE COURT: Okay.

23 MS. YOUNG: Something along those lines. We could  
24 also say if the order, instead of saying it appears venue is  
25 proper, if it can say the Debtors assert that venue is proper,

1 that would resolve our concerns about that language as well.

2 MR. CALIFANO: Okay. We'll work out language.

3 MS. YOUNG: Okay.

4 MR. CALIFANO: That's fine with us, Your Honor.

5 THE COURT: All right.

6 MS. YOUNG: And thank you, Your Honor. Again, thank  
7 you for your time.

8 MR. CALIFANO: We just had other -- I'm sorry. We  
9 just had other issues. We would have gotten to this. But we  
10 just didn't get a chance, Your Honor. I'm sorry.

11 THE COURT: Okay.

12 MS. YOUNG: Understood, and we're certainly okay with  
13 working something out. But my client did just want to make it  
14 clear on the record for today.

15 THE COURT: Okay. I think the concept you all talked  
16 about sounds fine. You ought to be able to wordsmith it, just  
17 everyone is kind of reserving their rights for May 7th.

18 MS. YOUNG: Thank you, Your Honor.

19 THE COURT: Okay. Thank you.

20 Counsel?

21 MR. CALIFANO: Yes. Your Honor, at that -- at this  
22 point, I will pass the podium. Oh, I'm sorry. I didn't  
23 realize. I apologize.

24 THE COURT: We have another opening statement, I  
25 think.

1 OPENING STATEMENT ON BEHALF OF PROGERIA RESEARCH FOUNDATION

2 MR. CARLSON: Yes. Your Honor, if now is the  
3 appropriate time, we do have a statement in support of the  
4 sale that we wanted to get in. If it's preferred to do it at  
5 the end, we're happy to do it then as well, but --

6 THE COURT: You can go ahead.

7 MR. CARLSON: So, Your Honor, we represent the  
8 Foundation.

9 THE COURT: Uh-huh.

10 MR. CARLSON: We support the sale to Sentynl. We're  
11 working with the Debtors and Sentynl to finalize documents,  
12 the final form of order, novation agreement, et cetera.

13 THE COURT: Uh-huh.

14 MR. CARLSON: But wanted to -- wanted to say, you  
15 know, we've, from the beginning, we've said PRF, the  
16 Foundation's focus is really on continued supply of this drug  
17 to Progeria patients across the country. We've spent a ton of  
18 time, dating back to October, diligencing Sentynl, and we  
19 think that they're best situated to meet that goal and we feel  
20 very comfortable, again, finalizing the documents. We're  
21 still working on those.

22 We were able to obtain a guaranty of an affiliate of the  
23 purchaser as well, which was sort of the final piece to get us  
24 comfortable with consenting to the assignment under the  
25 collaboration and supply agreement.



1 But, anyway, wanted to thank -- wanted to thank the  
2 Debtors, of course, and Sentynl on what we view as a great  
3 outcome, and for, you know, really going the extra mile to  
4 help us get up to speed and diligence Sentynl and get to where  
5 we are today. So, that's it.

6 THE COURT: All right.

7 MR. CARLSON: Thank you.

8 THE COURT: Glad to hear that. Thank you.

9 All right. Are we ready for evidence?

10 MR. CURTIN: I think so, Your Honor. At this point,  
11 the Debtors call Jay Scott Victor.

12 THE COURT: All right. Mr. Victor, welcome back.

13 MR. VICTOR: Thank you, Your Honor. It's good to be  
14 back.

15 THE COURT: Okay. Under these circumstances,  
16 especially, right?

17 Please raise your right hand.

18 (The witness is sworn.)

19 THE COURT: Okay. Thank you. You may be seated.

20 MR. CURTIN: Your Honor, at this point we would move  
21 to admit Mr. Victor's declaration, which was filed at ECF 141.

22 THE COURT: All right. I assume there is no  
23 opposition to that?

24 Okay. That declaration is admitted as evidence.

25 MR. CURTIN: Thank you very much.

Victor - Direct

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1 THE COURT: And, again, it's 141, Docket 141.

2 MR. CURTIN: Yes, Your Honor. Thank you.

3 THE COURT: Okay. Got it.

4 (Declaration of Jay Scott Victor, ECF 141, is received  
5 into evidence as Debtor's exhibit.)

6 JAY SCOTT VICTOR, DEBTOR'S WITNESS, SWORN

7 DIRECT EXAMINATION

8 BY MR. CURTIN:

9 Q Mr. Victor, can you briefly remind the Court of your  
10 background and your role in this case?

11 A Sure. I've been in restructuring for 41 years: 17 as a  
12 bankruptcy attorney, 24 as an investment banker. And I'm the  
13 lead investment banker at SSG on this assignment.

14 Q And can you describe for the Court the postpetition  
15 marketing process for the Zokinvy assets?

16 A Yes. As I testified last time, we had many inbound calls  
17 from interested parties. We signed approximately ten NDAs for  
18 the Zokinvy assets. Those parties did diligence. Two of them  
19 dropped out, two of the very interested parties that were both  
20 foreign dropped out the weekend before the auction, leaving us  
21 with the stalking horse bid of Sentynl, and Eton did provide a  
22 qualified overbid by the bid deadline.

23 Q So were you involved in the Zokinvy auction?

24 A Yes. I ran it.

25 Q Okay. And can you tell the Court -- let's just talk a

Victor - Direct

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1 little bit about the auction. What was the opening bid at the  
2 auction, and who submitted that?

3 A The opening bid was \$30 million plus the breakup fee plus  
4 the expense reimbursement -- plus the initial incremental  
5 overbid plus another \$50,000. I believe it was \$31,250,000,  
6 thereabout. And it was submitted by Eton as the qualified  
7 overbid, and that was accepted, and that's where the auction  
8 started.

9 Q And can you give the Court a summary of generally how the  
10 auction proceeded?

11 A It was via Zoom, despite some counsels not being a fan of  
12 Zoom. But it worked out quite well. It commenced at 9:30 in  
13 the morning last week, went through 36 rounds, and ended with  
14 Sentynl, the original stalking horse, as the winning bid at  
15 \$46.1 million, all in an hour and a half.

16 Q And to be clear, when you talked about counsel having an  
17 issue with the Zoom, you're referring to Debtor's counsel,  
18 correct?

19 A And also Sentynl's counsel.

20 Q And at the end of the auction, who was declared the  
21 winner, and, again, the value of the winning bid?

22 A Sentynl was the winning bidder after 36 rounds, with a  
23 winning bid of \$46.1 million.

24 Q Okay. I now have some questions about the remaining asset  
25 sale process, which, of course, is still ongoing. Based on

Victor - Direct

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1 the process so far, which, understanding it's still a work in  
2 progress, is it your belief that there are other significant  
3 assets of the estate that could generate value?

4 A Yes. We have three other assets. We have 10 NDAs  
5 executed. We are out to market to well over 300 other  
6 potential parties. And the 10 parties that have executed NDAs  
7 are all involved in heavy diligence.

8 Q Have you been involved in that diligence process for the  
9 remaining assets?

10 A I have.

11 Q To your knowledge, have the potential bidders for those  
12 remaining assets been focused at all on commercialization  
13 requirements?

14 A Well, they expect it. They expect the drugs to be ready  
15 for -- in one particular instance with lonafarnib for HDV;  
16 it's already through Phase III -- they expect it to be ready  
17 for commercialization.

18 Avexitide is ready for Phase III trials, and the bidder --  
19 and the potential bidders or potential buyers expect it to be  
20 ready for Phase III trials.

21 Q So, along those lines, the same question with regard to  
22 research and development on those assets. Is that also  
23 something that buyers expect to continue?

24 A Absolutely the same.

25 Q So is it your opinion that the continued R&D and

Victor - Direct

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1 commercialization efforts regarding the remaining assets are  
2 necessary for the success of selling the remaining assets at  
3 the highest possible value?

4 A Yes. It will maximize value.

5 Q Okay. Mr. Victor, based upon your 40 years in the  
6 restructuring industry and having successfully marketed  
7 numerous biopharma companies and assets, do you believe that  
8 the sale, the Zokinvy sale, resulted in the highest and best  
9 price for the Debtor's assets?

10 A Absolutely. It was a tremendously successful result.

11 Q And also, Mr. Victor, again, based on your experience, is  
12 the continued R&D and commercialization of the remaining  
13 assets while that sale process is pending in the best  
14 interests of the Debtor to maximize value?

15 A I do.

16 MR. CURTIN: No further questions, Your Honor.

17 THE COURT: All right. Any cross?

18 No? Okay. Thank you, Mr. Victor.

19 THE WITNESS: Thank you.

20 (The witness steps down.)

21 THE COURT: All right. Any other witnesses?

22 MS. WALLICE: Thank you, Your Honor. For the record,  
23 Anne Wallice of Sidley Austin on behalf of the Debtors. At  
24 this time, the Debtors would call Dr. David Apelian to the  
25 stand.

Apelian - Direct

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1 THE COURT: Okay. Welcome back, Dr. Apelian.

2 DR. APELIAN: Thank you, Your Honor.

3 THE COURT: I'll swear you in.

4 (The witness is sworn.)

5 THE COURT: Thank you. You may be seated.

6 DAVID APELIAN, DEBTOR'S WITNESS, SWORN

7 DIRECT EXAMINATION

8 BY MS. WALLICE:

9 Q Good morning, Dr. Apelian.

10 A Good morning.

11 Q For the record, could you state your name and spell it,  
12 please?

13 A It's David Apelian. D-A-V-I-D. Last name, Apelian. A as  
14 in apple, P as in Peter, E-L-I-A-N.

15 Q Thank you. And Dr. Apelian, what is your current  
16 position?

17 A I'm the CEO of Eiger.

18 Q And how long have you served in that role?

19 A I've served in the CEO role for about 15 months. I've  
20 been on the board of Eiger for about seven years. And I, even  
21 in the early tenure, part of the tenure, served on the  
22 management team and helped run the medical programs and  
23 clinical programs.

24 Q And Dr. Apelian, what are your responsibilities as the CEO  
25 of Eiger BioPharmaceuticals?

1 A I view my role as critically to make sure we're executing  
2 on our clinical programs to increase the value for all the  
3 stakeholders, including patients, the creditors, and our  
4 shareholders.

5 Q And Dr. Apelian, prior to your time at Eiger  
6 BioPharmaceuticals, were you in the drug development field?

7 A Yes. I spent the past 25 years in drug development, in  
8 the early part of my career at Schering Plough and Bristol-  
9 Myers Squibb directly managing programs, and the last I would  
10 say 20 years in chief medical officer-level roles, and most  
11 recently in senior management.

12 Q Thank you, Dr. Apelian. Could you briefly describe the  
13 Zokinvy assets?

14 A Zokinvy is a very, I think, unique program. It's really a  
15 spin-out of our HDV program that we originally licensed  
16 lonafarnib from Merck for our product hepatitis D program.  
17 And because of the good work of PRF doing an academic trial in  
18 Progeria patients to show that the same compound actually  
19 benefitted these children in dramatic fashion, we were able --  
20 and I think Merck stepped up in a really amazing way to make  
21 and to facilitate our ability to partner with PRF, Your Honor,  
22 to do the work we did over the last six years by granting us  
23 an amendment to the license, allowing us to work with PRF to  
24 get the drug approved. In terms of the obligations to Merck,  
25 they did not require royalty. They did not require

1 milestones. They allowed us to share the PRV, which was  
2 highly valuable, and we shared that with PRF at the time of  
3 our approval.

4 So I think it's a great example of a big company stepping  
5 up to do the right thing and facilitate a program that has  
6 proven to be amazingly beneficial to these patients. And  
7 obviously, based on the bid you just heard about, and the  
8 purchase, a valuable asset for all stakeholders.

9 Q And Dr. Apelian, you mentioned an amendment as you all  
10 were working to develop this with PRF and Merck. That  
11 amendment, did it provide for royalties and milestone payments  
12 related to the Progeria field?

13 A In contrast to the HDV license, which does -- we do have  
14 obligations to Merck for royalties and milestones, the Zokinvy  
15 amendment did not require that. So we were able to develop  
16 the product in collaboration with PRF without royalty and  
17 milestone obligations to Merck.

18 Q And in your understanding, was it contemplated that that  
19 would be the structure of the amendment moving forward?

20 A It was our understanding that this was -- and from my own  
21 phrasing -- a goodwill gesture by Merck to put the product in  
22 the hands of people that could get it approved in partnership  
23 with PRF, and I think that's proven to be the case over the  
24 last five or six years.

25 Q Thank you, Dr. Apelian. Could you briefly remind the



1 Court of the use for Zokinvy?

2 A So, Zokinvy is lonafarnib that is dosed in children with  
3 Progeria. Progeria, as you know, is the rapid aging syndrome  
4 of children. The average age of children with this disease is  
5 14 years.

6 At the time that we were able to finally get approved  
7 Zokinvy for Progeria, the survival advantage was greater than  
8 two years. We've monitored the patients over the last several  
9 years, and that survival advantage continues to improve. It's  
10 now greater than four years. I'm convinced, as we start  
11 diagnosing patients earlier and treating them sooner now that  
12 the drug is in the market, I expect that we might see even  
13 greater advantages in survival.

14 By far, over 25 years, this is the highest-impact drug  
15 I've ever been involved in in terms of a per-patient benefit.  
16 Progeria kids have a really high quality of life. They're  
17 cognitively intact. They're engaged in their communities.  
18 It's amazing to see that the drug has had that kind of impact.  
19 And I give a ton of credit to PRF for figuring out this use of  
20 lonafarnib and demonstrating that in the trial.

21 Q And approximately how many people suffer from Hutchinson-  
22 Gilford Progeria Syndrome and Progeroid Laminopathies?

23 A The estimate is about 400 patients worldwide have  
24 Progeria, classic Progeria. There may be as many as 200 that  
25 have Progeroid Laminopathies, which is a variant of Progeria

1 but has similar effects of varying severity. So, in  
2 aggregate, it could be as many 600 patients worldwide that  
3 have one of these conditions.

4 Q And are there any other treatments available for Progeria?

5 A There are no approved treatments for Progeria. Or PL.

6 Q Slightly pivoting to the contemplated sale, Dr. Apelian,  
7 could you describe the continuing obligations that the company  
8 has under the current stalking horse APA to ensure maintenance  
9 and transition of the Zokinvy assets?

10 A So, in general, when we -- for Zokinvy, but this also  
11 could apply to other assets -- we have obligations to maintain  
12 the integrity of the inventory, to maintain the usability of  
13 the asset in a quality and regulatory way so they can be used  
14 in studies but also support a registrational filing. So that  
15 applies to all of our assets.

16 In the case of Zokinvy, there's a special circumstance of  
17 a post-marketing requirement where the approval to  
18 commercialize the drug also had obligations to do additional  
19 studies to maintain the market authorization. And there's a  
20 few different categories of those studies that many -- several  
21 are ongoing. There's two drug interaction studies that are  
22 ongoing, at various stages of completion. We are about to  
23 complete a QTC study, which is a cardiac study. A rodent  
24 carcinogenicity study is about to be completed. These are all  
25 obligations we had to maintain our market authorization,

1 mostly for the European approval. And so these are simply --  
2 they're necessary. We have to maintain this. If we don't, we  
3 could lose our authorization to commercialize the product, in  
4 this case, in Europe. And, of course, a buyer needs to see --  
5 have assurance that these obligations are being met.

6 Otherwise, it would dramatically impair the value of the  
7 asset.

8 Q And for these continuing obligations, the studies as well  
9 as the PMRs, will these remain a cost of the company following  
10 the closing of the sale?

11 A So, at the time of closure of the sale, the buyer would  
12 assume the forward costs of these various studies. So, you  
13 know, in a way, this could be a moot point in a week or two,  
14 once we close the sale of Zokinvy.

15 Q And Dr. Apelian, in your opinion, are these obligations  
16 necessary to the successful maintenance and transition of the  
17 Zokinvy assets?

18 A They're absolutely necessary if -- and I've sat on the  
19 buyer's side of the table, looking at assets. These are  
20 critical things that have to be maintained. Otherwise, the  
21 asset will be damaged and will not -- either not get interest  
22 of parties that want to buy the asset or will dramatically  
23 reduce the value.

24 Q Pivoting slightly to the other assets, could you describe  
25 the other significant assets of the company that may generate

1 value to the estate?

2 A I'll start with lonafarnib HDV, because that was actually  
3 the primary license we had with Merck. Chronic hepatitis D is  
4 the most severe version of chronic hepatitis. Unlike  
5 hepatitis C, there is no cure for chronic hepatitis D. It's  
6 actually a co-infection with hepatitis B. It's the most  
7 aggressive version of chronic hepatitis, has the most rapid  
8 progression of cirrhosis. Survival in these patients without  
9 treatment resembles Stage 3 lung cancer. Mortality rates are  
10 very high. And there's no approved drug in the U.S. to treat  
11 chronic hepatitis D.

12 Lonafarnib, we, in 2022, demonstrated a Phase III program  
13 that delivered on the primary end point for two treatment  
14 regimens. We hit P values, which means statistical  
15 significance. And we had a pre-NDA meeting with FDA in the  
16 early part of 2023, where they agreed that we should submit  
17 the application for an approval. That doesn't guarantee an  
18 approval, but it was our opportunity to make sure we had all  
19 the necessary components of a package to submit for  
20 registrational approval in the U.S.

21 As a part of that discussion, they did note to us that  
22 they wanted to see some additional virology and genotyping  
23 supportive scientific studies, which we have since embarked  
24 on. And that's the only example, I think, in the case of  
25 lonafarnib HDV, where there is some ongoing work, because we

1 know it's a requirement of FDA for the submission for the  
2 approval.

3 Q Any other assets? We've discussed lonafarnib. Avexitide,  
4 potentially?

5 A Avexitide is a Phase III-ready asset, Your Honor, that  
6 treats hyperinsulinemic hypoglycemic conditions. There's two  
7 major examples of that. We have Phase II data in both of  
8 those of those diseases. CHI is a congenital hyperinsulinism  
9 syndrome in newborns and young children. And these children  
10 produce too much insulin, and they suffer from life-  
11 threatening, debilitating hypoglycemia. And so Avexitide  
12 blocks the receptor that can reverse this effect and stabilize  
13 these children.

14 In the neonatal period, about 50 percent of these children  
15 will have severe damage from this disease, and many of the  
16 children have to have their pancreases removed to remove the  
17 insulin risk. So they're fated to a life of brittle diabetes.  
18 So this is a serious disease, life-threatening disease in  
19 young children.

20 The other use for Avexitide is to treat post-bariatric  
21 surgery hypoglycemia. About five percent of the patients who  
22 get bariatric surgeries for weight loss suffer a debilitating  
23 hypoglycemic condition, and it's also triggered by a  
24 hyperinsulinemic condition that can be addressed by Avexitide.

25 We have Phase II data in both those disease states. We

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1 have breakthrough therapy status from FDA, which means they  
2 deem it to be a meaningful and promising program in  
3 (inaudible) population. And so those two programs are Phase  
4 III-ready. So Avexitide is really in a position of creating a  
5 lot of value for all stakeholders.

6 Q And you mentioned that Avexitide is Phase III-ready. What  
7 steps are required in order to begin that, entry into that  
8 phrase?

9 A So, we actually had -- and then a Phase II meeting with  
10 the FDA to support one of those indications, the post-  
11 bariatric hypoglycemia indication. We had a very favorable  
12 meeting. We got feedback from the FDA to make some -- you  
13 know, fine tune the plan for the Phase III program. That  
14 Phase III study and the protocol is written. It's ready to  
15 launch.

16 Because of recent events, we paused any actual patient  
17 enrollment, which is pretty costly. So we, you know, hit the  
18 pause button on those activities. But we need to continue  
19 maintaining inventory management and all the necessary I would  
20 say proper management of the Avexitide inventory and  
21 monitoring and compliance. And if we don't do that, the asset  
22 will lose value because it won't be ready for clinical trials  
23 and it won't be ready for registration. We're targeting  
24 somewhere in the middle of 2026.

25 Q And Dr. Apelian, could you provide a bit of information

1 regarding lambda?

2 A So, interferon lambda was a product that we were  
3 developing for chronic hepatitis, hepatitis D in particular.  
4 We had some safety signals in that population last year that  
5 caused us to terminate a Phase III program. And that's --  
6 drug development is a high risk enterprise, Your Honor, so  
7 these things happen. And we terminated the HDV program for  
8 lambda.

9 However, we had very promising data for COVID using a  
10 single injection of interferon lambda. That was the basis for  
11 a potential EUA application that we were not able to advance  
12 in 2022. But there's been interest in other respiratory  
13 diseases and COVID using lambda, and so we believe there's  
14 tremendous value still in the interferon lambda program for  
15 respiratory treatment.

16 The single dose changes the safety protocol to a much more  
17 favorable profile than the chronic weekly dosing we were using  
18 for hepatitis. And we believe there's going to be an unmet  
19 need in future COVID pandemics and flu and RSV and some other  
20 respiratory diseases where lambda could be very useful.

21 Q Dr. Apelian, you heard Mr. Scott mention that, as part of  
22 the bidding process, many interested parties expect  
23 continuation of certain costs related to commercialization.  
24 In your opinion, are such efforts necessary for value,  
25 preserving value of those assets?

1 A Absolutely necessary. If we didn't, as the sponsor of  
2 these programs, provide the oversight and management of these  
3 inventories and all the quality and compliance obligations we  
4 have, it would be -- I would say it's negligent of our  
5 stewardship of these programs. And this is how we maintain  
6 the value for all of our stakeholders.

7 So this is going to increase the value of these assets for  
8 our creditors as collateral. This is going to increase our  
9 ability to advance these programs to patients, whether it's in  
10 a clinical trial or as commercial approval. And it ultimately  
11 will bring the most value to all stakeholders, including  
12 shareholders.

13 So if we neglect those inventories and the management of  
14 those intermediates and final product and all the things that  
15 we have to do to be compliant, to provide drugs safely to  
16 patients, it would be -- I would consider it, in my role,  
17 negligent to not do that properly. And the cost-benefit of  
18 doing it is totally justified in light of the value that we  
19 see in these programs.

20 Q And Dr. Apelian, you discussed some of those efforts in  
21 your description of the other assets, but could you briefly  
22 describe the ongoing research and development and post-  
23 commercialization efforts that are related to the general  
24 remaining assets?

25 A So, in contrast to Zokinvy, which has post-approval



1 commitments that are based on the condition of the approval of  
2 the product, I look at the other assets a bit differently. We  
3 -- the main thing we want to focus on, I would say 90 percent  
4 of this effort is to preserve the integrity of the inventory  
5 and intermediates.

6 And as a small virtual company like us, we have to manage  
7 this through multiple vendors, so we have to make sure our  
8 intermediates and product, finished product, is being managed  
9 properly, in the proper conditions, is being monitored to be  
10 compliant. We monitor stability. And this is how we can then  
11 deploy these products into a clinic and ultimately for filing  
12 for an approval.

13 So that's an absolutely necessary part of managing these  
14 programs.

15 In HDV, there's the special condition of the requirement  
16 for the data that the FDA had told us at the pre-NDA meeting,  
17 so the virology and genotyping work I mentioned to you is  
18 research, in a way, but it's directly required for that  
19 submission to be successful.

20 Other than that, we've really pared down any other costs.  
21 We haven't been advancing patients in the clinic. We've been,  
22 you know, really cautious with our cash to make sure we have  
23 sufficient funds to do what's absolutely necessary to foster  
24 the sale of these assets.

25 Q Are there any other long-term studies that are ongoing?

1 A There are no other long-term studies ongoing. There is a  
2 future obligation for a registry study for Zokinvy, which  
3 Sentynl is aware of. This is something that's a future post-  
4 approval commitment. So, you know, there's different stages  
5 of this that we manage, as any drug program. But there are no  
6 current longstanding clinical activities of any kind.

7 Q What about with respect to Avexitide?

8 A Avexitide was poised and ready for the Phase III program,  
9 the Phase III trial, where, you know, we stopped, we didn't  
10 enroll any patients, we kind of hit the pause button. Sites  
11 were gearing up to do the study. We are in ethics committee  
12 review at various sites. So we had -- a lot of the setup is  
13 ready to go.

14 That could potentially be picked up by a buyer, and that  
15 same vendor and those same sites could potentially be  
16 reactivated, with some savings in time and cost, if the buyer  
17 so chose to do that.

18 Q In your opinion, is payment of these expenses necessary to  
19 the continued success of the remaining assets?

20 A Absolutely. If we don't maintain the inventories in a  
21 sufficient quality and compliant way, we could endanger the  
22 ability to use those products in clinical studies and endanger  
23 a massive delay of the registrational filing. So this is kind  
24 of part of our responsibility of maintaining these very  
25 valuable programs in the proper way.

1 And what we've done and the focus of our team has been  
2 what's absolutely essential to preserve asset value for a  
3 buyer. And we cut many, many activities that were not  
4 absolutely necessary for that purpose.

5 Q And Dr. Apelian, what would happen if those necessary  
6 expenses were terminated and the company could no longer honor  
7 those obligations?

8 A It will be a potential lost opportunity to advance those  
9 products for various lengths of time. You know, a year or  
10 more to get into the clinic if you don't have the product  
11 sufficiently stored and in the complaint way, ready to release  
12 for trial.

13 If you were to discontinue, for example, a long-term  
14 stability study -- in most cases you require five years of  
15 stability to file for an approval -- you don't get the time  
16 back. If you stop that study at year two or year three, you  
17 have to go back and restart a five-year study. So that could  
18 be years lost. And all that will impact the interest of a  
19 buyer. Lost time is lost money and lost value.

20 Q In your opinion, would that affect the value of the  
21 remaining assets?

22 A Absolutely. As a buyer, it would be a critical feature.  
23 And as Scott mentioned, he's hearing those questions already  
24 from potential bidders. So even potential bidders early in  
25 diligence are all going to ask questions about readiness. Is

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1 your product stored properly? Is it ready for trial? Is it  
2 ready to advance? This tends to be the early part of  
3 diligence, because no one wants to buy an asset and then find  
4 out they have two years' worth of work to do to get back up to  
5 speed so that you can actually do the trials that matter.

6 Q Dr. Apelian, in your business judgment, do believe that  
7 honoring the continuing obligations related to the Zokinvy  
8 assets is in the best interests of the company?

9 A Absolutely. And even though the buyer is likely to assume  
10 those costs fairly soon, we don't -- we can't afford any  
11 missteps in those programs staying on track and continuing.  
12 Any one of those obligations, if not met, could jeopardize the  
13 commercial authorization for Zokinvy.

14 Q And in your business judgment, do you believe that payment  
15 of the ongoing research and development, post-  
16 commercialization expenses of the remaining assets is in the  
17 best interests of the company?

18 A Well, we -- more accurately, what we have are obligations  
19 to be ready to file. So we don't have any post-marketing  
20 requirements for the other assets yet. But we do have  
21 obligations to be good stewards of these programs, to know  
22 what is required for a successful filing.

23 So, for Avexitide or for lonafarnib HDV, which are the  
24 nearest to being actually filed, we have to be ready to have  
25 the necessary manufacturing data, stability data, have the

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1 supplies ready for Phase III, ready for pre-approval  
2 inspections. This is a part of the approval process, is to  
3 have manufacturing up to a certain point of quality and  
4 compliance that can be inspected for approval. So part of our  
5 job is to always make sure that we're preserving that timeline  
6 to a value-creative event, like a product approval.

7 Q Thank you, Dr. Apelian.

8 MS. WALLICE: And Your Honor, I neglected to do this  
9 at the start. At this time, I would ask for entry of Dr.  
10 Apelian's declaration in support of the filing of these  
11 Chapter 11 cases at Docket #19 and Dr. Apelian's declaration  
12 in support of the bid procedures and -- at Docket #27 be  
13 entered.

14 THE COURT: All right. I assume there's no  
15 objection?

16 Those will be admitted.

17 (Declarations of Dr. David Apelian, ECFs 19 and 27, are  
18 received into evidence as Debtor's exhibits.)

19 MS. WALLICE: Thank you, Your Honor. No further  
20 questions.

21 THE COURT: All right. Do we have any cross-  
22 examination of Dr. Apelian?

23 All right. Thank you. You're excused.

24 THE WITNESS: Thank you, Your Honor.

25 THE COURT: Okay.

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1 (The witness steps down.)

2 MR. CURTIN: Your Honor, again, William Curtin from  
3 Sidley for the Debtors. For our last witness, we call Doug  
4 Staut.

5 THE COURT: All right. Mr. Staut? Welcome.

6 MR. STAUT: Thank you.

7 THE COURT: Please raise your right hand.

8 (The witness is sworn.)

9 THE COURT: Okay. You may be seated.

10 MR. CURTIN: And Your Honor, at this time we would  
11 move to admit Mr. Staut's declaration, which is filed on the  
12 docket at ECF #138.

13 THE COURT: All right. I assume there's no  
14 objection?

15 That will be admitted.

16 (Declaration of Doug Staut, ECF 138, is received into  
17 evidence as Debtor's exhibit.)

18 DOUGLAS STAUT, DEBTOR'S WITNESS, SWORN

19 DIRECT EXAMINATION

20 BY MR. CURTIN:

21 Q Mr. Staut, can you please spell your name for record?

22 A Doug, D-O-U-G. Staut, S-T-A-U-T.

23 Q And where are you currently employed?

24 A I'm employed with Alvarez & Marsal.

25 Q And what's your current position at Alvarez & Marsal?

1 A My position with Alvarez & Marsal is a managing director  
2 in the restructuring group.

3 Q And what is Alvarez & Marsal's current role with the  
4 Debtors?

5 A We are the financial advisor to the Debtor.

6 Q And what is your proposed position with the Debtors?

7 A Chief restructuring officer.

8 Q And if the retention is approved by the Court, what would  
9 your responsibilities be as CRO?

10 A They would be to manage the liquidity, do liquidity  
11 reporting for any parties that require it, review and approve  
12 all disbursements, and manage bankruptcy reporting as well.

13 Q And can you describe for the Court your experience in  
14 financial and restructuring services?

15 A Sure. I started with Alvarez & Marsal in 2009. My first  
16 case as an associate was Erickson Retirement Communities,  
17 working for Mr. Califano and Mr. Rundell. Since then, I've  
18 been interim officer or financial advisor to clients both in  
19 court and out of court. Oh, and mostly in the health care  
20 industry, I should say.

21 Q And does your work in evaluating a company's financial  
22 condition usually involve cash flow forecasting?

23 A Every client requires cash flow forecasting, yes.

24 Q And approximately how many times have you evaluated a  
25 company's liquidity?

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1 A Somewhere in the neighborhood of 50, I'd imagine.

2 Q And how many of those were health care companies?

3 A Almost all of them.

4 Q Mr. Staut, did you assist with the financial forecasts and  
5 budgeting in this case?

6 A I did.

7 Q And can you please briefly describe that process?

8 A Sure. So, we generally start with laying out the  
9 historical cash flows, and then we spend time with senior  
10 management, looking at every counterparty -- all the vendors,  
11 all the sources of the receipts. Go through them one by one.  
12 And in this particular case, we looked at the disbursements  
13 through two lenses. One lens was will this disbursement  
14 maximize or maintain value of the assets that we plan to  
15 auction off? And if not, you know, it's not going to go into  
16 our budget. And then the second was will this disbursement  
17 help with the distribution and allow children with Progeria to  
18 receive Zokinvy?

19 MR. CURTIN: Your Honor, at this point I would move  
20 to admit the final cash collateral budget, which was filed at  
21 Exhibit 1 to Docket #142.

22 THE COURT: All right. Any objection?

23 That will be admitted.

24 (Final cash collateral budget at Exhibit 1 to ECF 142 is  
25 received into evidence as Debtor's exhibit.)



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1 BY MR. CURTIN:

2 Q Mr. --

3 MR. JONES: Your Honor, just for clarification, are  
4 we having a sale hearing, a cash collateral hearing, or both?

5 MR. CURTIN: The -- the --

6 THE COURT: I think probably both --

7 MR. CURTIN: Right. Similar --

8 THE COURT: -- at this point.

9 MR. CURTIN: Right. Similar to -- similar to last  
10 time, this evidence is relevant to both.

11 THE COURT: To both.

12 MR. CURTIN: So we just --

13 THE COURT: Just like Dr. Apelian's was similar.

14 MR. CURTIN: Just like Dr. Apelian's was relevant to  
15 both.

16 THE COURT: Uh-huh.

17 MR. CURTIN: Actually, also Mr. Victor's, Your Honor,  
18 the testimony with regard to the remaining assets and how the  
19 -- what buyers are asking for and those expenses, that's part  
20 of cash collateral, because we need to spend that.

21 So all three witnesses are relevant to both motions.

22 THE COURT: All right. There we go.

23 MR. CURTIN: Your Honor, how -- I'm sorry, Your  
24 Honor.

25 BY MR. CURTIN:

1 Q Mr. Staut, how much cash do the Debtors currently have on  
2 hand?

3 A About \$12 million.

4 Q And does the cash collateral budget accurately reflect the  
5 Debtor's anticipated cash flow for the next 13 weeks?

6 A Yes, it does.

7 Q And can you explain what we mean when we're talking about  
8 Zokinvy commercialization costs?

9 A Sure. That's -- as Dr. Apelian spoke about a few minutes  
10 ago, it's the cost to get Zokinvy -- all of the costs to get  
11 Zokinvy ultimately in the hands of the people that need it.

12 Q And do you know approximately what those total payments  
13 are?

14 A Over the 13-week period, it's a little more than a million  
15 dollars.

16 Q And the same question with regard to R&D, what we term R&D  
17 expenses. What's the total of those?

18 A The total of the R&D is about 600 -- sorry. It's about  
19 \$900,000 over the 13-week horizon.

20 Q And can you -- we talked about this at the prior hearing,  
21 but can you just briefly explain why there are contingency  
22 expenses in the budget?

23 A Sure. Because we don't know what we don't know, so we've  
24 forecasted -- we add a contingency at 10 percent of operating  
25 disbursements on a weekly basis going forward.

1 Q And can you explain what the employee costs in the budget  
2 are for?

3 A Of course. The employee costs is the salaries and it's  
4 the wages and the benefits for the nine remaining employees at  
5 the company.

6 Q And do you know, that nine employees, what -- how many is  
7 that down from?

8 A I believe it was 25 pre-filing.

9 Q Did you discuss the budget with the Debtor's management?

10 A Absolutely. Yes.

11 Q And in your opinion and experience, did the Debtors  
12 exercise reasonable business judgment in determining which  
13 expenses need to be paid?

14 A Yes, they did. There were a significant amount of  
15 conversations and a healthy push-and-pull. So, absolutely,  
16 yes.

17 Q And did you involve Innovatus in the budgeting process?

18 A Yes.

19 Q And how many times did you speak to Innovatus through that  
20 process?

21 A In the -- over the -- I guess since the first day hearing,  
22 we've spoken to Innovatus twice.

23 Q How many times before that?

24 A Before that, I'm not exactly sure. I think it was two or  
25 three.

1 Q Okay. And are you also aware of written correspondence  
2 with Innovatus regarding budgeting?

3 A Yes. They submitted -- Innovatus submitted a list of  
4 questions to us last week.

5 Q And did you respond to those?

6 A We did.

7 Q Are you familiar generally with the Zokinvy sale process?

8 A I am.

9 Q What are the approximate net proceeds to the estate of the  
10 Zokinvy sale if it were to close tomorrow?

11 A So, net of the estimated Merck fees as well as the banker  
12 fees, the amount of cash to the estate is about approximately  
13 \$37 million.

14 Q And you talked about the available cash earlier, so what  
15 would that bring the total cash position to?

16 A The current cash position is \$12 million, plus the \$37  
17 million would be \$49 million in cash.

18 Q And you understand, Mr. Staut, that there's some question  
19 about the exact day that this -- that the sale will close?  
20 But that amount would reduce by essentially \$100,000 a day  
21 after tomorrow; is that right?

22 A Correct.

23 Q Based on the current forecasted budget, at what point in  
24 time would the Debtor's cash on hand no longer be sufficient  
25 to cover Innovatus's estimated claim?

1 A That would happen in July.

2 Q And do you believe that the budget is a reasonable  
3 estimation of the disbursements necessary to finalize the  
4 Zokinvy -- the post-closing Zokinvy sale issues as well  
5 preserve the value of the remaining assets?

6 A I do.

7 Q And will preserving the value of the remaining assets  
8 ultimately reduce the risk of diminution of value of those  
9 assets?

10 A Yes.

11 Q Mr. Staut, how important is the Debtor's need for cash  
12 collateral, for the use of cash collateral?

13 A It's of the utmost importance.

14 Q And is that need immediate?

15 A It is immediate, yes.

16 Q In your opinion, what would happen if the Debtors were  
17 unable to access cash collateral?

18 A Well, Zokinvy aside, you know, making sure Zokinvy gets  
19 into the hands of the children who need it, we heard Dr.  
20 Apelian talk a short while ago about if we stop some of these  
21 studies, they might not be able to be started again. You  
22 know, in some cases, we don't even have samples to start a  
23 study again. So there would be a definite diminution in value  
24 for these assets.

25 Q Are you aware if the Debtors spoke to Innovatus about the

1 proposed final use of cash collateral?

2 A Yes.

3 Q And do you recall that a 13-week cash flow was attached to  
4 the initial cash collateral motion?

5 A Yes.

6 Q Was that -- that wasn't approved by the Court, was it?

7 A Correct.

8 Q Can you tell the Court how and why that 13-week budget has  
9 changed since the petition date?

10 A Absolutely. It's most of -- most of the change is due to  
11 timing. There is a significant receipt that we pushed out a  
12 couple weeks while reconciliations continue, as well as the  
13 Medicaid payment that was discussed at the first day hearing.  
14 That was pushed out a couple weeks while some reconciliations  
15 are being done.

16 The disbursements during the first two weeks of the case  
17 that were not made were pushed out into the, you know, the  
18 latter weeks of the case.

19 We've added the proceeds from the Zokinvy sale.

20 And the only -- there was one actual change. I guess  
21 we've received a handful of questions related to IP for some  
22 of the assets, so we've re-engaged counsel. And it's  
23 relatively inexpensive, it's about \$40,000 a month, so to deal  
24 with the IP questions from the buyers.

25 Q And is it your understanding that that -- use of that IP

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1 counsel is necessary to meet the diligence requirements of the  
2 buyers?

3 A Absolutely. Yes.

4 Q Um, --

5 A But other than that, the forecast has not changed. It's  
6 mostly timing.

7 Q And did the Debtors make any proposed concessions with  
8 regard to the adequate protection package in their effort to  
9 obtain Innovatus's consent to cash collateral?

10 A Yes. We offered a \$15 million paydown of the Zokinvy  
11 proceeds as well as payment of the lender's professional fees.

12 MR. CURTIN: No further questions, Your Honor.

13 THE COURT: All right. Cross-examination?

14 CROSS-EXAMINATION

15 BY MR. JONES:

16 Q Mr. Staut, could I turn your attention to the proposed 13-  
17 week budget?

18 A Sure.

19 Q And there is a number for the Innovatus debt, 41685. Do  
20 you know that includes?

21 A The principal, --

22 Q Just the principal?

23 A -- I believe. Correct.

24 Q Does it include any fees, accrued interest, expenses?

25 A It does not, no.

1 Q Okay. You -- does it include the exit fee?

2 A No.

3 Q Does it include the prepayment fee?

4 A No.

5 Q Do you know how much those are?

6 A I think the total with those included is 45 something.

7 Q So, 45?

8 A Yeah.

9 Q And if we take a look at the column Ending Cash, April 26,  
10 do you see that?

11 A I don't. I don't see it.

12 MR. CURTIN: Mr. Jones, would you like to put the  
13 budget in front of him?

14 MR. JONES: Oh, he doesn't have it?

15 MR. CURTIN: No.

16 THE WITNESS: No.

17 MR. JONES: Oh, you didn't give him a copy?

18 MR. CURTIN: No, we didn't -- I didn't end up needing  
19 to. There you go.

20 THE WITNESS: Thank you.

21 MR. CURTIN: Sure.

22 (Pause.)

23 THE WITNESS: Okay.

24 BY MR. JONES:

25 Q April 26, \$48,078,000; is that correct?



1 A Okay. Yes.

2 Q And that assumes the closing of the Zokinvy sale, correct?

3 A It does.

4 Q Okay. So, today, as we sit here, there is sufficient cash  
5 on hand to pay Innovatus's \$45 million claim in full.

6 Correct?

7 A There -- well, assuming we receive the -- whenever we  
8 receive the Zokinvy.

9 Q Assuming the sale closes?

10 A There would be. Yes.

11 Q Okay. We'll come to that in a moment. But assuming the  
12 sale closes, there'd be plenty of money to pay the Innovatus  
13 claim in full, correct?

14 A There would be cash to pay Innovatus, yes.

15 Q Okay. Okay. So would you explain to me how the expenses,  
16 then, for the next -- for the remainder of the budget benefit  
17 Innovatus, if at all?

18 A They benefit all creditors, right?

19 Q All --

20 A We're maximizing the value of the estate, right?

21 Q That's not my question. My question was, do they benefit  
22 Innovatus?

23 A I don't see how they would benefit Innovatus.

24 Q You don't see how they would or would not?

25 A Would benefit Innovatus.

1 Q So they don't benefit Innovatus? In fact, they make it  
2 less likely that Innovatus will be paid, correct?

3 A If we paid Innovatus up front, yes.

4 Q Well, let's take a look, then, at your ending numbers  
5 after you incur these expenses. We see that the Innovatus  
6 debt, assuming a \$15 million paydown, is \$28 million, and the  
7 cash on hand is \$25 million. Am I correct?

8 A You are correct.

9 Q Okay. So, today, Innovatus would be paid in full? At the  
10 end of this budget, there is a shortfall?

11 A This doesn't include the other three asset -- proceeds  
12 from the auction of the other three assets.

13 Q It's true. It does not. And that -- if we take into  
14 account the prepayment fee, the exit fee, the shortfall would  
15 be \$6 million, correct?

16 A Correct.

17 Q So, today, Innovatus would be paid in full from the cash.  
18 At the end of your 13-week budget, there's a \$6 million  
19 shortfall. Correct?

20 A That's correct.

21 Q Now, this budget includes professional fees, does it not?

22 A It does.

23 Q Okay. And it includes \$5,643,000 in professional fees?  
24 Do I see that correctly?

25 A That sounds about right, --

1 Q Okay.

2 A -- yes.

3 Q Now, --

4 A Yeah.

5 Q -- your declaration said that the cash collateral budget  
6 and all the items in here were essential to maintaining the  
7 value of the remaining assets. Could you explain to me how  
8 the almost \$6 million in professional fees are essential to  
9 maintaining the value of the remaining assets?

10 A Well, I think -- I think managing this process and  
11 continuing the company and marketing the assets.

12 Q So, are those \$5,643,000, are those associated with  
13 running the process and marketing the assets, or is there more  
14 there?

15 A It's all -- it's everything. It's managing the whole  
16 bankruptcy process and managing --

17 Q Does it include confirming a Chapter 11 plan?

18 A It does. Yes.

19 Q Okay. And why is that necessary to preserve the value of  
20 the remaining assets?

21 A Why is it necessary to confirm a Chapter 11 plan?

22 Q To preserve -- you said these items are necessary to  
23 preserve the value of the remaining assets. How is  
24 confirmation of a Chapter 11 plan related to the preservation  
25 of the value of the remaining assets?

1 MR. CURTIN: Your Honor, I'm going to object. I  
2 think it calls for a legal conclusion.

3 THE COURT: Sustained.

4 MR. JONES: It's his declaration, Your Honor. He  
5 said all these expenses were necessary to preserve the value  
6 of the remaining assets. I'm just asking how these  
7 professional fees relate to that.

8 MR. CURTIN: Well, I --

9 MR. JONES: That's it.

10 MR. CURTIN: I didn't object when you asked those  
11 questions. I objected when you asked how confirmation of a  
12 plan relates to preserving value of those assets, which  
13 obviously it does, but this -- the witness is not a lawyer and  
14 is not -- and can't give you a legal conclusion on that.

15 MR. JONES: Well, he can tell me what he thinks.

16 THE COURT: I --

17 MR. CURTIN: It's sustained.

18 THE COURT: I sustained the objection.

19 MR. JONES: Okay.

20 BY MR. JONES:

21 Q Did you participate in preparing the professional fee  
22 budget?

23 A Yes.

24 Q Okay. Can you tell me what categories of professional  
25 fees are included?

1 A In --

2 Q Can you give us any breakdown of the \$6 million in  
3 professional fees?

4 A It's Debtor's counsel, Debtor's financial advisor. I  
5 believe there is still a category for UCC counsel. We have  
6 lender's counsel. We have our claims agent. And we have the  
7 investment banker. I think that's everything. I believe  
8 that's everything.

9 Q Do you know how -- what portion of the \$6 million of some  
10 professional fees are related to the maintenance and ultimate  
11 sale of the remaining assets?

12 A Well, the bankers are definitely part of the sale. The  
13 maintenance of the company and the continued management of the  
14 company and the maintaining these assets and continuing the  
15 studies, that's part of the professional fees.

16 Q Okay. Can you tell me what portion of in almost \$6  
17 million in professional fees are related to the maintenance  
18 and sale --

19 A No, I can't tell you what portion.

20 Q -- of the remaining assets? Okay. You mentioned a  
21 receivable that had been delayed or pushed out.

22 A Yes.

23 Q Did I hear that correctly?

24 A Yes.

25 Q Is that the \$1,700,000 receivable --

1 A It's --

2 Q -- entered May 3?

3 A It's -- it's actually 1.8. The 1.7 is the Zokinvy. The  
4 1.8 is the -- the 1.8 is the one that we pushed out a couple  
5 of weeks.

6 Q Okay. And that's been now pushed out several times,  
7 correct?

8 A Yes.

9 Q And why has it been pushed out several times?

10 A The counterparty has requested a little bit more time to  
11 do some reconciliation.

12 Q When you say they requested more time to do  
13 reconciliation, what are they reconciling?

14 A So, this was -- this was related to a \$65 million study  
15 that has been completed. And after a study is completed, then  
16 it's -- all the financials are reviewed of the study, and  
17 there's generally some kind of a reimbursement or refund of  
18 the monies paid, and that's what this represents. So they're  
19 going back through all the expenses related to the study to  
20 clarify this \$1.8 million payment.

21 Q Is there a dispute regarding this payment?

22 A Not that I'm aware of yet. We've had business discussions  
23 and it's -- and then -- well, there might be -- they did  
24 retain counsel, so it's -- I know that Sidley has been going  
25 back and forth. I'm not entirely sure where it stands now. I

1 think it -- it was back and forth as recently as last week.

2 So, --

3 Q Again, do you know whether they dispute the obligation to  
4 pay the \$1.8 million?

5 A I don't think they dispute the obligation. No. They do  
6 not dispute the obligation to pay the --

7 Q Do they dispute the amount?

8 A They might dispute the amount. We haven't received a  
9 dispute, but they absolutely know that they owe us the  
10 reimbursement.

11 Q And what is the amount of that dispute?

12 A I don't -- I don't know. I don't think -- I don't think  
13 they dispute. They might dispute the amount, but I haven't  
14 heard if they do.

15 Q Okay. Now, Mr. Staut, you spoke of the adequate  
16 protection package that Eiger had offered to Innovatus.  
17 Correct? And you mentioned it in your declaration.

18 A Correct.

19 Q Okay. The first one you mentioned is an interim paydown  
20 of \$15 million.

21 A Correct.

22 Q Okay? And that's simply a paydown of Innovatus's  
23 collateral, correct?

24 A It's a paydown of the Innovatus debt.

25 Q Yeah. But it's a payment out of Innovatus's collateral,

1 correct?

2 A Correct.

3 Q Okay. And so how does that provide --

4 A Out of all creditors' collateral.

5 Q How does that provide adequate protection to Innovatus, to  
6 receive \$15 million of its own collateral?

7 MR. CURTIN: Objection; calls for a legal conclusion.

8 THE COURT: Sustained.

9 MR. JONES: Your Honor, he described this as an  
10 adequate protection package in his declaration. I'm just  
11 asking him how it provides adequate --

12 THE COURT: A paydown of your debt by \$15 million? I  
13 mean, I don't really understand the question. You can make  
14 legal argument about this in the end.

15 MR. JONES: Okay.

16 BY MR. JONES:

17 Q The payment of Innovatus's professional fees on an ongoing  
18 basis, are those going to be paid out of Innovatus's  
19 collateral?

20 A They'll be paid out of the cash balance, yes.

21 Q Be paid out of Innovatus's collateral?

22 A All creditors' collateral, yes.

23 Q In Paragraph 7 of your declaration, you said you expect  
24 additional funds to be brought into the estate through future  
25 sales, but however that would be dependent upon successful



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1 closing. Do you recall that?

2 A That's correct.

3 Q So, today, as we sit here, we don't know what, if any,  
4 amounts will be brought in from these future sales, do we?

5 A We don't know, no.

6 MR. JONES: No further questions, Your Honor.

7 THE COURT: All right. Any redirect?

8 MR. CURTIN: Yes, please, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. CURTIN:

11 Q Mr. Staut, if Innovatus were to be paid in full on  
12 closing, isn't it correct that there wouldn't be sufficient  
13 cash available, too, for all the other expenses that are in  
14 the budget?

15 A That is correct.

16 Q And you're aware that Innovatus filed a document that they  
17 styled as a Consent to Cash Collateral, correct?

18 A Yes.

19 Q And in that document, they reference consenting to the  
20 budget. Is that correct?

21 A That is correct.

22 Q All right. We heard a lot about professional fees, so  
23 let's talk about that for a minute. You're aware of the  
24 initial stalking horse bid amount in this case for the Zokinvy  
25 assets, are you not?

1 A I am. \$26 million.

2 Q All right. And are you aware that in the two days, two  
3 first days of the case, whether or not that stalking horse bid  
4 was increased?

5 A Yes, it was.

6 Q And by how much was that increased?

7 A By \$4 million.

8 Q And you were involved in the -- in observing, at least,  
9 the auction process, correct?

10 A I was.

11 Q And what did the -- again, what was the purchase price  
12 that ended -- what ended up being the final purchase price for  
13 the Zokinvy assets?

14 A \$46.1 million.

15 Q Okay. Thank you, Mr. Staut. Was SSG involved in that  
16 auction process?

17 A SSG ran the auction.

18 Q Was A&M involved in much of the diligence and all the  
19 things that led up to that auction?

20 A Yes.

21 Q Was Sidley involved in that process?

22 A Absolutely.

23 Q Do you believe that the professionals in this case, which  
24 is about three weeks old, have increased the value coming into  
25 the estate for the Zokinvy assets from \$26 million to

1 approximately \$45 million?

2 A Yes. Clearly.

3 MR. CURTIN: Nothing further, Your Honor.

4 THE COURT: Any recross on that redirect?

5 RECROSS-EXAMINATION

6 BY MR. JONES:

7 Q Do you recall that -- well, strike that. Did you have any  
8 discussions with Eton prior to them submitting their \$30  
9 million stalking horse bid?

10 A Not personally.

11 MR. CURTIN: Objection, Your Honor. I think that's  
12 beyond the scope.

13 THE COURT: It --

14 MR. JONES: I don't think so.

15 MR. CURTIN: I'm not sure where he's going.

16 MR. JONES: You mentioned the sale and the increase  
17 from 26 to 24 [sic]. I just wanted to identify who was  
18 responsible for that particular increase.

19 THE COURT: Okay. I'll overrule.

20 BY MR. JONES:

21 Q Do you know who brought Eton to the table to submit a  
22 stalking horse bid?

23 A I -- was it -- it was probably Innovatus.

24 MR. JONES: Thank you.

25 THE COURT: All right. Thank you. You're excused.

1 THE WITNESS: Thank you.

2 (The witness steps down.)

3 THE COURT: Anything else?

4 MR. CURTIN: No, Your Honor. The Debtors have no  
5 additional witnesses.

6 THE COURT: Okay. Does Innovatus have any evidence  
7 today?

8 MR. JONES: We do not, Your Honor.

9 THE COURT: Okay. Anyone else have evidence?

10 All right. I'll hear closing arguments.

11 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

12 MR. CALIFANO: Thank you, Your Honor. Your Honor,  
13 first, on the sale, we ask that the sale be approved. There  
14 are no objections, and we will agree to work out the language  
15 with the Office of the United States Trustee. I don't think  
16 that will be a problem at all.

17 With respect to cash collateral, Your Honor, I'm actually,  
18 I have to say, I'm at a loss as to what Innovatus wants to do,  
19 what they thought they accomplished by their line of  
20 questioning, and, you know, where we are on cash collateral.

21 They submitted this consent which sought to bind the  
22 Debtor to the interim order. And in our reply, we explain why  
23 it's not appropriate. Your Honor, it's typical in these cases  
24 you have a DIP or you have a cash collateral on an interim  
25 basis, that you would preserve the rights for the Committee.

1 And I think it's, you know, it's standard in this district  
2 that the Committee have 75 days post-appointment to challenge  
3 the liens and looks at the claims against the lenders.

4 We are not going to have a Committee here. Today is the  
5 final hearing. There is no Committee by the final hearing.  
6 It is thus not appropriate for us to stipulate and to release  
7 the secured creditor.

8 Now, we are not filing an adversary proceeding right now,  
9 but I think, Your Honor, we laid out the basis why at least  
10 there is an area for inquiry. And, frankly, Your Honor, the  
11 fact that Innovatus would walk away from a \$15 million paydown  
12 and payment of their attorneys' fees so they could try to  
13 force the Debtor into a release against their will, frankly, I  
14 think that shows their concern about their prepetition  
15 conduct.

16 And their prepetition conduct is just continued by this  
17 line of questioning. We -- they are not the only party in  
18 interest here. You would have thought that after the results  
19 of this auction and it's pretty clear that after the results  
20 of this auction and their paydown, they're covered. There's  
21 other assets that'll be sold. And the parties in interest,  
22 the parties at risk here, are the unsecured creditors and then  
23 the public equity. Okay?

24 But what they're trying to do is they're trying to contest  
25 every payment, and they're really just trying shut us down

1 now, despite the fact that we ran a very successful auction  
2 and despite the fact that Mr. Victor's unrebutted testimony is  
3 that there is a number of other active participants in the  
4 sale process for the other assets.

5 So, Your Honor, what they're trying to do postpetition is  
6 exactly what they tried to do prepetition. They're trying to  
7 exert undue control over this process. Their ridiculous  
8 assertion that they're responsible for Eton, there's just no  
9 basis there because we were speaking to Eton and Eton would  
10 have been part of the auction.

11 But they can't help themselves, Your Honor. They can't  
12 sit back and allow the Debtors to fulfill their fiduciary  
13 duties in their independent business judgment. They can't  
14 allow the professionals to do what they need to do. And  
15 they're trying to micromanage it.

16 And the question as to whether a plan benefits Innovatus,  
17 that's really beside the point. It is pretty clear here, Your  
18 Honor, that we are going to have funds in excess of  
19 Innovatus's claim. Okay? And the only way to get those funds  
20 into the hands of unsecured creditors is through a plan. And  
21 a plan is the way Chapter 11 cases are supposed to be  
22 resolved.

23 But it's pretty clear that what Innovatus wants us to do  
24 is pay them off, pay them off at an inflated amount that seeks  
25 17-1/2 percent interest, seeks an exit fee, and seeks a

1 prepayment fee, and then shut this down, to the detriment of  
2 everybody else. And it's just not -- I mean, it's just not  
3 appropriate.

4 And I don't need to argue this. Their questioning  
5 establishes it. They've had one -- since last fall, they've  
6 had one aim: To pay themselves out early, before the maturity  
7 of this loan, without any regard to any of the other  
8 constituents.

9 Well, this Debtor, Your Honor, has fiduciary duties to  
10 those other constituents. And this Debtor is fulfilling its  
11 duties to the estate, to its equity holders, to its unsecured  
12 creditors. And at the same time, we're treating Innovatus  
13 well. Even though we are in dispute with them, Your Honor,  
14 even though we believe that there are significant claims  
15 against them, we're offering them a \$15 million pre-plan  
16 paydown, okay, without prejudice to their rights to claim any  
17 other amount they want. And we're willing to pay their  
18 attorneys' fees going forward. And they shouldn't have much  
19 by way of attorneys' fees because they should be sitting down  
20 in the corner applauding the Debtor's professionals and  
21 management and allowing this case to go forward.

22 But, frankly, based on the conflict between the consent,  
23 which purported to accept our budget, however, trying to  
24 impose releases that are inappropriate, and the questioning  
25 today, I'm not even sure where we stand.

1           Your Honor, I think we've made the case on use of cash  
2 collateral. We've provided a very healthy adequate protection  
3 proposal to this secured creditor. And we would ask that Your  
4 Honor approve the cash collateral order as proffered by the  
5 Debtors so that we can carry on with the important work of  
6 getting these drugs into a sale process that will ensure their  
7 continuance and maximize the value to the estates.

8           If Your Honor has no more questions -- doesn't have any  
9 questions, I don't have anything further, Your Honor.

10           THE COURT: All right. Other closing arguments?

11           CLOSING ARGUMENT ON BEHALF OF INNOVATUS LIFE SCIENCES

12           MR. JONES: Your Honor, when we were here a few weeks  
13 ago, we heard the Court. That is why we agreed and consented  
14 to the cash collateral relief, relief that was sought in the  
15 initial motion. That included the expenses, the budget, the  
16 whole nine yards. We didn't -- we said, we will consent to  
17 all of those things.

18           That motion and that interim order contemplated two things  
19 that were important to us in giving that consent. It  
20 contemplated that when the final order was entered, Innovatus  
21 would receive a release from the Debtors -- reserving rights  
22 of other parties -- receive a release from the Debtors. And  
23 it also prohibited the use of cash collateral to investigate  
24 or prosecute claims against Innovatus.

25           So those were part of the original proposed adequate



1 protection package for Innovatus. They were included in the  
2 motion. They were included in the interim order. The interim  
3 order expressly provides that that release will become  
4 effective upon the issuance of a final order.

5 So, after we consent to what -- everything they had asked  
6 for, they have now moved the goalposts. They've moved the  
7 goalposts by eliminating from their original cash collateral  
8 motion that release and that limitation on the use of cash  
9 collateral. They did it by filing a reply to our consent.  
10 There's no motion pending before the Court to approve use of  
11 cash collateral on the terms that they propose.

12 And so that's where our dispute is, Your Honor, because  
13 what they -- what their motion said, what their interim order  
14 said, is not what they now propose to submit to the Court as  
15 the final order. That's our dispute.

16 With respect to if those items are not imposed --  
17 reimposed or included in the final order, then we do object,  
18 narrowly, Your Honor, to the use of cash collateral. Here is  
19 the issue, Your Honor. When we look at the budget, we see  
20 that today, if every -- if the music stopped today, Innovatus  
21 would be paid in full. \$45 million. But we're not trying to  
22 get paid in full today. We consented. We were willing to  
23 consent to what they asked for.

24 The point is, at the end of the 13-week budget, we're down  
25 \$6 million. We're \$6 million short. There is no adequate

1 protection for the use of cash collateral here without our  
2 consent because their own numbers, their own budget, showed  
3 that those expenditures will result in our cash collateral  
4 position, our position being diminished by \$6 million. That's  
5 their own numbers.

6 And so what we object to, Your Honor, we're okay in the  
7 current budget with them paying the operating expenses, et  
8 cetera. But we think, in light of the fact that we will  
9 suffer a decline in our collateral position, we don't think it  
10 appropriate for this budget to include a carve-out and a  
11 payment of \$5.6 million in professional fees. Innovatus is  
12 being asked to pay out of its collateral the entire costs of  
13 this case. And there's been no determination at this point in  
14 time that that will result in Innovatus getting paid in full,  
15 although it would be paid in full today.

16 Your Honor, this is just like the case, Judge Houser's  
17 case, *MRI Beltline*, where it's premature for them to have a  
18 carve-out and a guarantee of, out of our collateral, up to  
19 \$5.6 million in professional fees, when there's been no  
20 determination that at the end of the day that there will be  
21 sufficient funds to pay those fees and to pay Innovatus in  
22 full. And so we --

23 THE COURT: I don't know the case you refer to or  
24 what the facts were, but to use Mr. Califano's words, to  
25 paraphrase, I mean, it's not all about you. We have other

1 creditors in this case. And we had a tremendous result on the  
2 Zokinvy auction. There may be a tremendous result on these  
3 other three assets. Why on earth would we not give these  
4 professionals the latitude to use cash to try to monetize  
5 those assets?

6 MR. JONES: Your Honor, --

7 THE COURT: For everyone's benefit, not just  
8 Innovatus?

9 MR. JONES: The Bankruptcy Code provides two  
10 alternatives to impose the costs of a Chapter 11 on a secured  
11 creditor. One alternative is 506(c). There's been no --  
12 premature now for a 506(c) surcharge. And moreover, Mr. Staut  
13 testified why these expenses really don't benefit Innovatus.

14 THE COURT: Okay.

15 MR. JONES: And the second method to make Innovatus  
16 or a secured creditor pay for the costs of a Chapter 11 is  
17 cash collateral, using its collateral. But only if it can  
18 show adequate protection. Adequate protection here, the only  
19 form of adequate protection they could possibly show here,  
20 Your Honor, would be an equity cushion, because everything  
21 else is simply the turnover of what is already Innovatus's  
22 collateral. That's not adequate protection.

23 Adequate protection would be a showing that if these  
24 monies are spent, then Innovatus's position will not be  
25 diminished or impaired. There's been no such showing. All

1 they've told you is their budget, \$48 million today, will be  
2 \$6 million short at the end. That's the evidence. There's no  
3 evidence to the contrary.

4 It's possible, Your Honor, --

5 THE COURT: Are you not happy about the auction  
6 results?

7 MR. JONES: Your Honor, we --

8 THE COURT: I mean, again, to paraphrase, I think he  
9 thinks you should be the happiest person in the room.

10 MR. JONES: Your Honor, we're ecstatic about the  
11 auction result.

12 THE COURT: Then why are we not going to have faith  
13 in letting the process go further forward?

14 MR. JONES: Your Honor, it's not a question of  
15 whether we have faith or not. It's a question of whether they  
16 can use our cash collateral to do this without our consent if  
17 they can't show an equity cushion.

18 And, again, we're willing to consent to the operating  
19 expenses. Have no problem with that. What we're not willing  
20 to consent to is the imposition of a carve-out for all these  
21 professional fees. It's premature. It's premature because we  
22 don't know yet whether there will be enough money at the end  
23 for Innovatus to be paid. So it is premature today to say  
24 yes, all of those fees are going to be paid, and they're going  
25 to be paid senior to Innovatus, when their own numbers show

1 Innovatus is not going to get paid in full.

2 THE COURT: Is this a thing -- how do I say this? In  
3 every Chapter 11 case I think I've ever had, there's been a  
4 carve-out for professionals, and it's usually agreed to by the  
5 secured lender. There may be a little bit of disagreement  
6 about how much. I'm not used to a lender taking this  
7 position.

8 MR. JONES: Your Honor, a carve-out is just that. A  
9 carve-out is consensual. There's no such thing as a carve-out  
10 other than it being consensual. And there's --

11 THE COURT: And I usually have consensual carve-outs  
12 --

13 MR. JONES: That's --

14 THE COURT: -- in pretty much every case.

15 MR. JONES: Yeah. And we could probably have a  
16 consensual carve-out if we agreed on the numbers. Or if we  
17 agreed on -- for example, the prior interim order said -- and  
18 we consented even to the professional fees with respect to the  
19 prior interim order. But we wanted the prohibition on the use  
20 of cash collateral to prosecute claims against Innovatus. We  
21 wanted that limitation. It was in the interim order. It was  
22 in the proposed -- it was in their motion as adequate  
23 protection to be provided.

24 So that was a -- that's a proposal on our part. If  
25 they're willing to limit, if they're willing to reinsert that

1 provision and reinsert the release that was provided for, we  
2 have no objection.

3 But for them to have unlimited use of our cash collateral  
4 to investigate and prosecute claims against us, and there's no  
5 adequate protection whatsoever, that's just not acceptable to  
6 us, Your Honor. So if there is a limit, they can't use that  
7 cash collateral to prosecute or investigate claims against  
8 Innovatus, we would consent to that.

9 THE COURT: Okay. Thank you.

10 MR. JONES: Thank you, Your Honor.

11 THE COURT: Any other closing argument?

12 MR. CALIFANO: Your Honor, if I may be very brief?

13 THE COURT: You may.

14 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

15 MR. JONES: Your Honor, there is testimony, there is  
16 sufficient evidence of an equity cushion. We have testimony  
17 that, with the sale that's going forward and the cash on hand,  
18 Innovatus is covered. We have testimony from Mr. Victor, with  
19 over 40 years of restructuring experience, that he believes  
20 that there's a vibrant sale process. And I think his  
21 performance in the Zokinvy sale is enough, I think that  
22 uncorroborated evidence is enough of an equity cushion.

23 But, I mean, Mr. Jones didn't even try to cover up the  
24 real issue here, Your Honor. The issue is, if we give them a  
25 release, they're not going to object to anything. If we don't

1 give them a release, they don't want the professionals to get  
2 paid.

3 Your Honor, we -- if we gave them these releases, without  
4 a Committee and without any investigation, we would be open to  
5 criticism from the U.S. Trustee. All right? There is not --  
6 we have not done an investigation. We have laid out in our  
7 reply the facts which tell us an investigation is warranted.  
8 But we're not filing an adversary proceeding here. We're not  
9 making this unduly contentious. But Your Honor, we could not  
10 fulfill our duty, our fiduciary duty to other constituents if  
11 we gave a release here when there is no other estate  
12 fiduciary. There is no Committee to pursue this. And there  
13 are unsecured creditors here, Your Honor. And there is public  
14 equity.

15 So we don't have a choice. But what they're trying to do  
16 is hold the professionals hostage so that they can force a  
17 release.

18 I think, under the circumstances, Your Honor, there is  
19 uncorroborated -- I mean, there is unrebutted testimony from  
20 Dr. Apelian, from Mr. Staut, and from Mr. Victor that  
21 establishes an equity cushion here. And, you know, what  
22 they're trying to do here and by their, you know, their  
23 consent, that trick, the consent trick, and then their  
24 argument that we're bound by the terms of an interim order,  
25 when the releases in the interim order and the findings say

1 subject to a final order, I mean, that is the way -- I mean,  
2 I've only been doing this for 35 years, Your Honor, but that's  
3 the way every interim cash collateral or interim DIP has  
4 worked in my entire career. You have the findings for the  
5 short interim period, and then you go to a final hearing, and  
6 typically there's a Committee that picks up the fight. And we  
7 preserved, you know, we preserved the rights of the Committee.  
8 There is no Committee. I don't know why. I don't know if the  
9 U.S. Trustee solicited or did not solicit. I don't know. But  
10 it is within our fiduciary duties to these other constituents,  
11 who I think we can all assume reasonably are either in the  
12 money or close to being in the money, it is our obligation to  
13 reserve those rights.

14 And we laid it out, Your Honor, just we laid out the  
15 issues in our reply so that the Court knows we're not being  
16 unreasonable.

17 So, that's all I can say, Your Honor. I think, Your  
18 Honor, allow us to give them that \$15 million at closing.  
19 Allow us to proceed and pay them down. And, you know, if they  
20 -- if they're entitled to these fees and they're entitled to  
21 the postpetition interest, they'll get it at the end of the  
22 plan. And if they're not, it's likely because of some of the  
23 issues that we've raised in our reply.

24 THE COURT: All right.

25 MR. CALIFANO: Thank you, Your Honor.



1 THE COURT: Thank you. Is there anyone else who  
2 wanted to make a closing argument?

3 And let me just clarify one thing. We didn't talk about  
4 Eton much today, but Debtor's counsel is asking me to approve  
5 them as a backup bidder if something goes awry with Sentynl?

6 MR. CALIFANO: Yes, Your Honor.

7 THE COURT: Okay.

8 MR. CALIFANO: Yes.

9 THE COURT: All right. Well, first off, I am going  
10 to approve the Zokinvy sale at the price that was put into  
11 evidence, the greatly enhanced price. I think it was \$46.1  
12 million was the gross amount.

13 The Court finds that notice of the sale process was  
14 reasonable and proper. The Court finds the Debtor had a sound  
15 business justification for proposing the sale process and  
16 exercised reasonable business judgment in all ways.

17 The evidence was we had a fulsome marketing process. We  
18 had competing bidders. We had a robust auction that went on  
19 36 rounds, I heard, between Eton and Sentynl. I think all of  
20 the evidence, testimony, of Mr. Victor in particular, showed  
21 that, as a result of this, the sale price appears to reflect a  
22 fair market value for Zokinvy. And it would appear from the  
23 evidence I heard we have a good faith purchaser for value in  
24 either Sentynl or Eton if they, as a backup bidder, end up  
25 being an ultimate purchaser.

1           So I will approve under 363(f) the sale of these assets  
2 free and clear of all encumbrances, with encumbrances to  
3 attach to the proceeds.

4           The Court is also approving, under 365, proposed  
5 assumptions and rejections of executory contracts and license.  
6 We're obviously carving out the Merck issues for now, to come  
7 back on on May 7th. But if an agreement is worked out before  
8 then, the Court would obviously incorporate that agreement  
9 into the sale order.

10          The Court reserves the right to supplement and amend in  
11 the written form of order that is ultimately submitted.

12          With regard to the motion to use cash collateral, the  
13 Court is going to overrule the objections and approve cash  
14 collateral usage on a final basis, as set forth in the budget.

15          First, I find that the evidence supported these are  
16 reasonable and necessary usages of cash, aimed at preserving  
17 the estate and value.

18          Second, I find that the adequate protection that's been  
19 offered to Innovatus is adequate under all the facts and  
20 circumstances here. Again, we have not only a \$15 million  
21 proposed pre-plan paydown at closing of the sale of Zokinvy,  
22 but we have an offer to pay reasonable attorneys' fees of the  
23 lender. And I do believe the evidence supports a finding that  
24 there's an equity cushion, a cushion of value above what  
25 Innovatus is owed.

1 Again, we have a very successful auction here that yielded  
2 \$20 million more of sale proceeds than what we started out  
3 with with the stalking horse offer. And I think that gives us  
4 all reason to have great faith that there will be more value  
5 coming in during this case if we let the professionals  
6 continue to work the process, as is proposed here.

7 I don't mean any disrespect to Mr. Jones, but I'm just,  
8 I'm baffled. We do have other stakeholders to consider here,  
9 unsecured creditors, even public shareholders. And I think  
10 what the Debtor is proposing is extremely reasonable and  
11 necessary for it to exercise its fiduciary duties here. And,  
12 again, I think your client is adequately protected without any  
13 doubt.

14 So I will look for forms of order. Again, we've heard  
15 about language of the U.S. Trustee that's going to be  
16 wordsmithed to preserve everyone's rights on venue.

17 Is there anything else we need to address, maybe a  
18 housekeeping matter or two, before we adjourn?

19 MR. CALIFANO: Not that I'm aware of, Your Honor.

20 THE COURT: No?

21 MR. CALIFANO: No, Your Honor.

22 THE COURT: All right. Well, I won't say  
23 congratulations until I have heard about a closing. But it  
24 feels like maybe I need to offer congratulations on great,  
25 great results thus far. And we will keep our fingers crossed

1 that that will all continue and the closing will fall into  
2 place.

3 All right. Just alert my courtroom deputy when the orders  
4 are in my queue so I can get them signed right away for you.  
5 Okay?

6 MR. CURTIN: We will, Your Honor.

7 THE COURT: Thank you.

8 MR. CALIFANO: All right. Thank you, Your Honor.  
9 Feel better.

10 THE CLERK: All rise.

11 (Proceedings concluded at 11:32 a.m.)

12 --oOo--

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 **/s/ Kathy Rehling**

**04/25/2024**

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\_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

\_\_\_\_\_  
Date

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