

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

IN RE:) BK. NO: 24-80040-SGJ
)
EIGER BIOPHARMACEUTICALS,)
INC.)
D E B T O R.)

* * * * *

TRANSCRIPT OF PROCEEDINGS

* * * * *

BE IT REMEMBERED, that on the 7th day of May, 2024,
before the HONORABLE STACEY G. JERNIGAN, United States
Bankruptcy Judge at Dallas, Texas, the above styled and
numbered cause came on for hearing, and the following
constitutes the transcript of such proceedings as hereinafter
set forth:

CINDY SUMNER, CSR (214) 802-7196



24800402405130000000000001

I N D E X

PAGE

DAVID APELIAN

DIRECT EXAMINATION

BY: Ms. Young

35

CROSS-EXAMINATION

BY: Mr. Curtin

41

E X H I B I T I N D E X

PAGE FIRST REFERENCED

Exhibit 4

36

Exhibit 5

37

Exhibit 10

38

Exhibit 11

37

P R O C E E D I N G S

THE COURT: All right. We have settings in

Eiger Pharmaceuticals. Let's start by getting lawyer

appearances here in the courtroom, please.

MR. CALIFANO: Good afternoon, Your Honor.

Tom Califano, Sidley Austin, on behalf of the debtors. With

me is my partner Bill Curtin and my associates, Veronica

Courtney, Anne Wallice, Parker Embry, and Chelsea McManus.

We also have the companies' CEO, Dr. Apelian with us, our

CRO, Doug Staut from Alvarez & Marsal.

THE COURT: Okay.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: All right. Other courtroom

appearances.

MS. YOUNG: Good afternoon, Your Honor. Liz

Ziegler-Young for the U.S. Trustee.

THE COURT: Okay. Thank you.

Any other courtroom appearances?

All right. I know we have a large number of people on

the Webex. I'm assuming everyone who wants to appear today

that is on the Webex will sign the appearance sheet

electronically and then we will post that.

Is there anyone on the Webex who for some reason

couldn't sign that appearance sheet and wants to speak their

appearance?

CINDY SUMNER, CSR (214) 802-7196

1 All right. Well, we have, my agenda shows nine things
2 set. It looks like three are carryover first day motions on
3 which there have been interim orders; five employment related
4 pleadings, and then our venue motion.

5 MS. WALLICE: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MS. WALLICE: For the record, Anne Walllice of
8 Sidley Austin, proposed counsel to the debtors.

9 Before we turn to the venue motion, we did want to
10 provide you a status update on all of the second day motions,
11 as well as the proposed final orders.

12 THE COURT: Okay.

13 MS. WALLICE: The debtors have worked with the
14 United States Trustee's Office and have incorporated informal
15 comments from the lenders, so I'm very happy to report that
16 subject to the outcome of today's hearing, all of those
17 orders are in agreed form.

18 THE COURT: Okay.

19 MS. WALLICE: So cognizant of Your Honor's
20 time today, as well as for the past two hearings, what the
21 debtors would suggest is that subject to the outcome of the
22 hearing today on the venue motion, the debtors would work
23 with the United States Trustee's Office to come to agreed
24 language on venue and submit those orders to the Court for
25 entry.

CINDY SUMNER, CSR (214) 802-7196

1 THE COURT: All right. Well, that is good
2 news to my ears. The Court will note that I have evidence on
3 all of these, what I count are eight matters; again, three
4 carryover first day motions that already had interim orders,
5 and then five either employment applications or orders
6 pertaining to compensation procedures. So I have
7 declarations in support of those, all of these items, you
8 know, Dr. Apelian in certain circumstances and estate
9 professionals in other circumstances.

10 So, Ms. Young, do you want to say anything? Does
11 anyone want to say anything about this? It looks like I have
12 evidence to approve these items.

13 MS. YOUNG: And that's correct, Your Honor. I
14 think there is the evidence with all the stipulations, as
15 well as the prior testimony in all the hearings to support
16 all the findings. Again, we're certainly happy to work with
17 the debtors. Just I think we're all sort of in limbo
18 depending on what the Court does today. So we'll certainly
19 address whatever the Court decides to do within the rest of
20 the orders.

21 THE COURT: Okay. All right. Well, subject
22 to the resolution of the venue motion, the Court is prepared
23 to grant the relief in all of these other matters set.
24 Again, based on the evidence and argument that has been made,
25 I think all of these motions and applications have merit and

CINDY SUMNER, CSR (214) 802-7196

1 statutory support. So I would -- I would grant them.

2 MS. WALLICE: Thank you, Your Honor.

3 THE COURT: All right. And I'm going to say
4 thank you to, I think it was Mr. Embry I heard scrambled and
5 put together a notebook for me of the pleadings. I
6 appreciate that. I didn't know what we were going to do on
7 the non-venue related motions, so I kind of wanted to have
8 all of the pleadings handy. So it turns out I probably
9 didn't need that, but thank you.

10 All right. Well, then, it sounds like the issue de
11 jour is this venue motion of the United States Trustee. And
12 I see there was a joinder by Innovatus, the secured lender.
13 And I see a stipulation was filed overnight. So if you all
14 will tee that up for me. Are we going to have evidence other
15 than the stipulations? Are we going to just have argument?
16 How are we going to proceed on this?

17 MS. YOUNG: I think, Your Honor, we did work
18 very heavily with the debtors to get, I would say, 98 percent
19 of the facts to be stipulated. We will have a brief
20 evidentiary portion of this hearing. But we do think the
21 bulk of the time will be reserved for oral arguments with
22 regard to the venue transfer.

23 THE COURT: All right.

24 Anything to add?

25 MR. CALIFANO: Yes. We're in agreement, Your

1 Honor.

2 THE COURT: Well, then I'll hear your opening
3 statements and presentation of evidence.

4 MS. YOUNG: Thank you, Your Honor. Liz Young
5 for the U.S. Trustee.

6 The United States Trustee has moved to transfer venue
7 of this case because the filing does not meet the standard of
8 proper venue under 28 USC 1408(1). The statute provides one
9 of four ways for a debtor to obtain proper venue for a case
10 in this District. It must be domiciled or resided in that
11 District. It must have its principal place of business in
12 this District. Or it must have principal assets in the
13 District, or an affiliate is properly venued in this
14 District. The debtor must also meet a time requirement that
15 has to be for the better of the 180 days preceding this case
16 to make sure that venue was proper in this District. And the
17 choice of words in the statute is important.

18 Principal. It does not mean an asset, it means the
19 principal assets of the principal place of business. And as
20 we go forward, I'm going to keep reminding the Court of this.
21 It's the principal. We're not disputing that the debtor has
22 business in the State of Texas or an asset in the State of
23 Texas. But it's important to focus on the language of the
24 statute here. It's principal assets, principal place of
25 business, and domicile.

CINDY SUMNER, CSR (214) 802-7196

1 This is the statutory framework that is set forth by
2 Congress. Words in statutes matter. And it is our role in
3 the U.S. Trustee's Office to bring these kinds of issues to
4 the Court's attention.

5 Your Honor, the facts will show that the debtors'
6 principal assets, principal place of business, and domicile
7 are all outside of the State of Texas. The debtors are an IP
8 company whose principal assets are the cash and its IP, which
9 we argue are based in their headquarters in Palo Alto. The
10 debtors' thought nexus is based out of their CEO who is in
11 New Jersey; their chief financial officer, who is based out
12 of Nevada; and their corporate counsel who is based out of
13 North Carolina. None of those take place in Texas. No
14 decisions were made in Texas in the 180 days prior. And that
15 is why, Your Honor, we don't think that there is sufficient
16 contact with the State of Texas.

17 The debtors are incorporated in Delaware and the two
18 foreign entities are incorporated in Ireland and the United
19 Kingdom. As a result, none of these companies are domiciled
20 under the laws of Texas for the purpose of venue under 1408.

21 Similarly, the debtors cannot meet the standard for
22 venue under 1408(2), which requires there to be a properly
23 venued case pending before this Court to attach venue of
24 these other affiliated companies.

25 Finally, 1408 really does act as a gatekeeping statute.

1 You need to establish proper venue under 1408 before you can
2 get to the permissive transfer provisions under 1412. That
3 is really the threshold issue that we are looking here today,
4 is there sufficient connection with the State of Texas under
5 1408 for these debtors to establish venue for the purposes of
6 this hearing going -- for the purposes of this case remaining
7 in Texas? Or does the Court have to transfer it to a place
8 where there is proper venue? And, Your Honor, that is what
9 the U.S. Trustee believes here, that there is not enough of a
10 connection to the State of Texas that it does not meet the
11 statutory requirements of 1408. And that this Court must
12 transfer this case to a District in which there is proper
13 venue.

14 THE COURT: All right. I have some things
15 that are turning through my mind.

16 MS. YOUNG: Okay.

17 THE COURT: And you can either address them
18 now or you can certainly tell me the evidence is going to
19 address this and then we'll tie it together in closing
20 argument.

21 MS. YOUNG: I'm happy to answer questions you
22 have right now, Your Honor.

23 THE COURT: Okay. One sort of overarching
24 question I have is this. Okay. As I understand it, the
25 debtors have started with what I'll call the parent company,

1 but I don't know, it's not really a holding company, Eiger

2 Bio --

3 MS. YOUNG: Eiger Biopharmaceuticals.

4 THE COURT: Delaware.

5 MS. YOUNG: Yeah.

6 THE COURT: They started with the notion that

7 it -- the principal place of business is Texas, I think.

8 Mr. Califano is either going to correct me or not. And then

9 everything else is an affiliate. So here is something

10 turning through my mind on that. In a post-COVID digital

11 world, what does principal place of business mean any more,

12 or principal assets, for that matter? I mean, it sounds like

13 you're focusing on principal, that adjective, and want me to

14 focus on that. But it feels like the gist of the debtors'

15 objection is, we're a virtual company. We have skinnied down

16 to nine employees and most of them work remotely. CEO in New

17 Jersey. General counsel in North Carolina. I guess it was a

18 CFO or shared CFO in Nevada. Everybody's working remotely.

19 We had reductions in force in late 2023 and then more in the

20 first quarter of 2024.

21 So what does principal place of business really mean in,

22 I'm saying post-COVID world, in a world where people work

23 remotely now? You know, we -- the cases of old talk about,

24 well, that's the corporate nerve center, right.

25 MS. YOUNG: Uh-huh.

CINDY SUMNER, CSR (214) 802-7196

1 THE COURT: The principal place of business
2 more so than where maybe an office is or an asset is. But
3 this is one thing going through my brain now. What does that
4 mean any more now with so much remote? Does it mean, well,
5 it's still got to be the physical address? Or does it mean
6 it's nowhere? Or does it mean it's everywhere?

7 MS. YOUNG: And, Your Honor, we've honestly
8 had the same debates internally within the program of, can
9 you be everywhere and can you be nowhere at the same time?
10 And I think you have to look at the case law that does exist
11 to inform the way you're analyzing these kinds of decisions.
12 And I think in this case, in particular, even if you're
13 talking about a nerve center approach, none of the nerve
14 center activities were still going on within the State of
15 Texas. So even if you're talking about a virtual world and
16 people are doing things from home and working remotely,
17 people still have to physically be someplace to be able to
18 have that.

19 THE COURT: Okay. So you're saying you don't
20 know if it's Palo Alto or not, but you just -- you're
21 position is it's not Texas?

22 MS. YOUNG: That is correct, Your Honor.

23 THE COURT: It's -- wherever it is, it's not
24 Texas.

25 Okay. And my principal assets conundrum in my brain is

1 a similar vein. What if almost all your assets are
2 intangible? You cannot physically point to them anywhere.
3 Okay. We don't have a manufacturing facility. We don't have
4 12 coal mines like Judge Chapman had in Patriot Coal.

5 MS. YOUNG: Right.

6 THE COURT: We have nothing but intangible
7 assets except for, I guess, some inventory, the third-party
8 store. What -- does that mean venue's nowhere?

9 MS. YOUNG: Again, I still think that you look
10 back to the statute which says, principal place of assets.
11 So what -- or principal assets. So I think, again, taking a
12 step backwards when you look at holistically, well, what
13 assets do we have? So for the debtors' argument it is, we
14 have the asset in Texas which is the assets in a bank
15 account. If you then look -- okay, well, what other money
16 does the debtor have in a bank account? They have almost \$10
17 million on the petition date that was in other bank accounts
18 that were not located within the State of Texas. So if
19 you're talking then about --

20 THE COURT: You don't add it up, though,
21 right? It's just you have principal assets. That is an
22 adjective, but --

23 MS. YOUNG: It is. But if --

24 THE COURT: Neither one of those cash amounts
25 are anywhere close to the totality, the majority of the

1 assets. Their intellectual property is the main -- you're
2 going to say, principal assets. They are the principal
3 assets.

4 MS. YOUNG: And, Your Honor, this is the
5 statutory framework that I think we're all struggling with
6 right now. All we can do is look at the facts as we have
7 them here today. And for intellectual property, we have to
8 look at the addresses. We have to look at where has the
9 debtor held itself out as having its nerve center? Where has
10 the debtor historically held itself out at the nerve center?
11 Because we don't have -- Congress has not spoken. They
12 haven't given us better guidance of where IP is. And I don't
13 think the intent of the venue statute is to create venue
14 wherever you want to file in the country. I don't think that
15 is the intent of the venue statutes. They're trying to focus
16 it on where there are principal assets, principal places of
17 business. And that is, again, in the virtual world harder to
18 parse out. But I still think that you have to look at what
19 assets do exist and what -- what is the business activity of
20 the debtor, and what are the appropriate places for venue in
21 that instance?

22 THE COURT: Okay. And this will be my last
23 here's what's on my mind question.

24 Does the Trustee agree that with regard to the foreign
25 entities that filed here, where I guess their sole asset was

1 the retainer, does the debtor -- does the U.S. Trustee agree
2 that there would be principal assets in this District for
3 purposes of the foreign entities?

4 MS. YOUNG: Your Honor, that is some of the
5 factual questions that we have.

6 THE COURT: Okay.

7 MS. YOUNG: And that is certainly, I think,
8 part of the argument that we will make is that maybe, but we
9 can't agree to that based on the facts on that we have them
10 right now.

11 THE COURT: Okay. So I'm going to -- I
12 thought you might -- I wasn't sure from the stipulation if we
13 had an agreement on there's a retainer in Dallas, Texas that
14 is property of the foreign entities, or that the foreign
15 entities have a property interest in.

16 MS. YOUNG: Correct.

17 THE COURT: We don't have agreement on that?

18 MS. YOUNG: Well, I mean, I think a retainer
19 is a retainer. The retainer was paid. And I think that is
20 in the stipulation, the retainer was paid by Eiger
21 Biopharmaceuticals. Whether or not any of the foreign
22 entities have an interest in that retainer, I think is a
23 legal argument. But whether or not they -- I do not believe
24 they have listed that as a scheduled asset on either of their
25 schedules that were filed late last night. So that's all I

1 have at this moment to be able to address the Court's
2 question about that.

3 THE COURT: Okay. We'll see where the
4 evidence and argument goes. But I'll -- again, I try to be
5 an open book here. Here's where my brain is going.

6 MS. YOUNG: I understand, Your Honor.

7 THE COURT: Let's say one of the foreign
8 entities, I don't know if it's one or both. But if they put
9 up a retainer or a retainer was put up on their behalf --

10 MS. YOUNG: Uh-huh.

11 THE COURT: -- which is now being held in
12 Sidley & Austin's bank account, is I thought I understood --

13 MS. YOUNG: Correct.

14 THE COURT: -- there possibly to be agreement
15 on that.

16 MS. YOUNG: Yes.

17 THE COURT: Then -- and those foreign entities
18 really have no other assets to speak of, then if at least one
19 of those foreign entities had principal assets in Dallas,
20 Texas, then under 1408 venue would be proper, right? And
21 then all of the affiliates could be added under 1408,
22 correct?

23 MS. YOUNG: Correct. However, that is not the
24 factual situation of how these cases were filed. The
25 affiliated cases with the UK and with the Ireland entities

1 were filed as having the affiliate, the Eiger
2 Biopharmaceuticals having the principal place of assets
3 within the State of Texas.

4 THE COURT: Okay. Are you talking about a
5 timing sequence theme?

6 MS. YOUNG: Yes.

7 THE COURT: They were filed number four and
8 five in the --

9 MS. YOUNG: Correct.

10 THE COURT: -- sequence of five filings?

11 MS. YOUNG: Correct. And if you look --

12 THE COURT: So they -- the fact that -- okay.

13 Under my hypothetical, if there would be proper venue of
14 let's say foreign entity number one, there would be proper
15 venue, let's say hypothetically under 1408 because it had
16 principal assets in Northern District of Texas, the fact that
17 it filed number four in sequence of the five debtors is an
18 incurable defect?

19 MS. YOUNG: Your Honor, that is the position
20 that my client is taking at this point.

21 THE COURT: They -- I looked, they filed 46
22 minutes apart.

23 MS. YOUNG: And, Your Honor, all we can do is
24 present the facts as we have them.

25 THE COURT: Okay.

CINDY SUMNER, CSR (214) 802-7196

1 MS. YOUNG: And so that is the position that
2 we are taking today.

3 THE COURT: Okay. And, again, I'm just trying
4 to be transparent and let people know what's on my brain as
5 they get ready to present their evidence and argument. If
6 you continue with my hypothetical and I say, you're right, as
7 a technical matter the sequencing problem means, you know,
8 they should have done the foreign entity first and then filed
9 all the others as affiliates. This Court could dismiss
10 everything but the foreign entity for improper venue and then
11 5 seconds later they could re-file them in this District as
12 affiliates, right?

13 MS. YOUNG: Again, legally --

14 THE COURT: I'm just trying to think through
15 this exercise.

16 MS. YOUNG: I understand legally speaking.

17 THE COURT: Because we may get to the point of
18 what is in the interest of justice and what's for the
19 convenience of the parties. We may get to that, right? I
20 think your argument is I first have to look is venue proper
21 under 1408.

22 MS. YOUNG: Correct.

23 THE COURT: And then only if I do, then I
24 consider interest of justice or convenience of parties.

25 MS. YOUNG: That is correct, Your Honor.

1 THE COURT: There's a contrary possible
2 argument there under Judge Leif Clark and whatever that case
3 was. Whatever Laranzo, or something like that.

4 MS. YOUNG: Yeah, something -- I know the
5 case.

6 THE COURT: But I'm just -- this is why this
7 is so vexing to me, because -- and why I'm zeroing in on that
8 retainer and what's been stipulated to and what hasn't been.

9 If, indeed, one of these foreign entities had a
10 property interest, has a property interest in a retainer held
11 in Dallas, Texas, then it would seem that it has principal
12 assets in Dallas, Texas. And then, okay, venue would be
13 proper. And maybe because of the sequence things don't work
14 here. But then I would dismiss and the other debtors could
15 turn around and file 5 second later saying, oh, affiliate in
16 a case pending. Lazaro, that was the case I was trying to
17 think about.

18 MS. YOUNG: Understand your questions, Your
19 Honor. All I can say is that we have to look at the facts of
20 the statute and we have to look at the facts on the petition
21 date and exactly the sequence of how things were filed. And
22 that is how my client has based his decisions about going
23 forward here today.

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

25 All right. Wait, do we want to hear friendlies first?

CINDY SUMNER, CSR (214) 802-7196

1 There was a joinder by Innovatus. And I don't know if
2 they're on the Webex and want to say anything at this point.

3 MR. JONES: We are, Your Honor. Roger Jones
4 on behalf of Innovatus.

5 We don't have anything to add to what the U.S. Trustee
6 has said.

7 THE COURT: Okay. Where -- where do you want
8 venue, if this Court transfers venue?

9 MR. JONES: Delaware, Your Honor.

10 THE COURT: Okay. Because you did not say in
11 your joinder. So we'll -- we'll hear any elaboration you
12 want to make on Delaware when we have closing arguments,
13 unless you want to say something more now.

14 MR. JONES: Nothing else now, Your Honor.

15 THE COURT: Okay. Mr. Califano, will it be
16 you?

17 MR. CALIFANO: Yes, Your Honor. Thank you.

18 THE COURT: And I hope you're going to address
19 the sequencing thing and --

20 MR. CALIFANO: Yes, I am going to address the
21 sequencing, Your Honor.

22 And it's very simple. There's no -- I mean, yes, the
23 statute does say, in which there is a pending case under
24 Title 11. But there's no precedent that I'm aware of that
25 says that that -- that requires that the foreign case be

1 filed first. There's no precedent. And when we're here now
2 reviewing venue, there is a pending case for an affiliate.
3 Okay. So I would say it would be an extreme exercise of form
4 over function to say that the fact that the foreign cases
5 were filed 46 minutes after the first -- the U.S. cases would
6 render venue which would otherwise be proper, would render
7 that improper. I think that would be form over substance. I
8 would think that's not within the cases, the vast majority of
9 the cases which say, the debtor's discretion -- the debtor's
10 are supposed to be given wide discretion. The Court should
11 defer to the debtor's choice on venue. And it simply just --
12 it's not practical, realistic, or just.

13 And we all know how these cases are filed. They're
14 filed by some -- you know, they're filed by people in the
15 office who are following the electronic filing protocol.
16 Okay. And there is no prejudice --

17 THE COURT: Are you saying you personally
18 didn't push the buttons to file the petitions?

19 MR. CALIFANO: Your Honor, I wouldn't know
20 what button to push.

21 THE COURT: I know. I --

22 MR. CALIFANO: Because I'm going to try and
23 put some statutes up. And we tried that this morning and
24 Ms. Courtney said, give me that.

25 THE COURT: I'm shocked that you don't sit

CINDY SUMNER, CSR (214) 802-7196

1 there and push the buttons.

2 MR. CALIFANO: Your Honor, I wouldn't --

3 THE COURT: I'm being sarcastic and everybody
4 knows it.

5 MR. CALIFANO: So absent that circumstance of
6 the timing of the filing, absent that, I mean, it's pretty
7 clear -- and Your Honor even -- there are interesting
8 questions that are presented about the post-COVID world and
9 what does it mean.

10 THE COURT: And I want to ask you. I'm not
11 sure if your primary argument is proper venue on the first
12 filed case because we think in a virtual company context
13 principal business, place of business, or principal assets
14 can be anywhere. I kind of got the impression from your
15 objection that that's your first and foremost argument. But
16 then maybe the retainer in the foreign sub is a secondary
17 argument?

18 MR. CALIFANO: No. That's really actually --
19 honestly, Your Honor, I'm sorry and we probably weren't clear
20 enough in our brief. To me that's the simpler, more
21 straightforward, more supported argument. We have foreign
22 debtors. Their only asset in the U.S. is their interest in
23 the retainer. There is case law that we've cited in our
24 objection that lays that out. There's not an issue. Okay.
25 1408 says, you know, and the case law says that that's

CINDY SUMNER, CSR (214) 802-7196

1 grounds for venue. It's also grounds for jurisdiction in
2 those global shipping cases. The only wrinkle here is the
3 timing of the filing of the petitions. Okay. And nowhere in
4 anything that I have read should the Court prejudice the
5 debtor on a foot fault like that, on the fact that the
6 foreign case wasn't filed first and everything else attached.
7 Okay. And if we're going to --

8 THE COURT: The word, pending, is the --

9 MR. CALIFANO: Right.

10 THE COURT: -- is the issue here. But you're
11 saying there's no case law construing that in the context --

12 MR. CALIFANO: And not only that. It
13 doesn't -- if you want to stick with the language of the
14 statute, okay, is it pending when we're looking at venue, or
15 is it pending when the case is filed? Okay. So I would
16 think it is -- I mean, I've never seen any case law to that
17 effect, and we've looked at it. The U.S. Trustee hasn't
18 cited any case law to that effect. So I can't see this Court
19 making a determination like that, or any Court making a
20 determination like that based on a 46-minute inadvertent
21 mistake by a clerk, okay, who was filing these cases late on
22 a Sunday night. I cannot imagine that that kind of foot
23 fault would mean there's no venue.

24 Our secondary argument as Your Honor noted is that when
25 you have virtual companies, they might as well be -- have

1 venue anywhere. They may as well have their principal place
2 of business or principal assets anywhere.

3 Now, we look at the nerve center test for principal
4 place of business. There is no nerve center. Okay. The
5 management meets on Zoom. The board meetings, held on Zoom.
6 It doesn't matter that the debtors aren't registered with the
7 Secretary of State in Texas, because case law has said that's
8 not determinative. The company is licensed to sell
9 pharmaceutical products in the State of Texas.

10 Now, Your Honor, I've been doing this for a long time.
11 And I remember the days when you would send a team to a
12 debtor, right, and we'd be there with the FAs getting
13 everything ready. None of that happened here. You know, if
14 the A&M folks were called, they would tell you that none of
15 them have been to Palo Alto. Nobody from my team has been to
16 Palo Alto. If you want to get a record, you don't need to
17 send somebody to Palo Alto. They're all cloud based.
18 They're all stored electronically, Your Honor, because that's
19 what this company is. This company is a high tech virtual
20 company. There is no reason for people to be in the same
21 space. There are no boxes where, you know, when we want to
22 sell Zokinvy where we have to get the information. It's not
23 stored in boxes, okay. And it's progressing because as Your
24 Honor heard in our testimony on cash collateral, there are
25 certain things we need to do to keep up those assets. Once,

CINDY SUMNER, CSR (214) 802-7196

1 again, those are contracted out. Okay.

2 And if we look at, you know, our principal place of
3 assets, which can be more than one site, okay, all the U.S.
4 entities have interest in the Dallas retainer. Okay. All of
5 the principal assets are intangibles that have no real
6 location. I would submit, Your Honor, that the bank
7 accounts, bank accounts are intangible. We all know that a
8 bank account doesn't mean if you go to the branch, there's
9 your money in a drawer, right. A bank account is actually a
10 debtor/creditor relationship between the bank and the account
11 party. They're national banks, all right. Who's to say that
12 because it's got a mailing address in California at JPMorgan
13 Chase or Silicon Valley Bank that it's not everywhere that
14 that bank is? Okay. Once again, it's an intangible. You
15 could go to any branch if you wanted to withdraw money. Any
16 branch anywhere.

17 All right. We have a prescriber in Texas, which means
18 that we have inventory in Texas. We use a Texas staffing
19 company. Okay. Now, one more thing that I want to get -- in
20 Palo Alto there's an office, okay. Part time, there's one
21 person there, okay. Delaware we have incorporation. And I
22 will note in -- further in our argument that the U.S. Trustee
23 in other cases has argued that Delaware isn't a proper venue
24 if it's solely the place of incorporation. Okay. Delaware
25 is not more convenient. Delaware has no more interest in

CINDY SUMNER, CSR (214) 802-7196

1 this case, all right. I'm surprised that Mr. Jones -- and
2 we'll talk about their joinder is a second -- why he wants
3 this case in Delaware, because my firm would have to hire
4 local counsel. His firm would have to hire local counsel.
5 There's no more convenience. He's located in Tennessee. I'm
6 in New York. Neither one of us are in Delaware. So I don't
7 know why he prefers that case -- that venue, other than maybe
8 to get in front of a different judge. And I don't want to
9 say that he's trying to run away from this Court, but it kind
10 of seems that way.

11 But, Your Honor, I think what's important -- and I'm
12 glad that the U.S. Trustee mentioned Congress and the fact
13 that words matter. I can -- as far back as I can remember,
14 there has always been a push for venue reform. Okay. It's
15 never been adopted. What does that tell us? It tells us
16 that Congress really doesn't see the abuse that a number of
17 people have -- now, we know that the U.S. Trustee is bringing
18 the venue motions all over -- you know, in different places.
19 We can surmise, we can guess that that's because of some
20 things that happened in another court where people were
21 supposedly forum shopping. But that's not our issue here.

22 And what I'd like to do is just walk through the
23 statute because I agree with Your Honor. I'm not sure that
24 just because -- that even if the U.S. Trustee were able to
25 argue that venue was improper, even if for some reason that

1 46-minute gap rendered our venue improper, I'm not so sure
2 that Your Honor couldn't retain this case. Okay. And I
3 think let's look at the language of 1406, okay. All right.

4 1406 says that if a case is lying in the wrong venue,
5 or District, shall dismiss, okay. Or if in the interest of
6 justice, transfer such case to a division where it could have
7 been brought, okay. The other thing that's important is to
8 remember that venue can be waived, okay. And if it was such
9 an abuse, could it be waivable? And if it was something that
10 was so important that a foot fault would render venue
11 improper, would it be waivable?

12 And now let's look at 1014(a), which is the bankruptcy
13 venue statute, okay. Cases filed in improper District. We
14 don't see, shall, we see, may dismiss the case or the
15 transfer it to any other District -- I'm sorry, due to where
16 it has improper District. May dismiss the case or transfer
17 it to any District. And that's what the Court found in
18 Lazaro that it's permissive. Okay. Well, 1406 is mandatory.

19 Now, Your Honor, there's only one Circuit level case
20 that we could find, okay. And that case said that after 1477
21 was repealed, that despite the language of 1014(a)(1) or (2),
22 the Court could not retain venue of an improperly venued
23 case. But that's one case, okay. It's in the Sixth Circuit.
24 And it's not binding. We have Lazaro in the Western District
25 of Texas and we have another case which has followed it.

1 Now, in a second -- well, maybe let's look at the venue
2 reform statute, okay. And I think that's telling. And this
3 is the venue reform statute that could not get -- get
4 approved, okay. So incorrectly filed cases or proceedings,
5 all right. The District Court shall immediately dismiss the
6 case or proceeding, or immediately transfer to another case
7 in which it would be brought.

8 If the law right now as we stood did not permit the
9 Court to retain an improperly venued case, why would you need
10 this venue changed, this change to the language?

11 THE COURT: And which attempt at reform is
12 this?

13 MR. CALIFANO: This is the latest one. This
14 is 2023.

15 THE COURT: Okay.

16 MR. CALIFANO: Okay. So this is 2023, okay.
17 So this, which has not been adopted, okay, which is DOA, this
18 changes the permissive language of 1014(a). If the
19 permissive language from 1014(a) didn't mean anything, why
20 would they need to change the statute? Why would you
21 need -- why would you need to have this venue reformed?

22 The other thing to keep in mind is this proposed and
23 unadopted venue statute impacts the timing, okay, by
24 requiring that the Court determine it within 14 days. Okay.
25 And, Your Honor, I don't know if you got a chance to read

1 Judge Lopez' oral ruling in Sorento, okay --

2 THE COURT: Read his oral ruling, no. I saw
3 his one sentence written order, but I --

4 MR. CALIFANO: I'm sorry, Your Honor.

5 THE COURT: -- I didn't read the transcript.

6 MR. CALIFANO: I'm sorry.

7 Your Honor, what George Lopez recognized in that case
8 was that timely depends on the circumstances. And it matters
9 what happened after the case was filed. And here, Your
10 Honor, even though this case was only filed on April 3rd,
11 this has been a very active case.

12 THE COURT: April 1st.

13 MR. CALIFANO: April 1st, I'm sorry. April
14 Fools.

15 It's been a very active case in that time. And we
16 thank Your Honor for making the time for us and having the
17 patience for us. But we have had extensive testimony. We
18 have had a sale. We've had issues surrounding the sale. I
19 think Your Honor last night issued an order, amended order on
20 the sale. We're in the middle of a sale process, okay.
21 We're in the middle of a very active sale process. So were
22 this case sent to Delaware, okay, a very active Court, when
23 we're talking about a case which has a very short time frame,
24 because we're trying to preserve these assets and get them
25 out into the hands of people who can develop them and we're

CINDY SUMNER, CSR (214) 802-7196

1 trying to do it quickly, to transfer the case to Delaware,
2 Your Honor, and have to educate a new judge and go to a very
3 busy Court and start from square one, I think those facts
4 weigh on the timeliness. And, once again, venue is something
5 that can be waived. It's not nearly as important as the
6 proponents of the venue reform that keeps getting -- I mean,
7 as long as I can remember, there has been a proposal, Your
8 Honor. And it's never been adopted.

9 So once we get past this issue that Your Honor cannot
10 retain this case -- and, Your Honor, once again at the risk
11 of being repetitive, I think there's three reasons why Your
12 Honor can retain this case.

13 First, despite the 46-minute gap, we have foreign
14 debtors for which venue is clearly proper and the rest are
15 affiliates. So we have that basis. The second. In today's
16 climate with a virtual company, I would submit that there is
17 just as much argument that the principal place of business is
18 Texas as anywhere else. And in my opinion, more than
19 Delaware or Palo Alto. Delaware, which is merely the state
20 of incorporation, and Palo Alto which is basically a mail
21 drop that none of the officers go to regularly or have been
22 within the last year.

23 So, Your Honor, if you look at this case -- we've
24 already talked about what's gone on in this case and what
25 Your Honor has learned. We have had counsel appearing for

1 the following without any complaints. We've had Merck
2 appear. We've had PRF appear. We've had Eton appear. We've
3 had Sentynl appear. And Innovatus appeared several times
4 without complaint. Now, this weekend on Sunday night, for
5 some reason they wanted to jump on the venue objection
6 bandwagon. I think it's more of a litigation tactic than any
7 prejudice that Innovatus serves by being here as opposed to
8 being in Delaware, okay.

9 And, Your Honor, I'm glad that you mentioned Patriot
10 Coal, because I was going to talk about Patriot Coal.
11 Patriot Coal is venue abuse, okay. You had a coal mining
12 company trying to get a way from the miners and get away from
13 the state regulators. So they created venue in New York.
14 We're not running away from anybody. We don't have any
15 employees, okay. Yes, we chose this venue, okay. We chose
16 this venue for legitimate reasons, okay. Not to prejudice
17 any party, but for legitimate reasons. It's convenient.
18 This Court knows healthcare cases. And is very sophisticated
19 with healthcare cases. But despite the fact that we had
20 reasons, we didn't do anything improper to get here. The
21 only impropriety, if you want to call it that, is that
22 46-minute time gap.

23 If you look at our creditor base, there are 500
24 entities scattered across approximately 37 states and 14
25 countries, okay. We've already talked about the touch points

CINDY SUMNER, CSR (214) 802-7196

1 in Texas, Your Honor. The touch points in Texas are just as
2 legitimate as anywhere else. Okay. There is no party in
3 interest who's harmed by venue in the Northern District of
4 Texas. There is no one who has an economic interest in these
5 cases who is complaining about where this case is venued.
6 All right. We have the U.S. Trustee, and it's not a
7 statement on
8 Ms. Young. It's I understand what they are doing all over
9 the country. But, Your Honor, I would submit it's misguided.
10 Venue has not been found to be --

11 THE COURT: Maybe this is beyond what I should
12 be asking about, but I am curious. Is this sort of a -- I
13 don't know if you can answer this or not. I understand if
14 you can't answer it. Maybe it's attorney/client privilege,
15 or something. But is this a new policy of the U.S. Trustee
16 to, I don't know, be more aggressive with regard to motions
17 to transfer venue? This is my first experience with the U.S.
18 Trustee ever filing a motion to transfer venue in my court.
19 Maybe it's popping up all over and I don't know it.

20 MS. YOUNG: Your Honor, our decision was based
21 on the facts of this case. I can't speak to anything else.

22 THE COURT: Okay. Well, he said -- you made
23 it sound like it's happening everywhere.

24 MR. CALIFANO: It is happening everywhere,
25 Your Honor. It's happened in a bunch of cases up in Sorrento.

1 It happened in Nortales. It happened in any number of cases.

2 THE COURT: What was the second one you said?

3 MR. CALIFANO: What's the --

4 MALE SPEAKER: Bowflex.

5 MR. CALIFANO: Bowflex. That was a case filed
6 in New Jersey, okay. There's also a case where the U.S.
7 Trustee complained about a case being filed in, I think it
8 was AmeriFirst. They complained about it being filed in
9 Delaware because that was the sole basis for venue there was
10 because it was incorporated in Delaware.

11 So what we have here, Your Honor, and present company
12 excluded, we have the U.S. Trustee trying to do what Congress
13 can't, okay, and hasn't, which is really address what people
14 call forum shopping. But if it was a real issue, Your Honor,
15 Congress would have acted. Congress would have acted in all
16 of these prior instances. Congress hasn't. It's not that
17 big an issue. But we don't need to go to those issues here,
18 because it's clear that we have venue. The only real
19 argument that we have today about whether venue is proper is
20 whether that 46-minute time gap, Your Honor, renders what
21 would otherwise be proper venue improper. That's what
22 everything boils down to, okay. It really is. Does that
23 46-minute time gap mean that the case has to leave the
24 Northern District of Texas? I would submit to Your Honor
25 that that 46-minute time gap is irrelevant. Okay. There's

CINDY SUMNER, CSR (214) 802-7196

1 no case that says the case which you're seeking to use needs
2 to be filed first. Okay. I think when you look at pending
3 there, they're talking about a case having been filed and
4 then you file a later case there. I don't think there's
5 any -- I don't even think the argument has ever been raised
6 in the context of cases filed at the same time. Okay. So I
7 think that is -- if there's a novel argument, that's the
8 novel argument, the fact that they weren't filed in order.

9 And all that would mean, Your Honor, is that you just
10 got to stand over them, apparently, and make sure that they
11 file this one first, okay. They don't file that one first.
12 Is that really what we should be basing a decision to take a
13 case from the Northern District of Texas and bring it to
14 Delaware where there are no greater connections? You don't
15 have creditors from Delaware saying, bring the case here. We
16 want to appear. It's burdensome in a time when most people
17 are appearing virtually. You don't have that. You don't
18 have the State of Delaware saying, we have an interest in
19 making sure that Eiger Bio Sciences follows our law, all
20 right. We don't have those issues here.

21 So really what it boils down to is the U.S. Trustee
22 wants Your Honor to accept something which I have not seen
23 any authority for, which is that pending means they have to
24 be filed -- when they're filed on the same day, within 46
25 minutes of each other, the foreign case has to be filed

1 first, or the case you intend venue first needs to be filed
2 first, or else you're out. Okay. There's no case law to
3 that affect. Okay. It all hinges on whether that pending
4 means actually pending. I would think that the fact that
5 these are within an hour, I would think that Your Honor can
6 deem them all simultaneously filed. But I really do think
7 that would be a really -- a very harsh rule for a Court of
8 equity to argue that you would otherwise have proper venue,
9 but this 46-minute gap kills you.

10 So, Your Honor, I'm going to hand it over to my
11 partner, Mr. Curtin, who's going to have some -- Dr. Apelian
12 give us some additional testimony. But if Your Honor has any
13 questions, I'm happy to answer them.

14 THE COURT: I do not at this time.
15 Technically it's Ms. Young who has the burden of proof and
16 gets to go first, unless you all have agreed to --

17 MR. CURTIN: No, we haven't, Your Honor.

18 THE COURT: Okay.

19 MR. CURTIN: Ms. Young goes first.

20 MS. YOUNG: That was our understanding, as
21 well.

22 THE COURT: Okay. Okay.

23 MS. YOUNG: May I approach, Your Honor?

24 THE COURT: You may.

25 Your Honor, before I call Dr. Apelian to the stand, I

1 would move for the admission of U.S. Trustee's Exhibits 1
2 through 12.

3 THE COURT: All right. I assume there's no
4 objection on these?

5 MR. CURTIN: No objection, Your Honor.

6 THE COURT: Okay. 1 through 12 are admitted.

7 MS. YOUNG: Okay.

8 The U.S. Trustee would call Dr. Apelian to the stand.

9 THE COURT: All right. Dr. Apelian, welcome
10 back. I think you know the drill now. If you'll approach
11 the witness box, I will swear you in.

12 (The witness was sworn by the Court.)

13 MS. YOUNG: May I approach, Your Honor?

14 THE COURT: You may.

15 DAVID APELIAN

16 The witness, having been duly sworn to tell the truth,
17 testified on his oath as follows:

18 DIRECT EXAMINATION

19 BY MS. YOUNG:

20 Q. Good afternoon, Dr. Apelian.

21 A. Hi.

22 Q. I just have a few questions for you today, if you'd
23 give me one moment. And, again, I'm just going to try to
24 plug in a couple of the gaps.

25 We've been talking quite a bit about the Eiger

CINDY SUMNER, CSR (214) 802-7196

1 Biopharmaceuticals Europe Limited. And I do just want to
2 have you turn to Exhibit Number 4 in your binder, please.

3 A. This is tabs?

4 Q. Tab Number 4, please, yes. And they're marked at
5 the bottom of the page with a page number.

6 A. Uh-huh.

7 Q. And this is the petition for the Eiger
8 Biopharmaceutical Europe Limited., correct?

9 A. That is correct, yes.

10 Q. And the address is in Thame Oxfordshire?

11 A. That is correct.

12 Q. And if we look at number 4, location of principal
13 assets if different from principal place of business is empty
14 on the --

15 A. I'm not following. On the same page?

16 Q. On the same page where you have the address. It
17 looks like it's right next to the United Kingdom.

18 A. Yes.

19 Q. Okay. So that is empty?

20 A. Uh-huh.

21 Q. And if we turn to page 3, question number 11.

22 A. Yes.

23 Q. You marked that the bankruptcy case concerning a
24 debtor's affiliate general partner or partnership is pending
25 in this District as the basis for venue?

1 A. That is true.

2 Q. Okay. And you signed this under penalty of
3 perjury?

4 A. Uh-huh, yes.

5 Q. Okay. And, again, if we can have you quickly turn
6 to Exhibit Number 5, please. I'm going to ask you those same
7 questions.

8 If we are on page 1, the principal place of business
9 for -- this is the petition for EigerBio Europe Limited,
10 correct?

11 A. That is correct, yes.

12 Q. And the principal place of business is indicated as
13 being Dublin, Ireland?

14 A. That is correct.

15 Q. And noting location of principal assets if
16 different from principal place of business is blank?

17 A. That is correct.

18 Q. And if you turn to page 3, the debtor also
19 indicated the case is filed in this District under question
20 11 because the bankruptcy case concerning the affiliate
21 partner or partnership is pending?

22 A. That is correct.

23 Q. Okay. I'm going to have you jump ahead to Exhibit
24 Number 11, please.

25 A. Yes.

1 Q. And this was Exhibit C to the cash management
2 motion that was filed back on April 1st, which indicates, if
3 you look at the top box, EigerBio Europe Limited has a bank
4 account at the Bank of Ireland?

5 A. That's correct, yes.

6 Q. Okay. And if we turn the page to page 2, for the,
7 all of the bank accounts, they're all titled in the name of
8 Eiger Biopharmaceuticals, Inc., with the exception of that
9 Bank of Ireland account from EigerBio Europe, correct?

10 A. That is correct.

11 Q. Okay. And if we go to Exhibit Number 10, please.

12 A. Yes.

13 Q. And Exhibit Number 10 is the Silicon Valley Bank
14 account statement for Eiger Biopharmaceuticals for March of
15 2024 ending in account 5537?

16 A. That's correct.

17 Q. And there are two transfers, one on March 21st,
18 2024 in the amount of \$553,529.50?

19 A. That is correct.

20 Q. And that is funds that came from the Bank of
21 Ireland account that we were just discussing?

22 A. It's hard for me to determine that from this
23 statement.

24 Q. Okay. And do you know maybe then for March 22nd,
25 there's also a transfer from -- in the amount of \$333,000 --

1 \$3,332,500?

2 A. And that credit appears on this statement, as well.

3 Q. Okay. Yes.

4 MS. YOUNG: And, Your Honor, I may just have
5 to -- I did not de-signature, but --

6 Q. Did you sign the schedules that were filed in the
7 EigerBio Europe case?

8 A. I don't recall exactly what schedules you're
9 referring to.

10 Q. Okay. I'm just going to -- if you'll give me one
11 moment.

12 A. Sure.

13 MS. YOUNG: Apologies my computer is loading
14 slightly slower than anticipated.

15 THE COURT: Okay.

16 Q. While I do -- while I'm waiting for my pdf to pull
17 up, your counsel mentioned that the office located in Palo
18 Alto is essentially a mail drop. But it is still an office;
19 is that correct?

20 A. There is an office there, yes.

21 Q. Yes. And there is office -- it's an actual office,
22 it's not just a mailbox?

23 A. It's an actual office.

24 Q. Okay.

25 A. There's office space.

CINDY SUMNER, CSR (214) 802-7196

1 Q. So you may not be the right person to ask this
2 question, but the schedules that were filed in the Eiger
3 Europe case reflect an intercompany receivable in the amount
4 of \$3,883,158.52. Do you know what that intercompany
5 receivable would be for?

6 A. When you say intercompany receivable, are you
7 referring from the one Eiger entity to the either?

8 Q. That is correct. That is how it is listed.

9 A. I'm aware of a transfer of funds from the Ireland's
10 bank to the SPV account. And so that might be what's
11 reflected here. It's just not -- the origin of the money in
12 this transfer is not very clear to me.

13 Q. Understood. And, again, if we look at the dates on
14 these two transfers, the first was on March 21st of 2024?

15 A. That's what's shown here, the credit. The \$553,000
16 credit is March 31st.

17 Q. And the second is March 22nd and that is the
18 \$3,332,500?

19 A. That is correct. That's shown here, yeah.

20 Q. Okay. And as part of the stipulation, the debtors
21 provided a retainer to Sidley on March 29th of \$300,000; is
22 that correct?

23 A. That is correct.

24 Q. Okay.

25 MS. YOUNG: Your Honor, I will pass the

1 witness at this time.

2 THE COURT: All right. Cross?

3 MR. CURTIN: Thank you, Your Honor. William

4 Curtin of Sidley Austin.

5 Your Honor, before I start, I conferred with Ms. Young

6 before we started. And if it's okay with Your Honor, even

7 though this is cross, I'll just proceed with all of my

8 questions for Dr. Apelian. There are not very many.

9 THE COURT: Go beyond the scope of direct?

10 MR. CURTIN: Go beyond -- essentially waiving

11 the beyond the scope objection.

12 THE COURT: Okay. You agree to that,

13 Ms. Young, so he doesn't have to recall him?

14 MS. YOUNG: That is correct.

15 THE COURT: Okay. Yeah. Thank you.

16 MR. CURTIN: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. CURTIN:

19 Q. Dr. Apelian, can you just very briefly remind the

20 Court of your position with Eiger and your very brief

21 background? You don't have to go into as much detail as

22 previous times.

23 A. Happy to. I'm currently the CEO of Eiger. I was

24 appointed as the interim CEO about a year and a half ago.

25 Mid last year in June I was appointed full-time CEO of Eiger.

CINDY SUMNER, CSR (214) 802-7196

1 Prior to that I've spent a better part of 25 years in the
2 pharmaceutical industry in various settings, large pharma,
3 biotech, public and private startups. And my most recent
4 position, the last two positions as CEO.

5 Q. Dr. Apelian, where would you say the business
6 decisions for the debtors are made?

7 A. They're made with the senior management team, the
8 executive team. I reside in New Jersey. My general counsel
9 resides in North Carolina. And our CFO, financial CFO until
10 recently in Nevada. It's a decentralized model. It's
11 perhaps the most decentralized environment I've ever been in.
12 We don't have any lab space. We don't have any physical
13 manufacturing space. We don't have full-time employees that
14 are required to be on the premises. Even at the time I
15 stepped in in January of 2023, the vast majority of the
16 people local -- not local to the Palo Alto office were not
17 working in the office. So it was already a virtual setup
18 without any tangible operations or assets in the facility in
19 Palo Alto.

20 Q. And when you and the general counsel and the
21 formerly the CFO and now the CRO, when you have meetings, how
22 are those meetings conducted?

23 A. We conduct them by Zoom teams or audio in the vast
24 majority of cases.

25 Q. Dr. Apelian, Ms. Young asked you these questions,

1 but just to confirm. You did sign the petitions for each of
2 the debtors, correct?

3 A. That's correct.

4 Q. And why was the principal place of business for the
5 U.S. entities -- and when I say U.S. entities, I'm referring
6 to Eiger Biopharmaceuticals, Inc., EBPI Pharma LLC, and EBPI
7 Merger, Inc. Why was the principal place of business listed
8 at the Palo Alto, California address?

9 A. It's the only singular convenient way to identify a
10 location, a mailing location or a singular location for a
11 virtual company. Otherwise, there would be no consistent way
12 of receiving information.

13 Q. And Ms. Young asked you a couple of questions about
14 that office. So I just wanted to follow up on just a couple
15 of points.

16 At some point in the recent past did you downsize the
17 size of that office?

18 A. We did. We were -- it was clear well prior to the
19 petition, or considering a petition that we were not
20 utilizing the space appropriately. We were downsizing the
21 company a tiny fraction, even the local employees were
22 actually using the space. We had determined mid last year in
23 2023 to go fully virtual, to downsize the office. We have
24 downsized it in early '24 to under 2,000 square feet just to
25 keep whatever physical desks and laptops and things we had

CINDY SUMNER, CSR (214) 802-7196

1 and the small handful of local employees that will still
2 occasionally come in and use the office. On average I think
3 we're probably getting maybe an aggregate of three or four
4 people, local people that still use the office. Maybe one
5 full-time equivalent of a person in a given period of time.

6 Q. How often do you go to the Palo Alto address?

7 A. I've ceased going there since about June of 2023.

8 Q. How often does the general counsel go to that
9 address?

10 A. I have -- I don't believe Jim has been there since
11 we hired him in the first quarter of '23. And he's been
12 operating virtually from North Carolina since that point in
13 time.

14 Q. And prior to him leaving, how often did the
15 fractional CFO go to the Palo Alto location?

16 A. I believe he was there once or twice in the first
17 half of 2023. And we've been operating virtually and
18 communication and meeting virtually through Zoom and phone
19 calls ever since.

20 Q. And how often does the current CRO, Mr. Staut, go
21 to that address?

22 A. I don't believe he's ever been to that address.

23 Q. Dr. Apelian, now moving on to the international
24 entities.

25 Are you familiar generally with the operations of

1 EigerBio Europe Limited?

2 A. I am.

3 Q. And can you please briefly describe those
4 operations for the Court?

5 A. EBE -- we refer to it as EBE in Ireland was set up
6 as our European entity to facilitate the compliant ability to
7 commercialize the drug in Europe, Zokinvy. And so it was set
8 up as an entity that would be kind of an extension of Eiger
9 into the European area.

10 Q. And what operations, if any, does EigerBio Europe
11 Limited conduct in the United States?

12 A. None.

13 Q. And what assets, other than the retainer that
14 you've already testified about does EigerBio Europe Limited
15 hold in the United States?

16 A. None.

17 Q. Okay. Same questions on the other European entity.
18 Are you familiar with the operations of Eiger
19 Biopharmaceuticals Europe Limited?

20 A. That's our UK entity, yes.

21 Q. And can you briefly describe the operations of that
22 entity?

23 A. They were set up for similar analogous reason for
24 commercializing Zokinvy in the UK. We haven't received
25 reimbursement there, so they have not been active in that

1 planned capacity. But that's their purpose for being in the
2 UK.

3 Q. And what operations, if any, does Eiger
4 Biopharmaceuticals Europe Limited conduct in the U.S.?

5 A. None.

6 Q. And what assets other than, again, the retainer
7 that's been discussed does Eiger Biopharmaceuticals Europe
8 Limited hold in the United States?

9 A. None.

10 Q. I want to ask you a few questions about the
11 transfer from the Bank of Ireland account that Ms. Young
12 asked you about.

13 First of all, you're familiar with the transfer of
14 funds from the Bank of Ireland account to the SPV account?

15 A. I am.

16 Q. And do you know when that transfer was made?

17 A. It occurred in the third week of March based on the
18 statement I just saw on the exhibit, March 21st and 22nd, I
19 believe.

20 Q. And are those funds being used to pay expenses
21 during the Chapter 11 case?

22 A. They are.

23 Q. And why was that transfer made?

24 A. In the weeks running up to the Chapter 11 petition,
25 the uncertainty around the status of our ability to access

1 our funds led us to move those funds to the SPV operating
2 account so that we would be able to utilize them for the
3 purpose of the estate.

4 Q. In the prior 180 days -- in the 180 days prior to
5 the filing, in what account were those funds primarily held?

6 A. The funds that were transferred from Dublin, in the
7 EBE account.

8 Q. And that's the account in Ireland?

9 A. That's correct.

10 MR. CURTIN: May I just have one moment,
11 please, Your Honor?

12 THE COURT: Okay.

13 MR. CURTIN: No further questions, Your Honor.
14 Thank you.

15 THE COURT: All right. Any redirect or cross?

16 MS. YOUNG: Nothing, Your Honor. Thank you.

17 THE COURT: Okay. Thank you, Doctor. You're
18 excused from the witness box.

19 THE WITNESS: Thank you.

20 THE COURT: All right. Do we have any other
21 evidence from --

22 MS. YOUNG: Nothing further, Your Honor.

23 THE COURT: All right.

24 MR. CURTIN: Nothing from us, Your Honor.

25 THE COURT: Okay. Well, do we want to do

CINDY SUMNER, CSR (214) 802-7196

1 closing arguments now, or would you like a 5 minute break,
2 perhaps, 5, 10 minute break perhaps?

3 You ready to go?

4 MS. YOUNG: I'm ready to go. But happy to
5 take a break, if we --

6 THE COURT: Okay. We'll let you go then.

7 MS. YOUNG: Okay.

8 Thank you, Your Honor. Again, Liz Young for the U.S.
9 Trustee.

10 We are not here arguing that the debtors do not have
11 contacts with the State of Texas. It is very clear they have
12 contacts with the State of Texas. But venue is not
13 determined by contacts with the State. As Congress has set
14 out in 1408, venue is determined by domicile, principal
15 assets, principal place of business, or if an affiliated case
16 is properly venued in the District for the better part of the
17 180 days preceding this case.

18 What do the uncontested facts demonstrate here? Let's
19 start first with domicile. It is undisputed that the
20 debtors, Eiger Biopharmaceuticals, EBPI Merger, EBPI Pharma,
21 EB Pharma are all incorporated under the laws of Delaware.
22 It is also undisputed that Eiger Biopharmaceuticals Limited
23 is organized under the laws of the UK and EigerBio Europe
24 Limited is recognized under the laws of Ireland. Looking
25 strictly at a domicile. None of these debtors qualify for

1 having domicile in the State of Texas for purposes of venue.

2 Turning to principal place of business. As the Supreme
3 Court has said in the Hertz case, principal case of business
4 refers to the place where the corporation's high-level
5 officers direct, control, and coordinate the corporation's
6 activities, the nerve center, which is typically found at its
7 corporate headquarters. The debtors argue that they have no
8 nerve center. But there has to be a location for a nerve
9 center someplace.

10 What is the debtor's nerve center here? Although they
11 repeatedly assert that this is a virtual company, it is still
12 a company that is headquartered in California. And no part
13 of its pre-petition nerve center was located in Texas. In
14 the 180 days preceding this case, the debtors' businesses
15 were managed directly by individuals who were residing in New
16 Jersey, North Carolina, and Nevada. They primarily conducted
17 their meetings virtually. Their only domestic office space
18 was located in Palo Alto, California.

19 In the one month prior to filing of this case, they
20 renegotiated, but did not terminate the lease for that
21 office. Their bank accounts all reflect California branch
22 addresses. Their tax returns, both federal and state, all
23 reflect addresses of their primary business being in Palo
24 Alto, California. The debtors' primary place of business
25 with the SEC is Palo Alto, California. The debtor did not

CINDY SUMNER, CSR (214) 802-7196

1 file any kind of an 8-K within the 180 days prior to this
2 case updating that address.

3 There are two creditors who are listed on the 30 largest
4 list of creditors who have addresses in Texas. And those
5 companies are located in Houston and in Austin.

6 THE COURT: Okay. Let me -- before you move
7 on, let me hone in on principal place of business.

8 MS. YOUNG: Correct.

9 THE COURT: Your argument -- the U.S.
10 Trustee's argument is there has to be a geographical place to
11 point to?

12 MS. YOUNG: Yes.

13 THE COURT: And -- so here you default to this
14 address in Palo Alto that the Court -- that the debtor used
15 on various documents. What about the fact that I have heard
16 it's down to less than 2,000 square feet and there's one
17 employee who goes in and that is an employee that would be in
18 the so-called nerve center?

19 MS. YOUNG: Your Honor, I think you still have
20 to look at the 180 days prior. And I understand that the
21 debtors were in the process of downsizing. But there still
22 has to be some kind of a principal place --

23 THE COURT: Well, Mr -- Dr. Apelian said he
24 hadn't gone to the Palo Alto office since June 2023. That
25 was more than 180 days before the bankruptcy filing. I mean,

CINDY SUMNER, CSR (214) 802-7196

1 I go back to my point from the beginning. In a world of
2 remote working, what is principal place of business any more?
3 Do I have a problem? Does that mean nothing constitutes a
4 principal place of business, or does it mean you have several
5 places of business? Or -- what does it mean any more?

6 MS. YOUNG: And I think the argument that my
7 client has to that is that there has to be some kind of --
8 some -- if all you've got is intangibles, there's still at
9 some point some place --

10 THE COURT: That's going to the assets.

11 MS. YOUNG: Correct.

12 THE COURT: I'm going to the principal --

13 MS. YOUNG: Principal place of business.

14 Okay. So putting that aside, they're also -- I mean,
15 if you're going to then point to a principal place of
16 business, there has to be a hook somewhere. You have to have
17 a post office box. You have to have a physical office. You
18 have to have some kind of a location for -- for, as we said,
19 the SEC. This is a publicly trade company. The SEC has to
20 have a physical address and a physical location. And that is
21 the presumption that that physical location would be the
22 company's headquarters. And whether or not, you know, again
23 in a virtual world, things can be spread out. But there
24 still has to be an actual, physical location some place in
25 the country for those purposes. For tax filing purposes.

CINDY SUMNER, CSR (214) 802-7196

1 For opening up bank accounts. For sending bills for storage.

2 THE COURT: So even if it's a UPS post office
3 box, that would be a principal place of business?

4 MS. YOUNG: Arguably, if that is the one that
5 has been listed and has been -- that is what the debtors have
6 held out to their creditors and parties in interest and
7 contract counterparties and, as I said, taxing authorities
8 and SECs. There has to be something.

9 THE COURT: Okay. So if we --

10 MS. YOUNG: There has to be something.

11 THE COURT: Okay. So if a post office box was
12 opened up in Dallas, Texas 91 days before the petition date,
13 that would be good enough, as far as the U.S. Trustee is
14 concerned?

15 MS. YOUNG: Your Honor, I can't speak to any
16 hypothetical like that. All I can focus --

17 THE COURT: I'm just wondering why a PO Box is
18 significant, I mean, at least in this argument you're making.

19 MS. YOUNG: Well, if --

20 THE COURT: The world has evolved. People
21 used to think, it's where the headquarters is, okay. And
22 then case law evolved to say, nerve center. Okay. Well,
23 okay. You know, there may be more than one headquarters, or
24 there may be many physical locations. So you focus on the
25 nerve center as opposed to maybe where primary operations

CINDY SUMNER, CSR (214) 802-7196

1 are.

2 MS. YOUNG: Right.

3 THE COURT: But now we've evolved further,
4 right? Where there might not be any physical location,
5 except a PO Box or an 1,800 square foot facility in Palo Alto
6 where no one goes in.

7 MS. YOUNG: Well, and, Your Honor, that is
8 what the debtors selected as their principal place of
9 business for the facts of this specific case. This is what
10 we're looking at specifically here is the debtors made the
11 admission in their petitions that their principal place of
12 business was in Palo Alto. If that wasn't the case, we don't
13 have that fact. What we have are the admissions in the
14 petition saying that the principal place of business is the
15 business -- is the location in Palo Alto. And that
16 corresponds with all of the other tax returns and other SEC
17 information.

18 THE COURT: Okay. So you're saying by default
19 I need to use an address the debtor has historically used on
20 a lot of documents, rather than focus on a nerve center test,
21 like cases have heretofore focused on.

22 MS. YOUNG: Your Honor, I think you look at
23 both. I think you have to say, regardless of even if you're
24 looking at a nerve center approach, as to Your Honor's
25 credit, the facts here do not demonstrate anybody who is a

CINDY SUMNER, CSR (214) 802-7196

1 nerve center was in the State of Texas.

2 THE COURT: Okay. So with a virtual company,
3 it can't be nowhere. Principal place of business can't be
4 nowhere. And it can't be everywhere. So we default to an
5 address used on corporate documentation.

6 MS. YOUNG: Again, for the specific facts of
7 this case with what we have here in front of us today, we
8 have the principal place of business that is being -- that is
9 shown as being in Palo Alto, California. We know that the --
10 you know, again, it is not in dispute that the parties who
11 are making the decisions were based in -- I'm sorry, in
12 Nevada, in New Jersey, and in North Carolina. But we're not
13 here looking at a nerve center argument that one of those
14 three locations of where one of the corporate officers are,
15 they're selecting a principal place of business as being in
16 the Northern District of Texas. And the argument is the
17 facts do not support that for this specific case.

18 THE COURT: Okay.

19 MS. YOUNG: The debtors rely heavily on the
20 premise their principal assets are in Texas for determining
21 venue. And the assets -- the assets are the retainers that
22 are in the Sidley IOLTA account.

23 THE COURT: I don't think they're in an IOLTA
24 account. Maybe they are.

25 MS. YOUNG: May in the Sidley --

CINDY SUMNER, CSR (214) 802-7196

1 THE COURT: I thought that was an argument
2 early on that that was a problem, they weren't in the IOLTA
3 account.

4 MS. YOUNG: They're in Sidley's accounts.
5 They are in Sidley's accounts.

6 And the cases they cite in support of those
7 propositions all deal with eligibility under 109. And we are
8 not here arguing that none of these debtors are eligible to
9 be debtors under 109. What we're arguing -- because
10 jurisdiction is not the same as venue. And these cases do
11 not cite whether venue is proper. They cite only whether
12 foreign entities have the ability to file within the United
13 States. And clearly we are not challenging whether or not
14 these cases have the ability to file -- whether or not
15 they're eligible to be debtors under 109. We do not think
16 that it rises to the level to be sufficient to meet the
17 standard for principal place of assets in the Northern
18 District of Texas.

19 THE COURT: Principal assets, isn't that
20 wording --

21 MS. YOUNG: Principal assets, principal
22 assets.

23 THE COURT: Okay. So what is my case law that
24 tells me what is principal assets for purposes of 1408?

25 MS. YOUNG: Give me one moment, Your Honor.

CINDY SUMNER, CSR (214) 802-7196

1

2 Your Honor, I do not have that case law handy.

3 THE COURT: Okay.

4 MS. YOUNG: However, we would argue that the
5 principal assets, if you're talking about something like a
6 bank account, as Mr. Califano did acknowledge -- sorry, I
7 think I'm getting some feedback here.

8 The principal place of -- bank accounts are an
9 intangible asset. So, again, it could be everywhere and
10 nowhere. However, these are Delaware corporations. Arguably
11 the interest -- the debtors would have interest in the stock
12 of those corporations. As Delaware corporations, that would
13 be a tangible asset that would be located in Delaware, at
14 least for the purposes of venue.

15 THE COURT: Okay. So if I have a foreign
16 entity whose only asset in the U.S. is its interest in
17 retainer funds held at Sidley & Austin, Dallas, that's not
18 principal assets?

19 MS. YOUNG: Your Honor, again, looking at the
20 specific facts of this case, because the Eiger -- and I can't
21 remember which -- it's the entity, the UK entity. Because
22 that was the affiliated case, you have to make sure that
23 jurisdiction was -- or venue was proper for the first filed
24 case before we get to that. And if we look specifically at
25 the retainer, the retainer was paid by Eiger

CINDY SUMNER, CSR (214) 802-7196

1 Biopharmaceuticals. And any monies that would be left over
2 at the end of the day would be returned to Eiger
3 Biopharmaceuticals, not to the UK entity.

4 THE COURT: Well, now you're asking me to
5 focus on evidence. And which evidence are you wanting me to
6 focus on?

7 MS. YOUNG: The -- if you go to the
8 stipulation, Your Honor.

9 THE COURT: Uh-huh.

10 MS. YOUNG: Give me one moment.

11 If we go to, which is Exhibit Number 12 --

12 THE COURT: I'm there. Maybe number --

13 MS. YOUNG: Page number 6, stipulated point
14 number 47, that is the Eiger Biopharmaceuticals transfer of
15 retainer funds. And if we go up to, I believe it's actually
16 page 5, it is the Silicon Valley Bank account stipulated
17 point 41 which it came out of the Eiger Biopharmaceutical's
18 operating account 0066.

19 THE COURT: Okay. But how do I know that is
20 only for Eiger representation as opposed to a retainer for
21 all five debtors' representation?

22 MS. YOUNG: Your Honor, I don't have that
23 piece of evidence.

24 THE COURT: Okay. All right. Well, so I
25 think -- I think you're making a factual argument and a legal

CINDY SUMNER, CSR (214) 802-7196

1 argument. I think you're making a factual argument that EBE
2 Ireland or EBE Europe, the foreign entities, I don't have
3 evidence that it has a property interest here, because I
4 don't have evidence, I think you're saying now, that the
5 retainer, you know, it has a property interest in the
6 retainer. But that's the factual argument, I think I hear
7 you making. But I think you're making the legal argument
8 that goes back to sequencing.

9 MS. YOUNG: Correct.

10 THE COURT: That goes back to the 46-minute
11 issue.

12 MS. YOUNG: Correct.

13 THE COURT: Okay. So here's what I am old
14 enough to be thinking of. You know, in the very old days
15 before Pacer and ECF when I, as a lowly attorney, had to run
16 over to the Clerk's Office before 4:30 when it closed and
17 physically file voluntary petitions. And let's say it was
18 five Chapter 11 debtor cases like here. I would just hand
19 the voluntary petitions to the Clerk's Office and they would
20 go bam, bam, bam, bam. They would file them all
21 simultaneously. So, again, I keep going to modern world,
22 digital assets, virtual companies, I mean, it feels like
23 you're saying, no, no, no, no, no, you can't treat these as
24 simultaneously filed. They were 46 minutes apart so,
25 therefore, if -- if foreign entity Eiger had a principal

CINDY SUMNER, CSR (214) 802-7196

1 asset here, too bad. It filed fourth. So just like the
2 Clerks in days of old may have stamped it fourth, you know, I
3 can't treat that as simultaneous. Help me to understand --
4 and here is where I'm going to get maybe too academic, but I
5 think we need to go there.

6 I mean statutes are supposed to be interpreted --
7 unambiguous statutes are supposed to be interpreted
8 literally, unless they yield absurd results. So tell me, is
9 that an absurd result to not treat these as simultaneously
10 filed. When in days of old I would have handed a stack of
11 voluntary petitions to the Clerk's Office and she would have
12 gone bam, bam, bam, bam, filed.

13 MS. YOUNG: And, Your Honor, we go back to the
14 admissions in the petitions. So it's slightly different in
15 the case of handing the Clerk five petitions at once and
16 saying, file them in, you know, however order that I managed
17 to put them together in the binder, as opposed to the way
18 these cases were filed in which the first case says, we have
19 venue based on the facts of the Eiger Biopharmaceuticals case
20 and everyone else has affiliated venue status as a result of
21 the first filed case. So we're focusing on just that very
22 narrow argument of what the debtors admitted and what was
23 signed in the petitions. What information we have on the
24 petitions. Those petitions have not been amended. We have
25 not had the case where they have selected to amend the

CINDY SUMNER, CSR (214) 802-7196

1 petitions on any of the foreign entities to say they are the
2 ones who have proper venue. So we are only as good as the
3 facts that we have here. And the facts of this case say why
4 we are taking this position.

5 THE COURT: Okay. So I hear what you're
6 saying. Don't go down hypotheticals, Judge. Look at the
7 facts. You always say facts matter. I do. And hold this
8 debtor to the facts that they filed Eiger Biopharmaceutical,
9 Inc., first saying, principal place of business, Dallas. And
10 the four remaining cases were filed as affiliates. Hold them
11 to almost estoppel kind of thing is what I think you're
12 saying.

13 MS. YOUNG: That is correct, Your Honor. And
14 that is the position.

15 THE COURT: Okay. So your further argument is
16 if I -- if I go with you on that and find technically no
17 proper venue under 1408, period, end of sentence, I don't
18 even go to the convenience factors, that's what you're
19 saying. Assuming I follow Judge Leif Clark on Lazaro and
20 some of those others, and I say, I can still retain. I think
21 I agree with Judge Leif Clark, I think I can still retain,
22 what are the convenience factors here that you think are
23 compelling?

24 MS. YOUNG: Again --

25 THE COURT: Or interest of justice factors

CINDY SUMNER, CSR (214) 802-7196

1 that you think are compelling.

2 MS. YOUNG: Again, my client does not take the
3 position that we even get to this point. And we urge the
4 Court to follow the Thompson versus Greenwood, which is the
5 Sixth Circuit opinion which we argue is the better reasoned
6 opinion. Which, again, says, requirements of 28 USC 1408 are
7 mandatory, not optional. That 1412 only applies to
8 bankruptcy cases that are filed within a proper venue. And
9 that if not, then you have to look at 1406. And if you look
10 at 1412 -- I'm sorry, Bankruptcy Rule 1014(a)(2), that can
11 only authorize the transfer of an improperly venued case.
12 Can only be -- I'm sorry. A transfer for an improperly
13 venued case can only be done to a case in which venue was
14 proper from the outset under 1408. That is the ruling that
15 we urge the Court to take here today and the approach. And
16 we think that is the better reason, the Sixth Circuit
17 opinion is the better reasoned approach.

18 THE COURT: Okay. But without any Fifth
19 Circuit binding authority, the U.S. Trustee does not want to
20 go the extra step of arguing the commonwealth factors, the
21 factor test of what is --

22 MS. YOUNG: That is correct.

23 THE COURT: -- in the interest of justice and
24 what --

25 MS. YOUNG: Correct, Your Honor. And that is

CINDY SUMNER, CSR (214) 802-7196

1 why we did not address that within our original briefing
2 because our concern is 1408 is a threshold matter. And
3 unless you can make the venue -- the argument that you have
4 proper venue under the 1408, then you do not get to 1412.

5 THE COURT: Okay. So convenience be darned,
6 interest of justice be darned. Send it to Delaware that has
7 no ties, or send it to Palo Alto that was no ties, except an
8 empty office.

9 MS. YOUNG: And, Your Honor, that is -- that
10 is what we set forth in our papers and what we think the
11 facts of this case show.

12 THE COURT: Okay. All right.

13 MS. YOUNG: Do you have any other questions?

14 THE COURT: I don't think I have any more
15 questions of you.

16 Mr. Jones, I always hear friendlies together. Anything
17 more you want to say about your joinder?

18 MR. JONES: No, Your Honor.

19 THE COURT: Okay. Who will argue for the
20 debtor?

21 MR. CALIFANO: Your Honor, I will.

22 Your Honor, I think you're seeing the problem that the
23 U.S. Trustee has. Because at the same time that they want
24 Your Honor to strictly apply a statute, they want you to read
25 language into the Bankruptcy Rule that isn't there. Okay.

CINDY SUMNER, CSR (214) 802-7196

1 As we've pointed out we have, shall, in the district court,
2 may, in the Bankruptcy Rule. But they want you to ignore
3 that, may. Okay, because they want a strict -- so when they
4 want strict applications, there's strict applications. When
5 they don't want strict applications, they want you to rely on
6 a Sixth Circuit case that ignored the distinction between
7 those statutes.

8 And, Your Honor, I want us to keep in mind the Second
9 Circuit's language in In re Financial News Network. In
10 bankruptcy proceedings substance should not give way to form.
11 And that's what we're faced with here, Your Honor. We're
12 faced with a motion to transfer venue that really what it
13 boils down to, it's all about the 46 minutes. All right.
14 Because they admitted that if the case was filed first, then
15 we'd meet the pending requirement. Okay. If we hadn't
16 checked their box on affiliate, then we would be fine.

17 THE COURT: Well, I think -- I think they're
18 not conceding on the retainer.

19 MR. CALIFANO: No -

20 THE COURT: I thought there was stipulation
21 they were, but maybe they're not.

22 MR. CALIFANO: And, Your Honor, there's so
23 much case law on the retainer. And it's also that case law
24 which is cited in our brief. Also said, it doesn't matter if
25 the retainer is paid by the parent. Okay. As long as it

1 covers the foreign entity. And we have that and we cite to,
2 Your Honor, it's Global Ocean Carriers, 251 B.R. at 18.

3 Now, they argue -- and this is where they get into
4 trouble, because they're arguing, well, those cases were
5 about 109, which is jurisdiction. But 109, Your Honor, is
6 much more of an important statute than venue. Jurisdiction
7 goes to this Court's ability to act. Venue goes to whether
8 it's this Court or a Court in some other District that can
9 act.

10 THE COURT: Okay. So Global Ocean Carrier,
11 Delaware Court, 251 B.R. 31.

12 MR. CALIFANO: Yes, Your Honor.

13 THE COURT: Quote, It is not relevant who paid
14 the retainer, so long as the retainer is meant to cover the
15 fees of the attorneys for all of the debtors, as clearly was
16 the case there. Okay.

17 MR. CALIFANO: So that's -- that issue was
18 irrelevant as to who funded that retainer.

19 And it's also interesting the U.S. Trustee cited Hertz.
20 Because the Hertz case, when talking about the nerve center,
21 I mean, it can't be more on point. The nerve center must be
22 more than a mail dropbox, a bare office with a computer, or
23 the location of an annual executive retreat.

24 So, Your Honor, there's -- if you went to the Palo Alto
25 office, it wouldn't help you in a determination of the

1 important decisions that this debtor has to make, okay. So
2 maybe it doesn't have a nerve center. Maybe the nerve center
3 is Zoom, or whatever it is. But it doesn't have a nerve
4 center. But as we address in our objection on page 9 and
5 following, when you have a situation like this, where there
6 are a few tangible assets, a small asset, or one asset in the
7 District could be enough. And you can have more than one
8 principal place of assets.

9 And if you look at ERG Intermediate Holdings, Judge
10 Hale's case, Your Honor. In that case a \$30,000 retainer in
11 a bank account in Dallas was enough for venue. So, I
12 mean --

13 THE COURT: As under the principal assets
14 theory.

15 MR. CALIFANO: Yes. On the principal assets.
16 That wasn't nerve centered and it wasn't a foreign debtor.
17 That was under the concept of principal assets. And the
18 concept of principal assets is very broad, Your Honor, as it
19 should be. Okay. The facts are here, we have three
20 different basis upon which this Court could find that venue
21 is proper in this District. The first is on the foreign
22 debtors, their retainer, and the rest of the cases are
23 affiliates. Okay. The problem there is the 46-minute gap.
24 Okay.

25 Form over function. They want you -- they want to

1 argue that the nerve center is our mailing address that we
2 put on documents, okay, because you need to have a mailing
3 address. That's just something you need, because it's a
4 harbinger -- you know, the old days, the way things were
5 done. That's Palo Alto. Once again, it's a technicality.
6 There's no purpose that's served by having this case in Palo
7 Alto.

8 And on the principal place of assets, Your Honor, we
9 have -- we've cited cases. There is much -- there's enough
10 basis to find that the principal assets are here in Dallas as
11 anywhere in the United States.

12 And then finally, Your Honor, we don't believe that
13 Your Honor is bound, even if Your Honor finds, I'm sorry,
14 Mr. Califano, those three basis, none of them persuade me.
15 Okay. Or that 46-minute gap, that's a killer. We don't
16 agree that that divests this Court of jurisdiction, or the
17 ability to retain this case.

18 Your Honor could just find that it's not a timely
19 motion because of all the time that's been dedicated to this
20 case and the learning and the impact on this case. The
21 impact on our ability to sell assets. Your Honor could
22 determine it's not timely at this point. Okay. And there
23 would be nothing wrong with that, okay. There wouldn't be a
24 violation and this Court would not have expanded its
25 jurisdiction because right within the statute, it says has to

1 be on a timely -- in a timely manner.

2 So Your Honor could also determine, in our opinion,
3 based on Lazaro and other cases that you can retain in the
4 interest of justice and for the convenience of the parties,
5 you can retain this case. Okay. We don't believe Your Honor
6 is bound by that Sixth Circuit case. Your Honor could easily
7 do that.

8 And we don't have any creditors really arguing that
9 they're being impaired or prejudiced. We have Innovatus
10 jumping on, but they can't even articulate why they're
11 jumping on. We can speculate why they're jumping on having
12 been here these last few hearings, Your Honor.

13 Your Honor, it's -- there is no reason to move this
14 case. Nobody can articulate a move -- a reason to move this
15 case. Nobody can articulate why it is better for the system,
16 for the creditors, for the debtors for this case to be in the
17 District of Delaware, okay. No one can articulate why it is
18 more convenient, it is more economic, why it's better for
19 anyone for this case to be in the Northern District of
20 California. There are three very legitimate basis for you to
21 find that venue is proper. And we also think that there is
22 an argument that even if venue isn't proper, Your Honor could
23 determine that this motion is not timely and we can -- we
24 also believe based on Lazaro and other cases that Your Honor
25 could say, you know what, I don't think venue is proper. I

CINDY SUMNER, CSR (214) 802-7196

1 think, therefore, 46-minute gap is fatal. But you know what,
2 in the interest of justice and convenience of parties, I'm
3 going to retain jurisdiction. So we're not asking Your Honor
4 to go out on a limb.

5 Your Honor, the U.S. Trustee, and this is no offense to
6 present company, the U.S. Trustee is arguing here, we hear
7 all that, but we think you made a foot fault and we want you
8 to go to Delaware. Okay. And there are plenty of cases
9 where the U.S. Trustee says, you don't belong in Delaware.
10 It's only a place of incorporation. And I was quite shocked
11 that the U.S. Trustee mentioned PO Boxes because the very --
12 they've argued in cases that were filed in White Plains,
13 where lawyers got a PO Box and in Sorento where a Jackson
14 Walker lawyer opened a PO Box as a basis for jurisdiction
15 there. They argued that it was improper and that was forum
16 shopping. So they're in a position, Your Honor, where
17 they're trying to usurp the debtors' ability to pick a place
18 to file the case, okay.

19 And debtors are given wide discretion. Okay. There's
20 no abuse here. We're not running away from any party. We're
21 not running away from any regulators. There's no reason to
22 argue that somebody is impaired here. What we're faced with
23 is an argument that we don't believe you satisfied the
24 statute, okay, the way we read the statute. Well, Your
25 Honor, we think we satisfied the statute. We also think

1 they're reading the statute wrong. And even if technically
2 we didn't fit into one of those basis, we believe that Your
3 Honor can retain this case. And there is no compelling
4 reason to move this case. There are a number of compelling
5 reasons why Your Honor should retain the case. Especially at
6 this point.

7 With that, Your Honor, we would ask that the U.S.
8 Trustee's motion be denied.

9 THE COURT: Okay. Thank you.

10 I always give movant the last word. And you don't --
11 you don't have to defend your honor on timeliness.

12 MS. YOUNG: Thank you, Your Honor.

13 THE COURT: I very well remember April 1st,
14 case was filed. I think it was April 11th at 5 something
15 p.m. my courtroom deputy contacted me, as I was taking my
16 dogs to the pet sitter before my cruise. And she said, the
17 U.S. Trustee has filed an emergency motion to transfer venue.
18 So I think that would have been the 11th, Thursday night the
19 11th.

20 MS. YOUNG: It was, Your Honor.

21 THE COURT: And I was leaving 8 a.m. Friday
22 morning, the 12th. And so I asked her to write a very clear
23 email, which I think she did, that I was going to be on a
24 cruise ship without communications for the next 10 or so
25 days. And so I -- you know, the fact that we're here now on

CINDY SUMNER, CSR (214) 802-7196

1 May 7th is because of me, more than anyone else. I was out
2 of pocket and this is when I set the hearing. So you don't
3 need to defend your honor on that.

4 But on the other hand, we've had a lot of wonderful
5 progress in this case, too, which is --

6 MS. YOUNG: And understand -- and
7 understanding, Your Honor, we understand that there has been
8 quite significant progress. But it's almost a natural pause
9 where we are on the case, because we've completed one sale
10 process. One is about to get going, or is in the process of
11 getting going. But it's a natural transition point that if
12 the Court is inclined to transfer venue, this is the right
13 time to do so.

14 And I did also just want to address one point on the
15 ERG ruling. And in ERG, those were Texas corporations.
16 There was venue because they were domiciled in Texas under
17 1408. It was a permissive transfer under 1412 that the
18 parties were seeking. And it was that \$30,000 retainer that
19 Judge Hale, I believe, found was sufficient to keep them in
20 Texas. But there was proper venue already under 1408. And,
21 again, that is what we are asking the Court here today.

22 We understand the law may not be popular. We
23 understand that Congress has gone through many iterations of
24 trying to change the law to make it better. But this is the
25 law we have today. This is the law --

CINDY SUMNER, CSR (214) 802-7196

1 THE COURT: Many iterations? They've ignored
2 all bills --

3 MS. YOUNG: Many attempts.

4 THE COURT: -- haven't they?

5 MS. YOUNG: Yeah, they have.

6 THE COURT: And lobbying efforts.

7 MS. YOUNG: All of the lobbying efforts. We
8 understand --

9 THE COURT: I was laying in bed like a boring
10 person I am reading an 80 page article from 1996 last night
11 about the National Bankruptcy Review Commission that was
12 formed by Congress in 1994 to study changes that were needed
13 to the Bankruptcy Code. And very prominent in that was venue
14 reform. Take out the affiliate provision. Take out the
15 domiciled means state of incorporation provision. 80 page
16 article exploring what was being attempted. Survey of
17 bankruptcy judges. Survey of other professionals, 30 years
18 later.

19 MS. YOUNG: Exactly. This is the statute we
20 have. This is the statutory framework. This is my client's
21 job is to bring these issues to your attention. And that is
22 why we are here today because that is the narrow issue here
23 of whether or not -- I think I'm getting sick -- I know, so I
24 apologize if I actually start losing my voice here.

25 THE COURT: Okay.

CINDY SUMNER, CSR (214) 802-7196

1 MS. YOUNG: But I do think that this is why we
2 are here is to enforce the law. And that is why we brought
3 this motion. So thank you, Your Honor.

4 THE COURT: Okay. Thank you.

5 All right. Well, we're going to take a short break. I
6 promise it will be relatively short. I have a lot of
7 thoughts on this. So it's 3:15 Central, we'll come back at
8 3:30.

9 (Brief recess ensued.)

10 THE COURT: I lied about my time estimate.
11 I'm sorry. I've done that a few times in my life.

12 All right. We are back on the record in Eiger
13 Biopharma. Case number 24-80040.

14 Before this Court is a motion to transfer venue filed
15 by the United States Trustee seeking transfer of the five
16 related Eiger Biopharma cases, Chapter 11 cases to either
17 Delaware, which happens to be the place of incorporation or
18 formation of three of the debtor entities, the three that are
19 U.S. based entities, or alternatively, to the Northern
20 District of California where the debtors' one and only
21 physical office has been in recent years. Which has been
22 alleged to be the debtors' principal place of business.

23 The Court notes that the secured lender in this case,
24 Innovatus, filed a short joinder in which it did not take a
25 position regarding where venue should be, but orally today

CINDY SUMNER, CSR (214) 802-7196

1 the lender's lawyer stated it would choose Delaware, if there
2 were to be a transfer. The Court will take judicial notice
3 that this lender is based in New York and has counsel from
4 Nashville, Tennessee.

5 This is a core -- this Court has jurisdiction under 28
6 USC Section 1334 and this is a core proceeding under 28 USC
7 157(b). The Court has determined it has constitutional
8 authority to make a final ruling here.

9 The Court notes that the movant has the burden of proof
10 on a motion to transfer venue, and the standard is
11 preponderance of the evidence. And the Court would also note
12 that many cases through the years have said a debtor's choice
13 of venue is to be given substantial deference by a Court.

14 Just to further make the record clear, the debtors have
15 been described as a commercial stage biopharmaceutical
16 company focused on the development of innovative therapies
17 for, among other things, hepatitis delta virus and other
18 serious diseases. Thus far in this case, the debtor has
19 successfully auctioned its commercial drug Zokinvy for a sale
20 price that was in excess of \$40 million. I think it was
21 closer to 46 million. And an auction is currently underway
22 for other assets of the debtor.

23 There are five debtor entities. As alluded to, three
24 are U.S. based entities formed in Delaware and two are
25 foreign entities; one formed in the UK and one formed in

1 Ireland.

2 The Court first must look to whether venue is
3 technically proper here. Pursuant to 28 USC 1408(1) or (2),
4 there are two arguments that have been advanced by the
5 debtors. The first argument is the principal place of
6 business for Eiger Biopharma is Dallas, or perhaps anywhere,
7 because it is a virtual company with only intangible assets.
8 Or it looked like they may have some inventory, actually,
9 that's held by third parties in cash, if you want to call
10 that a hard asset. But the vast, vast majority of the
11 debtors' assets are intangibles.

12 So the first argument, again, was the principal place
13 of business can be deemed to be Dallas, since we have a
14 virtual company with only intangible assets. And under this
15 argument, all other debtor entities, the other four could
16 come in as affiliates under 28 USC 1408(2).

17 The second argument advanced by the debtor here today
18 is that the foreign debtor entities are properly venued in
19 Dallas, in that their principal assets in the U.S., really
20 their only assets in the U.S., are in Dallas. Those
21 principal assets, or that principal asset being an interest
22 in a retainer held by debtors' counsel, Sidley & Austin, in
23 Dallas. And under that argument, all other debtor entities
24 can come in as affiliates under 1408(2).

25 The debtor, as we have discussed here today, was

1 arguably handicapped here, a little, in that with respect to
2 its second argument, the foreign debtors' petitions were
3 filed 46 minutes after the first filed case, what we'll call
4 the debtor parent company. And they are actually shown on
5 the face of the petition to be affiliates of the first filed
6 case. Okay. The Court has thought hard about that, as you
7 could probably tell by my many questions during the hearing.
8 The Court on balance thinks it should apply form over
9 substance -- or substance over form here. I said that
10 backwards.

11 The evidence is unrefuted, again, that the debtor --
12 the foreign debtors' only assets in the U.S., certainly its
13 principal assets are the retainer. There was case law cited
14 in the debtors' briefing that supports the notion that all
15 five debtors would have an interest in the retainer,
16 regardless of which debtor put it up because it was for the
17 benefit of all of them. So this means venue is proper for
18 the foreign entity, or entities, under 1408(1). Their
19 principal assets are here in this District. It's stipulated,
20 Sidley & Austin's account in Dallas. And so that means venue
21 of the other debtors can properly come in as affiliates under
22 1408(2).

23 The Court has focused heavily on this issue and the
24 word, pending, in 28 USC 1408(2). But as mentioned today,
25 there is a doctrine in the law that even if a statute is

1 unambiguous, the Court should not interpret it in a way to
2 yield absurd results. And here the Court believes it would,
3 indeed, yield an absurd result to hold that the sequence of
4 the filing of these five petitions within a 46-minute period
5 was fatal here. Because the foreign entity whose principal
6 assets are in Dallas, you know, was filed case number 4, or
7 46 minutes after the first filed case, when the clear intent
8 was for the cases to be filed simultaneously, all
9 simultaneously. Again, I made the hypothetical of days of
10 or where -- days of old where you'd go in the Clerk's Office
11 and hand the Clerk a pile of petitions. It's clearly the
12 intent here was that everything -- all the debtor cases were
13 being filed simultaneously. There's no temporal concept here
14 of any significance, like in the case of a statute of
15 limitations where you miss a statute of limitations. That's
16 a hugely significant legal thing. There's just nothing here
17 that is of such temporal significance.

18 Moreover, as we discussed during the hearing, this is a
19 defect, if it is a defect, that can be easily cured. You
20 know, my hypothetical was the Court could rule in favor of
21 the U.S. Trustee. You know, you're right. The debtor messed
22 up with this 46-minute time gap and sequence, so I'm going to
23 dismiss the cases. And then they could cure the defect
24 immediately 5 seconds later by putting the foreign entity
25 back in bankruptcy in Dallas, relying on the principal assets

CINDY SUMNER, CSR (214) 802-7196

1 holding of this Court, and then bring the others in as
2 affiliates. That's just, again, an absurd result here. So I
3 find that venue has properly been met here, has met the
4 standards of 1408(1) and (2).

5 As far as the debtors' other arguments. The debtor has
6 raised some very interesting issues, I think, about what is
7 the principal place of business and what are -- what's the
8 meaning of principal assets in our modern world where you do
9 have what appears to be an entirely virtual company, and
10 almost exclusively intangible assets. And what does that
11 mean? Does that mean there's no viable option for principal
12 place of business, or principal assets, or is it everywhere?
13 Or do you default to something like a mailbox? A mail drop?
14 When in another context we have people saying, that's not
15 enough. It has to be a nerve center. It seems like we're
16 sort of in a no man's land, brave new world.

17 And just to drive this point home for the record to be
18 clear, it was unrefuted here, we heard that none of the
19 debtors' professionals have ever been to Palo Alto,
20 California. We've heard that there is one, I think it's
21 part-time, not even full-time employee at this point who
22 might go into the office. We have a CEO in New Jersey. We
23 have general counsel in North Carolina. We had a fractional
24 CFO in Nevada. We had a decentralized organization, to use
25 the CEO's words. We have no boxes of documents out in Palo

CINDY SUMNER, CSR (214) 802-7196

1 Alto. We don't even have servers out there. We have
2 cloud-based data. We have, I think I said this, no lab
3 space. The debtors have a national bank with branches or
4 locations all over the country. We have evidence that
5 meetings happen by Zoom. We have evidence that there
6 happened to be 500 or so creditor entities spread in 37
7 states and 14 different countries.

8 The CEO testified credibly that he had ceased going to
9 the Palo Alto office in June of 2023. Again, the principal
10 assets are all intangible. They range from intellectual
11 property to license rights, and contract rights, and
12 sublicenses, you know, all sorts of contractual rights in
13 intellectual property as well as, I guess, financial assets
14 that are not cash stored in a vault, you know, or in
15 institutions.

16 So I think with facts like this we have some real, I
17 would say room for creativity of lawyers, pursuant to the
18 venue statute. It really is a head scratcher what should be
19 deemed the principal place of business or principal assets.
20 You know, are they every -- does that mean venue can be
21 anywhere, everywhere, or nowhere under those two factors? I
22 don't know. But what I've determined is I really don't need
23 to go there here. I am finding proper venue with regard to
24 the foreign entities having principal assets in Dallas and
25 then, thereby, they can bring in the other debtors as

CINDY SUMNER, CSR (214) 802-7196

1 affiliates. Again, we have one debtor entity, which I'm
2 calling the parent, the first filed entity, and all four
3 other entities, I'll take judicial notice are subs of it.

4 Now having found this, I am going to consider what's in
5 the interest of justice and what's in convenience of the
6 parties under 28 USC 1412. I think I'm statutorily required
7 to do that. And I think Judge Shelley Chapman's analysis in
8 Patriot Coal was very helpful. You know, if you remember the
9 facts in that case, you had a lead debtor that was
10 incorporated in the State of New York just a few weeks before
11 a bankruptcy was filed. It was incorporated in June of 2012
12 and then the bankruptcy was filed in July. And there were no
13 employees or business operations in New York. Principal
14 asset was a bank account with \$97,000 opened in a New York
15 branch of Capital One. So Judge Chapman correctly noted, you
16 know what, technically there's venue here. You know, I may
17 not be thrilled by the idea of a company being incorporated a
18 few weeks before the bankruptcy. And the debtor stipulated
19 that the New York companies were set up to establish venue.
20 But she found proper venue. But she said, now I'm going to
21 look at what's in the interest of justice and convenience of
22 the parties. And I think that is what you're required to do
23 here.

24 And there, of course, she found many compelling facts
25 to transfer not to the, you know, west Virginia venue that

CINDY SUMNER, CSR (214) 802-7196

1 had been argued for, but actually to the Eastern District of
2 Missouri. And she looked at such things as, you know, this
3 was the world's largest private sector coal company with 12
4 active mining operations. It had hard assets everywhere. It
5 had a corporate headquarters in Missouri with many employees.
6 There were 35 general unsecured creditors who joined in the
7 motion to transfer venue of mine workers and sureties, and
8 the U.S. Trustee even joined. There were 4,000 employees in
9 this case and 11,860 retirees.

10 I'm just pointing that out because there were very,
11 very compelling reasons in the interest of justice to
12 transfer venue out of New York, which Judge Chapman did. And
13 that is a contrast to what we -- we have here. I do think,
14 again, it's appropriate to consider what's in the interest of
15 justice and are there any compelling arguments to transfer
16 here to either Delaware or Northern California. And I just
17 don't think any have been demonstrated here. As one party
18 said today, there doesn't seem to be one party who is hurt or
19 prejudiced if this Court keeps venue versus sending it to
20 Delaware or Northern District of California.

21 We do have creditors in Texas. We have creditors
22 everywhere, as I pointed out. But we do have some creditors
23 in Texas. We do have a staffing company in Texas. We do
24 have distribution of the drug in Texas. And, again, we're in
25 this brave new world where we don't have -- you know, even

CINDY SUMNER, CSR (214) 802-7196

1 the drugs, the inventory is held by third parties. We just
2 have no hard assets or office to really point to in the way
3 that existed in Patriot Coal. So I find that there are no
4 compelling arguments for transfer here either in the interest
5 of justice or for the convenience of the parties.

6 Now, I'm going to go one step further and say, even if
7 I am wrong about there being technically proper venue under
8 28 USC 1408, there, of course, is an argument that can be
9 made and that has been made regarding a Bankruptcy Court's
10 ability to retain a case filed in an improper venue as
11 opposed to it being mandatory, say, under 28 USC 1406 to
12 either transfer or dismiss. We talked a few times about the
13 Western District of Texas case that I keep mispronouncing,
14 Larano, or Lorzano, the Judge Clark case. And there have
15 been a few others that have gone the same way.

16 I think the debtor made a compelling argument, why is
17 there a bill before Congress right now to change 28 USC 1412
18 or 1408, or maybe both, if 1406 applies here with regard to
19 bankruptcy cases? So if I'm technically wrong about venue
20 being proper here because of the foreign entity with the
21 principal assets, retainer, here in Dallas, I'm going to
22 follow Lazaro and say under the facts and circumstances of
23 this case, and giving deference to the Fifth Circuit's
24 Commonwealth Puerto Rico case, I think it's appropriate to
25 retain venue. And it would serve no interest of anyone to

CINDY SUMNER, CSR (214) 802-7196

1 transfer at this juncture of the case.

2 I am going to say that I respect what has happened here
3 today. I do well understand that the U.S. Trustee, we all
4 have our client to serve or a master to serve, in my case
5 it's the public and, you know, I guess the higher Courts. We
6 have to be concerned about the integrity of the system and
7 gamesmanship and other improprieties. But, you know, as I
8 said many times, facts matter. And we have a case here
9 where, again, it's a virtual company. We have already had
10 extraordinary success as far monetizing for the benefit of
11 creditors one of the debtors' main assets. It would appear
12 to me that the secured creditor may very well be in a
13 position to be paid in full at the rate we're going here. I
14 don't have employees or retirees or other major
15 constituencies who are, again, I think being harmed or
16 prejudiced or disadvantaged in some way in this case. So all
17 of that matters very much to me and has factored into my
18 thinking.

19 All right. So that will do it for the Court's ruling.
20 The motion is denied. And it is up to you all whether you
21 want a lengthy set of findings and conclusions of order --
22 and order, or if you want to just upload a one or two
23 sentence order that the motion is denied based on the Court's
24 oral bench ruling. So I'll let you talk amongst yourself.
25 But I'll defer to the debtors' counsel to be the scrivener on

CINDY SUMNER, CSR (214) 802-7196

1 whatever is uploaded, whether it's a one sentence order or a
2 lengthy one.

3 MR. CALIFANO: Yes, Your Honor. We'll consult
4 with Ms. Young and come to an agreement.

5 THE COURT: Okay.

6 MR. CALIFANO: Thank you. Thank you, Your
7 Honor.

8 THE COURT: Thank you.

9 We're adjourned.

10 (End of Proceedings.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CINDY SUMNER, CSR (214) 802-7196

C E R T I F I C A T E

I, CINDY SUMNER, do hereby certify that the
foregoing constitutes a full, true, and complete
transcription of the proceedings as heretofore set forth in
the above-captioned and numbered cause in typewriting before
me.

/s/Cindy Sumner

CINDY SUMNER, CSR #5832
Expires 10-31-2024
Cindy Sumner, CSR
5001 Vineyard Lane
McKinney, Texas 75070
214 802-7196

CINDY SUMNER, CSR (214) 802-7196