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SIDLEY AUSTIN LLP
Thomas R. Califano (TX Bar No. 24122825)
William E. Curtin (admitted *pro hac vice*)
John J. Kuster (admitted *pro hac vice*)
Jon W. Muenz (admitted *pro hac vice*)
Anne G. Wallice (admitted *pro hac vice*)
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: tom.califano@sidley.com
wcurtin@sidley.com
jkuster@sidley.com
jmuenz@sidley.com
anne.wallice@sidley.com

SIDLEY AUSTIN LLP
Charles M. Persons (TX Bar No. 24060413)
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Email: cpersons@sidley.com

Attorneys for the Debtors
and Debtors in Possession

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

In re: EIGER BIOPHARMACEUTICALS, INC., *et al.*[1] Debtors.	Chapter 11 Case No. 24-80040 (SGJ) (Jointly Administered) (Emergency Relief Requested)

DEBTORS' EMERGENCY MOTION *IN LIMINE* TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF DAVID E. KELTNER

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are: Eiger BioPharmaceuticals, Inc. (1591); EBPI Merger Inc. (9986); EB Pharma LLC (8352); Eiger BioPharmaceuticals Europe Limited (N/A); and EigerBio Europe Limited (N/A). The Debtors' service address is 2100 Ross Avenue, Dallas, Texas 75201.

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Emergency relief has been requested. Relief is requested not later than August 20, 2024 at 9:30 a.m.

If you object to the relief requested or you believe that emergency consideration is not warranted, you must appear at the hearing if one is set, or file a written response prior to the date that relief is requested in the preceding paragraph. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

A hearing will be conducted on this matter on August 20, 2024 at 9:30 a.m. prevailing Central Time in Courtroom 1, Floor 14, 1100 Commerce Street, Dallas, TX 75242-1496.

You may participate in the hearing either in person or by an audio and video connection.

Audio communication will be by use of the Court's dial-in facility. You may access the facility at 1.650.479.3207. Video communication will be by use of the Cisco WebEx platform. Connect via the Cisco WebEx application or click the link on Judge Jernigan's home page. The meeting code is 2304-154-2638. Click the settings icon in the upper right corner and enter your name under the personal information setting.

Hearing appearances must be made electronically in advance of electronic hearings. To make your appearance, click the "Electronic Appearance" link on Judge Jernigan's home page. Select the case name, complete the required fields and click "Submit" to complete your appearance.

The debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors") respectfully submit this memorandum of law in support of their motion *in limine* (the "Motion") to exclude the expert report of David E. Keltner, filed August 16, 2024 [Docket No. 521], and preclude him from testifying at the hearing (the "Hearing") on Debtors' *Motion for Entry of an Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves to Unimpair Claim* (the "Estimation Motion") [Docket No. 488].[2]

PRELIMINARY STATEMENT

1. Two business days before the Hearing scheduled for August 20, 2024—without any notice whatsoever to the Debtors—Innovatus Life Sciences Lending Fund I, LP ("Innovatus") filed an expert report attempting to challenge the Debtors' eminently reasonable estimation that the above-captioned chapter 11 proceedings will be resolved in approximately one year.[3] In doing

[2] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Estimation Motion or the Plan (as defined herein).

[3] *See* Estimation Motion at ¶ 16.

so, Innovatus has severely prejudiced the Debtors, as there is now insufficient time for the Debtors to depose Mr. Keltner or engage their own expert to provide a rebuttal report or testimony in advance of the Hearing. The Debtors had no choice but to file this Motion to cure the prejudice they now face.

2. While Innovatus's procedural failings should be sufficient on their own to warrant exclusion of Mr. Keltner's report and testimony, his opinions should also be excluded for the independent reason that they are inadmissible under the relevant legal standards. Your Honor is an experienced United States Bankruptcy Court judge. There is absolutely no basis for Innovatus to question Your Honor's ability to estimate the time to resolve the straightforward and narrow subject of the claims objection, or how long any appeal(s) could take. Simply put, Mr. Keltner does not have the "knowledge" that would qualify him as an appropriate expert under the applicable rules. Indeed, the databases and statistics upon which Mr. Keltner's entire report are based are readily publicly available information, and even a cursory review of his report shows that he cherry-picked matters handled by his law firm. Furthermore, Mr. Keltner's opinions are not based upon any methodology, let alone a reliable one. His expert opinion simply will not aid the Court in resolving the issues presented in the Estimation Motion.

3. For these reasons, and the reasons set forth below, the Motion should be granted and the expert report and testimony of Mr. Keltner excluded.

BACKGROUND

4. On July 15, 2024, the Debtors filed the *Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 424]. On July 28, 2024, the Debtors filed the *Notice of Filing of Amended Plan* [Docket No. 455], and the *Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* was attached thereto as

Exhibit A. On August 15, 2024, the Debtors filed a *Second Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 517-1] (the "Plan"). As discussed further in the Estimation Motion, and as Innovatus was aware, the Plan provides for the segregation of cash in an escrow account for the treatment of Prepetition Term Loan Claims (as defined in the Plan).[4]

5. On July 29, 2024, a hearing before the Court was held, during which Innovatus raised the issue of discovery that it purportedly required with respect to the Estimation Motion:

> THE COURT: Okay. Let me back up and ask you about discovery. Why do you think you would need discovery on your own claim?
>
> MR. PROSTOK: Well, it -- to some extent there were issues with the plan that we think we maybe need limited discovery. If we can get to resolution on everything else other than this number, then our discovery may not be necessary. It may be very limited.[5]

At no time during this discussion did Innovatus raise the prospect of expert discovery. At the conclusion of the hearing, the Court set a hearing on the Estimation Motion for August 20, 2024.

6. On August 2, 2024, the Debtors filed the Estimation Motion seeking entry of an order estimating the Innovatus claim for purposes of calculating an escrow amount to be segregated in an escrow account.[6] The Debtors estimated Innovatus's claim as of September 15, 2025 (*i.e.*, approximately one year after confirmation of the Debtors' Plan) out of an abundance of caution,[7] although the Debtors believe all issues with respect to Innovatus's simple claim can be determined in far less time. This is because there is only one single, direct question for the Court

[4] *See* Estimation Motion at ¶ 7.

[5] July 29, 2024 Hr'g Tr., 26:19—27:1.

[6] For a more detailed recitation of the facts and circumstances supporting this Motion and Debtors' chapter 11 cases, Debtors respectfully refer the Court to the Estimation Motion [Docket No. 488].

[7] Estimation Motion at ¶ 16.

to decide: whether there was or was not a valid event of default based upon a Material Adverse Change (as defined in the Prepetition Term Loan Credit Agreement) as alleged by Innovatus.

7. On August 16, 2024, two business days prior to the Hearing, Innovatus filed the Expert Report of David E. Keltner (the "Report") regarding "the length of appeals from an objection-to-claim/adversary proceeding . . . conducted in a Dallas Bankruptcy Court to a District Court for the Northern District of Texas, a subsequent appeal to the Fifth Circuit Court of Appeals, and possible motions for rehearing and appeal to the United States Supreme Court."[8] In the three-week period between the July 29 hearing and August 16, Innovatus never once mentioned that it contemplated expert discovery. Innovatus submitted the Report without any notice whatsoever.

8. In the Report, Mr. Keltner, a partner at the law firm Kelly Hart & Hallman, LLP and former Justice on the Texas Court of Appeals, concludes that a one-year time period for resolution of the above-captioned chapter 11 cases is "unrealistic" and that a time period between three and five years is "more realistic."[9] Mr. Keltner bases his opinion on (1) matters located on Lex Machina, a legal analytics service available via LexisNexis; (2) statistics published on the website of the Administrative Office of the United States Courts; and (3) anecdotes regarding select cases his law firm has handled.[10] Mr. Keltner did not provide any statistically significant data he compiled on his own as part of his report. Essentially, Mr. Keltner did nothing more than review publicly available data and include a few cherry-picked cases in which he or his law firm was personally involved.

[8] Report at 1.

[9] *Id.* at 3.

[10] *Id.* at 4-11.

ARGUMENT

9. A motion *in limine* is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered."[11] Courts have considerable discretion to manage the submission of evidence, including granting motions *in limine*.[12] For the reasons detailed below, the Court should exercise its discretion and exclude Mr. Keltner's report and testimony.

I. THE REPORT PREJUDICES DEBTORS BECAUSE INNOVATUS DID NOT PROVIDE SUFFICIENT NOTICE

10. As an initial matter, the Report should be struck—and Innovatus should not be allowed to present testimony from Mr. Keltner at the Hearing—because Innovatus did not provide sufficient notice to the Debtors or the Court that it intended to introduce expert testimony. Courts, including this Court, regularly bar expert testimony where a party does not timely disclose its experts.[13]

11. In *In re Highland Capital Management*, a trust disclosed the existence of its experts 60 hours before a motion hearing.[14] In excluding the expert evidence, this Court noted that the trust's "revelation . . . that it sought to offer expert testimony came far too late."[15] The Court also acknowledged that the trust "never raised even the prospect of expert testimony" at any point with the Court, and that "[o]bviously" the Court would have "fully vetted with the parties at the

[11] *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984).

[12] *See id*. at 41-42.

[13] *See, e.g.*, *In re Highland Cap. Mgmt., L.P.*, No. 19-34054-SGJ11, 2023 WL 4056065, at *7 (Bankr. N.D. Tex. June 16, 2023) (Jernigan, J.) (excluding proposed experts' testimony because experts were not "appropriately and timely disclosed"); *Seibert v. Jackson Cnty., Miss.*, No. 1:14-CV-188-KS-MTP, 2015 WL 5039950, at *2 (S.D. Miss. Aug. 26, 2015) ("Allowing [proposed witness] to testify as an expert would prejudice [d]efendants insofar as they did not receive timely notice of her opinions and had no opportunity to depose her as an expert or obtain rebuttal testimony.").

[14] 2023 WL 4056065, at *7.

[15] *Id.*

status/scheduling conferences the need for experts and the need for any discovery of them if [the trust] mentioned it as a possibility."[16]

12. The circumstances here are nearly identical to those in *Highland*. Innovatus disclosed its expert with only two business days' notice before the Hearing, even though Innovatus has known since the Debtors filed a plan on July 15—more than a month ago—that the issue as to the amount of escrow required would need to be resolved. Yet, Innovatus never made any mention of experts in its filings with the Court nor did it raise the issue of experts at the July 29 hearing, and Innovatus made no effort to discuss expert witnesses with the Debtors in the weeks since. Instead, Innovatus waited until August 16 to file its expert report, leaving the Debtors with no opportunity to depose Innovatus's expert or engage its own expert to submit a rebuttal report or provide testimony at the Hearing. Admitting Innovatus's proffered expert and his opinions would thus substantially prejudice the Debtors. The Court should not countenance Innovatus's attempt to engage in "trial by surprise," and should exclude the Report and any testimony from Mr. Keltner.[17]

II. MR. KELTNER'S EXPERT OPINIONS ARE INADMISSIBLE

13. Federal Rule of Evidence 702 ("FRE 702") provides that a party seeking to offer expert testimony must show that "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable

[16] *Id.*

[17] Nor can Debtors' prejudice be cured at this point by extending the current schedule for the Confirmation hearing. Debtors and other stakeholders are entitled to hold the current Hearing date, and Innovatus's dilatory litigation tactics should not be rewarded via further delays here.

principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."[18] Innovatus has not met its burden to show that Mr. Keltner meets these criteria.

A. Mr. Keltner Does Not Have "Specialized Knowledge" That Will Help the Court Resolve the Issues in the Estimation Motion

14. First, Mr. Keltner does not possess the "specialized knowledge" that will render his opinions helpful to the trier of fact. Opinion testimony does not rest on scientific, technical, or other specialized knowledge if the "testimony falls within the realm of knowledge of the average lay person."[19] In Mr. Keltner's first two opinions, he relies on data output from the Lex Machina data analytics service, as well as statistics available on the Administrative Office of the United States Courts.[20] Rather than reflecting the specialized knowledge of an expert, Mr. Keltner's opinions are simply lay testimony available by running searches in a commercially-available database and viewing a publicly-available website, obtaining statistics, and regurgitating them.

15. Notably, Mr. Keltner does not include any analysis in his report that might fall within the ambit of expert testimony: he does not opine on the reliability of Lex Machina or the Administrative Office of the United States Courts website, explain how these platforms operate in a technical sense, provide unique insight into whether the information provided by these sources is complete or even representative, or state that the information is beyond the knowledge of an average user of the Internet. The evidence that Innovatus seeks to present through Mr. Keltner is certainly within the general understanding of this Court (the trier of fact here), which is well experienced in managing bankruptcy cases (including with respect to appeals and how long they may take) and does not need to be instructed as to how federal legal procedure works. Indeed, this

[18] Fed. R. Evid. 702; *see also In re Highland Cap. Mgmt., L.P.*, 2023 WL 4056065, at *8 (applying FRE 702 to contested matter).

[19] *United States v. Caldwell*, 586 F.3d 338, 348 (5th Cir. 2009).

[20] Report at 4-8.

is well within the purview of what Innovatus's counsel could argue themselves. The proffered "expert" testimony of Mr. Keltner thus fails to satisfy the first prong of FRE 702.

16. For similar reasons, the personal anecdotes relied upon in Mr. Keltner's opinions likewise do not constitute "specialized knowledge." While Mr. Keltner refers the Court to self-selected examples of his law firm's experience with appeals, petitions for rehearing, and writs of certiorari,[21] the average individual—and certainly the capable counsel representing the parties—could calculate the length of appeal processing times through his or her own search of databases and other sources readily available to the public. Mr. Keltner should not be qualified as an expert regarding length of appeals processing times on these bases.

B. Mr. Keltner's Opinions Are Not Based Upon a Reliable Methodology

17. Mr. Keltner's expert report and testimony should be excluded for the additional reason that his opinions are not based on a reliable methodology. FRE 702 "imposes on the [trial] court a gatekeeper function" to ensure that all expert testimony "is not only relevant, but reliable."[22] "The reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, et alia."[23] "[T]he expert's testimony must be reliable at every step or else it is inadmissible."[24]

18. With respect to an expert's methodology, courts are required "to make a 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the

[21] Report at 6-11.

[22] *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589 (1993).

[23] *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 355 (5th Cir. 2007) (quoting *Heller v. Shaw Indust., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999)).

[24] *Knight*, 482 F.3d at 355.

facts in issue.'"[25] "This requires some objective, independent validation of the expert's methodology."[26] The expert's assurances as to the validity of his methodology are insufficient.[27] "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."[28]

19. Applying these principles, Mr. Keltner's lack of a reliable methodology, or any methodology at all, is plainly insufficient. Mr. Keltner provides no basis for his decision to rely on the Lex Machina database or the statistics available on the Administrative Office of the United States Courts website. Mr. Keltner has no unique expertise with respect to these public sources, and likewise does not suggest that his "methodology," to the extent it can be called that, has been independently validated or used previously by any other expert conducting a similar analysis. Indeed, Mr. Keltner fails to compare his methodology to any established one. These deficiencies are fatal to Mr. Keltner's opinions.[29]

20. The portions of Mr. Keltner's report based solely on his cherry-picked and self-serving anecdotal experience are likewise unreliable, and therefore, infirm.[30] *Western Air Charter, Inc. v. Schembari* is instructive on this score.[31] In *Schembari*, an airline service's expert opined that "the average length of the business relationship between an aircraft owner and an aircraft

[25] *Bear Ranch, L.L.C. v. Heartbrand Beef, Inc.*, 885 F.3d 794, 802 (5th Cir. 2018) (quoting *Daubert*, 509 U.S. at 592-93).

[26] *Moore v. Ashland Chemical Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

[27] *Id.*

[28] *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

[29] *See, e.g.*, *Dart v. Kitchens Brothers Manufacturing Co.*, No. 06-30658, 2007 WL 3283750, at *3 (5th Cir. Nov. 7, 2007) (magistrate judge did not abuse discretion in excluding expert testimony in part because expert "could not establish that his method had ever been used before and did not compare his method with an established one").

[30] Report at 8-11.

[31] No. LACV17420JGBKSX, 2019 WL 6998769, at *3 (C.D. Cal. Jan. 11, 2019).

management company is between seven and nine years."[32] The court ultimately found that the expert's methods were unreliable and excluded the challenged opinion because "[d]espite [the proposed expert's] extensive background in the aircraft management industry, a rough estimate based only in his anecdotal personal experiences in the airline industry [was] insufficient to establish the reliability of the specific figure of '7-9 years.'"[33]

21. Similarly here, Mr. Keltner's estimates of the duration of appeals in various courts based solely on a few of his and his law firm's experiences are unreliable and should be excluded. For example, the high end of what he refers to as a "reasonable time for an appeal from the Bankruptcy Court related to the Proceedings until a final judgment rendered in an appeal to the United States District Court for Northern District of Texas" is based on a *single* appeal that his "firm handled" —although in which he does not appear to have been personally involved—while he uses the "median" from the Lexis database as the low end of his range. Mr. Keltner does the same thing for the duration of appeals to the Fifth Circuit; he bases the high end of his "fair range" for such appeals on a single case that his "firm"—but not he—is handling, and then offers as the low end of that range a number that is higher than the *average* length of such appeals over each of the past two full years even based on his own suspect sources. He presents no basis to conclude that these "unsubstantiated extrapolations from his personal experience," which amount to nothing more than anecdotal cherry picking, are representative or reliable.[34]

[32] *Id.*, at *2.

[33] *Id.*, at *3.

[34] *Schembari*, 2019 WL 6998769, at *2.

CONCLUSION

22. For the foregoing reasons, the Debtors respectfully request that the Court exclude the expert report of David E. Keltner, and preclude him from testifying at the hearing on Debtors' Estimation Motion.

[Remainder of page intentionally left blank.]

Dated: August 19, 2024
Dallas, Texas

SIDLEY AUSTIN LLP

/s/ *Thomas R. Califano*

Thomas R. Califano (TX Bar No. 24122825)
William E. Curtin (admitted *pro hac vice*)
John J. Kuster (admitted *pro hac vice*)
Jon W. Muenz (admitted *pro hac vice*)
Anne G. Wallice (admitted *pro hac vice*)
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: tom.califano@sidley.com
wcurtin@sidley.com
jkuster@sidley.com
jmuenz@sidley.com
anne.wallice@sidley.com

and

Charles M. Persons (TX Bar No. 24060413)
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Email: cpersons@sidley.com

Attorneys for the Debtors and Debtors in Possession

Certificate of Service

I certify that on August 19, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas.

/s/ Thomas R. Califano
Thomas R. Califano

Certificate of Conference

The undersigned hereby certifies that, on August 19, 2024, at 6:15 p.m. CT, he communicated via email correspondence with a representative of Innovatus, as required by the Procedures for Complex Cases in the Northern District of Texas and Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas, notifying counsel of the filing of this Motion. Innovatus' counsel responded at 7:04 p.m. CT consenting to Debtors' filing of the Motion.

/s/ Jon W. Muenz
Jon W. Muenz

Exhibit A

Proposed Order

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

In re:	Chapter 11
EIGER BIOPHARMACEUTICALS, INC., *et al.* [1]	Case No. 24-80040 (SGJ)
	(Jointly Administered)
Debtors.	

ORDER APPROVING DEBTORS' EMERGENCY MOTION *IN LIMINE* TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF DAVID E. KELTNER

Upon the motion ("Motion")[2] of Eiger BioPharmaceuticals, Inc., and its debtor affiliates, as debtors and debtors in possession (collectively, the "Debtors"), for entry of an order (this "Order") (a) excluding the expert report of David E. Keltner, filed August 16, 2024; and (b) precluding Mr. Keltner from testifying at the Hearing; and this Court having jurisdiction over this

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are: Eiger BioPharmaceuticals, Inc. (1591); EBPI Merger Inc. (9986); EB Pharma LLC (8352); Eiger BioPharmaceuticals Europe Limited (N/A); and EigerBio Europe Limited (N/A). The Debtors' service address is 2100 Ross Avenue, Dallas, Texas 75201.

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

matter pursuant to 28 U.S.C. § 1334; and this matter being a core proceeding within the meaning of 28 U.S.C. § 157(b)(2); and the Court having found that it may enter a final order consistent with Article III of the United States Constitution; and that venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and appropriate notice of and opportunity for a hearing on the Motion having been given and no other notice need be provided; and the relief requested in the Motion being in the best interests of the Debtors' estates, their creditors and other parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is **GRANTED**.

2. Mr. Keltner's expert report is excluded, and he is precluded from testifying at the Hearing.

3. The Debtors are authorized and empowered to take any actions necessary to implement and effectuate the terms of this Order.

4. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order.

###END OF ORDER###

Submitted By:

SIDLEY AUSTIN LLP

Thomas R. Califano (TX Bar No. 24122825)
William E. Curtin (admitted *pro hac vice*)
John J. Kuster (admitted *pro hac vice*)
Jon W. Muenz (admitted *pro hac vice*)
Anne G. Wallice (admitted *pro hac vice*)
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: tom.califano@sidley.com
wcurtin@sidley.com
jkuster@sidley.com
jmuenz@sidley.com
anne.wallice@sidley.com
and

Charles M. Persons (TX Bar No. 24060413)
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Email: cpersons@sidley.com

Attorneys for the Debtors and Debtors in Possession