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FORSHEY & PROSTOK, LLP
Jeff P. Prostok
TX State Bar No. 16352500
Emily S. Chou
TX State Bar No. 24006997
777 Main Street, Suite 1550
Fort Worth, TX 76012
Tel: 817-877-8855
Fax: 817-877-4151
Email: jprostok@forsheyprostok.com
echou@forsheyprostok.com

KRAMER LEVIN NAFTALIS & FRANKEL, LLP
Adam C. Rogoff (admitted *Pro Hac Vice*)
P. Bradley O'Neill (admitted *Pro Hac Vice*)
Andrew J. Citron (admitted *Pro Hac Vice*)
1177 Avenue of the Americas
New York, NY 10036
Tel: 212-715-9100
Fax: 212-715-8000
Email: ARogoff@kramerlevin.com
BOneill@kramerlevin.com
ACitron@kramerlevin.com

Counsel for Innovatus Life Sciences Lending Fund I, LP

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)
Debtors.	§	(Jointly Administered)

INNOVATUS LIFE SCIENCES LENDING FUND I, LP'S
EMERGENCY MOTION FOR STAY PENDING APPEAL

[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 Ave., Dallas, Texas 75201.

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Innovatus Life Sciences Lending Fund I, LP ("Innovatus") hereby submits this emergency motion (the "Motion") pursuant to Rule 8007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") seeking a stay pending Innovatus's appeal of this *Court's Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves to Unimpair Claim* [Dkt. No. 561] (the "Estimation Order") substantially in the form attached hereto as **Exhibit A**. In support of this Motion, Innovatus respectfully submits as follows:

PRELIMINARY STATEMENT

1. The Debtors' proposed plan of liquidation provides for the establishment of an escrow to fund the payment of Innovatus's oversecured claim and use the remainder of its undisputed cash collateral to fund distributions to junior creditors and litigation against Innovatus. In early August, the Debtors moved under Sections 502(c) and 105 of the Bankruptcy Code to estimate Innovatus's secured claim. The Court held a hearing on August 20, 2024, and, on August 23, entered an order estimating the amount of Innovatus's claim at $15,738,961.47. On that basis, the Court deemed it "unimpaired" by the Debtors' plan.

2. The Debtors have asserted to Innovatus that the Court's ruling deprives Innovatus of standing to object to confirmation even though the plan causes it an obvious economic injury by redirecting its cash collateral to other parties. On the same basis, they will likely also argue that Innovatus lacks standing to appeal from any order confirming that plan, thereby potentially depriving Innovatus of Article III review of an order that causes it very material harm.

3. To prevent this harm, Innovatus asks this Court to stay the Estimation Order pending the conclusion of the hearing on confirmation of the Debtors' plan. Such a stay is essential to allow Innovatus to assert objections that were not resolved—or even considered—at the estimation hearing as well as to preserve its appellate rights. If the Court determines Innovatus's

objections lack merit after the confirmation hearing, it can terminate the stay, confirm the plan, and allow the appellate process to proceed.

4. Absent a stay, Innovatus faces irreparable harm. Not only may it be denied standing to assert objections to confirmation that the Court has not yet considered, but it may be denied the right to appeal an order confirming the plan which would cause it substantial harm. Among these harms are stripping Innovatus of its liens, distributing its collateral proceeds to junior stakeholders and a trust that will use those funds to sue Innovatus, and cancellation of Innovatus's prepetition loan documents. In addition, the plan expressly provides that the distributions of Innovatus's cash collateral will be made "free and clear" of any claims, effectively denying Innovatus a remedy if it prevails on appeal.

5. On the other hand, a stay of the estimation order pending the conclusion of the confirmation hearing threatens no cognizable harm to any other party. It will merely allow Innovatus to appear at the confirmation hearing and assert its objections, as well as preserve its appellate rights. No other party can credibly argue they are harmed by Innovatus preserving its rights.

6. Furthermore, under applicable Fifth Circuit precedent, Innovatus has a substantial likelihood of success on appeal or, at the very least, a "substantial case on appeal." First, a motion made under Section 502(c) of the Bankruptcy Code does not authorize the Court to make a ruling about Innovatus's impairment under Section 1124 of the Bankruptcy Code, an issue that is generally addressed at confirmation. Moreover, the requirements for estimation under Section 502(c) plainly were not met. Innovatus's claim is neither contingent nor unliquidated under applicable case law. Nor would fixing the amount of its claim have unduly delayed these cases. Not only could the Debtors have proposed plan terms that avoided any arguable need for

estimation, but they could and should have addressed the proper amount of the proposed escrow by demonstrating the "indubitable equivalence" under the cram down provisions of the Bankruptcy Code. To use estimation to circumvent these procedures and also deprive Innovatus of standing to object to confirmation or pursue an appeal would be clear error.

7. Second, the Court's determination that the Debtors' Claim Objection will be fully resolved in two years is patently inconsistent with the standards applicable under the cram down provisions, which would have mandated that it protect Innovatus from any reasonable risk of becoming undersecured. The two-year period itself, moreover, was unsupported by any evidentiary foundation and required rejection of the only evidence offered to the Court, which demonstrated that the average length of appeals from the bankruptcy court to the Fifth Circuit last anywhere from 11.5 months to 36 months, but may last months longer.

8. Third, this Court rejected Innovatus's request for a reserve that included $13,127,274.91 in attorney's fees (which was well-supported with evidence of fees incurred to date, which are far below the Debtors' fees incurred to date) by predicting what it would approve if a request was made under Bankruptcy Code Section 506(b). In making this prediction, however, the Bankruptcy Court did not conduct any inquiry into what would be reasonable under Section 506(b). Rather, the Court accepted the Debtors' proposal for $1 million for one year of attorney's fees. However, the Debtors proposed $1 million to cover one year of attorney's fees – the Court concluded two years of litigation and appeals would be necessary, but did not increase the reserve for attorney's fees, effectively limiting Innovatus to $500,000 per year, below what even the Debtors had offered.

9. Fourth, the Court disregarded Innovatus's arguments that impairment is a confirmation issue and that Innovatus is "impaired" under the plan. However, to leave Innovatus

unimpaired, the plan must leave unaltered Innovatus's legal, contractual, and equitable rights. Taking Innovatus's collateral proceeds to pay junior stakeholders while Innovatus's senior claims remain outstanding is just one way in which the plan alters Innovatus's legal, contractual, and equitable rights.

10. Innovatus therefore requests that this Court stay the Estimation Order pending its appeal. To avoid irreparable harm to Innovatus and to ensure Innovatus's rights to be heard on its objection to the plan are preserved, Innovatus respectfully requests that this Court rule on the Motion prior to the confirmation hearing, or, that it postpones the confirmation hearing until after it rules on the Motion.

BACKGROUND

A. The Innovatus Loan

11. On June 1, 2022, Innovatus entered into that certain Loan and Security Agreement due 2027 (the "LSA")[2] with Debtors Eiger Biopharmaceuticals, Inc. ("Eiger"), EB Pharma, LLC ("EB Pharma"), and EBPI Merger Inc. ("EBPI", and together with Eiger and EB Pharma, the "Borrower"), which provided for up to $75.0 million funded in three tranches with a maturity date of August 31, 2027 (the "Innovatus Loan"). Upon the closing of the LSA, the Debtors received a loan in an amount of $40 million under Term Loan A of the LSA. Innovatus is both the Collateral Agent and Lender under the LSA.

12. The Innovatus Loan is secured by perfected, non-avoidable, first-priority liens on substantially all of the Debtors' assets. Innovatus's liens are perfected by deposit account control agreements, financing statements recorded with the Delaware Department of State, and security

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the LSA, the Estimation Motion, the Cash Collateral Order, the Third Amended Plan, or the Disclosure Statement, as applicable.

interests recorded with the United States Patent and Trademark Office. No party has challenged the validity, priority or perfection of Innovatus's liens.

13. The floating per annum interest rate for Term Loan A is equal to the sum of (a) the greater of (i) the Prime Rate published in the Money Rates section of the Wall Street Journal (or any successor thereto) and (ii) 3.5%, plus (b) 3.75%. At the current floating rate, the base rate on the Innovatus Loan is 12.25%. After an Event of Default, the LSA provides that the Obligations[3] accrue interest at the floating per annum interest rate plus five percentage points (5.00%).

B. The Debtors' Bankruptcy Filing

14. On April 1, 2024 (the "Petition Date"), Eiger and its debtor affiliates (together, the "Debtors") filed voluntary chapter 11 petitions in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court," or, the "Court") under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") commencing these cases (the "Chapter 11 Cases").

15. On the Petition Date, the Debtors sought authority to use Cash Collateral and to provide adequate protection to Innovatus [Dkt. No. 16] (the "Cash Collateral Motion").

16. On April 24, 2024, the Court granted the Cash Collateral Motion on a final basis [Dkt. No. 161] (the "Cash Collateral Order").

17. The Cash Collateral Order includes the Bankruptcy Court's findings of fact and the Debtors' stipulations as to, among other things, the priority, extent, and validity of Innovatus's claims, liens, and interests. The Cash Collateral Order provides that such findings and stipulations

[3] The LSA defines "Obligations" as: "all of Borrower's obligations to pay when due any debts, principal, interest, Lenders' Expenses, the Prepayment Fee, the Final Fee, and other amounts Borrower owes the Lenders now or later, in connection with, related to, following, or arising from, out of or under, [the LSA] or, the other Loan Documents, or otherwise, and including interest accruing after Insolvency Proceedings begin (whether or not allowed) and debts, liabilities, or obligations of Borrower assigned to the Lenders and/or Collateral Agent, and the performance of Borrower's duties under the Loan Documents."

are binding on all parties in interest unless and until and only to the extent that (a) an applicable party files an adversary proceeding challenging in whole or part the validity, enforceability, priority or extent of the Innovatus Loan Secured Indebtedness or the Liens or otherwise prosecutes a claim related to the LSA, and (b) a final and non-appealable order is entered by a court of competent jurisdiction, in favor of the plaintiff, sustaining any such challenge or claim in any such duly filed adversary proceeding. *See* Cash Collateral Order ¶¶ E, 16.

C. Innovatus's Proof of Claim

18. The Cash Collateral Order also carved Innovatus out from the Bar Date Order's [Dkt. No. 375] requirement to file a proof of claim on or before July 22, 2024, at 4:00 PM (prevailing Central Time) (the "Bar Date"). *See* Cash Collateral Order ¶19. Even though it was not required to do so, on July 22, 2024, Innovatus timely submitted a proof of claim. *See* Claim No. 55 (the "Proof of Claim"). The Claim specifically reads that, after accounting for certain post-petition distributions, "the total amount of Lender's claim as of July 15, 2024, is not less than $20,760,388.51,[4] ***plus*** costs, expenses, charges, premiums, penalties, indemnities, and other claims as provided under the Loan Documents." Claim ¶18 (emphasis added).

19. Specifically, the Proof of Claim provides that, as of the Petition Date (a) the principal amount owed by the Debtors under Term Loan A of the LSA was $41,685,030.30; (b) the total amount of accrued and unpaid interest owing by the Debtors was $0; (c) the total amount due on account of costs and expenses was not less than $67,258.36, which amount was composed of not less than $67,047.10 on account of attorney's fees and expenses, and not less than $211.26

[4] This figure reflects that the Debtors have made adequate protection payments to the Lender of $15,000,000.00 on May 3, 2024, and $12,000,000.00 on July 11, 2024, which the Lender has applied in accordance with the terms of the LSA. In addition, this figure includes amounts due on account of postpetition interest. While the Lender has the contractual right to charge interest on account of all of the Obligations, the Lender has not yet charged interest on account of attorney's fees or on certain other expenses. The Lender reserves all rights to apply interest to all Obligations, including attorney's fees and expenses, pursuant to the Loan Documents.

on account of other costs and expenses; and (d) the Prepayment Fee owed by the Debtors was not less than $833,700.61 and the Final Fee was not less than $2,600,000.00. *Id.* ¶¶ 13-16. The Claim, which included Innovatus's expenses, specifically reads that, after accounting for certain post-petition distributions, and applying the $27 million in adequate protection payments it has received, "the total amount of Lender's claim as of July 15, 2024, is not less than $20,760,388.51, *plus* costs, expenses, charges, premiums, penalties, indemnities, and other claims as provided under the Loan Documents. Under the terms of the LSA, interest continues to ***accrue on these amounts*** *at the Default Rate, compounding monthly*." Claim ¶18 (emphasis added).

D. The Debtors' Proposed Chapter 11 Plan

20. On July 28, 2024, the Debtors filed an amended plan of liquidation for the Debtors [Dkt. No. 455] (the "First Amended Plan") and, together with an amended disclosure statement [Dkt. No. 456] (the "Disclosure Statement"). On August 15, 2024, the Debtors amended the First Amended Plan [Dkt. No. 517] (the "Second Amended Plan"). On August 28, 2024, the Debtors amended the Second Amended Plan [Dkt. No. 571] (the "Third Amended Plan," together with the First Amended Plan and the Second Amended Plan, the "Plan").

21. The Third Amended Plan proposes a class for Innovatus (Class 3); a class for general unsecured creditors (Class 4); and a class for existing equity holders (Class 6). A different method is proposed under the Plan for satisfying the claims of each of these Classes. See Third Amended Plan Article III § A.

22. As to Class 3, the Third Amended Plan proposed providing Innovatus an additional cash payment of $10 million (the "Partial Paydown") on the Effective Date, while establishing a segregated escrow account containing the remaining $15.7 million owed to Innovatus as of the

Effective Date in cash (the "Escrow").[5] *See* Third Amended Plan Article III § B.3. The amount in the proposed Escrow is substantially less than the value of Innovatus's Cash Collateral, which after the approval of the recent sales of Lonafarnib and Lambda, exceeds $40 million. *See* Plan Supplement [Dkt. No. 525], Ex. A, at 6. Further, under the Third Amended Plan, Innovatus's distribution will be held in abeyance until there is a full adjudication of the Debtors objection to Innovatus's claim and any "offsets." *See* Third Amended Plan Article III § B.3. Furthermore, despite holding perfected liens on substantially all of the Debtors' cash and other assets, holders of claims in Class 3 will have their recovery capped at the amount of the Escrow, even if the total amount of their claims ultimately exceeds the balance of the Escrow. *Id.* Remarkably, although holders of claims in Class 3 are not guaranteed to recover 100% of their claim, the Third Plan categorizes Class 3 as "unimpaired" and not entitled to vote on the Third Amended Plan. *Id.*

23. As to Class 4 (general unsecured creditors), however, the Third Amended Plan proposes to pay Allowed claims in full in cash (and without a cap) on or after the Effective Date. *See* Third Amended Plan Article III § B.4. General unsecured creditors are now, as a result of the amendments in the Third Amended Plan, categorized as unimpaired and not entitled to vote. *See* Third Amended Plan Article III § B.4

24. As to Class 6 (equity), the Debtors propose to establish an "Existing Equity Interest Recovery Pool" and propose that all existing equity interests will be exchanged for interests in the Existing Equity Interest Recovery Pool. *See* Third Amended Plan Article III § B.6. The Existing Equity Interest Recovery Pool shall be composed of, among other things, all of the Debtors' Distributable Cash (less amounts needed to (a) pay administrative and priority claims, (b) fund the Wind-Down Budget, (c) fund the Professional Fee Reserve Account, (d) fund the Escrow, and (e)

[5] The First Amended Plan did not provide the Partial Paydown and proposed to place approximately $22 million in Escrow.

satisfy the general unsecured claims). *See* Third Amended Plan Article I § A. The Third Amended Plan is clear that the distributions to unsecured creditors and equity holders, funded with Innovatus's collateral, will be made free and clear of all claims, liens, encumbrances, charges, causes of action, or other interests. *See* Third Amended Plan Article VI § M. Thus, if any distributions are ultimately found to have been made in error, Innovatus will have no remedy.

25. The Third Amended Plan adjusts Innovatus's rights in other ways as well. It provides that on the Effective Date, all agreements, instruments, notes, securities and other documents evidencing any Claim or Interest, and any rights of any Holder in respect thereof, shall be deemed cancelled and of no further force or effect and that parties to such cancelled instruments, securities, and other documentation shall have no rights arising from or related thereto. *See* Third Amended Plan Article IV, §§ G, M. Thus, although Innovatus will not have been paid in full, the Third Amended Plan will cancel its loan agreement and associated liens.

26. On July 30, 2024, the Bankruptcy Court entered an order [Dkt. No. 473] conditionally approving the Debtors' Disclosure Statement and scheduling a combined hearing on the adequacy of the Disclosure Statement and confirmation of the Third Amended Plan for September 5, 2024 (the "Confirmation Hearing").

E. The Estimation Motion

27. On August 2, 2024, the Debtors filed a motion [Dkt. No. 488] (the "Estimation Motion") seeking entry of an order, under Section 502(c) and 105 of the Bankruptcy Code providing that Innovatus's claim will be set at $13,418,949.41 for purposes of funding the Escrow under the Plan. The Debtors also sought a ruling that the funding of the Escrow rendered Innovatus unimpaired under the Plan, although Sections 502(c) and 105 do not address impairment, and the

Debtors did not move under Section 1124 of the Bankruptcy Code, which governs impairment.[6] The Debtors arrived at the $13,418,949.41 figure by adding the principal amount outstanding, accrued interest, the Final Fee, the Prepayment Fee, one year of interest following the effective date, and a $1 million indemnification for Innovatus's attorney's fees, reduced by $27 million in prepayments and the Partial Paydown. *See* Supplemental Staut Declaration ¶ 9. In computing this figure, the Debtors assumed that their objection to Innovatus's Proof of Claim and other purported estate causes of actions will be fully resolved within one year and that it will cost Innovatus no more than $1 million in legal fees to adequately defend its claim. The Debtors offered no evidence of any kind to support their assertions about the length of the litigation or the amount of legal fees Innovatus would incur.

28. Also, on August 15, 2024, the Debtors filed an Objection to Innovatus's Proof of Claim [Dkt. No. 516] (the "Claim Objection"). Among other things, the Debtors contend that Innovatus's declaration of an Event of Default citing a Material Adverse Change ("MAC") under the LSA was invalid, and, therefore, any fees or penalties related to such default arising under the LSA are void. The Debtors further allege that Innovatus's decision to declare a MAC notice was an attempt to exert control over the Debtors' sale processes and illicit an early repayment of the Innovatus Loan. The Debtors have been further investigating these claims pursuant to this Court's Order Granting the Debtors' Emergency Motion for Authority to Conduct Examinations Under Federal Rule of Bankruptcy Procedure 2004 (the "2004 Order").

[6] The Estimation Order initially proposed to set Innovatus's claim at $24,246,323 for purposes of rendering it unimpaired and funding the Escrow. However, on August 15, 2024, the eve of Innovatus's deadline to object to the Motion, the Debtors filed the *Supplemental Declaration of Douglas Staut in Support of the Motion* (the "Supplemental Staut Declaration") [Dkt. No. 518] and the *Revised Proposed Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves to Unimpair Claim* (the "Revised Order") [Dkt. No. 519], seeking to set Innovatus's claim at $13,418,949.41 for purposes of rendering it unimpaired and setting the Escrow.

29. On August 16, 2024, Innovatus objected to the Estimation Motion [Dkt. No. 526] (the "Estimation Objection"). In support of its Estimation Objection, Innovatus submitted the *Amended Declaration of James Webb George, Jr.* [Dkt. No. 533] (the "George Declaration") and the *Expert Report of David E. Keltner* [Dkt. 521] (the "Keltner Report"). Innovatus asserted that an Escrow of $34,172,196.38 was required to render it unimpaired. *See* George Declaration ¶ 46. The George Declaration demonstrated that during the four-year period following the effective date, interest would continue to accrue at an amount of at $5,013.20 per day (without accounting for interest compounding each month), or at least $1,829,818.00 per year. *See Id.* ¶¶ 35, 38, 41, and 44.

30. To arrive at the proposed four-year period, Innovatus submitted the Keltner Report, pursuant to which Mr. Keltner testified that arriving at a final, non-appealable judgment would take between three and five years. *See* Estimation Objection ¶ 52. As explained in the Keltner Report, Mr. Keltner computed the average time it would take to reach a final order on the merits from a bankruptcy appeal to the United States District Court for Northern District of Texas. Keltner Report ¶ IV.A. Using Lex Machina, Inc, a data analytic service offered through LexisNexis, Mr. Keltner examined the 37 matters that were appealed from the bankruptcy court to district courts in the Northern District of Texas between January 1, 2020–August 12, 2024 and where a final, appealable order on the merits was rendered, and concluded that a reasonable time for an appeal would be between 11.5 and 23 months. *Id.*[7] Next, using the Lex Machina program, statistics published by the Administrative Office of the United States Courts on the length of bankruptcy appeals in the United States Circuit Courts of Appeals from 2019–2023, Mr. Keltner analyzed the 27 bankruptcy appeals, including both direct appeals to the Fifth Circuit and

[7] Exhibit B of the Keltner Report included a spreadsheet of the 37 matters.

bankruptcy-specific appeals from the District Court for the Northern District of Texas to the Fifth Circuit where the Fifth Circuit issued a final appealable order on the merits between January 1, 2020–August 12, 2024, concluding that an appropriate estimate for the duration of an appeal from a bankruptcy proceeding in the Fifth Circuit is between 11.5 and 36 months. *Id.*[8]

31. As to an appropriate amount of Lenders' Expenses and/or indemnity, the George Declaration computed Innovatus's monthly average attorney's fees and expenses incurred during the bankruptcy case through July 31, 2024 ($439,039.29) and multiplied that by 18 months, which equals $7,902,707.22 and taking 33% of the monthly average of $439,039.29 in attorney's fees and expenses (which equals $144,882.97) and multiplying that by 30, which equals $4,346,489.10 and adding these two numbers to $878,078.59, which represents Innovatus's estimated expenses for August 2024 and September 2024, which all together equals $13,127,274.91. *See* George Declaration ¶¶ 32-45.

32. On August 19, 2024, the Debtors filed a reply brief in support of the estimation motion [Dkt. No. 535] and a motion *in limine* seeking to exclude the Keltner Declaration [Dkt. No. 539] (the "Motion in Limine").

F. The Bankruptcy Court's Ruling

33. On August 20, 2024, this Court held a hearing on the Estimation Motion.

34. Without addressing Innovatus's argument that its claim is not subject to estimation under Section 502(c), the Court focused on establishing the amount of the Escrow. In assessing the time period for which interest would accrue under the escrow, the Court first granted the

[8] The Keltner Report also concluded that if any party sought rehearing *en banc*, another one to six months would be required. Keltner Report ¶ IV.B-C. And, finally, reviewing the SCOTUS Rules and Mr. Keltner's own experience, the Keltner Report concludes that an appeal to the Supreme Court may add an additional eight to twelve months to the length of an appeal if certiorari is granted and approximately 4.5 months if certiorari is denied. Keltner Report ¶ IV.D.

Motion in Limine. Although the Keltner Declaration contained the only evidence submitted to the Court concerning the actual times for appeal from rulings of the bankruptcy court, the Court determined that it did not need expert testimony to determine what an appropriate length of time for resolution of all appeals was. *See* Hr'g Tr. (Aug. 20, 2024), 57:16. Without offering any basis for these conclusions, other than experience, the Court held that the one-year period suggested by the Debtors was unrealistic. Again, without citing any evidence or offering any explanation for this conclusion, the Court found that a two-year period was more appropriate. *See* Hr'g Tr. (Aug. 20, 2024), 80:11-12. This period was substantially shorter than the likely appeal period computed by Mr. Keltner, without even considering the length of time required to resolve the Claim Objection in the bankruptcy court.

35. The Court also adopted the Debtors' proposal of a Lenders' Expenses/indemnity reserve of $1 million for attorney's fees as reasonable. *See* Hr'g Tr. (Aug. 20, 2024), 80:19-20. Again, the Debtors had offered no evidence in support of this amount, and the Court cited none. Nor did the Court address the evidence offered by Innovatus explaining what the total amount of its legal fees had actually been during the first four months of the case. Significantly, the Court did not increase the amount reserved for legal fees even though it had previously concluded that two years, rather than one, would be required to resolve the litigation, effectively cutting the amount of legal fees the Debtors had proposed by 50%. *See* Hr'g Tr. (Aug. 20, 2024), 80:11-12; 19-20. The Court did not address the fact that the Debtors' own wind-down budget proposed to fund the Liquidating Trust, which will pursue the Claim Objection on behalf of the estates, with almost $6 million of Innovatus's cash collateral, six times the amount estimated for Innovatus. *See* Plan Supplement [Dkt. No. 525], Ex. A, at 6.

36. On August 21, 2024, the Court entered an *Order Approving the Debtors' Emergency Motion in Limine to Exclude the Expert Report of David E. Keltner*. [Dkt. No. 557].

37. On August 23, 2024, this Court entered the Estimation Order, which provided that Innovatus's claim shall be set $15,738,961.47 for the purposes of funding the Escrow and rendering Innovatus unimpaired.

G. Innovatus's Appeal of the Estimation Order

38. On August 30, 2024, Innovatus timely filed a notice of appeal of the Estimation Order.

LEGAL STANDARD

39. Bankruptcy Rule 8007 provides that a request for a stay of a bankruptcy judge's order pending the outcome of an appeal "must ordinarily be presented to the bankruptcy judge in the first instance." *See* Fed. R. Bankr. P. 8007. In determining whether to grant a stay pending appeal, a court considers the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *See Veasey v. Abbot*, 870 F.3d 387, 391 (5th Cir. 2017) (citing *Nken v. Holder*, 556 U.S. 418, 425-26 (2009)). In reviewing these factors, courts are mindful that the purpose of, "grant[ing] . . . a stay pending appeal is preventive or protective in that it seeks to maintain the status quo pending a final determination on the merits of the suit." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

40. "The Fifth Circuit has relaxed the requirement of demonstrating a likelihood of success on the merits to one of only having to demonstrate 'substantial merit' if the case presents a serious legal question *and* the other three factors are '**heavily tilted** in the movant's favor.'" *In re: Serta Simmons Bedding, LLC*, No. AP 23-09001, 2023 WL 4275019, at *2 (S.D. Tex. June 29,

2023), *appeal dismissed sub nom. Matter of Serta Simmons Bedding, L.L.C.*, No. 23-20309, 2023 WL 9056061 (5th Cir. July 31, 2023) (quoting *In re First S. Sav. Ass'n*, 820 F.2d 700, 709 n.10 (5th Cir. 1987) (emphasis in original)). If the balance of the equities (*i.e.*, the other three factors) is not "heavily titled" in favor of the movant, "the movant must then make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal." *Ruiz v. Estelle*, 650 F.2d at 566. In either case, "[a]lthough no factor is dispositive, the likelihood of success and irreparable injury factors are 'the most critical.'" *All. for Hippocratic Med. v. FDA*, No. 23-10362, 2023 WL 2913725, at *4 (5th Cir. Apr. 12, 2023) (quoting *Nken*, 556 U.S. at 434). Here, however, all four factors weigh strongly in favor of granting a stay.

ARGUMENT

41. This Court should grant a stay pending appeal because Innovatus is likely to succeed on the merits of its appeal and the balance of the harms overwhelmingly weighs in favor of a stay. In an appeal of an order of a bankruptcy court, the appellate court applies a *de novo* standard of review to questions of law and a "clear error" standard of review to factual findings. *Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1021 (5th Cir. 1999) (citing *Shurley v. Texas Commerce Bank (In re Shurley)*, 115 F.3d 333, 336 (5th Cir. 1997).

I. Innovatus is Likely to Succeed on the Merits on Appeal

42. To satisfy the first factor, courts have required that the movant demonstrate that it will present a "substantial case on the merits" and raise a "serious legal question." *In re Tex. Equip. Co.*, 283 B.R. 222, 227 (Bankr. N.D. Tex. 2002) (citing *Arnold v. Garlock Inc.*, 278 F.3d 426, 439 (5th Cir. 2001)). While issues that are factual in nature are unlikely to be overturned on appeal, "questions involving the application of law, or when the law has not been definitively addressed by a higher court" more easily satisfy the first factor. *See Texas Equip. Co.*, 283 B.R. at 227 (citing *In re Westwood Plaza Apartments Ltd.*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993)).

Admittedly, this is a difficult showing to make to the very court that entered the order sought to be stayed. Here, however, this Court's Estimation Order reflects significant assumptions that were not supported by the evidence or substantiated by the record. Thus, Innovatus can demonstrate that it has a "substantial case" for several reasons.

A. The Estimation Order Reflects an Improper Use of Estimation Under Section 502(c)

43. As an initial matter, the Court improperly used estimation under Section 502(c) to fix the amount of a reserve for Innovatus's claim. In relevant part, Section 502(c) provides that "there shall be estimated for purpose of allowance under this section . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case." 11 U.S.C. § 502(c). Thus, before a claim may be estimated, the movant "must demonstrate that the gating requirements for estimation are met – namely, that the claim to be estimated is contingent or unliquidated and that the delay associated with the fixing or liquidation of such claim would be 'undue'." *In re LightSquared Inc.*, No. 12-12080 (SCC), 2014 WL 5488413, at *3 (Bankr. S.D.N.Y. Oct. 30, 2014) (citing *In re Dow Corning Corp.*, 211 B.R. 545, 562-63 (Bankr. E.D. Mich. 1997)). If these requirements are not present, "estimation is 'simply inappropriate.'" *Matter of Cont'l Airlines*, 981 F.2d 1450, 1461 (5th Cir. 1993) (quoting *Matter of Ford*, 967 F.2d 1047, 1053 (5th Cir. 1992)).

44. At the hearing on the Estimation Motion, the Court never addressed Innovatus's arguments that the requirements for estimation had not been established. Instead, the Court concluded, without making any supporting findings of fact or referring to the evidentiary record, only found that Innovatus's Claim is contingent and unliquidated with respect to its interest and attorney's fees. Hr'g Tr. (Aug. 20, 2024) 77:17-23.

45. First, Innovatus's claim is not unliquidated. A claim is liquidated when "the amount due and the date on which it was due are fixed or certain, or when they are ascertainable by reference to (1) an agreement or (2) to a simple mathematical formula." *In re Visser*, 232 B.R. 362, 364 (Bankr. N.D. Tex. 1999). When the "amount due may be ascertained by computation or reference to the contract out of which the claim arises," then the claim is not considered unliquidated. *See In re Flaherty*, 10 B.R. 118, 120 (Bankr. N.D. Ill. 1981); *In re Horne*, 277 B.R. 712, 717 (Bankr. E.D. Tex. 2002) ("A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion."). Because Innovatus is oversecured — a fact conceded by the Debtors and acknowledged by this Court — it is entitled to post-petition interest, legal fees, other expenses and costs as part of its secured claim under Section 506(b). In accordance with the plain terms of the LSA, Innovatus's Proof of Claim set forth the amount of these items that had accrued as of July 15, 2024, a week before the Bar Date. It further reduced this number by $27 million to account for adequate protection payments made by the Debtors. Future accruals of interest, fees, and other expenses are likewise readily calculable in accordance with the terms of the LSA. *See In re LightSquared Inc.*, 2014 WL 5488413, at *3 (claim for future interest is a not unliquidated because "any additional interest is determinable by reference to" the governing documents). Indeed, Innovatus submitted a declaration from one of its executives to establish the amount of these future accruals based on the terms of the LSA. *See* George Declaration ¶¶ 30-45.

46. Second, Innovatus's claim is not contingent. While the Bankruptcy Code does not define the term "contingent," the Fifth Circuit has held that claims are contingent for purposes of Section 502(c) where the claim is contingent as to liability, not simply as to amount. *See Matter of Ford*, 967 F.2d at 1052 (estimation of claim contingent as to amount but not liability is improper

under Section 502(c)); *In re Frye*, No. 97-80342, 1997 WL 33475063, at *1 (Bankr. C.D. Ill. Aug. 26, 1997) (noting that a "contingent claim" is a term "judicially defined to include claims which have not yet accrued and which are dependent upon some future event which may not occur at all or may not occur until some uncertain time.").[9]

47. Here, the Debtors undisputedly agreed to pay the "Obligations" to Innovatus when due:

> Borrower hereby unconditionally promises to pay to Collateral Agent, for distribution to each lender, the outstanding principal amount of the Term Loan advanced to Borrower by each Lender and accrued and unpaid interest thereon and any other amounts due hereunder as and when due in accordance with this Agreement.

LSA §2.1. No uncertain extrinsic future event must occur to trigger the Debtors' liability to Innovatus under the LSA.

48. That Innovatus's claim will continue to grow with the accrual of interest and expenses during the pendency of the estate litigation does not render it contingent. The Fifth Circuit expressly rejected similar arguments in *Ford* where the claim was contingent as to amount but not as to liability. *See Matter of Ford*, 967 F.2d at 1051-52. Specifically, in *Ford*, a bank filed a proof of claim against the debtor's estate based on two notes for which the debtor was jointly and severally liable on with another party. *Id*. at 1048. The trustee objected to the claim, arguing that it must be estimated under Section 502(c). *Id.* The Fifth Circuit held that estimation was inappropriate. *Id*. at 1045. The claim was not contingent, it held, because the bank was entitled

[9] Disputing a claim does not render it contingent. *In re Mazzeo*, 131 F.3d 295, 303 (2d Cir. 1997) ("We cannot view a debt as contingent merely because the debtor disputes the claim, for that would make the word 'contingent,' in the definition of 'claim,' 'redundant.'"); *In re Green,* 574 B.R. 570, 577 (Bankr. E.D.N.C. 2017) ("The fact that a debtor disputes a debt or has potential defenses or counterclaims that might reduce a creditor's actual collection does not render a debt contingent."); *In re Imagine Fulfillment Services, LLC*, 489 B.R. 136 (Bankr. C.D. Cal. 2013) ("a dispute over a claim does not render the claim contingent"); *In re Pennypacker*, 115 B.R. 504, 507 (Bankr. E.D. Pa. 1990) (rejecting argument that all disputed debts are contingent).

to collect the entire amount from any one of the makers of the note, and estimation under Section 502(c) would be "simply inappropriate." *Id.* at 1053.

49. Finally, fixing Innovatus's claim did not threaten *any* delay, much less undue delay, in these chapter 11 proceedings. Although the burden of proof lies with the Debtors, they offered no explanation at all of what undue delay would be avoided by estimation under section 502(c). Nor could they have. The purported need for estimation arose from the terms of the plan that the Debtors proposed, terms which could easily have been revised to avoid any need for estimation. Innovatus holds liens on substantially all of the Debtors' assets, including all of their cash and the proceeds of all asset sales. Notwithstanding Innovatus's status, the Debtors did not propose to pay Innovatus on the Effective Date, but to cap its claim and hold its recovery in the Escrow pending the resolution of the Claim Objection. The remaining proceeds of Innovatus's Cash Collateral after establishment of the Escrow – likely millions or tens of millions of dollars – will be paid to junior stakeholders, as early as *the Effective Date*. This approach obviously impairs Innovatus, depriving it of the full protection of its bargained-for collateral and instead wrongfully (and non-consensually) redirects its cash collateral proceeds to other parties with lower priority. Not only does this raise profound legal, even potential constitutional issues of taking property without just compensation, but, as Innovatus demonstrated, this structure is entirely unnecessary to confirm a simple liquidating plan.

50. For one, as is typical with disputed claims, the debtors could fund a reserve for Innovatus with the entire amount of its Cash Collateral and provide that creditors junior to Innovatus will be paid in accordance with their statutory rights from any excess collateral proceeds released from the Escrow once the litigation with Innovatus is resolved. This structure would

protect Innovatus's rights to its collateral, without impairing the rights of junior stakeholders as part of a liquidating plan.

51. Alternatively, the Debtors could pay Innovatus's claim in full in cash on the Effective Date subject to a reservation of claims. This approach would stop the accrual of interest, and the Debtors' estates have sufficient cash to make the payment. Furthermore, Innovatus is a substantial enterprise with ample resources to satisfy any judgment that may be obtained against it post-effective date.

52. Put simply, the alleged "undue delay" the Debtors seek to avoid is not a result of the fixing of Innovatus's claim, but instead of their adoption of the elective and non-essential terms of the Third Amended Plan that the Debtors hope will maximize their litigation leverage. The Debtors cannot manufacture "undue delay" by arguing that their preferred plan may be delayed, especially when other straightforward and non-controversial alternatives are available. *See In re LightSquared Inc.*, 2014 WL 5488413 at *5 ("While the Court recognizes and shares the desire of all parties in interest to bring these cases to a successful conclusion as soon as possible, it declines to consider the failure to meet the parties' self-imposed deadlines and conditions to confirmation of the Inc. Plan as an appropriate factor to be considered in an undue delay analysis.").

53. Importantly, the estimation procedure the Court adopted was unnecessary to expedite confirmation, and if it was done to circumvent objections to confirmation likely violated Innovatus's due process rights. Section 1129 of the Bankruptcy Code, which governs plan confirmation, contains provisions that allow the Debtor to provide substitute collateral to a secured creditor (such as a cash escrow) so long as the Debtor demonstrates that the substitute collateral is the "indubitable equivalent" of the lender's existing collateral. *See* 11 U.S.C. §1129(b)(2)(a)(iii). Accordingly, the Debtors could have established the amount of collateral to secure Innovatus's

claim as part of cram down under the Section 1129 at confirmation, without any material delay of the case. Using a summary estimation proceeding to accomplish the same end in advance of confirmation, on truncated notice, improperly sidestepped the other protections of Section 1129 and eliminated Innovatus's right to object to confirmation on appropriate notice, but it did nothing to accelerate the resolution of the cases. In short, the Court's use of estimation therefore did not avoid any delay at all, let alone "undue" delay.

B. This Court Erred in Concluding That an Escrow Holding Two Years of Interest Would Not Impair Innovatus

54. This Court concluded that reserving two years of post-petition interest on Innovatus's claim was adequate to render Innovatus unimpaired under the Plan. *See* Hr'g Tr. (Aug. 20, 2024) 80:11-12, 19-21. In reaching this conclusion, the Court held that the Debtors' unsupported estimate that their Claim Objection will be fully resolved in one year was unrealistic, instead finding that a two-year reserve was appropriate. *See* Hr'g Tr. (Aug. 20, 2024), 53:8-12 (" . . . I know one year is not a realistic estimate for if there's a claim objection, there's an adversary proceeding, then there's an appeal to the district court, there's an appeal to the Fifth Circuit. I know that's not going to happen in one year . . ."). The Court, however, did not base this finding on any evidence, but instead on its unexplained intuition about the likely length of (i) litigation that had been commenced just five days before and (ii) all ensuing appeals. This is an inadequate basis to support the creation of a reserve that strips Innovatus of millions of dollars of its cash collateral and permits that collateral to be distributed to junior stakeholders.

55. The Court's ruling also deprived Innovatus of protections it would have received had the Court addressed the issue at confirmation under Section 1129. The Third Amended Plan cancels the Innovatus's Loan Documents, provides the Partial Paydown, and creates an escrow that caps Innovatus's claim, but purports to include the amount of interest, expenses, and legal fees

that may accrue pending a resolution of the Claim Objection. *See* Third Amended Plan Article III § B.3. Section 1129 authorizes the substitution of a limited reserve for the full value of Innovatus's collateral provided that the Debtor demonstrates that it is "fair and equitable," which in this case would require that the substitute collateral will provide Innovatus with the "indubitable equivalent" of its secured claim. *See* 11 U.S.C. § 1129(b)(2)(A)(iii); *Matter of Sandy Ridge Development Corp.*, 881 F.2d 1346, 1350 (5th Cir. 1989) (substitute collateral must provide the indubitable equivalent of secured claims). Proof of indubitable equivalence is inherently conservative, requiring evidence that the substitute collateral will prevent ***any risk*** of loss to the secured creditor. Where "'a debtor seeks to alter the collateral securing a creditor's loan, providing the 'indubitable equivalent' requires that the substitute collateral not increase the creditor's risk exposure." *In re Arnold & Baker Farms*, 85 F.3d 1415, 1422 (9th Cir. 1996). This requires that the "substitute collateral [must] give[] the creditor an ample cushion against becoming undersecured," so that the substitute collateral "doesn't increase the risk of [the creditor] becoming undersecured in the future." *In re River E. Plaza, LLC*, 669 F.3d 826, 831 (7th Cir. 2012) (finding that substitute collateral of $13.5 million in 30-year treasury bonds was not equivalent to a mortgage lien on real estate valued at $13.5 million because the risk profiles for each type of collateral were wildly different). Thus, had this matter been raised in a cram down scenario under Section 1129, the limited Escrow would not satisfy the "indubitable equivalent" standard.

56. Despite these requirements, the Court appeared only to offer its own assessment of how long the litigation and appeals would take. It did not address – let alone find – whether a two-year escrow period would increase the risk to Innovatus or provide "ample cushion against [Innovatus] becoming undersecured." Indeed, the Keltner Declaration – which the Court incorrectly excluded – provided substantial evidence that a two-year period would not provide

such protection. *See* Keltner Report at IV. Mr. Keltner, a former Texas appellate judge and highly experienced appellate advocate, presented statistics (i) from his own analysis of the length of appeals from the bankruptcy court to the district court and the district court to the Fifth Circuit from January 1, 2020-August 12, 2024 and (ii) the administrative office of the United States Courts, to demonstrate that the average time for all appeals was three and five years. *See* Keltner Report at III. He further explained from his own extensive experience that individual appeals regularly exceed these averages. *See* Keltner Report at IV. As such, the evidence the Court rejected demonstrates the fallacy of its holding. If appeals from a ruling in the Claim Objection simply equals the average length of appeals in this district – approximately four years – the Escrow is patently insufficient to protect Innovatus. It will become undersecured while its bargained-for cash collateral is distributed to junior creditors and equity.

57. Instead, rather than focusing on the protection of the secured creditor, in evaluating the length of the Debtors' proposed Escrow, this Court appeared to balance the interests of equity holders, unsecured creditors, and the secured lender. Hr'g Tr. (Aug. 20, 2024) 41:8-17 ("It's not just, it's not about you two, the debtor -- and the secured lender. We've got unsecured creditors . . . We've got equity who is in the money . . . So, isn't this a nice balance of all of those interests? Right?"). This analysis gets it backwards. The sole focus in establishing the amount of the reserve should be appropriate protection of the secured creditor, whose collateral is at issue. Junior creditors will recover their entitlements under the waterfall after protection of the secured creditor's property is assured. By elevating the interest of junior stakeholders in current distributions at the expense of assuring the satisfaction of the secured creditor's claim, the Court plainly erred.

C. The Court Erred in "Predicting" That it Would Find a $1 Million Indemnity Reasonable Under Section 506(b)

58. The Court's finding that an indemnity of $1 million for attorney's fees was reasonable under section 506(b) was also mistaken. This Court was presented with dueling estimates for attorney's fees. On the one hand, Innovatus's estimate of $13 million in attorney's fees for four years of litigation and appeals was well substantiated by estimating that attorney's fees will continue to accrue, on average, at the same monthly rate as they did during the first four months of these chapter 11 cases during the first 18 months of the projected litigation and thereafter accrue at 33% of the current monthly average. *See* George Declaration ¶¶ 32-45. On the other hand, the Debtors proposed an indemnity of $1 million with no evidence concerning Innovatus actual fees or attempted projection of future fees. Indeed, the Debtors offered no explanation at all of how they arrived at this figure. Acknowledging that Innovatus's attorney's fees under Bankruptcy Code Section 506(b) are "at this point, contingent and unliquidated in amount," this Court accepted the Debtors' unsubstantiated $1 million, based in part on a "prediction" of what legal fees it would approve if the matter were presented to it. *See* Hr'g Tr. (Aug. 20, 2024), 77:23; 81:1-4 ("And so part of my analysis here is just predicting what I would ultimately approve or not approve if there was 506 challenge of the reasonableness of attorneys fees. I don't know what goes on outside the courtroom."). But, even if the matter were before the Court (which it was not), this analysis is flawed.

59. By its terms, section 506(b) provides than an oversecured creditor may recover, on a secured basis, "any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose." 11 U.S.C. § 506(b). "[B]ankruptcy courts will generally require the party seeking allowance of attorney's fees to carry the burden of demonstrating reasonableness by providing a detailed description of the services rendered, supporting

documentation, or other evidence prior to making a determination on an application for payment [under § 506(b)]." *In re 804 Congress, L.L.C.*, 756 F.3d 368, 377 n.41 (5th Cir. 2014) (citing 1 COLLIER BANKRUPTCY MANUAL ¶ 506.03[3][c] (Alan N. Resnick & Henry J. Sommer eds., 4th ed. 2013)). The Fifth Circuit has adopted a three-step approach when determining the reasonableness of attorneys' fees for oversecured creditors: "(1) determine the nature and extent of the services supplied by the attorney with reference to the time and labor records submitted; (2) ascertain the value of the services; and (3) briefly explain the findings and the reasons upon which the award is based." *In re Pan American General Hosp., LLC*, 385 B.R. 855, 868 (Bankr. W.D. Tex. 2008) (citing *In re Hudson Shipbuilders*, 794 F.2d 1051, 1058 (5th Cir. 1986), *overruled in part on other grounds by Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313, 319 (5th Cir. 2013)). This Court effectively pre-determined what it would include under an application for fees under Section 506(b), but did not explain how, under these standards, it determined Innovatus's fee estimate and/or indemnity request is unreasonable. Although Innovatus carried its burden to defend its indemnity request as reasonable with evidence as to how it arrived at its calculation, the Debtors offered no rebuttal or any explanation as to how they calculated their proposed indemnity. This Court acknowledged that it did not know the extent of work that would be needed in connection with the Claims Objection – which had been filed just five days before – and to which Innovatus had no chance to respond. Hr'g Tr. (Aug. 20, 2024) 81:3-7. The Court nonetheless concluded that the litigation should not require "that extensive of discovery" and based its decision on what it thought was reasonable. *See* Hr'g Tr. (Aug. 20, 2024) 81:5-20. ("Every bankruptcy judge will tell you we don't know how many conversations or arguments or negotiations are needed in a situation like this. But I do know those numbers I talked about in the beginning. We have such an over-secured creditor here and that impacts what a bankruptcy judge

thinks is reasonable . . . But then, again, I'm looking at the fact that loan originated in 2022. We are not going to need that extensive of discovery. . . . So there's just no way. There's just no way attorneys fees should get into the range that maybe some people think.").

60. Moreover, the Court's unreasonable limitation on attorney's fees based on its "prediction" of what it would approve if it was presented with an application under section 506(b) is likely to be reversed regardless of what the District Court finds "reasonable" for litigation of this type. The purpose of the Escrow is purportedly to set aside funds to prevent Innovatus from becoming undersecured during the litigation of the Claim Objection. As part of a final order, if any court subsequently finds that Innovatus's fees, or any portion thereof, are unreasonable, Innovatus would not recover the portion of its fees not otherwise found reasonable, and funds remaining in Escrow after its secured claim is satisfied will be distributed in accordance with the plan's waterfall.

61. Even if the $1 million indemnity were reasonable (which it is not) for the Debtors' estimated one year, this Court did not increase the amount reserved for legal fees although it concluded that two years, rather than one, would be required to resolve the litigation. Thus, this Court erred by effectively cutting the already inadequate amount of legal fees the Debtors had proposed in half.

D. The Bankruptcy Court Erred in Concluding the Escrow Would Render Innovatus Unimpaired

62. While the Estimation Order provides that the Escrow will render Innovatus unimpaired, even if this Escrow was sufficient to cover Innovatus's Claim, no amount of reserve will render Innovatus unimpaired. And although Innovatus presented compelling arguments to demonstrate how any amount of reserve is impairment, the Court did not consider these arguments.

63. Section 1124 of the Bankruptcy Code provides, among other things, a creditor is impaired unless the plan "leaves unaltered the legal, equitable, and contractual rights." 11 U.S.C. §1124(1). The use of the Escrow, regardless of its overall size, inherently impairs Innovatus's rights. Stated differently, Innovatus is entitled to all of its rights under its Loan Documents, including to post-petition interest, fees, costs, and other charges, and the documents attendant to Innovatus's Claim and the Liens securing the Claim cannot be released until the Claim is paid in full. In its objection to the Estimation Motion, Innovatus argued that despite the Second Amended Plan (which altered Innovatus's proposed treatment) having been filed twenty-four hours prior to its objection deadline, estimation was improper because, independent of the amount of the Escrow established by the Court, the Plan clearly altered many of Innovatus's rights under its loan documents, thereby impairing it under Section 1124. Among these were:

- As of the Effective Date, long before Innovatus is paid in full, the Plan cancels the Innovatus Documents. *See* Third Amended Plan, Article IV § I;
- The Plan provides that no interest shall accrue or be paid on any Claim with respect to the period from the Effective Date to the date a final distribution is made on account of such Claim. *See* Third Amended Plan, Article VII § K;
- The Plan permits for the Debtors to use Innovatus's collateral, and proceeds of its collateral, to fund distributions under the Plan to junior stakeholders – and to do so free and clear of Innovatus's security interests. *See* Third Amended Plan, Article IV §§ F, M; and
- The Plan provides that all the estates' Causes of Action shall be brought exclusively in this Bankruptcy Court, which disregards the forum selection clause of the LSA. *See* Third Amended Plan, Article X.

64. Because adjudication of these forms of impairment was not subject to estimation or even arguably addressed through the creation of a reserve – and the Debtors had not sought relief under Section 1124 – Innovatus asserted that regardless of the Court's findings with respect to the amount of the Escrow, it could not find that Innovatus was unimpaired under the Plan. Without

considering Innovatus's arguments at all, the Court's Estimation Order reached the unsupported conclusion Innovatus was "unimpaired."

II. Innovatus Will Suffer Irreparable Harm Absent a Stay

65. The Estimation Order provides that: "[t]he Innovatus claim amount shall be set at $15,738,961.47 for the sole purpose of funding the Escrow and rendering Innovatus unimpaired." *See* Estimation Order ¶ 1. While Innovatus has appealed the Estimation Order, its entry threatens Innovatus with irreparable harm if it is not stayed. The Estimation Order establishes the amount of a reserve for Innovatus's claim, but it does not authorize the distribution of Innovatus's excess Cash Collateral to junior stakeholders. That transfer would occur pursuant to the Third Amended Plan, assuming that it is confirmed at the Confirmation Hearing. While the entry of the Estimation Order does not itself cause economic harm to Innovatus, however, the Debtors have asserted that the Court's finding that Innovatus is unimpaired deprives Innovatus of standing to be heard at the Confirmation Hearing. That position, if upheld, would undercut Innovatus's ability to participate in the Confirmation Hearing that clearly impacts its rights as well as, potentially, its ability to seek appellate review of any order confirming the Plan.

66. It would do this even though the issue of Innovatus's impairment was not properly before the Court on the Estimation Motion except with respect to the amount of the Escrow.[10] The Estimation Motion was made pursuant to Sections 502(c) and 105 of the Bankruptcy Code, not Section 1124 which governs impairment. As a result, the Court only had power to estimate Innovatus's Claim for purposes of setting the Escrow. It did not also have the power to determine that the Escrow rendered Innovatus's claim unimpaired in any other respect. Whether a plan impairs a class of creditors is traditionally and logically a confirmation issue. *See, e.g., Pieterse*

[10] Innovatus reserved all rights to object to the Debtors' characterization of Class 3 as unimpaired, and to assert any other objections of the Disclosure Statement and Third Amended Plan.

v. Tyler Donegan Duncan Real Est. Servs., Inc., No. 8:22-CV-00900-PX, 2022 WL 13937215, at *3 (D. Md. Oct. 24, 2022) (observing that "[i]t is at [the] confirmation stage that a final determination regarding impairment of claims is made" and concluding that a bankruptcy court decision on whether claims are impaired is final) (citing *In re Forrest Hills Assocs., Ltd.*, 18 B.R. 104, 104 (Bankr. D. Del. 1982) ("A statement that a class is not impaired does not necessarily make it so . . . This is a matter for determination at the confirmation hearing[.]")); *In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del), Sept. 21, 2015 Hr'g Tr. at 47:8-13 [Dkt. No. 6132] ("Hold all that aside, what's in front of me today? The disclosure statement under a plan which purports to unimpair the EFH noteholders. Whether that is truly what the plan does is an issue for confirmation.").

67. Because of the unorthodox procedure adopted by the Court, Innovatus may be stripped of important procedural, appellate and economic rights. Although it has appealed the Estimation Order, if the Court upholds the Debtors' standing arguments, it may not be able to oppose or appeal from the Confirmation Order which will authorize the distribution of its Cash Collateral to other stakeholders. Thus, absent a stay of the Estimation Order, Innovatus may be foreclosed from raising issues at confirmation that are critical to protect its status as a secured creditor while having its liens stripped and collateral proceeds distributed to junior stakeholders. And, if Innovatus is correct that the proposed Escrow is insufficient to cover its secured claim, Innovatus, as secured lender, is the only party that will suffer the consequences of a shortfall in collateral proceeds.

68. Moreover, without a stay, the Debtors will proceed with the Confirmation Hearing in a few days' time, and, assuming this Court confirms the Third Amended Plan, are likely to emerge from bankruptcy shortly thereafter. The Debtors would then be authorized to distribute

Innovatus's collateral to junior stakeholders and claim "equitable mootness" in response to Innovatus's appeal of the Estimation Order and any subsequent appeal of the confirmation order. *In re Voluntary Purchasing Gps., Inc.*, 196 F.3d 1258 (5th Cir. 1999) ("Without a stay, the confirmed plan may begin to be consummated, and the . . . appeal will become moot."). While Innovatus does not believe that its appeal would become equitably moot, the mere risk that the appeal might be mooted alone supports a finding of irreparable harm. "[W]here the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied." *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 348 (S.D.N.Y. 2007) (emphasis in original). Without a stay, the Debtors will be motivated to take advantage of this opportunity to insulate themselves from Innovatus's challenge on appeal.

69. To avert this harm, an immediate stay is warranted. Moreover, to preserve its right to raise objections to the Third Amended Plan, Innovatus respectfully requests that this Court rule on this Motion prior to the Confirmation Hearing, or, alternatively, delay the confirmation hearing until after it has ruled on this Motion.

III. No Other Party Will Be Substantially Injured By the Stay

70. "[I]n considering whether issuance of a stay pending appeal will substantially injure the other party, 'the maintenance of the status quo is an important consideration in granting a stay.'" *E.T. v. Paxton*, 19 F. 4th 760, 770 (5th Cir. 2021) (citing *Barber v. Bryan*, 833 F.3d 510, 511 (5th Cir. 2016)). Courts balance the likely harm to the movant absent a stay against the likely harm to stay opponents if the stay is granted. *S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP*, 927 F.3d 763, 772 (3d Cir. 2019).

71. Here, neither the Debtors nor any other party in interest would be substantially injured by a stay pending appeal. Allowing Innovatus to appear and object at the Confirmation Hearing will not harm other parties. If the Court determines Innovatus's objections lack merit, it

will overrule the objections and confirm the Third Amended Plan. If, on the other hand, the Court sustains those objections, then those objections will have been validated and their assertion cannot have injured any creditor.

72. Nor will a stay cause pecuniary harm to other constituencies. There is no reorganizing business here. This is a liquidating case. Substantially all of the Debtors' assets have been sold, and the Debtors are holding the sale proceeds for distribution. At most, a stay would delay consummation of the Debtors' plan, and postpone distributions to creditor constituencies, but the cash will remain secure and available for distribution once the stay ends.

73. Although a stay may briefly delay consummation of the Debtors' plan, any delays can be mitigated by the Debtors. Indeed, the Debtors have multiple alternatives to remedy the unlawful treatment of Innovatus without impairing the rights of any other stakeholder and can move forward with a confirmable chapter 11 plan. As explained above, the Debtors could fund a reserve for Innovatus with the entire amount of its Cash Collateral and provide that creditors junior to Innovatus will be paid under a liquidating plan waterfall with any excess, or the Debtors could pay Innovatus's claim in full in cash on the Effective Date subject to a reservation of claims.

74. Under either scenario, the Debtors can swiftly proceed with plan confirmation without hindering the rights of any other party-in-interest. Despite Innovatus proposing these alternatives multiple times, the Debtors have offered no explanation as to why the structure proposed in the Third Amended Plan – capping Innovatus's claim while distributing the remainder of Innovatus's collateral to junior creditors (unsecured creditors and equity) – is necessary. But by insisting on a structure that caps the amount of Innovatus's uncontested right to attorneys' fees and, instead, distributes Innovatus's collateral to junior stakeholders, it is the Debtors that are prolonging these proceedings. Thus, when evaluating the harm that would result to Innovatus

without a stay against the against the minimal harms that a stay would create, the balance of harms strongly favors a stay pending appeal.

IV. The Public Interest Weights in Favor of Granting a Stay

75. Courts consider whether the public interest will be served by granting a stay pending appeal, which requires a determination of "'consequences beyond the immediate parties.'" *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015) (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984)). "This factor calls for the court . . . to consider and balance the goal of efficient case administration and the right to a meaningful review on appeal." *In re Taub*, Case No. 08-44210, 2010 WL 3911360, at *3 (Bankr. E.D.N.Y. Oct. 1, 2010). In many cases, where, as here, the parties involved are all private entities, courts hold that the direct impact of a stay on the public interest is likely to be minimal and thus this factor is often neutral. *See Klobotos Props., LLC v. Thomas*, No. 4:21-CV-120-SDJ, 2021 WL 2953687, at *5 (E.D. Tex. Mar. 1, 2021) (recognizing that because the case "involves a private transaction, the dispute's impact on the public interest is likely to be minimal").

76. However, there is a strong public interest in the correct application of legal principles and a plan confirmation process that adheres to the Bankruptcy Code. *In re Voluntary Purchasing Groups., Inc.*, 196 F.3d at 1258 ("[T]he public interest weighs heavily in favor of a confirmation process that is seen specifically to follow and comport with applicable statutory standards."). Additionally, the public interests lie in the ability to obtain meaningful appellate review. *In re Revel AC, Inc.*, 2015 WL 567015, at *5 (D.N.J. Feb. 10, 2015) (noting the "public interest favoring the correct application of the law, and the ability to redress harm through appellate review.").

V. No Bond is Required

77. The posting of a bond is "discretionary and is not a prerequisite to obtain a stay pending appeal." *In* re *Suprema Specialties, Inc.*, 330 B.R. 93, 95 (S.D.N.Y. 2005) (citing *In re Sphere Holding Corp.*, 162 B.R. 639, 644 (E.D.N.Y. 1994)); *see also* Fed. R. Bankr. P. 8007(c). This is a liquidating case. There will be no reorganized business. Substantially all of the Debtors' assets have been sold and the proceeds are held in estate accounts. As a result, a temporary stay threatens no constituency with material harm. Moreover, Innovatus has a substantial secured claim against the Debtors for which the Debtors are holding onto a substantial amount of Innovatus's Cash Collateral. Because any harm that may arise while Innovatus pursues its appeal is minimal, no bond is required.

NOTICE

Innovatus will provide notice of this Motion to (a) the Debtors; (b) the U.S. Trustee; (c) the holders of the thirty (30) largest unsecured claims against the Debtors (on a consolidated basis); (d) the Unsecured Creditors Committee; (e) the Equity Committee; (f) the United States Attorney's Office for the Northern District of Texas; (g) the Food and Drug Administration; (h) the Internal Revenue Service; (i) the United States Securities and Exchange Commission; (j) the state attorneys general for the states in which the Debtors conduct business; and (k) any party that has requested notice pursuant to Bankruptcy Rule 2002. No other or further notice is needed in light of the nature of the relief requested.

CONCLUSION

WHEREFORE, for the reasons stated above, Innovatus respectfully requests the Court deny the Motion and grant such other relief as is just and proper.

Dated: August 30, 2024

Respectfully submitted,

FORSHEY & PROSTOK LLP
/s/ Jeff. P. Prostok
Jeff P. Prostok (TX Bar No. 16352500)
Emily S. Chou (TX Bar No. 24006997)
777 Main St., Suite 1550
Fort Worth, Texas 76102
Telephone: (817) 877-8855
Facsimile: (817) 877-4151
Email: jprostok@forsheyprostok.com
echou@forsheyprostok.com

-and-

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Adam C. Rogoff (admitted *pro hac vice*)
P. Bradley O'Neill (admitted *pro hac vice*)
Andrew J. Citron (admitted *pro hac vice*)
1177 Avenue of the Americas
New York, NY 10036
Telephone: (212) 715-9100
Email: aroggoff@kramerlevin.com
boneill@kramerlevin.com
acitron@kramerlevin.com

Counsel for Innovatus Life Sciences Lending Fund I, LP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument has been served on all parties and counsel of record in compliance with the Federal Rules of Bankruptcy Procedure on this 30th day of August.

/s/ Jeff P. Prostok
Jeff P. Prostok

EXHIBIT A

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 GRANTING INNOVATUS LIFE SCIENCES LENDING FUND I, LP'S EMERGENCY MOTION FOR STAY PENDING APPEAL

Upon the emergency motion (the "Motion")[2] of Appellants Innovatus Life Sciences Lending Fund I, LP ("Innovatus"), pursuant to Rule 8007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") seeking a stay pending Innovatus's appeal of this *Court's Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves to Unimpair Claim* [Dkt. No. 561]; and the Court having found

[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 Ave., Dallas, Texas 75201.
[2] Capitalized terms used herein but not otherwise defined shall have the meaning ascribed in the Motion.

that the Court may enter a final order with respect to the Motion consistent with Article III of the United States Constitution; and the Court having found that venue of the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and the Court having determined that there is good and sufficient cause for the relief granted in this order, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED to the extent set forth herein.

2. All provisions of the Estimation Order are hereby stayed pending the conclusion of Innovatus's appeal.

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

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

END OF ORDER

Submitted By:

FORSHEY & PROSTOK, LLP
Jeff P. Prostok
TX State Bar No. 16352500
Emily S. Chou
TX State Bar No. 24006997
777 Main Street, Suite 1550
Fort Worth, TX 76012
Tel: 817-877-8855
Fax: 817-877-4151
Email: jprostok@forsheyprostok.com
echou@forsheyprostok.com

KRAMER LEVIN NAFTALIS & FRANKEL, LLP
Adam C. Rogoff (admitted *Pro Hac Vice*)
P. Bradley O'Neill (admitted *Pro Hac Vice*)
Andrew J. Citron (admitted *Pro Hac Vice*)
1177 Avenue of the Americas
New York, NY 10036
Tel: 212-715-9100
Fax: 212-715-8000
Email: ARogoff@kramerlevin.com
BOneill@kramerlevin.com
ACitron@kramerlevin.com

Counsel for Innovatus Life Sciences Lending Fund I, LP