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

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

# DEBTORS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE FOURTH AMENDED JOINT PLAN OF LIQUIDATION OF EIGER BIOPHARMACEUTICALS, INC. AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

[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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The above-captioned debtors and debtors in possession (collectively, the "Debtors") in these chapter 11 cases (the "Chapter 11 Cases") submit this supplemental memorandum of law (this "Supplemental Memorandum") in support of the approval of the *Amended Disclosure Statement for Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 476-1] (as modified, amended, or supplemented from time to time hereafter, the "Disclosure Statement") and confirmation of the *Fourth Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 606-1] (as modified, amended, or supplemented from time to time hereafter, the "Plan").[1] As demonstrated below, the Plan satisfies the requirements of sections 1125 and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code")[2] and should be confirmed. In support of confirmation of the Plan, the Debtor respectfully states as follows:

## PRELIMINARY STATEMENT

1. Despite the fact that these Debtors faced a secured creditor who from the very first day of these Chapter 11 Cases made every effort to obstruct their attempts to realize the value of their assets, the Debtors are at the point where they can consummate a plan that pays every creditor in full and provides for a substantial distribution to equity holders. While it is not surprising that Innovatus (as defined below), who has litigated every possible issue in these Chapter 11 Cases (including by filing three appeals), would object to the Plan in a desperate attempt to prevent the very serious objections to its claim from being heard, it is surprising that the Equity Committee

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Plan or the Proposed Confirmation Order (as defined below), as applicable.

[2] A detailed description of the Debtors, their business, and the facts and circumstances surrounding these Chapter 11 Cases, is set forth in greater detail in the *Declaration of David Apelian in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 19] (the "First Day Declaration"). On April 1, 2024 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner in these Chapter 11 Cases. On July 10, 2024, the United States Trustee for the Northern District of Texas (the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "UCC") [Docket No. 322]. On July 25, 2024, the U.S. Trustee appointed an official committee of equity security holders pursuant to section 1101 of the Bankruptcy Code (the "Equity Committee").

has. To prove the adage that no good deed goes unpunished, the Equity Committee, which owes its very existence to the determined action by the Debtors' management to resist Innovatus's attempts to force a liquidation, objects to the Plan because it provides for releases by the Debtors to that very same management.

2. Thankfully, the Innovatus objections, to the extent they can even be raised, are without merit, as has been par for the course. Innovatus asserts a number of meritless objections to a Plan that provides for payment in full of the Allowed Amount of its Claim, whatever that turns out to be. What Innovatus really objects to is the fact that their Claim will be subject to the allowance process. They seek to derail these Chapter 11 Cases because the Debtors—who have paid Innovatus in excess of $27 million (plus almost $2 million in professional fees) since the commencement of these Chapter 11 Cases—have the temerity to assert an objection to the amount of their Claim. First, in an attempt to establish standing to object, Innovatus seeks to re-litigate the issue of whether it is unimpaired under the Plan. Even were it not law of the case, or if the Court wanted to entertain Innovatus's regurgitation of its arguments, the simple fact is there is no impairment of Innovatus's Claim. As shown herein, Innovatus's arguments all rely on its willful ignorance of the terms of the Plan. Innovatus also improperly tries to raise objections based on Plan provisions which do not have any conceivable impact on its interests. Finally, Innovatus makes the astounding argument that a Plan **that escrows the entire amount of its Claim in full, with default interest, and provides for payment of its full Allowed Claim when allowed,** somehow doesn't meet the standards of section 1129(b) of the Bankruptcy Code.

3. For its part, the Equity Committee, which has sat on its hands for the entirety of these Chapter 11 Cases, argues that the Debtors' inclusion of directors, officers, and employees in the Debtor Releases set forth in Article IX.A of the Plan is inappropriate, claiming that the Debtors have no justification for providing such releases and suggesting that the Debtors have not carefully analyzed potential claims of action. This is simply false. As discussed herein and in the Shanahan Declaration (as defined below), the Debtors and their advisors have undertaken a careful, independent review of all potential causes of action and, after a fulsome analysis of the Debtors'

corporate documents, records, and related information, concluded that there are no viable causes of action. Even if true (they are not), none of the "red flags" referenced by the Equity Committee would create a cognizable claim, especially in light of the strong protections provided to directors and officers under Delaware law. Accordingly, the Equity Committee Objection (as defined below) should be overruled.

4. The U.S. Trustee objected to (i) the Debtors' Third-Party Release, claiming that it is nonconsensual because it used Opt-Out Forms; (ii) the Debtors' Exculpation Provision (as defined below), claiming that it is too broad; (iii) the Debtors' Injunction Provision (as defined below), claiming that it is an impermissible discharge, and (iv) the Debtors' language regarding governmental entities, requesting further clarification that no parties shall be released from causes of action or proceedings brought by any governmental entity in accordance with its regulatory functions. The Debtors have reached a consensual resolution with the U.S. Trustee with regards to the Exculpation Provision and the governmental entities language. The U.S. Trustee's remaining objections should be overruled because of the longstanding precedent in this Court.

## ARGUMENT

5. In further support of confirmation, the Debtors submit the following declarations (collectively, the "Additional Declarations," and together with the *Declaration of Douglas Staut, Chief Restructuring Officer, in Support of Confirmation of the Third Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtors Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 574], the "Declarations"):

a. the *Declaration of Adam J. Gorman in Support of Confirmation of the Fourth Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 607] (the "Voting Report");

b. the *Declaration of Jon Muenz in Support of Confirmation of the Fourth Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 608] (the "Muenz Declaration"); and

c. the *Declaration of Michael Shanahan Regarding the Investigation of Alvarez & Marsal in Connection with the Fourth Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 609] (the "Shanahan Declaration").

## REPLY TO OBJECTIONS TO THE PLAN

6. On August 30, 2024, the Debtors received three objections to confirmation of the Plan (collectively, the "Objections" and each objecting party, an "Objector"). The Objections include (i) *Innovatus Life Sciences Lending Fund I, LP's Objection to (A) Final Approval of the Disclosure Statement and (B) Confirmation of the Debtors' Joint Plan of Liquidation* [Docket No. 588] (the "Innovatus Objection"); (ii) *The Official Equity Security Holders' Committee's Objection to the Third Amended Joint Plan of Liquidation of Eiger Biopharmaceuticals, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 589] (the "Equity Committee Objection"); and (iii) the *United States Trustee's Objection to Confirmation of Third Amended Joint Plan of Liquidation of Eiger Biopharmaceuticals, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 587] (the "U.S. Trustee Objection").

### I. The Innovatus Objection Should Be Overruled.

#### A. Innovatus Lacks Standing to Raise Certain Confirmation Objections.

7. Innovatus Life Sciences Lending Fund I, LP ("Innovatus") asserts that it has standing as a "party in interest" to object to confirmation of the Plan pursuant to the Supreme Court's recent ruling in *Truck Ins. Exch. v. Kaiser Gypsum Co., Inc.*, 144 S. Ct. 1414, 1420-21 (2024). Innovatus's reliance on *Truck* is beside the point.

8. Regardless of whether Innovatus is a party in interest, the doctrine of prudential standing imposes a "general prohibition on a litigant's raising of another person's legal rights."[3] Accordingly, courts routinely decline to permit objections that would violate traditional prudential limitations on standing—even if the party in interest has some financial stake in the case.[4] Because

[3] *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

[4] *See, e.g., In re Teligent, Inc.*, 417 B.R. 197, 210 (Bankr. S.D.N.Y. 2009) ("A party in interest must still satisfy the prudential limitations on standing, and cannot raise the rights of a third party even though it has a financial stake in

prudential standing is determined on an "issue-by-issue" basis,[5] courts have expressed a special concern regarding prudential standing "in the bankruptcy context where, as here, one constituency before the court seeks to disturb a plan of reorganization based on the rights of third parties . . . ."[6]

9. In *In re Fencepost Productions, Inc.*, the court found that a creditor lacked standing to object to confirmation and force the debtors to satisfy the section 1129(b) requirements of cram down because the creditor "would not benefit from enforcement of the requirements that the debtors' plan not discriminate, be fair and equitable to impaired classes, and satisfy the absolute priority rule."[7]

10. Similarly, Innovatus has been deemed unimpaired and therefore has no basis for objecting under section 1129(b) of the Bankruptcy Code. Any objection to the Plan's releases are likewise inapplicable to Innovatus, as it is not affected by the releases. Therefore, while Innovatus is a party in interest, it lacks prudential standing on a number of issues raised in the Innovatus Objection and, as such, the Court should overrule the Innovatus Objection.

11. Even further, relying on section 105(a) of the Bankruptcy Code, the Supreme Court in *Truck* noted that, despite the broad interpretation of party in interest, bankruptcy courts maintain "equitable discretion to control participation in a proceeding."[8] Indeed, section 105(a) of the Bankruptcy Code provides that:

> [n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.[9]

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the case."); *In re Tascosa Petroleum Corp*., 196 B.R. 856, 863 (D. Kan. 1996) (finding that "third-party prudential concerns prevented EFL, a class 5 creditor, from challenging those portions of the reorganization plan that did not affect its direct interests and from asserting the rights of the class 4 creditors").

[5] *In re Quigley Co., Inc.*, 391 B.R. 695, 705 (Bankr. S. D N.Y. 2008).

[6] *In re Fencepost Productions, Inc.*, 629 B.R. 289, 298 (Bankr. D. Kan. 2021).

[7] *Id.*

[8] *Id.* at 1428, note 5.

[9] 11 U.S.C. § 105(a).

12. Here, the Court should employ its equitable discretion to control Innovatus's further participation in this proceeding because this Court has already deemed Innovatus to be unimpaired. Innovatus has had many opportunities to be heard in these Chapter 11 Cases, but it does not get a vote or a veto; by disallowing objections to the Plan regarding Innovatus's unimpairment status, the Court will merely be taking appropriate action to enforce its previous order.

**B. Innovatus Is Not Impaired.**

13. In the *Order Estimating Claim of Innovatus Life Sciences Lending Fund I, LP for the Purposes of Establishing Sufficient Reserves to Unimpair Claim* [Docket No. 561] (the "Estimation Order"), this Court explicitly determined that Innovatus was unimpaired under the Plan.[10] Nevertheless, Innovatus now seeks to ignore the Court's ruling in the Estimation Order and relitigate its status as unimpaired. Indeed, without support, Innovatus also claims that this Court does not have the authority to estimate claims for purposes of impairment related to confirmation.[11] On the contrary, the Court's previous estimation for this purpose is within its core jurisdiction.[12]

14. Innovatus attaches to its objection a compilation of Plan provisions that allegedly impair Holders of Claims in Class 3.[13] What is particularly puzzling about this is that, for all the time allegedly spent parsing through the Plan to find "impairments," Innovatus ignores the fact that these "issues" have largely been addressed by the Debtors' the language *already included* in the Debtors' Plan. And to the extent not addressed by the Debtors' changes, this Court has already

[10] *See* Estimation Order ¶ 1 ("The Innovatus claim amount shall be set at $15,738,961.47 for the sole purpose of funding the Prepetition Term Loan Claims Escrow Account and rendering Innovatus unimpaired."); *see also In re Eiger Biopharmaceuticals, Inc.*, Transcript of Hearing on regarding Estimation, No. 24-80040, pg. 77 (SGJ) (Bankr. N.D. Tex. Aug. 20, 2024) (the "Estimation Transcript," attached hereto as **Exhibit A**) ("This is the Court's ruling on debtors' motion to estimate Innovatus's claim for purposes of establishing a sufficient reserve so that Innovatus's claim can be considered unimpaired and can be reasonably provided for in the debtors' plan such that it could be reasonably estimated to be provided for in full.").

[11] *See* Innovatus Objection, ¶ 15.

[12] *See In re North American Health Care, Inc.*, 544 B.R. 684, 688-68 (Bankr. C.D. Cal. 2016) (finding that "estimation of an unliquidated claim for the purpose of confirming a plan (which includes estimating for voting because plan confirmation usually requires voting by creditors)" is a "core" matter pursuant to 28 U.S.C. § 157(b)(2)(B)).

[13] *See* Innovatus Objection, Annex A.

addressed and issued a ruling on the objection or it is frivolous. Most of Innovatus's arguments have been previously addressed, and while they will not be addressed at length again here, below is a summary of the objections and the Debtors' responses:

| Plan Provision | Innovatus' Objection | Debtors' Response |
|---|---|---|
| Article III.B (Treatment) | Holders of Claims in Class 3 are not entitled to 100% of their Allowed Claims. | The Court has already addressed this in the Estimation Order. Innovatus will receive 100% recovery on its *Allowed* Claim. |
| Article IV.F (Vesting of Assets) | Assets vest free and clear of Innovatus's Liens. | This provision provides an exception that it applies "*[e]xcept as otherwise provided in this Plan*." As set forth throughout the Plan, Innovatus's rights are reserved pending further determination from the Court. |
| Article IV.G (Preservation of Causes of Action) | Innovatus's right to benefit from preclusion doctrines is eliminated. | Innovatus asserts that this is "fatal," but provides no support or explanation for such assertion. |
| Article IV.I (Cancellation of Existing Securities and Agreements) | Innovatus's securities and agreements are cancelled and of no effect upon the occurrence date. | This provision provides that "[a]ll parties' rights, defenses, and Causes of Action related to the Prepetition Term Loan Claims shall be reserved pending the Bankruptcy Court's determination of the Aggregate Allowed Prepetition Term Loan Claims Amount." |
| Article VI.C (Date of Distributions) | The Plan does not provide that interest, fees, or expenses will be allowed and will accrue—only that it may. | Whether the interest, fees, or expenses accrue depends on a further determination from the Bankruptcy Court. The Debtors' Plan includes the possibility that it will, which is sufficient for unimpairment purposes. |
| Article VI.F (Surrender of Instruments) | Innovatus is required to surrender its instruments or notes prior to being paid in full. | This provision provides that "[a]ll parties' rights, defenses, and Causes of Action related to the Prepetition Term Loan Claims shall be reserved pending the Bankruptcy Court's determination of the Aggregate Allowed Prepetition Term Loan Claims Amount." |
| Article VI.J (Setoffs and Recoupment) | The Debtors and the Liquidating Trustee have the absolute right to determine whether it can set off or recoup amounts and then effectuate such setoff and recoupment without any judicial determination. | Setoff is permitted under section 553 of the Bankruptcy Code. |
| Article VI.M (Distributions Free and Clear) | The Plan distributes Innoavtus's property free and clear in violation of its loan documents, without just compensation. | This provision provides an exception that it applies "*[e]xcept as otherwise provided in this Plan*." As set forth throughout the Plan, Innovatus's rights are reserved pending further determination from the Court. |
| Article VII.J (No Distributions Pending Allowance) | The Plan contemplates that will be no distribution while an objection to a Claim that is pending, which is inconsistent with the Debtors' statement that they will distribute $10 million to Innovatus. | At the request of Innovatus, the Debtors are happy to withhold the $10 million distribution contemplated under Article III.B.3.b of the Plan. |
| Article VII.K (Distributions | Innovatus's interest *may* accrue, but there is no certainty that it will accrue. | This provision explicitly states that "[t]he Aggregate Allowed Prepetition Term Loan Claims Amount shall |

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| After Allowance) | | include any interest accrued, as applicable per the Bankruptcy Court's determination, with respect to the period from the Effective Date to the date a final distribution is made on account of such Claim." |
| Article IX.D (Injunction) | The Plan injunction is too broad and effectively enjoins Innovatus from asserting setoff and it enjoins Innovatus from taking any action that would interfere with consummation of the Plan. | Innovatus does not have standing to object to this provision. |
| Article IX.F (Release of Liens) | Innovatus's security interest in its collateral is eliminated without just compensation. | This provision provides that "[a]ll parties' rights, defenses, and Causes of Action related to the Prepetition Term Loan Claims shall be reserved pending the Bankruptcy Court's determination of the Aggregate Allowed Prepetition Term Loan Claims Amount." |
| Article IX.G (Gatekeeper Provision) | The Plan requires Innovatus to obtain authority from the Court to pursue rights and remedies, but the loan documents include a forum selection clause laying venue in New York. Altering such provision impairs Innovatus. | Under the Bankruptcy Code, the Court has authority to hear such matters. |
| Article X (Retention of Jurisdiction) | The Court's retention of jurisdiction impairs Innovatus's rights under the Prepetition Term Loan Documents to litigate in New York. | Under the Bankruptcy Code, the Court has authority to hear such matters. Any such impairment is thus a result of the Bankruptcy Code and not the Debtors' Plan. |

15. In any event, the Debtors have accommodated Innovatus to the extent appropriate and Innovatus therefore will receive its full legal entitlement when such entitlement is determined, rendering Innovatus unimpaired under the Plan.

### C. To the Extent Necessary, The Plan Complies with the Cram Down Requirements of Section 1129(b)(2)(B) of the Bankruptcy Code.

16. Because Innovatus is unimpaired, each Class has either accepted or is deemed to accept the Plan. Therefore, cram down is not required. Nevertheless, Innovatus not only insists that the Debtors must satisfy the requirements of section 1129(b) of the Bankruptcy Code, but it unfoundedly claims that the Debtors have not done so. Innovatus shockingly claims that the Debtors are not providing it with the "indubitable equivalent" of its collateral —in fact, the Debtors are providing it with something even better: cash in an escrow account.

17. As previously discussed, Innovatus erroneously asserts that the Debtors are releasing Innovatus's liens and section 1129(b)(2)(A)(i) of the Bankruptcy Code therefore is

inapplicable.[14] However, the Plan contemplates that Innovatus will, in fact, retain its liens, and such liens merely will be transferred to the Liquidating Trust, at which point they will be subject to further determination by the Court in connection with its determination of the Aggregate Allowed Prepetition Term Loan Claims Amount. Accordingly, the Plan clearly complies with section 1129(b)(2)(A)(i) of the Bankruptcy Code.

18. Indubitable equivalence is a flexible standard that is a "matter left to the discretion of the bankruptcy court in its careful reliance upon sufficient facts."[15] Innovatus misunderstands the law and claims that the Debtors must provide Innovatus with the indubitable equivalent of its *collateral*.[16] What the Bankruptcy Code actually mandates is that the holder of a claim receive the indubitable equivalent of its "claim, not the property securing the claim."[17] Through the Prepetition Term Loan Claims Escrow Account, the Debtors are providing Innovatus with the indubitable equivalent of its Claims.[18] Further, the Court has already ruled on this matter. Any claim that the Debtors are depriving Innovatus of its constitutional rights is unfounded.[19]

**D. The Plan Was Proposed in Good Faith.**

19. A plan is proposed in good faith where it is "proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success. . . ."[20] In evaluating good faith,

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[14] *See* Innovatus Objection, ¶ 26.

[15] *In re Pearl Resources LLC*, 622 B.R. 236, 271 (Bankr. S.D. Tex. 2020); *In re Walat Farms, Inc.*, 70 B.R. 330, 336 (Bankr. E.D. Mich. 1987) ("a bankruptcy court is permitted, indeed required, to make these determinations on a case by case basis and to order confirmation of a plan which indubitably protects and pays the claim of an objecting creditor"); *In re Philadelphia Newspapers, LLC*, 418 B.R. 548, 568 (E.D. Pa. 2009) (noting that the indubitable equivalent prong is flexible).

[16] *See* Innovatus Objection ¶ 50.

[17] *See In re Pearl*, 622 B.R. at 270.

[18] Once again, the Debtors are placing the money into an escrow account to be held by a third-party escrow agent. One would imagine that Innovatus would find this to be a more agreeable security interest than a lien on cash alone.

[19] *See Matter of Baldwin-United Corp.*, 55 B.R. 885, 898-901 (Bankr. S.D. Ohio 1985) (rejecting creditor's argument that it was deprived of due process after the court estimated the creditor's claims pursuant to section 502 of the Bankruptcy Code).

[20] *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985).

the court should consider "the totality of the circumstances surrounding establishment of a Chapter 11 plan, keeping in mind that the purpose of the Bankruptcy Code is to give debtors a reasonable opportunity to make a fresh start."[21] Bankruptcy courts are afforded great deference in their findings regarding a party's motivation, because "[t]he bankruptcy judge is in the best position to assess the good faith of the parties' proposals."[22]

20. Here, this Court should find that the Debtors' have proposed their Plan in good faith. Unlike the debtor in *In re Double H Transportation*, whose projections were "incomprehensible" and lacked credible supporting evidence, who failed to give adequate notice to two large creditors, and who made significant, last-minute changes to the plan, including replacing a provision contemplating full payment to its creditors with a provision paying nothing to such creditors, the Debtors have provided extensive evidence supporting its calculations and financial projections, more than sufficient notice to interested parties in the case, and have not made substantive changes to the Plan that negatively affect Holders of Claims or Interests.[23]

**E. Plan's References to the Bankruptcy Court.**

21. Innovatus's request to revise the definition of "Bankruptcy Court" should be overruled. The Debtors further dispute Innovatus's ludicrous argument that this Court does not have exclusive jurisdiction over all matters arising in these Chapter 11 Cases.[24] It is well-settled law that bankruptcy courts retain such jurisdiction.[25]

[21] *Double H Transportation LLC*, 603 F. Supp. 3d 468, 477 (W.D. Tex. 2022).

[22] *Id.* (quoting *In re Jasik*, 727 F.2d 1379, 1383 (5th Cir. 1984)).

[23] *Id.* at 477-78.

[24] *See* 28 U.S.C. §§ 1334 and 157.

[25] *Id.*

**F. Preservation of Books and Records.**

22. In an effort to consensually resolve as many aspects of the Innovatus Objection as is possible, the Debtors have included the following addition to Section XII.H of the Plan to address Innovatus's request that book and records be maintained until these Chapter 11 Cases are closed:

> "Additionally, any books and records retained by the Wind-Down Debtors or Plan Administrator and not delivered to the Liquidating Trustee shall be maintained by the Wind-Down Debtors or the Plan Administrator pending the Bankruptcy Court's determination of the Aggregate Allowed Prepetition Term Loan Claims Amount."

**G. The Debtors Are Entitled to a Waiver of the 14-Day Stay.**

23. While Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise,"[26] courts have found it commonplace to waive the stay, instead finding that staying a confirmation order is an extraordinary remedy.[27] Courts typically evaluate "(1) whether the movant has made a strong showing that it is likely to succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether a stay will substantially injure other interested parties; and (4) where the public interest lies."[28] The burden of establishing that imposition of a stay is therefore on the movant.[29]

24. Here, Innovatus has not met its burden of establishing why the stay is warranted—primarily, it fails to show that it is likely to succeed on the merits and the stay itself causes substantial injury to other interested parties. As previously discussed herein, this Court has the

[26] Bankruptcy Rule 3020(e).

[27] *In re MTE Holdings, LLC*, No. 19-12269, 2021 WL 4203339, at *3 (Bankr. D. Del. Sept. 15, 2021) (denying motion for stay because movant did not demonstrate that it was warranted).

[28] *Id.*

[29] *Id.*

authority to control participation in a proceeding pursuant to its equitable discretion.[30] This Court has already ruled that Innovatus is *unimpaired*. Nevertheless, in a desperate money-grab, Innovatus very likely seeks to appeal any confirmation order entered by this Court and delay distributions to Holders of Class 4 General Unsecured Claims. As such, and for all of the reasons discussed herein, it is unlikely that Innovatus will succeed on the merits and any attempt to pursue frivolous litigation will only hurt other interest parties in interest. This can hardly be a situation that justifies such an extraordinary remedy.

25. Moreover, all parties in interest were provided notice of these Chapter 11 Cases, the Disclosure Statement, and the Plan, satisfying due process. The costs of staying these Chapter 11 Cases simply are not justified given the significant administrative and professional costs that directly reduce the amount of distributable value for creditors. Innovatus is the only party in interest who has made this extraordinary request, and all other stakeholders will be injured if this extraordinary remedy is granted.

26. Interestingly, Innovatus cites to *In re Adelphia Communications Corp.*, 361 B.R. 337 (S.D.N.Y. 2007), for the proposition that additional costs alone may not justify waiving the stay.[31] What Innovatus conveniently omits from its objection, however, is that the stay in *Adelphia* was conditioned on the movant posting cash or a bond in the amount of $1.3 billion, with ten percent to be posted within twenty-four hours of the court's opinion and the remainder within seventy-two hours of the date of the court's opinion.[32] The court in that case emphasized that the bond was necessary to ameliorate the financial harm that would affect all other interested parties

[30] *See Truck Ins. Exch.*, 144 S. Ct. 1414 at 1428.

[31] *See* Innovatus Objection, ¶ 50.

[32] *See In re Adelphia*, 361 B.R. at 368.

in the case.[33] Here, serious financial harm would befall other creditors should the Court grant a stay. Accordingly, the Court should (1) waive the stay or, in the alternative, (2) require Innovatus to post a bond in the full amount of the potential harm to the non-moving parties.

**H. Release and Exculpation Provisions.**

27. The Innovatus Objection includes objections regarding the permissibility of the Debtors' Debtor Releases, Third-Party-Releases, and Exculpation Provision. As discussed herein, Innovatus does not have prudential standing to object to the Debtor Releases, Third-Party Releases, or the Exculpation Provision. Accordingly, the Innovatus Objection should be overruled.

## II. The Equity Committee Objection Should Be Overruled.

28. The Equity Committee argues that the Debtors' inclusion of directors, officers, and employees (the "D&Os") included in the debtor release set forth in Article IX.A of the Plan (the "Debtor Release") is inappropriate and should therefore be (i) eliminated or (ii) narrowed so that causes of action may be pursued against the D&Os to the extent of available insurance.[34] As summarized briefly below and discussed further herein, the Equity Committee's Objection rests on a misapprehension of law and fact and should be overruled on numerous grounds.

29. First, the Debtors are proposing only a release of their own claims – what the Court has described as "the least-controversial type of release." As the Court well knows, such releases are routinely granted in this district and elsewhere. The Equity Committee ignores that precedent and instead relies misleadingly on inapplicable case law addressing third-party releases. This undermines the entirety of the Equity Committee Objection. *See infra* ¶¶ 62-66.

[33] *Id.* ("…if a stay pending appeal is likely to cause harm by diminishing the value of an estate or endanger the non-moving parties' interest in the ultimate recovery…then the court should set a bond at or near the full amount of the potential harm to non-moving parties") (internal citations omitted).

[34] Equity Committee Objection ¶ 1.

30. Second, it is well-settled that a debtor's decision to release its *own* claims is within the debtor's business judgment. In assessing whether a debtor validly exercised its business judgment, this Court has required an analysis of whether, given all the relevant facts and circumstances, the release is fair, equitable, and in the best interest of the estate. The Court also has deemed "relevant" whether the releasees have provided consideration. The Court should reject the Equity Committee's attempt to apply a different standard, which again relies on the same inapplicable case law relating to third-party releases. *See infra* ¶¶ 67-70.

31. Third, the Debtors unquestionably have properly exercised their business judgment with respect to the Debtor Release. Delaware law does not permit "second guessing" of the business judgment of D&Os who have acted in good faith and in the honest belief that their actions are in the best interests of the company. Contrary to the Equity Committee's false assertion, the Debtors have undertaken a thorough investigation of potential D&O claims and concluded that there are no viable claims. The Debtors also have considered the substantial contributions that the D&Os have made to this highly successful restructuring, as well as the fact that the D&Os have potential indemnification claims which would undermine attempts to collect on released claims. *See infra* ¶¶ 71-74, 81-84. What the Equity Committee fails to appreciate is that because this is a solvent estate, claims for indemnification, even if rejected, would give rise to general unsecured claims that would be senior in priority to any equity interests.

32. Fourth, despite "open book" access to the Debtors' records, the Equity Committee has not identified any viable claim. The Equity Committee complains about "mismanagement," but *even if such assertions were true,* its supposed claims are dead on arrival because it has not identified any bad faith or conflict of interest that could surmount Delaware's business judgment

rule. In any event, the Equity Committee's smear campaign has borne no fruit. *See infra* ¶¶ 89-100, 110.

33. The Court should reject the Equity Committee's attempt to tarnish the reputations of the D&Os who have shepherded the Debtors through what this Court has described as "a wildly successful bankruptcy."[35] As observed by the Debtors' Chief Restructuring Officer, the D&Os have "made significant contributions to a highly complex and contentious restructuring" all while safeguarding "patient health and the ability to maintain production of its life-saving products."[36] The claims that the Equity Committee purports to be "investigating" have no realistic likelihood of success and will only serve as a burden on individuals who have served the Debtors well. The Equity Commitment Objection should be overruled.

### A. Debtor Releases Are Routinely Approved In This District

34. Bankruptcy courts, including this Court, routinely approve debtor releases, including of a debtor's directors and officers.[37]

35. The Equity Committee nonetheless would have this Court believe that such releases are "highly controversial" and "rare."[38] This is wildly misleading and underscores the meritless

[35] Transcript of Hearing on Debtors' Emergency Motions ("Estimation Hearing") at 78:08, No. 24-80040-SGJ-11 (Bankr. N.D. Tex. Aug. 20, 2024) (Dkt. No. 554) (Jernigan, J.).

[36] Staut Decl. ¶ 32.

[37] *See, e.g.*, *In re Trivascular Sales LLC*, No. 20-31840 (SGJ), 2020 WL 5552598, at *19 (Bankr. N.D. Tex. Sept. 16, 2020) (Jernigan, J.); *In re: LWO Acquisitions Co. LLC*, No. 22-40256-ELM11, 2022 WL 1241445, at *7 (Bankr. N.D. Tex. Apr. 22, 2022); *In re Universal Rehearsal Partners, Ltd.*, No. 22-31966, 2023 WL 2816684, at *4 (Bankr. N.D. Tex. Apr. 6, 2023); *In re CiCi's Holdings, Inc.*, No. 21-30146 (SGJ), 2021 WL 819330, at *8 (Bankr. N.D. Tex. Mar. 3, 2021); *In re Taco Bueno Rests., Inc.*, No. 18-33678, 2018 WL 6720774, at *12 (Bankr. N.D. Tex. Dec. 20, 2018); *In re N. Richland Hills Alamo, LLC*, No. 22-40384 (ELM), 2022 WL 2975121, at *6 (Bankr. N.D. Tex. July 27, 2022); *In re PHI, Inc.*, No. 19-30923-HDH11, 2019 WL 3539941, at *20 (Bankr. N.D. Tex. Aug. 2, 2019).

[38] Equity Committee Objection, ¶ 57.

basis of the Equity Committee's Objections. All of the cases on which the Equity Committee relies involve non-consensual releases *by* non-debtors, *i.e.*, third-party releases.[39]

36. But these cases are *not* applicable, as this Court explained in *In re Highland Cap. Mgmt., L.P.*:

> A debtor release involves a release by the debtor and its bankruptcy estate of claims against nondebtor third-parties. For example, a release may be granted in favor of creditors, directors, officers, employees, professionals who participated in the bankruptcy process. ***This is the least-controversial type of release*** because the debtor is extinguishing its own claims, which are property of the estate, that a debtor has authority to utilize or not, pursuant to Sections 541 and 363 of the Bankruptcy Code.[40]

37. By contrast, "Chapter 11 plans also sometimes contain third-party releases."[41] Simply put, there are no nonconsensual third party releases here, only the "least-controversial type of release."[42]

### B. The Proposed Releases Are Within The Debtors' Business Judgment

38. It is well settled that, pursuant to Section 1123(b)(3) of the Bankruptcy Code, it is within a debtor's business judgment to include releases in a plan of reorganization with respect to "any claim or interest belonging to the debtor or to the estate."[43] This Court held as much in

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[39] *See In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1061–62 (5th Cir. 2012) (explaining that "***non-consensual***, ***non-debtor discharges***" are "foreclosed" and that "[o]ther courts have imposed similar restrictions on enjoining ***third-party claims*** against non-debtors") (emphasis added); *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (addressing "***nonconsensual third-party releases***") (emphasis added); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141–43 (2d Cir. 2005) (addressing "releases that permanently ***enjoin creditors*** from suing various nondebtors").

[40] Transcript of Bench Ruling at 24:11–20, No. 19-35054-SGJ-11 (Bankr. N.D. Tex. Feb. 8, 2021) (Dkt. No. 1917) (Jernigan, J.) (emphasis added).

[41] *Id*. at 27:05–06.

[42] *Id.* at 24:16.

[43] 11 U.S.C. § 1123(b)(3).

*Trivascular*, where it approved debtor releases that "represent[ed] a valid exercise of the Debtors' business judgment."[44]

39. Whether the inclusion of releases constitutes a "valid" exercise of a debtor's business judgment depends upon whether: (i) "[t]he release provisions are integral components of the Plan and the compromises and settlements contained therein"; (ii) management and directors "provided a tangible benefit to[] the Debtors' restructuring efforts" and "worked diligently in connection with the Debtors' restructuring for the benefit of all stakeholders"; and (iii) management and directors "acted in compliance with all provisions of the Bankruptcy Code, including the negotiation, preparation, and pursuit of confirmation of the Plan."[45]

40. The Equity Committee does not appear to dispute, nor could it, that the Debtors have satisfied the standards set forth by the Court in *Trivascular*. Instead, they again seek to mislead as to the applicable standards by citing to inapplicable case law (mostly from other jurisdictions and not controlling) in asserting that directors and officers *must* provide independent "consideration" for releases.[46]

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[44] 2020 WL 5552598, at *19. *See also LWO Acquisitions*, 2022 WL 1241445, at *7 ("The . . . release of Estate Claims . . . is reasonable and appropriate and reflects a proper exercise of the good faith business judgment of the Debtor.").

[45] *Trivascular*, 2020 WL 5552598 at *19; *Taco Bueno*, 2018 WL 6720774, at *12 (also considering "the probability of success in litigation of the released Claims and Causes of Action given uncertainty in fact and law with respect to the Claims and Causes of Action").

[46] Equity Committee Objection at ¶¶ 59-63 (citing, *e.g.*, a so-called "*Master Mortgage* test," which is based on a Missouri case that considered whether to enjoin *third parties* from pursuing claims against a creditor); *see also id.* ¶ 69 (asserting incorrectly that the Debtor Releases cannot be approved because this is a "liquidation scenario," based on the inapplicable "*Master Mortgage* test"). Again, each of the Equity Committee's cases concern third party releases. *See* Equity Committee Objection ¶ 69; *In re Master Mortg. Inv. Fund, Inc.*, 168 B.R. 930, 934 (Bankr. W.D. Mo. 1994) (evaluating the validity of third-party releases in different contexts); *In re Optical Technologies, Inc.*, 216 B.R. 989, 993 (M.D. Fla. 1997) (addressing "permanent injunction barring the claims of not only creditors of these Debtors but the claims of parties who had no dealings with the Debtors . . ."); *In re Regency Realty Assocs.*, 179 B.R. 717, 718 (Bankr. M.D. Fla. 1995) (addressing injunction against creditors); *LTV Corp. v. Aetna Cas. & Sur. Co. (In re Chateaugay Corp.)*, 167 B.R. 776, 780 (S.D.N.Y. 1994) (concerning "liability to third parties"); *In re Adelphia Commc'ns Corp.*, 364 B.R. 518, 529 (Bankr. S.D.N.Y. 2007) (addressing "channeling injunctions and third party releases").

41. While this Court has considered it to be "relevant" whether consideration has been provided,[47] neither this Court nor others in this district *required* directors or officers to provide independent consideration in order to find that Debtor releases are beneficial to the estate or otherwise permissible.[48]

42. Nonetheless, such consideration is amply provided here. Specifically, the D&Os have made significant contributions to a highly complex and contentious restructuring.[49] In the face of numerous obstacles and challenges, the Debtors' directors and officers navigated the Debtors through a Chapter 11 process that has been successful beyond any reasonable expectation.[50] The Debtors' highly successful Sale Transactions are evidence of the D&Os' contributions.[51] Recognizing the concern for patient health and the ability to maintain production of its life-saving products, the Released Parties consummated the Zokinvy sale within 32 days of the Petition Date and obtained a base purchase price that was approximately $20 million over the original Stalking Horse bid.[52] This effort was followed up by another highly successful sale process for Avexitide, which yielded approximately $25 million over the original Stalking Horse bid, far exceeding stakeholders' expectations by generating enough cash to fund meaningful recovery to equity.[53] The D&Os played an integral role in these successes, including by

[47] Transcript of Bench Ruling, *supra* note 102, at 24:25–25:06 ("In this context, it would appear that ***the only analysis required*** is to determine whether the release or settlement of the claim is an exercise of reasonable business judgment on that part of the debtor, is it fair and equitable, is it in the best interest of the estate, given all the relevant facts and circumstances? Also ***relevant*** is whether there's consideration given of some sort by the releasees.") (emphasis added).

[48] *See, e.g.*, *Trivascular*, 2020 WL 5552598 at *19 (discussing consideration provided by various parties, but not by directors and officers released pursuant to the plan); *Universal*, 2023 WL 2816684, at *4 (no requirement of consideration, but rather focus only on whether releases are "fair, reasonable, and in the best interests of the Debtors and Estates"); *LWO Acquisitions*, 2022 WL 1241445, at *7 (similar).

[49] Staut Decl. ¶ 32.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

shepherding potential bidders through complex diligence processes in compressed timeframes, facilitating closing of transactions involving numerous third parties and providing necessary transition services to ensure uninterrupted patient care and product testing and development.

43. Further, as discussed herein, the D&Os have potential indemnification claims which, even if rejected, would give rise to general unsecured claims that will recover at 100 percent.

44. As a result, and particularly in light of the conclusion that there are no viable causes of action against the D&Os (discussed below), Mr. Staut concluded that the Debtor Release "meet[s] the applicable standard because they are fair, reasonable, and in the best interests of the Debtors' Estates under the facts and circumstances of these Chapter 11 Cases."[54]

### C. The Debtors Have Concluded There Are No Viable Causes of Action Against the D&Os.

45. The valuable benefits and other consideration provided to the Debtors' estate that support the Debtor Release should be weighed against the "probability of success in litigation" of any claims that the Equity Committee has been able to identify through its extensive access to the Debtors' records. As set forth below, that probability is zero.

#### a. The Standard Applicable Generally to Claims against Directors and Officers.

46. The EC Objection challenges a number of decisions made by the D&Os and suggests that those decisions may give rise to its fictitious "claims." The Equity Committee, however, glosses over the "business judgment rule" standard applicable under Delaware law with respect to any such claims, because it knows it cannot possibly surmount that standard.

[54] Staut Decl. ¶ 35.

47. The business judgment rule is "a *presumption* that [directors] were faithful to their fiduciary duties,"[55] and "presumes that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.'"[56] The plaintiff bears the burden of overcoming this presumption.[57]

48. Delaware courts have extended the protections of the business judgment rule to corporate officers.[58] Thus, the business judgment rule is "a rule of law that 'insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation.'"[59] In other words, "[u]nder the 'business judgment' rule, alleged unwise, inexpedient, negligent or imprudent decisions or conduct will not sustain a suit against the management of a corporation."[60]

49. Where a plaintiff has not alleged and proven facts to overcome the business judgment rule presumption, the rule "insulate[s] the good faith decisions of disinterested corporate directors from judicial second-guessing."[61]

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[55] *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004) (emphasis original)

[56] *In re Walt Disney Co. Derivative Litig*, 906 A.2d 27, 52 (Del. 2006) (citation omitted). "[W]here business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'" *Id*. at 74 (citation omitted).

[57] *Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009).

[58] *See, e.g., In re McDonald's Corp. S'holder Derivative Litig.,* 289 A.3d 343, 375 (Del. Ch. 2023) ("This decision concludes that oversight liability for officers requires a showing of bad faith.").

[59] *Am. Soc'y for Testing & Materials v. Corrpro Cos., Inc.*, 478 F.3d 557, 572 (3d Cir. 2007) (citation omitted).

[60] *Mims v. Kennedy Cap. Mgmt., Inc*. *(In re Performance Nutrition, Inc.),* 239 B.R. 93, 111 (Bankr. N.D. Tex. 1999) (quoting *Cleaver v. Cleaver*, 935 S.W.2d 491, 495–96 (Tex. App. 1996)).

[61] *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 451-52 (Del. Ch. 2010); *see also In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009) ("To impose liability on directors for making a 'wrong' business

50. To overcome the business judgment rule presumption based on "bad faith," a "plaintiff must show either '[(i)] an extreme set of facts to establish that disinterested directors were intentionally disregarding their duties or [(ii)] that the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'"[62] There is nothing in the Equity Committee's Objection that could conceivably support such a finding.

b. The Debtors' Independent Investigation

51. Notwithstanding their confidence that no remotely viable D&O claims existed, in a further exercise of the impeccable judgment they have displayed throughout these cases, the Debtors requested that Michael Shanahan, a Managing Director at Alvarez & Marsal, conduct an investigation of any potential D&O claims so as to make absolutely certain that the Debtors were properly exercising their business judgment with respect to the D&O Releases.[63]

52. Mr. Shanahan is a Certified Public Accountant, a Certified Fraud Examiner, and Certified in Financial Forensics ("CFF") with more than 20 years of accounting, audit, and investigative experience.[64] He has conducted numerous investigations to develop, understand, and

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decision would cripple their ability to earn returns for investors by taking business risks. Indeed, this kind of judicial second guessing is what the business judgment rule was designed to prevent.").

[62] *Vladimir Gusinsky Revocable Tr. v. Hayes*, C.A. No. 2022-1124-MTZ, 2024 WL 3508530, at *6 (Del. Ch. July 23, 2024) (citation omitted); *Ryan v. Buckeye Partners, L.P.*, C.A. No. 2021-0432-JRS, 2022 WL 389827, at *12 (Del. Ch. Feb. 9, 2022), *aff'd*, 285 A.3d 459 (Del. 2022) ("The well-pled allegation of bad faith 'is a [rare bird].' A conclusory incantation of the words 'bad faith' is not enough; the plaintiff must, instead, offer a factual narrative that provides at least some explanation of the motive of the supposed bad faith actor."); *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009) ("General allegations of bad faith conduct are not sufficient.").

The Equity Committee raises unspecified concerns about non-officer "employees" obtaining releases, but it is unclear on what basis an objection can be raised. The Equity Committee has not identified any claim – plausible or implausible – against rank-and-file employees of the Debtors, nor can it. *See Ironworkers Dist. Council of Philadelphia & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *3 n.5 (Del. Ch. May 8, 2015) ("Under Delaware law, an employee does not owe fiduciary duties to the corporation unless he is a 'key managerial employee' subject to fundamental principles of agency law.").

[63] Shanahan Decl. ¶ 1.

[64] *Id.*

evaluate information in connection with potential avoidance and other causes of action, including breach of fiduciary duty claims.[65]

53. The Debtors provided Mr. Shanahan with access to more than 58,000 pages of material and made the Debtors' Chief Executive Officer, Dr. David Apelian, available for consultation. Over the course of the last month, Mr. Shanahan has carefully reviewed those materials for evidence of any potential D&O claims, with a focus on issues raised by the Equity Committee. In sum, Mr. Shanahan has concluded that (i) the evidence cited by the Equity Committee in support of its claim of improper safety reporting and monitoring practices is part of normal communications with the Department of Health;[66] (ii) there is no evidence to support the Equity Committee's claim of mismanagement regarding data integrity and public disclosures;[67] (iii) Debtors acted properly in their engagement with multiple parties related to the potential sale of its Zokinvy asset prior to the bankruptcy proceeding;[68] (iv) the bonuses paid prior to the bankruptcy filing were properly approved by the Compensation Committee and/or Board;[69] and (v) there has been no evidence identified that suggests the Directors and Officers were conflicted or prioritized their own self-interest over that of the Company at any time.[70]

54. Supported by this investigation, and as addressed further below with respect to the particular "claims" raised in the EC Objection, the Debtors have concluded that there are no viable causes of action against the D&Os.

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[65] *Id.*

[66] Shanahan Decl. ¶ 14.

[67] *Id.* ¶ 15.

[68] *Id.* ¶ 16.

[69] *Id.* ¶ 17.

[70] *Id.* ¶ 13.

c. Information Provided to the Equity Committee

55. The Debtors voluntarily provided the Equity Committee with same information available to Mr. Shanahan — over 58,000 pages of material and multiple interviews with Dr. Apelian.[71] The Equity Committee complains about the volume and timing of information produced and suggests that they need to conduct "further investigation," but any urgency is of their own making. The Equity Committee largely has sat on its hands in this case, most notably by abstaining from disputes with Innovatus and not even sending their lead counsel to the estimation hearing, where the interests of their constituents were clearly at issue.

56. The Equity Committee waited until five weeks prior to confirmation to propound discovery requests seeking the production of *twenty-two* broad categories of documents, including, *inter alia*, "[a]ny and all documents and/or communications" relating to the Debtors' pre-petition marketing efforts, valuations of the Debtors' assets, the Debtors' pre-petition term loan, "failed medical trials," efforts to obtain any type of equity or other financing, partnerships or joint ventures, SEC filings, and cash expenditures.[72] The Debtors proposed to apply broad search terms and produce information from five senior-level custodians, but the Equity Committee insisted on expanding that list to *eleven* custodians.[73] The Debtors agreed to the Equity Committee's request and promptly worked to collect documents from the Debtors' outside IT vendor.[74] On August 4, 2024, the Debtors informed the Equity Committee that they had "collected and identified for review approximately 24,000 documents from the eleven custodians that you identified," that this is a "substantial volume, but we will endeavor to begin rolling out productions

[71] Shanahan Decl. ¶¶ 7–9.

[72] Muenz Decl., ¶ 5, Ex. A.

[73] *Id*. ¶ 7, Ex. B.

[74] *Id*. ¶ 8.

as soon as possible."[75] The Debtors commenced production approximately one week later and substantially completed their production of more than 8,300 documents by August 22, 2024.[76]

57. The Debtors provided the Equity Committee with *everything* that they requested.[77] Indeed, the Equity Committee has not requested any additional information or suggested that any aspect of the information provided is deficient.[78] The Equity Committee has had ample opportunity to identify potential D&O claims if they exist, but has come up empty.

d. Each of the "Claims" Raised in the Equity Committee Objection is Without Merit

58. Based on Mr. Shanahan's investigation, and in the Debtors' business judgment, none of the Equity Committee's purported claims represents anything other than second-guessing of good faith business decisions or has any reasonable prospect of success.

*i. Breach of Fiduciary Duty or Fraudulent Transfer Claims Relating to Prepetition Bonuses*

59. The Equity Committee asserts that it has potential claims for breach of fiduciary duty and/or fraudulent transfer relating to retention bonuses that the Debtors approved in March 2024 (the "March Retention Plan"), prior to the Petition Date, in light of the fact that the Debtors had approved a separate bonus plan in December 2023 (that called for bonuses to be paid across two installments in January and June 2024).[79] No claim can succeed on these facts, none of which are in dispute or require further "investigation."

[75] *Id*. ¶10, Ex. C.

[76] *Id.* ¶ 13. The remaining productions about which the Equity Committee complains solely included documents that the Debtors determined were non-privileged in the course of preparing their privilege log. Indeed, the fact that Debtors de-designated these documents shows that Debtors fully cooperated with the Equity Committee to get it everything it requested and that Debtors had nothing to hide. *Id.* ¶ 14.

[77] *Id*. ¶¶ 12, 16.

[78] *Id*. ¶ 16.

[79] Equity Committee Objection ¶¶ 41, 74.

60. "The business judgment rule protects an independent board's compensation decisions, even those approving large compensation packages."[80] Indeed, "a board's decision on executive compensation is entitled to great deference," and "the size and structure of executive compensation are inherently matters of judgment."[81]

61. The Equity Committee asserts that the D&Os breached their fiduciary duties because the D&Os approved bonuses through the March Retention Plan that were "duplicative" and "excessive."[82] The Equity Committee simply has no basis to substitute its judgment for that of the Debtors with respect to whether these bonuses were reasonable and appropriate. There is no evidence whatsoever of any conflict of interest, self-dealing, or other improper "motive" that might have tainted the decision to approve the March Retention Plan, and so the D&Os' business judgment must be respected.

62. In any event, the March Retention Plan *was* reasonable and appropriate. After the Debtors published a press release in December 2022 touting statistical significance relating to the its study on the use of Lonafarnib for the treatment of HDV, the market had a surprising negative reaction, resulting in a sharp decline in the stock price. Following the publication of the press release and the market's negative reaction, the Debtors' CEO and Chief Marketing Officer at the time resigned from their positions and, in the wake of their departures, Dr. Apelian was appointed as Interim CEO of the Debtors. Having worked for the Debtors for approximately five years prior

[80] *Freedman v. Redstone*, 753 F.3d 416, 428 (3d Cir. 2014) ("[a]lthough Freedman may disagree with the Board's decision to award Viacom's executives substantial short-term incentive compensation . . . we may not second guess its exercise of its business judgment in this matter"). *Freedman* was overruled solely on the issue of demand futility by *In re Cognizant Tech. Sols. Corp. Derivative Litig.*, 101 F.4th 250 (3d Cir. 2024).

[81] *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000); *see also In re ATP Oil & Gas Corp.*, 711 F. App'x 216, 222–23 (5th Cir. 2017) (finding Chapter 7 Trustee "failed to plead with plausibility that the payment of cash bonuses constituted a fiduciary duty breach by any Officer or Director"); *id.* at 222 ("Executives may judge that continuing to compensate corporate management during times of financial hardship may be necessary to retain those employees.").

[82] Equity Committee Objection ¶ 80.

to his appointment as Interim CEO, and having served as a member of the Debtors' board since June 2017, Dr. Apelian immediately recognized the vulnerable position that the Debtors faced. Employees were apprehensive over the unexpected decline in the Debtors' stock price, and the loss of two of the Debtors leaders certainly did not assuage employees' concerns. Given the unique and highly technical nature of the industry, there were few individuals qualified to serve in key roles for the Debtors' operations and therefore, retention of certain employees was of utmost importance.

63. Accordingly, Dr. Apelian, in conjunction with the Debtors' board and the board's independent compensation committee, engaged in comprehensive discussions regarding the future well-being of the Debtors and concluded, in their reasonable business judgment, that to retain the talented executives necessary to maintain the value of the Debtors' diverse portfolio of late-stage products, retention payments were warranted for key employees. These retention payments were calculated with the assistance of a compensation consultant and approved by the Debtors' independent compensation committee and board.

64. Importantly, and contrary to the Equity Committee's bald assertion, there was nothing "duplicative" or "excessive" about the March Retention Plan. It is true that the Debtors had awarded bonuses in January 2024, but those bonuses already had been authorized and *paid* prior to any consideration of the March Retention Plan. It is (and was) obvious that bonuses paid out months earlier would not serve to incentivize key personnel to remain in their roles going *forward*. In other words, the bonuses served two different purposes and were not "duplicative." Moreover, even if the January bonuses were included as part of the March Retention Plan, the total

bonuses would fall within a reasonable range based on the analysis of the Debtors' compensation consultant.[83]

65. Meanwhile, the June 2024 bonuses cannot possibly be deemed duplicative because they have not been paid and, as the Equity Committee concedes, were not *expected* to be paid.[84] It is equally obvious that bonuses that have no expectation of being paid cannot incentive employees to remain employed. Consistent with expectations, the Debtors never sought authorization from the Court to pay the June 2024 bonuses. To the extent D&Os have submitted claims with respect to those bonus payments, that does not give rise to any D&O litigation claim, but rather is a matter as to which the liquidating trustee may object, if it sees fit, and the Court may address in determining whether to allow such claims.

66. The Equity Committee's purported fraudulent transfer claims are equally deficient. Fraudulent transfer claims require a showing of either (i) an actual intent to hinder, delay, or defraud creditors or (ii) a transfer for less than a "reasonably equivalent value" by an **insolvent debtor**.[85] There is nothing whatsoever in the record to evidence an intent by any of the D&Os to defraud the Debtors' creditors or that the Debtors are insolvent.

67. Such a claim also would need to ignore the value provided by the March Retention Plan, which secured the continued employment of key personnel during a critical period for the Debtors and thereby maintained the value of Debtors' assets to the benefit of creditors *and equity*. Moreover, it would be ironic for the Equity Committee to assert that the Debtors are insolvent as it would undermine their very existence.

[83] Shanahan Decl. ¶ 81-82.

[84] Equity Committee Objection, ¶ 68, n.12.

[85] 11 U.S.C. § 548(a)(1)(A)-(B).

68. Finally, there is no negative inference to be made from the fact that the Debtors approved the March retention plan prior to filing their Chapter 11 petition. The Debtors knew that they would be dealing with a contentious secured creditor – a prediction proven accurate and witnessed by the Court on many occasions – and that personnel would be concerned if the prospect of receiving retention bonuses were conditional and delayed. The Debtors had funds available and deployed them in their business judgment (again, with approval by an independent committee and in conjunction with a compensation consultant).[86]

*ii. Other Matters under "Investigation"*

69. It is telling that the purported claims relating to bonuses are the *only* specified "claims" that the Equity Committee references in its Objection. In an effort to muddy the waters, however, the Equity Committee also asserts that it is "investigating" other "red flags."[87] None of the "evidence" cited in the EC Objection comes close to establishing a probability of success in litigation on any D&O claim.

70. The Equity Committee groups these remaining areas of "investigation" into three areas: (i) "improper safety reporting and monitoring"; (ii) "mismanagement regarding data integrity and public disclosures"; and (iii) "mismanagement regarding cash management and the prepetition Zokinvy sale process."[88] The Debtors address each in turn below, none of which suggest even the barest prospect of a claim or warrant further "investigation."

[86] In this regard, the Equity Committee's reliance on *In re Enron Corp*., No. 01-16034-AJG, 2005 WL 6237551 (Bankr. S.D. Texas July 16, 2013), is misleading. In that case, the bonuses were "contrary to Enron's stated compensation policy" because the amounts were not "contingent" or "based on market surveying," and were higher than a year in which Enron had "stellar performance." *Id*. at *5.

[87] Equity Committee Objection ¶ 19.

[88] *Id.*

71. First, with respect to alleged deficiencies in "safety reporting and monitoring," the full extent of the Equity Committee's "evidence" is a handful of cherry-picked documents that establish the following timeline:

- June 1, 2023: the Department of Health ("DOH") issues a memorandum expressing "concern" that medical safety reviewers "may not be adequately trained on safety event reporting."
- July 5, 2023: The independent Data Safety Monitoring Board (the "DSMB") sought to consult with the Debtors about certain patients with "severe" liver injuries and to make sure the "medical monitor was aware of the cases."
- September 7, 2023: The DSMB recommends that the Debtors discontinue their hepatitis study.
- Undated: The FDA "criticizes" the Debtors for not sharing the DSMB recommendation between September 6 and September 11.[89]

72. On that bare scaffolding, the Equity Committee alleges "very serious failures" that require interviews, expert review, and depositions.[90] That is nonsense. The Equity Committee does not state what kind of "claim" it could even conceivably generate from these facts and it is clear there is no such viable claim. The Equity Committee omits the Debtors' detailed responses to DOH, which thoroughly addressed the DOH's concerns.[91] Most critically, the Debtors have never faced any penalty or lawsuits relating to "reporting" of "safety events."

73. Moreover, while it is true that the FDA indicated that it would have liked to have been informed sooner about the DSMB recommendation, the fact is that FDA regulations provide a study sponsor with "5 working days" to discontinue a clinical investigation "after making the determination that the investigation should be discontinued."[92] The Debtors complied with that

[89] Equity Committee Objection ¶¶ 21, 23, 24–25.

[90] Equity Committee Objection ¶26.

[91] Shanahan Decl. ¶ 28.

[92] Shanahan Decl. ¶ 34.

regulation: they received the DSMB recommendation on September 8, 2023 (a Friday), accepted the recommendation that very day, and then informed the FDA about the recommendation on September 12, 2023 (a Tuesday), or within *two* working days.[93] In other words, the Debtors' processes worked as they should. Most importantly, the Debtors immediately halted an important study to protect patient health.

74. Of course, as with any claim that the Equity Committee might pursue, it must overcome the business judgment rule presumption. The Equity Committee presents no evidence of bad faith or conflicts of interest to rebut that presumption. Accordingly, even if the D&Os had acted negligently – *and that is unquestionably not the case* – the Equity Committee still would have no viable claim.[94]

75. Second, with respect to alleged "mismanagement regarding data integrity and public disclosures," the sole "evidence" cited by the Equity Committee amounts to complaints by certain employees and a single "investor" who sent unsolicited (and frankly bizarre and harassing) emails to the Debtors.[95] Again, there is no conceivable claim here, much less one with a probability of success.

76. Contrary to the Equity Committee's implication of mismanagement, the employee complaints show a process that *worked*. Even under the Equity Committee's warped characterization of events, they concede that the complaints resulted in "action by the Debtors' Board of Directors," including a "resolution" that delegated powers to a committee to investigate issues relating to "management, data integrity, and public disclosures."[96] That is how good

[93] Shanahan Decl. ¶ 34.

[94] *See Mims*, 239 B.R. at 111 ("Under the 'business judgment' rule, alleged unwise, inexpedient, negligent or imprudent decisions or conduct will not sustain a suit against the management of a corporation.").

[95] *See* Equity Committee Objection ¶ 30.

[96] Equity Committee Objection ¶27.

corporate governance *is supposed to work*. As to the alleged "indemnification discussion," the Equity Committee raises only pure speculation without any evidence whatsoever of misconduct, much less a viable claim. Notably, the Debtors' auditor, KPMG, issued a report in 2022 that found no matters to report in relation to disclosure omissions, non-GAAP policies and practices, other financial reporting matters, or disagreements with management.[97] Nor have the Debtors faced any adverse regulatory action relating to "data integrity" or "public disclosures."[98]

77. The "investor" emails, for their part, hardly warrant a response. The fact that a single investor – if he even is one – berated management due to negative "sentiment" on the "several investor blog sites" that he follows does not come anywhere close to establishing a claim.[99]

78. Third, the Equity Committee's allegations of "mismanagement" is meritless.[100] The sale of the Zokinvy assets to Sentynl Therapeutics, Inc. secured a price beyond all contemporaneous estimates Debtors' received pre-petition while also ensuring no interruption in the supply of this life-enabling drug to the most vulnerable of populations. The Equity Committee cannot possibly attack the Debtors' (and the D&Os') conduct relating to the incredibly successful Zokinvy sale.

79. The entirety of the purported "mismanagement" rests on allegations that the Debtors were not sufficiently responsive when communicating with one potential bidder, Eton Pharmaceuticals ("Eton"), and that months earlier they had declined interest from another

[97] Shanahan Decl. ¶ 43–44.

[98] *Id*.

[99] Exhibit H, *Certification of Warren J. Martin in Support of The Official Equity Security Holders' Committee's Objection to the Third Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 593].

[100] *See* Equity Committee Objection ¶ 19.

"potential acquirer." According to the Equity Committee, the Debtors should have hired an investment banker to guide a potential sale of Zokinvy pre-petition.

80. As always, "mismanagement," even if it existed here, cannot constitute a claim under Delaware law absent a basis to rebut the business judgment rule, and there is none. Simply put, absent bad faith, "Delaware law does not require a board to treat all bidders equally[.]"[101] The Equity Committee has not identified any facts to suggest that management or the board acted for "a selfish or inappropriate reason," and thus whether the Debtors showed a "lack of follow-up and engagement" with Eton as compared to Sentynl is irrelevant. Furthermore, in light of the results of the post-petition sale process, there could be no conceivable damages.

**D. The Exculpation Provision Objection Has Been Addressed.**

81. As discussed in the Debtors' response to the U.S. Trustee Objection (below), the Debtors have proposed revisions to the exculpation provision set forth in Article IX.C of the Plan (the "Exculpation Provision") and as such, the Exculpation Provision is appropriate and complies with applicable Fifth Circuit law. Accordingly, the Court should overrule the Equity Committee Objection as to the Exculpation Provision.

## III. To the Extent Not Resolved, the U.S. Trustee Objection Should Be Overruled.

82. The U.S. Trustee objects to the Third-Party Release and exculpation provisions contained in Article IX of the Plan, as well as certain other matters. Specifically, among other things, the U.S. Trustee argues that: (i) the Plan's release provisions are nonconsensual opt-out releases and therefore impermissible; (ii) the Plan's exculpation provision is too broad under Fifth Circuit law; (iii) the Debtors should not receive a discharge by operation of the Plan's release and

[101] *In re Novell, Inc. S'holder Litig., C.A*. No. 6032-VCN, 2014 WL 6686785, at *9 (Del. Ch. Nov. 25, 2014); *In re Fort Howard Corp. S'holders Litig*., CIV. A. No. 9991, 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988) ("[A] board need not be passive even in an auction setting. It may never appropriately favor one buyer over another for a selfish or inappropriate reason, . . . but it may favor one over another if in good faith and advisedly it believes shareholder interests would be thereby advanced.").

injunction provisions because the Plan is a plan of liquidation; and (iv) the Plan should clarify that no parties shall be released from causes of action or proceedings brought by any governmental entity in accordance with its regulatory functions. As set forth more fully below, the Plan's release, exculpation, and injunction provisions (as revised, as discussed below) comply with applicable Fifth Circuit law, are reasonable, and should be approved. The U.S. Trustee Objection with respect to points (ii) and (iv) above have been resolved by amendments to the Plan.

**A. The Third Party Releases Are Appropriate and Lawful.**

83. The U.S. Trustee argues that the Third Party Release is nonconsensual and therefore contrary to *In re Harrington v. Purdue Pharma, L.P.*, 144 S.Ct. 2071 (2024).[102] The U.S. Trustee further argues that the option to execute a Release Opt-Out fails to create a consensual release.[103] The Debtors disagree.

84. Even before *Purdue*, the Fifth Circuit case law arguably prohibited non-consensual third-party releases.[104] *Purdue* did not change the law in the Fifth Circuit. Instead, what has long been permitted in the Fifth Circuit, and in this Court, are *consensual* third-party releases, which *Purdue* did not impact.[105] Importantly, the Supreme Court in *Purdue* specifically held that "[n]othing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan . . . ."[106] This Court need not, and should not, deviate from its prior rulings and broaden the scope of the Supreme Court's holding.[107]

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[102] U.S. Trustee Obj., at ¶¶ 24, 34.

[103] *Id*.

[104] *See In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (observing that prior Fifth Circuit authority "seem broadly to foreclose non-consensual non-debtor releases").

[105] *See, e.g., In re CJ Holding Co.*, 597 B.R. 597, 610 (S.D. Tex. 2019) (noting that the "Fifth Circuit does not preclude bankruptcy courts from approving a consensual non-debtor release"); *In re Wool Growers Cent. Storage Co.*, 371 B.R. 768, 775–76 (Bankr. N.D. Tex. 2007) (noting that consensual non-debtor releases are permissible); *In re Bigler LP*, 442 B.R. 537, 543–44 (Bankr. S.D. Tex. 2010) (same); *In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701–02 (Bankr. W.D. Tex. 2011) (same).

[106] 144 S.Ct. at 2087-88.

[107] The Debtors acknowledge Judge Scott W. Everett's recent decision in *In re Ebix*, No. 24-80004 (SWE) (Bankr. N.D. Tex. Aug. 2, 2024). Judge Everett is the only judge in the Northern District of Texas who has expressed this view.

85. The U.S. Trustee's contention that the Third Party Release is nonconsensual based on state law contradicts the great weight of precedent in this district and similar jurisdictions.[108] The U.S. Trustee Objection contends that opt-out provisions are insufficient to confer consent to a third-party release.[109] Opt-outs have long been used in the bankruptcy context. Just recently, the Bankruptcy Court for the Southern District of Texas approved a plan containing opt-outs for third party releases over the objection of the U.S. Trustee.[110] Moreover, the U.S. Supreme Court and the Fifth Circuit have also approved opt-outs as providing consent in non-bankruptcy cases, such as class actions.[111]

86. There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan.[112] Indeed, this Court has approved them numerous times in the past.[113] One determining factor when evaluating the propriety of such opt-outs is whether parties in interest were provided adequate notice.[114] Here, the Third Party Releases provide affected parties constitutional due process and a meaningful opportunity to opt out, thus satisfying applicable law.

87. Parties in interest were provided detailed notice about the Plan, the deadline to object to the Plan confirmation, the voting deadline, and the opportunity to opt out of the Third-

[108] *See supra* note 105.

[109] *See* U.S. Trustee Objection, ¶ 29.

[110] *See Robertshaw US Holding Corp.*, No. 24-90052 (CML) (Bankr. S.D. Tex. Aug. 16, 2024) [Docket No. 959] (confirming plan and finding that the debtors' opt outs were permissible, even following the Supreme Court's decision in *Purdue*).

[111] *See, e.g.*, *Phillips Petroleum Co. v. Irl Shutts*, 472 U.S. 797, 811–12 (1985) (approving opt-out); *Seacor Holdings, Inc. v. Mason, (In re Deepwater Horizon)*, 819 F.3d 190 (5th Cir. 2016) (same).

[112] *See, e.g.*, *In re Arsenal Intermediate Holdings, L.L.C.*, No. 23-10097 (CTG), 2023 WL 2655592, at *6–8 (Bankr. D. Del. Mar. 27, 2023).

[113] *See, e.g.*, *In re Impel Pharmaceuticals, Inc.*, No. 23-80016 (SGJ) (Bankr. N.D. Tex. Apr. 2, 2024) [Docket No. 321] (confirming plan with opt-out feature); *In re Studio Movie Grill Holdings, LLC*, No. 20-32633 (SGJ) (Bankr. N.D. Tex. Mar. 31, 2021) [Docket No. 875] (same); *In re CiCi's Holdings, Inc.*, No. 21-30146 (SGJ) (Bankr. N.D. Tex. Mar. 3, 2021) [Docket No. 200] (same).

[114] *See In re Arsenal*, 2023 WL 2655592, at *7 (noting that the opt outs resulted in consensual third party releases because "each affected party received notice and had an opportunity to be heard"); *In re Mallinckrodt PLC*, 639 B.R. 837, 879 (Bankr. D. Del. 2022) (explaining that the judicial system has many instances where silence is deemed consent, including failure to file a proof of claim, so opt-outs for third party releases were permissible so long as the creditor had notice).

Party Releases. The Disclosure Statement included a detailed description about the Third-Party Releases and the opt-out. The Solicitation Packages were sent to Holders of Claims or Interests on August 2, 2024.[115] The Solicitation Packages and the Non-Voting Packages provided Holders of Claims or Interests with an Opt-Out Form pursuant to which claimants could opt-out of the Third-Party Releases. Each Opt-Out Form contained bold and conspicuous language informing the Holder of the opt-out. The U.S. Trustee's Objection that the Non-Voting Packages did not contain a copy of the Plan and Disclosure Statement is not persuasive. The Non-Voting Packages contained full reproductions of the relevant language. To the extent that interested parties sought more information, the Non-Voting Packages provided instructions on how to obtain such information. In today's digital age, it is unrealistic to claim that interested parties are not fully capable of searching the Notice and Claim Agent's website online.

88. The Debtors also caused the Third-Party Release language to be published in the *New York Times (national edition)* and the *San Francisco Chronicle*.[116] The Voting Report shows that [142] creditors opted out of the Third-Party Releases, demonstrating that parties in interest had sufficient notice of the Third-Party Releases and were able to consent or not. Because *Purdue* has no effect on the Debtors' consensual Third-Party Release, the Court should follow its long-standing precedent of approving such releases and the use of opt-outs to obtain consent.

**B. The Exculpation Provision Is Appropriate.**

89. The Objections[117] seek to deny confirmation because the definition of "Exculpated Parties" includes the Wind-Down Debtors, Debtors' Professionals, including Sidley Austin LLP, SSG Advisors, LLC, Alvarez & Marsal North America, LLC, Neligan LLP, and Verita Global

[115] *See Certificate of Service* [Docket No. 508].

[116] *See Affidavit of Publication of Notice of (I) Combined Hearing on the Amended Disclosure Statement and Confirmation of the Amended Joint Plan, and (II) Notice of Objection and Opt Out Rights in the New York Times and San Francisco Chronicle* [Docket No. 494].

[117] All three Objections object to the Exculpation Provision. Accordingly, the arguments set forth in this section are responsive to each of the Objections.

f/k/a Kurtzman Carson Consultants, LLC, the Professionals of any Statutory Committee, and any directors and officers of the Debtors as of the Petition Date.

90. To resolve the U.S. Trustee Objection, the Debtors have revised the definition of Exculpated Parties to read as follows:

> "collectively, (1) the Debtors, and (2) any Statutory Committee and each of its members."

91. In its recent *Highland Capital Management, L.P.* opinion, the Fifth Circuit considered the appropriate scope of exculpations under the Debtors' chapter 11 plan and concluded that the list of properly exculpated parties included "the [d]ebtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties."[118] The revised Plan language is in line with *Highland*, and this Court recently approved similar language.[119] Accordingly, for both the reasons set forth in the Initial Memorandum and herein, the exculpation provision is appropriate, justified, and necessary under the facts and circumstances of these Chapter 11 Cases and should be approved.

**C. The Injunction Provision Is Not a Discharge.**

92. The Objection claims that the injunction provision in Article IX.D of the Plan (the "Injunction Provision") is inappropriate because it operates as a discharge injunction in violation of section 1141(d)(3) of the Bankruptcy Code.[120] The Debtors make clear in the current iteration of the Plan, however, that they are not entitled to a discharge of obligations.[121] Further, the language of the Injunction Provision is similar to other chapter 11 liquidating cases that have been

[118] *See NexPoint Advisors, L.P. v. Highland Cap. Mgmt. L.P. (In re Highland Cap. Mgmt. L.P.)*, 48 F.4th 419, 437-38 (5th Cir. 2022) *cert denied* 2024 U.S. LEXIS 2913 (U.S., July 2, 2024); *see also In re Pac. Lumber Co.*, 584 F.3d 229, 240–41 (5th Cir. 2009). In these chapter 11 cases the Debtors, as debtors in possession pursuant to section 1107 of the Bankruptcy Code, serve as trustees of the estates, and act through their boards of directors.

[119] *See In re Impel Pharmaceuticals Inc., et al.*, No. 23-80016 (SGJ) (Bankr. N.D. Tex. Apr. 2, 2024) [Docket No. 321] (approving the exculpation provision).

[120] 11 U.S.C. § 1141(d)(3)(A) ("The confirmation of a plan does not discharge a debtor if—the plan provides for the liquidation of all or substantially all of the property of the estate").

[121] *See* Plan, § IX.E ("Because the Debtors are liquidating, they are not entitled are liquidating and will not engage in business after consummation of the Plan, they are not entitled to a discharge of obligations pursuant to section 1141 of the Bankruptcy Code with regard to any Holders of Claims or Interests.").

approved by bankruptcy courts in this Circuit.[122] Regardless, to address the U.S. Trustee Objection, the Debtors have revised the Injunction Provision in the Plan to include the following language:

> This Article IX.D shall not operate as a discharge under section 1141(d)(3) of the Bankruptcy Code."[123]

93. Although this revision does not resolve the U.S. Trustee Objection with respect to the Injunction Provision, the Injunction Provision is appropriate and should be approved.

**D. Governmental Entities.**

94. The Debtors have added to the Confirmation Order the U.S. Trustee's requested language regarding releases of claims held by governmental entities.[124]

95. Accordingly, the Debtors submit that the U.S. Trustee Objection has been consensually resolved with respect to this point.

## CONCLUSION

For all of the reasons set forth in the Initial Memorandum, herein, and in the Declarations, the Debtors respectfully request that the Court overrule the Objections, confirm the Plan, and enter the Proposed Confirmation Order, and grant such other and further relief as is just and proper.

[122] *See In re AppHarvest Products, LLC*, No. 23-90745 (DRJ) (Bankr. S.D. Tex. Sept. 14, 2023) [Docket No. 471] (confirming the debtors' plan).

[123] *See* Plan, Ex. B.

[124] *See* U.S. Trustee Objection, ¶¶ 46-47.

Dated: September 4, 2024
Dallas, Texas

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**Certificate of Service**

I certify that on September 4, 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