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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.	

MEMORANDUM OF LAW IN SUPPORT OF DEBTORS' MOTION *IN LIMINE* TO PRECLUDE THE EXPERT TESTIMONY OF MATTHEW DUNDON

[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 debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors") respectfully submit this memorandum of law in support of their motion *in limine* (the "Motion") to exclude the expert testimony of Matthew Dundon and preclude him from testifying at the hearing (the "Hearing") on Debtors' Combined Hearing.

PRELIMINARY STATEMENT

1. In an egregious display of sandbagging, at 2 p.m. *the day before* the confirmation hearing, the Equity Committee has put forward as an "expert" its financial advisor, Mr. Dundon, with respect to "director and officer litigation and releases therefrom." Even Mr. Dundon was surprised by his eleventh-hour elevation, testifying initially that he did not "know" that he was being presented as an expert.

2. Mr. Dundon has not submitted any report or other materials. Mr. Dundon has not disclosed any prior testimony or whether he is being compensated separately for his "expert" testimony. There has been no schedule discussed for expert discovery and no opportunity for rebuttal testimony. The procedural deficiencies are legion.

3. There is also the problem that Mr. Dundon's "opinion" is blatantly inadmissible. Mr. Dundon claims to have views on whether the Equity Committee's purported D&O claims are viable, but **only the Court is qualified to reach that legal conclusion**. Mr. Dundon did not "recall" if he had ever been qualified as an expert on this topic. It is safe to assume he has not been. He offers no methodology whatsoever, much less a reliable one. Despite having been engaged in July, he **has not reviewed a single document** among the more-than 8,300 documents produced by the Debtors to the Equity Committee.

4. With respect to the Debtors' wildly successful Zokinvy sale, Mr. Dundon says he did "some thinking" and that the sale price should have been "probably in the order of somewhere

between 20 and 50 percent better." Yet he was not familiar with the Innovatus Loan Agreement or Merck License that were so critical to the Debtors' marketing process. As to the Debtors' retention bonuses, he had not "had a chance to review" a compensation analysis that his counsel had provided, but thinks that a potential claim is "obvious on its face." As to the Equity Committee's purported claims relating to "safety monitoring and reporting," he testified: "**I believe that the committee has considered these and thinks they're at least initially colorable. I personally did not**." Mr. Dundon **did not even consider** the Equity Committee's purported claims relating to "data integrity" and "public disclosures" or the potential PIPE transaction.

5. What is obvious on its face is that Mr. Dundon's testimony should be excluded and he should not be permitted to testify as an "expert" at the confirmation hearing.[1]

ARGUMENT

6. A motion *in limine* is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). Courts have considerable discretion to manage the submission of evidence, including granting motions *in limine*. *See id*. at 41-42. For the reasons detailed below, the Court should exercise its discretion and exclude Mr. Dundon's "expert" testimony.

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

7. Mr. Dundon should be precluded from testifying because the Equity Committee did not provide sufficient notice to the Debtors or the Court that it intended to introduce expert testimony. Courts, including this Court, regularly bar expert testimony where a party does not timely disclose its experts. *See, e.g., In re Highland Cap. Mgmt., L.P.*, No. 19-34054-SGJ11, 2023

[1] As this deposition occurred only this afternoon, a final transcript is not yet available and these quotes are taken from the rough transcript, which is not paginated. A final transcript can be made available at the Hearing at the Court's request.

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

8. In *In re Highland Capital Management*, a trust disclosed the existence of its experts 60 hours before a motion hearing. 2023 WL 4056065, at *7. In excluding the expert evidence, this Court noted that the trust's "revelation . . . that it sought to offer expert testimony came far too late." *Id.* The Court also acknowledged that the trust "never raised even the prospect of expert testimony" at any point with the Court, and that "[o]bviously" the Court would have "fully vetted with the parties at the status/scheduling conferences the need for experts and the need for any discovery of them if [the trust] mentioned it as a possibility." *Id.*

9. The circumstances here are even more egregious than those in *Highland*. The Equity Committee disclosed its "expert" in the middle of his deposition less than 20 hours before the Hearing is scheduled to commence. The Debtors have had no opportunity to engage their own expert to submit a rebuttal report or provide testimony at the Hearing. The Equity Committee never made any mention of experts in filings with the bankruptcy court, did not include any "expert" on any witness list, and made no effort to discuss expert witnesses with the Debtors. Mr. Dundon's testimony would substantially prejudice the Debtors and should not be permitted.

II. MR. DUNDON'S EXPERT OPINIONS ARE INADMISSIBLE

10. Federal Rule of Evidence 702 ("FRE 702") provides that a party seeking to offer expert testimony must show that "(a) the expert's scientific, technical, or other specialized

knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Mr. Dundon's "expert" opinions fall far short on all fronts.

11. First, Mr. Dundon does not possess the "specialized knowledge" that will render his opinions helpful to the trier of fact. Mr. Dundon is a lawyer, but only this Court is qualified to reach the legal conclusion of whether the Equity Committee's purported claims have a likelihood of success at litigation. *See, e.g.*, *In re Wyly*, 552 B.R. 338, 359 (Bankr. N.D. Tex. 2016) ("[E]xpert testimony that states a legal opinion that tells the fact finder what result to reach is improper."); *Floyd v. Hefner*, 556 F. Supp. 2d 617, 640 (S.D. Tex. 2008) (excluding expert testimony as to whether directors' conduct "comported with the actions of reasonably prudent individuals in the same or similar circumstances," finding that it was "a conclusion that must be determined by the trier of fact); *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (excluding expert testimony as an inadmissible legal opinion where expert sought to opine on whether the debtor company's "officers and directors fulfilled their fiduciary duties to the Company, its creditors, and shareholders. If not, how and to what extent did [they] breach their fiduciary duties.").

12. Second, Mr. Dundon does not base his testimony on "sufficient facts or data." In fact, he admits that he does not even know the relevant facts. He has not reviewed a single document from the substantial record made available to the Equity Committee. Such failure to review any underlying materials makes expert testimony inadmissible. *See, e.g.*, *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1160 (E.D. Wash. 2009) (holding that an expert's failure to consult any underlying materials makes such testimony independently excludable).

Fundamentally, Mr. Dundon's testimony will be unreliable, as he does not understand the underlying facts relevant to the marketing of the Debtors' Zokinvy assets because he has not bothered to learn them.

13. Third, Mr. Dundon's testimony is not the "product of reliable principles and methods." FRE 702 "imposes on the [trial] court a gatekeeper function" to ensure that all expert testimony "is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). Mr. Dundon has not offered any principles or methods at all. He does not purport to analyze whether similar claims to those raised by the Equity Committee have succeeded in any case. He has nothing beyond his own ipse dixit to suggest that the sale of Zokinvy should have obtained a higher price. As just one example, he has not analyzed at what prices similar companies have sold similar assets under similar circumstances. Nor could he, as he knows nothing about the circumstances that the Debtors faced while marketing Zokinvy. Fourth, because Mr. Dundon has not articulated any principles, he could not possibly have "reliably applied" those principles to "the facts of the case."

[*Remainder of page intentionally left blank.*]

CONCLUSION

For the foregoing reasons, Debtors respectfully request that the Court exclude the expert testimony of Matthew Dundon and preclude him from testifying at the Hearing.

Dated: September 4, 2024
Dallas, Texas

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/s/ *Thomas R. Califano*

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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
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