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MCKOOL SMITH, PC
John J. Sparacino (TX Bar No. 18873700)
S. Margie Venus (TX Bar No. 20545900)
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile: (713) 485-7344
Email: jsparacino@mckoolsmith.com
Email: mvenus@mckoolsmith.com

Travis E. DeArman (TX Bar No. 24074117)
300 Crescent Court, Suite 1200
Houston, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044
Email: tdearman@mckoolsmith.com

PORZIO, BROMBERG & NEWMAN, P.C.
Warren J. Martin Jr. (admitted *pro hac vice*)
Rachel A. Parisi (admitted *pro hac vice*)
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997
Telephone: (973) 538-4006
Facsimile: (973) 538-5146
Email: WJMartin@pbnlaw.com
Email: RAParisi@pbnlaw.com

Counsel for the Liquidating Trustee, Dundon Advisers LLC

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

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

THE LIQUIDATING TRUSTEE'S AND PLAN ADMINISTRATOR'S OBJECTION TO CLAIM NOS. 83 AND 43 FILED BY MERCK SHARP AND DOHME LLC

If you object to the relief requested, you must respond in writing. Unless otherwise directed by the Court, you must file your response electronically at https://ecf.txnb.uscourts.gov/ no more than thirty-one (31) days after the date this motion was filed. If you do not have electronic filing privileges, you must file a written objection that is actually received by the clerk and filed on the docket no more than thirty-one (31) days after the date this motion was filed. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

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

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Dundon Advisers LLC, c/o Joshua Nahas, in its capacity as liquidating trustee (the "Liquidating Trustee") of the liquidating trust of Eiger BioPharmaceuticals, Inc., *et al.* (the "Debtor" or "Eiger" or "Eiger Bio"), and the Plan Administrator appointed pursuant to the Fifth Amended Joint Plan of Liquidation of Eiger Biopharmaceuticals, Inc. and its Debtor Affiliates, by and through their undersigned counsel, hereby object (this "Objection") to the proofs of claim [Claim Nos. 83 & 43] filed by Merck Sharp and Dohme LLC ("Claimant" or "Merck"). In support of this Objection, the Liquidating Trustee and Plan Administrator submit the accompanying *Declaration of Joshua Nahas in Support of the Liquidating Trustee's and Plan Administrator's Objection to Claim Nos. 83 and 43 Filed By Merck Sharpe and Dohme LLC* (the "Nahas Dec."), and respectfully represents as follows:

PRELIMINARY STATEMENT

1. Merck is the title owner of the intellectual property behind the Sarasar/Lonafarnib molecule pursuant to which the Debtor under exclusive license from Merck (the "Merck License" (further described below) developed both: (i) the commercialized Zokinvy product line, which was sold to Sentynl Therapeutics, Inc. ("Sentynl") following bankruptcy court approval on May 3, 2024, and (ii) the pre-commercialization Lonafarnib for Hepatitis Delta Virus (HDV) product line, which was sold to Eiger Inno Therapeutics, Inc. ("Inno" or "Eiger Inno") following bankruptcy court approval on September 5, 2024.

2. As part and parcel of the second of these sales, on September 3, 2024, Merck and Inno entered into that certain side letter agreement (the "Side Letter") pursuant to which it was agreed by all[2] that the Debtor's anticipated future rejection pursuant to Section 365 of the Bankruptcy Code of the Merck License [redacted]

[2] The Debtor is also a signatory to the Side Letter.

[redacted] (Emphasis added). The Side Letter is annexed to the Nahas Dec. as Exhibit B.

3. The Side Letter constitutes a contractual novation pursuant to which Eiger Bio had no continuing obligations to Merck insofar [redacted] the Merck License. *See* Exhibit B to Nahas Dec. at page 1: "Direct License."

4. The original Merck License, a copy of which is annexed to the Nahas Dec., as Exhibit A, at Section 12.3(a) thereof, is instructive as to what happens [redacted]

See Exhibit A to Nahas Dec. at page 35 (emphasis added). [redacted]

5. The Side Letter, at Section 5 thereof, also includes an [redacted] *See* Exhibit B to Nahas Dec. at p. 5.

6. On October 2, 2024, Merck filed *unliquidated* claim #83 (defined below herein as the "Merck Rejection Claim"), for rejection damages, asserting that under the Merck License, "the

Debtor is obligated to make payments to Merck…includ[ing] the payment of certain [future] development and commercialization milestones and royalties." The Merck Rejection Claim amended an initial proof of claim filed by Merck on July 18, 2024 (defined below herein as the "Merck Initial Claim, and collectively with the Merck Rejection Claim, being the "Merck Claim").

7. [redacted] *See* Exhibit B to Nahas Dec. at pages 1-2.

8. As a result, there is simply no continuing obligation of the estate to Merck, and the Liquidation Trustee requests that this Court expunge the Merck Claim in its entirety, or, in the alternative, estimate the Merck Claim at zero.

JURISDICTION, VENUE & STATUTORY PREDICATE

9. This Court has jurisdiction to consider the Objection as a core proceeding pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these proceedings is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

10. The statutory predicate for the relief requested herein is 11 U.S.C. § 502, as supplemented by Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 3007-1 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas (the "Local Rules").

RELEVANT FACTUAL & PROCEDURAL BACKGROUND

A. The Chapter 11 Cases

11. On April 1, 2024 (the "Petition Date"), the Debtors petitioned this Court for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy

Code") commencing these cases (the "Chapter 11 Cases") in the United States Bankruptcy Court for the Northern District of Texas (the "Court").

12. On August 21, 2024, the Court entered the *Revised Order (I) Authorizing the Sale of the Lonafarnib and Lambda Assets Free and Clear of Liens, Encumbrances, and Other Interests, (II) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases, (III) Granting the Purchaser the Protections Afforded to a Good Faith Purchaser, (IV) Approving Purchaser Protections in Connection with the Sale of the Lonafarnib and Lambda Assets, and (V) Granting Related Relief* [Docket No. 558] (the "Lonafarnib Sale Order").

13. On September 3, 2024, Merck, Eiger and Inno executed the Side Letter, annexed as Exhibit B to the Nahas Dec., [redacted]

14. On September 5, 2024, the Bankruptcy Court entered the *Order (I) Authorizing the Debtors to Reject the Merck License and (II) Granting Related Relief* [Docket No. 638] (the "Rejection Order").

15. On September 5, 2024, the Court entered the *Order Approving the Debtors' Amended Disclosure Statement and Confirming the Fifth Amended Joint Plan of Liquidation of Eiger Biopharmaceuticals, Inc. and its Debtor Affiliates* [Docket No. 639] (the "Confirmation Order") confirming the *Fifth Amended Joint Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 635-1] (as amended or supplemented from time to time, the "Plan").

16. The Plan became effective on September 30, 2024 (the "Effective Date"). *See Notice of Occurrence of Effective Date* [Docket No. 685].

17. Pursuant to the Plan, the Liquidating Trustee was appointed with consent of the

Debtors and the respective committees in this case to administer the liquidating trust and was tasked with (1) preserving and liquidating the Debtors' remaining assets, (2) litigating and resolving any disputed claims, (3) making distributions to allowed claims pursuant to the Plan, and (4) procuring necessary insurance for the wind-down of the Debtors' estate. *See* the Plan, Article IV, Section D(1), p. 95.

B. The Merck Initial Claim and the Merck Rejection Claim

18. On July 18, 2024, Merck Sharp & Dohme, LLC filed a proof of claim, claim #43, against Eiger Bio asserting an unliquidated claim (the "Merck Initial Claim") for indemnification on account of any prepetition liability arising under the Merck License. *See* Addendum to Merck Initial Claim, at ¶ 6. However, in the Merck Initial Claim, Merck advised: "[a]s of the date of this Addendum, no pre-petition amounts are due and owing by the Debtor to Merck under the License Agreement", and "[a]s of the date . . . of this Addendum, Merick is not aware of any prepetition indemnifiable liability." *Id*., at ¶¶ 5, 6.

19. The September 5 Merck License Rejection Order, among other things, authorized the Debtors to reject the Merck License and required the filing of any rejection damages claim with respect to the rejected Merck License within 30 days from the date of entry of the Rejection Order.

20. On October 2, 2024, Merck filed an amended proof of claim, claim #83, which amended the Merck Initial Claim filed against Eiger Bio by including alleged "Rejection damages" (the "Merck Rejection Claim).

21. In the Merck Rejection Claim, Merck stated that "[a]s a consequence of the Sale Transactions [as defined in the Merck Rejection Claim] the Debtor has transferred to each of the respective Buyers all of its license rights with respect to the Progeria Field and Antiviral Field", and further acknowledged that "Merck has entered into certain agreements with the Buyers, as

contemplated by the Sale Transactions and Sale Orders, governing the use of the Licensed IP by the Buyers." *See* Addendum to Merck Rejection Claim, ¶ 7.

22. The Merck Rejection Claim ignores [redacted]

23. As addressed herein, the Merk Rejection Claim is without merit. Eiger Bio has sold off all of its assets and is no longer engaged in any business whatsoever that would result in any milestone payment becoming due. Furthermore, in the Side Letter, [redacted].[3] *See* Exhibit B to Nahas Dec.

24. The Merck unliquidated claims, so long as they remain outstanding and are not expunged or estimated at zero, prevent the Liquidating Trustee from making any distributions to creditors or to equity.

C. The Original License Agreement With Debtor

25. On September 3, 2010, Schering Corporation (that has since merged into Merck) and Eiger Bio entered into the Merck License whereby Merck provided Eiger Bio with a license to develop and commercialize 'Sarasar/Lonafarnib (SCH 66336)'. The Merck License was then subject to multiple amendments over time which were then incorporated into the Merck License.

26. Pursuant to Section 7.2(a) of the Merck License, [redacted]

[3] The Side Letter also expressly states that [redacted]

[redacted] *See* Exhibit A to Nahas Dec. at page 21.

27. Section 7.2(c) of the Merck License provides that [redacted] *See* Exhibit A to Nahas Dec. at page 22.

28. Upon information and belief, Merck may claim attorneys' fees in connection with its claim herein. However, the Merck License [redacted] *See* Exhibit A to Nahas Dec. at page 33. Neither of these has occurred.

D. The Side Letter

29. Section 1(a) of the Side Letter provides that [redacted] (the "Side Letter Transaction") (which occurred on September 3, 2024) and Eiger Bio rejecting the Merck License pursuant to an order entered into by the Bankruptcy Court, [redacted] (emphasis added). *See* Exhibit B to Nahas Dec. at page 2. Section 1(a) of the Side Letter also further provides [redacted] *Id.*

30. Once the Rejection Order was entered on September 5, 2024, [redacted]

OBJECTION

A. This Court's Rejection Order, Pursuant to the Express Terms of the Side Letter, Triggered a Novation Such That Merck May Now Only Look to Eiger Inno (and not the Debtor) for Future Performance

31. A "[n]ovation is defined as 'Substitution of a new contract, debt, or obligation for an existing one, between the same or different parties. The substitution by mutual agreement of one debtor for another or of one creditor for another, whereby the old debt is extinguished.'" *In re Jones,* 206 B.R. 569, 571 (Bankr. M.D. Ala. 1997)(citing Black's Law Dictionary, 5th Edition, West, 1979).

32. Numerous courts have recognized that a novation occurs when the original parties to an agreement clearly agreed to a substitution of one party for a new party even without an express acknowledgement of discharging the obligations of the original party. *See In re Celsius Network LLC*, 649 B.R. 87, 106 (Bankr. S.D.N.Y. 2023)(citing *Northville Indus. Corp. v. Fort Neck Oil Terminals Corp.*, 100 A.D.2d 865, 867 (1985) ("[U]nder New York law[4] it is 'well settled that where the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement . . . To be clear, an express waiver, discharge, or release of claims is not necessary to extinguish claims

[4] The Side Letter provides that it is governed by New York law. *See* Nahas Dec. at Exhibit B, Para. 10(a).

upon novation; in general, when there is an express superseding agreement, no claims may be made on the prior agreement unless the claims are expressly or impliedly reserved'")) (emphasis added); *see also Jay Cee Fish Co. v. Cannarella*, 279 F. Supp. 67, 72 (D.S.C. 1968) (finding that when a creditor who accepted checks from a new party impliedly consented to a novation although the creditor did not expressly agree to such and that the creditor was required to solely look to the new party for its remedy); *see also Int'l Harvester Credit Corp v. Clenny*, 505 F. Supp. 983, 986 (M.D. Ga. 1981); *see also In re Chateaugay Corp.*, 116 B.R. 887, 906 (Bankr. S.D.N.Y. 1990).

33. The law is the same within both the Fifth Circuit as well as the state of Texas, i.e., an express agreement to a novation is not required but rather the analysis turns on the intent of the parties. *See HDRE Bus. Partners Ltd. Grp., L.L.C. v. RARE Hosp. Int'l, Inc.*, 834 F.3d 537, 541 (5th Cir. 2016) ("Because novation turns on the parties' intent"); *see also In re Perry*, 423 B.R. 215, 290 (Bankr. S.D. Tex. 2010), citing *Flanagan v. Martin*, 880 S.W.2d 863, 867 (Tex.App.-Waco 1994) ("A novation agreement need not be in writing or evidenced by express words of agreement, and an express release is not necessary to effect a discharge of an original obligation by novation"); *see also Fulcrum Cent. v. AutoTester, Inc.*, 102 S.W.3d 274, 277 (Tex. App. 2003) ("whether a subsequent agreement works a novation of the first is the question of intent").

34. The elements of a novation are as follows: "a novation requires (1) a previously valid obligation, (2) agreement of all parties to a new contract, (3) extinguishment of the old contract, and (4) a legally valid new contract." *In re Perry*, 423 B.R. at 290.

35. In this case all of these elements are met. First, there was a previously valid contract between Eiger and Merck, i.e., the Merck License. *See* Exhibit A to Nahas Dec. Second, the side letter contained the "agreement of all parties" as it was signed by Merck, Eiger, and Inno. *See* Exhibit B to Nahas Dec. at pages 8-10. Third, the Side Letter, [redacted]

[redacted] *Id.*, at pages 1-2. Pursuant to the Side Letter's express language, [redacted] *See* Side Letter, Section 1(a) [redacted], *id.* at page 2. Fourth and finally, all agree that the Side Letter constitutes a legally valid new contract. *See In re Perry,* 423 B.R. at 290.

36. Simply put, by virtue of Merck's express agreement in the Side Letter, [redacted]

37. Pursuant to Section 5 of the Side Letter, Merck [redacted] while Eiger Bio was a party to the License Agreement. *See* Exhibit B to Nahas Cert. at pages 4-5.

38. As such, the Liquidating Trustee submits that Merck has already been paid all amounts that Eiger Bio could have been responsible for under the License Agreement. As a result, claim #'s 43 and 83 should be expunged.

B. In the Event the Court Determines Merck's Claim Should not Be Expunged, it should be Estimated for Purposes of Setting a Reserve such that the Liquidating Trustee May Proceed to Make Distributions to Creditors.

39. If the Court determines that, despite the fact that Eiger Bio clearly has no payment obligations to Merck in connection with future milestones achieved by Inno, Merck's claims should not be expunged but rather estimated for purposes of distribution, the Liquidating Trustee and Plan Administrator suggest an estimated Merck Claim amount of $0.

40. Section 502(c)(1) of the Bankruptcy Code "provides a mechanism for estimating the amount of a contingent or unliquidated claim for the purpose of its allowance where the actual liquidation of the claim as determined by the court would unduly delay the administration of the case." *In re Stone & Webster, Inc.*, 279 B.R. 748, 809 (Bankr. D. Del. 2002). Although section 502(c) refers to estimation for "allowance" of claims, courts have estimated claims for a range of purposes, including determining voting rights on a plan, gauging plan feasibility, and setting reserves for claim distribution amounts. *See In re Chemtura Corp.,* 448 B.R. 635, 649 (Bankr. S.D.N.Y. 2011) ("Claims estimation under Section 502(c)(1), which most commonly is used with respect to prepetition claims, can be used for a variety of purposes, including . . . setting claim distribution reserves[.]"); *In re Jacom Comput*. *Servs*., 280 B.R. 570, 571-73 (Bankr. S.D.N.Y. 2002) (estimating a claim at zero for the purpose of setting a reserve because the claim had no value as a matter of law).

41. In making a determination of the estimation, courts have wide leeway to use whatever method is best suited to the circumstances. "The Bankruptcy Code provides for the estimation of contingent or unliquidated claims, "the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case ..." 11 U.S.C. § 502(c)(1). The Code and the Bankruptcy Rules are silent as to an applicable procedure governing the estimation hearing. In filling the void, courts have determined that judges are to use "... whatever method is best suited to the circumstances." *In re Thomson McKinnon Sec., Inc.*, 191 B.R. 976, 979 (Bankr. S.D.N.Y. 1996)(citing *Addison v. Langston (In re Brints Cotton Marketing, Inc.)*, 737 F.2d 1338, 1341 (5th Cir. 1984)).

42. The method to use here is contract construction and application of the law-- an exercise this Court is skilled at and engages in each and every day.

43. Here, as stated in Point I, the estate, by virtue of the novation effectuated in the Side Letter, simply has no continuing obligation to Merck with respect to any future milestones as may be hit by Inno, [redacted]. As a result, and as a matter of law, the Liquidating Trustee and Plan Administrator request that this Court estimate the Merck Claim at zero.

C. Because of the Novation, Merck's Claim Against the Debtor is No Longer Valid against the Debtor and Must be Disallowed.

44. Section 502(b)(1)–(9) of the Bankruptcy Code lists nine separate grounds for disallowing a claim, including that "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." *See* 11 U.S.C. § 502(b)(1).

45. A claim is entitled to the presumption of prima facie validity under Bankruptcy Rule 3001(f) only until an objecting party refutes "at least one of the allegations that is essential to the claim's legal sufficiency." *In re Starnes*, 231 B.R. 903, 912 (N.D. Tex. 1998) (*quoting In re Allegheny Int'l, Inc.,* 954 F.2d 167, 173–74 (3d Cir. 1992)). Once an allegation is refuted, "the burden shifts to the claimant to prove its claim by a preponderance of the evidence." *In re 804 Congress, L.L.C.*, 529 B.R. 213, 219 (Bankr. W.D. Tex. 2015); *see also In re Cavu/Rock Props. Project I, LLC*, 516 B.R. 414, 422 (Bankr. W.D. Tex. 2014) ("If an objecting party brings evidence that calls the claim into question, however, the claimant bears the burden of proving his or her claim."). "[T]he ultimate burden of proof always lies with the claimant." *In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006).

46. Because of the novation, the Merck Claim does not assert factual allegations that would entitle the claimant to a recovery and is thus not legally sufficient because the claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable

law". 11 U.S.C. § 502(b)(1); *see also In re Jobs.com, Inc.*, 283 B.R. 209, 220 (Bankr. N.D. Tex. 2002) ("[an] entity's claim is not allowable in a bankruptcy case (and thus the claimant does not participate in distributions under a plan) unless the claim is enforceable against the debtor under an agreement or applicable nonbankruptcy law.").

RESERVATION OF RIGHTS

47. The Liquidating Trustee and Plan Administrator expressly reserve the right to amend, modify or supplement this Objection in any way and on any other applicable substantive or non-substantive ground(s).

NOTICE

48. The Liquidating Trustee and Plan Administrator shall provide notice of this Objection by serving a copy of such (together with the Nahas Declaration and all exhibits) upon: (a) Merck and its counsel; (b) Inno and its counsel; and (c) all other parties-in-interest who are required to receive notice pursuant to the Plan. The Liquidating Trustee and Plan Administrator submit that, in light of the nature of the relief requested, no other or further notice need be provided.

CONCLUSION

WHEREFORE, the Liquidating Trustee and Plan Administrator respectfully request the entry of an order substantially in the form of the proposed order submitted herewith disallowing/expunging claim #'s 43 and 83 filed by Merck as set forth herein, and for such other and further relief as the Court deems just and proper.

[*signature page follows*]

Dated: February 23, 2025

/s/ S. Margie Venus

MCKOOL SMITH, PC
John J. Sparacino (TX Bar No. 18873700)
S. Margie Venus (TX Bar No. 20545900)
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile: (713) 485-7344
Email: jsparacino@mckoolsmith.com
Email: mvenus@mckoolsmith.com

Travis E. DeArman (TX Bar No. 24074117)
300 Crescent Court, Suite 1200
Houston, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044
Email: tdearman@mckoolsmith.com

PORZIO, BROMBERG & NEWMAN, P.C.
Warren J. Martin Jr. (admitted *pro hac vice*)
Rachel A. Parisi (admitted *pro hac vice*)
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997
Telephone: (973) 538-4006
Facsimile: (973) 538-5146
Email: WJMartin@pbnlaw.com
Email: RAParisi@pbnlaw.com

Counsel for the Liquidating Trustee

/s/ Gary Broadbent

Gary Broadbent
Broadbent Advisors LLC
1209 Orange St.
Wilmington, DE 19801
Telephone: (740) 827-7165
Email: gary.broadbent@broadbentadvisors.com

Plan Administrator

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2025, I caused a copy of the foregoing redacted document[5] to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas, and upon the following who will receive both the redacted as well as an unredacted version via electronic mail:

Adam Gates
Merck Sharp and Dohme LLC
adam_gates@merck.com

Merck Sharpe and Dohme LLC
Office of the Corporate Secretary
office.secretary@merck.com

Emily Sauter
Merck Sharp and Dohme LLC
emily.sauter@merck.com

Martin Beeler
Covington and Burling LLP
mbeeler@cov.com

Dr. Jeffrey Glenn
Eiger Inno Therapeutics, Inc.
jsglenn@stanford.edu

Goodwin Proctor LLP
Kizzy Jarashow
kjarashow@goodwinlaw.com
Maggie Wong
mwong@goodwinlaw.com
David Chen
davidchen@goodwinlaw.com

/s/ S. Margie Venus
S. Margie Venus

[5] An Emergency Motion is simultaneously being filed requesting authority to file unredacted versions of the Objection and Declaration under seal.

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

In re:	§	**Chapter 11**
	§	
EIGER BIOPHARMACEUTICALS, INC., *et al.*[6]	§	**Case No. 24-80040 (SGJ)**
	§	
	§	
Debtors.	§	**(Jointly Administered)**

ORDER GRANTING THE LIQUIDATING TRUSTEE'S AND PLAN ADMINISTRATOR'S OBJECTION TO CLAIM NOS. 83 AND 43 FILED MERCK SHARP AND DOHME LLC

Upon the objection (the "Objection")[7] of Dundon Advisers, LLC in its capacity as the liquidating trustee (the "Liquidating Trustee") of the liquidating trust of Eiger BioPharmaceuticals, Inc., *et al.* (the "Debtor" or "Eiger Bio") and the Plan Administrator appointed pursuant to the

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

[7] Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Objection.

Fifth Amended Plan of Liquidation of Eiger BioPharmaceuticals, Inc. and its Debtor Affiliates, by and through their undersigned counsel, requesting an order disallowing and expunging claim nos. 83 and 43 filed by Merck Sharpe and Dohme LLC ("Merck"); and the Court having jurisdiction to consider the Objection and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Objection and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before the court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Objection having been provided; and such notice having been adequate and appropriate under the circumstances, and it appearing that no other or further notice need be provided; and the Court having reviewed the Objection; and the Court having determined that the legal and factual bases set forth in the Objection establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. Claim Nos. 83 and 43 filed by Merck Sharp and Dohme LLLC are hereby disallowed and expunged.

2. Verita Global, the claims and noticing agent appointed in these cases, is authorized to update the Claims Register to reflect the relief granted in this Order.

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

4. The Liquidating Trustee and Plan Administrator are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Objection.

5. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

End of Order

Order Submitted by:

MCKOOL SMITH, PC
John J. Sparacino (TX Bar No. 18873700)
S. Margie Venus (TX Bar No. 20545900)
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile: (713) 485-7344
Email: jsparacino@mckoolsmith.com
Email: mvenus@mckoolsmith.com

and

Travis E. DeArman (TX Bar No. 24074117)
300 Crescent Court, Suite 1200
Houston, Texas 75201
Telephone: (214) 978-4000
Facsimile: (214) 978-4044
Email: tdearman@mckoolsmith.com

PORZIO, BROMBERG & NEWMAN, P.C.
Warren J. Martin Jr. (admitted *pro hac vice*)
Rachel A. Parisi (admitted *pro hac vice*)
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997
Telephone: (973) 538-4006
Facsimile: (973) 538-5146
Email: WJMartin@pbnlaw.com
Email: RAParisi@pbnlaw.com

Counsel for the Liquidating Trustee

Gary Broadbent
Broadbent Advisors LLC
1209 Orange St.
Wilmington, DE 19801
Telephone: (740) 827-7165
Email: gary.broadbent@broadbentadvisors.com

Plan Administrator