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

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

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

The Official Equity Security Holders' Committee (the "Equity Committee"), by and through its undersigned counsel, hereby files this Objection (the "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* (the "Third Amended Plan") filed by the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Equity Committee requests that the Court deny confirmation of the Debtors' proposed plan at this time, absent either: (i) the elimination of the Debtor releases of Directors, Officers and "employees" (the D&Os) provided for therein, or (ii) the narrowing of the proposed releases such that they would provide protection of the individuals but not eliminate resort to

[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.

valuable and available insurance the Debtors paid dearly for just prior to the bankruptcy filinG.

2. The Debtors have provided no justification whatsoever for providing the releases proposed in their Plan for the D&Os (as well as for all current and former "employees," for that matter) now, at a confirmation hearing scheduled for September 5, 2024, particularly in light of the fact that: (i) confirmation is not required as a premise for any sale, exit financing, or any other transaction insofar as this is a liquidation, (ii) all assets of these estates have already been reduced to cash; (iii) because this is a liquidation, there will be no continuing need for the services of the Directors, Officers, and employees, except perhaps to answer questions from time-to-time for which services these people will be paid; and (iv) the Debtors spent $2.7 million in the two weeks prior to the petition to purchase some $20 million in D&O tail coverage, and that asset will be destroyed, as an asset of this estate, if and when the Debtor releases are approved by this Court; (v) no legally cognizable consideration is being paid by the proposed Released Parties for the releases proposed; (vi) no investigation had been conducted by the Debtors of D&O Claims (at least none that the Equity Committee has been made aware of, or that has been shared with the Equity Committee), and the Equity Committee's investigation is ongoing, and (vii) preliminary facts uncovered by the Equity Committee, even at this early stage of its investigation, reveal likely valid claims, as such facts are described herein.

RELEVANT FACTUAL & PROCEDURAL BACKGROUND

I. The Chapter 11 Cases

3. 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 "Bankruptcy Court").

4. The Debtors continue to operate their businesses and manage their affairs as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. To date, no trustee or examiner has been appointed in these Chapter 11 Cases.

5. On June 10, 2024, the Office of the United States Trustee, Region 6 (the "UST") appointed the Official Committee of Unsecured Creditors [ECF No. 322], and on June 25, 2024, the UST appointed the Equity Committee [ECF No. 359, as amended, ECF No. 438].

I. The Equity Committee Discovery Requests And The Debtors' Productions To Date

6. On July 15, 2024, the Debtors filed their proposed plan and Disclosure Statement which defined both "Released Party" and "Related Party," making it clear that broad releases would be sought at confirmation for present and former directors, officers, managers and even "employees" of the Debtors.

7. On July 26, 2024, the Equity Committee filed its limited objection to the Disclosure Statement, focused exclusively on the Debtor releases, as foreshadowing a confirmation objection on the same point.

8. The Plan and Disclosure Statement were the product of negotiation among the parties, and on all other issues, the parties were able to reach agreement, but not with respect to the releases.

9. On July 25, 2024, the Equity Committee sent the Debtors, through counsel, an informal list of document requests related specifically to the Debtor's proposed releases of the "Released Parties" under the proposed Plan.[2]

[2] The Debtors and the Equity Committee agreed to proceed with discovery informally rather than via motion practice at this stage of these Chapter 11 Cases.

10. On July 29, 2024, after discussion with the Debtors' counsel, the Equity Committee sent the Debtors a finalized custodian list for the search for relevant documents to the Equity Committee's document requests.

11. On August 7, 2024, the Debtors made Dr. David Apelian, the Debtors' Chief Executive Officer, available for one hour in order for the Equity Committee to conduct an initial informal interview.

12. On August 12, 2024, the Debtors produced their first set of documents responsive to the Equity Committee's document requests bearing Bates labels EIGER-EC-00000001 through EIGER-EC-00011521.

13. On August 14, 2024, the Equity Committee continued its informal interview of the Debtors' CEO.

14. On August 19, 2024, the Debtors produced their second set of documents responsive to the Equity Committee's document requests bearing Bates labels EIGER-EC-00011522 through EIGER-EC-00040467.

15. On August 22, 2024, the Debtors produced their third set of documents responsive to the Equity Committee's document requests bearing Bates labels EIGER-EC-00040468 through EIGER-EC-00054984.

16. In the late afternoon on August 29, 2024, approximately twenty-four hours before this Objection is due to be filed, the Debtors served a fourth set of documents on the Equity Committee bearing Bates labels EIGER-EC-00054985 through EIGER-EC-00057753. *See* **Exhibit "A"** to the Certification of Warren J. Martin Jr. in Support of Plan Objection (the "Martin Cert.").

17. A few hours later, at approximately 8:50 p.m. on August 29, 2024, and less than

twenty-four hours before this Objection is to be filed, the Debtors served a fifth set of documents on the Equity Committee bearing Bates labels EIGER-EC-00057754 through EIGER-EC-00058382. *See* **Exhibit "B"** to the Martin Cert. In the letter accompanying that production, the Debtors admit that the Debtors' privilege log remains "forthcoming." *Id.*

18. It is unclear if and when the Debtors will complete their production in response to the Equity Committee's informal document demands. At the every least, the Equity Committee needs additional time to review these latest productions, any additional productions, and an opportunity to review, vet and potentially challenge documents and communications that were withheld and will be identified on the forthcoming privilege log which has not been received to date.

II. The Equity Committee's Preliminary Investigation Reveals Numerous Red Flags That Warrant, At A Minimum, Further Investigation.

19. Although the Equity Committee is still in the process of reviewing the document productions received to date from the Debtors and from Innovatus Life Sciences Lending Fund I, L.P. ("Innovatus"), the Equity Committee has uncovered numerous documents that raise serious issues about the propriety of the actions taken by the Debtors' directors and officers (collectively, the "D&Os") and that require additional investigation. These include issues that fall into four broad categories, namely, issues relating to (i) improper safety reporting and monitoring; (ii) mismanagement regarding data integrity and public disclosures; (iii) mismanagement regarding cash management and the prepetition Zokinvy sale process; and (iv) significant insider payments approved on the eve of the filing of these Chapter 11 Cases apparently made in an effort to avoid Bankruptcy Court oversight. A summary of some of the issues and select documents demonstrating the need for further investigation is set forth below.

A. Improper Safety Reporting And Monitoring

20. Set forth below are certain examples that raise substantial questions about the Debtors' practices and procedures about reporting serious safety incidents in patients in their clinical trials, including, but not limited to, questions concerning whether the Debtors' investigators and medical reviewers had received appropriate training on how to report these serious incidents. While the below is simply a small snapshot based on what the Equity Committee has reviewed to date[3], these examples demonstrate that there are important issues and potentially viable claims that have not been vetted, much less analyzed, and should be preserved for further investigation by the Equity Committee despite the Debtors' inappropriate efforts to have the Proposed Releases (defined below) set forth in its Third Amended Plan wipe out any potential Director and Officer liability before anyone has the opportunity to "look behind the curtain" and see what actually happened.

1. The Department Of Health & Human Services Scathing Condemnation Of The Debtors' Test Reporting Practices

21. In a memorandum dated June 1, 2023 from the Department of Health & Human Services, Division of Antivirals, Food and Drug Administration (the "DOH") sent to the Debtors (the "DOH June 1 2023 Memo"), the DOH expressed great concern over whether the Debtors were properly reporting "hepatic safety events" and expressed concern that the Debtors' "investigators and medical safety reviewers may not be adequately trained on safety event reporting." *See* **Exhibit "C"** to the Martin Cert.

22. More specifically, in the DOH June 1 2023 Memo, the DOH expressed deep concern over the Debtors' failure to include hepatobiliary toxicity risks in their Investigator's

[3] As noted above, the Debtors are producing thousands of pages of documents less then twenty-four hours before this Objection is due to be filed, and, have not produced a privilege log so as of the filing of this Objection the Equity Committee has no idea of the scope and magnitude of documents and communications that are being withheld from production by the Debtors under the auspices of alleged privileges.

Brochure, despite the fact that these risks were present in test results going back to 2016:

> All seven of the peginterferon lambda-1a Drug Safety Update Reports (DSUR) reports generated by Eiger have identified hepatobiliary toxicity as risks. Accordingly, Eiger's first peginterferon lambda-1a Investigator's Brochure (IB, Edition 1, 15 March 2016) listed "hepatic events" in Core Safety Information.
>
> Nonetheless, in several expedited reports, the investigator and medical safety reviewer have stated that the event was not listed in the IB. **It is not clear to us how hepatic safety events could have been omitted from any recent version of the IB or how study staff would [be] unaware of this important safety risk and AE of special interest.**
>
> ***
>
> **Based upon these findings, we are concerned that EIG-LMD-002 investigators and medical safety reviewers may not be adequately trained on safety event reporting.**
>
> We are equally concerned that the information provided in the expedited safety reports on searches from the IQVIA Argus Safety Database appears to be inconsistent with the hepatic safety information reported in DSUR reports 7-12. For example, report EIGLMB02-22US0598 (23 November 2022 15 day initial) states that a search performed for the PTs of "alanine aminotransferase increased" and "liver function test abnormal" revealed only one case of liver alteration and no cases of elevated alanine aminotransferase. **It is unclear to us how the IQVIA Safety Database would have almost no reports of these hepatic events despite the clear and consistent hepatobiliary toxicity risks described in the DSURs and IB.**
>
> As the IND Sponsor, it is your responsibility to assess whether an event is expected or unexpected, to determine whether an SAE represents a clinically important increase in the rate of that event over that listed in protocol and IB, and to determine how events should be reported. **From the information you have submitted, it is not clear to us that you are fulfilling your responsibilities as outlined in the relevant guidance**…

Id. (emphasis added).

2. <u>Shortly Thereafter, Dr. Adrian Di Bisceglie Similarly Questions Whether The Debtors' Medical Monitor Was Aware Of Test Results Showing Severe Liver Injuries</u>

23. In a series of emails on July 5, 2023, Dr. Adrian Di Bisceglie, on behalf of the Data and Safety Monitoring Board ("<u>DSMB</u>"), wrote to the Debtors asking to speak about the "7 or 8

cases with liver injury apparently meeting the definition of Hy's Law, and hence quite severe." *See* **Exhibit "D"** to the Martin Cert. That email goes to state that Dr. Di Bisceglie "wanted to be sure the medical monitor was aware of the cases." *Id.*

3. Despite Test Results Showing Severe Liver Injuries, The Debtors Did Not Shut Down Its Clinical Study Until The DSMB Recommended Its Discontinuance On September 7, 2023

24. Although it's not entirely clear to the Equity Committee what transpired from the time the DOH issued the DOH June 1 2023 Memo and Dr. Di Bisceglie's July 5, 2023 email, what is clear is that whatever conversations ensued, Dr. Di Bisceglie, on behalf of the DSMB, was not satisfied and recommended that the Debtors discontinue the clinical study protocol EIG-LMD-002 as set forth in the September 7 2023 "To Whom it May Concern" Letter (the "Sept. 7 DSMB Letter"). *See* **Exhibit "E"** to the Martin Cert. The Sept. 7 DSMB Letter expressly states that the Debtors' study needed to be shut down based on liver injury that, up to that point, the Debtors were seemingly willing to accept in their desire to reach a marketable product. Dr. Di Bisceglie explained that the "Committee makes this recommendation based upon the relatively large number of enrolled subjects who appear to have experienced drug-induced liver injury (DILI) or potential DILI (pDILI), the severity of that liver injury (24 cases meeting Hy's Law criteria[4]) together with 4 cases developing clinical hepatic decompensation manifested by ascites." *Id.*

4. The FDA Criticizes The Debtors For Failure To Timely Report The DSMB Recommendation Given The Unbelievable And Alarming Test Results

25. In what appear to be undated draft minutes of a call between the Debtors and the FDA, an FDA representative, Dr. Rupali Doshi, medical officer review of IND, states that he

[4] Note that 24 cases is a substantial increase in the number of severe liver injuries as compared to what Dr. Di Bisceglia was made aware of (i.e., 7 or 8) at the time of the July 5, 2023 email exchange detailed above. It is unclear why Dr. Bisceglia only learned of the additional 15 to 16 cases after he started speaking with the Debtors about these severe liver issues in July 2023.

agrees "with [E]iger and DSMB that events are consistent with DILI; agree to discontinue…" *See* **Exhibit "F"** to the Martin Cert. Later in the conversation, Ms. Debra Birnkrant, on behalf of the FDA, criticizes the Debtors for failing to timely report the DSMB recommendation to shut down the clinical study: "DSMB issued on sept. 6, but you only told us on sept. 11; given the circumstances, you should have shared sooner; up to 24 pDILI is **<u>unbelievable and alarming</u>**; Moving forward expect more expedited reporting." *Id.* (emphasis added).

26. The Equity Committee needs time to investigate the very serious failures identified by the DOH in the DOH June 1 2023 Memo, including interviewing Suzanne Strayhorn, MS, Sr. Regulatory Project Manager, who authored the DOH June 1 2023 Memo on behalf of the DOH. Similarly, the Equity Committee needs time to interview Dr. Di Bisceglie to better understand his exchanges with the Debtors, their responses, and the ultimate shut-down of the EIG-LMD-002 clinical study, as well as the FDA representatives who were belatedly told about the DSMB recommendation. As this information has only recently been disclosed to the Equity Committee, and requires expert review and analysis, and likely depositions, it is premature to grant the Proposed Releases now, particularly given the fact that the Debtors have not done any evaluation or analysis of these claims to date. *See e.g.,* Debtors' Memorandum of Law in Support of Confirmation of Third Amended Plan [ECF No. 573] (the "<u>Moving Brf</u>.") and Declaration of Douglas Staut, Chief Restructuring Officer in Support of Confirmation of The Third Amended Plan (the "<u>Staut Decl</u>."), neither of which contain any information about whether potential claims against the D&Os have been analyzed or evaluated in any way, shape or form.

B. Employee And Shareholder Complaints About The Debtors' Mismanagement, Data Integrity And Public Disclosures

27. The Debtors' own employees were concerned, and indeed, lodged formal complaints, about the Debtors' Management, Data Integrity and Public Disclosures. Although the

Debtors have not yet produced the underlying complaints that were raised by the Debtors' employees, it is clear that enough these complaints were significant enough to warrant action by the Debtors' Board of Directors (the "Board"). Accordingly, at a meeting of the Board held on December 3, 2022, the Board approved a resolution whereby the Board delegated to the Debtors' Nominating and Governance Committee the authority to, amongst other powers, investigate, review and evaluate the facts and circumstances regarding the Debtors' management, data integrity and public disclosures, evaluate and approve new or modified procedures, and remove or appoint officers (the "Dec. 3 2022 Resolution"). *See* December 3, 2022 Minutes of an Executive Session of a Meeting of the Board of Directors of Eiger Biopharmaceuticals, Inc. (the "Dec. 3 2022 Board Minutes")[5] and resolution collectively attached to the Martin Cert. as **Exhibit "G"**.

28. The Dec. 3 2022 Board Minutes also raise unanswered questions concerning an "Indemnification" discussion, and the Board's decision to approve the request by the Debtors' former CEO, Mr. Cory, "to advance his attorneys' fees and expenses subject to his signing an undertaking and a reservation of rights satisfactory to the Company." *See* Exhibit "G". The same discussion and decision was apparently made with respect to a Mr. Ryali, former Chief Financial Officer. *Id.* What was the concern and why was there a need for the indemnification of these two former Directors and Officers? Did it involve the failure to properly monitor and report test safety results that ultimately led to the DOH issuing the DOH June 1 2023 Memo and the DSMB to issue the Sept. 7 DSMB letter which effectively shut down the EIG-LMD-002 clinical study?

29. David Cory's role as CEO ended on December 15, 2022 and he was severed from the Debtors employ. Did that severance result from any negligent management of the Debtors,

[5] Significant portions of the Dec. 3 Board Minutes have been redacted. To date, the Equity Committee has not received a privilege log or the reasoning for the redactions.

whether in connection with these test safety results and DOH Memo, or otherwise?

30. Furthermore, the employee complaints about what was being publicly disclosed was also shared by at least some of the Debtors' shareholders. For example, in a series of emails in March and April 2023, investor Bart De Ketelaere wrote to the Debtors' management expressing extreme dissatisfaction, and indeed, bewilderment, at the lack of transparency and public disclosure being made by the Debtors, including the lack of routine earnings calls. *See* **Exhibit "H"** to the Martin Cert. It's unclear if anyone ever responded to Mr. De Ketelaere's repeated requests for transparency and information, and, based on the fact that the Debtors' employees themselves were complaining about a lack of public disclosure, it seems highly likely that Mr. De Ketelaere's criticisms were valid.

31. The Equity Committee would like the opportunity to investigate and understand the numerosity and nature of the underlying complaints that led to the Board passing the Dec. 3 2022 Resolution, and, what resulted from the investigation into these issues by the Debtors' Nominating and Governance Committee? There are substantial unanswered questions here. Who was making the complaints? When were these complaints made? What was the basis for these complaints? How were these complaints conveyed to the Board? What was the time gap between the complaints and the passing of the Dec. 3 Resolution? Why did the CEO, David Cory, leave the Debtors employ at right around the same time? These are just a small sample of the questions that the Equity Committee should have the opportunity to investigate more fully.

C. Cash Management And Impeding Sale Process For Zokinvy

32. There came a point in the Debtor's business management, that there was a severe need for cash. In order to quell the market's concerns, Dr. Apelian, the CEO following the departure of David Cory, made the following public statement in June of 2023: "Importantly, an

approximate 25% reduction in workforce, a removal of out-of-pocket spending related to our HDV development program and our existing term loans are **expected to extend our cash runway into the fourth quarter of 2024, not including any capital we could realize from a partnership**." (emphasis added.) The Equity Committee is aware, and the Debtors do not dispute, that as a result of this need for cash, a decision was made to sell Zokinvy. There was a lot of market interest in the sale of the Debtors' Zokinvy product, including interest by Eton Pharmaceuticals ("Eton"). While the Equity Committee has heard extremely inconsistent (and, indeed, conflicting) stories from both the Debtors and Innovatus about the prepetition interest in Zokinvy by Eton as well as its ultimate purchaser in this bankruptcy, Sentnyl Therapeutics, Inc. ("Sentnyl"), it is clear that Eton was frustrated by the Debtors lack of follow-up and engagement on the potential transaction, resulting in the withdrawal of Eton's [redacted] for the asset. On January 12, 2024, Eton's David Krempa wrote to Dr. Apelian, and stated:

> [redacted]

See **Exhibit "I"** to the Martin Cert.

33. Mr. Krempa goes on in that email to express extreme frustration over the lack of responsiveness and missed deadlines by the Debtors over the course of the negotiations with Eton. *Id.*

34. However, the potential transaction with Eton was not the first time a party had been denied an opportunity to pursue a transaction involving Zokinvy. And even though the EIG-LMD-002 clinical study was shut down in September 2023, and the Debtors were in need of additional revenue to continue to operate, in response to an email from Oliver While of Bourne-Partners on

October 10, 2023 advising that he had identified a party interested in acquiring the Zokinvy asset, Dr. Apelian didn't even bother to meet with the potential acquirer, and responded [redacted] *See* **Exhibit "J"** to the Martin Cert.

35. Further, upon information and belief, the Debtor's at no time prepetition hired an investment banker, for purposes of this transaction. An investment banker would have run a process with a deadline, selected bids, and closed, potentially making the bankruptcy unnecessary. Much has been said about the excellent results obtained in the bankruptcy once SSG was brought in and a process, with a deadline, conducted. The Equity Committee agrees. But would the bankruptcy, and the Debtors' attendant estimated $13.5 million in costs of the bankruptcy have been required if a process with SSG had been conducted pre-petition, with Eton permitted to bid against Sentynl (as it did in the bankruptcy, thereby driving up the price to the price ultimately obtained) whereas the Debtor's management did not permit Eton to do so prepetition.

36. The Equity Committee wants to investigate the circumstances behind these known failed attempts to acquire Zokinvy prior to the Petition Date (and other potential transactions, including, but not limited to, the proposed $25 to $40 million private investment in public entity ("PIPE") that was proposed to the Debtors by Propel Bio Management LLC ("Propel") that was never consummated). There very well may be other potential transactions that the Equity Committee has not yet uncovered. And given the limited information provided to date, it's unclear whether these potential transactions could have avoided a bankruptcy filing, and preserved tens of millions of dollars for the Debtors' investors. As such, the Equity Committee requests the ability to meet with these parties and explore the precise circumstances that led to the Debtors effectively shutting down these opportunities.

D. Duplicative Bonuses And D&O Policy Machinations

37. In the waning days of the Debtors' pre-Chapter 11 existence, Eiger's management (i) used Eiger funds to pay themselves $2,204,831.44 in bonuses, (ii) refused to recognize that the KERP bonuses approved (and paid) just days before the filing of these cases in the amount of [redacted] superseded (and indeed, are duplicative of) the pre-existing KERP bonuses pursuant to which they had already earmarked for themselves the amount of [redacted][6], and (iii) paid $3,314,249 in Eiger funds to purchase $20 million in D&O insurance coverage, a policy they now seek to have rendered completely worthless if all potential D&O claims are released as proposed by the Debtors. These component parts total some [redacted] in Eiger funds directed solely to the benefit of the D&Os, at a time when the Debtors, upon information and belief, presumed that they were insolvent.

38. Now, by proposing to release the D&Os as well as all "employees" under the Plan,[7] the D&Os not only get themselves off the hook from the threat of litigation by the Liquidating Trustee, but they deliver to their carrier a "gift" of the $3,314,249 in premium so very recently paid, and essentially for nothing. The rights of the Liquidating Trustee, formed under the Third Amended Plan as the successor to the Debtors' assets, should have this valuable $20 million insurance asset available so that there is a specific source of recovery if the investigation of all of the issues raised herein (and others to be discovered) reveal viable claims. As the Debtors would have it, this $20 million insurance asset will be extinguished by virtue of releasing claims that have not yet been fully analyzed and reviewed, simply for the sake of expediency in granting the D&Os

[6] Of this amount, because these bonuses were to be paid in tranches, $386,885 was outstanding as of the Petition Date and is being asserted in proofs of claim filed in these cases. *See* POC 32 (Apelian - $195,000); POC 41 (Bys - $29,925); POC 27 (Vollins - $85,000); POC 64 (Kurtz - $76,960).

[7] *See* Third Amended Plan definition of "Released Parties" and "Related Parties".

a complete release for their work with the Debtors.

39. However, cases within the 5th Circuit and within Texas have either severely restricted such releases, e.g., releasing D&Os only to the extent that insurance coverage is exhausted, thereby protecting the D&Os from any personal financial exposure without abrogating valuable insurance coverage that the estate paid so dearly for (*see, e.g., In re Athenex, Inc., et al.,* Case No. 23-90295 (MI) (Bankr. S.D. Tex.) [Docket No. 501]; *In re Basic Energy Services, Inc., et al.*, Case No. 21-90002 (DRJ) (Bankr. S.D. Tex.) (The confirmed liquidation plan provided D&O Actions were "limited to available D&O Liability Insurance Policies proceeds.")), and/or have given the Liquidating Trustee a period of time to investigate D&O claims and bring such actions as may be necessary,[8] before allowing D&O releases to take effect, *see, e.g., Feld v. Zale Corp. (In re Zale Corp.),* 62 F.3d 746, 760 (5th Cir. 1995); *In re Pac. Lumber Co.,* 584 F.3d 229, 253 (5th Cir. 2009).

40. But the Debtors do not propose the limited types of releases approved in other cases in this district and elsewhere that both protect the D&Os from personal exposure, while preserving access to the insurance asset. But like the Wizard of Oz, the Debtors ask this Court not to allow the Equity Committee or Liquidating Trustee to look behind the curtain despite admitting: (a) that it has conducted no investigation of the D&O claims, and (b) that no consideration has been paid by any of the proposed releasees, which include not only directors, officers and "managers," but also "employees"[9] for the valuable releases they are proposed to receive here.

1. <u>The Retention Bonuses Paid on the Eve of Bankruptcy Were Fraudulent Transfers at the Worst, and Duplicative, Out of the Ordinary, and Unnecessary Payments at Best</u>

[8] While the Debtors have been cooperative in producing documents related to potential director and officer claims on a rolling basis, such production is not complete. In fact, the Equity Committee received the latest production on August 29, 2024.

[9] And a whole host of other categories of individuals as explained in Section IV, *infra*.

41. In December 2023, the Debtors entered into a number of "Retention Bonus Agreements" with certain officers and employees of the company. These agreements, dated on or around December 12, 2023, stated that individuals would receive a certain "Total Retention Award", with payment to be received in two tranches: the first payment would be made on January 2, 2024, and the second payment would be made on June 14, 2024. *See, e.g.,* POC No. 32 (Apelian). These are collectively referred to herein as the "Retention Bonus Awards".

42. The claims register in these cases reflect four relevant Retention Bonus Agreements as follows:

Individual	**POC No.**	**Total Retention Award**	**Payment Dates**	**Retention Bonus Agreement Date**
David Apelian	32	$390,000	January 2, 2024 and June 14, 2024	December 12, 2023
Matthew Bys	41	$59,850	January 2, 2024 and June 14, 2024	December 12, 2023
James Vollins	27	$170,000	January 2, 2024 and June 14, 2024	December 12, 2023
Christopher Kurtz	64	$153,950[10]	January 2, 2024 and June 14, 2024	December 12, 2023
	TOTAL	**$ 773,800**		

43. [redacted]

44. [redacted]

[10] There is a mathematical error in the retention agreement. The two payments equal $153,920, not $153,950.

[redacted]

45. [redacted]

46. On the heels of paying out no less than [redacted] for just four individuals (and most of those payments occurring within just weeks of the bankruptcy filing), the Debtors' D&Os somehow thought it prudent to also approve new additional and supplemental retention bonuses amounting to [redacted] that were paid just days prior to the bankruptcy filing as follows: [redacted] (collectively, the "Prepetition KERP"). Unlike the Retention Bonus Awards, these payments were to be made (conveniently) in one lump sum to each recipient rather than in tranches.

47. Thus, the Debtors' D&Os approved the following collective bonus amounts in the year leading up to the Debtors' bankruptcy cases as follows:

Name	Bonus Total
Apelian	$1,270,582
Bys	$59,850
Vollins	$628,057
Kurtz	$411,952
Mayer	$251,200
TOTAL: **$2,621,641**[11]	

48. Notably, by approving and paying the Prepetition KERP, the Debtors' D&Os more than doubled the Retention Bonus Awards that were already in place (and had already been

[11] Of this amount, $2,204,831.44 has been paid.

partially satisfied, i.e., 50% paid) prior to the Petition Date. Given that it was clear that the bankruptcy filing would interfere with the payment of the outstanding amounts of the Retention Bonus Awards (with the second tranche of the payments due in June 2024), the Directors and Officers decided to circumvent the bankruptcy process by approving the lump sum Prepetition KERP, while conveniently leaving the Retention Bonus Awards in place (such that certain individuals have filed proofs of claim against the Debtors for these duplicative and arguably already satisfied bonuses). As set forth below, there are viable fraudulent transfer and breach of fiduciary duty claims that can be asserted against the D&Os on account of these transfers, in addition to viable defenses to deny payment of their filed proofs of claim. As such, these claims must preserved and not extinguished by virtue of the Proposed Release.

III. The Plan And Its Objectionable Release And Exculpation Provisions

49. On July 15, 2024, the Debtors filed the Motion [ECF No. 426], as well its initial version of the Plan [ECF No. 424] and Disclosure Statement[ECF No. 425].

50. On August 28, 2024, the Debtors filed the Third Amended Plan [ECF No. 571].

A. The Proposed Release

51. Pursuant to the Plan, "Released Party"

> means each of, and in each case in its capacity as such: (1) each Debtor and its Estate; (2) each Wind-Down Debtor and its Estate; (3) **each Related Party of each Entity in clause (1) and (2)**; provided that in each case, an Entity shall not be a Released Party if it: (x) elects to opt out of the releases contained in Article IX.A or Article IX.B of the Plan or (y) timely objects to the releases contained in Article IX.A or Article IX.B of the Plan and such objection is not resolved before Confirmation.

Third Amended Plan, p. 12 (emphasis added).

52. And in the Plan, a "Related Party"

> means each of, and in each case in its capacity as such, **current and**

> **<u>former directors, managers, officers</u>**, committee members, members of any governing body, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, managed accounts or funds, predecessors, participants, successors, assigns, subsidiaries, Affiliates, partners, limited partners, general partners, principals, members, management companies, fund advisors or managers, employees, agents, trustees, advisory board members, financial advisors, attorneys (including any other attorneys or professionals retained by any current or former director or manager in his or her capacity as director or manager of an entity), accountants, investment bankers, consultants, representatives, and other professionals and advisors and any such Person's or Entity's respective heirs, executors, estates, and nominees.

Third Amended Plan, p. 12 (emphasis added).

53. The Debtor Releases are set forth in the Third Amended Plan at Article IX.A as follows:

> Notwithstanding anything contained in the Plan to the contrary, pursuant to section 1123(b) of the Bankruptcy Code, **<u>in exchange for good and valuable consideration, the adequacy of which is hereby confirmed</u>**, effective on the Effective Date, **<u>each Released Party is hereby deemed to be hereby released and discharged by the Debtors and their Estates</u>**, in each case on behalf of themselves and their respective successors, assigns, and representatives, and any and all other entities who may purport to assert any causes of action, directly or derivatively, by, through, for, or because of the foregoing Entities on behalf of the Debtors, **<u>from any and all derivative Claims and Causes of Action asserted on behalf of the Debtors, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtors or their Estates would have been legally entitled to assert in their own right (whether individually or collectively)</u>** or on behalf of the Holder of any Claim against, or Interest in, a Debtor or other Entity, or that any Holder of any Claim against, or Interest in, a Debtor or other Entity could have asserted on behalf of the Debtors, based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the capital structure, management, ownership, or operation thereof), the assertion or enforcement of rights and remedies against the Debtors, the Debtors' in- or out-of-court restructuring efforts, any Avoidance Actions (but excluding Avoidance Actions brought as counterclaims or defenses to Claims

> asserted against the Debtors), intercompany transactions, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or filing of the Disclosure Statement, the Plan (including, for the avoidance of doubt, the Plan Supplement), Sale Transactions, or any aspect of the Liquidation Transactions, including any contract, instrument, release, or other agreement or document (including any legal opinion requested by any Entity regarding any transaction, contract, instrument, document or other agreement contemplated by the Plan or the reliance by any Released Party on the Plan or the Confirmation Order in lieu of such legal opinion) relating to any of the foregoing, created or entered into in connection with the Disclosure Statement, the Plan, the Plan Supplement, and the Sale Transactions, before or during the Chapter 11 Cases, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence related or relating to any of the foregoing taking place on or before the Effective Date, except for claims related to any act or omission that is determined in a Final Order by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence of such Person. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release any post-Effective Date obligations of any party or Entity under the Plan, the Confirmation Order, or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan or any Claim or obligation arising under the Plan. Notwithstanding anything to the contrary in the foregoing, the releases under this section only release Claims held by the Debtors or Claims that could be asserted by the Debtors under applicable law.

Third Amended Plan, Article IX.A., pp. 41-42 (emphasis added) (the "Proposed Release").

B. The Proposed Exculpation Provision

54. The Third Amended Plan defines "Exculpated Parties" to mean, collectively, (1) the Debtors and the Wind-Down Debtors, (2) any Statutory Committee and each of its members, (3) the Debtors' Professionals, including Sidley Austin LLP, SSG Advisors, LLC, Alvarez & Marsal North America, LLC, Neligan LLP, and Verita Global f/k/a Kurtzman Carson Consultants, LLC, (4) the Professionals of any Statutory Committee, and (5) any directors and officers of the

Debtors as of the Petition Date. Third Amended Plan, p. 6.

55. And the Exculpation clause set forth in the Plan at Article IX section C states:

> Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur, and each Exculpated Party is hereby exculpated from any Cause of Action for any claim related to any act or omission taking place between the Petition Date and the Effective Date in connection with, relating to, or arising out of, the Chapter 11 Cases, the Disclosure Statement, the Plan, the Sale Transactions, or any aspect of the Liquidation Transaction, including any contract, instrument, release or other agreement or document (including providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Exculpated Party on the Plan or the Confirmation Order in lieu of such legal opinion) created or entered into in connection with the Disclosure Statement or the Plan, the Sale Transactions, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the administration and implementation of the Plan, or the distribution of property under the Plan or any other related agreement, except for claims related to any act or omission that is determined in a Final Order of a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan

Third Amended Plan, Article IX.C., p. 43 (the "Proposed Exculpation Provision").

56. As explained in further detail below, the Proposed Release should be denied for the additional reason of an utter lack of consideration exchanged for same by the Debtors' Directors & Officers. Simply working for the Debtors and participating in the Chapter 11 process is not sufficient to consideration to qualify for a broad release such as the one set forth in the Proposed Release. And further, at a minimum it is currently it is premature for the Court to approve the Proposed Release as it relates to the Debtors' Directors and Officers until the Equity Committee has had sufficient time to investigates its potential claims. Additionally, the Proposed Exculpation Provision is too broad under binding Fifth Circuit law and must be significantly narrowed so as to

only include the Debtors and the statutory committees and their respective members for conduct within the scope of their duties under 11 U.S.C. § 1103(c).

OBJECTION

I. The Debtor Releases Are Unsupported By The Record And Applicable Law.

57. Despite the Debtors' generalizations to the contrary, the propriety of non-debtor releases in plans of reorganization remains a highly controversial issue in nearly every Circuit, including this one. *See Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031, 1061 (5th Cir. 2012) (describing split among circuits that forbid non-debtor releases and “[t]hose not in agreement [which] nevertheless prohibit such releases in all but the rarest of circumstances.”); *see also In re Millennium Lab Holdings II, LLC,* 945 F.3d 126, 139 (3d Cir. 2019) (debtors seeking such releases must meet "exacting standards," and courts considering such releases must "do so with caution."); *see also In re Metromedia Fiber Network, Inc.,* 416 F.3d 136, 141-43 (2d Cir. 2005) (non-debtor release “is proper only in rare cases” where “truly unusual circumstances render the release terms important to success of the plan”).

A. The Debtors’ Misstate The Applicable Standard

58. The Debtors' assert that this Court should approve the Debtor Releases pursuant to section 1123(b)(3)(A) of the Bankruptcy Code, which “provide[s] for . . . the settlement or adjustment of any claim or interest belonging to the debtor or the estate.” *See* Moving Brf., ¶ 51.

59. In support of their arguments, the Debtors argue that this Court has held that, “the **only** analysis required is to determine whether the release…is an exercise of reasonable business judgment on that part of the debtor, is it fair and equitable, **[and]** is it in the best interest of the estate, given all the relevant facts and circumstances.” *See id.* (emphasis added) (*citing In re Highland Capital Management, L.P.*, Case No. 19-34054 (SGJ) (Bankr. N.D. Tex., Feb. 9, 2021)

[Docket No. 1917]).

60. In fact, the Court in *In re Highland Capital* also noted the importance of whether or not consideration is given in exchange for such releases. *See id.* [Docket No. 1917] ("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.").

61. The Debtors' selective use of a transcript as their main source of authority on this issue is telling. As far as its reliance on the deferential "fair and equitable" and "best interest of the estate" standards, it is unclear whether the Proposed Releases are even subject to section 1123(b)(3). Courts have differentiated between true controversies that are incorporated within the terms of a comprehensive plan, and that are, "to be viewed within the prism of a Bankruptcy Rule 9019 motion," as opposed to a "release which is broadly granted in favor of an entire category of unrelated creditors, professionals, or parties in interest would appear to be a general plan term that is unaffiliated with a specific claim or compromise." *See rue21, Inc.*, Docket No. 2:17-bk-22045 (Bankr. W.D. Pa. May 15, 2017) [Docket No. 1082] ("Court must first discern whether the release represents the compromise of a claim or an integrated component of the plan. This requires an examination into the essence of the transaction.").

62. Here, the Debtors fail to set forth any basis for this Court to consider the granting of the Proposed Releases a settlement of the Debtors' claims. *Compare Drexel,* 960 F.2d 285 (settlement at issue involved multi-billion dollar claims against the debtor and a payment by the released parties of $1.3 billion into the debtor's plan); *Kenton Cnty. Bondholders Comm. v. Delta*

Air Lines, Inc. (In re Delta Air Lines, Inc.), 374 B.R. 517, 523-24 (S.D.N.Y. 2007) (mutual releases were "integral" to the settlement and could not be severed from distributions to bondholders).

63. In the absence of a true settlement of issues that give rise to releases that is fundamental to the plan of reorganization, courts in this District, like many others, consider the following factors, first articulated by the United States Bankruptcy Court for the Western District of Missouri in the *In re Master Mortgage* decision, when deciding whether to allow non-debtor releases:

> (1) identity of interest between the debtor and the third-party, (2) ***substantial contribution of assets*** to reorganization, (3) **release is necessary to the reorganization**, (4) majority of affected creditors have overwhelmingly accepted plan treatment, and (5) plan provides payment of all, or substantially all, of affected classes' claim

(Emphasis added). *See In re Wool Growers Cent. Storage Co.,* 371 B.R. 768, 777 (Bankr. Northern Dist. Tex. July 19, 2007) (*citing In re Master Mortgage Inv. Fund, Inc.,* 168 B.R. 930, 934 (W.D. Mo. 1994)); *see also In re Spansion, Inc.,* 426 B.R. 114, 142–43 (Bankr. D. Del. 2010) (citing the *Master Mortgage* factors, including substantial contribution of assets, as relevant considerations in determining whether a plan release should be approved, notwithstanding the finding that the debtor's plan release was a valid exercise of the debtor's business judgment and was fair, reasonable, and in the best interests of the estate). So the Debtors' contention in its papers that Your Honor, and the 5th Circuit look "only" at business judgment, *see* Moving Bfr., ¶ 51, is simply wrong.

B. The Debtors Cannot Satisfy The Second Prong Of The Master Mortgage Test, i.e., 'A Substantial Contribution Of Assets To The Reorganization."

64. The Debtors state the following in support of the Proposed Releases:

> The Released Parties made significant contributions to a highly complex and contentious restructuring. 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. Consider, for example, the Debtors' highly successful Sale Transactions as evidence of the Released Parties' contributions. Recognizing the concern for patient health and the ability to maintain production of its life-savings 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. This effort was followed up by another highly successful sale 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.

Moving Brf. at p. 19; Staut Decl. ¶ 32.

65. Putting aside that the real contribution was by SSG running a process that the D&Os had failed to run prepetition, what is stated in the Debtors' papers is simply is not sufficient consideration for this type of broad ranging proposed release. Courts have categorically denied releases where, as here, representatives have "navigated" and "contributed" to the reorganization, i.e., by performing their jobs, even admirably, but have not contributed any actual assets to the reorganization. *See In re Genesis Health Ventures, Inc.,* 266 B.R. 591, 606-07 (Bankr. D. Del. 2001) ("As to the debtors' management personnel here, there is no showing that the individual releases have made a substantial contribution of assets to the reorganization. As in *Zenith*, the officers and directors of the debtors no doubt made meaningful contribution to the reorganization by designing and implementing the operational restructuring of the companies, and negotiating the financial restructuring with parties in interest. However, the officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of "assets" to the reorganization."); *In re Zenith Elec. Corp.*, 241 B.R. 92 (Bankr. D. Del. 1999); *In re Quincy Med. Ctr.*, 2011 WL 5592907 (Bankr. Dist. Mass. Nov. 16, 2011); *In re Wash. Mut., Inc., 4*42 B.R. 314, 352, 2 (Bankr. Del. 2011) (denying a release

to parties who merely fulfilled their fiduciary duties and did not provide an "extraordinary service").

66. The same is true for the D&Os here. The D&Os have been paid for (and indeed, have been paid for and bonused more than handsomely for) their contributions in helping the Debtors "navigate" these bankruptcy cases, including the sale processes that resulted in sufficient funds to pay unsecured creditors in full. But simply fulfilling your job on a post-petition basis is not sufficient to warrant a full and blanket release in the face of the great losses the Debtors' investors have incurred due to the necessity of these bankruptcy proceedings, particularly in light of the Equity Committee's information, with sources cited above, that the D&Os steadfastly refused to fully cooperate with potential acquirers of the very assets that were ultimately sold in these bankruptcy proceedings. This is particularly true when there has been no investigation of the very claims sought to be released, and the alarming criticisms leveled at the D&Os by the DOH, FDA, DSMB, employees and investors alike.

67. In a case last month in the Southern District of New York, *In re Mercon Coffee Corp.*, 23-11945 (MEW), 2024 WL 3490776 (Bankr. S.D.N.Y. Jul. 19, 2024), Bankruptcy Judge Michael Wiles was called upon to evaluate proposed Debtor releases of D&Os under a 503(c) standard, i.e., akin to retention bonuses: "[t]he [Debtor's] primary justification for the releases was that some of the recipients had threatened to terminate their employment if the parties did not commit to seek the releases." *See id.* at *9. First, Judge Wiles held that the grant of a release is a disposition of a party's interest in property (legal claims) and therefore is a "transfer" as defined in 101(54). *See id.* at *11. In his decision denying approval of the releases, Judge Wiles reviewed what he had stated in the transcript of the Disclosure Statement Hearing: "You don't get a release

just because you worked and continued to get paid after the petition date. That's not going to be enough." *See id.* at *4. He then held:

> There is no contention in this case that the proposed releases are in consideration of any post-confirmation work that the releases might provide.
>
> * ***
>
> I have sympathy for the insiders, who did good work and who did in many cases face hardships and personal risks. But I am constrained by the terms of the Bankruptcy Code and I am not free to ignore its relevant provisions.

See id. *16.

68. Indeed, many of the cases cited by the Debtors to support the Proposed Release were situations where a significant "contribution" was made by the releasees, beyond just performing their jobs post-petition. *See, e.g., In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010)(the court held that the release "constitutes an acceptable settlement under § 1123(b)(3) because the [d]ebtors and the [e]state are releasing claims that are property of the [e]state in consideration for funding of the Plan."); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (settlement at issue involved multi-billion dollar claims against the debtor and a payment by the released parties of $1.3 billion into the debtor's plan); *Kenton Cnty. Bondholders Comm. v. Delta Air Lines, Inc. (In re Delta Air Lines, Inc.)*, 374 B.R. 517, 523-24 (S.D.N.Y. 2007) (mutual releases were "integral" to the settlement and could not be severed from distributions to bondholders). Business judgment, is not sound business judgment, if no actual consideration is being paid for the releases.[12]

C. The Debtors Cannot Satisfy The Third Prong Of The Master Mortgage

---

[12] As one example, a waiver of $3,883,018.39 in bonus and severance claims filed herein by the proposed Released Parties, would constitute real consideration here. And on the eve of filing a bankruptcy, the Equity Committee assumes that the D&Os never imagined that they would be paid 100% on these claims. Indeed, the duplicative bonuses in the millions they actually paid themselves on the eve of the filing were, the Equity Committee believes, fully duplicative of these claims.

Test Because The Debtor Releases Are Not Necessary To Any Reorganization

69. This case is not a reorganization. And in a liquidation scenario, the requisite showing that the releases at issue "are essential to the reorganization of the debtor" (*In re Drexel*, 960 F.2d at 293, **cannot be made**. *See In re Optical Technologies, Inc.* 216 B.R. 989 (M.D. Fla., 1997) ("where, as here, a plan of reorganization provides for the total liquidation of the debtor, the factors of *Master Mortgage* cannot be met […] ***releases are not essential*** to the continued operation of the debtor… [T]he purpose of such [release and…] injunction is to aid in the rehabilitation of an ongoing business." *See also*, *generally, In re Regency Realty Associates,* 179 B.R. 717 (Bankr. M.D. Fla. 1995) (debtor's general partners not entitled to injunction [protecting] against non-debtor third parties where plan was a total liquidation plan); *LTV Corp. v. Aetna Cas. & Sur. Co. (In re Chateaugay Corp.)*, 167 B.R. 776, 782 (S.D.N.Y. 1994) (vacating order approving a settlement, which provided for non-debtor release, because the bankruptcy court had not determined that such agreement was essential to plan confirmation); *In re Adelphia Commc'ns Corp.,* 364 B.R. 518, 529 (Bankr. S.D.N.Y. 2007) (third party releases only permitted only "under limited circumstances - most significantly, where they are critical to the reorganization of the debtor").

70. Here, confirmation accomplishes nothing other than a transfer of assets to the Liquidating Trust, and a release of claims against the D&Os, thereby denuding that Liquidating Trust of a potentially valuable asset, with some $20 million of insurance coverage available on account of that asset. The asset that the releases will destroy, i.e., access to insurance coverage, which cost this estate $3,314,249 in the two weeks before the bankruptcy, was authorized and paid by these very same Directors and Officers. These same D&Os bonused themselves heavily (and illegally, as set forth in Section III, *supra*) just prior to the Petition Date to the tune of at least $2.2

million, and preserved additional outsized claims, *see note* 13, *supra*, which they seek to be paid via the claims process, all to the detriment of equity. Yet at the same time, these D&Os demand that both they receive a full and complete release before many claims have been investigated, and the insurance carriers receive a windfall on the $3.3 million premium paid, insofar as the carriers will resultantly be released from exposure on account of any D&O claims.

D. The D&Os Are Subject To Fraudulent Transfer Claims

71. Section 548(a)(1) of the Bankruptcy Code states:

> (a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> (B)
> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)
> (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. 548(a)(1).[13]

72. When the Directors and Officers approved of the Prepetition KERP, they were already aware of the Retention Bonus Awards approved in December 2023. They also knew that the June installment payments were not going to be made before the filing date. Thus, the Prepetition KERP payments "were made in direct anticipation of the imminent filing of the [Eiger] bankruptcy and to avoid the perceived delays in timely obtaining authority from the bankruptcy court, if any authority could be obtained, to (i) pay bonuses and (2) pay bonuses in such large amounts." *In re Enron Corp.*, 2005 WL 6237551, Bankr. S.D. Texas (July 16, 2013), at *39. Just as in *Enron*, "[w]hen payments were requested and distributed, [Eiger] knew it was going to file bankruptcy immediately thereafter. … [Eiger's] management was unwilling to allow [Eiger's] creditors and the bankruptcy court the right to participate in any decision concerning how [Eiger] spent the [$1.2mm] [] days before the bankruptcy. Thus, the bonuses were placed outside the advance scrutiny of creditors and the bankruptcy court." *Id*. It is clear that had the Debtors attempted to seek approval of the Prepetition KERP payments from this Court, they would have not met the requisite factors under 11 U.S.C. 503(c).[14] "'When a debtor acknowledges transferring property with the intent of placing it beyond the reach of creditors, he demonstrates 'an actual

[13] The California Uniform Voidable Transactions Act (Cal. Civ. Code § 3439.09) similarly states: "(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

> (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."

[14] The Equity Committee does not believe that any of the individuals who received Prepetition KERP payments had "a bona fide job offer from another business at the same or greater rate of compensation."

intent to hinder or delay a creditor.'"" *Id.* (citing *In re Thomas*, 172 B.R. 673, 675 (Bankr. M.D. Fla. 1994)).

73. The timing of management's awareness of an impending bankruptcy filing will dictate whether the nearly $1mm remaining payments made in the year prior to the bankruptcy were made with "actual intent to hinder or delay a creditor." The Debtors have set forth no reasonable position as to why releases of the directors, officers, employees (and more) must occur alongside confirmation of the Third Amended Plan, particularly in light of the millions that went out the door prior to the filing in a seemingly clear effort to avoid payment to the company's creditors.[15]

E. The D&Os Breached Their Fiduciary Duties By Approving Duplicative KERP Payments And Excessive Bonus Payments

74. The Directors and Officers of the company approved the payment of over $2.2 million in bonuses to certain insiders and employees, including: [redacted]

75. In the *Toys "R" Us, Inc.* bankruptcy matter before the United States Bankruptcy

[15] Moreover, management authorized the transfer of payments to executives and employees "in contemplation of a case under title 11 … or with intent to defeat the provisions of title 11." 8 U.S.C. § 152(7). Management authorized, at the very least, the Prepetition KERP payments to individuals in direct contemplation of the company filing a bankruptcy petition. Therefore, the transfers were "in contemplation of a case under title 11." Management knew of the restrictions on paying bonuses to executives found in the bankruptcy laws and the only plausible reason for the timing of paying the bonuses just before filing bankruptcy was the need to evade the limitations on bonuses to insiders, and to evade the scrutiny of creditors on the executive bonuses. Therefore, the transfers were also made "with intent to defeat the provisions of" the Bankruptcy Code.

Court for the Eastern District of Virginia, the TRU Creditor Litigation Trust brought an adversary proceeding (Adv. Pro. 20-03038) alleging, *inter alia*, breach of fiduciary duty claims related to: prepetition retention payments to 114 company executives and management level employees before the commencement of the bankruptcy case. The trust contended that the bonuses result in fraudulent transfers under both criminal and bankruptcy law.

76. More specifically, the trust contended that management breached their fiduciary duties by: (i) authorizing the bonuses knowing that they were extraordinary and not part of the regular compensation package; (ii) authorizing the bonuses knowing that the transfers were prohibited by bankruptcy law and intending to place those funds beyond the reach of creditors; and (iii) knowing that the company's actions, if done post-petition, would be under the oversight of creditors and the bankruptcy court, including executive compensation decisions.

77. In a September 20, 2022 Memorandum Opinion regarding the defendants' motion to dismiss (see ECF No. 448 in Adv. Pro. 20-03038), the Judge granted in part and denied in part the motion. The defendants asserted that they were protected by the business judgment rule with respect to payment of bonuses to the 114 company executives and management level employees before the filing of the bankruptcy cases. However, the Court found that the presumption of such protection is rebutted by a showing of the breach of the duties of loyalty, care, or good faith, in which case the burden then shifts to the defendants to establish that the transaction was the product of fair dealing and fair price.

78. The Court ultimately found that the evidence submitted by the trust – that the defendants were not disinterested, that they failed to consider reasonable alternatives, and abdicated the decision-making process to the CEO of TRU (who was set to get a sizable bonus) – was sufficient to establish a breach of the defendants' fiduciary duties and rebut the presumption

associated with the business judgment rule.

79. The Debtors in this case intend to release all D&Os yet have provided no specific information regarding the process to set and pay these insider and management level bonuses, and how and why the Prepetition KERP payments were approved in the face of a pre-existing retention bonus plan. These approvals led to excessive and duplicative retention payments that were seemingly intended to circumvent the bankruptcy process when it was clear that such payments could not withstand scrutiny under section 503 of the Bankruptcy Code.

80. As such, all of these claims relating to excessive and duplicative bonuses must be preserved and not subject to the Proposed Release, including for the defense of the filed claims requesting payments of bonuses that have arguably already been satisfied and are nothing more than a money grab by the D&Os.

II. The Proposed Exculpation Clause Is Too Broad And Fails To Comply With Governing Fifth Circuit Caselaw

81. The Proposed Exculpation Clause set forth in the Third Amended Plan states that "Exculpated Parties" means collectively, (1) the Debtors and the Wind-Down Debtors, (2) any Statutory Committee and each of its members, (3) the Debtors' Professionals, including Sidley Austin LLP, SSG Advisors, LLC, Alvarez & Marsal North America, LLC, Neligan LLP, and Verita Global f/k/a Kurtzman Carson Consultants, LLC, (4) the Professionals of any Statutory Committee, and (5) any directors and officers of the Debtors as of the Petition Date. Third Amended Plan, p. 6.

82. And the Exculpation clause set forth in the Plan at Article IX section C states:

> Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur, and each Exculpated Party is hereby exculpated from any Cause of Action for any claim related to any act or omission taking place between the Petition Date and the Effective Date in connection with, relating to, or arising out of, the Chapter 11 Cases, the Disclosure Statement,

> the Plan, the Sale Transactions, or any aspect of the Liquidation Transaction, including any contract, instrument, release or other agreement or document (including providing any legal opinion requested by any Entity regarding any transaction, contract, instrument, document, or other agreement contemplated by the Plan or the reliance by any Exculpated Party on the Plan or the Confirmation Order in lieu of such legal opinion) created or entered into in connection with the Disclosure Statement or the Plan, the Sale Transactions, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the administration and implementation of the Plan, or the distribution of property under the Plan or any other related agreement, except for claims related to any act or omission that is determined in a Final Order of a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan.

83. In *In re Highland Cap. Mgmt., LP*, 48 F.4th 419, 437 (5th Cir. 2022), the Fifth Circuit explained that the exculpation that was provided for in the plan "partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors." The court found that "[our precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties." *In re Highland Cap. Mgmt., LP*, 48 F.4th at 437.

84. Thus, the Third Amended Plan may not be confirmed due to the unlawful breadth of the Exculpated Parties.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Equity Committee respectfully requests that the Plan denied unless either: (i) the Released Parties provide real consideration for the releases, as envisioned in the caselaw, or the Plan is modified to allow for an appropriate period for the Equity Committee to conduct a meaningful investigation, and for such other and further relief as the Court deems just and proper.

Dated: August 30, 2024

Respectfully submitted,

MCKOOL SMITH, PC

/s/ S. Margie Venus
John J. Sparacino (SBN 18873700)
S. Margie Venus (SBN 20545900)
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile (713) 485-7344
jsparacino@mckoolsmith.com
mvenus@mckoolsmith.com

Travis E. DeArman (SBN 24074117)
300 Crescent Court, Suite 1200
Dallas, Texas 75201
Telephone (214) 978-4000
Facsimile (214) 978-4044
tdearman@mckoolsmith.com

and

PORZIO, BROMBERG & NEWMAN, P.C.

Warren J. Martin Jr. (admitted *pro hac vice*)
Rachel A. Parisi (admitted *pro hac vice*)
David E. Sklar (admitted *pro hac vice*)
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962-1997
Telephone: (973) 538-4006
Facsimile: (973) 538-5146
WJMartin@pbnlaw.com
RAParisi@pbnlaw.com
DESklar@pbnlaw.com

Counsel for the Official Equity Security Holders' Committee

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, a true and correct copy of the above and foregoing has been served on all parties that are registered to receive electronic transmission through this Court's CM/ECF filing system in these cases.

/s/ S. Margie Venus
S. Margie Venus