

SIDLEY AUSTIN LLP
Thomas R. Califano (TX Bar No. 24122825)
William E. Curtin (admitted *pro hac vice*)
Anne G. Wallace (admitted *pro hac vice*)
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: tom.califano@sidley.com
wcurtin@sidley.com
anne.wallace@sidley.com

SIDLEY AUSTIN LLP
Charles M. Persons (TX Bar No. 24060413)
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Email: cpersons@sidley.com

*Proposed Attorneys for the Debtors
and Debtors in Possession*

**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)

**DEBTORS' MOTION FOR ENTRY OF AN ORDER
AUTHORIZING THE DEBTORS TO RETAIN AND COMPENSATE
PROFESSIONALS UTILIZED IN THE ORDINARY COURSE OF BUSINESS**

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/> at least two (2) business days before the start of the hearing. 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 at least two (2) business days before the start of the hearing. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.

A hearing will be conducted on this matter on May 7, 2024 at 1:30 a.m. in Courtroom #1, 14th Floor, Earle Cabell Federal Building, 1100 Commerce Street, Suite 1254, Dallas, Texas, 75242.

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



You may participate in the hearing either in person or by an audio and video connection. Audio communication will be by use of the Court's dial-in facility. You may access the facility at 1.650.479.3207. Video communication will be by the use of the Cisco WebEx platform. Connect via the Cisco WebEx application or click the link on Judge Jernigan's home page. The meeting code is 479 393 582. Click the settings icon in the upper right corner and enter your name under the personal information setting.

Hearing appearances must be made electronically in advance of electronic hearings. To make your appearance, click the "Electronic Appearance" link on Judge Jernigan's home page. Select the case name, complete the required fields and click "Submit" to complete your appearance.

The debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors") state as follows in support of this motion:

Relief Requested

1. By this Motion, the Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit B** (the "Order"), (a) authorizing the retention and compensation of the OCPs (as defined below), (b) approving the OCP Procedures (as defined below), and (c) granting related relief.

Jurisdiction

2. The United States Bankruptcy Court for the Northern District of Texas (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to the Court's entry of a final order in connection with this motion.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a), 327, 328, and 330 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2014 and 2016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), Rules 2014-1, 2016-1, and 9013-1 of the Bankruptcy Local Rules for the Northern District of Texas (the "Bankruptcy Local Rules"), and Procedures for Complex Cases in the Northern District of Texas.

Background

5. The Debtors are a commercial-stage biopharmaceutical company focused on the development of innovative therapies for hepatitis delta virus (HDV) and other serious diseases. All five of the Debtors' rare disease programs have FDA Breakthrough Therapy designation.

6. On April 1, 2024 (the "Petition Date"), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their business and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Concurrently with the filing of this motion, the Debtors have requested procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). No party has requested the appointment of a trustee or examiner in these cases, and no statutory committee has been appointed.

7. A comprehensive description of the Debtors' businesses and operations, capital structure, and the events leading to the commencement of these chapter 11 cases can be found in the *Declaration of David Apelian in Support of Chapter 11 Petitions and First Day Pleadings* (the "First Day Declaration") [Docket No. 19].²

The Ordinary Course Professionals

8. The Debtors employ various attorneys, accountants, auditors, tax professionals, and other professionals in the ordinary course of their business (such professionals, collectively, the "OCPs"). The OCPs provide services for the Debtors in a variety of matters unrelated to these chapter 11 cases, including specialized legal services, accounting services, auditing and tax

² All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

services, and certain consulting services. A nonexclusive list of the Debtors' current OCPs (the "OCP List") is attached hereto as **Exhibit A**.³

9. The continued employment and compensation of the OCPs is in the best interests of the Debtors' estates, their creditors, and other parties in interest. The OCPs have significant knowledge, expertise, and familiarity with the Debtors and their operations. Although the Debtors anticipate that the OCPs will wish to continue to represent the Debtors during these chapter 11 cases, many would not be in a position to do so if the Debtors cannot pay them on a regular basis. And, without such knowledge, expertise, and familiarity that the OCPs possess, the Debtors undoubtedly would incur additional and unnecessary expenses in educating and retaining replacement professionals. Accordingly, the Debtors' estates and their creditors are best served by avoiding any disruption in the professional services that are required for the ongoing operations of the Debtors' business through the sale and wind-up processes. Moreover, in light of the number of OCPs, and the significant costs associated with the preparation of employment applications for professionals who will receive relatively modest fees, the Debtors submit that it would be impractical, inefficient, and costly for the Debtors and their legal advisors to prepare and submit individual applications and proposed retention orders for each OCP.

10. Accordingly, the Debtors request that the Court approve the following procedures for retention and payment of the OCPs (the "OCP Procedures"):

- a. Within thirty (30) days of the later of (i) the date of entry of the Order or (ii) the date on which an OCP commences work for the Debtor, such OCP shall cause a declaration of disinterestedness, substantially in the form annexed as **Exhibit 1** to the Order (a "Declaration of Disinterestedness"), to be filed with the Court and served upon: (i) the Debtors, to (a) Eiger BioPharmaceuticals Inc., 2100 Ross Avenue, Dallas, Texas 75201, Attn: Douglas Staut

³ The Debtors reserve the right to retain additional OCPs from time to time during these chapter 11 cases as the need arises, by filing a list or lists of additional professionals and complying with the notice requirements set forth in the OCP Procedures (as defined below). Upon such filing in accordance with the OCP Procedures, such filed list shall become the OCP List.

(dstaut@alvarezandmarsal.com); (b) proposed counsel to the Debtors, Sidley Austin LLP, 2021 McKinney Ave #2000, Dallas, TX 75201, Attn: William E. Curtin (wcurtin@sidley.com), Anne G. Wallice (awallice@sidley.com), and Parker G. Embry (parker.embry@sidley.com); and (c) proposed financial advisors to the Debtors, Alvarez & Marsal, 2100 Ross Avenue, Dallas, TX 75201, Attn: Paul Coloma (pcoloma@alvarezandmarsal.com); (ii) counsel to the Prepetition Term Loan Agent, Bradley Arant Boult Cummings LLP, 1221 Broadway, Suite 2400, Nashville, Tennessee 37203, Attn: Roger G. Jones (rjones@bradley.com); and (iv) the U.S. Trustee, to the Office of the United States Trustee, Region 6, Attn: Elizabeth A. Young (Elizabeth.A.Young@usdoj.gov) (collectively, the “Notice Parties”).

- b. The Notice Parties and any other party in interest shall have fourteen (14) days after the date of filing of each OCP’s Declaration of Disinterestedness (the “Objection Deadline”) to object to the retention of such OCP. The objecting party shall file any such objection and serve such objection upon the Notice Parties and the respective OCP on or before the Objection Deadline. If any such objection cannot be resolved within a reasonable time, the matter shall be scheduled for hearing before the Court. The Debtors shall not be authorized to retain and compensate such OCP until all outstanding objections have been withdrawn, resolved, or overruled by order of the Court.
- c. If no objection is received by the Objection Deadline, or if all outstanding objections have been withdrawn, resolved, or overruled, with respect to any particular OCP, the Debtors shall be authorized to: (i) retain such OCP as of the date such OCP commenced providing services to the Debtors; and (ii) compensate such OCP as set forth below.
- d. The Debtors shall be authorized to pay, without formal application to the Court by any OCP, one hundred percent (100%) of fees and disbursements to each of the OCPs retained by the Debtors pursuant to the OCP Procedures upon submission to the Debtors of an appropriate invoice setting forth in reasonable detail the nature of the services rendered after the Petition Date; *provided* that fees paid to OCPs, excluding costs and disbursements, may not exceed an aggregate of \$75,000 per month per OCP designated in Tier 1 in the OCP List or \$15,000 per month per OCP designated in Tier 2 of the OCP List, calculated as an average over a rolling three-month period while these chapter 11 cases are pending (together, the “OCP Caps”). The OCP Caps may be increased by mutual agreement between the Debtors and the U.S. Trustee, *provided* that the Debtors shall file a notice with the Court and submit such notice to the Notice Parties of any such agreed increase.
- e. To the extent that fees payable to any OCP exceed the OCP Caps (the “Excess Fees”), the applicable OCP shall (i) file with this Court a Notice of Fees in Excess of the OCP Caps (the “Notice of Excess Fees”) and an invoice setting forth, in reasonable detail, the nature of the services rendered and disbursements actually incurred, including all time entries and all fees incurred by the OCP for

the relevant month; and (ii) serve the Notice of Excess Fees on the Notice Parties. Interested parties shall then have fourteen (14) days to file an objection to the Notice of Excess Fees with this Court. If after fourteen (14) days no objection is filed, the Excess Fees shall be deemed approved, and the OCP may be paid 100 percent of its fees and 100 percent of its expenses without the need to file a fee application.

- f. Beginning on the quarter ending June 30, 2024, and for each quarter thereafter during which these chapter 11 cases are pending, the Debtors shall, within thirty (30) days following quarter end file with the Court and serve on the Notice Parties a statement with respect to each OCP paid during the immediately preceding quarterly period (the “Quarterly Statement”). Each Quarterly Statement shall include: (i) the name of the OCP; (ii) the aggregate amounts paid as compensation for services rendered and reimbursement of expenses incurred by that OCP during the reported quarter; and (iii) a general description of the services rendered by that OCP.
- g. The Debtors may retain additional OCPs from time to time during these chapter 11 cases by: (i) including such OCPs on an amended version of the OCP List that is filed with the Court and served on the Notice Parties; and (ii) having such OCPs comply with the OCP Procedures.

11. To the extent that any agreement between the Debtors and an OCP provides for the indemnification by the Debtors of such OCP in connection with the services that are the subject of this Motion (each such agreement, an “OCP Agreement”), such indemnification provisions are approved, subject to the following modifications, applicable during the pendency of these chapter 11 cases:

- a. The OCP shall not be entitled to indemnification, contribution, or reimbursement pursuant to the OCP Agreement for services other than the services provided under the OCP Agreement, unless such services and the indemnification, contribution, or reimbursement are approved by this Court.
- b. Notwithstanding anything to the contrary in the OCP Agreement, the Debtors shall have no obligation to indemnify the OCP, or provide contribution or reimbursement to the OCP, for any claim or expense that is either: (i) judicially determined (the determination having become final) to have arisen from the OCP’s gross negligence, willful misconduct, fraud, self-dealing (if found to be applicable), bad faith, or breach of fiduciary duty (if any); (ii) for a contractual dispute in which the Debtors allege the breach of the OCP’s contractual obligations if this Court determines that indemnification, contribution, or reimbursement would not be permissible under applicable law; (iii) of any type for which this Court determines that indemnification, contribution, or

reimbursement would not be permissible; or (iv) settled prior to a judicial determination under (i) or (ii), but determined by this Court, after notice and a hearing, to be a claim or expense for which the OCP should not receive indemnity, contribution, or reimbursement under the terms of the OCP Agreement as modified by this Court.

- c. If, before the earlier of (i) the entry of an order confirming a chapter 11 plan in these cases (that order having become a final order no longer subject to appeal), or (ii) the entry of an order closing these chapter 11 cases, the OCP believes that it is entitled to the payment of any amounts by the Debtors on account of the Debtors' indemnification, contribution and/or reimbursement obligations under the OCP Agreement (as modified by this Order), including the advancement of defense costs, the OCP must file an application therefor in this Court, and the Debtors may not pay any such amounts to the OCP before the entry of an order by this Court approving the payment. All parties in interest shall retain the right to object to any demand by the OCP for indemnification, contribution, or reimbursement. In the event that the OCP seeks reimbursement from the Debtors for attorneys' fees and expenses in connection with the payment of an indemnity claim pursuant to the OCP Agreement, the invoices and supporting time records for the attorneys' fees and expenses shall be included in the OCP's own applications, both interim and final, but determined by this Court after notice and a hearing.

Basis For Relief

12. Section 327(a) of the Bankruptcy Code requires a debtor to obtain court approval to retain and employ a "professional" to assist the debtor in the conduct of its chapter 11 case. *See* 11 U.S.C. § 327(a). In determining whether an entity is a "professional" within the meaning of section 327, courts often consider each of the following factors:

- a. Whether the entity controls, manages, administers, invests, purchases, or sells assets that are significant to the debtor's reorganization;
- b. Whether the entity is involved in negotiating the terms of a plan of reorganization;
- c. Whether the entity is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations;
- d. Whether the entity is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate;
- e. The extent of the entity's involvement in the administration of the estate; and

- f. Whether the entity's services involve some degree of special knowledge or skill, such that it can be considered a "professional" within the ordinary meaning of the term.

See In re Am. Tissue, Inc., 331 B.R. 169, 173 (Bankr. D. Del. 2005) (citation omitted); *In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989) (finding that only those professionals involved in the actual reorganization effort or administration of the debtor's estate, rather than the debtor's ongoing business, require approval under section 327 of the Bankruptcy Code).

13. The foregoing factors must be considered as a whole when determining if an entity is a "professional" within the meaning of section 327 of the Bankruptcy Code. None of the factors alone is dispositive. *In re First Merchants Acceptance Corp.*, 1997 WL 873551, at *3 (D. Del. Dec. 15, 1997).

14. Section 327(e) of the Bankruptcy Code further provides that "with the court's approval" a debtor may employ:

for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

See 11 U.S.C. § 327.

15. Once employed, section 330 of the Bankruptcy Code authorizes the Court to award reasonable compensation for actual and necessary services rendered by retained professionals. *See* 11 U.S.C. § 330. The Court may exercise its broad discretion under section 105(a) of the Bankruptcy Code in connection with the foregoing. 11 U.S.C. § 105(a).

16. Upon consideration of all the factors, the Debtors believe that the OCPs are not "professionals" whose retention must be approved by the Court, within the meaning of section 327(a) of the Bankruptcy Code. In particular, the OCPs will not be involved in the administration of the Debtors' estate, but instead will provide services in connection with the Debtors' ongoing

business operations that are ordinarily provided by non-bankruptcy professionals. Nevertheless, to provide certainty for the OCPs and oversight, the Debtors seek the relief requested in this Motion to establish definite procedures for the retention and payment of the OCPs during these chapter 11 cases. The Debtors will seek specific authority from the Court under section 327 of the Bankruptcy Code to retain any professionals involved in the conduct of these chapter 11 cases. Those professionals will be compensated in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Bankruptcy Local Rules, and other orders of the Court.

17. The Debtors and their estates will be well served by the continued retention of the OCPs because of their prior relationships with the Debtors and their knowledge of facts relevant to the services they are providing. Moreover, in light of the significant costs associated with the preparation of separate employment applications for professionals who will receive relatively modest fees, it would be impractical and inefficient for the Debtors and their counsel to prepare and submit individual retention applications and proposed retention orders for each OCP. The delay attendant to such a process would also be potentially disruptive to the professional services that are required for the ongoing operation of the Debtors' businesses during the sale and wind-up processes.

18. Although certain of the OCPs may hold unsecured claims against the Debtors for prepetition services rendered, the Debtors do not believe that any of the OCPs have an interest that is materially adverse to the Debtors, their creditors, or other parties in interest with respect to the matters for which such OCP is to be employed that would preclude such professional from continuing to represent the Debtors. Further, section 328(c) excludes attorneys retained pursuant to section 327(e) from the requirement that such professional be a "disinterested" person. *See* 11 U.S.C. § 328(c). Finally, the OCP Procedures require each OCP to file a Declaration of

Disinterestedness and be subject to an objection period before such OCP may be retained and compensated.

19. For the foregoing reasons, the relief requested is necessary, appropriate, and in the best interests of the Debtors, their estates, and all other parties in interest in these chapter 11 cases. Accordingly, the Court should authorize the Debtors to employ the OCPs in accordance with the OCP Procedures.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

20. The Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the fourteen-day stay period under Bankruptcy Rule 6004(h), which is necessary to implement the relief requested in this motion.

Reservation of Rights

21. Nothing contained herein or any action taken pursuant to relief requested is intended to be or shall be construed as (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any party in interest's rights to dispute any claim or interest on any grounds; (c) a promise or requirement to pay any claim; (d) a waiver of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law; (e) an implication or admission that any particular claim is of a type specified or defined in this motion or any order granting the relief requested in this motion or a finding that any particular claim is an administrative expense claim or other priority claim; (f) a request for or approval to assume, adopt, or reject any agreement, contract, program, policy, or lease under section 365 of the Bankruptcy Code; or (g) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates. Likewise, if the

Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' or any party in interest's rights to subsequently dispute such claim.

Notice

22. The Debtors will provide notice of this motion to the following: (a) the U.S. Trustee for the Northern District of Texas; (b) the holders of the thirty (30) largest unsecured claims against the Debtors (on a consolidated basis); (c) Innovatus Life Sciences Lending Fund I, LP, as agent to the Debtors' secured lenders, and counsel thereto; (d) the United States Attorney's Office for the Northern District of Texas; (e) the Food and Drug Administration; (f) the Internal Revenue Service; (g) the United States Securities and Exchange Commission; (h) the state attorneys general for the states in which the Debtors conduct business; and (i) any party that has requested notice pursuant to Bankruptcy Rule 2002. No other or further notice is needed in light of the nature of the relief requested.

[Remainder of page intentionally left blank.]

The Debtors request entry of an order, substantially in the form attached hereto, granting the relief requested herein and granting such other relief as is just and proper.

Dated: April 23, 2024
Dallas, Texas

SIDLEY AUSTIN LLP

/s/ Thomas R. Califano

Thomas R. Califano (TX Bar No. 24122825)
William E. Curtin (admitted *pro hac vice*)
Anne G. Wallice (admitted *pro hac vice*)
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: tom.califano@sidley.com
wcurtin@sidley.com
anne.wallice@sidley.com

and

Charles M. Persons (TX Bar No. 24060413)
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Email: cpersons@sidley.com

Proposed Counsel to the Debtors and Debtors in Possession

Certificate of Service

I certify that on April 23, 2024, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas.

/s/ Thomas R. Califano
Thomas R. Califano

Exhibit A

OCP List

Tier 1

PROFESSIONAL/FIRM	NATURE OF WORK
Kilpatrick Townsend and Stockton LLP	Legal Services

Tier 2

PROFESSIONAL/FIRM	NATURE OF WORK
BFGD Chartered Accountants	Accounting Services
Firefly Solutions LLC	Compliance Related Services
KPMG	Accounting Services
McCarter & English LLP	Legal Services
Moss Adams LLP	Accounting and Consulting Services
Tepper & Eyster, PLLC	Legal Services
Wheelhouse	PR Services

Exhibit B

Proposed Order

**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)

**ORDER AUTHORIZING THE DEBTORS TO RETAIN AND COMPENSATE
PROFESSIONALS UTILIZED IN THE ORDINARY COURSE OF BUSINESS**

Upon the motion (“Motion”)² of the debtors and debtors in possession on the above-captioned chapter 11 cases (collectively, the “Debtors”), for entry of an order (this “Order”) (a) authorizing the retention and compensation of the OCPs, (b) approving the OCP Procedures, and (c) granting related relief, each as more fully set forth in the Motion; and this Court having

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

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to them in the Motion.

jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this matter being a core proceeding within the meaning of 28 U.S.C. § 157(b)(2); and the Court being able to issue a final order consistent with Article III of the United States Constitution; and venue of this proceeding and the Motion in this district being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and appropriate notice of and opportunity for a hearing on the Motion having been given; and the relief requested in the Motion being in the best interests of the Debtors' estates, their creditors and other parties in interest; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Debtors are authorized to retain and compensate the professionals identified on the OCP List (collectively, the "OCPs") attached as **Exhibit A** to the Motion in the ordinary course of business pursuant to the following OCP Procedures:

- a. Within thirty (30) days of the later of (i) the date of entry of the Order or (ii) the date on which an OCP commences work for the Debtor, such OCP shall cause a declaration of disinterestedness, substantially in the form annexed as **Exhibit 1** to the Order (a "Declaration of Disinterestedness"), to be filed with the Court and served upon: (i) the Debtors, to (a) Eiger BioPharmaceuticals Inc., 2100 Ross Avenue, Dallas, Texas 75201, Attn: Douglas Staut (dstaut@alvarezandmarsal.com); (b) proposed counsel to the Debtors, Sidley Austin LLP, 2021 McKinney Ave #2000, Dallas, TX 75201, Attn: William E. Curtin (wcurtin@sidley.com), Anne G. Wallice (awallice@sidley.com), and Parker G. Embry (parker.embry@sidley.com); and (c) proposed financial advisors to the Debtors, Alvarez & Marsal, 2100 Ross Avenue, Dallas, TX 75201, Attn: Paul Coloma (pcoloma@alvarezandmarsal.com); (ii) counsel to the Prepetition Term Loan Agent, Bradley Arant Boult Cummings LLP, 1221 Broadway, Suite 2400, Nashville, Tennessee 37203, Attn: Roger G. Jones (rjones@bradley.com); and (iv) the U.S. Trustee, to the Office of the United States Trustee, Region 6, Attn: Elizabeth A. Young (Elizabeth.A.Young@usdoj.gov) (collectively, the "Notice Parties").
- b. The Notice Parties and any other party in interest shall have fourteen (14) days after the date of filing of each OCP's Declaration of Disinterestedness (the "Objection Deadline") to object to the retention of such OCP. The objecting party shall file any such objection and serve such objection upon the Notice Parties and the respective OCP on or before the Objection Deadline. If any such

objection cannot be resolved within a reasonable time, the matter shall be scheduled for hearing before the Court. The Debtors shall not be authorized to retain and compensate such OCP until all outstanding objections have been withdrawn, resolved, or overruled by order of the Court.

- c. If no objection is received by the Objection Deadline, or if all outstanding objections have been withdrawn, resolved, or overruled, with respect to any particular OCP, the Debtors shall be authorized to: (i) retain such OCP as of the date such OCP commenced providing services to the Debtors; and (ii) compensate such OCP as set forth below.
- d. The Debtors shall be authorized to pay, without formal application to the Court by any OCP, one hundred percent (100%) of fees and disbursements to each of the OCPs retained by the Debtors pursuant to the OCP Procedures upon submission to the Debtors of an appropriate invoice setting forth in reasonable detail the nature of the services rendered after the Petition Date; *provided* that fees paid to OCPs, excluding costs and disbursements, may not exceed an aggregate of \$75,000 per month per OCP designated in Tier 1 in the OCP List or \$15,000 per month per OCP designated in Tier 2 of the OCP List, calculated as an average over a rolling three-month period while these chapter 11 cases are pending (together, the “OCP Caps”). The OCP Caps may be increased by mutual agreement between the Debtors and the U.S. Trustee, *provided* that the Debtors shall file a notice with the Court and submit such notice to the Notice Parties of any such agreed increase.
- e. To the extent that fees payable to any OCP exceed the OCP Caps (the “Excess Fees”), the applicable OCP shall (i) file with this Court a Notice of Fees in Excess of the OCP Caps (the “Notice of Excess Fees”) and an invoice setting forth, in reasonable detail, the nature of the services rendered and disbursements actually incurred, including all time entries and all fees incurred by the OCP for the relevant month; and (ii) serve the Notice of Excess Fees on the Notice Parties. Interested parties shall then have fourteen (14) days to file an objection to the Notice of Excess Fees with this Court. If after fourteen (14) days no objection is filed, the Excess Fees shall be deemed approved, and the OCP may be paid 100 percent of its fees and 100 percent of its expenses without the need to file a fee application.
- f. Beginning on the quarter ending June 30, 2024, and for each quarter thereafter during which these chapter 11 cases are pending, the Debtors shall, within thirty (30) days following quarter end file with the Court and serve on the Notice Parties a statement with respect to each OCP paid during the immediately preceding quarterly period (the “Quarterly Statement”). Each Quarterly Statement shall include: (i) the name of the OCP; (ii) the aggregate amounts paid as compensation for services rendered and reimbursement of expenses incurred by that OCP during the reported quarter; and (iii) a general description of the services rendered by that OCP.

- g. The Debtors may retain additional OCPs from time to time during these chapter 11 cases by: (i) including such OCPs on an amended version of the OCP List that is filed with the Court and served on the Notice Parties; and (ii) having such OCPs comply with the OCP Procedures.

2. To the extent that any agreement between the Debtors and an OCP provides for the indemnification by the Debtors of such OCP in connection with the services that are the subject of this Order (each such agreement, an “OCP Agreement”), such indemnification provisions are approved, subject to the following modifications, applicable during the pendency of these chapter 11 cases:

- a. The OCP shall not be entitled to indemnification, contribution, or reimbursement pursuant to the OCP Agreement for services other than the services provided under the OCP Agreement, unless such services and the indemnification, contribution, or reimbursement are approved by this Court.
- b. Notwithstanding anything to the contrary in the OCP Agreement, the Debtors shall have no obligation to indemnify the OCP, or provide contribution or reimbursement to the OCP, for any claim or expense that is either: (i) judicially determined (the determination having become final) to have arisen from the OCP’s gross negligence, willful misconduct, fraud, self-dealing (if found to be applicable), bad faith, or breach of fiduciary duty (if any); (ii) for a contractual dispute in which the Debtors allege the breach of the OCP’s contractual obligations if this Court determines that indemnification, contribution, or reimbursement would not be permissible under applicable law; (iii) of any type for which this Court determines that indemnification, contribution, or reimbursement would not be permissible; or (iv) settled prior to a judicial determination under (i) or (ii), but determined by this Court, after notice and a hearing, to be a claim or expense for which the OCP should not receive indemnity, contribution, or reimbursement under the terms of the OCP Agreement as modified by this Court.
- c. If, before the earlier of (i) the entry of an order confirming a chapter 11 plan in these cases (that order having become a final order no longer subject to appeal), or (ii) the entry of an order closing these chapter 11 cases, the OCP believes that it is entitled to the payment of any amounts by the Debtors on account of the Debtors’ indemnification, contribution and/or reimbursement obligations under the OCP Agreement (as modified by this Order), including the advancement of defense costs, the OCP must file an application therefor in this Court, and the Debtors may not pay any such amounts to the OCP before the entry of an order by this Court approving the payment. All parties in interest shall retain the right to object to any demand by the OCP for indemnification, contribution, or reimbursement. In the event that the OCP seeks reimbursement from the Debtors

for attorneys' fees and expenses in connection with the payment of an indemnity claim pursuant to the OCP Agreement, the invoices and supporting time records for the attorneys' fees and expenses shall be included in the OCP's own applications, both interim and final, but determined by this Court after notice and a hearing.

3. Nothing contained herein shall affect the Debtors' or any appropriate party in interest's ability to dispute any invoice submitted by an OCP.

4. Notwithstanding anything else herein, nothing in this Order shall prevent any party in interest from seeking a determination from the Court (a) requiring an OCP to file a separate retention application under section 327(a) or 327(e) of the bankruptcy Code, or (b) altering the amount of the OCP Caps.

5. This Order shall not apply to any professional retained by the Debtors pursuant to a separate order of the Court.

6. Nothing in this Order shall preclude an OCP from subsequently seeking retention as an estate professional under sections 327 or 328 of the Bankruptcy Code.

7. Notwithstanding the relief granted herein and any actions taken pursuant to such relief, nothing in this Order shall be deemed (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable nonbankruptcy law; (b) a waiver of the Debtors' or any party in interest's rights to dispute any claim or interest on any grounds; (c) a promise or requirement to pay any claim; (d) a waiver of the Debtors' or any other party in interest's rights under the Bankruptcy Code or any other applicable law; (e) an implication or admission that any particular claim is of a type specified or defined in this order or any other order granting the relief requested in this motion or a finding that any particular claim is an administrative expense claim or other priority claim; (f) an approval to assume, adopt, or reject any agreement, contract, program, policy, or lease under section 365 of the Bankruptcy Code; or (g) an admission as to the validity, priority, enforceability, or perfection

of any lien on, security interest in, or other encumbrance on property of the Debtors' estates. Any payment made pursuant to this order is not intended to be nor should it be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

8. Notwithstanding anything to the contrary herein, any payment made by the Debtors pursuant to the authority granted herein shall be subject to and in compliance with any orders entered by the Court authorizing the Debtors' use of cash collateral and/or any budget in connection therewith.

9. The Debtors are authorized to take all actions necessary to implement the relief granted in this Order.

10. Notwithstanding any Bankruptcy Rule to the contrary, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

11. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Bankruptcy Local Rules are satisfied by such notice.

12. The Court retains jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

Submitted By:

SIDLEY AUSTIN LLP

Thomas R. Califano (TX Bar No. 24122825)
William E. Curtin (admitted *pro hac vice*)
Anne G. Wallice (admitted *pro hac vice*)
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: tom.califano@sidley.com
wcurtin@sidley.com
anne.wallice@sidley.com

and

Charles M. Persons (TX Bar No. 24060413)
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Email: cpersons@sidley.com

*Proposed Counsel to the Debtors and Debtors
in Possession*

Exhibit 1

Declaration of Disinterestedness

**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)

**DECLARATION OF DISINTERESTEDNESS OF [OCP] PURSUANT
TO THE ORDER AUTHORIZING THE RETENTION AND COMPENSATION OF
CERTAIN PROFESSIONALS UTILIZED IN THE ORDINARY COURSE OF BUSINESS**

I, [NAME], make this declaration (this “Declaration”) under penalty of perjury:

1. I am a [POSITION] of [COMPANY], located at [STREET, CITY, STATE, ZIP CODE] (the “Company”).

2. Impel Pharmaceuticals, Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, the “Debtors”), have requested that the Company provide [DESCRIPTION] services to the Debtors, namely [SPECIFY DEBTOR(S) FOR WHICH SERVICES ARE BEING PROVIDED], and the Company has consented to provide such services.

3. The Company may have performed services in the past, may currently perform services and may perform services in the future, in matters unrelated to these chapter 11 cases, for persons that are parties in interest in the Debtors’ chapter 11 cases. The Company does not perform services for any such person in connection with these chapter 11 cases or have any relationship

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

with any such person, their attorneys, or accountants that would be adverse to the Debtors or their estates with respect to the matter on which the Company is proposed to be employed.

4. As part of its customary practice, the Company is retained in cases, proceedings, and transactions involving many different parties, some of whom may represent or be employed by the Debtors, claimants, and parties in interest in these chapter 11 cases.

5. Neither I nor any principal, partner, director, officer of, or professional employed by, the Company has agreed to share or will share any portion of the compensation to be received from the Debtors with any other person other than the principal and regular employees of the Company.

6. Neither I nor any principal, partner, director, officer of, or professional employed by, the Company, insofar as I have been able to ascertain, holds or represents any interest adverse to the Debtors or their estates with respect to the matter(s) upon which this Company is to be employed.

7. The Debtors owe the Company \$_____ for prepetition services, the payment of which is subject to limitations contained in the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532.

8. I understand that the amount owed by any of the Debtors to the Company for prepetition services will be treated as a general unsecured claim, and, as such, the Company may file a proof of claim.

9. I further understand that this Declaration will not suffice as the Company's proof of claim.

10. As of April 1, 2024, which was the date on which the Debtors commenced these chapter 11 cases, the Company [was/was not] party to an agreement for indemnification with certain of the Debtors. [A copy of such agreement is attached as **Exhibit [●]** to this Declaration.]

11. **[If there is an indemnification agreement]:** Such agreement for indemnification (the “OCP Agreement”) is subject to the following modifications, applicable during the pendency of the Debtors’ chapter 11 cases:

- a. The OCP shall not be entitled to indemnification, contribution, or reimbursement pursuant to the OCP Agreement for services other than the services provided under the OCP Agreement, unless such services and the indemnification, contribution, or reimbursement are approved by this Court.
- b. Notwithstanding anything to the contrary in the OCP Agreement, the Debtors shall have no obligation to indemnify the OCP, or provide contribution or reimbursement to the OCP, for any claim or expense that is either: (i) judicially determined (the determination having become final) to have arisen from the OCP’s gross negligence, willful misconduct, fraud, self-dealing (if found to be applicable), bad faith, or breach of fiduciary duty (if any); (ii) for a contractual dispute in which the Debtors allege the breach of the OCP’s contractual obligations if this Court determines that indemnification, contribution, or reimbursement would not be permissible under applicable law; (iii) of any type for which this Court determines that indemnification, contribution, or reimbursement would not be permissible; or (iv) settled prior to a judicial determination under (i) or (ii), but determined by this Court, after notice and a hearing, to be a claim or expense for which the OCP should not receive indemnity, contribution, or reimbursement under the terms of the OCP Agreement as modified by this Court.
- c. If, before the earlier of (i) the entry of an order confirming a chapter 11 plan in these cases (that order having become a final order no longer subject to appeal), or (ii) the entry of an order closing these chapter 11 cases, the OCP believes that it is entitled to the payment of any amounts by the Debtors on account of the Debtors’ indemnification, contribution and/or reimbursement obligations under the OCP Agreement (as modified by this Order), including the advancement of defense costs, the OCP must file an application therefor in this Court, and the Debtors may not pay any such amounts to the OCP before the entry of an order by this Court approving the payment. All parties in interest shall retain the right to object to any demand by the OCP for indemnification, contribution, or reimbursement. In the event that the OCP seeks reimbursement from the Debtors for attorneys’ fees and expenses in connection with the payment of an indemnity claim pursuant to the OCP Agreement, the invoices and supporting time records for the attorneys’ fees and expenses shall be

included in the OCP's own applications, both interim and final, but determined by this Court after notice and a hearing.

12. The Company is conducting further inquiries regarding its retention by any creditors of the Debtors, and upon conclusion of that inquiry, or at any time during the period of its employment, if the Company should discover any facts bearing on the matters described herein, the Company will supplement the information contained in this Declaration.

[Remainder of page intentionally left blank]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
and correct.

Date: _____, 2024

[DECLARANT]