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5 Attorney for
ARADIGM CORPORATION
6 Debtor and Debtor-in-Possession

8 UNITED STATES BANKRUPTCY COURT

9 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

10 In re

CASE NO. 19-40363 WJL

11 ARADIGM CORPORATION

Chapter 11

12 **REPLY OF DEBTOR AND DEBTOR IN**
13 **POSSESSION IN SUPPORT OF**
14 **APPLICATION OF DEBTOR AND**
15 **DEBTOR IN POSSESSION FOR ORDER**
16 **AUTHORIZING THE EMPLOYMENT OF**
17 **EMA PARTNERS, LLC AS**
18 **INVESTMENT BANKER TO THE**
19 **DEBTOR IN POSSESSION**

Hearing Date: May 7, 2019
Time: 2:00 p.m.
Place: 1300 Clay Street, Room 220
Oakland, CA
Judge: Hon. William J. Lafferty

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21 Aradigm Corporation, as debtor and debtor in possession (the "Debtor") in the above-
22 captioned chapter 11 case hereby submits this Reply in support of its Application For Order
23 Authorizing the Employment of EMA Partners, LLC as Investment Banker to the Debtor in
24 Possession (the "Application").

25 **INTRODUCTION**

26 The objection of Grifols, S.A. and Grifols Worldwide Operations (collectively, "Grifols") to
27 the Application should be overruled. The objection is completely dependent on the factual
28 allegations made by Grifols but there is not a shred of evidence to support these allegations. There

1 is no declaration or any documentary evidence, just Grifols' allegations and mere allegations are
2 insufficient. The Court should base its decisions on the evidence before it and should overrule
3 Grifols' objection as lacking any evidentiary support.

4 Grifols has a huge conflict of interest that completely undermines its credibility. Grifols
5 made a low ball offer for the Debtor's assets which the Debtor rejected. The Debtor believes that its
6 assets have significantly greater value and is attempting to maximize value for all of its constituents.
7 The Debtor believes that the way to do so is to have a competitive process and that retaining an
8 investment banker is the best way to achieve a competitive sales process. Having made a low offer,
9 the last thing Grifols wants to see is a truly competitive process. Grifols' claim that retention of an
10 investment banker is not in the estate's best interests rings hollow.

11 Grifols asserts that retention of an investment banker is not in the best interests of the estate.
12 Grifols first alleges that the Debtor previously retained Wedbush Securities to run a sales process
13 which was unsuccessful and therefore contends that there is no benefit to retaining an investment
14 banker to run a further process. However, Wedbush ran a process with a different objective.
15 Wedbush's assignment was to find a reverse merger partner for the Debtor in order to capitalize on
16 the value of the Debtor's listing on the NASDAQ exchange. The sale of the Debtor was not
17 Wedbush's principal focus. Furthermore, Wedbush ran its process between February and the
18 summer of 2018, nearly a year ago. The results of a process with a different aim over a year ago
19 says nothing about the benefit of a different process now. Finally, and most importantly, Grifols
20 ignores the impact of the Debtor's bankruptcy filing. The prior process did not succeed in large part
21 because interested parties were scared off by the Debtor's heavy indebtedness. The Debtor's
22 bankruptcy filing completely changes this situation.

23 Next, Grifols alleges that the European Medicines Agency refused to approve the Debtor's
24 marketing authorization application ("MAA"). From this Grifols concludes that the Debtor
25 effectively has nothing left to sell. The short answer to this contention is that it is not accurate. The
26 process of the European Medicines Agency review of the Debtor's MAA is ongoing and no final
27 decision has been made.

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1 Finally, Grifols argues that the fees to be paid to EMA Partners are exorbitant. Hardly. EMA
2 Partners will be paid \$20,000 the first month, \$15,000 the second and \$10,000 in each succeeding
3 month, plus a contingent success fee based on a sliding scale that starts at five percent (5%) of the
4 first \$10 million. These fees are the product of negotiations and are not exorbitant. Furthermore, the
5 monthly fees are a fraction of the cost savings the Debtor has realized by rejecting its office lease
6 and moving to new premises.

7 **FACTS**

8 **A. Grifols' Unsupported Factual Allegations Are Misleading and Inaccurate**

9 Grifols bases its assertion that retention of an investment banker is not in the best interests of
10 the estate on two factual contentions. Grifols first alleges that the Debtor retained Wedbush
11 Securities to run a sales process which was unsuccessful. Grifols therefore contends that there is no
12 benefit to retaining an investment banker to run a further process. Next, Grifols alleges that the
13 European Medicines Agency refused to approve the Debtor's MAA. From this Grifols concludes
14 that the Debtor effectively has nothing left to sell.

15 Notably, Grifols did not submit any evidence to support these allegations. These bare
16 allegations should be disregarded by the Court. Moreover, as explained below, Grifols' factual
17 allegations are highly misleading if not inaccurate.¹

18 **1. Wedbush Securities Was Hired To Find a Reverse Merger Partner**

19 The Debtor retained Wedbush Securities in February 2018. Contrary to Grifols' assertion,
20 the principal focus of Wedbush's engagement was to find a reverse merger partner for the Debtor,
21 not to sell the Debtor. The Debtor's stock was publicly traded on the NASDAQ exchange and the
22 Debtor and Grifols believed that the Debtor's NASDAQ listing was one of its two most valuable
23 assets. The listing potentially was valuable to a merger partner as that partner could combine with
24 the Debtor in a reverse merger and thereby become a NASDAQ listed public company. Declaration
25 of John Siebert In Support of Application of Debtor and Debtor In Possession For Order
26 Authorizing the Retention of EMA Partners, LLC as Investment Banker to the Debtor In

27 ¹ Given the inaccuracies of Grifols' allegations, the absence of sworn testimony to support
28 them is perhaps not surprising.

1 Possession, ¶¶ 3 – 5 ("Siebert Decl.").

2 In February 2018 the NASDAQ notified the Debtor that the stock would be delisted because
3 the Debtor had not maintained the minimum market value required by the NASDAQ's rules. In
4 order to avoid delisting, in or about February 2018 the Debtor retained Wedbush Securities to seek a
5 sale, merger or financing of the Debtor. Siebert Decl., ¶ 4.

6 At the time, the Debtor was heavily indebted to Grifols and First Eagle Investment
7 Management on account of the promissory notes issued by the Debtor. As a result of this debt load,
8 Wedbush was unable to find a merger partner for the Debtor and ceased its efforts in the summer of
9 2018 in light of the negative feedback it received in the market. Siebert Decl., ¶¶ 6, 7.

10 **2. The European Medicines Agency Approval Process Is Ongoing**

11 Grifols' contentions regarding the European Medicines Agency approval process are equally
12 misleading. The process of the European Medicines Agency review of the Debtor's MAA is
13 ongoing. No final decision has been made. The Debtor received the formal Day 180 List of
14 Outstanding Issues (LOI) from the European Medicines Agency and has until June 25, 2019 to
15 submit its responses to the Day 180 LOI. The Debtor is currently in the process to obtain additional
16 data to address all outstanding issues and prepare and finalize its responses in a timely manner.
17 Declaration of Juergen Froehlich In Support of Application of Debtor and Debtor In Possession For
18 Order Authorizing the Retention of EMA Partners, LLC as Investment Banker to the Debtor In
19 Possession, ¶ 4 ("Froehlich Decl.").

20 The Debtor had a clarification phone conference with the European Medicines Agency
21 during which the Debtor raised its plan to request conditional approval for the most severe and pre-
22 specified subgroup in the Phase 3 trial. For this subgroup in both trials the Debtor has seen a
23 clinically meaningful improvement of much greater magnitude as in the overall populations of each
24 trial. The feedback the Debtor received was that it needs to provide a mechanistic rationale that
25 explains why the most severe subgroup has a more pronounced response. Froehlich Decl. ¶ 5.

26 One of the worldwide most renowned clinical experts, Prof James Chalmers, participated in
27 this phone conference. He is convinced such a rationale exists and is currently writing a position
28 paper based on currently available clinical data to provide the rationale. This rationale will be

1 submitted with the Debtor's response to the Day 180 LOI. Only after review of this response will
2 the EMA be able to make a decision on the approvability of our MAA. The Debtor expects a
3 hearing in front of the CHMP (the decision making body for the MAA) to substantiate its request
4 for conditional approval. A final decision by the CHMP is not expected before September or
5 October of this year. The Debtor believes that, if the Debtor receives conditional approval from the
6 CHMP, the value of its assets will increase significantly. Froehlich Decl. ¶¶ 6, 7.

7 **B. Grifols Is a Bidder For the Debtor's Assets**

8 Grifols is a bidder for the Debtor's assets. Grifols made what the Debtor considers to be a
9 low ball offer. The Debtor made a counter proposal three weeks ago, but Grifols has not responded.
10 Siebert Decl., ¶ 11.

11 **C. EMA Partner's Fees are Not Exorbitant**

12 EMA Partners' fees are not exorbitant. EMA Partners fee agreement provides that it will be
13 paid \$20,000 the first month, \$15,000 the second and \$10,000 in each succeeding month, plus a
14 contingent success fee based on a sliding scale that starts at five percent (5%) of the first \$10
15 million. Declaration of Tod White In Support of Application For Order Authorizing the
16 Employment of EMA Partners, LLC as Investment Banker to the Debtor in Possession, ¶ 5 and
17 Exhibit B.

18 This fee structure is the result of negotiations between the Debtor and EMA Partners. The
19 Debtor interviewed three investment bankers and selected the party that made the most favorable
20 proposal. Siebert Decl., ¶ 9. The Debtor negotiated the proposal with EMA Partners and in the
21 course of those negotiations EMA Partners reduced its monthly fee request. *Id.* Moreover, the
22 Debtor recently rejected the lease of its business premises and moved to new quarters, resulting in
23 monthly savings on rent of nearly \$60,000. *See* Declaration of Lisa Thomas In Support of Motion to
24 Reject Lease, ¶ 7 (dkt. no. 52-1).

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28 **ARGUMENT**

1 **1. The Objection Has No Evidentiary Support and Should Be Overruled**
2 **for that Reason Alone**

3 As noted above, Grifols did not offer any evidence in support of its factual assertions. There
4 is no declaration accompanying the objection and there are no documents attached. Instead, Grifols
5 asks the Court to take Grifols' word for the facts alleged by it. The Court should decline this
6 invitation and overrule the objection as having no evidentiary support. *See* Local Bankruptcy Rule
7 9013-1(d)(1).

8 **2. The Retention of EMA Partners Is In the Best Interests of the Estate**

9 The Debtor submits that its retention of an investment banker is in the best interests of the
10 estate. "The determinative question in approving the employment of a professional person is
11 whether it is reasonably necessary...." 3 Collier on Bankruptcy, ¶ 327.02[1], at 327-9 (16th ed.
12 2017); *see In re Computer Learning Ctrs., Inc.* 272 B.R. 897, 903 (Bankr. E.D. Va. 2001). Here, the
13 Debtor's assets are complicated and the sales process will be a delicate one. The Debtor explored
14 selling the assets without using a banker, but soon concluded that it needed this assistance. Siebert
15 Decl., ¶ 8. The Debtor therefore interviewed three candidates, negotiated with one of them and
16 made the best deal that it could. Siebert Decl., ¶¶ 9, 10. In these circumstances, the Court should
17 give deference to the Debtor's exercise of its business judgment that the retention of an investment
18 banker is reasonably necessary and approve the Application.

19 Grifols argues that because the prior process with Wedbush did not succeed there is no
20 benefit to retaining an investment banker to run a further process. This argument suffers from
21 multiple fatal flaws.

22 In the first place, Wedbush ran a process with a different objective. Wedbush's assignment
23 principally was to find a reverse merger partner for the Debtor. The Debtor believed that its public
24 listing on the NASDAQ was a valuable attribute and it sought to capitalize on that attribute.
25 Wedbush's focus was not to sell the company. Furthermore, Wedbush ran its process approximately
26 one year ago. Wedbush was engaged in February 2018 and had largely ceased its efforts by the
27 summer. That a process with a different goal one year ago did not succeed says nothing about
28 whether a sales process run now will be successful.

1 Most importantly, Grifols ignores the effect of the Debtor's bankruptcy filing. The
2 bankruptcy filing is a game changer. The Debtor's prior process was unsuccessful because interested
3 parties understandably were concerned by the Debtor's heavy debt load. Bankruptcy Code section
4 363(f) solves this problem.

5 Next, Grifols argues that the European Medicines Agency refused to approve the Debtor's
6 MAA. The Froehlich Declaration establishes that this contention is factually wrong. The Debtor
7 received the formal Day 180 List of Outstanding Issues (LOI) from the European Medicines
8 Agency and has until June 25, 2019 to submit its responses to the Day 180 LOI. The Debtor is
9 currently in the process to obtain additional data to address all outstanding issues and prepare and
10 finalize its responses in a timely manner. The Debtor expects a hearing in front of the CHMP (the
11 decision making body for the MAA) to substantiate its request for conditional approval. A final
12 decision by the CHMP is not expected before September or October of this year. If the Debtor
13 receives conditional approval from the CHMP, the value of its assets is likely to increase
14 significantly.

15 Finally, contrary to Grifols' assertion, the fees payable to EMA Partners are not exorbitant.
16 The engagement letter is the product of negotiations between EMA Partners and the Debtor in
17 which EMA Partners reduced its monthly fee request. Moreover, the monthly fees payable to EMA
18 Partners pale in comparison to the savings of nearly \$60,000 per month the Debtor achieved from
19 the rejection of its office lease and move to new premises.

20 **3. Grifols Has A Conflict Of Interest**

21 The Debtor submits that Grifols has an ulterior motive in opposing the Application. Grifols
22 made a low ball offer for the Debtor's assets. The Debtor rejected that offer, made two alternative
23 counter proposals and now seeks to retain an investment banker to further market its assets. Having
24 tried to obtain the Debtor's assets with a de minimis offer, the last thing Grifols wants is for there to
25 be a truly competitive process. Grifols' obvious conflict of interest severely undercuts the credibility
26 of its objection. The Court should see through Grifols' stratagem and approve the Application.

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28 Wherefore the Debtor prays that the Court overrule Grifols' objection and approve the

1 Application.

2 DATED: May 6, 2019

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BENNETT G. YOUNG

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By: /s/ Bennett G. Young

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BENNETT G. YOUNG

Attorney for ARADIGM CORPORATION
Debtor and Debtor-in-Possession

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