

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
Caption in Compliance with D.N.J. LBR 9004-1

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*Proposed Co-Counsel to the Official Committee of
Unsecured Creditors*

In re

INVITAE CORPORATION., *et al.*,

Debtors.¹

Chapter 11

Case No. 24-11362 (MBK)

(Jointly Administered)

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
FINAL APPROVAL OF DEBTORS' CASH COLLATERAL MOTION [ECF NO. 18]**

¹ The last four digits of Debtor Invitae Corporation's tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at www.kccllc.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.



The Official Committee of Unsecured Creditors (the “**Committee**”) appointed in these chapter 11 cases (the “**Chapter 11 Cases**”) of the above-captioned debtors and debtors-in-possession, by and through its undersigned proposed counsel, hereby submits this objection (the “**Objection**”) to final approval of *Debtors’ Motion for Entry of Interim and Final Orders Pursuant to Sections 105, 361, 362, 363, 503, and 507 of the Bankruptcy Code and Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [ECF No. 18] (the “**Motion**”). In support of this Objection, the Committee respectfully states as follows:²

PRELIMINARY STATEMENT

1. Between 2019 and 2021, the Debtors made acquisition after acquisition—all of which were self-proclaimed “pre-commercial and, as such, unprofitable.” At no point during these unsuccessful acquisitions did the Debtors take a hard look at whether each successive transaction was fiscally sound. Instead, the Debtors blew through the \$1.5 billion they obtained through issuing unsecured notes and continued down this value-destructive path.

2. Only after the Debtors consummated *thirteen* ill-fated deals did they execute “liability management” uptiering transactions with Deerfield Partners, L.P. (“**Deerfield**”). This series of transactions purportedly granted Deerfield and the other Prepetition Secured Parties liens at the expense of identically situated unsecured noteholders (the “**Deerfield Uptier**”). The Deerfield Uptier also increased Invitae’s debt burden and appears to have resulted in the Company’s inability to raise new financing. In exchange, Invitae received a *de minimis* amount

² Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the Motion or the Interim Order, as applicable.

of new money funding and an extension on a remote debt maturity—a maturity that is still six months away. Invitae’s subsidiaries, which received no new funding and extinguished no tendered securities, simultaneously encumbered their assets with alleged liens to Deerfield and the other Prepetition Secured Parties. Thus, rather than act as a course correction, the Deerfield Uptier appears to have further crippled the Debtors and improperly favor one creditor—Deerfield—at the expense of the remaining unsecured creditors.

3. One month after completing the Deerfield Uptier, the Debtors constituted a purportedly independent “Special Committee” to bless the Deerfield Uptier *post hoc* and assess restructuring alternatives. Shortly thereafter, the Special Committee stipulated to the complete validity of Deerfield’s liens and authorized entry into the Transaction Support Agreement. The Transaction Support Agreement is premised upon a plan that affirms Deerfield’s purported priority status and contemplates a sale of substantially all of the Debtors’ businesses. Following the sale, the Debtors intend to prosecute a pot plan that allocates the sale proceeds (the “**Pot Plan**”).

4. Confirmation of any plan of reorganization will hinge on challenges to the validity, extent and priority of Deerfield’s claims and liens, as well as other potential claims and causes of action of the Debtors that benefit general unsecured creditors. At first blush, the Deerfield Uptier raises significant questions. The Committee is laser focused on understanding and assessing the Deerfield Uptier, among other transactions and the circumstances surrounding management turnover, with minimal disruption to the proposed sale process. However, the Committee needs more time and a larger budget to thoroughly investigate and, if appropriate, raise challenges.

5. The Committee has engaged with the Debtors in good faith to modify certain provisions of the proposed final cash collateral order to safeguard the rights of unsecured creditors. On many of these issues—and on all the first day motions other than cash collateral—

the parties consensually resolved the Committee’s concerns. Yet three remaining aspects of the proposed final cash collateral order appear to unnecessarily hinder the Committee’s ability to diligence and challenge the intercreditor treatment at the heart of the Pot Plan, and in ways that are particularly inappropriate for these cases. First, the proposed final cash collateral order would permit Deerfield and the other Prepetition Secured Parties—the most likely defendants to an avoidance action—to attach adequate protection liens on the proceeds of property that they may be required to disgorge. Second, the proposed final cash collateral order would limit the budget, and expedite the timetable, for diligencing and prosecuting challenges. Third, the proposed final cash collateral order seeks to require the Committee to obtain standing before challenging the Pot Plan’s affirmation of the claims and liens of the Prepetition Secured Parties.

6. All three of these provisions are improper in these cases. The Debtors have not demonstrated that the Deerfield Uptier was properly investigated; yet, they are seeking to stipulate to the validity of Deerfield’s liens and release any related claims. The Committee is statutorily obligated to investigate and should be granted an appropriate timeline, budget, and automatic standing to prosecute any viable actions. Further, akin to unclean hands, proceeds of a successful avoidance action against the Prepetition Secured Lenders should not inure to their own benefit. Therefore, the Court should submit the Committee’s proposed order, attached hereto as

Exhibit A.

BACKGROUND

I. General Background

7. On February 13, 2024 (the “**Petition Date**”), each Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”). The Debtors are operating their businesses and managing their property as debtors in possession

pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases.

8. On the Petition Date, the Debtors filed the Motion. The Motion seeks entry of interim and final orders, among other things, (i) authorizing the use of cash collateral, as defined in section 363 of the Bankruptcy Code and (ii) granting adequate protection to the Prepetition Secured Parties.

9. On February 15, 2024, the Bankruptcy Court held an interim hearing on the Motion (the “**Interim Hearing**”). Following the Interim Hearing, the Court entered an order approving the Motion on an interim basis [Docket No.47] (the “**Interim Order**”).

10. On March 1, 2024, the United States Trustee appointed the Committee pursuant to Bankruptcy Code section 1102(a)(1). The Committee consists of (i) Wilmington Savings Fund Society, Federal Savings Bank, (ii) Chimetech Holding Ltd and (iii) Workday, Inc.

II. Company Background and Prepetition Capital Structure

11. Between 2019 and 2021, the Company tried to aggressively expand its business through strategic acquisitions, entering into 13 different acquisitions in three years.³ The Company incurred a significant amount of debt to fund these acquisitions, including: (1) in September 2019, Invitae issued \$350 million of 2.00% unsecured notes due 2024 (the “**2024 Convertible Unsecured Notes**”); (2) in October 2020, Invitae entered into a credit agreement with Perceptive Credit Holdings III, LP under which Invitae borrowed \$135.0 million due 2024 (the “**2024 Term Loan**”); and (3) in April 2021, Invitae issued \$1.15 billion of 1.50% convertible unsecured notes due in 2028 (the “**2028 Convertible Unsecured Notes**”).

³ Declaration of Ana Schrank, Chief Financial Officer of Invitae Corporation in Support of Chapter 11 Filing, First Day Motions, and Access to Cash Collateral [ECF No. 21] (the “**First Day Decl.**”) ¶ 4.

12. In February 2023, Invitae repaid the principal balance and interest outstanding of the 2024 Term Loan and incurred debt extinguishment costs of \$19.3 million to complete this prepayment.⁴

13. From 2019 to the Petition Date, the Company experienced significant management turnover with numerous c-suite executives leaving the Company. This includes “turnover in four (4) chief financial officers” in the last two years.⁵

A. The Deerfield Uptier

14. In March 2023, Invitae and certain holders of 2024 Convertible Unsecured Notes, the largest of which was Deerfield, entered into a series of exchanges that converted most of the 2024 Convertible Unsecured Notes to secured notes through that certain Indenture (the “**Senior Secured Indenture**”), dated as of March 7, 2023, by and among Invitae Corporation, as issuer; certain of its subsidiaries, as Guarantors; and U.S. Bank Trust Company, National Association, as trustee and collateral agent (the “**Prepetition Secured Agent**”). Under the Senior Secured Indenture, the Company (i) exchanged \$305.7 million in aggregate principal amount of 2024 Convertible Unsecured Notes for \$275.3 million aggregate principal amount of new 4.50% secured Series A Notes due in 2028 (the “**Series A Notes**”) and 14,219,859 shares of common stock, and (ii) sold \$30 million of new 4.50% secured Series B Notes due in 2028 (the “**Series B Notes**” and, together with the Series A Notes, the “**Secured Notes**”) for cash.⁶

15. In August 2023, pursuant to an amendment to the Senior Secured Indenture, Deerfield entered into an additional exchange agreement with Invitae for its remaining 2024

⁴ *Invitae Corporation Form 10-Q*, U.S. SEC EDGAR, 21 (filed on Nov. 8, 2023), <https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/0001501134/000150113423000104/nvta-20230930.htm>.

⁵ First Day Decl. ¶ 62.

⁶ *Id.* ¶ 65.

Convertible Unsecured Notes, whereby Invitae exchanged approximately \$17.2 million aggregate principal amount of 2024 Convertible Unsecured Notes for \$0.1 million aggregate principal amount of Series A Notes and approximately 15 million shares of common stock.⁷

16. As of the Petition Date, the Secured Notes have an aggregate outstanding principal amount of \$305.4 million, the remaining 2024 Convertible Unsecured Notes have an aggregate outstanding principal amount of approximately \$27.1 million, and the 2028 Convertible Unsecured Notes have an outstanding principal balance of \$1.15 billion.⁸

III. The Proposed Restructuring

17. One month after consummating the Deerfield Uptier, Invitae formed a special committee of its board of directors (the “**Special Committee**”) for the purported purpose of “evaluat[ing] strategic alternatives.”⁹ Similar to the Debtors’ management, the Special Committee experienced turnover in the short span of its existence.¹⁰

18. The Debtors commenced these Chapter 11 Cases following the execution of a Transaction Support Agreement on February 13, 2024 (the “**TSA**”).¹¹ The TSA is supported solely by Deerfield, which holds approximately 78% of the 2028 Convertible Senior Secured Notes (the “**Prepetition Secured Noteholders**,” and together with the Prepetition Secured Agent, the “**Prepetition Secured Parties**”).¹²

⁷ *Id.* ¶ 66; see also *Invitae Corporation Form 10-Q, Ex. 10.1 (Exchange Agreement, dated as of August 22, 2023, by and among Invitae Corporation, the guarantor parties thereto and Deerfield Partners, L.P.)*, U.S. SEC EDGAR (filed on Nov. 8, 2023), <https://www.sec.gov/Archives/edgar/data/1501134/000150113423000072/exhibit101-exchangeagreeme.htm>.

⁸ First Day Decl. ¶ 48.

⁹ *Id.* ¶ 8.

¹⁰ *Id.* ¶¶ 8, n.2; 69 n.5.

¹¹ *Id.* ¶ 10.

¹² *Id.*; February 15, 2024 Hr’g. Tr. 10:24-25, *In re Invitae Corp.*, Case No. 24-11362 (MBK) (Bankr. D.N.J. Feb. 15, 2024) [ECF No. 64].

19. The TSA contemplates a proposed sale of all or substantially all of the Debtors' assets and/or equity, followed by a plan that will allocate sale proceeds for an orderly wind-down of the Debtors' business.¹³ This is a prototypical "pot plan" where sale proceeds will simply flow through the creditor waterfall.

OBJECTION

I. Deerfield and the Other Prepetition Secured Parties Should Not Receive Adequate Protection Claims and Liens on Proceeds of Avoidance Actions and Commercial Tort Claims for Which They Are the Defendants

20. The Interim Order grants Deerfield and the other Prepetition Secured Parties adequate protection liens on proceeds of Avoidance Actions and commercial tort claims to the extent there is any diminution in value. *See* Interim Order ¶ 4. Such liens are inappropriate, as (i) Deerfield and the other Prepetition Secured Parties should not be able to benefit from cash that they themselves have disgorged, (ii) the value of the causes of action they seek to encumber should be preserved for the benefit of unsecured creditors, and (iii) the remaining adequate protection package is sufficient.

A. Deerfield and the Other Prepetition Secured Parties Should Not Benefit From Their Own Disgorged Funds

21. The Debtors cannot justify pledging the proceeds of Avoidance Actions or commercial tort claims against the Prepetition Secured Parties as adequate protection. Otherwise, the same parties that would be the defendants to such Avoidance Actions and commercial tort claims would receive the benefit of such adequate protection claims and liens. *See In re Cardell*, 88 B.R. 627, 632 (Bankr. D.N.J. 1988) (noting that the determination of whether a creditor is adequately protected must weigh the facts surrounding the case as well as the equitable considerations to which the facts give rise); *In re Gallegos Rsch. Grp.*, 193 B.R. 577, 583 (Bankr.

¹³ First Day Decl. ¶ 78.

D. Colo. 1995) (noting that in scrutinizing adequate protection agreements courts have considered, among other factors, whether the conduct of the secured creditor has been equitable and whether effecting the agreement would create an inequitable result).

22. Deerfield and the other Prepetition Secured Noteholders were the sole beneficiaries of the note exchanges that purportedly elevated their status from unsecured creditors to secured creditors. The Committee intends to thoroughly investigate these exchanges but, on their face, these exchanges appear to give rise to viable claims and causes of action. The Debtors consummated the Deerfield Uptier despite the lack of any imminent maturity and during a time when the Debtors had liquidity on hand. All the while, the Debtors entered into the transaction saddled with “significant operating expenses” and “vulnerable to economic and business cycle swings.” First Day Decl. ¶ 58. Most concerning, through the Deerfield Uptier, the subsidiary Debtors pledged substantially all of their assets to Deerfield and a select amount of other 2024 Convertible Unsecured Noteholders and committed to a higher interest rate in exchange for nominal value. The Debtors report that they received an infusion of cash of \$30,000,000, but \$19,900,000 of debt issuance costs was incurred, which primarily went to pay legal and consulting fees.¹⁴ Adding to the red flags surrounding this transaction, Deerfield’s current advisor, Perella Weinberg Partners, acted as Invitae’s advisor in connection with the Deerfield Uptier.¹⁵

23. Time will tell whether there are viable claims against Deerfield and the other beneficiaries of the Deerfield Uptier. But, if such claims are successful, proceeds of them should

¹⁴ *Invitae Corporation Form 10-Q*, U.S. SEC EDGAR, 23-24 (filed on Nov. 8, 2023), <https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/0001501134/000150113423000104/nvta-20230930.htm>.

¹⁵ *See Our Advisory Transactions*, PERELLA WEINBERG PARTNERS, <https://pwpartners.com/transactions/> (Feb. 2024); Press Release, *Invitae Announces \$1.15 Billion Investment Supporting Ongoing Growth Initiatives*, INVITAE CORP. INVS. RELS. (Apr. 5, 2021), <https://ir.invitae.com/news-and-events/press-releases/press-release-details/2021/Invitae-Announces-1.15-Billion-Investment-Supporting-Ongoing-Growth-Initiatives/default.aspx>.

be preserved for the benefit of unsecured creditors who were purportedly primed by such improper exchanges—not the parties who perpetrated them. *Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P’shp. IV*, 229 F.3d 245, 250 (3d Cir. 2000) (stating that when recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors); *see also Wolff v. Tzanides (In re Tzanides)*, 574 B.R. 489, 511 (Bankr. D.N.J. 2017) (same).

24. It is well-established that parties should not be able obtain equitable relief “when the party seeking relief is guilty of fraud, unconscionable conduct, or bad faith directly related to the matter at issue that injures the other party and affects the balance of equities.” *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 147 n.12 (3d Cir. 1999); *JPMorgan Chase Bank, N.A. v. Neu*, No. CV 17-3475 (JMV), 2017 WL 2290142, at *4 (D.N.J. May 24, 2017); *Vicchirelli v. New Eng. Linen Supply Co., Inc.*, No. CV 19-12989 (JHR), 2021 WL 2587995, at *6 (D.N.J. June 24, 2021). For Deerfield and the other Prepetition Secured Parties to potentially benefit from their unclean hands via adequate protection claims and liens is inequitable and should not be approved.

B. Proceeds of Avoidance Actions and Commercial Tort Claims Should Be Preserved for Unsecured Creditors

25. Proceeds of Avoidance Actions and commercial tort claims are unencumbered assets of the Debtors’ estates that should be preserved for unsecured creditors. Avoidance Actions are products of the Bankruptcy Code and, thus, could not have been encumbered by prepetition liens. *See Official Comm. of Unsecured Creditors v. UMB Bank (In re Residential Cap., LLC)*, 497 B.R. 403, 414 (Bankr. S.D.N.Y. 2013) (finding that proceeds of avoidance actions arise postpetition and are therefore after-acquired property of the estate and as such, cannot be encumbered by prepetition liens). Commercial tort claims are unencumbered unless described specifically in the grant of prepetition liens. *See Polk 33 Lending, LLC v. Schwartz*, 555 F.Supp.

3d 38, 42-43 (D. Del. 2021) (finding that a security interest in a commercial tort claim must be specifically identified to be perfected under the Uniform Commercial Code). On information and belief, no such specific description exists here.

26. The Debtors' attempt to grant liens on the proceeds of Avoidance Actions to the purportedly secured noteholders is fundamentally at odds with the unique purposes served by avoidance actions. Avoidance actions and the proceeds thereof are uniquely designed to benefit unsecured creditors. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000) (identifying underlying intent of avoidance powers to recover valuable assets for estate's benefit); *Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'shp. IV*, 229 F.3d at 250 ("When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors . . ."). The Bankruptcy Code similarly mandates that recovery of Avoidance Actions be "for the benefit of the estate." 11 U.S.C. § 550(a); *see also* 11 U.S.C. § 551 (stating that "any transfer avoided [pursuant to the chapter 5 avoidance provisions], or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate").

27. The same logic applies to commercial tort claims, which existed prior to the filing of these cases, but are unencumbered assets that unsecured creditors can look to for recovery to the extent the value of the Debtors' other assets is insufficient.

28. While there is no *per se* rule prohibiting a debtor from pledging the proceeds of avoidance actions or commercial tort claims as adequate protection, a fact-intensive inquiry is required to determine if the pledge is appropriate. *See In re AppliedTheory Corp.*, No. 02-11868 (REG), 2008 Bankr. LEXIS 1373, at *3 (Bankr. S.D.N.Y. Apr. 24, 2008) (allowing superpriority

claim on avoidance proceeds where “necessary” as adequate protection); *see also Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. U.S. Dep’t of the Treasury (In re Motors Liquidation Co.)*, 460 B.R. 603, 633 (Bankr. S.D.N.Y. 2011) (granting summary judgment of Creditors Committees’ declaratory judgment action and finding that, under the terms of the underlying documents, the DIP Lenders were not entitled to liens or superpriority claims on the proceeds of avoidance actions against prepetition lenders in adversary proceeding brought by Creditors’ Committee). The Debtors have not provided any justification for granting the Prepetition Secured Parties such assets as adequate protection and, given the numerous concerns that the Deerfield Uptier raises (as discussed above), such justification does not exist.

C. The Remaining Adequate Protection Package Is Sufficient

29. Under the Interim Order, the Prepetition Secured Parties would receive (i) replacement liens on all of the Debtors’ assets on which they had prepetition liens that would otherwise be cut off by section 552 of the Bankruptcy Code for any diminution in value, (ii) superpriority administrative claims for any diminution in value, (iii) payment of current interest, and (iv) payment of professional fees. *See* Interim Order ¶ 4. This package is more than adequate and provides ample protections to Deerfield and the other Prepetition Secured Parties for any potential diminution in value they could suffer during these cases. Removing recourse to proceeds of Avoidance Actions and commercial tort claims solely against the parties that would be defendants of such claims would not change this.

II. The Cash Collateral Order Inappropriately Hampers the Committee’s Ability to Perform Its Fiduciary Duties

30. The proposed final cash collateral order should not be approved because it improperly hamstring the Committee’s ability to perform its fiduciary duties. First, the Committee needs a larger budget to perform an appropriate investigation of numerous suspect

transactions in the few years prior to the Petition Date, including the prepetition note exchanges consummated within the last 12 months. Second, because of the amount and complexity of these transactions, the Committee requires more than 60 days from formation to conduct its investigation and bring any appropriate challenges. Third, the Committee should be granted automatic standing to bring challenges given the Debtors unjustified abdication of their right to bring claims.

A. The Committee’s Challenge Budget Should be Increased

31. The proposed final cash collateral order includes a meager \$50,000 budget for the Committee to investigate the Debtors’ stipulations and releases, including with respect to the validity and amount of Deerfield’s prepetition secured claims and liens. Interim Order ¶ 20. Such a miniscule budget will impede the proper and necessary function of the Committee in these Chapter 11 Cases.

32. Under section 1103(c) of the Bankruptcy Code, the duties of a statutory committee include “investigat[ing] the acts, conduct, assets, liabilities, and financial condition of the debtor . . . and any other matter relevant to the case . . . and perform[ing] such other services as are in the interest of those represented.” The Committee needs adequate funding to serve this statutory role. *See, e.g., In re Ames Dep’t Stores*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (“[F]ailure to provide a reasonable sum for professionals has, in other cases before this Court, left estates, creditors’ committees and trustees without the assistance of counsel and the Court without the adversary system contemplated by Congress.”).

33. An appropriate challenge budget is vital here. The Committee has already identified several potential causes of action associated with the Deerfield Uptier alone. The proposed \$50,000 budget is not only insufficient to review claims and liens that are critically important to the unsecured creditors but is also less than a typical budget approved in this Circuit.

See, e.g., In re Rite Aid Corp., No. 23-18993 (MBK) (Bankr. D.N.J. Dec. 22, 2023) [ECF No. 1159] (authorizing an investigation budget for the committee of \$500,000); *In re WeWork, Inc.*, No. 23-19865 (JKS) (Bankr. D.N.J. Dec. 11, 2023) [ECF No. 428] (authorizing an investigation budget for the committee of \$300,000).

34. For a chapter 11 case to be administered effectively, statutory committees must be represented by professionals who are equipped to represent the interests of all unsecured creditors. These professionals must work within the bounds of the Committee's statutory duties—they should not be confined to the box the Prepetition Secured Parties self-interestedly created. In fact, the proper governor on Committee costs is the fee application process. The Court should reject any ex-ante restriction on the ability of the Committee to perform its most basic function, including by increasing the investigation budget to \$400,000 and clarifying that the Committee is nevertheless entitled to seek allowance of all fees and expenses as administrative claims.

B. The Challenge Period Should Be Extended

35. The Interim Order gives the Committee a deadline of 60 days from the date of its appointment (i.e., April 30, 2024) to challenge the Debtors' stipulations and releases. *See* Interim Order ¶ 19(a). This proposed deadline does not reasonably balance the competing interests of the Prepetition Secured Parties' desire for finality of the validity of their claims against the fiduciary obligations of the Committee to conduct a meaningful investigation and assert Challenges as appropriate. The investigation could be critical to the ultimate determination of how sale proceeds will be distributed among the stakeholders following the intended sale of the Debtors' assets. It should not be rushed on account of the Prepetition Secured Noteholders' desire to have finality on an expedited basis. Accordingly, the Committee requests that the Court extend its Challenge Period to ninety (90) days following its appointment so the Committee can properly exercise its

fiduciary duties. This Circuit has granted similar Challenge Periods in other cases. *See In re Cal Dive Int'l, Inc.*, 2015 Bankr. LEXIS 4540, at *108 (establishing a Challenge Period of 90 days after formation of a committee); *In re Glob. Safety Textiles Holdings LLC*, No. 09-12234 (KG), 2009 Bankr. LEXIS 4903, at *47 (Bankr. D. Del. July 30, 2009) (granting a Challenge Period of 90 days after formation of a committee); *In re EPV Solar, Inc.*, No. 10-15173 (MBK), 2010 Bankr. LEXIS 5786, at *42 (Bankr. D.N.J. Mar. 26, 2010) (establishing a Challenge Period of 90 days from the entry of an order authorizing the Committee's retention of counsel). It should do so again here.

C. The Committee Should Be Granted Standing to Bring a Challenge

36. To ensure that the Committee has the full initial Challenge Period to complete its investigation and mount a Challenge, the Committee should be given automatic standing to pursue challenges and claims that the Debtors are waiving. Such relief is appropriate as the Debtors have waived their rights as to any relevant causes of action via the Interim Order and the Committee is the only party with the capability and a fiduciary duty to investigate and pursue any viable claims. Moreover, while the Debtors claim in the First Day Declaration that they have done an investigation regarding their claims against the Prepetition Secured Parties, they have not identified the results of that investigation, much less explained how it supports their decision to abandon those claims. First Day Decl. ¶ 70.

37. In the Interim Order, the Debtors stipulate to, among other things, (i) the validity and priority of the liens and security interests securing the debt under the Secured Notes Indenture; (ii) the lack of a basis to challenge or avoid the validity, enforceability, priority, or perfection of the liens and security interests of the Senior Secured Noteholders; and (iii) the absence of any claims or causes of action against, or with respect to, the Senior Secured Noteholders under the

Secured Indenture. *See* Interim Order ¶ E(a)(iv). The Debtors have also agreed to release the Prepetition Secured Parties from “any and all claims and causes of action arising under the Bankruptcy Code” and “any and all claims and causes of action regarding the validity, priority, extent, enforceability, perfection, or avoidability of the liens or claims of the Prepetition Secured Parties.” *See* Interim Order ¶ 16. Therefore, it is clear that the Debtors will not—and cannot—bring claims and causes of action against the Prepetition Secured Parties.

38. Various courts, including some in this Circuit, have granted automatic standing to committees to bring a challenge in similar circumstances. *In re AOG Entertainment Inc.*, No. 16-11090 (SMB) (Bankr. S.D.N.Y. Apr. 29, 2016) [ECF No. 49, 33:13-15] (where cash collateral order provides the debtor is “giving up its right to sue,” the committee “doesn’t have to come in and seek standing”); *In re YogaWorks, Inc.*, No. 20-12599 (KBO) (Bankr. D. Del. Nov. 9, 2020) [ECF No. 133, ¶ 19] (“The Committee shall have automatic standing to commence a Challenge as to the validity, extent, priority, perfection and enforceability of Prepetition Liens”); *In re Phoenix Payment Sys., Inc.*, No. 14-11848 (MFW) (Bankr. D. Del. Sept. 3, 2014) [ECF No. 149, ¶ 20] (“The Creditor’s Committee is hereby granted standing to file, seek relief and prosecute any and all Claims and Defenses and no further order or notice granting the Creditors’ Committee standing shall be necessary.”).

39. Generally, prevailing on a movant’s standing request requires that a court determine, among other factors, that the debtor unjustifiably failed to bring such an action. *Walnut Creek Mining Co. v. Cascade Inv., LLC (In re Optim Energy, LLC)*, 527 B.R. 169, 173 (D. Del. 2015); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 572 (3d Cir. 2003) (finding that “derivative standing is a prudent way for bankruptcy courts to remedy lapses in a trustee’s execution of its fiduciary duty.”). The

Debtors are disclaiming their ability to bring any avoidance actions against Deerfield and the Prepetition Secured Parties but do not offer any explanation for their decision. Without any explanation as to why the Debtors do not think there are viable claims and causes of action against Deerfield and the other Prepetition Secured Parties, the Debtors cannot justify their abdication of such claims and causes of action.

40. Moreover, the Debtors do not have an interest in this dispute, as they have agreed to pursue a plan with a limited pot of assets for unsecured creditors that will wind-down the Debtors and pay the secured lenders in full and grant them releases. This case is not like any other where the Debtors are giving up claims and causes of action that will benefit the estate going forward or avoid disturbing an operational reorganization, as there will be no estate going forward. Avoidance actions in a liquidating plan deserve the special attention of the Committee, which is the only constituency that has the true interests of maximizing the estate. Once the Debtors' sale process is completed and the Debtors have moved to the process of distributing the sale proceeds, the Committee should be able to freely litigate any avoidance actions against Deerfield and the other Prepetition Secured Parties on a normal timetable free of constraints around operational concerns or administrative expenses. The Committee is *the* constituency on the other side of Deerfield and the other Prepetition Secured Parties for this dispute over recoveries.

41. Granting such relief at this juncture would also avoid the unnecessary consumption of estate resources associated with requiring the Committee to draft, file, and prosecute a standing motion. Given that the Debtors and Prepetition Secured Parties seek to drive these Chapter 11 Cases forward on an expedited basis, they should not be allowed to require the Committee to jump through time-consuming and value-destructive procedural hoops to establish standing to assert a challenge that the Debtors have already determined not to bring. Ultimately, the standards for

obtaining standing to bring derivative actions in light of the Debtors' unwillingness and inability to bring such claims and causes of action all come down to whether the claims are viable. If the Court determines that such claims are ultimately not viable, it can just as easily dismiss them as it can refuse to grant standing, without the additional layer of requiring the Committee to file a standing motion.

III. Additional Modifications Should Be Made to the Proposed Final Cash Collateral Order

42. There are a number of other changes to the proposed final cash collateral order that the Committee has requested and understands have been agreed to by the Debtors and the Prepetition Secured Parties, which are reflected in the proposed modifications set forth in **Exhibit A**. This is in addition to changes addressing the points raised in this Objection and one additional change in paragraph 19(a) that would prohibit the Debtors and the Prepetition Secured Parties from defending a Challenge on the basis that it is precluded under the Delaware Limited Liability Company Act. If, however, if this is not the case, the Committee reserves the right to raise additional objections before or at the final hearing on the Motion with respect to these proposed modifications.

RESERVATION OF RIGHTS

43. This Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights, claims, defenses, and remedies, including the right to amend, modify, or supplement this Objection, to raise additional objections and to introduce evidence at any hearing

related to this Objection, and without in any way limiting any other rights of the Committee to further object to the Motion, on any grounds, as may be appropriate.

CONCLUSION

44. For the reasons set forth herein, the Court should (i) require that the proposed final cash collateral order be modified to address the issues set forth herein or, alternatively, deny approval of the Motion on a final basis and (ii) grant such other relief as it deems just and proper.

[Remainder of page intentionally left blank]

Dated: March 11, 2024

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*Proposed Co-Counsel to the Official Committee
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Exhibit A

Caption in Compliance with D.N.J. LBR 9004-1(b)

| |
|---|
| UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY |
| In re: INVITAE CORPORATION, <i>et al.</i> , Debtors. ¹ |

Chapter 11

Case No. 24-11362 (MBK)

(Joint Administration Requested)

**FINAL ORDER
PURSUANT TO SECTIONS
105, 361, 362, 363, 503, AND 507
OF THE BANKRUPTCY CODE AND RULES
2002, 4001, AND 9014 OF THE FEDERAL RULES OF
BANKRUPTCY PROCEDURE: (I) AUTHORIZING
DEBTORS TO USE CASH COLLATERAL; (II) GRANTING
ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES;
(III) MODIFYING AUTOMATIC STAY; AND (IV) GRANTING RELATED RELIEF**

The relief set forth on the following pages, numbered (3) through (~~51~~52), is **ORDERED**.

¹ The last four digits of Debtor Invitae Corporation's tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at www.kcellc.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

Caption in Compliance with D.N.J. LBR 9004-1(b)

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Debtors: INVITAE CORPORATION, *et al.*
Case No. 24-11362 (MBK)
Caption of Order: FINAL ORDER PURSUANT TO SECTIONS 105, 361, 362, 363, 503, AND 507 OF THE BANKRUPTCY CODE AND RULES 2002, 4001, AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE: (I) AUTHORIZING DEBTORS TO USE CASH COLLATERAL; (II) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES; (III) MODIFYING AUTOMATIC STAY; AND (IV) GRANTING RELATED RELIEF

Upon the motion (the “Motion”) of the above-referenced debtors, as debtors and debtors in possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases (the “Cases”), for entry of an order pursuant to sections 105, 361, 362, 363, 503 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 4001-1, 4001-3, 9013-1, 9013-2, 9013-4 and 9013-5 of the Local Rules of the United States Bankruptcy Court for the District of New Jersey (the “Local Rules”), seeking, among other things:

- (a) authorization for the Debtors, pursuant to sections 105, 361, 362, 363, 503 and 507 of the Bankruptcy Code to (i) use cash collateral, as such term is defined in section 363(a) of the Bankruptcy Code (the “Cash Collateral”), and all other Prepetition Collateral (as defined below) in which the Prepetition Secured Parties (as defined below) have an interest, solely in accordance with the terms of the interim order entered on February 16, 2024 [D.I. 47] (together with all annexes and exhibits thereto, the “Interim Order”) and this final order (together with all annexes and exhibits hereto, the “Final Order”), and (ii) grant adequate protection to the Prepetition Secured Parties to the extent of any Diminution in Value (as defined below) of their interests in the Prepetition Collateral (including Cash Collateral);
- (b) modification of the automatic stay imposed by section 362 of the Bankruptcy Code and any other applicable stay to the extent necessary to implement and effectuate the terms and provisions of this Final Order;
- (c) subject and subordinate to the Carve Out (as defined below), the waiver of all rights to surcharge any Prepetition Collateral or Collateral (as defined below) under section 506(c) of the Bankruptcy Code or any other applicable principle of equity or law;
- (d) to the extent set forth herein, for the “equities of the case” exception under Bankruptcy Code section 552(b) to not apply to any of the Prepetition Secured Parties with respect to the proceeds, products, offspring, or profits of any of the Prepetition Collateral under section 552(b) of the Bankruptcy Code or any other applicable principle of equity or law;

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-
- (e) to the extent set forth herein, the equitable doctrine of “marshalling” or any other similar doctrine, to not apply with respect to any Prepetition Collateral or Collateral;
 - (f) approval of certain stipulations by the Debtors with respect to the Secured Notes Documents (as defined below), the Prepetition Liens (as defined below), the Prepetition Collateral, and Collateral as set forth herein;
 - (g) waiver of any applicable stay with respect to the effectiveness and enforceability of this Final Order; and
 - (h) granting related relief.

Upon consideration of (i) the Motion and the exhibits attached thereto, the Approved Budget (as defined below) filed and served by the Debtors, offers of proof, evidence adduced, and the statements of counsel at the interim hearing held by the Court on February 15, 2024 (the “Interim Hearing”), (ii) the evidentiary record made at the Interim Hearing , (iii) the Court having entered the Interim Order granting the relief requested on an interim basis, (iv) the *Declaration of Ana Schrank, Chief Financial Officer of Invitae Corporation, in Support of Chapter 11 Filing, First Day Motions, and Access to Cash Collateral* (the “First Day Declaration”), and (v) the evidentiary record made at the final hearing held by the court on March [15], 2024 (the “Final Hearing”); and in accordance with Bankruptcy Rules 2002, 4001(b), (c), and (d), 9014, and all applicable Local Rules, and notice of the Motion and the Final Hearing having been given in accordance therewith; and it appearing that approval of the final relief requested in the Motion on the terms and conditions herein is necessary and is otherwise fair and reasonable, and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and all objections, if any,

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Debtors: INVITAE CORPORATION, *et al.*
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to the entry of this Final Order having been withdrawn, resolved or overruled by the Court; and after due deliberation and consideration, and for good and sufficient cause appearing therefor:

IT IS HEREBY FOUND AND DETERMINED THAT:²

A. ***Petition Date.*** On February 13, 2024 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of New Jersey (the “Court”).

B. ***Debtors in Possession.*** The Debtors have continued in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Cases.

C. ***Jurisdiction and Venue.*** The Court has jurisdiction over the Motion, these Cases, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157 and 1334 and the *Standing Order of Reference to the Bankruptcy Court Under Title 11 of the United States District Court for the District of New Jersey*, dated July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.). Consideration of the Motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue for these Cases is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This Court may enter a final order consistent with Article III of the United States Constitution.

² Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Bankruptcy Rule 7052.

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Debtors: INVITAE CORPORATION, *et al.*
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D. **Committee.** On March 1, 2024, the Office of the United States Trustee for the District of New Jersey appointed, pursuant to Section 1102 of the Bankruptcy Code, an official committee of unsecured creditors in these Cases (the “Committee”).

E. **Debtors’ Stipulations.** Without limiting the rights of [the Committee or](#) any other parties in interest specifically set forth in paragraph 19 of this Final Order (and subject to the limitations thereon contained in such paragraph), as approved upon entry of the Interim Order and approved pursuant to this Final Order on a final basis, the Debtors admitted, stipulated and agreed that (collectively, paragraphs E(a) through E(e) below are referred to herein as the “Debtors’ Stipulations”):

(a) *Secured Notes.*

(i) That certain Indenture, dated as of March 7, 2023 (as amended, amended and restated, supplemented, or otherwise modified from time to time prior to the Petition Date, the “Secured Notes Indenture” and, together with the other “Notes Documents” (as defined in the Secured Notes Indenture), the “Secured Notes Documents”), for the 4.5% Series A Convertible Senior Secured Notes due 2028 (the “Series A Notes”) and the 4.5% Series B Convertible Senior Secured Notes due 2028 (the “Series B Notes”; together with the Series A Notes, the “Secured Notes”), by and among Invitae Corporation, as issuer

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Debtors: INVITAE CORPORATION, *et al.*

Case No. 24-11362 (MBK)

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(the “Secured Notes Issuer”), the guarantors party thereto from time to time (the “Secured Notes Guarantors”; together with the Secured Notes Issuer, the “Prepetition Secured Notes Parties”), U.S. Bank Trust Company, National Association, as indenture trustee and collateral agent (including any successors thereto, the “Prepetition Secured Agent”).

(ii) *Prepetition Secured Indebtedness.* As of the Petition Date, the Prepetition Secured Notes Parties were jointly and severally indebted to the holders of the notes issued under the Secured Notes Indenture (the “Prepetition Secured Noteholders”) and the Prepetition Secured Agent (together with the Prepetition Secured Noteholders, the “Prepetition Secured Parties”) pursuant to the Secured Notes Documents, without objection, defense, counterclaim, or offset of any kind, in the aggregate principal amount of approximately \$305.3 million *plus* accrued and unpaid interest with respect thereto and any additional fees, premiums, costs, expenses (including any attorneys’, accountants’, consultants’, appraisers’, financial advisors’, and other professionals’ fees and expenses), reimbursement obligations, indemnification obligations, guarantee obligations, other contingent

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Debtors: INVITAE CORPORATION, *et al.*

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obligations, and other charges of whatever nature, whether or not contingent, whenever arising, due, or owing, in each case to the extent reimbursable pursuant to the terms of the Secured Notes Documents and all other Obligations (as defined in Secured Notes Indenture) owing under or in connection with the Secured Notes Documents (collectively, “Prepetition Secured Indebtedness”).

(iii) *Secured Notes Collateral*. In connection with the Secured Notes Indenture, certain of the Debtors entered into the Collateral Documents (as defined in the Secured Notes Indenture). Pursuant to the Collateral Documents and the other Secured Notes Documents and subject to any Permitted Prior Liens, the Prepetition Secured Indebtedness is secured by first-priority security interests in and liens on all of the Collateral (as defined in the Collateral Documents) (the “Prepetition Collateral”) consisting of substantially all of each Prepetition Secured Notes Party’s assets (the “Prepetition Liens”).

(iv) *Validity, Perfection, and Priority of Prepetition Liens and Prepetition Secured Indebtedness*. Each of the Debtors acknowledges and agrees that, in each case as of the Petition Date: (i) the Prepetition Liens encumber all of the Prepetition Collateral, including that held by

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Debtors: INVITAE CORPORATION, *et al.*

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the Prepetition Secured Notes Parties, as the same existed on the Petition Date; (ii) the Prepetition Liens are valid, binding, enforceable, non-avoidable, and properly perfected liens on and security interests in the Prepetition Collateral held by the Prepetition Secured Notes Parties; (iii) the Prepetition Liens are subject and subordinate only to those valid, enforceable, and non-avoidable liens that are (1) in existence on the Petition Date, (2) either perfected as of the Petition Date or perfected subsequent to the Petition Date solely to the extent permitted by section 546(b) of the Bankruptcy Code, and (3) permitted under the Secured Notes Documents and senior in priority to the Prepetition Liens granted to the Prepetition Secured Parties under and in connection with the Secured Notes Documents in accordance with applicable law (such liens, the "Permitted Prior Liens"); (iv) the Prepetition Liens were granted to or for the benefit of the Prepetition Secured Agent and the other Prepetition Secured Parties for fair consideration and reasonably equivalent value and were granted contemporaneously with, or covenanted to be provided as an inducement for, the making of the loans and/or commitments and other financial accommodations secured thereby; (v) the Prepetition Secured

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Debtors: INVITAE CORPORATION, *et al.*

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Indebtedness constitutes legal, valid, binding and non-avoidable obligations of the Debtors, enforceable against them in accordance with their respective terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code); (vi) no offsets, challenges, objections, defenses, claims, or counterclaims of any kind or nature to any of the Prepetition Liens or Prepetition Secured Indebtedness exist, and no portion of the Prepetition Liens or Prepetition Secured Indebtedness is subject to any challenge, cause of action, or defense including impairment, set-off, right of recoupment, avoidance, attachment, disallowance, disgorgement, reduction, recharacterization, recovery, subordination (whether equitable or otherwise), attack, offset, contest, defense, counterclaims, cross-claims, or “claim” (as defined in the Bankruptcy Code), pursuant to the Bankruptcy Code or applicable nonbankruptcy law or regulation including in any cases under Chapter 7 of the Bankruptcy Code upon the conversion of any of these Cases, or in any other proceedings superseding or related to any of the foregoing (collectively, the “Successor Cases”); and (vii) the Debtors and their estates have no claims, objections, challenges, causes of action, recoupments,

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counterclaims, cross-claims, setoff rights, and/or choses in action, including “lender liability” causes of action or avoidance claims under chapter 5 of the Bankruptcy Code or applicable state law equivalents, whether arising under applicable state law or federal law (including any recharacterization, subordination, avoidance, disgorgement, recovery, or other claims arising under or pursuant to sections 105, 510, or 542 through 553 of the Bankruptcy Code), against the Prepetition Secured Parties or any of their respective affiliates, agents, representatives, attorneys, advisors, professionals, officers, directors, and employees [\(in their capacities as such\)](#) arising out of, based upon, or related to their obligations under the Secured Notes Documents, the Prepetition Secured Indebtedness, or the Prepetition Liens.

(b) *Cash Collateral.* Any and all of the Prepetition Secured Notes Parties’ cash, including all amounts on deposit or maintained in any banking, checking, or other deposit accounts by the Prepetition Secured Notes Parties, any amounts generated by the collection of accounts receivable or other disposition of the Prepetition Collateral or deposited into the Prepetition Secured Notes Parties’ banking, checking, or other deposit accounts, in each case as of or after the Petition Date, and any of the proceeds of any of the foregoing is the Prepetition Secured Parties’ Cash Collateral.

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(c) *Bank Accounts.* The Debtors acknowledge and agree that, as of the Petition Date, none of the Debtors has either opened or maintains any bank accounts other than the accounts listed in the exhibit attached to the *Interim Order Authorizing the Debtors to (A) Continue to Operate their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintain Existing Business Forms, and (D) Perform Intercompany Transactions* [D.I. 48] or an order approving the *Motion for Entry of Interim and Final Orders Authorizing the Debtors to (A) Continue to Operate their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintain Existing Business Forms, and (D) Perform Intercompany Transactions* [D.I. 10] on a final basis (the “Cash Management Order”).

(d) *Credit Bids.* Subject to the Secured Notes Documents, the Prepetition Secured Agent (at the direction of the Prepetition Secured Noteholders constituting Required Holders as defined in the Secured Notes Indenture) shall have the rights granted pursuant to and consistent with section 363(k) of the Bankruptcy Code with respect to any credit bidding of the Prepetition Secured Indebtedness on which they have Prepetition Liens or Adequate Protection Liens (as defined below). No Debtor or Debtor’s affiliate shall object to any Prepetition Secured Agent’s or Prepetition Secured Party’s right to credit bid up to the full amount of Prepetition Secured Indebtedness, in each case including, without limitation, any accrued interest and expenses, in any sale, as applicable, whether such sale is effectuated

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Debtors: INVITAE CORPORATION, *et al.*
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through Bankruptcy Code section 363, in a chapter 11 or chapter 7 proceeding, under Bankruptcy Code section 1129, by a chapter 7 or chapter 11 trustee, or otherwise, subject to applicable law.

(e) *No Control.* None of the Prepetition Secured Parties (including in connection with the Transaction Support Agreement) controls the Debtors or their properties or operations, has authority to determine the manner in which any Debtors' operations are conducted, or is a control person or insider of the Debtors by virtue of any of the actions taken with respect to, in connection with, related to or arising from the Interim Order, this Final Order, the Secured Notes Indenture or the Secured Notes Documents.

F. *Adequate Protection.* The Prepetition Secured Noteholders and the Debtors have negotiated in good faith regarding the Debtors' use of the Prepetition Collateral (including the Cash Collateral) to fund the administration of the Debtors' estates and continued operation of their businesses in accordance with the terms hereof. The Prepetition Secured Parties are entitled, pursuant to sections 105, 361, 362 and 363(e) of the Bankruptcy Code, as a condition for the use of their Prepetition Collateral, including the Cash Collateral, ~~to~~after the Petition Date, to adequate protection of their respective interests in the Prepetition Collateral, including the Cash Collateral, to the extent of any postpetition diminution in value of their respective interests in the Prepetition Collateral as of the Petition Date resulting from the Debtors' use, sale, or lease of the Prepetition Collateral (including Cash Collateral), ~~the grant of a lien under section 364 of~~

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~~the Bankruptcy Code,~~ and/or the imposition of the automatic stay pursuant to section 362(a) of
the Bankruptcy Code ([any such diminution after the Petition Date, a “Diminution in Value”](#)).

The foregoing shall not, nor shall any other provision of this Final Order be construed as, a
determination or finding that there has been or will be any Diminution in Value of Prepetition
Collateral (including Cash Collateral) and the rights of all parties as to such issues are hereby
preserved.

G. ***Need to Use Cash Collateral.*** The Debtors have requested entry of this Final
Order pursuant to Bankruptcy Rule 4001(b)(2) and Local Rule 4001-3 and have an immediate
need to continue using the Prepetition Collateral, including the Cash Collateral (subject to and in
compliance with the Approved Budget), in order to, among other things, (i) conduct a sale of all
or some of the Debtors’ assets and/or equity in accordance with that certain Transaction Support
Agreement, dated as of February 13, 2024 (the “Transaction Support Agreement”), by and
among, *inter alios*, the Debtors and the Prepetition Secured Noteholders party thereto,
(ii) continue their operations, for working capital purposes, other general corporate purposes of
the Debtors, and (iii) to satisfy in full the costs and expenses of administering the Cases and
preserving the value of their estates during the Cases. The continued ability of the Debtors to
obtain liquidity through the use of the Cash Collateral is vital to the Debtors and their efforts to
maximize the value of their estates. If the authorization to use Cash Collateral is not approved

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on a final basis in accordance with the terms hereof, the Debtors' estates and reorganization efforts will be immediately and irreparably harmed.

H. **Notice.** Notice of the Motion and the hearing thereon was provided pursuant to Bankruptcy Rules 2002, 4001(b) and (d), and 9006 and Local Rule 4001-3, as required by sections 361 and 363 of the Bankruptcy Code and the Local Rules. Except as provided herein with respect to notice of the Final Hearing and Final Order, no further notice of, or hearing on, the relief sought in the Motion is necessary or required. The Debtors have represented that notice of the Final Hearing and the relief requested in the Motion has been provided by the Debtors, by email, overnight courier and/or hand delivery, to: (a) the office of the U.S. Trustee for the District of New Jersey (the "U.S. Trustee"); (b) the holders of the thirty largest unsecured claims against the Debtors (on a consolidated basis); (c) counsel to the Prepetition Secured Agent; (d) Sullivan & Cromwell LLP, as counsel to a certain holder of a majority of the Secured Notes constituting the Required Holders (under and as defined in the Secured Notes Indenture) (the "Required Holders"); (e) Wollmuth Maher & Deutsch LLP, as counsel to the Required Holders; (f) the office of the attorney general for each of the states in which the Debtors operate; (g) the United States Attorney's Office for the District of New Jersey; (h) the Internal Revenue Service; (i) the Prepetition Secured Parties; and (j) all other parties entitled to notice pursuant to Local Rule 9013-5(c).

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I. ***Consent.*** The Required Holders constitute “Required Holders” as defined in the Secured Notes Indenture. To the extent required, the Required Holders have consented to the Debtors’ use of Cash Collateral, in accordance with and subject to the terms and conditions provided for in this Final Order.

J. ***Relief Essential; Best Interest.*** The Debtors have requested entry of this Final Order pursuant to Bankruptcy Rule 4001(b)(2) and Local Rule 4001-3. The relief requested in the Motion (and as provided in this Final Order) is necessary, essential and appropriate for the continued operation of the Debtors’ businesses and the management and preservation of the Debtors’ assets and the property of their estates. It is in the best interest of the Debtors’ estates that the Debtors be allowed to use the Cash Collateral under the terms hereof. The Debtors have demonstrated good and sufficient cause for the relief granted herein.

K. ***Arm’s-Length, Good Faith Negotiations.*** The terms of this Final Order were negotiated in good faith and at arm’s-length between the Debtors and the Required Holders. The Required Holders have acted without negligence or violation of public policy or law in respect of all actions taken by them in connection with or related in any way to negotiating, implementing, documenting, or obtaining requisite approvals of the use of Cash Collateral, including in respect of the granting of the Adequate Protection Liens and all documents related to and all transactions contemplated by the foregoing.

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Now, therefore, upon the record of the proceedings heretofore held before this Court with respect to the Motion, the evidence adduced at the Interim Hearing, and the statements of counsel thereat, and based upon the foregoing findings and conclusions,

IT IS HEREBY ORDERED THAT:

1. ***Motion Granted.*** The Motion is granted on a final basis as set forth herein, and the use of Cash Collateral on a final basis is authorized, subject to the terms of this Final Order.

2. ***Objections Overruled.*** Any objections to the Motion with respect to the entry of this Final Order that have not been withdrawn, waived, settled or otherwise resolved and all reservations of rights included therein, are hereby denied and overruled with prejudice.

3. ***Authorization to Use Cash Collateral; Budget.***

(a) ***Authorization.*** Subject to the terms and conditions of this Final Order, the Court hereby authorizes the Debtors' use of Cash Collateral during the period beginning with the Petition Date and ending on the Termination Date (as defined below), in each case, solely and exclusively in a manner consistent with this Final Order and the Approved Budget, and for no other purposes. Notwithstanding anything herein to the contrary, subject only to the Debtors' rights under paragraph 8(a) hereof and the Carve Out, the Debtors' right to use Cash Collateral shall terminate on the Termination Date.

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(b) *Approved Budget; Budget Period.* Except as otherwise provided herein, the Debtors may only use Cash Collateral in accordance with the budget prepared by the Debtors attached as **Exhibit 1** to the Interim Order (the “Initial Approved Budget”) as may be amended, replaced, extended, supplemented, or otherwise modified in accordance with the terms of this Final Order or by the Required Holders (such budget, including the Initial Approved Budget, the “Approved Budget”) subject to permitted variances as set forth below. On the Friday of the first full calendar week after the Petition Date, and each two weeks thereafter, the Debtors shall deliver an updated budget to the Prepetition Secured Agent, counsel to the Prepetition Secured Agent, as advisors to the Prepetition Secured Agent (the “Prepetition Secured Agent Advisors”), the Required Holders, Sullivan & Cromwell, LLP, Wollmuth Maher & Deutsch LLP, Perella Weinberg Partners L.P., as advisors to the Required Holders (the “Required Holders Advisors” and, together with the Prepetition Secured Agent, the Prepetition Secured Agent Advisors, the Required Holders, and counsel to any statutory committees appointed in these Cases, the “Notice Parties”), in form and substance satisfactory to the Required Holders in their sole discretion.

(c) *Budget Testing.* On the Friday of the first full calendar week after the Petition Date, and each week thereafter, the Debtors shall deliver a budget variance report/reconciliation (the “Variance Report”) to the Notice Parties, in form and substance reasonably satisfactory to the Notice Parties, showing for the prior two-week period ending

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on the Friday immediately prior (each such period, a “Test Period”). For the avoidance of doubt, the reporting schedule is detailed in **Exhibit 2** – “Testing Cadence”, attached herein.

The Variance Report will include (i) the variance (as compared to the applicable Approved Budget) of actual cash receipts (on a line item by line item basis) of the Debtors for the applicable Test Period, (ii) the variance (as compared to the applicable Approved Budget) of the disbursements (on a line item by line item basis) made by the Debtors set forth in the Approved Budget for the applicable Test Period, and (iii) an explanation, in reasonable detail, for any material variances (on a line item basis) set forth in such Variance Report, certified by an authorized officer of the Debtors. Commencing with the first full calendar week after the Petition Date, the Debtors shall not permit (i) a total receipts variance for any Test Period to have a negative variance in excess of 12.5% (with negative variance meaning, for the avoidance of doubt, that actual receipts are less than projected receipts) or (ii) a total disbursements variance for any Test Period to have a negative variance in excess of 12.5% (with negative variance meaning, for the avoidance of doubt, that actual disbursements are greater than the projected disbursements on a line-item basis); *provided* that, (1) any positive receipts variance may be used to offset any negative disbursements variance for such Test Period or carried over to the immediately subsequent (but not any other) Test Period, and (2) any positive disbursements variance may be used to offset any negative receipts variance for such Test Period or carried over to the immediately subsequent (but not any other) Test

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Period. For the avoidance of doubt, the cash disbursements considered for determining compliance with this covenant shall exclude the Debtors' disbursements in respect of restructuring professional fees (such excluded cash disbursements, the "Restructuring Professional Fees"). Debtors shall provide notice of the occurrence of the Debtors' unrestricted cash and cash equivalents ("Liquidity") falling below \$56,700,000 (the "Minimum Liquidity Amount") at the end of any week and the amount of such Liquidity as of such time.

(d) *Proposed Budget Updates.* On or before the second (2nd) day before the end of each Test Period, the Debtors shall deliver to the Notice Parties and the U.S. Trustee a rolling 13-week cash flow forecast of the Debtors substantially in the format of the Initial Approved Budget (each, a "Proposed Budget"), which Proposed Budget (including any subsequent revisions to any such Proposed Budget), shall become the Approved Budget effective the subsequent Test Period *unless* the Required Holders notify the Debtors of any reasonable objection to the Proposed Budget within four (4) business days after receipt of the Proposed Budget (the "Approval Deadline"). For the avoidance of doubt, the Debtors' use of Cash Collateral shall be governed by the then-existing Approved Budget (x) at all times prior to the earlier of (i) the Required Holders' approval of the Proposed Budget in accordance with this paragraph and (ii) the Approval Deadline; and (y) during the pendency of any unresolved objection by the Required Holders to the Proposed Budget.

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(e) *Miscellaneous.* For the avoidance of doubt, except as otherwise set forth in the Approved Budget, Cash Collateral may not be [transferred to any non-Debtor affiliate of the Debtors or](#) used (i) by any non-Debtor entity, or (ii) to pay any expense of any non-Debtor entity, in each case, except as necessary to satisfy trade claims against non-Debtor ~~entities~~[subsidiaries of the Debtors](#) in the ordinary course of the Debtors' and [such](#) non-Debtors' business and consistent with the historical practices of such entities and the Approved Budget.

4. ***Adequate Protection for the Prepetition Secured Parties.*** Subject only to the Carve Out and the terms of this Final Order, pursuant to sections 361, 362, and 363(e) of the Bankruptcy Code, and in consideration of the stipulations and consents set forth herein, as approved upon entry of the Interim Order and pursuant to this Final Order on a final basis, as adequate protection of the interests of the Prepetition Secured Parties in the Prepetition Collateral (including Cash Collateral), in each case, solely for and equal in amount to the Diminution in Value of the Prepetition Collateral (including Cash Collateral), the Prepetition Secured Agent, for its benefit and the other Prepetition Secured Parties, was granted pursuant to the Interim Order, and is hereby further granted on a final basis the following:

(a) *Adequate Protection Liens.* Pursuant to sections 361(2) and 363(c)(2) of the Bankruptcy Code, solely to the extent of any Diminution in Value of the Prepetition Secured Parties' interests in the Prepetition Collateral and subject in all cases to the Carve

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Out, as made effective upon entry of the Interim Order and in each case perfected without the necessity of the execution by the Debtors (or recordation or other filing) of security agreements, control agreements, pledge agreements, financing statements, mortgages or other similar documents, or by possession or control, the Debtors are authorized to grant, and hereby deemed to have granted, to the Prepetition Secured Agent, for the benefit of itself and the other Prepetition Secured Parties, valid, binding, continuing, enforceable, fully-perfected, nonavoidable, first-priority senior (except as otherwise provided in this paragraph 4(a) below with respect to the Permitted Prior Liens), additional and replacement security interests in and liens on (all such liens and security interests, the “Adequate Protection Liens”) (i) the Prepetition Collateral and (ii) all of the Debtors’ other now-owned and hereafter-acquired real and personal property, assets and rights of any kind or nature, wherever located, whether encumbered or unencumbered, including, without limitation, all prepetition property and postpetition property of the Debtors’ estates, and the proceeds, products, rents and profits thereof, whether arising from section 552(b) of the Bankruptcy Code or otherwise, including, without limitation, all equipment, all goods, all accounts, cash, payment intangibles, bank accounts and other deposit or securities accounts of the Debtors (including any accounts opened prior to, on, or after the Petition Date), insurance, equity interests, intercompany claims, accounts receivable, other rights to payment, all general intangibles, contracts, securities, chattel paper, all interest rate hedging agreements, all owned real estate, real

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property leaseholds, fixtures, patents, copyrights, trademarks, trade names, rights under license agreements and other intellectual property, claims and causes of action, and any and all proceeds, products, rents, and profits of the foregoing (all property identified in this paragraph 4(a) being collectively referred to as the “Collateral”), subject only to the Carve Out and any Permitted Prior Liens, in which case the Adequate Protection Liens shall be immediately junior in priority to any such Permitted Prior Liens and to the Carve Out; notwithstanding the foregoing, the Collateral shall exclude all claims and causes of action arising under any section of chapter 5 of the Bankruptcy Code or applicable state law equivalents (the “Avoidance Actions”), but shall include proceeds of and other property that is recovered or becomes unencumbered as a result of (whether by judgment, settlement, or otherwise) any Avoidance Actions; *provided that the Adequate Protection Liens shall not include liens or security interests on the proceeds of any Avoidance Action or commercial tort claim against any of the Prepetition Secured Parties.*

(b) *Adequate Protection Superpriority Claims.* As further adequate protection, and to the extent provided by sections 503(b) and 507(b) of the Bankruptcy Code, including subject to the priorities set forth therein, the Debtors granted, and hereby are deemed to have granted on a final basis, to the Prepetition Secured Agent, for the benefit of itself and the other Prepetition Secured Parties, allowed superpriority administrative expense claims in each of the Cases ahead of and senior to any and all other administrative expense

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claims in such Cases to the extent of, and in an aggregate amount equal to, any Diminution in Value (the “Adequate Protection Superpriority Claims”), but junior to the Carve Out; provided that the Adequate Protection Superpriority Claims shall not have recourse against the proceeds of any Avoidance Action or commercial tort claim against the Prepetition Secured Parties. Subject to the Carve Out, the Adequate Protection Superpriority Claims will not be junior to any claims and shall have priority over all administrative expense claims and other claims against each of the Debtors, now existing or hereafter arising, of any kind or nature whatsoever, including, without limitation, administrative expense claims of the kinds specified in or ordered pursuant to sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 726, 1113 and 1114 of the Bankruptcy Code to the extent of, and in an aggregate amount equal to, any Diminution in Value.

(c) *Right to Seek Additional Adequate Protection.* This Final Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, the rights of any of the Prepetition Secured Parties to request, upon notice and a hearing, further or alternative forms of adequate protection at any time or the rights of the Debtors or any other party to contest such request.

(d) *Other Covenants.* The Debtors shall maintain their cash management arrangements in a manner consistent with this Court’s order(s) granting the Debtors’ cash management motion [Docket No. 10] or final order granting similar relief. The Debtors shall

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provide the Required Holders (and the Required Holders Advisors) with material updates and information as reasonably requested by the Required Holders.

(e) *Fees and Expenses.* As additional adequate protection, the Debtors shall, and are directed to, pay (i) postpetition monthly interest payments in cash to the Prepetition Secured Agent, on behalf of the Prepetition Secured Parties, in an amount equal to the accrued and unpaid interest at the non-default interest rate and as otherwise provided under the Secured Notes Indenture (including, for the avoidance of doubt, payment of all prepetition accrued and unpaid interest under the Secured Notes Indenture); (ii) within ten (10) days after the Debtors' receipt of invoices therefor, the reasonable and documented professional fees, expenses and disbursements (including, but not limited to, the expenses and disbursements of counsel and other third-party consultants, including financial advisors), arising prior to the Petition Date, incurred by the Prepetition Secured Agent (including reasonable and documented fees, expenses and disbursements incurred by the Prepetition Secured Agent Advisors) and the Required Holders (including reasonable and documented fees, expenses and disbursements incurred by the Required Holders Advisors and Hogan Lovells US LLP, as counsel to the Required Holders); and (iii) subject to paragraph 25, on a monthly basis, within ten (10) days of the Debtors' receipt of invoices therefor, which may be sent by email to Debtors' counsel, the reasonable and documented fees, expenses and disbursements (including, but not limited to, the reasonable and documented fees, expenses

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and disbursements of the Prepetition Secured Agent, the Prepetition Secured Agent Advisors, the Required Holders Advisors, Hogan Lovells US LLP, and any conflicts counsel or other legal counsels necessary to represent the interests of the Prepetition Secured Parties (collectively, the “Prepetition Secured Party Professionals”) incurred by the Prepetition Secured Parties), arising subsequent to the Petition Date through the date on which the Debtors’ authority to use Cash Collateral terminates in accordance with this Final Order. None of the foregoing reasonable and documented fees, expenses and disbursements shall be subject to separate approval by this Court or require compliance with the U.S. Trustee Guidelines, and no recipient of any such payment shall be required to file any interim or final fee application with respect thereto or otherwise seek the Court’s approval of any such payments. Any payments made pursuant to this paragraph 4(e) shall be without prejudice to whether any such payments should be recharacterized or reallocated pursuant to section 506(b) of the Bankruptcy Code as payments of principal, interest or otherwise.

(f) *Miscellaneous.* Except for (i) the Carve Out and (ii) as otherwise provided in this paragraph 4, the Adequate Protection Liens and Adequate Protection Superpriority Claims granted to the Prepetition Secured Parties pursuant to this paragraph 4 of this Final Order shall not be subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtors’ estates under section 551 of the Bankruptcy

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Code and shall not be subordinated to or made *pari passu* with any lien, security interest or
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5. *Carve Out.*

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(a) Carve Out. As used in this Final Order, the “Carve Out” means the sum of (i) all fees required to be paid to the Clerk of the Court and to the U.S. Trustee under section 1930(a) of title 28 of the United States Code plus interest at the statutory rate (without regard to the notice set forth in (iii) below); (ii) all reasonable fees and expenses up to \$50,000 incurred by a trustee under section 726(b) of the Bankruptcy Code (without regard to the notice set forth in (iii) below); (iii) to the extent allowed at any time, whether by interim order, procedural order, or otherwise, all unpaid fees and expenses (the “Allowed Professional Fees”) incurred by persons or firms retained by the Debtors pursuant to section 327, 328, or 363 of the Bankruptcy Code (the “Debtor Professionals”) and the Committee pursuant to section 328 or 1103 of the Bankruptcy Code (the “Committee Professionals” and, together with the Debtor Professionals, the “Professional Persons”) at any time before the date of delivery of the Carve Out Trigger Notice (as defined below) by the Required Holders or the Prepetition Secured Agent (at the direction of the Required Holders), whether allowed by the Court prior to or after delivery of a Carve Out Trigger Notice; and (iv) Allowed Professional Fees of Professional Persons in an aggregate amount not to exceed \$2,500,000 incurred on or after the date of delivery of the Carve Out Trigger Notice by the Required Holders or the Prepetition Secured Agent (at the direction of the Required Holders), to the extent allowed at any time, whether by interim order, procedural order, or otherwise (the amounts set forth in this clause (iv) being the “Post-Carve Out Trigger Notice Cap”). For purposes of the foregoing, “Carve Out Trigger Notice” shall mean a written

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notice delivered by email (or other electronic means) by the Required Holders or the Prepetition Secured Agent (at the direction of the Required Holders) to the Debtors, their lead restructuring counsel, the U.S. Trustee, and counsel to the Committee, which notice may be delivered following the occurrence and during the continuation of a Termination Event and upon termination of the Debtors' right to use Cash Collateral by the Prepetition Secured Noteholders, stating that the Post-Carve Out Trigger Notice Cap has been invoked.

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(b) Carve Out Reserves. On the day on which a Carve Out Trigger Notice is given by the Required Holders or the Prepetition Secured Agent (at the direction of the Required Holders) to the Debtors with a copy to counsel to the Committee and the U.S. Trustee (the "Termination Declaration Date"), the Carve Out Trigger Notice shall constitute a demand to the Debtors to utilize all cash on hand as of such date and any available cash thereafter held by any Debtor to fund a reserve in an amount equal to the then unpaid amounts of the Allowed Professional Fees. The Debtors shall deposit and hold such amounts in a segregated account in trust to pay such then unpaid Allowed Professional Fees (the "Pre-Carve Out Trigger Notice Reserve") prior to any and all other claims. On the Termination Declaration Date, after funding the Pre-Carve Out Trigger Notice Reserve, the Debtors shall utilize all remaining cash on hand as of such date and any available cash thereafter held by any Debtor to fund a reserve in an amount equal to the Post-Carve Out Trigger Notice Cap (the "Post-Carve Out Trigger Notice Reserve") and, together with the Pre-Carve Out Trigger Notice Reserve, the "Carve Out Reserves") prior to any and all other claims. All funds in the Pre-Carve Out Trigger Notice Reserve shall be used first to pay the obligations set forth in clauses (i) through (iii) of the definition of Carve Out set forth above (the "Pre-Carve Out Amounts"), but not, for the avoidance of doubt, the Post-Carve Out Trigger Notice Cap, until paid in full, and then, to the extent the Pre-Carve Out Trigger Notice Reserve has not been reduced to zero, to pay the Prepetition Secured Agent for the benefit of the Prepetition Secured Noteholders, unless the

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Secured Notes has been indefeasibly paid in full, in cash, in which case any such excess shall be paid to the Debtors' creditors in accordance with their rights and priorities as of the Petition Date. All funds in the Post-Carve Out Trigger Notice Reserve shall be used first to pay the obligations set forth in clause (iv) of the definition of Carve Out set forth above (the "Post-Carve Out Amounts"), and then, to the extent the Post-Carve Out Trigger Notice Reserve has not been reduced to zero, to pay the Prepetition Secured Agent for the benefit of the Prepetition Secured Noteholders, unless the Secured Notes has been indefeasibly paid in full, in cash, in which case any such excess shall be paid to the Debtors' creditors in accordance with their rights and priorities as of the Petition Date. Notwithstanding anything to the contrary in the Secured Notes Documents, or the Interim Order or this Final Order, if either of the Carve Out Reserves is not funded in full in the amounts set forth in this paragraph 5, then, any excess funds in one of the Carve Out Reserves following the payment of the Pre-Carve Out Amounts and Post-Carve Out Amounts, respectively, shall be used to fund the other Carve Out Reserve, up to the applicable amount set forth in this paragraph 5, prior to making any payments to the Prepetition Secured Agent or any of the Debtors' creditors, as applicable. Notwithstanding anything to the contrary in the Secured Notes Documents or this Final Order, following delivery of a Carve Out Trigger Notice, the Prepetition Secured Agent shall not sweep or foreclose on cash (including cash received as a result of the sale or other disposition of any assets) of the Debtors until the Carve Out Reserves have been fully funded, but shall have a security interest in any residual interest in

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the Carve Out Reserves, with any excess paid to the Prepetition Secured Agent for application in accordance with the Secured Notes Documents. Further, notwithstanding anything to the contrary in this Final Order, (i) disbursements by the Debtors from the Carve Out Reserves shall not constitute Secured Notes (as defined in the Prepetition Notes Documents) or increase or reduce the Secured Notes, (ii) the failure of the Carve Out Reserves to satisfy in full the Allowed Professional Fees shall not affect the priority of the Carve Out, and (iii) in no way shall the Approved Budget, Carve Out, Post-Carve Out Trigger Notice Cap, Carve Out Reserves, or any of the foregoing be construed as a cap or limitation on the amount of the Allowed Professional Fees due and payable by the Debtors. For the avoidance of doubt and notwithstanding anything to the contrary in this Final Order or in any Secured Notes Documents, the Carve Out shall be senior to all liens and claims securing the Prepetition Collateral, the Adequate Protection Liens, and the 507(b) Claim, and any and all other forms of adequate protection, liens, or claims securing the Secured Notes.

(c) *Payment of Allowed Professional Fees Prior to the Termination Declaration Date.* Any payment or reimbursement made prior to the occurrence of the Termination Declaration Date in respect of any Allowed Professional Fees shall not reduce the Carve Out.

(d) *No Direct Obligation To Pay Allowed Professional Fees.* Subject to the terms of the Transaction Support Agreement, the Prepetition Secured Agent and the other

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Prepetition Secured Parties reserve the right to object to the allowance of any fees and expenses, whether or not such fees and expenses were incurred in accordance with the Approved Budget. Except for permitting the funding of the Carve Out Reserves as provided herein, none of the Prepetition Secured Noteholders shall be responsible for the payment or reimbursement of any fees or disbursements of any Professional Person or any fees or expenses of the U.S. Trustee or Clerk of the Court incurred in connection with these Cases or any successor cases under any chapter of the Bankruptcy Code. Nothing in this Final Order or otherwise shall be construed to obligate the Prepetition Secured Noteholders, in any way, to pay compensation to, or to reimburse expenses of, any Professional Person or to guarantee that the Debtors have sufficient funds to pay such compensation or reimbursement.

(e) *Payment of Carve Out On or After the Termination Declaration Date.*

Any payment or reimbursement made on or after the occurrence of the Termination Declaration Date in respect of any Allowed Professional Fees shall permanently reduce the Carve Out on a dollar-for-dollar basis.

6. ***Access and Information.*** In addition to, and without limiting, whatever rights to access the Prepetition Secured Parties have under the Secured Notes Indenture, upon reasonable prior written notice (including via acknowledged electronic mail) during normal business hours, the Debtors shall permit the Prepetition Secured Agent Advisors, the Required Holders, ~~and~~ the Required Holders Advisors (each of which is bound by obligations of

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confidentiality pursuant to a separate confidentiality agreement entered into with the Debtors),
and the Committee's advisors to have access to such information regarding the operations,
business affairs and financial condition of the Borrower or any of its subsidiaries, or compliance
with the terms of any Secured Notes Document as the Prepetition Secured Agent (acting on
behalf of itself or any applicable Prepetition Secured Party), the Required Holders, ~~or~~ the
Required Holders Advisors, or the Committee's advisors may reasonably request, and it being
understood that nothing in this paragraph 6 shall require the Debtors (or any of their advisors) to
take any action that would conflict with any applicable requirements of law or any binding
agreement, or that would waive any attorney-client or similar privilege.

7. **Termination.** Subject to the Remedies Notice Period (as defined herein) and
paragraph 5, the Debtors' right to use the Cash Collateral pursuant to this Final Order shall
automatically cease without further court proceedings on the Termination Date (as defined
herein). As used herein "Termination Events" means any of the events set forth in clauses (a)
through (n) below (each such events a "Termination Event"):

(a) The violation of any term of this Final Order by the Debtors that is not
cured within five (5) business days of receipt by the Debtors, counsel for the Committee, and
the U.S. Trustee of notice of such default, violation or breach (which may be provided to the
Debtors, counsel for the Committee, and the U.S. Trustee by email);

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(b) Entry of any order modifying, reversing, revoking, staying for a period in excess of five (5) business days, rescinding, vacating, or amending this Final Order without the express written consent of the Required Holders;

(c) Any of the Cases is dismissed (other than following the effective date of a chapter 11 plan) or converted to a case under chapter 7 of the Bankruptcy Code, without the express written consent of the Required Holders, or a trustee under chapter 11 of the Bankruptcy Code or an examiner [with enlarged powers](#) is appointed in any of the Cases, or any of the Debtors seeks entry of an order accomplishing any of the foregoing;

(d) An order is entered granting another claim or lien (except for the Permitted Prior Liens) *pari passu* with or senior to except as provided under this Final Order, the Prepetition Liens, Adequate Protection Liens or the Adequate Protection Superpriority Claims granted to the Prepetition Secured Parties under this Final Order;

(e) Any motion, pleading, or proceeding is filed or is commenced by any Debtor seeking, or otherwise consenting to or supporting, (i) the invalidation, subordination, or other challenge to the Prepetition Secured Indebtedness, the Prepetition Liens, the Adequate Protection Liens or the Adequate Protection Superpriority Claims or (ii) any relief under section 506(c) of the Bankruptcy Code with respect to any Prepetition Collateral or any Collateral, including the Cash Collateral, or against any of the Prepetition Secured Parties;

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provided that if the Debtors provide any response to any third-party discovery request or may make a witness available for deposition, such action shall not be a violation of this clause (f);

(f) Any Debtor files a motion, pleading, or proceeding that would, if the relief sought therein were granted, result in a Termination Event (other than a Termination Event under this paragraph 7(f)), and such motion, pleading, or proceeding is not dismissed or withdrawn (as applicable) within five (5) business days after receipt by the Debtors, counsel to the Committee, and the U.S. Trustee of notice (which may be by email) that the Required Holders have determined that such motion, pleading, or proceeding, if the relief sought therein were granted, would give rise to such a Termination Event; *provided* that if the Debtors receive the written consent of the Required Holders to file such motion, pleading, or proceeding than such action shall not be a violation of this clause (f);

(g) The entry by this Court of an order granting relief from or modifying the automatic stay imposed by section 362 of the Bankruptcy Code to any entities other than the Prepetition Secured Parties with respect to the Prepetition Collateral or the Collateral (except for the Permitted Liens) with a value in excess of \$500,000 without the written consent of the Required Holders;

(h) The failure by the Debtors to make any payment required pursuant to this Final Order when due; *provided* that such failure remains uncured for at least five (5)

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business days following a written notice from the Required Holders (which may be by email);

(i) The failure by the Debtors to deliver to any of the Notice Parties any of the documents or other information reasonably required to be delivered to such applicable party pursuant to this Final Order within five (5) days following a request therefor from any of the Notice Parties pursuant to the terms of this Final Order; or any such documents or other information shall contain a material misrepresentation; *provided* that, such misrepresentation remains uncured for at least five (5) business days following written notice thereof from any of the Prepetition Secured Agent;

(j) The Debtors' failure to comply with an Approved Budget except with respect to Permitted Variances or the Debtors' failure at the end of any week to maintain Liquidity in an amount equal to or greater than the Minimum Liquidity Amount;

(k) The failure of the Debtors to observe or perform any of the material terms or material provisions contained herein, *provided* that such failure remains uncured for at least five (5) business days following written notice thereof from any of the Prepetition Secured Agent;

(l) The entry of an order granting relief from the automatic stay imposed by section 362 of the Bankruptcy Code authorizing any party to exercise remedies against

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any asset of the Debtors without which the Debtors' ability to operate their business in the ordinary course would be materially and adversely affected; and

(m) The occurrence of a "Consenting Stakeholder Termination Event" under the Transaction Support Agreement, unless waived by the Required Holders.

8. ***Remedies after the Termination Date.***

(a) Notwithstanding anything contained herein, the Debtors' authorization to use Cash Collateral hereunder shall automatically terminate (except for purposes of funding the Carve Out, as provided in paragraph 5) on the date (such date, the "Termination Date") that is the earlier of (i) 5:00 p.m. on the date that is 159 days from the Petition Date, (ii) the effective date of any chapter 11 plan with respect to the Debtors confirmed by the Court, or (iii) five (5) business days from the Termination Declaration Date (which notice may be given by electronic mail (or other electronic means)) by the Required Holders to counsel to the Debtors, counsel to the Committee, and the U.S. Trustee (the "Termination Declaration," and such period commencing on the Termination Declaration Date and ending five (5) business days later, the "Remedies Notice Period"); *provided* that, until expiration of the Remedies Notice Period, the Debtors may continue to use Cash Collateral to make payments in respect of expenses critical to keep the business of the Debtors operating in accordance with the Approved Budget; and *provided, further*, that the Debtors may continue to use Cash Collateral during or after expiration of the Remedies Notice Period solely to the

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extent necessary to fund the Carve Out Reserves subject to paragraph 5 hereof. The automatic stay in the Cases otherwise applicable to the Prepetition Secured Parties is hereby modified so that upon the occurrence of the Termination Date, the Prepetition Secured Agent shall, subject to the Remedies Notice Period, be entitled to exercise their rights and remedies in accordance with the Secured Notes Documents and this Final Order with respect to the Debtors' use of Cash Collateral, subject and subordinate to the Carve Out. For the avoidance of doubt, during the Remedies Notice Period, unless otherwise ordered by the Court, the automatic stay under section 362 of the Bankruptcy Code shall remain in effect.

(b) During the Remedies Notice Period, if applicable, the Debtors, the Committee, and/or any party in interest shall be entitled to seek an emergency hearing with the Court with respect to any relevant matters as determined by the Court; *provided, however,* that nothing herein limits the Court's ability to hear other matters it deems appropriate at such hearing; *provided, further,* that if a hearing to consider the foregoing is requested to be heard before the end of the Remedies Notice Period but is scheduled for a later date by the Court, the Remedies Notice Period shall be automatically extended to the date of such hearing, but in no event later than eight (8) business days after delivery of the Termination Declaration unless a further extension is agreed to consensually. Upon expiration of the Remedies Notice Period, if applicable, the Required Holders shall be permitted to exercise all remedies set forth herein, in the Secured Notes Documents, and as

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otherwise available at law or in equity without further order of or application or motion to
this Court consistent with this Final Order, subject and subordinate to the Carve Out.

(c) Nothing herein shall alter the burden of proof set forth in the
applicable provisions of the Bankruptcy Code at any hearing on any request by the Debtors or
other party in interest to re-impose or continue the automatic stay under Bankruptcy Code
section 362(a), use Cash Collateral, or to obtain any other injunctive relief. Any delay or
failure of the Required Holders to exercise rights under the Secured Notes Documents, the
Interim Order or this Final Order shall not constitute a waiver of their respective rights
hereunder, thereunder or otherwise. The occurrence of the Termination Date or a
Termination Event shall not affect the validity, priority, or enforceability of any and all
rights, remedies, benefits, and protections provided to any of the Prepetition Secured Parties
under this Final Order, which rights, remedies, benefits, and protections shall survive the
Termination Date or the delivery of a Termination Declaration.

9. ***Payments Free and Clear.*** Pursuant to the provisions of this Final Order
(including the Carve Out), any and all payments or proceeds remitted to the Prepetition Secured
Agent for the benefit of itself and the other Prepetition Secured Parties, pursuant to the
provisions of the Interim Order or this Final Order ~~or any subsequent order of this Court~~ shall be
irrevocable (subject to paragraphs 4(e) and 19 of this Final Order), received free and clear of any
claim, charge, assessment or other liability, including without limitation, any such claim or

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charge arising out of or based on, directly or indirectly, Bankruptcy Code section 506(c) (whether asserted or assessed by, through or on behalf of the Debtor) or 552(b).

10. ***Limitation on Charging Expenses Against Collateral.*** All rights to surcharge the interests of the Prepetition Secured Parties in any Prepetition Collateral or any Collateral under section 506(c) of the Bankruptcy Code or any other applicable principle or equity or law shall be and are hereby finally and irrevocably waived, and such waiver shall be binding upon the Debtors and all parties in interest in the Cases.

11. ***Section 507(b) Reservation.*** Subject to the Carve Out, nothing herein shall impair or modify the application of section 507(b) of the Bankruptcy Code in the event that the adequate protection provided to the Prepetition Secured Agent or the other Prepetition Secured Parties hereunder is insufficient to compensate for any Diminution in Value of their respective interests in the Prepetition Collateral (including Cash Collateral) during the Cases or any Successor Case.

12. ***Reservation of Rights of the Prepetition Secured Parties.*** This Final Order and the transactions contemplated hereby shall be without prejudice to (a) the rights of any of the Prepetition Secured Parties to seek additional or different adequate protection, or to appear and be heard in any matter raised in the Cases to the extent consistent with the Transaction Support Agreement, and (b) any and all rights, remedies, claims and causes of action which the Prepetition Secured Parties may have against any non-Debtor party liable for the Prepetition

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Secured Indebtedness. For all adequate protection purposes throughout the Cases, each of the Prepetition Secured Parties shall be deemed to have requested relief from the automatic stay and adequate protection for any Diminution in Value from and after the Petition Date. For the avoidance of doubt, such request will survive termination of this Final Order.

13. ***Modification of Automatic Stay.*** The Debtors are authorized and directed to perform all acts and to make, execute and deliver any and all instruments as may be reasonably necessary to implement the terms and conditions of this Final Order and the transactions contemplated hereby. The stay of section 362 of the Bankruptcy Code is hereby modified to permit the parties to accomplish the transactions contemplated by this Final Order.

14. ***Survival of Final Order.*** The provisions of this Final Order shall be binding upon any trustee appointed during the Cases or upon a conversion to cases under chapter 7 of the Bankruptcy Code, and any actions taken pursuant hereto shall survive entry of any order which may be entered converting the Cases to chapter 7 cases, dismissing the Cases under section 1112 of the Bankruptcy Code or otherwise. The terms and provisions of and the priorities in payments, liens, and security interests granted pursuant to, this Final Order, shall continue notwithstanding any conversion of any of the Cases to a case under chapter 7 of the Bankruptcy Code, or the dismissal of any of the Cases. Subject to the limitations described in paragraphs 4 (e) and 19 of this Final Order, payments made pursuant to this Final Order shall not be subject to

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counterclaim, setoff, subordination, recharacterization, defense or avoidance in any of the Cases
or any Successor Case.

15. ***No Third-Party Rights.*** Except as explicitly provided for herein, this Final
Order does not create any rights for the benefit of any third party, creditor, equity holder, or any
direct, indirect, or incidental beneficiary.

16. ***Release.*** Subject to the rights and limitations set forth in paragraph 19 of this
Final Order, each of the Debtors and the Debtors' estates, on its own behalf and on behalf of
each of their predecessors, their successors, and assigns, shall, to the maximum extent permitted
by applicable law, unconditionally, irrevocably, and fully forever release, remise, acquit,
relinquish, irrevocably waive, and discharge each of the Prepetition Secured Parties (each in their
respective roles as such), and each of their respective affiliates, former, current, or future
officers, employees, directors, agents, representatives, owners, members, partners, financial and
other advisors and consultants, legal advisors, shareholders, managers, consultants, accountants,
attorneys, affiliates and assigns, and predecessors and successors in interest, each in their
capacity as such, of and from any and all claims, demands, liabilities, responsibilities, disputes,
remedies, causes of action, indebtedness and obligations, rights, assertions, allegations, actions,
suits, controversies, proceedings, losses, damages, injuries, attorneys' fees, costs, expenses, or
judgments of every type, whether known, unknown, asserted, unasserted, suspected,
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limitation, all legal and equitable theories of recovery, arising under common law, statute, or regulation or by contract, of every nature and description that exist on the date hereof with respect to or relating to the Secured Notes, the Prepetition Liens, the Prepetition Secured Indebtedness, the Secured Notes Documents, the Interim Order or this Final Order, as applicable, and/or the transactions contemplated hereunder or thereunder including, without limitation, (i) any so-called “lender liability” or equitable subordination claims or defenses, (ii) any and all claims and causes of action arising under the Bankruptcy Code, and (iii) any and all claims and causes of action regarding the validity, priority, extent, enforceability, perfection, or avoidability of the liens or claims of the Prepetition Secured Parties—; provided that nothing in this paragraph shall in any way limit or release the right of the Debtors to enforce the terms of this Final Order; provided, further, that this release shall not include a release of any claim arising from bad faith, gross negligence or willful misconduct as determined by a final non-appealable order of a court of competent jurisdiction.

17. ***Binding and Controlling Effect of Final Order.*** The terms of this Final Order shall be valid and binding upon the Debtors, all creditors of the Debtors and all other parties in interest from and after the entry of this Final Order by this Court, and none of the terms and provisions of this Final Order shall be abrogated or suspended by the conflicting provisions of any other order entered by this Court (unless otherwise contemplated hereunder or consented to by the Prepetition Secured Parties). To the extent any provision of this Final Order conflicts or

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is inconsistent with any provision of the Motion or the Interim Order, the provisions of this Final Order shall control.

18. ***Reversal, Stay, Modification or Vacatur.*** In the event the provisions of this Final Order are reversed, stayed, modified or vacated by court order following notice and any further hearing, such reversals, modifications, stays or vacatur shall not affect the rights and priorities of the Prepetition Secured Parties granted pursuant to this Final Order. Notwithstanding any such reversal, stay, modification or vacatur by court order, any indebtedness, obligation or liability incurred by the Debtors pursuant to this Final Order arising prior to the Required Holders' receipt of notice of the effective date of such reversal, stay, modification or vacatur shall be governed in all respects by the original provisions of the Interim Order or this Final Order, as applicable, and the Prepetition Secured Parties shall continue to be entitled to all of the rights, remedies, privileges and benefits, including any payments authorized therein or herein and the security interests and liens granted therein or herein, with respect to all such indebtedness, obligation or liability, and the validity of any payments made or obligations owed or credit extended or lien or security interest granted pursuant to the Interim Order or this Final Order, as applicable, is and shall remain subject to the protection afforded under the Bankruptcy Code.

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19. ***Reservation of Certain Third-Party Rights and Bar of Challenge and***

Claims.

(a) Subject to the Challenge Period (as defined below), (1) the stipulations, admissions, waivers, and releases contained in the Interim Order and this Final Order, as applicable, including the Debtors' Stipulations, shall be binding upon the Debtors, their estates, and any of their respective successors, including, without limitation, any chapter 7 or chapter 11 trustee (a "Trustee") appointed in any Successor Cases, responsible person, examiner with expanded powers, or other estate representative, and (2) upon entry of the Interim Order the Debtors were deemed to have irrevocably waived and relinquished all Challenges (as defined below) as of the Petition Date. The stipulations, admissions, waivers and releases contained in the Interim Order and this Final Order, as applicable, including the Debtors' Stipulations, shall be binding upon all other parties in interest, including the Committee and any other person acting on behalf of the Debtors' estates, unless and to the extent that (i) a party in interest (other than any Debtor or successor thereto, but including any Trustee) with proper standing to do so (to the extent derivative standing is required under applicable law), has timely and properly ~~(A) objects~~objected to or ~~challenges~~challenged the findings or Debtors' Stipulations regarding (I) the validity, enforceability, extent, priority, or perfection of the mortgages, security interests, and or liens of any of the Prepetition Secured Parties, or (II) the validity, enforceability, allowability, priority, secured status, or amount of

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the Prepetition Secured Indebtedness (any such claim, a “Challenge”) by commencing an adversary proceeding or contested matter, as required under the Bankruptcy Rules (subject in either case to the limitations contained herein, including, *inter alia*, in this paragraph), and setting forth with particularity the basis for such Challenge, by the date that is seventy five (75) days from the date of entry of the Interim Order; *provided* that the Committee shall automatically have derivative standing to file a Challenge hereunder without the requirement to file a motion seeking standing and shall have until the date that is ~~sixty~~ninety (6090) calendar days after its appointment, ~~except in no event shall the deadline described above extend beyond the first day of any hearing held in these Cases to consider confirmation of a chapter 11 plan for the Debtors (a~~ to file a Challenge (a “Challenge Period” and, the date of expiration of each Challenge Period, a “Challenge Period Termination Date”); *provided, further* that any party in interest reserves the right to seek relief to modify the Challenge Period or oppose such requested relief; and (ii) the Court enters a final order in favor of the plaintiff sustaining any such Challenge in any such timely filed adversary proceeding or contested matter, which is no longer subject to appeal; *provided*, that the timely filing of a motion seeking standing to file a Challenge before the expiration of the Challenge Period, which attaches a draft complaint setting forth the legal and factual bases of the proposed Challenge, shall toll the Challenge Period only as to the party that timely filed such standing motion until such standing motion is resolved or adjudicated by the Court. The Debtors and

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the Prepetition Secured Parties shall not object to a motion by any party seeking standing to pursue any Challenge solely on the basis that standing is precluded by the Delaware Limited Liability Company Act (as applied to any applicable Debtor entity). If a chapter 7 trustee or a chapter 11 trustee is appointed or elected during the Challenge Period, then the Challenge Period Termination Date with respect to such trustee only, shall be the later of (i) the last day of the Challenge Period and (ii) the date that is fifteen (15) calendar days after the date on which such trustee is appointed or elected. For the avoidance of doubt, no party that has timely filed a Challenge or a motion seeking standing to assert a Challenge shall be bound by the stipulations, admissions, waivers, or releases contained in the Interim Order or this Final Order unless such Challenge or motion seeking standing, as applicable, is denied by a final and non-appealable order of a court of competent jurisdiction.

(b) To the extent the stipulations, admissions, waivers and releases contained in the Interim Order and this Final Order, including the Debtors' Stipulations, are (x) not subject to a Challenge timely and properly commenced prior to the expiration of the Challenge Period Termination Date or (y) subject to a Challenge timely and properly commenced prior to the expiration of the Challenge Period Termination Date, but such Challenge does not result in a final and nonappealable judgment or order of the Court that is inconsistent with the stipulations, admissions, waivers and releases contained in the Interim Order or this Final Order, including the Debtors' Stipulations, then, without further notice,

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motion, or application to, or order of, or hearing before, this Court and without the need or requirement to file any proof of claim: (i) any and all such Challenges by any party (including the Committee, any chapter 11 trustee, and/or any examiner or other estate representative appointed or elected in these Cases, and any chapter 7 trustee and/or examiner or other estate representative appointed or elected in any Successor Case) shall be deemed to be forever, waived, released, and barred; (ii) the Prepetition Secured Indebtedness shall constitute allowed claims, not subject to counterclaim, setoff, recoupment, reduction, subordination, recharacterization, defense, or avoidance for all purposes in the Debtors' Cases and any Successor Case; (iii) the Prepetition Liens shall be deemed to have been, as of the Petition Date, legal, valid, binding, and perfected secured claims, not subject to recharacterization, subordination, or avoidance; and (iv) all of the Debtors' stipulations, admissions, waivers and releases contained in the Interim Order and this Final Order, including the Debtors' Stipulations, and all other waivers, releases, affirmations, and other stipulations as to the priority, extent, and validity as to the Prepetition Secured Parties' claims, liens, and interests contained in the Interim Order or this Final Order shall be in full force and effect and forever binding upon the Debtors, the Debtors' estates, and all creditors, interest holders, and other parties in interest in these Cases and any Successor Case.

(c) If a Challenge is timely and properly filed under the Bankruptcy Rules and remains pending and the Cases are converted to chapter 7, the chapter 7 trustee may

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continue to prosecute such Challenge on behalf of the Debtors' estates, as applicable.

Furthermore, if any such Challenge is timely and properly filed under the Bankruptcy Rules, the stipulations, admissions, waivers and releases contained in the Interim Order and this Final Order, including the Debtors' Stipulations, shall nonetheless remain binding and preclusive on the Committee, Trustee, and any other person or entity except to the extent that such stipulations and admissions were expressly challenged in such timely and properly filed Challenge prior to the Challenge Period Termination Date and determined by final order of the Court to be disallowed. Nothing in this Final Order vests or confers on any person (as defined in the Bankruptcy Code), including, without limitation, the Committee, standing or authority to pursue any cause of action belonging to the Debtors or their estates, including, without limitation, any challenges (including a Challenge) with respect to the Secured Notes Documents, the Prepetition Liens, and the Prepetition Secured Indebtedness, and a separate order of the Court conferring such standing on the Committee or other party-in-interest shall be a prerequisite for the prosecution of a Challenge by the Committee or such other party-in-interest.

20. ***Limitation on Use of Collateral and Cash Collateral.*** Notwithstanding anything to the contrary set forth in the Interim Order or this Final Order, but subject to the proviso below in this paragraph 20, none of the Collateral, the Prepetition Collateral, including Cash Collateral, or the Carve Out or proceeds thereof may be used for the payment of

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professional fees, disbursements, costs, or expenses incurred by any person: (a) to investigate (including by way of examinations or discovery proceedings), initiate, assert, prosecute, join, commence, support, or finance the initiation or prosecution of any claim, counterclaim, action, suit, arbitration, proceeding, application, motion, objection, defense, adversary proceeding, or other litigation of any type (i) against any of the Prepetition Secured Parties (in their capacities as such), and each of their respective affiliates, officers, directors, employees, members, managers, partners, agents, representatives, attorneys, consultants, financial advisors, affiliates, assigns, or successors (in their capacities as such), with respect to any transaction, occurrence, omission, action, or other matter (including formal discovery proceedings in anticipation thereof), including, without limitation, any so-called “lender liability” claims and causes of action, or seeking relief that would impair the rights and remedies of the Prepetition Secured Parties under the Secured Notes Documents, the Interim Order or this Final Order, including, without limitation, for the payment of any services rendered by the professionals retained by the Debtors or the Committee in connection with the assertion of or joinder in any claim, counterclaim, action, suit, arbitration, proceeding, application, motion, objection, defense, adversary proceeding, or other contested matter, the purpose of which is to seek, or the result of which would be to obtain, any order, judgment, determination, declaration, or similar relief that would impair the ability of any of the Prepetition Secured Parties to recover on the Prepetition Collateral or seeking affirmative relief against any of the Prepetition Secured Parties related to

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the Prepetition Secured Indebtedness; (ii) invalidating, setting aside, avoiding, or subordinating, in whole or in part, the Prepetition Secured Indebtedness, or the Prepetition Secured Parties' respective Prepetition Liens or security interests in the Collateral or Prepetition Collateral, as applicable; or (iii) for monetary, injunctive, or other affirmative relief against any of the Prepetition Secured Parties, or the Prepetition Secured Parties' respective liens on or security interests in the Collateral or the Prepetition Collateral that would impair the ability of any of the Prepetition Secured Parties to assert or enforce any lien, claim, right, or security interest or to realize or recover on the Prepetition Secured Indebtedness, to the extent applicable; (b) for objecting to or challenging in any way the legality, validity, priority, perfection, or enforceability of the claims, liens, or interests (including the Prepetition Liens) held by or on behalf of each of the Prepetition Secured Parties related to the Prepetition Secured Indebtedness; (c) for asserting, commencing, or prosecuting any claims or causes of action whatsoever (including, without limitation, any Avoidance Actions) related to the Prepetition Secured Indebtedness or the Prepetition Liens; or (d) for prosecuting an objection to, contesting in any manner, or raising any defenses to, the validity, extent, amount, perfection, priority, or enforceability of any of the Prepetition Liens or any other rights or interests of any of the Prepetition Secured Parties related to the Prepetition Secured Indebtedness or the Prepetition Liens; *provided*, that notwithstanding the foregoing, an aggregate of \$~~50,000~~400,000 of Cash Collateral may be used for the payment of professional fees, disbursements, costs, or expenses incurred by the Committee to investigate

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potential Challenges: without prejudice to the Committee's right to assert administrative claims in excess of such amount; provided that, for the avoidance of doubt, a reference to a potential or pending Challenge in an objection or other pleading that does not itself constitute a Challenge or otherwise seek relief with respect to the validity, enforceability, extent, priority, or perfection of the mortgages, security interests, and/or liens of any of the Prepetition Secured Parties, or the validity, enforceability, allowability, priority, secured status, or amount of the Prepetition Secured Indebtedness shall not render such objection or other pleading a Challenge for purposes of this paragraph 20.

21. ***Enforceability; Waiver of Any Applicable Stay.*** The Interim Order constituted, and this Final Order shall constitute, findings of fact and conclusions of law and shall take effect and be fully enforceable effective as of the Petition Date immediately upon entry hereof. Notwithstanding Bankruptcy Rule 9014 or any other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Final Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Final Order.

22. ***Proofs of Claim.*** Notwithstanding anything to the contrary contained in any prior or subsequent order of the Court, including, without limitation, any order establishing a deadline for the filing of proofs of claim or requests for payment of administrative expenses under section 503(b) of the Bankruptcy Code, neither the Prepetition Secured Agent nor any

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Prepetition Secured Party shall be required to file any proof of claim or request for payment of administrative expenses with respect to any of the Prepetition Secured Indebtedness or any claims (including, without limitation, Adequate Protection Superpriority Claims) arising under this Final Order. The failure of the Prepetition Secured Agent or any Prepetition Secured Party to file any such proof of claim or request for payment of administrative expenses shall not affect the validity, priority, or enforceability of any of the Secured Notes Documents or of any indebtedness, liabilities, or obligations arising at any time thereunder or prejudice or otherwise adversely affect the Prepetition Secured Agent's or any Prepetition Secured Party's respective rights, remedies, powers, or privileges under any of the Secured Notes Documents, the Interim Order, this Final Order or applicable law (as applicable). The provisions set forth in this paragraph are intended solely for the purpose of administrative convenience and shall not affect the substantive rights of any party-in-interest or their respective successors-in-interest.

23. ***Section 552(b) of the Bankruptcy Code.*** The Prepetition Secured Parties shall each be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code, and the "equities of the case" exception under section 552(b) of the Bankruptcy Code shall not apply to the Prepetition Secured Parties with respect to proceeds, products, offspring or profits of any of the Prepetition Collateral or the Collateral.

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24. ***No Marshaling.*** The Prepetition Secured Parties shall not be subject to the equitable doctrine of “marshaling” or any other similar doctrine with respect to any of the Prepetition Collateral or the Collateral, as the case may be.

25. ***Expense Invoices; Disputes; Indemnification.***

(a) Any of the Debtors’ obligations to pay, in accordance with this Final Order, the principal, interest, fees, payments, expenses, or any other amounts described in the Secured Notes Documents the Interim Order or this Final Order as such amounts become due, shall not require the Prepetition Secured Parties or any party to obtain further Court approval. For the avoidance of doubt, such payments include, without limitation, the reasonable and documented fees and disbursements of the Prepetition Secured Party Professionals, in each case to the extent set forth in paragraph 4 of this Final Order, whether or not such fees arose before or after the Petition Date, all to the extent provided in the Interim Order, this Final Order or the Secured Notes Documents.

(b) As approved upon entry of the Interim Order and pursuant to this Final Order on a final basis, the Debtors shall be jointly and severally obligated to pay all reasonable and documented fees and expenses described above, which obligations shall constitute Prepetition Secured Indebtedness. The Debtors shall pay the reasonable and documented fees and professional fees, expenses, and disbursements to the extent provided for in paragraph 4(e)(ii) and (iii) of this Final Order no later than ten business days (the

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“Review Period”) after the receipt by counsel for the Debtors, the Committee, or the U.S. Trustee of each of the invoices therefor (the “Invoiced Fees”) and without the necessity of filing formal fee applications or complying with the U.S. Trustee Guidelines, including such amounts arising before the Petition Date. Invoiced Fees shall be in the form of an invoice summary for professional fees and categorized expenses incurred during the pendency of the Cases, and such invoice summary shall not be required to contain time entries, but shall include a general, brief description of the nature of the matters for which services were performed, which may be redacted or modified to the extent necessary to delete any information subject to the attorney-client privilege, any work product doctrine, privilege or protection, common interest doctrine privilege or protection, any other evidentiary privilege or protection recognized under applicable law, or any other confidential information (such information, collectively, “Confidential Information”), and the provision of such invoices shall not constitute any waiver of the attorney-client privilege, work product doctrine, privilege or protection, common interest doctrine privilege or protection, or any other evidentiary privilege or protection recognized under applicable law; *provided*, that at any time a Professional seeks payment of Invoiced Fees from the Debtors, the Debtors, the Committee, and the U.S. Trustee reserve their rights to request additional detail regarding the services rendered and expenses incurred by such Professional, subject to any attorney-client privilege, work product doctrine, privilege or protection, common interest doctrine privilege

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or protection, or any other evidentiary privilege or protection recognized under applicable law.

(c) The Debtors, the Committee, or the U.S. Trustee may dispute the payment of any portion of the Invoiced Fees (the “Disputed Invoiced Fees”) if, within the Review Period, a Debtor, the Committee, or the U.S. Trustee notifies the submitting party in writing setting forth the specific objections to the Disputed Invoiced Fees (to be followed by the filing with the Court, if necessary, of a motion or other pleading, with at least ten days’ prior written notice to the submitting party of any hearing on such motion or other pleading). Any hearing to consider such an objection to the payment of any fees, costs, or expenses set forth in a professional fee invoice hereunder shall be limited to the reasonableness of the fees, costs and expenses that are the subject of the objection and any other matter that the Court determines to be heard. For the avoidance of doubt, the Debtors shall promptly pay in full all Invoiced Fees other than the Disputed Invoiced Fees.

(d) In addition, the Debtors hereby indemnify each of the Prepetition Secured Noteholders, the Prepetition Secured Agent, and each of their respective affiliates, successors, and assigns and the officers, directors, employees, agents, attorneys, advisors, controlling persons, and members of each of the foregoing, each in their capacity as such, (each, an “Indemnified Person”) and hold them harmless from and against all costs, expenses (including reasonable and documented postpetition legal fees and expenses), and liabilities

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arising out of or relating to the transactions contemplated hereby and any actual or proposed use of the Cash Collateral [as set forth herein](#). No Indemnified Person shall have any liability (whether direct or indirect, in contract, tort, or otherwise) to the Debtors or any shareholders or creditors of the Debtors for or in connection with the transactions contemplated hereby, except to the extent such liability is found in a final non-appealable judgment by a court of competent jurisdiction to have resulted solely from such Indemnified Person's gross negligence, fraud, or willful misconduct. In no event shall any Indemnified Person or any Debtor be liable on any theory of liability for any special, indirect, consequential, or punitive damages; *provided*, that this shall not affect the Debtors' indemnification obligations pursuant to the immediately preceding sentence.

26. ***Headings.*** The headings in this Final Order are for purposes of reference only and shall not limit or otherwise affect the meaning of this Final Order.

27. ***Interim Order.*** Except as specifically amended or modified hereby, all of the provisions of the Interim Order and any actions taken by the Debtors or the Prepetition Secured Parties (including, without limitation, the Prepetition Secured Agent) in accordance therewith or in reliance thereon are hereby ratified by this Final Order.

28. ***Retention of Jurisdiction.*** The Court has and will retain jurisdiction to enforce this Final Order according to its terms.

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29. ***Controlling Effect of Final Order.*** To the extent any provision of this Final
Order conflicts or is inconsistent with any provision of the Motion, the Interim Order or any
other order of this Court, the provisions of this Final Order shall control.

Exhibit 1

Final Budget

Exhibit 2

Testing Cadence

Test Periods

| <u>Budget Delivered</u> | <u>Test Period</u> | | <u>Variance Report Sent</u> |
|------------------------------|--------------------|------------|-----------------------------|
| | <u>Start</u> | <u>End</u> | |
| Wednesday, February 28, 2024 | WE 3/1 | WE 3/8 | Friday, March 15, 2024 |
| Wednesday, March 13, 2024 | WE 3/15 | WE 3/22 | Friday, March 29, 2024 |
| Wednesday, March 27, 2024 | WE 3/29 | WE 4/5 | Friday, April 12, 2024 |
| Wednesday, April 10, 2024 | WE 4/12 | WE 4/19 | Friday, April 26, 2024 |
| Wednesday, April 24, 2024 | WE 4/26 | WE 5/3 | Friday, May 10, 2024 |
| Wednesday, May 8, 2024 | WE 5/10 | WE 5/17 | Friday, May 24, 2024 |
| Wednesday, May 22, 2024 | WE 5/24 | WE 5/31 | Friday, June 7, 2024 |
| Wednesday, June 5, 2024 | WE 6/7 | WE 6/14 | Friday, June 21, 2024 |
| Wednesday, June 19, 2024 | WE 6/21 | WE 6/28 | Friday, July 5, 2024 |
| Wednesday, July 3, 2024 | WE 7/5 | WE 7/12 | Friday, July 19, 2024 |
| Wednesday, July 17, 2024 | WE 7/19 | WE 7/26 | Friday, August 2, 2024 |
| Wednesday, July 31, 2024 | WE 8/2 | WE 8/9 | Friday, August 16, 2024 |
| Wednesday, August 14, 2024 | WE 8/16 | WE 8/23 | Friday, August 30, 2024 |
| Wednesday, August 28, 2024 | WE 8/30 | WE 9/6 | Friday, September 13, 2024 |

| Summary report: | |
|--|-----------|
| Litera Compare for Word 11.6.0.100 Document comparison done on 3/11/2024 10:11:43 PM | |
| Style name: 2 WC StandardSet | |
| Intelligent Table Comparison: Active | |
| Original filename: NVTa - Cash Collateral Final Order (4875-0795-6906.2).docx | |
| Modified filename: Invitae - Cash Collateral Final Order WC Comments - Ex. to CC Obj..docx | |
| Changes: | |
| <u>Add</u> | 33 |
| Delete | 20 |
| Move From | 0 |
| <u>Move To</u> | 0 |
| <u>Table Insert</u> | 0 |
| Table Delete | 0 |
| <u>Table moves to</u> | 0 |
| Table moves from | 0 |
| Embedded Graphics (Visio, ChemDraw, Images etc.) | 0 |
| Embedded Excel | 0 |
| Format changes | 0 |
| Total Changes: | 53 |