SULLIVAN & CROMWELL LLP
Ari Blaut (admitted pro hac vice)
Benjamin Beller (admitted pro hac vice)
125 Broad Street
New York, NY 10004
Telephone: (212) 558-1656
Facsimile: (212) 558-3588
Email: blauta@sullcrom.com
bellerb@sullcrom.com

Counsel to the Deerfield Partners, L.P.

WOLLMUTH MAHER & DEUTSCH LLP
James N. Lawlor
500 Fifth Avenue
New York, NY 10110
Telephone: (212) 382-3300
Facsimile: (973) 741-2398
Email: jlawlor@wmd-law.com

Counsel to Deerfield Partners, L.P.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
INVITAE CORPORATION, *et al*.,	Case No. 24-11362 (MBK)
Debtors.[1]	(Jointly Administered)

RESPONSE OF DEERFIELD PARTNERS, L.P. AND JOINDER TO DEBTORS' REPLY TO OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO FINAL APPROVAL OF DEBTORS' CASH COLLATERAL MOTION

Deerfield Partners, L.P. ("Deerfield"), as holder of a majority of the 2028 Senior Secured Notes, hereby submits this response and joinder to the Debtors' reply (the "Response") in support of the *Debtors' Motion for Entry of a 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; (IV) Scheduling a Final*

[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' 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.

Hearing; and (V) Granting Related Relief [ECF No. 18] (the "Motion")[2] and in response to the objection to the Motion filed by the Official Committee of Unsecured Creditors (the "Committee").[3]

Deerfield joins in and incorporates by reference herein the arguments set forth in the Debtors' Reply. In further support of the Response, Deerfield respectfully states as follows:

PRELIMINARY STATEMENT

1. The Debtors' proposed final order approving the use of cash collateral is the product of extensive, arm's-length negotiation among the Debtors, Deerfield and the Prepetition Secured Agent (together with Deerfield, the "Consenting Parties") for the Debtors' consensual use of the Prepetition Secured Parties' Cash Collateral. The final order provides customary and market terms that are fair and reasonable to the Debtors' estates while avoiding a potentially expensive litigation battle with the Prepetition Secured Parties, which, in addition to reducing the estates' liquidity, could have negatively impacted the Debtors' marketing process, the success of which is critical to all stakeholders. In exchange for their consent to use Cash Collateral, the Consenting Parties negotiated for customary adequate protection designed to provide the Prepetition Secured Parties with reasonable protection against the diminution in value of their collateral, which was critical given the Debtors' forecast that their liquidity will decline by more than $66 million over the thirteen weeks following the Petition Date.[4] The final order reflects an appropriate balance between providing the Debtors with funding for their chapter 11 cases and protecting the Consenting Parties' interests in Cash Collateral.

---

[2] Capitalized terms used but not otherwise defined herein shall have the meaning set forth in the Motion or the Interim Order [ECF No. 47], as applicable.

[3] ECF No. 148 (the "Objection").

[4] Interim Order Ex. 1.

2. Through the Objection, however, the Committee takes issue with a handful of pieces of that careful bargain that it postulates are unnecessary to adequately protect the Prepetition Secured Parties. In so doing, the Committee appears willing to push the Debtors headfirst into a default under the Interim Cash Collateral Order and the Transaction Support Agreement and destabilize the Debtors' operations early in these cases, to the detriment of all of the Debtors' stakeholders, including the unsecured creditor constituency represented by the Committee. It is not the Committee's judgment about what is "sufficient" to provide the Prepetition Secured Parties with adequate protection that matters. The Debtors, in their business judgment, determined that agreeing to the terms negotiated with the Consenting Parties, which are entirely consistent with market terms, is appropriate and reasonable. Contrary to the Committee's objection, the terms of the proposed final order enable the Committee to exercise its fiduciary duties to the fullest extent. The Committee's anticipated investigation and effort to seek standing to commence a challenge to the Prepetition Liens, which are not before the Court, do not change that and are not prejudiced by those terms.

3. The Committee's purported concerns are misplaced. Nevertheless, the Debtors and Deerfield have endeavored to work in good faith with the Committee to resolve their concerns, and the Consenting Parties agreed to accommodate the majority of the requests made by the Committee to modify the proposed order, including increasing the Committee's investigation from $50,000 to $125,000 and extending the Committee's Challenge Deadline to 75 days from the Committee's formation from 60 days. These accommodations are reflected in an updated proposed order filed contemporaneously by the Debtors.

4. Despite the Debtors' and Consenting Parties' good-faith attempts to work with the Committee to resolve the Objection, the Committee has insisted on additional revisions

to the terms of the proposed final order that are entirely off-market and would deprive the Prepetition Secured Parties of important and necessary protections in connection with the use of Cash Collateral. The Committee cannot selectively rewrite the bargain between the Debtors and the Consenting Parties, which was negotiated at arm's length and in good faith and is inextricably linked to the overall agreement to consent to the use of Cash Collateral. Accordingly, the Objection should be overruled.

RESPONSE

I. The Proposed Adequate Protection Liens on Proceeds of Avoidance Actions and Commercial Tort Claims Is Customary and Appropriate.

5. The Committee provides no relevant support for its assertion that the proposed adequate protection liens on proceeds of Avoidance Actions and commercial tort claims are "inappropriate." *See* Obj. ¶ 20. In the case of adequate protection liens, section 361(2) expressly contemplates the imposition of "additional liens" as a form of adequate protection to the extent of any diminution in value. *See* 11 U.S.C. § 361(2). Courts in this district routinely authorize liens on proceeds of avoidance actions and commercial tort claims in the context of adequate protection. *See, e.g., In re Mee Apparel LLC,* No. 14-16484 (CMG), 2014 WL 2558191, at *14 (Bankr. D.N.J. 2014) (entering final order approving postpetition liens on proceeds of any avoidance actions under Chapter 5 of the Bankruptcy Code); *In re Roseville Senior Living Properties, LLC*, No. 13-31198 (DHS), 2013 WL 6388342, at *4 (Bankr. D.N.J. 2013) (same); *In re Love Culture Inc.*, No. 14-24508 (NLW), 2016 WL 11908916, at *7 (Bankr. D.N.J. 2016) (entering final order approving postpetition liens on proceeds of commercial tort claims and avoidance actions under Chapter 5 of the Bankruptcy Code). As with any estate asset, a debtor may grant liens or superpriority claims on avoidance action proceeds or any other unencumbered

asset to provide adequate protection to prepetition lenders.[5] Doing so is especially appropriate in cases where, as here, there are limited unencumbered assets and providing such liens – which are granted only to the extent of diminution in value of valid prepetition collateral of the Prepetition Secured Parties – is a reasonable exchange for the consent provided to the use of cash collateral.

6. The Committee's argument that proceeds of Avoidance Actions cannot be pledged to secure the Adequate Protection Liens because Avoidance Actions arise as of the petition date and therefore cannot be encumbered by prepetition liens is also unavailing. Obj. ¶ 25. Adequate protection liens are themselves a creation of the Bankruptcy Code and arise on a post-petition basis to protect lenders such as the Prepetition Secured Parties against the diminution in value of their collateral during chapter 11 cases. It is therefore entirely appropriate – as innumerable courts have recognized – to permit the pledge of such proceeds to secure the Adequate Protection Liens. *See* Response ¶13 (citing cases).

7. Moreover, the Committee's arguments that principles of equity justify excluding proceeds of Avoidance Actions and commercial tort claims for the Adequate Protection Liens are similarly unpersuasive.[6] First, the Committee's disparaging allegations that Deerfield or other exchanging noteholders have "unclean hands" or may be "guilty of fraud, unconscionable conduct, or bad faith" are entirely baseless and without any factual support. And, in any event,

---

[5] As Judge Goldblatt in the District of Delaware recently noted, there is nothing unique about avoidance actions as estate assets; they may be pursued, pledged, sold, or otherwise used by the debtor in whichever way, in its business judgment, the debtor determines maximizes value. *In re Nova Wildcat Shur-Line Holdings, Inc.*, Case No. 23-10114 (CTG) (Bankr. D. Del. March 2, 2023), Hr'g Tr. at 88–89.

[6] Notably, the two cases cited by the Committee involve situations where the creditor seeking adequate protection is significantly oversecured and/or the value of the collateral is expected to increase. *See In re Gallegos Rsch. Grp.,* 193 B.R. 577, 586 (Bankr. D. Colo. 1995) (noting that the debt owed to the secured party is $36,988 and the assets securing the debt are valued at $86,000); *In re Cardell*, 88 B.R. 627, 633 (Bankr. D.N.J. 1988) ("In this case, the value of the collateral will not only be stabilized but it should also increase. As indicated supra, the debtors have equity in the collateral of approximately $480,000 and this interest is increasing . . ."). Here the value of the Prepetition Secured Parties' collateral is not fully determine and in any event is declining and will continue decline over the course of the cases, and thus they are entitled to replacement liens to protect against such diminution. *See, supra* ¶ 1.

the Committee's ability to assert equitable claims in connection with any Challenge are fully preserved under the proposed order. There is simply no basis in the record or otherwise to exclude a standard form of adequate protection from the package provided to the Prepetition Secured Parties at this stage, particularly when the Committee has not even articulated any such claim.[7]

II. The Proposed Final Order Enables the Committee to Perform Its Fiduciary Duties.

8. The challenge budget and the duration of the Challenge Period provided under the proposed order are consistent with market terms in light of the circumstances of these chapter 11 cases, and the terms of the proposed order provide the Committee a full opportunity to investigate and seek standing to litigate any Challenge.

A. The Challenge Budget Set Forth in the Proposed Final Order Is More Than Sufficient Considering the Circumstances of the Cases.

9. As discussed above, the Debtors and the Consenting Parties have already agreed to increase the challenge budget from $50,000 to $125,000 in the Proposed Final Order. *See, supra* ¶ 2. A challenge budget of $125,000 is significantly above-market relative to other cases involving similar complexity with respect to debtors' capital structure. *See, e.g., In re David's Bridal, LLC*, No. 23-13131 (CMG) (Bankr. D.N.J. 2023) [ECF Nos. 63, 285] (authorizing a budget of $50,000); *In re Thrasio Holdings, Inc.*, No. 24-11840 (CMG) (Bankr. D.N.J. 2024) [ECF. No. 81] (authorizing a budget of $50,000); *In re Custom Alloy Corporation*, No. 22-18143 (MBK) (Bankr. D.N.J. 2024) [ECF Nos. 31, 60, 489] (authorizing a budget of $50,000).

10. The two cases that the Committee cites in favor of a larger budget involve significantly larger cases with capital structures that are far more complex than the Debtors'. Obj.

[7] Furthermore, the Committee's concern with respect to the Prepetition First Lien Adequate Protection Liens seems particularly misplaced given the Committee's expectation that it will successfully avoid the Prepetition Liens. If the Committee successfully challenges the Prepetition Liens in full, any adequate protection replacement liens afforded to those claims and liens would fall away.

¶ 33; *see, e.g., In re WeWork, Inc.*, No. 23-19865 (JKS) (Bankr. D.N.J. 2023) [ECF No. 1159] (authorizing a budget of $300,000 where the debtors' capital structure includes a credit facility, first, second and third lien secured notes, and second and third lien exchangeable notes); *In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. 2023) [ECF No. 428] (authorizing a budget of $500,000 where the debtors' capital structure includes a credit facility and two tranches of secured notes). Unlike the cases cited by the Committee, the Debtors have only one class of secured creditors.[8] The Committee's suggestion that the investigation budget in those two cases are "typical" for cases in this Circuit is disingenuous at best. The $125,000 budget set forth in the Proposed Final Order is more than sufficient in light of the circumstances of the Cases.

B. The Challenge Period Set Forth in the Proposed Final Order Is More Than Sufficient Considering the Circumstances of the Cases.

11. As discussed above, the Debtors and the Consenting Parties have already agreed in the Proposed Final Order to increase the duration of the Challenge Period from 60 to 75 days following the appointment of the Committee. *See, supra* ¶ 2. Courts in this district routinely authorize challenge periods of 75 days or less, including, notably, in the more complex *Rite Aid* case that the Committee cites in the Objection in favor of its argument for an increased challenge budget. *See, e.g., In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. 2023) [ECF No. 428] (authorizing 60 days); *In re David's Bridal, LLC*, No. 23-13131 (CMG) (Bankr. D.N.J. 2023) [ECF Nos. 63, 285] (authorizing 60 days); *In re Thrasio Holdings, Inc.*, No. 24-11840 (CMG) (Bankr. D.N.J. 2024) [ECF. No. 81] (authorizing 60 days); *In re Custom Alloy Corporation*, No. 22-18143 (MBK) (Bankr. D.N.J. 2024) [ECF Nos. 31, 60, 489] (authorizing 75 days pursuant to the first interim order and 60 days pursuant to the second interim order). The 75-day Challenge

[8] *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."). ¶ 47.

Period provided in the Proposed Final Order thus conforms to market practice while respecting the Prepetition Secured Parties' legitimate interest in finality.

C. There Is No Basis to Grant the Committee Standing Through the Final Cash Collateral Order.

12. The Committee's complaint that it is too burdensome to file a standing motion as is required by established authority and that the Committee therefore should be granted automatic standing is entirely unpersuasive. Obj. ¶ 41. *First*, such a demand is entirely inconsistent with both established law and market practice. *See, e.g., In re Gulf Coast Health Care, LLC*, No. 21-11336 (KBO) (Bankr. D. Del. 2021) [ECF Nos. 226, 491 (approving final order without granting the committee automatic standing over the committee's objection); *In re AppHarvest Products, LLC*, No. 23-9074 (DRJ) (Bankr. S.D. Tex. 2023) [ECF Nos. 245, 297] (same); *In re Exide Holdings, Inc.*, No. 20-11157 (CSS) (Bankr. D. Del. 2020) [ECF Nos. 268, 345] (same).[9] *Second*, it is unnecessary here given the time and budget provided to the Committee to conduct an investigation, as well as the tolling of the Challenge Deadline on filing a standing motion provided in the proposed order. *See* Proposed Final Order ¶ 19. *Third,* the requirement for the Committee to seek and obtain standing serves an important gatekeeping function that avoids wasteful litigation that would deplete the estates' resources. That is why the standard requires the Committee to show not only that it seeks to pursue colorable claims, but that the Debtors have unjustifiably refused to pursue those claims. *See Official Comm. of Unsecured Creditors*

[9] Courts have consistently taken the view that it is debtors, not creditors' committees, that are vested with the primary responsibility for pursuing claims based on the interest of the estate. *See, e.g., In re Smart World Techs. (Smart World Techs et al. v. Official Comm. of Unsecured Creditors, et al.)*, 423 F.3d 166, 175 (2d Cir. 2005) ("It is the debtor-in-possession who controls the estate's property, including its legal claims, and it is the debtor-in-possession who has the legal obligation to pursue claims or to settle them, based upon the interests of the estate"); *In re Merritt (Merritt v. R&R Cap. LLC et al.)*, 711 F. App'x 83, 86 (3d Cir. 2017) (noting that situations involving "lapses in a trustee's execution of its fiduciary duty" are "uncommon"). That is because the interests of debtors (which have duties to the estates) and committees (which have duties only to unsecured creditors) can easily diverge.

Cybergenics v. Chinery, 330 F.3d 548, 567 (3d Cir. 2003). The Committee attempts to flip this burden improperly onto the Debtors. Moreover, the Committee has produced no evidence demonstrating that a colorable claim exists, that the Debtors have unjustifiably refused to bring suit on account of such claim, or that prosecution of such claim would benefit the Debtors' estates as a whole. Instead, the Committee seeks to shortcut these fundamental evidentiary requirements, substitute its business judgement for that of the Debtors and usurp the Court's role in determining whether standing is proper. The Committee's request for standing, if any, should be brought by motion, on appropriate notice, and upon a sufficient evidentiary record, and the proposed order fully preserves the Committee's rights to do so.

III. The Committee's Allegations With Respect to the 2023 Transactions Are Rife with Mischaracterizations, Misstatements and Assumptions.

13. Although the Committee's assertions with respect to the 2023 transactions are not before the Court in connection with the Motion and are of no moment for the requested relief, the Committee's allegations paint an incomplete and misleading picture of those transactions to suit the Committee's own agenda.

14. First, while the Committee characterizes the 2023 transactions as the "Deerfield Uptier", as the Committee itself acknowledges, a number of other unsecured noteholders participated in those transactions, including current holders of Convertible Senior Unsecured Notes.[10]

15. Second, the Committee unjustifiably diminishes the material value provided to the Debtors in connection with the 2023 transactions, including the reduction in principal

[10] In addition, the Committee's ad hominem attack on Perella Weinberg Partners, while lacking any actual allegation of wrongdoing, is inappropriate and unsubstantiated.

resulting from the exchange of unsecured notes for equity, the material maturity extension, and the new-money financing provided by the exchanging parties.

16. Third, the Committee's focus on the alleged absence of value provided to Invitae's subsidiaries ignores the plan structure agreed to by the Debtors and Deerfield under the terms of the Transaction Support Agreement. The Transaction Support Agreement provides that, subject to the terms thereof, the Prepetition Secured Parties' liens against those subsidiaries will not be enforced and, in fact, that all unsecured creditors of the subsidiary Debtors will be repaid in full *ahead* of the Prepetition Secured Parties. First Day Decl. Ex. B.

17. Finally, while the Committee will have a full opportunity to investigate any claims it alleges exist with respect to the 2023 transactions, any such claims will be vigorously defended and will be shown to be without merit.

CONCLUSION

18. For the reasons set forth herein, Deerfield respectfully requests that the Court overrule the Objection and grant the Motion on a final basis and such other relief as it deems just and proper.

Dated: March 14, 2024

/s/ James N. Lawlor

WOLLMUTH MAHER & DEUTSCH LLP
James N. Lawlor
500 Fifth Avenue
New York, NY 10110
Telephone: (212) 382-3300
Facsimile: (973) 741-2398
Email: jlawlor@wmd-law.com

SULLIVAN & CROMWELL LLP
Ari Blaut (admitted pro hac vice)
Benjamin Beller (admitted pro hac vice)
125 Broad Street
New York, NY 10004
Telephone: (212) 558-1656
Facsimile: (212) 558-3588
Email: blauta@sullcrom.com
bellerb@sullcrom.com

Counsel to Deerfield Partners, L.P.