UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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| IN RE: | . | Case No. 24-11362(MBK) |
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| INVITAE CORPORATION, | . | (Jointly Administered) |
| *et al.*, | . | |
| | . | 402 East State |
| | . | Trenton, NJ 08608 |
| Debtors. | . | |
| | . | May 7, 2024 |
| . . . . . | . | 10:05 a.m. |

TRANSCRIPT OF HEARING ON
NOTICE OF (I) FILING OF THE ASSET PURCHASE AGREEMENT AND PROPOSED SALE ORDER WITH RESPECT TO THE LABCORP SALE TRANSACTION, (II) MODIFIED CURE OBJECTION DEADLINE, AND (III) RESCHEDULED SALE HEARING [DOCKET NO. 364]; AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION TO EXTEND THE CHALLENGE PERIOD THROUGH JUNE 15, 2024 [DOCKET NO. 438]; AND DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP and KIRKLAND & ELLIS INTERNATIONAL LLP AS ATTORNEY FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024 [DOCKET NO. 158]; AND MOTION FOR RELIEF FROM AUTOMATIC STAY IN ORDER TO OFFSET SECURITY DEPOSIT AND LETTER OF CREDIT [DOCKET NO. 296]

BEFORE THE HONORABLE MICHAEL B. KAPLAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

APPEARANCES ON NEXT PAGE.

Audio Operator: Kiya Martin

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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**268 Evergreen Avenue**
**Hamilton, New Jersey 08619**
**E-mail: jjcourt@jjcourt.com**

**(609) 586-2311 Fax No. (609) 587-3599**

APPEARANCES:

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|---|---|
| For the Debtors: | Kirkland & Ellis LLP<br>BY: FRANCIS PETRIE, ESQ.<br>JOSHUA A. SUSSBERG, ESQ.<br>NICOLE L. GREENBLATT, ESQ.<br>JEFFREY GOLDFINE, ESQ.<br>601 Lexington Avenue<br>New York, New York 10022<br><br>Kirkland & Ellis LLP<br>BY: SPENCER A. WINTERS, ESQ.<br>300 North LaSalle<br>Chicago, IL 60654<br><br>Kirkland & Ellis LLP<br>BY: MARK McKANE, ESQ.<br>555 California Street<br>27th Floor<br>San Francisco, CA 94104<br><br>Cole Schotz, P.C.<br>BY: MICHAEL D. SIROTA, ESQ.<br>WARREN A. USATINE, ESQ.<br>FELICE R. YUDKIN, ESQ.<br>DANIEL J. HARRIS, ESQ.<br>Court Plaza North, 25 Main Street<br>Hackensack, New Jersey 07601 |
| For the U.S. Trustee: | Office of the United States Trustee<br>By: JEFFREY M. SPONDER, ESQ.<br>LAUREN BIELSKIE, ESQ.<br>One Newark Center<br>Newark, NJ 07102 |
| For Integrated DNA Technologies, Inc.: | Proskauer Rose LLP<br>BY: TIMOTHY QUAID KARCHER, ESQ.<br>11 Times Square<br>New York, NY 10036 |
| For Deerfield Partners, L.P.: | Sullivan & Cromwell, LLP<br>By: BENJAMIN BELLER, ESQ.<br>125 Broad Street<br>New York, NY 10004 |
| For the Official Committee of Unsecured Creditors: | White & Case LLP<br>BY: J. CHRISTOPHER SHORE, ESQ.<br>1221 Avenue of the Americas<br>New York, NY 10020 |

**I N D E X**

(Proceedings commenced at 10:05 a.m.)

THE COURT: -- hand function. We have a full courtroom here of counsel, but I will do my best to make sure you have access.

Let me turn to debtors' counsel. Good morning.

MR. PETRIE: Good morning, Your Honor.

For the record, Francis Petrie of Kirkland, proposed counsel for the debtors.

We have several items up for hearing today as Your Honor noted so I'd like to take a minute to just set the stage on the major discussions that are going to be happening.

First, we're going to be seeking approval of the sale order which memorializes the results of the months-long marketing process that led to a competitive auction which coming out of we received the successful bid from LabCorp Genetics.

We'll provide more detail about the sale transaction later but it is truly a significant achievement for the company and a major step for progress in these Chapter 11 cases. The sale order contemplates that Invitae will be sold as a going concern with LabCorp acquiring substantially all of the company's assets and employees in exchange for cash and other consideration that provides sufficient amounts to the estate to provide a path out of Chapter 11.

Next on the agenda, we have the Committee's motion to

extend the challenge period which was filed on Friday with an accompanying motion to shorten. We understand from a text order entered on the docket yesterday that Your Honor has set this item to go forward as a status conference only with any substantive argument to come at a later hearing.

The debtors in Deerfield, one of the secured lenders, each filed objections to the motion to shorten, but based on Your Honor's text order, I believe that scheduling this argument will be the main order of business today.

And third, we have Kirkland's retention application which will be going forward on a contested basis. As Your Honor is aware, Kirkland's retention received objections from the Committee and the U.S. Trustee. I'd like to inform Your Honor that we've engaged with the U.S. Trustee very constructively to solve the 10 or so ancillary issues that he raised in the end of his objection and we've reached consensus with Mr. Sponder on those items.

So those will be contained in a proposed form of order in a supplemental declaration -- or a supplemental declaration, as applicable, which means that their only remaining objection are the Committee's issues which we can address when the time comes.

So that's what's coming up at today's hearing. Would Your Honor like to make any comments or do you have any questions at the outset before we jump into the agenda?

THE COURT: No, I think we should just go all in.

MR. PETRIE: All right, then.

With that, Your Honor, today the debtors are here seeking entry of the sale order originally filed at Docket Number 364 that we have amended since then and submitted to chambers.

First, in support of the sale order, we and LabCorp, the purchaser, have submitted two declarations, one of Andrew Swift, a managing director at Moelis & Company, which was filed at Docket Number 437, which discusses how the assets were marketed and the process that led to the selection of LabCorp as the highest and best fit.

And Hogan Lovells, as counsel to the purchaser, filed the declaration of Anil Asnani of LabCorp at Docket Number 435, which discusses other aspects of the sale and auction process, including that the parties engaged in good faith and at arm's length and that LabCorp has the financial wherewithal to provide adequate assurance to contract counterparties.

Both Mr. Swift and Mr. Asnani are in the courtroom here today and are available for cross-examination if needed. But at this point, in support of the sale order, I would like to move both of those declarations into evidence.

THE COURT: All right. Any objection by counsel present or remote?

(No audible response)

THE COURT: Hearing none, we'll mark them D-1 and D-2 respectively.

(Debtors' Exhibits D-1 and D-2 admitted into evidence)

MR. PETRIE: Great. Thank you, Your Honor.

So as Your Honor is aware, the company entered Chapter 11 without any committed bids for all of the company's assets, though we had engaged in a robust pre-petition marketing process. Under the bidding procedures that were approved in February, we had 54 days to get to the bid deadline.

Accordingly, through that time frame, we continued our extensive efforts with multiple potential purchasers, including strategic investors in the healthcare space and certain special situations investors. The process included substantial efforts by the company's advisor team and management, including many rounds of telephonic meetings and diligence calls. We believe we engaged with over 70 potential buyers in total.

These efforts yielded several actionable offers by the bid deadline. Ultimately, this led to a competitive auction that began on April 17th and closed on April 24th, which included participation and arms-length negotiation with several potential purchasers over many rounds of bidding.

At the auction, and based on the bid documentation and underlying consideration, the debtors ultimately determined

in consultation with the Committee that the sale transaction proposed by LabCorp Genetics was the otherwise best offer available for substantially all of the debtors' assets. After naming LabCorp the successful bidder, the debtors and LabCorp worked to finalize the terms of the transaction.

And, ultimately, on May 1st, 2024, the debtors and LabCorp entered into an asset purchase agreement that included many features, including a purchase price of 239 million in cash in exchange for substantially all of the debtors' assets. We filed a version of this APA on the docket on April 25th at Docket Number 634.

The APA in this instance represents greater cash consideration than any other bid received by the debtors but, beyond that, the sale transaction creates value far in excess of the headline purchase price of 239 million. The applicable standard here is the business judgment rule, and entry into this APA is certainly a sound exercise of that judgment. The auction yielded best return for these assets and will bring millions into the estates, with some additional features, as well.

The LabCorp APA contemplates a going-concern transaction that preserves the vast majority of employees' jobs, a commitment by LabCorp to collect and remit collections of any accounts receivable existing at the time of closing for the benefit of the debtors' estates, and the assumption and

assignment to LabCorp of a significant number of the debtors' executory contracts and unexpired leases, with certain truer costs to be borne by LabCorp pursuant to the terms of the APA.

Your Honor, there does remain a lot of work to do to close this transaction, including finalizing regulatory approvals with government agencies, which we hope to accomplish this summer. But getting the sale approved today is the first major step in that process. Finalizing approval today will allow us to take the steps necessary to consummate the sale and for the estate to begin to collect the sale proceeds.

These proceeds will give the debtors sufficient consideration to wind down the remaining estate assets pursuant to a Chapter 11 plan and in accordance with the priority outlined in the transaction support agreement. We do plan to file a plan and disclosure statement this week that describes how those sale proceeds will be allocated and demonstrate a path out of Chapter 11 for this company.

The debtors did receive three formal objections at the UCC's reservation of rights to entry of the sale order, as well as several informal inquiries, including from the U.S. Trustee. We worked collaboratively and constructively with all of the objecting parties, the UCC, and the U.S. Trustee, as well as with the purchaser and pre-petition secured lenders to incorporate certain language into the proposed sale order, which the debtors shared with chambers yesterday.

Accordingly, we understand that no party currently objects to entry of the sale order and that we can move forward with approval of this order on a consensual basis. One of the objections by MassMutual has been withdrawn as of this morning.

The remaining substantive objections were solved through mutually agreeable language. We also received eleven formal cure objections and eight informal cure objections from contract counterparties, all of which have been resolved or nearing resolution.

And to the extent that we need, Your Honor, to weigh in a cure dispute, all parties' rights are reserved with regards to these cure disputes. And we would plan to have those heard at a later hearing if necessary.

But with that, Your Honor, we do request entry of the sale order. I understand that -- first, does Your Honor have any questions thus far?

THE COURT: I just want to confirm, apart from the cure objections that were filed, the objections with respect to the insurance policies.

MR. PETRIE: Yes.

THE COURT: And --

MR. PETRIE: Natera was the other --

THE COURT: The other --

MR. PETRIE: Yes.

THE COURT: -- sale agreement, supply agreements have

been satisfied --

MR. PETRIE: They have, yeah.

THE COURT: -- consensually?

MR. PETRIE: Yes, they have.

THE COURT: There's -- we'll hear, Counsel?

MR. PETRIE: Well --

MR. KARCHER: Your Honor, this is Timothy Karcher.

Timothy Karcher of Proskauer Rose, on behalf of Integrated DNA Technologies.

You mentioned supply agreements. We are objecting to the assumption of the supply agreement. That agreement is being heard at another date.

THE COURT: Oh, right. Okay. So, again, I lumped that in with the cure objection amounts and the related issues.

MR. KARCHER: Understood.

THE COURT: All right. Thank you, Counsel.

So the other objections have either been resolved with language that will be submitted?

MR. PETRIE: Yes. So that's in the APA that was submitted -- in the sale order that was submitted to chambers, there was additional language with regards to Natera about the scope of their injunction and to Chubb about the treatment of their insurance policies. Both of those have been resolved.

THE COURT: All right. Will we be awaiting a new form of order or do we have --

MR. PETRIE: No, barring any changes today, the one that we submitted last night is the one that still stands.

THE COURT: I've got to keep current here.

MR. PETRIE: Yes.

THE COURT: It's ever-changing.

All right. The Court is very pleased to see that it was an effective and rigorous bidding process. This is not a situation where the stalking horse bidder prevailed. That is evident. I'm not going to make specific findings orally at the moment apart from just noting that there's been sufficient notice and proper notice with respect to the sale process starting with the bidding procedures orders through today's confirmation of the sale.

Certainly, the Court is going to defer to the debtors' and consulting parties' business judgment in selecting LabCorp as the prevailing bidder. The process was at arm's length. Certainly, the consideration seems ample and reasonable unless we satisfy the Abbotts Dairies requirements, which I'm sure most -- the language in the proposed order will satisfy all parties with respect to specific findings that are necessary and conclusions of law.

And so the Court has no issue with approving the sale as presented.

MR. PETRIE: Great. Thank you, Your Honor.

THE COURT: Thank you, Counsel.

MR. PETRIE: We were wondering if Karcher's counsel wanted to say something.

Thank you, Your Honor. With that, we'll resubmit the order to chambers just for good measure so you have the latest, but it will be substantially the same.

THE COURT: All right. And, of course, the Court recognizes that all parties with respect to the cure issues preserve their rights for yet another day.

MR. PETRIE: Right.

On a related note, Mr. Karcher, who was just up here, filed a declaration in support of his cure objection. There was a motion to seal at Docket Number 406. That is currently unopposed. If Your Honor would indulge us and have that entered or we can have that carried to whatever hearing in the future.

THE COURT: Well, is there any opposition?

Mr. Sponder?

MR. SPONDER: Thank you, Your Honor.

Jeff Sponder from the Office of the United States Trustee.

Your Honor, we would appreciate if it gets adjourned to the same date so we could have a further look at it.

THE COURT: Any issue, Mr. Karcher?

MR. KARCHER: There's no issue with adjourning it to another date. However, if we could just share it with the

Office of the United States Trustee in advance of any adjourned date, perhaps we could have it entered on consent.

THE COURT: At any point, if you resolve the issues or concerns of the UST, the Court's more than happy to enter it in advance of the next round of hearings.

MR. KARCHER: Thank you very much, Your Honor.

THE COURT: All right.

MR. SPONDER: Thank you, Your Honor.

THE COURT: Thank you. So, we'll mark that motion carried. Do we have a date?

MR. PETRIE: We have, I think, May 20th. We have an omnibus, don't we?

THE COURT: An omnibus date?

THE CLERK: Yes, 10 a.m.

THE COURT: All right. So, why don't we carry that motion to that date, and we'll go from there.

MR. PETRIE: Great.

THE COURT: All right.

MR. KARCHER: Thank you, Your Honor.

THE COURT: Thank you.

MR. PETRIE: Thank you, Your Honor.

So with that, that brings an end to the sale portion of this agenda. Next is the Committee's motion, which I understand is going forward on status. So I'll turn it over to him.

THE COURT: Sure. Good morning, Counsel.

MR. SHORE: Good morning, Your Honor.

Chris Shore from White & Case on behalf of the Official Committee. We submitted the motion. We're happy to have a discussion regarding scheduling. The current deadline is the 15th, so we can have a -- and I think we can probably do it telephonically, if Your Honor -- or by video, if Your Honor wants.

Any time between now and then, we just need a decision before the 15th, because if Your Honor denies the application, we'll push the button.

THE COURT: All right.

MR. SHORE: And if it's -- you know, if we're playing preferences online, next Wednesday is bad for me, but otherwise, I'm good.

THE COURT: Well, let me hear from debtors' counsel or counsel for Deerfield.

MS. GREENBLATT: Good morning, Your Honor.

Nichole Greenblatt from Kirkland & Ellis on behalf of the debtors. Nice to see you.

We have no objection to moving the hearing to next week. We see no emergency requiring it to go forward today with everything else that's on the agenda. So no opposition to a Zoom scheduling hearing either. We do think it might make sense to also schedule a status conference or a chambers

conference with Your Honor in connection with this which we would propose doing off the record, but we're also happy to just get back on a Zoom next week.

THE COURT: All right. And, Counsel, thank you --

MS. GREENBLATT: Thank you.

THE COURT: -- Ms. Greenblatt.

MR. BELLER: Good morning, Your Honor.

Ben Beller from Sullivan & Cromwell on behalf of Deerfield.

We're also happy to accommodate the arrangement that was just proposed as well as the chambers conference that debtors' counsel has requested.

THE COURT: Great.

MR. BELLER: Thank you.

THE COURT: Let me, if I may, give you my thoughts and try to work this out into a calendar and see if it can spur any consensus.

At the outset, when we started this back in February and we talked about time frames, we started with 60 and then there was a request for 90 and there was a settlement for 90 days of opportunity for due diligence. In candor, the Court was -- the Court found 90 days to be reasonable, but appreciated the consensus of 75. The Court still views 90 as reasonable and that 90 brings us to, I believe, May 30th.

Nothing -- I've read the papers and I'm still

inclined to think that the May 30th date is a reasonable date, but I understand the debtor wishes to present argument and to argue to keep it on the 15th and, of course, the Committee preserved their right to try to argue for the 15th.

What I will do and trying to fit this into my calendar is schedule the hearing for -- I still can't get my computer up -- 5/13. And before anybody jumps, let me finish off. Let me just make sure. I have to go to my phone.

So 5/13 is Monday. And I would permit opposition to be filed by Saturday, 4 p.m., so that everybody can enjoy Mother's Day the next day, on May 11th. There will be opportunities to reply to any opposition at the hearing on May 13th.

In the event I deny the motion to extend, I will extend the challenge date to 5/17 just as a courtesy because we're cutting it close and then we'll go from there. But I've given you my thoughts and if you can resolve it, great. If not, 5 -- I'm sorry, 5/13 will be 10 a.m. It will be done remotely. Anybody have any issues or concerns?

(No audible response)

THE COURT: All right. Thank you. That was easy.

Now let's go to the last matter, which I don't think is going to be as easy. I don't anticipate it.

MR. McKANE: Good morning, Your Honor.

Mark McKane, Kirkland & Ellis, proposed counsel for

the debtors. Just a very preliminary matter, I filed a pro hac motion on Friday and I believe as of last night, it had not been entered. If I could be heard today.

THE COURT: Welcome to Jersey.

MR. McKANE: Thank you.

THE COURT: Don't worry about it.

MR. McKANE: Thank you, Your Honor. I think we've all agreed this is a non-evidentiary hearing. There's a -- in in light of the fact that you might not be the only judge who ultimately reviews this issue, I believe Mr. Goldfine had worked with counsel for the Committee on a set of stipulated facts that were filed yesterday, as well as a couple of declarations. I'll leave the podium to him just for a few minutes and make certain we have a, you know, a sufficient evidentiary basis for the arguments that are about to proceed.

THE COURT: I appreciate that. Thank you.

MR. GOLDFINE: Good morning, Your Honor.

Jeff Goldfine from Kirkland & Ellis.

Hopefully some non-controversial housekeeping. As Mr. McKane just said, we worked with the Committee to put in a set of stipulated facts and a couple of exhibits thereto that was filed at Docket Number 454. The parties also agreed that the Winters declaration and exhibits and schedules thereto filed at Docket Number 158, I believe it's starting on Page 36, could come in, as well as the Chase declaration and exhibits

thereto that is at Docket Number 285, and then 285-9 is when the exhibits end.

Your Honor can, of course, take judicial notice of his own docket. There's just a few docket numbers that I want to call out that might get touched on in the presentation. That would be Docket Number 47, which is the interim cash collateral order, the bidding procedures order at Docket Number 57, the final cash collateral order at Docket Number 188, and the sale notice at Docket Number 364.

THE COURT: All right, thank you.

So, for purposes let me first start with either the U.S. Trustee or the Committee. Any objections?

MR. SHORE: No objection.

Again, Chris Shore from White & Case. The only point is that it is coming into this hearing only as evidence, and we deserve with respect to other hearings.

THE COURT: Fair enough.

MR. SPONDER: Jeff Sponder from the Office of the, U.S. Trustee. Same, Your Honor. Thank you.

THE COURT: All right. Then, let's mark these as J for joint. J-1 will be the stipulated undisputed facts at Docket Number 454. And we'll have the Winters declaration as J-2, the Chase Declaration with the tenant Exhibits as J-3.

(Joint Exhibits J-1 through J-3 admitted into evidence)

THE COURT: All right. Mr. McKane?

MR. McKANE: Very good, Your Honor. Sometimes what we want to do, Your Honor, we have a deck to help guide the discussion. Some might argue that that's my talking points, but I couldn't help myself.

May I approach?

THE COURT: Yes, please.

MR. McKANE: Your Honor, again, for the record, Mark McKane, Kirkland & Ellis, proposed counsel for the debtors.

We're here on our motion, the debtors' motion to retain Kirkland & Ellis. If I could start --

THE COURT: Okay, good.

(Pause)

MR. McKANE: Your Honor, I know you can see it. And I just think -- you know, for folks who are participating remotely -- oh, here we go.

Your Honor, I don't need the clicker. My finger hopefully will work. Let's just start on, Your Honor should approve Kirkland's retention. It unquestionably satisfies Section 327. We'd start with just some framework issues.

A client's selection of counsel is given significant deference around the country, which is why motions to disqualify are disfavored and disqualification is a drastic measure. Those aren't my quotes. That's from the In re Twong (phonetic) decision here in New Jersey.

Invitae, a public company with an independent board,

selected Kirkland after interviewing with others, Kirkland affirmed with whom it had no prior relationship as its restructuring counsel. No one, none of the objectors disputes Kirkland qualifications or the fact that we somehow hold an adverse interest, that we're a creditor.

What we have is Kirkland's alleged de minimis, unrelated fund work that we've done for Deerfield, a client that we have a relatively small relationship with. That does not pose a conflict of interest. Deerfield, a sophisticated firm that focuses on healthcare gave Kirkland a broad and fully enforceable advance waiver. We have consistently represented debtors in the last few years adverse to Deerfield in restructuring situations.

The second area, the real focus of where they're going, Your Honor, is Kirkland's investigation of the 2023 Exchange. That also does not create a conflict of interest. While they raise concerns about who we represented in their objections, in the stipulated facts, the objectors now concede that Kirkland only represented the company, not the board, not the special Committee, not Ms. Frizzley separately, right? Those issues really, I think, are tabled. So ultimately, where are we? Are we disinterested? We don't have a conflict. Are we disinterested?

Our interest and, you know, one of our core practices is 100 percent aligned with the debtors. We zealously

represent clients because that's what we do. And our handling of this case confirms that we've zealously represented these debtors in these cases. So we think the Committee should see -- sorry, you should see the Committee's objection really for what it is. It's a preview of events to come potentially with a standing motion, right?

Our retention should not be held hostage in this way. If I was just arguing to you, Your Honor, as opposed to potentially other courts as well down the road, I'd stop right here. You know this law. You know this record. We'd be done. But for the fuller record, let's just level set what the legal framework is.

Section 327(a) says that with the Court's approval, a debtor may employ one or more attorneys that does not hold an interest or represent an interest adverse to the estate and that are disinterested. Section 327 goes further and makes clear that you are not disqualified from employment under this section by the representation of a creditor.

Concurrent representations are recognized under 327 unless there's an objection by a creditor or the U.S. Trustee in which case the Court shall disapprove if there is an actual conflict of interest. That's where we are here, Your Honor. Those are the issues.

We all know the Third Circuit's retention framework. It's two-fold, right? You must be disinterested as that is

defined in 101-14, typically here in this context. I think no one suggests that 101-14(a) or (b) is applicable. We fall down to (c), that we don't have an interest materially adverse to the interest of the estate or any of the classes of creditors or equity holders. That's the focus of disinterestedness under 14(c) and that we don't have an interest adverse to the estate.

I know sometimes the lines blur on this, and the Third Circuit recognizes the lines that blur on this, but there are two different standards that need to be addressed. I would importantly note that the key here is that those standards are evaluated presently.

Right here, are we disinterested and do we hold an adverse interest at the time that the Court considers the retention applications? The Boy Scouts case in the Third Circuit reaffirmed that position as recently as two years ago.

What we have is the classic kind of flow of conflicts that the Marvel court in the Third Circuit reaffirmed about when and under what circumstances would a disqualification be appropriate. And Marvel made absolutely clear that in this circuit, appearance of conflict cannot justify disqualification. That in a circumstance of a potential conflict, the Court has discretion to approve retention if their potential. And the question there is if there's potential or whether we are remote or compelling interest to do so.

And then finally, if there is, we all acknowledge an actual conflict, it is per se disqualified. There are multiple courts that have said that. None of what I'm telling you is new or novel. And ultimately, because of the review of conflicts waivers here, we also look at the Model Rules. We look at the Rules of Professional Conduct. And the key ones that Your Honor is going to have to consider are Model Rule 1.7(a) and 1.7(b). And then obviously, the definition of informed consent in Model Rule 1. And let me just be clear.

In 1.7(a), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. We all know that rule. We all live by that rule every day. The key is 1(b), Notwithstanding the existence of a concurrent conflict of interest under (a), a lawyer may represent a client if, among other things, the client gives informed consent.

And ultimately, this entire discussion today is going to really fall down in large part to, you know, are we disinterested and do we have a conflict of interest? And then 1.1(e) gives the definition of informed consent.

So, where are we with the objections? The Committee filed an objection. The United States Trustee filed an objection. The Committee focuses on two areas. One, they allege Paragraph 3, Kirkland has insisted that it be able to stand on all sides of the transaction and represent everyone involved in connection with its investigation of the '23

Exchange. And as a result of that, they say Kirkland has an actual disqualifying conflict of interest with respect to Deerfield. Those are our two issues. That's what they're drilling in on.

They say deny it, but what they really want to, is they don't really want you to deny our retention. They just want you to bar Kirkland from doing anything as it relates to Deerfield in these cases, including with regards to an evaluation of claims against Deerfield. That's their request for relief in Paragraph 4.

The United States Trustee's Office takes a little more targeted view. They say they view the concurrent representation of Kirkland and Deerfield and which they admit, albeit in unrelated matters, constitutes a conflict of interest. They basically say, we failed the Project Orange test and therefore we should be denied. We're going to address those objections in detail today.

But let's level set in terms of what they don't contest. The Committee and U.S. Trustee's Office do not contest that we're qualified to be counsel for the debtors. They don't contest that we are suggesting in any way we hold an interest or that we didn't adequately disclose our interest in our connections.

So what remains is ultimately two questions. Do we have an actual or potential conflict of interest and are we

disinterested? The second one's a little easier. Let's take it first. Is Kirkland disinterested?

Your Honor, let's step back. Disinterestedness in this context, when evaluated relative to conflict of interest, is largely focused on economics. Do we hold some type of economic interest such that we would not take all of the steps necessary to do everything appropriate to represent our clients?

And I stop and say to you, that's nonsense. Restructuring, representing debtors, this is what we do for a living. This is one of our core practices. We're one of the top restructuring firms in the country. Just ask us. And you know our records, right? Representing 29 debtors of over a billion dollars in liabilities over the past three years. It's what we do.

I bring that up only because it's not just about our qualifications. It's doing great work for debtors is how we get additional work. We don't want Chapter 22s and 23s. If we do great results for this debtor, that's the last time we're ever going to see this client. Our business on the debtor side is doing great work for debtors. So our interests are 100 percent aligned.

Then what is the alleged competing interest that they focus on in Deerfield? We're going to talk about Art Van a little bit more later in this case. Art Van is a decision from

Chief Judge Sontchi as it relates to potential conflicts in Delaware. And the reason why I bring it up here is level setting what is de minimis. And here, Judge Sontchi, in overruling objection to retention, focused in on the amount of revenue saying here it amounted to no more than one-tenth of one percent of the annual firm revenues. That was Judge Sontchi and Art Van.

Level setting interests, Kirkland's representation of Deerfield in unrelated matters largely focused on fund formation work cannot be disqualifying from an economic interest standpoint, right? The work we've done for them is 2.4 million in total for the entire life that we've ever done work for them.

In '23, it was $1.885 million, right? That's 0.03 percent of our annual revenue. In '24, the year to date, Kirkland has invoiced Deerfield for $36,000 in total across all matters. In evaluating our economic interests and whether we are disinterested, if the focus is on Deerfield, the answer is no.

Now, let's get into this alleged conflict. And to do that, we have to step back a little bit. Talk about who is Invitae? Who is our client? Invitae is a medical genetics company that delivers genetic testing services and digital health and health data services. They've been doing it since 2010. They went public through an IPO in 2015.

We've known that since the first day declaration. But for these purposes, who is Invitae? Invitae is a sophisticated party. It's a public company with its own in-house counsel that routinely retains law firms and engages in evaluation and engagement letters and waivers, right? Invitae interviewed multiple law firms in addition to Kirkland for this engagement. We had no prior relationship with them. And as you've seen in the papers, and I'll just say it again here, we had no involvement with the '23 Exchange.

When Kirkland pitched Invitae, we, Ms. Greenblatt, specifically informed Invitae management that we had been and that we could be adverse to Deerfield. Why did that matter? Because they had already been a secured creditor. They would be a player in these cases. And they are a player in healthcare lending. So the fact that we could be adverse to them was a factor that Invitae wanted to know about from the get-go. That was explained on the front end.

And what did Invitae do at the front end? It waived all conflicts, right? At the time of the engagement, we informed Invitae that we represent numerous parties with whom Invitae had a relationship in matters unrelated to Invitae. We told them there's a possibility of a divergence of interest. And importantly, Your Honor, we told Invitae that we provide them with a disclosure schedule describing all of our relationship with interested parties in connection with a

future retention application if this became an in-court proceeding.

So upon signing that agreement, Invitae waived all conflicts. That's Exhibit B to the stipulated facts. It's the Invitae engagement letter. Let's go through it in detail.

First, in the section that is bold and underlying, "Conflicts of Interest," we and Invitae agree that it is -- as is customary for a law firm of the firm's size, there are numerous business entities with which Kirkland currently has relationships that the firm has represented or currently represents in matters unrelated to Invitae. We went further, right, because it's -- and we told them, it's our interests may diverge so its interest, the client's interest, may diverge from those of the firm's other clients.

And so the possibility exists that one of the firm's current or future clients may take positions adverse to the client and adverse to Invitae, including in litigation, right? And we went further. And in a matter in such which -- sorry, in a matter in which such other client may have retained the firm or one of the firm's adversaries, we may be adverse to the client. So we flagged it from the beginning. We have concurrent representations. We have concurrent relationships, right?

We then went further in the next paragraph.

"In the event, a present conflict of interest exists

between the client Invitae and the firm's other clients, or in the event one arises in the future, client Invitae agrees to waive any such conflict of interest or other objection that would preclude the firm's representation of another client in another current or future matter unsubstantiated to the engagement or other than during a restructuring case in other matters related to the client that is defined as the allowed adverse representation."

We were not subtle about this. We went further, Your Honor, and said, to be clear, right? We gave examples.

By way of example, such allowed adverse representation may take the form of litigation, transactional work, counseling, and here, restructuring. And what do we mean by restructuring? We're not shy. That includes bankruptcy, insolvency, financial distress, recapitalization, equity and debt workouts, and other transactions or adversarial adjudicated proceedings related to any of the foregoing.

All of this is agreed between Invitae and Kirkland on the front end. As it relates to an in-court proceeding, we went further. This is what we said with regard to restructuring cases.

"If it becomes necessary for Invitae to commence a restructuring case under Chapter 11, the firm will take steps necessary to prepare disclosure materials

required in connection to the firm's retention as lead restructuring counsel. If necessary, the firm will prepare a preliminary draft of the schedule describing the firm's relationship with certain interested parties, defined as the disclosure schedule, and the firm will give the client a draft of the disclosure schedule once it's available."

That's the engagement pre-petition. That's the waiver pre-petition, and Kirkland 100 percent followed through on that agreement.

What Slide 25 is, is extracts from the Winters declaration specifically going through the schedule of all of our connections and in Paragraphs 37 and 38 highlighting the Deerfield relationship.

So in Winters 37, sorry, Winters paragraph -- Winters declaration Paragraph 37, we highlighted that as disclosed in Schedule 2, "Kirkland currently represents and in the past has represented Deerfield Management Company and its various subsidiaries and affiliates, as well as SoftBank."

We'll talk about SoftBank in a minute. We go further. "Deerfield is the holder of approximately 78 percent of the Debtor and Vitae's 2028 senior secured notes and is represented by Sullivan & Cromwell."

We then go further, right? "Kirkland's current and prior representations of Deerfield is in matters unrelated to

the debtors of these Chapter 11 cases. Kirkland has not represented and will not represent Deerfield in connection with any matters in these cases during the pendency of these Chapter 11 cases."

So we did exactly what we said we were going to do with the bring down of all of our connections as we're required to do under Rule 2014. And we specifically highlighted Deerfield.

What this argument really boils down to is somehow our connection with Deerfield, the Committee suggests, is sufficiently strong or persuasive that we would somehow bias our work in favor of Deerfield, right? That's their suggestion. If you look at this disclosure, when we're talking about current representations, they're all focused on Deerfield because Deerfield is a senior secured creditor. But we flag Deerfield and SoftBank.

SoftBank's an unsecured creditor. We have a concurrent representation of SoftBank, as well. Are we steering our investigations, steering our work skewed towards the unsecured creditors because we represent SoftBank? How is SoftBank differentiated from Deerfield if that's the analysis that they're putting forward? Now, that's the Invitae story.

Let's just level set again about who Deerfield is, right? Deerfield, as I mentioned before, healthcare investment firm, unquestionably a sophisticated party with its own

counsel, routinely retains law firm, engages in negotiations of engagement letters and waivers. It is not uncommon for Deerfield to be a creditor in the healthcare sector. In fact, I take out the double negative. It's common for Deerfield to be a player in these cases.

Deerfield in healthcare is equivalent to Wells Fargo in retail as ABL lending, right? Our relationship, however, with Deerfield, Kirkland's relationship is de minimis. Let's dig into that a little more.

The scope of the representation, as I mentioned before, funds formation work. The amount in total that's been billed out, I get a little more granular here, it's $2.37 million in total for all matters since the engagement began in '21, right? And that includes the $1.88 million in '23 and the $36,000 invoiced to date.

I want to be absolutely clear about this perception of overlap. We do no restructuring work for Deerfield. Kirkland has not performed any work for them. No restructuring partners have worked on these cases, have ever billed time for any Deerfield matters. And to the extent that there's some question about overlap, about billers, no litigation or restructuring attorneys have worked with Deerfield. There is no overlap there.

There have been three Kirkland attorneys in support practices. One is tax, another I believe is international

trade, that have done work, you know, in their specialty for Invitae and Deerfield. The overlap is extremely minimal, 3.9 hours billed collectively across those three attorneys. That's the Deerfield relationship that they think we're going to skew our interest for.

And I want to be absolutely clear about this. We have a binding, fully infallible, unequivocal advance waiver from Deerfield. Some of this is going to look similar because it's a similar letter, but here we go. In the "Conflicts of Interest" section, we flag at the start, "Kirkland is a general service law firm that you recognize will continue to represent numerous clients, including without limitation, your affiliates, debtors, creditors, and direct competitors."

From day one, that's what Deerfield recognized. And we went further. "Given this, without a binding conflicts waiver, conflicts of interest may arise that could deprive you or other clients of the right to select Kirkland as their counsel without a binding conflicts waiver."

But that's what we have. We go further.

"Deerfield agrees that Kirkland may now and in the future represent other entities or persons adverse to you or any of your affiliates on all matters, whether or not such matters are substantially related to the legal services we provide or other legal services that we've rendered over time or may render you in the future an allowed adverse

representation."

Not a carve-out like we're going to see in some other cases, a full blanket waiver. But we go further, just like you saw within detail. By way of an example, what is an allowed adverse representation? We say that might take the form of, among other contexts, litigation and restructuring. And it's that same language, broad restructuring, including bankruptcy, insolvency, financial distress, recapitalization -- and I go further -- "and other transactions or adversarial adjudicated proceedings related to any of the foregoing and similar matters."

But we go further in the Deerfield letter. And I want to highlight this for you. In '21, as you know, as Deerfield, as you know, Deerfield, we often are retained by issuers to represent them in financial and/or organizational restructurings. Our representation of you Deerfield in connection with this matter and any future matter will be with the understanding that such representation will not preclude Kirkland from continuing any present or assuming any future representation in other matters that another client may request, including a matter in where, one, Deerfield management company or its affiliates, its personnel and another client are on the opposite sides of the same transaction or litigation.

That's in the Restructuring section where we're saying we have a debtors' practice, where we will do this work

for you, but you acknowledge that doing that work, we're not prohibited from doing restructuring work in the future. And it's not just negotiating. It's in any transaction or litigation.

And Your Honor, this isn't just a piece of paper. This is the basis on which we had been retained in other debtors cases in which Deerfield is a creditor. This is the third time Kirkland has been retained by a debtor and has been retained by a debtor in a potential bankruptcy proceeding where Deerfield was a creditor.

The other two times in Delaware in last year and this year. The first one was Lynette. The second one In re Cintra. We're going to come back to Cintra in the past. But when you wonder why Ms. Greenblatt was so confident she could be adverse to Deerfield when she was making that pitch, it's because she already was adverse to Deerfield. That's Ms. Greenblatt in Lynette and Ms. Greenblatt in Cintra. In both of those cases, Kirkland was approved as counsel for those debtors.

And Your Honor, we're adverse to Deerfield here. We've zealously represented the debtors pre- and post-petition on issues adverse to Deerfield. Negotiating against Deerfield on multiple supplements of the company's indenture. In actively investigating claims and causes of action arising out and relating to the '23 Exchange. In negotiating the transition support agreement which contemplated the sale. And

the transition support agreement is not just the sale. Deerfield agreed to subordinate its claims to two classes of unsecured creditors. No question there's adversity there.

We negotiated the debtors' use of cash collateral in these cases. And we negotiated a competitive auction process in which Deerfield put forward a credit bid and didn't win. The auction process led to a third party being successful.

So why are we here? Why all this focus? It comes back to this '23 Exchange, when Deerfield became that 78- percent holder of the new senior secured notes. They are, we acknowledge, the largest secured creditor. We didn't do that deal. Latham Watkins did that deal for Invitae. And Sullivan & Cromwell represented Deerfield. We had no involvement. So when we came to that issue, we could investigate it.

Now, let's level set. We filed our 2014 -- we filed a retention application. We did everything we were supposed to do under 2014. We provided and disclosed all of our connections, right? We've demonstrated the de minimis relationship with Deerfield. And we've shown that Invitae and Deerfield are sophisticated players, right? There's no question.

At that point, the burden has shifted. The burden shifts to the objectors, the Committee and the UST, to prove that somehow we cannot be retained. And they've failed in that

burden. And as part of all of it -- I have to step back. There's no question that we don't represent Deerfield here. Sullivan & Cromwell has been Deerfield's counsel throughout this engagement, pre-petition and even today. And we have been at odds with S&C.

Turning to the objections, I framed them before. I put it back up for this point only. When the Committee started, Committees had two factual bases of their allegations. They say, we're trying to stand on all sides of the transaction and, quote, represent everyone involved in connection with this investigation of the '23 Exchange. That's what they said in their objection. And Your Honor, that's not true.

As they said in their objection, we represent the debtors, Ms. Frizzley, the Special Committee, the full board and Deerfield. Based on the stipulated facts that are in front of Your Honor, what do we have? We represent the debtor, and we represent Deerfield in unrelated matters. They have walked back the suggestion that we represent Ms. Frizzley, the Special Committee, or the full board. They've stipulated that we don't.

Now, with regards to the investigation, we know this is an issue to come, but Kirkland's handling of the investigation is not a conflict of interest and cannot create a conflict of interest for the disqualification here. What did we do? In our capacity as counsel for the debtors, Kirkland

provided advice to the board of directors or the special Committee or Ms. Frizzley as appropriate in their capacity as the governing bodies of the debtors, right?

Ms. Frizzley was originally appointed as an advisor, and then she was brought onto the board in December to increase the knowledge of the board regarding corporate issues, including restructurings. Ms. Frizzley wasn't on the board or affiliated in any way with Invitae at the time of the '23 Exchange and had no involvement in those transactions. So Kirkland worked with the Special Committee, particularly Ms. Frizzley to conduct an independent review of the '23 Exchange. She wasn't involved, we weren't involved, right?

And we determined whether there were causes of actions related to those transactions. That's what we're going to talk about with the challenge period down the road. And when we were done, we presented our findings on the viability of potential claims and causes of actions to Ms. Frizzley in the first instance, and then ultimately to the full board, including those members who are on the Special Committee. That's what we did.

Now, if we step back and we say, all right, that's an attack maybe on the Committee, on our work, that's not for today. When we get back to the issues of the day, Art Van, we're still on, you know, on fours with Art Van. We're better than that, but it is the case that that is -- most easily

aligns with us.

In Judge Sontchi's decision in Art Van from 2020, there was a question about whether there was unquestionably a concurrent representation. The Benesch firm wanted to represent the debtors, did work for the debtors. At the same time, they acknowledged they had a relationship with Wells Fargo. And the question was, is that work for Wells Fargo that is admittedly unrelated sufficient to somehow disqualify Benesch?

The United States Trustee tried to take the position that it did. Judge Sontchi said absolutely not. Benesch -- from the decision, "Benesch did not represent Wells in these cases or in any related transaction. Wells Fargo had a de minimis component of the aggregate revenue of the firm. There was one-tenth of one percent and there was no evidence to the record that Benesch lacked zealousness in its representation of the debtors."

So how do we match up? What are we looking at? Unrelated matters, de minimis fees, waiver, and zealous representation. On those four factors, unrelated matters, Art Van has that. That's what we have here. There's no question we're not doing any work for Deerfield here. On de minimis fees in Art Van, approximately one-tenth. Here, unquestionably, de minimis fees, three one-hundredths of a percent.

On a waiver, Art Van had a waiver. And actually, let's look at it because the Art Van waiver, not that great. Most of that decision's about does the waiver cover the actions that were done? That was the question, the scope of the waiver. Because there's a carve-out in the Wells Fargo that Wells Fargo and Benesch negotiated, right? So that was the issue that took up the majority of the analysis in Art Van.

By comparison, ours, no carve-out. We could be adverse to Deerfield in any transaction, in any litigation, specifically as it relates to restructural litigation. But we both have waivers that were sufficient for engagement. And as to zealous representation, the court found that the Benesch firm had that.

I don't think you can look at this record and find anything that suggests other than a zealous representation of our clients. That's what we do, and that's what we've done here. And that's why we ask you to take judicial notice of the orders and the actions we've taken to do today.

Where we think White & Case wants to go here is to argue somehow that there's a concurrent representation that's so overwhelming and that it swamps the day. But concurrent representations does not equal a conflict of interest. And if they want to go there, let's be absolutely clear. Our waivers are fully enforceable, right? The Invitae waiver, those experts that think about ethics and evaluate these issues

basically say giving effect to a client's consent to a conflicting representation can rest either on the grounds of contract freedom or the related ground of personal autonomy of a client to choose whatever champion the client wants.

Let's step back on those issues. Selection priority by counsel and contract freedom, right? Invitae is a sophisticated party with its own counsel that routinely represents -- engages firms and negotiates those waivers. They knowingly, eyes wide open, chose Kirkland after interviewing other firms and they agreed to waive the conflicts. That is informed consent.

On the bandwidth of clients for whom the Model Rules apply from individuals without experience to public company boards, right? Invitae is on the far end of the spectrum of sophisticated clients. So too is Deerfield. No question Deerfield is a sophisticated party that chooses counsel as appropriate, Sullivan & Cromwell, Kirkland & Ellis. They choose who they want to for their needs.

They eyes wide open agreed to waive conflicts and matters adverse to Deerfield, including in bankruptcy. There's no question Deerfield is aware of the Kirkland debtor practice in 2021 when they sign on. That waiver was effective, has been relied on in other bankruptcies, and should be relied on today. That waiver is valid and enforceable.

So what do we have left? We have some case law that

the debtors, that the objectors rely on. First, their main case, Project Orange. Your Honor, both of these cases are inapposite. But Project Orange in particular, let's level set what happened in Project Orange.

DLA was the proposed debtor's counsel in Project Orange. It was a power plant. It had nothing to do -- you know, up in Syracuse. GE, manufacturer of the turbines at the power plant, was a one- percent client of DLA and an essential supplier of the debtors. There was an issue with the generators. Without the generators, you can't run the power plant. It was also in active litigation against the debtors.

What's the issue? DLA had at best an incomplete conflicts waiver, which barred DLA. GE did not allow DLA from both bringing suits and threatening to bring suits against GE or its affiliates for monetary damages or relief. That's from the decision.

As a result, Judge Glenn concluded DLA could not negotiate with full efficacy without at least being able to hint at the possibility of litigation. So, their proposed debtor concedes an active conflict exists. There was a limit, a material limit on the ability of the debtors to do some of its core work. That was not sufficient.

That is the exact opposite of what we have here, Your Honor. We have a signed, full, advanced waiver from Deerfield permitting adversity in litigation, including not just

threatening litigation, bringing litigation against us. We are not Project Orange.

The second case, Leslie Fay. In Leslie Fay, Weil was proposed debtor's counsel. If you step back -- let me just stop for one second. Leslie Fay is a disclosure case. It is very much about Weil's failure to make the proper disclosures under Rule 2014. But what they didn't disclose was what was so infuriating to Judge Brozman.

Weil represented the audit committee members in pre-bankruptcy litigation arising out of the fraudulent accounting practices of the company. It didn't just represent the company. It filed appearances in multiple class actions on behalf of those board members. Weil didn't disclose those representations or the fact that two of the audit Committee members had connections to material clients of Weil, Bear Stearns and Odyssey Partners, who the court found were large and valuable clients of Weil.

And Weil didn't disclose in what it later admitted in a deposition that it would not have sued the auditor in those cases, that was BDO Seidman, even if the facts warranted it, right? And so ultimately, there was a sanction. Weil was allowed to finish that case, but there was a sanction for failing to disclose material adversities in the connections to the board.

Here, no one's disputing our disclosures. We

properly disclosed all of our connections, including with Deerfield. And unlike refusing to go against BDO Seidman, we actively investigated those claims. What the Committee doesn't like is the conclusion we reached. That's a fight for another day. But there's no question that we have the ability and that we did the investigation. So those are the cases.

In the back half of the argument, in the objection, we get into a little bit of soft string. 327 can't be waived. So therefore, even if you waive conflicts, you can't waive 327, and therefore you're out. Not certain that holds. This is actually fundamental to understanding both the law and, frankly, modern better practice. Conflict waivers are a key reason why concurrent representations are the norm, right?

We agree 327 can't be waived, but conflicts can be. And so how do you reconcile those two? Courts regularly analyze waivers in analyzing Section 327. The issue is simply, did the waiver eliminate the asserted conflict of interest? If you look at the two cases in Art Van, it did. In Project Orange, it didn't. Here we have, as we've established, broad enforceable waivers provided by sophisticated parties.

Next step in the analysis. Even if the waiver eliminates the conflict of interest, we still have to prove that we're disinterested. That goes back to the two-part analysis that is established in this circuit. We have no conflicts of interest and that we're disinterested. And the

case is all recognized.

A creditor can be sufficiently large that a proposed debtor could be economically motivated to skew its thinking in favor of the creditor, right? And there's some examples of that. The American Printers Lithographers case out of Chicago, where the proposed waiver was not sufficient because the secured creditor amounted to 10 percent of the law firm's annual revenue.

Or the Amdura case from Colorado, where the proposed debtors counsel testified that other counsel would have to investigate the creditor and potentially bring a suit because that firm won't bite the hand that feeds it. Those are situations where you have a question of disinterestedness. You don't have it with Deerfield and three one-hundredths of Kirkland's revenue.

And, finally, Your Honor, like, let's just acknowledge this, right? The Committee has other recourse. If you have issues with regards to our investigation, you don't hold the debtors' retention application hostage. You bring a standing motion, right?

Nothing about -- if Your Honor approves the retention application, as Mr. Shore acknowledged, right, all the evidence we put in for today, it's just for today. It doesn't preclude -- it, doesn't put a thumb on the scale with regards to standing or anything else. We'll have those fights another day

if we need to, right?

That's the recourse to the extent that the Committee thinks that there's a viable claim that we disagree with them on, right? Approval of our retention application has no impact on that get-to-be-filed motion for standing. The Court shouldn't sanction the effort to hold the retention hostage in this way. And what we mean by that is ultimately, Your Honor, this is tactical. I don't mean it lightly, I don't mean it pejoratively, but it is tactical. And that's one of the things the courts look at. Is this motion potentially for tactical purposes?

Why do we bring that up? We bring it up because, Your Honor, concurrent representations are the norm. Not just in Kirkland debtor practice, in White & Case's debtor practice, right? If you look at situations recently where White & Case concurrently represented the debtors and secured creditors, they exist. We're large law firms that have lots of clients, right? In Alpha Latam Management, White & Case represented the debtors, secured creditors, including Morgan Stanley and (indiscernible).

In Boy Scouts, right, they represented the debtors. Secured creditors, JPM Chase, CIT, Wells Fargo. In PWM, right, they represented Wells Fargo, JPM, Apollo, and Naveen, all secured creditors. And in Hertz, they represented the debtors, and one of the secured creditors, Deutsche Bank, which was a

one-percent client of the firm, right?

Concurrent representations are the norm. Do you have sufficient conflict waivers? Do you commit that you're not going to represent them in a related matter? We have. T hat's what White & Case did in those cases, and that's why we all have to recognize that concurrent representations are appropriate.

And ultimately, Your Honor, let's just put it out there. Disqualifying Kirkland doesn't help these cases. It hurts these cases. It hurts the estate. It hurts the creditors. It's a draconian measure, which is why it rarely happens. We've been engaged by the debtors for months. We've diligently done the work to prepare these cases and bring them through to a successful sale.

We now want to bring them to a successful plan and conclusion, right? We have the knowledge institutionally on these issues. We know this client is suggesting some way to disqualifying us now, saying that we cannot be retained is only going to hurt the recovery of creditors, especially unsecured creditors, the fulcrum securities that don't have a very large recovery right now.

And so, Your Honor, what we ask is that you approve our retention. We all see this for what it is. We might have a standing fight down the road. We can address the issues then, and I'd just like to reserve a few minutes of your time

for rebuttal for what's about to come.

THE COURT: All right.

MR. McKANE: Thank you.

THE COURT: Thank you, Mr. McKane.

Mr. Shore.

MR. SHORE: Thank you, Your Honor.

Again, Chris Shore from White & Case on behalf of the Committee. I do not have a deck so I won't need the clicker.

Let me start with four preliminary points, and I'll get to three substantive legal points. The first point, I just want to be clear. The evidence does not include the deck that was there. There's a lot of material in there that is not sourced from any of the evidence.

THE COURT: It's a demonstrative. It's not brought into evidence.

MR. SHORE: Correct. So I'm not going to respond, for example, to what White & Case has done in other cases or things like that. But it does come down, I'll come to it, this distinction between potential conflicts and actual conflicts and how we handle actual conflicts versus potential ones.

Second comment, there's been a lot about controversial. I don't actually see this, at least insofar as our objection is concerned, is that controversial. We're not here to put up roadblocks. We're here to just put guardrails on a representation. And when we start talking about

disqualification, there's no disqualification here. When counsel appears as counsel for an estate, the Court must approve the scope of that retention.

We're just asking that this retention not include the scope of advising the debtors with respect to matters on which Deerfield and they are adverse. In fact, the evidence contains descriptions of our efforts to try to get the debtors to agree to guardrails. And they have refused any guardrail. It's contrary to my practice in cases.

People, and I'm going to come to it, the big case issue, people deal with restrictions on representations in front of debtors all the time. In fact, Mr. McKane went through some examples where debtors have said, we won't do this, we won't do that, and they get their retention done.

Now, the second thing, we're going to come to revenues in a bit. Great for Kirkland. It's fantastic that they put $7 billion of revenue up last year, but it's not an excuse not to follow the rules. I agree. The issues here, Your Honor is familiar with. If this were a Chapter 13 debtor and the debtor had one asset, a home, and there was a mortgage on that home, and there was a question that had to be investigated as to whether that mortgage was properly perfected.

And the Chapter 13 debtors' counsel came in, or Trustee's counsel came in and said, I just want as part of my

retention the authority to look into the priority issue. I do want to tell you that the bank is a current client of the firm. I have people working on this debtor case and working for the client of the firm. And don't worry, it's just a couple million bucks a year.

That's a problem. It's a problem that could have been solved a long time ago. And I'm going to come to it. There's no explanation as to why this problem was not solved earlier, but we don't get out of the rules just because it makes it hard for big firm practice. Big firm practice does not require that you waive the rules.

Rather, it requires that the parties work together and see if you can't come to some sort of arrangement which resolves that issue. We are not taking on the practice of big law in big cases. We're just saying that because of having thousands of clients and thousands of matters, issues arise that need to be dealt with by responsible parties.

The last point, this is an appearances case, but to some extent it is, and I'm not talking about the fact that the press is watching this and we keep getting reports out and people publish cartoons of what's going on. This is a case in which Mr. McKane just said there may be nothing left for unsecured creditors in light of this transaction.

That we just heard about the sale hearing. Congratulations to the debtors for getting it done, but this is

a case where the definitive issue with respect to not just unsecured coveries, whether the debtors have any equity in their estate property comes down to this transaction.

It is in big cases and complicated cap structures sometimes lead to zeros. Sometimes lead to big zeros. A billion dollars of debt here would be extinguished for no consideration. And we accept that, and we all understand that's the case. And some of these are big players and some of these are not big players. You're going to get a zero.

But it is from our perspective as a fiduciary for the unsecured creditors, a very bad look to say that debtors, the debtors could only hire Kirkland & Ellis who had Deerfield as a client, weren't even told that Deerfield was an active client of the firm until after the case started. And that Deerfield is at least such an important client of the firm that they're not willing to drop them.

That is, it is Kirkland here insisting that they be able to continue to represent Deerfield and represent the debtors in matters related to Deerfield. So I have three legal points.

I want to discuss the nuance, if any, between actual and potential conflicts here. Two, the effectiveness of the Invitae waiver, the only waiver that is in the record in this case for the debtors, and the Special Committee problem, which we didn't hear a lot about in the presentation.

And when we go through this, I think we end up where we've asked, which is that the Kirkland could be retained, there just has to be a provision in the order which puts some guardrails on what Kirkland can and cannot do. And if Your Honor can't do that, we can sit and discuss it with them with respect to what is and is not in play.

Cash collateral, plan terms, things like that all have to be addressed. And they have to be addressed in a transparent way so that if unsecured creditors are going to get a zero, they don't feel like the process was rigged from the start.

Actual versus potential. Marvel's the great place to start, right? Potential conflicts, not a problem. Actual conflicts, you're out -- or, sorry, potential conflicts, you maybe out. Actual conflicts, you're out. And mere appearance is not a problem. We have an actual conflict here.

And I want to be crystal clear about this. It sounds like both from the reply that was filed in the presentation today, the fact that we're not actively litigating against Deerfield is not a conflict. We're just advising the debtors. And it happens that Deerfield is part of that advice. That's wrong. I want to read from an ABA -- what did I do with it -- yes, an ABA opinion, which I can give Your Honor.

And let's be clear about this, right? We're operating under Model Rule 1.7. You have concurrent

representation of clients who are directly adverse. Directly adverse isn't really defined. There's some comment in the official commentary to 1.7 which says it's not just litigation. It could be transactional work, as well. Okay?

And so when we dig down on what directly adverse means, this is from a formal opinion of the ABA 5-434.

"Direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. There may be direct adverseness even though there is no overt confrontation between the clients as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter.

"Thus, for example, a lawyer would be precluded by Rule 1.7A from advising a client as to his rights under a contract with another client of the lawyer as to whether the statute of limitations has run on potential claims against or by another client of the lawyer. Such conflict involves the legal rights and duties of the two clients vis-a-vis one another."

So all the time that Kirkland was representing the debtors, pre-petition and now, advising with respect to the rights under these security documents for the use of cash collateral and the required holder here, Deerfield, that's an

actual conflict. I'm going to come to waiver in a bit, but that's an actual conflict. Whether or not claims and cause of action arise under Chapter V is a conflict with Deerfield being a current client of the firm.

Whether or not Deerfield engaged in a aiding and abetting a breach of fiduciary duty of the directors and officers who pushed this exchange through, that's an actual conflict of interest. So their only hook here, only hook to getting retained is the waiver. And I'm focusing, I'm going to come to a bit in discussing Art Van, but I'm focusing on the NVTI waiver, not the Deerfield waiver.

In fact, why don't I discuss Art Van? Art Van is, there are two waivers at issue. One is -- or two waivers disclosed. The debtors out about the petition date got an advance, or got an actual waiver of the Wells Fargo relationship, and Wells Fargo had its pre-existing waiver.

There is nothing in that opinion about what a -- what the debtors' waiver was, what the debtor was told, what the debtor was not told, what risks were given to the client. So Art Van tells us nothing about the enforceability of the Invitae waiver here. And that's why I'm going to focus on the Invitae waiver.

Here is the evidentiary record with respect to that waiver. They had an engagement letter with Deerfield in 2021, and there were seven open matters by the time Kirkland pitched

to Invitae. There was the up-tier transaction, and then K&E was brought in, we've never said otherwise, in September of 2023.

They said, we can be adverse to everybody. That's -- I get that. What they did not say, and what they did not tell the client, until the draft retention application was sent to Invitae days before the final cash collateral hearing, right? This is all after they've signed the transaction support agreement, after they've stipulated the liens and claims, and validity and priority of the secured notes, and the non-existence of claims against Deerfield, then they told the client, we represent Deerfield in active matters.

That is the problem here. And you can call it a foot fault, or you can call it a problem, but this is a big case that we got to operate pursuant to the rules. That is not informed consent.

If you look at Celgene, which we cited, you must tell your client, I've got seven open matters with Deerfield. And then the client can decide, well, wait a minute, I'm headed down a path towards a bankruptcy. I need advice with respect to whether or not there's anything to see with respect to this transaction. And the client is entitled to say, you know what, you represent Deerfield. Weil Gotshal does not represent Deerfield. I don't want to get into this fight over whether or not you get disqualified, or your retention is restricted.

That's how a client makes informed consent.

Telling the client when all this is done, the investigation is over, the board's made its decisions, the cash collateral stipulation's been agreed, the interim use of cash collateral has been approved. By the way, I just want to let you know from a process perspective, all that time I was representing Deerfield on these matters, and I have attorneys who are billing you time and billing Deerfield time. That is not an informed consent.

And I want to be clear about this, as well, with respect to burdens. It is the burden of Kirkland & Ellis and the debtors to show the waiver. That's directly from Celgene, as well.

Kirkland & Ellis must convince Your Honor that their waiver in that pre-petition letter is effective on the debtors' estates. And that is the only waiver. There is no evidence with respect to any attempt to obtain a subsequent waiver, any attempt to clear up this issue at all. It is purely the engagement letter and K&E's attempt to say that that's how you go and get an advance waiver. And having this Court sign off on saying that advance waiver is appropriate under the circumstances given the facts and circumstances here.

While we're talking about what's not in the record, there is no explanation that anybody's offered as to why K&E did not disclose the existence of the ongoing relationships.

No explanation. So you're left to decide, was it just an inadvertence, was it an attempt to win a case? I don't want to give the client some reason not to hire me.

We have nothing on that. Nor do we have anything on Paragraph 17 of the stipulation, how it came to be that lawyers were representing both Deerfield, individual lawyers, right? It's an imputation issue. But individual lawyers were representing both Deerfield and Invitae at the same time.

So where we stand right now, I believe, is we have an actual conflict of interest. We've had an actual conflict of interest, let's start there, all the way from the time that they got engaged in September of last year, all the way through the pre-petition machinations, all the way through the beginning of the case, all the way until now, is an unwaived conflict of interest to the extent that they want to be retained to address Deerfield matters. And Deerfield matters are going to continue to happen.

We have a hearing on Monday in which Kirkland wants to appear and object to the extension of the challenge period. What are we going to do about that? Why are they doing it that way? They have Cole Schotz who can handle that issue. They've made it clear. They want to appear and be heard on those issues.

We're going to have issues with respect to the plan. And I do want to note this for the record. I heard actually

for the last time last night, the debtors are intending to file a plan and disclosure statement in two days. For the record, the Committee has never seen a draft of a plan, nor had any discussions with the debtors regarding the appropriate terms of a plan of reorganization.

THE COURT: Let me interrupt just for a question. And sorry, I didn't interrupt their presentation.

MR. SHORE: No.

THE COURT: But before I lose my train of thought.

MR. SHORE: Okay.

THE COURT: The argument is the failure to apprise Invitae of K&E's concurrent representation with Deerfield creates the actual conflict that continues to this day. That's the Committee's position or the UST's position.

If that is the case, then why is it appropriate to allow the debtor to use K&E as part of this case at all?

MR. SHORE: Well, that is the --

THE COURT: Because you've said they can go forward. Most of that action already occurred and there's already a new counsel here.

MR. SHORE: I'll answer it this way, as frankly as I can. That is the unintended but foreseeable consequence of refusing to resolve the issue. This issue could have been resolved if Kirkland had said we're not doing this or had done things at the beginning.

The Committee has raised an objection, a specific objection. We have waived our right to appeal, I suppose, with respect to a determination that they can't come in at all. But from the Committee's perspective after deliberation, taking into consideration all of the things that the debtors have said with respect to disruption of the case, we are willing to live in a world in which Kirkland does work for the debtors but doesn't do other things.

In other words, I'm going to let the U.S. Trustee carry the water on their relief requested, which is the total denial of the application. But the Committee, recognizing the position the creditors have been put in through no fault of their own, are willing to abide in a world in which the retention application is constrained.

THE COURT: Fair enough.

MR. SHORE: And the issue, and I want to end here with respect to the Special Committee issue. No question, in our papers, we took the position that debtors were representing this slate of people, and we had -- and that was driven by the fact that they've taken the position that all of the board materials with respect to the up tier are privileged.

We thought, well, then you must be representing the board and the members and things like that. It turns out they haven't been. Issue for another day with respect to the position they want to take, that they can represent the company

and disclose whether or not their claims and cause of action against the directors on the board. That's an issue for another day.

But let's clarify one thing from their papers. In Paragraph 21 of their papers, they say, "To that end, the debtors delegated the authority to investigate the 2023 Exchange transactions to Jill Frizzley, a newly appointed disinterested director." And they end the paragraph, "She is the duly authorized decision maker for the debtors with respect to the investigation."

That is not borne out in the record. Attached as Exhibit C to the joint stipulated facts is the only delegation that we have seen of any matters from the full board. It is to the Special Committee. The Special Committee controls all conflict matters. This has to be a conflict matter or the conflicted full board is dealing with it.

But the issue of whether or not the up-tier was bad gives rise to cause of action against the Ds and Os and/or the secured creditors creates a conflict because the board has on it, the people who voted for that and has the officers reporting to it who authorized the transaction.

The Special Committee is three of the directors who authorized the transaction, who would be in the firing line of a D&O action. And Ms. Frizzley, the Special Committee controls conflict matters, including the investigation and prosecution

thereof. And the Special Committee controls the attorney-client relationship and privilege. So it is not true that Frizzley, an independent party is controlling the investigation.

The reason why I raise that is there's no, the only party who could control a waiver here, the way they've set this up, is the Special Committee, who I think would be quite happy that that counsel who concurrently represents Deerfield has come to the conclusion that claims don't exist against them and therefore would waive it. So we don't -- we can't fix this problem given where we are in time and the problem that they've created with their corporate governance.

In other words, it's up to the Court to put guardrails here. And it's Your Honor's discretion, again, leaving aside the, if it's an actual conflict, you have no discretion. But from our perspective, it's Your Honor's discretion to put some guardrails on what they can and they cannot do. If they're not willing to walk away from their $38,000-a-year client or whatever that latest figure was up there, then they're going to have to pick their poison, going to have to agree to some form of restriction on what they can do.

And I'll end kind of where I started. This is an issue-determinative case. I mean, the reason we're here is not tactically because we're trying to get rid of Kirkland. It is

the unsecured creditor's recovery is tied up in this, and the unsecured creditors are entitled to a record in which an investigation was done by unconflicted counsel. And we're not in this challenge period and this negative notice of having to prove something in order to keep the claims alive.

So we'd ask that you restrict the retention as we laid out in our papers.

THE COURT: Thank you, Mr. Shore.

MR. SHORE: You're welcome.

And I have, if you wanted, the, the bar -- the formal opinion.

THE COURT: Yes, please.

MR. SHORE: It's just kind of hard to find online, so.

THE COURT: Then even more so.

Mr. Sponder.

MR. SPONDER: Thank you, Your Honor.

And good morning again, Jeff Sponder from the office of the United States Trustee.

As Your Honor's aware, the United States Trustee filed his objection, which, which is the Docket Number 322. As to this conflict issue, also, as Your Honor is aware, a joint stipulation of facts has been filed, which the United States Trustee signed as having no objection to its entry.

The United States Trustee objects to the retention of

Kirkland because Kirkland seeks to simultaneously represent the debtors in these cases and Deerfield, the debtors' largest secured creditor, albeit in matters unrelated to these cases.

Deerfield has taken a major role in these cases, including negotiating the transaction support agreement, which upon information and belief required the filing of these bankruptcy cases with the milestones, and negotiated the cash collateral order entered in these cases.

Further, Your Honor, Deerfield was included as a consultation party under the bid procedures order and initially submitted a joint bid to purchase substantially all of the debtors assets. In other words, Deerfield as a debtors largest secured creditor negotiated the TSA with the debtors, negotiated the cash collateral order with the debtors, and sought to purchase all of the debtors' assets. At the same time this was occurring, Kirkland represented Deerfield, again, albeit in unrelated matters.

The United States Trustee understands the potential prejudice to the debtors, should his chosen counsel be denied, and that case law suggests that debtors should be allowed to choose their specific counsel. However, a debtors' choice of counsel must comply with Section 327(a) of the Bankruptcy Code. The requirements of Section 327 cannot be taken lightly, for they, and I quote, "serve the important policy of ensuring that all professionals appointed pursuant to Section 327(a) tender

undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." And that quote is from Rome v. Braunstein at 19 F.3d, Page 58 from the First Circuit in 1994.

Your Honor, the Third Circuit has stated that a professional person has an interest adverse to the estate when the professional has, and I quote, "a competing economic interest tending to diminish estate values or create a potential or actual dispute in which the estate is a rival claimant"

That quote, Your Honor, is from the United States Trustee v. First Jersey Securities at 180 F.3d, Page 509. That's the Third Circuit in 1999. Again, Your Honor, Kirkland seeks to represent the debtors while it's simultaneously representing their largest secured creditor, Deerfield, in other matters.

The fact that the matters are unrelated is not dispositive in light of Deerfield's status as the largest secured creditor and a party to the TSA, which is driving this bankruptcy case. And see Project Orange Associates at 431 B.R. 363, Page 379, and that's from the Southern District of New York in 2010.

Your Honor, Kirkland argues in its reply brief that it properly disclosed its ongoing representation of Deerfield and has an advance waiver from Deerfield that enables Kirkland

to be adverse to Deerfield in any matter, including a bankruptcy. The United States Trustee agrees that Kirkland disclosed its concurrent representation of the debtors in Deerfield.

In fact, in Kirkland's reply brief, Kirkland admits that the debtors are adverse to Deerfield and that Kirkland represented the debtors adverse to Deerfield, and I quote, "Kirkland has already represented the debtors adverse to Deerfield in these Chapter 11 cases and can and will continue to do so." And that's Paragraph 30 of the reply brief.

Also, Your Honor, in the joint stipulation of facts, Kirkland admits that three Kirkland attorneys, including two partners, have worked on these cases as well as ongoing matters where Kirkland represents Deerfield simultaneously. I'm sure Kirkland will argue that the services provided by such attorneys were minimal and they have done so.

However, no matter how minimal, Your Honor, nothing will change the fact that these three attorneys are representing the debtors in these cases at the same time they're representing Deerfield, even in unrelated matters. In fact, Your Honor, as set forth in the stipulation of facts, the last time entry was only three weeks ago, which was April 16th of 2024.

Even if the same attorneys were not working for both clients, the concurrent representation of the debtors in

Deerfield still should not be allowed. Rather than engage conflicts counsel, Your Honor, Kirkland relies on a conflicts waiver. As to the conflicts waiver, it cannot trump the requirements of Section 327(a).

Even if Deerfield agreed that Kirkland could act against Deerfield on any matter, including a bankruptcy, Kirkland must still satisfy the statutory requirements of Section 327(a) to be retained as general bankruptcy counsel, and that goes for Invitae, as well.

I advise the Court to look at Granite Partners at 219 B.R. Page 34 of the Southern District of New York in 1998, where it was observed that while clients may in some instances waive conflicts, the mandatory provisions of Section 327(a) do not allow for such a waiver.

Here, Kirkland's concurrent representation of the debtors in Deerfield, who played a major role in commencing these bankruptcy cases, was involved in negotiating the transaction support agreement and milestones, was involved in the negotiation of the cash collateral order, and was a bidder to purchase the debtors' assets, is a conflict of interest, similar to the analysis set forth in the Project Orange case.

For the reasons set forth on the record today, as well as the reasons set forth in the United States Trustee's objection, and as well as the Committee objection, the United States Trustee respectfully requests that the Court sustain his

objection and enter an order denying debtors' retention of Kirkland.

MR. SPONDER: Thank you, Your Honor.

Thank you, Mr. Sponder.

MR. McKANE: Your Honor, if I may, just for a few minutes?

THE COURT: Yes.

MR. McKANE: And for the record, once again, it's Mark McKane, Kirkland & Ells, proposed counsel for the debtor.

Your Honor, this may not surprise you, but, you know, Mr. Shore and I have sparred in the past, and this is a classic Shoreism, right? You're going to create a false choice, right? The classic pick your poison, right? Either give up your client or limit, you know, or limit your representation so as to not touch the client, right? That's his, like, false dichotomy.

And the crazy thing about it is here, Rule 327(c) specifically says you don't have to make that choice. Concurrent representations between a debtor and a creditor in unrelated situations are allowed so long as there's not an actual conflict. And there is no actual conflict here. We have valid enforceable waivers that eliminate, eliminate both whether there's an actual conflict or a potential conflict.

And I went through both of them on purpose to show that there's no carve-outs because it's neither actual nor

potential. Your Honor, they want to create this construct where it's like, you know, limit your engagement so as not to engage with the secured creditor that holds 78 percent of the notes. I think you know from the course of these cases, that's not practical or reasonable.

And Mr. Shore says he wants to make clear, I'm not saying deny Kirkland's application. But in Paragraph 40 of his objection, the lead request was deny Kirkland's application. So it's nice to see that he's narrowing his scope so as to allow the UST to carry that water.

As to informed consent, the fact that Mr. Shore retreats to referring to a Chapter 7-13 debtor with a mortgage shows how far afield we are from Invitae a public company with an independent board and Deerfield on the issue of informed consent.

As it relates to the Model Rules, very telling, Your Honor, that he cites and quotes from 1.7(a) about actual conflict with no reference to 1.7(b) about conflicts. There's no question there's a conflict. And as to the issue of informed consent and how you evaluate it, while -- excuse me, Mr. Shore wants to talk about the record and what he wants to highlight, you need to look no further than his objection in Paragraph 40 as to where you should look to evaluate informed consent.

Because at that point in time, the Committee said the

language in the relevant engagement letter is the primary source for determining whether or not a particular client's consent is informed. That's why I spent so much time on the engagement letter.

In the engagement letter, we made absolutely clear Kirkland represents many other clients, right? Clients that, in fact, in unrelated matters, but that touched this debtor. And we specifically disclosed how we were going to go about addressing the issue where you had to come to the higher standard of the bankruptcy court in 327 with a retention application. But that doesn't diminish the fact that there was informed consent given by Invitae while providing the waiver at the time.

Why did we focus on the ability to go adverse to Deerfield? Because they just became the largest secured creditor. Clearly, they'd be someone we'd have to engage with over the course of our engagement.

Your Honor, with regards to the corporate governance, we laid out exactly what we did to whom we reported. All of that's a nice preview of, I think, things to come. Mr. Shore's privilege analysis is both wrong and also not for today.

But when you step back and look at what the Committee is arguing, right, on waivers, the objectors are trying to supplant their judgment for that of Invitae and Deerfield as to what is informed consent.

As to the burden, the law is clear on this. Once we file that 2014 application, once we've satisfied our disclosures, the burden shifts to them. That's Caesars, a published decision out of Chicago.

And then they want to create rules that would be absolutely impractical. And the Committee's mind set, under their privilege analysis, every company would need to somehow retain separate counsel for its boards in an evaluation of potential adversary proceedings. That's crazy.

You can't have a situation where every company has to bring in separate counsel for the board just so we can evaluate an avoidance action. And under their rules, if concurrent representations of unrelated matters were not acceptable, you can't have major law firms represent debtors.

And, finally, if we had to, you know, what they would suggest is that in advance of us becoming debtors counsel in a pre-petition situation, sometimes when it's a fully distressed situation, we would somehow have to disclose every possible connection, essentially do the 2014 process in a pre-petition situation. That can't be the rule. That's not the rule.

Your Honor's responsibility is to evaluate the retention application now based on what we have, which are the engagement letters, the advance with the conflicts waivers, as well as all of the disclosures that we have made in the 2014. We absolutely have done that. And what does that show? We

don't represent a material adverse interest to the state, and we're just interested. We ask that you approve the retention so that we can be general restructuring counsel.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Counsel.

MR. BELLER: Thank you, Your Honor.

Benjamin Beller from Sullivan & Cromwell.

I didn't want to break anybody's flow, but since it seems like argument has ended, just one point of clarification for Mr. McKane's presentation to start. Sullivan & Cromwell did not represent Deerfield in connection with the '23 Exchange transaction. We were brought in after the fact and have represented Deerfield in connection with the pre-petition negotiations and in these cases.

THE COURT: Fair enough.

MR. BELLER: Thank you, Your Honor.

THE COURT: Thank you. No problem.

And I don't see any raised hands from those participating or watching remotely. So let's see, it's 10 to 12. I'm going to go for a 10-minute recess and gather my thoughts and see how to address this. I'll be back at noon.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

THE COURT: All right. Thank you.

(Recess at 11:48 a.m./Reconvened at 12:06 p.m.)

THE COURT: All right. I thank you all counsel for argument. It's argued exceedingly well on all sides, and there are difficult issues.

Of course, my knee-jerk reaction is to reserve and put something together in detailed opinion to cover all bases. But that becomes problematic with a case that has significant events upcoming, hearings that are going to be dispositive. And it would be, frankly, just inequitable to the parties, Committees, that are alike to defer a ruling.

So I'm going to give a very brief ruling today. I am going to supplement it with a written ruling in the short term. I think the parties are deserving of that as well.

Okay. Notwithstanding, and it was referenced, very colorful Spider-Man memes and considerable editorializing by certain online publications. The Court does not find the application and the objections and the concerns raised here to be remarkable. This is not the first concurrent representation matter before the Court, nor before any bankruptcy court. In other words, this Court is not going to be making new law, at least I don't anticipate it, rather than just applying the law as it stands.

Overall, the Court is going to overrule the objections of the Committee and the U.S. Trustee. It does so in finding that they have not met their burden with respect to identifying the actual and potential conflicts that would knock

out the representation of the debtor by Kirkland & Ellis, K&E.

The Court finds and determines that K&E has satisfied the requirements under Section 327, as well as the Model Rules of Professional Conduct. Now, the Court acknowledges that concurrent representation is not ideal, but to rule otherwise would just simply write out a provision of the Code 327(c), which allows it in certain situations. What the Code calls for is for this Court to do a deeper dive, to determine whether or not beyond the concurrent representation or the prior representation that there's adversity in interests and competing economic interests present in the continuation of the concurrent representation.

While the Court is impressed with K&E's revenue numbers, it's not the issue. It's a tool for the Court to judge whether or not there are indeed competing economic interests. So the Court takes into account the nature of the representation, in this case of Deerfield, and the fact that, overall, it amounts to roughly $2.3 million in three or four years and less than that, certainly in 2023, and that that represents, I believe, three-tenths of one percent of the revenues.

Again, it's only a factor in determining whether there are indeed the competing adverse economic interests in the continued representation. The record supports a finding that Kirkland is disinterested under 327(a) and 1014(c). I

think the parties acknowledge that 1014(a) and (b) are not an issue.

The focus of Section 1014(c) is whether the prospective counsel has a materially adverse interest at the time of the retention. Again, we look at the work being generated and the nature of the work. K&E does not represent Deerfield in this Chapter 11. K&E is not doing the restructuring work for Deerfield presently. K&E was not involved in the 2023 March transaction. Invitae was represented by Latham & Watkins throughout that transaction.

And K&E, as I said, is not representing Deerfield in this proceeding. Deerfield has extremely competent counsel, two law firms, Sullivan & Cromwell, and the Wollmuth firm. Those are critical in determining whether there is adversity and whether K&E can aggressively and zealously continue to serve the interests of the bankruptcy estate and to be adverse to Deerfield where appropriate.

The existence, pre-petition, of the expansive waivers, the pre-petition advance waivers, as well as the language in the retainer agreements are significant for this Court. No, and I agree, you cannot waive yourself or your firm out of meeting the requirements of Section 327 as a whole. But the waivers can, if done appropriately and properly, address some of the issues that the Court must decide if there is a level of adversity warranting a finding of a potential or

actual conflicts as espoused by Marvel.

In other words, the waivers will address the fact that, yes, there may be mere concurrent representation, but you have to go beyond that. You have to look at the nature of the work and the volume of the work being done. In this case, there were expansive, detailed waivers, both, and I'll focus, again, I agree with counsel, what's of record.

I'll focus on the Invitae retention engagement letter. There were detailed provisions directed at providing the client, Invitae, with informed consent that K&E can and does represent adverse parties. No, the engagement letter did not detail or identify the adverse parties. I doubt any retention agreement ever does, but it should put in place a mechanism for doing so at a later point in time when there is a transaction or litigation that warrants the disclosures. And I believe the informed consent language does that in this case.

Marvel, the Third Circuit's decision, advises this Court that it should not disqualify a law firm or an attorney simply on the appearance of conflict alone. And. certainly, the courts in this circuit, when conducting its Section 327 analysis, have taken into account the standards that Marvel put in place. In other words, to engage in a deeper scrutiny of the type of work being undertaken as part of the concurrent representation and the volume of that work.

This Court has done so in this matter and, certainly,

finds that Kirkland's relationship to Deerfield does not give rise to that material adverse interest as noted or defined under Section 111.14(c). Certainly, the volume of work supports that conclusion. Let me rephrase that.

I gave considerable thought to the request for guardrails in this matter, and in many cases, it is certainly appropriate. You can use conflict counsel. We have limitations. The Court certainly is loathed to place handcuffs on debtors' counsel and debtors' choice of counsel and the work that needs to be undertaken in a complex Chapter 11, such as this matter, by restricting what work can be undertaken.

It's just so impractical, I believe, to suggest that we can limit Kirkland & Ellis from undertaking representation or tasks on behalf of the debtor as long as it doesn't impact Deerfield one way or the other, when Deerfield is the major secured party or potentially unsecured party, holding close to 80 percent of the debt, the most minimal task is probably going to have some impact, and any meaningful work is certainly going to impact Deerfield.

It becomes folly to think that we can start carving out tasks that could be undertaken in the representation. It becomes a requirement that there needs to be an "all or nothing" approach. In certain cases, there should be a nothing approach, meaning not allowing representation, but that's when the Court has to take into account the other factors as far as

whether there are truly competing economic interests or adversity.

Nothing this Court has seen in the record to date post-filing suggests to the Court that Kirkland & Ellis cannot zealously represent the debtor and the bankruptcy estate's interest in this Chapter 11 proceeding. Nothing the Court has seen in the record suggests that Kirkland & Ellis wasn't zealously representing Invitae's interest prior to the filing in conducting the investigation into the merits of the 2023 transaction.

Now, having said that, let me be clear. This Court is not ruling in any way on the merits, the propriety of the investigation, or the bona fides of the transaction. That's all for another day, unfortunately. But in representing the debtor, Kirkland & Ellis certainly had to address the needs of the board and the special Committee and the independent director in undertaking its responsibilities effectively and had to report and confer with those entities and individuals.

I am, again, loathed to start the process of advising companies to start lawyering up when undertaking an investigation as to the merits for transaction unless there are competing interests and adverse situations and then it's going to be appropriate. I mean, we've seen this. So, again, I hope to be far more eloquent and detailed in a written opinion. But again, I think in all fairness you ought to know which way the

Court's coming down.

So, I'll ask Counsel to submit another form of order referencing the record, the Court's oral ruling, the intent to submit a more detailed written ruling. Because as you all pointed out, I may not be the only judge looking at this, so, at that point in time.

Is there any -- I can go on forever. Is there any concerns or issues any counsel wish to raise for the Court?

(No audible response)

THE COURT: Then I appreciate your time and coming down today. Thank you very much.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

(Proceedings adjourned at 12:21 p.n.)

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**C E R T I F I C A T I O N**

I, DIPTI PATEL, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

J&J Court TRANSCRIBERS, INC. DATE: May 9, 2024