Docket #0528 Date Filed: 05/22/2024

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

WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
J. Christopher Shore, Esq. (admitted *pro hac vice*)
(cshore@whitecase.com)
Harrison Denman, Esq. (admitted *pro hac vice*)
(harrison.denman@whitecase.com)
Andrew Zatz, Esq. (admitted *pro hac vice*)
(azatz@whitecase.com)
Samuel P. Hershey, Esq. (admitted *pro hac vice*)
(sam.hershey@whitecase.com)
Ashley Chase, Esq. (admitted *pro hac vice*)
(ashley.chase@whitecase.com)
Brett Bakemeyer, Esq. (admitted *pro hac vice*)
(brett.bakemeyer@whitecase.com)

WHITE & CASE LLP
555 S. Flower St., Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7700
Aaron Colodny, Esq. (admitted *pro hac vice*)
(aaron.colodny@whitecase.com)

-and-

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962
Telephone: (973) 538-4006
Warren J. Martin Jr., Esq. (wjmartin@pbnlaw.com)
John S. Mairo, Esq. (jsmairo@pbnlaw.com)
Christopher P. Mazza, Esq. (cpmazza@pbnlaw.com)

Co-Counsel to the Official Committee of Unsecured Creditors

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

[1] The last four digits of Debtor Invitae Corporation's ("**Invitae**," and with its subsidiary debtors, the "**Debtors**") tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at

NOTICE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO THE 2028 SENIOR SECURED NOTE CLAIMS [CLAIM NOS. 360, 378, 379, 380, 381, 382]

PLEASE TAKE NOTICE that a hearing on *The Official Committee of Unsecured Creditors' Objection to the 2028 Senior Secured Note Claims [Claim Nos. 360, 378, 379, 380, 381, 382]* (the "**Claim Objection**") will be held **on a date and time later to be set by the Court** or as soon thereafter as counsel may be heard (the "**Hearing**") before the Honorable Chief Judge Michael B. Kaplan, United States Bankruptcy Court for the District of New Jersey, at the Clarkson S. Fisher United States Courthouse, 402 East State Street, Second Floor, Courtroom No. 8, Trenton, New Jersey 08608.

PLEASE TAKE FURTHER NOTICE that the Claim Objection sets forth the relevant factual bases upon which the relief requested should be granted. A proposed order granting the relief requested in the Claim Objection is also submitted herewith.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Claim Objection shall: (i) be in writing, (ii) state with particularity the basis of the objection, (iii) be filed with the Clerk of the United States Bankruptcy Court electronically be attorneys who regularly practice before the Bankruptcy Court in accordance with the General Order Regarding Electronic Means for Filing, Signing, and Verification of Documents dated March 27, 2002 (the "**General Order**") and the Commentary Supplementing Administrative Procedures dated as of March 2004 (the "**Supplemental Commentary**") (the General Order, the Supplemental Commentary and the User's Manual for Electronic Case Filing System can be found at www.njb.uscourts.gov, the official website for the Bankruptcy Court) and, by all the other parties-in-interest, on CD-ROM in Portable Document Format (PDF), and shall be served in accordance

www.kccllc.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

with the General Order, the Supplemental Commentary, and the *Order Establishing Certain Notice, Case Management and Administrative Procedures* [Dkt. No. 62], so as to be received **at least seven (7) days before the Hearing**.

PLEASE TAKE FURTHER NOTICE that only those responses or objections that are timely filed, served, and received will be considered at the Hearing. Failure to file a timely objection may result in entry of a final order sustaining the Claim Objection as requested by the Committee.

PLEASE TAKE FURTHER NOTICE that unless objections are timely filed and served, the Claim Objection shall be decided on the papers in accordance with D.N.J. LBR 9013-3(d) and the relief requested may be granted without further notice or hearing.

PLEASE TAKE FURTHER NOTICE that copies of all documents filed in these chapter 11 cases may be obtained free of charge by visiting the website of Kurtzman Carson Consultants LLC at www.kccllc.net/invitae. You may also obtain copies of any pleadings by visiting the Court's website at https://www.njb.uscourts.gov in accordance with the procedures and fees set forth therein.

Dated: May 21, 2024

By: */s/ John S. Mairo*
John S. Mairo, Esq.
Warren J. Martin Jr., Esq.
Christopher P. Mazza, Esq.
PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962
(973) 538-4006
(973) 538-5146 Facsimile
Email: wjmartin@pbnlaw.com
jsmairo@pbnlaw.com
cpmazza@pbnlaw.com

-and-

J. Christopher Shore, Esq. (admitted *pro hac vice*)
Harrison Denman, Esq. (admitted *pro hac vice*)
Andrew Zatz, Esq. (admitted *pro hac vice*)
Samuel P. Hershey, Esq. (admitted *pro hac vice*)
Ashley Chase, Esq. (admitted *pro hac vice*)
Brett Bakemeyer, Esq. (admitted *pro hac vice*)
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
Email: cshore@whitecase.com
harrison.denman@whitecase.com
azatz@whitecase.com
sam.hershey@whitecase.com
ashley.chase@whitecase.com
brett.bakemeyer@whitecase.com

Aaron Colodny, Esq. (admitted *pro hac vice*)
WHITE & CASE LLP
555 S. Flower St., Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7706
Email: aaron.colodny@whitecase.com

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WHITE & CASE LLP
1221 Avenue of the Americas
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J. Christopher Shore, Esq. (admitted *pro hac vice*)
(cshore@whitecase.com)
Harrison Denman, Esq. (admitted *pro hac vice*)
(harrison.denman@whitecase.com)
Andrew Zatz, Esq. (admitted *pro hac vice*)
(azatz@whitecase.com)
Samuel P. Hershey, Esq. (admitted *pro hac vice*)
(sam.hershey@whitecase.com)
Ashley Chase, Esq. (admitted *pro hac vice*)
(ashley.chase@whitecase.com)
Brett Bakemeyer, Esq. (admitted *pro hac vice*)
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(aaron.colodny@whitecase.com)

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

[1] The last four digits of Debtor Invitae Corporation's ("**Invitae**," and with its subsidiary debtors, the "**Debtors**") tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO THE 2028 SENIOR SECURED NOTE CLAIMS [CLAIM NOS. 360, 378, 379, 380, 381, 382]

www.kccllc.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

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MISCELLANEOUS

The Official Committee of Unsecured Creditors (the "**Committee**") appointed in the chapter 11 cases of the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**"), by and through its undersigned counsel, hereby files its objection (the "**Objection**") to the 2028 Senior Secured Note Claims (as defined below) set forth in proofs of claim 360, 378, 379, 380, 381, 382 (collectively, the "**Proofs of Claim**"). In support of this Objection, the Committee submits the *Certification of Aaron Colodny in Support of the Objection of the Official Committee of Unsecured Creditors to the 2028 Senior Secured Note Claims [Claim Nos. 360, 378, 379, 380, 381, 382]*, filed contemporaneously herewith. In further support of this Objection, the Committee respectfully states as follows:[2]

PRELIMINARY STATEMENT

1. Through the Uptier Transaction, most of the Debtors' then-outstanding 2024 Unsecured Notes were exchanged for 2028 Senior Secured Notes with liens on substantially all assets of Invitae and its subsidiaries. The transactions were led by and primarily benefitted Deerfield Partners, L.P. and its affiliates (collectively, "**Deerfield**"), who now hold approximately 78% of the new 2028 Senior Secured Notes. The Debtors, on the other hand, were left with exacerbated liquidity issues and no ability to raise additional capital at the time they desperately needed it. The Committee's investigation has revealed that the Debtors' estates hold significant constructive fraudulent transfer, actual fraudulent transfer, aiding and abetting breaches of fiduciary duties, and other claims in connection with the Uptier Transaction and the August

[2] Capitalized terms used but not defined herein shall have the meanings set forth in the *Declaration of Anna Schrank, Chief Financial Officer of Invitae Corporation, in Support of Chapter 11 Filing, First Day Motions, and Access to Cash Collateral* [Dkt. No. 21] (the "**First Day Decl.**") or the *Final Order Pursuant to Sections 105, 361, 362, 363, 503, and 507 of the Bankruptcy Code and Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; and (IV) Granting Related Relief* [Dkt. No. 188] (the "**Final Cash Collateral Order**").

Exchange, and the Committee is filing a motion seeking authority to pursue those claims on behalf of the estates contemporaneously with this Objection. If such claims are successful, the liens securing the 2028 Senior Secured Note Claims should be invalidated, and the Secured Noteholders deemed unsecured creditors. In that event, the Secured Noteholders would lose all entitlements that come with secured status, including payment of the make-whole, adequate protection claims, and other postpetition entitlements.

2. Having already improperly attempted to vault themselves ahead of similarly situated unsecured creditors, Deerfield and the other holders of the new 2028 Senior Secured Notes now seek to extract even more value from the Debtors at the expense of unsecured creditors. Through the Proofs of Claim, the Agent and the Secured Noteholders (together, the "**Claimants**") are seeking to recover, in addition to the principal amount of the 2028 Senior Secured Notes, a make-whole of approximately $27.5 million, postpetition interest at the default rate, and other postpetition entitlements. The Secured Noteholders are not entitled to these additional amounts irrespective of whether the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable.

3. First, the make-whole should be disallowed because it constitutes unmatured interest under section 502(b)(2) of the Bankruptcy Code, which cannot be saved by section 506(b) of the Bankruptcy Code. Alternatively, the make-whole should not be awarded because it is an unreasonable fee or charge under section 506(b) of the Bankruptcy Code or it is an unenforceable penalty under New York law and, thus, disallowed under section 502(b)(1) of the Bankruptcy Code. Second, the Secured Noteholders should not receive both the make-whole and postpetition interest to avoid a "double dip," nor should they be entitled to postpetition interest on the make-whole. Third, postpetition interest at the default rate is similarly unsupported by section 506(b) of

the Bankruptcy Code. Fourth, the Claimants do not have a properly perfected security interest in certain bank and letter of credit accounts and the Natera Litigation and proceeds thereof, and any secured portion of the 2028 Senior Secured Note Claims should exclude the value of those unencumbered assets. Fifth, the 2028 Senior Secured Note Claims should, at a minimum, be subject to setoff on account of the estates' claims for damages against the Claimants. And, sixth, pursuant to section 502(d) of the Bankruptcy Code, the 2028 Senior Secured Note Claims should be disallowed until the Claimants return to the estates property, or pay to the estates amounts, for which they are liable in connection with the avoidance claims the Committee has requested standing to pursue.

4. For the reasons set forth below, the Court should grant the relief requested herein.

RELIEF REQUESTED

5. By this Objection, the Committee seeks entry of an order, substantially in the form attached hereto as **Exhibit A** (the "**Proposed Order**"):

(i) disallowing the Make Whole Amount (as defined below), all other postpetition interest, fees, costs and charges, and any Adequate Protection Claims;

(ii) if the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable, disallowing the portion of the 2028 Senior Secured Note Claims attributable to the Make Whole Amount;

(iii) if the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable, disallowing either the postpetition payment of the Make Whole Amount or postpetition interest to avoid double counting, and disallowing payment of postpetition interest on the Make Whole Amount;

(iv) if the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable, disallowing the 2028 Senior Secured Note Claims to the extent they seek payment of postpetition interest at the default rate;

(v) reducing any secured portion of the 2028 Senior Secured Note Claims to exclude the value allocable to the Unencumbered Assets;

(vi) finding that the 2028 Senior Secured Note Claims are subject to setoff on account of the estates' damages recoverable from the Claimants;

(vii) determining that the 2028 Senior Secured Note Claims should be disallowed under section 502(d) of the Bankruptcy Code until the Claimants return to the estates property, or pay to the estates amounts, for which they are liable in connection with the avoidance claims the Committee has requested standing to pursue; and

(viii) granting such other and further relief as the Court deems just and proper.

JURISDICTION

6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 as a core matter "arising under" title 11 of the United States Code (the "**Bankruptcy Code**"). This proceeding has been referred to this Court under 28 U.S.C. § 157(a) and the *Standing Order of Reference to the Bankruptcy Court Under Title 11*, entered July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.). This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief requested by this Objection are sections 502 and 506(b) of title 11 of the Bankruptcy Code, rule 3007 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and rule 3007-1 of the Local Rules of the United States Bankruptcy Court for the District of New Jersey (the "**Local Bankruptcy Rules**").

BACKGROUND[3]

I. General Background

7. On February 13, 2024 (the "**Petition Date**"), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses

[3] In addition to the facts set forth herein, this Objection incorporates as evidentiary support for the relief sought herein all facts and cited documents set forth in the Standing Motion and the Proposed Complaint (each as defined below).

and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**").

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

II. The Debtors' Capital Structure Prior to the Uptier Transaction

9. Between 2019 and 2021, Invitae consummated thirteen "unprofitable" transactions. *See* First Day Decl. ¶ 4. To fund its aggressive expansion, Invitae incurred the Term Loan and issued the 2024 Unsecured Notes and the 2028 Unsecured Notes (each as defined below).

10. ***2024 Unsecured Notes***. On September 10, 2019, Invitae issued $350 million of 2.00% convertible unsecured senior notes due 2024 (the "**2024 Unsecured Notes**"). First Day Decl. ¶¶ 51–52. The 2024 Unsecured Notes are unsecured obligations of Invitae and mature on September 1, 2024. *Id.* ¶ 52. U.S. Bank National Association entered into the governing 2024 Unsecured Notes indenture as trustee. *Id.* ¶ 51. As of February 28, 2023, Deerfield held 79.1% of the 2024 Unsecured Notes. *See The Debtors', The Official Committee of Unsecured Creditors', and the United States Trustee's Joint Stipulation of Undisputed Facts Related to the Debtors' Application to Retain Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors-In-Possession* ¶ 11 [Dkt. No. 454]. The 2024 Unsecured Notes can be repaid prior to maturity or accelerated without payment of a make-whole or any other penalty. Invitae Corp., Current Report (Form 8-K) (Sept. 11, 2019) Ex. 4.1 § 6.02.

11. ***Term Loan***. On October 2, 2020, Invitae and certain of its subsidiaries entered into that certain Credit Agreement and Guaranty, dated as of October 2, 2020 (the "**Term Loan Credit**

Agreement"), by and among Invitae, the subsidiary guarantors from time to time party thereto, Perceptive Credit Holdings III, LP, as the closing date lender, and Perceptive Credit Holdings III, LP, as the administrative agent. Invitae Corp., Current Report (Form 8-K) (Oct. 5, 2020) Ex. 10.3. Pursuant to the Term Loan Credit Agreement, the lenders provided Invitae with a senior secured term loan facility in an aggregate principal amount of no less than $135 million and no more than $200 million. *Id.* Ex. 10.3, at 31. Invitae borrowed $135.0 million under this facility (the "**Term Loan**"). *Id.* at 2. The Term Loan was a senior secured obligation of Invitae and its maturity date was June 1, 2024, which could be extended under certain conditions to no later than June 1, 2025. *Id.* Ex. 10.3, at 17. The Term Loan was secured by a first priority lien on substantially all assets of Invitae and its subsidiaries, and several of these subsidiaries jointly and severally guaranteed the obligations. The Term Loan included an early prepayment fee of 6% if the prepayment was in the first three-year period post-closing and 4% thereafter. *Id.* Ex. 10.3, at 6.

12. ***2028 Unsecured Notes***. On April 8, 2021, Invitae issued, at 99% of par value, $1.15 billion of 1.5% convertible unsecured senior notes due 2028 (the "**2028 Unsecured Notes**"). First Day Decl. ¶¶ 53–54. The 2028 Unsecured Notes are senior unsecured obligations of Invitae and mature on April 1, 2028. *Id.* ¶ 54. U.S. Bank National Association entered into the governing 2028 Unsecured Notes indenture as trustee. *Id.* ¶ 53.

III. The Uptier Transaction and the Resulting Capital Structure

13. Through several transactions that began in February 2023 and that were spearheaded by Deerfield, Invitae extinguished its Term Loan obligations and exchanged a substantial portion of its 2024 Unsecured Notes into senior secured notes due 2028. As a result, Deerfield and certain other parties handpicked by Deerfield obtained the right, at a time when the Debtors were insolvent, to recover from the first $305.4 million of the Debtors' value in the event

of any future bankruptcy proceedings. *See generally The Official Committee of Unsecured Creditors' Motion for (I) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action on Behalf of the Debtors' Estates and (II) Exclusive Settlement Authority*, filed contemporaneously herewith (the "**Standing Motion**"), at Ex. A (the "**Proposed Complaint**"). The Debtors did not receive even close to the amount of new capital necessary to fund operations beyond the short term in exchange. The transactions increased Invitae's debt burden and rendered the Debtors unable to raise new financing, ultimately leading to this bankruptcy filing. Other creditors had proposed alternative restructuring transactions, which the Debtors declined. *Id.*

14. ***The Term Loan Repayment***. The precursor to the March Exchange (as defined below) occurred on February 7, 2023, when Invitae began its early repayment of the Term Loan with a $53.7 million payment, including interest and a $3 million prepayment fee, reducing the principal balance of the term loan by $50.0 million. Invitae Corp., Annual Report (Form 10-K) (Feb. 28, 2023), at 110. On February 28, 2023, Invitae completed repaying the Term Loan with an additional payment of $85.0 million, plus outstanding interest of $1.9 million, and a prepayment fee of $5.1 million. *Id.* The total repayment of the Term Loan (the "**Term Loan Repayment**") consisted of (i) a principal amount of $135.0 million, (ii) $2.6 million of accrued interest, (iii) $11.2 million of unamortized debt issuance costs, and (iv) $8.1 million of prepayment fees. Invitae Corp., Quarterly Report (Form 10-Q) (Aug. 8, 2023), at 18.

15. ***March Exchange***. On the same day the Term Loan Repayment was completed, Invitae announced a "transaction led by Deerfield Management." *See* Press Release, *Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance* (Feb. 28,

2023).[4] Through that transaction, Invitae (a) exchanged $305.7 million of 2024 Unsecured Notes for $275.3 million of new secured 4.5% Series A Convertible Senior Secured Notes (the "**Series A Notes**") and 14,219,859 shares of Invitae's common stock, and (b) issued $30 million of new secured 4.5% Series B Convertible Senior Secured Notes (the "**Series B Notes**" and, together with the Series A Notes, the "**2028 Senior Secured Notes**") for $30 million in cash (clauses (a) and (b), the "**March Exchange**" and, together with the Term Loan Repayment, the "**Uptier Transaction**"). First Day Decl. ¶ 65.

16. The 2028 Senior Secured Notes were issued pursuant to an indenture, dated as of March 7, 2023 (the "**2028 Senior Secured Notes Indenture**"), between Invitae, as issuer, the guarantor parties thereto (the "**Secured Note Guarantors**"), and U.S. Bank Trust Company, National Association, as indenture trustee and collateral agent (the "**Agent**"). First Day Decl. ¶ 49.[5] The 2028 Senior Secured Notes were jointly and severally guaranteed by (i) Debtor ArcherDX, LLC; (ii) Debtor ArcherDX Clinical Services, Inc.; (iii) non-Debtor Citizen, LLC; (iv) Debtor Genetic Solutions, LLC; (v) Debtor Genosity, LLC; (vi) Debtor Ommdom Inc.; and (vii) non-Debtor YouScript, LLC, which include the same Debtor subsidiaries that had guaranteed the Term Loan. *See* 2028 Senior Secured Notes Indenture. The 2028 Senior Secured Notes are secured obligations of Invitae and the Secured Note Guarantors with a maturity date of March 15, 2028. First Day Decl. ¶ 50. The 2028 Senior Secured Notes accrue an interest rate of 4.5% per annum, payable quarterly in arrears. *Id.* If an Event of Default under the 2028 Senior Secured Notes Indenture has occurred and is continuing, the default interest rate is 6.5%. 2028 Senior Secured Notes Indenture § 2.03(c) ("Any Defaulted Amounts shall accrue interest per annum at

[4] Available at https://ir.invitae.com/news-and-events/press-releases/press-release-details/2023/Invitae-Announces-Convertible-Notes-and-Share-Exchange-and-New-Convertible-Notes-Issuance/default.aspx.

[5] A copy of the 2028 Senior Secured Notes Indenture is attached to the Proofs of Claim. *See, e.g.*, Claim No. 360.

the rate borne by the Notes of the applicable series *plus* two percent, subject to the enforceability thereof under Applicable Law . . . ."). The 2028 Senior Secured Notes and the guarantees thereof are secured by (i) substantially all the assets of Invitae and its domestic material subsidiaries and (ii) a pledge of the equity interests of Invitae's direct and indirect subsidiaries, in each case subject to certain exceptions described in the 2028 Senior Secured Notes Indenture, the Security Agreement,[6] and other collateral documents. First Day Decl. ¶ 50. Section 19.04 of the 2028 Senior Secured Indenture provides that it is governed by New York law.

17. ***August Exchange***. In August 2023, Deerfield entered into an additional exchange agreement with Invitae for Deerfield's remaining 2024 Unsecured Notes, whereby Invitae exchanged $17.2 million of 2024 Unsecured Notes for $100,000 principal amount of secured Series A Notes and 15,819,604 shares of Invitae common stock (the "**August Exchange**"). First Day Decl. ¶ 66. In connection with the August Exchange, Invitae, the Secured Note Guarantors, and the Agent entered into a first supplemental indenture on August 22, 2023, which supplemented and amended the existing 2028 Senior Secured Notes Indenture. *Id.*

18. As the result of the above transactions, the Debtors' capital structure immediately before the Petition Date consisted of the following funded debt obligations:

Debt	Principal Amount
2028 Senior Secured Notes:	
Series A Notes	$275.4 million
Series B Notes	$30.0 million

[6] The "**Security Agreement**" means that certain Security Agreement, dated as of March 7, 2023, among Invitae Corporation, as the company, and each other grantor from time to time party hereto, and U.S. Bank Trust Company, National Association, as collateral agent. A copy of the Security Agreement is attached to the Proofs of Claim. *See, e.g.*, Claim No. 360.

Debt	Principal Amount
2024 Unsecured Notes	$27.1 million
2028 Unsecured Notes	$1.15 billion
Total	**$1.4825 billion**

First Day Decl. ¶ 48.

19. Seeing the writing on the walls, Deerfield prodded Invitae to execute the Uptier Transaction in order to elevate its claims (and those of its chosen coconspirators) above similarly situated noteholders to better position itself in the Debtors' inevitable bankruptcy cases. *See generally* Proposed Complaint. Deerfield holds approximately 78% of the Debtors' 2028 Senior Secured Notes. First Day Decl. ¶ 10; Mar. 15, 2024 Hr'g Tr. 22:6–7 [Dkt. No. 236].

IV. The Make Whole Provision in the 2028 Senior Secured Notes Indenture

20. The 2028 Senior Secured Notes Indenture contains a provision (the "**Make Whole Provision**") that, if triggered and enforceable, would entitle the holders of the 2028 Senior Secured Notes (the "**Secured Noteholders**") to a make-whole in certain specified circumstances, stating:

> If any Note is prepaid, repaid, redeemed or paid at any time, including, in connection with (i) an Optional Redemption[7] . . . , (ii) an acceleration of the Notes following the occurrence of an Event of Default pursuant to Section 6.02 or (iii) a Major Transaction Repurchase,[8] then in addition to the principal amount of the Notes and other Obligations and the issuance of Warrants pursuant to Section 2.14 (as applicable)), the Company shall contemporaneously pay in cash (A) any accrued and unpaid interest owed

[7] Section 16.01 of the Senior Secured Indenture provides: "Subject to the terms, conditions and limitations set forth in this Article 16, at any time prior to the date that is sixty (60) days prior to the Maturity Date, the Company shall have the right to redeem (an '**Optional Redemption**') all or any portion of the remaining principal amount of the Notes then outstanding for the Optional Redemption Price."

[8] The term "**Major Transaction**" includes, *inter alia*, sale, lease, transfer, or other conveyance of all or substantially all of the consolidated assets of Invitae Corp. and its Subsidiaries. In the event of a Major Transaction, "each Holder, at its option, shall have the right (the '**Major Transaction Repurchase Right**') to require the Company to repurchase all or any portion of the outstanding principal amount of its Notes for the Major Transaction Repurchase Price as provided in this Section 15.01 (a '**Major Transaction Repurchase**')." Senior Secured Indenture § 15.01.

> on such principal and (B) the Make Whole Amount, in each case, applicable to the principal amount of the Notes so prepaid, repaid, redeemed, paid or otherwise reduced. . . .
>
> The Make Whole Amount shall automatically be due and payable at any time any of the Notes subject to such amounts become due and payable prior to the applicable Maturity Date of the applicable Notes in accordance with the terms hereof . . . as though such Indebtedness was voluntarily prepaid and shall constitute part of the Obligations, whether due to acceleration pursuant to the terms of this Agreement, by operation of law or otherwise (including, without limitation, on account of any bankruptcy filing) . . . .

2028 Senior Secured Notes Indenture § 2.13. The term "**Make Whole Amount**" means:

> on any date such amount is required to be paid in accordance with this Indenture, an amount in cash equal to, the lesser of (i) all required interest payments, fees, charges and premiums due on any of the Notes that are prepaid, paid, redeemed or repaid from the date of prepayment, payment, redemption or repayment (as applicable) through and including the Maturity Date applicable to such Notes (assuming that the interest rate applicable to all such interest is the applicable interest rate for such Notes), and for the avoidance of doubt, without any discount rate applying thereto (but assuming a 360-day year and actual days elapsed), and (ii) nine percent (9%) of the principal amount prepaid, paid, redeemed or repaid of any of the Notes.

2028 Senior Secured Notes Indenture § 1.01. As of the Petition Date, the lesser of the two amounts was 9% of the principal amount of the outstanding 2028 Senior Secured Notes.

21. Section 6.01(f) of the 2028 Senior Secured Notes Indenture provides that a bankruptcy filing by Invitae or any of its Significant Subsidiaries or group of Subsidiaries that, taken together, would constitute a Significant Subsidiary is an Event of Default (each term as defined therein). 2028 Senior Secured Notes Indenture § 6.01(f). In turn, Section 6.02 provides:

> If an Event of Default specified in Section 6.01(f) with respect to the Company or any of its Significant Subsidiaries (or group of Subsidiaries that taken together would constitute a Significant Subsidiary) occurs and is continuing, 100% of the principal of, and accrued and unpaid interest, if any, on (including any Make Whole Amount and any Cash Settlement Amount (including any Cash Settlement Amount within the meaning of the

Warrants)) all Notes shall become and shall automatically be immediately due and payable.

V. The Final Cash Collateral Order

22. Shortly after the Petition Date, the Debtors filed a motion seeking authority to use cash collateral of the Secured Noteholders based on consent received from the Agent and Deerfield, as the "Required Holder" [Dkt. No. 18]. On March 18, 2024, the Court entered the Final Cash Collateral Order.

23. Pursuant to the terms of the Final Cash Collateral Order, the Debtors stipulated, subject to potential challenges by third parties, to the validity and amount of the indebtedness under the 2028 Senior Secured Notes Indenture (including any accrued and unpaid interest with respect thereto and any additional fees, premiums, costs, expenses, and other obligations thereunder) and the validity, priority, and extent of associated liens on the Prepetition Collateral (as defined in the Final Cash Collateral Order). Final Cash Collateral Order ¶ E.

24. Under the Final Cash Collateral Order, the Agent, for the benefit of itself and the Secured Noteholders, was granted superpriority adequate protection claims (the "**Adequate Protection Claims**") solely to the extent of any diminution in value of the Secured Noteholder's collateral during these Chapter 11 Cases. *Id.* ¶ 4(b). As part of the adequate protection package granted to the Secured Noteholders for the use of cash collateral, the Debtors are directed to pay (i) postpetition monthly interest payments in cash to the Agent, on behalf of the Secured Noteholders, in an amount equal to the accrued and unpaid interest at the non-default interest rate (including payment of all prepetition accrued and unpaid interest under the 2028 Senior Secured Notes Indenture) and (ii) reasonable and documented professional fees, expenses, and disbursements of Deerfield's advisors and of the Agent and its advisors, accrued prepetition and postpetition, in each case without prejudice to whether any such payments should be

recharacterized or reallocated pursuant to section 506(b) of the Bankruptcy Code as payments of principal, interest or otherwise. *Id.* ¶ 4(e).

VI. The Proofs of Claim

25. On April 3, 2024, the Agent filed the Proofs of Claim against each Debtor on account of the 2028 Senior Secured Notes, each of which is identical and asserts claims for $335,091,137.88, plus unliquidated amounts, secured by property valued at an "unknown/unliquidated" amount (collectively, the "**2028 Senior Secured Note Claims**").[9] The asserted prepetition amount of the 2028 Senior Secured Note Claims in the Proofs of Claim comprises the following:

- Principal amount of the 2028 Senior Secured Notes: $305,357,000.00;
- Accrued and unpaid interest through the Petition Date: $2,252,007.88;
- Make Whole Amount: $27,482,130.00 (calculated at 9% of the principal amount of the 2028 Senior Secured Notes); and
- Any and all other accrued but unpaid interest, fees, expenses, and any and all other amounts due and owing in unspecified amounts.

Proofs of Claim ¶ 4. Pursuant to the Proofs of Claim, Invitae and each of the Secured Note Guarantors are also purportedly indebted for postpetition obligations comprising:

- All postpetition costs and expenses in connection with the claims, including legal fees and expenses (amounts unspecified);
- Make Whole Amount; and

[9] The Debtors also listed the 2028 Senior Note Claims on Schedule D of their schedules. Invitae Corp. Sch. D [Dkt. No. 202], at 35; ArcherDX Clinical Services, Inc. Sch. D [Dkt. No. 203], at 34; ArcherDX, LLC Sch. D [Dkt. 204], at 34; Genetic Solutions LLC Sch. D [Dkt. No. 205], at 34; Genosity, LLC Sch. D [Dkt. No. 206], at 34; Ommdom Inc. Sch. D. [Dkt. No. 207], at 34. Pursuant to Bankruptcy Rule 3003(c)(4), a proof of claim supersedes any scheduling of that claim. Notwithstanding that the Proofs of Claim govern, by filing this Objection, the Committee objects to the 2028 Senior Note Claims both as evidenced by the Proofs of Claim and as scheduled on the Debtors' schedules. *See In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 163 (Bankr. S.D.N.Y. 2007) ("[J]ust as proofs of claim can be challenged by a party in interest, schedules can be challenged too, and if challenged (as they have been here), the schedules no longer have a presumption of validity.").

- Postpetition interest on all claims of the Agent.

Id. ¶ 6.

26. According to the Proofs of Claim, the 2028 Senior Secured Note Claims are secured by perfected, first-priority security interests, liens, and other rights in the Prepetition Collateral and have the benefit of secured Adequate Protection Superpriority Claims granted under the Final Cash Collateral Order. *Id.* ¶ 19. The Proofs of Claim further state that the 2028 Senior Secured Note Claims are not subject to any setoff or counterclaim. *Id.* ¶ 17.

VII. The Debtors' Sale

27. Shortly after the Petition Date, the Debtors sought and obtained a bid procedures order granting them authority to run a sale process for all or substantially all of their assets [Dkt. Nos. 19, 57]. After running a marketing process and auction, the Debtors determined to sell most of their assets to Labcorp Genetics Inc. ("**Labcorp**") for a base purchase price of $239 million in cash, plus additional non-cash consideration. *See Notice of Successful Bidder with Respect to the Auction Held on April 17 and 24, 2024* [Dkt. No. 362]. The following significant assets are excluded from the sale: (1) the Debtors' cash; (2) accounts receivable, which Labcorp has agreed to help the Debtors' collect in exchange for the right to retain certain collected amounts; (3) accounts payable; and (4) chapter 5 claims and causes of action and all other litigation claims of the Debtors' estates, except to the extent arising under transferred intellectual property and assigned contracts, including specific patent litigations. *See 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* [Dkt. No. 364], Ex. A, Ex. A (Asset Purchase Agreement) §§ 1.1(k), 1.2(a), 1.2(j).

28. On May 7, 2024, the Court entered an order approving the sale [Dkt. No. 463]. The parties estimate that the closing will occur in the third quarter of 2024. *See* Press Release, *Invitae Enters into Agreement with Labcorp for Sale of Business* (Apr. 24, 2024).[10]

29. The price obtained from Labcorp, combined with the value of the Debtors' retained assets, renders the Secured Noteholders oversecured (to the extent that their claims and liens are upheld as valid). The Debtors have, thus, identified unsecured creditors of Invitae as the "fulcrum securities" in these Chapter 11 Cases. May 7, 2024 Hr'g Tr. 48:19–21 [Dkt. No. 469]. However, taking into account payment of administrative claims, priority claims, and other claims entitled to payment in full under the Debtors' proposed Plan (as defined below), any recovery for the vast majority of such unsecured creditors is projected to be minimal unless the relief sought in the Standing Motion and the Proposed Complaint is granted.

VIII. The Debtors' Proposed Chapter 11 Plan

30. On May 9, 2024, the Debtors filed a proposed plan [Dkt. No. 471] (the "**Plan**") and disclosure statement [Dkt. No. 472] (the "**Disclosure Statement**"). The terms of the Plan materially track the terms of the Debtors' prepetition transaction support agreement with Deerfield. *See* First Day Decl., Ex. B.

31. The Plan provides that holders of the 2028 Senior Secured Note Claims will receive distributions on account of "any and all unpaid interest, fees, premiums, and all other obligations, amounts, and expenses due and owing under the 2028 Senior Secured Notes Indenture or related documents (including post-petition interest at the default contract rate) through and including the date of payment" of the 2028 Senior Secured Note Claims. Plan, Art. III.B.3. This provision

[10] Available at https://ir.invitae.com/news-and-events/press-releases/press-release-details/2024/Invitae-Enters-into-Agreement-with-Labcorp-for-Sale-of-Business/default.aspx.

appears to include payment of the Make Whole Amount. Pursuant to the Plan, the Debtors propose to distribute all value to holders of the 2028 Senior Secured Note Claims after paying priority and administrative claims, claims in a convenience class, and general unsecured claims against Debtor subsidiaries. Plan, Art. III.B. The Plan further states that the allowed amount of the 2028 Senior Secured Notes must be paid in full before general unsecured creditors at Invitae will receive any recovery. Plan, Art. III.B.6.

ARGUMENT

32. Section 502(a) of the Bankruptcy Code provides, in pertinent part, that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." Section 502(b) of the Bankruptcy Code and Bankruptcy Rule 3007 grant parties in interest the opportunity to object to claims against a debtor's estate. Section 1109(b) of the Bankruptcy Code makes clear that a statutory creditors' committee (among others) is a party in interest in a chapter 11 case. *See In re Solutia Inc.*, 379 B.R. 473, 483 (Bankr. S.D.N.Y. 2007) (stating that the official committee of unsecured creditors is a party in interest for purposes of section 502 of the Bankruptcy Code); *see also AI Int'l Holdings (BVI) Ltd v. MUFG Union Bank, N.A. (In re Weinstein Co. Holdings)*, 595 B.R. 455, 463–64 (Bankr. D. Del. 2018) (holding that a creditor has standing to object to a claim under sections 502 and 506 of the Bankruptcy Code as a party in interest). Consistent with the foregoing, by filing this Objection, the Committee is exercising its well-established right to object to the allowance of claims, to seek the reduction of any secured portion of such claims to the extent of certain unencumbered assets, and to request the other relief set forth herein.[11]

[11] Statutory committees in this Circuit have objected to claims as a party in interest, including to claims for make-wholes. *See, e.g.*, *In re Energy Future Holdings Corp.*, Case No. 14-10979 (CSS) (Bankr. D. Del. 2015) [Dkt. No. 4365]; *In re Corp Group Banking S.A.*, Case No. 21-10969 (JKS) (Bankr. D. Del. 2021) [Dkt. No. 396]; *In*

33. While a properly-filed proof of claim is *prima facie* evidence of the claim's allowed amount, when an objecting party presents evidence to rebut a claim's *prima facie* validity, the claimant bears the burden of proving the claim's validity by a preponderance of evidence. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173–74 (3d Cir. 1992). The burden of persuasion with respect to the claim is always on the claimant. *See, e.g., Biolitec, AG v. Cyganowski*, No. 13-cv-5864, 2013 WL 6795400, *3 (D.N.J. Dec. 16, 2013); *see also In re Allegheny Int'l*, 954 F.2d at 173–74.

34. Once an objection to a claim is filed, the Court, after notice and a hearing, shall determine the allowed amount of the claim as of the date of the filing of the petition. For the reasons set forth and to the extent described herein, the Committee respectfully requests that the Court disallow the 2028 Senior Secured Note Claims.

A. The Make Whole Amount and Other Postpetition Interest, Fees, Costs and Charges and the Adequate Protection Claims Should Be Disallowed if the Liens Securing the 2028 Senior Secured Notes Are Avoided

35. As set forth in detail in the Standing Motion and the Proposed Complaint, the March Exchange was a constructive fraudulent transfer and an actual fraudulent transfer. Proposed Complaint, First Cause of Action and Second Cause of Action. If the claims asserted by the Committee are successful, the liens securing the 2028 Senior Secured Notes should be invalidated and, as a result, the 2028 Senior Secured Note Claims should thus be deemed to be unsecured. *Id.*

36. Section 502(b)(2) of the Bankruptcy Code disallows claims for unmatured interest. Section 506(b) provides that, if a secured creditor is oversecured (*i.e.*, the value of its collateral exceeds its claim), it is entitled to postpetition interest and reasonable fees, costs, and charges

re Sch. Specialty, Inc., Case No. 13-10125 (KJC) (Bankr. D. Del. 2013) [Dkt. No. 475]; *In re Hercules Offshore, Inc.*, Case No. 16-11385 (KJC) (Bankr. D. Del. 2016) [Dkt. No. 255].

provided for under its agreement or state statute under which the claim arose. If the 2028 Senior Secured Notes are determined to be unsecured as a result of the causes of action set forth in the Proposed Complaint, the Secured Noteholders naturally are not entitled to postpetition interest. This includes the Make Whole Amount, which is also unmatured interest, as discussed in Section B.i below.

37. If the liens securing the 2028 Senior Secured Notes are avoided, the Secured Noteholders are also not entitled to other postpetition entitlements including fees (such as attorneys' fees), costs, and charges. *See Finova Grp., Inc. v. BNP Paribas (In re Finova Grp., Inc.)*, 304 B.R. 630, 638 (D. Del. 2004) (holding that unsecured creditors were not entitled to postpetition attorneys' fees and costs); *In re Loewen Grp. Int'l, Inc.*, 274 B.R. 427, 445 n.36 (Bankr. D. Del. 2002) (interpreting "the language in § 506(b) limiting the recovery of post-petition fees and costs to oversecured creditors as demonstrative of Congressional intent not to allow the recovery of post-petition fees and costs by creditors whose claims are not oversecured.").[12]

38. Certain courts have held that an unsecured creditor is still entitled to postpetition fees, costs, and charges that are contractually required but only as part of its unsecured claim. *See, e.g.*, *Wilmington Tr. Co. v. Tribune Media Co. (In re Tribune Media Co.)*, No. 1:15-cv-01116-RGA, 2018 U.S. Dist. LEXIS 199137, at *4 (D. Del. Nov. 26, 2018); *Ogle v. Fid. & Deposit Co. of Md.*, 586 F.3d 143, 148 (2d Cir. 2009). The better view is that, similar to the prohibition of unmatured interest of section 502(b)(2), such postpetition entitlements should not be allowed unsecured claims because the same rationale for disallowance of unmatured interest applies: it "avoids the administrative inconvenience of continuous recomputation of claims, and prevents

[12] As set forth in Section B.ii below, the Court may determine that the Make Whole Amount is a fee or charge rather than unmatured interest. In that event, it should still be disallowed in light of section 506(b).

certain creditors from profiting at the expense of others solely as a result of the delay in post-petition repayment caused by operation of law." *In re Loewen Group Int'l*, 274 B.R. at 443.

39. Regardless of whether fees, costs, and charges are determined to be disallowed or part of the Secured Noteholders' unsecured claims, if the liens securing the 2028 Senior Secured Notes are avoided, the Claimants have not been legally entitled to the payments of postpetition interest and attorneys' (and other) fees they have been receiving during these Chapter 11 Cases under the Final Cash Collateral Order. Such payments should, thus, be (i) recharacterized as payments of principal to the extent they relate to disallowed claims and (ii) determined to be an initial installment of any distributions the Claimants are ultimately entitled to in these Chapter 11 Cases or, alternatively, disgorged.

40. Finally, if the Secured Noteholders' liens are avoided, there necessarily could not be any diminution of value in the Secured Noteholders' collateral (as they would no longer have enforceable liens). Therefore, in that event, the Adequate Protection Claims should be disallowed.

B. The Make Whole Amount Should Be Disallowed

41. Even if the Court is not inclined to invalidate liens securing the 2028 Senior Secured Note Claims, the Court should disallow the portion of the 2028 Senior Secured Note Claims attributable to the Make Whole Amount because the Make Whole Amount is (i) unmatured interest disallowed under section 502(b)(2) of the Bankruptcy Code that is not saved by section 506(b) or (ii) in the alternative, is an unreasonable fee or charge under section 506(b) of the Bankruptcy Code and an unenforceable penalty under New York law and, thus, should be disallowed under section 502(b)(1) of the Bankruptcy Code.

i. The Make Whole Amount Should Be Disallowed Under Section 502(b)(2) of the Bankruptcy Code as Unmatured Interest

42. Section 502(b)(2) of the Bankruptcy Code disallows claims for unmatured interest. Although the term "unmatured interest" is not defined by the Bankruptcy Code, courts have defined it as "interest that is not yet due and payable at the time of a bankruptcy filing, or is not yet earned." *HSBC Bank USA, Nat'l Ass'n. v. Calpine Corp.*, No. 07-3088 (GBD), 2010 U.S. Dist. LEXIS 96792, at *19 (S.D.N.Y. Sept. 15, 2010). "Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money or as damages for its detention." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 745 (1996) (quoting *Brown v. Hiatts*, 82 U.S. 177, 185 (1873)); *see also Black's Law Dictionary* (11th ed. 2019) ("interest" means "compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially the amount owed to a lender in return for the use of borrowed money").

43. An obligation does not need to be labeled as "interest" to constitute unmatured interest under section 502(b)(2). "Courts have interpreted that provision to include the 'economic equivalent of unmatured interest' because to find otherwise would make the provision susceptible to end-runs by canny creditors." *Wells Fargo Bank, N.A. v. Hertz Corp. (In re Hertz Corp.)*, Nos. 20-11218 (MFW), 21-50995 (MFW), 2022 Bankr. LEXIS 3358, at *9 & n.20 (Bankr. D. Del. Nov. 21, 2022) ("***Hertz II***") (citing *In re Ultra Petro. Corp.*, 51 F.4th 138, 146 (5th Cir. 2022) ("***Ultra III***")). For example, courts have held original issue discount ("**OID**"), which provides for a lesser amount of loan proceeds to be extended than the face amount of the debt, to be the economic equivalent of interest because it is reflective of additional interest spread out over the life of the loan, and have disallowed the unmatured portion thereof under section 502(b)(2). *See, e.g.*, *In re Pengo Indus., Inc.*, 962 F.2d 543, 546 (5th Cir. 1992); *In re Chateaugay Corp.*, 961 F.2d 378, 380-

81 (2d Cir. 1992); *In re Pub. Serv. Co. of N.H.*, 114 B.R. 800, 803 (Bankr. D.N.H. 1990); *In re Allegheny Int'l, Inc.*, 100 B.R. 247, 250 (Bankr. W.D. Pa. 1989).

44. Like OID, make-wholes (also known as redemption premiums or prepayment premiums) have been subject to disallowance under section 502(b)(2) of the Bankruptcy Code in a number of instances. Make-wholes "compensate creditors for damages incurred by the repayment of the notes prior to maturity." *Hertz II*, 2022 Bankr. LEXIS 3358, at *9. "Those damages typically are incurred when the noteholders are required to reinvest their funds in a market with lower prevailing interest rates." *Id.* Make-wholes are similar to OID because they are both "one-time charges to compensate the lender for lending: that is, the price of money received now in terms of money received later." *Paloian v. LaSalle Bank N.A.* (*In re Doctors Hosp. of Hyde Park, Inc.*), 508 B.R. 697, 705 (Bankr. N.D. Ill. 2014). A determination of whether a make-whole is the economic equivalent of interest depends on the facts of the case. *Hertz II*, 2022 Bankr. LEXIS 3358, at *9-10.

45. Simply labeling a make-whole as "liquidated damages, damages for breach of contract or a 'separate contract right' from the obligation to pay interest" is not dispositive. *Wells Fargo Bank. N.A. v. Hertz Corp. (In re Hertz Corp.)*, 637 B.R. 781, 791 (Bankr. D. Del. 2021) ("***Hertz I***"); *see also Hertz II*, 2022 Bankr. LEXIS 3358, at *10 ("Courts look to the economic substance of the transaction rather than 'dictionary definitions or formalistic labels' when making that determination.") (quoting *Ultra III*, 51 F.4th at 147). Even if the Make Whole Amount is rightfully labeled as liquidated damages (which it is not), that does not preclude the Court from holding that it is also unmatured interest. *See Hertz I*, 637 B.R. at 791 ("The Court is not prepared to conclude, as a legal matter, that make-wholes cannot be disallowed as unmatured interest as [the indenture trustee asserting a make-whole], the cases it cites, and academics suggest."); *Ultra III*,

51 F.4th at 149 (holding that the make-whole amount was "*both* liquidated damages *and* the 'economic equivalent of unmatured interest'"); *In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. at 706 (holding that the distinction between liquidated damages and unmatured interest is a "false dichotomy" and a prepayment premium "may well be both").

46. Courts have disallowed prepayment premiums as claims for unmatured interest on the grounds that they are the contractual equivalent of future interest. *See, e.g.*, *In re Doctors Hosp. of Hyde Park*, 508 B.R. at 705–06 (holding that yield maintenance premium was a liquidated damages provision constituting disallowable unmatured interest). In *Ultra III*, the Fifth Circuit held that a make-whole was effectively interest because it "compensate[d] [c]reditors for the *future* use of their money, albeit use that will never actually occur because of [the debtor's] default"). 51 F.4th at 146. The Fifth Circuit further held that the make-whole at issue fit the description of make-wholes generally, in that it was calculated as future interest payment that would not get paid because of early payment and, thus, "a make-whole amount is nothing more than a lender's unmatured interest, rendered in today's dollars." *Id.* (citing *In re Energy Future Holdings Corp.*, 842 F.3d 247, 251 (3d Cir. 2016) (holding that a make-whole is a "contractual substitute for interest lost on [n]otes redeemed before their expected due date")); *Apollo Glob. Mgmt., LLC v. Bokf, NA* (*In re MPM Silicones, L.L.C.)*, 874 F.3d 787, 806 n.13 (2d Cir. 2017) (same). Therefore, the Fifth Circuit held that the make-whole at issue was unmatured interest disallowed under section 502(b)(2). *Ultra III*, 51 F.4th at 146.[13]

47. In *Hertz II*, the bankruptcy court held that each of the three components of the make-whole at issue was the economic equivalent of interest: the first being accrued and unpaid

[13] In *Ultra III*, the Fifth Circuit ultimately held that the make-whole at issue had to be paid notwithstanding section 502(b)(2) in light of the "solvent-debtor exception." *Ultra III*, 51 F.4th at 156. The solvent-debtor exception has no bearing here, as the Debtors do not project having nearly enough cash to pay all unsecured claims in full.

interest through the redemption date, the second being the present value of future interest payments from the redemption date to the first call date in the indenture, and the third being the net present value of the redemption price that the debtors agreed to pay on the initial call date minus the undiscounted principal amount (which was the mathematic equivalent of one semi-annual interest payment). 2022 Bankr. LEXIS 3358, at *12–13. The court noted that the make-whole was "not at all tied to the reinvestment costs" that the trustee or the noteholders would incur in reinvesting the cash received from early repayment of the notes, "such as the costs associated with marketing or finding a replacement borrower." *Id.*, at *13.

48. The Make Whole Amount should similarly be disallowed as unmatured interest under section 502(b)(2). The Make Whole Amount has two components, which together are simply future interest payments subject to a 9% cap. The future interest payments are indisputably the economic equivalent of unmatured interest in light of *Ultra III*, *Hertz II*, and other related cases. The 9% cap does nothing to change this—it merely acts as a limitation on the windfall that the Secured Noteholders would receive if the Make Whole Amount is triggered in the first three and a half years of its existence (an outcome that was extremely likely and entirely foreseeable by Deerfield and the other Secured Noteholders). Further, the 9% cap is also tied to future interest payments—it is double the non-default contractual rate of 4.5% and, thus, reflects two years' worth of interest. This is akin to the third prong of the make-whole formula in *Hertz II*, with respect to which the court held that "because the input is entirely interest, the application of the formula does not change its nature." 2022 Bankr. LEXIS 3358, at *13. Also similar to the make-whole in *Hertz II*, nothing about the Make Whole Amount relates to the Secured Noteholders' reinvestment costs if they are repaid early.

49. Section 506(b) of the Bankruptcy Code does not save the Make Whole Amount. As stated above, section 506(b) of the Bankruptcy Code provides that, if a secured creditor is oversecured, it is entitled to postpetition interest and reasonable fees, costs, or charges provided for under its agreement or state statute under which the claim arose. If the Court rightfully determines that the Make Whole Amount is unmatured interest, it necessarily means that it is the economic equivalent of future interest payments.[14] Therefore, like OID (which also is triggered by acceleration of obligations upon the bankruptcy filing), as interest payments come due and are paid (which the Debtors have been doing under the Final Cash Collateral Order), the unmatured portion of the Make Whole Amount is reduced accordingly. *See, e.g.*, *In re Allegheny Int'l.*, 100 B.R. at 252-55 (calculating amount of OID on a "straight-line basis"). But, once these Chapter 11 Cases are resolved via the consummation of a plan or otherwise, the postpetition "maturing" of interest (or the economic equivalent thereof) will cease. *See In re Nixon*, 404 F. App'x 575, 578–79 (3d Cir. 2010) ("The Bankruptcy Code does not specify, however, that an oversecured creditor must receive interest indefinitely or at the contract rate."); *Key Bank Nat'l Ass'n v. Milham (In re Milham)*, 141 F.3d 420, 423 (2d Cir. 1998) ("'It is generally recognized that the interest allowed by § 506(b) will accrue until payment of the secured claim or until the effective date of the plan.'") (quoting *Rake v. Wade*, 508 U.S. 464, 468 (1993)).

50. *In re Solutia Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007) is instructive in this regard. In that case, holders of secured notes that were issued with OID were receiving both postpetition interest and the amount of the OID that accrued during the bankruptcy cases. In addition to those

[14] The Proofs of Claim identify the Make Whole Amount as both a prepetition obligation and a postpetition obligation. It cannot be both. Because the Make Whole Amount was triggered by the bankruptcy filing, it is necessarily a postpetition obligation. *Ultra III*, 51 F.4th at 147 ("First the petition is filed; then the make-whole amount becomes due—first the cause; then the effect. Thus, if is indeed 'interest,' the make-whole amount is also 'unmatured' as of the time of filing—and therefore subject to § 502(b)(2) disallowance.")

payments, the secured noteholders sought to receive the balance of the OID that remained unaccrued between the effective date of the plan and the notes' maturity date. The court rejected the claim for post-effective date unaccrued OID, holding that any OID that remained unaccrued as of the effective date should be disallowed as unmatured interest regardless of section 506(b) of the Bankruptcy Code. *Id.* at 486–87. The court noted that "[t]here are no apparent bankruptcy policy reasons to be found in the legislative history, [sections 502 or 506 of the Bankruptcy Code] and the relevant case law to warrant different treatment for unsecured and secured [OID]." *Id.* at 487.

51. The same is equally applicable to the Make Whole Amount. Under section 506(b) of the Bankruptcy Code, the Secured Noteholders (if their liens are determined to be valid) are oversecured and are entitled to postpetition interest, which they are receiving. But section 506(b) does not require the Debtors to pay the entirety of the Make Whole Amount. Once these Chapter 11 Cases are resolved and the 2028 Senior Secured Notes are repaid, the payment of postpetition interest will cease, as should any remaining unmatured obligations under the Make Whole Provision.

52. Further, as set forth in Section D below, the Court has discretion with respect to the rate of postpetition interest awarded under section 506(b) using its equitable powers. For the same reasons set forth therein that the Court should not award interest at the default rate, it should also refuse to materially increase the interest rate by adding the Make Whole Amount to it.

ii. Alternatively, the Make Whole Amount Should Not Be Awarded Under Section 506(b) of the Bankruptcy Code and Should Be Disallowed Under Section 502(b)(1) of the Bankruptcy Code

53. If the Make Whole Amount is not determined to be unmatured interest, then it must be a fee or charge. In that case, it should not be awarded under section 506(b) because it is not

reasonable. Or it should be disallowed under section 502(b)(1) of the Bankruptcy Code because it is an impermissible penalty under New York law.

54. Although, as described above, the recent trend in case law has been to view a make-whole as unmatured interest, courts have historically labeled a make-whole as a charge. *See, e.g.*, *In re Atrium View, LLC*, No. 1:07-BK-02478MDF, 2008 WL 5378293, at *2 (Bankr. M.D. Pa. Dec. 24, 2008) ("A prepayment premium is a type of 'charge' and, thus, must be 'reasonable.'"); *In re Outdoor Sports Headquarters*, 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993) ("Prepayment charges are encompassed in the term 'charges,' as used in § 506(b)."); *In re Amigo PAT Tex., LLC*, 579 B.R. 779, 782 (Bankr. S.D. Tex. 2017) (same). A make-whole could similarly be labeled as a fee, which is akin to a charge. *Black's Law Dictionary* (11th ed. 2019) (defining "fee" as "[a] charge or payment for labor or services, esp[ecially] professional services"). To simply label the Make Whole Amount as liquidated damages without applying section 506(b) of the Bankruptcy Code would skirt Congress's clear intent to put certain restraints on postpetition entitlements. As courts have held is the case with respect to unmatured interest, the Make Whole Amount can potentially be liquidated damages and be a fee or charge.[15]

55. Section 506(b) of the Bankruptcy Code provides that, to the extent a creditor's claim is oversecured, "there shall be allowed to the holder of such claim, interest on such claim, and any ***reasonable*** fees, costs, or charges provided for under the agreement or State statute under which such claim arose." 11 U.S.C. § 506(b) (emphasis added); *see also Calpine Corp.*, 2010 Dist. LEXIS 96792, at *27–28 ("Bankruptcy courts have broad discretion and 'inherent power' in deciding upon the reasonableness of fees under § 506(b)."") (quoting *In re Mills*, 77 B.R. 413, 419

[15] *See* paragraph 45 above.

(Bankr. S.D.N.Y. 1987)). The claimant bears the burden of proof that amounts requested under section 506(b) are reasonable. *See, e.g., In re Stanwood Devries, Inc.*, 72 B.R. 140, 143 (Bankr. D.N.J. 1987) (stating that an "overwhelming majority" of courts hold that the party seeking compensation under section 506(b) must carry the burden of demonstrating reasonableness to the court); *In re Canal Asphalt, Inc.*, No. 15-23094 (RDD), 2017 WL 1956849, at *7 (Bankr. S.D.N.Y. May 10, 2017) ("The claimant has the burden to establish that its fees are allowable under section 506(b) . . . .").

56. Although it did not consider whether a make-whole can constitute unmatured interest, the court in *In re Energy Future Holdings Corp.* held that a make-whole is enforceable "where (1) actual damages may be difficult to determine and (2) the sum stipulated is not 'plainly disproportionate' to the possible loss." 540 B.R. 96, 105 (Bankr. D. Del. 2015) (quoting *United Merchs. and Mfrs., Inc. v. Equitable Life Assurance Soc'y of the U.S. (In re United Merchs. & Mfrs., Inc.)*, 674 F.2d 134, 142 (2d Cir. 1982)). In turn, a prepayment fee or charge is generally reasonable for purposes of section 506(b) where it bears a relationship to ***actual*** damages. *See In re Duralite Truck Body & Container Corp.*, 153 B.R. 708, 714 (Bankr. D. Md. 1993) ("This court approves of actual damages as the measure of reasonableness for prepayment charges under 11 U.S.C. § 506(b)."). On the other hand, courts have denied a prepayment premium as unreasonable under section 506(b) because it did not approximate actual damages, holding that "[o]nly a prepayment charge formula which reasonably measures actual damages will be respected under § 506(b)." *Id.*; *see also In re Atrium View, LLC*, 2008 WL 5378293, at *3 (disallowing a fixed prepayment fee as unreasonable, noting that the creditor "provided no evidence that the prepayment premium approximates reasonably predicted actual losses," and holding that "[a] flat fee that is the same regardless of how many months interest is lost and that is unrelated to the

market interest rate clearly is not based on a forecast of actual damages"); *In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. 823, 829, 831–32 (Bankr. E.D. La. 2001) (holding that a make-whole was unreasonable, in part, because it presumed a loss); *In re Kroh Bros. Dev. Co.*, 88 B.R. 997, 1000–02 (Bankr. W.D. Mo. 1988) (holding that a make-whole that does not discount to present value is not reasonable under 506(b)); *In re Amigo PAT Tex.*, 579 B.R. at 783–84 ("To be reasonable, the prepayment premium must effectively estimate actual damages."); *cf. Anchor Resol. Corp. v. State St. Bank & Trust Co. of Conn., Nat'l Ass'n (In re Anchor Resol. Corp.)*, 221 B.R. 330, 341 (Bankr. D. Del. 1998) (finding that a make-whole was reasonable because the make-whole formula "accounts for changes in the Treasury rate, decreases over time, and has no applicable 'minimum charge'").

57. The Make Whole Amount bears no relationship to the Secured Noteholders' actual damages. It is calculated as the future interest due on the 2028 Senior Secured Notes (subject to a cap) without any regard to market rate changes and without any present value discount, thus presuming the Secured Noteholders would suffer a loss. *See* Senior Secured Indenture §§ 1.01, 2.13(b). Under these circumstances, the Make Whole Amount is not a reasonable fee or charge.

58. Further, in determining whether the reasonableness standard under section 506(b) is satisfied, courts have considered various factors such as: "(1) whether the prepayment premium approximates actual damages; (2) whether the creditor will receive the full amount of its principal and will receive interest in full at the contract rate; (3) the amount of prepayment premium as a percentage of the principal loan amount; and (4) the effect on junior creditors." *In re Amigo PAT Tex.*, 579 B.R. at 783. And while no single factor is dispositive, "the last factor—the effect on junior creditors—may be considered 'especially significant.'" *Id.*

59. Applying these factors, the court in *Amigo PAT Tex.* denied a secured creditor's claim for a postpetition prepayment premium, notwithstanding that it was only 4.9% of the principal amount of the loan. *Id.* at 784–85. The court reasoned that the premium did not take into consideration market interest rates and tacked on an additional flat percentage fee amount, the creditor was receiving the full principal amount of the loan with postpetition interest, and unsecured creditors, who were projected a 40% recovery, would be further harmed because "every dollar that goes to [the creditor] constitutes further harm to unsecured creditors." *Id.* Similarly, in *In re Schwegmann Giant Supermarkets P'ship*, the court refused to award a prepayment premium it deemed unreasonable where the debtor was not in default on the loan triggering the premium immediately prior to the bankruptcy, the creditor suffered no losses by virtue of the bankruptcy filing and was repaid in full, and the junior creditors would not be paid in their entirety if the premium was allowed. 264 B.R. at 831–32. The court found that the equities of the bankruptcy case warranted not awarding the prepayment premium under section 506(b) of the Bankruptcy Code, stating: "The net effect of allowing [the creditor] the premium it seeks is not to redress [the creditor] for its damages, but instead to penalize the debtor and junior creditors for the debtor's filing of [c]hapter 11 relief—a highly inequitable result that this court is not willing to condone under all the circumstances of the case." *Id.* at 832.

60. The Make Whole Amount similarly should not be awarded when applying these factors. The Make Whole Amount does not attempt to approximate the actual damages that could be suffered by the Senior Noteholders from early repayment, as it does not reflect the cost of sourcing a similar loan or market interest rates at the time of repayment, but rather is the sum of future interest payments (subject to a 9% cap). The Secured Noteholders are oversecured, as the Debtors have conceded. The Make Whole Amount, as of the Petition Date, is 9% of the total

principal amount of the loan (approximately $27.5 million), and the Claimants have not demonstrated that this substantial amount of cash is required to source a similar loan to replace the 2028 Senior Secured Notes or reflective of the interest rate it can get in such a loan, as is their burden. And, most importantly, unsecured creditors who were previously positioned behind a significantly lower make-whole under the Term Loan (both as a percentage of the debt and as a dollar amount), which has ***already*** been paid, would be meaningfully impacted by payment of the Make Whole Amount. Given that unsecured creditors of Invitae only receive value under the Plan once the 2028 Senior Secured Note Claims are paid in full, every dollar toward the Make Whole Amount is one less dollar for unsecured creditor recoveries.[16]

61. The unreasonableness of the Make Whole Amount is further evidenced by the circumstances surrounding the Uptier Transaction. As described in the Standing Motion and the Proposed Complaint, the Debtors effectuated the Uptier Transaction when they were insolvent. *See generally* Proposed Complaint §§ II.E, III.B. As Deerfield was acutely aware, rather than address the debt burden and cash burn to right set the Debtors, the Uptier Transaction snowballed Invitae further toward this bankruptcy filing. *See generally id.* §§ II.B, II.F. Requiring a make-whole that would be triggered under these circumstances further indicates Deerfield's desire not only to better position itself and its chosen coconspirators from similarly situated unsecured noteholders but also to artificially inflate the Secured Noteholders' claims at the expense of the general unsecured creditors. Under these circumstances, the Make Whole Amount is nothing more than a "bankruptcy penalty" that must be disallowed.

[16] The Committee believes that the Plan is unconfirmable and reserves all rights with respect thereto. In any event, under any plan, allowed secured claims will have to receive the value of collateral subject to valid, enforceable and non-avoidable liens before unsecured creditors can recover, absent a consensual agreement to the contrary. *See* 11 U.S.C. § 1129(b)(2)(A).

62. Section 502(b)(1) of the Bankruptcy Code also precludes payment of the Make Whole Amount. It disallows claims to the extent they are unenforceable under applicable nonbankruptcy law. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (holding that section 502(b)(1) "is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy."). Under well-established New York law,[17] a prepayment premium or early termination fee may be analyzed as a liquidated damages provision. *See, e.g.*, *United Merchs. & Mfrs.*, 674 F.2d at 141-43 (analyzing a provision for a "pre-payment charge" as a liquidated damages provision); *JMD Holding Corp. v. Cong. Fin. Corp.*, 828 N.E.2d 604, 608-609 (N.Y. 2005) (analyzing "early termination" fee under liquidated damages standards).[18]

63. " Liquidated damages that constitute a penalty, however, violate public policy, and are unenforceable." *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assn., Inc.*, 25 N.E.3d 952, 957 (N.Y. 2014). A liquidated damages provision is enforceable only if "the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." *JMD Holding*, 828 N.E.2d at 609. If the liquidated damages are "plainly or grossly disproportionate to the probable loss," the provision is considered a penalty and unenforceable. *Id.* "[W]here there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty." *Pyramid Ctrs. & Co., Ltd. v. Kinney Shoe Corp.*, 663 N.Y.S.2d 711, 713 (N.Y. App. Div. 1997) (quoting *Willner v. Willner*, 538 N.Y.S.2d 599, 602 (N.Y. App. Div. 1989)). Under New York law, there is a longstanding presumption that

[17] As noted in paragraph 16 above, the 2028 Senior Secured Notes Indenture is governed by New York law.

[18] As provided in paragraph 45 and 54 above, a determination that the Make Whole Amount constituted liquidated damages does not preclude the Court from holding that it is also unmatured interest, a fee, or a charge.

liquidated damages provisions are penalties. *See, e.g.*, *Pyramid Ctrs*, 663 N.Y.S.2d at 713; *NCSPlus Inc. v. WBR Mgmt. Corp.*, 949 N.Y.S.2d 317, 323 (N.Y. Sup. Ct. 2012); *Menorah Home & Hosp. for the Aged & Infirm v. Laufer*, 859 N.Y.S.2d 904, *7 (N.Y. Sup. Ct. 2008) (citing *Pyramid Ctrs.*, 663 N.Y.S.2d at 713); *AXA Inv. Managers UK Ltd. v. Endeavor Cap. Mgmt. LLC*, 890 F. Supp. 2d 373, 388 (S.D.N.Y. 2012); *L & L Wings, Inc. v. Marco-Destin Inc.*, 756 F. Supp. 2d 359, 364 (S.D.N.Y. 2010).

64. The Claimants have the burden to show that the Make Whole Amount is enforceable under New York law. *See Premier Ent. Biloxi LLC v. U.S. Bank Nat'l Ass'n (In re Premier Ent. Biloxi LLC)*, 445 B.R. 582, 618-19 (Bankr. S.D. Miss. 2010) (stating that the holder of the make-whole claim had "the ultimate burden of proving . . . that the premium is valid under New York law, and that the premium constituted a 'reasonable' charge under federal law").

65. When determining whether a make-whole bears a reasonable proportion to probable loss under New York law, courts look at whether the make-whole calculation uses a reasonable discount rate, such as the yield of U.S. Treasury bonds of comparable maturity, to estimate the present value of the amount owed to the lender at maturity. *See In re Sch. Specialty, Inc.*, 2013 WL 1838513, at *13–14 (holding that a prepayment premium tied to Treasury Notes was not "disproportionate to a lender's potential losses" and, thus, not an impermissible penalty under New York law); *In re S. Side House, LLC*, 451 B.R. 248, 271 (Bankr. E.D.N.Y. 2011) ("[P]repayment consideration calculated on the basis of U.S. Treasury bond interest rates satisfies [the proportionality standard of New York liquidated damages law]."); *Katzenstein v. VIII SV5556 Lender, LLC (In re Saint Vincent's Catholic Med. Ctrs. of N.Y.)*, 440 B.R. 587, 594 (Bankr. S.D.N.Y. 2010) (noting that make-wholes "influenced by U.S. Treasury bills" have been upheld by New York bankruptcy courts applying New York state law).

66. As described above in the context of section 506(b) of the Bankruptcy Code, the Make Whole Amount bears no relationship to probable loss, assuming instead that damages equate to all future interest payments (subject to a cap) regardless of the realities of the market at the time and without any present value discount. *See supra* ¶¶ 57-60. Further, for the reasons stated in the Standing Motion and the Proposed Complaint and paragraph 61 above, taking the context of the Uptier Transaction and Deerfield's motives into account, the Make Whole Amount is an impermissible penalty that would not be enforced under New York law. Accordingly, the Make Whole Amount should be disallowed under section 502(b)(1) of the Bankruptcy Code.

C. The Secured Noteholders Are Not Entitled to Both the Full Make Whole Amount and Postpetition Interest or to Postpetition Interest on the Make Whole Amount

67. If the Court ultimately allows the Make Whole Amount (which it should not), then the Make Whole Amount should be reduced by the amount of postpetition interest the Secured Noteholders have received and will receive during these Chapter 11 Cases pursuant to the Final Cash Collateral Order. Allowing the Secured Noteholders to effectively "double-dip" on interest would grant them a windfall at the expense of the Debtors' unsecured creditors. *See Nov. 5, 2021 Hr'g Tr., In re Mallinckrodt, PLC*, No. 20-12522 (JTD) (Bankr. D. Del. Nov. 8, 2021) [Dkt. No. 5220] 107:21-108:5 (refusing to require the payment of a make-whole on reinstated debt given that it would be duplicative of interest owed on the debt post-effectiveness); *In re Anchor Resol. Corp.*, 221 B.R. at 340 (reducing amount of a make-whole to reflect adequate protection payments made during the case to avoid double-counting). Notwithstanding that the Make Whole Amount still hits the 9% cap after postpetition interest is applied, it would be inequitable to award the Secured Noteholders both postpetition interest and the full Make Whole Amount given that its sole purpose is to compensate the Secured Noteholders for missed future interest payments. *See Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 165 (1946) ("It is manifest that

the touchstone of each decision on allowance of interest in bankruptcy . . . has been a balance of equities between creditor and creditor or between creditors and the debtor."); *see also In re Energy Future Holdings Corp.*, 842 F.3d at 251 (holding that a make-whole is a "contractual substitute for interest lost on [n]otes redeemed before their expected due date").

68. Additionally, although not expressly specified by the Agent in the Proofs of Claim, the Secured Noteholders are not entitled to postpetition interest on the Make Whole Amount if it is allowed. Any such asserted interest would constitute an unenforceable penalty under New York law and, thus, is not allowed under section 502(b)(1). Courts have held that, under New York law, interest not intended to compensate lenders for a debtor's breach constitutes a penalty and is unconscionable. *See Bristol Inv. Fund, Inc. v. Carnegie Int'l Corp.*, 310 F. Supp. 2d 556, 568 (S.D.N.Y. 2003) (holding that certain "liquidated damages" constitute a penalty and are unconscionable because they "are not intended to compensate" the lender under New York law); *LG Cap. Funding, LLC v. Coroware, Inc.*, No. 16-cv-2266 (AMD), 2017 WL 3973921, at *3 (E.D.N.Y. Sept. 8, 2017) (declining to award as liquidated damages daily penalty provisions of a note, noting that the plaintiff failed to establish "the parties contemplated the proposed award of damages for lost profits" and cannot establish that the "proposed calculation estimates its actual loss of profits[.]").

69. Further, courts have the authority to modify the interest rate contemplated by agreements if such interest rate is deemed a penalty. *See In re P.G. Realty Co.*, 220 B.R. 773, 780 (Bankr. E.D.N.Y. 1998) (holding that the court "possesses the power to modify rights created by state law or private agreement" where "application of the statutory interest rate would cause direct harm to the unsecured creditors, where the statutory interest rate is a penalty").

70. As discussed in paragraphs 62-66 above, the Make Whole Amount is a penalty under New York law. Therefore, any alleged interest arising from the Make Whole Amount is also a penalty under New York law.

71. Further, the Make Whole Amount was triggered solely by Invitae's bankruptcy filing. Given that the Claimants have been getting paid current interest and professional fees and are oversecured, they have not suffered any damages. If the Claimants could include postpetition interest on the Make Whole Amount, it would serve solely to penalize the Debtors for filing the bankruptcy proceeding. *In re W.R. Grace & Co.*, 475 B.R. 34, 152 (D. Del. 2012) ("Now, however, it is well-established that *ipso facto* clauses are unenforceable as a matter of law under the Bankruptcy Code."); *EBC I, Inc. v. Am. Online, Inc.* (*In re EBC I, Inc.)*, 356 B.R. 631, 640 (Bankr. D. Del. 2006) (stating that *ipso facto* clauses "are generally disfavored, if not expressly void, under the Bankruptcy Code"); *see also Nov. 5, 2021 Hr'g Tr.*, *In re Mallinckrodt, PLC*, No. 20-12522 (JTD) (Bankr. D. Del. Nov. 8, 2021) [Dkt. No. 5220] 109:8–11 (holding that a secured creditor was not entitled to a prepayment premium and stating that "a party should not receive a 'windfall merely by reason of the happenstance of the bankruptcy'") (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979)).

72. Finally, interest on the Make Whole Amount would effectively be interest on interest, which courts have disallowed in cases involving insolvent debtors. *See Vanston*, 329 U.S. at 165 (disallowing payment of interest on interest when a debtor was insolvent, stating that a court must balance the "equities between creditor and creditor or between creditors and the debtor"); *Matter of Timberline Prop. Dev., Inc.*, 136 B.R. 382, 386 (Bankr. D.N.J. 1992) (relying on *Vanston* and denying default interest as an unenforceable penalty). It is undisputed that the Debtors are insolvent here. In weighing the equities between the Claimants, who are oversecured, and

unsecured creditors of Invitae, who are poised to receive a paltry recovery, the balance favors disallowing any interest on the Make Whole Amount.

D. The Secured Noteholders Are Not Entitled to Postpetition Interest at the Default Rate

73. Although the Agent does not specify the rate of postpetition interest it asserts in the Proofs of Claim, it could argue that the default rate of 6.5% applies given the bankruptcy filing. The Claimants are not entitled to postpetition interest at the default rate (which, by its terms, is only applied if it is enforceable under applicable law) and, instead, should only be entitled to interest (if at all) at the contractual non-default rate of 4.5%. This is the interest rate the Secured Noteholders have agreed to be paid during the Chapter 11 Cases under the Final Cash Collateral Order, which adequately protects them given the lack of any default other than the filing of the bankruptcy cases.

74. While section 506(b) of the Bankruptcy Code entitles oversecured creditors to postpetition interest, it does not specify the interest rate. It is well-established in this Circuit that "[t]he Bankruptcy Code does not specify, however, that an oversecured creditor must receive interest indefinitely or at the contract rate." *In re Nixon*, 404 F. App'x at 578–79. Judge Stripp of this Court has held that the contract rate should not be the applicable rate for oversecured creditors if the court finds that "equities favor allowing interest at a different rate." *In re Route One W. Windsor Ltd. P'ship*, 225 B.R. 76, 87 (Bankr. D.N.J. 1998); *see also In re Nixon*, 404 F. App'x at 578–79 (recognizing that "courts have used equitable considerations to modify the interest awarded oversecured creditors within the parameters of the [Bankruptcy Code]").

75. In evaluating the equities, the focus lies on the "status of the interests which will bear the adverse effects of allowance of a default rate." *In re Route One W. Windsor Ltd. P'ship*, 225 B.R. at 90. Specifically, where "non-insider creditors, whether unsecured or secured, would

bear the adverse effects of allowance of default rates to oversecured creditors, this court would not be inclined to allow such default rates." *Id.* at 90-91 ("In most bankruptcy cases undersecured and unsecured creditors receive less than the full amount due, and often they receive nothing. In such circumstances equity will not ordinarily favor allowing oversecured creditors default interest rates."); *see also Urb. Communicators PCS Ltd. P'ship v. Gabriel Cap., L.P.*, 394 B.R. 325, 338 (S.D.N.Y. 2008) (holding that "equitable considerations" may weigh against a contractual default rate of interest in situations "where there has been misconduct by the creditor, where application of [such] interest rate would cause direct harm to the unsecured creditors, where [such] interest rate is a penalty, or where its application would prevent the [d]ebtor's fresh start") (quoting *In re P.G. Realty Co.*, 220 B.R. 773, 780 (Bankr. E.D.N.Y. 1998)); *In re Nw. Airlines Corp.*, No. 05-17930 (ALG), 2007 WL 3376895, at *6 (Bankr. S.D.N.Y. Nov. 9, 2007) (denying the oversecured creditor's request for default interest and noting that "there is no question as to the insolvency of the [d]ebtors and the fact that the recovery of other creditors would be diminished by a grant of default interest to [the oversecured creditor]"); *In re Bownetree, LLC*, No. 1-08-45854-DEM, 2009 WL 2226107, at *4 (Bankr. E.D.N.Y. July 24, 2009) (disallowing default rate because among others, such reduction "would reduce an already limited recovery to unsecured creditors to a minimal amount").

76. This is precisely the situation here. If the Secured Noteholders, who are oversecured, were allowed to receive postpetition interest at the default rate as part of their claims, the recovery for unsecured creditors, most of whom are projected to receive a minimal distribution, would be significantly further diminished by approximately $508,928 per month for the duration of these Chapter 11 Cases, which adds up to over $3.0 million in the first six months of these Chapter 11 Cases. Further diminishing the available recovery for unsecured creditors for the

benefit of the Secured Noteholders will have a substantial adverse effect. And the only default here is the bankruptcy filing—such *ipso facto* triggers are disfavored, as discussed in paragraph 71 above. Therefore, the equities favor reducing the postpetition interest to the non-default contract rate.

77. In addition, courts often utilize equitable powers to modify postpetition interest for oversecured creditors in cases where the secured creditors were involved in misconduct. *See In re Nixon*, 404 F. App'x at 578–79 (upholding the lower court's decision to toll the interest due to an oversecured creditor "given his dilatory conduct" and his "purposeful delay of the proceedings"). Here, Deerfield and other Secured Noteholders engaged in the Uptier Transaction and elevated their status from unsecured to secured creditors, thereby increasing its control of the Debtors and ensuring priority recovery over other unsecured creditors at a time when Deerfield knew (or should have known) that the Debtors were insolvent and that the Uptier Transaction would do nothing to fix that. Deerfield's naked attempt to enhance its position in an inevitable bankruptcy filing further demonstrates the inequitable nature of awarding default rate of interest here.

E. Any Secured Portion of the 2028 Senior Secured Note Claims Should Exclude Value Associated with the Unencumbered Assets

78. If, contrary to the Committee's allegations in the Standing Motion and the Proposed Complaint, the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable, the liens should nonetheless be held to exclude assets not subject to validly perfected liens. The Proofs of Claim provide that the 2028 Senior Secured Note Claims are secured by perfected, first-priority security interests, liens, and other rights in the Prepetition Collateral. Such collateral does not include the Natera Litigation (as defined below), unencumbered bank accounts holding approximately $3,067,938.69 of cash, and certain unencumbered letter of credit accounts

(collectively, the "**Unencumbered Assets**") because the Agent was not granted, or otherwise did not properly perfect, security interests in those assets.

i. Any Secured Portion of the 2028 Senior Secured Note Claims Should Exclude the Natera Litigation and Proceeds Thereof

79. The Debtors granted liens on commercial tort claims in favor of the Agent as part of the collateral package under the 2028 Senior Secured Notes Indenture. *See* Security Agreement § 3.1(b). The Agent has not, however, been granted a security interest in the Natera Litigation (as defined below) because commercial tort claims asserted therein were never specifically identified and listed on the relevant schedule to the 2028 Senior Secured Notes Indenture or the Security Agreement, nor was there ever a UCC-1 financing statement filed specifically identifying the Natera Litigation.

80. The New York Uniform Commercial Code (the "**N.Y. U.C.C.**")[19] defines a "Commercial Tort Claim" as "a claim arising in tort with respect to which: The claimant is an organization; or the claimant is an individual and the claim: arose in the course of the claimant's business or profession; and does not include damages arising out of personal injury to or the death of an individual." N.Y. U.C.C. § 9-102(a)(13). Under the N.Y. U.C.C., a commercial tort claim must be specifically identified in a security agreement for it to be subject to a valid lien. *Id.* § 9-108(e)(1); *see also, e.g.*, *Polk 33 Lending, LLC v. Schwartz*, 555 F. Supp. 3d 38, 43 (D. Del. 2021) (interpreting an identical Uniform Commercial Code provision under Delaware law and holding that a provision that "all commercial tort claims (including D&O Claims)" constitute collateral was insufficient for purposes of section 9-108 of the Delaware Uniform Commercial Code to convey a security interest in those claims because "interests in commercial tort claims must . . . be

[19] Both the 2028 Senior Secured Notes Indenture and the Security Agreement are governed by New York law.

specifically identified" rather than be described only by type of collateral); *In re Main St. Bus. Funding, LLC*, 642 B.R. 141, 153-54 (Bankr. D. Del. 2022) (holding that a "general collateral description" was insufficiently specific to create a security interest in commercial tort claims under an identical Pennsylvania statute).

81. Therefore, to constitute collateral under the 2028 Senior Secured Notes Indenture, a "Commercial Tort Claim" must be specifically identified on the relevant schedule to the Security Agreement (or supplement thereto in accordance with Section 5.9 of the Security Agreement). Security Agreement § 3.1. Here, the security interest granted by the Security Agreement encompasses (among other things) "the commercial tort claims described on Schedule 1 and on any supplement thereto received by [Agent] pursuant to Section 5.9." *Id.*

82. Only one commercial tort claim was identified on Schedule 1 to the Security Agreement: *ArcherDX, LLC (f/k/a ArcherDX, Inc.), and The General Hospital Corporation d/b/a Massachusetts General Hospital v. QIAGEN Sciences, QIAGEN LLC (f/k/a QIAGEN Inc.), QIAGEN Beverly Inc., QIAGEN Gaithersburg, Inc., QIAGEN Gmbh, and QIAGEN N.V., and Jonathan Arnold*, filed in the U.S. District Court for the District of Delaware, as Case No. 1:18-cv-01019. Security Agreement, Sch. 1 (Commercial Tort Claims).

83. Upon information and belief, the following commercial tort claims belong to the Debtors and are unencumbered (together, the "**Natera Litigation**"):

- ***Invitae Corp. v. Natera, Inc.*, C.A. No. 21-669-GBW (D. Del. filed May 7, 2021):** Invitae Corporation filed a lawsuit against Natera, Inc. ("**Natera**") on May 7, 2021, in the United States District Court for the District of Delaware. Invitae asserted one count of patent infringement of U.S. Patent No. 10,604,799 (the "**'799 Patent**"), which relates to novel techniques for improving the performance of DNA sequencing technology by allowing researchers to better extract the full scope of available information that results from modern DNA sequencing platforms so that mutations in an individual's DNA can be identified with enhanced specificity. Invitae alleges that certain tests offered and sold by Natera and the underlying

technology of such tests infringe of the '799 Patent. Natera filed a motion to dismiss, and on November 23, 2021, the District Court denied Natera's motion. The matter is scheduled for trial beginning in September 2024.

- ***Invitae Corp. v. Natera, Inc.*, C.A. No. 21-1635-GWB (D. Del. filed Nov. 21, 2021):** Invitae Corporation filed a lawsuit against Natera on November 21, 2021, in the United States District Court for the District of Delaware. Invitae asserted two counts of patent infringement of U.S. Patent No. 11,149,308 (the "**'308 Patent**") and of U.S. Patent No. 11,155,863 (the "**'863 Patent**"), both of which relate to novel techniques for improving the performance of DNA sequencing technology by allowing researchers to better extract the full scope of available information that results from modern DNA sequencing platforms so that mutations in an individual's DNA can be identified with enhanced specificity. Invitae alleges that certain tests offered and sold by Natera and the underlying technology of such tests infringe on the '308 Patent and '863 Patent. The matter is scheduled for trial beginning in September 2024.

84. Courts have held that patent infringement claims sound in tort. *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1365 (Fed. Cir. 2008) ("Patent infringement is a tort. . . . 'In patent cases, as in other commercial torts, damages are measured by inquiring: had the tortfeasor not committed the wrong, what would have been the financial position of the person wronged?'") (citing *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1579 (Fed. Cir. 1992)).

85. Invitae, as claimant in both offensive litigations against Natera, is an organization and as described above, the underlying claims arose in the course of their business and do not include damages arising out of personal injury to or the death of an individual. Further, the underlying causes of action each involve patent infringement which, as stated in *Mars*, are tort claims requiring the Debtors to specifically identify the claims to convey a security interest in same. There is no contractual relationship between the Debtors and Natera such that it could even be argued or alleged that the aforementioned commercial tort claims against Natera could be considered a breach of contract claim or anything but a commercial tort claim.

86. Further, neither the Debtors, nor the Agent have identified the Natera Litigation with any specificity such that any alleged security interest is properly granted and perfected under

the N.Y. U.C.C. and in accordance with the terms of the Security Agreement. Absent such a supplemental schedule or a contemporaneous formal writing delivered pursuant to or in accordance with the Security Agreement, the Natera Litigation and proceeds thereof cannot qualify for inclusion in the grant set out in Section 3.1 of the Security Agreement and was, therefore, unencumbered as of the Petition Date.[20]

ii. Any Secured Portion of the 2028 Senior Secured Note Claims Should Exclude Value Associated with Cash in the Unencumbered Accounts

87. As of the Petition Date, the Debtors had twenty-six (26) bank accounts (collectively, the "**Bank Accounts**"), of which, sixteen (16) are owned and controlled by the Debtors and ten (10) are owned and controlled by non-Debtor foreign affiliates. *See Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to (A) Continue to Operate their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintaining Existing Business Forms, and (D) Perform Intercompany Transactions* ¶ 9 [Dkt. No. 10]. The Debtors granted liens on the Bank Accounts (other than the Excluded Accounts) in favor of the Agent as part of the Collateral under (and as defined in) the 2028 Senior Secured Notes Indenture.

88. While the 2028 Senior Secured Notes Indenture identifies deposit accounts (other than the Excluded Accounts) as part of the Collateral, the Agent was not granted any security interests in fourteen (14) of the Bank Accounts (collectively the "**Unencumbered Bank Accounts**") because such accounts are Excluded Accounts and are neither subject to deposit account control agreements nor subject to control by the Agent sufficient to perfect such interest

[20] Unlike the QIAGEN tort claim for which there was a UCC-1 filing, there is no UCC-1 filing with specificity for the Natera Litigation, which is further evidence that the Natera Litigation is unencumbered.

under applicable law. The Unencumbered Bank Accounts, at which $3,067,938.69 of cash was held as of the Petition Date, include the following:

Grantor	Financial Institution	Account No.	Cash as of Petition Date
Invitae Corporation	HSBC Bank USA, National Association	9536	$1,240.70
Invitae Corporation	HSBC Bank USA, National Association	3311	$1,626,052.05
Invitae Corporation	HSBC Bank USA, National Association	1182	$0.00
Invitae Corporation	JP Morgan Chase & Co.	0155	$3,801.20
Invitae Corporation	JP Morgan Chase & Co.	0310	$0.00
Invitae Corporation	Silicon Valley Bank	7197	$0.00
Invitae Corporation	Silicon Valley Bank	5516	$0.00
Invitae Corporation	Silicon Valley Bank	6069	$118,918.54
Invitae Corporation	Silicon Valley Bank	3836	$1,310,073.35
Invitae Corporation	Silicon Valley Bank	8723	$0.00
Invitae Corporation	Silicon Valley Bank	3426	$0.00
ArcherDX, LLC	Silicon Valley Bank	3575	$0.00
ArcherDX, LLC	Silicon Valley Bank	6710	$0.00
ArcherDX, LLC	Silicon Valley Bank	3560	$7,852.85
		TOTAL:	**$3,067,938.69**

89. Additionally, the Debtors also have three (3) letter of credit accounts, which are Excluded Accounts (collectively, the "**Unencumbered Letter of Credit Accounts**," and together with the Unencumbered Bank Account, the "**Unencumbered Accounts**"):

Grantor	Financial Institution	Account No.	Face Amount of Underlying Letter of Credit
Invitae Corporation	HSBC Bank USA, National Association	7147	$69,000
Invitae Corporation	HSBC Bank USA, National Association	3583	$312,500
Invitae Corporation	HSBC Bank USA, National Association	3591	$118,000
		TOTAL:	**$499,500**

90. Article 9 of the Uniform Commercial Code, which governs perfection and priority of security interests in collateral, provides that "a security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 9-310 through 9-316 have been satisfied." N.Y. U.C.C. § 9-308(a). "Attachment" occurs once a security interest becomes enforceable. A security interest becomes enforceable when (1) value has been given; (2) the debtor has rights in the collateral (or the power to transfer rights in the collateral to the bank); and (3) in the case of deposit account collateral, and the secured party has control under Section 7-106, 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement. N.Y. U.C.C. § 9-203(b); *see also TSA Stores, Inc. v. M J Soffe, LLC (In re TSAWD Holdings, Inc.)*, Nos. 16-10527 (MFW), 16-50364 (MFW), 2018 Bankr. LEXIS 3681, at *20 (Bankr. D. Del. Nov. 26, 2018) ("[A] security interest is enforceable with respect to collateral if '(1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; [and] (3) . . . (A) the debtor has authenticated a security agreement that provides a description of the collateral . . . .'").

91. Although the Debtors granted the Agent a security interest in certain bank accounts, the Agent was not granted a security interest in the cash in the Unencumbered Accounts because such accounts were carved out of the security grant as "Excluded Accounts." Specifically, Section 3.1 of the Security Agreement excludes from the collateral grant "Excluded Assets," which term comprises, among other assets, "Excluded Accounts." Security Agreement §§ 3.1, 1.1. The 2028 Senior Secured Notes Indenture generally defines Excluded Accounts as, among other things, zero-balance accounts, low balance accounts not to exceed $4.0 million in the aggregate, accounts securing letter of credit obligations (the face amount of such obligations not to exceed $25 million in the aggregate) or payroll accounts. 2028 Senior Secured Notes Indenture § 1.01. Each of the

Unencumbered Accounts falls within the definition of "Excluded Accounts" and, therefore, does not serve as collateral securing the Debtors' obligations under the 2028 Senior Secured Notes.

92. Even if the Unencumbered Accounts are not Excluded Accounts, the Agent has not perfected security interests in those accounts under New York law. Pursuant to the N.Y. U.C.C.,

> [a] secured party has control of a deposit account if: (1) the secured party is the bank with which the deposit account is maintained; (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; (3) the secured party becomes the bank's customer with respect to the deposit account; (4) the name on the deposit account is the name of the secured party or indicates that the secured party has a security interest in the deposit account; or (5) another person has control of the deposit account on behalf of the secured party or, having previously acquired control of the deposit account, acknowledges that it has control on behalf of the secured party.

N.Y. U.C.C. § 9-104(a). None of the Unencumbered Accounts are held with the Agent, nor is there any evidence that the Agent became a customer with respect to any of the Unencumbered Accounts. And there is no control agreement or other record in place with respect to the Unencumbered Accounts. Accordingly, the cash held in the Unencumbered Accounts is not subject to perfected prepetition security interests under New York law and other applicable state law.

iii. Effect of Section 544(a) of the Bankruptcy Code

93. Under section 544(a)(1) of the Bankruptcy Code, a trustee or debtor in possession may avoid any security interest, transfer of property, or obligation incurred by the debtor that would be avoidable under non-bankruptcy law by a creditor who has a judicial lien on all of the debtor's property as of the date of the petition. In other words, the trustee or debtor in possession acquires the status of a hypothetical lien creditor that may avoid any security interest that is not properly perfected as of the petition date, causing the secured party to lose its security interest and

become a general unsecured creditor, preserving the value of the avoided security interest for the benefit of the estate. As such, any secured portion of the 2028 Senior Secured Note Claims should exclude any value associated with the Unencumbered Assets because those assets remained unencumbered as of the Petition Date.

F. The 2028 Senior Secured Note Claims Are Subject to Setoff

94. The Debtors' estates have claims against the Claimants for which the estates may be entitled to recover damages, including a claim for aiding and abetting breaches of fiduciary duties. *See generally* Proposed Complaint. Therefore, at a minimum, the estates' damages must be offset against the 2028 Senior Secured Note Claims prior to any distribution on account of those claims, and the 2028 Senior Secured Note Claims should be disallowed to the extent of the estates' setoff rights pursuant to section 502(b)(1) of the Bankruptcy Code as unenforceable against the Debtors under applicable non-bankruptcy law. *See, e.g.*, *In re El-Atari*, No. 09-14950-BFK, 2012 WL 404947, at *5 (Bankr. E.D. Va. Feb. 8, 2012) (noting that a valid setoff defense held by a debtor against its creditor affords the debtor a basis for the disallowance of the claim pursuant to section 502(b)(1) of the Bankruptcy Code); *Scherling v. Hellman Elec. Corp. (In re Westchester Structures, Inc.)*, 181 B.R. 730, 739–40 (Bankr. S.D.N.Y. 1995) ("[W]e look to the parties' contract and to applicable non-bankruptcy law to ascertain whether a debtor may offset its claim against a creditor's claim under either 11 U.S.C. § 502(b)(1) or 11 U.S.C. § 558."); *In re Walnut Equip. Leasing Co., Inc.*, No. 97-19699DWS, 2000 WL 1692840, at *4 (Bankr. E.D. Pa. Nov. 1, 2000) (citing *Westchester Structures*) (same).

G. The 2028 Senior Secured Note Claims Should Be Disallowed Under Section 502(d) of the Bankruptcy Code

95. Section 502(d) of the Bankruptcy Code provides that "the court shall disallow any claim of any entity . . . that is a transferee of a transfer avoidable under section[s 544, 547, and

548] of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section [550] of this title." 11 U.S.C. § 502(d). In the Standing Motion and Proposed Complaint, the Committee has alleged a number of causes of action against the Claimants including avoidance of actual and constructive fraudulent transfers. Until those claims are resolved and the Claimants return to the estates property, and pay the estates amounts, for which they are liable, the 2028 Senior Secured Note Claims should be disallowed under section 502(d) of the Bankruptcy Code.

RESERVATION OF RIGHTS

96. By this Objection, the Committee objects to the 2028 Senior Secured Note Claims for the reasons identified therein. The Committee reserves the right to amend, modify, or supplement this Objection, and to file additional objections regarding the 2028 Senior Secured Note Claims on any basis after further investigation. Further, the Committee reserves the right to object to any other claims (or a portion thereof) of the Claimants on any other grounds whatsoever, including, among other things, based on amount, priority, classification, secured status, or otherwise.

97. Nothing in this Objection shall be deemed: (a) an admission as to the amount of, basis for, or validity of any claim against the Debtors under the Bankruptcy Code or other applicable non-bankruptcy law; (b) a waiver of the Committee's or any other party in interest's right to dispute any claim; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Objection; (e) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; or (f) a waiver of any of the

Debtors' claims or causes of action which may exist against any entity under the Bankruptcy Code or any other applicable law.

WAIVER OF MEMORANDUM OF LAW

98. The Committee respectfully requests that the Court waive the requirement to file a separate memorandum of law pursuant to Local Bankruptcy Rule 9013-1(a)(3) because the legal bases upon which the Committee relies are set forth herein and, therefore, a separate memorandum of law would be unnecessary.

NOTICE

99. In accordance with the *Notice, Case Management, and Administrative Procedures* in these Chapter 11 Cases [Dkt. No. 62], notice of this Motion will be provided to: (a) the Debtors; (b) counsel to the Debtors, Attn: Kirkland & Ellis LLP, and Cole Schotz P.C.; (c) the office of the United States Trustee for the District of New Jersey; (d) counsel to the Required Holders (as defined in the Final Cash Collateral Order); (e) the indenture trustee to the 2028 Unsecured Notes and the 2024 Unsecured Notes, and counsel thereto; (f) U.S. Bank Trust Company, National Association, as indenture trustee and collateral agent for the 2028 Senior Secured Notes, and counsel thereto; (g) the U.S. Securities and Exchange Commission; (h) the United States Attorney's Office for the District of New Jersey; (i) the attorneys general in the states where the Debtors conduct their business operations; (j) the Internal Revenue Service; and (k) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Committee submits that no other or further notice of the Objection need be provided.

NO PRIOR REQUEST

100. No previous request for the relief sought herein has been made by the Committee to this or any other Court.

CONCLUSION

101. For the foregoing reasons, the Committee respectfully requests that the Court enter the Proposed Order: (i) disallowing the Make Whole Amount, all other postpetition interest, fees, costs and charges, and any Adequate Protection Claims; (ii) if the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable, disallowing the portion of the 2028 Senior Secured Note Claims attributable to the Make Whole Amount; (iii) if the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable, disallowing either the postpetition payment of the Make Whole Amount or postpetition interest to avoid double counting, and disallowing payment of postpetition interest on the Make Whole Amount; (iv) if the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are determined to be valid and enforceable, disallowing the 2028 Senior Secured Note Claims to the extent they seek payment of postpetition interest at the default rate; (v) reducing any secured portion of the 2028 Senior Secured Note Claims to exclude the value allocable to the Unencumbered Assets; (vi) finding that the 2028 Senior Secured Note Claims are subject to setoff on account of the estates' damages recoverable from the Claimants; (vii) determining that the 2028 Senior Secured Note Claims should be disallowed under section 502(d) of the Bankruptcy Code until the Claimants return to the estates property, or pay to the estates amounts, for which they are liable in connection with the avoidance claims the Committee has requested standing to pursue; and (viii) granting such other and further relief as the Court deems just and proper.

Dated: May 21, 2024

By: */s/ John S. Mairo*
John S. Mairo, Esq.
Warren J. Martin Jr., Esq.
Christopher P. Mazza, Esq.
PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962
(973) 538-4006
(973) 538-5146 Facsimile
Email: wjmartin@pbnlaw.com
jsmairo@pbnlaw.com
cpmazza@pbnlaw.com

-and-

J. Christopher Shore, Esq. (admitted *pro hac vice*)
Harrison Denman, Esq. (admitted *pro hac vice*)
Andrew Zatz, Esq. (admitted *pro hac vice*)
Samuel P. Hershey, Esq. (admitted *pro hac vice*)
Ashley Chase, Esq. (admitted *pro hac vice*)
Brett Bakemeyer, Esq. (admitted *pro hac vice*)
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
Email: cshore@whitecase.com
harrison.denman@whitecase.com
azatz@whitecase.com
sam.hershey@whitecase.com
ashley.chase@whitecase.com
brett.bakemeyer@whitecase.com

Aaron Colodny, Esq. (admitted *pro hac vice*)
WHITE & CASE LLP
555 S. Flower St., Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7706
Email: aaron.colodny@whitecase.com

Co-Counsel to the Official Committee of Unsecured Creditors

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

WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
J. Christopher Shore, Esq. (admitted *pro hac vice*)
(cshore@whitecase.com)
Harrison Denman, Esq. (admitted *pro hac vice*)
(harrison.denman@whitecase.com)
Andrew Zatz, Esq. (admitted *pro hac vice*)
(azatz@whitecase.com)
Samuel P. Hershey, Esq. (admitted *pro hac vice*)
(sam.hershey@whitecase.com)
Ashley Chase, Esq. (admitted *pro hac vice*)
(ashley.chase@whitecase.com)
Brett Bakemeyer, Esq. (admitted *pro hac vice*)
(brett.bakemeyer@whitecase.com)

WHITE & CASE LLP
555 S. Flower St., Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7700
Aaron Colodny, Esq. (admitted *pro hac vice*)
(aaron.colodny@whitecase.com)

-and-

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962
Telephone: (973) 538-4006
Warren J. Martin Jr., Esq. (wjmartin@pbnlaw.com)
John S. Mairo, Esq. (jsmairo@pbnlaw.com)
Christopher P. Mazza, Esq. (cpmazza@pbnlaw.com)

Co-Counsel to the Official Committee of Unsecured Creditors

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

[1] The last four digits of Debtor Invitae Corporation's ("**Invitae**," and with its subsidiary debtors, the "**Debtors**") tax identification number are 1898. A complete list of the Debtors in these chapter 11 cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' proposed claims and noticing agent at

CERTIFICATION OF AARON COLODNY IN SUPPORT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO THE 2028 SENIOR SECURED NOTE CLAIMS [CLAIM NOS. 360, 378, 379, 380, 381, 382]

I, Aaron Colodny, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am an attorney-at-law admitted to practice in the State of California and am a partner with the law firm White & Case LLP. I am admitted *pro hac vice* before the United States Bankruptcy Court for the District of New Jersey in the above-captioned matter. White & Case LLP ("**Counsel**") is co-counsel to the Official Committee of Unsecured Creditors (the "**Committee**") appointed in the Chapter 11 Cases[2] in connection with this matter and have knowledge of the facts contained herein.

2. I submit this Certification in support of *The Official Committee of Unsecured Creditors' Objection to the 2028 Senior Secured Note Claims [Claim Nos. 360, 378, 379, 380, 381, 382]* (the "**Claim Objection**") filed contemporaneously herewith.

3. Each and every one of the factual allegations in the Claim Objection are the product of a diligent, good faith investigation conducted by Counsel.

4. This includes Counsel's review of documents that were produced by the Debtors and Deerfield Partners, LP, Deerfield Mgmt, LP, and Deerfield Management Company, LP, (collectively, "**Deerfield**") in these Chapter 11 Cases as well as review of publicly available documents and information.

5. On March 14, 2024, the Committee exchanged discovery requests with the Debtors and Deerfield under Bankruptcy Rule 2004, seeking the production of documents. In response, to

www.kccllc.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Claim Objection (defined herein).

date, the Debtors and Deerfield have collectively produced to the Committee over 28,000 documents, consisting of over 257,000 pages. The Debtors and Deerfield have communicated that their document production is complete. However, review and other discovery is still ongoing, including interviews with principals from the Debtors and Deerfield that are scheduled to occur after the submission of this certification.

6. I, or members of my firm that I supervise, have substantially completed our review of the documents produced to date. The Committee's investigation is otherwise ongoing.

7. The factual allegations in the Claim Objection were derived in part from review of the documents provided to date. Upon request, the documents underlying the facts asserted in the Claim Objection will be provided to this Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 21, 2024
Los Angeles, California

By */s/ Aaron Colodny*
Aaron Colodny (admitted *pro hac vice*)
WHITE & CASE LLP
555 S. Flower St., Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7706
Email: aaron.colodny@whitecase.com

Co-Counsel to the Official Committee of Unsecured Creditors

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

WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
J. Christopher Shore, Esq. (admitted *pro hac vice*)
(cshore@whitecase.com)
Harrison Denman, Esq. (admitted *pro hac vice*)
(harrison.denman@whitecase.com)
Aaron Colodny, Esq. (admitted *pro hac vice*)
(aaron.colodny@whitecase.com)

- and -

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962
Telephone: (973) 538-4006
Warren J. Martin Jr., Esq. (wjmartin@pbnlaw.com)
John S. Mairo, Esq. (jsmairo@pbnlaw.com)
Christopher P. Mazza, Esq. (cpmazza@pbnlaw.com)

Co-Counsel to the Official Committee of Unsecured Creditors

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

ORDER SUSTAINING THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OBJECTION TO THE 2028 SENIOR SECURED NOTE CLAIMS [CLAIM NOS. 360, 378, 379, 380, 381, 382]

The relief set forth on the following pages, numbered three (3) through five (5), is **ORDERED.**

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

Upon consideration of *The Official Committee of Unsecured Creditors' Objection to the 2028 Senior Secured Note Claims [Claim Nos. 360, 378, 379, 380, 381, 382]* (the "**Claim Objection**")[2]; and the Court having jurisdiction to consider the Claim Objection and the relief requested therein pursuant to 28 U.S.C. § 1334, as a core matter "arising under" title 11 of the Bankruptcy Code; and this proceeding having been referred to this Court under 28 U.S.C. § 157(a) and the *Standing Order of Reference to the Bankruptcy Court Under Title 11*, entered July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.); and consideration of the Claim Objection and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Claim Objection having been provided; and it appearing that no other or further notice of the Claim Objection need be provided; and all responses, if any, to the Claim Objection having been withdrawn, resolved, or overruled; and upon all proceedings had before the Court; and the Court having determined that the legal and factual bases set forth in the Claim Objection establish just cause for the relief granted herein,

IT IS HEREBY ORDERED THAT:

1. The Claim Objection is **SUSTAINED**.

2. If the liens securing the 2028 Senior Secured Notes Claims are avoided, the Make Whole Amount, all other postpetition interest, fees, costs and charges, and all Adequate Protection Claims are disallowed. Any payments of interest, fees, costs or charges made to any of the

[2] Capitalized terms used but not defined herein shall have the meanings set forth in the Claim Objection.

Claimants shall be (i) recharacterized as payments of principal to the extent they relate to disallowed claims and (ii) determined to be an initial installment of any distributions the Claimants are ultimately entitled to in these Chapter 11 Cases or, alternatively, disgorged.

3. If the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are valid and enforceable, the portion of the 2028 Senior Secured Note Claims attributable to the Make Whole Amount is disallowed.

4. If the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are valid and enforceable, the Claimants are not entitled to receive (i) both the Make Whole Amount and postpetition interest and (ii) any interest accrued on the Make Whole Amount, and the 2028 Senior Secured Note Claims are disallowed to that extent.

5. If the 2028 Senior Secured Note Claims and the liens securing the 2028 Senior Secured Note Claims are valid and enforceable, the portions of the 2028 Senior Secured Note Claims attributable to interest at the default rate is disallowed.

6. The secured portion of the 2028 Senior Secured Note Claims (if any) is reduced to exclude the value allocable to the Unencumbered Assets.

7. The 2028 Senior Secured Note Claims are subject to setoff on account of the Debtors' estates' damages recoverable from the Claimants.

8. The 2028 Senior Secured Note Claims are disallowed under section 502(d) of the Bankruptcy Code until the Claimants return all property required under the Proposed Complaint.

9. The Debtors' claims and noticing agent is authorized and directed to update the claims register maintained in these Chapter 11 Cases to reflect the relief granted in this Order.

10. The Committee is authorized to take all steps necessary or appropriate to carry out the relief granted in this Order.

11. The terms, conditions, and provisions of this Order shall be immediately effective and enforceable upon its entry.

12. Nothing in the Claim Objection or this Order shall affect the Committee's right (i) to file additional objections regarding the 2028 Senior Secured Note Claims on any basis after further investigation or (ii) to object to any other claims (or a portion thereof) of the Claimants on any other grounds whatsoever, including, among other things, based on amount, priority, classification, secured status, or otherwise. Nothing in the Claim Objection or this Order shall be deemed: (a) an admission as to the amount of, basis for, or validity of any claim against the Debtors under the Bankruptcy Code or other applicable non-bankruptcy law; (b) a waiver of the Committee's or any other party in interest's right to dispute any claim; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in the Claim Objection; (e) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; or (f) a waiver of any of the Debtors' claims or causes of action which may exist against any entity under the Bankruptcy Code or any other applicable law.

13. The requirement set forth in Local Bankruptcy Rule 9013-1(a)(3) that any motion be accompanied by a memorandum of law is hereby deemed satisfied by the contents of the Claim Objection or is otherwise waived.

14. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.