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

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

[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 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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STATUTES AND RULES

The Official Committee of Unsecured Creditors (the "**Committee**") appointed in the chapter 11 cases (the "**Chapter 11 Cases**") of Invitae Corp. ("**Invitae**") and its affiliated debtors and debtors-in-possession (collectively, the "**Debtors**," and together with Invitae's non-Debtor affiliates, the "**Company**"), by and through its undersigned counsel, hereby moves this Court for entry of an order granting the Committee (i) leave, standing, and authority to commence and prosecute certain claims and causes of action (the "**Proposed Claims**") against various named defendants (the "**Defendants**") on behalf of the Debtors' estates (the "**Estates**"), as set forth in more detail in the draft adversary complaint attached hereto as **Exhibit A** and incorporated for all purposes herein (the "**Proposed Complaint**"); and (ii) exclusive authority to settle such claims on behalf of the Estates (the "**Motion**"). In support of this Motion, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. By this Motion, the Committee seeks standing to bring a series of estate claims and causes of action arising under state and federal law to remedy conduct by which the proposed Defendants gave one group of unsecured creditors all of the equity value of the Debtors' estates and attempted to leave more than $1 billion of similarly situated unsecured creditors with nothing. As set forth in the attached Proposed Complaint, the proposed Defendants' prepetition actions have resulted in the destruction of hundreds of millions of dollars of value to the Debtors' estates. And, unless this Court grants the Committee standing to pursue the valuable claims and causes of action resulting from its conduct, the Debtors would similarly release those assets for ***zero*** consideration.

2. The Debtors have a tortured history of vaporizing capital, and the Committee has significant, unresolved concerns with respect to an entire series of acquisitions and dispositions transactions conducted by the Debtors' officers and directors in which they took more than

$1.4 billion of cash and squandered it. This motion, however, only concerns the Debtors' end game, namely the 2023 Uptier Transaction which has previously been brought to this Court's attention.

3. The complained of conduct began in the fall of 2021, [redacted]. By that time Invitae was not an early-stage startup business that required significant investment to cover near term losses with a good faith belief that borrowed capital would be repaid later. Rather, in 2021, the Debtors' officers and directors [redacted]

4. Specifically, in October 2022, the Debtors had approximately $585 million of cash and cash equivalents, $135 million owed to one secured lender, and over $1.4 billion of fully-funded unsecured debt. Had the Debtors simply accelerated their inevitable chapter 11 filing at that time, the Debtors' estate would have likely had more than $700 million of unencumbered value to distribute to its unsecured creditors after they paid off their secured lender in full. That is, before the Uptier Transaction, the Debtors had approximately three-quarters of a billion dollars in equity in their assets (but still far less than the $1.4 billion in unsecured debt).

5. At the same time, however, the directors and officer Defendants knew that the Debtors would [redacted] The director and officer Defendants also advised and aware that the Debtors' [redacted] So what to do? Stop the clock, pay all creditors with existing liquidity or enter into a transaction that both

reduced their total debt and raised additional capital. As set forth in the alleged Complaint, the Board did neither.

6. In March 2023, under the guise of a "liability management exercise" purportedly designed to extend their "runway," the Debtors pledged the entirety of the unencumbered value of their assets to one favored group of unsecured lenders led by Deerfield Partners LP. (collectively with Deerfield Mgmt, LP and Deerfield Management Company, LP, "**Deerfield**"). In other words, rather than protect all creditors, the Board decided to coronate one particular group of lenders and provide them with a first look at all of the Debtors' assets in an inevitable bankruptcy. In return, the Debtors received next to nothing. As catalogued in the Complaint, through the Uptier Transaction, at a time when they were plainly insolvent, the Debtors provided approximately $100 million more value to the coronated unsecured creditors than they received in return ***and*** lost approximately $140 million of precious liquidity used to pay off the existing Term Loan early.

7. The Board's decision to move forward with Deerfield and its selected group of other unsecured creditors at the expense of the Debtors' estate was not arbitrary or unknowing. As alleged in the Complaint, prior to entering into the transaction, the Board was fully aware that the Uptier Transaction [redacted]. To carry the analogy forward, if the Debtors needed another 10,000 feet of runway to lift the Invitae jet off of the ground, they spent all of their unencumbered value and liquidity to build 100 feet of runway and a crash pad. So, without any qualified financial advisor or attorney advising them that the transaction would put the Debtors on a path towards payment of their existing creditors, the Board determined to plow ahead.

8. The Debtors' situation and thought process was not lost on Deerfield, which fully understood and appreciated that the Debtors [redacted]. Deerfield was also aware that the Uptier Transaction provided [redacted]. For Deerfield, the transaction was all about preparing for an inevitable chapter 11 filing.

9. That filing then was no surprise to anyone when it eventually came to pass. Having pledged all of their tangible assets and restricting their ability to dispose of material assets without Deerfield's consent, less than a year after completing the Uptier Transaction, the Debtors were left with no choice but to file these Cases. Even then, the director and officer Defendants have continued their strategy of picking winners and losers within their creditor body, and have now proposed a plan of liquidation that would provide all of the value of their estates to their favored, newly and purportedly secured creditors and release any claims of their estate that could benefit the more than $1 billion of creditors actually harmed by their conduct. In effect, the $700 million of equity the Debtors had in their assets within a year of this filing was used for no legitimate purpose. It did not keep the Debtors out of bankruptcy. Did not reduce their leverage. Did not benefit their liquidity. Rather, it merely had the effect of ensuring that one group of unsecured creditors would support the Debtors' agenda.

10. To add insult to injury, with complete knowledge that the Debtors would likely be unable to pay their unsecured creditors a dime, the Board determined to award the Company's executives more than $12 million of bonuses on the eve of the bankruptcy filing. In fact, according to the Debtors' current estimated waterfall, if the status quo is maintained, those exorbitant bonuses may be the difference between unsecured creditors receiving any recovery in these Chapter 11 Cases.

11. As set forth below, the conduct of the Debtors, their Board, their officers, Deerfield, and the Agent (solely in its capacity as collateral agent) gives rise to significant estate claims and causes of action under state and federal law. The Debtors have unjustifiably refused to bring any of these claims and instead have proposed to release all of them for no consideration. Based on its investigation to date, the Committee believes that there is likely sufficient cash and other assets in this estate to pay the Debtors' purported senior secured claims in full if the liens supporting such claims are not avoided. As such, there is simply no reason for those lenders to receive any form of release from the estate. Likewise, because the Court has already approved the sale of the entire business to a third party for all cash consideration, there is no legitimate reason to release the Debtors' directors and officers from any of the estate's claims or causes of action. In light of the foregoing, the Committee should be granted standing to prosecute and full authority to settle such claims and causes of action for the benefit of the Debtors' estates and ***all*** of their creditors.

JURISDICTION AND VENUE

12. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b) and the Standing Order of the United States District Court dated July 10, 1984, as amended September 18, 2012, referring all bankruptcy cases to the bankruptcy court.

13. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

14. The statutory predicates for relief requested herein are sections 1103 and 1109 of chapter 11 of section 11 of the United States Code (the "**Bankruptcy Code**").

RELIEF REQUESTED

15. By this Motion, the Committee requests that the Court grant it leave, standing, and authority to (a) prosecute the Proposed Claims, and (b) if appropriate, propose and effectuate

settlements for all or a portion of the Proposed Claims on an exclusive basis, subject to further order of this Court.

ALLEGATIONS OF THE PROPOSED COMPLAINT[2]

A. Invitae Incurs Billions in Debt to Fund Unprofitable Acquisitions

16. Invitae was founded by Sean George and Randal Scott in January 2010 with aspirations to become a leader in the genetic testing services industry. Between 2019 and 2021, the Company spent more than $3.3 billion in cash, equity and assumed liabilities or other forms of consideration acquiring thirteen different pre-commercial and unprofitable companies and technologies.[3]

Date	Acquired Entity	Cash	Equity	Assumed Liabilities / Other	Total Consideration Paid	Total Consideration Received through Disposition
June 2019	Singular Bio	$3,400,000	$53,900,000	$-	$57,300,000	NA
July 2019	Jungla Inc.	$14,100,000	$44,900,000	$-	$59,000,000	NA
November 2019	Clear Genetics, Inc.	$24,841,000	$25,221,000	$-	$50,062,000	NA
March 2020	Diploid	$32,323,000	$42,453,000	$7,538,000	$82,314,000	NA
April 2020	Genelex	$-	$13,200,000	$-	$13,200,000	NA
April 2020	YouScript Inc.	$24,500,000	$28,200,000	$-	$52,700,000	NA
October 2020	ArcherDX	$335,300,000	$1,060,600,000	$935,600,000	$2,331,500,000	$48,100,000[4]
December 2020	IntelliGene Health Informatics, LLC	$-	$2,700,000	$-	$2,700,000	NA

[2] The Proposed Complaint contains a more detailed recitation of the facts uncovered as part of the Committee's investigation to date. The Proposed Complaint also include charts of (1) the Debtors' acquisitions, (2) the Retention Bonuses, and (3) the unencumbered bank accounts and balances as Appendixes. The Committee reserves its right to amend the Complaint and supplement this Motion as its investigation continues.

[3] First Day Decl. ¶ 4.

[4] Invitae Corp., Annual Report (Form 10-K) at 88 (Feb. 28, 2023)

Date	**Acquired Entity**	**Cash**	**Equity**	**Assumed Liabilities / Other**	**Total Consideration Paid**	**Total Consideration Received through Disposition**
February 2021	Reference Genomics, Inc. d/b/a One Codex	$16,504,000	$58,774,000	$8,113,000	$83,391,000	"immaterial amount"[5]
April 2021	Genosity, Inc.	$119,959,000	$67,308,000	$8,774,000	$196,041,000	NA
July 2021	MedNeon LLC	$12,900,000	$16,300,000	$4,900,000	$34,100,000	NA
September 2021	Ciitizen Corporation	$87,361,000	$186,778,000	$34,161,000	$308,300,000	$843,742
December 2021	Stratify Genomics, Inc.	$8,000,000	$16,800,000	$4,200,000	$29,000,000	NA
	Total	**$679,188,000**	**$1,617,134,000**	**$1,003,286,000**	**$3,299,608,000**	**$48,943,742**
Sale to LabCorp						$239,000,000
Total					***$3,299,608,000***	***$287,943,742***

17. The Company never turned a profit, and, according to the board materials and internal reports, each year measured its success in terms of revenue and the amount of cash it "burned."

18. To fund the spending spree, Invitae received almost $1.5 billion of financing between September 2019 and April 2021: (1) $350 million of convertible unsecured notes that mature on September 1, 2024 (the "**2024 Unsecured Notes**");[6] (2) a first lien term loan (the "**Term Loan**") that the Company drew $135 million under and was scheduled to mature on June 1, 2024; and (3) $1.15 billion in convertible unsecured notes that mature on April 1, 2028 (the "**2028 Unsecured Notes**").[7] Following the issuance of the 2028 Unsecured Notes, the Company had the following capital structure:

[5] Invitae Corp., Annual Report (Form 10-K) at 88 (Feb. 28, 2023)

[6] *See* Invitae Corp., Current Report (Form 8-K) at 1.01 (Sept. 11, 2019); First Day Decl. ¶ 52.

[7] *See* Invitae Corp., Quarterly Report (Form 10-Q), at 20 (Aug. 2, 2021).

Debt	Maturity Date	Principal Amount	Interest Rate
Term Loan	June 1, 2024	$135 million	8.75% + the greater of (i) WSJ Prime Rate and (ii) 2.00%
2024 Unsecured Notes	September 1, 2024	$350 million	2.00%
2028 Unsecured Notes	April 1, 2028	$1,150 million	1.50%

19. When completed, the Company, by its own admission was "overflowing" with a "portfolio of increasingly unprofitable business lines." *See* First Day Declaration ¶ 61.

B. The Company's Unsustainable Financial Trajectory

20. According to an October 2021 presentation to Invitae's board of directors (the "**Board**"), six months after issuing the 2028 Unsecured Notes, the Company was already aware that [redacted]. Yafei "Roxi" Wen, Invitae's then-Chief Financial Officer, presented that Company's [redacted] Proposed Compl. ¶ 53. In 2021, Invitae reported a net loss of $379 million. It had $923 million in cash that had been raised from the 2028 Unsecured Notes.[8]

21. In a June 2022 presentation to the Board, Invitae projected that [redacted]. Proposed Compl. ¶ 57. The next month management proposed a plan to divest certain businesses and reduce the Company's operating expenses which it estimated would save more than [redacted] each year. Even under those aggressive assumptions, the Company again estimated it would need [redacted]. *Id.* ¶ 60. That

[8] Invitae Corp., Annual Report (Form 10-K) at 75-76 (Mar. 1, 2022).

presentation recognized that [redacted]. Analysts warned that the Company's "[i]nability to renegotiate loans' terms could result in bankruptcy." *Id.* ¶ 62.

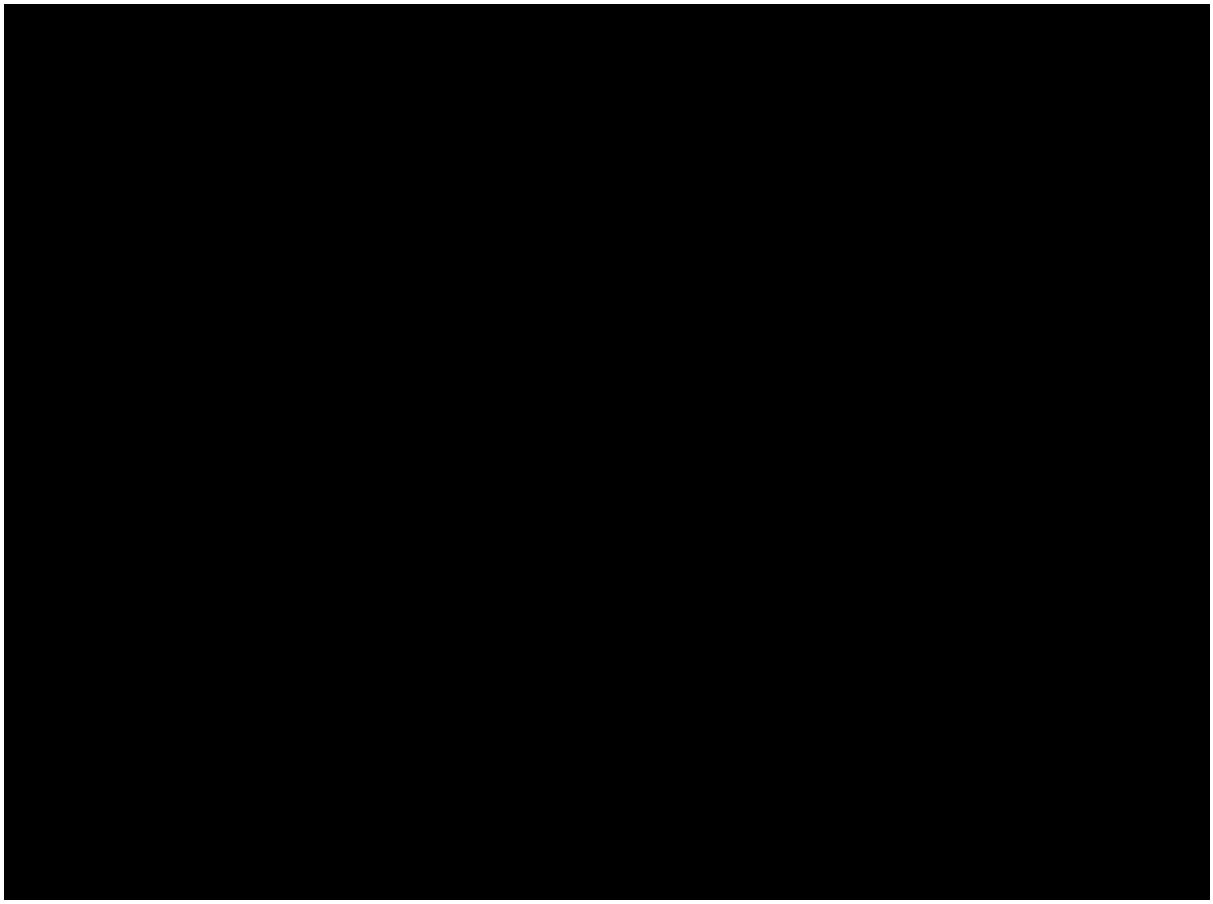
C. The Company's Advisors Recommend the Company Raise New Capital

22. Before these discussions and after the Company's first quarter financials were published in 2022, Deerfield proposed [redacted] (the "**First Deerfield Uptier Proposal**"). At that time, [redacted]. Ultimately, the Company and Deerfield did not move forward with a transaction at that time.

23. In August 2022, it was clear that the Company needed to raise additional capital. Perella Weinberg Partners ("**PWP**"), the Company's financial advisor and investment banker, projected [redacted]. Proposed Compl. ¶ 63.

24. A year after the Company knew about its liquidity issues, the Company started planning a "liability management transaction." In early October 2022, Goldman Sachs ("**Goldman**"), another Company advisor, [redacted]. *Id.* ¶ 66. Goldman warned Ms. Wen in an email that [redacted]. Goldman noted that [redacted]. Goldman expressed its belief that the Company [redacted] *Id.* ¶ 66.

25. The Company's management and advisors presented the following restructuring alternatives to the Board in mid-October 2022:



26. The Company projected that [redacted]. The projections show that the Company [redacted]. The presentation showed [redacted]. The Board expressed [redacted].

D. Deerfield Was Aware the Company Was Insolvent and Likely Headed for a Bankruptcy

27. By September 2022, Deerfield was discussing internally how it was [redacted]. It made clear in internal messages that [redacted]

[redacted]. Between the third quarter of 2022 and the fourth quarter of 2022, Deerfield increased its holdings of 2024 Unsecured Notes from approximately $207 million to $242 million, to obtain a super majority of the outstanding 2024 Unsecured Notes.

28. On October 31, 2022, Terence Fox-Karnal, a Partner at Deerfield and day-to-day lead on the transaction, and Deerfield managing partner James Flynn, discussed Deerfield's unsecured position. Proposed Compl. ¶ 70. Mr. Fox-Karnal proposed [redacted]: *Id.*

[redacted]

29. Mr. Flynn questioned whether the Company could execute such a transaction that [redacted]. Mr. Fox-Karnal [redacted]. *Id.* ¶ 71.

30. Nearly a year after the Company identified its dire financial condition in 2021, the Company finally began to engage in potential restructuring discussions. However, [redacted]. *Id.* ¶ 72. At that time, Baker Brothers Investments ("**Baker Brothers**") and SB Northstar LP ("**SB Northstar**") (both significant holders of the 2028 Unsecured Notes) were [redacted]. *Id.*

31. During negotiations, the Company threatened [redacted]. *Id.* ¶ 74.

Both Baker Brothers and SB Northstar informed the Company that such a transaction would [redacted]. *Id.* They also advised the Company [redacted]. *Id.*

32. Deerfield had its own concerns about the Company. One of its principals acknowledged that Invitae [redacted] *Id.* ¶ 72. Another expressed doubts that a cash infusion of [redacted] *Id.* ¶ 73. Deerfield refused to invest more money. It is unclear what efforts, if any, the Company took to identify additional financing opportunities outside of its capital structure at this time.

33. On December 31, 2022, the Company had $557 million of cash and cash equivalents, $366 million less than the year before.

34. In January 2023, Deerfield proposed trading 90% of its unsecured debt for secured convertible debt and receiving the remaining 10% in equity. On January 14, 2023, Ms. Wen was presented with a cash flow model that [redacted]. *Id.* ¶¶ 78-79. [redacted] the Company projected that [redacted].

35. The Company held a Board meeting on January 26, 2023 and management presented a revised cash forecast that decreased the Company's projections of available cash in the fourth quarter by [redacted] compared with the projections presented to the Board in

December 2022. *Id.* ¶ 81. The revised cash flow forecast now showed that, [redacted]

[redacted].[9] *Id.*

[redacted]

36. In other words, prior to the close of the March Exchange, the Board was aware that the transaction [redacted].

E. The Company Crowns Deerfield.

37. Even though the Company knew the proposed uptier transaction neither extended its runway nor de-levered its balance sheet to allow the potential for additional financing, the Company gave up and determined to plow ahead with Deerfield. Proposed Compl. ¶ 162. Definitive documentation of Deerfield's proposal was well underway by mid-January. In addition to more than doubling the Company's secured debt, Deerfield insisted on terms that significantly limited the Company's ability to raise additional capital including "anti-dilution" rights, the terms of *pari passu* and junior debt, and consent rights over asset sales. In an apparent acknowledgment of the Company likely trajectory, Deerfield also sought to restrict the rights of other creditors in a

[9] The Company's board materials indicate that [redacted]. Proposed Compl. ¶ 81 n.14.

future bankruptcy. During negotiations, its counsel made clear that it [redacted] *Id.* ¶ 84.

38. Deerfield also acknowledged internally how punitive the proposed transaction would be for the Company's other creditors, with Mr. Flynn noting that the [redacted] *Id.* ¶ 86. At the same time, Deerfield recognized that [redacted]. Both the Company and Deerfield were focused on the Company's [redacted].

39. Deerfield and the Company also colluded to [redacted]. *Id.* ¶ 91. In a seemingly last-minute decision, Deerfield agreed to provide [redacted]. *Id.* That plan was kept secret. *Id.*

40. Just days before the transaction closed, [redacted] The Company refused [redacted]. In email messages, Mr. Knight was resolute that [redacted].

41. [redacted] Proposed Compl. ¶ 93.

F. The Company Executes the Uptier Transaction

42. As part of the Uptier Transaction, the Company prepaid the Term Loan in two transactions: (a) a $50 million principal payment plus a $3 million prepayment fee and (b) $85 million payment plus a $5.1 million prepayment fee (collectively, the "**Term Loan Repayment**"). The Company then (1) exchanged $305.7 million of principal amount of the 2024 Unsecured Notes for $275.3 million principal amount of the Series A 2028 Convertible Senior Secured Notes (the "**Series A Notes**"), (2) issued $30 million of Series B Convertible Senior Secured Notes (the "**Series B Notes**" and together with the Series A Notes, the "**2028 Senior Secured Notes**") for cash, and (3) issued 14,219,859 shares (with a fair market value of $22.9 million) to the converting 2024 Unsecured Noteholders (together, the "**March Exchange**" and together with the "**Term Loan Repayment**," the "**Uptier Transaction**"). The 2028 Senior Secured Notes are guaranteed by substantially all of the Company's subsidiaries and purportedly

secured by a first-priority lien on substantially all of the assets of the Company and the guarantors, subject to certain exceptions in the loan documents.[10]

43. The full Board and a separate pricing committee of the Board (the "**Pricing Committee**") approved the terms of the March Exchange, which was executed and closed on March 7, 2023.[11] The Uptier Transaction reduced the Company's cash by $135.6 million—exacerbating its liquidity issues.

44. The Uptier Transaction gave Deerfield and a select group of unsecured lenders (together, the "**Participating 2024 Unsecured Noteholders**") approximately $100 million more in value than was provided to the Company.[12] The Uptier Transaction also gave the Participating 2024 Unsecured Noteholders a security interest in substantially all of the Company's assets that would result in their payment prior to previously similar situated creditors in the Company's inevitable chapter 11 filing. The 2028 Senior Secured Notes also had significant benefits when compare to the exchanged 2024 Unsecured Notes, including (1) guarantees from substantially all of Invitae's subsidiaries, (2) a higher interest rate paid at more regular intervals, (3) a $27.5 million make-whole premium designed to be paid upon the inevitable Invitae chapter 11 filing, and (4) significant approval rights and covenants on the Company's operations and material transactions, including asset sales and its restructuring. Proposed Compl. ¶¶ 171-72.

45. Both the Company and Deerfield knew that the Uptier Transaction would entitle the hand-selected 2024 Unsecured Participating Noteholders to payment in full, whereas the other

[10] *See* Exchange Agreement, Recitals.

[11] *See* Press Release, Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance (Feb. 28, 2023); *see also* Invitae Corp., Annual Report (Form 8-K), at 1.01 (Mar. 7, 2023).

[12] Baker Brothers was one of the 2024 Unsecured Noteholders who participated in the March Exchange.

unsecured noteholders would get whatever was left over when Invitae filed for bankruptcy. *Id.* ¶ 212.

46. The Company was insolvent and inadequately capitalized at the time of the Uptier Transaction. Shortly after the March Exchange, the Company reported in its public filings that its liabilities exceeded the book value of its assets.[13] As the Company would later admit, the book value of the Company's assets, however, significantly overstated the market value of such assets. As one example, later that year, new-CFO Anna Schrank noted that the Company's [redacted] When the Company eventually adjusted the value of its intangible assets in September 2023, ***its liabilities exceeded its assets by approximately $1.1 billion***. Thus, it is plausible that the value that the Company had been disclosing to the market all along was inflated, causing the opportunity for those close to the Company to trade out of their equity positions at inflated values.

G. The Market Acknowledged that the March Exchange Doomed the Company

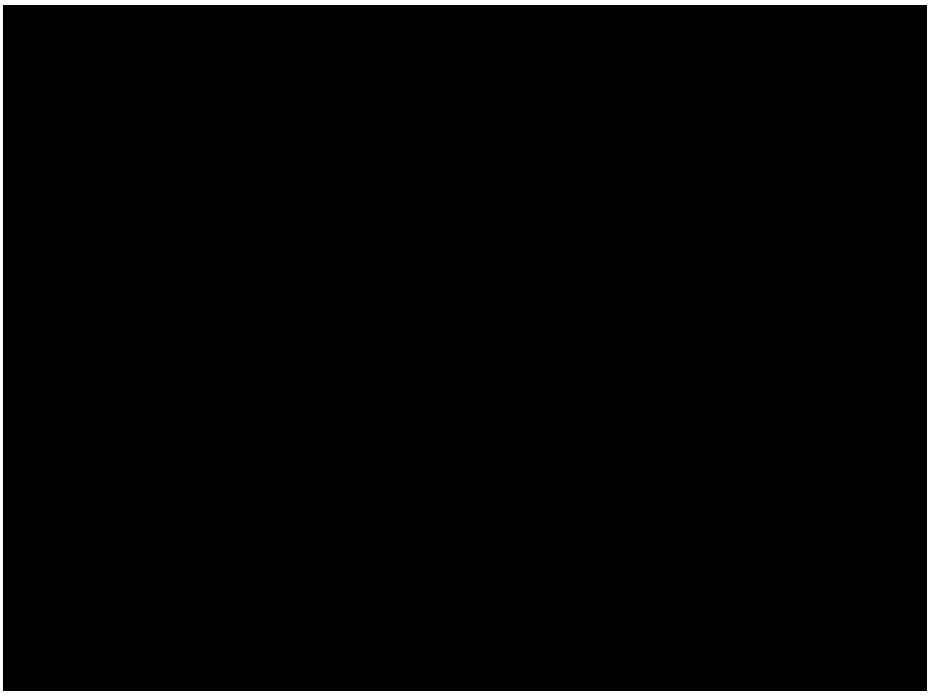
47. On February 28, 2023, the Company announced the March Exchange "led by Deerfield Management."[14] Following the announcement, Invitae's stock price collapsed, falling more than 25% to $1.61 per share—an all-time low.[15] Deerfield was not surprised and in internal messages noted that [redacted].

[13] Invitae Corp., Quarterly Report (Form 10-Q) at 1 (May 9, 2023).

[14] *See* Press Release, Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance (Feb. 28, 2023).

[15] *Invitae Shares Hit New All-Time Low on Downbeat 2023 Revenue Guidance, Debt Refinance*, MarketScreener (Mar. 1, 2023), available at https://www.marketscreener.com/quote/stock/INVITAE-CORPORATION-23400709/news/Invitae-Shares-Hit-New-All-Time-Low-on-Downbeat-2023-Revenue-Guidance-Debt-Refinance-43128771/.

48. While it is unclear what efforts the Company took to raise additional capital after the Uptier Transaction, it is clear, and not surprising, that any such efforts were not successful. On April 27, 2023—less than two months after the March Exchange—management presented the Board another revised cash flow forecast, which again showed the Company [redacted]. The Company did not account for the [redacted]. Drafts of that Board presentation prepared in early April noted that the Company [redacted]



49. The Company determined to sell its Women's Health and Ciitizen business to try to dramatically reduce its operating expenses, but now needed Deerfield's consent. The Company and Deerfield began to prepare for bankruptcy.

50. Shortly thereafter Ms. Wen resigned as CFO.

H. The Company Approves an Additional Exchange for Deerfield

51. On August 22, 2023, the Company entered into a second exchange agreement with Deerfield (the "**August Exchange**") whereby it exchanged Deerfield's remaining $17.2 million of 2024 Unsecured Notes[16] for $100,000 of Series A Notes and approximately 15.8 million shares of Invitae common stock (with a market value of approximately $16 million).[17] The parties agreed that the accrued and unpaid interest on Deerfield's exchanged 2024 Unsecured Notes in the amount of $164,460.67 would remain due and payable on September 1, 2023.[18] Upon information and belief, Deerfield sold that equity soon thereafter.

52. Invitae's third quarter financials published on November 8, 2023, disclosed that "[a]s a result of losses, projected cash needs, and current liquidity level, substantial doubt exists about the Company's ability to continue as a going concern."[19]

I. Deerfield Pushes the Company into Chapter 11

53. By the end of the summer of 2023, the Company heard pitches for restructuring advisors. PWP pitched. The Company hired Moelis & Company ("**Moelis**") and FTI Consulting ("**FTI**") instead at considerably added expense. Very shortly after, Deerfield hired PWP to advise them on the restructuring transaction with Invitae. PWP intimately knew the Company's strategy, privileged, and other confidential information. Notwithstanding its adversity to Deerfield, the Company agreed that PWP could switch sides and [redacted]

[16] *See* Invitae Corp., Current Report (Form 8-K) at 1.01 (Aug. 22, 2023); Exchange Agreement.

[17] *See* First Supplemental Indenture; Invitae Corp., Current Report (Form 8-K), Exhibit 10.2 (Aug. 22, 2023).,

[18] *See* Exchange Agreement Art. 1.

[19] Invitae Corp., Quarterly Report (Form 10-Q) at 6 (Nov. 8, 2023). The Company also noted that the debt markets were difficult and its ability to raise additional financing was uncertain. *Id.* at 14.

[redacted]

54. In September 2023, the Company retained Kirkland & Ellis LLP ("**K&E**") as restructuring counsel. Proposed Compl. ¶ 126. On September 23, 2023, the Company also formed a special committee of its board of directors (the "**Special Committee**") to work on and make recommendations to the Board regarding restructuring or financing activities [redacted] *Id*. ¶¶ 127-28.

55. Deerfield leveraged its consent to the sale of Women's Health and Ciitizen for a marketing process and chapter 11 filing funded with the Company' s remaining cash, now the purported cash collateral of the Participating 2024 Unsecured Noteholders. Without another option, the Company acquiesced and agreed to case milestones and a $150 million minimum liquidity covenant that it knew would quickly be breached. Deerfield received a $2,100,000 consent fee and its advisors were paid over $3,000,000 as a result.[20]

56. Shortly thereafter, Ciitizen was divested for a minority equity interest in the purchaser and no additional consideration.[21] The Company had purchased Ciitizen for $325 million approximately two years earlier.

57. The Company also received restructuring proposals from the 2028 Unsecured Noteholders at that time. As negotiations progressed on the transaction support agreement

[20] *See* Second Supplemental Indenture Art. II(d); Second Supplemental Indenture Art. III(iv); Art. II(a); *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* [Docket No. 454] (the "**Stipulated Facts**") ¶ 35; *Schedule of Assets and Liabilities for Invitae Corporation* [Docket No. 202] at 334, 339, 347, 350, 361 (Mar. 18, 2024).

[21] *See* Press Release, Invitae Corp., Invitae Divests Ciitizen Health Data Platform and Implements Further Cost Cuts (Dec. 13, 2023).

("**TSA**"), however, Deerfield made clear it would not consent to anything other than a sale with it receiving nearly all of the proceeds. That is what the Company did.

J. The Company Pays Millions in Bonuses to Executives

58. Following the March Exchange the Company paid more than $20 million in various forms of compensation to executives, some of which was far in excess of amounts it had previously approved. Specifically, between March 2023 and the end of the year, the Company paid [redacted], gave "Stock Based" compensation and other long term retention bonuses over $5 million. The following amounts were received by Defendants: Mr. Knight received a total of $728,641.10, Ms. Wen received a total of $282,336.74, Mr. Nussbaum received a total of $158,206.52, Mr. Brida received a total of $ 302,083.98, and Mr. Werner received $82,473.30. On October 27, 2023, Mr. Knight received another $3,500,000 retention bonus.

59. Then on the eve of bankruptcy, January 17, 2024, the Company paid executives and employees more than $16.5 million in bonuses, including (1) ***another*** $2,974,687 to Mr. Knight, (2) $2,002,750 to Ms. Schrank, (3) $1,834,351 to Mr. Brida, (4) $1,726,850 to Robert Guigley (Chief Commercial Officer), and (5) $1,594,740 to Dave Sholehvar (Chief Operating Officer).[22] The Company's board materials note these bonuses were [redacted]. When it found out that the Company paid millions more in retention bonuses than what was budgeted in the 13 week cash flow, Deerfield wrote that it was [redacted].

[22] *See Schedule of Assets and Liabilities for Invitae Corporation*, [Docket No. 202] at 354, 358-61 (Mar. 18, 2024). From the beginning of 2021 (the year in which the Company issued the 2028 Unsecured Notes) to the Petition Date, the Company's C-level executives were paid more than $70 million in total compensation.

K. The Company's Investigation.

60. The Company authorized its Special Committee, composed of proposed Defendants Mssrs. Osborne, Gorjanc, and Aguiar (each of whom directed and approved the Uptier Transaction) was designated to investigate the March Exchange, including claims against themselves. The Special Committee also hired Jill Frizzley as an advisor. K&E conducted the investigation. As discussed more fully in the Committee's objection to the retention of K&E as Debtors' counsel, K&E also "concurrently" represented Deerfield in unrelated matters. Its concurrent representation of Deerfield was not disclosed to the Board or the Ms. Frizzley until after the investigation had concluded and the Board determined to release itself and Deerfield, presumably based on K&E's advice.

61. The Special Committee's investigation included [redacted].[23] That investigation included [redacted].

62. K&E's investigation was completed in less than two months. It presented its findings to Jill Frizzley on December 19, 2023. K&E then presented its findings to the full Board on January 3, 2024. At all times, the entire Special Committee (three out of four of whom were targets of the investigation) controlled the ability to settle claims.

L. The Sale of the Debtors' Assets to LabCorp

63. On the February 13, 2024 (the "**Petition Date**"), the Company filed a motion to approve sale procedures to sell all of its assets and filed with its first day declaration a Plan[24] term

[23] *Debtors' Responses and Objections to Rule 2004 Document Requests and Interrogatories*, Interrog. No. 10.

[24] *See Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 471] (the "**Plan**").

sheet providing that after payment of certain priority claims, all sale proceeds would be used to pay the 2028 Purported Secured Noteholders in full. The term sheet also proposed to release the Debtors, the director and officer defendants (the "**Fiduciary Defendants**"), Deerfield, the Agent, and the claims related to the 2028 Senior Secured Notes. On May 7, 2023, this Court entered an order authorizing the sale of substantially all the Debtors' remaining assets to LabCorp Genetics for $239 million. On May 9, 2023, the Debtors filed a proposed plan of reorganization and disclosure statement. After payment of the proceeds from the sale and distribution of the retained assets, the proposed Plan provides for the payment in full of administrative, priority, convenience, unsecured claims at Invitae's subsidiaries and the 2028 Senior Secured Notes. Based upon the value obtained in the LabCorp sale, the Committee believes that if the value of the claims and liens of the 2028 Purported Secured Noteholders remain valid—they are not—the 2028 Purported Secured Noteholderss are oversecured. Upon information and belief, there was no material change in the value of the assets from the Petition Date, meaning the expectation was that the 2028 Purported Secured Noteholderss would always be paid in full. The Debtors conceded this at a recent hearing, referring to unsecured creditors as the "fulcrum security." May 7, 2024 Hr'g Tr. 48:19–21 [Docket No. 469]. However, in the disclosure statement, the Debtors estimate that the remaining unsecured creditors will receive nothing. [Docket. No. 472] at 15. The Plan proposes to release the Debtors' claims against the proposed Defendants for no monetary consideration.[25]

M. The Committee's Investigation

64. Following the entry of the Final Cash Collateral Order,[26] the Committee and its professionals commenced an investigation of the Debtors' business and the circumstances leading

[25] *See Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 471] at 38-39 (May 9, 2024).

[26] *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;*

to the filing of these Chapter 11 Cases. The Committee has reviewed thousands of documents produced by the Debtors and Deerfield.

65. The Debtors motion to approve its proposed disclosure statement and solicitation procedures is scheduled to be heard on June 11, 2024. The Committee files this Motion now so that it may be heard on regular notice at the hearing to approve the Debtors' Disclosure Statement.[27]

66. However, the Committee's investigation is still ongoing. The Committee has scheduled interviews with Ms. Frizzley, Mr. Knight, Mr. Scott, and Mr. Fox-Karnal. Although the Debtors and Deerfield have completed their initial productions, the Committee is in the process of reviewing privilege logs and seeking de-designations of several thousands of documents that have been withheld or redacted. The Committee reserves all rights to supplement this Motion or the Proposed Complaint prior to the hearing on this Motion.

N. Unencumbered Assets.

1. Unencumbered Bank Accounts.

67. As of the Petition Date, the Company had 26 bank accounts (collectively, the "**Bank Accounts**"), of which, 16 are owned and controlled by the Debtors and 10 are owned and controlled by non-Debtor foreign affiliates.[28] The Debtors granted liens on the Bank Accounts (other than the Excluded Accounts)[29] in favor of U.S. Bank Trust Company, National Association,

(II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; and (IV) Granting Related Relief [Docket No. 188].

[27] *The Disclosure Statement relating to the Joint Plan of Invitae Corporation and tis Debtor Affiliates pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 472] (the "**Disclosure Statement**").

[28] *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* [Docket No. 10] (the "**Cash Management Motion**").

[29] "**Excluded Accounts**" means any (i) a zero balance account that sweeps on a daily basis into a deposit account subject to a Control Agreement, (ii) bank or deposit account used exclusively for payroll, the withheld employee portion of payroll taxes or other employee wage and benefit payments, (iii) merchant accounts in the nature of accounts

as Trustee and Collateral Agent under the 2028 Senior Secured Notes Indenture[30] (in such capacities, the "**Agent**") as part of its Collateral under and as defined in the supplement to the indenture to the 2028 Senior Secured Notes (the "**2028 Senior Secured Notes Indenture**").

68. While the 2028 Senior Secured Notes Indenture identifies deposit accounts as part of the Collateral (as defined in the 2028 Senior Secured Notes Indenture), the Agent was not granted any security interests in 14 of the Bank Accounts (collectively the "**Unencumbered Bank Accounts**") because such accounts are Excluded Assets and are neither subject to deposit account control agreements ("**DACAs**") or subject to control by the Agent sufficient to perfect such interest under applicable law. A list of the Unencumbered Bank Accounts and the balance of such accounts as of the Petition Date is attached as Appendix C to the Proposed Complaint. As of the Petition Date, the cash in the Unencumbered Bank Accounts totaled $3,067,938.69.

69. 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 Accounts, 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

with payment service providers such as Square, PayPal and Stripe, entered into in the ordinary course of business, (iv) any bank or deposit account exclusively used for purposes of cash deposits or pledges constituting Liens permitted pursuant to Sections 4.27(j), (n) or (p), (v) any deposit account used exclusively for receipt of any Third Party Payor Program accounts receivable or other accounts receivable under which any Third Party Payor is the account debtor are directly paid, *provided* that the funds in such account are transferred within two (2) Business Days to an account of a Note Party that is subject to a Control Agreement and (vi) any other Deposit Account or Securities Account (x) located in the United States, so long as with respect to this clause (vi)(x) the average trailing five (5) day closing balance of the aggregate amounts on deposit in all such accounts does not exceed $4,000,000 and (y) located outside of the United States, so long as, with respect to this clause (vi)(y) the average trailing five (5) day closing balance of the aggregate amounts on deposit in all such accounts does not exceed $6,000,000. 2028 Senior Secured Notes Indenture § 1.01.

[30] The "**2028 Senior Secured Notes Indenture**" means the supplement to the indenture to the 2028 Senior Secured Notes negotiated by the Company and Deerfield that would approve the Company's sale of its Women's Health and Ciitizen businesses.

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

2. Unencumbered Commercial Tort Claims.

70. The Debtors granted liens on commercial tort claims in favor of the Agent as part of the Collateral under the 2028 Senior Secured Notes Indenture. 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).

71. Certain of the Debtors' commercial tort claims against Natera that were sold to LabCorp (and are further described in the Proposed Complaint) (collectively, the "**Unencumbered Commercial Tort Claims**") are not listed on any schedule to the Security Agreement or a UCC-1 financing statement. Those include:

Litigation	Description
Invitae Corp. v. Natera, Inc., C.A. No. 21-669-GBW (D. Del. filed May 7, 2021)	Invitae asserts patent infringement of U.S. Patent No. 10,604,799, which relates to DNA sequencing technology, against Natera. The matter is scheduled for trial beginning in September 2025.
Invitae Corp. v. Natera, Inc., C.A. No. 21-1635-GWB (D. Del. filed Nov. 21, 2021)	Invitae asserts patent infringement of U.S. Patent Nos. 11,149,308 and 11,155,863, which relates to DNA sequencing technology, against Natera. The matter is scheduled for trial beginning in September 2025.

LEGAL STANDARD

72. The Bankruptcy Code authorizes formation of an official committee of unsecured creditors which "may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). The right to be heard "includes the right to sue when a trustee or debtor in possession will not." *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 446 n.11 (3d Cir. 1982) (quoting *In re Joyanna Holitogs, Inc.*, 21 B.R. 323, 326 (Bankr. S.D.N.Y. 1982)). The Third Circuit has recognized that "Congress approved of creditors' committees suing derivatively to recover property for the benefit of the estate." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery* ("***Cybergenics***"), 330 F.3d 548, 567 (3d Cir. 2003); *see also In re G-I Holdings, Inc.*, 313 B.R. 612, 628 (Bankr. D.N.J. 2004) ("'[N]early all courts considering the issue [of appointing a creditor's committee to act on behalf of the debtor] have permitted creditor's committees to bring actions in the name of the debtor-in-possession if the committee is able to establish' that a debtor is neglecting its fiduciary duty.") (quoting *Cybergenics*, 330 F.3d at 553)), *aff'd in part, vacated in part on other grounds by* No. 04-3423 (WGB), 2006 U.S. Dist. LEXIS 45510 (D.N.J. June 21, 2006).

73. To be granted derivative standing, the Committee must establish that (i) the claim is "colorable;" (ii) prosecution of the claim would be beneficial to the estate; and (iii) the debtor-in-possession has unjustifiably failed to bring the claim. *In re G-I Holdings, Inc.*, 313 B.R. at 628 ("A committee may have derivative standing to initiate an avoidance action on behalf of the debtor where . . . a colorable claim that would benefit the estate if successful exists[.]") (citing cases).

74. Colorability only requires a showing that the claim meets the applicable pleading standards. *Id.* at 631 ("[T]he first inquiry is much the same as that undertaken when a defendant moves to dismiss a complaint for failure to state a claim.") (citations omitted). In finding a claim colorable, the Court must accept as true all factual allegations in the complaint. *Id.* at 630-31.

"[U]nless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim" the "colorability" prong of derivative standing is met. *Id.* (quoting *Jordan v. N.J. Dep't of Corr.*, 881 F. Supp. 947, 950 (D.N.J. 1995) (emphasis added)). Thus, if the Committee's claims "set out sufficient factual matter to show that [they are] facially plausible," they are colorable. *In re Roman Cath. Diocese of Harrisonburg*, 640 B.R. 59, 68 (Bankr. M.D. Pa. 2022).

75. The Court should grant the Committee standing if the asserted claims are likely to benefit the estate—in other words, if "the proposed litigation will not be a hopeless fling." *Adelphia Commc'ns Corp. v. Bank of Am., N.A. (In re Adelphia Commc'ns Corp.)*, 330 B.R. 364, 386 (Bankr. S.D.N.Y. 2005).

76. Finally, the Committee must demonstrate that the "debtor in possession unjustifiably failed to bring suit." *Official Comm. ex rel. Cybergenics*, 330 F.3d at 566 (citing *In re STN Enters.*, 779 F.2d 901, 904 (2d Cir. 1985)). Courts have found such unjustifiable failure where "the debtor-in-possession . . . acts under the influence of conflicts of interest." *Id.* at 573 (internal citation omitted). For example, where a debtor's managers "avoid bringing a claim that would amount to reputational self-immolation" or where a debtor is "unwilling to pursue claims against . . . businesses . . . with whom it has an ongoing relationship that it fears damaging," "[t]he possibility of a derivative suit by a creditors' committee provides a critical safeguard against lax pursuit of avoidance actions." *Id.* A formal demand on the Debtors is not required and "refusal to pursue an avoidance action can be implied." *In re G-I Holdings, Inc.*, 313 B.R. at 630 (citing *Official Comm. of Unsecured Creditors of Nat'l Forge Co. v. Clark (In re Nat'l Forge Co.*), 304 B.R. 214, 222 (Bankr. W.D. Pa. 2004)).

ARGUMENT

A. The Proposed Claims Are Colorable

1. The March Exchange Was a Fraudulent Transfer and Should Be Unwound

77. The March Exchange should be unwound as a fraudulent transfer under both section 544 and section 548 of the Bankruptcy Code.

78. Section 548 of the Bankruptcy Code provides that a transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within two years before the petition date is avoidable as fraudulent if the debtor voluntarily or involuntarily:

> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B)
>
> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)
>
> (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548.

79. Section 544(b) of the Bankruptcy Code grants the trustee the rights and powers of any unsecured creditor to avoid obligations pursuant to applicable state fraudulent conveyance law. Here, the potentially applicable state fraudulent conveyance laws impose similar or identical requirements as Section 548 of the Bankruptcy Code. 11 U.S.C. § 544(b); *compare* 11 U.S.C. § 548 *with* N.J. Stat. Ann. § 25:2-25, 26, 27 (West) *and* Cal. Civ. Code § 3439.04 (West) *and* N.Y. Debt. & Cred. Law § 273 (McKinney); *see also MSGI Liquidation Tr. v. Modell* (*In re Modell's Sporting Goods, Inc.*), Nos. 20-14179 (VFP), 22-1076 (VFP), 2023 Bankr. LEXIS 1031, at *81 (Bankr. D.N.J. Apr. 14, 2023) ("In short, federal bankruptcy law and New York and New Jersey fraudulent transfer law all have similar standards.").[31]

80. The March Exchange was a transfer of the Debtors' interests in property and obligations incurred by the Debtors within two years of the Petition Date. Proposed Compl. ¶ 171. Specifically, as part of the March Exchange, Invitae gave the Agent, for the benefit of the Participating 2024 Unsecured Noteholders, (1) $305.3 million in Series A 2028 Senior Secured Notes secured by a lien on substantially all of Invitae and its subsidiaries' assets (subject to the exceptions identified above) and 14,219,859 shares of Invitae's common stock (with a market price of $22.9 million). *Id.* The Debtors also incurred significant obligations in connection with the March Exchange, including, but not limited to, (1) $8.1 million in prepayment premiums resulting from the Term Loan Repayment, which was a condition precedent and (2) $19.1 million in debt issuance costs (primarily advisor fees). *Id.* ¶ 172. In return, the Debtors (1) extinguished

[31] With respect to state law fraudulent transfer claims, courts have held that it may be unnecessary to engage in a conflict of law analysis where the statutes are not in conflict. *See, e.g.*, *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 230 (3d Cir. 2007) (holding, in a non-bankruptcy context that "[i]f two jurisdictions' laws are the same, then there is *no conflict* at all, and a choice of law analysis is unnecessary"). Instead, "where there is no real conflict between the choice of law, the Court may utilize the law of the forum state." *Forman v. Gittleman (In re OpenPeak, Inc.)*, Nos. 16-28464 (SLM), 17-01755 (SLM), 2020 Bankr. LEXIS 3463, at *84-85 (Bankr. D.N.J. Dec. 10, 2020).

2024 Unsecured Notes with a fair market value that was significantly less than the face amount of the debt and (2) received $30 million in cash. *Id.*

2.The March Exchange Is an Avoidable Constructive Fraudulent Transfer

81. A transfer of an interest of the debtor in property, or any obligation incurred by the debtor, is avoidable as a constructive fraudulent transfer if: (i) the transfer made or obligation incurred was for less than reasonably equivalent value; and (ii) the debtor (a) was insolvent on the date of the transaction or was rendered insolvent thereby, (b) had unreasonably small capital, or (c) intended to incur, or reasonably should have known it would incur, debts that it could not pay as they matured. *See* 11 U.S.C. § 548(a)(1)(B).

82. The fraudulent conveyance laws of the relevant states—New York (the governing law of the 2028 Senior Secured Notes Indenture), New Jersey (Invitae's place of business), California (Invitae's place of business and chief executive office), and Delaware (Invitae's state of incorporation)—are similar to Section 548 of the Bankruptcy Code. *See* N.Y. Debt. & Cred. Law § 273-74 (McKinney); N.J. Stat. Ann. § 25:2-25, 27 (West); Cal. Civ. Code § 3439.04-05 (West); Del. Code Ann. tit. 6, §§ 1304, 1305 (West).

a. The Debtors Did Not Receive Reasonably Equivalent Value for the March Exchange

83. "Reasonably equivalent value" is not defined in the Bankruptcy Code. In determining whether a debtor received reasonably equivalent value, the Third Circuit applies a "totality of the circumstances" test "including consideration of factors such as market value, good faith, and whether the transaction was at arms[']' length." *EPLG I, LLC v. Citibank, N.A.* (*In re Qimonda Richmond, LLC*), 467 B.R. 318, 327 (Bankr. D. Del. 2012); *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L.* (*In re R.M.L.*), 92 F.3d 139, 151, 153 (3d Cir. 1996); *Kartzman v. Latoc, Inc.* (*In re Mall at the Galaxy*), 2022 Bankr. LEXIS 1180, at *36 (Bankr. D.N.J.

Apr. 29, 2022) (same). "The touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *In re R.M.L.*, 92 F.3d at 151. The question of whether the value received was reasonably equivalent to the value given is a fact-driven comparison between such value and the transfer or obligation sought to be avoided to determine whether the debtor got roughly the value it gave. *Autobacs Strauss, Inc. v. Autobacs Seven Co.* (*In re Autobacs Strauss, Inc.*), 473 B.R. 525, 568 (Bankr. D. Del. 2012).

84. Because reasonably equivalent value compels a factual analysis of all relevant circumstances, the issue may not be determined on a motion to dismiss or at the standing motion phase of an action. *In re Qimoda Richmond, LLC*, 467 B.R. 318 at 327 ("[T]he issue of 'reasonably equivalent value' requires a factual determination that cannot be made on a motion to dismiss."); *see Stanziale v. Brown-Minneapolis Tank ULC, LLC* (*In re BMT-NW Acquisition, LLC*), 582 B.R. 846, 858 (Bankr. D. Del. 2018) ("Determining reasonable equivalence 'requires case-by-case adjudication,' which depends on 'all the facts of each case, an important element of which is market value.'" (quoting *Barrett v. Commonwealth Fed. Sav. and Loan Ass'n*, 939 F.2d 20, 23 (3d Cir. 1991)).

85. The Proposed Complaint asserts that the Debtors provided the Agent, on behalf of the Participating 2024 Unsecured Noteholders, with approximately $100 million more in value than was received by the Debtors, including, among other things: (1) a $305.3 million secured note with all asset security interest and value that exceeded the fair market value of the exchanged 2024 Unsecured Notes,[32] (2) increased interest payments through the original maturity of the 2024

[32] When a company is insolvent at the time of the subject transaction, the debt is not worth its face or principal value because the company cannot otherwise pay its creditors in full in bankruptcy and the market would therefore apply a discount. Courts in the Third Circuit take the market value of debt into account when determining whether a debtor received reasonably equivalent value. *See e.g.*, *Aphton Corp. v. Sonafi Pasteur (In re Aphton Corp.)*, 423 B.R. 76, 93

Unsecured Notes, (3) a make whole claim, that unless avoided or disallowed would provide the Agent with an $27.5 million increased claim in these Chapter 11 Cases; (4) approximately $22.9 million in Invitae common stock, (5) an $8.1 million obligation to pay a prepayment fee in connection with the 2024 Term Loan Repayment which was a condition precedent to the March Exchange, (6) the obligation to pay $19.1 million in costs in connection with the issuance of the 2028 Senior Secured Notes (primarily consisting of professional fees), (7) equity option value through a dramatically improved conversion feature in the 2028 Senior Secured Notes when compared to the 2024 Unsecured Notes, and (8) significant control over the Company, its ability to raise additional financing, and its ability to operate and restructure its business. Proposed Compl. ¶ 172.

86. Throughout these Chapter 11 Cases, the Debtors and Deerfield have suggested the Debtors received two forms of value in return for the March Exchange: (1) extended maturity date when compared with the 2024 Unsecured Notes and (2) $30 million of "new-money financing."[33] The Proposed Complaint alleges that none of the foregoing provided value to the Debtors, let alone reasonably equivalent value for the issuance of a $305.3 million security interest in substantially all of the Debtors' assets. *Id.*[34]

87. First, even accounting for the March Exchange, the Debtors projected that [redacted]. *Id.* ¶ 81. Accordingly, the March Exchange did not buy the Debtors any more runway. The relevant Officer and Director

(Bankr. D. Del. 2010) (denying the motion to dismiss constructive fraudulent transfer complaint finding that it was possible that the notes were worthless at the time of the transfer when the debtor gave $15 million of cash, preferred stock, and common stock in exchange for face value of $15 million of notes based on the debtors' insolvency at the time)

[33] *Statement in Response to Committee's Objection to the Debtors' Retention of Kirkland & Ellis*, [Docket No. 336] at 2 n.5 (Apr. 18, 2024).

[34] As an initial matter, the determination of whether any of the forgoing constitute reasonably equivalent value is a question of fact and thus it is improper to decide the issues at the standing phase of the proceeding.

Defendants were [redacted]. *Id.* ¶ 81. Courts have found that the transfer of value in exchange for opportunity to avoid a potential default or bankruptcy does not constitute value when, like here, it only delayed the inevitable. *Senior Transeastern Lenders v. Official Comm. of Unsecured Creditors* (*In re TOUSA, Inc.*), 680 F.3d 1298, 1311-13 (11th Cir. 2012); *Feltman v. Wells Fargo Bank, N.A.* (*In re TS Emp., Inc.*), 597 B.R. 494, 528 (Bankr. S.D.N.Y. 2019) ("The opportunity to avoid a default or bankruptcy may not necessarily constitute "reasonably equivalent value.'"); *cf. Official Comm. of Unsecured Creditors v. Credit Suisse First Boston* (*In re Exide Techs.*) 299 B.R. 732, 747-48 (Bankr. D. Del. 2003) (assertion of reasonable equivalent value of an "agree[ment] to forbear from exercising remedies," requires "a showing of what the value of the forbearance was"); *Stillwater Nat'l Bank & Trust Co. v. Kirtley* (*In re Solomon*), 300 B.R. 57, 67 (Bankr. N.D. Okla. 2003) (finding that a forbearance was not reasonably equivalent value for granting additional security), *aff'd,* 299 B.R. 626 (10th Cir. 2003). Here, that is the case. In fact, the March Exchange, made it more difficult for the Debtors to avoid their inevitable insolvency, by restricting the Debtors' ability to raise additional capital in the future or sell their assets.

88. Second, when the costs of the transaction are considered, the $30 million in proceeds from the sale of the Series B Notes was almost entirely consumed by the transaction costs and completely consumed in the days and months after the transaction.

89. On the other hand, the Debtors gave Deerfield more than $100 million more value than it received from the March Exchange. *Id.* ¶ 172. The all-asset security interest that was purportedly provided to Deerfield and the other Participating 2024 Unsecured Noteholders will also entitle those creditors to receive up to an estimated $242 million more value under the

Debtors' proposed plan than such lenders would have received if such lenders shared pro rata with other unsecured creditors.

90. Under the totality of circumstances test, courts also will examine whether the transaction was made at arm's length and in good faith when determining whether a debtor received reasonably equivalent value. *See In re R.M.L., Inc.*, 92 F.3d at 149, 153. A significant factor when determining whether a transferee acted in good faith is whether it knew or should have known of the financial condition of the debtor and the voidability of a transfer. *Perkins v. Bamburger* (*In re Carton*), Nos. 20-19781 (VFP), 22-1272 (VFP), 2023 Bankr. LEXIS 2793, at *32 (Bankr. D.N.J. Nov 20, 2023) ("To determine whether a transferee took in good faith, the court takes an objective approach to determine what the transferee knew or should have known 'such that a transferee does not act in good faith when it has sufficient knowledge to place it on inquiry notice of the voidability of the transfer.'" (citing *In re Hill*, 342 B.R. 183, 203 (Bankr. D.N.J. 2006)).

91. Here, the Proposed Complaint alleges that all parties, including the Debtors, Deerfield, and both of their advisors, were aware the Debtors were [redacted] prior to the March Exchange and [redacted]. *See* Proposed Compl. ¶ 73. In fact, both SB Northstar and Baker Brothers directly raised that the March Exchange was [redacted]. *Id.* ¶ 74. All parties knew that the transaction would only [redacted]. *Id.* And, all parties knew that upon the inevitable chapter 11 filing, the consequence of the March Exchange would be to provide Deerfield and the other Participating 2024 Unsecured Noteholders with significant control over the Debtors' restructuring, bankruptcy

cases, and allow such lenders to capture 100% of the value of the Debtors' at the expense of the Debtors' other creditors.

92. All of the foregoing was known or should have been known at the time of the March Exchange and has actually come to pass. As is discussed in further detail in Section I.E, below, although the March Exchange was negotiated at arm's length, the Proposed Complaint alleges facts that demonstrate that it was not conducted in good faith.

b. The Debtors Were Insolvent at the Time of the March Exchange

93. Section 548(a) of the Bankruptcy Code provides three relevant tests for insolvency—the balance sheet test, the capital adequacy test, and the cash flow test—only one of which must be met to establish a constructive fraudulent transfer claim. 11 U.S.C. § 548(a)(1)(B)(ii). Solvency is a question of fact that is not proper for decision at the standing or motion to dismiss phase. *See United States v. Rocky Mt. Holdings, Inc.*, No. 0-3381, 2009 U.S. Dist. LEXIS 52203, at *22 n.6 (E.D. Pa. Mar. 3, 2009). Here, the Proposed Complaint illustrates that the Debtors were insolvent under each of the three applicable tests such that standing for the Committee to bring these claims is proper.

94. Balance Sheet Insolvency. Under the balance sheet test for insolvency, a debtor is "insolvent" when the "sum of such entity's debts is greater than all of such entity's property, at a fair valuation," exclusive of exempt property and any property transferred in actual fraudulent transfers. *See* 11 U.S.C. § 101(32)(A); *In re R.M.L.*, 92 F.3d at 156. Courts will consider adjustments to the debtor's financial statements if appropriate to determine "fair valuation." *See R.M.L.*, 92 F.3d at 156. Solvency is measured at the time the debtor transferred value, not at some later or earlier time. *See id.*

95. The Proposed Complaint proffers facts that demonstrate the Debtors were insolvent under the balance sheet test at the time of the March Exchange. Proposed Compl. ¶¶ 51, 102. By

March 31, 2023, after the Term Loan Repayment and the March Exchange, the Company reported it was insolvent with total liabilities of $1.7 billion and total assets with a book value of $1.69 billion. *Id.* ¶ 102.

96. The Proposed Complaint asserts that the reported book value of the Debtors' assets, however, significantly exceeded their fair market value. Courts will consider adjustments for purposes of finding balance sheet insolvency. *See Sklar v. Susquehanna Bank* (*In re Global Prot. USA, Inc.*), 546 B.R. 586, 611 (Bankr. D.N.J. 2016); *see also* Proposed Compl. ¶ 102. As an example, after the transaction closed, new-CFO Anna Schrank acknowledged the book value of the Company's assets significantly exceeded their fair market value. *See supra* Section F. At the end of September 2023, when the Company finally remarked its intellectual property to reflect a value closer to its market value, ***its liabilities exceeded its assets by approximately $1.1 billion***.[35] *Id.* ¶ 102.

97. Capital Adequacy Test. A debtor was not adequately capitalized if the debtor was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was unreasonably small capital. 11 U.S.C. § 548(a)(1)(B)(ii)(II). An entity has unreasonably small capital if it lacks the ability to generate sufficient profits to sustain operations. *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1070 (3d Cir. 1992). Courts have held that a plaintiff meets the requisite pleading standard to establish unreasonably small capital when a complaint asserts a transaction left the debtor with no access to raise money in capital markets or if it becomes "reasonably foreseeable" that the debtor would soon become insolvent. *See, e.g., In re Autobacs Strauss, Inc.*, 473 B.R. at 553 (holding that

[35] Invitae Corp., Quarterly Report (Form 10-Q) at 1 (Aug. 8, 2023); Invitae Corp., Quarterly Report (Form 10-Q) at 1 (Nov. 8, 2023).

plaintiffs sufficiently alleged that the debtor was left with unreasonably small capital where pled facts implied that the debtor had no access to raise money in the capital markets); *In re Jevic Holding Corp.*, Nos. 08-11006 (BLS), 08-51903, 2011 Bankr. LEXIS 3553, at *32 (Bankr. D. Del. Sept. 15, 2011) (holding that the creditors' committee sufficiently alleged that the debtor was left with unreasonably small capital following consummation of the challenged transaction where it was reasonably foreseeable that the debtor soon thereafter would become insolvent).

98. As alleged in the Proposed Complaint, as early as July 2022, management identified that the Company would require [redacted]. Proposed Compl. ¶ 60. The Debtors' advisors at the time similarly advised [redacted]. *Id.* ¶¶ 66-67. Deerfield was also aware that the [redacted]. *Id.* ¶¶ 69-71, 86-87. Indeed, prior to executing the transaction, both the Debtors and Deerfield had [redacted]. *Id.* ¶¶ 79, 87.

99. Prior to executing the March Exchange, the Debtors solicited the mostly likely source of additional capital—their existing lenders. *Id.* ¶ 72. The Company's advisors warned management [redacted]. *Id.* ¶ 66. And, their CFO's analysis demonstrated that [redacted]. *Id.* ¶ 79.

100. The March Exchange only worsened the Company's liquidity position, depleting the Company's cash by $135.6 million. *Id.* ¶ 97. The terms of the 2028 Senior Secured Notes Indenture also imposed significant limitations on the Company ability to raise additional capital. *Id.* ¶ 172.

101. It is no surprise that the Debtors were ultimately unable to raise additional capital and filed for chapter 11 protection. Indeed, an eventual chapter 11 filing was contemplated by Deerfield and the Debtors at the time of the March Exchange. *Id.* ¶ 99.

102. Cash Flow Test. A debtor fails the cash flow solvency test if, at the time a transfer is made, the debtor intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they came due. 11 U.S.C. § 548(a)(1)(B)(ii)(III). This "forward looking" test requires assessing the debtor's reasonable prediction about its ability to repay a debt as it is incurred. *Burtch v. Opus LLC (In re Opus E. LLC)*, 698 F. App'x 711, 715 (3d Cir. 2017) (citation omitted). A court may, however, consider the facts and circumstances surrounding the transaction to determine whether the debtor was "able to pay, intended to pay, and . . . was paying its debts as they came due." *Id.* (citation omitted).

103. The Debtors knew they [redacted]. *Id.* ¶¶ 107-11. The Board projected that [redacted]. *Id.* ¶ 81, 107-11. The Debtors' internal cash flow projections only got worse following the March Exchange.

3. The March Exchange Is an Avoidable Actual Fraudulent Transfer

104. Section 548(a)(1)(A) of the Bankruptcy Code provides that a transfer of an interest of the debtor in property that was made or incurred with "actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted." 11 U.S.C. § 548(a)(1)(A). Similarly,

under section 544(b) of the Bankruptcy Code, a bankruptcy trustee may avoid a transfer of property or obligation that is voidable under state fraudulent transfer law. 11 U.S.C. § 544(b). State fraudulent transfer laws have similar elements for avoidance of actual fraudulent transfers. *In re Modell's Sporting Goods, Inc.*, 2023 Bankr. LEXIS 1031, at *81 ("In short, federal bankruptcy law and New York and New Jersey fraudulent transfer law all have similar standards.").

105. To establish standing to bring an actual fraudulent transfer claim, a plaintiff must allege that there was either an intent to hinder, to delay, ***or*** defraud the Debtors' creditors. *Kirchner v. J.P. Morgan Chase Bank, N.A. (In re Millenium Lab Holdings II, LLC)*, Nos. 15-12284 (LSS), 17-5140 (LSS), 2019 Bankr. LEXIS 636, at *8 n.15 (Bankr. D. Del. Feb. 28, 2019). The question of whether the debtor executed a transaction with wrongful intent is a question of fact. *In re Exide Techs., Inc.*, 299 B.R. at 749. Fraudulent intent must be assessed at the time of the transfer. *Kartzman v. Schwartz* (*In re Schwartz*), Nos. 10-21505 (DHS) , 12-01344 (DHS), 2014 Bankr. LEXIS 3120, at *15 (Bankr. D.N.J. 2014).

106. Understanding that it is unlikely that a defendant will admit its fraudulent intent, courts have identified several "badges of fraud" to assist in the determination of "actual intent." *In re Millennium Lab Holdings II, LLC*, 2019 Bankr. LEXIS 636, at *9.[36] For example, "badges of fraud" may include: (1) the relationship between the debtor and the transferee; (2) consideration for the conveyance; (3) insolvency or indebtedness of the debtors; (4) how much of the debtor's estate was transferred; (5) reservation of benefits, control or dominion by the debtor over the

[36] Badges of fraud include: (a) the transfer or obligation was to an insider; (b) the debtor retained possession or control of the property transferred after the transfer; (c) the transfer or obligation was disclosed or concealed; (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (e) the transfer was of substantially all the debtor's assets; (f) the debtor absconded; (g) the debtor removed or concealed assets; (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. *See MSKP Oak Grove, LLC v. Venuto*, 875 F. Supp. 2d 426, 435 (D.N.J. 2012) (internal citations omitted).

property transferred; and (6) secrecy or concealment of the transaction. *Zazzali v. Mott* (*In re DBSI, Inc.*), 445 B.R. 344, 348 (Bankr. D. Del 2011); *SB Liquidation Trust v. Preferred Bank (In re Syntax-Brillian Corp.)*, Nos. 08-11407 (BLS), 10-51389 (BLS), 2016 Bankr. LEXIS 988, at *12 (Bankr. D. Del. Feb. 8, 2016). Actual fraudulent transfer does not employ a mechanical test and thus it is not necessary to allege that each badge of fraud exists. *In re Millennium Lab Holdings II, LLC*, 2019 Bankr. LEXIS 636, at *9. If the natural consequence of a debtor's action is to hinder, delay or defraud creditors, a court may infer an intentional fraudulent conveyance. *Id.* Furthermore, a transferee's intent to hinder, delay or defraud the debtors' creditors may be imputed on the debtor where the transferee is in a position to control the transaction. *See Maxus Liquidating Tr. v. YPF S.A.* (*In re Maxus Energy Corp.*), 641 B.R. 467, 513 (Bankr. D. Del. 2022).

107. Beginning in the summer of 2022, Deerfield's primary goal was to [redacted]. *Id.* ¶¶ 69,76. Deerfield's internal discussions demonstrate that it knew the Debtors were likely [redacted] *Id.* ¶ 73. Deerfield was also aware that the Debtors needed more than [redacted]. *Id*. And, that [redacted] *Id*.

108. The Debtors also knew that without additional capital, a transaction that simply [redacted] *Id.* ¶¶ 66, 73. The Debtors were also informed on multiple occasions by their advisors and the 2028 Unsecured Noteholders that simply [redacted]. *Id.* ¶¶ 7, 66, 73.

109. Notwithstanding that understanding, the Debtors proceeded to negotiate the transaction with Deerfield. During those negotiations, it was apparent (or should have been apparent) that the Deerfield transaction would worsen the Company's insolvent position. *Id.* ¶¶ 76-85. Indeed, during the negotiations, it was apparent that the parties who were most likely to contribute additional capital (the Debtors' existing investors) would not. *Id.* ¶ 74. The transaction did not reduce the Debtors' leverage. *Id.* ¶ 98. And, the terms that were required by Deerfield significantly restricted the Debtors ability to raise any additional capital. *Id.* ¶ 172.

110. Materials presented to the Board immediately prior to the transaction demonstrated that [redacted]. *Id.* ¶ 81. Those materials showed that the Debtors were aware that [redacted]. *Id.*

111. Deerfield was well aware of the reality of the Debtors' financial condition and internal communications demonstrate [redacted]. *Id.* ¶¶ 86-87.

112. The Debtors and Deerfield intentions are highlighted by email correspondence that indicates [redacted]. The end result, unless the March Exchange is avoided, Participating 2024 Unsecured Noteholders are estimated to receive a par recovery, while those holders who were not

chosen by the Debtors and Deerfield are estimated to receive nothing. The Debtors' fraudulent intent is also demonstrated by the [redacted].

113. The facts alleged in the Proposed Complaint clearly demonstrate the Debtors' and Deerfield's intent to provide all of the value of the Debtors' estate to Deerfield and the other Participating 2024 Unsecured Noteholders. The natural result of the March Exchange, was to hinder, delay and defraud the Debtors other unsecured creditors.

114. The Debtors' intent is also supported by numerous badges of fraud including:

a. A lack of reasonably equivalent value for the transfer. *See supra* Section I.A.1.a.

b. The Debtors were insolvent and inadequately capitalized as a result of the transaction. *See supra* Section 1.A.1.b.

c. The Debtors transferred a security interest in substantially all of their assets that entitled Deerfield and the Participating 2024 Unsecured Noteholders to substantially all of the value of the Debtors' estates. Proposed Compl. ¶ 96.

d. The Debtors and Deerfield colluded in secret regarding the [redacted]. *Id.* ¶ 91.

e. The March Exchange allowed Deerfield significant control over the Debtors' major transactions, including its restructuring. *Id.* ¶ 172.

4. The Subsidiary Guarantees Issued In Connection With the March Exchange Should Be Avoided

115. To the extent the March Exchange is not avoided in its entirety, the guarantees and security interests issued by the Debtors' subsidiaries should be avoided as constructive fraudulent transfers. As part of the Uptier Transaction, certain subsidiaries of Invitae, including, ArcherDX, LLC; ArcherDX Clinical Services, Inc.; Genetic Solutions, LLC; Genosity, LLC; Ommdom Inc. (together, the "**Debtor Subsidiaries**"), Ciitizen, LLC; and YouScript, LLC,[37] guaranteed

[37] Ciitizen, LLC and YouScript, LLC are not Debtor entities, the remaining entities are Debtors.

obligations of Invitae on the 2028 Senior Secured Notes and granted a security interest in substantially all of their assets to secure their guarantee obligations.[38] *Id.* ¶ 198. The Debtor Subsidiaries were not obligors or guarantors with respect to the 2024 Unsecured Notes or the 2028 Unsecured Notes. *Id.* ¶ 100. After the Term Loan Repayment, each of the Debtor Subsidiaries assets and equity was unencumbered. *Id.* ¶¶ 97, 100. Upon information and belief, the Debtor Subsidiaries received no value in connection with the March Exchange but pledged substantially all of their assets and equity to secure the $305.3 principal amount of the 2028 Senior Secured Notes. *Id.* ¶¶ 96, 201. The Debtor Subsidiaries did not receive reasonably equivalent value in connection with the issuance of that security interest.

116. The Debtor Subsidiaries were rendered insolvent and, for the reasons stated in Section I.A.1.b, above, were inadequately capitalized as a result of the March Exchange. Accordingly, the issuance of the security interest with respect to the Subsidiary Guarantors should be avoided as a constructive fraudulent transfer. *See, e.g.*, *In re TOUSA, Inc.*, 422 B.R. 783, 866 (Bankr. S.D. Fla. 2009) (invalidating upstream guarantees and related liens as constructive fraudulent conveyances for lack of reasonably equivalent value), *aff'd* 680 F.3d 1298 (11th Cir. 2012).

5. The August Exchange Should Be Avoided and the Value of the Stock Should Be Returned to the Debtors

117. By early August 2023, the Debtors had hired advisors to evaluate and prepare for an eventual chapter 11 filing. Proposed Compl. ¶ 117. Deerfield was also focused on forcing the Company [redacted]. *Id.* ¶¶ 125-150. Deerfield was aware that

[38] Invitae Corp. Current Report (Form 8-K) (Mar. 8, 2023), at 3; *id.*, Ex. 4.1, at Signature Page.

in that eventual chapter 11 case, its remaining 2024 Unsecured Notes would likely receive at most pennies on the dollar. *Id.* ¶ 81.

118. On August 22, 2023, the Debtors and Deerfield agreed to exchange its $17.2 million of remaining 2024 Unsecured Notes for $100,000 of Series A Notes and approximately 15.8 million shares of Invitae common stock (with a market value of approximately $16.3 million). *Id.* ¶ 121. The Proposed Complaint alleges, upon information and belief, that Deerfield sold those shares shortly thereafter. Deerfield received more than $16.3 million of liquid securities for 2024 Unsecured Notes that it knew were soon to be worthless and were largely illiquid.

119. The Debtors were insolvent and inadequately capitalized at the time of the August Exchange. *Id.* ¶ 124. On August 8, 2023, Invitae published its second quarter financials which disclosed that "[a]s a result of losses, projected cash needs, and current liquidity level, substantial doubt exists about the Company's ability to continue as a going concern." *Id.* Invitae's third quarter financials also recorded that its liabilities exceeded its assets by approximately $1.1 billion. *Id.* Invitae only had $158 million of cash and cash equivalents, rendering it inadequately capitalized as well. *Id.* As such, the Committee should be granted standing to pursue these colorable claims.

6. The Consent Fees Should Be Avoided As Constructive Fraudulent Transfers

120. In connection with the execution of the Second Supplemental Indenture, Deerfield required the Company to pay it a $2.1 million consent fee and $3 million of its professional fees. The Company did not receive any value for those payments, as the Second Supplemental Indenture (1) removed all flexibility for the Company to restructure, (2) mandated sales and chapter 11 process milestone, and (3) accelerated Deerfield's realization of 100% of the value of the

liquidation of the Debtors' assets. The only potential value the Company received was to sell two businesses, one at a loss of over $300 million through a dubious sales process. Additionally, for the reasons set forth above, the Debtors were insolvent and inadequately capitalized at the time of they executed the Second Supplemental Indenture and made the Consent Fees. The Consent Fees should be avoided. *See In re Millennium Lab Holdings II, LLC*, No. 15-12284 (LSS), 2019 WL 1005657, at *1 (Bankr. D. Del. Feb. 28, 2019) (denying motion to dismiss actual and constructive fraudulent transfer claims to avoid a $35.3 million fee paid to banks as part of term loan transaction); *see In re TS Emp., Inc.*, 597 B.R. 494, 530 (Bankr. S.D.N.Y. 2019) (finding the debtors did not receive reasonably equivalent value for fees incurred in connection to amendments to a financing facility).

7. Invitae's Directors and Officers Breached Their Fiduciary Duties

121. Directors and officers of a Delaware corporation owe companies two duties: the duty of care and the duty of loyalty. "The fiduciary duty of due care requires that directors of a Delaware corporation both: (1) 'use that amount of care which ordinarily careful and prudent men would use in similar circumstances'; and (2) 'consider all material information reasonably available.'" *Bridgeport Holdings Inc. Liquidating Trust v. Boyer (In re Bridgeport Holdings, Inc.)*, 388 B.R. 548, 568 (Bankr. D. Del. 2008) (quoting *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (Del. Ch. 2005), *aff'd* 906 A.2d 27 (Del. 2006)).[39] "The duty of due care obligates corporate directors and officers to 'act on an informed basis.'" *Resnik v. Woertz*, 774 F. Supp. 2d 614, 632 (D. Del. 2011) (citations omitted).

[39] A single transaction is not necessary to assert a breach of fiduciary duty claim, rather a pattern of conduct can be used to demonstrate breach. *See Frederick Hsu Living Trust v. ODN Holding Corporation*, No. 17-129, 2017 Del. Ch. LEXIS 67, at *41 (Del. Ch. Apr. 14, 2017) (holding that a five-year long scheme of "abandoning the Company's growth strategy which was benefitting its common stockholders in favor of selling off whole business lines and hoarding cash in order to provide the maximum amount [defendant] could extract non-ratably from the Company by exercising its redemption right" breached a fiduciary duty).

122. The duty of loyalty generally obligates a fiduciary to act in "good faith" and to refrain from conflicts and from putting its interests ahead of those of the corporation. *See Miller v. Greystone Bus. Credit II, L.L.C.*, (*In re USA Detergents, Inc.*), 418 B.R. 533, 545 (Bankr. D. Del. 2009) ("The duty of loyalty 'mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.'") (quoting *In re Fedders N. Am., Inc.*, 405 B.R. 527, 540 (Bankr. D. Del. 2009)). The duty of loyalty is violated where a director or officer "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties" or appears on both sides of a transaction, expects to derive personal financial benefit from the transaction in the sense of self-dealing, or is beholden to an interested party. *See Walt Disney Co. Derivative Litig.*, 907 A.2d at 751, 755; *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) (subsequent history omitted).

123. Under Delaware law,[40] "[a] claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. Ct. 2010). Normally, breach of fiduciary duty claims must be brought derivatively on behalf of shareholders, but "[a]fter a corporation becomes insolvent, creditors gain standing to assert claims derivatively for breach of fiduciary duty." *Quadrant Structured Prods. Co., Ltd.*, 115 A.3d at 546; *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101-2 (Del. 2007) (holding that "the creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties" because a "corporation's insolvency 'makes the

[40] A breach of fiduciary duty claim against Invitae's directors and officers is governed by Delaware law, as the law of the state in which Invitae is incorporated. *See Fry v. Trump*, 681 F. Supp. 252, 255-56 (D.N.J. 1988) ("Claims involving the 'internal affairs' of corporations, such as breach of fiduciary duty and the like, are subject to the laws of the state of incorporation.").

creditors the principal constituency injured by any fiduciary breaches that diminish the firm's value'"). As described above and in the Proposed Complaint, the Company was insolvent at all relevant times. *See supra* Section I.A.1.B.

124. Breach of Duty of Care. As early as the fall of 2021, the Fiduciary Defendants knew the Company had [redacted]. Proposed Compl. ¶ 3. A year later, in October 2022, analyses prepared by the Company's financial advisors and management showed that [redacted]. *Id.* ¶ 66. The Company's advisors also warned the Fiduciary Defendants that [redacted]. *Id.*

125. Fully aware of those identified issues, the Fiduciary Defendants determined to proceed with the March Exchange, which did not deleverage the Company or provide needed additional capital. Various parties—including SB Northstar and Baker Brothers—[redacted]. *Id.* ¶ 74. But, denying the insolvent state of the Company, the Fiduciary Defendants pursued the Deerfield transaction that provided all of their value to one creditor constituency, Deerfield and the other Participating 2024 Unsecured Noteholders, at the expense of over $1 billion in similar situated creditors. The Fiduciary Defendants knew that would be the result. The Company's consideration of other transactions – such as the one [redacted] – was shallow and largely ignored because the Fiduciary Defendants [redacted]. All the while, the Fiduciary Defendants held significant amounts of Invitae common stock. *Id.* ¶ 102.

126. The Fiduciary Defendants were aware that if the Company executed the March Exchange it would [redacted] *Id.* ¶ 174. Board materials indicate that the Fiduciary Defendants knew that [redacted]. *Id.* ¶ 82. The Fiduciary Defendants, however, made no efforts to understand whether [redacted]. *Id.*

127. The Debtors' CFO, Ms. Wen, had previously been advised that [redacted]. *Id.* ¶ 66. However, upon information and belief, the Board received no materials or advice as to the viability of a subsequent capital raise. Nor did the Fiduciary Defendants request their advisors conduct any market check to determine the viability of any such financing. Moreover, that the Company's existing lenders, who were familiar with the business and had the most to lose, [redacted] should have been a sign that raising additional capital without reducing leverage was doomed.

128. Based on discovery received to date, it is unclear what efforts the Fiduciary Defendants took to raise additional capital after the March Exchange closed. Ultimately, the Debtors were unable to raise additional financing, in part due to the terms and conditions of the 2028 Senior Secured Notes Indenture which were negotiated and agreed to by the Fiduciary Defendants, including the dilution that would occur if the 2028 Senior Secured Notes were converted to equity, the strong anti-dilution provisions contained therein, the amount of secured debt issued thereunder, and the restrictions on issuing *pari passu* or junior secured debt.

129. These actions constitute breaches of care because the Fiduciary Defendants approved the Uptier Transaction, without regard to Invitae's solvency, without meaningfully considering potential competing proposals or the viability of a subsequent capital raise, without exercising the care that an ordinarily careful and prudent person would exercise in similar circumstances, and without understanding the Company's ability to raise additional capital. The Fiduciary Defendants' actions were negligent, grossly negligent, in bad faith, and with reckless indifference to the interests of unsecured creditors. Additionally, the Fiduciary Defendants did not consider (or perhaps simply ignored) relevant and reasonably available material information, such as the [redacted]

130. Although the business judgment rule presumes that a director acted on an informed basis and in good faith, *Quadrant Structured Prod. Co. v. Vertin*, 102 A.3d 155, 183 (Del. Ch. 2014), such presumption can be overcome by demonstrating that the directors and officer "d[id] not act in good faith, act[ed] in a manner that cannot be attributed to a rational business purpose or reach[ed] their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Stanziale v. Nachtomi* (*In re Tower Air, Inc.*), 416 F.3d 229, 240 (3d Cir. 2005) (citation omitted). Upon such a showing, a fiduciary's conduct must be measured against a standard of "entire fairness," which is the "most onerous standard of review" and shifts the burden of proof to the defendants "to demonstrate that the challenged act or transaction was entirely fair to the corporation and its stockholders." *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 815 (Del. Ch. 2022) ("It is rare that the court will dismiss a fiduciary duty claim on a Rule 12(b)(6) motion when entire fairness is the governing standard of review.") (citing *Tornetta v. Musk*, 250 A.3d 793, 812 (Del. Ch. 2019)).

131. Here, the Fiduciary Defendants' actions and lack of action with respect to the March Exchange , including picking winners and losers among their capital structure, were not in good faith and the Fiduciary Defendants did not act on an informed basis or as a reasonably prudent person would have done in their position. The Fiduciary Defendants' approval of the March Exchange without regard to Invitae's solvency, without meaningfully considering the viability of a [redacted], and without exercising the care that an ordinarily careful and prudent person would exercise in similar circumstances constitutes a breach of the duty of care. *See In re Bridgeport Holdings, Inc.*, 388 B.R. at 569-70 (finding breach of duty of care where D&Os "decided to proceed with the CDW sale without knowing what price other prospective purchasers, such as Office Depot, would have been willing to pay" and instead "simply approved the CDW deal that arose out of Wilson's long-time acquaintance with the CEO of CDW"). The Fiduciary Defendants' actions were negligent, grossly negligent, in bad faith, and/or with reckless indifference to the interests of unsecured creditors. Additionally, the Fiduciary Defendants did not properly consider—or worse, blatantly ignored—relevant and reasonably available material information, such as the [redacted]. The March Exchange does not meet the entire fairness standard or the more deferential business judgment rule. Accordingly, these claims are colorable.

132. Breach of the Duty of Loyalty. The Proposed Complaint also alleges that the Fiduciary Defendants breached their fiduciary duty of loyalty to Invitae and its unsecured creditors, by acting in bad faith, failing to act in the best interests of Invitae as a whole, and failing to subordinate their personal interests to the interests of Invitae. *See e.g., Balasiano v. Borell (In re Furniture Factory Ultimate Holding, L.P.)*, 2023 Bankr. LEXIS 2164, at *29-30 (Bankr. D.

Del. Aug. 31, 2023); Proposed Compl. ¶ 217. The Officer Defendants have been paid more than $15.2 million in bonuses since the Fiduciary Defendants knew the Company since March 2023 after the March Exchange closed. *See e.g.*, *Palmer v. Reali*, 211 F. Supp. 3d 655, 667-68 (D. Del. 2016). In particular, Mr. Knight, Mr. Brida, and Ms. Wen were paid special "retention" bonuses in June 2023 and January 2024 (with respect to Mssrs. Knight and Brida). The initial retention bonuses paid in June 2023 were approved simultaneously with the closing of the March Exchange. Moreover, management's determination to increase the retention bonuses granted on the eve of bankruptcy was "materially misleading" according to Deerfield, further evidencing the Fiduciary Defendants' failure to subordinate their personal interests and bad faith actions.

133. The Officer Defendants' actions to favor certain creditors and keep the Debtors' afloat to preserve their equity interests and receive bonuses breaches their fiduciary duty. These actions support a colorable claim for breach of fiduciary duty.

8. Deerfield Aided and Abetted the Fiduciary Defendants' Breaches of the Fiduciary Duties

134. To state a claim for aiding and abetting a breach of fiduciary duty under Delaware law, in addition to the elements discussed in Section I.E, *supra*, the Committee must also allege (i) knowing participation in the breach by the non-fiduciary defendants, and (ii) damages proximately caused by the breach. *See In re Rural Metro Corp.*, 88 A.3d 54, 80 (Del. Ch. 2014) (citing *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001)); *In re USA Detergents, Inc.*, 418 B.R. at 546. The element of knowing participation is satisfied when the aider and abettor "act[s] with the knowledge that the conduct advocated or assisted constitutes such a breach." *In re Rural Metro Corp.*, 88 A.3d at 97 (quoting *Malpiede*, 780 A.2d at 1097), or "when a third party, for improper motives of its own, misleads the directors into breaching their duty of care." *Id.* at 99.

135. Deerfield knowingly participated in and substantially aided and abetted the Fiduciary Defendants in their above-alleged breaches of fiduciary duties. Deerfield, with the motive of ensuring it would be positioned senior to the 2028 Unsecured Notes, used its preexisting relationship with the Debtors and its consent rights to encourage the Company's management to enter into a transaction that would not benefit the Company to ensure it was first in line as the Company snowballed toward chapter 11. Proposed Compl. ¶ 223.

136. Deerfield also colluded with the Debtors to hand pick [redacted]. *Id.* By colluding to select winners and losers, Deerfield and the Company caused the non-participating 2024 Unsecured Noteholders and the Debtors other unsecured creditors significant damages.

9. The Unencumbered Assets Are Not Subject to Any Security Interests and Any Purported Liens on the Non-Perfected Assets Should Be Avoided

137. Under section 544 of the Bankruptcy Code, a trustee or debtor in possession 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. 11 U.S.C. § 544(a)(1). The Agent did not have a security interest in the Unencumbered Assets was not properly perfected prior to the Petition Date. The Proposed Complaint seeks to avoid any unperfected security interests on the Unencumbered Assets under section 544 of the Bankruptcy Code.

A. Unencumbered Commercial Tort Claim

138. The N.Y. U.C.C. 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)(A). 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. *See* N.Y. U.C.C. §9-108(e)(1).

139. Therefore, to constitute collateral under the Secured Notes Indenture, a Commercial Tort Claim must be specifically identified on the relevant schedule to the Security Agreement. *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 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). Here, the security interest granted by the Security Agreement encompasses:

> a) [a]ll accounts, chattel paper, deposit accounts, documents (as defined in the UCC), equipment, general intangibles, instruments, inventory, investment property, letter-of-credit rights, Pledged Collateral, and any supporting obligations relating to any of the foregoing;
>
> b) the commercial tort claims described on Schedule 1 and on any supplement thereto received by Agent pursuant to Section 5.9;
>
> c) all books and records pertaining to the other property described in this Section 3.1;
>
> d) all Intellectual Property owned by such Grantor at any time, including as of the date hereof, the Intellectual Property set forth on Schedule 5(a), together with all products, proceeds, substitutions, and accessions of or to any of such Intellectual Property; and

e) to the extent not otherwise included, all proceeds of the foregoing. [41]

140. Only one such claim was identified on Schedule 1 to the Secured Notes Indenture Security Agreement: *ArcherDx, LLC v. Qiagen Sciences, LLC*, No. 1:18-cv-01019 (Fed. Cir. App. Mar. 27, 2024).

141. The Unencumbered Commercial Torts Claims are unencumbered because such claim was never listed on a schedule to the 2028 Senior Secured Notes Indenture nor was any UCC-1 that identified the Unencumbered Commercial Tort Claim filed.[42] Without such a supplemental schedule or a contemporaneous formal writing delivered pursuant to or in accordance with the Security Agreement, the Unencumbered Commercial Tort Claims and proceeds thereof cannot qualify for inclusion in the grant set out in the Security Agreement and were, therefore, unencumbered as of the Petition Date.

B. Unencumbered Bank Accounts

142. A security interest is perfected under Article 9 of the Uniform Commercial Code if it has "attached" or, in short, becomes enforceable. N.Y. U.C.C. Law § 9-308(a). 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. N.Y. U.C.C. Law § 9-203(b). 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

[41] Secured Notes Indenture Security Agreement Art. III, § 3.1.

[42] Contemporaneously with this Standing Motion and Complaint, the Committee filed a claims objection to certain claims filed by the Agent which also seeks to reduce the Agent's claim to the extent the claim alleges a secured interest in the Natera Litigation.

> 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. Law § 9-104(a)

143. The Agent was not granted a security interest in the Unencumbered Accounts because they are Excluded Accounts. But even if the Unencumbered Assets are not Excluded Accounts, the Agent did not properly perfect its security interest in the Unencumbered Bank Accounts. The Unencumbered Bank Accounts are not subject DACAs or subject to control by the Agent. Indeed, here the accounts are held at HSBC Bank USA, National Association, JP Morgan Chase & Co., and Silicon Valley Bank and are in the name of the Debtors. Therefore, the Agent does not have control and a perfected security interest under applicable law. Accordingly, $3,067,938.69 of cash held in the Unencumbered Bank Accounts and cash held in the Unencumbered Letter of Credit Accounts are not subject to properly perfected pre-petition security interests under New York law.

144. Because the Agent does not have a perfected security interest in the Unencumbered Commercial Tort Claims and the cash in the Unencumbered Bank Accounts, any purported lien of the Agent may be avoided for the benefit of the Debtors' estate under section 544 of the Bankruptcy Code.

10. The Bonus Payments Should Be Avoided As Preferential and Fraudulent Transfers.

A. The Bonus Payments Should Be Avoided As a Preferential Transfer

145. Section 547 of the Bankruptcy Code provides that certain transfers of an interest in the Debtors' property can be avoided as preferential transfers. To avoid a transfer under section 547(b) of the Bankruptcy Code, a plaintiff must show that the transfer: (i) was made to or for the

benefit of a creditor; (ii) was for or on account of an antecedent debt; (iii) was made while the debtors were insolvent; (iv) was made on or within 90 days of the petition date or one year if the creditor was an insider; and (v) enables such creditor to receive more than it would have if the case where a chapter 7 liquidation. *See* 11 U.S.C. § 547(b), (g); *In re Nathan & Miriam Barnert Mem'l Hosp. Ass'n*, 2009 WL 3230789 at *1 (Bankr. D.N.J. Oct. 5, 2009).

146. The Debtors' schedules identify bonus and stock payments totaling: (a) $7,203,328.16 total to Mr. Knight; (b) 2,136,434.98 to Mr. Brida; (c) $2,002,750 to Ms. Schrank, (d) $1,726,850 to Mr. Guigley, (e) $1,594,740 to Mr. Sholehvar, and (f) $82,473.30 of to Mr. Werner within one year of the Petition Date that the Committee seeks to claw back. Each of those payments were identified as the Debtors as having benefited an insider. *See Schedule of Assets and Liabilities and Statement of Financial Affairs for Invitae Corporation*, [Docket No. 202] at 354, 358-61 (Mar. 18, 2024).

147. As alleged in the Proposed Complaint, the Debtors transferred over $15.2 million in retention bonuses to their executives (the "**Bonus Payments**"), including Messrs. Knight, Brida, Guigley, Sholehvar, Werner and Ms. Schrank (the "**Bonus Payment Defendants**") between March 2023 and January 2024. *See* Proposed Compl. ¶ 240.

148. Bonus payments made to management are avoidable as preferences. *see Official Comm. of Unsecured Creditors of Enron Corp. v. Whalen (In re Enron Corp.)*, 357 B.R. 32, 48 (Bankr. S.D.N.Y. 2006) (finding bonus payment to be a transfer made "'for or on account of an antecedent debt owed by the debtor before the transfer was made' within the meaning of section 547(b)" and thus subject to avoidance as a preferential transfer). The Proposed Complaint proffers that the Bonus Payments were made while the Debtors were insolvent because, and as further discussed above, at the time the Bonus Payments were made, the Debtors' debts and liabilities

exceeded the reasonable fair value of their assets, and the Debtors did not have the ability to meet their maturing obligations or to satisfy their existing or probable liabilities as they came due in the ordinary course of their business. *See supra* ¶¶ 58-59; Proposed Compl. ¶ 242.

149. Directors, officers, or persons in control of the Debtors are "insiders" under section 101(31) of the Bankruptcy Code. As alleged in the Proposed Complaint, the Bonus Payment Defendants are insiders, and each of the Bonus Payments was made within one year of the Petition Date, as required for preference claims against insiders. *See id.* ¶ 245. Finally, the Proposed Complaint illustrates that, as a result of the Bonus Payments, each of the Bonus Payment Defendants received more than they would be entitled to receive (i) under a hypothetical Chapter 7 case; (ii) if the transfers had not been made; and (iii) such creditor received payment of such debt to the extent provided by the provisions of the Bankruptcy Code. *See* Proposed Compl. ¶ 246.

150. Because the Bonus Payments occurred during the preference period, were made on account of antecedent debt, were made while the Debtors were insolvent, and enabled the Bonus Payment Defendants (all of whom were insiders) to receive far more than they would have in a chapter 7 liquidation, they are avoidable preferences. *See generally* 11 U.S.C. § 547(b); *In re Teligent, Inc.*, 380 B.R. 324, 338-39 (Bankr. S.D.N.Y. 2008). The majority of the Bonus Payments were made in late January, when the Debtors knew they would soon be filing for chapter 11, upon information and belief, contemplated in conjunction with approval of filing the Debtors' chapter 11 petitions. Court have found similar bonus payments are avoidable preferences. *See In re Enron Corp.*, No. 01-16034-AJG, 2005 WL 6237551, at *21 (Bankr. S.D. Tex. Dec. 9, 2005) (finding bonus payments to be avoidable preferences where they were "made in direct anticipation of an imminent bankruptcy filing").

B. The Bonus Payments Should Be Avoided As Constructive Fraudulent Transfers

151. To the extent the Bonus Payments are not avoided as preferential transfers, the Proposed Complaint sufficiently asserts, in the alternative, a cause of action for avoidance of the Bonus Payments as constructive fraudulent transfers.

152. The Bonus Payments constituted a transfer of the Debtors' interests in property and an obligation incurred by the Debtors within the appropriate lookback period set forth in the Bankruptcy Code and relevant fraudulent transfer statutes as enacted in the states of New York, New Jersey, California, and Delaware. *See* Proposed Compl. ¶ 251. The Proposed Complaint sufficiently alleges that the Debtors did not receive reasonably equivalent value in exchange for the Bonus Payments, which were ***prepaid*** for 2024 such that, at the time the transfers were made on January 17, 2024, the Debtors had not yet received any value in exchange for the Bonus Payments. *See id* ¶ 146. The Proposed Complaint further alleges that the Debtors were insolvent, or became insolvent, and/or had unreasonably small capital in relation to their business at the time of or as a result of the Bonus Payments. *See id* ¶ 253. The Proposed Complaint further alleges that the Debtors made the Bonus Payments to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. *See id* ¶¶ 242-43. Accordingly, the Proposed Complaint alleges colorable claims for avoidance of the Bonus Payments as constructive fraudulent transfers under (i) section 548 of the Bankruptcy Code or (ii) section 544(b) of the Bankruptcy Code and the substantially similar fraudulent conveyance provision under applicable state law. *See In re Enron Corp.*, 2005 WL 6237551, at *21 (finding retention bonus payments avoidable as constructive fraudulent transfers).

B. Prosecution of the Proposed Claims Would Benefit the Estate

153. Prosecution of the Proposed Claims would clearly benefit the Debtors' Estates. In determining if an action would be beneficial, courts engage in a limited cost-benefit analysis. *In re Pack Liquidating, LLC, 2024* WL 409830, at *21 (Bankr. D. Del. Feb. 2, 2024) ("While not an explicit requirement under *Cybergenics* for obtaining derivative standing, many other courts consider whether the committee's claim would benefit the bankruptcy estate based on a cost-benefit analysis.") (citing cases). Courts conduct this analysis by "consider[ing] the probability of success and the potential costs of litigation[.]" *Id.*

154. Without prosecution of the Proposed Claims, the Defendants are getting a free release. Because the Debtors have indicated that the 2028 Purported Secured Noteholders are oversecured, there is no impairment and therefore no consideration being exchanged for the release of claims related to the 2028 Senior Secured Notes. Similarly, because the Company is winding down, there is no value the Fiduciary Defendants can give to the Company in exchange for their releases.

155. Here, the Proposed Claims are not only viable, but they have significant potential value and could materially improve the recoveries of unsecured creditors, outweighing any delay or cost associated with litigating them. Indeed, the Proposed Claims could result in avoiding the Uptier Transaction entirely and avoiding the liens that encumber the Debtors' property, dramatically shifting the recoveries and materially increasing the recoveries for the unsecured creditors. Finally, the Committee understands that the Debtors have approximately $60 million of director and officer liability coverage. This coverage provides a third-party source of significant recoverable value to the Debtors' Estates for the benefit of unsecured creditors. Additionally, the Committee has the opportunity to claw back more than $15 million in bonus payments made to

the Bonus Payment Defendants. And the value of the Unencumbered Assets is anywhere from $4 million in cash to tens of millions in proceeds from the Unencumbered Commercial Tort Claims.

156. The Debtors have proposed to distribute the proceeds of the sale of their assets and their remaining assets through a liquidating plan.[43] This litigation will not impact the sale or otherwise hold the Debtors' operations hostage. It will result in the equitable distribution of the Debtors' estate. At this time it is difficult to forecast any further financial costs to the estate related to the prosecution of the Proposed Claims. More specifically, the Committee cannot forecast which claims will be prosecuted to judgment and whether litigation financing or fee arrangements are available. In any event, it is not anticipated that the Proposed Claims will be litigated prior to the confirmation of a chapter 11 plan for the Debtors and these questions may be addressed in the context of Plan feasibility when the Committee will have better insight into the amount of cash in excess of the 2028 Purported Secured Noteholders' claims (if any) and the scope and financing of the post-effective date litigation.

157. Accordingly, the benefits to be gained from pursuing the Proposed Claims are substantial and significantly outweigh any concerns about delay or expense. There is no justification for declining to prosecute the Proposed Claims at this juncture.

C. The Debtors' Unwillingness to Pursue the Proposed Claims is Unjustified

158. Where, as here, proposed claims are colorable, a presiding court then determines whether the "debtor in possession unjustifiably failed to bring suit." *Cybergenics*, 330 F.3d at 566.

159. The Debtor committed not to bring suit against the 2028 Senior Secured Notes in the context of obtaining the Final Cash Collateral Order. This was done with the perception that consent was necessary and that a fight over adequate protection could be avoided. After all, the

[43] *See Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 471] (May 9, 2024)

2028 Secured Lenders are oversecured and therefore any form of release was unnecessary, much less one they did not provide any consideration for. Moreover, the Debtors' TSA term sheet and proposed Plan provide for expansive releases to the Fiduciary Defendants without any explanation of the consideration being given or justification to the estate – and none will be given until the confirmation hearing. *See* Disclosure Statement, Art. IV.I. Given the way these claims have been handled, no deference should be given to release these claims for no consideration.

160. While a formal demand upon the Debtors was not required, it was made in the context of negotiating automatic standing in the Final Cash Collateral Order – which the Debtors and Deerfield vehemently refused. *In re G-I Holdings, Inc.*, 313 B.R. at 630 (citing *In re Nat'l Forge Co.*), 304 B.R. at 222 (unjustifiable failure to bring an action can be implied in a debtor in possessions' "refusal to pursue an avoidance action."). In any event, demanding the Debtors to prosecute the Proposed Claims is futile because the power to prosecute the claims is with the Special Committee made up by the Fiduciary Defendants.

161. The Third Circuit aptly recognized that before bankruptcy, a debtor's management and its most powerful creditors typically try to "work out" the debtors' financial distress and management therefore may take "extraordinary concessions" such as "committing to lavish retention bonuses" or "doing virtually anything to avoid filing for bankruptcy" which often reduces assets available to creditors. *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003). It is in those situations where "if managers can devise any opportunity to avoid bringing a claim that would amount to reputational self-immolation, they will seize it." *Id.* "For example, a debtor may be unwilling to pursue claims against individuals or business . . . with whom it has an ongoing relationship that it

fears damaging." *Id.* As a result, "[t]he possibility of a derivative suit by a creditors' committee provides a critical safeguard against lax pursuit of avoidance actions." *Id.*

162. Here, the Debtors are acting "under the influence of conflicts of interest" with respect to their pursuit of claims against two separate sets of the proposed Defendants. *First*, the Debtors appointed the Special Committee to conduct the investigation and determine whether causes of action against the Potential Defendants existed. However, the process was flawed. The Special Committee included three members of the Pricing Committee (which was created to approve the March Exchange) that were the subjects of the investigation. The Special Committee—not its later appointed "Independent Director"—was granted the authority to address "conflicts matters" and therefore the power to make decisions about the investigation. The Special Committee met regularly to discuss the upcoming chapter 11 filing and Board members were invited and encouraged to attend all Special Committee meetings. Proposed Compl. ¶ 142. On at least one occasion, including on the same date that Mr. Knight encouraged broader participation, the topic of [redacted] was discussed. *Id.*

163. Based on conversations with the Debtors, the Committee has significant concerns with respect to the breadth and intensity of the investigation that led to the Debtors' decision to release all of the claims against the Defendants outlined in the Complaint. Among other things, it is unclear whether the investigators reviewed more than public filings, Board minutes and Board materials. They only interviewed three witnesses. And, the actual decision maker, Jill Frizzley, reviewed almost none of the primary source materials and relied on summaries of the interviews of the three witnesses. Further, the Debtors are releasing potential claims that have never been the subject of any investigation, such as the bonus payments. Finally, to make matters worse, the Debtors have claimed that all of the advice that was received in connection with the decision to

release the claims is subject to privilege, even though it was shared with the Defendants, so the Court has no record basis on which to determine the substantive legal precepts upon which the decision to release was based.

164. Additionally, K&E advised the Special Committee on the investigation, advised the other subject of the investigation – Deerfield – on unrelated matters, and the main Board on everything else – three competing interests. Finally, it appears that the full Board, not the Special Committee or its Independent Director, ultimately decided whether the transactions and claims at issue in the investigation were ultimately to be released upon the chapter 11 filing. The investigation was tainted. The Special Committee, investigating itself, and the Board, signing off on the ultimate decision, presumably wanted to avoid "reputational self-immolation" – the exact thing the Third Circuit warned against.

165. *Second*, by providing Deerfield with a consent right on the Debtors' ability to sell any assets or consider a restructuring with any other creditor constituency, it was inevitably released. *Id.* ¶¶ 9, 133. The Special Committee and the Board were clearly "unwilling to pursue claims against [Deerfield]… with whom it has an ongoing relationship it fears damaging" because Deerfield was the gatekeeper to any financial resolution for the Debtors. *See Cybergenics*, 330 F.3d at 573. Indeed, by entering this chapter 11 bankruptcy with the TSA in place with Deerfield, which provided for a plan term sheet that provides for almost no recovery for unsecured creditors and full releases of all claims against the proposed Defendants, this chapter 11 case is being run for the primary benefit of the proposed Defendants. The proposed plan reinforces this as it provides broad releases for Management and Deerfield, and provides for no recoveries – and no vote – for the Unsecured Noteholders.

D. The Committee Should Be Granted Exclusive Authority to Settle the Proposed Claims

166. The Debtors' refusal to bring the Proposed Claims also renders the Debtors incapable of effectively managing or settling any resulting litigation. It is indisputable that any decision to settle any of the Proposed Claims will have a disproportionate economic impact on the Debtors' unsecured creditors, whose interests the Committee represents in this case. The Debtors have chosen not to pursue the claims, the Committee should be granted full authority, including the authority to transfer such claims to a liquidating or litigation trust, to do so. *See, e.g.*, *In re Nat'l Forge Co.*, 304 B.R. at 217 (granting creditors' committee the authority to assert, pursue, and/or settle claims filed on behalf of the estate).

NOTICE[44]

167. In accordance with the *Notice, Case Management and Administrative Procedures Order* entered in these Chapter 11 Cases [Docket 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; (e) the indenture trustee to the 2028 Convertible Notes and the 2024 Convertible Notes, and counsel thereto; (f) agent to 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.

[44] All capitalized terms in this section not otherwise defined herein are to be given the definitions ascribed to them in the *Notice, Case Management and Administrative Procedures Order* [Docket No. 62].

NO PRIOR REQUEST

168. No prior request for the relief sought in this Motion has been made by the Committee.

WAIVER OF MEMORANDUM OF LAW

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

RESERVATION OF RIGHTS

170. The Committee reserves all rights with respect to the Motion and these Chapter 11 Cases, including the right to amend and/or supplement this Motion, the right to participate in additional briefing, and the right to be heard at any hearing or trial related to the Motion. Nothing contained herein shall constitute a waiver of any of the rights or remedies of the Committee, each of which is expressly reserved.[45]

CONCLUSION

WHEREFORE, for the reasons stated herein, the Committee respectfully requests that this Court enter the proposed form of order filed contemporaneously herewith: (a) granting the Committee standing to pursue the Proposed Claims; (b) granting the Committee exclusive settlement authority with respect to the Proposed Claims; and (c) granting the Committee such other and further relief, at law or in equity, as this Court may deem just and proper.

[45] The Debtors have refused to produce approximately 100 families of documents concerning the Special Committee's investigation even though the Special Committee analyzed causes of action against Invitae's officers and directors and then disclosed its findings to those same officers and directors. In fact, the Debtors' productions do not include any legal analyses that the Board considered to justify waiving these claims. The Committee's position is that "[t]he presentation of the [Special Committee's] report constitutes a waiver of privilege because the client, the Special Committee, disclosed its communications concerning the investigation and final report to third parties-the individual director defendants and [their counsel]-whose interests are not common with the client." *Ryan v. Gifford*, No. 2213-CC, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007).

Dated: May 21, 2024

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: INVITAE CORPORATION, *et al*., Debtors.[1]	Chapter 11 Case No. 24-11362 (MBK) (Jointly Administered)
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF INVITAE CORPORATION, on behalf of the estates of the Debtors, *Plaintiff* *v.* U.S. BANK TRUST COMPANY, NATIONAL ASSOCIATION, solely in its capacity as Trustee and Collateral Agent under the Senior Secured Indenture for the 4.5% Series A and Series B Convertible Senior Secured Notes Due 2028, DEERFIELD PARTNERS, LP, DEERFIELD MGMT, LP, DEERFIELD MANAGEMENT COMPANY, LP, ERIC AGUIAR, GEOFFREY CROUSE, KIMBER LOCKHART, CHITRA NAYAK, RANDAL SCOTT, WILLIAM OSBORNE, CHRISTINE GORJANC, KENNETH KNIGHT, THOMAS BRIDA, YAFEI "ROXI" WEN, ROBERT DICKEY IV, ANA SCHRANK, ROBERT GUIGLEY, DAVID SHOLEHVAR, ROBERT NUSSBAUM, ROBERT WERNER, and John Does 1-100, *Defendants.*	Adv. Proc. No. 24-_____ **[JURY TRIAL DEMANDED]**[2]

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

[2] The Committee reserves its right to seek a jury trial in connection with appropriate claims.

[PROPOSED] ADVERSARY COMPLAINT

The Official Committee of Unsecured Creditors ("**Plaintiff**" or the "**Committee**") of Invitae Corporation ("**Invitae**") and its affiliated debtors and debtors in possession (collectively, the "**Debtors**," and together with their non-Debtor affiliates, "**Company**") in the above-captioned chapter 11 cases (the "**Chapter 11 Cases**"), by and through its undersigned counsel, files this complaint (the "**Complaint**") as Plaintiff on behalf of the Debtors' estates against U.S. Bank Trust Company, National Association, solely in its capacity as Trustee and Collateral Agent under the Indenture for the 2028 Senior Secured Notes (solely, in such capacities, the "**Agent**"); Deerfield Partners, LP, Deerfield Mgmt, LP, Deerfield Management Company, LP (collectively, "**Deerfield**"); Eric Aguiar; Geoffrey Crouse; Kimber Lockhart; Chitra Nayak; Randal Scott; William Osborne; Christine Gorjanc; Kenneth Knight; Thomas Brida; Yafei (Roxi) Wen; Robert Dickey IV, Ana Schrank, Robert Guigley, David Sholehvar, Robert Nussbaum, Robert Werner, and John Does 1-100 (collectively, the "**Individual Defendants**," together with the Agent and Deerfield, the "**Defendants**"). In support of this Complaint, and based upon knowledge, information, belief, and its investigation to date, the Committee alleges as follows:

NATURE OF ACTION

1. This action brings a series of estate claims and causes of action arising under state and federal law to remedy conduct by which the Company's officers and directors gave one group of unsecured creditors all of the equity value of the Company's assets and attempted to leave more than $1 billion of similarly situated unsecured creditors with nothing. The Defendants' actions have resulted in the destruction of hundreds of millions of dollars of value to the Debtors' estates.

2. The Company has a tortured history of vaporizing capital, and the Committee has significant, unresolved concerns with respect to an entire series of acquisitions and dispositions

conducted by the Officer and Director Defendants in which the Company took more than $1.4 billion of cash and squandered it. This Complaint, however, only concerns the Company's end game, namely the 2023 Uptier Transaction.

3. The complained of conduct began in the fall of 2021, [redacted]. By that time the Company was not an early-stage startup business that required significant investment to cover near term losses with a good faith belief that borrowed capital would be repaid later. Rather, in 2021, the Company's directors and officers [redacted]

4. Specifically, in October 2022, the Company had approximately $585 million of cash and cash equivalents, $135 million owed to one secured lender, and over $1.4 billion of fully funded unsecured debt. Had the Company simply accelerated its inevitable chapter 11 filing at that time, its estate would have likely had more than $700 million of unencumbered value to distribute to unsecured creditors after it paid off its secured lenders in full. That is, before the Uptier Transaction, the Company had nearly three-quarters of a billion dollars in equity in its assets (but still far less than the $1.4 billion in unsecured debt).

5. At the same time, however, the Board and management knew that the Company would [redacted] The Board and management were also advised and aware that the Company's [redacted]. So what to

do? Stop the clock and pay all creditors with existing liquidity or enter into a transaction that both reduced its total debt and raised additional capital. The Board did neither.

6. In March 2023, under the guise of a "liability management exercise" designed to extend its "runway," the Company pledged the entirety of the unencumbered value of its assets to one favored group of unsecured lenders led by Deerfield. In other words, rather than protect all creditors, the Board decided to coronate one particular group of lenders and provide them with a first look at all of the Company's assets in an inevitable bankruptcy. In return, the Company received next to nothing. Through the Uptier Transaction, at a time when it was plainly insolvent, the Company provided approximately $100 million more value to its coronated unsecured creditors than it received ***and*** lost approximately $140 million of precious liquidity used to pay off the existing Term Loan early.

7. The Board's decision to move forward with Deerfield and its selected group of other unsecured creditors at the expense of the Company and its creditors was not arbitrary or unknowing. Prior to entering into the transaction, the Board was fully aware that the Uptier Transaction [redacted]. To carry the analogy forward, if the Company needed another 10,000 feet of runway to lift the Invitae jet off of the ground, it spent all of its unencumbered value and assets to build 100 feet and a crash pad. So, without any qualified financial advisor or attorney advising it that the transaction would put the Company on a path towards payment of its existing creditors, the Board determined to plow ahead.

8. The Company's situation and thought process was not lost on Deerfield, which fully understood and appreciated that the Debtors [redacted] Deerfield

was also aware that the Uptier Transaction provided [redacted] For Deerfield, the transaction was all about preparing for an inevitable chapter 11 filing.

9. That filing was no surprise to anyone when it eventually came to pass. Having pledged all of its tangible assets and restricting its ability to dispose of material assets without Deerfield's consent, less than a year after completing the Uptier Transaction, the Company was left with no choice but to file for chapter 11 protection. The Director and Officer Defendants continued their strategy of picking winners and losers within their creditor body, and have now proposed a plan of liquidation that would provide all of the value of their estates to their favored, newly and purportedly secured creditors and release any claims of their estates that could benefit the more than $1 billion of creditors actually harmed by their conduct. In effect, the $700 million of equity the Company had in its assets within a year of this filing was used for no legitimate purpose. It did not keep the Company out of bankruptcy. Did not reduce its leverage. Did not benefit its liquidity. Rather, it merely had the effect of ensuring that one group of unsecured creditors would support the Company's agenda.

10. To add insult to injury, with complete knowledge that the Company would likely be unable to pay its unsecured creditors a dime, the Board determined to award the Company's executives more than $12 million of bonuses on the eve of the bankruptcy filing. In fact, according to the Company's current estimated waterfall, if the status quo is maintained, those exorbitant bonuses may be the difference between unsecured creditors receiving any recovery in these Chapter 11 Cases.

11. This action seeks to level the playing field and return value that was wrongly taken from the Company's estate.

PARTIES[3]

12. The Committee was appointed in the Chapter 11 Cases on March 1, 2024, pursuant to section 1102(a) of title 11 of the United States Code (the "**Bankruptcy Code**") by the United States Trustee for Regions 3 and 9. The Committee is vested with, among other things, the powers described in section 1103 of the Bankruptcy Code, including the power to investigate the acts, conduct, assets, liabilities, and financial condition of the Debtors, and any other matter relevant to the Chapter 11 Cases.

13. The Committee brings this action derivatively, on behalf of the Debtors' estates (the "**Estates**"). Standing was granted to the Committee to file this Complaint by the *Order Granting 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 Debtors' Estate and (II) Exclusive Settlement Authority* [Docket No. [●]].

14. Defendant U.S. Bank Trust Company, National Association is a national banking association organized under the laws of the United States and the National Bank Act, with its principal office located in the state of Minnesota. It currently serves as the trustee and collateral agent for the 2028 Senior Secured Notes (defined below) and this suit is brought solely in its capacity as trustee and collateral agent thereunder.

15. Defendant Deerfield Partners, L.P. is a limited partnership formed under the laws of Delaware with its address at 345 Park Avenue South, New York, NY 10010. Deerfield Partners, L.P. is the holder of 78% of the 2028 Senior Secured Notes.

[3] Plaintiff reserves the right to name additional defendants, either through the amendment of this Complaint if standing is granted, and such defendants are related to the Defendants named herein, or through a subsequent motion for standing to bring claims against additional defendants.

16. Defendant Deerfield Mgmt, L.P. is a limited partnership formed under the laws of Delaware with its address at 345 Park Avenue South, New York, NY 10010. Deerfield Mgmt, L.P. is a general partner of Deerfield Partners, L.P.

17. Defendant Deerfield Management Company, L.P. is a limited partnership formed under the laws of Delaware with its address at 345 Park Avenue South, New York, NY 10010. Deerfield Management Company, L.P. is the investment advisor to Deerfield Partners, L.P.

18. Defendant Eric Aguiar is a member of Invitae's board of directors (the "**Board**") and a member of the Board's special committee (the "**Special Committee**"). He has been a member of the Board since September 2010 and a member of the Special Committee since September 2023. Mr. Aguiar approved the Uptier Transaction (defined below) and the August Exchange (defined below).

19. Defendant Geoffrey Crouse is a member of the Board. Mr. Crouse has served on the Board since 2012. Mr. Crouse approved the Uptier Transaction and the August Exchange.

20. Defendant Kimber Lockhart is a member of the Board. Ms. Lockhart has served on the Board since 2020. Ms. Lockhart approved the Uptier Transaction and the August Exchange.

21. Defendant Chitra Nayak is a member of the Board. Ms. Nayak has served on the Board since 2018. Ms. Nayak approved the Uptier Transaction and the August Exchange.

22. Defendant Randal Scott is a co-founder and former chief executive officer ("**CEO**") of Invitae. He is a member of the Board and a former member of the Special Committee. He was the chairman of the Board from 2012 to 2017. He was reappointed to the Board in August 2022 and has been a member of the Board since that time. He was the chair of the Special Committee between September 2023 and January 2024. Mr. Scott approved the Uptier Transaction and the August Exchange.

23. Defendant William Osborne is a member of the Board and a member of the Special Committee. He has been a member of the Board since January 2023 and a member of the Special Committee since September 2023. Mr. Osborne approved the Uptier Transaction and the August Exchange.

24. Defendant Christine Gorjanc is a member of the Board and a member of the Special Committee. She has been a member of the Board since 2015 and a member of the Special Committee since September 2023. Ms. Gorjanc approved the Uptier Transaction and the August Exchange. Ms. Gorjanc was the Interim Chief Financial Officer ("**CFO**") of the Company from July 1, 2023, to August 14, 2023.

25. Defendant Kenneth Knight is a member of the Board and the Company's current CEO. He has been the CEO since July 2022 and has been on the Board since August 2022. Mr. Knight approved the Uptier Transaction and the August Exchange. As Invitae's CEO, Mr. Knight was designated as an "Authorized Officer" with the authority to negotiate and execute the March Exchange (defined below) and the August Exchange.

26. Defendant Thomas Brida is the Company's General Counsel, Chief Compliance Officer, and Secretary. He has served as General Counsel since January 2017, Chief Compliance Officer since February 2019, and Secretary since May 2019. As Invitae's General Counsel, Chief Compliance Officer and Secretary, Mr. Brida was designated as an "Authorized Officer" with the authority to negotiate and execute the March Exchange and the August Exchange.

27. Defendant Yafei "Roxi" Wen was the Company's CFO from June 2021 to June 2023. As Invitae's CFO at the time of the March Exchange, Ms. Wen was designated as an "Authorized Officer" with the authority to negotiate and execute the March Exchange.

28. Defendant Robert Dickey IV was the Interim CFO of the Company from August 14, 2023 to October 2, 2023. As Interim CFO for Invitae at the time of the August Exchange, Mr. Dickey was designated as an "Authorized Officer" with the authority to negotiate and execute the August Exchange.

29. Defendant Ana Schrank is the Company's current CFO. She has been the CFO since September 2023.

30. Defendant Robert Guigley is the Company's current Chief Commercial Officer. He has been the Chief Commercial Officer since September 2023.

31. Defendant David Sholehvar is the Company's current Chief Operating Officer. He has been the Chief Operating Officer since November 2023.

32. Defendant Robert Nussbaum was the Company's Chief Medical Officer from August 2015 to December 2023.

33. Defendant Robert Werner was the Company's Chief Accounting Officer from May 2020 to April 2023.

34. Messrs. Aguiar, Crouse, Scott, Osborne, and Knight, and Mses. Gorjanc, Lockhart, and Nayak (the "**Director Defendants**") served as members of the Board at the time of the Uptier Transaction and the August Exchange and approved the Uptier Transaction and the August Exchange. Messrs. Scott, Aguiar, and Ms. Gorjanc also served as members of the pricing committee of the Board (the "**Pricing Committee**"), which was charged with the negotiation and execution of the March Exchange.

35. Messrs. Knight, Brida, and Ms. Wen were designated as "Authorized Officers" with the authority to negotiate and execute the March Exchange. Messrs. Knight, Brida, and Dickey

(together, with Ms. Wen, the "**Officer Defendants**") were designated "Authorized Officers" with the authority to negotiate and execute the August Exchange.

36. Defendants John Does 1-100 are defendants whose true names, identities and capacities are presently unknown to the Committee. As and when the names, identities, and capacities of these fictitiously named Defendants become known, the Committee will amend this Complaint to set forth these Defendants' true names, identities, and capacities and otherwise proceed against them as if they had been named parties upon the commencement of this adversary proceeding.

JURISDICTION AND VENUE

37. The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157(b), 1334(a) and 1367 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 matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and an adversary proceeding pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure (the **"Bankruptcy Rules"**).

38. This Court has personal jurisdiction over all Defendants pursuant to Bankruptcy Rule 7004.

39. The Committee confirms its consent to entry of a final order by the Court in connection with this Complaint to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

40. Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409 because this adversary proceeding arises under and in connection with cases commenced under chapter 11 of the Bankruptcy Code.

FACTUAL BACKGROUND

I. Invitae Incurs Billions in Debt to Fund Numerous Unprofitable Acquisitions.

41. Sean George and Mr. Scott founded the Company in 2010 to provide genetics testing services, digital health solutions, and health data services. The Company's genetic testing unit focused on testing related to hereditary cancer, precision oncology, and rare diseases.

42. Mr. Scott was the CEO from 2012 to 2017 and served on the Board from 2012 to 2019 and again from August of 2022 to the present. Mr. George was the Company's CEO from 2017 to July 18, 2022. Mr. George was a member of the Board from 2010 to December 31, 2022.

43. Between 2019 and 2021, the Company spent approximately $3.3 billion of total consideration, consisting of approximately $679 million of cash, $1.617 billion of equity, and $1 billion of assumed liabilities and other consideration, acquiring thirteen different pre-commercial and unprofitable companies and technologies.[4] The acquisitions increased the Company's operating expenses significantly. The Company never turned a profit, and each year measured its success in terms of revenue and the amount of cash it spent or "burned."

44. The first acquisition occurred in July 2019, when the Company acquired Singular Bio, Inc. and Jungla Inc. for $116.3 million in total consideration consisting of $17.5 million of cash and $98.8 million of equity. In September 2019, Invitae issued $350 million of convertible unsecured notes that mature on September 1, 2024 (the "**2024 Unsecured Notes**"). Deerfield Partners, LP has held the majority of the 2024 Unsecured Notes since at least August 2022.

45. Between November 2019 and April 2020, the Company acquired four more companies for total consideration of approximately $198.3 million consisting of $81.6 million of

[4] *See Declaration of Ana Schrank, Chief Financial Officer of Invitae Corporation, in Support of Chapter 11 Filing, First Day Motions, and Access to Cash Collateral* [Docket No. 21] ¶ 4 (the "**First Day Declaration**"); Appendix A.

cash, $109.1 million of equity, and $7.6 million of assumed liabilities and other consideration. The acquired businesses included software, artificial intelligence, and pharmacogenetic testing companies.

46. In October 2020, the Company acquired ArcherDX, Inc. ("**ArcherDX**"), a genetics analytics company, for total consideration of approximately $2.3 billion consisting of $335 million in cash, $1.06 billion in equity, and $936 million in assumed liabilities and other consideration. The Company valued the non-contingent consideration provided by Invitae in the transaction to be "roughly $1.4 billion."[5]

47. To fund the purchase of ArcherDX, Invitae entered into a first lien term loan (the "**Term Loan**") with Perceptive Credit Opportunities GP, LLC, as the administrative agent, and Perceptive Credit Holdings III, LP, and Perceptive Credit Opportunities GP, LLC, as lenders (together, "**Perceptive**"). The Term Loan was set to mature on June 1, 2024.[6] The Term Loan was guaranteed by several subsidiaries of the Company, which initially included Genetic Solutions, LLC, Singular Bio, Inc., YouScript, LLC, Good Start Genetics, Inc., Ommdom Inc., ArcherDX, LLC, and ArcherDX Clinical Services, Inc.[7] The Term Loan included a prepayment fee of 6% of the outstanding principal amount prepaid before October 2, 2023, and 4% of the outstanding principal amount prepaid after that date.[8]

48. During 2021, the Company continued acquiring businesses that required significant investment. In April 2021, the Company acquired Genosity, Inc., a company that provided personalized cancer care and monitoring software services, for approximately $196 million in total

[5] First Day Decl. ¶ 57.

[6] The "**Term Loan Credit Agreement**" is attached to Invitae Corp., Current Report (Form 8-K) (Oct. 5, 2020) as Exhibit 10.3. *See* Term Loan Credit Agreement § 1.01.

[7] *See* Invitae Corp., Current Report (Form 8-K) at 149-50 (Oct. 5, 2020).

[8] *See* Term Loan Credit Agreement § 1.01.

consideration consisting of $120 million in cash, $67.3 million in equity, and $8.7 million in assumed liabilities and other consideration.

49. On April 8, 2021, Invitae issued $1.15 billion in unsecured notes that mature on April 1, 2028 (the "**2028 Unsecured Notes**"). There were three primary investors in the 2028 Unsecured Notes: SB Northstar LP ("**SB Northstar**"), Baker Brothers Investments ("**Baker Brothers**"), and Chimera Investments.

50. Following the issuance of the 2028 Unsecured Notes, the Company had the following capital structure:

Debt	Maturity Date	Principal Amount	Interest Rate
Term Loan	June 1, 2024	$135 million	8.75% + the greater of (i) WSJ Prime Rate and (ii) 2.00%
2024 Unsecured Notes	September 1, 2024	$350 million	2.00%
2028 Unsecured Notes	April 1, 2028	$1,150 million	1.50%

51. The Company continued its string of acquisitions. Just over half a billion in aggregate common stock, cash, and assumed liabilities was used over the remainder of 2021, to acquire MedNeon LLC, Stratify Genomics, Inc., and Ciitizen Corporation ("**Ciitizen"**). Notably, in September 2021, the Company acquired Ciitizen, a "healthcare AI-startup" that aggregates medical records for cancer and rare disease patients, for approximately $308 million in total consideration consisting of $87.4 million in cash, $186.8 million in equity, and $34.2 million in assumed liabilities and other consideration.

52. A summary of the Company's acquisitions is set forth in **Appendix A** to this Complaint. As the Debtors admitted in their First Day Declaration, following those acquisitions, the Company was "overflowing" with a "portfolio of increasingly unprofitable business lines."[9]

II. Despite Raising More Than $1.5 Billion in Debt in the Last 3 Years, the Company Faced an Unsustainable Financial Trajectory and Needed Additional Capital.

53. By the end of October 2021, the Company was aware that it faced significant liquidity issues. At an October 2021 Board meeting, Ms. Wen noted that the Company's [redacted] and that there was [redacted] Messrs. Aguiar, Crouse, Knight, Brida, Mses. Gorjanc, Lockhart, Nayak, and Wen attended the meeting.

54. The Company publicly reported a net loss of approximately $379 million in 2021.[10] It reported approximately $923 million in cash and cash equivalents.[11]

55. Between the last quarter of 2021 and the first quarter of 2022, Deerfield increased its holdings of 2024 Unsecured Notes from approximately $163 million to $207 million (over 50% of the outstanding principal amount).

56. In May 2022, Deerfield sent the Company a proposal to [redacted] (the "**First Deerfield Uptier Proposal**"). The Company and Deerfield did not go forward with the First Deerfield Uptier Proposal.

57. The Board met on June 3, 2022 with Messrs. Aguiar, Crouse, Scott, Brida, Knight, Mses. Gorjanc, Lockhart, Nayak, and Wen attending. The Company acknowledged in its June 3,

[9] First Day Decl. ¶ 61.

[10] Invitae Corp., Annual Report (Form 10-K) at 76 (Mar. 1, 2022).

[11] *Id.* at 75.

2022 Board materials it was [redacted]. Despite beginning 2022 with more than a billion of cash, because of its extreme operating losses, Invitae projected in its Board June 3, 2022 materials a [redacted]. In the same Board materials, management identified that [redacted]. The Company identified that Invitae's stock price was [redacted]. Invitae anticipated that there would continue to be a [redacted].

58. Notwithstanding its identified critical financing need, upon information and belief, the Board determined not to engage with potential financing partners in earnest at that time. It did, however, [redacted] in connection with its proposal.

59. Instead of addressing its financing need, management proposed an operational restructuring called [redacted] which proposed to divest certain businesses to reduce the Company's operating expenses. Management forecasted that [redacted] would result in an average of [redacted] in cash savings each year for the next 5 years.

60. Management was aware that [redacted] would not solve its financial issues. Even with its aggressive cost savings assumptions and a refinancing of the $485 million of debt that was coming due in 2024, the Company again estimated in its July 16, 2022 Board materials that it would need [redacted].[12] The Company did not even consider its ability (or lack thereof) to [redacted].

[12] Messrs. Aguiar, Knight, Scott, and Brida, and Mses. Lockhart, Nayak, and Wen attended the meeting.

61. Two days later, on July 18, 2022, Mr. Knight, who was then the Chief Operating Officer, replaced Mr. George as CEO.

62. The Board met again on July 28, 2022 and discussed investor feedback that focused on [redacted] Around that time, [redacted] an analyst report from Silicon Valley Bank that warned that the Company's "[i]nability to renegotiate loans' terms could result in bankruptcy."

A. The Company's Restructuring Advisors Recommend the Company Raise New Capital.

63. In August 2022, the Company heard pitches from restructuring advisors, including Goldman Sachs ("**Goldman**"), J. Wood Capital Advisors ("**J. Wood**"), Perella Weinberg Partners ("**PWP**"), and Moelis & Company ("**Moelis**"). All of the potential advisors acknowledged the need for the Company to raise additional capital. For instance, PWP, who was the Company's existing investment banker, explained [redacted] PWP noted the Company projected a [redacted] PWP estimated that the Company would need [redacted] in a downside scenario. PWP questioned whether [redacted].

64. In its pitch, Moelis also identified the need to [redacted]

65. The Company ultimately engaged PWP, Goldman, and J. Wood as advisors (together, the "**Advisors**") to address its impending negative cash flow. The fees owed to each

advisor were [redacted].

66. In early October 2022, [redacted]. In an October 8, 2022 email correspondence, Goldman warned Ms. Wen that [redacted]. Goldman expressed its belief that the Company [redacted]

67. On October 13, 2022, the Advisors discussed potential financing options with the Board. Messrs. Aguiar, Crouse, Knight, Scott, Brida, Mses. Gorjanc, Lockhart, and Wen attended the meeting. The Advisors informed the Board at the meeting that under the current "status quo" the Company would [redacted]. The Advisors presented the Board with three financing strawman scenarios:

68. Under each proposed scenario, the cash flow projections demonstrated that the Company [redacted].

B. Deerfield Was Aware the Company Was Insolvent and Likely Headed for Bankruptcy.

69. Deerfield was aware of the Company's perilous financing position at that time. On September 23, 2022, Michael Bergen, a principal on the Deerfield deal team, told Terence Fox-Karnal, the partner and day-to-day lead, that he was [redacted] Accordingly, Deerfield viewed obtaining security as [redacted]. Deerfield increased its

holdings of 2024 Unsecured Notes from approximately $207 million to $242 million between the third quarter of 2022 and the fourth quarter of 2022, growing its position to more than 67% of the outstanding 2024 Unsecured Notes.

70. On October 31, 2022, Mr. Fox-Karnal and Deerfield managing partner James Flynn, discussed Deerfield's unsecured position. Mr. Fox-Karnal proposed [redacted]

71. Mr. Flynn questioned whether the Company could execute such a transaction that [redacted]. Mr. Fox-Karnal [redacted].

C. The Company Seeks, but then Abandons, New Money from a Potential Transaction.

72. In October 2022, nearly a year after the Company identified its dire financial condition, the Company finally began to engage in potential restructuring discussions. An October 12, 2022 presentation from the Advisors to the Company's management, including Mr. Knight and Ms. Wen, noted that they intended to [redacted]. At that time, Baker Brothers and SB Northstar were [redacted]. In the same presentation, the Advisors indicated that they also intended to [redacted]

[redacted]. To the best of the Committee's knowledge, the Debtors have not produced any documents that show that the Company reached out to any third parties financing sources outside of its capital structure at any time prior to the consummation of the March Exchange.

73. Around that time, Deerfield determined that providing additional funding would be a bridge to nowhere. In a December 7, 2022 correspondence with Mr. Fox-Karnal, Deerfield partner Sumner Anderson expressed doubts that a cash infusion of [redacted] Similarly, on December 12, 2022, Deerfield principal Wenxi Chen described Deerfield's view that Invitae was likely [redacted] She acknowledged that Invitae needed at least [redacted] The Company's Advisors agreed, as Goldman told Deerfield in a November 28, 2022 email that just [redacted]

74. During December 2022 negotiations, the Company threatened the holders of the 2028 Unsecured Notes in email correspondence that it would [redacted]. Both Baker Brothers and SB Northstar informed the Company that such a transaction would [redacted]. SB Northstar stressed that it believed it would be funding [redacted]. Notwithstanding those reservations, both [redacted].

75. On December 31, 2022, the Company had $557 million of cash and cash equivalents, $366 million less than the year before.[13]

D. The Company Crowns Deerfield.

76. Deerfield was focused on a [redacted]. In his January 5, 2023 notes, Mr. Fox-Karnal considered two scenarios where Deerfield either [redacted] In the [redacted] scenario, the Company [redacted] In the [redacted] Deerfield could [redacted] On January 10, 2023, Abraham Kometz, a Deerfield partner, instructed Ms. Chen and Mr. Bergen to analyze scenarios where Deerfield [redacted]

77. On January 12, 2023, Mr. Fox-Karnal sent the Company a proposal to exchange Deerfield's [redacted]. Deerfield, however, quickly walked back [redacted]. In internal communications on January 17, 2023, Mr. Fox-Karnal relayed to Mr. Flynn that the Company had asked for [redacted]. He again stressed that [redacted]

[13] Invitae Corp., Annual Report (Form 10-K) at 73, 75 (Feb. 28, 2023).

78. From that point forward, Deerfield refused to provide any new capital and instead proposed an exchange where it would trade 90% of its unsecured debt for secured convertible financing and receive the remaining 10% in equity. Even though it knew that transaction neither extended its runway nor de-levered its balance sheet to allow for additional financing, the Company gave up on getting any additional new capital as part of the transaction and determined to go ahead with Deerfield's proposal.

79. On January 14, 2023, Ms. Wen was presented with a cash flow model that [redacted]. But even this tag-along transaction was insufficient to fill the hole left by the uptier. Ms. Wen projected that, [redacted]

E. The Company Realizes that Even After the Transaction, It Would Still Run out of Cash Prior to the 2024 Unsecured Notes Maturity Date.

80. In January of 2023, the Company instructed its advisors to begin to negotiate definitive documents with Deerfield. At that time, the Company executed a second agreement to [redacted] in connection with the transaction.

81. The Company held a board meeting on January 26, 2023 that was attended by Messrs. Aguiar, Crouse, Knight, Osborne, Scott, Brida, Mses. Gorjanc, Lockhart, Nayak and Wen. At that Board meeting, management presented a revised cash forecast that decreased the Company's projections of available cash in the fourth quarter by [redacted] compared with the projections presented to the Board in December 2022. The revised cash flow forecast now showed that, [redacted]

[redacted][14] In other words, prior to the close of the March Exchange, the Board and Officer Defendants were aware that the transaction would not [redacted].

[redacted]

82. To make up for the cash needed just to get through the end of the year, the Company noted in the January 26, 2023 Board materials that it planned to open an [redacted] It is not clear what the Board relied on to determine that the Company would be able to [redacted] given Ms. Wen's prior analysis.

83. In addition to more than doubling the Company's secured debt, Deerfield insisted on proposed terms that significantly limited the Company's ability to raise additional financing.

[14] The Company's Board materials indicate that it [redacted].

For instance, Deerfield insisted on [redacted]. Deerfield also sought to limit the Company's ability to raise additional secured debt by dictating that any [redacted]. The covenants Deerfield proposed with respect to permitted unsecured debt were even more restrictive, including that such debt could not [redacted].

84. In acknowledgement of the Company's likely trajectory, Deerfield also sought to restrict the rights of other creditors in a future bankruptcy. During negotiations, its counsel made clear that it [redacted]

85. On January 31, 2023, Goldman's equity research analyst downgraded Invitae's rating from "Neutral" to "Sell." Goldman did "not see NVTA turning EBIT positive until 2028+" and emphasized that Invitae would "need to do additional capital raises to meet their debt and other contractual obligations."

F. Deerfield Knew the Company Was Insolvent and the Uptier Transaction Would Significantly Hinder Any Chance the 2028 Unsecured Noteholders Had to Be Repaid.

86. By the middle of February, the economic terms of the transaction had largely been agreed, and documentation was well underway. In a February 14, 2023 conversation with Mr. Fox-Karnal, Mr. Flynn acknowledged how punitive the proposed transaction would be for the Company's other creditors, noting that the [redacted]

87. Deerfield was also aware that the proposed exchange would leave the Company [redacted]. Specifically, notes of a Deerfield all-hands meeting

held on February 21, 2023 recorded that the [redacted] At that same meeting, Deerfield reiterated its focus on including [redacted] for Deerfield. In correspondence with Mr. Fox-Karnal, Ms. Chen, and Mr. Kometz, Mr. Bergen noted that the Company purportedly only [redacted]

G. The Board Refuses to Consider Any Alternative to the Deerfield Led Transaction and Instructs Goldman to No Longer Pursue Alternative Transactions.

88. On February 24, 2023, Baker Brothers wrote to Mr. Knight, Mr. Scott, and [redacted]. Baker Brothers noted that Deerfield's proposal [redacted] Baker Brothers referred to the transaction as [redacted] Baker Brothers attempted one more time to convince the Company to [redacted]

89. In a February 24, 2023 email to Ms. Wen, Mr. Knight insisted that the Company would not [redacted]. Ms. Wen and J. Wood agreed that they would not recommend [redacted] [redacted]. J. Wood also noted that it did not favor a transaction with [redacted].

90. Mr. Knight and Ms. Wen were frustrated that [redacted]. Ms. Wen

went a step further and expressed annoyance that [redacted] and stated in a February 24, 2023 email to Mr. Knight that [redacted]

91. During this time, Deerfield sought to selectively [redacted]. Deerfield agreed to provide [redacted]. That plan was kept secret.

92. On February 24, 2023, Goldman updated Mr. Knight on another conversation it had with Baker Brothers. It explained that Baker Brothers [redacted]. Goldman disclosed that it had [redacted]. Mr. Knight was furious.

93. Later on February 25, 2023, Goldman suggested to Mr. Knight, Ms. Wen, and Mr. Brida that it reached out to Baker Brothers to ask some clarifying questions about its proposal, including whether Baker Brothers [redacted]. Mr. Knight instructed Goldman to [redacted]. After this conflict, [redacted]

94. On February 26, 2023, the Board approved the Uptier Transaction (defined below).

95. On February 28, 2023, the Company publicly reported a $3.1 billion net loss, a $2.3 billion goodwill impairment, and that it significantly underperformed the cash projections it had

forecast in the previous summer.[15] The Company warned in its Form 10-K that "[w]hile our revenue has increased over time, we may never achieve revenue sufficient to offset our expenses."[16] The Company also announced the Uptier Transaction.[17] Prior to the announcement of the Uptier Transaction, the 2024 Unsecured Notes traded at approximately 79 cents on the dollar.

III. The Company Executes the Uptier Transaction.

96. As part of the Uptier Transaction, the Company prepaid the Term Loan in two transactions: (a) a $50 million principal payment plus a $3 million prepayment fee and (b) $85 million payment plus a $5.1 million prepayment fee (collectively, the "**Term Loan Repayment**").[18] The Company then (1) exchanged $305.7 million of aggregate principal amount of the 2024 Unsecured Notes for $275.3 million aggregate principal amount of the Series A 2028 Convertible Senior Secured Notes (the "**Series A Notes**"), (2) issued $30 million of Series B Convertible Senior Secured Notes (the "**Series B Notes**" and together with the Series A Notes, the "**2028 Senior Secured Notes**") for cash, and (3) issued 14,219,859 shares (with a fair market value of $22.9 million) to the converting holders of 2024 Unsecured Notes (together, the "**March Exchange**" and together with the "**Term Loan Repayment**," the "**Uptier Transaction**").[19] The $305.3 million aggregate principal amount of the 2028 Senior Secured Notes are guaranteed by substantially all of the Company's subsidiaries and purportedly secured by a first-priority lien on

[15] Invitae Corp., Annual Report (Form 10-K) at 63 (Feb. 28, 2023).

[16] *Id.* at 65.

[17] *Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance*, Invitae (Feb. 28, 2023), 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#:~:text=The%20privately%20negotiated%20agreements%20with,principal%20amount%20of%20new%204.50%25.

[18] *See* Invitae Corp., Quarterly Report (Form 10-Q) (Aug. 8, 2023) at 46.

[19] *See* Invitae Corp., Current Report (Form 8-K) (Mar. 8, 2023) at 2.

substantially all of the assets of the Company and the guarantors, subject to certain exceptions in the loan documents.

97. The Uptier Transaction gave a select group of unsecured lenders who knew the Company [redacted] a security interest in substantially all of the Company's assets. The Company used $135.6 million of cash to effectuate the Uptier Transaction, exacerbating its liquidity issues.

98. The Uptier Transaction did not extend the Company's runway, as the Company still projected in February 25, 2023 Board materials to be [redacted]. The Uptier Transaction did not reduce the Company's leverage at all and did not provide any significant amount of liquidity. In fact, as a result of the Uptier Transaction, the Company more than doubled its secured debt when compared with its capital structure prior to the Term Loan Repayment (and added $305.3 million in secured debt when compared with the capital structure after the Term Loan Repayment).

99. The Company also provided more than $100 million more value to the participating holders of the 2024 Unsecured Notes (the "**Participating 2024 Unsecured Noteholders**") than it received as part of the Uptier Transaction, including a substantial makewhole premium (approximately $27.5 million as of the Petition Date (as defined below)) that was designed to be paid upon the inevitable Invitae chapter 11 filing. Ultimately, both the Company and Deerfield knew that the Uptier Transaction and security interests granted thereby would entitle the hand-selected participating lenders to be paid in full before formerly similarly situated unsecured creditors received ***any*** recovery.

100. Compared to the 2024 Unsecured Notes, the 2028 Senior Secured Notes had (1) a lien on substantially all of the Company's assets, (2) were guaranteed by seven subsidiaries, while the 2024 Unsecured Notes had no guarantors, (3) a higher coupon rate (4.5% versus 2.0%), and (4) interest payable quarterly rather than semi-annually. The 2028 Senior Secured Notes also had the right to convert their secured debt claims to common equity at a conversion price of $2.58 compared to the $29.74 conversion price of the 2024 Unsecured Notes. The conversion ratio also increased to provide the 2028 Senior Secured Notes with approximately six times more equity ownership upon conversion. The prospective 29.7% dilution from the conversion of the 2028 Senior Secured Notes, plus the anti-dilution provisions in the 2028 Senior Secured Notes, effectively prevented any hope of a subsequent equity raise.

101. The terms of the March Exchange were approved by the full Board and a separate Pricing Committee, comprised of Messrs. Scott and Aguiar, and Ms. Gorjanc. Mr. Brida was Invitae's General Counsel during the March Exchange and remains in that position today. The March Exchange was executed and closed on March 7, 2023.[20]

102. Shortly after the March Exchange, the Company reported that its liabilities exceeded the book value of its assets: for the period ending on March 31, 2023, the Company reported total liabilities of approximately $1.728 billion and total assets of approximately $1.692 billion.[21] The book value of the Company's assets, however, significantly overstated their actual market value. The vast majority of the Company's assets were associated with its intangible assets. Upon information and belief, the book value of certain of those assets was established by

[20] *See Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance*, Invitae (Feb. 28, 2023), 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#:~:text=The%20privately%20negotiated%20agreements%20with,principal%20amount%20of%20new%204.50%25; *see also* Invitae Corp., Annual Report (Form 8-K) (Mar. 7, 2023).

[21] Invitae Corp., Quarterly Report (Form 10-Q) at 1 (May 9, 2023).

the inflated price the Company had paid for those assets and had not been remarked since the close of each acquisition. The actual market value of the Company's intellectual property and other intangible assets was far less. After the transaction closed, new-CFO Ms. Schrank acknowledged the book value of the Company's assets significantly exceeded their fair market value. Specifically, she noted that of the [redacted] At the end of September 2023, when the Company finally remarked its intellectual property to reflect a value closer to its market value, its liabilities exceeded its assets by approximately $1.1 billion.[22] Thus, upon information and belief, the value that the Company had been disclosing to the market all along was inflated, causing the opportunity for those close to the Company to trade out of their equity positions. Upon information and belief, the Director Defendants and Officer Defendants held significant amounts of common stock of Invitae.

A. The Market Acknowledged that the March Exchange Doomed the Company.

103. On February 28, 2023, the Company issued a press release announcing the "success" of the March Exchange "led by Deerfield Management."[23] Following that announcement, Invitae's stock price collapsed, falling more than 25% to $1.61 per share—an all-time low.[24]

[22] Invitae Corp., Quarterly Report (Form 10-Q) at 1 (Aug. 8, 2023); Invitae Corp., Quarterly Report (Form 10-Q) at 1 (Nov. 8, 2023).

[23] *See Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance*, Invitae (Feb. 28, 2023), 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#:~:text=The%20privately%20negotiated%20agreements%20with,principal%20amount%20of%20new%204.50%25.

[24] *Invitae Shares Hit New All-Time Low on Downbeat 2023 Revenue Guidance, Debt Refinance*, MarketScreener (Mar. 1, 2023), available at https://www.marketscreener.com/quote/stock/INVITAE-CORPORATION-23400709/news/Invitae-Shares-Hit-New-All-Time-Low-on-Downbeat-2023-Revenue-Guidance-Debt-Refinance-43128771/.

104. The exchange, however, was a massive success for Deerfield. As Mr. Fox-Karnal said to Mr. Bergen the day after the transaction closed, the transaction was [redacted]

105. Deerfield was concerned regarding how the Company presented the transaction. Following the Company's earnings call, Deerfield sent an email on March 3, 2023 to the Company stating that the Company should stop focusing on [redacted] Instead, Deerfield pushed the Company to say the [redacted]

106. On March 10, 2023, the Company paid its executives the first of nearly $16.6 million in bonuses following the transaction, including (1) $393,437.25 to Mr. Knight, (2) $209,833.20 to Ms. Wen, (3) $174,861.00 to Mr. Brida, and (4) $174,861.00 to Mr. Nussbaum.[25] After the March Exchange, the compensation committee of the Board also instituted a [redacted] for certain executives, which, upon information and belief, was used as additional incentive for management to close the transaction. Upon information and belief, in connection with the Company's [redacted] the Company paid approximately $785,000 to its executives.[26] Between March 15, 2023 and August 25, 2023, the Company also paid the same executives "Stock Based Comp" in the amount of

[25] *See Statement of Financial Affairs for Invitae Corporation* [Docket No. 202-1] at 71, 73-74 (the "**SOFA**").

[26] *See id.* at 71-75. While these payments are characterized as "Payroll" payments on the Debtors' schedules, upon information and belief, these payments were in fact bonuses paid to executives in connection with the March Exchange.

$668,771.70, including (a) $228,641.16 for Mr. Knight, (b) $78,206.52 to Mr. Nussbaum, (c) $82,473.30 to Mr. Werner, (d) $122,083.98 to Mr. Brida, and (e) $157,366.74 to Ms. Wen.[27]

B. The March Exchange Left the Company with Inadequate Capital and Restricted Its Ability to Raise Additional Capital.

107. For the period ending on March 31, 2023, the Company reported that it had cash and cash equivalents of $171 million ($386 million less than the prior quarter).[28] On April 3, 2023, the Company approved additional raises and incentive and retention bonuses to its executives.

108. At an April 27, 2023 board meeting—less than 2 months after the March Exchange had closed—the Company once again [redacted]. Under the new projections, management anticipated that the Company [redacted]. Messrs. Aguiar, Brida, Crouse, Knight, Osborne, Scott, Mses. Gorjanc, Lockhart, Nayak, and Wen attended the meeting.

[redacted]

[27] *See id.* at 71, 73-75.

[28] Invitae Corp., Quarterly Report (Form 10-Q) at 49 (May 9, 2023).

109. Prior to that Board meeting, management conceded that [redacted]. Specifically, in a draft of the April 27, 2023 Board presentation created on or about April 10, 2023 (*i.e.* a little more than a month after the transaction closed), management noted that [redacted]

110. The final April 27, 2023 Board presentation estimated the Company would need to [redacted]

111. It is unclear whether the Company attempted to raise additional financing at that time. Presumably aware of the bed that it had made for itself, the Company proposed another drastic operational restructuring that would include divesting its Women's Health and Ciitizen

businesses. However, as a result of the March Exchange, the Company now needed Deerfield's consent to execute that restructuring.[29]

112. On May 25, 2023, Ms. Wen resigned as CFO of the Company. When told the news of Ms. Wen's resignation, Mr. Fox-Karnal's reaction was [redacted] Prior to resigning, Ms. Wen sold 43,452 shares of Invitae stock.[30] On the same day, Mr. Knight sold 45,432 shares of Invitae stock.[31] On July 1, 2023, Ms. Gorjanc began serving as interim CFO.

113. In the summer of 2023, Mr. Knight continued to have an unrealistic outlook on the Company's chances of raising additional financing. In a June email, Richard Lusk, the Company's head of financial planning and analysis, told PWP that Mr. Knight was [redacted]

114. As part of the [redacted] the Company paid bonuses of $250,000 to Mr. Knight, $125,000 to Ms. Wen, $40,000 to Mr. Brida, and $40,000 to Mr. Nussbaum on June 16, 2023.[32]

115. Both the Advisors and Deerfield knew that it was [redacted]. On June 27, 2023, Deerfield employees noted it was [redacted]

[29] 2028 Senior Secured Notes Indenture, Art. I.

[30] *See* Invitae Corp., Statement of Changes in Beneficial Ownership of Securities (Form 4) (Yafei Wen) (May 16, 2023).

[31] Invitae Corp., Statement of Changes in Beneficial Ownership of Securities (Form 4) (Kenneth Knight) (May 16, 2023).

[32] *See* SOFA at 71-75.

Similarly, on June 29, 2023, PWP informed the Company that it was [redacted]

116. In its July 26, 2023, meeting, the Board revisited that the [redacted] and the Company was projected to [redacted]. PWP informed the Company that its liquidity [redacted] PWP informed the Company that it would [redacted] PWP presented an [redacted] to the Company, including filing for chapter 11 and selling its assets. Messrs. Knight, Brida, Ms. Gorjanc and, upon information and belief, the other Director Defendants were present at that meeting.

117. The Company determined to hear additional pitches for restructuring advisors. Moelis was ultimately hired. On or around August 9, 2023, the Company also hired FTI Consulting ("**FTI**") as an additional restructuring advisor. FTI immediately warned that, based on its current run rate, the Company [redacted]. FTI saw two likely scenarios moving forward—either [redacted]

118. During the fall of 2023, the Company pushed Deerfield to approve its proposed sale of Women's Health and Ciitizen. It is unclear whether the Company ran a formal sale process for those entities. Deerfield would not consent to these sales unless the Company would agree to [redacted]. Deerfield continued

to [redacted]

119. Around the time the Company was urging Deerfield to allow the proposed divestitures, Deerfield contacted the Company and informed it that Deerfield wished to hire PWP. PWP knew the Company intimately and had knowledge of all of the Company's confidential information and internal strategy considerations. The Company consented to Deerfield retaining PWP. The Company did not require [redacted]. Mark Adomanis, an Executive Director at PWP, is a member of both the Invitae and Deerfield teams.

120. PWP was not the only insider to switch sides. [redacted]

C. The August Exchange.

121. On August 22, 2023, the Company entered into a second exchange agreement (the "**August Exchange**") with Deerfield whereby it exchanged the $17.2 million of Deerfield's remaining 2024 Unsecured Notes for $100,000 of Series A Notes and approximately 15.8 million shares of Invitae common stock (with a market value of approximately $16.0 million).[33] The parties agreed that the accrued and unpaid interest on Deerfield's exchanged 2024 Unsecured Notes in the amount of $164,460.67 would remain due and payable on September 1, 2023.

[33] *See* Invitae Corp., Current Report (Form 8-K) (Aug. 23, 2023).

122. The terms of the August Exchange were approved by the full Board, which included the Director Defendants. Upon information and belief, Deerfield sold the shares of common stock shortly after the August Exchange.

123. Upon information and belief, after the August Exchange was completed, other holders of the remaining 2024 Unsecured Notes requested to complete a similar exchange. The Company refused.

124. Invitae's third quarter financials published on November 8, 2023 disclosed that "[a]s a result of losses, projected cash needs, and current liquidity level, substantial doubt exists about the Company's ability to continue as a going concern."[34] Invitae reported that its liabilities exceeded its assets by approximately $1.1 billion and that it only had approximately $158 million of cash and cash equivalents.[35]

IV. Deerfield and the Company Planned for the Debtors' Imminent Bankruptcy.

125. The Uptier Transaction was a calculated maneuver whereby the Company coronated one group of hand-selected creditors— primarily Deerfield—to the detriment of over a billion dollars of other similarly situated investors. The Uptier Transaction reduced the Company's liquidity, its ability to raise needed capital, and its ability to execute other transactions to potentially turn its business around. Shortly after the completion of the August Exchange, the Debtors began contemplating an in-court restructuring.

126. On September 22, 2023, Invitae retained Kirkland & Ellis LLP ("**K&E**") as restructuring counsel. On September 23, 2023, the Company retained Ms. Schrank as CFO. Ms.

[34] Invitae Corp., Quarterly Report (Form 10-Q) at 7 (Nov. 8, 2023). The Company also noted that the debt markets were difficult and its ability to raise additional financing was uncertain. *Id.* at 14.

[35] *Id.* at 1.

Schrank received a $165,000 sign-on bonus as part of that engagement.[36] Around the same time, Mr. Guigley received a $150,000 sign-on bonus as part of his engagement as Chief Commercial Officer.[37] On September 26, 2023, Invitae expanded the scope of FTI's services to support the development of long-range financial projections, related scenario analyses, sales processes, and contingency planning for a possible restructuring.

127. One month after completing the August Exchange, the Company constituted a purportedly independent, special committee initially composed of Messrs. Scott, Osborne, Aguiar, and Ms. Gorjanc, each of whom approved the Uptier Transaction.[38]

128. Shortly after the Company's Special Committee was established, it undertook two initiatives related to restructuring. First, the Company and Deerfield began to negotiate a supplement to the indenture to the 2028 Senior Secured Notes (the "**2028 Senior Secured Notes Indenture**") that would approve the Company's sale of its Women's Health and Ciitizen businesses. Second, the Special Committee began to "investigate" the Uptier Transaction (and its members' roles in connection therewith).

129. On October 18, 2023, the Special Committee engaged Jill Frizzley as an "advisor." Ms. Frizzley's engagement letter, however, acknowledged that [redacted] Upon information and belief, Ms. Frizzley was appointed as an advisor rather than an independent Board member to avoid the Company having to disclose her employment to the public. Even though it feared a negative reaction due to Ms. Frizzley's involvement, the Company viewed Ms. Frizzley's title as the

[36] *See* SOFA at 67.

[37] *See id.* at 72.

[38] First Day Decl. ¶¶ 8, 69.

barometer of whether her involvement was material information for its investors. Messrs. Aguiar, Osborne, Scott, Knight, Brida, Dickey and Ms. Gorjanc were in attendance at the meeting where Ms. Frizzley's engagement was approved.

130. Deerfield continued to push the Company to enter bankruptcy and use its cash to fund Deerfield's foreclosure. According to Ms. Schrank's notes from October 2023, Mr. Fox-Karnal [redacted] Moelis relayed its belief that Deerfield [redacted]

131. On or around October 18, 2023, Deerfield formally proposed entering into a transaction support agreement (the "**TSA**") with the Company to govern an upcoming chapter 11 filing.

132. On October 20, 2023, Deerfield proposed a preliminary term sheet that asked for a [redacted]

133. On October 26, 2023, the Company's advisors told the Board that [redacted] Messrs. Aguiar, Crouse, Knight, Osborne, Scott, Brida, Dickey, Mses. Gorjanc, Lockhart, and Nayak were present at this meeting.

134. On October 27, 2023, the Company paid Mr. Knight another $3,500,000 bonus.[39]

[39] *See* SOFA at 71. In connection with the receipt of that bonus, the Board cancelled the $1,000,000 long term retention

135. On November 15, 2023, Deerfield communicated that, in exchange for its consent to divest the Women's Health and Ciitizen businesses, it would require the Company to [redacted].

136. On November 16, 2023, Mr. Aguiar responded internally that a [redacted] Messrs. Aguiar, Osborne, Scott, Knight, Brida, and Ms. Gorjanc attended this meeting.

137. On December 1, 2023, Mr. Sholehvar received a $150,000 sign-on bonus as part of his engagement as Chief Operating Officer.[40]

138. On December 7, 2023, Ms. Frizzley was appointed as "an independent and disinterested director of the Board and as a member of the Special Committee."

139. On December 8, 2023, the Company entered into a supplement to the 2028 Senior Secured Notes Indenture (the "**Second Supplemental Indenture**"), which memorialized the restrictions described above, including chapter 11 milestones included in a TSA, requirements to run a sale process, and minimum liquidity covenants. As part of the Second Supplemental Indenture, Deerfield received a $2,100,000 consent fee and its advisors were paid over $3,000,000 (the "**Consent Fees**").[41] The Second Supplemental Indenture required Invitae to execute a TSA with Deerfield "in form and substance acceptable to the Corporation and the Deerfield Holders no later than January 12, 2024[.]"

bonus it had awarded to Mr. Knight in April 2023. *See* Invitae Corp., Current Report (Form 8-K) at 2 (Oct 13, 2023).

[40] *See* SOFA at 67.

[41] *See* Second Supplemental Indenture Art. II(a), II(d), III(iv); SOFA at 47, 52, 60, 63.

140. On December 13, 2023, the Company divested Ciitizen in exchange for a minority equity interest in the purchaser.[42] The Company had purchased Ciitizen for approximately $308 million in total consideration two years earlier consisting of $87.4 million in cash, $186.8 million in equity, and $34.2 million in assumed liabilities and other consideration.

141. On December 22, 2023, the Company paid a $100,000 retention bonus to Mr. Brida.[43]

142. On December 22, 2023, the Board delegated its authority to the Special Committee to "review, discuss, consider, negotiate, approve, and authorize the Corporation's entry into the TSA and any restructuring or liability management transactions[.]" In December 27, 2023, Special Committee materials, the Company's advisors stated that [redacted] Messrs. Aguiar, Osborne, Scott, Knight, Brida, and Ms. Gorjanc attended this Special Committee meeting.

143. In December, certain junior creditors made a restructuring proposal to the Company. Later that month, the Company's advisors informed the Special Committee that Deerfield had countered the junior creditors' proposal [redacted]

144. As part of the [redacted] the Company transferred an additional $40,000 to Mr. Nussbaum on December 29, 2023.[44] As part of the same program,

[42] *See Invitae Divests Ciitizen Health Data Platform and Implements Further Cost Cuts*, Invitae (Dec. 13, 2023), available at https://ir.invitae.com/news-and-events/press-releases/press-release-details/2023/Invitae-Divests-Ciitizen-Health-Data-Platform-and-Implements-Further-Cost-Cuts/default.aspx#:~:text=The%20company%20has%20divested%20the,and%20other%20operating%20expense%20reductions.&text=Ciitizen%20is%20a%20patient%2Dcentric,share%20their%20medical%20records%20digitally.

[43] *See* SOFA at 74.

[44] *See id.* at 72.

the Company transferred bonuses of an additional $250,000 to Mr. Knight and $40,000 to Mr. Brida on January 5, 2024.[45]

145. On January 9, 2024, Deerfield sent its initial draft of the TSA and plan term sheet. Deerfield proposed that the Company should [redacted] The proposal provided that [redacted].

146. After sending a January 10, 2024, 13-week cash flow forecast to Deerfield, the Company increased the amount of the bonuses to its executives and employees. On or around January 17, 2024, the Company paid executives and employees more than $16.6 million in bonuses, including (1) ***an additional*** $2,974,687 to Mr. Knight, (2) $2,002,750 to Ms. Schrank, (3) $1,834,351 to Mr. Brida, (4) $1,726,850 to Mr. Guigley, and (5) $1,594,740 to Mr. Sholehvar (the "**January 2024 Retention Program**").[46]

147. According to minutes from the Board meetings held on January 7, 2024 and January 11, 2024, the Company issued these retention payments on the eve of bankruptcy specifically to individuals [redacted] Materials from a January 5, 2024 compensation committee of the Board meeting noted that the retention payments were directed towards [redacted] The compensation committee of the Board materials also noted that [redacted]

[45] *See id.* at 71, 73.

[46] *See id.* at 67, 71-74.

[redacted]

148. Deerfield sent a letter on January 24, 2024 to the Board expressing its frustration [redacted]. In the letter, Deerfield remarked it was [redacted] Deerfield demanded that the Company [redacted]

149. In three months (and while on its way to bankruptcy), the Company had paid Mr. Knight nearly $6,500,000 in bonuses.[47]

150. In the 90 days before the Petition Date, the Company paid a total of $2,376,280.42 to Deerfield's counsel and paid Deerfield's investment banker in these Chapter 11 Cases, PWP, $796,683.49.

A. <u>The Debtors Entered into the TSA and Filed for Bankruptcy.</u>

151. On February 13, 2024, the Board, by unanimous written consent, approved the TSA and the Company entered into it. The Company also stipulated to the validity of Deerfield's liens and agreed to file a motion for the use of cash collateral and plan of reorganization that released (1) the holders and agents of the 2028 Senior Secured Notes from all claims and causes of action and (2) its directors and officers of the Company from all claims and causes of action.

152. Deerfield is the only holder of the 2028 Senior Secured Notes that entered into the TSA.

[47] *See id.* at 71-72.

153. On February 13, 2024 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On the Petition Date, the Debtors filed a motion to approve sale procedures to sell all of their assets and filed with the First Day Declaration a Plan term sheet providing that, after payment of certain priority claims, all sale proceeds would be used to pay holders of the 2028 Senior Secured Notes in full. The term sheet also proposed to release the Debtors, Fiduciary Defendants (defined below), Deerfield, and the claims related to the 2028 Senior Secured Notes.

154. During these Chapter 11 Cases, the Debtors ran a marketing process for their assets. The Debtors agreed to sell substantially all of their assets for $239 million pursuant to section 363 of the Bankruptcy Code.[48] Upon information and belief, there was no material change in the value of the assets from the Petition Date, meaning the expectation was that the holders of the 2028 Senior Secured Notes would always be paid in full. The Debtors estimate that the proceeds from the sale, plus their assets, which include accounts receivable, provides full recoveries for holders of secured claims and that unsecured creditors will receive *de minimis* recoveries, unless judgment is awarded in favor of the claims in this Complaint.

155. The Debtors have proposed a plan of reorganization and disclosure statement.[49] By the Debtors' estimates, the proceeds from the sale and retained assets would provide for administrative, priority, convenience, and unsecured claims at Invitae's subsidiaries in full, and would provide the purportedly secured claims of the 2028 Senior Secured Notes with a full

[48] *See Order (I) Approving the Sale of the Acquired Assets Free and Clear of All Liens, Claims, and Encumbrances and (II) Authorizing the Debtors to Enter into and Perform their Obligations under the Labcorp Asset Purchase Agreement* [Docket No. 463] at 55.

[49] *See Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 471] (the "**Plan**"); *Disclosure Statement relating to the Joint Plan of Invitae Corporation and its Debtor Affiliates pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 472] (the "**Disclosure Statement**").

recovery. The Plan proposes to release the Debtors' claims against the Defendants for no monetary consideration.[50]

156. Deerfield knew that would be the result and guided the Company to this outcome. The Director Defendants and Officer Defendants knew that was the inevitable outcome as well and have profited handsomely off the Company's demise, receiving millions of bonuses in the last six months. At the end of the day, the Company paid Deerfield and then liquidated for the benefit of Deerfield and to the detriment of all of its other creditors.

V. Unencumbered Assets.

157. On February 13, 2024, the Debtors filed the *Debtors' Motion for Entry of Interim and Final Orders Pursuant to Sections 105, 361, 362, 363, 503, and 507 of the Bankruptcy Code and Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [Docket No. 18] (the "**Cash Collateral Motion**").

158. On March 18, 2024, the Court entered 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* [Docket No. 188] (the "**Final Cash Collateral Order**").

159. The Final Cash Collateral Order contains the following provision regarding the effect of stipulations on third parties:

> The stipulations, admissions, waivers and releases contained in the Interim Order and this Final Order, as applicable, including the

[50] *See* Plan at 42-43.

> Debtors' Stipulations, shall be binding upon all other parties in interest, including the Committee and any other person acting on behalf of the Debtors' estates, unless and to the extent that (i) a party in interest (other than an Debtor or successor thereto, but including any Trustee) with proper standing to do so (to the extent derivative standing is required under applicable law), has timely and properly objected to or challenged the findings or Debtors' Stipulations regarding (I) the validity, enforceability, extent, priority, or perfection of the mortgages, security interests, and/or liens of any of the Prepetition Secured Parties, or (II) the validity, enforceability, allowability, priority, secured status, or amount of the Prepetition Secured Indebtedness[.][51]

A. <u>Unencumbered Accounts.</u>

160. As of the Petition Date, the Company had 26 bank accounts (collectively, the "**Bank Accounts**"), of which 16 are owned and controlled by the Debtors and 10 are owned and controlled by non-Debtor foreign affiliates.[52] The Debtors granted liens on the Bank Accounts (other than the Excluded Accounts)[53] in favor of the Agent as part of its "collateral" under and as defined in the 2028 Senior Secured Notes Indenture.

[51] Final Cash Collateral Order ¶ 19(a).

[52] *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* [Docket No. 10] ¶ 9 (the "**Cash Management Motion**").

[53] "**Excluded Accounts**" means any (i) a zero balance account that sweeps on a daily basis into a deposit account subject to a Control Agreement, (ii) bank or deposit account used exclusively for payroll, the withheld employee portion of payroll taxes or other employee wage and benefit payments, (iii) merchant accounts in the nature of accounts with payment service providers such as Square, PayPal and Stripe, entered into in the ordinary course of business, (iv) any bank or deposit account exclusively used for purposes of cash deposits or pledges constituting Liens permitted pursuant to Sections 4.27(j), (n) or (p), (v) any deposit account used exclusively for receipt of any Third Party Payor Program accounts receivable or other accounts receivable under which any Third Party Payor is the account debtor are directly paid, *provided* that the funds in such account are transferred within two (2) Business Days to an account of a Note Party that is subject to a Control Agreement and (vi) any other Deposit Account or Securities Account (x) located in the United States, so long as with respect to this clause (vi)(x) the average trailing five (5) day closing balance of the aggregate amounts on deposit in all such accounts does not exceed $4,000,000 and (y) located outside of the United States, so long as, with respect to this clause (vi)(y) the average trailing five (5) day closing balance of the aggregate amounts on deposit in all such accounts does not exceed $6,000,000. 2028 Senior Secured Notes Indenture § 1.01.

161. While the 2028 Senior Secured Notes Indenture identifies deposit accounts as part of the Collateral,[54] the Agent was not granted any security interests in 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 ("**DACAs**") nor subject to control by the Agent sufficient to perfect such interests under applicable law.

162. As of the Petition Date, the cash in the Unencumbered Bank Accounts totaled approximately $3,067,938.69.[55]

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

164. A list of the Unencumbered Accounts is attached as **Appendix C**.

B. Unencumbered Commercial Tort Claims.

165. The Debtors granted liens on commercial tort claims in favor of the Agent as part of the Collateral. 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[56] (or supplement thereto in accordance with section 5.9 of the Security Agreement).

166. The following commercial tort claims are not listed on any schedule to the Security Agreement or a UCC-1 financing statement (collectively, the "**Unencumbered Commercial Tort**

[54] "**Collateral**" means "collateral" as defined in the 2028 Senior Secured Notes Indenture.

[55] Contemporaneous with this proposed Complaint, the Committee filed a claims objection to certain claims filed by the Agent which also seeks to reduce the Agent's claim to the extent the claim alleges a secured interest in the Unencumbered Accounts.

[56] 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.

Claims"). Accordingly, the Agent does not have a security interest in the following Unencumbered Commercial Tort Claims:

- ***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. 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 on 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, Inc. 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.

167. The Unencumbered Commercial Torts Claims are unencumbered because such claims were never listed on a schedule to the 2028 Senior Secured Notes Indenture nor was any UCC-1 ever filed.[57] Absent such a supplemental schedule or a contemporaneous formal writing delivered pursuant to or in accordance with the Security Agreement, the Unencumbered Commercial Tort Claims cannot qualify for inclusion in the grant set out in section 3.1 of the Security Agreement and were, therefore, unencumbered as of the Petition Date.

[57] Contemporaneously with this proposed Complaint, the Committee filed a claims objection to certain claims filed by the Agent which also seeks to reduce the secured portion of the Agent's claim to the extent the claim alleges a secured interest in the Unencumbered Commercial Tort Claims.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Avoidance and Recovery of the March Exchange as a Constructive Fraudulent Conveyance Under Bankruptcy Code §§ 544, 548, 550, and 551, and Applicable State Law of New York, New Jersey, California, and/or Delaware
(Against Defendants Agent, Deerfield, and John Does 1-100)

168. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

169. Section 548 of the Bankruptcy Code provides that a trustee or debtor may avoid a transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within two years before the petition date as constructively fraudulent if it can be shown that: (i) the transfer made or obligation incurred was for less than reasonably equivalent value; and (ii) the debtor (a) was insolvent on the date of the transaction or was rendered insolvent thereby, (b) had unreasonably small capital, or (c) intended to incur, or reasonably should have known it would incur, debts that it could not pay as they matured. 11 U.S.C. § 548(a)(1)(B).

170. Section 544(b) of the Bankruptcy Code operates similarly and permits a trustee or debtor to avoid a transfer or obligation of the debtor pursuant to state fraudulent conveyance law, which imposes similar or identical requirements as section 548 of the Bankruptcy Code. 11 U.S.C.§ 544(b). The fraudulent conveyance laws of the relevant states—New York (based on the governing law of the 2028 Senior Secured Notes Indenture), New Jersey (based on Invitae's place of business), California (based on Invitae's place of business and chief executive office), and Delaware (based on Invitae's state of incorporation)—are substantially similar to section 548 of the Bankruptcy Code. *See* N.Y. Debt. & Cred. Law § 273-74 (McKinney); N.J. Stat. Ann. § 25:2-25, 27 (West); Cal. Civ. Code § 3439.04-05 (West); Del. Code Ann. Tit. 6, §§ 1304, 1305 (West).

171. The March Exchange was a transfer of the Debtors' interests in property and an obligation incurred by the Debtors within the appropriate lookback period set forth under all relevant law. In connection with the March Exchange, Invitae exchanged $305.7 million of the aggregate principal amount of the 2024 Unsecured Notes for $275.3 million in 2028 Senior Secured Notes that were secured by a lien on substantially all of Invitae and its subsidiaries' assets (subject to the exceptions identified above), and issued $30 million in additional 2028 Senior Secured Notes and 14,219,859 shares of Invitae's common stock (with a market price of $22.9 million).

172. The Debtors received less than reasonably equivalent value in exchange of the $305.3 million in 2028 Senior Secured Notes issued. Specifically, the Agent, on behalf of Deerfield and the Participating 2024 Unsecured Noteholders, received nearly $100 million more in value than was received by the Debtors in connection with the March Exchange, including, among other things: (1) a $305.3 million secured note with a value that exceeded the fair market value of the exchanged 2024 Unsecured Notes, (2) increased interest payments through the original maturity of the 2024 Unsecured Notes, (3) a make-whole claim totaling $27.5 million as of the Petition Date, (4) approximately $22.9 million in Invitae common stock, (5) an $8.1 million obligation of Debtors to pay a prepayment fee in connection with the Term Loan Repayment which was a condition precedent to the March Exchange, (6) the Debtors' obligation to pay $19.1 million in debt issuance costs, (7) significant equity option value through the conversion feature in the 2028 Senior Secured Notes, and (8) significant control over the Debtors, their ability to raise additional financing, and their ability to operate and restructure their business.

173. The Uptier Transaction reduced the Debtors' liquidity by $135.6 million and, in doing so, shortened their runway and limited their ability to restructure and reorganize. Both the

Company and Deerfield knew that, as a result of the March Exchange, the Debtors would not have [redacted]

174. The Debtors were insolvent at the time of, or as a result of, the Uptier Transaction under the balance sheet test. The Debtors were likewise insolvent under the capital adequacy test and the cash flow test, as they projected that [redacted]. Deerfield, the largest holder of the 2028 Senior Secured Notes and the party who negotiated and led the March Exchange, [redacted].

175. By virtue of the foregoing, the March Exchange constituted a constructive fraudulent transfer avoidable under section 548 of the Bankruptcy Code, section 544(a)(1)(B) of the Bankruptcy Code, and applicable law, including, but not limited to, the fraudulent conveyance laws as enacted in the states of New York, New Jersey, California, and Delaware.

176. Under sections 550(a) and 551 of the Bankruptcy Code, the Committee, on behalf of the Estates, seeks (i) to invalidate and avoid the liens securing the 2028 Senior Secured Notes and (ii) such other relief as the Court deems appropriate in connection with the unwinding of the March Exchange.

SECOND CAUSE OF ACTION

Avoidance and Recovery of the March Exchange as an Actual Fraudulent Conveyance Under Bankruptcy Code §§ 544, 548, 550, and 551 and Applicable State Law of New York, New Jersey, California, and/or Delaware
(Against Defendants Agent, Deerfield, and John Does 1-100)

177. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

178. Section 548(a)(1)(A) of the Bankruptcy Code provides that a debtor or trustee may avoid a transfer of an interest of the debtor in property, or an obligation incurred by the debtor, that was made or incurred with "actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted." 11 U.S.C. § 548(a)(1)(A).

179. Under section 544(b) of the Bankruptcy Code, a debtor may avoid a transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law, including any applicable state fraudulent transfer laws. 11 U.S.C. § 544(b).

180. The Uptier Transaction constituted a transfer of the Debtors' interests in property and obligation incurred by the Debtors within the appropriate lookback period set forth in the Bankruptcy Code and relevant fraudulent transfer statutes as enacted in the states of New York, New Jersey, California, and Delaware.

181. The Company and Deerfield caused the Uptier Transaction to be executed, and obligations incurred, by the Debtors with actual intent to hinder or delay unsecured creditors in realizing the value of their claims. Such transfers were made with the intention to impede or obstruct unsecured creditors' ability to receive payment on their unsecured claims. Indeed, the Debtors [redacted].

182. Both the Debtors and Deerfield were aware that the Debtors would have [redacted].

183. The Debtors executed the Uptier Transaction with the knowledge that the natural consequence and effect of the March Exchange would be to encumber certain assets of Invitae and its subsidiaries that would otherwise be available for collection by unsecured creditors.

184. The Uptier Transaction was designed to move Deerfield's and the Participating 2024 Unsecured Noteholders' unsecured debt ahead of other unsecured creditors' *pari passu* debt and, thereby, to hinder, delay, or stall the ability of unsecured creditors to realize the value of their unsecured claims. Both Deerfield and the Debtors [redacted] at the time of the March Exchange and understood that the result of the transaction in such a proceeding would be to provide all of the value of the Estates to Deerfield and the Participating 2024 Unsecured Noteholders.

185. Deerfield and the Debtors selected [redacted].

186. The Debtors' intent to hinder or delay unsecured creditors in realizing the value of their unsecured claims is further established by at least the following badges of fraud:

a. the transfer was not made in the ordinary course of Debtors' business;

b. the value of the consideration received by the Debtors was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

c. the Debtors were insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; and

d. the Debtors and Deerfield sought to conceal the Debtors' true financial condition at the time of the transfer.

187. The Uptier Transaction was an intentional effort by the Debtors to serve Deerfield and the Participating 2024 Unsecured Noteholders' interests at the direct expense of the Debtors' general unsecured creditors. The real purpose of the Uptier Transaction was to ensure that when—

not if—the Debtors filed for chapter 11 protection, Deerfield and the Participating 2024 Unsecured Noteholders would recover on their claims before general unsecured creditors. Their actions, which were arranged and consummated through complicated transactions involving various professionals with full knowledge of the repercussions, demonstrate the Debtors' actual intent to hinder, delay, and defraud the rights of general unsecured creditors.

188. Therefore, the March Exchange should be avoided under section 548 of the Bankruptcy Code, section 544(b) of the Bankruptcy Code, and the substantially similar fraudulent conveyance provision under applicable state law.

189. Under sections 550(a) and 551 of the Bankruptcy Code, the Committee, on behalf of the Estates, seeks (i) to invalidate and avoid the liens securing the 2028 Senior Secured Notes and (ii) such other relief as the Court deems appropriate in connection with the unwinding of the March Exchange.

THIRD CAUSE OF ACTION

Avoidance and Recovery of the August Exchange Transaction as a Constructive Fraudulent Conveyance Under Bankruptcy Code §§ 544, 548, 550, and 551, and Applicable State Law of New York, New Jersey, California, and/or Delaware (Against Defendant Deerfield)

190. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

191. The August Exchange constituted a transfer of the Debtors' interests in property and obligation incurred by the Debtors within the appropriate lookback period set forth in the Bankruptcy Code and relevant fraudulent transfer statutes as enacted in the states of New York, New Jersey, California, and Delaware.

192. The Debtors did not receive reasonably equivalent value in exchange for the property they transferred in connection with the August Exchange. Deerfield received approximately $16 million in value in the form of Invitae equity compared with its 2024 Unsecured Notes, which the Debtors estimate will now receive pennies on the dollar. The August Exchange was consummated when Deerfield knew of, and contemplated scenarios about, the Debtors' impending bankruptcy, and it was aware it was likely the 2024 Unsecured Notes would not receive any value in a chapter 11 proceeding.

193. Deerfield exchanged its remaining 2024 Unsecured Notes that it knew were illiquid and likely had *de minimis* value for equity with higher value that it could monetize. Upon information and belief, Deerfield planned to sell, and immediately sold, the equity it gained as part of the August Exchange.

194. The Debtors were insolvent at the time the August Exchange transfers were made and the obligations arising therefrom were incurred.

195. Therefore, the August Exchange should be avoided under section 548 of the Bankruptcy Code, section 544(b) of the Bankruptcy Code, and the substantially similar fraudulent conveyance provision under applicable state law.

196. Under sections 550(a) and 551 of the Bankruptcy Code, the Committee seeks to recover the property conveyed through the August Exchange or the value thereof, for the benefit of the Estates.

FOURTH CAUSE OF ACTION

Avoidance and Recovery of Constructive Fraudulent Conveyance in Relation to Guarantees and Liens of the Debtor Subsidiaries Under Bankruptcy Code §§ 544, 548, 550, and 551, and Applicable State Law of New York, New Jersey, California, and/or Delaware (Against Defendant Agent)

197. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

198. Through the Uptier Transaction, certain subsidiaries of Invitae, including, ArcherDX, LLC; ArcherDX Clinical Services, Inc.; Genetic Solutions, LLC; Genosity, LLC; Ommdom Inc. (together, the "**Debtor Subsidiaries**"), Ciitizen, LLC; and YouScript, LLC—guaranteed the obligations of Invitae on the 2028 Senior Secured Notes and granted a security interest in substantially all of their assets to secure their guarantee obligations (the "**Guarantees**"). Specifically, the 2028 Senior Secured Notes and the guarantee thereof are secured by a first-priority lien "on substantially all of the tangible and intangible assets of the Company and the Guarantors, now owned or hereafter acquired by the Company and any Guarantor," subject to certain exceptions described in the 2028 Senior Secured Notes Indenture and documents governing the Collateral.

199. The issuance of the Guarantees constituted a transfer of the Debtor Subsidiaries' interests in property and obligation incurred by the Debtor Subsidiaries within the appropriate lookback period set forth in the Bankruptcy Code and relevant fraudulent transfer statutes as enacted in the states of New York, New Jersey, California, and Delaware.

200. The Debtor subsidiaries were not adequately capitalized following the March Exchange. Upon information and belief, the Debtor Subsidiaries were insolvent at the time of, or as a result of, the Uptier Transaction.

201. The Debtor Subsidiaries did not receive reasonably equivalent value in exchange for the Guarantees. The Debtor Subsidiaries had not pledged their assets to secure any obligation at the time of the March Exchange. As a result of the March Exchange, the Debtor Subsidiaries pledged substantially all of their assets to the Agent, for the benefit of Deerfield and a select amount of other 2024 Unsecured Notes and committed to a higher interest rate in exchange for nominal value. Indeed, Debtor Subsidiaries incurred obligations in connection with notes in the aggregate principal amount of $305.3 million.

202. By virtue of the foregoing, the Debtor Subsidiaries' issuance of the Guarantees constituted a constructive fraudulent transfer avoidable under section 548 of the Bankruptcy Code, section 544(a)(1)(B) of the Bankruptcy Code, and applicable law, including, but not limited to, the state fraudulent conveyance laws as enacted in the states of New York, New Jersey, California, and Delaware. Thus, the Committee is entitled to avoid the transfer.

203. Under sections 550(a) and 551 of the Bankruptcy Code, the Committee seeks to avoid the Guarantees in their entirety, or recover the value thereof, for the benefit of the Estates and unsecured creditors.

FIFTH CAUSE OF ACTION

Breach of Fiduciary Duty
Under Delaware Law
(Against the Director Defendants and the Officer Defendants)

204. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

205. As set forth above, Invitae was insolvent at all relevant times. Its debts and liabilities exceeded the reasonable fair value of its assets, it was inadequately capitalized, and it

did not have the ability to meet its maturing obligations as they came due in the ordinary course of its business.

206. The Director Defendants served as members of the Board that approved the Uptier Transaction and the August Exchange. Messrs. Scott, Aguiar, and Ms. Gorjanc also served as members of the Pricing Committee that approved the final principal terms of the Uptier Transaction and authorized the Authorized Officers to execute and consummate the Uptier Transaction.

207. The Officer Defendants (together with the Director Defendants, the "**Fiduciary Defendants**") were designated by the Board as "Authorized Officers" in connection with the negotiation and execution of the March Exchange and August Exchange and, in that capacity, negotiated, executed and consummated the Uptier Transaction and August Exchange.[58]

208. By virtue of their roles as Board members and Authorized Officers, the Fiduciary Defendants owed Invitae and its residual claimants—including, but not limited to, unsecured creditors—a fiduciary duty to exercise the care, skill, and diligence that an ordinarily careful and prudent person would use when carrying out the functions exercised by the directors and officers in relation to the Debtors. This duty included the obligation to acquire and maintain sufficient knowledge to enable them to discharge their duties as directors and officers, and to act on an informed basis after considering relevant and reasonably available information.

209. The Fiduciary Defendants also owed Invitae and its residual claimants, including, but not limited to, unsecured creditors, a fiduciary duty of loyalty, including the duty to act in good

[58] Ms. Wen, as Invitae's CFO at the time of the March Exchange, was designated as an "Authorized Officer" in connection with the negotiation and execution of the March Exchange. Mr. Dickey, as Interim CFO for Invitae at the time of the August Exchange, was designated as an "Authorized Officer" in connection with the negotiation and execution of the August Exchange.

faith and in the best interest of the Estates and, at all times, to subordinate their personal interests to the interests of Invitae.

210. The Fiduciary Defendants breached their fiduciary duties of care by approving the Uptier Transaction and August Exchange. They did so without regard to Invitae's solvency and without exercising the care that an ordinarily careful and prudent person would exercise in similar circumstances; by not considering and ignoring relevant and reasonably available material information; or in acting with bad faith, gross negligence, or reckless indifference to the interests of unsecured creditors.

211. Even though analyses prepared by PWP and J. Wood showed that [redacted], the Fiduciary Defendants nevertheless proceeded with the Uptier Transaction and August Exchange. The Board was aware that, [redacted]. The Fiduciary Defendants relied on an unrealistic expectation that they would be able to [redacted] without properly investigating their ability to do so. That unrealistic expectation was not based [redacted].

212. Deerfield and the Fiduciary Defendants selected [redacted].

213. The Fiduciary Defendants executed the Uptier Transaction and August Exchange, in part, to exercise leverage over the non-participating holders of the 2024 Unsecured Notes and 2028 Unsecured Notes.

214. The Fiduciary Defendants then proceeded to approve expenses that were beyond the Company's ability to pay and depleted the Estates, including exorbitant cash bonuses to executives.

215. The Fiduciary Defendants participated in or approved the selection [redacted]. The Fiduciary Defendants acted in bad faith by [redacted] The Fiduciary Defendants' refusal [redacted].

216. By approving the Uptier Transaction and August Exchange under these circumstances, the Fiduciary Defendants breached their duty of care and acted in bad faith and with gross negligence.

217. The Officer Defendants further breached their fiduciary duty of loyalty by acting in bad faith, failing to act in the best interests of Invitae as a whole, and failing to subordinate their personal interests to the interests of Invitae in negotiating and approving the Uptier Transaction and August Exchange and collecting exorbitant bonuses at the expense of the Debtors' creditors.

218. The Fiduciary Defendants, by such aforementioned breaches of fiduciary duty, did not act to maximize the value, or the long-term wealth-creating capacity, of Debtors as a whole for the benefit of all stakeholders.

219. The Fiduciary Defendants' breaches of their fiduciary duties caused substantial damage to unsecured creditors, in an amount to be proven at trial. But for such breaches of fiduciary duty, unsecured creditors would not have suffered such damage.

SIXTH CAUSE OF ACTION

Aiding and Abetting Breach of Fiduciary Duty Under Delaware Law (Against Defendant Deerfield)

220. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

221. The Fiduciary Defendants owed fiduciary duties of care and loyalty to, among others, unsecured creditors and repeatedly breached those fiduciary duties by favoring Deerfield to the detriment of the Debtors' unsecured creditors.

222. At all relevant times, Deerfield had actual knowledge (i) that Invitae was insolvent; (ii) that the Fiduciary Defendants owed fiduciary duties of care and loyalty to, among others, unsecured creditors; and (iii) that the Fiduciary Defendants breached their fiduciary duties of care and loyalty as set forth above. Deerfield was aware of the precarious financial position of the Debtors and that the Uptier Transaction and August Exchange would benefit it and other participants at the expense of the Debtors' other stakeholders.

223. Deerfield nonetheless knowingly participated in and substantially aided and abetted the Fiduciary Defendants in their above-alleged breaches of fiduciary duties by, among other things, directing and orchestrating the negotiation, formulation, and effectuation of the Uptier Transaction and August Exchange. Deerfield did so with the knowledge that the Uptier Transaction would unlawfully cause Deerfield's debt to move ahead of other unsecured creditors' *pari passu* unsecured claims without providing any benefit to the Debtors. In particular, Deerfield

exerted undue influence over Invitae's negotiation of the Uptier Transaction and August Exchange, including by, upon information and belief, [redacted]. Deerfield knowingly participated in the Fiduciary Defendants' conscious abdication of their roles as fiduciaries.

224. Deerfield's aiding and abetting of the above-specified breaches of fiduciary duty resulted in damages to Invitae and its business and prospects in an amount to be proved at trial.

SEVENTH CAUSE OF ACTION

Avoidance and Recovery of Unperfected Security Interest in Unencumbered Accounts
11 U.S.C. §§ 544, 550, and 551
(Against Defendant Agent)

225. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

226. The Debtors' Unencumbered Accounts are Excluded Accounts, and the asserted liens, claims, and interests in the Debtors' Unencumbered Accounts were unperfected as of the Petition Date because the Agent did not have control of the Unencumbered Accounts as: (a) the Debtors did not execute a DACA for these accounts in favor of the Agent; and (b) such accounts were not in possession of the Agent.

227. Because the Agent was not granted and did not properly perfect any lien, claim, or interest in the Unencumbered Accounts, any and all asserted liens, claims, and interests in the Unencumbered Accounts are avoidable pursuant to section 544(a) of the Bankruptcy Code, and the cash those accounts should be recovered by the Estates pursuant to section 550(a) of the

Bankruptcy Code and/or automatically preserved for the benefit of the Estates pursuant to section 551 of the Bankruptcy Code.

EIGHTH CAUSE OF ACTION

Avoidance and Recovery of Unperfected Security Interest in the Unencumbered Commercial Tort Claims and Proceeds Thereof
11 U.S.C. §§ 544, 550, and 551
(Against Defendant Agent)

228. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

229. The Agent was not granted any security interest in the Unencumbered Commercial Tort Claims, and the asserted liens, claims, and interests in the Unencumbered Commercial Tort Claims were unperfected as of the Petition Date because there was no UCC-1 filed specifically identifying the Unencumbered Commercial Tort Claims.

230. As a result, any asserted liens, claims, and interests by the Agent in the Unencumbered Commercial Tort Claims were unperfected as of the Petition Date.

231. Because the Agent has not been granted any security interest in the Unencumbered Commercial Tort Claims and has not properly perfected any lien, claim, and interest in the Unencumbered Commercial Tort Claims, any and all asserted liens, claims, and interests in the Unencumbered Commercial Tort Claims are avoidable pursuant to section 544(a) of the Bankruptcy Code, and the property and proceeds therefrom should be recovered by the Estates pursuant to section 550(a) of the Bankruptcy Code and/or automatically preserved for the benefit of the Estates pursuant to section 551 of the Bankruptcy Code.

NINTH CAUSE OF ACTION

Declaratory Judgment Regarding the Unencumbered Accounts and Unencumbered Commercial Tort Claims
28 U.S.C. §§ 2201 and 2202
(Against Defendant Agent)

232. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

233. For the reasons set forth herein, the Collateral does not include, and/or the Agent has failed to perfect its asserted liens, claims and interests in, the Unencumbered Accounts and Unencumbered Commercial Tort Claims.

234. An actual controversy exists between the parties concerning the validity, enforceability, priority, extent and perfection of the Agent's liens, claims, and interests in the Unencumbered Accounts and Unencumbered Commercial Tort Claims.

235. The Committee disputes any liens, claims, or interest as they relate to the Unencumbered Accounts and Unencumbered Commercial Tort Claims.

236. The Committee timely and properly objects to any asserted liens, security interest, or claims in the Unencumbered Accounts and Unencumbered Commercial Tort Claims to the extent inconsistent with allegations herein.

237. There exists a substantial controversy between the parties of sufficient immediacy and reality to warrant the issuance of a declaratory judgement under 28 U.S.C. § 2201 that: the Collateral does not include the Unencumbered Accounts and Unencumbered Commercial Tort Claims; that any asserted lien, claim or interest in the Unencumbered Accounts and Unencumbered Commercial Tort Claims are unperfected; and that the Committee's rights and remedies are reserved under applicable law. A prompt judicial determination of the respective rights and duties of the parties in these respects is necessary and appropriate.

TENTH CAUSE OF ACTION

Avoidance and Recovery of Preferential Transfers of Bonus Payments
11 U.S.C. §§ 547 and 550
(Against Defendants Knight, Brida, Schrank, Guigley, Sholehvar, Wen, Nussbaum, and Werner)

238. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

239. Section 547(b) of the Bankruptcy Code permits the avoidance as a preference of all transfers made to or for the benefit of a creditor on account of an antecedent debt, while the debtor was insolvent, within 90 days before the petition date, or up to one year before the petition date if such transfer was made to or for the benefit of a creditor who was an insider, which enables such creditor to receive more than such creditor would have received in a chapter 7 liquidation if such transfer had not been made.

240. Between March 2023 and January 2024, the Debtors transferred over $15,187,149.70 in bonuses, including retention bonuses, to their executives (the "**Bonus Payments**"), including Messrs. Knight, Brida, Guigley, Sholehvar, Nussbaum, Werner, Mses. Schrank, and Wen (the "**Bonus Payment Defendants**"). A list of the Bonus Payments is included as **Appendix B** to this Complaint and are described herein. Additionally, the Debtors transferred a total of $16,584,000 in retention bonuses as part of the January 2024 Retention Program.

241. The Bonus Payments were transfers made to, or for the benefit of, the Bonus Payment Defendants, who were creditors of the Debtors at the time of the Bonus Payments, on account of an antecedent debt or debts owed by the Debtors to each of the Bonus Payment Defendants before such transfers were made.

242. The Bonus Payments were made while the Debtors were insolvent. At all relevant times, the Debtors' debts and liabilities exceeded the reasonable fair value of their assets, and they

did not have the ability to meet their maturing obligations or to satisfy their existing or probable liabilities as they came due in the ordinary course of their business.

243. The Bonus Payment Defendants qualify as statutory insiders under section 101(31) of the Bankruptcy Code as the Bonus Payment Defendants were all directors, officers, or persons in control of the Debtors, or relatives of directors, officers, or persons in control of the Debtors.

244. The Bonus Payments are identified in the *Schedule of Assets and Liabilities and Statement of Financial Affairs for Invitae Corporation* [Docket No. 202] as "[p]ayments or other transfers of property made within 1 year before filing this case that benefited any insider."

245. Each of the Bonus Payments was made within one year of the Petition Date.

246. As a result of the Bonus Payments, each of the Bonus Payment Defendants received more than they would be entitled to receive if (i) under a hypothetical chapter 7 case; (ii) the transfers had not been made; and (iii) such creditor received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

247. Accordingly, the Bonus Payments should be avoided as preferential transfers under section 547(b) of the Bankruptcy Code, and such assets, or the value thereof, should be recovered and preferred in their entirety for the benefit of the Estates and unsecured creditors.

248. Based upon the foregoing, the Bonus Payments constitute avoidable preferential transfers pursuant to section 547(b) of the Bankruptcy Code and, in accordance with section 550(a) of the Bankruptcy Code, the Committee may recover from the Bonus Payment Defendants on behalf of the Debtors the amount of the Bonus Payments, plus interest.

ELEVENTH CAUSE OF ACTION

Avoidance and Recovery of Constructive Fraudulent Conveyance of Bonus Payments 11 U.S.C. §§ 544, 548, and 550, and Applicable State Law of New Jersey, California, and/or Delaware (Against Defendants Knight, Brida, Schrank, Guigley, Sholehvar, Wen, Nussbaum, and Werner)

249. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

250. To the extent the Bonus Payments are not deemed avoidable preferences, the Committee asserts, in the alternative, a cause of action for avoidance of the Bonus Payments as a constructive fraudulent transfer.

251. The Bonus Payments constituted a transfer of the Debtors' interests in property and an obligation incurred by the Debtors within the appropriate lookback period set forth in the Bankruptcy Code and relevant fraudulent transfer statutes as enacted in the states of New Jersey, California, and Delaware.

252. The Debtors did not receive reasonably equivalent value in exchange for the Bonus Payments.

253. Upon information and belief, the Debtors were insolvent, or became insolvent, and/or had unreasonably small capital in relation to their business at the time of or as a result of the Bonus Payments.

254. Therefore, the Bonus Payments should be avoided under section 548 of the Bankruptcy Code, section 544(b) of the Bankruptcy Code, and the substantially similar fraudulent conveyance provisions under applicable state law.

255. Under sections 550(a) of the Bankruptcy Code, the Committee seeks to recover the property conveyed through the Bonus Payments or the value thereof, for the benefit of the Estates.

TWELFTH CAUSE OF ACTION

Disallowance of Claims
11 U.S.C. § 502(d)
(Against Defendants Deerfield, Agent, Knight, Brida, Schrank, Guigley, Sholehvar, Wen, Nussbaum, Werner, and John Does 1-100)

256. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

257. Deerfield, Agent, Messrs. Knight, Brida, Guigley, Sholehvar, Nussbaum, Werner, Mses. Schrank, Wen, and John Does 1-100 (the "**Chapter 5 Defendants**") are persons or entities from which property is recoverable under section 550 of the Bankruptcy Code or is a transferee of transfers avoidable under sections 544, 547, and 548 of the Bankruptcy Code.

258. The Chapter 5 Defendants have not paid the amount or turned over any property transferred for which the Chapter 5 Defendants are liable under section 550 of the Bankruptcy Code.

259. To the extent that any of the Chapter 5 Defendants assert any claims, including any claims that are filed or scheduled, against the Debtors, such claims are disallowed unless and until such Chapter 5 Defendant, as appropriate, returns to the Estates property, and pay the Estates amounts, for which it is liable under section 550 of the Bankruptcy Code.

THIRTEENTH CAUSE OF ACTION

Declaratory Judgment Regarding Right to Setoff
28 U.S.C. §§ 2201 and 2202, 11 U.S.C. § 558, and Applicable State Law
(Against Defendants Deerfield, the Director Defendants, and the Officer Defendants)

260. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

261. The Estates have the benefit of any defense available to the Debtors as against any entity. As such, the Committee, bringing the Complaint on behalf of the Estates, may assert the

Debtors' right to setoff as a defense under section 558 of the Bankruptcy Code and applicable state law.

262. The Estates have claims against Deerfield, the Director Defendants, and the Officer Defendants for damages arising under the applicable counts alleged herein that arose from Deerfield's, the Director Defendants', and the Officer Defendants' conduct and are entitled to such damages as described herein.

263. To the extent that any damages are awarded to the Estates from Deerfield, the Director Defendants, and the Officer Defendants under the applicable counts alleged herein, the Estates are entitled to setoff any such damages against any claims asserted by Deerfield, the Director Defendants, and the Officer Defendants against the Debtors.

264. To the extent that any damages are awarded to the Estates from Deerfield, the Director Defendants, and the Officer Defendants under the applicable counts alleged herein, an actual controversy exists between the parties regarding the Estates' right to apply the damages incurred by the Estates as a result of Deerfield's, the Director Defendants', and the Officer Defendants' conduct to setoff the amounts possibly owed to Deerfield, the Director Defendants, and the Officer Defendants on account of any claims by Deerfield, the Director Defendants, and the Officer Defendants against the Debtors.

265. To the extent any damages are awarded to the Estates from Deerfield, the Director Defendants, and the Officer Defendants on account of any claims against Deerfield, the Director Defendants, and the Officer Defendants, there exists a substantial controversy between the parties of sufficient immediacy and reality to warrant the issuance of a declaratory judgement under 28 U.S.C. § 2201. A prompt judicial determination of the respective rights and duties of the parties in these respects is necessary and appropriate.

FOURTEENTH CAUSE OF ACTION

Avoidance and Recovery of Constructive Fraudulent Conveyance of Consent Fees
11 U.S.C. §§ 544, 548, 550, and Applicable State Law of New Jersey, California, and/or Delaware
(Against Defendant Deerfield)

266. The Committee repeats and realleges the allegations in the foregoing paragraphs, which are incorporated by reference as if fully set forth herein.

267. The Committee asserts a cause of action for avoidance of payment of the Consent Fees as a constructive fraudulent transfer.

268. Payment of the Consent Fees constituted a transfer of the Debtors' interests in property and an obligation incurred by the Debtors within the appropriate lookback period set forth in the Bankruptcy Code and relevant fraudulent transfer statutes as enacted in the states of New Jersey, California, and Delaware.

269. The Debtors did not receive reasonably equivalent value in exchange for the Consent Fees.

270. Upon information and belief, the Debtors were insolvent, or became insolvent, and/or had unreasonably small capital in relation to their business at the time of or as a result of payment of the Consent Fees.

271. Therefore, the Consent Fees should be avoided under section 548 of the Bankruptcy Code, section 544(b) of the Bankruptcy Code, and the substantially similar fraudulent conveyance provisions under applicable state law.

272. Under sections 550(a) of the Bankruptcy Code, the Committee seeks to recover the property conveyed through the Consent Fees or the value thereof, for the benefit of the Estates.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter an order consistent with the relief sought in the above listed causes of action as follows:

(i) Ordering damages in an amount to be proven at trial;

(ii) Avoiding, as fraudulent conveyances under section 548 of the Bankruptcy Code, section 544 of the Bankruptcy Code, and applicable state law, the March Exchange;

(iii) Ordering, that, under sections 550(a) and 551 of the Bankruptcy Code, the liens securing the 2028 Senior Secured Notes are invalidated and avoided, and other such relief as appropriate in connection with the unwinding of the March Exchange;

(iv) Avoiding, as fraudulent conveyances under section 548 of the Bankruptcy Code, section 544 of the Bankruptcy Code, and applicable state law, the August Exchange;

(v) Ordering, that, under sections 550(a) and 551 of the Bankruptcy Code, Plaintiff may recover the value of the property conveyed in connection with the August Exchange, for the benefit of the Estates;

(vi) Avoiding, as fraudulent conveyances under section 548 of the Bankruptcy Code, section 544 of the Bankruptcy Code, and applicable state law, all of the guarantees and collateral pledges in favor of the Agent made by each of the Debtors, and recovering and preserving such guarantees and pledges in their entirety, or the value thereof, for the benefit of the Estates and unsecured creditors;

(vii) Ordering judgment against the Fiduciary Defendants for breaches of fiduciary duties, including disgorgement of compensation and resulting damages in an amount to be determined at trial;

(viii) Ordering judgment against Deerfield for aiding and abetting the Fiduciary Defendants' breaches of fiduciary duties and resulting damages in an amount to be determined at trial;

(ix) Ordering recission of the March Exchange for breaches of fiduciary duties by the Fiduciary Defendants;

(x) Avoiding the unperfected security interests in the Debtors' Unencumbered Accounts and the Unencumbered Commercial Tort Claims and the proceeds thereof;

(xi) Ordering and declaring that the Collateral does not include the Unencumbered Accounts and Unencumbered Commercial Tort Claims, that any asserted lien, claim or interest in the Unencumbered Accounts and Unencumbered Commercial

Tort Claims are unperfected, and that Plaintiff's rights and remedies are reserved under applicable law;

(xii) Ordering that, under sections 550(a) and 551 of the Bankruptcy Code, Plaintiff may recover of the cash in the Unencumbered Accounts and the property and proceeds from the Unencumbered Commercial Tort Claims, and that such property is automatically preserved for the benefit of the Estates pursuant to section 551 of the Bankruptcy Code;

(xiii) Avoiding, as preferential and fraudulent transfers under sections 544, 547, and 548 of the Bankruptcy Code, and all applicable state laws, the transfers of the Bonus Payments to Bonus Payment Defendants;

(xiv) Ordering that, under sections 550(a) and 551 of the Bankruptcy Code, Plaintiff may recover from the Bonus Payment Defendants on behalf of the Estates the amount of the Bonus Payments, plus interest;

(xv) Avoiding, as fraudulent transfers under sections 544 and 548 of the Bankruptcy Code, and all applicable state laws, the transfers of the Consent Fees to Deerfield;

(xvi) Ordering that, under sections 550(a) and 551 of the Bankruptcy Code, Plaintiff may recover from Deerfield on behalf of the Estates the amount of the Consent Fees, plus interest;

(xvii) Ordering, that pursuant to the applicable provisions of the Bankruptcy Code, including, without limitation, section 502(d) of the Bankruptcy Code, each claim asserted by the Chapter 5 Defendants is disallowed;

(xviii) Ordering and declaring, to the extent necessary, that Plaintiff is entitled to setoff the damages awarded to the Estates under the applicable counts alleged herein against any claims raised by Deerfield, the Director Defendants, and the Officer Defendants and any other amounts allegedly owed to Deerfield, the Director Defendants, and the Officer Defendants;

(xix) Granting Plaintiff costs of suit incurred herein, including, without limitation, attorneys' fees, costs, and other expenses incurred in this action;

(xx) Granting Plaintiff pre- and post-judgment interest on the judgment amount to the fullest extent allowed by applicable law; and

(xxi) Granting such other and further relief, at law or in equity, to which Plaintiff is justly entitled.

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Appendix A

Date	Acquired Entity	Cash ($)	Equity ($)	Assumed Liabilities / Other ($)	Total Consideration Paid ($)	Consideration Received Through Disposition ($)
June 2019	Singular Bio	3,400,000	53,900,000	-	57,300,000	N/A
July 2019	Jungla Inc.	14,100,000	44,900,000	-	59,000,000	N/A
November 2019	Clear Genetics, Inc.	24,841,000	25,221,000	-	50,062,000	N/A
March 2020	Diploid	32,323,000	42,453,000	7,538,000	82,314,000	N/A
April 2020	Genelex	-	13,200,000	-	13,200,000	N/A
April 2020	YouScript Inc.	24,500,000	28,200,000	-	52,700,000	N/A
October 2020	ArcherDX	335,300,000	1,060,600,000	935,600,000	2,331,500,000	48,100,000
December 2020	IntelliGene Health Informatics, LLC	-	2,700,000	-	2,700,000	N/A
February 2021	Reference Genomics, Inc. d/b/a One Codex	16,504,000	58,774,000	8,113,000	83,391,000	"Immaterial amount"
April 2021	Genosity, Inc.	119,959,000	67,308,000	8,774,000	196,041,000	N/A
July 2021	MedNeon LLC	12,900,000	16,300,000	4,900,000	34,100,000	N/A
September 2021	Ciitizen Corporation	87,361,000	186,778,000	34,161,000	308,300,000	843,742

Date	Acquired Entity	Cash ($)	Equity ($)	Assumed Liabilities / Other ($)	Total Consideration Paid ($)	Consideration Received Through Disposition ($)
December 2021	Stratify Genomics, Inc.	8,000,000	16,800,000	4,200,000	29,000,000	N/A
Total Amount Spent		**679,188,000**	**1,617,134,000**	**1,003,286,000**	**3,299,608,000**	**48,943,742**
Sale to LabCorp						239,000,000
Total					**3,299,608,000**	**287,943,742**

Appendix B

Executive Name	Date	Amount	Item
Kenneth Knight			
Kenneth Knight	3/15/2023	$10,366.32	Stock Based Bonus
Kenneth Knight	5/16/2023	$218,274.84	Stock Based Bonus
Kenneth Knight	6/16/2023	$250,000.00	2023 Special Bonus
Kenneth Knight	10/27/2023	$3,500,000.00	Retention Payment
Kenneth Knight	1/5/2024	$250,000.00	2023 Special Bonus
Kenneth Knight	1/17/2024	$2,974,687.00	Retention Payment
Total	**-**	**$7,203,328.16**	**-**
Ana Schrank			
Ana Schrank	1/17/2024	$2,002,750.00	Retention Payment
Total	**-**	**$2,002,750.00**	**-**
Robert Nussbaum			
Robert Nussbaum	3/15/2023	$10,366.32	Stock Based Bonus
Robert Nussbaum	5/16/2023	$89,548.20	Stock Based Bonus
Robert Nussbaum	6/16/2023	$40,000.00	2023 Special Bonus
Robert Nussbaum	12/29/2023	$40,000.00	2023 Special Bonus
Robert Nussbaum	12/29/2023	-$21,708.00	Stock Based Bonus Adjustment
Total	**-**	**$158,206.52**	**-**
Thomas Brida			
Thomas Brida	3/15/2023	$10,366.32	Stock Based Bonus
Thomas Brida	5/16/2023	$89,548.20	Stock Based Bonus
Thomas Brida	6/16/2023	$26,223.61	Stock Based Bonus
Thomas Brida	6/16/2023	$40,000.00	2023 Special Bonus
Thomas Brida	8/25/2023	$17,653.85	Stock Based Bonus
Thomas Brida	12/22/2023	$100,000.00	Retention Payment
Thomas Brida	12/29/2023	-$21,708.00	Stock Based Bonus Adjustment
Thomas Brida	1/5/2024	$40,000.00	2023 Special Bonus
Thomas Brida	1/17/2024	$1,834,351.00	Retention Payment
Total	**-**	**$2,136,434.98**	**-**
David Sholehvar			
David Sholehvar	1/17/2024	$1,594,740.00	Retention Payment
Total	**-**	**$1,594,740.00**	**-**
Robert Guigley			
Robert Guigley	1/17/2024	$1,726,850.00	Retention Payment
Total	**-**	**$1,726,850.00**	**-**
Yafei (Roxi) Wen			
Yafei (Roxi) Wen	3/15/2023	$10,366.32	Stock Based Bonus
Yafei (Roxi) Wen	5/16/2023	$147,000.42	Stock Based Bonus
Yafei (Roxi) Wen	6/16/2023	$125,000.00	2023 Special Bonus
Total	**-**	**$282,366.74**	**-**
Robert Werner			
Robert Werner	5/16/2023	$82,473.30	Stock Based Bonus
Total	**-**	**$82,473.30**	**-**
Total Management Bonuses			
Total Bonus Payments		**$15,187,149.70**	**-**

Appendix C

Owner	Financial Institution	Account No. (last four digits)	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
Grantor	**Financial Institution**	**Account No. (last four digits)**	**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