UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 24-11362(MBK)
	.	
INVITAE CORPORATION,	.	(Jointly Administered)
et al.,	.	
	.	Clarkson S. Fisher U.S. Courthouse
	.	402 East State
	.	Trenton, NJ 08608
Debtors.	.	
	.	June 11, 2024
. . . .	.	10:02 a.m.

TRANSCRIPT OF HEARING ON DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING (I) THE ADEQUACY OF THE DISCLOSURE STATEMENT, (II) THE SOLICITATION AND VOTING PROCEDURES, (III) THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, AND (IV) CERTAIN DATES WITH RESPECT THERETO [DOCKET NO. 470], AND DEBTORS' MOTION FOR ENTRY OF AN ORDER EXTENDING THE DEBTORS' EXCLUSIVITY PERIODS TO FILE A CHAPTER 11 PLAN AND SOLICIT ACCEPTANCES THEREOF PURSUANT TO SECTION 1211 OF THE BANKRUPTCY CODE [DOCKET NO. 523]

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

APPEARANCES ON NEXT PAGE.

Audio Operator: Kiya Martin

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For the U.S. Trustee:	Office of the United States Trustee By: JEFFREY M. SPONDER, ESQ. One Newark Center Newark, NJ 07102
For the Official Committee of Unsecured Creditors:	White & Case LLP BY: J. CHRISTOPHER SHORE, ESQ. 1221 Avenue of the Americas New York, NY 10020

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1 (Proceedings commenced at 10:02 a.m.)
2 THE COURT: Okay, good morning, everyone. This is
3 Judge Kaplan. I'll be hearing the Invitae matters this
4 morning. And I'll give everybody a chance to alter their video
5 for those who wish to be seen and heard.
6 All right. I assume you all can hear me.
7 UNIDENTIFIED SPEAKER: Yes, Your Honor.
8 THE COURT: Great, thank you.
9 UNIDENTIFIED SPEAKER: Yes, Your Honor.
10 THE COURT: All right. So we have a few matters on
11 an amended agenda in the Invitae Corporation matter. Before I
12 turn first to debtors' counsel, let me address the status of
13 the mediation and the selection of a mediator. I think it
14 would be appropriate.
15 I did receive the suggested -- the lists of suggested
16 mediators from both the Committee and the debtor. I have
17 selected retired judge Jose Linares to conduct the mediation.
18 I have spoken with Judge Linares. Judge Linares is with the
19 McCarter & English firm. And he is available. He also -- I
20 forwarded to him the proposed mediation order. He looked at
21 the dates. He did have some concerns. He has availability
22 July 1, I think, and July 3rd.
23 He will -- well, I'll ask the parties to reach out
24 for him directly as far as scheduling an initial call. He did
25 provide to me certain disclosures that I will relay to you all.

1 I will say from the outset this will come as no surprise. I
2 don't view them as any disabling conflicts. But McCarter &
3 English represents U.S. Bank Trust Company on various matters
4 that are completely unrelated. I'll give everybody a chance
5 just to take notes.
6 McCarter & English also represents Fidelity National
7 Title Group, which is an affiliate of Wilmington Savings Fund.
8 Also, in a wholly unrelated matter and Judge Linares nor anyone
9 who would be working with him, Mr. Jeffrey Testa, do not work
10 on any of those matters or have not.
11 And, finally, well, in addition, a partner at
12 McCarter & English, Lee Martinson, did file a declaration in
13 this case to be continued as an ordinary course professional
14 for the debtor ArcherDx in certain pending patent litigation,
15 again, I don't find that to be disabling or of concern.
16 And, finally, Judge Linares would like the parties to
17 know he has served in the past as a neutral mediator in
18 unrelated matters where parties were represented by Kirkland &
19 Ellis and/or Cole Schotz as counsel. I've reviewed those. I
20 don't find them disabling or in any way impairing Judge
21 Linares' ability to pursue the role as a neutral mediator, as a
22 neutral in this case. My hope and expectation is that he will
23 do a great job and make my life easier.
24 So with that, I will ask the parties -- I will enter
25 the order -- Judge Linares just changed some language that I

1 viewed as de minimis. I'll enter an order hopefully later
2 today, and I'll ask the parties to arrange a call initially
3 with him and to start the process.
4 All right. With that, let me turn to debtors'
5 counsel. Good morning.
6 MR. PETRIE: Good morning, Your Honor.
7 This is Francis Petrie of Kirkland. Can you hear and
8 see me all right?
9 THE COURT: I can hear and see you.
10 MR. PETRIE: Great.
11 Okay. So the first item on the agenda is approval of
12 our disclosure statement. The motion to approve the disclosure
13 statement was filed originally on May 9th at Docket Number 470.
14 And we hope to gain entry of this order, which will approve the
15 adequacy of the disclosure statement and approval of our
16 solicitation and voting procedures to stay on track for a
17 confirmation hearing of July 22nd.
18 Your Honor, with respect to the DS, we hope to have a
19 fully uncontested hearing today. As instructed at our last
20 hearing, we worked with all parties in interest to incorporate
21 disclosures that reflect their positions on the proposed plan
22 or reserve their rights to raise issues that are more properly
23 brought at confirmation.
24 Specifically, we received comments from the U.S.
25 Trustee on the form of DS order. We worked with the SEC on

1 agreeable language, reserving their rights. U.S. Bank added
2 some language in its capacity as a trustee. And with respect
3 to the formal objection of the Committee of Unsecured
4 Creditors, we included their statement in the revised
5 disclosure statement.
6 In a further effort to resolve the Committee's
7 outstanding objections, we also agreed to solicit votes of all
8 unsecured classes under the plan while reserving rights related
9 to whether such votes will be needed or counted for purposes of
10 confirmation. Your Honor will see last night that we filed the
11 amended disclosure statement at Docket Number 614. This
12 reflects the changes we just discussed, as well as additional
13 edits to update parties in interest on the debtors' best
14 available information regarding the likely outcomes to
15 distributions to expect from the proposed waterfall plan.
16 If it pleases the Court, given the late hour by which
17 we filed this disclosure statement and the correlated plan
18 changes, we believe it would be helpful for the record to walk
19 through a quick summary of the changes that are in that
20 document. Perhaps most importantly, we worked to clarify the
21 expected distributions and recoveries under the plan based on
22 the facts on the ground.
23 As Your Honor is aware, the plan is a liquidating
24 plan, and it proposes to allocate the attributable values to
25 the various classes of the debtor's stakeholders under the

1 terms contemplated by the TSA and incorporated into the plan.
2 The total distributable value has been the subject of some
3 dispute, but it's a simple formula. It comprises, first, the
4 239 billion purchase price of the LabCorp sale; second, the
5 estimated remaining cash on hand with an assumed effective date
6 of August 2nd; and third, some contingent assets that are
7 highly dependent on the debtors' ability to continue to collect
8 amounts receivable and certain contingent earnouts, which will
9 take place over the course of an estimated nine-month wind-down
10 period post-effective date.
11 Because of the contingent nature of the recoveries in
12 that third bucket, the plan has always been premised on a range
13 of total distributable value that the debtors have continued to
14 refine with granular specificity. The debtors believe this
15 will land in a fairly narrow range of 398 to 409 million.
16 However, irrespective of where the ultimate number falls,
17 because of the benefits secured by the TSA, the plan ensures
18 that certain value can be reserved or taken off the top to
19 cover specific categories of costs and claims, namely, the
20 administrative costs of the estate, which are estimated to be
21 approximately $65 million, the costs associated with winding
22 down the estate and collecting on the contingent assets, which
23 is projected to be approximately 15 million for the nine-month
24 wind-down period, and the immediate and effective date payment
25 to holders of general unsecured convenience claims who fall or

1 elect into Class 4 and holders of Class 5 subsidiary general
2 unsecured claims, which classes together are estimated to
3 capture approximately 94 percent of all unsecured claim holders
4 and require payment of approximately $16 million on the
5 effective date.
6 After and only after those costs and claims are taken
7 off or reserved from the total distributable value available on
8 the effective date, payments will then flow in accordance with
9 the Bankruptcy Code. If there's enough excess value that can
10 be distributed to the remaining unsecured claims in Classes 6
11 or 11, they will come through that.
12 So, after netting the illustrative administrative and
13 wind-down costs of 65 plus 15, so an 80 total, from this
14 projected midpoint, the estimated value available for
15 distribution to creditors on the effective date is
16 approximately $324 million. And with a projected $16 million
17 of that amount expected to be needed to pay out Classes 4 and
18 5, that would leave an estimated $308 million available for
19 distribution to Class 3 secured claims on the effective date.
20 So, Your Honor, although illustrative, this map is
21 important because it serves to highlight two issues that we
22 believed were important to include in our updated disclosure
23 statement. First, it shows exactly how cuspy this case is.
24 Even with the successful sale expected to generate a
25 significant proceeds and the debtors' enhanced performance

1 pre-sale generating a higher distributable value than we
2 initially thought.
3 And second, the map highlights an important issue
4 related to the quantum and validity of the Class 3 secured
5 notes claim. When inclusive of the make-whole and accrued
6 interest, even accounting for the interest at the non-default
7 contract rate, it would exceed the remaining distributable
8 value. The debtors have, therefore, reflected the full claim
9 amount with appropriate footnotes to explain the related
10 dispute so parties in interest can understand the impact of the
11 full claim amount on projected recovery.
12 The debtors have also added a supplemental
13 liquidation analysis that incorporates this full claim amount
14 inclusive of the make-whole and interest, which reflects that
15 in a hypothetical Chapter 7 liquidation, all value would flow
16 to the secured class and these debtors would be
17 administratively insolvent with no value expected to flow to
18 any unsecured creditor.
19 Your Honor, that summarizes the changes and the
20 substance of the disclosure statement. We do believe that the
21 disclosure statement is sufficient to meet the flexible
22 standard of Section 1125 in that it provides adequate
23 information for creditors to make an informed decision
24 regarding whether or not to vote for the plan.
25 Does Your Honor have any questions for me at this

1 time?
2 THE COURT: Not at this point. Let me hear from the
3 Committee. I thank you, Mr. Petrie.
4 Mr. Shore, good morning.
5 MR. SHORE: Good morning, Your Honor.
6 Chris Shore from White & Case on behalf of the
7 Official Committee.
8 A lot of what was just said I can address in the
9 context of exclusivity, particularly some of the figures that
10 were gone through. But from the Committee's perspective, the
11 debtors agreed to put in our letter, have also agreed to
12 solicit all unsecured creditors so that if we're able to get to
13 a resolution in mediation, we can re-solicit light or may not
14 need to re-solicit at all in order to get that deal done.
15 I will say that we did get the amendments to the plan
16 in DS early this morning. Some of the members of the team have
17 been through it. I'm not confident I have everybody's
18 response. I'm certain that we're going to get comfortable with
19 it, but the debtors may need to take some comments from us.
20 But otherwise, we have no objection to entry of the disclosure
21 statement and solicitation order.
22 THE COURT: All right. I thank you, Mr. Shore.
23 And I thank the professionals for their work in
24 trying to move towards at least a consent pathway, consensual
25 pathway on the disclosure statement. But first, let me see if

1 -- I don't see any other hands. Does anybody else wish to be
2 heard? There's Mr. Sponder.
3 Good morning, Mr. Sponder. I see your hand.
4 MR. SPONDER: Good morning, Your Honor.
5 THE COURT: There you are.
6 MR. SPONDER: As was just said by Committee Counsel,
7 Mr. Shore, the documents were just filed at 2 a.m. this
8 morning. We haven't had a chance to review the revised
9 disclosure statement order, which we'd like to do. I believe
10 that there are a few exhibits that are new that we'd like to
11 look at and make sure that we don't have any issues with those.
12 I don't think we will because I think they're
13 basically similar to the ballots that were already put in there
14 but, like I said, we haven't had a chance to go through it all,
15 so we can do so immediately after this hearing and get back to
16 debtors' counsel. Thank you, Your Honor.
17 THE COURT: All right. Mr. Petrie, let me ask you
18 this. If the Court were to commit to entering the order
19 approving the disclosure statement by noon on Thursday, does
20 that work schedule-wise and, also, that should at least give
21 the parties a chance if there's any language changes for the
22 rest of the day and to make them tomorrow? Is that --
23 MR. PETRIE: That would be fine, Your Honor
24 (indiscernible) --
25 THE COURT: All right.

1 MR. PETRIE: -- resolution before then and
2 (indiscernible).
3 THE COURT: If you send word down to chambers that
4 everybody has signed off on it, we'll enter it when that
5 occurs. Otherwise, I would look to have my staff enter the
6 order once I get a chance to look at it by noon on Thursday,
7 which is the 13th, I guess.
8 All right. So, we'll mark the hearing granted, order
9 to be submitted.
10 MR. PETRIE: Great. Thank you, Your Honor.
11 THE COURT: Thank you.
12 MR. PETRIE: That brings us to the next item we have
13 up, which is the debtors' request to extend exclusivity, which
14 we originally filed at Docket Number 523.
15 Your Honor, this is the debtors' first request to
16 extend exclusivity. If Your Honor takes judicial notice of the
17 docket, you will see that we've made substantial progress in
18 filing these cases in February. We have, in these four months,
19 filed many motions that obtained relief from the Court on a
20 number of fronts, including first and second day orders that
21 assisted to stabilize the business after we filed for Chapter
22 11.
23 We obtained approval of a consensual cash collateral
24 order and continued our efforts in the marketing and auction
25 process that ultimately led to the LabCorp bid and approved

1 sale, which is the only reason that the allocation of value
2 under the plan is possible. We also filed a viable plan and
3 disclosure statement that's meant to proceed in parallel with
4 sale closing in order to affect the wind-down of the remaining
5 estate as quickly and efficiently as possible.
6 These cases involve a public company in a highly
7 regulated industry that delivers advanced testing services with
8 approximately 1.5 billion in funded debt obligations, so they
9 are certainly large and complex. We're making good-faith
10 progress towards confirming our plan of reorganization and
11 getting out of Chapter 11 in an orderly way.
12 We do believe we've demonstrated that we should be
13 able to afford the protections of breathing room to complete
14 solicitation of our plan without the distraction of defending
15 against multiple plans proposed by other stakeholders, a
16 scenario that would put the sale transaction at risk and cause
17 delay in returning value to stakeholders.
18 Our original motion for exclusivity asked for a
19 120-day extension. We did receive an objection from the
20 Committee and, in response, we have lessened our request to 60
21 days. This time frame would extend our proposed exclusivity
22 period through August 10th and the proposed solicitation period
23 through October 11th. We do believe that this shortened time
24 frame, which will get us to the projected emergence and close
25 of the sale transaction, as well as the decision to solicit

1 general unsecured creditors taken together, defuse the issues
2 raised by the Committee in its objection.
3 We take our role as fiduciaries to the estate very
4 seriously, and we're mindful of the need to expedite these
5 cases and bring them to conclusion. We're optimistic of how
6 mediation will go and further negotiations with key
7 stakeholders in obtaining the approval of regulatory bodies for
8 the sale process.
9 At this stage, there's no reason to prematurely
10 terminate exclusivity. We seek to proceed expeditiously on our
11 confirmation schedule and, because of the work we still have to
12 do, we believe that our requested extension is reasonable under
13 the circumstances. Thank you, Your Honor.
14 THE COURT: All right, thank you again.
15 Mr. Shore?
16 MR. SHORE: Thank you, Your Honor. I'd like to do
17 this. I'd like to address the Court on exclusivity and then
18 move into the issues that were raised in last night's letter
19 regarding scheduling of the mechanics of the July 9th hearing,
20 if that's okay.
21 THE COURT: That's fine.
22 MR. SHORE: All right. I've come to see exclusivity
23 hearings as one of the key opportunities for a court to get an
24 understanding of the deal dynamics and what's going on in a
25 case. It's why exclusivity looks at, among other things, the

1 good-faith progress towards a plan. And, indeed, in Paragraphs
2 25, 26, and 27 of their reply, the debtors seek to portray
3 themselves as a reasonable, responsive, proactive debtor eager
4 to engage and negotiate. It won't surprise the Court, based on
5 what you've seen already, that the Committee disagrees with
6 that.
7 We have found this debtor slate particularly rigid
8 and uncooperative, and I do, for the record, in responding to
9 their reply, defend my client to some extent. The gist of the
10 debtors' criticism of the Committee is that they believe the
11 Committee is intent on litigating at all costs and turning
12 every hearing into a litigation. And, you know, assigning
13 motives is tricky from our perspective. It seems like the
14 Special Committee has directed the debtors to sweep the uptier
15 under the rug and get B&O releases at all costs.
16 But motives are what motives are. Let's just focus
17 on the facts. The pattern emerged early. Before I appeared in
18 the Court, I came in on the retention hearing, but at the first
19 day, with respect to cash collateral, they point out we
20 objected to cash collateral. What we asked for was more time
21 and more budget. The debtors said no. We had to file an
22 objection, prosecute the objection, and then, ultimately, they
23 gave us more time and budget.
24 At the retention hearing, we asked them, you don't
25 need to step out of the case. Please recuse yourself, if only

1 for appearances. It's not a good look to say that we must
2 control this. The debtors said absolutely not. We worked to
3 streamline the case so that you didn't have to have a witness
4 there. We agreed to stipulated facts. And if I could
5 summarize what Your Honor said, regardless of whether it's a
6 good look or not, we're going to have to deal with the fact
7 that Deerfield's too important in this case, and we're going to
8 go on. Okay, we moved on. There's no appeal. We just lived
9 with your ruling and moved on in the case.
10 I do want to pause. It's not that the debtors are
11 just ignoring us. Your Honor ended that hearing with a
12 statement that I'll paraphrase as, I don't normally do this,
13 but it may be time for people to start lawyering up. The
14 debtors have done nothing. Ms. Frizzley does not have her own
15 counsel. The Special Committee is still controlling things.
16 The D's and O's have no counsel. The debtors have
17 said that they're not bringing the D's and O's to the
18 mediation. The debtors are going to be carrying the water for
19 the D and O releases at the mediation, even though there's $60
20 million of D&O insurance. In other words, even though there
21 are defense costs to be paid out there, the debtors want to
22 spend the money defending the D's and O's.
23 With respect to scheduling, we said we wanted a
24 preplanned setting. The debtors said absolutely not. In fact,
25 the first thing they did was they decided that notwithstanding

1 that they had an agreed court order to produce people for
2 interviews, they said no. Both they and Deerfield blew off the
3 interviews and then said the first time you can talk to the
4 people you wanted to talk to is the week of July 4th. That's
5 in their proposed schedule.
6 Anyway, the Court gave us a preplanned setting and
7 we're working to meet that. But we did come out with an
8 alternate plan and waterfall. We are not sitting back just
9 taking potshots at the debtor. We are moving proactively
10 forward to secure recoveries for our clients.
11 The debtors keep saying we're wildly wrong, but they
12 didn't meet for almost two weeks until after we sent that. We
13 finally had the and, as you just heard, the secured creditors
14 are oversecured by $65 million. We have been right all along.
15 There is more than enough money to pay the secured creditors.
16 And, in fact, the revised liquidation analysis shows that in
17 the Chapter 7, there's more than enough to pay.
18 The issue is whether this breaks in the admin claims.
19 That is whether all the money that we're spending right now is
20 going to be the reason unsecured creditors get paid or don't
21 get paid. That's when they say cuspy. It's every dollar that
22 is spent on a process like this is a dollar that makes it more
23 cuspy.
24 But I have two things of note. First, in the reply,
25 they accuse us, the Committee, of not minding its fiduciary

1 duties by blowing up recoveries to the subsidiary unsecureds
2 and the convenience class. Your Honor has seen our plan.
3 Absolutely, our plan provides for the same treatment for those
4 two classes. What we did do is say, we need to understand
5 better. You're in possession of information we don't have.
6 With respect to the subsidiary unsecureds, are there assets in
7 those boxes? They may be structurally senior but, if there are
8 no assets in those boxes, we need to understand and advise our
9 clients with respect to how it should be then that unsecured
10 creditors in assetless boxes are getting recoveries when parent
11 creditors are not. It's just a point of process for the
12 Committee.
13 The debtors still have not provided that information.
14 We said, how did you come up with a convenience class? We keep
15 calling it a convenience class. It says, a convenience class
16 is, we've got a lot of small creditors, the cost of
17 administering the process is such that it's better probably
18 just to cash them out than to give them equity in a new process
19 or liquidating trust interest or anything else. You pay them a
20 discounted cash figure or a figure of this is approximately
21 what you would get if you took a distribution and you pay them
22 in cash instead. This is not a convenience class.
23 They just said, everybody who has a claim of less
24 than $250,000 gets paid in full. So, again, we've asked them,
25 how did you come up with $250,000? How do we advise our

1 clients with respect to why they're getting paid 100 cents?
2 We've gotten no response.
3 We have outstanding requests that I brought to Your
4 Honor at the last hearing with respect to Ms. Frizzley's
5 promise to provide us information. No response. We've asked
6 questions with respect to the timing of the payment of the
7 receivables. No response. We've asked them, well, what's your
8 view? If peace breaks out and we get to a mediation, how much
9 money is built into this budget for this fight? No response.
10 Two points on this, or the second point, our
11 waterfall has enough to pay the $335 million to the secureds
12 with money to spare. Now, I want to pause here because the
13 letter last night says the Committee is obviously litigating
14 for no purpose because there's no question with respect to
15 reasonably equivalent value. We took $305 million of bonds at
16 the uptier, and we took in an additional $30 million in cash.
17 Then we paid $20 million in fees, paid interest, legal fees,
18 gave $20 million in equity, agreed to pay a make-whole, plus
19 all these other things.
20 And they now, in their liquidation analysis, are
21 showing a $335-million claim. They took $305 million of bonds
22 and made it into a $335-million secured claim. And, yet, we
23 get accused of being completely irrational when we're
24 questioning reasonably equivalent value.
25 Back to the pattern. We asked specifically with

1 respect to the disclosure statement, which they filed without
2 ever talking to us, can we have a rider, and will you solicit
3 the un's? They never got back to us. They said, actually, you
4 can put the rider, and never got back to us on solicitation.
5 So we file a disclosure statement objection. Then they say,
6 oh, yeah, oh, you want us to solicit? Yes, we'll solicit.
7 Exclusivity. We asked them directly, you're going to have
8 to pare it back. If this plan doesn't go forward, we want it
9 coterminous. They told us absolutely not. We want all the way
10 through October. So we file an objection. Then they cave and
11 say, okay, we'll give you the reasonable results.
12 So contrary to the platitudes in the reply, the
13 record shows that the reason we're filing pleadings and having
14 these hearings with the Court is the debtors take an
15 unreasonable position, force us to litigate just to get back to
16 reasonable.
17 Now, in another case with more runway and more cash,
18 I would probably press the motion to terminate exclusivity and
19 prove up what we see as their motives, that this is really
20 about just providing a free D&O release and burying the uptier
21 than having a open process, which is to maximize value. But
22 where does that get us? Because we're still going to end up
23 with a melting pot of cash that we have to litigate over. We
24 don't have the runway.
25 And we hear you loud and clear. Your Honor wants us

1 all to make a good-faith effort to see if we can't mediate
2 this. Now, I don't suppose you sent us to mediation because
3 you believe that these claims are worth zero. We're going to
4 find out what people are willing to pay for peace, if anything,
5 and, if they're not willing to pay, whether they're doing so in
6 good faith.
7 But that brings me to when we talk about all this
8 unnecessary cost, the last night's letter. We've been clear
9 about how we see the hearing going on July 9th. We have the
10 burden. We're going to put in the complaint. We're going to
11 put in the documents that are cited in the complaint. We've
12 made a proffer of what this is going to cost, and Your Honor
13 has views with respect to what litigations cost, as well.
14 And assuming that the corporate governance doesn't
15 change, we'll make the record with respect to unjustifiable
16 refusal in the sense that the D's and O's being sued are the
17 ones who are saying they don't want the suit to be brought.
18 We'll also argue the make-whole, which is a legal issue, but
19 that's a busy day already.
20 Two arguments, moving a bunch of stuff into evidence.
21 The debtors have said we want to put on witnesses. We've said,
22 okay, we only have one day setting. How are we going to do
23 this? Would you please, I asked a week ago, would you please
24 let us know how many witnesses and who you're going to put on?
25 What is the scope of their testimony? And then we can talk

1 about what's going on. We get a letter last night, one or two
2 witnesses they may put on. We asked them who. Still silence.
3 Now, why does this matter? If they're going to put
4 on a solvency expert, right, they're going to try to rebut our
5 prima facie case. We're going to, I don't know how we get an
6 expert in and do that, but then we're going to, we're not
7 waiving our right for rebuttal. Same with reasonably
8 equivalent value. Unjustifiable refusal. Are they going to
9 put on a affidavit of cost? This is what it's going to cost.
10 This is the balance to be done. A business judgment expert.
11 Are they going to put on a member of the board to talk about
12 good faith or not?
13 We're not waiving our right to a rebuttal case. And
14 I have no idea how that's going to play out when we finally get
15 these depositions. But the notion that we're going to have two
16 arguments on standing and make-whole, and then also have a
17 evidentiary presentation with cross-examinations and multiple
18 witnesses, that just doesn't seem practical to us. So we had
19 asked, rather than have a mini-trial, why don't we just handle
20 this on the pleadings? They cite to the proposition saying
21 it's fair, we should be able to rebut your allegations.
22 And when you look at the cases they've cited, it's
23 not the way it happens. First of all, we all talk about Sabine
24 and that was not the norm with respect to a multi-day hearing
25 on standing. But when you look at the cases, what normally

1 happens is the debtors say, I have a settlement on the table.
2 I've got $25 million on the table from the D's and O's and the
3 people who were involved in the transaction. It's better to
4 take that money in than to give the Committee standing.
5 This is a zero case. And I get it that they say the
6 secureds are giving up something. The secureds are giving up
7 nothing here. In a Chapter 7, they are getting $335 million.
8 And if it's going to break here, we're not not having a Chapter
9 11 plan because of the money run up by the lawyers litigating
10 over things that we shouldn't be litigating over. There's
11 going to be a Chapter 11 plan here. It's going to pay the
12 secured creditors in full.
13 The only issues are whether or not they should also
14 get a release, whether or not the D's and O's should also get a
15 release. And do we have enough money to satisfy our obligation
16 to pay admin claims at or about the time of the effective date
17 in full in cash? We believe we will. And we believe that if
18 everybody starts rowing in the right direction and not having
19 this pattern of forcing people to litigate just to get back to
20 reasonable, we can get it done.
21 So with that, they can have their extension of
22 exclusivity as they proposed. And we'll come back if and when
23 we blow up this plan and have either an alternative plan or a
24 mediated result, we'll figure out who has the pen on that plan
25 and when it gets done.

1 THE COURT: All right. Thank you, Mr. Shore. We'll
2 get back on the letter request and we'll address that issue.
3 Does anybody else wish to be heard on the exclusivity
4 motion that's pending? I'm giving Mr. Sponder a chance. I
5 don't see any hand raised.
6 All right. Then the parties having -- well, the
7 debtor having reduced its request to a 60-day period, frankly,
8 I think that's reasonable in light of the Court's mandate that
9 the parties take the time to go through mediation. And we all
10 know that mediation may always have the potential to retard the
11 process and slow things down. And confirmation hearings do get
12 adjusted. So that I think the 60-day window is more than
13 reasonable. And I will enter the order of approving the same.
14 Mr. Petrie, do we have an amended order that's been
15 submitted?
16 MR. PETRIE: Yes, Your Honor. We'll submit that to
17 chambers.
18 THE COURT: All right. Thank you. So then --
19 MR. PETRIE: Thank you. I think next --
20 THE COURT: Go ahead.
21 MR. PETRIE: We thank you for that. Obviously, we
22 reserve all rights to Mr. Shore's presentation and correcting
23 the record as appropriate. But now I'm going to turn the
24 podium over to one of my colleagues to scheduling --
25 THE COURT: Let me -- I do see hands raised. Let me

1 first turn -- Ms. Manne, good morning.
2 MS. MANNE: Good morning, Your Honor.
3 This is a very small and technical question. We are
4 parties, my clients, the Fisher Scientific Entities, are
5 parties to various executory contracts. This proposed order
6 has dates for the cure notice to be sent out, has dates for
7 cure hearing, but does not have a date for the proposed
8 responses to the cure notice. It's blank.
9 And I know the Court said you'll enter the order, but
10 no one has said what the date would be. I don't want to -- and
11 that's an important issue to us. And we'd like enough time to
12 be able to run through it with our clients. So I was just
13 curious whether or not they're going to propose a date for the
14 Court to enter into that particular piece of the proposed
15 order, Your Honor.
16 THE COURT: I think it's a fair question, and I'll
17 turn to debtors' counsel.
18 MR. PETRIE: Yes, Your Honor. We will fill in that
19 date. We'll discuss it with Mr. Sponder and the Office of the
20 U.S. Trustee to see what's appropriate, and then we will be in
21 touch with you separately, ma'am.
22 MS. MANNE: Thank you.
23 THE COURT: As with all issues relative to orders
24 that I'm being asked to enter, if there are language issues or
25 date issues or concerns, reach out for chambers. We'll have a

1 quick call to resolve any contentious issues or concerns.
2 All right. Thank you.
3 All right. Let's go then to the letter request that
4 the Court received.
5 MR. PETRIE: Thank you, Your Honor.
6 MR. McKANE: Good morning, Your Honor.
7 It's Mark McKane of Kirkland & Ellis. Can you hear
8 me okay?
9 THE COURT: I can.
10 MR. McKANE: Your Honor, I didn't think I could
11 expect a rise today, but I also didn't expect the narrative
12 that Mr. Shore put out there with regards to an issue where
13 ultimately he agreed to the exclusivity. It actually is just
14 not consistent with what you have in front of you in terms of
15 the overall management of these cases and the hearing. I came
16 in for the retention app hearing, the one I guess Mr. Shore
17 did. It's really not consistent with my experience.
18 But what's in front of Your Honor was a request to
19 put down the schedule so we can put some structure for handling
20 the standing hearing that's set for July 9th. And I don't
21 think -- like there's the suggestion that there's been some
22 disconnect or miscommunication.
23 We actually proposed the schedule to Mr. Shore and
24 the White & Case team. They came back with a response,
25 including agreeing on the date of Friday to identify witnesses

1 and to move forward. They were reserving their rights. They
2 wanted to flag the fact that they thought on the colorability
3 issue that that was a motion to dismiss. What they failed to
4 really glean in on was the unjustified refusal aspect of a
5 standing hearing.
6 We all know the law in this area, right? That
7 unjustified refusal typically takes in some form of
8 cost-benefit analysis to evaluate what is before the Court with
9 regard to a plan and settlement as opposed to what the cost and
10 expenses might be of proceeding forward with the litigation.
11 That takes in more than just the cost of proceeding with the
12 case. We put forward evidence. We want to put forward
13 evidence on those issues, not just the colorability, but the
14 laying down the overall fact of what is focused in the
15 complaint, which is the up-tiering transactions.
16 That's why we put forward the schedule we did. We
17 shared it with counsel for Deerfield. We shared it with the
18 Committee, and I frankly think it's relatively undisputed.
19 What we flagged in terms of a matter of efficiency, as Your
20 Honor knows, the form and the structure of how you want to
21 proceed on the 9th is largely within your discretion.
22 And as part of that, we were proposing that in lieu
23 of live direct, we put in a form of written direct testimony in
24 the form of a declaration in advance of the hearing with live
25 cross as a means of streamlining that process. And we were

1 also straightforward. They were talking about one to two
2 witnesses, and I don't believe there are going to be expert
3 witnesses. But we just want to be able to have the opportunity
4 to -- frankly, I haven't spoken to the general counsel of the
5 company just to make certain we flagged who we're going to be
6 using forward.
7 I can tell you right now, it's most likely going to
8 be Randy Scott and Jill Frizzley. That's not a surprise, but
9 we're going to be moving forward in that proposed process. We
10 just wanted to get some interim dates so that we had some
11 structure to this process.
12 We also are very cognizant of the fact that we're
13 doing this kind of sequence with the mediation. We learned
14 today that the mediator may not be able to meet with us, I
15 guess, until like January 1st, 2nd, or 3rd. That creates some
16 challenges in terms of trying to streamline things and be most
17 efficient.
18 I think you heard my colleague earlier today
19 emphasize that we are hoping to have a constructive and
20 hopefully successful mediation. And just as you noted with the
21 exclusivity extension, that may require adjustments to certain
22 of the dates. But we're not trying to litigate for
23 litigation's sake. No one wants that. We all recognize what
24 burdens the administrative costs of these cases may have. The
25 fact of the matter is, this is the word of the day. It's

1 cuspy. It's super cuspy. It is right on the line.
2 But the suggestion that somehow Deerfield is
3 unimpaired and all that, that's just wrong. But it's that
4 cuspy nature of this and the kind of almost binary nature of is
5 there a secured creditor of that size or not that is driving a
6 lot of this. Could it be resolved? Absolutely. That could be
7 resolved in the mediation and otherwise. But like when we have
8 multi-hour meetings with the Committee like we did last week
9 where we go through all these issues and we get no recognition
10 of like the fact that we are trying to engage with them, we are
11 sharing information, and then we get kind of like this broad
12 time, it's surprising.
13 And I say that only because it's a critique and a
14 criticism where ultimately on the merits, they didn't oppose
15 the relief requested. We actually engaged, dialed it back, got
16 to 60 days. But as to this schedule, I think we're just
17 looking for some direction and guidance from Your Honor in
18 terms of how you want to proceed on the 9th and put some
19 interim dates along the way so that we are as efficient as
20 possible as we can be with regards to the standing motions.
21 And, Your Honor, I'm happy to answer any questions
22 you may have, but that's all I wanted to really flag with
23 regards to those interim dates we put forward yesterday.
24 They're not new. They're not unique. They're not different.
25 And they're relatively -- frankly, they're consistent with I

1 think how standing hearings are handled in New Jersey and as
2 recently as the Diocese of Camden, New Jersey case from '22.
3 THE COURT: All right. Well, I'll hopefully make
4 life a little easier for the parties. I have no intention of
5 having expert testimony at a standing motion. I think that
6 undercuts the nature of the relief sought. The Court is not to
7 delve that far into the merit of the underlying litigation.
8 I certainly want to hear from the parties as to the
9 proposed schedule, what is workable, what is not workable. I
10 guess my question is, would it make more sense to have this
11 discussion, even if it's very briefly on Monday after the
12 debtor or the parties opposing the standing motion identify the
13 one or two declarants and the scope of their anticipated
14 testimony?
15 MR. McKANE: Absolutely. And by the way, that date,
16 Friday's date, was proposed by the Committee. We're happy to
17 kind of continue this dialogue further. Frankly, I understood
18 from an engagement I had with Mr. Shore last week that he was
19 going to raise this issue today as part of the DS hearing,
20 which is why we put the date in front of you, but happy to jump
21 on the line with actually Mr. Shore and see if there's really
22 anything to fight about on Monday. And if there actually needs
23 to be an imposition of those dates through an order from Your
24 Honor, we can do that Monday, Tuesday, whatever works for you.
25 THE COURT: All right. Well, let me turn to those --

1 let's hear from Mr. Beller first. I see a hand raised.
2 MR. BELLER: Yes. Thank you, Your Honor.
3 Benjamin Beller from Sullivan & Cromwell on behalf of
4 Deerfield.
5 I only raised my hand to just give a short support
6 for what the debtors' counsel has said in terms of what we view
7 as the appropriate path for the hearing on the 9th. Certainly,
8 there are cases, a number of cases, I think it's common for
9 standing motions to have witnesses, to have evidence so that
10 the allegations and the assertions being made in the standing
11 motion can be properly addressed.
12 You know, Mr. Shore referenced Sabine. Certainly,
13 that's a good example, but there are more recent ones, right?
14 There's DeCurtis in Delaware. There is Wesco in Delaware, all
15 of which had standing motions where there were evidentiary
16 hearings. So that's common. I'm not sure exactly what the
17 disagreement is after all of the back and forth here, but
18 that's our view, which sounds like we're coming out in a
19 similar place.
20 The other issue that I do think is relevant, and I'm
21 happy to continue to talk about this because it does seem like
22 the parties are talking past each other. But in terms of what
23 we think should be heard at the July 9th hearing, it is the
24 standing motion.
25 As we talked about at the last hearing on the

1 scheduling, the Committee has filed a claim objection to a
2 number of -- raising a number of issues to the 1L secured
3 claims that are entirely unrelated to the standing motion, the
4 May call, post-petition interest rate, things like that. They
5 filed that claim objection without a date. I think the Court
6 set that originally to be heard on July -- I'm sorry, June
7 18th.
8 As Your Honor will recall, the standing motion was
9 originally set to be heard on June 11th based on the
10 Committee's timing for filing. So those two issues were never
11 going to be heard together. The claims issues need to be heard
12 whether there's a standing motion or not. Those are all
13 usually heard at confirmation. And so our view is that those
14 should be heard at confirmation.
15 And again, I think there was agreement last time at
16 the scheduling hearing. I believe that even within the claim
17 objection, there's some bifurcation that needs to happen
18 between the bucket of issues that can be heard regardless of a
19 standing motion, regardless of whether there is a complaint
20 filed. And then there are ones that hinge on it. Certainly,
21 the ones that hinge on a successful challenge are premature to
22 be heard.
23 Now, again, I thought there was agreement on that at
24 the last hearing. But that first bucket of issues, of
25 disputes, our view is, should be heard at confirmation. As

1 Mr. Shore acknowledged just a moment ago, there's already a lot
2 to be done on a one-day hearing on July 9th for the standing
3 motion. And given that the Committee already never planned for
4 those to be heard together, we think it should be heard that
5 way.
6 And then lastly, Your Honor, again, separate from the
7 scheduling, we take issue with much, if not all, of what
8 Mr. Shore said with respect to the process and the plan and
9 their alternative plan and the parties' behavior and conduct in
10 this case. But I don't think that we need to spend time
11 rebutting that now, including because I think Your Honor can
12 anticipate what we would say.
13 THE COURT: All right. Thank you, Mr. Beller.
14 Mr. Shore, let me go back to you. What are your
15 thoughts on timing as far as addressing these issues? Would it
16 help first to see exactly and pin the debtor down as to the
17 declarants and the scope?
18 MR. SHORE: Well, look, I think Your Honor can see
19 from that exchange exactly what we're dealing with. I've been
20 asking for, I asked Mr. McKane a week ago, can you just tell us
21 who generally? And then he comes in today and says, of course,
22 this is who we're going to do. And why would you ask? But
23 whatever. Frizzley, okay, I get that. That's the unjustifiable
24 refusal part. That's what I mentioned.
25 I'm not sure that having a director come on and talk

1 about the merits and say I've read these allegations in the
2 complaint and my official response is "nuh-uh" is particularly
3 useful. We'll try to talk him out of that and we can go
4 forward. I will say we did ask for his interview. We should
5 have talked to him a month ago, but we'll get it done in that
6 time frame. But I think if we can get a better sense of
7 exactly what they're going to talk about, I can engage with
8 them and we'll come back to you if we have a problem.
9 With respect to the scheduling of the make-whole, I
10 disagree 100 percent that the make-whole and the standing
11 complaint are whole or entirely unrelated. The math I just
12 did, it's the make-whole. If the make-whole is an allowed
13 claim, the $305 million of bonds that were defused at that
14 time, instead of buying them back at 80 cents on the dollar,
15 they turned it into a $335-million secured claim.
16 So if Your Honor were to say that the make-whole is
17 disallowed, we may have a different view with respect to
18 reasonably equivalent value. If Your Honor says the make-whole
19 is allowed, we're going to have a very different view with
20 respect to reasonably equivalent value. So I think to the
21 extent that was a request to adjourn the make-whole dispute to
22 confirmation, we would oppose it.
23 THE COURT: All right. Mr. Beller?
24 So well, before I go back to Mr. Beller, Mr. Shore,
25 so do I take it that we can run with this schedule for now and

1 if there's a need once more information, once the debtor
2 commits to the scope of the declarant's testimony, we can come
3 back, we can get on the phone and address anything you all
4 can't work out. Does that make sense?
5 MR. SHORE: That's exactly what I would propose, Your
6 Honor. Thank you.
7 THE COURT: Mr. Beller, do you want to respond?
8 MR. BELLER: Yes, Your Honor. Thank you.
9 Benjamin Beller for Deerfield.
10 Your Honor, if the standing motion and the make-whole
11 issue are both heard on July 9th, the entire proceedings on
12 both will happen before Your Honor has ruled on either. So the
13 Committee is not going to know whether the make-whole is
14 allowed or not in arguing the standing motion one way or
15 another. If they had wanted to have clarity on the make-whole
16 or any other issues raised in the claim objection, they should
17 have filed that sooner, and they could have. They chose not
18 to. And they never intended for the claim objection to be
19 heard either before or even at the same time as the standing
20 motion.
21 It is clear that they never intended that. This is a
22 new theory. This is brand new. It is the same tactic in
23 changing strategies and processing timing that they did when
24 they after agreeing to a stipulation on the timing and process
25 for the standing motion. It is the same exact move. So

1 there's no need to hear the make-whole together with the
2 standing proceedings.
3 The make-whole is separate entirely. They can make
4 whatever arguments they want about the value given or not in
5 the exchange. We obviously dispute the characterization that
6 they traded anything for 335 million of secured claim. That's
7 not true. But this process is, again, a new theory that for
8 whatever reason they think is convenient and is going to create
9 leverage and strategy for them. It's not appropriate. It is
10 not consistent with what they did two weeks ago in filing all
11 of these pleadings as a surprise.
12 And I don't know whether the proposal is to continue
13 to talk about this, but I find it hard to imagine that we're
14 going to come to an agreement on this. So I would ask Your
15 Honor to give some guidance to the parties so that we know what
16 we're litigating in approximately three and a half weeks.
17 THE COURT: All right. Mr. Shore?
18 MR. SHORE: Yes. Yes, Your Honor.
19 I'm not sure whether we filed all our pleadings too
20 early, according to the debtors, or too late, according to
21 Deerfield. But let me just respond to the strategic point.
22 The debtors, and even in the cash collateral
23 stipulation, were never allowing the make-whole. The debtors
24 left it out of their waterfall, which is why their old
25 liquidation analysis showed a $305-million claim, not the

1 $335-million claim. It was when Deerfield filed its -- or the
2 agent filed the proof of claim, which asserted the entire
3 secured claim plus the make-whole, that forced our hands to
4 object to the make-whole in the context of this whole process.
5 What I didn't hear was a response, these are tied up
6 issues, and Your Honor should have the record in front of you
7 in making a decision whether the make-whole is allowed or
8 disallowed plays into the analysis. I'm not expecting you to
9 rule from the bench. Maybe you do, maybe you don't. But the
10 fact is those things need to be addressed in tandem.
11 THE COURT: All right. Well, I'll disabuse everybody
12 who thinks that I'll have the capacity to rule from the bench
13 on issues that have a value in hundreds of millions of dollars.
14 I think that would be irresponsible. So on the 9th, I intend
15 to listen to the evidence proffered, listen to the oral
16 arguments made on both issues, the standing and the make-whole.
17 Now, my expectation with the make-whole is that it is
18 primarily legal arguments at issue. I'm not sure there's a
19 factual dispute. If it turns out that I'm wrong and that there
20 are key facts that are in dispute, I might decide that the
21 resolution will await confirmation or another day. But at the
22 hearing on the 9th, all I am anticipating is oral argument on
23 the legal issues relative to the appropriateness of the
24 make-whole.
25 The standing issue does involve certain factual

1 predicates, and we'll focus on those that are needed for the
2 standing issue. But I would anticipate in all likelihood, at
3 least at the end of the hearing on the 9th, reserving and then
4 I'll decide when I'm in the best position to make rulings
5 anywhere from that point forward. I hope that helps.
6 So at this juncture, I look through the proposed
7 schedule. It seems reasonable. If it turns out to be
8 problematic because of the witnesses or the scope of
9 anticipated testimony, I'm happy to address it. I've always
10 felt that the direct testimony through declaration, affidavit,
11 expedites the process. And I'm happy to decide the matters on
12 competing declarations, as well, if you're comfortable with
13 that.
14 So I think that covers all the issues. Have I missed
15 anything?
16 MR. SHORE: I don't believe so, Your Honor. I think
17 that's it.
18 THE COURT: All right.
19 MR. McKANE: No issue for the debtors, Your Honor.
20 THE COURT: Okay. Well, good. I'm sure we'll be
21 speaking again. Take care, folks. And I'll await the orders
22 that are coming to chambers on the two motions that were
23 pending today.
24 MR. SHORE: Thank you, Your Honor.
25 THE COURT: Thank you. And also, please make sure

1 you reach out to Judge Linares and start that process.

2 All right. Thank you. We are adjourned.

3 (Proceedings adjourned at 10:57 a.m.)

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

10 I, DIPTI PATEL, court-approved transcriber, certify

11 that the foregoing is a correct transcript from the official

12 electronic sound recording of the proceedings in the above-

13 entitled matter, and to the best of my ability.

14

15 /s/ Dipti Patel

16 DIPTI PATEL, CET-997

17 J&J COURT TRANSCRIBERS, INC. DATE: June 12, 2024

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