

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 20, 2024  
. . 9:35 a.m.  
. . . . .

TRANSCRIPT OF HEARING ON DEERFIELD PARTNERS, L.P.'S MOTION TO  
COMPEL DEPOSITION AND PRODUCTION OF DOCUMENTS BY BAKER BROTHERS  
ADVISORS LP [DOCKET NO. 646] AND  
STATUS CONFERENCE ON NOTICE OF THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS' OBJECTION TO THE 2028 SENIOR NOTE CLAIM  
(CLAIM NOS. 360, 378, 379, 380, 381, 382) [DOCKET NO. 635]

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

APPEARANCES ON NEXT PAGE.

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

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



APPEARANCES:

For the Debtors: Kirkland & Ellis LLP  
BY: JEFFREY R. GOLDFINE, ESQ.  
601 Lexington Avenue  
New York, New York 10022

For Deerfield Partners, L.P.: Sullivan & Cromwell, LLP  
By: JUSTIN J. DECAMP, ESQ.  
BENJAMIN BELLER, ESQ.  
125 Broad Street  
New York, NY 10004

For Baker Brothers: Akin Gump Strauss Hauer & Feld LLP  
By: JOSEPH SORKIN, ESQ.  
One Bryant Park  
Bank of America Tower  
New York, NY 10036

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 9:35 a.m.)

2 THE COURT: Okay, good morning, everyone. This is  
3 Judge Kaplan on what will be a very long day for me. Let's  
4 start with Invitae matters. I will give everybody a chance to  
5 adjust their monitors. As always, if you wish to be heard,  
6 please use the "raise hand" function.

7 My understanding, and I did see the debtors' proposed  
8 agenda, notice of agenda. There is essentially before the  
9 Court a motion to compel certain production of evidence and  
10 documents regarding Baker Brothers and, also, general questions  
11 or dispute regarding the scope of the hearings on July 9th.  
12 Let's start, let me turn to debtors' counsel and who can  
13 correct me if I'm wrong if there are other issues at play this  
14 morning.

15 MR. GOLDFINE: Good morning, Your Honor.

16 Jeff Goldfine, Kirkland & Ellis, on behalf the  
17 debtors. You have it exactly right. I believe that is the  
18 entire agenda for today. I understand you're busy, so we will  
19 do our best to be efficient.

20 THE COURT: That's all right. Here to serve,  
21 although, and I'll repeat this, nobody gave any credence to the  
22 fact that there was a federal holiday yesterday, so -- in  
23 filings with courts.

24 Let's start with -- well, do you have a  
25 recommendation? Should we start with the motion to compel?

1 MR. GOLDFINE: I believe we should start with the  
2 motion to compel. I think Mr. DeCamp will be taking the lead  
3 on that from Sullivan & Cromwell.

4 THE COURT: All right, thank you.

5 Good morning, Mr. DeCamp.

6 MR. DeCAMP: Yes. Good morning, Judge Kaplan.

7 Justin DeCamp from Sullivan & Cromwell for Deerfield.  
8 We filed this motion.

9 THE COURT: Right.

10 MR. DeCAMP: To begin, I just want to explain briefly  
11 who Baker Brothers is and what Deerfield's seeking from them.  
12 Baker Brothers is a highly successful biotech firm, investment  
13 firm that was holder of both 2024 and 2028 senior unsecured  
14 notes. Baker Brothers participated in and they benefitted from  
15 the March 2023 exchange that the Committee is seeking to  
16 challenge in its standing motion. And Baker Brothers also made  
17 various alternative proposals to Invitae in the lead-up to that  
18 exchange.

19 Baker Brothers is not a Committee member, but the  
20 Committee references Baker Brothers here more than 30 times in  
21 their proposed complaint and standing motion.

22 Now the discovery that we're seeking is very limited.  
23 We really just want three things. First is Baker Brothers'  
24 communications with third parties about Invitae, excluding  
25 communications with the debtor itself, which we believe

1 probably have already been produced by the debtor. The second  
2 is Baker Brothers' internal analyses about Invitae, and then  
3 the third is a limited deposition of a Baker Brothers witness  
4 on these issues.

5           There are two objections that have been filed with  
6 the Court in response to our motion. The first objection was  
7 filed by the Committee. That objection we thought was a little  
8 bit strange because the Committee sought discovery from  
9 Deerfield that's very similar to the discovery that Deerfield  
10 is seeking from Baker Brothers. And we would have thought the  
11 Committee would seek this discovery from Baker Brothers itself.

12           We actually asked the Committee counsel, Committee's  
13 counsel if they intended to seek discovery from Baker Brothers.  
14 We're surprised to learn that they did not intend to do so. We  
15 were also surprised at how paciferously the Committee's  
16 objected to the motion here, much more paciferously in fact  
17 than Baker Brothers itself. And, you know, this is obviously a  
18 dispute that we view as between Deerfield and Baker Brothers  
19 that really does not concern the Committee.

20           So in terms of why the Committee is objecting to this  
21 discovery from a single unsecured creditor that's not even a  
22 member of the Committee, you know, we think there are two  
23 reasons. First of all, the Committee's counsel here, White &  
24 Case, represented Baker Brothers in its negotiations with  
25 Invitae pre-petition and now appears to want to shield its

1 client from discovery. And then, second, the Committee clearly  
2 wants to control the flow of information that's available to  
3 the other parties and the Court in connection with its standing  
4 motion.

5           You know, we think that the objection makes clear  
6 that the Committee wants to maintain information asymmetry and  
7 Deerfield, and I think I can say the debtors as well, want the  
8 Court to have more information. The Committee wants the Court  
9 to have less information.

10           White & Case, the Committee's counsel, obtained full  
11 discovery from Deerfield and the debtors and used that  
12 discovery extensively in its standing motion and proposed  
13 complaint. White & Case, again, now as Committee counsel made  
14 numerous representations in its standing motion and proposed  
15 complaint regarding its client, Baker Brothers, alternative  
16 proposals and views concerning Invitae.

17           But when Deerfield seeks access to Baker Brothers'  
18 internal documents because those documents may potentially  
19 reveal information helpful to Deerfield and the debtors, the  
20 Committee suddenly claims it's a waste of estate resources.  
21 And we think the Committee's clearly trying to have its cake  
22 and eat it too here, which it should not be allowed to do.

23           As to the Committee's arguments on relevance, as I  
24 mentioned earlier, the Committee served essentially the same  
25 discovery request on Deerfield before filing the motion. The

1 Committee referenced Deerfield's initial objections to those  
2 requests, but Deerfield agreed to make an extensive production  
3 including of its own internal communications and analyses,  
4 which the Committee insisted were relevant.

5           And, in fact, the Committee's quoted those internal  
6 documents from Deerfield prominently in its standing motion.  
7 Examples of that are at Paragraphs 69, 70, 71, 73, 76, 86, 104,  
8 and 112 of the proposed complaint which, quote, cherry-picked  
9 subsets of Deerfield's internal communications and analyses  
10 that the Committee clearly views as highly relevant.

11           So if those communications are relevant, then by  
12 extension, the similar communications from Baker Brothers who  
13 also participated in the March exchange and proposed multiple  
14 alternative transactions to Invitae before the petition date,  
15 those documents are relevant by the same logic.

16           And the Committee seems to recognize that in its  
17 objection. At Paragraph 6, they say, "Baker Brothers may have  
18 a set of potentially relevant non-duplicative documents that  
19 could shed light on the underlying merits of any claims the  
20 Committee decides to pursue." We agree with that. We think  
21 it's very clear that Baker Brothers possesses relevant  
22 documents.

23           And the Court has already decided to hear evidence at  
24 the standing motion. We think it makes sense, again, for the  
25 Court to have more information, not less.

1 As to the Committee's objection to the Baker  
2 Brothers' deposition, first of all, Deerfield's not proposing,  
3 as the Committee suggests, to depose a Baker Brothers  
4 representative as an expert here. And then, second, nothing in  
5 the Federal Rules or the litigation schedule would prevent  
6 Deerfield from citing excerpts of a deposition transcript in  
7 its objection to the standing motion or seeking to designate  
8 portions of the deposition transcript to be introduced at the  
9 standing motion hearing or, if the Committee objects to that,  
10 even seeking leave to call a Baker Brothers witness. It's  
11 certainly possible.

12 And we think the litigation schedule here clearly  
13 contemplates this type of discovery. There's discussion in the  
14 schedule about July 2nd, 5th, and 7th being the deadlines,  
15 respectively, for exchanging, countering, and opposing  
16 deposition designations. And in any event, of course, the  
17 Committee counsel will attend the deposition. They'll have an  
18 opportunity to ask questions of the Baker Brothers witness, so  
19 no one's going to be prejudiced here if the Baker Brothers  
20 witness is deposed.

21 What the Committee's trying to do here, after taking  
22 full discovery itself, is to have the Court apply a very  
23 permissive pleading standard to its motion inappropriately but  
24 then to hold Deerfield and the debtors to very strict rules of  
25 evidence on the other side. And we think that's just not fair.



1           The Committee's assertion that Deerfield unreasonably  
2 delayed its discovery request is also unwarranted. We served  
3 these requests on May 31st. That was one day after the Court  
4 set the schedule on the standing motion on May 30th. And the  
5 litigation schedule that's been agreed here provides that the  
6 deadline for serving discovery requests was June 12th. That  
7 was almost two weeks after we served these requests on Baker  
8 Brothers.

9           So, in sum, we don't see any of the Committee's  
10 arguments here as standing in the way of the discovery that  
11 we're seeking from Baker Brothers.

12           As to Baker Brothers' objections, they're obviously  
13 the party from which the discovery is actually being sought.  
14 they basically make unsubstantiated burden and relevance  
15 objections which are unavailing.

16           First of all, as to burden, we're only seeking a  
17 limited set of documents from Baker Brothers, again, internal  
18 materials and third-party communications regarding Invitae's  
19 financial condition and alternative transactions. We've made a  
20 number of concessions to alleviate any burden on Baker  
21 Brothers. We agreed to exclude from review and production  
22 communications with Invitae. We've agreed to exclude  
23 communications with attorneys and, of course, we're willing to  
24 further narrow the review through a targeted list of custodians  
25 and search terms.

1 To date, Baker Brothers has not offered Deerfield any  
2 names of its attorneys, any hit counts, or engaged with  
3 Deerfield on any search terms, so they just have not  
4 substantiated any burden here whatsoever. And then as to the  
5 deposition, to lessen the burden on Baker Brothers and  
6 accommodate the schedule of their proposed witness who they've  
7 identified to us, we agreed to their request to limit that  
8 deposition if it takes place to three hours by Zoom on June  
9 27th between 10 a.m. and 1 p.m. We understand their witness is  
10 available then. So we don't think there's any real burden  
11 here.

12 As to relevance arguments, I made some of these  
13 arguments already as to the Committee's objections. But Baker  
14 Brothers argues that the requests are not relevant because the  
15 standing motion is governed by Rule 12(b)(6). You know, that  
16 may be true as to colorability to some extent, but this is not  
17 a typical 12(b)(6) motion, obviously. The plaintiff in a usual  
18 case has no opportunity to conduct discovery before filing a  
19 complaint.

20 Here, the Committee's conducted full document  
21 discovery from both Invitae and Deerfield. They've also  
22 interviewed a debtor witness before filing the standing motion  
23 and complaint, so they've had full discovery. And the proposed  
24 complaint prominently cites and quotes documents produced by  
25 Invitae and Deerfield in discovery. So, you know, if we don't

1 get this discovery, basically what we're dealing with is the  
2 kind of one-sided discovery that, you know, courts routinely  
3 caution against.

4           Unilateral discovery is just not how discovery works  
5 under the Federal Rules. Even if the standing motion were  
6 evaluated under Rule 12(b)(6), you know, essentially what the  
7 Committee and Baker Brothers are seeking here is a stay of  
8 discovery which would be inappropriate here, absent an explicit  
9 request and justification for that. And we don't see any  
10 reason for that here.

11           And the limited discovery we seek is absolutely  
12 relevant to the standing motion that the Committee has filed  
13 under Rule 26. Obviously, Rule 26 provides for very broad  
14 discovery. Courts in this circuit say that unless it's clear  
15 that the information sought can have no possible bearing upon  
16 the subject matter of the action, discovery should be allowed.  
17 That's the Karaki (phonetic) case, and that's also in the In re  
18 Energy Future Holdings case. Both of those cases stand for  
19 this proposition that discovery is very broad.

20           Obviously here, Baker Brothers' views and analyses  
21 concerning Invitae and its financial condition and the  
22 alternative transactions, they obviously bear upon the subject  
23 matter of the standing motion. Baker Brothers was a key  
24 participant in discussions leading up to the March exchange.  
25 They participated in the March exchange itself. And they were

1 part of an ad hoc group of unsecured creditors that was  
2 represented by White & Case pre-petition that was proposing  
3 alternative proposals, restructuring proposals to Invitae.

4           The crux of the standing motion that the Committee  
5 has filed is that the March exchange that Baker Brothers  
6 participated in was a fraudulent transfer and that Invitae's  
7 directors and officers breached their fiduciary duties by  
8 turning down alternative transactions that were proposed mainly  
9 by Baker Brothers. So Baker Brothers' internal views about the  
10 March exchange, about Invitae's solvency and financial  
11 condition, about alternative transactions that it was proposing  
12 to Invitae, all of these are plainly relevant here.

13           And the Committee's recognized that by referencing  
14 these issues and Baker Brothers in its papers no fewer than 35  
15 times. But they don't talk about a lot of detail. We're  
16 seeking to get out that detail in this discovery. So that,  
17 Your Honor, I think covers our arguments on relevance and  
18 burden here and the objections that have been made. It's clear  
19 as to Baker Brothers that they have, you know, an important  
20 role to play in the lead-up to the petition and the alternative  
21 transactions that were considered, and we think the discovery  
22 that we're seeking from them is appropriately tailored and  
23 highly relevant.

24           THE COURT: All right. Thank you.

25           Let me hear from counsel for Baker Brothers.

1 MR. SORKIN: Good morning, Your Honor.

2 Joseph Sorkin from Akin Gump Strauss Hauer & Feld on  
3 behalf of Baker Brothers. Can you hear me okay?

4 THE COURT: I can. Thank you.

5 MR. SORKIN: And, Your Honor, I will just note that  
6 my *pro hac vice* motion was filed at Docket Number 663. I don't  
7 think the order has been entered yet, but I assume no issue  
8 proceeding?

9 THE COURT: Welcome to Jersey. Go ahead.

10 MR. SORKIN: Thank you, Judge Kaplan.

11 Your Honor, there are two things I would like to  
12 cover today, of course, in addition to answering any questions  
13 the Court has. First, who is Baker Brothers in relation to the  
14 complaint. I think this is important to ground this discussion  
15 in the actual complaint. Second, why discovery from Baker  
16 Brothers, if any at all, should be very narrow in target and,  
17 in fact, limited to what we've already agreed to.

18 And I didn't hear anything different in what Mr.  
19 DeCamp said today. Now I will say part of what I'm stepping  
20 into, I feel like this started with a discussion about the  
21 Committee's objection and what's gone on previously. I feel a  
22 little bit like the new kid on the playground where there have  
23 been discussions and things happening, so I don't have that  
24 perspective. I'm going to address solely what I see in the  
25 papers and what I saw in the transcript previously.

1           So, first, who is Baker Brothers in relation to the  
2 proposed complaint? As noted in the complaint and as Mr.  
3 DeCamp said, they were one of three primary investors in the  
4 April 2028 unsecured notes. In addition, they did also  
5 participate in a small portion of the March uptier exchange at  
6 issue in the proposed complaint after it was made available to  
7 holders of the 2024 unsecured notes, not prior to. They were  
8 not a party to the discussions with Deerfield or with the  
9 company. They did make alternative transactions.

10           Now, Mr. DeCamp said it again and it's also in their  
11 motion to compel that, quote, no fewer than bold italics, 35  
12 references to Baker Brothers are in the standing motion. I  
13 think it's important to actually look at that because actually  
14 there are fewer. There are 15 references in the standing  
15 motion and 19 in the proposed complaint. I really looked hard,  
16 but, for the life of me, I couldn't find the last one to make  
17 it 35. So I think there are fewer than 34. But what's  
18 important is the 19 in the proposed complaint.

19           So, Your Honor, I know that that number was not  
20 intended to be deceitful. I'm not suggesting that. But if it  
21 was a mistake, it was not innocent because it's important what  
22 we have to do here, which is look at and consider the relevance  
23 and proportionality of non-party discovery to understand  
24 exactly what is relevant about Baker Brothers.

25           So here, if we look at the proposed complaint, the

1 first reference of the 19 to Baker Brothers is in Paragraph 49,  
2 where it identifies Baker Brothers as a holder in the 2028  
3 unsecureds. Understood. The other 18 references are in  
4 Paragraphs 66 to 93 discussing the alternative proposals that  
5 Baker Brothers made to the company. We don't dispute that.  
6 That is what we looked at to try and understand what is the  
7 appropriate scope of discovery.

8 Baker Brothers made an alternative proposal. We  
9 understand that. We also understand that discovery has already  
10 been taken with respect to the debtors' investigation and the  
11 committee's investigation of the communications regarding that  
12 alternative proposal. So we shouldn't have to produce those.  
13 We're in agreement there.

14 We were not communicating with Deerfield. So there  
15 were no material communications. To the extent there are any,  
16 Deerfield would have those. So what we understood was that  
17 there was a limited window of documents that had not been  
18 produced yet. Those are communications with the debtors'  
19 advisors, their bankers, Moelis, Jay Wood, and Goldman, that  
20 would have gone back and forth with Baker Brothers that the  
21 debtors wouldn't have been on. We agreed to produce those.

22 So in the late 2022 up to March 2023 time frame,  
23 we're prepared to produce those documents. Beyond that, we  
24 tried to understand what else would be relevant. And in doing  
25 so, we looked at what else would be there. So we really are

1 talking about a pretty narrow universe of documents. As  
2 Mr. DeCamp said, we're talking about internal analyses and  
3 communications at Baker Brothers.

4 We'll exclude the attorney communications, which  
5 we've already agreed on. And I appreciate that Mr. DeCamp  
6 stands by that, because that happens to be a burdensome,  
7 challenging piece here, because there is an individual, Scott  
8 Lessing, a former Sullivan & Cromwell attorney, who is at Baker  
9 Brothers and has been involved in this particular investment  
10 throughout. So those communications would need to be excluded.

11 In addition, with respect to the deposition, while we  
12 were prepared to discuss, once the documents were produced, the  
13 need for some very limited deposition, we have not agreed to a  
14 deposition. What I told Mr. DeCamp was that there's a window  
15 of availability. We have not agreed yet, and we don't think  
16 it's necessary.

17 We also think the three-hour window is too large a  
18 window. This deposition should not go forward, and so we have  
19 not agreed to that yet. We were simply providing information  
20 so that the parties could prepare in the event that one was  
21 necessary. Of course, that kind of set of agreements wasn't  
22 enough, so they brought the motion.

23 That brings me to the second part, Your Honor, why  
24 Baker Brothers shouldn't have to do more than what we've  
25 already agreed to. So I've tried to imagine the standing



1 motion hearing on July 9th based upon what I've seen in the  
2 pleadings and from the transcripts. I understand there are no  
3 experts testifying about solvency. If there are no experts  
4 discussing solvency, it's hard to conceive of how an individual  
5 creditor's view, here Baker Brothers, would be relevant to the  
6 Court, because what I see happening now is a rabbit hole of  
7 what did you consider.

8 I can tell you, and we wrote in the papers, there is  
9 no solvency report. There's no written report that would be  
10 handed over. So instead, we're going down a rabbit hole of  
11 what did you think, what did you consider, what access to  
12 information did you have. And all of a sudden, if Baker  
13 Brothers' view about solvency is relevant, I'm not sure how  
14 we're not in a world of other individual creditors' views about  
15 solvency. So this is a rabbit hole that I just don't see how  
16 it is relevant, given the scope of the hearing on the 9th as I  
17 understand it.

18 In addition, I understand that there are one or two  
19 witnesses from the debtors to talk about the other elements,  
20 whether the debtors unjustifiably refused to bring the claims  
21 or what the value would be. Baker Brothers would not have any  
22 information relevant to those issues. I simply can't identify  
23 any. And so once we've already offered to provide the  
24 information we do have that would be relevant to the  
25 alternative transaction and the proposals, everything else is

1 something that the parties can argue and the Court can make a  
2 determination about whether those alternative proposals and the  
3 debtors' refusal to engage in them or pursue them is enough to  
4 satisfy the colorable claim standard in order to indicate that  
5 there are or are not fraudulent transfer or breach of fiduciary  
6 duty claims as laid out in the (indiscernible) complaint.  
7 There's simply nothing else about any internal analyses at  
8 Baker Brothers or any deposition that would shed additional  
9 light on that.

10           So with that, Your Honor, it really is not  
11 understanding the need to burden a third party with additional  
12 discovery and a deposition in light of what actually will be  
13 presented to the Court that led to what we thought was a  
14 reasonable proposal to limit and narrow the discovery requests  
15 in a way that provided the parties information they needed  
16 without unduly burdening Baker Brothers and creating additional  
17 expense.

18           So, again, I would just add that at this point we  
19 have not and we still object to the need for any deposition,  
20 though, as we indicated, we were always prepared to talk about  
21 a very limited deposition that is targeted to certain issues  
22 once the discovery has been produced.

23           Your Honor, subject to any questions the Court has,  
24 I'm happy to end there.

25           THE COURT: Thank you, Mr. Sorkin.

1           Let me turn to Mr. Shore. Do you have anything you  
2 wish to add to your papers or what you've heard this morning?

3           MR. SHORE: Sure. Actually, it's nice to be back for  
4 what seems to be our weekly setting in this case now. Let me  
5 start with an update, Your Honor.

6           You'll be pleased to know, I think, we had our first  
7 session with Judge Linares, a kickoff call. He's doing calls  
8 with the parties next week, and we are on the calendar for a  
9 July 1, and if needed, a July 3rd mediation setting, and we'll,  
10 of course, update the Court if anything comes out of that.

11           I'd also like to note that while Deerfield has two  
12 matters before the Court relating to the standing hearing,  
13 hearing prep with the debtors and the Committee has been  
14 proceeding. We have depositions scheduled for next week.  
15 Documents are flowing back and forth. I'm not going to say  
16 that we're in agreement with everything, but we haven't had to  
17 come to Your Honor with any disputes between what I see is the  
18 primary antagonist and defending party in the hearing.

19           It looks like we're going to have three to four  
20 witnesses for the standing hearing, preparing written directs.  
21 We're trying to get to an agreement with the debtors about  
22 exchanging those before the deposition so we can streamline  
23 what's going on, but we're not there yet. But we're going to  
24 have crosses that are going to go on. And given that at least  
25 the make-whole dispute is going to go forward, the hearing is

1 going to be a full day.

2           Turning to the motion to compel, I've got just four  
3 points to make. One, it's getting a little frustrating. I  
4 keep hearing Deerfield's counsel stating a falsehood. Baker  
5 Brothers was not a client of White & Case pre-petition. They  
6 know this. They can't just keep saying it, and I'm sorry I  
7 have to correct the record every time. But I'm not making  
8 additional disclosures with respect to the Committee retention.

9           I'll point to an overarching one. I kind of  
10 question, in general, the probative value of Deerfield's  
11 participation in the hearing. There are a number of times in a  
12 bankruptcy case from which a non-debtor party is transacting  
13 with a debtor, a DIP lender, a contract counterparty. And I  
14 always find that the participation of those parties in a DIP  
15 dispute or a contract assumption dispute is just kind of self-  
16 serving.

17           Deerfield, I'm sure, believes that its arrangement  
18 with the debtors is in the best interest of the estate, but  
19 it's really for the estate to defend its actions. And it's  
20 especially unnecessary here because not only are the debtors  
21 being paid or their counsel being paid but paying Deerfield to  
22 make the same points that the debtors can make seems wasteful.

23           Point three, this concept of unfairness. I've got a  
24 number of references, both in the letters and in the  
25 presentation today, to we're trying to level the playing field.

1 The Committee got a bunch of documents in its investigation and  
2 Deerfield can't get it. I'd just like the level-set on that.  
3 The reason we had to do an investigation is because the playing  
4 field was tilted to begin with. Deerfield insisted and  
5 received a claims allowance stipulation from the debtors that  
6 could only be upset if standing were granted. So the fact that  
7 the Committee got documents is, I don't mean to re-argue the  
8 cash collateral stipulation, but we kind of view unfairness  
9 differently than they do at this point.

10 But importantly, we're not talking about  
11 investigation. We're talking about preparation for this  
12 hearing. Nothing's going to prevent Deerfield from going out  
13 and getting information from Baker Brothers or any other  
14 pre-petition unsecured creditor consistent with the Federal  
15 Rules if standing is granted. The question is, is this  
16 information necessary or appropriate for the hearing? And we  
17 don't think so.

18 So let me just finally focus on practicality.  
19 The comment that was made that this doesn't concern the  
20 committee at all, as we lay out in our papers and as you can  
21 see just from this hearing, this whole process is expensive.  
22 Leave aside the production of the documents and people  
23 reviewing it, this deposition, I'll say it, it's going to be a  
24 Sullivan partner, two associates, two Kirkland partners, two  
25 Kirkland associates, and one of the Committee showing up to

1 defend this deposition or take the deposition. All of that's  
2 going to be billed to the estate. So the cost of this  
3 definitely concerns the Committee.

4 Two, as we lay out in our papers, I don't think that  
5 they can use the deposition at the hearing. Baker Brothers is  
6 not an unavailable witness. They have to call Baker Brothers  
7 live, and they did not put Baker Brothers on their witness  
8 list. And we have no time on that standing hearing to add  
9 another witness to the mix.

10 Three, another practical point, I'm not sure  
11 Deerfield will want to use the information. Deerfield insists  
12 that what Baker Brothers views are relevant to this hearing.  
13 But if Baker Brothers comes in and says, you know what, we were  
14 making proposals based upon the fact that the debtor was  
15 woefully insolvent, and the uptier transaction was going to be  
16 an avoidable transaction. Is Deerfield going to be using that  
17 information? You're going to hear a totally different view  
18 from Deerfield at the hearing that the information that they  
19 sought at great expense to the estate is in fact irrelevant.  
20 And I will say, I think it is irrelevant.

21 Your Honor made clear we're not having testimony from  
22 experts on reasonably equivalent value insolvency. If that's  
23 not coming in, a lay witness, a lay non-party witnesses view  
24 with respect to whether the company was solvent or when it  
25 became insolvent and whether it got reasonably equivalent value

1 in the uptier shouldn't be coming in either.

2 So we'd ask that the Court deny the application  
3 without prejudice to Deerfield renewing it if standing is  
4 granted and an adversary proceeding started.

5 THE COURT: All right, thank you.

6 Mr. DeCamp, very briefly. I'm already running  
7 behind.

8 MR. DeCAMP: Yes, I will keep it brief, Your Honor.  
9 I'm not going to rehash any of the relevance arguments. I just  
10 want to address the suggestion that Baker Brothers is somehow a  
11 lay non-party witness or a random investor. That's not the  
12 case. They were leading a group that was proposing alternative  
13 transactions. They are very differently situated from other  
14 random creditors here.

15 The Committee says in their papers that Baker  
16 Brothers, among other things, wondered about whether the March  
17 exchange was a fraudulent transfer, even though Baker Brothers  
18 participated in it. So the Committee believes that's relevant.  
19 I'm not sure how they can dispute the relevance of what we're  
20 seeking here.

21 In terms of just the numerical error, Your Honor, I  
22 apologize if it's 34 references. We certainly didn't mean to  
23 give the Court incorrect information on that; 34, 35, it's the  
24 same ballpark, obviously.

25 And then as to Mr. Shore's statement about White &

1 Case's representation, our understanding, Your Honor, is that  
2 White & Case was leading the negotiations on behalf of an ad  
3 hoc group in meetings pre-petition that included Baker Brothers  
4 and was speaking for that group. And they were taking the lead  
5 on the proposals for the group. So I don't think anything  
6 we've suggested here in that regard is false. Thank you.

7 THE COURT: All right, thank you. Well, there's no  
8 question in the Court's mind that the Committee has placed  
9 Baker Brothers' activities with respect to proposals and  
10 information that were provided to the debtor and third parties  
11 at issue and that there is relevance.

12 And to that extent, certainly any communications by  
13 Baker Brothers, non-privileged, of course, to third parties  
14 relative to the proposals and other information related to the  
15 March transaction is relevant and subject to discovery and  
16 production by Baker Brothers, as well as a deposition limited  
17 on those issues.

18 What I disagree with or what I have a problem with is  
19 reaching a conclusion that the debtors' decision to not bring a  
20 claim and the Court's ultimate determination on whether that is  
21 an abuse of discretion or unjustifiable, I don't see how that  
22 can rest on internal opinions, views, and evaluations, and  
23 internal communications by Baker Brothers. I don't see how the  
24 debtor can point to information that it clearly didn't have  
25 access to and say it relied on that in deciding not to pursue



1 claims. So I'm not going to require production at this point.

2 The world changes to the extent derivative standing  
3 is granted or in the event production does produce information  
4 that points to access to that information by third parties. In  
5 other words, if such information had been disclosed outside of  
6 the internal confines of Baker Brothers, then it certainly  
7 should be available. But at this point, I'm going to cabin the  
8 production.

9 I'm going to require production since Baker Brothers'  
10 activities were relevant. I don't think anybody disputes that.  
11 But certainly, I'm not going to allow at this point discovery  
12 into the internal evaluations, assessments, or communications  
13 within Baker Brothers because I don't see how that will be tied  
14 to one of the prongs or the two main prongs, colorability, and  
15 unjustifiable refusal to bring the suit.

16 The debtor has to establish -- well, actually, it's  
17 the Committee's burden to establish that the debtors' decision-  
18 making was unjustifiable. And I don't know that they're going  
19 to point to anything that Baker Brothers created internally in  
20 that regard.

21 So that's my ruling. I'll let you all -- you all  
22 have gone pretty far in agreeing to the scope and days. I  
23 think the deposition can be done. I don't think three hours is  
24 extraordinary. It's taken an hour almost today just to decide  
25 this. So I think three hours is reasonable. It should be done

1 remote. It should be done limited to really what's being  
2 produced. I think the documents produced should come first.  
3 That's the way we've always done it. That's the way litigation  
4 in my experience has been undertaken.

5 So we'll let you work on the schedule. Call the  
6 Court if there's still a hang up and you need to have me make a  
7 call on some nuance of it.

8 I think Mr. Shore addressed pretty much the second  
9 issue on the scope of the July 9th hearing. It sounds like,  
10 and I anticipated, a full day on July 9th, as it is, with the  
11 standing motion, the witnesses. I think we can carve out time  
12 for legal argument, which is why I wanted to limit legal  
13 argument on the make-whole, rather, which is why I thought it  
14 should be limited in that regard, and not bring in other  
15 aspects of the objection, which would involve other legal and  
16 factual issues. I just don't think I have time on the 9th.

17 That's not to say I won't continue the hearing to  
18 another day in advance of confirmation or as part of  
19 confirmation. I first want to hear what's going on with the  
20 other elements. But I just don't -- there's only so many hours  
21 we have on July 9th, and I'm confident we'll subsume all of  
22 them.

23 So is there anything specific we want to address on  
24 that aspect?

25 MR. BELLER: Your Honor, if I may, Benjamin Beller

1 from Sullivan & Cromwell on behalf of Deerfield.

2 I thought we were clear at the last hearing on this  
3 point. And then clearly, there was a misunderstanding between  
4 us and the Committee, which is what necessitated our letter to  
5 you. And I'm glad we're clarifying. But again, I don't want  
6 to leave today's hearing, and I know you're pressed for time,  
7 without being crystal clear. Because the Committee's claim  
8 objection has a number of parts. There are some clear make-  
9 whole issues, right?

10 They argue that it should be considered unmatured  
11 interest. I think we're clear that that's being argued on July  
12 9th. They argue that if it's not unmatured interest, it should  
13 be disallowed for other reasons, including that it's a penalty.  
14 I think we're clear that that's being heard on July 9th. They  
15 also make an argument that a secured party is not entitled to  
16 both the make-whole on separate -- even if it's not unmatured  
17 interest, even if it's entirely enforceable, and post-petition  
18 interest.

19 So this sort of double-dipping, double-counting  
20 argument that has come up in other cases. Again, I just want  
21 clarity, uncertainty on what we are briefing and litigating on  
22 July 9th. Does Your Honor want that issue heard as well on  
23 July 9th?

24 THE COURT: I don't see why not. It seems to be a  
25 legal issue. It's not involving a factual predicate, unless

1 you tell me I'm wrong. I don't want --

2 MR. BELLER: Okay.

3 THE COURT: I certainly would want to entertain all  
4 of the arguments that we can, and they all seem to be  
5 intertwined.

6 MR. BELLER: Okay. So we will --

7 THE COURT: Does anybody take issue with it?

8 MR. BELLER: We will consider that issue to be heard  
9 on July 9th. To my mind, those are the make-whole issues that  
10 we've talked about, and that's what should go forward. We're  
11 perfectly happy to proceed on that basis. I just wanted to  
12 clarify that we finally have a common understanding among the  
13 parties with Your Honor.

14 THE COURT: That works for me.

15 Mr. Shore, do you have any issue with it?

16 MR. SHORE: No, Your Honor.

17 THE COURT: All right. And the debtor is on board?

18 MR. DeCAMP: No issues from the debtor.

19 THE COURT: Okay, then let's leave after an  
20 agreement. All right, folks, thank you for your time this  
21 morning.

22 COUNSEL: Thank you, Your Honor.

23 THE COURT: Do I need an order on the motion? Do you  
24 want to submit a limited order? I can have it just as a bench  
25 ruling.

1 MR. DeCAMP: I think it's fine with us, Your Honor,  
2 as a bench ruling. And I don't anticipate we're going to have  
3 any misunderstanding about it. So we'll confer with  
4 Mr. Sorkin, and I think we're good.

5 MR. SORKIN: I agree, Your Honor.

6 THE COURT: One less hour of billable time.

7 Great, thank you. Take care, folks.

8 (Proceedings adjourned at 10:23 a.m.)

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

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

15  
16 /s/ Dipti Patel

17 DIPTI PATEL, CET-997

18 J&J COURT TRANSCRIBERS, INC. DATE: June 21, 2024

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