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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW JERSEY**

In re:

INVITAE CORPORATION, *et al.*<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-11362 (MBK)

Hon. Michael B. Kaplan

**JOINDER AND SUPPLEMENTAL STATEMENT OF U.S. BANK TRUST COMPANY,  
NATIONAL ASSOCIATION, AS TRUSTEE AND COLLATERAL AGENT, TO  
DEERFIELD PARTNERS L.P.'S (I) OBJECTION TO THE COMMITTEE'S  
STANDING MOTION AND (II) RESPONSE TO THE COMMITTEE'S  
OBJECTIONS TO THE MAKE WHOLE AMOUNT**

U.S. Bank Trust Company, National Association (“**U.S. Bank**”) serves as trustee (the  
“**Indenture Trustee**”) and as collateral agent (in such capacity, the “**Collateral Agent**” and,

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



collectively with the Indenture Trustee, the “**Trustee**”) under that certain Indenture dated as of March 7, 2023 (the “**Indenture**”), pursuant to which the 4.5% Series A and Series B Convertible Senior Secured Notes due 2028 (the “**Secured Notes**”) were issued by Invitae Corporation. The Trustee hereby joins in *Deerfield’s (I) Objection to the Committee’s Standing Motion and (II) Response to the Committee’s Objections to the Make Whole Amount* (the “**Deerfield Objection and Response**”) [Docket No. 718] and hereby further supplements the Deerfield Objection and Response.

### **JOINDER**

1. Pursuant to this Court’s prior rulings in connection with the *Debtors’ Motion for Entry of an Order Scheduling the Hearing on the Committee’s Standing Motion with the Hearing on Plan Confirmation, Together with Interim Dates and Deadlines* [Docket No. 548], (a) the *Official Committee of Unsecured Creditors’ Motion for (i) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action on Behalf of the Debtors’ Estate and (ii) Exclusive Settlement* (the “**Standing Motion**”) [Docket No. 536] and (b) those portions of the *Official Committee of Unsecured Creditors’ Objection to the 2028 Senior Secured Note Claims [Claim Nos. 360, 378, 379, 380, 381, 382]* (the “**Claim Objection**”) [Docket No. 528] going to the allowance of the Make Whole Amount<sup>2</sup> will be heard at the hearing currently scheduled for July 9, 2024. The Trustee files this joinder to the Deerfield Objection and Response (this “**Joinder**”) to respond to the Standing Motion and to those portions of the Claim Objection that will be heard at that hearing, and hereby joins in and incorporates by reference the arguments made in the Deerfield Objection and Response as if set forth herein. In addition, the Trustee supplements the Deerfield Objection and Response as set forth below.

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<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Indenture, Claim Objection, or Standing Motion.

**A. The Terms of the Secured Notes are Well Documented and Not in Dispute**

2. The Secured Notes are held through the Depository Trust Company (“**DTC**”), which is the sole registered holder of the Secured Notes. Deerfield Partners, L.P. has represented that it holds approximately 78% of the Secured Notes (the “**Deerfield Holders**”). The remaining 22% of the Secured Notes are held by other parties (the “**Minority Holders**”). The Trustee does not know the identity of the Minority Holders.

3. Pursuant to the Indenture, the Trustee is to exercise the rights and powers under the Indenture solely at the discretion of the Administrative Determination Holder(s) (defined in the Indenture as a Holder or Holders holding more than 50% of the aggregate principal amount of the Secured Notes), which are the Deerfield Holders.

4. The security interest granted pursuant to the Indenture and related documents (collectively, the “**Note Documents**”) was granted for the benefit of all the secured parties, including the Indenture Trustee, Collateral Agent, Deerfield Holders, and the Minority Holders (the “**Secured Parties**”). The Trustee, accordingly, filed Proofs of Claim Nos. 360, 378, 379, 380, 381, and 382 on behalf of all Secured Parties with respect to all obligations owed by the Debtors pursuant to the Note Documents (collectively, the “**Claim**”).

5. The Official Committee of Unsecured Creditors (the “**Committee**”) has filed its Claim Objection attacking, among other things, the Make Whole Amount. The gravamen of the Claim Objection is the Committee’s challenge of a transaction in 2023 (the “**March Exchange**”) that led to the issuance of the Secured Notes. The March Exchange is also the subject of the Standing Motion, which is thoroughly addressed in the Deerfield Objection and Response. As more fully set forth in the Deerfield Objection and Response, and contrary to the Committee’s assertions, the March Exchange was not an avoidable transaction. Rather, the March Exchange was an arm’s-length, well-documented, and transparent transaction to manage certain upcoming

debt maturities, and followed what the Trustee understands were nuanced discussions among sophisticated financial stakeholders, resulting in the issuance of the Secured Notes and the appointment of the Trustee as a non-economic party serving as Indenture Trustee and Collateral Agent under the Note Documents.

**B. The Nullification of Liens Attaching to Valid, Binding, Legal, and Well-Documented Obligations of an Issuer of Notes Is Relief that Should Only Be Granted under Extraordinary Circumstances**

6. The Note Documents contain all of the indicia of, and elements of, secured debt, and the Committee does not dispute that the amounts included in the Claim are well-documented or that the liens attaching to such Claim are adequately perfected. The Committee further does not dispute that the Indenture provides for the payment of a Make Whole Amount equal to 9% of the outstanding principal amount and default interest at a rate *per annum* of 6.5% (the “**Default Rate**”). It, of course, cannot make such a claim since the Note Documents expressly and unambiguously provide for the payment of the Make Whole Amount and interest at the Default Rate upon default and acceleration of the Notes. (Indenture § 2.13.)

7. A prima facie basis for the Claim has been established and the burden is on the Committee to demonstrate how the extraordinary relief sought—relief by which substantive rights attaching to the Secured Notes would be wiped out—could be warranted. This high burden has not been met.

8. Since the rights granted in the Note Documents are clear, the Committee instead attacks the March Exchange in its effort to nullify the security interest granted to the Collateral Agent under the Note Documents. The Committee further seeks to nullify the bargained-for terms set forth in the Indenture with respect to the Make Whole Amount, arguing that such amount is unmatured interest rather than liquidated damages. The arguments made by the Committee seeking to modify the unambiguous terms set forth in the Note Documents are equitable in nature.

The Trustee refers the Court to the Deerfield Objection and Response for all of the reasons why such equitable arguments fail.

**C. The Market Relies on Contractual Rights Attaching to Secured Notes**

9. Furthermore, the implication on all holders of the Secured Notes, as well as on the securities market, must also be considered when analyzing the extraordinary relief sought by the Committee. As mentioned above, the Secured Notes are held through DTC, which is the sole registered holder of the Secured Notes. In a DTC-held transaction, the Trustee does not know the identity of beneficial owners of the notes, nor the circumstances under which such holders obtained their notes. A particular investor may have become a holder at the time of the March 2023 exchange or may have acquired their notes on the open market thereafter. To the extent that there was trading of the Secured Notes, subsequent purchasers would presumably have relied on the secured status of the Secured Notes as well as the terms thereof, including rights related to the Make Whole Amount provided for in the Indenture, when purchasing their Secured Notes and factored those terms into the negotiated purchase price. Accordingly, if the relief the Committee is seeking is granted, it is possible that the rights of parties who were strangers to the March Exchange, but who now hold Secured Notes, would be stripped.

10. Subsequent purchasers must be able to rely on the terms of securities purchased through the open market. While the Trustee recognizes that facts of some cases may justify an unusual result, such facts are not present here. The circumstances of this case, and most cases, do not warrant a result that may undermine the integrity of the trading market and cause purchasers of securities to question that what they are buying is not what is described.

*[Remainder of page left blank intentionally]*

**CONCLUSION**

WHEREFORE, for all the foregoing reasons, and for the reasons set forth in the Deerfield Objection and Response, U.S. Bank, as Trustee, respectfully requests that this Court deny the relief sought by the Committee in its Standing Motion and overrule the Claim Objection, which claims were filed by the Trustee on behalf of itself and Holders of the Secured Notes.

July 2, 2024  
Morristown, New Jersey

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