

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

Caption in Compliance with D.N.J. LBR 9004-1(b)

PROSKAUER ROSE LLP

Timothy Karcher, Esq. (NJ28351998)

Michael Mervis, Esq.

11 Times Square

New York, NY 10036

212-969-3000

tkarcher@proskauer.com

mmervis@proskauer.com

Counsel to Integrated DNA Technologies, Inc.

Case No. 24-11362 (MBK)

Chapter 11

(Jointly Administered)

Hearing Date: July 22, 2024 at 10 a.m. (ET)

In re:

Invitae Corporation, *et al.*,¹

Debtors.

**OBJECTION OF INTEGRATED DNA TECHNOLOGIES,
INC. TO THE SECOND AMENDED JOINT PLAN OF
INVITAE CORPORATION AND ITS DEBTOR AFFILIATES
PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

Integrated DNA Technologies, Inc. (“IDT”) respectfully objects to the *Second Amended Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 791] (the “Plan”)² proposed by Invitae Corporation (“Invitae”), Archer DX, LLC (“ArcherDX”) and Invitae’s remaining subsidiaries (collectively, the “Debtors”).

¹ 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. The Debtors’ service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

² Capitalized but undefined terms used herein shall have the meaning ascribed to them in the Plan.



PRELIMINARY STATEMENT

1. IDT timely filed two claims in the above-captioned Chapter 11 Cases. Both claims contained amounts asserted as (i) administrative expenses, (ii) unsecured claims (including contractual indemnification claims), and (iii) potential rejection damage claims.

2. IDT also filed an Assumption Objection (defined below) to a Notice of Cure, in which IDT raised concerns regarding adequate assurance of future performance by the purchaser (Labcorp) in connection with its purchase of substantially all of the Debtors' assets, including a "Supply Agreement" to which IDT is the non-debtor counterparty.

3. As of the deadline to object to Plan confirmation, IDT's objection to the assumption and assignment of its contract has not been resolved. IDT files this objection to preserve its rights, including its rights to indemnification, in connection with the assignment or potential rejection of IDT's contracts, and its rights to assert claims against the Debtors' estates.

BACKGROUND AND RELEVANT FACTS

A. The APA Transaction

4. Prior to the Petition Date, on December 19, 2022, Invitae and IDT entered into that certain *Asset Purchase Agreement* (the "APA"), which included a number of ancillary agreements and licenses identified as exhibits to, and executed by IDT and Invitae (and in some cases, ArcherDX) in connection with the transactions contemplated by the APA (the "Ancillary Agreement(s)," and, collectively with the APA, the "APA Transaction"). Those Ancillary Agreements include:

- i. Assignment and Assumption Agreement and Bill of Sale
- ii. Intellectual Property License Agreement
- iii. Registered IP Assignment Agreement
- iv. ArcherDX Software Source Code License Agreement
- v. Sublease Agreement
- vi. Supply Agreement

vii. Transition Services Agreement

5. Taken as a whole, pursuant to the APA Transaction, IDT purchased from Invitae the *Archer* business comprised of research use only test kits (“RUO Test Kits”) and associated software, and IDT agreed to supply the RUO Test Kits back to Invitae on a non-exclusive basis. IDT additionally agreed to manufacture on behalf of Invitae and supply Invitae with certain personalized cancer monitoring test kits (the “PCM Test Kits,”³ collectively with the RUO Test Kits, the “Supplied Products”) on an exclusive basis. In turn, Invitae agreed to indemnify IDT for liabilities arising from, among other things, the infringement or violation of any third party’s intellectual property, or allegations thereof, including with respect to such infringement or violation resulting from the APA Transaction and the Supplied Products implicated therein.

6. In the APA Transaction, Invitae and IDT also agreed that certain Excluded Assets and Excluded Liabilities (each, as defined therein) would remain with Invitae.

B. The Tecan Action

7. In October 2023, IDT, Invitae, and ArcherDX were named as defendants in that certain litigation styled *Tecan Genomics, Inc., v. Invitae Corporation*, Case No. 23-cv-01114 (GBW) (D. Del.) (the “Tecan Action”), which was commenced in the United States District Court for the District of Delaware. In the Tecan Action, plaintiff Tecan Genomics, Inc. (“Tecan”) asserted various claims against IDT, Invitae, and ArcherDX, alleging infringement of various patents, and alleged that certain products now sold by IDT utilize infringing technology. IDT filed an answer in the Tecan Action, in which it denied Tecan’s allegations of infringement.

8. Tecan filed Proof of Claim No. 719 and Proof of Claim No. 731 in these Chapter 11 Cases, asserting contingent and unliquidated claims on account of any damages and related

³ The PCM Test Kits remained property of Invitae.

costs arising from the Tecan Action, and asserting an administrative claim for post-petition, ongoing future infringement related damages (the “Tecan Claims”). Notably, the claims asserted by IDT against Invitae and ArcherDX in these Chapter 11 Cases are unlike the Tecan Claims insofar IDT’s claims do not depend on any pending or future litigation against the Debtors by IDT.

9. The Tecan Action gives rise to indemnification claims by IDT against the Debtors, which IDT has asserted in the IDT Claims (defined below). To the extent Tecan’s infringement claims are administrative claims, IDT asserts that indemnification claims of IDT associated with such liability would also be entitled to administrative expense status. Tecan has sought to estimate its claims for allowance, and to the extent such estimation is conducted, IDT maintains the estimation should have no preclusive or prejudicial effect on IDT with respect to the Tecan Litigation.

C. The Debtors’ Bankruptcy Filing

10. On the February 13, 2024 Petition Date, the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”), in the United States Bankruptcy Court for the District of New Jersey (the “Court”).

D. The IDT Claims

11. On April 12, 2024, IDT timely filed Proof of Claim No. 1047 against Invitae and Proof of Claim No. 1048 against ArcherDX (collectively, the “IDT Claims”) in these Chapter 11 Cases. The IDT Claims are substantively similar and assert the following rights and claims against the Debtors:

- Administrative expenses against Invitae and ArcherDX for unpaid balances.
- Indemnification claims against Invitae and ArcherDX in connection with the Tecan Action.
- The oPools Claim against ArcherDX, which is now fixed at \$3,405,164.91.

12. In addition, the IDT Claims contained broad reservations for potential rejection damages claims in the event the APA and the Ancillary Agreements were not assumed. The IDT Claims were initially classified by the Debtors solely as Class 2 (Other Priority Claims),⁴ but have now been corrected to also include general unsecured claims against Invitae (in Class 6) and ArcherDX (in Class 5).⁵

E. The Labcorp Sale and Executory Contracts

13. During the pendency of the Debtors' chapter 11 Cases, the Debtors sought authority to enter into a sale of substantially all of the Debtors' assets (the "Labcorp Sale") to Labcorp Genetics Inc. and its affiliates (collectively "Labcorp"). In connection therewith, Invitae sought authority to assume and assign the "Supply Agreement" to Labcorp and filed a *Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* [Docket 365] (the "Notice of Assumption") indicating Invitae's intent to do so.⁶

14. IDT timely objected to the Notice of Assumption with respect to the Supply Agreement on the basis that, as an Ancillary Agreement to the APA, the Supply Agreement does

⁴ The Plan defines Other Priority Claim as "any Claim, to the extent such Claim has not already been paid during the Chapter 11 Cases, other than an Administrative Claim or a Priority Tax Claim, entitled to priority in right of payment under section 507(a) of the Bankruptcy Code." *Id.*, Art. 1.A.93. As such, IDT understands Class 2 to encompass administrative claims arising under Bankruptcy Code § 507(a) even though the Plan states that Administrative Claims "have not been classified." *Id.*, Art. II.

⁵ In an entirely separate transaction, which preceded the APA Transaction, on May 10, 2022, IDT and ArcherDX entered into that certain oPool Oligo Pools - RUO Supply Agreement (the "oPools Agreement"), pursuant to which IDT agreed to supply ArcherDX with certain oPools products (the "oPools Products"). Importantly, the oPools Agreement contains certain minimum purchase obligations owed by ArcherDX to IDT. Specifically, ArcherDX agreed to purchase over \$4.5 million in oPools Products from IDT prior to May 8, 2024 to satisfy the Year 2 Annual Minimum Revenue Requirement under §§ 2.2.2–2.2.4 of the oPools Agreement (the "oPools Minimum"). ArcherDX has failed to satisfy the oPools Minimum, and IDT has a claim against ArcherDX for \$3,405,164.91 (the "oPools Claim"). The Debtors have classified this claim in Class 5.

⁶ As set forth in the Notice of Assumption, the Debtors also proposed to assume and assign three other agreements involving IDT: the Quality Terms and Conditions dated 12/8/20, the Work Order dated 9/26/18, and the Assignment and Assumption Agreement dated 10/3/23. The Debtors have identified a cure amount of \$2,358,079.66 in connection with the Work Order. IDT did not object to the assumption or assignment of those agreements.

not stand alone and is integral to a broader, comprehensive transaction that cannot be broken into parts in connection with an assumption and assignment. The basis for IDT's objection is more fully set forth in the *Objection of Integrated DNA Technologies, Inc. to Debtors' Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* [Docket 403] (the "Assumption Objection"). In brief, IDT has asserted that Labcorp cannot strip IDT's indemnification rights in connection with the Supply Agreement, which—by necessity—implicates broader indemnity and other obligations of Invitae under the APA Transaction. To hold otherwise could potentially contractually bind IDT to provide infringing products to Labcorp, without indemnification protection, which is not how the APA is constructed. By only seeking to assume the Supply Agreement (and not the more fulsome obligations under the APA) Labcorp is taking only the "beneficial" elements of the APA, without the burdens inherent in the broader indemnification provisions. It is black-letter law that the assignee of an executory contract cannot have the benefit of the bargain, without also assuming its burdens.

15. The Assumption Objection remains outstanding and is scheduled to be heard by the Court on July 18, 2024. IDT and Labcorp have engaged in discussions in an attempt to resolve the Assumption Objection. While IDT is optimistic that the Assumption Objection will be consensually resolved, it may not be resolved prior to confirmation.

F. Classification and Treatment of the IDT Claims

16. As of the deadline to object to the Plan, IDT and the Debtors are party to the APA (and its Ancillary Agreements) and no formal rejection has been initiated. Moreover, in connection with the resolution of the Notice of Cure and Assumption Objection, those contracts may be assumed and assigned to Labcorp, which may happen after the confirmation hearing.

17. In light of the uncertainty regarding the status of these claims, the confirmation must not be used to truncate IDT's rights in connection with its claims.

OBJECTION

18. IDT believes its claims should be properly classified and addressed as described below, and notwithstanding the confirmation of the Plan, IDT should have the right to fully pursue its claims against the Debtors.

i. Administrative Expenses

19. As described above, IDT asserted certain administrative expenses in the IDT Claims. Specifically, IDT asserted Invitae accrued an open balance of \$322,699.27 in invoices after the Petition Date. IDT Claims ¶ 5. That sum remains outstanding and therefore should be afforded Administrative Claims status. The Plan provides that Administrative Claims will be paid in full and need not be classified. *See id.*, Art. II. IDT believes its asserted administrative expenses—which have not been challenged—must receive that same treatment and objects to the Plan to the extent they are not.

20. Tecan has asserted that it has administrative expenses in connection with post-petition infringement. To the extent there are post-petition indemnification obligations of the Debtors to IDT that arise in connection with the Tecan Action, IDT asserts such indemnification obligations as administrative expenses against the Debtors. Those administrative expenses must be paid in full pursuant to the Plan, and IDT objects to the Plan to the extent it does not so provide.

ii. APA Transaction Claims

21. IDT has also asserted claims in Class 5 and Class 6 against the Debtors with respect to the APA Transaction. To the extent the APA is ultimately rejected, IDT is entitled to rejection damages against Invitae and ArcherDX arising under and in connection with the APA and its

Ancillary Agreements (including the Intellectual Property License Agreement, the ArcherDX Software Source Code License Agreement, Supply Agreement).⁷

22. While ArcherDX is not a signatory to the APA, ArcherDX is nevertheless legally bound by the APA in its capacity as Selling Subsidiary and will incur liability vis-à-vis IDT if the APA is rejected. For instance, in Article III of the APA, Invitae, acting “on behalf of itself and the Selling Subsidiary” (as ArcherDX’s agent), made certain representations and warranties, including that, to its knowledge, “the conduct of the Business as currently conducted or as conducted since September 30, 2020 does not infringe, misappropriate or otherwise violate, and has not infringed, misappropriated or otherwise violated, any Intellectual Property of any Person.” *Id.* § 3.5(b)(ii).

23. The Debtors should confirm that IDT’s claims related to the APA Transaction are classified as Class 5 and Class 6 claims under the Plan and will be provided the associated treatment under the Plan notwithstanding their contingent nature as of the date hereof or any other provision of the Plan. IDT objects to the Plan to the extent IDT’s claims related to the APA Transaction are not afforded such classification and treatment.⁸

⁷ In the case of rejection, IDT may also have rights under section 365(n) of the Bankruptcy Code that must be respected by the Debtors.

⁸ If the APA is assigned, Invitae’s assignee would indemnify IDT for any of those contractual obligations and therefore prevent any harm to IDT from materializing. If that were to occur, IDT’s objection to the Plan based on such claims would be resolved

CONCLUSION

WHEREFORE, IDT requests the Court deny confirmation of the Plan to the extent it fails to protect IDT's rights with respect to its claims as set forth herein.

Dated: July 15, 2024

Respectfully submitted,

/s/ Timothy Karcher

Timothy Karcher, Esq.

Michael Mervis, Esq.

PROSKAUER ROSE LLP

11 Times Square

New York, NY 10036

Telephone: 212-969-3000

Email: Tkarcher@proskauer.com

Mmervis@proskauer.com