

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Caption in Compliance with D.N.J. LBR 9004-1(b)	
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In re:	Case No.: 24-11362 (MBK)
INVITAE CORPORATION, <i>et al.</i> ,	Chapter: 11
Debtors. ¹	(Jointly Administered)

**WILMINGTON SAVINGS FUND SOCIETY, FSB’S
(I) OBJECTION TO CONFIRMATION OF THE AMENDED
JOINT PLAN OF INVITAE CORPORATION AND ITS DEBTOR
AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY
CODE; AND (II) JOINDER TO COMMITTEE’S OBJECTION TO THE PLAN**

Wilmington Savings Fund Society, FSB (“WSFS” or “Convertible Notes Trustee”²), in its capacity as Successor Trustee under the Convertible Notes Indentures,³ by and through its undersigned counsel, ArentFox Schiff LLP, hereby files this objection (the “Objection and

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 For the avoidance of doubt, and unless stated otherwise, references herein to WSFS as Convertible Notes Trustee are made to it in each of its roles as successor trustee under both of the Convertible Notes Indentures.

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan (as defined below).



Joinder”) to confirmation of the *Second Amended Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 791, Ex. A] (the “Second Amended Plan”, and as may be further amended, the “Plan”) filed by the above captioned Debtors and joins the Official Committee of Unsecured Creditors’ (the “Committee”) objection to the Plan [Docket No. 801] (the “Committee Objection”), and respectively submits as follows⁴:

BACKGROUND

1. WSFS is, among other roles, successor trustee, paying agent and custodian under each of the Convertible Notes Indentures, pursuant to which Invitae Corporation (“Invitae”) issued the 2024 Convertible Notes and 2028 Convertible Notes. As of the Petition Date, there was approximately \$27.06 million and \$1.15 billion in principal outstanding (plus accrued and unpaid interest, fees and other costs) under the 2024 Convertible Notes and 2028 Convertible Notes, respectively.

2. WSFS succeeded U.S. Bank Trust Company, N.A. in these roles after the Petition Date pursuant to the *Instrument of Resignation, Appointment and Acceptance* dated as of February 20, 2024, by and between U.S. Bank, WSFS and Invitae (the “Tripartite Agreement”). As successor Convertible Notes Trustee, WSFS holds all rights and powers as set forth in each of the Convertible Notes Indentures and all related and ancillary documents executed and delivered in connection therewith. Since its succession, WSFS has diligently fulfilled its duties and obligations as Convertible Notes Trustee, and shall continue to do so.

3. In connection with the postpetition execution of the Tripartite Agreement and WSFS’s succession as Convertible Notes Trustee, Invitae also countersigned a fee letter from WSFS whereby Invitae further acknowledged and agreed to pay WSFS’ reasonable fees and

⁴ The Debtors agreed to extend the Convertible Notes Trustee’s deadline to file this Objection and Joinder to Tuesday, July 16, 2024 at 4:00 p.m. prevailing Eastern Time.

expenses as Convertible Notes Trustee, including the reasonable fees and expenses of counsel, in accordance with the Convertible Notes Indentures.

OBJECTION

4. The Convertible Notes Trustee has been in ongoing discussions with the Debtors to resolve its issues and concerns with certain provisions contained in the Plan. While many of these issues and concerns have already been consensually resolved and incorporated into the current version of the Plan, certain issues and concerns remain open that are primarily related to ensuring that the rights and protections afforded to the Convertible Notes Trustee under each of the Convertible Notes Indentures are included in the Plan. While the Convertible Notes Trustee is hopeful that these issues will be consensually resolved by the parties prior to the confirmation hearing, the Convertible Notes Trustee files this Objection and Joinder in order to preserve its rights pending the conclusion of these proceedings and reserves its right to address such issues and concerns.

5. Among the Convertible Notes Trustee's remaining issues and concerns are the Plan's failures: (i) to provide for the payment of the Convertible Notes Trustee's fees and expenses (the "Convertible Notes Trustee Fees") in cash on the Effective Date; and (ii) to include the Convertible Notes Trustee as a Released Party under the Plan, both of which are customary for indenture trustees in chapter 11 plans restructuring significant funded debt and should be included here.⁵ See, e.g., *In re WeWork, Inc.*, 23-19865 (Bankr. D.N.J. 2024) (Doc. 2051, Ex. A, pp. 25, 29, 51); *In re Aceto Corporation*, 19-13448 (Bankr. D.N.J. 2019) (Doc. 996, pp. 16-17, 19, 48); *In re Claire's Stores, Inc.*, 18-10584 (Bankr. D. Del. 2018) (Doc. 1040, Ex. A, pp. 18, 44).

6. With respect to the payment of the Convertible Notes Trustee Fees, such fees and

⁵ Seemingly recognizing the common place nature of this requested relief, the 2028 Senior Secured Notes Trustee is afforded both of these rights under the Plan, while the Convertible Notes Trustee is not.

expenses constitute administrative expenses of these estates and must be paid in full in cash on the Effective Date, whether by classifying and treating such claim as an administrative expense claim or simply as a payment under a confirmed plan.⁶ The Convertible Notes Trustee is required to fulfill its duties and obligations during these cases while the Convertible Notes Indentures remain in full force and effect. The Convertible Notes Trustee's performance of these necessary duties on behalf of the Debtors' largest aggregate creditor body (holding more than \$1.17 billion in outstanding principal) is entirely consistent with the purpose of administrative expense priority and the well-settled public policies underlying indentures, which are designed to equip trustees with the ability to protect public investors by assigning the expenses of compliance to the issuer and to have a single voice acting on behalf of all holders. This is not just a benefit to holders but to debtor-issuers as well. Absent the Convertible Notes Trustee, the Debtors would have had to deal with hundreds if not thousands of holders appearing or exercising remedies individually.

7. Recognizing the importance of an indenture trustee's role after a bankruptcy filing, Invitae both appointed WSFS as successor Convertible Notes Trustee in the Tripartite Agreement (where Invitae also acknowledged WSFS's assumption of the rights, duties and obligations of Convertible Notes Trustee) and executed a separate fee letter agreeing to the payment of WSFS's fees and expenses after the Petition Date. Moreover, the Convertible Notes Indentures expressly provide that Convertible Notes Trustee's fees and expenses incurred following the commencement a bankruptcy case by Invitae are administrative expenses.⁷

⁶ Section 503(b)(1)(A) of the Bankruptcy Code permits payment of administrative expenses for "the actual, necessary costs and expenses of preserving the estate." This includes payment for postpetition services, particularly where the debtor has agreed to treat such services as administrative expenses and engaged the party for these services after the Petition Date.

⁷ Specifically, each of the Convertible Notes Indentures provide that when the Convertible Notes Trustee and its agents "incur expenses or render services after an Event of Default specified in Section 6.01(h) or Section 6.01(i) occurs, the expenses and the compensation for the services are intended to constitute expenses of administration under any bankruptcy, insolvency or similar law." *E.g.*, 2024 Convertible Notes Indenture § 7.06 (emphasis added) (section 7.06 of the 2028 Convertible Notes Indenture contains identical language). Section 6.01(h), in turn, refers to the filing

8. Rather than fulfill their postpetition obligations to pay the Convertible Notes Trustee's fees and expenses, the Plan shifts Invitae's liabilities to the Convertible Notes Trustee to noteholders by forcing the Convertible Notes Trustee to assert its charging lien against distributions to holders. The charging lien, however, is a backstop for the Convertible Notes Trustee's benefit, not a tool for Invitae to avoid contractual obligations.

JOINDER

9. The Convertible Notes Trustee also shares the Committee's concerns with respect to confirmation of the Plan raised in the Committee Objection and, therefore, submits this Joinder to the Committee Objection and adopts and incorporates the arguments made therein.

10. In addition to the points raised by the Committee in its objection concerning the Debtors' improper classification of claims and use of a so-called convenience class, the Convertible Notes Trustee thinks it appropriate to highlight the Debtors' misleading statement in the notice filed with the Second Amended Plan asserting that "under the Second Amended Plan, at least 93% in number of general unsecured claims are estimated to receive a recovery in full."⁸ This statement provides only a description of claims being paid based on the number of the claims, makes no reference to the percentage of General Unsecured Claims being paid based on the amount of the claims and it exists only as a function of the improperly gerrymandered convenience class to which the Committee objects. *See* Committee Objection ¶¶ 66-68.

11. As more fully described in the Committee Objection, participation in the convenience class is capped at \$250,000. Any holders of Convertible Notes who wish to participate in the convenience class are required to reduce the amount of their claims to \$250,000.

of a voluntary bankruptcy case.

⁸ *Notice of Filing Second Amended joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 791], p. 2.

Any holders of Convertible Notes who do not opt into the convenience class (i.e., do not agree to reduce the amount of their claims to \$250,000) will have their claims classified as Parent Unsecured Claims, which the Debtors estimated in their Disclosure Statement will total \$1.183 billion⁹ and project will not receive any recoveries under the Plan. *See* Disclosure Statement, p. 32.

12. A quick review of the latest Wind-Down Budget¹⁰ demonstrates the incongruity between the percentage of General Unsecured Claims to be paid as promoted by the Debtors (and highlighted above) and the percentage of General Unsecured Claims to be paid by the actual amount of claims. The Wind-Down Budget estimated that the other classes of General Unsecured Claims that are not Parent Unsecured Claims will contain of an aggregate total of \$17.245 million in claims (Class 4 – Convenience Class Claims at \$8.846 million and Class 5 – Subsidiary Unsecured Claims at \$8.399 million).¹¹ *See* Wind-Down Budget at 4. Given the estimate that there will be \$1.183 billion in Parent Unsecured Claims, only 1.4% of the General Unsecured Claims (by amount of claims) will be paid in full, while 98.6% of the General Unsecured Claims are not projected to receive any recoveries under the Plan. A 1.4% recovery on account of General Unsecured Claims is not something for which the Debtors and their professionals should be proud.¹²

⁹ This figure is inclusive of the claims arising under the Convertible Notes, which had an aggregate principal amount outstanding on the Petition Date of more than \$1.177 billion (plus prepetition accrued and unpaid interest, fees, expenses and other charges).

¹⁰ *Plan Supplement for the Amended Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy* [Docket No. 761, Ex. F].

¹¹ These figures are consistent with those provided in the Disclosure Statement, which estimated that non-Parent Unsecured Claims would contain an aggregate total of \$16.3 million in claims (Class 4 – Convenience Class Claims at \$9.2 million and Class 5 – Subsidiary Unsecured Claims at \$7.1 million). Disclosure Statement at 32.

¹² Note that figures and estimations described in this section are based on the numbers provided by the Debtors' in their Wind-Down Budget and Disclosure Statement and will change based on the amount of holders of Parent Unsecured Claims who actually elect to participate in the Convenience Class. The Convenience Class's opt-in deadline was July 15, 2024 at 4:00 p.m. prevailing Eastern Time and the total amount of opt-ins have not yet been disclosed as of the filing of this Objection and Joinder.

RESERVATION OF RIGHTS

13. The Convertible Notes Trustee is continuing to work with counsel for the Debtors to resolve its issues. The Convertible Notes Trustee files this Objection and Joinder to protect and preserve its rights pending final confirmation that all of its objections are resolved and any revisions are acceptable. The Convertible Notes Trustee expressly reserves its right to further address the Plan, including any further changes or modifications to the Plan, the proposed Confirmation Order, and any other ancillary issues either by further submission to this Court, at oral argument or testimony to be presented at the hearing.

Dated: July 15, 2024
New York, New York

Respectfully submitted,

ARENTFOX SCHIFF LLP

/s/ Jeffrey R. Gleit

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