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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
INVITAE CORPORATION, *et al*.,	Case No. 24-11362 (MBK)
Debtors.[1]	(Jointly Administered)

DEERFIELD'S STATEMENT IN SUPPORT OF CONFIRMATION OF THE PLAN AND JOINDER TO THE DEBTORS' BRIEF IN SUPPORT OF CONFIRMATION

Deerfield Partners, L.P. (together with its applicable affiliated funds and entities, "Deerfield"), as holder of a majority of the 2028 Senior Secured Notes, hereby submits this statement (this "Statement") in support of 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] (the "Plan")[2] and joins in the *Debtors' Memorandum of Law in Support of the*

[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' 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 terms used but not defined herein have the meanings ascribed to them in the Plan.

Debtors' Second Amended Joint Plan of Invitae Corporation and Its Debtor Subsidiaries Pursuant to Chapter 11 of the Bankruptcy Code (the "Debtors' Confirmation Brief").

STATEMENT

1. Deerfield supports confirmation of the Plan. The Plan satisfies all plan confirmation requirements under section 1129 of the Bankruptcy Code, as set forth in the Debtors' Confirmation Brief and as will be demonstrated at the Confirmation Hearing. The Plan pays in full more than 90% of all unsecured creditors and all administrative and priority claims. The Plan appropriately distributes to creditors the proceeds of the value-maximizing sale approved by the Court in these cases and is unquestionably in the best interests of the Debtors and their estates and should be approved.

2. As it has done from day one of these cases, the Committee blindly objects to the Debtors' chosen path. The Committee's confirmation objection[3] is little more than an attempt at a second bite at the apple for the relief they sought through the Standing Motion despite the Court's July 12, 2024 ruling preliminarily denying that relief (the "July 12 Ruling"). And while the Court's July 12 Ruling paved the way to confirmation of the previous version of the Plan, in light of the Committee's stated concerns with the treatment of Class 5 creditors as compared to Class 6 and 11 creditors,[4] the Debtors, with Deerfield's consent, amended the Plan so that all unsecured creditors that are not Convenience Class holders (including Parent Unsecured Creditors) will

[3] *The Official Committee of Unsecured Creditors' Objection 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. 801] (the "Committee Objection").

[4] At the hearing on July 9, 2024, counsel to the Committee questioned Jill Frizzley on cross-examination regarding the propriety of paying the Subsidiary Unsecured Claims in full given the "de minimis" assets held by subsidiaries of the Debtors. *See* July 9 Hr'g Tr. 113:21-24. At the hearing on June 11, 2024, the Committee stated "[the Subsidiary Unsecured Claims] may be structurally senior but, if there are no assets in those boxes, we need to understand and advise our clients with respect to how it should be then that unsecured creditors in assetless boxes are getting recoveries when parent creditors are not." June 11 Hr'g Tr. 18:6-11.

receive the same treatment, and will be ensured of a recovery through the GUC Distribution Reserve (a gift by the Class 3 creditors) in addition to any residual value after payment in full of all higher priority creditors.

3. In addition, in the days following the July 12 Ruling, the Debtors and Deerfield engaged in further discussions with respect to potential compromises as to the distribution of value under the Plan to further improve recoveries for unsecured creditors. Through those discussions, Deerfield has agreed to support a compromise of the Make Whole Amount as follows: (i) waiver of 50% of the $27.5 million Make Whole Amount and (ii) distributions on the remaining portion of the Make Whole Amount shared with unsecured creditors with $0.75 of every dollar paid to Class 3 creditors and $0.25 of every dollar paid to unsecured creditors (the "Make Whole Settlement"). Using the Committee's own assumptions about Distributable Value, the Make Whole Settlement would generate approximately $17 million of additional value for non-Convenience Class general unsecured creditors and would ***double*** recoveries for general unsecured creditors under the Plan, before accounting for the additional residual value to which they would be entitled.

4. In light of the changes to the Plan since the July 12 Ruling, there can be no doubt that the Plan is reasonable and fair to all creditors. In addition, the Committee Objection should be overruled for the reasons set forth in the Debtor's Confirmation Brief and for the additional reasons stated below.[5]

5. **Class 5 Treatment is Reasonable**. Despite having spent significant time raising issues with respect to the Plan's unimpaired treatment of Class 5 creditors as unfair to Parent Unsecured Claims, the Committee now objects to the Debtors' modifications to the Plan to provide

[5] Deerfield reserves all rights to respond to the Committee Objection at the Confirmation Hearing.

the same treatment to all non-Convenience Class unsecured creditors. Committee Objection, ¶¶ 24-29. It was surprising that the Committee had objected to paying Subsidiary Unsecured Claims in full under the prior iteration of the Plan despite its fiduciary duties to ***all*** unsecured creditors, and it is disingenuous for the Committee now to object to the Plan changes responding directly to those objections. The modification of the Plan represents the Debtors' good faith effort to respond to the Committee's repeatedly stated concerns regarding the treatment of Subsidiary Unsecured Claims under the Plan and to resolve any alleged classification issues without reducing the amount of the original "gift" associated with the Secured Noteholders agreeing to subordinate a portion of their claim to unsecured creditors. The Committee cannot have it both ways.

6. **The Make Whole Amount Will Be Addressed by the Court**. The Committee's objection with respect to the allowance of the Make Whole Amount is mooted by their objection to the Make Whole Amount in *The Official Committee of Unsecured Creditors' Objection to the 2028 Senior Secured Note Claims [Claims Nos. 360, 378, 379, 380, 381, 382]* [Docket No. 528], which has been fully briefed and argued before the Court. The Court will rule on the propriety of the Make Whole Amount including for purposes of the Plan. Notably, as described above, the Make Whole Settlement provides an additional gift to unsecured creditors even if the Court allows the full Make Whole Amount (as it should), which further mitigates the Committee's objection.

7. **Class 3 Is Impaired**. The Committee asserts that the Secured Noteholders are unimpaired under the Plan and thus the Plan does not have an impaired consenting class. That argument is entirely unsupported by facts and law. ***First***, under the Plan, the Secured Noteholders are not receiving postpetition interest at the default rate of interest, to which they are legally entitled as set forth in the *Joint Response of Deerfield and U.S. Bank Trust Company, National Association, as Trustee and Collateral Agent, In Opposition to the Committee's Remaining*

Objections to Claims No. 360, 378, 379, 380, 381 and 382 [Docket No. 800]. ***Second***, the Secured Noteholders will not receive payment in full on the Effective Date and will need to wait nine months in order to receive full repayment (if in fact they do). ***Third***, a material source of the distributions to the Secured Noteholders after the Effective Date is contingent accounts receivable collections, which are significantly riskier than cash.

8. Class 3 holders are clearly impaired. *See In re Brewery Park Assocs.*, L.P., 2011 Bankr. LEXIS 1596, at *26 (Bankr. E.D. Pa. Apr. 29, 2011) (creditors' claims were impaired because, among other things, the chapter 11 plan deferred any plan distribution for at least six months); *In re G.L. Bryan Investments, Inc.,* 2006 Bankr. LEXIS 577, at *8–9, 55 C.B.C.2d 1793 (Bankr. D. Col. Mar. 8, 2006) (creditors' claims were impaired because the chapter 11 plan deferred the payment of their claims and reduced the interest rate from 8% to 4.3%); 7 Collier on Bankruptcy P 1124.03 (16th 2023) ("[A] delay in payment of a claim beyond its contractual maturity date results in impairment."); *See also In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 240 (Bankr. D.N.J. 2000) (concluding that even full cash payment to a class of creditor may still result in impairment and holding that "each of the four possible treatments of [a secured creditor's] claim, including a cash payout, deferred payments, surrender or agreement, constitute an impairment of the claim"). Class 3 has voted in favor of the Plan, making them an impaired consenting class for purposes of section 1129(b).

9. **Payment of Post-Petition Interest Post-Effective Date**. The Committee's argument that the Secured Noteholders are not entitled to receive post-petition interest after the Effective Date while awaiting payment in full of all outstanding principal is patently unreasonable and is not supported by the two cases to which the Committee cites. The Committee cites to *In re Nixon,* 404 Fed. Appx. 575 (3d Cir. 2010) for the proposition that oversecured creditors are not

entitled to post-confirmation interest under Section 506(b) of the Bankruptcy Code. Committee Objection, ¶ 35. But *In re Nixon* does not stand for that proposition at all. The court in *In re Nixon* relied on inequitable conduct by the secured creditor purposefully delaying the proceedings in order to "[run] up the tab" as a basis to cut off post-petition interest under section 506(b) ***months before the chapter 13 plan was confirmed***. *See In re Nixon,* 404 Fed. Appx. at 578-579. Thus, the Committee's appeal to *In re Nixon* is completely inapposite here.

10. The Committee also cites to *Key Bank Nat'l Ass'n* v. *Milham (In re Milham)*, 141 F.3d 420 (2d Cir. 1998), which, in fact, ***supports*** the Secured Noteholders' entitlement to post-confirmation interest under the Plan. In *In re Milham*, the Court held that an oversecured creditor is not entitled to be paid its contract rate of interest post-confirmation *if the payment of that rate of interest will enable the creditor to receive more than the present value of its claim as of the effective date of the plan*. 141 F.3d at 420 (emphasis added). The court in *In re Milham* determined that payment of post-confirmation interest of 9.5% would have entitled the secured creditor to recover more than the present value of its claim as of the effective date of the plan, and therefore affirmed the bankruptcy court's decision to limit post-confirmation interest to a rate of 8.5%, which reflected the rate on US Treasury Bonds plus a premium to reflect the risk to the creditor in receiving deferred payments under the reorganization plan. *See Id.* at 424. Thus, contrary to the Committee's objection, *In re Milham* expressly allows for the Secured Noteholders to receive post-confirmation interest on account of deferred payments under the Plan so long as the rate of post-confirmation interest is fixed at the rate required to allow the Secured Noteholders to recoup the present value of the deferred payments as of the Effective Date, taking into account an appropriate risk premium. The Committee has offered no evidence to suggest that the Plan's provision of post-confirmation interest at the contract rate of 4.5% would result in an amount that exceeds present

value. In fact, the contract rate of 4.5% is only a fraction of a percentage point higher than the current rate of 10-year US Treasury Bonds, suggesting that the Secured Noteholders will likely receive ***less*** than the present value of their claim as of the Effective Date after accounting for any risk premium.

11. **The Releases Are Consensual**, **Reasonable and Appropriate**. The releases provided for under the Plan are entirely appropriate in light of the significant contributions made by the Released Parties, including Deerfield, throughout the chapter 11 process. Among other things, Deerfield (i) invested the time and resources to negotiate the Transaction Support Agreement with the Debtors, which provided structure to these Cases that enabled the Debtors to preserve considerable value for the benefit of all creditors, (ii) consented to the Debtors' use of the Secured Noteholders' cash collateral, providing the Debtors with the funds necessary to continue operating as a going concern without a costly fight over the terms of any non-consensual use of the cash collateral, (iii) supported the Debtors' sale process, including facilitating the increase in sale proceeds from Labcorp Genetics, Inc. and allowing for recoveries to the unsecured creditors, (iv) backstopping the full recovery of the Convenience Class Creditors and Subsidiary Unsecured Creditors and ensuring the payment in full of all administrative expenses and priority claims *prior* to and regardless of the ultimate amount of proceeds available for distribution, thereby assuming the risk of Deerfield's own recovery and (v) agreeing to the Make Whole Settlement in order to further enhance the recovery of the non-convenience class unsecured creditors. The 2028 Senior Secured Notes Indenture Trustee and Collateral Agent has also supported the Debtors' efforts to maximize value through the Chapter 11 process alongside Deerfield. Deerfield also has made enormous contributions to these Cases that have resulted in a successful sale and timely emergence from bankruptcy. The Committee seeks to allow the Debtors to retain all of the benefits they

received from the contributions and concessions made by Deerfield throughout these Cases while requiring the Debtors to renege on the corresponding obligations to Deerfield that the Debtors voluntarily assumed in exchange for these contributions and concessions. The Committee asks the Court to set a dangerous precedent that would empower Debtors to pull the rug out from under consenting and constructive creditors. The Court's July 12 Ruling preliminarily denying the Standing Motion makes clear the reasonableness of the releases of Deerfield and the 2028 Senior Secured Notes Indenture Trustee and Collateral Agent.

12. **Costs of Post-Effective Committee Appeal Should Not Be Borne by Secured Creditors**. Finally, if the Court determines that the Committee should be permitted to continue to exist following the Effective Date in order to pursue any timely filed appeal, the Committee should not be permitted to spend the recoveries of the Secured Noteholders in connection with such meritless litigation. As the Court noted in its July 12 Ruling, the Court "[took] into account a variety of significant issues and hurdles" in denying the Committee's Standing Motion in full. July 12 Hr'g Tr. 6:12-14. In light of the significant hurdles the Committee will need to overcome in order to succeed on any appeal, the Secured Noteholders should not be required to finance ongoing efforts by the Committee to drag the parties into protracted litigation where, as is the case here, the Committee would be "embarking on a senseless enterprise." *Id.* at 6:10. If the Committee continues to remain in existence after the Effective Date in order to pursue any appeals, any fees

and expenses incurred by the Committee or its advisors should be borne by the general unsecured creditors.

CONCLUSION

WHEREFORE, based on the foregoing, Deerfield respectfully requests that the Court confirm the Plan.

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