UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 24-11362(MBK)
	.	(Jointly Administered)
INVITAE CORPORATION,	.	
et al.,	.	Clarkson S. Fisher U.S.
	.	Courthouse
	.	402 East State
	.	Trenton, NJ 08608
Debtors.	.	
	.	July 23, 2024
. . . . .	.	1:15 p.m.

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

APPEARANCES VIA WEBEX:

For the Debtors:	Kirkland & Ellis LLP BY: WILLIAM E. ARNAULT, P.C. 333 West Wolf Point Plaza Chicago, IL 60654
For the Official Committee of Unsecured Creditors:	White & Case LLP BY: ANDREW ZATZ, ESQ. 1221 Avenue of the Americas New York, NY 10020
For Deerfield Partners, L.P.:	Sullivan & Cromwell LLP By: BENJAMIN S. BELLER, ESQ. 125 Broad Street New York, NY 10004
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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THE COURT: Okay. Good afternoon, everyone. This is Judge Kaplan, and we are returning to the Invitae matters. My apologies for the slight delay.

Before I start with my rulings, let me ask is there -- are there any matters or concerns that any of the parties wish to raise at this point?

(No audible response)

THE COURT: All right. Don't say I didn't give you a chance. Let's start.

As discussed yesterday at the close of the hearings, I will be reading into the record a series of rulings which will address the following matters.

Number 1, the pending motion by the Committee seeking leave, standing and authority to commence and prosecute certain claims and causes of action on behalf of the debtors' estates and exclusive settlement authority that was filed at Docket Number 536.

Number 2, the pending objection by the Committee to the 2028 senior secured noteholders' claims as it relates to the entitlement to the make-whole amount and post-petition interest.

And, Number 3, the contested confirmation hearing for the second amended joint plan.

Let me address these in the order which I think is logical. As this is a summary ruling, I will refrain from

reciting any of the supporting legal citations. This is somewhat unfortunate that it's a summary ruling because there are significant issues that have been litigated that warrant considerable time and discussion. However, the Court believes that the parties are more in need of more immediate resolutions than lengthy written opinions. However, the Court does reserve its right to supplement this ruling with a more expansive opinion in the event of an appeal.

So, first, none of the evidence introduced or the arguments made at the confirmation hearing have caused the Court to change its views on the derivative standing motion, and, therefore, the Court considers its prior preliminary ruling and the underlying reasoning to be final. The debtors are directed to submit a final form of order denying the motion.

With respect to the pending objection to the secured noteholders' claims, specifically as to the make-whole amount and post-petition interest, for the reasons to be explained further, the Court sustains the objection in part and overrules the objection in part.

Specifically, the Court rules as follows. The matter comes before the Court on the Official Committee's objection to the 2028 secured noteholders' claims. These were Claim Numbers 350, 378, 379, 380, 381 and 382 docketed at ECF Number 528.

The primary dispute before the Court regards the

treatment of Section 1.1 of the 2028 convertible note's indenture, which is the make-whole amount, as either -- whether it either should be treated as unmatured interest or as a liquidated damages clause.

The Official Committee of the Unsecured Creditors objects to the make-whole amount on the grounds that it constitutes an unmatured -- constitutes unmatured interest and, therefore, should be disallowed under 502(b)(2) of the Bankruptcy Code, or in the alternative, that the Court finds the make-whole amount is a liquidated damages clause. The Court should disallow the provision under 506(b) of the Code.

The Court first addresses the Committee's contention with respect to the make-whole amount being treated under the Code as the functional equivalent of unmatured interest, and then we'll address the Committee's concerns arising under 506(b) of the Code.

The Committee asserts that the make-whole amount, which in this matter totals approximately $27.5 million, serves as the functional equivalent of unmatured interest as of the petition date and accordingly should be disallowed under 502(b)(2) of the Code.

As an initial point, the Court notes that the make-whole provisions are commonly employed and heavily negotiated provisions between investors and creditors in debt instruments. The purpose of a make-whole amount is to compensate creditors

for damages incurred by the repayment of the notes prior to their maturity or upon acceleration.

Courts engage in a fact-sensitive inquiry in determining whether a make-whole amount is unmatured interest. Such determination depends on the specific facts of each case, and the courts look to the economic substance of the transaction.

While courts across the country have taken different approaches in their treatment of make-whole provisions, the majority approach taken by the courts in this circuit is to treat prepayment obligations or make-whole amounts as liquidated damages rather than unmatured interest. This Court is inclined to adopt such approach.

As the debtors note in their joinder to Deerfield Partners' response to the Committee's claim objection, courts interpret make-whole provisions as liquidated damage clauses because upon a breach the entirety of the outstanding make-whole amount fully accelerates and, therefore, fully matures and, thus, cannot properly be classified as unmatured interest.

Additionally, this Court's treatment of the make-whole amount as liquidated damages is supported by examining the economic substance underlying the transaction. Unlike interest, the make-whole amount does not simply compensate holders for the use of their money over time. Rather, the make-whole amount compensates the noteholders for the actual

losses they would suffer were the issuer would cease prematurely using the holder's money, forcing the holders to redeploy their capital, possibly at lower interest rates.

As argued before the Court, while lost interest may indeed constitute a component of the damages suffered from the acceleration of the loan, it does not represent the only sustainable loss. Indeed, it is likely that the repaid principal and interest would be reinvested.

However, there are additional likely damages in this scenario, such as the delay and cost associated with the unanticipated reinvestment, including the possible negative movement in interest rates, professional fees incurred in connection with remarketing and closing any new loans, as well as the noteholders' lost opportunity to convert the notes into equity.

Given the economic substance of this transaction, to say that the make-whole amount reflects solely unmatured interest would be a mischaracterization. Rather, the make-whole amount represents a good faith estimate of the lost profits, additional costs and delays facing the noteholders upon acceleration and repayment of the amounts due under the 2028 senior secured notes.

Having determined that the make-whole amount is treated more properly as a liquidated damages provision, the Court turns to the enforceability of the liquidated damages

under both state law and Section 506(b) of the Code. Whether a make-whole amount is enforceable in bankruptcy turns initially on whether the make-whole amount is enforceable under applicable state law. It is well established that a creditor's rights in bankruptcy arise from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary Bankruptcy Code provisions.

The basic federal rule in bankruptcy is that state law governs the substantive claims. The parties have conceded in their pleadings and at oral argument that New York law governs the 2028 convertible notes indenture.

As noted by the Supreme Court in Raleigh v. Illinois Department of Revenue, given its importance to the outcome of cases, we have long held the burden of proof to be a substantive aspect of a claim. That is the burden of proof is an essential element of the claim itself. One who asserts a claim is entitled to the burden of proof that normally comes with it.

Under New York law the party challenging a make-whole amount bears the burden of persuasion that it should be allowed or disallowed. New York courts consider a prepayment premium or make-whole amount enforceable when actual damages are difficult to determine, the sum stipulated to is not plainly disproportionate to the possible loss. That second prong of the standard closely parallels a court's traditional inquiry as

to the reasonableness of the charges under Section 506(b). To recover charges under this section, a secured creditor must satisfy three criteria. The creditor must be oversecured. The agreement under which the claim arose must provide for such fees and costs, and the claim amount must be reasonable.

In the case at hand this Court's finding turns on the last prong of this analysis, reasonability. Courts have interpreted 11 U.S.C. Section 506(b) to impose a reasonableness standard on claims for interest and other charges. While the analysis of reasonability required 506(b) is similar to the analysis under New York substantive law, bankruptcy courts consider additional factors when analyzing reasonableness under this section, including the impact upon junior creditors.

Other courts have made it clear that equitable -- I'm sorry, equitable considerations may be critical in examining the reasonableness of a prepayment premium.

In examining the reasonableness, this Court considers the larger context in which the parties entered into the 2028 secured notes indenture and the subsequent make-whole amount. While the parties were hopeful that Invitae would emerge in a financially stronger position, the financial reality of the company was clear, it was performing very poorly.

More to the point, the bankruptcy filing was entirely predictable. Noteholders were apprised of debtors' projections that under the status quo it would run out of money before the

end of 2024.

The record is clear that the secured noteholders were keenly aware of the debtors' poor financial and operational position and focused upon enhancing their position as part of any new financing. The make-whole amount was not intended to compensate the secured noteholders for an unexpected prepayment.

Indeed, there is little doubt that the principal purpose of the March exchange transaction from the secured noteholders' perspective was to secure an enhanced collateralized position while at the same time affording the debtors an opportunity to right the ship.

This Court remain unconvinced that such efforts are actionable or warrant challenge. However, the Court finds ample evidence in the record presented at both the standing motion and confirmation hearing to find that claimants at the time of the March exchange were cognizant of the likelihood the debtors would require a further restructuring in the short term and that the obligations owing under the 2028 secured notes would be accelerated.

In point of fact, the March exchange agreement obligates the debtors to pay the make-whole amount in the event of the initiation of a bankruptcy, and within months following the March exchange the debtors had retained Moelis Company and other professionals to advise on restructuring efforts and had

received from Deerfield Partners, L.P., the largest 2028 senior secured noteholder, a preliminary restructuring term sheet for a contemplated Chapter 11 filing. The term sheet further mandated that the debtors pursue a sale of the business.

This Court finds that from the outset of the March exchange transaction the acceleration of the obligations under 2028 secured notes was both inevitable and foreseeable. To award claimants the make-whole amount would simply serve to penalize other creditors in this case unnecessarily.

These other unsecured creditors have already had to bear the cost of an additional make-whole charge as part of the prior repayment of the term loan effectuated under the March exchange.

Multiple prepayment penalties foisted upon the unsecured creditor body is unacceptable and inequitable. As such, the Court finds that this make-whole amount is unreasonable and unenforceable.

The Court now turns to the parties' arguments proffered that under Section 506(b) of the Code the secured noteholders are entitled to post-petition interest. Despite finding that the make-whole amount is unenforceable as liquidated damages, the Court nonetheless does grant post-petition interest through the date of repayment at the non-default rate and to the extent claimants are oversecured.

As the Fifth Circuit observed in Ultra Petroleum

Corp., a make-whole amount and post-petition interest addressed two different harms, and that separate harms warrant separate recoveries.

As the Committee acknowledges, the price obtained from LabCorp together with the debtors' retained assets render the secured noteholders oversecured for purposes of post-petition interest under 506(b) and, thus, entitled to collect such interest until repayment.

The parties are directed to settle an order based upon this ruling.

Now, proceeding to confirmation, the Court is prepared to confirm the second amended joint plan, subject to the previous ruling, as well as certain modification required by the Court and in response to certain filed objections. Pertinently and in no particular order, the Court requires the following modifications to the plan, and they should be incorporated in the final confirmation order with appropriate language to be agreed upon by the parties.

Number 1, the Court carves out from the definition under the plan of released parties all former, and I emphasize former, directors, officers, employees and professionals who are not associated with or retained by the debtors at the time of the bankruptcy filing. This carveout is intended to apply to all of the release exculpation and injunction provisions in the plan.

Number 2, the plan's definition of exculpated parties is to be revised to include the Official Committee of Unsecured Creditors and its members in their capacities as such. To the extent the language of the plan is unclear or ambiguous, the confirmation order is to clarify that carved out of the exculpation provisions are claims for gross negligence, bad faith and willful misconduct.

Number 3, with respect to the plan administrator, the Court is not making any changes to the manner of his or her selection or administration, other than to require that the Committee or in the event the Committee is dissolved a creditor representative shall be deemed a required consulting stakeholder for purposes of consultation with respect to any settlement with any party to a non-released claim or cause of action.

Moreover, upon satisfaction of the claims of the secured noteholders, their rights with respect to post-effective date governance shall terminate.

In addition, the confirmation order will clearly reflect that the plan administrator will owe fiduciary duties of care and loyalty to all of the debtors' creditors and will keep all stakeholders reasonably informed of his or her progress when winding down the debtors' estates, liquidating claims, making disbursements, and pursuing retained causes of action.

Number 4, notwithstanding dissolution of the Committee, the Committee shall remain in existence for the limited purposes of (a) pursuing, supporting or participating in any appeals in these Chapter 11 cases, and (b) filing, objecting or otherwise participating in any final fee applications for professionals.

Notwithstanding the foregoing, all fees and costs associated with such activities are to be paid solely from the funds allocated under the plan for general unsecured creditors.

Finally, the treatment of the convenience class creditors in Class 4 was troublesome for the Court. The Court viewed the provisions to be unjustifiably generous and has proposed a series of options, four options for the plan proponents with respect to their treatment of Class 4 creditors.

Number 1, the Court's recommendation is to modify the treatment in Class 4, so that such creditors are entitled to distributions equal to the lesser of either 25 percent of their allowed claims or the sum of $250,000. So let me repeat, that would be lesser of either 25 percent of their claims, allowed claims or the sum of $250,000.

Option 2, and these options are for the plan proponents, the plan proponents may elect to modify the plan without resolicitation to eliminate Class 4 convenience altogether.

Option 3, the plan proponents and the Committee can agree on an acceptable distribution formula and retain the Class 4 and its treatment.

Or Option 4, the plan proponents can retain the provision of Class 4 and the treatment as is without changing to the extent the secured noteholders opt to gift an additional equivalent sum to the Class 6 claimants.

I will ask the parties to meet and confer and discuss the best way to proceed with those options.

All other objections that have not been addressed are deemed overruled. This includes the objections of the Office of the U.S. Trustee with respect to plan releases, the opt-out mechanism and gatekeeper provisions. The Court incorporates by reference its prior recent holdings and expressed rationales on these issues as set forth in the Court's rulings in BlockFi, Bed Bath & Beyond, and in Rite Aid.

That concludes my rulings. Let me let you all digest it for a moment and open up the floor if there are any questions or concerns. Oh, also, we need to discuss and I guess the parties can confer on the balance of the objections to Class 3, the noteholders' claims, whether in light of the rulings we need to move forward with those and in what fashion. Anyone wish to be heard?

(No audible response)

THE COURT: No? Oh, I see a hand. Mr. Beller.

MR. BELLER: (No audible response).

THE COURT: I don't hear you.

MR. BELLER: Apologies. I was double muted. Benjamin Beller from Sullivan & Cromwell on behalf of Deerfield.

I do want to just clarify one of the rulings on the post-petition interest because I had understood that that was -- the applicable rate of interest, I don't think we had argued on. I'm more than happy to take Your Honor's rulings. I just want to clarify whether that issue has been resolved or not, or whether we should still present on the entitlement to the rate of interest, or whether because the plan provides for the payment of non-default interest in any event that the -- that confirmation of the plan has essentially mooted that issue.

THE COURT: Well, I had -- I think I had read into the award of post-petition interest under the non-default rate, and I took that because the plan so provided. I didn't think we needed to address it further.

MR. BELLER: So I'm more than happy to -- given that we've already consented to that treatment under the plan, that I think it -- from our perspective it mooted the objection anyway, but I defer to Committee counsel whether there is any remaining issue that need to be discussed about that.

THE COURT: All right. Well, I see Mr. Zatz, your hand is up. Thank you, Mr. Beller.

MR. ZATZ: Yes. Hello, Your Honor. Can you hear me okay?

THE COURT: Yes, I can.

MR. ZATZ: Great. Thank you. Andrew Zatz, White & Case, on behalf of the Committee.

I agree with Mr. Beller. In light of Your Honor's ruling on confirmation, I am presuming that you are overruling our objection on no impaired, except in class, which was the only context in which the default interest argument was still live. So I agree that that is mootable. We'll reserve on that, if circumstances change, but I don't think there's any reason to litigate that or have the Court rule on that specifically.

I think that only leaves one issue left on our claim objection, which is liens covering what we identified as unencumbered assets. So happy to discuss with parties offline how to best proceed on that, or whether maybe something could be worked in light of Your Honor's other rulings today.

THE COURT: All right. I think it would make sense if the parties could meet and confer on it. The Court is -- would welcome any call, if you need the Court's participation on how best to move forward.

MR. ZATZ: Thank you.

MR. BELLER: We're happy to proceed on that basis, Your Honor.

THE COURT: Any other concerns?

(No audible response)

THE COURT: Then I will -- chambers will await either proposed confirmation orders that have been circulated or any other notification that the Court needs to address any specific matters with respect to the plan going forward.

Needless to say, the Court's ruling reflects the nature of a plan the Court is prepared to confirm, but the plan proponents need to digest it all.

Anyone else wish to be heard?

(No audible response)

THE COURT: All right. Well, I thank you all for your time and efforts. And we are adjourned. Thank you.

UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

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

I, COLETTE MEHESKI, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Colette Meheski

COLETTE MEHESKI

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