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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re: INVITAE CORPORATION, *et al.*, Debtors.[1]	Chapter 11 Case No. 24-11362 (MBK) (Jointly Administered)
NATERA INC., Plaintiff, v. INVITAE CORPORATION, *et al.*, Defendants.	Adv. Pro. No. 25-01015 (MBK)

DEBTORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS NATERA INC.'S ADVERSARY COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

[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 https://www.veritaglobal.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

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Defendants Invitae Corporation ("Invitae") and its debtor affiliates (collectively, the "Debtors"), by and through their undersigned counsel, hereby submit this motion to dismiss the Verified Adversary Complaint filed by Plaintiff Natera, Inc. ("Natera") (together with the Debtors, the "Parties") on January 21, 2025 (the "Adversary Complaint"). Adversary Complaint, ECF No. 1140.

I. INTRODUCTION

Natera's Adversary Complaint rests on the premise that the Debtors' rejection of an asset purchase agreement between the Parties (the "APA") absolves Natera of any contractual obligations and should result in the dismissal of Debtors' pending Delaware lawsuit against Natera pursuant to which the disputes between the Parties relating to the calculation of the Milestone Payment under the APA will be resolved (the "Delaware Action"). The relief sought by Natera, however, ignores the express language of the Plan confirmed by this Court. In seeking dismissal of the Delaware Action, Natera conspicuously ***ignores and never mentions*** language in the Plan that addresses this very situation:

> The Debtors, the Wind-Down Debtors, or the Plan Administrator, as applicable, reserve and shall retain such Causes of Action *notwithstanding the rejection or repudiation of any Executory Contract or Unexpired Lease during the Chapter 11 Cases or pursuant to the Plan*.

Notice of Filing Third Amended Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code ("Third Amended Plan") at 36, ECF No. 909 (emphasis added).

The Plan specifically identifies the Debtors' claims against Natera, including those asserted in the Delaware Action, as a "Retained Cause of Action" under the Plan. Thus, under the express terms of the Plan, and pursuant to applicable law, even though the APA was rejected pursuant to

the Plan and Plan Supplement, the Debtors expressly preserved the ability to pursue claims against Natera—and that ability was part of the record in connection with the Plan confirmation proceedings and was memorialized in several orders approved and issued by this Court. Given this explicit language, Natera's failure to even mention it is less than forthcoming. It is, however, dispositive, and Natera's Adversary Complaint should be summarily dismissed with prejudice.

II. BACKGROUND

On January 17, 2024, the Parties executed the APA, pursuant to which Invitae agreed to sell certain assets related to its digital health solutions and health data services. Adversary Complaint ¶¶ 1, 21, 23. In exchange, Natera agreed to provide several forms of consideration, including a cash "Milestone Payment" payable to Invitae based on the deferred calculation of the "Volume Retention Percentage," as those terms are defined in the APA. *Id.* ¶¶ 3, 23. The Milestone Payment was contingent on the closing of the APA, which occurred on January 17, 2024. Verified Complaint for Declaratory Relief ¶ 5, *Invitae Corporation v. Natera, Inc.*, Case No. 2024-1284-PAF (Del. Ch. 2024) ("Delaware Action Complaint").

On February 13, 2024, the Debtors filed a voluntary petition for bankruptcy protection under chapter 11 of the Bankruptcy Code. Adversary Complaint ¶ 24. Calculation of the "Volume Retention Percentage" required data "to be collected and analyzed months after Invitae's bankruptcy filing." *Id.* ¶ 3. After the Debtors filed these chapter 11 cases, Natera, pursuant to the terms of the APA, informed Invitae that it had calculated the Milestone Payment as $0. Delaware Action Complaint ¶ 24. The Debtors dispute Natera's calculation of the Milestone Payment and assert that Natera owes a Milestone Payment of $22.5 million. The APA provides for an independent auditor to resolve disputes relating to the calculation of the Milestone Payment. *See id.* at ¶¶ 8, 13. Natera has taken the position that, before the independent auditor can calculate the

Milestone Payment, there must be a legal determination as to the manner of calculation, which the Parties dispute. The Debtors seek such a legal determination in the Delaware Action.

On May 9, 2024, the Debtors filed the first versions of their joint chapter 11 plan and disclosure statement. *Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code*, ECF No. 471[2]; *Disclosure Statement Relating to the Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* ("First Disclosure Statement"), ECF No. 472.[3] The disclosure statement states that the Debtors had the "potential [to receive] cash milestone payments" pursuant to the APA. First Disclosure Statement, at 59. The Debtors filed an amended disclosure statement on June 9, 2024, and the solicitation version of the disclosure statement on June 13, 2024. These versions of the disclosure statements again disclosed that the Debtors had the potential to receive cash milestone payments pursuant to the APA in language that was substantively identical to that in the First Disclosure Statement. *Notice of Filing Disclosure Statement Relating to the Amended Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* ("Second Disclosure Statement"), at 71, 173, ECF No. 614; *Notice of Filing Solicitation Version of Disclosure Statement Relating to the Amended Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* ("Solicitation Disclosure Statement"), at 71, 287, ECF No. 631.

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[2] Courts may, in ruling on a motion to dismiss, consider "document[s] integral to or explicitly relied upon in the complaint" and "matters of public record of which the court can take judicial notice" without converting such a motion into a motion for summary judgment. *E.g.*, *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (emphasis omitted). Here, the Delaware Action Complaint is both a document integral to the Adversary Complaint and a matter of public record.

[3] For citations to materials available on the Court's public docket, pin citations refer to the pagination in the filed version's header, not the document's internal pagination.

Natera was active in the bankruptcy cases. It filed two motions in June and July of 2024: "(1) a motion to preserve its setoff rights pursuant to the Bankruptcy Code, and (2) a motion to lift the automatic stay in order to adjudicate a contract interpretation dispute concerning the Milestone Payment . . . ." Adversary Complaint ¶¶ 4, 25–27. In July 2024, the Parties agreed to add language to the Plan that reserved their respective rights (the "Reservation of Rights Provisions"). *Id.* ¶¶ 4, 28–31.

The Debtors filed their third and final Amended Joint Chapter 11 Plan on August 1, 2024. On August 2, 2024, the Court entered its *Findings of Fact, Conclusions of Law, and Order Confirming the Third Amended Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* ("Confirmation Order"), ECF No. 913. The Confirmation Order confirmed the Plan and its supplements ("Plan Supplement") in full. Confirmation Order ¶¶ 58–59, ECF No. 913; *see also id.* ¶¶ o, w (defining "Plan Supplement" as the "Initial Plan Supplement" and "Amended Plan Supplement" together, and may be further modified, amended, or supplemented).

On July 19, 2024, the Debtors filed the *Notice of Filing Amended Plan Supplement for the Second Amended Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (Technical Modifications)* ("Amended Plan Supplement"), ECF No. 857. There are five exhibits to the Amended Plan Supplement, including "Exhibit A – Schedule of Retained Causes of Action" and "Exhibit D – Plan Administrator Agreement." *Id.* at 8–13, 20–35. Plan supplements were filed on August 1, 2024, and August 7, 2024, and each of these were to be considered "together with the Original Plan Supplement" and other additional Plan supplements. *Notice of Filing Second Amended Plan Supplement for the Third Amended Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy*

Code ("Second Amended Plan Supplement"), at 2, ECF No. 910; *Notice of Filing Third Amended Plan Supplement for the Third Amended Joint Plan of Invitae Corporation and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* ("Final Plan Supplement"), at 2, ECF No. 924.

Exhibit A to the Amended Plan Supplement describes that the Debtors retained and were entitled to prosecute "Retained Causes of Action"—even if the relevant contract was rejected by the Debtors:

Article IV.G of the Plan provides as follows:

> Except as otherwise provided herein or in the Sale Order, in accordance with section 1123(b) of the Bankruptcy Code, but subject in all respects to Article VIII hereof, the Wind-Down Debtors and the Plan Administrator (following transfer of such Causes of Action to the Plan Administrator), shall retain and may enforce all rights to commence and pursue, as appropriate, any and all Causes of Action, whether arising before or after the Petition Date, including any actions specifically enumerated in the Schedule of Retained Causes of Action, and the rights of the Wind-Down Debtors or the Plan Administrator to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date . . . .
>
> The Wind-Down Debtors or the Plan Administrator, as applicable, may pursue such Causes of Action, as appropriate, in accordance with the best interests of the Wind-Down Debtors. No Entity may rely on the absence of a specific reference in the Plan, the Plan Supplement, or the Disclosure Statement to any Cause of Action against it as any indication that the Debtors, the Wind-Down Debtors, or the Plan Administrator, as applicable, will not pursue any and all available Causes of Action against it. The Debtors, the Wind-Down Debtors, and the Plan Administrator, as applicable, expressly reserve all rights to prosecute any and all Causes of Action against any Entity . . . . Unless any Causes of Action against a Person or Entity are expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or a Final Order, the Wind-Down Debtors, or the Plan Administrator, as applicable, expressly reserve all Causes of Action, for later adjudication, and, therefore, no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Causes of Action upon, after, or as a consequence of the Confirmation or Consummation.

> ***The Debtors, the Wind-Down Debtors, or the Plan Administrator, as applicable, reserve and shall retain such Causes of Action notwithstanding the rejection or repudiation of any Executory Contract or Unexpired Lease during the Chapter 11 Cases or pursuant to the Plan.*** In accordance with section 1123(b)(3) of the Bankruptcy Code, any Causes of Action that a Debtor may hold against any Entity shall vest in the corresponding Wind-Down Debtor except as otherwise expressly provided in the Plan, including Article VIII of the Plan. Prior to the Effective Date, the Debtors, and on and after the Effective Date, the Wind-Down Debtors, or the Plan Administrator, through its authorized agents or representatives, shall retain and may exclusively enforce any and all such Causes of Action. Prior to the Effective Date, the Debtors, and on and after the Effective Date, the Wind-Down Debtor, or the Plan Administrator, in consultation with the Required Consenting Stakeholders, shall have the exclusive right, authority, and discretion to determine and to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw, or litigate to judgment any such Causes of Action and to decline to do any of the foregoing without the consent or approval of any third party or further notice to or action, order, or approval of the Bankruptcy Court. . . .
>
> Notwithstanding and without limiting the generality of Article IV.G of the Plan, the Debtors and the Wind-Down Debtors, as applicable, expressly reserve all Causes of Action that are not expressly released or settled under the Plan (including pursuant to Article VIII and Article IV thereof), including all Causes of Action against the Entities identified in **Schedule A(i)** attached hereto.

Amended Plan Supplement, at 9–10 (quoting Third Amended Plan, at 36–37) (first emphasis added). Exhibit A to the Amended Plan Supplement further provides:

> Unless otherwise specifically released, settled, compromised, transferred, or assigned under the Plan or the Asset Purchase Agreement, the Debtors and the Wind-Down Debtors, as applicable, expressly reserve Causes of Action based in whole or in part upon any and all contracts . . . to which any of the Debtors or the Wind-Down Debtors is a party or pursuant to which any of the Debtors or the Wind-Down Debtors has any rights whatsoever . . . .

Id. at 11. In turn, Schedule A(i) to the Plan Supplement precisely identifies as reserved "[a]ll Claims and Causes of Action arising from or related to . . . Natera's obligation to perform under

that certain Asset Purchase Agreement between Natera and Invitae Corporation, dated as of January 17, 2024 . . . ." *Id.* at 13.

Exhibit D of the Amended Plan Supplement establishes the duties, powers, and rights of the Plan Administrator, which include the right to pursue all retained Causes of Action:

> subject in all respects to Articles IV.G and VIII of the Plan and to the extent not otherwise expressly waived, relinquished, exculpated, released, compromised, settled, or acquired by the Purchaser in accordance with the Asset Purchase Agreement, [to] prosecute all Causes of Action retained by the Wind-Down Debtors after the Effective Date on behalf of the Wind-Down Debtors, elect not to pursue any such Causes of Action, and determine whether and when to compromise, settle, abandon, dismiss, or otherwise dispose of any such Causes of Action, as the Plan Administrator may determine is in the best interests of the Wind-Down Debtors and the Estates . . . .

Id. at 23. On August 1, 2024, the Debtors filed the Second Amended Plan Supplement, ECF No. 910. The Second Amended Plan Supplement further specified that the Plan Administrator had the right to "prosecute all Causes of Action retained by the Wind-Down Debtors (including for the avoidance of doubt all Retained Causes of Action) . . . ." *Id.* at 10. Natera never objected to any of these Plan and Plan Supplement provisions.

The APA was deemed rejected as of August 2, 2024, when the Court issued the Confirmation Order, and the Debtors confirmed the rejection on August, 7, 2024, when they filed the Final Plan Supplement, ECF No. 924, which listed the APA as a rejected executory contract. The Plan became effective and binding on all parties to it on August 7, 2024, and was substantially consummated on the same date. Adversary Complaint ¶ 34.

On December 11, 2024, as contemplated by the Plan, the Plan Administrator filed the Delaware Action seeking declaratory judgment clarifying the proper construction of the APA with respect to the Volume Retention Percentage formula and the Milestone Payment. Adversary Complaint ¶ 39. In response, Natera filed the Adversary Complaint in this Court seeking (i) a

declaration that the Debtors' rejection of the APA absolved Natera of any further obligations under the APA; and (ii) an injunction prohibiting the Plan Administrator from pursuing the Delaware Action.

III. LEGAL STANDARDS

A complaint is properly dismissed under Rule l2(b)(6) if a plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under this standard, factual allegations in the complaint must be taken as true and viewed in the light most favorable to the non-moving party, *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008), however, allegations of a "conclusory nature . . . are not entitled to assumptions of truth." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 225 (3d Cir. 2011).

IV. ARGUMENT

Natera seeks an order directly undercutting core principles of bankruptcy law, the express provisions of the Plan, and this Court's power to finally adjudicate the rights of the Debtors and the parties involved in these cases. *See* 11 U.S.C. § 1141(a). For these reasons, and as further described below, the Court should dismiss Natera's Adversary Complaint with prejudice.

A. The Preservation of the Claims Against Natera and the Reservation of Rights Provisions Are the Product of the Parties' Negotiations and Were Approved by the Court

The Delaware Action should be a surprise to no one. Since at least as early as the First Disclosure Statement, filed on May 9, 2024, the Debtors have consistently maintained that "in accordance with section 1123(b) of the Bankruptcy Code, the Wind-Down Debtors and the Plan Administrator (following transfer of such Causes of Action to the Plan Administrator), shall retain and may enforce all rights to commence and pursue any and all Causes of Action (including any actions specifically enumerated in the Schedule of Retained Causes of Action) regardless of whether they arose before or arise after the Petition Date." First Disclosure Statement, at 20. The

First Disclosure Statement explicitly "preserved [claims or causes of action], despite the occurrence of the Effective Date [and] . . . despite the rejection or repudiation of any Executory Contract . . . during the Chapter 11 Cases or pursuant to the Plan." *Id.* at 20–21; *see also* Second Disclosure Statement, 28–29; Solicitation Disclosure Statement, 28–29.

Specifically, the Milestone Payment was repeatedly discussed as a potential asset of the Debtors' estates in public filings and in open court during the confirmation hearing. Beginning with the Second Disclosure Statement, the Debtors explicitly included the Milestone Payment among their estates' potential assets and noted that the *quantum* of payment "is subject to dispute and reconciliation and is not likely available for immediate distribution as of the Effective Date."[4] Second Disclosure Statement, at 34; *accord id.*, at 36 n.11, 101–102. These disclosures are identical in the Solicitation Disclosure Statement, which was ultimately sent to creditors entitled to vote on the Plan, including Natera. Solicitation Disclosure Statement, at 34, 36 n.11, 206–207, 249, 250 n.10. Both the Second Disclosure Statement and Solicitation Disclosure Statement were filed *before* Natera filed the motions that precipitated negotiation between the Parties over the Reservation of Rights Provisions. *See* Adversary Complaint ¶¶ 26–27. And, ultimately, Natera negotiated Plan language explicitly affirming the Debtors' right to pursue claims or causes of action related to the Milestone Payment. *See infra*, Part IV.B.

Later, at the confirmation hearing, counsel for the Official Committee of Unsecured Creditors cross-examined Andrew Spirito, Managing Director of FTI Consulting and then proposed Plan Administrator, regarding the Debtors' contingent receivables, including the

[4] *See, e.g.*, Second Disclosure Statement, at 71 ("On January 17, 2024, Invitae reached an agreement with Natera, Inc. regarding the divestiture of Women's Health . . . . This transaction included, among other things, the sale of certain assets of Women's Health including the Women's Health customer list for . . . potential cash milestone payments.").

Milestone Payment. Confirmation Tr. 63:15–22, 64:16–65:7. Mr. Spirito testified that the "middle" Milestone Payment was expected to be approximately $11.25 million but could be as great at $22.5 million. *Id.* And this claim was expressly preserved in the Plan Supplement—notwithstanding Natera's false allegation in the Adversary Complaint that the Plan Supplement does not "include the APA on any schedules contained therein." Adversary Complaint ¶ 32.[5]

Natera, however, seeks to disregard this Court's Confirmation Order in a manner that defies and undercuts the very principles of the Bankruptcy Code. As the Plan makes clear, this was a liquidating case where the Plan Administrator was charged with winding down the estates and collecting any recoverable value from the Debtors' prepetition assets to distribute to the Debtors' creditors in accordance with the Plan waterfall. *See* Third Amended Plan, at 24–31. In such a scenario, liquidating debtors—like the Debtors here—cannot, consistent with their fiduciary obligations, assume contractual obligations to third parties when they are no longer operational. As a result, liquidating debtors are compelled to reject all executory contracts because they are not operational. Yet, if Natera's argument in the Adversary Complaint is accepted, all future liquidating debtors that responsibly reject executory agreements as part of their wind down efforts must also forfeit any recovery associated with claims and causes of action in connection with the rejected contracts. And that would be true even in situations—like here—where such claims and causes of actions were expressly reserved and never objected to. That is not consistent with the language or intent of the Bankruptcy Code, which is to maximize recoveries for all creditors. *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 303 (3d Cir. 2010), *as amended* (May 7, 2010).

[5] Indeed, the Amended Plan Supplement, expressly identifies "[a]ll Claims and Causes of Action arising from or related to . . . Natera's obligation to perform under th[e] . . . Asset Purchase Agreement between Natera and Invitae Corporation, dated as of January 17, 2024" as reserved in "Schedule A(i) – Retained Causes of Action." Amended Plan Supplement at 13.

B. The Plan and Plan Supplement, as Confirmed by the Court, Foreclose Natera's Requested Relief

"A confirmed plan of reorganization 'acts like a contract that is binding on all of the parties, debtor and creditors alike.'" *Karathansis v. THCR/LP Corp.*, No. 06-1591 (RMB), 2007 WL 1234975, at *5 (D.N.J. Apr. 25, 2007) (quoting *First Union Com. Corp. v. Nelson, Mullins, Riley and Scarborough (In re Varat)*, 81 F.3d 1310, 1317 (4th Cir. 1996)); *accord G–I Holdings, Inc. v. Ashland, Inc. (In re G-I Holdings Inc.)*, No. 17-0077, 2017 WL 1788656, at *11 (D.N.J. May 5, 2017). As such, courts interpret the provisions of confirmed plans under the principles of contract interpretation. *See, e.g.*, *Karathansis*, 2007 WL 1234975, at *5; *ICCO Design/Build, Inc. v. Sunbrite Cleaners, Inc. (In re Sunbrite Cleaners, Inc.)*, 284 B.R. 336, 342 (N.D.N.Y. 2002). Contract interpretation is a matter of state law. *Wash. Mut., Inc. v. XL Specialty Ins. Co. (In re Wash. Mut., Inc.)*, No. 12-50422 (MFW), 2012 WL 4755209, at *4 (Bankr. D. Del. Oct. 4, 2012). The Plan and Plan Supplement each contain a choice-of-law provision selecting New York law. Third Amended Plan, at 23 ¶ D; Amended Plan Supplement at 31.

Under New York law, "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent[,] and the best evidence of what parties to a written agreement intend is what they say in their writing." *Donohue v. Cuomo*, 184 N.E.3d 860, 866 (N.Y. 2022) (internal quotation marks and citation omitted). The language of the Plan is clear and unambiguous: notwithstanding the rejection or repudiation of the APA during the chapter 11 cases or pursuant to the Plan, the Plan Administrator reserves the right and ability to pursue the causes of action that the Debtors retain against Natera. And that is all that is happening with the Delaware Action: resolution of the Debtors' entitlement to the Milestone Payment.

Natera, for its part, seeks to evade the plain language of the Court-confirmed Plan under the guise that it is merely seeking to enforce rights it has accrued "by operation of law." Adversary

Complaint ¶¶ 41, 53. But any rights that it might otherwise have accrued "by operation of law" are subject to the language in the Plan. *See Karathansis*, 2007 WL 1234975, at *8 (holding that a "confirmation order constitutes a final judgment on the merits with respect to the issues addressed in the plan."). Clear and unambiguous language in a confirmed plan is binding on all interested parties, even when the result is different than the result that would otherwise occur. The Plan's preservation of the claims against Natera is dispositive and binding on Natera.

C. The Milestone Payment Became Due Before Debtors Filed for Bankruptcy Protection

The Adversary Complaint is misleading because Natera's obligation to pay the Milestone Payment matured before the Debtors filed for bankruptcy. Natera contends that it has no obligation to perform after Debtors rejected the APA, constituting a breach by Invitae. *See* Adversary Complaint ¶¶ 5, 9, 53. However, Natera's obligation to perform arose when the APA *closed*, prior to Invitae's breach. *See* Delaware Action Complaint at 4 n.6. When the APA closed, Natera's duty to remit the Milestone Payment (and Invitae's earned right to receive it) was triggered—all that remained was its deferred calculation.

The Debtors' rejection of the APA does not rescind or terminate Invitae's rights thereunder. Instead, the date of breach is relevant only to the extent that it affords Natera an unsecured, pre-petition claim against the Debtors' estates. *See In re Shar*, 253 B.R. 621, 634 (Bankr. D.N.J. 1999) (recognizing that "the only effect of rejection is that the executory contract at issue i[s] not assumed and the non-debtor party thereto cannot make an administrative claim" upon the debtor's failure to perform) (*quoting In re Walnut Assocs.*, 145 B.R. 489, 494 (Bankr. E.D. Pa. 1992). Otherwise,

rejection "has the same effect as a breach outside bankruptcy." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 387 (2019).[6]

Principles of bankruptcy law also support Invitae's right to the Milestone Payment post-rejection. While a debtor's estate "can take only what [rights] the debtor possessed before filing," *Mission*, 587 U.S. at 382, Invitae possessed a vested right to the Milestone Payment when it filed for bankruptcy. *See Matter of M. Frenville Co., Inc.*, 744 F.2d 332, 336 (3d Cir. 1984), *overruled in part by In re Grossman's Inc.*, 607 F.3d 114 (3d Cir. 2010) (stating that where a party contracts to compensate another party depending on the occurrence of a certain event there exists a contingent right to payment upon execution of the agreement); *cf. In re G–I Holdings, Inc.*, 580 B.R. 388, 419 (Bankr. D.N.J. 2018) (applying *Frenville* and holding "a contingent right to payment of an indemnification claim under an express agreement exists 'upon the signing of the agreement,'" even "if the obligations under the contract arose post-confirmation"). Further, Invitae's pre-petition claims and defenses survive its rejection of the APA. *See Kavod Pharms. LLC v. Sigmapharm Labs., LLC (In Re Tri Harbor Holdings Corp.)*, No. 19-2053 (VFP), 2022 WL 17184547, at *12–13 (Bankr. D.N.J. Nov. 22, 2022); *see also First Ave. W. Building, LLC v. James (In re Onecast Media, Inc.)*, 439 F.3d 558, 563 (9th Cir. 2006). A "Claim" is defined under the Bankruptcy Code, in part, to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,

[6] The APA is governed by Delaware law, which supports Invitae's right to the Milestone Payment despite its rejection of the APA. Delaware courts award contract damages to place the non-breaching party "in the same place as he would have been if the contract had been performed." *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009). Delaware courts strongly disfavor windfall awards. *See id.* A non-breaching party cannot "stop performance *and* continue to take advantage of the contract's benefits." *In re Woodbridge Grp. of Cos., LLC*, 590 B.R. 99, 105 (Bankr. D. Del. 2018) (quoting *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 376 (3d Cir. 1992)) (applying Delaware law) (emphasis in *Jiffy Lube*). Thus, while the party first in breach cannot enforce the contract going forward, the non-breaching party is not entitled to a windfall and the breaching party may recover in restitution for any benefit conferred through its partial performance. *Preferred Inv. Servs., Inc. v. T & H Bail Bonds, Inc.*, No. 5886VCP, 2013 WL 3934992, at *21 (Del. Ch. July 24, 2013).

legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). Invitae possessed such a right—pre-petition—against Natera through its earned right to payment, "subject to dispute and reconciliation." *E.g.*, Second Disclosure Statement, at 34. These claims were preserved under the language of the Plan. But even if they were not expressly preserved, Invitae's claims would have survived the rejection of the APA and could be properly asserted against Natera by the Plan Administrator in the Delaware Action.

V. CONCLUSION

For the foregoing reasons, the Adversary Complaint fails to state a claim upon which relief can be granted, and the Adversary Complaint should be dismissed with prejudice.

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Dated: February 21, 2025

By: */s/ Michael D. Sirota*

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Exhibit A

Proposed Order

Caption in Compliance with D.N.J. LBR 9004-1(b)	
UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
In re: INVITAE CORPORATION, *et al.*, Debtors.[1]	Chapter 11 Case No. 24-11362 (MBK) (Jointly Administered)
NATERA INC., Plaintiff, v. INVITAE CORPORATION, *et al.*, Defendants.	Adv. Pro. No. 25-01015 (MBK)

ORDER DISMISSING NATERA INC.'S ADVERSARY COMPLAINT

The relief set forth on the following pages, numbered three (3) through four (4), is **ORDERED**.

[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 https://www.veritaglobal.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

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

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Upon the *Debtors' Motion to Dismiss Natera Inc.'s Adversary Complaint for Failure to State a Claim Upon Which Relief Can be Granted* (the "Motion"),[2] of the above-captioned debtors-defendants (collectively, the "Debtors"), for entry of an order (this "Order") pursuant to the Plan and rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure, dismissing the Adversary Complaint, with prejudice; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the *Standing Order of Reference to the Bankruptcy Court Under Title 11* of the United States District Court for the District of New Jersey, entered July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.); and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that sufficient cause exists for the relief set forth herein; and this Court having found that the Debtors' notice of the Motion was appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"), if any; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor **IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** as set forth herein.

2. The Adversary Complaint is dismissed, with prejudice.

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[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

3. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

4. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re: INVITAE CORPORATION, *et al.*, Debtors.[1]	Chapter 11 Case No. 24-11362 (MBK) (Jointly Administered)
NATERA INC., Plaintiff, v. INVITAE CORPORATION, *et al.*, Defendants.	Adv. Pro. No. 25-01015 (MBK)

NOTICE OF HEARING ON DEBTORS' MOTION TO DISMISS NATERA INC.'S ADVERSARY COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

[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 https://www.veritaglobal.net/invitae. The Debtors' service address in these chapter 11 cases is 1400 16th Street, San Francisco, California 94103.

PLEASE TAKE NOTICE that on **March 27, 2025 at 10:00 a.m. (prevailing Eastern Time)** or as soon thereafter as counsel may be heard the above-captioned debtors-defendants (collectively, the "Debtors"), by and through the undersigned counsel, shall move the *Debtors' Motion to Dismiss Natera Inc.'s Adversary Complaint for Failure to State a Claim Upon Which Relief Can be Granted* (the "Motion") before the Honorable Michael B. Kaplan, United States Bankruptcy Judge, in Courtroom 8 of the United States Bankruptcy Court for the District of New Jersey (the "Court"), 402 East State Street, Trenton, NJ 08608, for entry of an order (the "Order"), substantially in the form submitted herewith, dismissing the Verified Adversary Complaint filed by Natera, Inc. on January 21, 2025.

PLEASE TAKE FURTHER NOTICE that in support of the relief requested therein, the Debtors shall rely on the accompanying Motion, which sets forth the relevant legal and factual bases upon which the relief requested should be granted. A proposed Order granting the relief requested in the Motion is also submitted herewith.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion shall: (i) be in writing; (ii) state with particularity the basis of the objection; and (iii) be filed with the Clerk of the Court electronically (x) by attorneys who regularly practice before the Court in accordance with the *General Order Regarding Electronic Means for Filing, Signing, and Verification of Documents* dated March 27, 2002 (the "General Order") and the *Commentary Supplementing Administrative Procedures* dated as of March 2004 (the "Supplemental Commentary") (the General Order, the Supplemental Commentary, and the User's Manual for the Electronic Case Filing System can be found at www.njb.uscourts.gov, the official website for the Court) and (y) by all other parties in interest, on CD-ROM in Portable Document Format (PDF), and shall be

served in accordance with the General Order and the Supplemental Commentary so as to be received no later than seven (7) days before the hearing date set forth above.

PLEASE TAKE FURTHER NOTICE that copies of all documents filed in these chapter 11 cases may be obtained free of charge by visiting the website of Kurtzman Carson Consultants LLC dba Verita Global at https://www.veritaglobal.net/invitae. You may also obtain copies of any pleadings by visiting the Court's website at https://www.njb.uscourts.gov in accordance with the procedures and fees set forth therein.

PLEASE TAKE FURTHER NOTICE that unless objections are timely filed and served, the Motion shall be decided on the papers in accordance with D.N.J. LBR 9013-3(d) and the relief requested may be granted without further notice or hearing.

[*Remainder of page intentionally left blank*]

Dated: February 21, 2025

By: */s/ Michael D. Sirota*

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