Case Nos. 3:24-cv-08550, 3:24-cv-08555

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

IN RE INVITAE CORPORATION, ET AL., DEBTORS.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, APPELLANT,

V.

INVITAE CORPORATION, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY
BANKR. CASE NO. 24-11362 (MBK)

SUPPLEMENTAL BRIEF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

Dated: July 21, 2025

PORZIO, BROMBERG & NEWMAN, P.C.
Warren J. Martin Jr., Esq.
Christopher P. Mazza, Esq.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962
Telephone: (973) 538-4006
wjmartin@pbnlaw.com
cpmazza@pbnlaw.com

WHITE & CASE LLP
J. Christopher Shore, Esq.
(admitted *pro hac vice*)
Harrison Denman, Esq.
(admitted *pro hac vice*)
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
cshore@whitecase.com
harrison.denman@whitecase.com

WHITE & CASE LLP
Aaron Colodny, Esq.
(admitted *pro hac vice*)
555 S. Flower St., Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7700
aaron.colodny@whitecase.com

Co-Counsel to the Official Committee of Unsecured Creditors

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ARGUMENT[1]

On June 25, 2025, this Court directed the Bankruptcy Court to supplement its oral rulings denying the Committee's Standing Motion and overruling the Committee's confirmation objections with respect to the Debtors' releases of various Estate claims in the Plan. The Bankruptcy Court issued its *Supplemental Findings of Fact and Analysis Pursuant to Order of Remand, Dated June 25, 2025* (the "**Supplemental Ruling**"). This brief focuses on those findings and conclusions in the Supplemental Ruling that were not meaningfully addressed in the prior rulings.

With respect to the Standing Motion, the Bankruptcy Court did not fundamentally change its flawed "hurdle" analysis (*see* Opening Brief at 16–25; Reply Brief at 9–15), nor did it conduct a colorability analysis. Suppl. Ruling at 14–15. The Bankruptcy Court did, however, make one new finding of fact supporting its denial of standing: "[t]he Committee has not demonstrated that funding of this litigation could be achieved on a contingency or alternatively financed basis." *Id.* at 12. That factual finding is not supported by the record. The Committee refers this Court to the written direct and live testimony of David Dunn, who explained his

[1] Capitalized terms used in this Supplemental Brief but not otherwise defined shall have the meanings ascribed to such terms in the Committee's Consolidated Opening Brief [App. DE 11] (the "**Opening Brief**") or the Committee's Consolidated Reply Brief [App. DE 60] (the "**Reply Brief**," and together with the Opening Brief, the "**Committee Briefs**"), as applicable.

belief, based on discussions with several law firms and litigation funders, that a contingency arrangement would be available and described the many reasons why he (a Committee representative) could not seek a firm contingency commitment: Mr. Dunn could not share the unredacted proposed complaint, the claims were not the Committee's property, and the Committee had no ability to execute an engagement agreement. (AX16 at A7562–66; AX21 at A7648–50.)

With respect to the issue of the propriety of releases in the Plan, the oral ruling at confirmation provided no legal or factual analysis. The Supplemental Ruling now includes discussion of the releases in the Plan, particularly as they relate to the prepetition conduct of the Debtors' D&Os. But that new legal analysis is plainly erroneous, and the new findings are not supported by the record.[2]

First, the Bankruptcy Court held that, as a matter of law, it is "well-settled" that postpetition efforts of a debtor's management and board constitute a substantial contribution justifying blanket releases for all prepetition actions. Suppl. Ruling at 17. That is not an accurate statement of the law. In *In re Genesis Health Ventures, Inc.*, the same Delaware court expressly disagreed with *Zenith* (case cited by the Bankruptcy Court) and denied debtor releases of its management, holding that while

[2] By focusing on the lack of any consideration for the D&O releases, the Committee does not waive its argument that "consideration" provided by Deerfield and other Secured Noteholders was sufficient to justify their releases.

management made meaningful contributions to the reorganization by implementing the debtor's restructuring, they contributed no new "assets" and were otherwise compensated for their work, including through a "generous retention package," and that in any event, such "sweat" contribution does not support releases for prepetition conduct. 266 B.R. 591, 606–07, 617 (Bankr. D. Del. 2001). Similarly, in *In re Exide Techs.*, the same Delaware court held that a director's or officer's contribution to steering a contentious restructuring process does not warrant their release from claims on account of prepetition conduct, particularly where the chapter 11 plan provides for a minimal payment of claims of the class affected by the releases. 303 B.R. 48, 73–74 (Bankr. D. Del. 2003); *see also*, *e.g.*, *In re Aegean Marine Petroleum Network*, 599 B.R. 717, 729 (Bankr. S.D.N.Y. 2019) (stating that "directors did what they were paid to do, and that does not mean they are entitled to releases"); Hr'g Tr. 9:16–19, *In re Boomerang Tube, LLC*, No. 15-11247-MFW (Bankr D. Del. Nov. 9, 2015) [Dkt. No. 688] (noting that "negotiating a plan is not a sufficient substantial contribution by a director and officer, such as to warrant a release"). The Bankruptcy Court ignored these more well-reasoned cases, many of which are from the same Court as the two cases that are cited, and made no attempt to reconcile the case law.

Second, in supporting its newly articulated legal conclusion, the Bankruptcy Court makes several factual findings that are not supported by the record.

Independence of the investigation. In approving the Plan releases, the Bankruptcy Court deferred to the "independent" judgment of one of the Debtors' directors that, even though they were providing no monetary consideration, the D&Os should be released of all claims related to their prepetition conduct, including their participation in the Uptier Transaction and awarding of the $13.5 million in bonuses to management immediately prior to the bankruptcy filing. Suppl. Ruling at 14, 20. But the Bankruptcy Court did not consider substantial evidence establishing that this director and her investigation were not "independent," particularly vis-à-vis the releases of the retention bonuses claims, because the director herself participated in their approval. (AX21 at A7705, A7716.)

Reliance on the releases. The Bankruptcy Court also made a new finding that the D&Os acted in reliance on the releases and were induced in participating in the sale process and negotiating and formulating the Debtors' liquidating plan. Suppl. Ruling at 16, 18–19. But there is nothing in the record showing that the Debtors' D&Os would not have done their jobs without a release. In fact, the retention bonuses paid prepetition were contingent on management staying with the Debtors through the restructuring without any promise of a release by the Debtors.[3]

[3] This record establishing no reliance differentiates this case from *Hercules*, where the bonuses and releases were tied together and the general unsecured creditors

AX35 at A8442 (Q: "To be clear, nobody at the debtors promised you a release, right?" Ms. Schrank: "Right." Q: "And you're not aware of any agreement to which you owe a party that says you would get a release, right?" Ms. Schrank: "Right."). In addition, nothing in the record suggests that Deerfield and other Secured Noteholders would have refused to support the Debtors' bankruptcy and sale processes without D&O releases. *See* Suppl. Ruling at 19.

Other* Master Mortgage *factors. The Bankruptcy Court also erred in finding that the Plan releases are supported by other *Master Mortgage* factors. The Debtors' indemnification obligations create no identity of interest between the Debtors and the D&Os because the Plan specifically limits any such obligations to the extent of coverage available under directors and officer insurance policies (AX38 at A8907) and those obligations are unsecured claims that would be swamped by the other $1.2 billion in unsecured claims. Unlike *Zenith* debtors, the Debtors here are liquidating, and the D&O releases were not connected to work that the D&Os performed as part of that liquidation—claims regarding management's postpetition activities are subject to the Plan's exculpation provisions not challenged by the Committee. (AX38 at A8919.) Finally, granting free releases to the D&Os from prepetition

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were unimpaired. *See In re Hercules Offshore, Inc.*, Case No. 16-11385 (KJC) (Bankr. D. Del. Oct. 18, 2016) [Dkt. No. 436], at 23, 41.

claims is particularly egregious where holders of close to $1.2 billion in unsecured claims will likely receive no recovery (AX10 at A1046–47) while the D&Os were made whole through the payment of the bonuses. *Exide Techs.*, 303 B.R. at 73–74.

Dated: July 21, 2025
Morristown, New Jersey

By: */s/ Christopher P. Mazza*

PORZIO, BROMBERG & NEWMAN, P.C.
Christopher P. Mazza, Esq.
Warren J. Martin Jr., Esq.
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962
Telephone: (973) 538-4006
cpmazza@pbnlaw.com
wjmartin@pbnlaw.com

WHITE & CASE LLP
J. Christopher Shore, Esq.
(admitted *pro hac vice*)
Harrison Denman, Esq.
(admitted *pro hac vice*)
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 819-8200
cshore@whitecase.com
harrison.denman@whitecase.com

WHITE & CASE LLP
Aaron Colodny, Esq.
(admitted *pro hac vice*)
555 S. Flower St., Suite 2700
Los Angeles, California 90071
Telephone: (213) 620-7700
aaron.colodny@whitecase.com

Co-Counsel to the Official Committee of Unsecured Creditors

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Supplemental Brief submitted herein complies with the 5-page limitation set forth by the Court at the July 14, 2025 status conference, not including items excluded from length under Bankruptcy Rule 8015(g).

Dated: July 21, 2025 */s/ Christopher P. Mazza*

CERTIFICATE OF SERVICE

I hereby certify that, on July 21, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of New Jersey by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 21, 2025 */s/ Christopher P. Mazza*