Docket #1010 Date Filed: 09/04/2024

UNITED STATES BANKRUPTCY COURT **DISTRICT OF NEW JERSEY**	
Caption in Compliance with D.N.J. LBR 9004-2(c) **GOODWIN PROCTER LLP** Howard S. Steel, Esq. (admitted *pro hac vice*) Stacy A. Dasaro, Esq. Scott Weingaertner, Esq. John Padro, Esq. Yelizaveta (Liza) L. Burton, Esq. Meredith Mitnick, Esq. (NJ Bar No. 337002020) The New York Times Building 620 Eighth Avenue New York, NY 10018 212-813-8800 hsteel@goodwinlaw.com sdasaro@goodwinlaw.com sweingaertner@goodwinlaw.com jpadro@goodwinlaw.com lburton@goodwinlaw.com mmitnick@goodwinlaw.com *Counsel to Tecan Genomics, Inc.*	
In re: Invitae Corporation, *et al*.,[1] Debtors.	Case No. 24-11362 (MBK) Chapter 11 (Jointly Administered)

MOTION OF TECAN GENOMICS, INC. FOR ALLOWANCE OF ADMINISTRATIVE CLAIM

Tecan Genomics, Inc. ("Tecan") hereby submits this motion (the "Motion") for entry of an order allowing Tecan an administrative claim (the "Tecan Administrative Claim") against Invitae Corporation ("Invitae") and ArcherDX, LLC ("ArcherDX" and, together with Invitae, the "Debtors") and authorizing payment of the same. In support of this Motion, Tecan respectfully states as follows:

[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.

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JURISDICTION AND VENUE

1. This court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue for these cases and this Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. Tecan consents to the entry of a final order by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. The statutory basis for the relief requested in this Motion is section 503 of title 11 of the United States Code (the "Bankruptcy Code").

BACKGROUND

4. On October 6, 2023, Tecan commenced litigation (the "Tecan Litigation") before the United States District Court for the District of Delaware against the Debtors and Integrated DNA Technologies, Inc. (the "Non-Debtor Defendant" and, together with the Debtors, the "Defendants").[2] In the Tecan Litigation, Tecan alleges that the Defendants knowingly and willfully infringed on Patents[3] held by Tecan through their production and sale of certain products and services—including, but not limited to, ArcherDX VariantPlex AMP Panels; ArcherDX FusionPlex AMP Panels; ArcherDX LiquidPlex AMP Panels; Invitae Personalized Cancer Monitoring™–Baseline Test; and Invitae Personalized Cancer Monitoring™–Monitoring Test (collectively, the "Products").[4]

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[2] A copy of the Complaint and its supporting exhibits is attached as Exhibit A to the *Motion of Tecan Genomics, Inc. for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 502(c) Estimating Tecan's Claims for All Purposes in These Chapter 11 Bankruptcy Cases* [Dkt. No. 758]. The Complaint is fully incorporated herein by reference.

[3] The "Patents" are U.S. Patent Nos. 10,036,012, 10,876,108, 9,546,399, 11,098,357, and 11,725,241. Compl. ¶ 1.

[4] Compl. ¶¶ 7-10, 60-74.

5. On February 13, 2024 (the "Petition Date"), the Debtors commenced these cases by filing petitions for relief under chapter 11 of the Bankruptcy Code. The Tecan Litigation was stayed as to the Debtors on the Petition Date but remains ongoing as to the Non-Debtor Defendant.[5]

6. On April 11, 2024, Tecan filed Proofs of Claim Nos. 719 (against Invitae) and 731 (against ArcherDX) (together, the "Tecan Claims") describing the Debtors' prepetition infringement of the Patents by the manufacturing and sale of the Products.[6]

7. On August 2, 2024, the Court entered an order [Dkt. No. 913] confirming the *Third Amended Joint Plan of Invitae Corporation and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Dkt. No. 909] (the "Plan").[7] The Effective Date of the Plan occurred on August 7, 2024. [Dkt. No. 932]. The Administrative Claims Bar Date is September 6, 2024.[8] Pursuant to the Plan, unless otherwise agreed, the Holder of an Allowed Administrative Claim is entitled to an amount of Cash equal to the amount of such Holder's Allowed Administrative Claim.[9]

8. The Debtors have continued to infringe upon the Patents in the same manner as described in the Tecan Claims following the Petition Date through the Effective Date, giving rise to the Tecan Administrative Claim.

RELIEF REQUESTED

9. Bankruptcy Code Section 503(b) provides that claims on account of "the actual, necessary costs and expenses of preserving the bankruptcy estate" may be allowed as

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5 *See Tecan Genomics,* Inc. *v. Invitae Corp. et al.*, C.A. No. 23-1114 (GBW) (D. Del. Dec. 15, 2023), Dkt. Nos. 16, 18.

6 The Tecan Claims also assert administrative claims based on the Debtors' post-petition infringement of the Patents.

7 All capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Plan.

8 Plan, § I.A.20.

9 Plan, § II.A.

administrative expenses.[10] Specifically, courts must find: "(1) there was a post-petition transaction between the claimant and the estate, and (2) those expenses yielded a benefit to the estate." *See In re Energy Future Holdings Corp.*, 990 F.3d 728, 741 (3d Cir. 2021) (citing *In re Women First Healthcare, Inc.*, 332 B.R. 115, 121 (Bankr. D. Del. 2005)). Furthermore, courts routinely supplement this test with considerations of fundamental fairness as set forth in the Supreme Court's decision in *Reading Company v. Brown*, which held that "actual and necessary" costs may include "costs ordinarily incident to operation of a business." 391 U.S. 471, 483 (1968).

10. Applying the *Reading* doctrine, courts have found that "a post-petition tort committed by a debtor-in-possession within the course and scope of its continued operation of the estate's business may, itself, be considered a cost of doing business and is, therefore, entitled to administrative expense priority under section 503(b)(1)(A)." *In re Mallinckrodt PLC*, No. 20-12522, 2021 WL 4876908, at *3 (Bankr. D. Del. Oct. 19, 2021) (citing *In re Blanchard*, 547 B.R. 347, 353 (Bankr. C.D. Cal. 2016)). Courts have likewise applied the *Reading* doctrine to allow for post-petition tort claims as administrative expenses if those claims arise from ordinary course actions of the debtor in possession related to the "preservation of [the] debtor's estate." *Id*. (citing *In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 173 (3d Cir. 2012), *as corrected* (Oct. 25, 2012)).[11] As such, courts have applied *Reading* to a variety of post-petition torts and claims, including, patent infringement claims like Tecan's administrative expense claims. *See, e.g.*, *In re Eagle-Picher Industries, Inc.*, 447 F.3d 461, 464 (6th Cir. 2006) (holding that claims against debtor

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[10] 11 U.S.C. § 503(b)(1)(A).

[11] *See also Oil, Chemical & Atomic Workers, AFL CFOCLC v. Hanlin Group (In Re Hanlin Group, Inc.)*, 176 B.R. 329, 334-35 (Bankr. D. N.J. 1995) (holding that damages awarded for post-petition WARN violations were administrative expense claims); *Brandt v. Lazard Freres & Co, et al. (In re Healthco Int'l, Inc.)*, 310 F.3d 9, 12-13 (1st Cir. 2002) (holding that costs awarded to defendants in an unsuccessful lawsuit brought by Trustee are entitled to administrative expense priority).

for contributory patent infringement arising post-petition are entitled to administrative expense priority); *In re Cambridge Biotech Corp.*, 186 B.R. 9, 14 (Bankr. D. Mass. 1995) (explaining that infringement claims arising from post-petition conduct give rise to an administrative expense claim entitled to first priority); *In re Dahlgren Intern. Inc.*, 147 B.R. 393, 403 (N.D. Tex. 1992) (explaining that a damages claim based on acts of patent infringement can constitute an administrative expense).

11. Furthermore, a claim may qualify as an administrative expense under Bankruptcy Code Section 503(b) even if it originates from conduct that began prior to the petition date but continued post-petition. *See In re Eagle-Picher Industries*, 447 F.3d at 462 (allowing administrative expense claim for patent infringement damages arising out of pre-petition and post-petition purchases); *see also In re Charlesbank Laundry, Inc.*, 755 F.2d 200, 202 (1st Cir. 1985) (allowing administrative expense claim for fines issued to the debtor for its continued violation of injunction post-petition).

12. Here, the Debtors have generated significant profits from the post-petition manufacturing and sale of the Products and other infringing products, which could not have occurred without infringing upon Tecan's Patents. The Debtors have benefited from the continuing and uninterrupted use of the technology protected by the Patents and have not paid any amounts to Tecan in connection with the Debtors' use of Tecan's patented technology. The Debtors' ordinary course production and sale of the Products has benefited and preserved the Debtors' estates while harming Tecan. Accordingly, Tecan asserts the Tecan Administrative Claim against the Debtors in an amount of not less than $2,750,000. This amount relates to (i) the estimated revenues obtained from the manufacture and sale of the Products by the Debtors during the post-petition period through the Effective Date in violation of Tecan's Patent rights applying

a reasonable market royalty rate—in other words, this amount represents what royalty payments the Debtors should have paid to Tecan in exchange for relying upon the Patents in the manufacture and sale of the Products in the post-petition period and which amounts are rightfully owed to Tecan—and (ii) amounts for reasonable attorneys' fees, costs and expenses incurred post-petition and owed by the Debtors pursuant to 35 U.S.C. § 285. *See Fabriclear, LLC v. Harvest Direct, LLC*, 2024 U.S. Dist. LEXIS 77401, *3 (D. Mass Apr. 9, 2024) (awarding plaintiff's attorneys' fees pursuant to 35 U.S.C. § 285).

CONCLUSION

WHEREFORE, Tecan respectfully requests that this Court enter an Order: (i) allowing as the Tecan Administrative Claim all post-petition damages caused by the Debtors' infringement of the Patents in the amount of $2,750,000 and payment to Tecan of such sum within thirty (30) days after entry of the Order; and (ii) granting such other relief as is just and proper.

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Dated: September 4, 2024

/s/ Meredith Mitnick

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ORDER GRANTING MOTION OF TECAN GENOMICS, INC. FOR ALLOWANCE OF ADMINISTRATIVE CLAIM

The relief set forth on the following page (2), 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' 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.

Upon consideration of the *Motion of Tecan Genomics, Inc. for Allowance of Administrative Claim* (the "Motion"),[2] filed by Tecan Genomics, Inc. ("Tecan"), and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue is proper under 28 U.S.C. §§ 1408 and 1409; and this Court having determined that notice of the Motion was adequate and sufficient under the circumstances and that no further notice of the Motion need be provided; and this Court having reviewed the Motion; 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 after due deliberation and sufficient cause appearing therefor; **IT IS HEREBY ORDERED THAT**:

1. The Motion is GRANTED.

2. Tecan shall have an Allowed Administrative Claim in the amount of $2,750,000 (the "Tecan Administrative Claim").

3. The Debtors shall pay the Tecan Administrative Claim in full in Cash within thirty (30) days after entry of this Order.

4. This Court shall retain jurisdiction with respect to all matters relating to this Order.

[2] All capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Motion.