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Ethics Roundtable: Current Issues in Bankruptcy Practice

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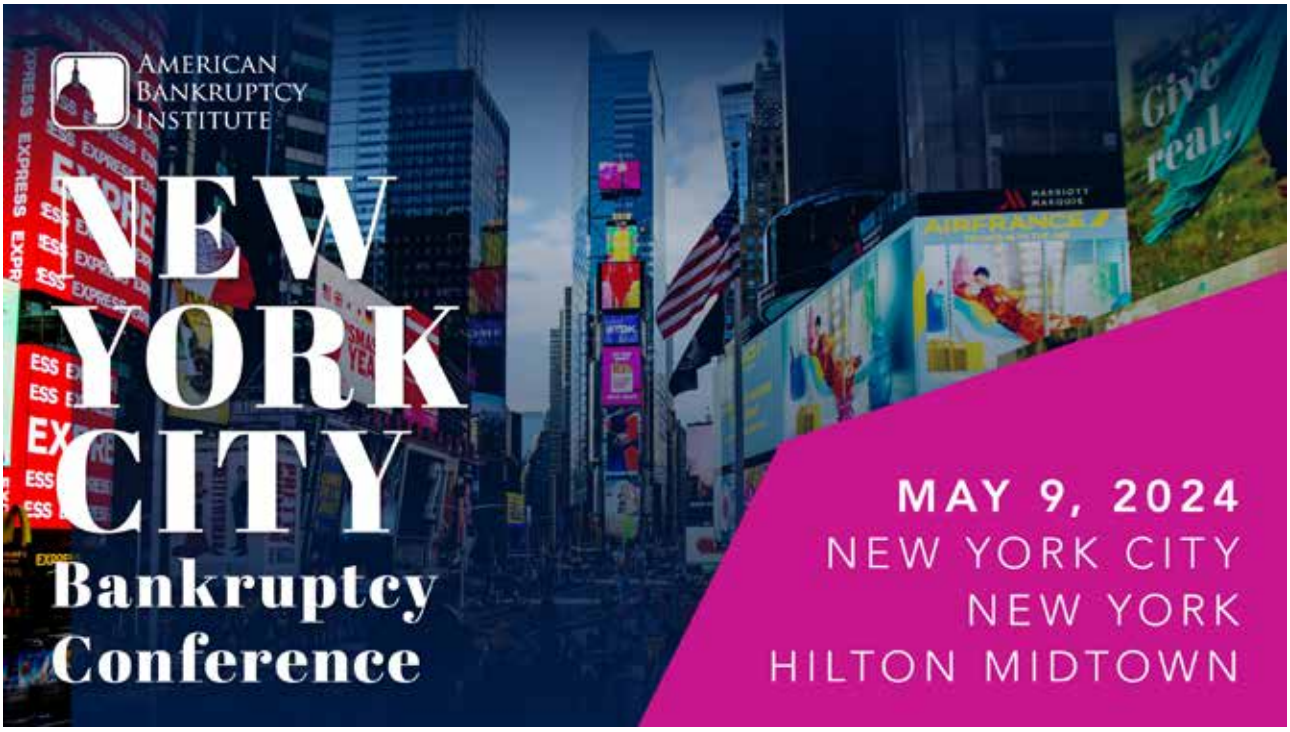
CONCURRENT SESSION

2024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Overview

1. Ethical Considerations for Lawyers and Judges

- Considerations for Lawyers
- Considerations for Judges
- Transparency and Public Interest

2. The Ethics of AI

3. The Ethics of Mass Torts in Bankruptcy

Ethical Considerations for Lawyers and Judges

Considerations for Lawyers

Ethical Considerations for Lawyers and Judges

Considerations for Judges

Ethical Considerations for Lawyers and Judges

Transparency and Public Interest

The Ethics of AI

The Ethics of Mass Torts in Bankruptcy

McGuireWoods

AI and Legal Ethics

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ABI New York
May 9, 2024

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ABA Resolution 604 (adopted February 2023) Excerpt:

Responsible individuals and organizations should be accountable for the consequences caused by their use of AI products, services, systems, and capabilities, including any legally cognizable injury or harm caused by their actions or use of AI systems or capabilities, unless they have taken reasonable measure to mitigate against that harm or injury.

But I will never use AI.

In fact, your firm already is – examples are CoCounsel, Lexis +AI, Harvey.ai, document review tools (Relativity, Brainspace), contract due diligence (eBrevia, Kira, Luminance), LexMachina.

And Lexis, Westlaw, Wolter-Kluwers, and Bloomberg Law are all enhancing their legacy legal solutions with AI-based search.

F. Use of ChatGPT and Other Tools. Counsel is responsible for providing the Court with complete and accurate representations of the record, the procedural history of the case, and any cited legal authorities. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.

Standing Order, Judge Subramanian, SDNY USDC

Attorneys must represent their clients competently. The ethical duty of competence requires that an attorney have a reasonable understanding of the benefits and risks associated with relevant technology.

ABA Model Rule 1.1

CLE

To satisfy their duty of competence, attorneys may acquire sufficient learning and skill about using AI in their practices by attending CLEs. In New York, attorneys must take one hour of CLE every other year relating to cybersecurity, privacy, and data protection.

Technical Consultants

Attorneys may also satisfy their duty of competence by associating with other professionals who are knowledgeable about the use of AI. However, an attorney must properly supervise a non-attorney consultant.

ABA Model Rule 5.3

Duty to Communicate with Clients

Attorneys must reasonably consult with clients about the means by which they intend to accomplish the clients' objectives. ABA Model Rule 1.4

If an attorney desires to use AI technology on a client matter, she should discuss the benefits and risks of using that technology with the client. An attorney should also explain why she does not intend to use AI technology for a particular task, if that technology is available. And an attorney should obtain a client's informed consent to use or not use AI technology on a client matter (perhaps in the engagement letter).

Duty to Charge a Reasonable Fee

Under ABA Model Rule 1.5, an attorney may not charge an unreasonable fee or collect an unreasonable amount for expenses.

An attorney must inform clients about more efficient, less expensive ways of accomplishing legal tasks. It is unreasonable, absent informed consent (perhaps in an engagement letter), to charge a client for attorney time to perform legal research, document review, or another task that can be performed quicker and more cheaply using AI technology.

Duty to Maintain Confidentiality

Under ABA Model Rule 1.6, attorneys must not disclose their clients' confidential information unless they have received their clients' informed consent, or disclosure is impliedly authorized or otherwise permitted.

An attorney may have ethical or civil exposure if an AI vendor or contractor retained by the law firm suffers a cyberattack or otherwise experiences a data breach. Attorneys should carefully vet the cybersecurity practices and security compliance of vendors and preferably use vendors approved or directed by the client.

Duty to Supervise Nonlawyer Assistance

Under ABA Model Rule 5.3(b), an attorney with supervisory authority over a nonlawyer [includes outside service providers and technology services] has a duty to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the attorney's professional obligations.

Duty to Supervise Nonlawyer Assistance (continued)

When using an AI technology or service, an attorney should ensure the provider:

a. has acceptable credentials, references, and reputation,
b. has reasonable procedures in place to protect confidential client information,
c. understands its confidentiality obligations, and
d. provides a written statement of its assurance of confidentiality.

When using an AI technology or service, an attorney should:

a. understand how the tool works,
b. be aware of shortcomings, such as AI hallucination (ie, fictitious case citations),
c. provide clear, unbiased instructions to the AI tool,
d. carefully review the quality of work product, and
e. make necessary adjustments to instructions.

Questions or Comments?

***In re Leslie Fay Companies, Inc.*, 175 B.R. 525 (Bankr. S.D.N.Y. 1994)**

In *Leslie Fay*, Judge Brozman grappled with the request of the U.S. Trustee to disqualify the law firm of Weil, Gotshal & Manges ("Weil"). Weil was retained prepetition to represent Leslie Fay's audit committee in investigating accounting irregularities following a disclosure that its controller had made unsupported entries in the company books. When the company filed for bankruptcy nine weeks later in April 1993, Weil was retained as debtors' counsel, and the retention order contemplated that Weil would continue its work for the audit committee as part of its representation of the debtors.

By late September 1993, the audit committee determined that there was no evidence that the targets of the investigation — Leslie Fay's board and certain members of senior management — were involved in the fraud. Around the same time, questions regarding Weil's disinterestedness were raised by the U.S. Trustee and the creditors' committee. In December 1993, at the request of the creditors' committee and Leslie Fay, an examiner was appointed by Judge Brozman to (i) investigate whether Weil (a) was disinterested or held an adverse interest to the debtors and (b) made adequate disclosure; (ii) determine whether there were viable claims that the audit committee did not identify that could be asserted in connection with the accounting irregularities; and (iii) evaluate whether the audit committee's report was acceptable in light of Weil's possible lack of disinterestedness.

The examiner conducted his investigation over the course of the next six months. His report concluded that, while Weil had not represented Leslie Fay prior to its retention by the audit committee, it maintained professional and personal relationships with parties that had an interest in the outcome of Weil's investigation on behalf of the audit committee, none of which had been disclosed to the court. Specifically, while Weil had disclosed that it represented entities that were "claimants of the [d]ebtors in matters totally unrelated to [d]ebtors' cases," it did not disclose that it had professional relationships with individual members of the audit committee, that it represented the investment firms in which those audit committee members were partners, or that such firms were involved in and/or had members who acquired ownership of Leslie Fay stock through a June 1991 secondary public offering of 2.1 million shares of Leslie Fay stock, well after the accounting irregularities began. Similarly, the report revealed that Weil did not disclose its representation of BDO Seidman ("BDO"), the outside accounting firm that had certified the debtors' false financial statements (and a target of the audit committee's investigation), despite the fact that Weil recognized that the debtors might have claims against BDO.

Based on the failure to disclose these relationships, the examiner determined that Weil had violated the disclosure requirements of Bankruptcy Rule 2014 and was not disinterested when it advised the audit committee in connection with its investigation. However, the examiner also found no evidence that Weil's potential conflicts had affected its representation of Leslie Fay, instead finding that Weil had represented the debtors in an exemplary fashion. Accordingly, the examiner recommended sanctions in the form of disallowance of future fees to pay some of the cost of the examiner's investigation, but not the disqualification of Weil as counsel to the debtors. Nevertheless, in October 1994, the U.S. Trustee asked Judge Brozman to disqualify Weil and to order disgorgement of a large portion of its fees due to its violations of Bankruptcy Rule 2014 and section 327 of the Bankruptcy Code.

Judge Brozman found that Weil (i) represented interests that were materially adverse to the debtors at the time of its retention and (ii) violated Rule 2014 by not making complete disclosure of its connections, thereby causing actual injury to Leslie Fay. Regarding its relationship with members of the audit committee, Weil asserted that, by the time it was retained as counsel for the debtors, it was clear that no

claims existed against such audit committee members. While the Court did not doubt Weil's belief that no claims existed, it found that, pursuant to Rule 2014, Weil was required to have disclosed its connections to the members. The Court stated that "there is 'no merit to the . . . argument that [a party] did not have to disclose its connections . . . because its attorneys did not feel that a conflict existed.' . . . Weil Gotshal had no right to 'make a unilateral determination regarding the relevance of a connection.'" Similarly, with respect to BDO, the court also found that Weil was not disinterested. In commenting on Weil's undisclosed ties to three different targets of the audit committee investigation, Judge Brozman observed that "[i]t was for the Court, and not Weil Gotshal, to determine whether in fact a conflict existed and, if so, what the remedy should be."

In discussing the harm caused to Leslie Fay by Weil's nondisclosure, the court observed that if Weil had revealed its connections at the time it requested court approval of its retention, it might still have been retained, albeit in a narrower role. As the court stated, "[t]he shame in all of this is that the heavy financial and emotional toll in this matter could have been avoided completely."

Although the court neither disqualified Weil completely nor ordered the disgorgement of all its fees, it precluded Weil from taking on new matters, and ordered the disgorgement of an amount equal to the total cost of the examiner's investigation, estimated to be $800,000 (in 1994 dollars), plus the related fees of the creditors' and equity security holders' committees.

***In re Marvel Entertainment Group, Inc.*, 140 F.3d 463 (3d Cir. 1998)**

The Third Circuit considered appeals from orders appointing a chapter 11 trustee and refusing to permit the appointed chapter 11 trustee to retain his own law firm, because the firm represented a substantial creditor in a non-related matter.

In *Marvel*, two entities, each controlled by a single person, Carl Ichan ("the Ichan Entities"), purchased a large portion of pre-petition debt claims and bonds from holding companies that owned substantially all of Marvel's stock, which was controlled by Ronald Perelman. The Marvel stock served as collateral for the Ichan Entities' debts. Subsequently, over the objection lenders of Marvel, and after the district court had vacated a restraining order imposed by the bankruptcy court, the Ichan Entities foreclosed on the stock and successfully took control of Marvel. After unsuccessful attempts at a consensual reorganization plan with the lenders and the Perelman-controlled holding companies, the now-Ichan-controlled debtor-in-possession commenced an action in the district court against the holding companies, lenders, and other creditors alleging fraud, breach of fiduciary duty, fraudulent conveyance, preferential transfers, and breach of contract. Further, the complaint contained allegations of conspiracy to "sabotage" the reorganization. The lenders then renewed their previous motion for the appointment of a trustee. The district court, which had withdrawn the reference from the bankruptcy court, heard oral argument regarding the appointment of a trustee, observed that the debtor-in-possession's arguments in opposition to the trustee motion contained many of the allegations of the district court complaint, including that the lenders' efforts were intended to frustrate reorganization, and the lenders had countered that the Ichan Entities acting as debtors-in-possession had an elaborate scheme to take over Marvel and diminish the value of the lenders' claims, were incapable of neutrality, and guilty of breaching their fiduciary duty. Based on the degree of acrimony, the district court ordered the appointment of a chapter 11 trustee. The U.S. Trustee selected former Third Circuit Judge, John J. Gibbons.

The Trustee's declaration of disinterestedness acknowledged that his firm, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. represented one of the lenders, Chase Bank, in an unrelated matter, and Chase had waived any conflicts. Notwithstanding this declaration, the district court approved the appointment of the trustee. Nevertheless, when the trustee sought to retain his firm as his counsel, with a declaration acknowledging the same representation of Chase, the district court disapproved the retention, stating that the firm's representation of Chase "taints the image of objectivity that the trustee and his counsel should possess."

The Third Circuit affirmed the appointment of a trustee. The Third Circuit stated that "we are faced with circumstances in which the Icahn interests, themselves creditors of the Perelman holding companies, are currently in control of the debtor" and, "although the Icahn interests are technically and officially fiduciaries to all creditors, they would also be placed in an awkward position of evaluating their own indenture and debt claims."

The Third Circuit reversed the disapproval of the retention of the trustee's own firm. Relying on its precedent, *In re B H & P, Inc.*, 949 F.2d 1300 (3d Cir. 1991), the court reaffirmed that with regard to employment of counsel for a trustee (1) there is a per se disqualification of an attorney with an actual conflict of interest, (2) there is discretion to disqualify an attorney with a potential conflict of interest, and (3) there is no discretion to disqualify an attorney on the appearance of a conflict alone. Because the district court had disqualified the Gibbons firm on the basis of the appearance of a conflict, it abused its discretion. The court of appeals noted that the district court had approved the appointment of the trustee himself despite the very same set of facts. If the trustee himself was not disqualified, it was reversible error to deny the trustee his counsel of choice and disqualify the firm that the trustee himself headed.

***United States v. Gellene*, 182 F.3d 578 (7th Cir. 1999)**

The Seventh Circuit upheld the conviction of John G. Gellene, a partner at the law firm Milbank Tweed Hadley & McCloy, for making false declarations under oath during the Chapter 11 bankruptcy proceedings of Bucyrus-Erie, in violation of 18 U.S.C. § 152 and for using a document he knew contained false statements, under 18 U.S.C. § 1623. Gellene was representing Bucyrus-Erie, a mining equipment manufacturer, in its bankruptcy. He submitted a declaration of disinterestedness under oath, pursuant to Bankruptcy Rule 2014, which disclosed that the firm was representing one major creditor, Goldman Sachs, in unrelated matters, had formerly represented another major creditor, but significantly, omitted to state that the firm also represented another of the debtor's senior secured creditors, its manager, and two of the manager's principals, who were former members of Goldman Sachs. These omissions came despite multiple interactions and legal engagements between Milbank and these entities, which Gellene failed to disclose in supplemental declarations filed with the bankruptcy court and during testimony at a fee hearing. When the simultaneous representations were later discovered, after Milbank had been awarded $1.8 million in fees, Gellene testified that he had made an error in judgment in failing to disclose the other representations. The bankruptcy court ordered Milbank to disgorge its fees, a grand jury indicted Gelene for the crimes mentioned above, and a jury convicted him of these crimes.

On appeal, the Seventh Circuit found that Gellene's omissions were material and deliberate. His failure to disclose these relationships in the bankruptcy filings constituted making false declarations under oath with intent to deceive, satisfying the elements of bankruptcy fraud under 18 U.S.C. § 152. Gellene's failure to disclose conflicts of interest also compromised the integrity of the bankruptcy process, potentially disadvantaging creditors and other parties reliant on the unbiased counsel of the firm representing the

debtor. Furthermore, when testifying about his firm's fee application related to the bankruptcy, Gellene used these false declarations to mislead the court, constituting perjury under 18 U.S.C. § 1623.

***Alix v. McKinsey & Co.*, 23 F.4th 196 (2d Cir. 2022)**

The Second Circuit addressed allegations under RICO, where Plaintiff Jay Alix, the assignee of AlixPartners, claimed that McKinsey, by submitting false disclosure statements in bankruptcy court, including statements under Bankruptcy Rule 2014, wrongly obtained lucrative financial advisory positions in 13 major chapter 11 cases, resulting in financial losses to AlixPartners. The key issue was whether these actions proximately caused losses to AlixPartners sufficient to meet RICO's stringent requirements. The District Court initially dismissed Alix's complaint, arguing that the causal connection between McKinsey's alleged false disclosures and the financial harm to AlixPartners was too indirect. The Second Circuit reversed this decision, holding that the complaint plausibly established proximate causation for RICO purposes. The appellate court found that Alix had sufficiently alleged that McKinsey's actions, by failing to make the required disclosure of connections, directly harmed AlixPartners' business opportunities in the bankruptcy consulting market. In particular, Alix had plausibly alleged that had McKinsey made the required disclosure of its connections, it would have been disqualified from many of these financial advisory positions, which require such professionals to be disinterested and not hold or represent an interest adverse to the estate, thus allowing AlixPartners to be retained. Furthermore, Alix had also sufficiently alleged RICO violation for a "pay-to-play" scheme, in which McKinsey had arranged meetings between its clients and bankruptcy attorneys in exchange for exclusive bankruptcy assignments from these attorneys.

***In re Level 8 Apparel LLC*, No. 16-13164 (JLG), 2023 WL 2940489 (Bankr. S.D.N.Y. Apr. 13, 2023)**

In *Level 8 Apparel LLC*, the bankruptcy court considered a disputed second and final fee application of the law firm Ruta Soulios & Stratis LLP (RSS), which had represented the debtors in chapter 11 prior to the conversions of their cases to chapter 7. RSS's retention and first interim fee application had been unopposed. In response to the second and final fee application, which was heard during the administration of the chapter 7 case, the principal creditor filed an objection, the U.S. Trustee filed a limited objection and reservation of rights, and the chapter 7 trustee filed a motion to compel the turnover of the unused pre-petition retainer, disqualification of RSS, and disgorgement of their previously awarded fees, based on RSS's failure to disclose connections with insiders. The objections and the chapter 7 trustee's motions to compel and disgorge were particularly focused on RSS's failure to disclose its prior representation of Sam Kim, a director of the debtors and the husband of the 100% owner of the debtors, in the litigation with the principal creditor, which resulted in a judgment that precipitated the chapter 11 filings, as well as RSS's financial links to On Five, an insider of Level 8, which provided the funding of RSS's pre-petition retainer. Further, there was an allegation that RSS neglected potential claims against Sam Kim and On Five, which had received significant pre-petition transfers of funds from the debtors. The Court determined that RSS violated the disclosure requirements of section 329 of the Bankruptcy Code and Rules 2014 and 2016 of the Federal Rules of Bankruptcy Procedure. RSS's argument that their nondisclosure was an "innocent oversight" and that their relationship with Sam Kim concluded prior to the case did not exempt them from the strict disclosure requirements. The Court also rejected RSS's argument that its retainer was a "classic" retainer, meaning that it was earned upon receipt and nonrefundable to the client

irrespective of whether services were rendered, and as a consequence, not subject to disgorgement. The Court determined that the retainer was property of the estate.

Despite these violations, the Court opted not to disqualify RSS but, because the estate was potentially administratively insolvent, stated that it would impose sanctions at a later date. The issues of whether RSS's fee should be approved or its fees disgorged were deferred.

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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)

DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND & ELLIS

[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.

INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this application (this "Application") for the entry of an order (the "Order"), substantially in the form attached hereto as **Exhibit A**, authorizing the Debtors to retain and employ Kirkland & Ellis LLP and Kirkland & Ellis International LLP (collectively, "Kirkland") as their attorneys effective as of the Petition Date (as defined herein). In support of this Application, the Debtors submit the declaration of Spencer A. Winters, the president of Spencer A. Winters, P.C., a partner of Kirkland & Ellis LLP, and a partner of Kirkland & Ellis International LLP (the "Winters Declaration"), which is attached hereto as **Exhibit B** and the declaration of Ana Schrank, the Chief Financial Officer of Invitae Corporation, which is attached hereto as **Exhibit C** (the "Schrank Declaration"). In further support of this Application, the Debtors respectfully state as follows.

Jurisdiction and Venue

1. The United States Bankruptcy Court for the District of New Jersey (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and the Debtors confirm their consent to the entry of a final order by the Court in connection with this Application to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The bases for the relief requested herein are sections 327(a) and 330 of title 11 of the United States Code (the "Bankruptcy Code"), rules 2014(a) and 2016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and rules 2014-1 and 2016-1 of the Local Rules of the United States Bankruptcy Court for the District of New Jersey (the "Local Rules").

Background

4. On February 13, 2024 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On February 16, 2024, the Court entered an order [Docket No. 54] authorizing the joint administration and procedural consolidation of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). No request for the appointment of a trustee or examiner has been made in these chapter 11 cases. On March 1, 2024 the United States Trustee for the District of New Jersey (the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Committee") [Docket No. 131].

5. A description of the Debtors' business, the reasons for commencing the chapter 11 cases, and the relief sought from the Court to allow for a smooth transition into chapter 11 are set forth in the *Declaration of Ana Schrank, Chief Financial Officer of Invitae Corporation, in Support of Chapter 11 Filing, First Day Motions*, *and Access to Cash Collateral*, filed on February 13, 2024 [Docket No. 21], incorporated herein by reference.

Relief Requested

6. By this Application, the Debtors seek entry of the Order authorizing the retention and employment of Kirkland as their attorneys in accordance with the terms and conditions set forth in that certain engagement letter between the Debtors and Kirkland effective as of September 22, 2023 (the "Engagement Letter"), a copy of which is attached hereto as **Exhibit 1** to the Order and incorporated herein by reference.

Kirkland's Qualifications

7. The Debtors seek to retain Kirkland because of Kirkland's recognized expertise and extensive experience and knowledge in the field of debtors' protections, creditors' rights, and business reorganizations under chapter 11 of the Bankruptcy Code.

8. Kirkland has been actively involved in major chapter 11 cases and has represented debtors in many cases, including, among others: *See*, *e.g.*, *In re Careismatic Brands, LLC*, No. 24-10561 (VFP) (Bankr. D.N.J. Mar. 1, 2024); *In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. Jan. 10, 2024); *In re WeWork Inc.*, No. 23-19865 (JKS) (Bankr. D.N.J. Dec. 20, 2023); *In re Cyxtera Techs. Inc.*, (JKS) (Bankr. D.N.J. July 18, 2023); *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575 (MBK) (Bankr. D.N.J. June 26, 2023); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J June 5, 2023); *In re David's Bridal*, No. 23-13131 (CMG) (Bankr. D.N.J. June 1, 2023); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Feb. 1, 2023).[2]

9. In preparing for its representation of the Debtors in these chapter 11 cases, Kirkland has become familiar with the Debtors' business and many of the potential legal issues that may arise in the context of these chapter 11 cases. The Debtors believe that Kirkland is both well-qualified and uniquely able to represent the Debtors in these chapter 11 cases in an efficient and timely manner.

Services to be Provided

10. Subject to further order of the Court, and consistent with the Engagement Letter, the Debtors request the retention and employment of Kirkland to render the following legal services:

[2] Because of the voluminous nature of the orders cited in this Application, they are not attached to this Application. Copies of these orders are available upon request to Kirkland.

a. advising the Debtors with respect to their powers and duties as debtors in possession in the continued management and operation of their businesses and properties;

b. advising and consulting on the conduct of these chapter 11 cases, including all of the legal and administrative requirements of operating in chapter 11;

c. attending meetings and negotiating with representatives of creditors and other parties in interest;

d. taking all necessary actions to protect and preserve the Debtors' estates, including prosecuting actions on the Debtors' behalf, defending any action commenced against the Debtors, and representing the Debtors in negotiations concerning litigation in which the Debtors are involved, including objections to claims filed against the Debtors' estates;

e. preparing pleadings in connection with these chapter 11 cases, including motions, applications, answers, orders, reports, and papers necessary or otherwise beneficial to the administration of the Debtors' estates;

f. representing the Debtors in connection with obtaining authority to continue using cash collateral and postpetition financing;

g. advising the Debtors in connection with any potential sale of assets;

h. appearing before the Court and any appellate courts to represent the interests of the Debtors' estates;

i. advising the Debtors regarding tax matters;

j. taking any necessary action on behalf of the Debtors to negotiate, prepare, and obtain approval of a disclosure statement and confirmation of a chapter 11 plan and all documents related thereto; and

k. performing all other necessary legal services for the Debtors in connection with the prosecution of these chapter 11 cases, including: (i) analyzing the Debtors' leases and contracts and the assumption and assignment or rejection thereof; (ii) analyzing the validity of liens against the Debtors' assets; and (iii) advising the Debtors on corporate and litigation matters.

Professional Compensation

11. Kirkland intends to apply for compensation for professional services rendered on an hourly basis and reimbursement of expenses incurred in connection with these chapter 11 cases, subject to the Court's approval and in compliance with applicable provisions of the Bankruptcy

Code, the Bankruptcy Rules, the Local Rules, and any other applicable procedures and orders of the Court. The hourly rates and corresponding rate structure Kirkland will use in these chapter 11 cases are the same as the hourly rates and corresponding rate structure that Kirkland uses in other restructuring matters, and are comparable to the hourly rates and corresponding rate structure that Kirkland uses for similar complex corporate, securities, and litigation matters whether in court or otherwise, regardless of whether a fee application is required. These rates and the rate structure reflect that such restructuring and other complex matters typically are national in scope and involve great complexity, high stakes, and severe time pressures.

12. Kirkland operates in a national marketplace for legal services in which rates are driven by multiple factors relating to the individual lawyer, his or her area of specialization, the firm's expertise, performance, and reputation, the nature of the work involved, and other factors.

13. Kirkland's current hourly rates for matters related to these chapter 11 cases range as follows:[3]

Billing Category[4]	U.S. Range
Partners	$1,195-$2,465
Of Counsel	$820-$2,245
Associates	$745-$1,495
Paraprofessionals	$325-$625

[3] For professionals and paraprofessionals residing outside of the U.S., hourly rates are billed in the applicable currency. When billing a U.S. entity, such foreign rates are converted into U.S. dollars at the then applicable conversion rate. After converting these foreign rates into U.S. dollars, it is possible that certain rates may exceed the billing rates listed in the chart herein. While the rate ranges provided for in this Application may change if an individual leaves or joins Kirkland, if any such individual's billing rate falls outside the ranges disclosed above, Kirkland does not intend to update the ranges for such circumstances.

[4] Although Kirkland does not anticipate using contract attorneys during these chapter 11 cases, in the unlikely event that it becomes necessary to use contract attorneys, Kirkland will not charge a markup to the Debtors with respect to fees billed by such attorneys. Any contract attorneys or non-attorneys who are employed by the Debtors in connection with work performed by Kirkland will be subject to conflict checks and disclosures in accordance with the requirements of the Bankruptcy Code.

14. Kirkland's hourly rates are set at a level designed to compensate Kirkland fairly for the work of its attorneys and paraprofessionals and to cover fixed and routine expenses. Hourly rates vary with the experience and seniority of the individuals assigned. These hourly rates are subject to periodic adjustments to reflect economic and other conditions.[5]

15. Kirkland represented the Debtors during the five (5)-month period before the Petition Date, using the hourly rates listed above and in the Winters Declaration. Moreover, these hourly rates are consistent with the rates that Kirkland charges other comparable chapter 11 clients, regardless of the location of the chapter 11 case.

16. The rate structure provided by Kirkland is appropriate and not significantly different from (a) the rates that Kirkland charges for other similar types of representations or (b) the rates that other comparable counsel would charge to do work substantially similar to the work Kirkland will perform in these chapter 11 cases.

17. It is Kirkland's policy to charge its clients in all areas of practice for identifiable, non-overhead expenses incurred in connection with the client's case that would not have been incurred except for representation of that particular client. It is also Kirkland's policy to charge its clients only the amount actually incurred by Kirkland in connection with such items. Examples of such expenses include postage, overnight mail, courier delivery, transportation, overtime expenses, computer-assisted legal research, photocopying, airfare, meals, and lodging.

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[5] For example, like many of its peer law firms, Kirkland typically increases the hourly billing rate of attorneys and paraprofessionals twice a year in the form of: (i) step increases historically awarded in the ordinary course on the basis of advancing seniority and promotion and (ii) periodic increases within each attorney's and paraprofessional's current level of seniority. The step increases do not constitute "rate increases" (as the term is used in the *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases*, effective November 1, 2013). As set forth in the Order, Kirkland will provide ten business-days' notice to the Debtors, the U.S. Trustee, and any official committee before implementing any periodic increases, and shall file any such notice with the Court.

18. To ensure compliance with all applicable deadlines in these chapter 11 cases, from time-to-time, Kirkland utilizes the services of overtime secretaries. Kirkland charges fees for these services pursuant to the Engagement Letter, which permits Kirkland to bill the Debtors for overtime secretarial charges that arise out of business necessity. In addition, Kirkland professionals also may charge their overtime meals and overtime transportation to the Debtors consistent with prepetition practices.

19. Kirkland currently charges the Debtors $0.16 per page for standard duplication in its offices in the United States. Notwithstanding the foregoing and consistent with the Local Rules, Kirkland will charge no more than $0.10 per page for standard duplication services in these chapter 11 cases. Kirkland does not charge its clients for incoming facsimile transmissions. Kirkland has negotiated a discounted rate for Westlaw computer-assisted legal research. Computer-assisted legal research is used whenever the researcher determines that using Westlaw is more cost effective than using traditional (non-computer assisted legal research) techniques.

Compensation Received by Kirkland from the Debtors

20. Per the terms of the Engagement Letter, on October 16, 2023 the Debtors paid $250,000 to Kirkland, which, as stated in the Engagement Letter, constituted a "special purpose retainer" (also known as an "advance payment retainer") as defined in Rule 1.5(d) of the Illinois Rules of Professional Conduct and *Dowling v. Chicago Options Assoc., Inc.*, 875 N.E.2d 1012, 1018 (Ill. 2007). Subsequently, the Debtors paid to Kirkland additional special purpose retainer totaling $10,741,656.22 in the aggregate. As stated in the Engagement Letter, any special purpose retainer is earned by Kirkland upon receipt, any special purpose retainer becomes the property of Kirkland upon receipt, the Debtors no longer have a property interest in any special purpose retainer upon Kirkland's receipt, any special purpose retainer will be placed in Kirkland's general account and will not be held in a client trust account, and the Debtors will not earn any interest on

any special purpose retainer.[6] A chart identifying the statements setting forth the professional services provided by Kirkland to the Debtors and the expenses incurred by Kirkland in connection therewith, as well as the special purpose retainer transferred by the Debtors to Kirkland, prior to the Petition Date is set forth in the Winters Declaration.

21. Pursuant to Bankruptcy Rule 2016(b), Kirkland has neither shared nor agreed to share (a) any compensation it has received or may receive with another party or person, other than with the partners, associates, and contract attorneys associated with Kirkland or (b) any compensation another person or party has received or may receive.

22. As of the Petition Date, the Debtors did not owe Kirkland any amounts for legal services rendered before the Petition Date. Although certain expenses and fees may have been incurred but not yet applied to Kirkland's special purpose retainer, the amount of Kirkland's special purpose retainer always exceeded any amounts listed or to be listed on statements describing services rendered and expenses incurred (on a "rates times hours" and "dates of expenses incurred" basis) prior to the Petition Date.

Kirkland's Disinterestedness

23. To the best of the Debtors' knowledge and as disclosed herein and in the Winters Declaration, (a) Kirkland is a "disinterested person" within the meaning of section 101(14) of the Bankruptcy Code, as required by section 327(a) of the Bankruptcy Code, and does not hold or represent an interest adverse to the Debtors' estates and (b) Kirkland has no connection to the

[6] The Engagement Letter provides that Kirkland may continue to hold any remaining prepetition special purpose retainer during the pendency of a chapter 11 case rather than applying such special purpose retainer to postpetition fees and expenses. Kirkland evaluates whether to retain any remaining prepetition special purpose retainer on a case-by-case basis. In this particular case, Kirkland has elected not to hold any remaining prepetition special purpose retainer but, instead, will apply any remaining special purpose retainer to postpetition fees and expenses as such fees and expenses are allowed by the Court.

Debtors, their creditors, or other parties in interest, except as may be disclosed in the Winters Declaration.

24. Kirkland will review its files periodically during the pendency of these chapter 11 cases to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new relevant facts or relationships are discovered or arise, Kirkland will use reasonable efforts to identify such further developments and will promptly file a supplemental declaration, as required by Bankruptcy Rule 2014(a).

Supporting Authority

25. The Debtors seek retention of Kirkland as their attorneys pursuant to section 327(a) of the Bankruptcy Code, which provides that a debtor, subject to Court approval:

> [M]ay employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the [debtor] in carrying out the [debtor]'s duties under this title.

11 U.S.C. § 327(a).

26. Bankruptcy Rule 2014(a) requires that an application for retention include:

> [S]pecific facts showing the necessity for the employment, the name of the [firm] to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the [firm's] connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014.

27. The Debtors submit that for all the reasons stated above and in the Winters Declaration, the retention and employment of Kirkland as counsel to the Debtors is warranted. Further, as stated in the Winters Declaration, Kirkland is a "disinterested person" within the

meaning of section 101(14) of the Bankruptcy Code, as required by section 327(a) of the Bankruptcy Code, and does not hold or represent an interest adverse to the Debtors' estates and has no connection to the Debtors, their creditors, or other parties in interest, except as may be disclosed in the Winters Declaration.

Notice

28. The Debtors have provided notice of this Application to the following parties or their respective counsel: (a) the U.S. Trustee; (b) counsel to the Committee; (c) counsel to the agent to the Secured Notes; (d) the indenture trustee to the 2024 Convertible Notes; (e) the indenture trustee to the 2028 Convertible Notes; (f) Sullivan & Cromwell LLP, as counsel to the Required Holders; (g) Wollmuth Maher & Deutsch LLP, as counsel to the Required Holders; (h) counsel to the 2028 Convertible Noteholders; (i) the U.S. Securities and Exchange Commission; (j) the United States Attorney's Office for the District of New Jersey; (k) the attorneys general in the states where the Debtors conduct their business operations; (l) the Internal Revenue Service; and (m) any party that has requested notice pursuant to Bankruptcy Rule 2002. A copy of this Application is also available on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/invitae. In light of the nature of the relief requested, the Debtors submit that no other or further notice is required.

No Prior Request

29. No prior request for the relief sought in this Application has been made to this or any other court.

[*Remainder of Page Intentionally Left Blank*]

WHEREFORE, the Debtors respectfully request that the Court enter the Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and granting such other relief as is just and proper.

Dated: March 13, 2024
Trenton, New Jersey

/s/ Ana Schrank
Ana Schrank
Invitae Corporation
Chief Financial Officer

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)

ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND & ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

The relief set forth on the following pages, numbered three (3) through eight (8), 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 www.kccllc.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)

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
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-and-

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
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Proposed Co-Counsel to the Debtors and Debtors in Possession

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Proposed Co-Counsel to the Debtors and Debtors in Possession

Debtors:	INVITAE CORPORATION, *et al*.
Case No.	24-11362 (MBK)
Caption of Order:	ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND AND ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

Upon the application (the "Application")[1] of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for the entry of an order (the "Order") authorizing the Debtors to retain and employ Kirkland & Ellis LLP and Kirkland & Ellis International LLP (collectively, "Kirkland") as their attorneys effective as of the Petition Date, pursuant to sections 327(a) and 330 of title 11 of the United States Code (the "Bankruptcy Code"), rules 2014(a) and 2016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and rules 2014-1 and 2016-1 of the Local Bankruptcy Rules for the District of New Jersey (the "Local Rules"); and the Court having reviewed the Application, the Declaration of Spencer A. Winters, the president of Spencer A. Winters, P.C., a partner of Kirkland & Ellis LLP, and a partner of Kirkland & Ellis International LLP (the "Winters Declaration"), and the declaration of Ana Schrank, the Chief Financial Officer of Invitae Corporation (the "Schrank Declaration"); and the Court having found that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that the Application is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having found that venue of this proceeding and the Application in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found based on the representations made in the Application and in the Winters Declaration that (a) Kirkland does not hold or represent an interest adverse to the Debtors' estates and (b) Kirkland is a "disinterested person" as defined in section 101(14) of the Bankruptcy Code and as required by section 327(a) of the Bankruptcy Code; and the Court having found that the relief requested in the Application is

[1] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Application.

in the best interests of the Debtors' estates; and the Court having found that the Debtors provided adequate and appropriate notice of the Application under the circumstances and that no other or further notice is required; and the Court having reviewed the Application and having heard statements in support of the Application at a hearing held before the Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Application and at the Hearing establish just cause for the relief granted herein; and any objections to the relief requested herein having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The Application is granted to the extent set forth herein.

2. The Debtors are authorized to retain and employ Kirkland as their attorneys effective as of the Petition Date in accordance with the terms and conditions set forth in the Application and in the Engagement Letter attached hereto as **Exhibit 1**.

3. Kirkland is authorized to provide the Debtors with the professional services as described in the Application and the Engagement Letter. Specifically, but without limitation, Kirkland will render the following legal services:

a. advising the Debtors with respect to their powers and duties as debtors in possession in the continued management and operation of their businesses and properties;

b. advising and consulting on their conduct during these chapter 11 cases, including all of the legal and administrative requirements of operating in chapter 11;

c. attending meetings and negotiating with representatives of creditors and other parties in interest;

d. taking all necessary actions to protect and preserve the Debtors' estates, including prosecuting actions on the Debtors' behalf, defending any action commenced against the Debtors, and representing the Debtors in negotiations concerning litigation in which the Debtors are involved, including objections to claims filed against the Debtors' estates;

e. preparing pleadings in connection with these chapter 11 cases, including motions, applications, answers, orders, reports, and papers necessary or otherwise beneficial to the administration of the Debtors' estates;

f. representing the Debtors in connection with obtaining authority to continue using cash collateral and postpetition financing;

g. advising the Debtors in connection with any potential sale of assets;

h. appearing before the Court and any appellate courts to represent the interests of the Debtors' estates;

i. advising the Debtors regarding tax matters;

j. taking any necessary action on behalf of the Debtors to negotiate, prepare, and obtain approval of a disclosure statement and confirmation of a chapter 11 plan and all documents related thereto; and

k. performing all other necessary legal services for the Debtors in connection with the prosecution of these chapter 11 cases, including: (i) analyzing the Debtors' leases and contracts and the assumption and assignment or rejection thereof; (ii) analyzing the validity of liens against the Debtors' assets; and (iii) advising the Debtors on corporate and litigation matters.

4. Kirkland shall apply for compensation for professional services rendered and reimbursement of expenses incurred in connection with the Debtors' chapter 11 cases in compliance with sections 330 and 331 of the Bankruptcy Code and applicable provisions of the Bankruptcy Rules, Local Rules, and any other applicable procedures and orders of the Court. Kirkland also intends to make a reasonable effort to comply with the U.S. Trustee's requests for information and additional disclosures as set forth in the *Guidelines for Reviewing Applications*

for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases Effective as of November 1, 2013, both in connection with the Application and the interim and final fee applications to be filed by Kirkland in these chapter 11 cases.

5. Notwithstanding anything in the Application, Declaration, or Engagement Letter to the contrary, Kirkland shall apply any remaining amounts of its prepetition special purpose retainer as a credit toward postpetition fees and expenses, after such postpetition fees and expenses are approved pursuant to an order of the Court awarding fees and expenses to Kirkland. Kirkland is authorized without further order of the Court to reserve and apply amounts from the prepetition special purpose retainer that would otherwise be applied toward payment of postpetition fees and expenses as are necessary and appropriate to compensate and reimburse Kirkland for fees or expenses incurred on or prior to the Petition Date consistent with its ordinary course billing practices.

6. Notwithstanding anything to the contrary in the Application, the Engagement Letter, or the Declarations attached to the Application, the reimbursement provisions allowing the reimbursement of fees and expenses incurred in connection with participating in, preparing for, or responding to any action, claim, suit, or proceeding brought by or against any party that relates to the legal services provided under the Engagement Letter and fees for defending any objection to Kirkland's fee applications under the Bankruptcy Code are not approved pending further order of the Court.

7. Kirkland shall not charge a markup to the Debtors with respect to fees billed by contract attorneys who are hired by Kirkland to provide services to the Debtors and shall ensure that any such contract attorneys are subject to conflict checks and disclosures in accordance with the requirements of the Bankruptcy Code and Bankruptcy Rules.

8. Kirkland shall provide ten-business-days' notice to the Debtors, the U.S. Trustee, and any official committee before any increases in the rates set forth in the Application or the Engagement Letter are implemented and shall file such notice with the Court. The U.S. Trustee retains all rights to object to any rate increase on all grounds, including the reasonableness standard set forth in section 330 of the Bankruptcy Code, and the Court retains the right to review any rate increase pursuant to section 330 of the Bankruptcy Code.

9. No agreement or understanding exists between Kirkland and any other person, other than as permitted by Bankruptcy Code section 504, to share compensation received for services rendered in connection with these chapter 11 cases, nor shall Kirkland share or agree to share compensation received for services rendered in connection with these chapter 11 cases with any other person other than as permitted by Bankruptcy Code section 504.

10. In order to avoid any duplication of effort and provide services to the Debtors in the most efficient and cost-effective manner, Kirkland shall coordinate with Cole Schotz P.C ("Cole Schotz") and any additional firms the Debtors retain regarding their respective responsibilities in these chapter 11 cases.

11. The Debtors and Kirkland are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Application.

12. Notice of the Application as provided therein is deemed to be good and sufficient notice of such Application, and the requirements of the Local Rules are satisfied by the contents of the Application.

13. To the extent the Application, the Winters Declaration, the Schrank Declaration, or the Engagement Letter is inconsistent with this Order, the terms of this Order shall govern.

14. The requirement set forth in Local Rule 9013-1(a)(3) that any motion be accompanied by a memorandum of law is hereby deemed satisfied by the contents of the Application or otherwise waived.

15. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

16. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

EXHIBIT 1

Engagement Letter

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

Joshua A. Sussberg, P.C.
To Call Writer Directly:
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September 22, 2023

Tom Brida, General Counsel
Invitae Corporation
1400 16th Street
San Francisco, CA 94103

Re: Retention to Provide Legal Services

Dear Mr. Brida:

We are very pleased that you have asked us to represent Invitae Corporation and only those wholly or partially owned subsidiaries listed in an addendum or supplement to this letter (collectively, "Client") in connection with liability management and/or a potential restructuring. Please note, the Firm's representation is only of Client; the Firm does not and will not represent any direct or indirect shareholder, director, officer, partner, employee, affiliate, or joint venturer of Client or of any other entity.

General Terms. This retention letter (this "Agreement") sets forth the terms of Client's retention of Kirkland & Ellis LLP (and its affiliated entity Kirkland & Ellis International LLP (collectively, the "Firm")) to provide legal services and constitutes an agreement between the Firm and Client (the "Parties"). This Agreement (notwithstanding any guidelines for outside counsel that Client may provide to the Firm) sets forth the Parties' entire agreement for rendering professional services for the current matter, as well as for all other existing or future matters (collectively, the "Engagement"), except where the Parties otherwise agree in writing.

Fees. The Firm will bill Client for fees incurred at its regular hourly rates and in quarterly increments of an hour (or in smaller time increments as otherwise required by a court). The Firm reserves the right to adjust the Firm's billing rates from time to time in the ordinary course of the Firm's representation of Client.

Although the Firm will attempt to estimate fees to assist Client in Client's planning if requested, such estimates are subject to change and are not binding unless otherwise expressly and unequivocally stated in writing.

Expenses. Expenses related to providing services shall be included in the Firm's statements as disbursements advanced by the Firm on Client's behalf. Such expenses include photocopying, printing, scanning, witness fees, travel expenses, filing and recording fees, certain

secretarial overtime, and other overtime expenses, postage, express mail, and messenger charges, deposition costs, computerized legal research charges, and other computer services, and miscellaneous other charges. Client shall pay directly (and is solely responsible for) certain larger costs, such as consultant or expert witness fees and expenses, and outside suppliers' or contractors' charges, unless otherwise agreed by the Parties. By executing this Agreement below, Client agrees to pay for all charges in accordance with the Firm's schedule of charges, a copy of which is attached hereto at Schedule 1, as revised from time to time.

Billing Procedures. The Firm's statements of fees and expenses are typically delivered monthly, but the Firm reserves the right to alter the timing of delivering its statements depending on circumstances. Client may have the statement in any reasonable format it chooses, but the Firm will select an initial format for the statement unless Client otherwise requests in writing. Depending on the circumstances, however, estimated or summary statements may be provided, with time and expense details to follow thereafter.

Retainer. Client agrees to provide to the Firm a "special purpose retainer" (also known as an "advance payment retainer") as defined in Rule 1.5(d) of the Illinois Rules of Professional Conduct, *Dowling v. Chicago Options Assoc., Inc.*, 875 N.E.2d 1012, 1018 (Ill. 2007), and *In re Caesars Entm't Operating Co., Inc.*, No. 15-01145 (ABG) (Bankr. N.D. Ill. May 28, 2015) (and cases cited therein), in the amount of $250,000. In addition, Client agrees to provide one or more additional special purpose retainer upon request by the Firm so that the amount of any special purpose retainer remains at or above the Firm's estimated fees and expenses. The Firm may apply the special purpose retainer to any outstanding fees as services are rendered and to expenses as they are incurred. Client understands and acknowledges that any special purpose retainer is earned by the Firm upon receipt, any special purpose retainer becomes the property of the Firm upon receipt, Client no longer has a property interest in any special purpose retainer upon the Firm's receipt, any special purpose retainer will be placed in the Firm's general account and will not be held in a client trust account, and Client will not earn any interest on any special purpose retainer; provided, however, that solely to the extent required under applicable law, at the conclusion of the Engagement, if the amount of any special purpose retainer held by the Firm is in excess of the amount of the Firm's outstanding and estimated fees, expenses, and costs, the Firm will pay to Client the amount by which any special purpose retainer exceeds such fees, expenses, and costs. Client further understands and acknowledges that the use of a special purpose retainer is an integral condition of the Engagement, and is necessary to ensure that: Client continues to have access to the Firm's services; the Firm is compensated for its representation of Client; the Firm is not a pre-petition creditor in the event of a Restructuring Case; and that in light of the foregoing, the provision of the special purpose retainer is in Client's best interests. The fact that Client has provided the Firm with a special purpose retainer does not affect Client's right to terminate the client-lawyer relationship.

Please be advised that there is another type of retainer known as a "security retainer," as defined in *Dowling v. Chicago Options Assoc.*, 875 N.E.2d at 1018, and *In re Caesars Entm't Operating Co., Inc.*, No. 15-01145 (ABG) (Bankr. N.D. Ill. May 28, 2015) (and cases cited therein). A security retainer remains the property of the client until the lawyer applies it to charges for services that are actually rendered and expenses that are incurred. Any unearned funds are then returned to the client. In other circumstances not present here, the Firm would consider a security retainer and Client's funds would be held in the Firm's segregated client trust account until applied to pay fees and expenses. Funds in a security retainer, however, can be subject to claims of Client's creditors and, if taken by creditors, may leave Client unable to pay for ongoing legal services, which may result in the Firm being unable to continue the Engagement. Moreover, a security retainer creates clawback risks for the Firm in the event of an insolvency proceeding. The choice of the type of retainer to be used is Client's choice alone, but for the Engagement and for the reasons set forth above, the Firm is unwilling to represent Client in the Engagement without using the special purpose retainer.

Termination. The Engagement may be terminated by either Party at any time by written notice by or to Client. The Engagement will end at the earliest of (a) Client's termination of the Engagement, (b) the Firm's withdrawal, and (c) the substantial completion of the Firm's substantive work. If permission for withdrawal is required by a court, the Firm shall apply promptly for such permission, and termination shall coincide with the court order for withdrawal. If this Agreement or the Firm's services are terminated for any reason, such termination shall be effective only to terminate the Firm's services prospectively and all the other terms of this Agreement shall survive any such termination.

Upon cessation of the Firm's active involvement in a particular matter (even if the Firm continues active involvement in other matters on Client's behalf), the Firm will have no further duty to inform Client of future developments or changes in law as may be relevant to such matter. Further, unless the Parties mutually agree in writing to the contrary, the Firm will have no obligation to monitor renewal or notice dates or similar deadlines that may arise from the matters for which the Firm had been retained.

Cell Phone and E-Mail Communication. The Firm hereby informs Client and Client hereby acknowledges that the Firm's attorneys sometimes communicate with their clients and their clients' professionals and agents by cell telephone, that such communications are capable of being intercepted by others and therefore may be deemed no longer protected by the attorney-client privilege, and that Client must inform the Firm if Client does not wish the Firm to discuss privileged matters on cell telephones with Client or Client's professionals or agents.

The Firm hereby informs Client and Client hereby acknowledges that the Firm's attorneys sometimes communicate with their clients and their clients' professionals and agents by unencrypted e-mail, that such communications are capable of being intercepted by others and

therefore may be deemed no longer protected by the attorney-client privilege, and that Client must inform the Firm if Client wishes to institute a system to encode all e-mail between the Firm and Client or Client's professionals or agents.

File Retention. All records and files will be retained and disposed of in compliance with the Firm's policy in effect from time to time. Subject to future changes, it is the Firm's current policy generally not to retain records relating to a matter for more than five years. Upon Client's prior written request, the Firm will return client records that are Client's property to Client prior to their destruction. Although we will return your records (i.e., your client file) to you at any time upon your written request, you agree that your client file will not include our Firm's internal files including administrative materials, internal communications, and drafts. It is not administratively feasible for the Firm to advise Client of the closing of a matter or the disposal of records. The Firm recommends, therefore, that Client maintain Client's own files for reference or submit a written request for Client's client files promptly upon conclusion of a matter. Notwithstanding anything to the contrary herein, Client acknowledges and agrees that any applicable privilege of Client (including any attorney-client and work product privilege or any duty of confidentiality) (collectively, the "Privileges") belongs to Client alone and not to any successor entity (including without limitation the Client after a change in control or other similar restructuring or non-restructuring transaction (including without limitation a reorganized Client after the effective date of a plan of reorganization), whether through merger, asset or equity sale, business combination, or otherwise, irrespective of whether such transaction occurs in a Restructuring Case or on an out-of-court basis (in each case, a "Transaction")). Client hereby waives any right, title, and interest of such successor entity to all information, data, documents, or communications in any format covered by the Privileges that is in the possession of the Firm ("Firm Materials"), to the extent that such successor entity had any right, title, and interest to such Firm Materials. For the avoidance of doubt, Client agrees and acknowledges that after a Transaction, such successor entity shall have no right to claim or waive the Privileges or request the return of any such Firm Materials; instead, such Firm Materials shall remain in the Firm's sole possession and control for its exclusive use, and the Firm will (a) not waive any Privileges or disclose the Firm Materials, (b) take all reasonable steps to ensure that the Privileges survive and remain in full force and effect, and (c) assert the Privileges to prevent disclosure of any Firm Materials.

Data Protection. You further agree that, if you provide us with personal data, you have complied with applicable data protection legislation and that we may process such personal data in accordance with our Data Transfer and Privacy Policy at www.kirkland.com. We process your personal data in order to (i) carry out work for you; (ii) share the data with third parties such as expert witnesses and other professional advisers if our work requires; (iii) comply with applicable laws and regulations and (iv) provide you with information relating to our Firm and its services.

Conflicts of Interest. As is customary for a law firm of the Firm's size, there are numerous business entities, with which Client currently has relationships, that the Firm has represented or currently represents in matters unrelated to Client.

Further, in undertaking the representation of Client, the Firm wants to be fair not only to Client's interests but also to those of the Firm's other clients. Because Client is engaged in activities (and may in the future engage in additional activities) in which its interests may diverge from those of the Firm's other clients, the possibility exists that one of the Firm's current or future clients may take positions adverse to Client (including litigation or other dispute resolution mechanisms) in a matter in which such other client may have retained the Firm or one of Client's adversaries may retain the Firm in a matter adverse to another entity or person.

In the event a present conflict of interest exists between Client and the Firm's other clients or in the event one arises in the future, Client agrees to waive any such conflict of interest or other objection that would preclude the Firm's representation of another client (a) in other current or future matters substantially unrelated to the Engagement or (b) other than during a Restructuring Case (as defined below), in other matters related to Client (such representation an "Allowed Adverse Representation"). By way of example, such Allowed Adverse Representations might take the form of, among other contexts: litigation (including arbitration, mediation and other forms of dispute resolution); transactional work (including consensual and non-consensual merger, acquisition, and takeover situations, financings, and commercial agreements); counseling (including advising direct adversaries and competitors); and restructuring (including bankruptcy, insolvency, financial distress, recapitalization, equity and debt workouts, and other transactions or adversarial adjudicative proceedings related to any of the foregoing and similar matters).

Client also agrees that it will not, for itself or any other entity or person, assert that either (i) the Firm's representation of Client or any of Client's affiliates in any past, present, or future matter or (ii) the Firm's actual or possible possession of confidential information belonging to Client or any of Client's affiliates is a basis to disqualify the Firm from representing another entity or person in any Allowed Adverse Representation. Client further agrees that any Allowed Adverse Representation does not breach any duty that the Firm owes to Client or any of Client's affiliates. Client also agrees that the Firm's representation in the Engagement is solely of Client and that no member or other entity or person related to it (such as a shareholder, parent, subsidiary, affiliate, director, officer, partner, employee, or joint venturer) has the status of a client for conflict of interest purposes.

In addition, if a waiver of a conflict of interest necessary to allow the Firm to represent another client in a matter that is not substantially related to the Engagement is not effective for any reason, Client agrees that the Firm may withdraw from the Engagement. Should that occur, Client will not, for itself or any other entity or person, seek to preclude such termination of services or assert that either (a) the Firm's representation of Client or any of Client's affiliates in any past,

present, or future matter or (b) the Firm's actual or possible possession of confidential information belonging to Client or any of Client's affiliates is a basis to disqualify the Firm from representing such other client or acting on such adverse matter.

It is important that you review this letter carefully and consider all of the advantages and disadvantages of waiving certain conflicts of interests that would otherwise bar the Firm from representing parties with interests adverse to you during the time in which the Firm is representing you. You also understand that because this waiver includes future issues and future clients that are unknown and unknowable at this time, it is impossible to provide you with any more details about those prospective clients and matters. Thus, in choosing to execute this waiver, you have recognized the inherent uncertainty about the array of potential matters and clients the Firm might take on in matters that are adverse to you but have nonetheless decided it is in your interest to waive conflicts of interest regarding the Allowed Adverse Representations and waive rights to prohibit the Firm's potential withdrawal should a conflict waiver prove ineffectual.

The Firm informs Client that certain entities owned by current or former Firm attorneys and senior staff ("attorney investment entities") have investments in funds or companies that may, directly or indirectly, be affiliated with Client, hold investments in Client's debt or equity securities, may be adverse to Client, or conduct commercial transactions with Client (each, a "Passive Holding"). The attorney investment entities are passive and have no management or other control rights in such funds or companies. The Firm notes that other persons may in the future assert that a Passive Holding creates, in certain circumstances, a conflict between the Firm's exercise of its independent professional judgment in rendering advice to Client and the financial interest of Firm attorneys participating in the attorney investment entities, and such other persons might seek to limit Client's ability to use the Firm to advise Client on a particular matter. While the Firm cannot control what a person might assert or seek, the Firm believes that the Firm's judgment will not be compromised by virtue of any Passive Holding. Please let us know if Client has any questions or concerns regarding the Passive Holdings. By executing this letter, Client acknowledges the Firm's disclosure of the foregoing.

Restructuring Cases. If it becomes necessary for Client to commence a restructuring case under chapter 11 of the U.S. Bankruptcy Code (a "Restructuring Case"), the Firm's ongoing employment by Client will be subject to the approval of the court with jurisdiction over the petition. If necessary, the Firm will take steps necessary to prepare the disclosure materials required in connection with the Firm's retention as lead restructuring counsel. In the near term, the Firm will begin conflicts checks on potentially interested parties as provided by Client.

If necessary, the Firm will prepare a preliminary draft of a schedule describing the Firm's relationships with certain interested parties (the "Disclosure Schedule"). The Firm will give Client a draft of the Disclosure Schedule once it is available. Although the Firm believes that these

relationships do not constitute actual conflicts of interest, these relationships must be described and disclosed in Client's application to the court to retain the Firm.

If in the Firm's determination a conflict of interest arises in Client's Restructuring Case requiring separate conflicts counsel, then Client will be required to use separate conflicts counsel in those matters.

No Guarantee of Success. It is impossible to provide any promise or guarantee about the outcome of Client's matters. Nothing in this Agreement or any statement by Firm staff or attorneys constitutes a promise or guarantee. Any comments about the outcome of Client's matter are simply expressions of judgment and are not binding on the Firm.

Consent to Use of Information. In connection with future materials that, for marketing purposes, describe facets of the Firm's law practice and recite examples of matters the Firm handles on behalf of clients, Client agrees that, if those materials avoid disclosing Client's confidences and secrets as defined by applicable ethical rules, they may identify Client as a client, may contain factual synopses of Client's matters, and may indicate generally the results achieved.

Reimbursement of Fees and Expenses. Client agrees to promptly reimburse the Firm for all internal or external fees and expenses, including the amount of the Firm's attorney and paralegal time at normal billing rates, as incurred by the Firm in connection with participating in, preparing for, or responding to any action, claim, objection, suit, or proceeding brought by or against any third-party that relates to the legal services provided by the Firm under this Agreement. Without limiting the scope of the foregoing, and by way of example only, this paragraph extends to all such fees and expenses incurred by the Firm: in responding to document subpoenas, and preparing for and testifying at depositions and trials; and with respect to the filing, preparation, prosecution or defense of any applications by the Firm for approval of fees and expenses in a judicial, arbitral, or similar proceeding. Further, Client understands, acknowledges, and agrees that in connection with a Restructuring Case, if Client has not objected to the payment of a Firm invoice or to a Firm fee and expense application, has in fact paid such invoice, or has approved such fee and expense application, then Client waives its right (and the right of any successor entity as a result of a Transaction or otherwise) to subsequently object to the payment of fees and expenses covered by such invoice or fee application

LLP. Kirkland & Ellis LLP is a limited liability partnership organized under the laws of Illinois, and Kirkland & Ellis International LLP is a limited liability partnership organized under the laws of Delaware. Pursuant to those statutory provisions, an obligation incurred by a limited liability partnership, whether arising in tort, contract or otherwise, is solely the obligation of the limited liability partnership, and partners are not personally liable, directly or indirectly, by way of indemnification, contribution, assessment or otherwise, for such obligation solely by reason of being or so acting as a partner.

Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Illinois, without giving effect to the conflicts of law principles thereof.

Miscellaneous. This Agreement sets forth the Parties' entire agreement for rendering professional services. It can be amended or modified only in writing and not orally or by course of conduct. Each Party signing below is jointly and severally responsible for all obligations due to the Firm and represents that each has full authority to execute this Agreement so that it is binding. This Agreement may be signed in one or more counterparts and binds each Party countersigning below, whether or not any other proposed signatory ever executes it. If any provision of this Agreement or the application thereof is held invalid or unenforceable, the invalidity or unenforceability shall not affect other provisions or applications of this Agreement which can be given effect without such provisions or application, and to this end the provisions of this Agreement are declared to be severable. Any agreement or waiver contained herein by Client extends to any assignee or successor in interest to Client, including without limitation the reorganized Client upon and after the effective date of a plan of reorganization in a Restructuring Case.

This Agreement is the product of arm's-length negotiations between sophisticated parties, and Client acknowledges that it is experienced with respect to the retention of legal counsel. Therefore, the Parties acknowledge and agree that any otherwise applicable rule of contract construction or interpretation which provides that ambiguities shall be construed against the drafter (and all similar rules of contract construction or interpretation) shall not apply to this Agreement. The Parties further acknowledge that the Firm is not advising Client with respect to this Agreement because the Firm would have a conflict of interest in doing so, and that Client has consulted (or had the opportunity to consult) with legal counsel of its own choosing. Client further acknowledges that Client has entered into this Agreement and agreed to all of its terms and conditions voluntarily and fully-informed, based on adequate information and Client's own independent judgment. The Parties further acknowledge that they intend for this Agreement to be effective and fully enforceable upon its execution and to be relied upon by the Parties.

* * *

KIRKLAND & ELLIS LLP

CONFIDENTIAL

Please confirm your agreement with the arrangements described in this letter by signing the enclosed copy of this letter in the space provided below and returning it to us. Please understand that, if we do not receive a signed copy of this letter within twenty-one days, we will withdraw from representing you in this Engagement.

Very truly yours,

KIRKLAND & ELLIS LLP

DocuSigned by:
By: Joshua Sussberg
031334276624422
Printed Name: Joshua A. Sussberg
Title: Partner

Agreed and accepted 2023-Sep-22 | 8:55 AM PDT

INVITAE CORPORATION

DocuSigned by:
By: Thomas Brida
Name: Thomas Brida
Title: General Counsel & Secretary

ADDENDUM: List of Client Subsidiaries

LIST OF SUBSIDIARIES OF INVITAE CORPORATION

ArcherDX, LLC
ArcherDX Clinical Services, Inc.
Ciitizen, LLC
Genelex India Private Limited
Genetic Solutions LLC, d/b/a Genelex
Genosity, LLC
Good Start Genetics, Inc.
Invitae Australia PTY LTD
Invitae Canada Inc.
Invitae Israel Inc Ltd.
Invitae Japan, KK
Invitae Latvia SIA
Invitae Netherlands, B.V.
Invitae (Singapore) Pte. Ltd.
Medneon LLC
Ommdom Inc.
Orbicule BVBA d/b/a Diploid
Prompt Genomics, LLC
YouScript, LLC

KIRKLAND & ELLIS LLP

CLIENT-REIMBURSABLE EXPENSES AND OTHER CHARGES

Effective 01/01/2023

The following outlines Kirkland & Ellis LLP's ("K&E LLP") policies and standard charges for various services performed by K&E LLP and/or by other third parties on behalf of the client which are often ancillary to our legal services. Services provided by in-house K&E LLP personnel are for the convenience of our clients. Given that these services are often ancillary to our legal services, in certain instances it may be appropriate and/or more cost efficient for these services to be outsourced to a third-party vendor. If services are provided beyond those outlined below, pricing will be based on K&E LLP's approximate cost and/or comparable market pricing.

- **Duplicating, Reprographics and Printing**: The following list details K&E LLP's charges for duplicating, reprographics and printing services:
  - Black and White Copy or Print (all sizes of paper):
    - $0.16 per impression for all U.S. offices
    - €0.10 per impression in Munich
    - £0.15 per impression in London
    - HK$1.50 per impression in Hong Kong
    - RMB1.00 per impression in Beijing and Shanghai
  - Color Copy or Print (all sizes of paper):
    - $0.55 per impression
  - Scanned Images:
    - $0.16 per page for black and white or color scans
  - Other Services:
    - CD/DVD Duplicating or Mastering - $7/$10 per CD/DVD
    - Binding - $0.70 per binding
    - Large or specialized binders - $13/$27
    - Tabs - $0.13 per item
    - OCR/File Conversion - $0.03 per page
    - Large Format Printing - $1.00 per sq. ft.

- **Secretarial and Word Processing**: Clients are not charged for secretarial and word processing activities incurred on their matters during standard business hours.

- **Overtime Charges**: Clients will be charged for overtime costs for secretarial and document services work if either (i) the client has specifically requested the after-hours work or (ii) the nature of the work being done for the client necessitates out-of-hours overtime and such work could not have been done during normal working hours. If these conditions are satisfied, costs for related overtime meals and transportation also will be charged.

- **Travel Expenses**: We charge clients our out-of-pocket costs for travel expenses including associated travel agency fees. We charge coach fares (business class for international flights) unless the client has approved business-class, first-class or an upgrade. K&E LLP personnel are instructed to incur only reasonable airfare, hotel and meal expenses. K&E LLP negotiates, uses, and passes along volume discount hotel and air rates whenever practicable. However, certain retrospective rebates may not be passed along.

- **Catering Charges:** Clients will be charged for any in-house catering service provided in connection with client matters.

- **Communication Expenses**: We do not charge clients for telephone calls, conference calls, videoconferences or faxes made from K&E LLP's offices.

  Charges incurred for conference calls, videoconferences, cellular telephones, and calls made from other third-party locations will be charged to the client at the actual cost incurred. Further, other telecommunication expenses incurred at third-party locations (e.g., phone lines at trial sites, Internet access, etc.) will be charged to the client at the actual cost incurred.

- **Overnight Delivery/Postage**: We charge clients for the actual cost of overnight and special delivery (e.g., Express Mail, FedEx, and DHL), and U.S. postage for materials mailed on the client's behalf. K&E LLP negotiates, uses, and passes along volume discount rates whenever practicable.

- **Messengers**: We charge clients for the actual cost of a third-party vendor messenger.

- **Library Research Services:** Library Research staff provides research and document retrieval services at the request of attorneys, and clients are charged per hour for these services. Any expenses incurred in connection with the request, such as outside retrieval service or online research charges, are passed on to the client at cost, including any applicable discounts.

- **Online Research Charges**: K&E LLP charges for costs incurred in using third-party online research services in connection with a client matter. K&E LLP negotiates and uses discounts or special rates for online research services whenever possible and practicable and passes through the full benefit of any savings to the client based on actual usage.

- **Inter-Library Loan Services**: Our standard client charge for inter-library loan services when a K&E LLP library employee borrows a book from an outside source is $25 per title. There is no client charge for borrowing books from K&E LLP libraries in other cities or from outside collections when the title is part of the K&E LLP collection but unavailable.

- **Off-Site Legal Files Storage**: Clients are not charged for off-site storage of files unless the storage charge is approved in advance.

- **Electronic Data Storage**: K&E LLP will not charge clients for costs to store electronic data and files on K&E LLP's systems if the data stored does not exceed 100 gigabytes (GB). If the data stored for a specific client exceeds 100GB, K&E LLP will charge clients $6.00 per month/per GB for all network data stored until the data is either returned to the client or properly disposed of. For e-discovery data on the Relativity platform, K&E LLP will also charge clients $6.00 per month/per GB until the data is either returned to the client or properly disposed of.

- **Tax Filings**: Clients will be charged a fixed fee for certain tax filings. Our standard charge is $400 per Form 8832 election; $250 per Form 83(b) election for the first 20 forms, $100 per form for any additional forms; $1,000 each for Form SS-4 (Foreign); $100 each for Form SS-4 (Domestic); and $75 for each FIRPTA certificate.

- **Calendar Court Services**: Our standard charge is $25 for a court filing and other court services or transactions.

- **Supplies**: There is no client charge for standard office supplies. Clients are charged for special items (e.g., a minute book, exhibit tabs/indexes/dividers, binding, etc.) and then at K&E LLP's actual cost.

- **Contract Attorneys and Contract Non-Attorney Billers**: If there is a need to utilize a contract attorney or contract non-attorney on a client engagement, clients will be charged a standard hourly rate for these billers unless other specific billing arrangements are agreed between K&E LLP and client.

- **Expert Witnesses, Experts of Other Types, and Other Third Party Consultants**: If there is a need to utilize an expert witness, expert of other type, or other third party consultant such as accountants, investment bankers, academicians, other attorneys, etc. on a client engagement, clients will be requested to retain or pay these individuals directly unless specific billing arrangements are agreed between K&E LLP and client.

- **Third Party Expenditures**: Third party expenditures (e.g., corporate document and lien searches, lease of office space at Trial location, IT equipment rental, SEC and regulatory filings, etc.) incurred on behalf of a client, will be passed through to the client at actual cost. If the invoice exceeds $50,000, it is K&E LLP's policy that wherever possible such charges will be directly billed to the client. In those circumstances where this is not possible, K&E LLP will seek reimbursement from our client prior to paying the vendor.

Unless otherwise noted, charges billed in foreign currencies are determined annually based on current U.S. charges at an appropriate exchange rate.

EXHIBIT B

Winters Declaration

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Joshua A. Sussberg, P.C. (admitted *pro hac vice*)
Nicole L. Greenblatt, P.C. (admitted *pro hac vice*)
Francis Petrie (admitted *pro hac vice*)
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-and-

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Spencer A. Winters, P.C. (admitted *pro hac vice*)
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
spencer.winters@kirkland.com

Proposed Co-Counsel to the Debtors and Debtors in Possession

COLE SCHOTZ P.C.
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msirota@coleschotz.com
wusatine@coleschotz.com
fyudkin@coleschotz.com
dharris@coleschotz.com

Proposed Co-Counsel to the Debtors and Debtors in Possession

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)

DECLARATION OF SPENCER A. WINTERS IN SUPPORT OF THE DEBTORS' APPLICATION

[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.

FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND & ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

I, Spencer A. Winters, being duly sworn, state the following under penalty of perjury:

1. I am the president of Spencer A. Winters, P.C., a partner of the law firm of Kirkland & Ellis LLP, located at 300 North LaSalle, Chicago, Illinois 60654, and a partner of Kirkland & Ellis International, LLP (together with Kirkland & Ellis LLP, collectively, "Kirkland"). I am one of the lead attorneys from Kirkland working on the above-captioned chapter 11 cases. I am a member in good standing of the Bar of the State of Illinois, and I have been admitted to practice in the United States District Court for the Northern District of Illinois. There are no disciplinary proceedings pending against me.

2. I submit this declaration (the "Declaration") in support of the Debtors' *Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors in Possession Effective as of February 13, 2024* (the "Application").[2] Except as otherwise noted, I have personal knowledge of the matters set forth herein.

Kirkland's Qualifications

4. The Debtors seek to retain Kirkland because of Kirkland's recognized expertise and extensive experience and knowledge in the field of debtors' protections, creditors' rights, and business reorganizations under chapter 11 of the Bankruptcy Code.

5. Kirkland has been actively involved in major chapter 11 cases and has represented debtors in many cases, including, among others: *See*, *e.g.*, *In re Careismatic Brands, LLC*, No.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Application.

24-10561 (VFP) (Bankr. D.N.J. Mar. 1, 2024); *In re Rite Aid Corp.*, No. 23-18993 (MBK) (Bankr. D.N.J. Jan. 10, 2024); *In re WeWork Inc.*, No. 23-19865 (JKS) (Bankr. D.N.J. Dec. 20, 2023); *In re Cyxtera Techs. Inc.*, (JKS) (Bankr. D.N.J. July 18, 2023); *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575 (MBK) (Bankr. D.N.J. June 26, 2023); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J June 5, 2023); *In re David's Bridal*, No. 23-13131 (CMG) (Bankr. D.N.J. June 1, 2023); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Feb. 1, 2023).[3]

6. In preparing for its representation of the Debtors in these chapter 11 cases, Kirkland has become familiar with the Debtors' business and many of the potential legal issues that may arise in the context of these chapter 11 cases. I believe that Kirkland is both well-qualified and uniquely able to represent the Debtors in these chapter 11 cases in an efficient and timely manner.

Services to Be Provided

7. Subject to further order of the Court and that certain engagement letter dated September 22, 2023 (the "Engagement Letter"), a copy of which is attached as **Exhibit 1** to the Order, the Debtors retained Kirkland to render, without limitation, the following legal services:

a. advising the Debtors with respect to their powers and duties as debtor in possession in the continued management and operation of their businesses and properties;

b. advising and consulting on the conduct of these chapter 11 cases, including all of the legal and administrative requirements of operating in chapter 11;

c. attending meetings and negotiating with representatives of creditors and other parties in interest;

d. taking all necessary actions to protect and preserve the Debtors' estates, including prosecuting actions on the Debtors' behalf, defending any action commenced against the Debtors, and representing the Debtors in negotiations concerning litigation in which the Debtors are involved, including objections to claims filed against the Debtors' estates;

[3] Because of the voluminous nature of the orders cited in this Declaration, they are not attached to this Declaration. Copies of these orders are available upon request to Kirkland.

e. preparing pleadings in connection with these chapter 11 cases, including motions, applications, answers, orders, reports, and papers necessary or otherwise beneficial to the administration of the Debtors' estates;

f. representing the Debtors in connection with obtaining authority to continue using cash collateral and postpetition financing;

g. advising the Debtors in connection with any potential sale of assets;

h. appearing before the Court and any appellate courts to represent the interests of the Debtors' estates;

i. advising the Debtors regarding tax matters;

j. taking any necessary action on behalf of the Debtors to negotiate, prepare, and obtain approval of a disclosure statement and confirmation of a chapter 11 plan and all documents related thereto; and

k. performing all other necessary legal services for the Debtors in connection with the prosecution of these chapter 11 cases, including: (i) analyzing the Debtors' leases and contracts and the assumption and assignment or rejection thereof; (ii) analyzing the validity of liens against the Debtors' assets; and (iii) advising the Debtors on corporate and litigation matters.

8. By separate application, the Debtors have also asked the Court to approve the retention of Cole Schotz as bankruptcy co-counsel to the Debtors. In order to avoid any duplication of effort and provide services to the Debtors in the most efficient and cost-effective manner, Kirkland will coordinate with Cole Schotz and any other firms the Debtors retain regarding their respective responsibilities in these chapter 11 cases.

9. Cole Schotz is primarily responsible for the following:

a. providing the Debtors with advice, based on their extensive experience practicing in the District of New Jersey, regarding the Debtors' rights, powers, and duties as debtors in possession in continuing to operate and manage their assets and business;

b. providing legal advice and services regarding local rules, practices and procedures including Third Circuit law;

c. providing certain services in connection with the administration of the Chapter 11 Cases including, without limitation, preparing agendas, hearing notices, and hearing binders of documents and pleadings;

d. reviewing and commenting on proposed drafts of pleadings to be filed with the Court;

e. appearing in Court and at any meeting with the United States Trustee and any meeting of creditors;

f. providing legal advice and services on any matter on which K&E may have a conflict or as needed based on specialization;

g. performing all other legal services for and on behalf of the Debtors which may be necessary or appropriate in the administration of their Chapter 11 Cases and fulfillment of their duties as debtors in possession; and

h. responding to creditor and party-in-interest inquiries directed to Cole Schotz.

Professional Compensation

10. Kirkland intends to apply for compensation for professional services rendered on an hourly basis and reimbursement of expenses incurred in connection with these chapter 11 cases, subject to the Court's approval and in compliance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any other applicable procedures and orders of the Court. The hourly rates and corresponding rate structure Kirkland will use in these chapter 11 cases are the same as the hourly rates and corresponding rate structure that Kirkland uses in other debtor representations, and are comparable to the hourly rates and corresponding rate structure that Kirkland uses for complex corporate, securities, and litigation matters whether in court or otherwise, regardless of whether a fee application is required. These rates and the rate structure reflect that such restructuring and other complex matters typically are national in scope and involve great complexity, high stakes, and severe time pressures.

11. Kirkland operates in a national marketplace for legal services in which rates are driven by multiple factors relating to the individual lawyer, his or her area of specialization, the firm's expertise, performance, and reputation, the nature of the work involved, and other factors.

12. Kirkland's current hourly rates for matters related to these chapter 11 cases range as follows:[4]

Billing Category[5]	U.S. Range
Partners	$1,195-$2,465
Of Counsel	$820-$2,245
Associates	$745-$1,495
Paraprofessionals	$325-$625

13. Kirkland's hourly rates are set at a level designed to compensate Kirkland fairly for the work of its attorneys and paralegals and to cover fixed and routine expenses. Hourly rates vary with the experience and seniority of the individuals assigned. These hourly rates are subject to periodic adjustments to reflect economic and other conditions.[6]

14. It is Kirkland's policy to charge its clients in all areas of practice for identifiable, non-overhead expenses incurred in connection with the client's case that would not have been incurred except for representation of that particular client. It is also Kirkland's policy to charge its clients only the amount actually incurred by Kirkland in connection with such items. Examples

[4] For professionals and paraprofessionals residing outside of the U.S., hourly rates are billed in the applicable currency. When billing a U.S. entity, such foreign rates are converted into U.S. dollars at the then applicable conversion rate. After converting these foreign rates into U.S. dollars, it is possible that certain rates may exceed the billing rates listed in the chart herein. While the rate ranges provided for in this Application may change if an individual leaves or joins Kirkland, and if any such individual's billing rate falls outside the ranges disclosed above, Kirkland does not intend to update the ranges for such circumstances.

[5] Although Kirkland does not anticipate using contract attorneys during these chapter 11 cases, in the unlikely event that it becomes necessary to use contract attorneys, Kirkland will not charge a markup to the Debtors with respect to fees billed by such attorneys. Moreover, any contract attorneys or non-attorneys who are employed by the Debtors in connection with work performed by Kirkland will be subject to conflict checks and disclosures in accordance with the requirements of the Bankruptcy Code.

[6] For example, like many of its peer law firms, Kirkland typically increases the hourly billing rate of attorneys and paraprofessionals twice a year in the form of: (i) step increases historically awarded in the ordinary course on the basis of advancing seniority and promotion and (ii) periodic increases within each attorney's and paraprofessional's current level of seniority. The step increases do not constitute "rate increases" (as the term is used in the *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases*, effective November 1, 2013). As set forth in the Order, Kirkland will provide ten business days' notice to the Debtors, the U.S. Trustee, and any official committee before implementing any periodic increases, and shall file such notice with the Court.

of such expenses include postage, overnight mail, courier delivery, transportation, overtime expenses, computer-assisted legal research, photocopying, airfare, meals, and lodging.

15. To ensure compliance with all applicable deadlines in these chapter 11 cases, Kirkland utilizes the services of overtime secretaries. Kirkland charges fees for these services pursuant to the Engagement Letter between Kirkland and the Debtors, which permits Kirkland to bill the Debtors for overtime secretarial charges that arise out of business necessity. In addition, Kirkland professionals also may charge their overtime meals and overtime transportation to the Debtors consistent with prepetition practices.

16. Kirkland currently charges the Debtors $0.16 per page for standard duplication in its offices in the United States. Notwithstanding the foregoing and consistent with the Local Rules, Kirkland will charge no more than $0.10 per page for standard duplication services in these chapter 11 cases. Kirkland does not charge its clients for incoming facsimile transmissions. Kirkland has negotiated a discounted rate for Westlaw computer-assisted legal research. Computer-assisted legal research is used whenever the researcher determines that using Westlaw is more cost effective than using traditional (non-computer assisted legal research) techniques.

Compensation Received by Kirkland from the Debtors

17. Per the terms of the Engagement Letter, on October 16, 2023, the Debtors paid $250,000 to Kirkland, which, as stated in the Engagement Letter, constituted a "special purpose retainer" (also known as an "advance payment retainer") as defined in Rule 1.5(d) of the Illinois Rules of Professional Conduct and *Dowling v. Chicago Options Assoc., Inc.*, 875 N.E.2d 1012, 1018 (Ill. 2007). Subsequently, the Debtors paid to Kirkland additional special purpose retainer totaling $10,741,656.22 in the aggregate. As stated in the Engagement Letter, any special purpose retainer is earned by Kirkland upon receipt, any special purpose retainer becomes the property of Kirkland upon receipt, the Debtors no longer have a property interest in any special purpose

retainer upon Kirkland's receipt, any special purpose retainer will be placed in Kirkland's general account and will not be held in a client trust account, and the Debtors will not earn any interest on any special purpose retainer.[7] A chart identifying the statements setting forth the professional services provided by Kirkland to the Debtors and the expenses incurred by Kirkland in connection therewith, as well as the special purpose retainer transferred by the Debtors to Kirkland, prior to the Petition Date is set forth below.

Type of Transaction	Date	Amount of Fees and Expenses Listed on Statement	Amount of Special Purpose Retainer Requested	Amount of Special Purpose Retainer Received	Resulting Special Purpose Retainer Following
Initial Request for Special Purpose Retainer	10/12/2023	N/A	$250,000.00	N/A	N/A
Receipt of Initial Special Purpose Retainer	10/16/2023			$250,000.00	$250,000.00
Additional Special Purpose Retainer (Full Statement)	10/26/2023	$148,201.58	$448,201.58		$101,798.42
Receipt of Additional Special Purpose Retainer	11/13/2023			$448,201.58	$550,000.00
Additional Special Purpose Retainer (Full Statement)	11/16/2023	$384,693.25	$684,693.25		$165,306.75
Receipt of Additional Special Purpose Retainer	11/30/2023			$684,693.25	$850,000.00
Additional Special Purpose Retainer (Full Statement)	12/6/2023	$544,683.97	$744,683.97		$305,316.03
Receipt of Additional Special Purpose Retainer	12/11/2023			$744,683.97	$1,050,000.00
Additional Special Purpose Retainer (Full Statement)	12/15/2023	$806,244.14	$806,244.14		$243,755.86
Receipt of Additional Special Purpose Retainer	12/22/2023			$806,244.14	$1,050,000.00
Additional Special Purpose Retainer (Full Statement)	12/29/2023	$903,921.89	$1,203,921.89		$146,078.11
Receipt of Additional Special Purpose Retainer	1/12/2024			$1,203,921.89	$1,350,000.00
Additional Special Purpose Retainer (Full Statement)	1/15/2024	$1,172,063.55	$1,472,063.55		$177,936.45
Receipt of Additional Special Purpose Retainer	1/19/2024			$1,472,063.55	$1,650,000.00

[7] The Engagement Letter provides that Kirkland may continue to hold any remaining prepetition special purpose retainer during the pendency of a chapter 11 case rather than applying such special purpose retainer to postpetition fees and expenses. Kirkland evaluates whether to retain any remaining prepetition special purpose retainer on a case-by-case basis. In this particular case, Kirkland has elected not to hold any remaining prepetition special purpose retainer but, instead, will apply any remaining special purpose retainer to postpetition fees and expenses as such fees and expenses are allowed by the Court.

Type of Transaction	Date	Amount of Fees and Expenses Listed on Statement	Amount of Special Purpose Retainer Requested	Amount of Special Purpose Retainer Received	Resulting Special Purpose Retainer Following
Additional Special Purpose Retainer (Full Statement)	1/23/2024	$1,405,819.99	$1,705,819.99		$244,180.01
Receipt of Additional Special Purpose Retainer	2/1/2024			$1,705,819.99	$1,950,000.00
Additional Special Purpose Retainer (Full Statement)	2/2/2024	$1,346,817.50	$1,346,817.50		$603,182.50
Receipt of Additional Special Purpose Retainer	2/8/2024			$1,346,817.50	$1,950,000.00
Additional Special Purpose Retainer (Summary Statement)	2/9/2024		$2,329,210.35		$1,950,000.00
Receipt of Additional Special Purpose Retainer	2/9/2024			$2,329,210.35	$4,279,210.35

18. As of the Petition Date, the Debtors did not owe Kirkland any amounts for legal services rendered before the Petition Date. Although certain expenses and fees may have been incurred, but not yet applied to Kirkland's special purpose retainer, Kirkland's total special purpose retainer always exceeded any amounts listed or to be listed on statements describing services rendered and expenses incurred (on a "rates times hours" and "dates of expenses incurred" basis) prior to the Petition Date.

19. Pursuant to Bankruptcy Rule 2016(b), Kirkland has not shared nor agreed to share (a) any compensation it has received or may receive with another party or person, other than with the partners, associates, and contract attorneys associated with Kirkland or (b) any compensation another person or party has received or may receive.

Statement Regarding U.S. Trustee Guidelines

20. Kirkland shall apply for compensation for professional services rendered and reimbursement of expenses incurred in connection with the Debtors' chapter 11 cases in compliance with sections 330 and 331 of the Bankruptcy Code and applicable provisions of the Bankruptcy Rules, Local Rules, and any other applicable procedures and orders of the Court. Kirkland also intends to make a reasonable effort to comply with the U.S. Trustee's requests for

information and additional disclosures as set forth in the *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases Effective As of November 1, 2013* (the "Revised UST Guidelines"), both in connection with this Application and the interim and final fee applications to be filed by Kirkland in these chapter 11 cases.

Attorney Statement Pursuant to Revised UST Guidelines

21. The following is provided in response to the request for additional information set forth in Paragraph D.1. of the Revised UST Guidelines:

a. **Question**: Did Kirkland agree to any variations from, or alternatives to, Kirkland's standard billing arrangements for this engagement?

Answer: No. Kirkland and the Debtors have not agreed to any variations from, or alternatives to, Kirkland's standard billing arrangements for this engagement. The rate structure provided by Kirkland is appropriate and is not significantly different from (a) the rates that Kirkland charges for other non-bankruptcy representations or (b) the rates of other comparably skilled professionals.

b. **Question**: Do any of the Kirkland professionals in this engagement vary their rate based on the geographic location of the Debtors' chapter 11 cases?

Answer: No. The hourly rates used by Kirkland in representing the Debtors are consistent with the rates that Kirkland charges other comparable chapter 11 clients, regardless of the location of the chapter 11 case.

c. **Question**: If Kirkland has represented the Debtors in the 12 months prepetition, disclose Kirkland's billing rates and material financial terms for the prepetition engagement, including any adjustments during the 12 months prepetition. If Kirkland's billing rates and material financial terms have changed postpetition, explain the difference and the reasons for the difference.

Answer: Kirkland's current hourly rates for services rendered on behalf of the Debtors range as follows:[8]

Billing Category	U.S. Range
Partners	$1,195-$2,465
Of Counsel	$820-$2,245
Associates	$745 - $1,495
Paraprofessionals	$325 - $625

Kirkland represented the Debtors from September 22, 2023, to December 31, 2023 before the Petition Date, using the hourly rates listed below:

Billing Category	U.S. Range
Partners	$1,195-$2,245
Of Counsel	$820-$2,125
Associates	$685-$1,395
Paraprofessionals	$295-$575

d. **Question**: Have the Debtors approved Kirkland's budget and staffing plan, and, if so, for what budget period?

Answer: Yes. More specifically, pursuant to the Interim Cash Collateral Order,[9] the Debtors must furnish biweekly budget and variance reports, which include detail regarding the fees and expenses incurred in these chapter 11 cases by professionals proposed to be retained by the Debtors.

Kirkland's Disinterestedness

22. In connection with its proposed retention by the Debtors in these chapter 11 cases, Kirkland undertook to determine whether it had any conflicts or other relationships that might

[8] While the rate ranges provided for in this Application may change if an individual leaves or joins Kirkland, and if any such individual's billing rate falls outside the ranges disclosed above, Kirkland does not intend to update the ranges for such circumstances.

[9] "Interim Cash Collateral Order" means the *Interim Order Pursuant to Sections 105, 361, 362, 363, 503, and 507 of the Bankruptcy Code and Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [Docket No. 47].

cause it not to be disinterested or to hold or represent an interest adverse to the Debtors. Specifically, Kirkland obtained from the Debtors and their representatives the names of individuals and entities that may be parties in interest in these chapter 11 cases (the "Potential Parties in Interest") and such parties are listed on **Schedule 1** hereto. Kirkland has searched its electronic database for its connections to the entities listed on **Schedule 1** hereto. In addition, after Kirkland identified all client connections with the parties in interest over a specified time period, Kirkland circulated a survey email to all Kirkland attorneys who billed 10 or more hours to such clients during the prior six years. Further, beyond the individual emails, Kirkland sent a daily report of new matters firm wide. All Kirkland attorneys are responsible for reviewing the daily report of new matters and raising any potential concerns with respect to new representations. Kirkland did not receive any answers in the affirmative to these emails. Additionally, to the extent that I have been able to ascertain that Kirkland has been retained within the last three years to represent any of the Potential Parties in Interest (or their affiliates, as the case may be) in matters unrelated to these cases, such facts are disclosed on **Schedule 2** attached hereto.

23. Kirkland and certain of its partners and associates may have in the past represented, may currently represent, and likely in the future will represent, entities that may be parties in interest in these chapter 11 cases in connection with matters unrelated (except as otherwise disclosed herein) to the Debtors and these chapter 11 cases. Kirkland has searched its electronic database for its connections to the entities listed on **Schedule 1** attached hereto. The information listed on **Schedule 1** may have changed without our knowledge and may change during the pendency of these chapter 11 cases. Accordingly, Kirkland will update this Declaration as

necessary and when) Kirkland becomes aware of additional material information. The following is a list of the categories that Kirkland has searched:[10]

Schedule	Category
1(a)	Debtholders
1(b)	Debtor Entities and Non-Debtor Affiliates
1(c)	Current and Former Directors and Officers
1(d)	Administrative Agents
1(e)	Bankruptcy Judges, Staff, and U.S. Trustee
1(f)	Banks
1(g)	Contract Counterparties
1(h)	Equity Holders of Greater Than 5%
1(i)	Government/Regulatory Agencies
1(j)	Insurance Providers / Sureties / Letters of Credit Beneficiaries
1(k)	Lienholders
1(l)	Major Customers
1(m)	Major Lease Counterparties
1(n)	Major Unsecured Creditors
1(o)	Major Vendors
1(p)	Ordinary Course Professionals
1(q)	Parties to Litigation
1(r)	Potential Sale Process Counterparties
1(s)	Restructuring Professionals
1(t)	Taxing Authorities
1(u)	Utility Providers

24. To the best of my knowledge, (a) Kirkland is a "disinterested person" within the meaning of section 101(14) of the Bankruptcy Code, as required by section 327(a) of the Bankruptcy Code, and does not hold or represent an interest adverse to the Debtors' estates and (b) Kirkland has no connection to the Debtors, their creditors, or other parties in interest, except as may be disclosed in this Declaration.

[10] Kirkland's inclusion of parties in the following Schedules is solely to illustrate Kirkland's conflict search process and is not an admission that any party has a valid claim against the Debtors or that any party properly belongs in the schedules or has a claim or legal relationship to the Debtors of the nature described in the schedules.

25. Listed on **Schedule 2** to this Declaration are the results of Kirkland's conflicts searches of the above-listed entities.[11] For the avoidance of doubt, Kirkland will not commence a cause of action in these chapter 11 cases against the entities listed on **Schedule 2** that are current clients of Kirkland (including entities listed below under the "Specific Disclosures" section of this Declaration) unless Kirkland has an applicable waiver on file or first receives a waiver from such entity allowing Kirkland to commence such an action. To the extent that a waiver does not exist or is not obtained from such entity and it is necessary for the Debtors to commence an action against that entity, the Debtors will be represented in such particular matter by conflicts counsel.

26. Of the entities listed on **Schedule 2**, only two represented more than one percent of Kirkland's fee receipts for the twelve-month period ending on February 29, 2024 (collectively, the "One-Percent Clients"). Eli Lilly & Company is a major customer of the Debtors and a One-Percent Client. The other One-Percent Client executed a non-disclosure agreement with the Debtors regarding potential M&A transactions regarding the Debtors and their businesses but is no longer active in the Debtors' postpetition sale process. Kirkland does not, and will not, represent any of these entities in connection with the chapter 11 cases. I do not believe that any current or former representation of such entities precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code. [12]

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[11] As referenced in **Schedule 2**, the term "current client" means an entity listed as a client in Kirkland's conflicts search system to whom time was posted in the 12 months preceding the Petition Date. As referenced in **Schedule 2**, the term "former client" means an entity listed as a client in Kirkland's conflicts search system to whom time was posted between 12 and 36 months preceding the Petition Date. As referenced in **Schedule 2**, the term "closed client" means an entity listed as a client in Kirkland's conflicts search system to whom time was posted in the 36 months preceding the Petition Date, but for which the client representation has been closed. Whether an actual client relationship exists can only be determined by reference to the documents governing Kirkland's representation rather than its potential listing in Kirkland's conflicts search system. The list generated from Kirkland's conflicts search system is over-inclusive. As a general matter, Kirkland discloses connections with "former clients" or "closed clients" for whom time was posted in the last 36 months, but does not disclose connections if time was billed more than 36 months before the Petition Date.

[12] Specific percentages will be disclosed to the U.S. Trustee upon request.

27. Kirkland's conflicts search of the entities listed on **Schedules 1(a) – 1(u)** (that Kirkland was able to locate using its reasonable efforts) reveals, to the best of my knowledge, that those Kirkland attorneys and paraprofessionals who previously worked at other law firms that represented such entities in these chapter 11 cases have not worked on matters relating to the Debtors' restructuring efforts while at Kirkland.

28. Based on the conflicts search conducted to date and described herein, to the best of my knowledge, neither I, Kirkland, nor any partner or associate thereof, insofar as I have been able to ascertain, have any connection with the Debtors, their creditors, or any other parties in interest, their respective attorneys and accountants, the U.S. Trustee, any person employed by the U.S. Trustee, or any Bankruptcy Judge currently serving on the United States Bankruptcy Court for the District of New Jersey, except as disclosed or otherwise described herein.

29. Kirkland will review its files periodically during the pendency of these chapter 11 cases to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new relevant facts or relationships are discovered or arise, Kirkland will use reasonable efforts to identify such further developments and will promptly file a supplemental declaration, as required by Bankruptcy Rule 2014(a).

30. Generally, it is Kirkland's policy to disclose entities in the capacity that they first appear in a conflicts search. For example, if an entity already has been disclosed in this Declaration in one capacity (*e.g.*, a customer), and the entity appears in a subsequent conflicts search in a different capacity (*e.g.*, a vendor), Kirkland does not disclose the same entity again in supplemental declarations, unless the circumstances are such in the latter capacity that additional disclosure is required.

31. From time to time, certain former partners of Kirkland are entitled to compensation for a limited period of time following their departure from the firm.

32. From time to time, Kirkland has referred work to other professionals to be retained in these chapter 11 cases. Likewise, certain such professionals have referred work to Kirkland.

33. Certain insurance companies pay the legal bills of Kirkland clients. Some of these insurance companies may be involved in these chapter 11 cases. None of these insurance companies, however, are Kirkland clients as a result of the fact that they pay legal fees on behalf of Kirkland clients.

Specific Disclosures

34. As specifically set forth below and in the attached exhibits, Kirkland represents certain of the Debtors' creditors, equity security holders, or other entities that may be parties in interest in ongoing matters unrelated to the Debtors and these chapter 11 cases. None of the representations described herein are materially adverse to the interests of the Debtors' estates. Moreover, pursuant to section 327(c) of the Bankruptcy Code, Kirkland is not disqualified from acting as the Debtors' counsel merely because it represents certain of the Debtors' creditors, equity security holders, or other entities that may be parties in interest in matters unrelated to these chapter 11 cases.

A. Connections to Officers and Directors.

35. As disclosed below and on **Schedule 2**, Kirkland currently represents, and in the past has represented, certain affiliates, subsidiaries, and entities associated with the Debtors' current and recent former officers and directors. I do not believe that Kirkland's current or prior representation of the affiliates, subsidiaries, and entities associated with certain officers and directors precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

36. Jill Frizzley, a disinterested director and member of the special committee of Debtor Invitae Corporation's board of directors, has served, or may serve from time to time, in various management and/or director capacities of certain Kirkland clients or affiliates thereof. I do not believe that Kirkland's current or prior representation of clients for which Ms. Frizzley serves or served in management and/or director capacities precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

B. Connections to Other Entities.

37. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, Deerfield Management Company and various of its subsidiaries and affiliates (collectively, "Deerfield") and Softbank Group Corporation and various of its subsidiaries and affiliates (collectively, "Softbank") on a variety of matters. Deerfield is the holder of approximately 78% of Debtor Invitae Corporation's 2028 Senior Secured Notes and is represented by Sullivan & Cromwell LLP and Wollmuth Maher & Deutsch LLP in these chapter 11 cases. Softbank is a substantial holder of the Debtor Invitae Corporation's 2028 Convertible Unsecured Notes and is represented by Morrison & Foerster LLP in these chapter 11 cases.

38. Kirkland's current and prior representations of Deerfield and Softbank have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, Deerfield or Softbank in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of Deerfield or Softbank precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

39. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, Perceptive Advisors ("Perceptive") on a variety of matters. Kirkland previously represented Perceptive in its capacity as a shareholder of ArcherDX, an entity acquired by the

Debtors in 2020, in connection with the Debtors' acquisition of ArcherDX. Kirkland has not represented, and will not represent, Perceptive in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. The Kirkland attorneys who represented Perceptive in connection with the Debtors' acquisition of ArcherDX are screened from any matters related to these chapter 11 cases and will not perform any work in connection with these chapter 11 cases. I do not believe that Kirkland's current or prior representation of Perceptive precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

40. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, UnitedHealthcare Group, Inc. and various of its subsidiaries and affiliates (collectively, "UnitedHealthcare") on a variety of matters. UnitedHealthcare is a party on the Debtors' top 30 unsecured creditors list. Kirkland's current and prior representations of UnitedHealthcare have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, UnitedHealthcare in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of UnitedHealthcare precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

41. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, certain of the Debtors' landlords and lease counterparties and/or various of their respective subsidiaries and affiliates (collectively, the "Major Lease Counterparties") on a variety of matters. Kirkland's current and prior representations of the Major Lease Counterparties have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, the Major Lease Counterparties in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's

current or prior representations of the Major Lease Counterparties preclude Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

42. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, certain of the Debtors' major customers and their respective subsidiaries and affiliates, including: (i) Eli Lilly & Company; (ii) Pfizer, Inc.; (iii) Regeneron Pharmaceuticals Inc.; and (iv) Sanofi (collectively, the "Major Customers") on a variety of matters. Kirkland's current and prior representations of the Major Customers have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, the Major Customers in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representations of the Major Customers preclude Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

C. Potential M&A Transaction Counterparties.

43. The Debtors are in discussions with certain parties (and may be in discussions with other parties in the future) regarding potential M&A transactions regarding the Debtors and their businesses. Due to the inherently competitive nature of this process, it is imperative that the identities of these potential counterparties remain confidential. Contemporaneously herewith, the Debtors filed the *Debtors' Motion for Entry of an Order Authorizing the Debtors to File Under Seal the Names of Certain Confidential Transaction Parties in Interest Related to the Debtors' Professional Retention Applications* (the "Motion to Seal"). The Motion to Seal seeks authority for the Debtors to redact and file under seal the names of certain potential transaction counterparties whose non-disclosure agreements require that their identities remain confidential. For the avoidance of doubt, Kirkland will not represent any of the potential counterparties in connection with any matter in these chapter 11 cases.

D. Other Chapter 11 Professionals.

44. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, certain affiliates, subsidiaries, and entities associated with various professionals that the Debtors seeks to retain in connection with these chapter 11 cases. Kirkland's current and prior representations of these professionals have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, any such professionals in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of these professionals precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

45. The Debtors' proposed financial advisor is FTI Consulting, Inc. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, FTI and certain of its affiliates ("FTI") on a variety of matters. Kirkland's current and prior representations of FTI have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, FTI in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of FTI precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

46. The Debtors' proposed investment banker is Moelis & Company LLC. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, Moelis and its affiliates ("Moelis") on a variety of matters. Kirkland's current and prior representations of Moelis have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, Moelis in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or

prior representation of Moelis precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

47. The Debtors' proposed tax services provider is Deloitte Tax LLP. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, Deloitte Tax LLP and certain of its affiliates ("Deloitte") on a variety of matters. Kirkland's current and prior representations of Deloitte have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, Deloitte in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of Deloitte precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

48. The Debtors' proposed bankruptcy co-counsel is Cole Schotz. As disclosed on **Schedule 2**, Kirkland in the past has represented Cole Schotz on a variety of matters. Kirkland's prior representation of Cole Schotz has been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, Cole Schotz in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's prior representation of Cole Schotz precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

49. On February 16, 2024, the Court approved Kurtzman Carson Consultants LLC ("KCC") as the Debtors' claims and noticing agent [Docket No. 49].[13] Certain former Kirkland attorneys and professionals are currently employed by KCC. Though previously employed by Kirkland, any work provided by these former Kirkland employees is unrelated to the Debtors and

[13] *See Order Authorizing the Appointment of Kurtzman Carson Consultants LLC as Claims and Noticing Agent Effective as of the Petition Date* [Docket No 49].

these chapter 11 cases. I do not believe these connections preclude Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

50. The Senior Secured Noteholders engaged Perella Weinberg Partners LP as their financial advisor. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, Perella Weinberg Partners LP and certain of its affiliates ("PWP") on a variety of matters. Kirkland's current and prior representations of PWP have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, PWP in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of PWP precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

51. The 2028 Convertible Unsecured Noteholders engaged Lazard Frères & Co. LLC ("Lazard") as their investment banker. As disclosed on **Schedule 2**, Kirkland currently represents, and in the past has represented, Lazard on a variety of matters. Kirkland's current and prior representations of Lazard have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, Lazard in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of Lazard precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

52. Rachael Bentley, a Kirkland partner, is married to Matthew Bentley, an associate at ArentFox Schiff LLP, counsel to the agent of the 2028 Convertible Notes and a member of the Committee. Ms. Bentley does not work, and will not work, on cases where Mr. Bentley is involved. Likewise, Mr. Bentley does not work, and will not work, on cases where Ms. Bentley

is involved. I do not believe this connection precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

E. Kirkland Attorney and Employee Investments.

53. From time to time, Kirkland partners, of counsel, associates, and employees personally invest in mutual funds, retirement funds, private equity funds, venture capital funds, hedge funds, and other types of investment funds (the "Investment Funds"), through which such individuals indirectly acquire an interest in debt or equity securities of many companies, one of which may be one of the Debtors, their creditors, or other parties in interest in these chapter 11 cases, often without Kirkland's knowledge. Each Kirkland person generally owns substantially less than one percent of such Investment Fund, does not manage or otherwise control such Investment Fund, and has no influence over the Investment Fund's decision to buy, sell, or vote any particular security. The Investment Fund is generally operated as a blind pool, meaning that when the Kirkland persons make an investment in the Investment Fund, he, she, or they do not know what securities the blind pool Investment Fund will purchase or sell, and have no control over such purchases or sales.

54. From time to time one or more Kirkland partners and of counsel voluntarily choose to form an entity (a "Passive-Intermediary Entity") to invest in one or more Investment Funds. Such Passive-Intermediary Entity is composed only of persons who were Kirkland partners and of counsel at the time of the Passive-Intermediary Entity's formation (although some may later become former Kirkland partners and of counsel). Participation in such a Passive-Intermediary Entity is wholly voluntary and only a portion of Kirkland's partners and of counsel choose to participate. The Passive-Intermediary Entity generally owns substantially less than one percent of any such Investment Fund, does not manage or otherwise control such Investment Fund, and has no influence over the Investment Fund's decision to buy, sell, or vote any particular security. Each

Investment Fund in which a Passive-Intermediary Entity invests is operated as a blind pool, so that the Passive-Intermediary Entity does not know what securities the blind pool Investment Funds will purchase or sell, and has no control over such purchases or sales. And, indeed, the Passive-Intermediary Entity often arranges for statements and communications from certain Investment Funds to be sent solely to a blind administrator who edits out all information regarding the identity of the Investment Fund's underlying investments, so that the Passive-Intermediary Entity does not learn (even after the fact) the identity of the securities purchased, sold, or held by the Investment Fund. To the extent the Passive-Intermediary Entity is or becomes aware of the identity of the securities purchased, sold, or held by the Investment Funds ("Known Holdings"), such Known Holdings are submitted to Kirkland's conflict checking system.

55. From time to time, Kirkland partners, of counsel, associates, and employees personally directly acquire a debt or equity security of a company which may be (or become) one of the Debtors, their creditors, or other parties in interest in these chapter 11 cases. Kirkland has a long-standing policy prohibiting attorneys and employees from using confidential information that may come to their attention in the course of their work, so that all Kirkland attorneys and employees are barred from trading in securities with respect to which they possess confidential information.

F. Other Disclosures.

56. Finally, certain interrelationships exist among the Debtors. Nevertheless, the Debtors have advised Kirkland that the Debtors' relationships to each other do not pose any conflict of interest because of the general unity of interest among the Debtors. Insofar as I have been able to ascertain, I know of no conflict of interest that would preclude Kirkland's joint representation of the Debtors in these chapter 11 cases.

57. The spouse of Kirkland partner Helen E. Witt, P.C. is a managing director of JPMorgan Chase & Co. JPMorgan Chase & Co. and certain of its affiliates are among the Debtors' cash management banks. Out of an abundance of caution, Kirkland has instituted formal screening measures to screen Ms. Witt from all aspects of Kirkland's representation of the Debtors.

58. Jamie Botter, a Kirkland non-attorney employee, is the daughter of David H. Botter, a partner of Cleary Gottlieb Steen & Hamilton LLP, which is an ordinary course professional to the Debtors. I do not believe that this connection precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code.

59. Furthermore, prior to joining Kirkland, certain Kirkland attorneys represented clients adverse to Kirkland's current and former restructuring clients. Certain of these attorneys (the "Screened Kirkland Attorneys") will not perform work in connection with Kirkland's representation of the Debtors and will not have access to confidential information related to the representation. Kirkland's formal ethical screen provides sufficient safeguards and procedures to prevent imputation of conflicts by isolating the Screened Kirkland Attorneys and protecting confidential information.

60. Under Kirkland's screening procedures, Kirkland's conflicts department distributes a memorandum to all Kirkland attorneys and legal assistants directing them as follows: (a) not to discuss any aspects of Kirkland's representation of the Debtors with the Screened Kirkland Attorneys; (b) to conduct meetings, phone conferences, and other communications regarding Kirkland's representation of the Debtors in a manner that avoids contact with the Screened Kirkland Attorneys; (c) to take all measures necessary or appropriate to prevent access by the Screened Kirkland Attorneys to the files or other information related to Kirkland's representation of the Debtors; and (d) to avoid contact between the Screened Kirkland Attorneys and all Kirkland

personnel working on the representation of the Debtors unless there is a clear understanding that there will be no discussion of any aspects of Kirkland's representation of the Debtors. Furthermore, Kirkland already has implemented procedures to block the Screened Kirkland Attorneys from accessing files and documents related to the Debtors that are stored in Kirkland's electronic document managing system.

Affirmative Statement of Disinterestedness

61. Based on the conflicts search conducted to date and described herein, to the best of my knowledge and insofar as I have been able to ascertain, (a) Kirkland is a "disinterested person" within the meaning of section 101(14) of the Bankruptcy Code, as required by section 327(a) of the Bankruptcy Code, and does not hold or represent an interest adverse to the Debtors' estates and (b) Kirkland has no connection to the Debtors, their creditors, or other parties in interest, except as may be disclosed herein.

[*Remainder of Page Intentionally Left Blank*]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: March 13, 2024

Respectfully submitted,

/s/ Spencer A. Winters
Spencer A. Winters
as President of Spencer A. Winters, P.C., as Partner of Kirkland & Ellis LLP; and as Partner of Kirkland & Ellis International LLP

Schedule 1

The following lists contain the names of reviewed entities as described more fully in the *Declaration of Spencer A. Winters in Support of the Debtors' Application for the Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors in Possession Effective as of February 13, 2024* (the "Winters Declaration").[1] Where the names of the entities reviewed are incomplete or ambiguous, the scope of the search was intentionally broad and inclusive, and Kirkland & Ellis LLP and Kirkland & Ellis International LLP reviewed each entity in its records, as more fully described in the Winters Declaration, matching the incomplete or ambiguous name.[2]

[1] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Winters Declaration.

[2] Pursuant to the *Interim Order (I) Authorizing the Debtors to (A) File a Consolidated List of Creditors in Lieu of Submitting a Separate Mailing Matrix for Each Debtor, (B) File a Consolidated List of the Debtors' Thirty (30) Largest Unsecured Creditors, and (C) Redact Certain Personally Identifiable Information and (II) Waiving the Requirement to File a List of Equity Security Holders and Provide Notice Directly to Equity Security Holders* [Docket No. 50] Kirkland has redacted the names of individuals that appear on Schedules 1 and 2. Kirkland has also redacted the names of any confidential marketing process parties.

SCHEDULE 1

List of Schedules

Schedule	Category
1(a)	Debtholders
1(b)	Debtor Entities and Non-Debtor Affiliates
1(c)	Current and Former Directors and Officers
1(d)	Administrative Agents
1(e)	Bankruptcy Judges, Staff, and U.S. Trustee
1(f)	Banks
1(g)	Contract Counterparties
1(h)	Equity Holders of Greater Than 5%
1(i)	Government/Regulatory Agencies
1(j)	Insurance Providers / Sureties / Letters of Credit Beneficiaries
1(k)	Lienholders
1(l)	Major Customers
1(m)	Major Lease Counterparties
1(n)	Major Unsecured Creditors
1(o)	Major Vendors
1(p)	Ordinary Course Professionals
1(q)	Parties to Litigation
1(r)	Potential Sale Process Counterparties
1(s)	Restructuring Professionals
1(t)	Taxing Authorities
1(u)	Utility Providers

SCHEDULE 1(a)

Debtholders

Baker Brothers Advisors LP
Baker Brothers Life Sciences LP
Braidwell LP
Context Capital Management LLC
Chimera Investment LLC
Deerfield Management Co. LP
J. Wood Capital Advisors LLC
SoftBank Group Corp.

SCHEDULE 1(b)

Debtor Entities and Non-Debtor Affiliates

ArcherDX Clinical Services Inc.
ArcherDX LLC
Ciitizen LLC
Genelex India Private Ltd.
Genetic Solutions LLC
Genosity LLC
Good Start Genetics Inc.
Invitae (Singapore) Pte. Ltd.
Invitae Australia Pty. Ltd.
Invitae Canada Inc.
Invitae Corp.
Invitae Israel Inc. Ltd.
Invitae Japan KK
Invitae Latvia SIA
Invitae Netherlands BV
MedNeon LLC
Ommdom Inc.
Orbicule BVBA
Prompt Genomics LLC
YouScript LLC

SCHEDULE 1(c)

Current and Former Directors and Officers

Aguiar, Eric
Alderson, Lisa Janssen
Bendekgey, Lee
Brida, Tom
Crouse, Geoffrey S.
Dickey, Robert, IV
Duquette, Melanie
Finks, Jackson
French, Desarie
Frizzley, Jill
Furman, Alex
George, Sean Emerson
Gorjanc, Christine M.
Guigley, Robert
Karlan, Beth Young
Knight, Ken
Korn, W. Michael, MD
Lockhart, Kimber
Luk, Hoki
McManus, David
Myers, Jason W.
Nayak, Chitra
Nussbaum, Robert
Olivares, Eric
Osborne, William H.
Pace, Sandra
Parsons, Jeff
Schrank, Ana
Scott, Randy, Ph.D.
Sholehvar, David
Stuart, Jim
Stueland, Katherine
Suri, Karthik
Wedgeworth, Layton
Wen, Yafei
Werner, Robert

SCHEDULE 1(d)

Administrative Agents

US Bank Trust Co. NA
Wilmington Savings Fund Society, Federal Savings Bank

SCHEDULE 1(e)

Bankruptcy Judges, Staff, and U.S. Trustee

Alfaro, Aleda
Altenburg, Andrew B., Jr.
Ardelean, Kirsten K.
Arendas, Francyne D.
Artis, Michael
Bielskie, Lauren
Brown, Michael
D'Auria, Peter J.
Figueria, Maria
Figueroa, Nancy
Filgueiras, Juan
Flynn, Marie
Fowler, Chris
Gambardella, Rosemary
Gerardi, David
Gilmore, Michael
Gravelle, Christine M.
Green, Tia
Haywood, Zelda
Heim, Robert
Hildebrandt, Martha
Jackson, Bruce
Kaplan, Michael B.
Kern, Joseph C.
Kropiewnicki, Daniel C.
Lipcsey, Diane
Martin, Kiya
McAuley, Catherine
McGee, Maggie
McGettigan, Margie
Meisel, Stacey L.
Moore, Sharon
Oppelt, Tina L.
Ortiz-Ng, Angeliza
Papalia, Vincent F.
Pappas, Ntorian
Poslusny, Jerrold N., Jr.
Primo, Mariela
Quigley, Sean
Quiles, Wendy
Renye, Heather
Richardson, Charlene
Ryan, Kathleen
Schneider, Robert J., Jr.
Shaarawy, Adam
Sherwood, John K.
Sodono, Anthony
Sponder, Jeffrey
Steele, Fran B.
Stillwell, Rachel
Stives, James
Vara Andrew R.
Veloz-Jimenez, Lucy
Walsh, Thomas C.
Wolf, Rachel
Ziemer, William J

SCHEDULE 1(f)

Banks

HSBC Bank USA
HSBC Holdings plc
JPMorgan Chase & Co.
SVB Financial Group
U.S. Bancorp

SCHEDULE 1(g)

Contract Counterparties

Ada, County of (ID)
Advance Radiologia
Advanced Package Engineering LLC
Advanced Reproductive Health Center Ltd.
Adventist Health
Alberta Reproductive Centre
ARCPoint Franchise Group
ARCPoint Labs of Humble
Argonaut Manufacturing Services Inc.
ARUP Laboratories Inc.
Association for Women's Health Care - Chicago & Northbrook, The
Atelier Health Solutions
Baylor Research Institute
Beam Radiology
Biron Medical Laboratory Inc.
BocaFertility IVF Center
Bonfi Uribe, Quautli Angel
Boob Bus, The
Boston Medical Center Corp.
Box Hill Hospital
Bristol-Myers Squibb Co.
California Excellent Fertility Inc.
California Fertility Partners
California IVF
Calvary Mater Newcastle
Cancer Care North West
Centre Hospitalier de l'Université de Montréal
Centre Hospitalier de l'Université Laval
Centro De Atencion e Investigacion en Salud Mental
CenturyLink Communications LLC
Children's Health System of Texas
Children's Hospital of Wisconsin Inc.
CHRISTUS Santa Rosa Health System
Circulo Medico GMM
Comanche County Memorial Hospital
Compass Group USA Inc.
Confluence Health
Cooper Clinic PA
Cooper Donor Institute
Cummins Inc.
Delaware, State of, Division of Forensic Science
Dental College of Georgia
Dr. Aimee Eyvazzadeh Inc.
Elite Wellness Center
EMCOR Services Northeast Inc.
ExtraView Corp.
EY Reviseurs d'Entreprises/Bedrijfsrevisoren BV
Federal Association of German Pathologists eV
Fem Surgery Pte Ltd.
Fertilidad 360 SAPI De CV
Fertility Answers LLC
Fertility Care of Orange County
Fertility Center of Las Vegas, The
Fertility Center of Southern California, A Merdical Group Inc.
Fertility Centers of Illinois
Fertility Solutions
Fertilys Inc.
First Steps Fertility
Forensic Medical Holdings of Kansas LLC
Fresno Community Hospital & Medical Center
Fundacion De Ojos Vidaurri
Fundacion Santos y de la Garza Evia IBP
Gene Council, The
Genea Pty Ltd.
Genes Talk, The
Genetica Medical & Wellness Centre
Genetics B&C
Genome Medical Inc.
Group Health Cooperative of South Central Wisconsin
Gulf States Hemophilia & Thrombophilia Center
Gulf States Hemophilia Center
Harris County Institute of Forensic Sciences
HCA Health Services of Oklahoma Inc.
HCA International Ltd.

Heritage Global Partners Inc.
High Profile Laboratory Testing Services
Hyet Nocarbon USA Inc.
Ideagen plc
Incinta Fertility
Instituto para la Salud del Nino y del Adolescente SC
Invest-Med
InVia Fertility
j2 Cloud Services Inc.
Jackson, County of (MO), Medical Examiner's Office
Janitronics Inc.
Kaelum Neurocenter
Kaiser Foundation Health Plan
Kaiser Foundation Hospitals
Kane, County of (IL), Coroner's Office
King Square Medical Centre
King, County of (WA), Medical Examiner's Office
Lab Medicine Service, VA Medical Center
Little Zebra Fund - San Francisco Public Health
Lorain, County of (OH), Coroner's Office
Los Angeles Reproductive Center LARC
Los Cabos Children's Foundation
M por Tres de Mexico SC
Madison Avenue Inc.
MAPS Public Benefit Corp.
Mary Hitchcock Memorial Hospital
MD2 Wellesley
MDVIP LLC
Michael E. DeBakey Veterans Affairs Medical Center
Midtown Medical Clinic
Midwest Fertility Specialist
Murphy Co. Mechanical Contractors & Engineers
My Blooming Health Lab Inc.
New Hampshire, State of, Office of the Chief Medical Examiner
Neway Fertility
Nueces, County of (TX), Medical Examiner
Ochsner Clinic Foundation
Odry Neurogenetica y Genetica Clinica
Onco Life Centre
Online Genetic Counselling Services Inc.
Philadelphia, City of (PA)
Phoenician Operating LLC
Phoenix Children's Hospital Inc.
Pinnacle Fertility
PricewaterhouseCoopers LLP
Princess Margaret Cancer Centre
Private Health Dallas
Proquis Inc.
Providence Health & Services - Washington
Rector & Visitors of the University of Virginia, The
ReGen Scientific Inc.
Regents of the University of Michigan, The
Reproductive Fertility Center
Reproductive Fertility Center Orange County Irvine
Rise Fertility
Rockefeller Fertility Center
Salud y Bienestar Industrial SA de CV
San Diego Fertility Center
San Mateo, County of (CA), Coroner's Office
Scripps Executive Health Medical Group Inc.
Scripps Health Inc.
Sergen Molecular Diagnostics
Shodair Children's Hospital
Shriners Children's Texas
Signature Health
Singapore Breast Surgery Center Pte Ltd.
Six Sigma Solutions International Inc.
Sog-Natalie Chua Clinic for Women
Southcentral Foundation
Southern California Center for Reproductive Medicine
Spring Creek Fertility
St. Jude's Children's Research Hospital Inc.
St. Louis, City of (MO), Medical Examiner's Office
Suffolk, County of (NY), Medical Examiner
SuperDNA Sdn Bhd
Tall Tree Integrated Health Centre
Telos Scientific LLC
Texas Fertility Center

Texas Health Houston Gulf States Hemophilia Center
Thermo Fisher Scientific Baltics UAB
Thermo Fisher Scientific Inc.
Trinity Cancer Care Center
UAB Health Systems
University Hospital Geelong
University of Michigan, Department of Pathology, Autopsy & Forensic Services
University of Texas MD Anderson Cancer Center
Vanderbilt University Medical Center
Variety Children's Hospital
Victory Reproductive Care
Washington University
Washington University School of Medicine
Weill Cornell Medical College
Western Health, Sunshine Hospital
Xytex Laboratories
Your Family Fertility PLLC
Zuckerberg San Francisco General Hospital, Division of Cardiology
[Confidential]

SCHEDULE 1(h)

Equity Holders of Greater Than 5%

ARK Investment Management LLC
BlackRock Institutional Trust Co. NA
Nikko Asset Management Co. Ltd.
Sumitomo Mitsui Trust Holdings Inc.
Vanguard Group Inc., The

SCHEDULE 1(i)

Government/Regulatory Agencies

California, State of, Department of Public Health
College of American Pathologists
New Jersey, State of, Department of Health
New York Stock Exchange
New York, State of, Department of Health
Pennsylvania, Commonwealth of, Department of Health
Rhode Island, State of, Department of Health
United States, Government of the, Patent & Trademark Office

SCHEDULE 1(j)

Insurance Providers / Sureties / Letters of Credit Beneficiaries

ACE American Insurance Co.
AIG Australia Ltd.
AIG Specialty Insurance Co.
Allied Real Estate Ltd.
Allied World Specialty Insurance Co.
Arch Insurance Co.
Ascot Specialty Insurance Co.
AXIS Insurance Co.
AXIS Surplus Insurance Co.
Beazley Insurance Co. Inc.
Chubb Custom Insurance Co.
Chubb Insurance Co. of Canada
Chubb National Insurance Co.
Corvus Insurance Agency LLC
Federal Insurance Co.
Hanover Insurance Co., The
Hudson Insurance Co.
Liberty Surplus Insurance Corp.
National Union Fire Insurance Co. of Pittsburgh PA
Old Republic Insurance Co.
RSUI Indemnity Co.
Sidra Medicine
Vantage Risk Assurance Co.
W Projects (No. 36) Pty. Ltd.
XL Specialty Insurance Co.

SCHEDULE 1(k)

Lienholders

36th Street Capital Partners LLC
California, State of, Employment Development Department Lien Group
Corporate Service Co.
De Lage Landen Financial Services Inc.
Deerfield Management Co. LP
Greatamerica Financial Services Corp.
NFS Leasing Inc.
Pacific Western Bank
People's United Bank NA
Perceptive Credit Holdings II LP
Silicon Valley Bank
Sterling National Bank
Thermo Fisher Financia Services Inc.
United States, Government of the, Internal Revenue Service
US Bank Trust Co. NA
Western Capital Technologies LLC

SCHEDULE 1(l)

Major Customers

Aeglea BioTherapeutics Inc.
Alector LLC
Alnylam Pharmaceuticals Inc.
Amicus Therapeutics US Inc.
Arbor Diagnostics
Aspa Therapeutics Inc.
AstraZeneca Pharmaceuticals LP
AstraZeneca Singapore Pte Ltd.
Behind the Seizure Canada
Biogen MA Inc.
BiogenIQ Inc.
BioMarin Pharmaceutical Inc.
Brain Neurotherapy Bio Inc.
Calcilytix Therapeutics Inc.
Catalyst Health Solutions Inc.
Catalyst Pharmaceuticals Inc.
Centre Hospitalier de l'Université de Montréal
Children's Hospital Colorado
City of Hope Precision Medicine Only
Clementia Pharmaceuticals Inc.
CRISPR Therapeutics AG
Decibel Therapeutics Inc.
Eidos Therapeutics Inc.
Enzyvant Therapeutics Inc.
Eugene Labs Pty Ltd.
Genda SA
Genome Medical Holding Co.
Genometrics
HCA Laboratories UK
Hemoshear Therapeutics Inc.
Horizon Health Fredericton
Horizon Pharma USA Inc.
Janssen Research & Development LLC
Kaiser Oakland Genetics
Kaiser Permanente - Sacramento Genetics
Kaiser Permanente Mid Atlantic States
Kaiser Permanente Northwest
Kaiser Permanente San Francisco Genetics
Kaiser Permanente San Jose Genetics
Kaiser Permanente Southern California
King Hussein Cancer Center
Kyowa Kirin Canada Inc.
Kyowa Kirin Inc.
Kyowa Kirin Pharmaceutical Development Ltd.
LabConnect LLC
Marinus Pharmaceuticals Inc.
MyoKardia Inc.
Nationwide Children's Hospital
Neurogene Inc
PellePharm Inc.
Pfizer Inc.
Pharming Healthcare Inc.
Prevail Therapeutics Inc.
PTC Therapeutics GT Inc.
Reata Pharmaceuticals Inc.
Regeneron Pharmaceuticals Inc.
Repare Therapeutics Inc.
Roche SMA Sponsored Testing
Sanofi-Aventis Australia Pty Ltd.
Spark Therapeutics Inc.
Stoke Therapeutics Inc.
Strongbridge US Inc.
Ultragenyx Pharmaceuticals Inc.
Verve Therapeutics Inc.
Virtus Diagnostics
Walter Reed National Military Center Bethesda
X4 Pharmaceuticals Inc.
Yaya Foundation for 4H Leukodystrophy, The
Zogenix International Ltd.

SCHEDULE 1(m)

Major Lease Counterparties

1400 16th Street LLC
449 Broadway LLC
Alton Tech ADA LLC
Amacon Westpark Investment Corp.
APB Owner LLC
ASB de Haro Place LLC
Aspira Women's Health Inc.
Centennial Owner LLC
Fiverr Inc.
Hohbach Realty Co. LP
Integrated DNA Technologies Inc.
Reef Flatiron LLC
RREEF America REIT II Corp.
Selig Holdings Co. LLC
W Projects (No. 36) Pty. Ltd.
Woodbridge Executive LLC

SCHEDULE 1(n)

Major Unsecured Creditors

449 Broadway LLC
ACCO Engineered Systems Inc.
AGF Management Ltd.
Agilent Technologies Inc.
Alton Tech ADA LLC
Amacon Westpark Investment Corp.
Amazon Web Services Inc.
APB Owner LLC
ASB de Haro Place LLC
Braidwell LP
Centennial Owner LLC
Chimtech Holding Ltd.
Connor Group
Context Capital Management LLC
DNA Genotek Inc.
EPAM Systems Inc.
Federal Express Corp.
Fisher Scientific Co. LLC
Fiverr Inc.
Flagship Facility Services Inc.
GBF Inc.
Genematters LLC
Hamilton Robotics
Hohbach Realty Co. LP
Illumina Inc.
Integrated DNA Technologies Inc.
Klick USA Inc.
Life Technologies Corp.
Natera Inc.
Omega Bio-Tek Inc.
Oracle America Inc.
Prosegur Services Group Inc.
Quantumsoft Inc.
Redox Inc.
Reef Flatiron LLC
Rightway Healthcare Inc.
Roche Diagnostics Corp.
RREEF America REIT II Corp. PPP
Salesforce.com Inc.
Selig Holdings Co. LLC
SoftBank Group Corp.
Streck LLC
Tecan Genomics Inc.
UnitedHealthcare
US Bank Trust Co. NA
Verinata Health Inc.
Watchmaker Genomics Inc.
Wilmington Savings Fund Society, Federal Savings Bank
Workday Inc.

SCHEDULE 1(o)

Major Vendors

1400 16th Street LLC
Agilent Technologies Inc.
Amazon Web Services Inc.
ASB de Haro Place LLC
Connor Group
Covaris Inc.
DNA Genotek Inc.
EPAM Systems Inc.
Eved LLC
Federal Express Corp.
Fisher Scientific Co. LLC
GBF Inc.
Genematters LLC
Illumina Inc.
Integrated DNA Technologies Inc.
JetBridge Software Inc.
Kaiser Permanente Inc.
Kintetsu World Express Inc.
Klick USA Inc.
Life Technologies Corp.
Omega Bio-Tek Inc.
Prosegur Services Group Inc.
Quantumsoft Inc.
Reef Flatiron LLC
Rightway Healthcare Inc.
Roche Diagnostics Corp.
SADA Systems Inc.
Salesforce.com Inc.
Stitch Owner LLC
Streck LLC
Target CW
Verinata Health Inc.
Woodruff-Sawyer & Co.
XiFin Inc

SCHEDULE 1(p)

Ordinary Course Professionals

Al Tamimi & Co. Advocates and Legal Consultants
Baker & McKenzie LLP
Baker Donelson Bearman Caldwell & Berkowitz PC
Blake Cassels & Graydon LLP
Bryan Cave Leighton Paisner LLP
Carpmaels & Ransford LLP
Coblentz Patch Duffy & Bass LLP
Cooley LLP
Ernst & Young LLP
Farnan LLP
Goldfarb Gross Seligman & Co.
Gordon Rees Scully Mansukhani LLP
Hanson Bridgett LLP
Heamanson Guzman & Wang
Hogan Lovells US LLP
Jensen Baird Gardner & Henry
Latham & Watkins LLP
Latvia Pty Ltd. Transactions
Law Office of Brad Simon
McCarter & English LLP
Mewburn Ellis LP
Morris Nichols Arsht & Tunnell LLP
Nixon Peabody LLP
Ogletree Deakins
Paul Weiss Rifkind Warton & Garrison LLP
Pillsbury Winthrop Shaw Pittman LLP
PricewaterhouseCoopers LLP
Sterne Kessler Goldstein & Fox PLLC
Ulmer & Berne LLP
Weil Gotshal & Manges LLP
WFBM LLP
Wolf Greenfield & Sacks PC
Womble Bond Dickinson
ZAB Ellex Klavins SIA
Zuckerman Spaeder LLP

SCHEDULE 1(q)

Parties to Litigation

Alvandi Law Group PC
Beverly Hills Trial Attorneys
Foley Hoag LLP
Goodwin Procter LLP
Groombridge Wu Baughman & Stone LLP
Law Offices of Claire Cochran, The
Levine & Blit LLP
Matern Law Group PC
McDermott Will & Emery LLP
Meridian Law PLLC
Morris Nichols Arsht & Tunnell LLP
Natera Inc.
Premier Diagnostics LLC
Qiagen Sciences LLC
Quinn Emanuel Urquhart & Sullivan LLP
Scott S. Nakama Ladva Law Firm
Skelton Taintor & Abbott
Tecan Genomics Inc.
[Confidential]

SCHEDULE 1(r)

Potential Sale Process Counterparties

[Confidential]

SCHEDULE 1(s)

Restructuring Professionals

ArentFox Schiff LLP
Cole Schotz PC
Deloitte & Touche LLP
Ernst & Young LLP
FTI Consulting Inc.
Hogan Lovells US LLP
Kurtzman Carson Consultants LLC
Lazard Frères & Co. LLC
Moelis & Co.
Morrison & Foerster LLP
Perella Weinberg Partners LP
PWP Holdings LP
Sullivan & Cromwell LLP
White & Case LLP
Wollmuth Maher & Deutsch LLP

SCHEDULE 1(t)

Taxing Authorities

Alabama, State of, Department of Revenue
Alameda, County of (CA), Treasurer & Tax Collector
Arizona, State of, Department of Revenue
Australia, Government of, Taxation Office
Belastingdienst/Apeldoorn
Belgium, Government of, Federal Public Service Finances
Boulder, County of (CO), Treasurer
Bowling Green, City of (KY), Treasury
Brazil, Government of, Ministry of Finance
California, State of, Department of Tax and Fee Administration
California, State of, Franchise Tax Board
Canada, Government of, Revenue Agency
Colorado, State of, Department of Revenue
Connecticut, State of, Department of Revenue Services
Delaware, State of, Division of Corporations
Florida, State of, Department of Revenue
Georgia, State of, Department of Revenue
Hawaii, State of, Department of Taxation
Idaho, State of, Tax Commission
Illinois, State of, Department of Revenue
India, Government of, Income Tax Department
Indiana, State of, Department of Revenue
Israel, Government of, Tax Authority
Japan, Government of, National Tax Agency
Jefferson, County of (IL),Treasurer
Kansas, State of, Department of Revenue
Kentucky, State of, Department of Revenue
King, County of (WA), Treasury
Latvia, Government of, State Revenue Service
Louisiana, State of, Department of Revenue
Maine, State of, Revenue Services
Maryland, State of, Department of Revenue
Massachusetts, Commonwealth of, Department of Revenue
Michigan, State of, Department of Treasury
Minnesota, State of, Department of Revenue
Mississippi, State of, Secretary of State
Missouri, State of, Department of Revenue
Nebraska, State of, Department of Revenue
New Hampshire, State of, Department of Revenue Administration
New Jersey, State of, Division of Taxation
New York, City of (NY), Department of Finance
New York, State of, Corporation Tax
North Carolina, State of, Department of Revenue
Ohio, State of, Department of Taxation
Orange, County of (CA), Treasurer & Tax Collector
Oregon, State of, Department of Revenue
Pennsylvania, Commonwealth of, Department of Revenue
Rhode Island, State of, Division of Taxation
San Diego, County of (CA), Treasurer & Tax Collector
San Francisco, City of (CA), Treasurer & Tax Collector
Santa Clara, County of (CA), Department of Tax & Collections
Singapore, Government of, Inland Revenue Authority
South Carolina, State of, Department of Revenue
Tennessee, State of, Department of Revenue
Utah, State of, Tax Commission
Virginia, Commonwealth of, Department of Taxation
Wake, County of (NC), Tax Administration
Washington, D.C., Office of Tax & Revenue
Washington, State of, Department of Revenue
Wisconsin, State of, Department of Revenue

SCHEDULE 1(u)

Utility Providers

AT&T Inc.
Cary, Town of (NC)
Cox Communications Inc.
Duke Energy Corp.
Irvine Ranch Water District (CA)
Pacific Gas & Electric Co.
Public Service Co. of North Carolina Inc.
San Francisco Public Utilities Commission
Southern California Edison Co.
Southern California Gas Co.
Verizon Business Network Services Inc.
Verizon Communications Inc.
Xcel Energy

SCHEDULE 2

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
ACE American Insurance Co. Chubb Custom Insurance Co. Chubb Insurance Co. of Canada Chubb National Insurance Co. Federal Insurance Co.	Chubb Bermuda Insurance Ltd.	Current
Aeglea BioTherapeutics Inc.	Aisling Capital LLC	Current
Amazon Web Services Inc.	Zoox Labs, Inc.	Current
ARK Investment Management LLC	ARK Investment Management LLC	Current
AT&T Inc.	AT&T Billing Southeast, LLC	Current
	AT&T Billing Southwest, LLC	Current
	AT&T Communications of Indiana, Inc.	Current
	AT&T Communications of Indiana, LLC	Current
	AT&T Communications of New York Inc.	Current
	AT&T Communications of Texas, LLC	Current
	AT&T Communications of Virginia, LLC	Current
	AT&T Comunicaciones Digitales, S. de R.L. de C.V.	Current
	AT&T Corp.	Current
	AT&T Datacomm Holdings, LLC	Current
	AT&T DataComm, L.P.	Current
	AT&T Global Communications Services Inc.	Current
	AT&T Inc.	Current
	AT&T Investment Fund IV, LLC	Current
	AT&T Investment Fund V, LLC	Current
	AT&T Investment Fund VI, LLC	Current
	AT&T Investment Operations I, LLC	Current
	AT&T Investment Operations II, LLC	Current
	AT&T Management Services, LLC	Current
	AT&T Mobility II LLC	Current
	AT&T Mobility LLC	Current

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
	AT&T MVPD Group Holdings, LLC	Current
	AT&T Network Supply, LLC	Current
	AT&T of Puerto Rico, Inc.	Current
	AT&T of the Virgin Islands, Inc.	Current
	AT&T Services, Inc.	Current
	AT&T Southeast Supply, LLC	Current
	AT&T Southwest Supply, LLC	Current
	AT&T Supply I, LLC	Current
	AT&T Technical Services Company, Inc.	Current
	AT&T Teleholdings, Inc.	Current
	AT&T West Supply, LLC	Current
	Be Sunshine, LLC	Current
	Illinois Bell Telephone Co. LLC	Current
BlackRock Institutional Trust Co. NA	BlackRock Investment Management (UK) Limited	Closed
	BlackRock TCP Capital Corp. Designated Underwriters Counsel	Closed
	BlackRock, Inc.	Current
	Mark B. Florian	Current
	Pam Chan	Current
Brain Neurotherapy Bio Inc.	Bayer AG	Closed
	Bayer Aktiengese	Closed
Bristol-Myers Squibb Co.	Bristol-Myers Squibb (China) Investment Co Ltd	Closed
MyoKardia Inc.	Bristol-Myers Squibb Company	Current
	MyoKardia Australia Pty Ltd.	Current
	MyoKardia Europe BV	Current
	MyoKardia Inc.	Current
Canada, Government of, Revenue Agency	Canada Pension Plan Investment Board	Current
Ascot Specialty Insurance Co.	CPP Investment Board	Current
	CPP Investment Board Europe SARL	Current
	CPPIB Asia Inc.	Current
	CPPIB Canada Inc.	Closed
	Public Sector Pension Investment Board	Current

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
Centro De Atencion e Investigacion en Salud Mental	Konstantina Diamantopoulos	Current
CenturyLink Communications LLC	Lumen Technologies, Inc.	Closed
Cole Schotz PC	Cole Schotz P.C.	Closed
Covaris Inc.	Matthew Holt	Current
	New Mountain Partners V LP	Current
	New Mountain Capital	Current
	New Mountain Guardian IV BDC LLC	Current
	New Mountain Guardian IV BDC SPV LLC	Current
	New Mountain Investments V LLC	Current
Decibel Therapeutics Inc. Regeneron Pharmaceuticals Inc.	Regeneron Pharmaceuticals Inc.	Current
Deerfield Management Co. LP	Deerfield Management Company	Current
	Julian Harris	Closed
Deloitte & Touche LLP	Deloitte Consulting LLP	Current
	Deloitte LLP	Current
	Deloitte Tax LLP	Current
	Deloitte USA LLP	Current
Fiverr Inc.	Fiverr International Ltd.	Former
FTI Consulting Inc.	FTI Consulting Inc.	Former
	John Howard Batchelor	Current
	Kenneth Fung	Current
Georgia, State of, Department of Revenue	State of Georgia	Current
Gulf States Hemophilia & Thrombophilia Center Gulf States Hemophilia Center Texas Health Houston Gulf States Hemophilia Center	University of Texas Law School Clinic	Current
Hanover Insurance Co., The	The Hanover Insurance Group Inc.	Closed
HSBC Bank USA HSBC Holdings plc	HSBC Holdings plc	Current
Ideagen plc	Hg Capital 7 LP	Current
	HgCapital LLP	Current
	HgCapital Mercury 2 LP	Former
	Hg Pooled Management Ltd.	Current

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
Illinois, State of, Department of Revenue	Office of the Governor, State of Illinois	Former
Illumina Inc.	Illumina, Inc.	Closed
Integrated DNA Technologies Inc.	Danaher Corp. Pall Corporation	Current Former
J. Wood Capital Advisors LLC	J. Wood Capital Advisors LLC	Closed
Janssen Research & Development LLC	Janssen Pharmaceuticals Inc. Janssen Research & Development LLC Johnson & Johnson Johnson & Johnson Consumer Inc. Johnson & Johnson Health Care Systems Inc.	Current Closed Current Current Current
Kane, County of (IL), Coroner's Office	Kane County Judicial Partners	Closed
Klick USA Inc.	Klick Brave Fund I Inc. Klick Inc. Klick USA Inc. Klick Ventures Inc.	Current Current Current Current
Kurtzman Carson Consultants LLC	KCC Buyer LLC KCC Intermediate LLC KCC Parent LLC KCC Topco LLC Kurtzman Carson Consultants LLC	Current Current Current Current Current
Latham & Watkins LLP	Robert J. Frances Robert T. Buday	Former Current
Lazard Frères & Co. LLC	Lazard, Freres & Co. The Edgewater Funds	Former Current
McDermott Will & Emery LLP	McDermott Will & Emery	Closed
MDVIP LLC	Charlesbank Capital Partners, LLC Charlesbank Credit Opportunities Fund II, Limited Partnership Charlesbank Credit Opportunities Fund III, Limited Partnership Charlesbank Equity Fund X GP, Limited Partnership Charlesbank Technology Opportunities Fund, Limited Partnership	Current Former Current Current Current

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
Minnesota, State of, Department of Revenue	Minnesota Department of Human Rights	Current
	Minnesota, State of, Office of the Attorney General	Current
Moelis & Co.	Moelis & Co.	Former
Old Republic Insurance Co.	National Union Fire Insurance Company of Pittsburgh, PA	Current
Oracle America Inc.	Oracle America Inc.	Closed
	Oracle Corporation	Current
Pacific Gas & Electric Co.	Pacific Gas and Electric Company	Former
Pacific Western Bank	Banc of California	Closed
Pennsylvania, Commonwealth of, Department of Revenue	Office of the General Counsel of Pennsylvania	Former
	Office of the Governor of Pennsylvania	Former
	Pennsylvania, Commonwealth of, Office of the Secretary of State	Former
People's United Bank NA	Wilmington Trust-London Limited	Closed
Perceptive Credit Holdings II LP	ARYA Sciences Acquisition Corp.	Closed
	ARYA Sciences Acquisition Corp. II	Closed
	ARYA Sciences Acquisition Corp. III	Closed
	ARYA Sciences Acquisition Corp. IV	Current
	Perceptive Advisors	Current
Perella Weinberg Partners LP	Perella Weinberg Partners LP	Current
PWP Holdings LP	Tudor, Pickering, Holt & Co.	Former
Pfizer Inc.	Hospira, Inc.	Closed
	Pfizer, Inc.	Current
Pharming Healthcare Inc.	Pharming Healthcare Inc.	Closed
Prevail Therapeutics Inc.	Eli Lilly & Company	Current
	Eli Lilly Export SA	Current
PricewaterhouseCoopers LLP	David Jonas	Current
	PricewaterhouseCoopers LLP	Current
	PricewaterhouseCoopers LLP Ontario	Closed
RREEF America REIT II Corp.	RREEF America LLC	Current
RREEF America REIT II Corp. PPP		
RSUI Indemnity Co.	Berkshire Hathaway Inc.	Current

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
	BHE Renewables LLC	Current
	BHER Power Resources Inc.	Current
	BNSF Railway	Current
	Brilliant National Services, Inc.	Current
	FlightSafety International Inc.	Closed
	HomeServices of America, Inc.	Current
	PPW Holdings LLC	Current
Sanofi-Aventis Australia Pty Ltd.	Sanofi	Current
Scripps Executive Health Medical Group Inc.	Gilad Jaffe	Current
Scripps Health Inc.	Scripps Summit Investments LLC	Current
Silicon Valley Bank SVB Financial Group	Leerink Partners LLC	Current
Singapore, Government of, Inland Revenue Authority	GIC Private Markets Private Limited	Current
	GIC Real Estate Inc.	Current
	GIC Ventures Pte. Ltd	Current
	Temasek Holdings (Pte.) Ltd.	Closed
Skelton Taintor & Abbott	First American Financial Corporation	Closed
SoftBank Group Corp.	Bingbai Hou	Former
	Mwashuma Kamata Nyatta	Former
	Open Opportunity Management LLC	Current
	SB Energy Global, LLC	Current
	SB Group US, Inc.	Current
	SB International, Inc.	Current
	SB Investment Advisers (UK) Limited	Current
	SB Investment Advisers (US) Inc.	Current
	SBLA Advisers Corp.	Closed
	SoftBank Vision Fund II-2 LP	Former
	SVF 2	Closed
	SVF Holdco (UK) Ltd.	Closed
	SVF Investment Corp.	Former
Streck LLC	Madison IAQ LLC	Current
	Madison Safety & Flow LLC	Closed
Trinity Cancer Care Center	Trinity Healthcare Solutions LLC	Current

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
UnitedHealthcare	UnitedHealth Group Inc, Board of Directors	Current
	UnitedHealth Group, Inc.	Current
	USHealth Group, Inc.	Current
U.S. Bancorp US Bank NA US Bank Trust Co. NA	MUFG Union Bank, N.A.	Current
Utah, State of, Tax Commission	Utah Solicitor General	Closed
Vanderbilt University Medical Center	Vanderbilt University	Closed
	Vanderbilt University Donors Group	Current
Vanguard Group Inc., The	The Vanguard Group	Former
Verizon Business Network Services Inc. Verizon Communications Inc.	Verizon Communications Inc.	Current
Virtus Diagnostics	BGH Capital Services Pty Ltd	Current
Weill Cornell Medical College	Cornell University	Current
XiFin Inc.	Avista Capital Partners Fund V LP	Closed
	Avista Capital Partners, L.P.	Current
	Xifin, Inc.	Closed
XL Specialty Insurance Co.	AXA European Infrastructure Fund SA	Current
	AXA Real Estate Investment Managers UK Ltd.	Current
	AXA REIM SGP	Current
	AXA REIM SGP on behalf of AXA Avenir Infrastructure	Current
Zuckerberg San Francisco General Hospital, Division of Cardiology	Lily S. Kornbluth	Current
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]

Name of Entity Searched	Name of Entity and/or Affiliate of Entity, that is a K&E Client	Status
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]
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[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]
[Confidential]	[Confidential]	[Confidential]

EXHIBIT C

Schrank Declaration

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Proposed Co-Counsel to the Debtors and Debtors in Possession

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)

DECLARATION OF ANA SCHRANK IN SUPPORT OF THE DEBTOR'S APPLICATION FOR THE ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND

[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.

& ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

I, Ana Schrank, Chief Financial Officer, of Invitae Corporation being duly sworn, state the following under penalty of perjury:

1. I am the Chief Financial Officer of Invitae Corporation located at 1400 16th Street, San Francisco, California 94103.

2. I submit this declaration (this "Declaration") in support of the *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP as Attorneys for the Debtors and Debtors in Possession Effective as of February 13, 2024* (the "Application").[2] Except as otherwise noted, I have personal knowledge of the matters set forth herein.

The Debtors' Selection of Counsel

3. The Debtors recognize that a comprehensive review process is necessary when selecting and managing chapter 11 counsel to ensure that bankruptcy professionals are subject to the same client-driven market forces, scrutiny, and accountability as professionals in non-bankruptcy engagements.

4. To that end, the review process utilized by the Debtors here assessed potential counsel based on their expertise in the relevant legal issues and in similar proceedings. Using this review process, the Debtors interviewed several firms to serve as potential bankruptcy counsel.

5. Ultimately, the Debtors retained Kirkland because of its extensive experience in corporate reorganizations, both out-of-court and under chapter 11 of the Bankruptcy Code. More specifically, Kirkland is familiar with the Debtors' business operations and many of the potential

[2] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Application.

legal issues that may arise in the context of these chapter 11 cases. I believe that Kirkland is both well qualified and uniquely able to represent the Debtor in these chapter 11 cases in an efficient and timely manner.

Rate Structure

6. In my capacity as Chief Financial Officer, I am responsible for supervising outside counsel retained by the Debtors in the ordinary course of business. Kirkland has informed the Debtors that its rates for bankruptcy representations are comparable to the rates Kirkland charges for non-bankruptcy representations. As discussed below, I am also responsible for reviewing the statements regularly submitted by Kirkland, and can confirm that the rates Kirkland charged the Debtors in the prepetition period are the same as the rates Kirkland will charge the Debtors in the postpetition period.

Cost Supervision

7. Pursuant to the Interim Cash Collateral Order[3] the Debtors must furnish budget and variance reports biweekly, which include detail regarding the fees and expenses incurred in these chapter 11 cases by professionals proposed to be retained by the Debtors. As a retained professional, Kirkland's fees and expenses will be included in those reporting requirements. Moreover, the Debtors and Kirkland recognize that in the course of a large chapter 11 case like these chapter 11 cases, it is possible that there may be a number of unforeseen fees and expenses that will need to be addressed by the Debtors and Kirkland. The Debtors further recognize that it is their responsibility to monitor closely the billing practices of their counsel to ensure the fees and

[3] "Interim Cash Collateral Order" means the *Interim Order Pursuant to Sections 105, 361, 362, 363, 503, and 507 of the Bankruptcy Code and Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* [Docket No. 47].

expenses paid by the estate remain consistent with the Debtors' expectations and the exigencies of the chapter 11 cases. The Debtors will continue to review the statements that Kirkland regularly submits.

8. As they did prepetition, the Debtors will continue to bring discipline, predictability, client involvement, and accountability to the counsel fees and expenses reimbursement process. While every chapter 11 case is unique, these budgets will provide guidance on the periods of time involved the level of the attorneys and professionals that will work on various matters, and projections of average hourly rates for the attorneys and professionals for various matters.

[*Remainder of Page Intentionally Left Blank*]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: March 13, 2024

Respectfully submitted,

/s/ Ana Schrank
Name: Ana Schrank
Title: Chief Financial Officer

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
Caption in Compliance with D.N.J. LBR 9004-1

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Proposed Co-Counsel to the Official Committee of Unsecured Creditors

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

[1] The last four digits of Debtor Invitae Corporation's ("**Invitae**," and with its subsidiary debtors, the "**Debtors**") 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.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' LIMITED OBJECTION TO DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND & ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

The Official Committee of Unsecured Creditors (the "**Committee**") appointed in these chapter 11 cases (the "**Cases**"), by and through its undersigned proposed counsel, hereby submits this limited objection (the "**Limited Objection**"), supported by the *Declaration of Ashley Chase in Support of the Official Committee of Unsecured Creditors' Limited Objection to Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLC as Attorneys for the Debtors and Debtors-in-Possession Effective as of February 13, 2024* (the "**Chase Declaration**" or "**Chase Decl.**") filed contemporaneously herewith, to *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors in Possession Effective as of February 13, 2024* [ECF No. 158] (the "**Retention Application**") filed by the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") and respectfully represent as follows:[2]

PRELIMINARY STATEMENT

1. As previously addressed with this Court, the validity of Invitae's 2023 Exchange, whereby one unsecured creditor - Deerfield Management Company L.P. ("**Deerfield**") - vaulted ahead of all other unsecured creditors of the Debtors for virtually no consideration, will likely be a central issue in these Cases. If successfully challenged, there could be hundreds of millions of dollars of additional recovery to unsecured creditors. From the perspective of all unsecured

[2] Capitalized terms used in this Limited Objection and not otherwise defined shall have the meaning ascribed to such term in the *Declaration of Ana Schrank, Chief Financial Officer of Invitae Corporation, In Support of Chapter 11 Filing, First Day Motions, and Access to Cash Collateral* [ECF No. 21] ("**First Day Declaration**").

creditors then, any evaluation, prosecution, or settlement of matters related to the 2023 Exchange should be transparent, comprehensive, and perhaps most important, performed by unconflicted, independent counsel and fiduciaries.

2. By the Retention Application, Kirkland & Ellis LLP and Kirkland & Ellis International LLP (together "**K&E**") seek Court authority to continue to simultaneously represent – to the exclusion of everyone else – five parties in that transaction and investigate three of its current clients. Specifically, K&E seeks to represent (1) the Debtors, including with respect to all matters related to the 2023 Exchange, (2) Jill Frizzley as an independent director, including with respect to her investigation of all matters related to the 2023 Exchange, (3) the Special Committee (the majority of whose members approved the 2023 Exchange) on all matters related to the 2023 Exchange, (4) the full Board of the Company on all matters related to the 2023 Exchange, ***and*** (5) Deerfield on [redacted] currently open matters.

3. As set forth below, K&E's proposed concurrent representation of all of these parties is not permitted under section 327(a) of the Bankruptcy Code. The Committee has therefore formally requested that K&E recuse itself from matters related to the 2023 Exchange (and any other matter in which the Debtors are materially adverse to Deerfield). To date, however K&E has insisted that it be able to stand on all sides of the transaction and represent everyone involved in connection with its investigation into the 2023 Exchange. The Committee disagrees and, to the extent that K&E refuses to restrict the scope of its representations, the Committee respectfully requests that this Court deny the Retention Application.

BACKGROUND

4. On February 13, 2024 (the "**Petition Date**"), each Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). The Debtors are operating their businesses and managing their property as debtors in possession

pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Cases.

5. On March 1, 2024, the United States Trustee appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code. The Committee consists of (i) Wilmington Savings Fund Society, Federal Savings Bank, (ii) Chimetech Holding Ltd, and (iii) Workday, Inc. Each of the Committee members supports this Limited Objection.

A. The 2023 Exchange

6. In February 2023, Invitae Corporation ("**Invitae**" or the "**Company**") prepaid its $135 million secured term loan (the "**2020 Term Loan**"), including a $8.1 million prepayment fee and $2.6 million of outstanding interest (the "**Term Loan Prepayment**"). *See* Invitae Corp., Quarterly Report (Form 10-Q) (May 9, 2023) at 16–17.[3] On the same day the 2020 Term Loan was extinguished, Invitae (a) exchanged $305.7 million of 2024 Convertible Senior Unsecured Notes for $275.3 million of new secured Series A Notes and 14,219,859 shares of Invitae's common stock, and (b) issued $30 million of new secured Series B Notes (together with the Series A Notes, the "**Secured Notes**") for $30 million in cash (the "**February 2023 Notes Exchange**" and together with the Term Loan Repayment, the "**February 2023 Transaction**"). First Day Decl. ¶ 65.[4] Before the February 2023 Transaction, the fair market value of the $305.7 million principal amount of the 2024 Convertible Unsecured Notes that were exchanged was $261 million. *See* Invitae Corp., Quarterly Report (Form 10-K) (Feb. 28, 2023) at 99.

7. All told, through the February 2023 Transaction, Invitae made a net cash payment of approximately $115.7 million (not including approximately $20 million in advisor fees incurred

[3] A description of the circumstances surrounding repayment of the Debtors' 2020 Term Loan is notably absent from Ms. Schrank's First Day Declaration.

[4] The February 2023 Notes Exchange closed in March 2023. *See* First Day Decl. ¶ 65.

in the transaction) and more than doubled its outstanding secured debt. *See* Invitae Corp., Quarterly Report (Form 10-Q) (May 9, 2023) at 5, 16-17, 20.

8. In August 2023, Deerfield entered into an additional exchange agreement with Invitae for Deerfield's remaining 2024 Convertible Senior Unsecured Notes, whereby Invitae exchanged $17.2 million of 2024 Convertible Senior Unsecured Notes for $0.1 million principal amount of secured Series A Notes and approximately 15 million shares of Invitae common stock (the "**August 2023 Notes Exchange**," and together with the February 2023 Transaction, the "**2023 Exchange**"). First Day Decl. ¶ 66.

9. The terms of the 2023 Exchange were determined and approved by [redacted] *See* Chase Decl. Ex. 1, at INVITAE_ 00000738, INVITAE_00000740; *id.* at Ex. 2, at INVITAE_00000751. The 2023 Exchange was approved by the full Board, which included Dr. Scott, Dr. Aguiar, Ms. Gorjanc, Geoffrey S. Crouse, Kenneth D. Knight, Kimber D. Lockhart, Chitra Nayak, and William H. Osborne. *See* Invitae Corp., Current Report (Form 8-K) (Mar. 1, 2023) Ex. 10.1, at 22 (noting that the Board approved the February 2023 Exchange through a unanimous written consent); Invitae Corp., Annual Report (Form 10-K) (filed Feb. 28, 2023) at 120 (listing Invitae's directors); Invitae Corp., Current Report (Form 8-K) (Aug. 22, 2023). Thomas Brida was Invitae's General Counsel during the 2023 Exchanges and remains in that position today. *See, e.g.*, Invitae Corp., Definitive Proxy Statement (Schedule 14A) (Apr. 19, 2023) at 20 (disclosing that Mr. Brida has served as the Company's General Counsel since January 2017). Latham & Watkins LLP and Pillsbury Winthrop Shaw Pittman LLP served as outside counsel to Invitae in connection with the 2023 Exchange. *See* Invitae Corp., Current Report (Form 8-K) (Feb. 28, 2023), Ex. 10.1, at 34; Invitae

Corp., Current Report (Form 8-K) (Aug. 22, 2023), Ex. 10.1, at 3. Perella Weinberg Partners L.P. was a financial advisor to Invitae in connection with at least the February 2023 Notes Exchange.[5] *See* Press Release, *Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance* (Feb. 28, 2023).[6]

10. The issue presented by the 2023 Exchange is simple: in the absence of that exchange, all of the value of the Debtors' business would be shared *pari passu* by the Debtors' unsecured creditors holding more than $1.5 billion in pre-petition claims. Pursuant to the 2023 Exchange, Deerfield obtained the right, at a time when the Debtors were likely insolvent, to recover from the first $305.4 million in exchange for providing the Debtors and the advisors that arranged the transaction $30 million, while at the same reducing and restricting any restructuring runway. Though the Committee is still investigating these transactions, as this Court recognized, the 2023 Exchange raises "significant issues." Mar. 15, 2024 Hr'g Tr. at 27:9.

B. K&E's Conflicting Representations

11. Deerfield, the main beneficiary of the 2023 Exchange, is a current client of K&E in matters unrelated to these cases and has been a K&E client since [redacted]. Retention App. Ex. B ¶ 37; Chase Decl. Ex. 5, at 3.

12. Invitae did not become a K&E client until September 22, 2023, only one month after the 2023 Exchange closed (and five months prior to the Petition Date). On that date, Mr. Brida, on behalf of Invitae, executed an engagement letter (the "**Engagement Letter**") with K&E. The defined scope of the engagement was to represent Invitae and certain of its subsidiaries in

[5] Perella Weinberg Partners L.P. now represents Deerfield in connection with both the Transaction Support Agreement, entered into immediately prior to these Cases, and these Cases.

[6] Available at https://ir.invitae.com/news-and-events/press-releases/press-release-details/2023/Invitae-Announces-Convertible-Notes-and-Share-Exchange-and-New-Convertible-Notes-Issuance/default.aspx.

connection with "liability management and/or a potential restructuring." Retention App. at 23.[7] The Engagement Letter includes a broad clause titled "Conflicts of Interest," wherein Mr. Brida, on behalf of Invitae, agreed, *inter alia*, that:

> In the event a present conflict of interest exists between [Invitae] and [K&E's] other clients or in the event one arises in the future, [Invitae] agrees to waive any such conflict of interest or other objection that preclude [K&E's] representation of another client (a) in other current or future matters substantially unrelated to the Engagement or (b) other than during a Restructuring Case … , in other matters related to [Invitae] (such representation an "Allowed Adverse Representation")

(the "**General Waiver**"). Chase Decl. Ex. 6, at 5.

13. The Engagement Letter, however, does not identify Deerfield or any other clients of K&E that might be adverse to Invitae. Nor does the Retention Application describe any of the circumstances surrounding any negotiation of the Engagement Letter, such as any disclosures then made by K&E regarding their ongoing representations of Deerfield, the existence of potential conflicts related to the 2023 Exchange, or other matters which would be relevant to an informed consent by Mr. Brida and Invitae to waive any such conflict.

14. Since being retained by Invitae, K&E has continued to represent Deerfield in [redacted] separate matters unrelated to these Cases. Chase Decl. Ex. 5, at 2.[8] [redacted] *Id.* at 3. The Retention Application does not indicate that any K&E attorneys have been screened regarding the Deerfield representations.

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[7] For the Court's convenience, a copy of the Engagement Letter is also attached as **Exhibit 6** to the Chase Declaration.

[8] Like the Debtors, [redacted] *Id.* The Retention Application likewise does not describe any of the circumstances surrounding the negotiation of the Deerfield Engagement Letter, such as disclosures by K&E regarding potential future conflicts of interest, which would demonstrate that support that Deerfield provided informed consent for K&E to investigate it and bring litigation against it.

C. The Current Conflict Regarding the 2023 Exchange

15. On September 23, 2023, one day after retaining K&E, the Company initiated a series of corporate governance transactions to establish an "investigation" that cannot properly be described as being done "by the book."

16. *First*, also on September 23, 2023, Invitae formed a special committee of its Board (the "**Special Committee**") for the purported purpose of "evaluat[ing] strategic alternatives." First Day Decl. ¶ 8. The Special Committee was initially composed of Dr. Scott, Mr. Osborne, Ms. Gorjanc, and Dr. Aguiar each of whom (as discussed above) approved the 2023 Exchange. First Day Decl. ¶ 69. Moreover, as discussed above, Dr. Scott, Ms. Gorjanc, and Dr. Aguiar were also [redacted] Chase Decl. Ex. 1, at INVITAE_00000738, INVITAE_00000746.

17. *Second*, at some point between its initial appointment and October 18, 2023, the Special Committee's mandate expanded to investigate whether [redacted] *Id.* Ex. 7, at INVITAE_00000037.

18. *Third*, on October 18, 2023, [redacted] (the "**Investigation**"). Chase Decl. Ex. 8, at INVITAE_00000015 – INVITAE_00000016.

19. *Fourth*, on October 23, 2023, the full Board officially appointed Ms. Frizzley as an "advisor." First Day Decl. ¶ 70.

20. *Fifth*, on December 7, 2023, now two months after the 2023 Exchange concluded and two months prior to the Petition Date, Ms. Frizzley was appointed as a "disinterested director" to the Board and a member of the Special Committee. First Day Decl. ¶¶ 8, 69 n.5. That role is not new to Ms. Frizzley – she has been appointed as a director or an independent director of nine (9) companies in which K&E was debtor's counsel in the last four years. *See In re Envision Healthcare Corp.*, Case No. 23-90342 (CML) (Bankr. S.D. Tex. May 15, 2023); *In re Avaya Inc.*, Case No. 23-90088 (DRJ) (Bankr. S.D. Tex. Feb. 14, 2023); *In re BlockFi Inc.*, Case No. 22-19361 (MBK) (Bankr. D.N.J. Nov. 28, 2022); *In re Voyager Digit. Ltd.*, Case No. 22-10944 (MEW) (Bankr. S.D.N.Y. July 5, 2022); *In re Carlson Travel, Inc.*, Case No. 21-90017 (MI) (Bankr. S.D. Tex. Nov. 11, 2021); *In re iQor Holdings Inc.*, Case No. 20-34500 (DRJ) (Bankr. S.D. Tex. Sept. 10, 2020); *In re Town Sports Int'l, LLC*, Case No. 20-12168 (CSS) (Bankr. D. Del. Sept. 14, 2020); *In re Intelsat S.A.*, Case No. 20-32299 (KLP) (Bankr. E.D. Va. May 14, 2020); and *In re Dura Auto. Sys., LLC*, Case No. 19-06741 (RSM) (Bankr. M.D. Tenn. Oct. 17, 2019).

21. *Sixth*, according to the First Day Declaration, Ms. Frizzley, in "her capacity as independent director," then commenced the Investigation into the Debtors' possible claims and causes of action arising from the 2023 Exchange, including [redacted]. First Day Decl. ¶ 70; Chase Decl. Ex. 3, at 26 (Debtors' Resp. to Interrog. No. 10). To be clear, while Ms. Frizzley was still an advisor to the Special Committee, [redacted][9] Chase Decl. Ex. 8, at INVITAE_00000015 – INVITAE_00000016; *id.* Ex. 3, at 27 (Debtors' Resp. to Interrog. No. 6). Throughout the Investigation, the Company has had only one outside counsel—K&E—and one outside financial advisor—FTI, both of whom were hired by conflicted management. In other words, in performing

[9] Irrespective of whether K&E conducted its investigation at Ms. Frizzley's direction or at the direction of the Special Committee, K&E [redacted] Chase Decl. Ex. 5, at 1.

her "independent" Investigation of the 2023 Exchange, the Special Committee, the Board, and Ms. Frizzley has relied solely on K&E for legal advice, even though K&E has also simultaneously represented (1) the Company, (2) the Special Committee whose members determined the terms of and approved the 2023 Exchange, (3) the full Board that approved the 2023 Exchange, and (4) Deerfield, the creditor which was the primary beneficiary of the 2023 Exchange.

22. *Seventh*, attorneys from K&E [redacted]—six weeks after Ms. Frizzley was retained as an advisor and one month after she was appointed as an independent director.[10] Chase Decl. Ex. 3, at 27 (Debtors' Resp. to Interrog. No. 9).

23. *Finally*, on February 13, 2024, the Debtors entered into a Transaction Support Agreement (the "**TSA**") with Deerfield that provides broad estate releases to certain holders of the Secured Notes that executed the TSA. First Day Decl., Ex. B, Annex 1. The version of the TSA that was attached to the First Day Declaration does not include the signature pages for the Consenting Stakeholders (as defined in the TSA), but upon information and belief, Deerfield led the negotiations and has executed the TSA. These releases were later embedded in the Debtors' cash collateral order. *See Final Order Pursuant to Sections 105, 361, 362, 363, 503, and 507 of the Bankruptcy Code and Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; and (IV) Granting Related Relief* [Docket No. 188] ("**Cash Collateral Order**") ¶¶ E, 16, 19.

[10] The Debtors have claimed much of the presentation made to the full Board regarding the Investigation is privileged. The Committee reserves all rights to challenge that privilege claim.

D. The Retention Application

24. On March 13, 2024, the Debtors filed the Retention Application, and Spencer A. Winters of K&E submitted a declaration in support thereof (the "**Winters Declaration**"). In the Winters Declaration, K&E disclosed that it currently represents, and in the past has represented, Deerfield on a variety of matters "unrelated to the Debtors or these chapter 11 cases." Winters Decl. ¶¶ 37–38. Mr. Winters also indicates that K&E will "not commence a cause of action in these chapter 11 cases against the entities listed on Schedule 2 that are current clients of Kirkland," which includes Deerfield, "unless Kirkland has an applicable waiver on file or first receives a waiver from such entity allowing Kirkland to commence such an action." *Id*. ¶ 25. [redacted] Chase Decl. Ex. 5, at 3.

25. On April 4, 2024, counsel to the Committee discussed the Retention Application with K&E and raised its concerns about the ability of K&E to continue its current representations of all the material participants in the 2023 Exchange. During that call, counsel specifically requested that K&E recuse itself from all matters in which the Debtors are adverse to Deerfield in these Cases. K&E refused.

ARGUMENT

I. K&E HAS AN ACTUAL CONFLICT OF INTEREST AND IS MATERIALLY ADVERSE INTEREST TO THE ESTATE

26. Section 327(a) of the Bankruptcy Code authorizes a debtor in possession, with court approval, to employ professionals only if they (1) "do not hold or represent an interest adverse to the estate" and are (2) "disinterested persons." 11 U.S.C. § 327(a); *In re BH & P, Inc.*, 949 F.2d 1300, 1314 (3d Cir. 1991). Section 101(14)(C) of the Bankruptcy Code defines disinterested persons as those who, *inter alia*, do not "have an interest materially adverse to the interest of the

estate or of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C). While the "adverse interest" and "disinterested person" prongs are distinct, courts often collapse them into a single test of disinterestedness. *See also In re BH & P, Inc.*, 949 F.2d at 1314. ("There is, indisputably, some overlap between the [section] 327(a) standard and [section] 101(14)[C] disinterest requirement."); 1 COLLIER ON BANKR. ¶ 8.03[9] (noting that "[t]hese two tests invoke the same consideration of whether the professional holds or represents an adverse interest to the interests of the debtor and its estate").

27. In determining whether a professional is disinterested and may be retained under section 327(a), the relevant inquiry is "whether a possible conflict implicates the economic interests of the estate and might lessen its value." *U.S. Trustee v. First Jersey Sec., Inc. (In re First Jersey Sec., Inc.)*, 180 F.3d 504, 509 (3d Cir. 1999) ("A [c]ourt may consider an interest adverse to the estate when counsel has 'a competing economic interest tending to diminish estate values or to create a potential or actual dispute in which the estate is a rival claimant.'") (citation omitted). The Third Circuit has held that:

> (1) Section 327(a), as well as § 327(c), imposes a per se disqualification as trustee's counsel of any attorney who has an actual conflict of interest; (2) the district court may within its discretion – pursuant to § 327(a) and consistent with § 327(c) – disqualify an attorney who has a potential conflict of interest and (3) the district court may not disqualify an attorney on the appearance of conflict alone.

Staiano v. Pillowtex, Inc. (In re Pillowtex, Inc.), 304 F.3d 246, 251 (3d Cir. 2002) (quoting *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998)).

28. A conflict is actual and "per se disqualifying, if it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest." *In re Pillowtex, Inc.*, 304 F.3d at 251; *In re BH & P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J. 1989), *aff'd*, 949 F.2d at 1300 (holding that a conflict of interest is "actual" if there is "active

competition between two interests, in which one interest can only be served at the expense of the other").

29. Here, K&E's representation of the Debtors in respect of any matters related to the 2023 Exchange is an actual conflict of interest for two independent reasons. *First*, K&E already represents the Special Committee, which consists of board members who participated in the 2023 Exchange. It has also advised the Special Committee on its review of the potential causes of action stemming therefrom.[11] Certain of the potential claims related to the 2023 Exchange, if viable, would require a determination that the Debtors intentionally or constructively improperly transferred value and that such actions should be unwound. *See* N.Y. Debt. & Cred. Law § 273 (McKinney); N.J. Stat. Ann. § 25:2-25, 26, 27 (West); Cal. Civ. Code § 3439.04 (West); Del. Code Ann. tit. 6, §§ 1304, 1305 (West); 11 U.S.C. §§ 544, 548. The Debtors and the Board that approved the 2023 Exchange would of course prefer that not to be the case and their prior decisions be blessed. K&E cannot advise on whether such claims are viable while simultaneously representing the Debtors in light of this clear conflict.

30. *Second*, K&E is currently representing Deerfield, which is plainly in conflict with the Debtors' estates with respect to the 2023 Exchange. Indeed, given the lack of any meaningful, appropriate corporate governance efforts, it is unsurprising that K&E and the Debtors have concluded that the causes of action subject to the investigation are not worth pursuing. *See Debtors' Reply to Objection to the Official Committee of Unsecured Creditors to Final Approval*

[11] Though not the subject of this Limited Objection, the Committee notes that the Special Committee was itself conflicted. Three of four current members of the Special Committee—a super-majority—are board members who approved the 2023 Exchange. Chase Decl. Ex. 3, at 25 (Debtors' Resp. to Interrog. No. 3); First Day Decl. ¶ 69 n.5. These board members had a clear incentive not to find claims against Deerfield arising from the 2023 Exchange, as such claims would likely implicate them as well. Additionally, according to the Debtors, the Special Committee was charged with investigating [redacted] Chase Decl. Ex. 3, at 27 (Debtors' Resp. to Interrog. No. 10).

of Debtors' Cash Collateral Motion [Docket No. 161] ¶ 4 ("In fact, in the months leading up to the filing of these cases, the Special Committee of the Debtors' board conducted a thorough investigation into these transactions and concluded that they were permitted by the underlying indenture and consistent with the Debtors' fiduciary duties."); Cash Collateral Order ¶¶ 16, 19 (releasing claims against Deerfield, but preserving a period for the Committee to challenge and seek standing).

31. The fact that K&E currently represents Deerfield only in matters unrelated to these Cases does not save it from its actual conflict of interest. *See, e.g.*, *In re Project Orange Assocs., LLC*, 431 B.R. 363, 379 (Bankr. S.D.N.Y. 2010) (denying debtor's proposed counsel's retention application where counsel also represented, on unrelated matters, the debtor's biggest unsecured creditor and essential supplier). In determining whether such concurrent representation rises to an actual conflict of interest, courts focus on whether there is a current or even envisioned litigation between the debtor and counsel's non-debtor client. *See, e.g.*, *id.* at 369 (finding a disqualifying conflict where it was possible that the debtor and its proposed counsel's non-debtor client could be engaged in future litigation and a conflict waiver counsel had obtained prohibited it from bringing or threatening any litigation against that non-debtor client or its affiliates); *In re Git-N-Go, Inc.*, 321 B.R. 54, 61 (Bankr. N.D. Okla. 2004) (finding an actual conflict where the debtor's proposed counsel was "unable or unwilling to represent the [d]ebtor in its dispute" with counsel's other client, even though counsel represented that client in matters unrelated to the debtor's case). Prior to the Petition Date, K&E has investigated Deerfield and determined not to pursue any claims for the estates, has opposed the Committee's request for automatic standing to pursue claims against Deerfield and has proposed a term sheet for a plan which effectuates a release of estate claims against Deerfield. A disinterested counsel may come to a different conclusion and institute

litigation. This actual conflict is disqualifying. *See In re Leslie Fay Cos., Inc.*, 175 B.R. 525, 535 (Bankr. S.D.N.Y. 1994) (holding that a law firm had an adverse interest where conflicted attorneys were determining whether the debtors had claims against the debtors' outside directors, who were also the firm's clients).

32. *Leslie Fay* is instructive here. In that case, the Bankruptcy Court sanctioned Weil, Gotshal & Manges LLP ("**Weil**") for failure to disclose certain conflicts and disqualified Weil from further work for the debtors that required Weil to take adverse positions to its existing clients. *Id.* at 539. In reaching this result, the bankruptcy court found that Weil could not both represent the debtors and lead an investigation into claims against the debtors' board. *Id.* at 534, 538 ("Because Weil Gotshal was requesting retention not only as Leslie Fay's general bankruptcy counsel but also to complete an investigation into a fraud which may have reached into senior management or even the board of directors, it was especially important that the court ensure that counsel was completely disinterested."). The *Leslie Fay* court noted that, even if Weil had an honest belief in the likely immunity of the outside directors, "'such a determination must be made by the counsel who is in a position to make an independent judgment.'" *Id.* at 535 (quoting *In re Bohack,* 607 F.2d 258, 263 (2d Cir. 1979)). Moreover, the court found that Weil could not represent the debtor in an investigation into an existing client, regardless of the amount of firm business that that client represented. *Id.* ("The short answer to this is that Weil Gotshal should be presumed to be loyal to its client. That the client may not be a major client is no reason to think that Weil Gotshal would ignore the relationship."). In other words, the "incentive to discount any possible liability so as to preserve its substantial client relationships with the firms of which the directors were principals" created an adverse interest. *Id.*; *see also In re Granite Partners, L.P.*, 219 B.R. 22, 37 (Bankr. S.D.N.Y. 1998) ("Consistent with *Bohack* and section 327(a), a lawyer

cannot represent a trustee for the purpose of investigating the alleged wrongdoing of another, valuable client.").[12]

33. The rulings in *Leslie Fay* apply equally here. K&E's actual conflict with respect to its current clients prohibits the firm from assessing, advising on, bringing claims, or releasing against Deerfield and the Invitae Board. *See In re Relativity Media, LLC*, No. 18-11358, 2018 Bankr. LEXIS 2037, at *13 (Bankr. S.D.N.Y 2018) ("[A] lawyer is not permitted to sue a current client, even if the litigation against a client is on matters that are unrelated to the other work that the lawyer is doing for that client."). K&E concedes as much, as it states in the Retention Application that it will not pursue claims against an existing client for matters relating to Invitae. *Winters Decl*. at ¶ 25. If K&E by its own admission, cannot sue an existing client, then neither should it be investigating those potential claims or advising the Board or the Special Committee on determining whether those claims should be pursued. Further, K&E's inherent bias and unwillingness to bring claims against Deerfield effects its ability to render impartial advice. *See Project Orange*, 431 B.R. at 375 ("[T]he Court does not believe that [counsel] can negotiate with full efficacy without at least being able to hint at the possibility of litigation."); *see also In re Amdura Corp.*, 121 B.R. 862, 867 (Bankr. D. Colo. 1990) ("How can counsel fairly and fully advise the [d]ebtors in negotiating with [counsel's client and the debtors' secured creditor] and in drafting a plan if they are unable, or at least unwilling, to espouse positions detrimental to the interests of the [creditor]?").

[12] Courts outside of bankruptcy have likewise viewed a special committee's legal representation by the same counsel as its company as a factor showing lack of fairness. *See, e.g.*, *In re Tele-Comms., Inc. S'holders Litig.*, No. 16470, 2005 Del. Ch. LEXIS 206, at *41 (Del. Ch. Sept. 29, 2005) ("Rather than retain separate legal and financial advisors, the [s]pecial [c]ommittee chose to use the legal and financial advisors already advising [the company appointing the special committee]. This alone raises questions regarding the quality and independence of the counsel and advice received.").

II. K&E'S ACTUAL CONFLICT OF INTEREST CANNOT BE WAIVED

34. To address an argument that may be raised by K&E in reply, blanket, advance pre-petition conflict waivers do not provide a way around the "disinterestedness" standard of section 327(a). *See In re Congoleum Corp.*, 426 F.3d 675, 692 (3d Cir. 2005) (citing *In re Granite Partners L.P.*, 219 B.R. at 34) (holding that for purposes of the disinterestedness standard under section 327(a), waivers are "ordinarily not effective"); *Project Orange*, 431 B.R. at 374 ("Even if GE agreed that DLA Piper could act against GE on all issues, through litigation, negotiation or otherwise, DLA Piper must still satisfy the statutory requirements of section 327(a) to be retained as general bankruptcy counsel."); *Git-N-Go*, 321 B.R. at 60 ("[T]he written conflict waivers, while necessary in order to satisfy the rules of professional conduct, do not aid the cause of eliminating the adversity of interests between Hale–Halsell and the estate."); *see also* 3 COLLIER ON BANKR. ¶ 328.05[2] ("The requirement that a professional be 'disinterested' cannot be waived or circumvented by agreement or consent among creditors and the debtor.").

35. Regardless of what might happen with an advance waiver outside of Chapter 11, bankruptcy retention standards are more stringent than general retention standards because, upon commencement of a chapter 11 case, debtor's counsel represents a fiduciary that owes duties to parties who did not grant the counsel a waiver. *See, e.g.*, *In re Jeep Eagle 17, Inc.*, No. 09-23708 (DHS), 2009 Bankr. LEXIS 3614, at *14 (Bankr. D.N.J. July 13, 2009) ("Consent by a Chapter 11 debtor to waive conflicts is insufficient because the ultimate parties in interest are the bankruptcy estate's creditors."); *In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1018 (Bankr. N.D. Ill. 1993) ("Multiple representations which may be tolerable in a commercial setting after full disclosure are not permissible in the bankruptcy setting. Upon the commencement of a chapter 11 proceeding, a debtor . . . assumes fiduciary duties and obligations to all parties in interest without fear or favor."); *In re Am. Printers & Lithographers, Inc.*, 148 B.R. 862, 867 (Bankr. N.D. Ill.

1992) ("A firm that is not disinterested may not represent a debtor even if that debtor has consented to such representation and waived the conflict.").

36. Even if waivers were relevant to whether a professional is disinterested, the advance waivers here are not effective because waivers must be informed and explicit. The New Jersey Rules of Professional Conduct[13] prohibit concurrent conflicts of interest when "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." N.J. Court Rules, RPC 1.7. A conflict of interest may be waived if "each affected client gives informed consent, confirmed in writing, ***after full disclosure and consultation***." *Id*. (emphasis added).

37. For there to be "informed consent," the specific conflict must be disclosed and the attorney "must explain the risks of the proposed representation to the client." *Celgene Corp. v. KV Pharm. Co.*, No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *20-21, *28 (D.N.J. Jul. 28, 2008) (holding that the client's waiver was not informed because the engagement letter lacked: "1) any statements which adequately communicate a proposed course of conduct with regard to concurrent conflicts of interest; 2) any explanation of the material risks of the course of conduct with regard to concurrent conflicts of interest; or 3) any explanation of reasonably available alternatives to the proposed course of conduct");[14] *see also In re Congoleum Corp.*, 426 F.3d at 691 ("Given the

[13] Attorney conduct is governed by the ethical standards of the court before which the attorney appears. *In re Valsartan N-Nitrosodimethylamine (NDMA), Losartan, & Irbesartan Prods. Liab. Litig.*, No. 19-2875, 2020 WL 955059, at *2 (D.N.J. Feb. 27, 2020). "Normally, the United States District Court must first look to the New Jersey Rules of Professional Conduct . . . to see if they govern the issue [of disqualifying an attorney for being adverse]." *Cordy v. Sherwin-Williams Co*, 156 F.R.D. 575, 583 (D.N.J. 1994). The rules of professional conduct with respect to conflict waivers in New Jersey and Illinois (the law governing the Engagement Letter) are substantially similar. *See* Chase Decl. Ex. 6, at 8.

[14] The waiver at issue in *Celgene* was similar to the advance waiver by the Debtors. Like in *Celgene*, the Debtors here purported to generally "waive[s] any [present or future] conflict of interest or other objection that would

complexities of the bankruptcy proceeding and the 'many hats' worn by Gilbert throughout the pre- and post-petition process, we cannot conclude that the purported waivers Gilbert received from [its co-counsel] on behalf of the individual clients constituted informed, prospective consent." (citing *In re Lanza*, 322 A.2d 445, 447 (N.J. 1974)) (concluding that attorney "should have first explained . . . all the facts and indicated in specific detail all of the areas of potential conflict that foreseeably might arise")).

38. The language in the relevant engagement agreement is the primary source for determining whether or not a particular client's consent is informed. *See Mylan, Inc. v. Kirkland & Ellis LLP*, No. 15-581, 2015 U.S. Dist. LEXIS 194338, at *45 (W.D. Pa. June 9, 2015). Once a conflict regarding a concurrent representation has been identified, the burden is on the law firm to demonstrate it has an effective waiver. *Celgene*, 2008 U.S. Dist. LEXIS 58735, at **16-17. Courts have found that even if the party executing the engagement letter was a sophisticated counsel who was attuned and informed about conflicts of interest, a general unspecific waiver does not suffice. *Id*. at *34.

39. Here, the Retention Application provides no disclosures as to any of the circumstances surrounding the execution of the Engagement Letter, including whether K&E ever advised Invitae that Deerfield was an existing client while it was conducting its "Investigation." Further, the documentary record makes clear that K&E did not obtain a specific written waiver from the Debtors [redacted] prior to advising the Special Committee on its Investigation, and thus did not cure the conflict of interest between the two entities. N.J. Court Rules, RPC 1.7(b)(1).

preclude the Firm's representation of another client (a) in other current or future matters substantially unrelated to the Engagement or (b) other than during a Restructuring Case . . ., in other matters related to Client." Chase Decl. Ex. 6, at 5. The *Celgene* court found similar language regarding "substantially unrelated" matters too vague and the waiver at issue not effective to waive a future conflict. *See Celgene*, 2008 U.S. Dist. LEXIS 58735, at *22-23.

In sum, there is no evidentiary basis upon which this Court can find an informed waiver to permit K&E to act as section 327(a) counsel in matters related to the 2023 Exchange.

CONCLUSION

40. As noted above, the Committee attempted to get K&E to do the right thing and restrict its current cornucopia of representations. It has, to date, refused. Thus, the Committee respectfully requests that the Court (i) require as a condition for K&E's engagement as the Debtors' counsel under section 327(a) that it be precluded from representing the Debtors in any matters (a) related to the 2023 Exchange, including but not limited to any estate claims or causes of action related thereto and (b) in which the Debtors are otherwise adverse to Deerfield and (ii) grant such other and further relief as the Court deems just and proper.

RESERVATION OF RIGHTS

41. This Limited Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights, claims, defenses, and remedies, including the right to amend, modify, or supplement this Limited Objection, to raise additional objections, serve and take discovery in advance of any hearing on the Retention Application, and to introduce evidence at any hearing related to the Retention Application and this Limited Objection, and without in any way limiting any other rights of the Committee to further object to the Retention Application, retention of any other professional in these Cases, or any applications for allowance of fees and expenses or to seek disqualification of any professional retained in these Cases, on any grounds, as may be appropriate.

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Dated: April 5, 2024

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

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Proposed Co-Counsel to the Official Committee of Unsecured Creditors

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

[1] The last four digits of Debtor Invitae Corporation's ("**Invitae**," and with its subsidiary debtors, the "**Debtors**") 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.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' LIMITED OBJECTION TO DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND & ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

The Official Committee of Unsecured Creditors (the "**Committee**") appointed in these chapter 11 cases (the "**Cases**"), by and through its undersigned proposed counsel, hereby submits this limited objection (the "**Limited Objection**"), supported by the *Declaration of Ashley Chase in Support of the Official Committee of Unsecured Creditors' Limited Objection to Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLC as Attorneys for the Debtors and Debtors-in-Possession Effective as of February 13, 2024* (the "**Chase Declaration**" or "**Chase Decl.**") filed contemporaneously herewith, to *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors in Possession Effective as of February 13, 2024* [ECF No. 158] (the "**Retention Application**") filed by the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") and respectfully represent as follows:[2]

PRELIMINARY STATEMENT

1. As previously addressed with this Court, the validity of Invitae's 2023 Exchange, whereby one unsecured creditor - Deerfield Management Company L.P. ("**Deerfield**") - vaulted ahead of all other unsecured creditors of the Debtors for virtually no consideration, will likely be a central issue in these Cases. If successfully challenged, there could be hundreds of millions of dollars of additional recovery to unsecured creditors. From the perspective of all unsecured

[2] Capitalized terms used in this Limited Objection and not otherwise defined shall have the meaning ascribed to such term in the *Declaration of Ana Schrank, Chief Financial Officer of Invitae Corporation, In Support of Chapter 11 Filing, First Day Motions, and Access to Cash Collateral* [ECF No. 21] ("**First Day Declaration**").

creditors then, any evaluation, prosecution, or settlement of matters related to the 2023 Exchange should be transparent, comprehensive, and perhaps most important, performed by unconflicted, independent counsel and fiduciaries.

2. By the Retention Application, Kirkland & Ellis LLP and Kirkland & Ellis International LLP (together "**K&E**") seek Court authority to continue to simultaneously represent – to the exclusion of everyone else – five parties in that transaction and investigate three of its current clients. Specifically, K&E seeks to represent (1) the Debtors, including with respect to all matters related to the 2023 Exchange, (2) Jill Frizzley as an independent director, including with respect to her investigation of all matters related to the 2023 Exchange, (3) the Special Committee (the majority of whose members approved the 2023 Exchange) on all matters related to the 2023 Exchange, (4) the full Board of the Company on all matters related to the 2023 Exchange, ***and*** (5) Deerfield on [redacted] currently open matters.

3. As set forth below, K&E's proposed concurrent representation of all of these parties is not permitted under section 327(a) of the Bankruptcy Code. The Committee has therefore formally requested that K&E recuse itself from matters related to the 2023 Exchange (and any other matter in which the Debtors are materially adverse to Deerfield). To date, however K&E has insisted that it be able to stand on all sides of the transaction and represent everyone involved in connection with its investigation into the 2023 Exchange. The Committee disagrees and, to the extent that K&E refuses to restrict the scope of its representations, the Committee respectfully requests that this Court deny the Retention Application.

BACKGROUND

4. On February 13, 2024 (the "**Petition Date**"), each Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). The Debtors are operating their businesses and managing their property as debtors in possession

pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Cases.

5. On March 1, 2024, the United States Trustee appointed the Committee pursuant to section 1102(a)(1) of the Bankruptcy Code. The Committee consists of (i) Wilmington Savings Fund Society, Federal Savings Bank, (ii) Chimetech Holding Ltd, and (iii) Workday, Inc. Each of the Committee members supports this Limited Objection.

A. The 2023 Exchange

6. In February 2023, Invitae Corporation ("**Invitae**" or the "**Company**") prepaid its $135 million secured term loan (the "**2020 Term Loan**"), including a $8.1 million prepayment fee and $2.6 million of outstanding interest (the "**Term Loan Prepayment**"). *See* Invitae Corp., Quarterly Report (Form 10-Q) (May 9, 2023) at 16–17.[3] On the same day the 2020 Term Loan was extinguished, Invitae (a) exchanged $305.7 million of 2024 Convertible Senior Unsecured Notes for $275.3 million of new secured Series A Notes and 14,219,859 shares of Invitae's common stock, and (b) issued $30 million of new secured Series B Notes (together with the Series A Notes, the "**Secured Notes**") for $30 million in cash (the "**February 2023 Notes Exchange**" and together with the Term Loan Repayment, the "**February 2023 Transaction**"). First Day Decl. ¶ 65.[4] Before the February 2023 Transaction, the fair market value of the $305.7 million principal amount of the 2024 Convertible Unsecured Notes that were exchanged was $261 million. *See* Invitae Corp., Quarterly Report (Form 10-K) (Feb. 28, 2023) at 99.

7. All told, through the February 2023 Transaction, Invitae made a net cash payment of approximately $115.7 million (not including approximately $20 million in advisor fees incurred

[3] A description of the circumstances surrounding repayment of the Debtors' 2020 Term Loan is notably absent from Ms. Schrank's First Day Declaration.

[4] The February 2023 Notes Exchange closed in March 2023. *See* First Day Decl. ¶ 65.

in the transaction) and more than doubled its outstanding secured debt. *See* Invitae Corp., Quarterly Report (Form 10-Q) (May 9, 2023) at 5, 16-17, 20.

8. In August 2023, Deerfield entered into an additional exchange agreement with Invitae for Deerfield's remaining 2024 Convertible Senior Unsecured Notes, whereby Invitae exchanged $17.2 million of 2024 Convertible Senior Unsecured Notes for $0.1 million principal amount of secured Series A Notes and approximately 15 million shares of Invitae common stock (the "**August 2023 Notes Exchange**," and together with the February 2023 Transaction, the "**2023 Exchange**"). First Day Decl. ¶ 66.

9. The terms of the 2023 Exchange were determined and approved by [redacted] *See* Chase Decl. Ex. 1, at INVITAE_ 00000738, INVITAE_00000740; *id.* at Ex. 2, at INVITAE_00000751. The 2023 Exchange was approved by the full Board, which included Dr. Scott, Dr. Aguiar, Ms. Gorjanc, Geoffrey S. Crouse, Kenneth D. Knight, Kimber D. Lockhart, Chitra Nayak, and William H. Osborne. *See* Invitae Corp., Current Report (Form 8-K) (Mar. 1, 2023) Ex. 10.1, at 22 (noting that the Board approved the February 2023 Exchange through a unanimous written consent); Invitae Corp., Annual Report (Form 10-K) (filed Feb. 28, 2023) at 120 (listing Invitae's directors); Invitae Corp., Current Report (Form 8-K) (Aug. 22, 2023). Thomas Brida was Invitae's General Counsel during the 2023 Exchanges and remains in that position today. *See, e.g.*, Invitae Corp., Definitive Proxy Statement (Schedule 14A) (Apr. 19, 2023) at 20 (disclosing that Mr. Brida has served as the Company's General Counsel since January 2017). Latham & Watkins LLP and Pillsbury Winthrop Shaw Pittman LLP served as outside counsel to Invitae in connection with the 2023 Exchange. *See* Invitae Corp., Current Report (Form 8-K) (Feb. 28, 2023), Ex. 10.1, at 34; Invitae

Corp., Current Report (Form 8-K) (Aug. 22, 2023), Ex. 10.1, at 3. Perella Weinberg Partners L.P. was a financial advisor to Invitae in connection with at least the February 2023 Notes Exchange.[5] *See* Press Release, *Invitae Announces Convertible Notes and Share Exchange and New Convertible Notes Issuance* (Feb. 28, 2023).[6]

10. The issue presented by the 2023 Exchange is simple: in the absence of that exchange, all of the value of the Debtors' business would be shared *pari passu* by the Debtors' unsecured creditors holding more than $1.5 billion in pre-petition claims. Pursuant to the 2023 Exchange, Deerfield obtained the right, at a time when the Debtors were likely insolvent, to recover from the first $305.4 million in exchange for providing the Debtors and the advisors that arranged the transaction $30 million, while at the same reducing and restricting any restructuring runway. Though the Committee is still investigating these transactions, as this Court recognized, the 2023 Exchange raises "significant issues." Mar. 15, 2024 Hr'g Tr. at 27:9.

B. K&E's Conflicting Representations

11. Deerfield, the main beneficiary of the 2023 Exchange, is a current client of K&E in matters unrelated to these cases and has been a K&E client since [redacted]. Retention App. Ex. B ¶ 37; Chase Decl. Ex. 5, at 3.

12. Invitae did not become a K&E client until September 22, 2023, only one month after the 2023 Exchange closed (and five months prior to the Petition Date). On that date, Mr. Brida, on behalf of Invitae, executed an engagement letter (the "**Engagement Letter**") with K&E. The defined scope of the engagement was to represent Invitae and certain of its subsidiaries in

[5] Perella Weinberg Partners L.P. now represents Deerfield in connection with both the Transaction Support Agreement, entered into immediately prior to these Cases, and these Cases.

[6] Available at https://ir.invitae.com/news-and-events/press-releases/press-release-details/2023/Invitae-Announces-Convertible-Notes-and-Share-Exchange-and-New-Convertible-Notes-Issuance/default.aspx.

connection with "liability management and/or a potential restructuring." Retention App. at 23.[7] The Engagement Letter includes a broad clause titled "Conflicts of Interest," wherein Mr. Brida, on behalf of Invitae, agreed, *inter alia*, that:

> In the event a present conflict of interest exists between [Invitae] and [K&E's] other clients or in the event one arises in the future, [Invitae] agrees to waive any such conflict of interest or other objection that preclude [K&E's] representation of another client (a) in other current or future matters substantially unrelated to the Engagement or (b) other than during a Restructuring Case … , in other matters related to [Invitae] (such representation an "Allowed Adverse Representation")

(the "**General Waiver**"). Chase Decl. Ex. 6, at 5.

13. The Engagement Letter, however, does not identify Deerfield or any other clients of K&E that might be adverse to Invitae. Nor does the Retention Application describe any of the circumstances surrounding any negotiation of the Engagement Letter, such as any disclosures then made by K&E regarding their ongoing representations of Deerfield, the existence of potential conflicts related to the 2023 Exchange, or other matters which would be relevant to an informed consent by Mr. Brida and Invitae to waive any such conflict.

14. Since being retained by Invitae, K&E has continued to represent Deerfield in [redacted] separate matters unrelated to these Cases. Chase Decl. Ex. 5, at 2.[8] [redacted] *Id.* at 3. The Retention Application does not indicate that any K&E attorneys have been screened regarding the Deerfield representations.

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[7] For the Court's convenience, a copy of the Engagement Letter is also attached as **Exhibit 6** to the Chase Declaration.

[8] Like the Debtors, [redacted] *Id.* The Retention Application likewise does not describe any of the circumstances surrounding the negotiation of the Deerfield Engagement Letter, such as disclosures by K&E regarding potential future conflicts of interest, which would demonstrate that support that Deerfield provided informed consent for K&E to investigate it and bring litigation against it.

C. The Current Conflict Regarding the 2023 Exchange

15. On September 23, 2023, one day after retaining K&E, the Company initiated a series of corporate governance transactions to establish an "investigation" that cannot properly be described as being done "by the book."

16. *First*, also on September 23, 2023, Invitae formed a special committee of its Board (the "**Special Committee**") for the purported purpose of "evaluat[ing] strategic alternatives." First Day Decl. ¶ 8. The Special Committee was initially composed of Dr. Scott, Mr. Osborne, Ms. Gorjanc, and Dr. Aguiar each of whom (as discussed above) approved the 2023 Exchange. First Day Decl. ¶ 69. Moreover, as discussed above, Dr. Scott, Ms. Gorjanc, and Dr. Aguiar were also [redacted] Chase Decl. Ex. 1, at INVITAE_00000738, INVITAE_00000746.

17. *Second*, at some point between its initial appointment and October 18, 2023, the Special Committee's mandate expanded to investigate whether [redacted] *Id.* Ex. 7, at INVITAE_00000037.

18. *Third*, on October 18, 2023, [redacted] (the "**Investigation**"). Chase Decl. Ex. 8, at INVITAE_00000015 – INVITAE_00000016.

19. *Fourth*, on October 23, 2023, the full Board officially appointed Ms. Frizzley as an "advisor." First Day Decl. ¶ 70.

20. *Fifth*, on December 7, 2023, now two months after the 2023 Exchange concluded and two months prior to the Petition Date, Ms. Frizzley was appointed as a "disinterested director" to the Board and a member of the Special Committee. First Day Decl. ¶¶ 8, 69 n.5. That role is not new to Ms. Frizzley – she has been appointed as a director or an independent director of nine (9) companies in which K&E was debtor's counsel in the last four years. *See In re Envision Healthcare Corp.*, Case No. 23-90342 (CML) (Bankr. S.D. Tex. May 15, 2023); *In re Avaya Inc.*, Case No. 23-90088 (DRJ) (Bankr. S.D. Tex. Feb. 14, 2023); *In re BlockFi Inc.*, Case No. 22-19361 (MBK) (Bankr. D.N.J. Nov. 28, 2022); *In re Voyager Digit. Ltd.*, Case No. 22-10944 (MEW) (Bankr. S.D.N.Y. July 5, 2022); *In re Carlson Travel, Inc.*, Case No. 21-90017 (MI) (Bankr. S.D. Tex. Nov. 11, 2021); *In re iQor Holdings Inc.*, Case No. 20-34500 (DRJ) (Bankr. S.D. Tex. Sept. 10, 2020); *In re Town Sports Int'l, LLC*, Case No. 20-12168 (CSS) (Bankr. D. Del. Sept. 14, 2020); *In re Intelsat S.A.*, Case No. 20-32299 (KLP) (Bankr. E.D. Va. May 14, 2020); and *In re Dura Auto. Sys., LLC*, Case No. 19-06741 (RSM) (Bankr. M.D. Tenn. Oct. 17, 2019).

21. *Sixth*, according to the First Day Declaration, Ms. Frizzley, in "her capacity as independent director," then commenced the Investigation into the Debtors' possible claims and causes of action arising from the 2023 Exchange, including [redacted]. First Day Decl. ¶ 70; Chase Decl. Ex. 3, at 26 (Debtors' Resp. to Interrog. No. 10). To be clear, while Ms. Frizzley was still an advisor to the Special Committee, [redacted][9] Chase Decl. Ex. 8, at INVITAE_00000015 – INVITAE_00000016; *id.* Ex. 3, at 27 (Debtors' Resp. to Interrog. No. 6). Throughout the Investigation, the Company has had only one outside counsel—K&E—and one outside financial advisor—FTI, both of whom were hired by conflicted management. In other words, in performing

[9] Irrespective of whether K&E conducted its investigation at Ms. Frizzley's direction or at the direction of the Special Committee, K&E [redacted] Chase Decl. Ex. 5, at 1.

her "independent" Investigation of the 2023 Exchange, the Special Committee, the Board, and Ms. Frizzley has relied solely on K&E for legal advice, even though K&E has also simultaneously represented (1) the Company, (2) the Special Committee whose members determined the terms of and approved the 2023 Exchange, (3) the full Board that approved the 2023 Exchange, and (4) Deerfield, the creditor which was the primary beneficiary of the 2023 Exchange.

22. *Seventh*, attorneys from K&E [redacted]—six weeks after Ms. Frizzley was retained as an advisor and one month after she was appointed as an independent director.[10] Chase Decl. Ex. 3, at 27 (Debtors' Resp. to Interrog. No. 9).

23. *Finally*, on February 13, 2024, the Debtors entered into a Transaction Support Agreement (the "**TSA**") with Deerfield that provides broad estate releases to certain holders of the Secured Notes that executed the TSA. First Day Decl., Ex. B, Annex 1. The version of the TSA that was attached to the First Day Declaration does not include the signature pages for the Consenting Stakeholders (as defined in the TSA), but upon information and belief, Deerfield led the negotiations and has executed the TSA. These releases were later embedded in the Debtors' cash collateral order. *See Final Order Pursuant to Sections 105, 361, 362, 363, 503, and 507 of the Bankruptcy Code and Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure: (I) Authorizing Debtors to Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; (III) Modifying Automatic Stay; and (IV) Granting Related Relief* [Docket No. 188] ("**Cash Collateral Order**") ¶¶ E, 16, 19.

[10] The Debtors have claimed much of the presentation made to the full Board regarding the Investigation is privileged. The Committee reserves all rights to challenge that privilege claim.

D. The Retention Application

24. On March 13, 2024, the Debtors filed the Retention Application, and Spencer A. Winters of K&E submitted a declaration in support thereof (the "**Winters Declaration**"). In the Winters Declaration, K&E disclosed that it currently represents, and in the past has represented, Deerfield on a variety of matters "unrelated to the Debtors or these chapter 11 cases." Winters Decl. ¶¶ 37–38. Mr. Winters also indicates that K&E will "not commence a cause of action in these chapter 11 cases against the entities listed on Schedule 2 that are current clients of Kirkland," which includes Deerfield, "unless Kirkland has an applicable waiver on file or first receives a waiver from such entity allowing Kirkland to commence such an action." *Id*. ¶ 25. [redacted] Chase Decl. Ex. 5, at 3.

25. On April 4, 2024, counsel to the Committee discussed the Retention Application with K&E and raised its concerns about the ability of K&E to continue its current representations of all the material participants in the 2023 Exchange. During that call, counsel specifically requested that K&E recuse itself from all matters in which the Debtors are adverse to Deerfield in these Cases. K&E refused.

ARGUMENT

I. K&E HAS AN ACTUAL CONFLICT OF INTEREST AND IS MATERIALLY ADVERSE INTEREST TO THE ESTATE

26. Section 327(a) of the Bankruptcy Code authorizes a debtor in possession, with court approval, to employ professionals only if they (1) "do not hold or represent an interest adverse to the estate" and are (2) "disinterested persons." 11 U.S.C. § 327(a); *In re BH & P, Inc.*, 949 F.2d 1300, 1314 (3d Cir. 1991). Section 101(14)(C) of the Bankruptcy Code defines disinterested persons as those who, *inter alia*, do not "have an interest materially adverse to the interest of the

estate or of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C). While the "adverse interest" and "disinterested person" prongs are distinct, courts often collapse them into a single test of disinterestedness. *See also In re BH & P, Inc.*, 949 F.2d at 1314. ("There is, indisputably, some overlap between the [section] 327(a) standard and [section] 101(14)[C] disinterest requirement."); 1 COLLIER ON BANKR. ¶ 8.03[9] (noting that "[t]hese two tests invoke the same consideration of whether the professional holds or represents an adverse interest to the interests of the debtor and its estate").

27. In determining whether a professional is disinterested and may be retained under section 327(a), the relevant inquiry is "whether a possible conflict implicates the economic interests of the estate and might lessen its value." *U.S. Trustee v. First Jersey Sec., Inc. (In re First Jersey Sec., Inc.)*, 180 F.3d 504, 509 (3d Cir. 1999) ("A [c]ourt may consider an interest adverse to the estate when counsel has 'a competing economic interest tending to diminish estate values or to create a potential or actual dispute in which the estate is a rival claimant.'") (citation omitted). The Third Circuit has held that:

> (1) Section 327(a), as well as § 327(c), imposes a per se disqualification as trustee's counsel of any attorney who has an actual conflict of interest; (2) the district court may within its discretion – pursuant to § 327(a) and consistent with § 327(c) – disqualify an attorney who has a potential conflict of interest and (3) the district court may not disqualify an attorney on the appearance of conflict alone.

Staiano v. Pillowtex, Inc. (In re Pillowtex, Inc.), 304 F.3d 246, 251 (3d Cir. 2002) (quoting *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998)).

28. A conflict is actual and "per se disqualifying, if it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest." *In re Pillowtex, Inc.*, 304 F.3d at 251; *In re BH & P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J. 1989), *aff'd*, 949 F.2d at 1300 (holding that a conflict of interest is "actual" if there is "active

competition between two interests, in which one interest can only be served at the expense of the other").

29. Here, K&E's representation of the Debtors in respect of any matters related to the 2023 Exchange is an actual conflict of interest for two independent reasons. *First*, K&E already represents the Special Committee, which consists of board members who participated in the 2023 Exchange. It has also advised the Special Committee on its review of the potential causes of action stemming therefrom.[11] Certain of the potential claims related to the 2023 Exchange, if viable, would require a determination that the Debtors intentionally or constructively improperly transferred value and that such actions should be unwound. *See* N.Y. Debt. & Cred. Law § 273 (McKinney); N.J. Stat. Ann. § 25:2-25, 26, 27 (West); Cal. Civ. Code § 3439.04 (West); Del. Code Ann. tit. 6, §§ 1304, 1305 (West); 11 U.S.C. §§ 544, 548. The Debtors and the Board that approved the 2023 Exchange would of course prefer that not to be the case and their prior decisions be blessed. K&E cannot advise on whether such claims are viable while simultaneously representing the Debtors in light of this clear conflict.

30. *Second*, K&E is currently representing Deerfield, which is plainly in conflict with the Debtors' estates with respect to the 2023 Exchange. Indeed, given the lack of any meaningful, appropriate corporate governance efforts, it is unsurprising that K&E and the Debtors have concluded that the causes of action subject to the investigation are not worth pursuing. *See Debtors' Reply to Objection to the Official Committee of Unsecured Creditors to Final Approval*

[11] Though not the subject of this Limited Objection, the Committee notes that the Special Committee was itself conflicted. Three of four current members of the Special Committee—a super-majority—are board members who approved the 2023 Exchange. Chase Decl. Ex. 3, at 25 (Debtors' Resp. to Interrog. No. 3); First Day Decl. ¶ 69 n.5. These board members had a clear incentive not to find claims against Deerfield arising from the 2023 Exchange, as such claims would likely implicate them as well. Additionally, according to the Debtors, the Special Committee was charged with investigating [redacted] Chase Decl. Ex. 3, at 27 (Debtors' Resp. to Interrog. No. 10).

of Debtors' Cash Collateral Motion [Docket No. 161] ¶ 4 ("In fact, in the months leading up to the filing of these cases, the Special Committee of the Debtors' board conducted a thorough investigation into these transactions and concluded that they were permitted by the underlying indenture and consistent with the Debtors' fiduciary duties."); Cash Collateral Order ¶¶ 16, 19 (releasing claims against Deerfield, but preserving a period for the Committee to challenge and seek standing).

31. The fact that K&E currently represents Deerfield only in matters unrelated to these Cases does not save it from its actual conflict of interest. *See, e.g.*, *In re Project Orange Assocs., LLC*, 431 B.R. 363, 379 (Bankr. S.D.N.Y. 2010) (denying debtor's proposed counsel's retention application where counsel also represented, on unrelated matters, the debtor's biggest unsecured creditor and essential supplier). In determining whether such concurrent representation rises to an actual conflict of interest, courts focus on whether there is a current or even envisioned litigation between the debtor and counsel's non-debtor client. *See, e.g.*, *id.* at 369 (finding a disqualifying conflict where it was possible that the debtor and its proposed counsel's non-debtor client could be engaged in future litigation and a conflict waiver counsel had obtained prohibited it from bringing or threatening any litigation against that non-debtor client or its affiliates); *In re Git-N-Go, Inc.*, 321 B.R. 54, 61 (Bankr. N.D. Okla. 2004) (finding an actual conflict where the debtor's proposed counsel was "unable or unwilling to represent the [d]ebtor in its dispute" with counsel's other client, even though counsel represented that client in matters unrelated to the debtor's case). Prior to the Petition Date, K&E has investigated Deerfield and determined not to pursue any claims for the estates, has opposed the Committee's request for automatic standing to pursue claims against Deerfield and has proposed a term sheet for a plan which effectuates a release of estate claims against Deerfield. A disinterested counsel may come to a different conclusion and institute

litigation. This actual conflict is disqualifying. *See In re Leslie Fay Cos., Inc.*, 175 B.R. 525, 535 (Bankr. S.D.N.Y. 1994) (holding that a law firm had an adverse interest where conflicted attorneys were determining whether the debtors had claims against the debtors' outside directors, who were also the firm's clients).

32. *Leslie Fay* is instructive here. In that case, the Bankruptcy Court sanctioned Weil, Gotshal & Manges LLP ("**Weil**") for failure to disclose certain conflicts and disqualified Weil from further work for the debtors that required Weil to take adverse positions to its existing clients. *Id.* at 539. In reaching this result, the bankruptcy court found that Weil could not both represent the debtors and lead an investigation into claims against the debtors' board. *Id.* at 534, 538 ("Because Weil Gotshal was requesting retention not only as Leslie Fay's general bankruptcy counsel but also to complete an investigation into a fraud which may have reached into senior management or even the board of directors, it was especially important that the court ensure that counsel was completely disinterested."). The *Leslie Fay* court noted that, even if Weil had an honest belief in the likely immunity of the outside directors, "'such a determination must be made by the counsel who is in a position to make an independent judgment.'" *Id.* at 535 (quoting *In re Bohack,* 607 F.2d 258, 263 (2d Cir. 1979)). Moreover, the court found that Weil could not represent the debtor in an investigation into an existing client, regardless of the amount of firm business that that client represented. *Id.* ("The short answer to this is that Weil Gotshal should be presumed to be loyal to its client. That the client may not be a major client is no reason to think that Weil Gotshal would ignore the relationship."). In other words, the "incentive to discount any possible liability so as to preserve its substantial client relationships with the firms of which the directors were principals" created an adverse interest. *Id.*; *see also In re Granite Partners, L.P.*, 219 B.R. 22, 37 (Bankr. S.D.N.Y. 1998) ("Consistent with *Bohack* and section 327(a), a lawyer

cannot represent a trustee for the purpose of investigating the alleged wrongdoing of another, valuable client.").[12]

33. The rulings in *Leslie Fay* apply equally here. K&E's actual conflict with respect to its current clients prohibits the firm from assessing, advising on, bringing claims, or releasing against Deerfield and the Invitae Board. *See In re Relativity Media, LLC*, No. 18-11358, 2018 Bankr. LEXIS 2037, at *13 (Bankr. S.D.N.Y 2018) ("[A] lawyer is not permitted to sue a current client, even if the litigation against a client is on matters that are unrelated to the other work that the lawyer is doing for that client."). K&E concedes as much, as it states in the Retention Application that it will not pursue claims against an existing client for matters relating to Invitae. *Winters Decl*. at ¶ 25. If K&E by its own admission, cannot sue an existing client, then neither should it be investigating those potential claims or advising the Board or the Special Committee on determining whether those claims should be pursued. Further, K&E's inherent bias and unwillingness to bring claims against Deerfield effects its ability to render impartial advice. *See Project Orange*, 431 B.R. at 375 ("[T]he Court does not believe that [counsel] can negotiate with full efficacy without at least being able to hint at the possibility of litigation."); *see also In re Amdura Corp.*, 121 B.R. 862, 867 (Bankr. D. Colo. 1990) ("How can counsel fairly and fully advise the [d]ebtors in negotiating with [counsel's client and the debtors' secured creditor] and in drafting a plan if they are unable, or at least unwilling, to espouse positions detrimental to the interests of the [creditor]?").

[12] Courts outside of bankruptcy have likewise viewed a special committee's legal representation by the same counsel as its company as a factor showing lack of fairness. *See, e.g.*, *In re Tele-Comms., Inc. S'holders Litig.*, No. 16470, 2005 Del. Ch. LEXIS 206, at *41 (Del. Ch. Sept. 29, 2005) ("Rather than retain separate legal and financial advisors, the [s]pecial [c]ommittee chose to use the legal and financial advisors already advising [the company appointing the special committee]. This alone raises questions regarding the quality and independence of the counsel and advice received.").

II. K&E'S ACTUAL CONFLICT OF INTEREST CANNOT BE WAIVED

34. To address an argument that may be raised by K&E in reply, blanket, advance pre-petition conflict waivers do not provide a way around the "disinterestedness" standard of section 327(a). *See In re Congoleum Corp.*, 426 F.3d 675, 692 (3d Cir. 2005) (citing *In re Granite Partners L.P.*, 219 B.R. at 34) (holding that for purposes of the disinterestedness standard under section 327(a), waivers are "ordinarily not effective"); *Project Orange*, 431 B.R. at 374 ("Even if GE agreed that DLA Piper could act against GE on all issues, through litigation, negotiation or otherwise, DLA Piper must still satisfy the statutory requirements of section 327(a) to be retained as general bankruptcy counsel."); *Git-N-Go*, 321 B.R. at 60 ("[T]he written conflict waivers, while necessary in order to satisfy the rules of professional conduct, do not aid the cause of eliminating the adversity of interests between Hale–Halsell and the estate."); *see also* 3 COLLIER ON BANKR. ¶ 328.05[2] ("The requirement that a professional be 'disinterested' cannot be waived or circumvented by agreement or consent among creditors and the debtor.").

35. Regardless of what might happen with an advance waiver outside of Chapter 11, bankruptcy retention standards are more stringent than general retention standards because, upon commencement of a chapter 11 case, debtor's counsel represents a fiduciary that owes duties to parties who did not grant the counsel a waiver. *See, e.g.*, *In re Jeep Eagle 17, Inc.*, No. 09-23708 (DHS), 2009 Bankr. LEXIS 3614, at *14 (Bankr. D.N.J. July 13, 2009) ("Consent by a Chapter 11 debtor to waive conflicts is insufficient because the ultimate parties in interest are the bankruptcy estate's creditors."); *In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1018 (Bankr. N.D. Ill. 1993) ("Multiple representations which may be tolerable in a commercial setting after full disclosure are not permissible in the bankruptcy setting. Upon the commencement of a chapter 11 proceeding, a debtor . . . assumes fiduciary duties and obligations to all parties in interest without fear or favor."); *In re Am. Printers & Lithographers, Inc.*, 148 B.R. 862, 867 (Bankr. N.D. Ill.

1992) ("A firm that is not disinterested may not represent a debtor even if that debtor has consented to such representation and waived the conflict.").

36. Even if waivers were relevant to whether a professional is disinterested, the advance waivers here are not effective because waivers must be informed and explicit. The New Jersey Rules of Professional Conduct[13] prohibit concurrent conflicts of interest when "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." N.J. Court Rules, RPC 1.7. A conflict of interest may be waived if "each affected client gives informed consent, confirmed in writing, ***after full disclosure and consultation***." *Id*. (emphasis added).

37. For there to be "informed consent," the specific conflict must be disclosed and the attorney "must explain the risks of the proposed representation to the client." *Celgene Corp. v. KV Pharm. Co.*, No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *20-21, *28 (D.N.J. Jul. 28, 2008) (holding that the client's waiver was not informed because the engagement letter lacked: "1) any statements which adequately communicate a proposed course of conduct with regard to concurrent conflicts of interest; 2) any explanation of the material risks of the course of conduct with regard to concurrent conflicts of interest; or 3) any explanation of reasonably available alternatives to the proposed course of conduct");[14] *see also In re Congoleum Corp.*, 426 F.3d at 691 ("Given the

[13] Attorney conduct is governed by the ethical standards of the court before which the attorney appears. *In re Valsartan N-Nitrosodimethylamine (NDMA), Losartan, & Irbesartan Prods. Liab. Litig.*, No. 19-2875, 2020 WL 955059, at *2 (D.N.J. Feb. 27, 2020). "Normally, the United States District Court must first look to the New Jersey Rules of Professional Conduct . . . to see if they govern the issue [of disqualifying an attorney for being adverse]." *Cordy v. Sherwin-Williams Co*, 156 F.R.D. 575, 583 (D.N.J. 1994). The rules of professional conduct with respect to conflict waivers in New Jersey and Illinois (the law governing the Engagement Letter) are substantially similar. *See* Chase Decl. Ex. 6, at 8.

[14] The waiver at issue in *Celgene* was similar to the advance waiver by the Debtors. Like in *Celgene*, the Debtors here purported to generally "waive[s] any [present or future] conflict of interest or other objection that would

complexities of the bankruptcy proceeding and the 'many hats' worn by Gilbert throughout the pre- and post-petition process, we cannot conclude that the purported waivers Gilbert received from [its co-counsel] on behalf of the individual clients constituted informed, prospective consent." (citing *In re Lanza*, 322 A.2d 445, 447 (N.J. 1974)) (concluding that attorney "should have first explained . . . all the facts and indicated in specific detail all of the areas of potential conflict that foreseeably might arise")).

38. The language in the relevant engagement agreement is the primary source for determining whether or not a particular client's consent is informed. *See Mylan, Inc. v. Kirkland & Ellis LLP*, No. 15-581, 2015 U.S. Dist. LEXIS 194338, at *45 (W.D. Pa. June 9, 2015). Once a conflict regarding a concurrent representation has been identified, the burden is on the law firm to demonstrate it has an effective waiver. *Celgene*, 2008 U.S. Dist. LEXIS 58735, at **16-17. Courts have found that even if the party executing the engagement letter was a sophisticated counsel who was attuned and informed about conflicts of interest, a general unspecific waiver does not suffice. *Id*. at *34.

39. Here, the Retention Application provides no disclosures as to any of the circumstances surrounding the execution of the Engagement Letter, including whether K&E ever advised Invitae that Deerfield was an existing client while it was conducting its "Investigation." Further, the documentary record makes clear that K&E did not obtain a specific written waiver from the Debtors [redacted] prior to advising the Special Committee on its Investigation, and thus did not cure the conflict of interest between the two entities. N.J. Court Rules, RPC 1.7(b)(1).

preclude the Firm's representation of another client (a) in other current or future matters substantially unrelated to the Engagement or (b) other than during a Restructuring Case . . ., in other matters related to Client." Chase Decl. Ex. 6, at 5. The *Celgene* court found similar language regarding "substantially unrelated" matters too vague and the waiver at issue not effective to waive a future conflict. *See Celgene*, 2008 U.S. Dist. LEXIS 58735, at *22-23.

In sum, there is no evidentiary basis upon which this Court can find an informed waiver to permit K&E to act as section 327(a) counsel in matters related to the 2023 Exchange.

CONCLUSION

40. As noted above, the Committee attempted to get K&E to do the right thing and restrict its current cornucopia of representations. It has, to date, refused. Thus, the Committee respectfully requests that the Court (i) require as a condition for K&E's engagement as the Debtors' counsel under section 327(a) that it be precluded from representing the Debtors in any matters (a) related to the 2023 Exchange, including but not limited to any estate claims or causes of action related thereto and (b) in which the Debtors are otherwise adverse to Deerfield and (ii) grant such other and further relief as the Court deems just and proper.

RESERVATION OF RIGHTS

41. This Limited Objection is submitted without prejudice to, and with a full reservation of, the Committee's rights, claims, defenses, and remedies, including the right to amend, modify, or supplement this Limited Objection, to raise additional objections, serve and take discovery in advance of any hearing on the Retention Application, and to introduce evidence at any hearing related to the Retention Application and this Limited Objection, and without in any way limiting any other rights of the Committee to further object to the Retention Application, retention of any other professional in these Cases, or any applications for allowance of fees and expenses or to seek disqualification of any professional retained in these Cases, on any grounds, as may be appropriate.

[*Remainder of Page Intentionally Left Blank*]

Dated: April 5, 2024

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

	:	Case No. 24-11362 (MBK)
In re:	:	Jointly Administered
	:	
Invitae Corporation, et al.,[1]	:	Chapter 11
	:	
	:	The Honorable Michael B. Kaplan, Chief Judge
Debtors.	:	
	:	Hearing Date: April 29, 2024 @ 10:00 a.m.

OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF KIRKLAND & ELLIS LLP AND KIRKLAND & ELLIS INTERNATIONAL LLP AS ATTORNEYS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION EFFECTIVE AS OF FEBRUARY 13, 2024

Andrew R. Vara, the United States Trustee for Regions 3 & 9 (the "U.S. Trustee"), by his undersigned counsel, and in furtherance of his duties pursuant to 28 U.S.C. §§ 586(a)(3) and (5), respectfully submits this objection ("Objection") to the *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors-In-Possession Effective as of*

[1] The last four digits of Debtor Invitae Corporation's ("**Invitae**," and with its subsidiary debtors, the "**Debtors**") 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.

February 13, 2024 (the "Application") (Dkt. 158) filed by the above-captioned debtors and debtors-in-possession (collectively, the "Debtors") and respectfully represents as follows:

JURISDICTION

1. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of New Jersey issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this Objection.

2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the "U.S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts." *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the "U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest).

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised in this Objection.

BACKGROUND AND RELEVANT FACTS

A. The Bankruptcy Case.

4. On February 13, 2024 (the "Petition Date"), each Debtor filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). *See* Case Nos. 24-11361 at Dkt. 1; 24-11362 at Dkt. 1; 24-11363 at Dkt. 1; 24-11364 at Dkt. 1, 24-11365 at Dkt. 1; and 24-11366 at Dkt. 1.

5. On February 16, 2024, the Court entered an Order Directing Joint-Administration of Chapter 11 Cases, which noted *Invitae Corporation* as the lead case. *See* Case No. 24-11362 at Dkt. 54.

6. The Debtors continue to operate their business and manage their property as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

7. On March 1, 2024, the U.S. Trustee filed a Notice of Appointment of Official Committee of Unsecured Creditors (the "Committee"). *See* Dkt. 131.

B. The Application.

8. On March 13, 2024, the Debtors filed the Application and the Declaration of Spencer A. Winters in Support of the Debtors' Application For Entry of an Order Authorizing the Retention and Employment of Kirkland & Ellis LLP and Kirkland & Ellis International LLP as Attorneys for the Debtors and Debtors In Possession Effective as of February 13, 2024 (the "Winters Declaration"). *See* Dkt. 158.

9. Pursuant to the Winters Declaration, it was disclosed that:

> "Kirkland currently represents, and in the past has represented, Deerfield Management Company and various of its subsidiaries and affiliates (collectively, "Deerfield") and Softbank Group Corporation and various of its subsidiaries and affiliates (collectively, "Softbank") on a variety of matters. Deerfield is the holder of approximately 78% of Debtor Invitae Corporation's 2028 Senior Secured Notes and is represented by Sullivan & Cromwell LLP and Wollmuth Maher & Deutsch LLP in these chapter 11 cases. Softbank is a substantial holder of the Debtor Invitae Corporation's 2028 Convertible Unsecured Notes and is represented by Morrison & Foerster LLP in these chapter 11 cases. Kirkland's current and prior representations of Deerfield and Softbank have been in matters unrelated to the Debtors or these chapter 11 cases. Kirkland has not represented, and will not represent, Deerfield or Softbank in connection with any matter in these chapter 11 cases during the pendency of these chapter 11 cases. I do not believe that Kirkland's current or prior representation of Deerfield or Softbank precludes Kirkland from meeting the disinterestedness standard under the Bankruptcy Code."

See id. at ¶¶ 37 and 38.

10. The Winters Declaration also discloses that "Kirkland will not commence a cause of action in these chapter 11 cases against the entities listed on Schedule 2 that are current clients of Kirkland (including entities listed below under the "Specific Disclosures" section of this Declaration) unless Kirkland has an applicable waiver on file or first receives a waiver from such entity allowing Kirkland to commence such action." *See id.* at ¶ 25.

11. Further, the Winters Declaration discloses that Kirkland & Ellis LLP, and Kirkland & Ellis International LLP ("K&E") is concurrently representing the Debtors and Deerfield Partners, L.P. ("Deerfield"), who is the holder of a majority of the 2028 Senior Secured Notes, in matters unrelated to the Debtors or these cases. *See id.* ¶ 38 and Dkt. 162 at page 1 of 11.

12. Upon information and belief, in February or March of 2023, a transaction occurred where the Debtors exchanged $305.7 million of their 2024 Convertible Senior Unsecured Notes for $275.3 million of new secured Series A Notes and 14,219,859 shares of Debtors' common stock, followed by the issuance of $30 million of new secured Series B Notes for $40 million in cash. *See* Dkt. 21 at ¶ 65. As a result, Deerfield appears to be the main beneficiary of the conversion of unsecured notes to secured notes, the largest secured creditor of the Debtors, and the entity allowing the Debtors use of cash collateral.

13. Commencing on March 26, 2024, the U.S. Trustee corresponded with K&E concerning the Debtors' retention of K&E in these cases. The U.S. Trustee attempted to limit the issues consistent with the resolutions reached by K&E and the U.S. Trustee on retentions in other cases before this Court, but K&E would not agree to resolve these issues if the U.S. Trustee moved forward with this Objection.

14. As a result of its prior and current representation of Deerfield, the Debtors' secured creditor, and upon information and belief, other possible concurrent representations, it appears that K&E is not disinterested and holds an adverse interest against the estate.[2]

LAW, ANALYSIS AND ARGUMENT

15. 11 U.S.C. § 327(a) allows the debtor in possession to employ professional persons that "do not hold or represent an interest adverse to the estate" and that are "disinterested persons."[3] One court described Section 327(a) as "a prophylactic provision designed to insure that the undivided loyalty and exclusive allegiance required of a fiduciary to an estate in bankruptcy is not compromised or eroded." *See In re Prudent Holding* Corp., 153 B.R. 629, 631 (Bankr. E.D.N.Y. 1993).[4]

[2] The Committee filed a Limited Objection to K&E's Application, which is scheduled for hearing on April 29, 2024. Dkt. 283.

[3] 11 U.S.C. § 101(14)(C) defines a "disinterested person" as a person that ". . . does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason."

[4] Professional persons seeking employment under 11 U.S.C. § 327(a) must submit a verified statement disclosing "all connections" with the debtor, creditors, other parties in interests, and their respective attorneys and accountants. *See* Fed. R. Bankr. P. 2014(a). Rule 2014 sets forth the procedural requirements for an application for employment as a professional for the debtor in possession. The substantive requirements for employment are contained in Code § 327. Bankruptcy Rule 2014 requires the applicant to, inter alia, state with specificity, the facts evidencing the necessity of the employment, the professional services to be rendered, any proposed arrangement for compensation, and to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee. *See* Fed. R. Bankr. 2014. To comply with Bankruptcy Rule 2014, the applicant must consider and disclose all of his or her "connections." Disclosure is not limited to the disclosure of facts which the applicant deems relevant but includes all connections between members of the firm and the parties in interest to the bankruptcy case. The scope of disclosure is broader than the question of disqualification; the applicant and the professional must disclose, without exception, all connections and not merely those that rise to the level of conflicts. *See In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr. S.D.N.Y. 1998). The professional may not leave the court or other

16. The term "disinterested person" means a person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

See 11 U.S.C. § 101(14).

17. The stringent requirements and standards for employment of professionals under the Bankruptcy Code and Bankruptcy Rules are designed to insure the integrity of the bankruptcy process, and the public confidence in the bankruptcy courts. *See In re Lee Way Holding Co.,* 100 B.R. 950, 961 (Bankr. S.D. Ohio 1989).

18. An applicant under Section 327 has the burden of establishing by motion and accompanying affidavit that their chosen professional is qualified. *See In re BH&P*, *Inc.,* 949 F.2d 1300, 1317 (3d Cir. 1991) ("It is not ... the obligation of the bankruptcy court to search the record for possible conflicts of interest. That obligation belongs to the party who seeks employment by the estate").

19. While the Bankruptcy Code does not define "interest adverse", it does define "disinterested person" as one "who is not a creditor ... or an insider ... and does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." *See* 11 U.S.C. § 101(14).

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parties in interest to search the record for such relationships or otherwise to ferret them out. *See In re BH&P, Inc.*, 949 F.2d 1300, 1317-18 (3d Cir 1991).

20. The Third Circuit has stated that a professional person has an interest adverse to the estate when the professional has ". . . a competing economic interest tending to diminish estate values or create a potential or actual dispute in which the estate is a rival claimant." *See United States Trustee v. First Jersey Secs.,* 180 F.3d 504, 509 (3d Cir. 1999) (internal quotations omitted). Any professional person that does not meet both the "no adverse interest" and the "disinterested person" tests is disqualified from employment under Section 327(a). *See In re BH&P Inc*., 949 F.2d at 1314 (Section 327(a) "creates a two-part requirement for retention of counsel"). Thus, a professional who holds or represents an adverse interest is *per se* disqualified. However, a professional who may not hold or represent an adverse interest is nevertheless disqualified unless he or she is a "disinterested person" as set forth in 11 U.S.C. § 101(14). *See, e.g.*, *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 141-42 (3d Cir. 1994) (disqualified because not disinterested); *Michel v. Eagle-Picher Indus. (In re Eagle-Picher Indus.)*, 999 F.2d 969, 972 (6th Cir. 1993) (professional can lack disinterestedness without having an adverse interest).

21. Even if an actual conflict of interest does not exist, the Court has wide discretion to deny the Application due to the potential for such conflicts to arise in the future. *See BH&P, Inc.*, 949 F.2d at 1316-17 ("denomination of a conflict as 'potential' or 'actual' and the decision concerning whether to disqualify a professional based upon that determination in situations not yet rising to the level of an actual conflict are matters committed to the bankruptcy court's sound exercise of discretion.").

22. Here, K&E discloses that the firm concurrently represents the Debtors and Deerfield, the Debtors' largest secured creditor, "in matters unrelated to these cases." *See* Dkt. 158, Winters Declaration at ¶ 38. The fact that K&E represents Deerfield in unrelated matters does not change the existence of a conflict of interest. *See In re Project Orange Assocs., LLC*, 431

B.R. 363, 379 (Bankr. S.D.N.Y. 2010) (denying the debtor's proposed counsel's retention application where counsel also represented, on unrelated matters, the debtor's largest unsecured creditor and essential supplier).

23. Under a *Project Orange* analysis, Deerfield qualifies as an "essential supplier" to the Debtors, standing as the Debtors' largest secured creditor, providing cash collateral. As a result, K&E's concurrent representation of the Debtors and Deerfield, albeit in unrelated matters, constitutes a conflict of interest and, as such, the Application should be denied.

24. The U.S. Trustee was of the belief that K&E and the U.S. Trustee resolved many of the issues raised by the U.S. Trustee other than the concurrent representation by K&E of the Debtors and Deerfield. However, despite the U.S. Trustee's efforts to narrow the issues for the Court, K&E would not agree to resolve these issues if the U.S. Trustee moved forward with this Objection. As such, and out of an abundance of caution, the U.S. Trustee sets forth the various issues that were raised.

25. Fed. R. Bankr. P. 2014 requires an applicant to provide all its connections with the debtor, creditors, and any other party in interest. *See* Fed. R. Bankr. P. 2014. Here, K&E has not provided all of its connections as evidenced by paragraph 23 of the Winters Declaration, which provides that K&E only searched its connection with major customers, major lease counterparties, major unsecured creditors, and major vendors. *See* Dkt. 158 at ¶ 23. The disclosure of conflicts is not discretionary.

26. K&E sets forth in paragraph 26 of the Winters Declaration that only two clients generated fees representing more than one percent of K&E's fee receipts for the twelve-month period ending on February 29, 2024. *See id.* at ¶ 26. K&E provided the exact percentage to the U.S. Trustee but has declined to provide such information in a supplemental declaration. The U.S.

Trustee does not request the disclosure of the name of the client and the exact percentage but does request additional disclosure of the upper percentage range. As in other supplemental declarations, K&E should be required to disclose that its gross income received from current clients over either a twelve-month or twenty-four-month period was less than x%.

27. K&E discloses in paragraph 43 of the Winters Declaration that K&E will not represent any of the potential M&A counterparties in connection with any matter in these chapter 11 cases. However, the disclosure did not include whether screens were implemented concerning the potential M&A counterparties.

28. Although it appears that K&E will abide by the *U.S. Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases* effective as of November 1, 2013 (the "U.S. Trustee Guidelines"), it is unclear from the Application or the Winters Declaration whether K&E will agree to file staffing plans and budgets with its interim fee applications as required by the U.S. Trustee Guidelines. As in other cases, the U.S. Trustee simply asks for an affirmative statement in a supplemental declaration that K&E will agree to file staffing plans and budgets with its interim fee applications. Also, section D.2 of the U.S. Trustee Guidelines requires the Debtors to disclose the number of firms interviewed to represent the Debtors in bankruptcy. The Debtors, through the Declaration of Ana Schrank, disclosed that they interviewed several firms. The Debtors should be required to state the number of firms that were interviewed.

29. The Winters Declaration contains billing categories for professionals and their range of hourly rates. However, the U.S. Trustee requests that K&E disclose the names of the professionals expected to work on the cases and their hourly rates.

30. Finally, the U.S. Trustee requested certain revisions to the proposed order including the following:

a. The removal from the preamble of the proposed order: "and the Court having found that the relief requested in the Application is in the best interests of the Debtors' estates";

b. The addition of "except as modified herein" to the end of paragraph 2 of the proposed order;

c. The addition of the following language to the end of paragraph 5 of the proposed order: "At the conclusion of Kirkland's engagement by the Debtors, if the amount of any advance special purpose retainer held by Kirkland is in excess of the amount of Kirkland's outstanding and estimated fees, expenses, and costs, Kirkland will pay to the Debtors the amount by which any advance special purpose retainer exceeds such fees, expenses, and costs, in each case in accordance with the Engagement Letter";

d. The addition of a paragraph in the proposed order as follows: "Notwithstanding anything to the contrary in the Application, the Engagement Letter, or the Declarations attached to the Application, Kirkland shall bill in one-tenth of an hour increments";

e. Remove "pending further order of the Court" from the end of paragraph 7 of the proposed order;

f. Add to the end of paragraph 11 of the proposed order: "As such, Kirkland shall use its best efforts to avoid duplication of services provided by any of the Debtors' other professionals in these chapter 11 cases"; and

g. The addition of a paragraph in the proposed order as follows: "The U.S. Trustee requested the following language to be included in the proposed Order: "If the Court denies the Debtors' *Motion for Entry of an Order Authorizing the Debtors to File Under Seal the Names of Certain Confidential Transaction Parties in Interest Related to the Debtors Professional Retention Applications* [Docket No. 156], or such motion is withdrawn or the relief requested is moot, Kirkland will, within fourteen (14) days of such denial, withdrawal or other resolution, and through a supplemental declaration, disclose the identities of all Confidential Transaction Parties that were filed under seal."

31. The U.S. Trustee reserves and any all rights, remedies, and obligations to, *inter alia*, complement, supplement, augment, alter, substitute and/or modify this Objection, file a

Motion, or seek any other relief deemed appropriate and necessary and to conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent.

WHEREFORE, for the foregoing reasons, the U.S. Trustee respectfully requests that the Court deny the Application in its entirety at this time and grant such other and further relief that is deemed just and equitable.

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 & 9

By: */s/ Jeffrey M. Sponder*
Jeffrey M. Sponder
Trial Attorney

Dated: April 15, 2024

Case 24-10453-BFK Doc 273 Filed 04/10/24 Entered 04/10/24 13:38:06 Desc Main Document Page 1 of 12
Docket #0273 Date Filed: 04/10/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

In re ENVIVA, INC., *et al.*,[1] Debtors.	Case No. 24-10453 (BFK) Chapter 11 (Jointly Administered)

U.S. TRUSTEE'S OBJECTION TO APPLICATION TO EMPLOY VINSON & ELKINS LLP AS DEBTORS' COUNSEL

Gerard R. Vetter, Acting United States Trustee for Region Four ("U.S. Trustee"), by counsel, objects to the Debtors' Application to Employ Vinson & Elkins LLP ("Vinson") as counsel. *See* ECF No. 183. In support of his objection, the U.S. Trustee states:

JURISDICTION AND VENUE

1. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(a) and the Order of Reference of the U.S. District Court for the Eastern District of Virginia dated August 15, 1984. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2). Venue of this proceeding is proper under 28 U.S.C. §§ 1408 and 1409.

FACTUAL BACKGROUND

2. The Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code commencing the above-captioned cases on March 12, 2024, and March 13, 2024. *See* ECF No. 1.

[1] A complete list of the Debtors in these jointly administered chapter 11 cases and the last four digits of their federal tax identification numbers is available on the website of the Debtors' claims and noticing agent at www.kccllc.net/enviva. The location of the Debtors' corporate headquarters is: 7272 Wisconsin Avenue, Suite 1800, Bethesda, MD 20814.

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3. The Debtors continue to operate their businesses as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108 ("Bankruptcy Code").

4. No trustee or examiner has been appointed in these cases.

5. The U.S. Trustee appointed an official committee of unsecured creditors ("Committee") on March 25, 2024. *See* ECF No. 173.

6. The Debtors filed an application to employ Vinson as counsel on March 27, 2024 ("Employment Application"). *See* ECF No. 183.

7. Vinson filed a Declaration of David S. Meyer ("Meyer Declaration") and a copy of a January 23, 2024 retainer agreement ("Retainer Agreement") in support of its Employment Application. *Id*.

8. Vinson disclosed that it "has represented the Debtors on a variety of corporate, securities, transactional, and litigation matters since 2015." *See* Meyer Dec. ¶ 3.

9. Vinson disclosed that it "currently represents, and in the past has represented, Riverstone Investment Group LLC and its affiliates ("Riverstone") in a variety of other matters[.]" *See Id*. at ¶ 20.

10. Vinson's representation of Riverstone "accounted for 0.8% of V&E's billings and 1.4% of V&E's collections for V&E's fiscal year ended December 31, 2023." *Id*.

11. Meyer and Jessica C. Peet ("Peet") are Vinson partners currently working on these Chapter 11 cases. Both Meyer and Peet have previously represented Riverstone and its affiliates in several matters. *See* https://www.velaw.com/people/david-s-meyer/ ; *see also* https://www.velaw.com/people/jessica-c-peet/

12. Vinson also disclosed that it "currently represents Debtor Enviva Inc. and certain of its current and former directors and officers in two putative class action securities lawsuits"

("Securities Cases") pending in the United States District Court for the District of Maryland. *See* Meyer Dec. ¶ 21.

13. The Debtors paid Vinson "for its services representing Enviva Inc. and its current and former directors and officers in the Securities Cases" prior to the Petition Date. *Id*.

14. Vinson "intends to continue representing such current and former directors and officers in the Securities Cases to the extent such claims are not stayed" and any compensation for "continued representation would be through insurance policies maintained by the Debtors and would be subject to further order of this Court authorizing such payments." *Id*.

15. Vinson further disclosed that it "currently represents Enviva Inc., as nominal defendant, along with current or former Enviva Inc. directors and officers, Ralph Alexander, John C. Bumgarner, Jr., Janet S. Wong, Eva T. Zlotnicka, Martin N. Davidson, Jim H. Derryberry, John K. Keppler, Gerrit L. Lansing Jr., Pierre F. Lapeyre, Jr., David M. Leuschen, Thomas Meth, Jeffrey W. Ubben, Gary L. Whitlock, Shai S. Even, and Michael A. Johnson" in a derivative action pending in the United States District Court for the District of Maryland ("Derivative Action"). *Id*. at ¶ 22.

16. The Debtors paid Vinson "for its services representing Enviva Inc. and its current and former directors and officers in the" Derivative Action. *Id*.

17. Vinson represented that the parties to the Derivative Action stipulated to "stay all proceedings and deadlines" pending resolution of the Securities Cases. *Id*.

18. The U.S. Trustee submitted informal comments and inquiries to Vinson regarding its Employment Application on April 2, 2024 and April 9, 2024.

19. The U.S. Trustee requested Vinson provide additional information regarding the following:

(a) Whether Vinson rendered services that were not yet billed or paid prior to the Petition Date. If so, a request for the amounts owed for services rendered prepetition but not billed or paid prior to the Petition Date.

(b) A breakdown of fees paid prepetition including invoice dates and Pillowtex analysis chart.

(c) Whether Vinson previously represented Riverstone or its affiliates in connection with any matter involving the Debtors, its non-debtor affiliates, or joint ventures.

(d) Whether Meyer or Peet, Vinson professionals working on these Chapter 11 Cases, are currently working on matters on behalf of Riverstone.

(e) Additional information regarding the last date Meyer or Peet provided services to Riverstone or its affiliates. Requested a description of the nature of Meyer's and Peet's prior representation(s) of Riverstone and any of its affiliates within the previous two years.

(f) Information regarding whether there is any overlap of employees working on these Chapter 11 cases with those working on matters related to Riverstone or its affiliates. If so, the identification of any employee overlap and description of the Riverstone or affiliate matters.

(g) Whether Vinson has separate engagement letters with the individual defendants in the Securities Cases and Derivative Action.

(h) Whether Vinson received separate retainers in connection with the Securities Cases and Derivative Action. The date and retainer amounts received from the Debtors and current retainer balances if applicable.

(i) Clarification regarding the source of compensation for Vinson's representation of the individual defendants in the Securities Cases and Derivative Action.

(j) Whether a claim has been made for insurance coverage for fees and expenses incurred in relations to the Securities Cases and Derivative Action. Identification of policy limits for any coverage and explanation about the source of compensation for any fees and expenses not covered by an insurance policy.

(k) Whether Vinson rendered services related to the Securities Cases and Derivative Action that were not billed or paid prior to the Petition Date. Information regarding the amounts owed for services rendered prepetition but not yet billed or paid prior to the Petition Date if applicable.

(l) Whether Vinson render services in connection with other non-bankruptcy matters that were not yet billed or paid prior to the Petition Date. If so, a request to

provide the amounts owed for non-bankruptcy services rendered prepetition but not yet billed or paid prior to the Petition Date.

(m) Whether Vinson rendered services in connection with any non-bankruptcy matter since the Petition Date. If so, a request for information regarding any payments received by Vinson from the Debtors for all post-petition non-bankruptcy work.

(n) An explanation regarding how Vinson will address any conflicts that arise between its representation of the individual defendants in the Securities Cases and Derivative Action and any potential claims the Debtors may have against these individuals.

(o) Whether Vinson represented the Debtors or any individuals in connection with the Q4 Transactions.

(p) Additional information regarding whether Vinson's investment partnership as disclosed in Meyer's Declaration holds any investments in the Debtors, its non-debtor affiliates, or joint ventures.

(q) Whether Vinson canvassed its employees to ascertain whether any individual holds investments in the Debtors or its non-debtor affiliates and the results if so.

(r) Whether Vinson can be adverse to Barclays (litigation counterparty), BMO (litigation counterparty), and JP Morgan Chase (litigation counterparty).

(s) Clarification of whether Vinson's representation of the parties on Schedule 3 are ongoing or concluded.

(t) Disclose additional connections referenced in prior Vinson retention applications including: Unifirst Corp., Duke Energy, AT&T Co., FedEx Freight Inc., Starr Indemnity, and Lazard. *See In re Strategic Materials, Inc*., No. 23-90907, ECF No. 135, pp 47-53 (Bankr. S.D.Tex. 2023); *see also In re Rockwall Energy Holdings, Inc*., No. 22-90000, ECF No. 144, pp 63-65 (Bankr. N.D.Tex. 2022).

(u) Additional information regarding all non-bankruptcy related services rendered by Vinson on behalf of the Debtors including payments received within the ninety days preceding the Petition Date.

(v) Identification of all non-bankruptcy matters Vinson rendered services on behalf of the Debtors within the two years preceding the Petition Date.

(w) Clarification regarding the purported discount referenced in Meyer Dec. Dec. ¶ 16(a) since discount is not disclosed in the Engagement Letter**.**

20. The U.S. Trustee also requested certain changes to the proposed order including the following:

(a) Order ¶ 2**: "**The Debtors are authorized to retain and employ V&E as their counsel as of the Petition Date in accordance with ~~(a)~~ the terms and conditions set forth in the Engagement Letter attached to the Application as Schedule 1 to Exhibit B-1 ~~and (b)~~, **as modified by** this Order."

Requested the portions crossed out be stricken and the highlighted portion be added to this paragraph.

(b) Order 3: "V&E will make a reasonable effort to comply with the U.S. Trustee's requests for information and additional disclosures as set forth in the *Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases Effective as of November 1, 2013* (the "***Revised UST Guidelines***") in connection with the interim and final fee applications to be filed by V&E in these chapter 11 cases and V&E shall use its reasonable efforts to avoid any duplication of services provided by any of the Debtors' other professionals."

Requested the following language be added to the end of this paragraph.

(c) "Notwithstanding anything to the contrary in the Application, the Engagement Letter, or the Declarations attached to the Application, the reimbursement provisions allowing the reimbursement of fees and expenses incurred in connection with participating in, preparing for, or responding to any action, claim, suit, or proceeding brought by or against any party that relates to the legal services provided under the Engagement Letter and fees for defending any objection to V&E's fee applications under the Bankruptcy Code are not approved pending further order of the Court."

Requested the following provision be added to the proposed order.

(d) "To the extent that there may be any inconsistency between the terms of the Application, the Engagement Letter, the Meyer Declaration, and this Order, the terms of this Order shall govern."

Requested the following provision be added to the proposed order.

21. Vinson agreed to all changes requested by the U.S. Trustee to the proposed order.

22. Vinson provided the U.S. Trustee with some additional information on April 5, 2024 and continues to cooperate with the U.S. Trustee.

23. The U.S. Trustee will continue to work with Vinson in obtaining and reviewing information to resolve his concerns and narrow any remaining issues.

24. The Court entered an order continuing the hearing on the Employment Application from April 11, 2024 to May 9, 2024 due to possible issues concerning Vinson's disinterestedness and established a briefing schedule on April 3, 2024. *See* Order Continuing Hearing, ECF No. 224.

25. The objection deadline to the Employment Application is April 10, 2024.

26. This objection is timely[2].

LEGAL ARGUMENT

27. Vinson has failed to provide sufficient information to adequately evaluate certain connections, and absent additional disclosures the Employment Application should be denied.

28. A debtor, "with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons...." 11 U.S.C. § 327(a); *see also Baker Botts L.L.P. v. ASARCO LLC,* 576 U.S. 121, 124 (2015). Employment under section 327(a) is limited to professionals that do not "hold or represent an interest adverse to the estate and are disinterested." *In re Congoleum Cop*., 426 F.3d 675, 688-89 (3d Cir. 2005) (citing 11 U.S.C. § 327(a)); *see also Harold & Williams Development Company v. U.S. Trustee,* 977 F.2d 906, 909 (4th Cir. 1992).

29. Vinson bears the burden to establish that it is "both disinterested and [does] not represent an interest adverse to the estate." *In re Big Mac Marine, Inc*., 326 B.R. 150, 154 (8th BAP Cir. 2005) (citing *Interwest Bus. Equip., Inc. v. United States Trustee* (*In re Interwest Bus.*

[2] The U.S. Trustee reserves the right to file a supplemental brief in accordance with the Order Continuing Hearing.

Equip., Inc.), 23 F.3d 311, 318 (10th Cir. 1994); *In re Huntco Inc.,* 288 B.R. 229, 232 (Bankr. E.D.Mo. 2002)).

a. Disclosures

30. As the applicant, Vinson is obligated to provide clear and candid disclosures regarding all connections to the debtor, creditors, and parties in interest in a verified statement and adequately disclose its compensation arrangement with the Debtors. *See* Fed. R. Bankr. P. 2014(a); *see also In re Park-Helena Corp.,* 63 F.3d 877, 881 (9th Cir. 1995); *In re Alpha Natural Resources, Inc*., No. 15-33896, 2016 Bankr. LEXIS 4374, at *31 n. 7 (Bankr. E.D.Va. Dec. 20, 2016); *In re Roberts*, 618 B.R. 213, 219 (Bankr. S.D.Ohio 2020). Vinson's duty to disclose under Rule 2014(a) is a continuous one. *See In re Final Analysis*, Inc., 640 B.R. 633, 641-42 (Bankr. D.Md. 2022); *see also In re Sandpoint Cattle Company, LLC*, 556 B.R. 408, 421 (Bankr. D.Neb. 2016) (citations omitted)

31. Compliance with Rule 2014(a)'s verified statement and disclosure requirements is mandatory. *In re Blue Ridge Limousine and Tour Service, Inc*., No. 12-17551, 2014 WL 4101595, at * 4 (Bankr. E.D.Va. Aug. 20, 2014); *see also In re Rowe*, 750 F.3d 392, 397 (4th Cir. 2014) ("[T]he term 'shall' customarily connotes a command…")(citations omitted).

32. Courts, creditors, and the U.S. Trustee rely upon a professional's disclosures to evaluate whether retention is appropriate. *In re eToys, Inc.,* 331 B.R. 176, 189 (Bankr. D.Del. 2005). An applicant's failure to provide clear and candid disclosures inhibits the ability to conduct a meaningful evaluation of disqualifying connections. *See In re Champagne Services*, LLC, 560 B.R. 196, 201 (Bankr. E.D.Va. 2016); *see also In re LSS Supply Inc*., 247 B.R. 280, 282-83 (Bankr. D.Ariz. 2000) (citations omitted). Accordingly, "[i]t is not ... the obligation of the bankruptcy court to search the record for possible conflicts of interest. That obligation belongs to the party who seeks employment by the estate." *In re BH & P, Inc.,* 949 F.2d 1300,

1317 (3d Cir. 1991). Moreover, it is not within the province of a professional to "usurp the court's function by choosing, *ipse dixit,* which connections impact disinterestedness and which do not. The existence of an arguable conflict must be disclosed if only to be explained away." *In re Midway Industry Contractors, Inc*., 272 B.R. 651, 662 (Bankr. N.D.Ill. 2001) (citations omitted); *see also In re Vascular Access Centers, L.P*., 613 B.R. 613, 625 (Bankr. E.D.Pa. 2020) (citations omitted).

33. The U.S. Trustee's request for additional information noted above highlights Vinson's disclosure deficiencies. Vinson's incomplete disclosures fall short of its mandatory obligation to provide "full, candid, and complete disclosures." *In re Kings River Resorts, Inc*., 342 B.R. 76, 85 (Bankr. E.D.Cal. 2006) (citations omitted). Vinson must provide additional disclosures regarding its connections to parties in interest and its compensation agreement[3] with the Debtors. *See In re Dickson Properties, LLC*, No. 11-18617, 2012 WL 2026760, at *8 (Bankr. E.D.Va. June 5, 2012).

34. Vinson's lack of full disclosures regardless of any prejudice to the estate is a sufficient basis, by itself, to warrant denial of its employment. *See In re Lewis Road, LLC*, No. 09-37672, 2011 WL 6140747, at *9 (Bankr. E.D.Va. Dec. 9, 2011) (citations omitted); *see also In re Biddle*, No. 12-05171, 2012 WL 6093926, at *4 (Bankr. D.S.C. Dec. 6, 2012) (same).

[3] Any payment received or compensation agreement made within the one year preceding the Petition Date "in connection with the bankruptcy case" must be disclosed in accordance with Section 329(a) and Rule 2016(b). *See* 11 U.S.C. § 329(a); Fed. R. Bankr. P. 2016(b); *see also In re Gorski,* 519 B.R. 67, 71 (Bankr. S.D.N.Y. 2014) ("The term "in connection with the case" in § 329(a) is construed broadly…"); *In re Hargis*, 148 B.R. 19, 21-22 (Bankr. N.D.Tex. 1991).

b. Conflict of interest

35. Vinson's prior and current representation of Riverstone and insiders may create a conflict to merit denial of its Employment Application.

36. Section 327(a) imposes "a per se disqualification...of any attorney who has an actual conflict of interest." *In re Marvel Entertainment Group, Inc*., 140 F.3d 463, 476 (3d Cir. 1998). Additionally, potential conflicts of interest may be sufficiently egregious to warrant disqualification. *See Congoleum Cop*., 426 F.3d at 692.

37. Vinson has not provided sufficient information regarding its prior and ongoing representations of Riverstone, its affiliates, and insiders. Nor did Vinson provide any information regarding internal controls to combat potential conflicts as noted by the Court. *See* Order Continuing Hearing, ECF No. 224. Vinson also did not highlight Meyer's and Peet's prior representations of Riverstone or its affiliates.

38. The U.S. Trustee and Court need additional information from Vinson regarding its connections with Riverstone and current and former directors to evaluate whether a conflict of interest arises to warrant denial of its Employment Application

39. Additionally, Vinson has not provided sufficient information upon which a determination may be made whether Vinson is a creditor of the Debtors, and if so, whether Vinson received preferential payments from the Debtors. *Staiano v. Pillowtex, Inc. (In re Pillowtex, Inc.)*, 304 F.3d 246 (3d Cir. 2002); *see also In re BF Chinatown, LLC*, No. 22-11143, 2022 WL 17861775, at*2 (Bankr. E.D.Va. Dec. 22, 2022).

40. Vinson's informal disclosures to the U.S. Trustee in no way supplants or alleviates its duty to disclose under Rule 2014(a). *See In re Swansea Consol. Resources, Inc*.,

155 B.R. 28, 35 n.9 (Bankr. D.R.I. 1993) (citations omitted); *see also In re Granite Sheet Metal Works, Inc*., 159 B.R. 840, 847 (Bankr. S.D.Ill. 1993).

41. The Employment Application in its current form lacks necessary and adequate information and must be denied.

CONCLUSION

WHEREFORE, the U.S. Trustee respectfully requests that the Debtors' Application to Employ Vinson & Elkins LLP be denied. Additionally, the U.S. Trustee seeks such other and further relief as the Court may find appropriate and just.

Respectfully submitted,

Gerard R. Vetter, Acting United States Trustee for Region Four

By: /s/ Nicholas S. Herron

Kenneth N. Whitehurst, III
Assistant United States Trustee

Nicholas S. Herron
Trial Attorney

CERTIFICATE OF SERVICE

I certify that on **April 10, 2024** service on all attorney Users in this case was accomplished through the Notice of Electronic Filing, pursuant to CM/ECF Policy 9 of the United States Bankruptcy Court for the Eastern District of Virginia, Case Management/Electronic Case Files (CM/ECF) Policy Statement, Version 05/02/2023. A copy of this Objection was mailed on the same date by First Class U.S. Mail, postage prepaid addressed as follows: Enviva Inc., 7272 Wisconsin Avenue, Suite 1800, Bethesda, MD 20814 (Debtor); David S. Meyer and Jessica C. Peet, Vinson & Elkins LLP, The Grace Building, 1114 Avenue of the Americas, 32nd Floor, New York, NY 10036-7708 (Proposed Debtors' Counsel); Matthew J. Pyeatt and Trevor G. Spears, Vinson & Elkins LLP, 2001 Ross Avenue, 39th Floor, Dallas, TX 75201 (Proposed Debtors' Counsel); Michael A. Condyles, Peter J. Barrett and Jeremy S. Williams, Kutak Rock LLP, 901 East Byrd Street, Suite 1000, Richmond, VA 23219-4071 (Proposed Debtors' Co-Counsel); Ira S. Dizengoff, Abid Qureshi and Jason P. Rubin, Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, NY 10036 (Proposed Counsel for Unecured Creditor Committee); Scott L. Alberino and Alexander F. Antypas, Akin Gump Strauss Hauer & Feld LLP, 2001 K Street, N.W., Washington, DC 20006 (Proposed Counsel for Unecured Creditor Committee).

/s/ Nicholas S. Herron

DISCLOSURE AND CERTIFICATION REQUIREMENTS – GENERATIVE ARTIFICIAL INTELLIGENCE

Chambers of United States District Judge
Leslie E. Kobayashi

1. Consistent with Rule 11(b) of the Federal Rules of Civil Procedure, and the certifications required thereunder, the Court directs that any party, whether appearing *pro se* or through counsel, who utilizes any generative artificial intelligence (AI) tool in the preparation of any documents to be filed with the Court, must disclose in the document that AI was used and the specific AI tool that was used. The unrepresented party or attorney must further certify in the document that the person has checked the accuracy of any portion of the document drafted by generative AI, including all citations and legal authority.

2. If generative AI is utilized in the preparation of any documents filed with the Court, the unrepresented party or attorney will be held responsible for the contents thereof, in accordance with Rule 11 and applicable rules of professional conduct and/or attorney discipline.

3. The failure to make the disclosure and certification described in paragraph 1 may result in the imposition of sanctions.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

The following Practical Guidance is based on current professional responsibility obligations for lawyers and demonstrates how to behave consistently with such obligations. While this guidance is intended to address issues and concerns with the use of generative AI and products that use generative AI as a component of a larger product, it may apply to other technologies, including more established applications of AI. This Practical Guidance should be read as guiding principles rather than as "best practices."

PRACTICAL GUIDANCE

Applicable Authorities	Practical Guidance
Duty of Confidentiality Bus. & Prof. Code, § 6068, subd. (e) Rule 1.6 Rule 1.8.2	Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security. A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client. A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols. A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.
Duties of Competence and Diligence Rule 1.1 Rule 1.3	It is possible that generative AI outputs could include information that is false, inaccurate, or biased. A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law. Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product. Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer. AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for

Applicable Authorities	Practical Guidance
	accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results. A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.
Duty to Comply with the Law Bus. & Prof. Code, § 6068(a) Rule 8.4 Rule 1.2.1	A lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools. There are many relevant and applicable legal issues surrounding generative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns. A lawyer should analyze the relevant laws and regulations applicable to the attorney or the client.
Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers Rule 5.1 Rule 5.2 Rule 5.3	Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm's lawyers and non lawyers' conduct complies with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use. A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations.

Applicable Authorities	Practical Guidance
Communication Regarding Generative AI Use Rule 1.4 Rule 1.2	A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client. The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use. A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.
Charging for Work Produced by Generative AI and Generative AI Costs Rule 1.5 Bus. & Prof. Code, §§ 6147–6148	A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI. Costs associated with generative AI may be charged to the clients in compliance with applicable law. A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI.
Candor to the Tribunal; and Meritorious Claims and Contentions Rule 3.1 Rule 3.3	A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court. A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.
Prohibition on Discrimination, Harassment, and Retaliation Rule 8.4.1	Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees). Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.

Applicable Authorities	Practical Guidance
Professional Responsibilities Owed to Other Jurisdictions Rule 8.5	A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.

MAGISTRATE JUDGE JEFFREY COLE
219 South Dearborn Street
Courtroom 1003, Chambers 1088
Chicago, IL 60604
(312) 435-5601

THE USE OF "ARTIFICIAL INTELLIGENCE" IN THE PREPARATION OF DOCUMENTS FILED BEFORE THIS COURT

I have adopted the following Standing Order regarding the use of artificial intelligence ("AI") in the event AI is used in the preparation of documents in cases assigned to this court. The Rule is based upon the Rule adopted by Judge Brantley Starr. *See* Hon. Brantley Starr, "Mandatory Certification Regarding Generative Artificial Intelligence [Standing Order]," (N.D. Tex.) (unlike attorneys, "generative artificial intelligence … hold[s] no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth.")) (www.txnd.uscourts.gov/judge/judge-brantley-starr). The Standing Order of this Court provides that:

> Any party using AI in the preparation of materials submitted to the court must disclose in the filing that an AI tool was used to conduct legal research and/or was used in any way in the preparation of the submitted document. Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry. The Federal Rules of Civil Procedure, including Rule 11, will apply.

The mission of the federal courts to ascertain truth is obviously compromised by the use of an AI tool that generates legal research that includes false or inaccurate propositions of law and/or purport to cite non-existent judicial decisions cited for substantive propositions of law. *See Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), 2023 WL 3696209, at *1-2 (S.D.N.Y. May 4, 2023) (issuing show cause order where "[a] submission filed by plaintiff's counsel in opposition to a motion to dismiss [wa]s replete with citations to nonexistent cases."); *Mata, supra,* Attorney Affidavit (S.D.N.Y. May 25, 2023) (D.E. 32-1) (responding to show cause order by stating that the case authorities found by the district court to be nonexistent "were provided by Chat GPT which also provided its legal source and assured the reliability of its content.").

In any case in which Artificial Intelligence was employed in the research and/or drafting of any document submitted for filing in support of any proposition advanced to the court as purported authority in support of or opposition to any point or conclusion in the case, Rule 11 and the other rules of the Federal Rules of Civil Procedure will apply, and a certification on a filing will be deemed as a representation by the filer that they have read and analyzed all cited authorities to ensure that such authorities actually exist and that counsel actually have assessed and considered the cited case or other authority offered in support or in contravention of the particular proposition.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

FILED
2023 JUL 25 P 12: 26
DOUGLAS E. WILDGE, CLERK
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF OK
DEPUTY

IN RE:	)	
	)	
PLEADINGS USING GENERATIVE ARTIFICIAL INTELLIGENCE.	)	**General Order No. 23-01**
	)	

Effective September 1, 2023, any document filed with the Court that has been drafted utilizing a generative artificial intelligence program, including but not limited to ChatGPT, Harvey.AI, or Google Bard, must be accompanied by an attestation: (1) identifying the program used and the specific portions of text for which a generative artificial intelligence program was utilized; (2) certifying the document was checked for accuracy using print reporters, traditional legal databases, or other reliable means; and (3) certifying the use of such program has not resulted in the disclosure of any confidential information to any unauthorized party. The Court finds such attestation necessary because as noted by Hon. Brantley Starr: "While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or . . . the truth)." Hon. Brantley Starr, Mandatory Certification Regarding Generative Artificial Intelligence, www.txnd.uscourts.gov/judge/judge-brantley-starr (last visited June 22, 2023).

Additionally, Rule 9011 of the Federal Rules of Bankruptcy Procedure continues to apply to all documents filed with the Court, and the Court construes all filings as a certification by the person signing the filed document of compliance with Rule 9011(b).

SO ORDERED this 25th day of July, 2023.

Sarah A. Hall, Chief
United States Bankruptcy Judge

Janice D. Loyd,
United States Bankruptcy Judge

CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 21, 2023

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

IN RE:	§	
	§	
PLEADINGS USING GENERATIVE	§	**GENERAL ORDER**
ARTIFICIAL INTELLIGENCE	§	**2023-03**
	§	

If any portion of a pleading or other paper filed on the Court's docket has been drafted utilizing generative artificial intelligence, including but not limited to ChatGPT, Harvey.AI, or Google Bard, the Court requires that all attorneys and pro se litigants filing such pleadings or other papers verify that any language that was generated was checked for accuracy, using print reporters, traditional legal databases, or other reliable means. Artificial intelligence systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States and are likewise not factually or legally trustworthy sources without human verification. Failure to heed these instructions may subject attorneys or pro se litigants to sanctions pursuant to Federal Rule of Bankruptcy Procedure 9011.

IT IS SO ORDERED.

###END OF ORDER###

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION, AT DAYTON

STANDING ORDER GOVERNING CIVIL CASES

Effective as of December 18, 2023

Notice to counsel: New Requirement for Joint Proposed Final Pretrial Conference Orders Effective as of December 18, 2023

Notice to counsel: New AI Provision Effective as of July 14, 2023

Hon. Michael J. Newman
United States District Judge
Walter H. Rice Federal Building & U.S. Courthouse
200 West Second Street, Room 505
Dayton, Ohio 45402
newman_chambers@ohsd.uscourts.gov

Courtroom Deputy/Judicial Assistant:
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TABLE OF CONTENTS

I. GENERAL PROVISIONS

a. Local Rules

The **Local Civil Rules of the United States District Court for the Southern District of Ohio**, including the *Introductory Statement on Civility*, shall be strictly adhered to by all parties and counsel appearing before the undersigned and will be strictly enforced by the Court. The Court reserves the right to sanction counsel who violate the Local Rules or Civility Statement.

b. Conflicting General Orders

This Standing Order replaces Dayton General Order No. 12-01 for all civil cases assigned to the undersigned. On or after the effective date of this Standing Order, all counsel of record are charged with knowledge of the procedures and requirements contained herein.

II. PRETRIAL PROCEDURES

a. Preliminary Pretrial Conference

The assigned magistrate judge will generally set a pretrial scheduling conference to occur by telephone within 45 days after all parties have appeared in an action.

i. Participation

All *pro se* parties must participate in the preliminary pretrial conference. Parties represented by counsel need only appear at the preliminary pretrial conference through their "trial attorney" (defined in S.D. Ohio Civ. R.

83.4(a)).[1] Co-counsel for any party may also participate in the preliminary pretrial conference, but a party's "trial attorney" is required to participate.

ii. Subject Matter

During the preliminary pretrial conference, the assigned magistrate judge will discuss the contents of the Rule 26(f) report, including the dates and deadlines proposed by the parties; the parties' discovery plan; the need for issuance of a protective order governing the exchange of confidential information; the status of settlement negotiations; and whether the parties seek to engage in mediation or other alternative dispute resolution ("ADR") mechanism.

b. Rule 26(f) Conference and Report

Prior to the preliminary pretrial conference, the parties shall confer as required by Fed. R. Civ. P. 26(f) and jointly prepare a Rule 26(f) report for filing.

i. Trial Date

Trial in a civil case will generally not be set to commence any sooner than 5 months after the dispositive motion deadline.

[1] "Unless otherwise ordered, in all actions filed in, transferred to, or removed to this Court, all parties other than *pro se* parties must be represented at all times by a 'trial attorney' who is a permanent member in good standing of the bar of this Court. Each filing made on behalf of such parties shall identify and be signed by the trial attorney. The trial attorney shall attend all hearings, conferences, and the trial itself unless excused by the Court from doing so. Admission *pro hac vice* does not entitle an attorney to appear as a party's trial attorney, but the Court may, in its discretion and upon motion that shows good cause, permit an attorney who has been so admitted to act as a trial attorney." S.D. Ohio Civ. R. 83.4(a).

ii. Discovery Plan

In formulating a discovery plan, the parties shall consider the need for a protective order governing the exchange and use of confidential information during the discovery phase of the case.

iii. Filing

The Rule 26(f) report of the parties shall be filed at least 7 days prior to the date of the pretrial scheduling conference.

iv. Binding Nature of the Rule 26(f) report

In the absence of objection by any party, the Court will generally adopt in a Scheduling Order the following deadlines jointly proposed by the parties in the Rule 26(f) report: amending the pleadings; adding/joining additional parties; filing motions directed to the pleadings (*i.e.*, motions to dismiss or for judgment on the pleadings); disclosing lay and expert witnesses; completing discovery; and filing dispositive motions. Unless otherwise stated in the Court's Scheduling Order, the dates jointly proposed by the parties in the Rule 26(f) report shall govern the action and the parties are bound by the discovery plan and other agreements set forth in the Rule 26(f) report**.**

v. Form

A form Rule 26(f) report is attached in Appendix A to this Standing Order.

c. Scheduling Order

A Scheduling Order will promptly issue after the preliminary pretrial conference and shall, upon issuance, govern the case. No deadline set in the Scheduling Order shall be extended, amended, or continued in the absence of a Court Order issued upon good cause shown. In other words, even if all parties agree, a Court Order is nevertheless required to extend, amend, or continue any deadline set in the Scheduling Order. To seek amendment of deadlines, counsel or *pro se* litigants must file a motion to amend and comply with all provisions of the Local Rules. *See* S.D. Ohio Civ. R. 7.2 and 7.3.

III. MAGISTRATE JUDGE PRACTICE

a. Assignment

All civil cases, upon filing, are assigned by the Clerk to a district judge and a magistrate judge.

b. Reference

All civil cases assigned to the undersigned, upon filing, are hereby referred by this Standing Order to a magistrate judge pursuant to 28 U.S.C. §§ 636(b)(1)(A), (B), and (C) and § 636(b)(3). Unless otherwise ordered,[2] the magistrate judge is authorized to perform any and all functions authorized for full-time United States

[2] Certain categories of cases are referred to the United States magistrate judge to perform any and all functions authorized for full-time magistrate judges by statute. *See* **Dayton General Order, No. 22-01 (S.D. Ohio Jan. 28, 2022)**. These cases include, *inter alia*, IRS summonses, government loans, Miller Act cases, *pro se* cases, post-conviction relief matters, Social Security disability appeals, and all post-judgment proceedings in aid of execution. *Id.* In addition, other cases may be referred for full disposition upon the unanimous consent of the parties. *See* 28 U.S.C.§ 636(c); *see also infra* § III(c).

magistrate judges by statute except that, unless specifically ordered, the following motions are not referred, regardless of when they may be filed: (1) motions for temporary restraining order or preliminary injunction; (2) motions to dismiss, for judgment on the pleadings, or for summary judgment; (3) motions for class certification; (4) motions *in limine*; and (5) motions for default judgment.

c. Consent

A United States magistrate judge of this court is available to conduct all proceedings in a civil action (including a jury or nonjury trial) and to order the entry of a final judgment (a judgment that may then be appealed directly to the United States Court of Appeals for the Sixth Circuit). A magistrate judge may exercise this authority only if all parties voluntarily consent. You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. *Pro se* litigants and counsel may consent at any time during the litigation so long as trial has not yet begun.

If all parties consent to the jurisdiction of the magistrate judge, they shall so advise the Clerk of Court by signing and jointly submitting to the **Clerk** Form AO 85, which is attached to this Standing Order at Appendix B.

IV. DISCOVERY

a. The Discovery Deadline

No discovery from any source shall be requested or received, or any depositions occur, after the discovery deadline. All discovery must be completed, not just requested, by the discovery deadline. For such discovery to occur, the requesting

party must seek leave of court to amend the discovery deadline for that limited purpose. The Court may disregard -- on summary judgment, at trial, or otherwise -- any information or documents obtained, received, or produced after the discovery deadline.

b. Discovery Disputes and Associated Motion Practice

The parties may jointly request an informal discovery dispute conference with the assigned magistrate judge only after exhausting all extrajudicial means[3] to resolve the dispute. *See* S.D. Ohio Civ. R. 37.1. In the absence of extraordinary circumstances, no discovery motion -- such as a motion to compel or a motion for a protective order (except for a joint motion for entry of a proposed protective order) -- shall be filed in a case assigned to the undersigned until the parties have participated in an informal discovery dispute conference as set forth in S.D. Ohio Civ. R. 37.1.

c. Depositions in Lieu of Trial Testimony

After the discovery deadline, a party may take a deposition for use at trial in lieu of live testimony only if leave of court is granted.

d. Protective Orders Governing Confidential Information in Discovery

Where the parties believe that a protective order is needed to govern the exchange and use of confidential information during the discovery phase of the case, the parties shall confer to negotiate the terms of such an order for the Court's approval.

[3] The undersigned interprets the phrase "all extrajudicial means" to require both telephonic and written communication between the parties.

To obtain Court approval, the parties shall jointly file a motion for the entry a joint protective order and attach the joint proposed protective order thereto. In addition, the parties shall email the joint proposed protective order to the undersigned's chambers and the chambers of the assigned magistrate judge. In negotiating the terms of the protective order, the parties shall be familiar with Sixth Circuit case law, including *Shane Group, Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299 (6th Cir. 2016). Form protective orders are available on the Court's **website**.

e. Inadvertent Disclosure

Pursuant to Evidence Rule 502(d), an inadvertent disclosure of a communication or information covered by the attorney-client privilege or work-product protection made in connection with this litigation shall not constitute a waiver of that privilege or protection in this or any other federal or state proceeding.

V. MOTION PRACTICE

a. Memoranda in Support

Memoranda in support of a motion shall be appended directly to the motion and shall not be filed separately on the Court's CM/ECF docketing system.

b. Motion Filing Deadlines

Motions filed under Fed. R. Civ. P. 12 and 56 before the undersigned shall be briefed in the following manner: Plaintiff's memorandum in opposition is due within 21 days of the filing of the motion to dismiss; the movant's reply memorandum is due within 14 days of the filing of the opposition memorandum. All other motion, unless otherwise ordered, shall follow the same timeline.

c. Evidence in Support

The Court prefers that, to the extent practicable, all evidence used in support of a motion shall be filed on the Court's CM/ECF system before the motion is filed. Citations to evidence shall reference the case-specific document number and PageID number (*e.g.*, Doc. No. 50 at PageID 123) where the evidence cited is located within the record.

i. Depositions

Deposition transcripts referred to or relied upon in support of or in opposition to a motion shall be filed with the Court. When filing deposition transcripts, the parties shall file the full transcript in a condensed format. All deposition transcripts filed with the Clerk must include a signature page and statement of changes in form or substance made by the witness pursuant to Fed. R. Civ. P. 30(e) and the certificate described in Fed. R. Civ. P. 30(f).

ii. Confidential Information as Evidence

Except where impractical to do so, a party seeking to support a motion with information deemed "confidential" or otherwise protected by the terms of a protective order must, sufficiently in advance of date upon which the party seeks to file such information with the Court, confer with the party or parties designating the information confidential or otherwise protected by the terms of a protective order to determine whether it is appropriate to file a motion for leave to file that information under seal.

iii. Filing Evidence Under Seal

Leave of court is required before a party may file evidence on the Court's docket under seal. This includes information deemed "confidential" or otherwise protected by the terms of a protective order. When moving for leave to file information under seal, the moving party shall be familiar with the standards set by the Sixth Circuit, including *Shane Group*. The Court anticipates that motions for leave to file documents under seal will be accompanied by: (1) a memorandum explaining, with legal citations, why the proposed seal is no broader than necessary; and (2) an affidavit demonstrating compliance with *Shane Group* and its progeny.

Any Order denying a motion to seal or denying a motion for continued sealing will be stayed for a period of 14 days after entry of the Order during which an appropriate appeal from the Order may be filed or during which all or part of the material filed under seal may be withdrawn before it becomes a part of the public record. If an appeal is filed, the subject Order will remain stayed until the appeal is determined and, if the Order is affirmed, in whole or in part, the Order will remain stayed for an additional 14 days after the entry of the appellate ruling during which all or part of the material filed under seal may be withdrawn before it becomes a part of the public record.

iv. The Same Evidence Should be Filed Once

To the extent practicable, the parties should refrain from filing the same evidence multiple times on the Court's docket. For example, if the

transcript of a deposition is filed as Document #20 on the docket in support of a motion to compel, that same deposition should not be separately filed again to support a later-filed motion for summary judgment; instead, the party should simply cite Doc. 20 and the appropriate PageID in the motion for summary judgment. Similarly, if defendant cites a contract governing the relationship between the parties and files such contract as an exhibit in support of a motion for summary judgment, plaintiff should not again file the same contract as an exhibit to the memorandum in opposition; instead, plaintiff should simply cite to the contract filed by defendant.

d. Page Limitations and Formatting

While the Court prefers that memoranda not exceed the 20-page limitation set forth in S.D. Ohio Civ. R. 7.2(a)(4), leave of court is not required to file a memorandum exceeding that page limitation. However, parties filing memoranda exceeding 20 pages in length shall comply with all other requirements of S.D. Ohio Civ. R. 7.2(a)(4).

All briefs and memoranda shall comport with the following specifications: (1) one-inch margins on all sides; (2) main body of the text in 12-point, Times New Roman font; (3) footnote text in at least10-point font in the same typeface as the main body of the text; and (4) citations in the main body of the text, not footnotes.

e. Impact on Court Discovery

Unless otherwise expressly ordered by the Court, discovery is not stayed, extended, continued, or tolled by the filing of any motion or while any dispositive motion

remains pending on the docket awaiting decision. For example: the filing of a motion for judgment on the pleadings or the pendency of a motion to dismiss does not stay or toll the discovery deadline pending a decision on the motion.

f. Hearings and Oral Argument

Unless required by law or otherwise ordered by the Court, all motions will be decided on the parties' written submissions filed in accordance with S.D. Ohio Civ. R. 7.2. The parties may request oral argument or a hearing on any motion by following the procedure set forth in S.D. Ohio Civ. R. 7.1(b).

g. Courtesy Copies

Unless requested by the Court, the parties need not provide the Court with courtesy copies of any motion or memorandum.

VI. ARTIFICIAL INTELLIGENCE ("AI") PROVISION

No attorney for a party, or a *pro se* party, may use Artificial Intelligence ("AI") in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, *inter alia*, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.

VII. MEDIATION

Mediations are conducted by the Dayton magistrate judge not otherwise assigned to the case. To schedule a mediation, counsel should contact Judge Newman's Courtroom Deputy directly, not the magistrate judge's chambers.

VIII. TRIAL, ASSOCIATED CONFERENCES AND DEADLINES

a. Final Pretrial Conference

The date for the final pretrial conference will generally be set forth in the Scheduling Order issued at the outset of the case and will typically occur approximately 14 days or more prior to trial. The trial attorney and all co-counsel who intend to participate at trial shall attend the final pretrial conference. The Court reserves the right to bar from trial all counsel who fail to attend the final pretrial conference in person.

b. Joint Proposed Final Pretrial Order

No later than 7 days before the final pretrial conference, the parties shall file a joint proposed final pretrial order using the form attached hereto in Appendix C. A copy of the joint proposed final pretrial order shall also be emailed to the undersigned's chambers.

i. Procedures for Preparing the Joint Proposed Final Pretrial Order

During the parties' preparation of the joint proposed final pretrial order, counsel shall discuss and agree to the maximum number of trial days it will take to submit the case to the jury or, in bench trials, to the Court. In the event the Court has bifurcated any claims or issues, counsel shall discuss

and agree to the maximum number of trial days it will take to submit each bifurcated stage of the case to the jury or, in bench trials, to the Court. Absent extraordinary circumstances or a showing of substantial prejudice, trial will not last longer than the maximum number of days agreed to by the parties in the Joint Final Pretrial Order.

Unless otherwise ordered by the Court or agreed to by the parties, the following procedure applies to the parties' preparation of the joint proposed final pretrial order:

> 1. Plaintiff shall prepare and deliver to each defendant a first draft of the joint proposed final pretrial order no later than 14 days prior to the filing deadline (without the information which is within the knowledge of defendants, such as lists of witnesses, exhibits, etc.);
>
> 2. Defendant must add all information necessary to complete a second draft of the joint proposed final pretrial order, clearly delineating the text which has been changed or added, and deliver the second draft to plaintiff(s) no later than 7 days prior to the filing deadline;
>
> 3. Following delivery of the second draft of the joint proposed final pretrial order, the parties shall confer and, thereafter, file and submit the joint proposed final pretrial order to the Court as set forth above.

ii. Sanctions

Failure to timely file the joint proposed final pretrial order as required may result in the continuance of the final pretrial conference and trial. Further, the failure to timely file the joint proposed final pretrial order may result in the issuance of sanctions, including the dismissal of a case for failure to prosecute.

iii. Entry of the Final Pretrial Order

Following the final pretrial conference, the Court will promptly enter the final pretrial order with any changes thereto on the Court's docket.

c. Exhibits

Exhibits shall be marked with sequential numerals as follows: joint exhibits shall be designated by its sequential number, e.g., JX1, JX2. Plaintiff's exhibits shall be designated PX followed by its sequential number, e.g., PX1, PX2. Defendant's exhibits shall be designated DX followed by its alphabetically sequential letter e.g., DXA, DXB. In cases involving multiple plaintiffs and/or defendants, questions regarding how to properly mark exhibits will be discussed during the final pretrial conference

i. Exchange Between the Parties

Unless otherwise ordered, all exhibits shall be marked and copies of such delivered to all other parties no later than 3 business days before the final pretrial conference.

ii. Court Copies

A hard copy of all exhibits shall be provided to the undersigned's Courtroom Deputy at least 3 business days prior to trial. To the extent possible, an electronic copy of all exhibits shall also be provided to the Court. If the parties are unable to provide the Court with electronic copies, 2 additional hard copies must be given to the undersigned's Courtroom Deputy at the time set forth above.

iii. Demonstratives

Sketches, models, diagrams, videos, PowerPoints, or any other demonstrative exhibit that will be used at trial for any purpose must be exhibited to all other parties no later than the final pretrial conference.

iv. Display of Exhibits at Trial

Unless admitted into evidence, no exhibit can be displayed to the jury without Court approval.

v. Admission into Evidence

The admissibility of all exhibits referred to during trial and offered by the parties, other than those examined by the jury, will be ruled upon by the Court, at the latest, prior to that party's resting. Either side may offer any marked exhibit, regardless of which party marked it. There is no requirement that counsel object to any exhibit at the final pretrial conference.

d. Jury Instructions

Proposed jury instructions and verdict forms must be filed 7 days or more before the final pretrial conference. In addition, a Word version of each parties' proposed jury instructions shall be emailed to chambers at **newman_chambers@ohsd.uscourts.gov**. As filed, they shall be formatted so that each instruction can be printed on a separate 8.5" x 11" sheet of paper identified as "Plaintiff(s) (Defendant(s)) Requested Instruction No. __." Each instruction must contain a citation of authority upon which counsel relies.

i. Citation to Authority

The Court uses as sources for its instructions O'Malley, Grenig, and Lee's FEDERAL JURY PRACTICE AND INSTRUCTIONS; OHIO JURY INSTRUCTIONS; the Sixth Circuit Pattern Jury Instructions; Pattern Instructions from other circuit courts; and instructions given in prior cases of a similar nature.

ii. Agreed Statement of the Case

The parties are required to confer and submit an agreed statement of the case to the undersigned's chambers via email (**newman_chambers@ohsd.uscourts.gov**) 7 days or more before trial.

e. Motions *in Limine*

Unless otherwise ordered, all motions *in limine*, directed to the presentation of evidence at trial, must be filed not later than 14 days prior to the final pretrial conference. Memoranda in opposition to motions *in limine* shall be filed no later than 7 days prior to the final pretrial conference. The failure to file a motion *in limine* does not waive any argument regarding the admissibility of evidence at trial.

f. *Daubert* Motions

The parties are encouraged to file *Daubert* motions simultaneously to their motions for summary judgment. If so filed, the opposing party will have 21 days to respond. No replies are permitted without leave of Court.

Any motion *in limine* addressed to the admissibility of expert testimony under *Daubert*, if not included in a previously filed motion for summary

judgment, must be filed at least 30 days before the Final Pretrial Conference. Responses to such motions must be filed no later than 23 days before the Final Pretrial Conference. No replies are permitted without leave of Court.

g. Depositions

Counsel will specify in the joint proposed final pretrial order those portions of any deposition which will be read or played at trial in lieu of live testimony. The deposition itself must be filed with the Clerk not later than the date of the final pretrial conference. Opposing counsel will note objections to any portion of the deposition in advance of the trial, and the Court will rule on the objections either prior to the commencement of the trial or, at the latest, prior to the reading or playing of the deposition in open court.

Video presentations must include a method for cutting off either sound or the entire picture from the jury in situations where the Court must rule on objections to testimony. In addition to the video record itself, a typewritten transcript must be provided to the Court and opposing counsel as an aid in following the videotape presentation and in ruling upon any objections.

Any deposition to be used solely for impeachment must be filed with the Clerk prior to the final pretrial conference.

h. Trial Briefs

Trial briefs, if desired by counsel or ordered by the Court, must be filed and served 7 days or more before trial. All briefs shall comply with S. D. Ohio Civ. R. 5.1,

with citations and references conforming to S. D. Ohio Civ. R. 7.2(b) and the style requirements for memoranda set forth in this General Order. Counsel should use their trial briefs to instruct the Court in advance of trial in any area of law upon which counsel will rely at trial. Therefore, the briefs should contain arguments, with citations to legal authority, in support of any evidentiary or other legal questions which may reasonably be anticipated to arise at trial.

i. Courtroom Practice

Conduct of counsel during the trial of cases will be governed by the following:

i. Counsel Tables

The plaintiff in all civil cases, and the United States Government in criminal cases, will occupy the counsel table nearest the jury. Defendants in both civil and criminal cases will occupy the counsel table furthest from the jury.

ii. Court Sessions

Trials will usually start at 9:00 a.m. The morning session will continue until approximately noon. There will be a morning recess of approximately 15 minutes at an approximately 10:30 a.m. The afternoon session will start one hour after the end of the morning session unless otherwise announced. The afternoon session will usually end at approximately 4:30 p.m. A recess of 15 minutes will occur at approximately 3 p.m. It is expected that the parties and all counsel will be available at least 15-20 minutes prior to the beginning of the morning and afternoon sessions.

iii. *Voir Dire*

For *voir dire,* the Court will generally ask initial questions of the entire panel first and will then allow counsel for the parties to ask follow-up questions.[4] Following questioning, the Court will entertain "for cause" challenges and peremptory challenges. The parties shall each have 3 peremptory challenges and may request additional peremptory challenges during the final pretrial conference.

iv. Size of the Jury

The Court will seat a jury of 8 in civil cases with a requirement of unanimity, unless otherwise ordered in the final pretrial order.

v. Courtroom Demeanor

Counsel should consult with Judge Newman at the final pretrial conference regarding the judge's preference as to requesting permission to approach a witness.

Presenting Exhibits to Witnesses. Since all evidence will have been previously deposited with the Courtroom Deputy, counsel should request the Courtroom Deputy to hand specific documents to the witness. Documents intended for impeachment purposes which are not admitted into evidence will be handed to the Courtroom Deputy for suitable marking and then handed to the witness.

[4] For a list of sample questions, see *infra* Appendix D.

Comments by Counsel. Counsel should address any comments to the Court and not to opposing counsel.

Objections. Counsel shall not make speaking objections and are not to argue objections in the hearing of the jury.

vi. Jury Charge Conference

The Court will hold a conference with counsel, in chambers and on the record, prior to the final argument in jury cases for the following purposes (1) counsel may be heard on proposed jury charges presented by either side and/or on the tentative charges submitted by the Court (counsels' attention is directed to Fed. R. Civ. P. 51); and (2) the Court will determine the length of the summations to the jury.

IT IS SO ORDERED.

December 14, 2023

s/Michael J. Newman
Hon. Michael J. Newman
United States District Judge

IX. APPENDICES

The following forms are available for the parties to use throughout the course of litigation:

1. Appendix A: Fed. R. Civ. P. 26(f) Order
2. Appendix B: Form AO85 for Unanimous Consent to Magistrate Judge Jurisdiction
3. Appendix C: Joint Proposed Final Pretrial Order
4. Appendix D: Sample Voir Dire Questions

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

_____	:	
		Case No.
Plaintiff(s),	:	
		District Judge _____
		Magistrate Judge _____
vs.	:	
		RULE 26(f) REPORT OF PARTIES
_____	:	(to be filed not later than seven (7) days prior to the preliminary
Defendant(s).	:	pretrial conference)

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on _____,

and was attended by:

_____, counsel for plaintiff(s) _____

_____, counsel for plaintiff(s) _____

_____, counsel for plaintiff(s) _____

_____, counsel for defendant(s) _____

_____, counsel for defendant(s) _____

_____, counsel for defendant(s) _____

_____, counsel for defendant(s) _____

2. The parties:

____ have provided the pre-discovery disclosures required by Fed. R. Civ. P. 26(a)(1), including a medical package (if applicable).

____ will exchange such disclosures by _____.

____ are exempt from disclosure under Fed. R. Civ. P. 26(a)(1)(E).

3. The parties:

____ unanimously consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

____ do not unanimously consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636 (c).

____ unanimously give contingent consent to the jurisdiction of the United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), for trial purposes only, in the event that the assigned District Judge is unavailable on the date set for trial (e.g., because of other trial settings, civil or criminal).

4. Recommended cut-off date for filing of motions directed to the pleadings:

_____

5. Recommended cut-off date for filing any motion to amend the pleadings and/or to add additional parties: _____

6. Recommended discovery plan:

a. Describe the subjects on which discovery is to be sought and the nature, extent and scope of discovery that each party needs to: (1) make a settlement evaluation, (2) prepare for case dispositive motions and (3) prepare for trial:

_____

_____

_____

_____

b. What changes should be made, if any, in the limitations on discovery imposed under the Federal Rules of Civil Procedure or the local rules of this Court, including the limitations to 40 interrogatories/requests for admissions and the limitation of 10 depositions, each lasting no more than one day consisting of seven (7) hours?

_____

_____

_____

_____

c. Additional recommended limitations on discovery:

_____

_____

_____

_____

d. Recommended date for disclosure of lay witnesses.

_____

e. Describe the areas in which expert testimony is expected and indicate whether each expert has been or will be specifically retained within the meaning of Fed. R.

Civ. P. 26(a)(2).

_____

_____

_____

_____

f. Recommended date for making primary expert designations:

_____

g. Recommended date for making rebuttal expert designations:

_____

h. The parties have electronically stored information in the following formats:

_____

_____

The case presents the following issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced:

_____

_____

_____

_____

i. The case presents the following issues relating to claims of **privilege or of protection as trial preparation materials:**

_____

_____

_____

Have the parties agreed on a procedure to assert such claims **AFTER** production?

_____ No

_____ Yes

_____ Yes, and the parties ask that the Court include their agreement in an order.

j. Recommended discovery cut-off date: _____

6. Recommended dispositive motion date: _____

7. Recommended date for status conference (if any): _____

8. Suggestions as to type and timing of efforts at Alternative Dispute Resolution:

_____

_____

_____

9. Recommended date for a final pretrial conference: _____

10. Has a settlement demand been made? _____ A response? _____

Date by which a settlement demand can be made: _____

Date by which a response can be made: _____

11. Other matters pertinent to scheduling or management of this litigation:

_____

_____

_____

_____

Signatures:

Attorney for Plaintiff(s):

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

Attorney for Defendant(s)

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

_____
Ohio Bar #
Trial Attorney for

Appendix B

AO 85 (Rev. 02/17) Notice, Consent, and Reference of a Civil Action to a Magistrate Judge

UNITED STATES DISTRICT COURT

for the

_____ *Plaintiff*	)	
v.	)	Civil Action No.
_____ *Defendant*	)	

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

Printed names of parties and attorneys	*Signatures of parties or attorneys*	*Dates*

Reference Order

IT IS ORDERED: This case is referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Date: _____

_____
District Judge's signature

_____
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

Print Save As... Reset

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Plaintiff(s)

vs. Case Number: _____
District Judge: _____

Defendant(s).

FINAL PRETRIAL ORDER

(A proposed final pretrial order following this form must be jointly prepared and filed not later than the date set forth in the Preliminary Pretrial Conference Order.)

This action came before the Court at a final pretrial conference held on _____ at____a.m./p.m., pursuant to Rule 16, Federal Rules of Civil Procedure.

I. APPEARANCES:

For Plaintiff(s):

For Defendant(s):

II. NATURE OF ACTION AND JURISDICTION:

A. This is an action for

B. The jurisdiction of the Court is invoked under Title_____United States Code, Section_____.

C. The subject matter jurisdiction of the Court (is) (is not) disputed. [If disputed, state by which party and on what basis.]

III. TRIAL INFORMATION:

A. The estimated length of trial is_____days.

B. Trial to_____has been set for_____.

IV. AGREED STATEMENTS AND LISTS:

A. General Nature of the Claims of the Parties:

(1) PLAINTIFF CLAIMS: (suggested type of simple language)
"Plaintiff asserts in Count 1 a right of recovery for defendants' negligence as follows:

"Plaintiff asserts in Count 2 a right of recovery for defendants' wanton and willful misconduct as follows:

"Plaintiff asserts in Count 3 a right to punitive damages and attorney fees for the following reasons:

(2) DEFENDANT CLAIMS: (suggested type of simple language)
Defendant denies liability as asserted in Counts___for the following reasons:

Defendant as an affirmative defense asserts:

(3) ALL OTHER PARTIES' CLAIMS

B. Uncontroverted Facts
Suggested Language:
"The following facts are established by admissions in the pleadings or by stipulations of counsel (set forth and number uncontroverted or uncontested facts.)

C. Issues of Fact and Law
Suggested Language:
(1) "CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are: (list)"
(2) "CONTESTED ISSUES OF LAW: The contested issues of law in addition to those implicit in the foregoing issues of fact, are: (set forth)
OR: There are no special issues of law reserved other than those implicit in the foregoing issues of fact."
If the parties are unable to agree on what the contes ted issues of fact or law are, their respective contentions as to what the issues are shall be set forth separately and clearly labeled.

D. Witnesses

Suggested Language:
(1) "Plaintiff will call or will have available for testimony at trial those witnesses listed in Appendix A hereof."

(2) "Defendant will call or will have available for testimony at trial those Witnesses listed on Appendix B hereof."

(3) _____will call or will have available for testimony at trial those witnessed listed on Appendix C hereof."

(4) "The parties reserve the right to call rebuttal witnesses whose testimony could not reasonably be anticipated without prior notice to opposing counsel."

INSTRUCTIONS:
(1) A brief one or two sentence synopsis of the witnesses' testimony must be given -- i.e., "Will testify to pain and suffering," "Will testify to lost profits, *etc.*"

(2) Leave to call additional witnesses may be granted by the Court in unusual situations on motion with names, addresses, and an offer of proof of such witness' testimony within twenty-four hours after the need to call such witness becomes known.

(3) The witnesses need not be called in the order listed, but the witnesses to be called on the succeeding day shall be disclosed to opposing counsel not later than the end of trial each day, unless otherwise ordered.

E. Expert Witnesses
Suggested Language:
"Parties are limited to the following number of expert witnesses, including treating physicians, whose names have been disclosed and reports furnished to the other side:
Plaintiff (a) Defendant(s)

F. Exhibits
The parties will offer as exhibits those items listed herein and numbered with Arabic numerals as follows:
(1) Joint Exhibits -- Appendix D (marked "JX_____")
(2) Plaintiff Exhibits Appendix E (marked "PX_____")
(3) Defendant Exhibits Appendix F (marked "DX____")
(4) Third-Party Exhibits -- appendix G (use Arabic numerals prefixed by initial of party.

INSTRUCTIONS:
The above exhibits will be deposited with the Court's Deputy Clerk not later than 4:00 p.m. on the third working day prior to trial.

G. Depositions
Suggested Language:
"Testimony of the following witnesses will be offered by deposition (read or videorecorded)"; OR
"No testimony will be offered by deposition"

H. Discovery
Suggested Language:
"Discovery has been completed" OR
"The following provisions have been made for discovery."

I. Pending Motions
Suggested Language:
"The following motions are pending at this time" OR
"There are no pending motions at this time."

J. Miscellaneous orders
INSTRUCTIONS: Set forth any orders not properly includable elsewhere.

V. MODIFICATION
Suggested Language:
"This final pretrial order may be modified at the trial of this action, or prior thereto, to prevent manifest injustice. Such modification may be made by application of counsel, or on motion of the Court."

VI. SETTLEMENT EFFORTS
Suggested Language:
"The parties have made a good faith effort to negotiate a settlement," or otherwise describe the status of settlement negotiations.

VII. TRIAL TO A JURY
PROPOSED INSTRUCTIONS ---
Suggested Language:
"The parties have submitted proposed jury instructions as required by Judge Michael J. Newman's Standing Order Governing Civil Cases."

Counsel for Plaintiff(s)
\
Counsel for Defendant(s)

Approved following Final Pretrial Conference:

_____
Hon. Michael J. Newman
United States District Judge

Appendix D

VOIR DIRE QUESTIONS BY THE COURT

The Court will first conduct a preliminary examination, typically using questions such as the following. After the Court has finished its examination of the jury panel, counsel may elect to supplement the Court's examination with questions that do not repeat, in substance, any question the Court already has put to the panel.

1. **I am now going to read the names of the parties and the witnesses that you may be hearing from in this case. Please listen to the list carefully as I will be asking you whether you know any of these people.**

First, as I just told you, the Plaintiff is represented by_____. Seated at the counsel table with _____ is_____.

At the next table is the Defendant in this case_____. He [or she] is represented by _____ of_____.

The Plaintiff may call the following persons as witnesses:

The Defendant in this case may call the following persons as witnesses:

Is any panel member related by blood or marriage to any of the individuals that I have just named?

Are you personally acquainted with these persons, or do you have any knowledge of them, directly or indirectly, through your social, business, or professional lives?

2. **Has any panel member ever heard of or been involved with any of the following entities or persons: [List any businesses or non-witness entities that will be important in this case.] Are any of these names familiar to any panel member?**

3. **OUTLINE THE COUNTS IN THE COMPLAINT**

Does any panel member have prior knowledge or information about the allegation(s) made against the Defendant(s), which I have just explained to you? This includes knowledge gained from personal contacts or from the media.

<u>Follow-up Questions for Any Affirmative Responses</u>:

- **i.** **From what source did you hear about this case (newspaper, TV, radio, conversation with others)?**
- **ii.** **How many times did you hear or read about it?**
- **iii.** **Do you remember specifically what you heard or read?**
- **iv.** **Did what you heard or read cause you to have any feeling concerning the merits of the parties' claims?**
- **v.** **Did what you heard or read cause you to have a favorable or an unfavorable impression concerning the parties?**
- **vi.** **Do you today have any impression or even tentative opinion as to the probable outcome of this case?**

4. **Does any panel member have any personal interest of any kind in this case, or in the Defendant(s)?**

5. **If any panel member has served as a juror in the federal or state court -- either in a civil or criminal case -- and regardless of the outcome of such case(s), would your prior experience have any effect or influence on your ability to serve as a fair and impartial juror in this case?**

6. **Does any panel member have any feeling -- thought -- inclination -- premonition -- prejudice -- religious belief or persuasion -- or bias -- which might influence or interfere with your full and impartial consideration and which might influence you either in favor of or against either the Plaintiff or Defendant?**

7. **Is there any reason in your mind why you cannot hear and consider the evidence and render a fair and impartial verdict?**

8. **Can you take the law as the Court instructs you, without any reservation whatsoever, and apply the facts to the Court's instructions on the law? If you cannot do this, please hold up your hand.**

9. **Do you recognize and accept the proposition that jurors are the sole judge of the facts and the Court is the sole judge of the law? If you cannot do this, please hold up your hand.**

10. **Has any panel member formed or expressed any opinion as to the liability of the Defendant(s)?**

11. **Does any panel member have:**

a. **Any transportation problem? For example, does anyone have difficulty getting to or from the courthouse?**

b. **Any medical or disability problems, such as difficulty hearing, walking or seeing? Does any other medical problem exist which could affect your service on the jury?**

12. **The Court and counsel estimate this trial will last____ days. Does any panel member have any immediate family or personal reason or situation which persuades you that you cannot serve as a juror during this period and give your undivided attention to this case?**

Finally, can any of you think of any matter that you should call to the Court's attention that may have some bearing on your qualifications as a juror, or that -- even to the slightest degree -- may prevent your rendering a fair and impartial verdict based solely upon the evidence and my instructions as to the law?

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

539 THEODORE LEVIN UNITED STATES COURTHOUSE
231 W. LAFAYETTE BOULEVARD
DETROIT, MICHIGAN 48226
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PORT HURON

NOTICE OF PROPOSED AMENDMENTS TO LOCAL RULES

At their regular meeting on December 4, 2023, the Judges of the United States District Court for the Eastern District of Michigan approved for publication and comment amendments to the following local rules:

- LR 5.1, Filing of Papers
- LR 83.4, Disclosure of Corporate Affiliations and Financial Interest
- LR 83.32, Possession and Use of Electronic Devices in Federal Court Facilities

In order to be assured consideration, comments in writing, which may include recommended changes to the proposed amendments, should be received by the Court no later than January 19, 2024. Comments may be sent to Local_Rules@mied.uscourts.gov or to Local Rules, 539 Theodore Levin United States Courthouse, 231 W. Lafayette Boulevard, Detroit, Michigan 48226.

[Additions are indicated by underline, and deletions by strikethrough.]

LR 5.1 Filing of Papers

(a) Papers presented for filing must comply with the following:

(1) – (3) [Unchanged]

(4) Disclosing Use of Artificial Intelligence.

(A) "Artificial intelligence" or "AI" means the capability of computer systems or algorithms to imitate intelligent human behavior.

(B) "Generative artificial intelligence" or "Generative AI" means artificial intelligence that is capable of generating new content (such as images or text) in response to a submitted prompt (such as a query) by learning from a large reference database of examples.

(C) If generative AI is used to compose or draft any paper presented for filing, the filer must disclose its use and attest that citations of authority have been verified by a human being by using

December 8, 2023

print volumes or traditional legal databases and that the language in the paper has been checked for accuracy by the filer.

(b) – (e) [Unchanged]

LR 83.4 Disclosure of Entity ~~Corporate~~ Affiliations, ~~and~~ Financial Interest, and Citizenship

(a) Parties Required to Make Disclosure.

(1) ~~With the exception of the United States Government or agencies thereof, or a state government or agencies or political subdivisions thereof, all corporate parties~~ Every non-governmental entity that is a party to a civil case, a non-governmental entity that seeks to intervene, an entity ~~and all corporate~~ defendant~~s~~ in a criminal case must file a Statement of Disclosure ~~of Corporate Affiliations and Financial Interest~~ as described in part (d). A negative report is also required.

(2) For the purposes of this Rule and the Statement of Disclosure, the term "entity" refers to any corporation, partnership, trust, limited liability company, unincorporated association, and any other organization with a legally recognized existence.

(b) Entities - Financial Interest to be Disclosed.

(1) Whenever a corporation which is a party to a case is a parent, subsidiary, or affiliate of any non-party entity ~~publicly owned corporation not named~~ in the case, counsel for the ~~corporation which is a~~ party entity must identify ~~file~~ on the ~~s~~Statement of ~~d~~Disclosure ~~provided in (c) identifying~~ the non-party entity ~~parent corporation or affiliate and the~~ its relationship to ~~between it and~~ the ~~corporation which is a~~ party entity ~~to the case~~. A ~~corporation~~ party entity is considered an affiliate of a ~~publicly owned corporation~~ non-party entity ~~for purposes of this Rule~~ if ~~it~~ the party entity controls, is controlled by, or is under common control with ~~a publicly owned corporation~~ the non-party entity.

(2) A party entity must identify any non-party entity that owns 10% or more of the non-party entity's stock or otherwise has at least a 10% ownership interest in the party entity.

(3) Whenever, by reason of insurance, a franchise agreement, lease, profit sharing agreement, or indemnity agreement, a ~~publicly owned corporation~~ non-party entity ~~or its affiliate, not a party to the case,~~ has a ~~substantial~~ direct financial interest in the outcome of the litigation, counsel for the party entity whose interest is aligned with that of the ~~publicly owned corporation or its affiliate~~ non-party entity must identify on the Statement of Disclosure ~~file the statement of disclosure provided in (c) identifying~~ the ~~publicly owned corporation~~ non-party entity and the nature of ~~its or its affiliate's substantial~~ that non-party entity's direct financial interest in the outcome of the litigation. ~~(3) The duty of disclosure by the corporate parties described in this Rule is continuing.~~

(c) Parties in Diversity Cases. Whenever the jurisdiction of a cause of action is based on diversity of citizenship under 28 U.S.C. § 1332(a), every party entity must identify on the Statement of Disclosure the name and citizenship of every individual or entity whose citizenship is attributed to that party.

December 8, 2023

(d) Statement of Disclosure. The ~~s~~Statement of ~~d~~Disclosure must be made on a form provided by the Clerk. A party entity must ~~and~~ file~~d~~, the Statement of Disclosure as part of the first pleading or paper filed by the party in this Court~~, or as soon as the party becomes aware of the corporate affiliation or financial interest, or as otherwise ordered by the judge to whom the case is assigned~~. The duty of disclosure described in this Rule is continuing, and a party must file promptly a supplemental statement immediately upon filing new or additional information immediately upon learning new or additional information, including when any later event occurs that could affect the Court's jurisdiction under § 1332(a).

LR 83.32 Possession and Use of Electronic Devices in Federal Court Facilities

(a) [Unchanged]

(b) Exempted Persons and Uses ~~Permitted and Prohibited Practices~~

(1) [Unchanged]

(2) Exempted Persons - Subject to subparagraph (c), below, the following persons are permitted to carry and use Electronic Devices within federal court facilities in the Eastern District of Michigan:

(A) – (H) [Unchanged]

(I) Attendees at Naturalization Ceremonies may use a Personal Electronic or Computing Device only to take still photographs in the Detroit Room or any courtroom in which the ceremony takes place.

(3) – (5) [Unchanged]

(c) Conditions for authorized use of Personal Electronic Devices
Unless express permission to the contrary is given by the presiding judicial officer, the following conditions and restrictions apply to those individuals authorized to carry a Personal Electronic Device:

(1) – (5) [Unchanged]

(6) Prospective jurors and seated jurors may bring into a Federal Court facility their Personal Electronic Device, and electronic book readers of any kind, including but not limited to Kindles, Nooks, iPads, and any type of electronic tablet reading device, but may not use the device in ~~on~~ any way except upon permission of a judicial officer. No juror may use an electronic device to access the Internet in any Federal Court facility or its environs.

(d) Conditions for authorized use of General Purpose Computing Devices

(1) – (3) [Unchanged]

(4) A district judge or magistrate judge may authorize ~~I~~internet access ~~is not provided~~ for personally owned devices. ~~and~~ ~~c~~Counsel, however, should still come prepared with all needed material

loaded on the device prior to the commencement of court in case there is an issue receiving internet service. A user may NOT access the Internet by any wireless means during jury selection ~~while in the courtroom~~.

(5) – (10) [Unchanged]

(e) Permitted and Prohibited Uses

(1) [Unchanged]

(2) Taking photographs or video or audio recordings in connection with any Judicial Proceeding (including any participants in a Judicial Proceeding while they are in a courtroom or its environs), and the recording or broadcasting of Judicial Proceedings by radio or television or other means is prohibited.

(3) [Unchanged]

(4) A district judge or magistrate judge may authorize:

(A) [Unchanged]

(B) The radio or television broadcasting, audio or video recording or photographing of court proceedings, but only pursuant to~~,~~ a resolution of the Judicial Conference of the United States.

The judicial officer will provide by written notice to the United States Marshal that such permission has been granted.

(5) [Unchanged]

(f) – (h) [Unchanged]

December 8, 2023

394th Judicial District Court
The Honorable Roy Ferguson
Judge Presiding

STANDING ORDER REGARDING USE OF ARTIFICIAL INTELLIGENCE

This Standing Order of the 394th Judicial District Court applies to every pending or hereafter filed case in the 394th Judicial District Court of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties. Nothing in this Order should be construed as to relieve an attorney or self-represented litigant of any legal or ethical obligation required by law, statute, or rule, including rules of procedure, evidence, or the Texas Disciplinary Rules of Professional Conduct.

Generative artificial intelligence systems (such as ChatGPT, Harvey.AI,, Google Bard, TensorFlow, OpenAI, Bing, and many others) are being incorporated into common professional use. The abilities of these systems vary widely depending on the application, version, and specific underlying technology used. While the technology is developing quickly, it is currently unreliable and prone to bias, and often fabricates information. The creators of these systems are not attorneys of record, licensed and in good standing to practice law in the State of Texas, and are not bound by the Texas Disciplinary Rules of Professional Conduct.

WHEREAS the signing of a pleading or motion in Texas certifies that each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

WHEREAS courts have the inherent power to sanction parties for violation of rules, orders, standing orders, and statutory obligations; and

WHEREAS a court on its own initiative may direct a court participant to show cause why his or her conduct has not violated a rule, order, standing order or statutory obligation;

IT IS THEREFORE ORDERED THAT:

All self-represented litigants and attorneys who utilize any form of artificial intelligence for legal research or drafting in connection with a case shall before using any AI-generated information in a court submission or proceeding sign and submit the attached form, certifying that:

1. all language, quotations, sources, citations, arguments, and legal analysis created or contributed to by generative artificial intelligence were before submission verified as accurate through traditional (non-AI) legal sources by an attorney licensed to practice law in the State of Texas, and
2. that the person understands and acknowledges that they are and will be held responsible and potentially sanctioned for their or their co-counsel's failure to comply with this Order.

This Order is effective immediately for all cases filed or pending in the 394th District Court. This Order remains in effect until rescinded or replaced by this Court. This Order is subject to modification or amendment by the undersigned at any time.

This Order shall be posted on the Court's website at www.Texas394th.com, and the district clerks of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties are hereby directed to file this Order with the Office of Court Administration and in the county administrative orders of the Court, and to post a file-marked copy of this Order as a Public Notice at the County Courthouse.

Signed the 9th day of June, 2023.

Roy B. Ferguson
Judge, 394th Judicial District Court

CAUSE NO. _____

PLAINTIFF	§	IN THE DISTRICT COURT
	§	
v.	§	_____ COUNTY
	§	
DEFENDANT	§	394TH JUDICIAL DISTRICT COURT

CERTIFICATION REGARDING USE OF ARTIFICIAL INTELLIGENCE

I, an attorney or self-represented litigant in the 394th Judicial District Court, hereby certify as follows:

1. I reviewed and understand this Court's Standing Order Regarding Artificial Intelligence. I will comply with the Standing Order throughout this case.

2. All information created or contributed to by generative artificial intelligence—including language, quotations, sources, citations, arguments, and legal analysis—was before submission to this Court verified as accurate using traditional (non-AI) legal sources by a human being licensed to practice in the State of Texas.

3. I understand that I will be held responsible and subject to possible sanction under Texas Disciplinary Rules of Professional Conduct, Texas Rule of Civil Procedure 10, and the inherent power of the Court, or for contempt of court, for failing to comply with the Court's Standing Order or this certification.

Signed on: _____

_____
[ATTORNEY NAME]

MAGISTRATE JUDGE GABRIEL A. FUENTES
219 South Dearborn Street
Chicago, IL 60604

Courtroom 1838 **Telephone: (312) 435-7570**
Chambers 1828
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STANDING ORDER FOR CIVIL CASES BEFORE MAGISTRATE JUDGE FUENTES

Please review this order in its entirety at the outset of a district court referral of your case to U.S. Magistrate Judge Fuentes for discovery supervision or for other civil litigation case management, or at the outset of your consent to proceed before the magistrate judge. A separate standing order is on the Court's website for settlement conference referrals. This Standing Order was recently revised, so please review it carefully. The highlights of the order's recent revisions are as follows:

- As a matter of policy, Magistrate Judge Fuentes strongly encourages the participation of junior and diverse attorneys in all court proceedings, with appropriate supervision. The Court has included, in this order, additional information about the Court's practices in this regard, amid the need to promote attorney professional development through practical experience and the opportunity to "stand up" and speak for a client in court. More on the involvement of junior and diverse attorneys is set forth below under "A Word About Involving Junior and Diverse Attorneys."

- All participants in any proceeding before Magistrate Judge Fuentes are invited to inform the Court, either themselves or through their attorneys, of their preferred pronouns and honorifics, if they wish. Unless the Court knows such preferences, the Court inadvertently may misdescribe an individual. On the other hand, Judge Fuentes will not begin a proceeding by asking participants to state their preferences on the record. Whether participants want the Court or others to know their preferred pronouns or honorifics is strictly up to them. Preferences may be communicated by email to the

courtroom deputy, at the email address shown on the Court's website. The Court will take note and then do its best to abide by such preferences.

- The Court has adopted a new requirement in the fast-growing and fast-changing area of generative artificial intelligence ("AI") and its use in the practice of law. The requirement is as follows: Any party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that …. This mission is too important for me to allow you to jeopardize it." 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes "bogus judicial decisions" cited for substantive propositions of law. *See Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), Order to Show Cause (S.D.N.Y. May 4, 2023) (issuing rule to show cause where "[a] submission filed by plaintiff's counsel in opposition to a motion to dismiss is replete with citations to nonexistent cases.") (D.E. 31); *Id.*, Attorney Affidavit (D.E. 32-1) (S.D.N.Y. May 25, 2023) (responding to rule to show cause order by stating that the case authorities found by the district court to be nonexistent "were provided by Chat GPT which also provided its legal source and assured the reliability of its content."). Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2). *See* Hon. Brantley Starr, "Mandatory Certification Regarding Generative Artificial Intelligence [Standing Order]," (N.D. Tex.) ("While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth.")) (www.txnd.uscourts.gov/judge/judge-brantley-starr) (last visited May 31, 2023).

Introduction

Civil matters come before U.S. Magistrate Judge Fuentes in one of two ways. First, the parties may consent to have Judge Fuentes, as the assigned magistrate judge, preside over all aspects of the case. Second, in matters not before Judge Fuentes on consent, the assigned U.S. district judge may refer a matter to Judge Fuentes, also as the assigned magistrate judge, for a specific purpose. Usually, the scope of these referrals is for supervision of discovery and/or for settlement including conducting a settlement conference. This standing order is meant to give the parties guidance in civil matters before Judge Fuentes. It sets forth the practices the Court

expects itself and the parties will follow in these cases, but the practices may vary to suit the peculiarities of any given case. Judge Fuentes is open to a continuing discussion in any case about the best, most efficient way to proceed. In the absence of such a discussion, this standing order should be treated as a set of default rules. This order applies to all matters pending before Judge Fuentes on consent or referral. Litigants should review the procedures of their assigned district judge(s), and in the case of any conflict, the practice of the assigned district judge governs.

Goals

The Court's goal for each case is to promote the just, speedy and inexpensive determination of the matter. Fed. R. Civ. P. 1. In pursuit of that goal, the Court will exercise the broad discretion afforded it under the applicable rules and the common law. *See Jones v. City of Elkhart, Ind.*, 737 F.3d 1107, 1115 (7th Cir. 2013).

On discovery, the Court believes cases should move expeditiously, but the Court is sensitive to the many demands on an attorney's time. The Court also is sensitive to the needs of *pro se* and prisoner litigants. The Court also cares a great deal about controlling litigation costs by carefully applying Rule 26(b)(1) as amended in 2015. Parties contesting a particular discovery issue should be prepared for the Court to pay close attention to whether the requested discovery is within the scope of the rule as amended, including whether the discovery is proportional to the needs of the case.

On settlement, the Court relishes its role as a facilitator and mediator. The Court may communicate with counsel for both sides before or after settlement conferences, in attempt to bridge differences and find pathways toward success. Parties should review retired Judge Denlow's Top Ten Ways to Defeat Settlement, available on the Court's website with the permission of the Hon. Morton Denlow (Ret.). Several of Judge Denlow's maxims apply at the start of the case and call for careful management of costs, long before a settlement conference is scheduled. In addition, in some cases, parties have facilitated settlement by exchanging key information first, then considering whether to begin settlement discussions before incurring greater costs. Settlement may be appropriate before expert discovery – and its costs. Settlement may be appropriate before the litigation of summary judgment motions – and its costs and attendant risks. It may be appropriate after denial of summary judgment but before a looming trial. The Court's settlement practices are set forth more fully in the Court's Standing Order for Settlement Conferences, also available on the Court's website.

Initial Status Reports and Hearings

If a recent status report is on file, the Court will not require an additional report and will rely on the previously filed report. Where the Court orders an initial joint status report upon referral, the report should contain the below information. Where the Court orders a joint status report to address identified issues during the Court's ongoing management of a case, the parties may limit their report to those identified issues.

1. Description of Claims and Relief Sought.

a. Describe the claims and defenses raised by the pleadings, including the basis for federal jurisdiction. Include enough detail to color in the nature of the key factual allegation(s) and dispute(s). In other words, a bare statement to the effect of "this is a Title VII employment discrimination lawsuit in which the plaintiff alleges a hostile work environment and a retaliatory discharge" is not very helpful to the Court.

b. State the relief sought, including an itemization of damages.

2. Referral Cases.

Describe the matter(s) referred to the magistrate judge.

3. Discovery Schedule.

Identify any existing discovery cut-off dates. If no discovery schedule has yet been set, and the case has been referred for discovery supervision, the parties should confer and submit the following information:

a. Initial Disclosures

i. The due date for Fed. R. Civ. P. 26(a)(1) disclosures.

ii. A date to issue written discovery requests.

iii. (The Court's Mandatory Initial Discovery Pilot Program expired on June 1, 2020. The program is no longer in effect as to cases filed after June 1, 2020. As to cases filed before June 1, 2020, if an order has been entered requiring MIDP disclosures, parties should abide by that order or seek relief as appropriate by motion.)

b. A fact discovery completion date. For claims involving medical conditions, fact discovery ordinarily includes treating physician depositions.

c. If there will be expert discovery, proposed dates for Rule 26(a)(2) expert disclosure reports and depositions, with an expert discovery completion date.

4. Consideration of Issues Concerning ESI.

State whether the parties anticipate or are engaged in discovery of ESI in this case, and, if so, what agreements have been reached regarding ESI and whether there are any areas of disagreements.

Please note the Court has adopted the Principles of the Seventh Circuit Electronic Discovery Pilot Program and the parties should be familiar with them. In a patent case, the Court will apply the Local Patent Rules for Electronically Stored Information. In addition, all counsel should have a thorough understanding of their ESI discovery obligations under Federal Rule of Civil Procedure 26 and their related ethical obligations including but not limited to the requirements of Rules of Professional Conduct 1.1, 3.3, 3.4, and 8.4. *See generally DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 923-49 (N.D. Ill. 2021) (containing detailed outline of the obligations of parties and counsel with respect to ESI discovery).

5. Settlement.

a. Describe the status of settlement discussions.

b. State whether all parties wish to participate in a settlement conference or believe such a conference would be productive.

6. Magistrate Judge Consent.

State whether all parties will consent to have Judge Fuentes conduct all further proceedings in this case, including trial and entry of final judgment, in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73.

7. Pending Motions.

Indicate the status of any pending motions.

8. Trial.

In consent cases, state whether a jury trial is requested, the date when the parties expect to be ready for trial, and the probable length of trial.

9. Other Matters.

State any other matters that should be brought to the Court's attention for scheduling purposes.

10. Standards for Professional Conduct.

The Court calls all counsel's attention to the Seventh Circuit's "Standards for Professional Conduct," available on the Seventh Circuit's website at

> http://www.ca7.uscourts.gov/rules-procedures/rules/rules.htm#standards. At the outset of each case assigned to Judge Fuentes, counsel for each of the parties should review the standards and make a good-faith effort to abide by them during the litigation of the case and during any settlement discussions. Counsel should pay particular attention to the statement in the preamble of the Standards, stating that "[a] lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms," and to the first of the listed "Lawyers' Duties to Other Counsel," stating that although the lawyers' role is to advance the legitimate interests of their clients, "[i]n our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications." Lawyers practicing in Illinois are reminded that their conduct is subject to the Illinois Rules of Professional Conduct, including but not limited to Rules 3.1, 3.2, 3.3, 3.4, 3.5, and 8.4. In particular, Rule 3.5(d) broadly prohibits conduct that is "intended to disrupt a tribunal." As the commentary to Rule 3.5 states, "[a]n advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics," and "[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."

Whether or not an initial status report is ordered, the Court may schedule an initial status hearing to discuss a plan for managing the case. Since the onset of the COVID-19 public health emergency in March 2020, the Court has conducted these hearings telephonically. Lead counsel is not required to attend these initial status hearings, but all counsel must be familiar with the facts, posture, and client positions in the case. Counsel are encouraged to send junior counsel to speak at these hearings.

Depositions

Resolving disputes

The Court generally prefers that parties resolve their deposition disputes consistent with Local Rule 37.2 and then present the dispute to the Court by motion if the dispute cannot be resolved. On the other hand, the Court recognizes that in some circumstances, a same-day resolution to a dispute during a deposition can save the litigants time and fees, in that a deposition might be completed on that day instead of being reconvened after a judicial ruling. The costs of reconvening the deposition can be substantial, particularly where the witness or the attorneys must travel. If, in the judgment of at least one of the parties at the deposition, the Court's same-day intervention would further the just, speedy and inexpensive determination of the matter, and if the dispute reasonably can be presented briefly and orally, such party is welcome to telephone chambers to request a same-day hearing. Again, the Court expects that this will be the exception and not the rule, but the Court will make every attempt to make itself available on that same day. The Court cannot promise that it will be available. If a hearing is not conducted at the time of the call or later in the day, the parties should continue the deposition and reserve the disputed

issue for determination. *See* Fed. R. Civ. P. 30(c)(2). All same-day hearings shall be conducted on the record as transcribed by the retained private court reporter, with the hearing transcript prepared and filed on an expedited basis to ensure public access. In rare cases, the Court may supervise a deposition remotely.

Technology and cost management

Even before the COVID-19 public health emergency, many litigants were gravitating toward video depositions in the interest of efficiency and cost savings. They are encouraged to continue doing so. The Court directs the parties to Judge Gilbert's well-reasoned approach to video depositions as set forth in *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2020 WL 3469166, at *4-5, 11-12 (N.D. Ill. June 25, 2020), and to Judge Gilbert's protocol for such depositions at Docket Entry 3729 of that matter. The Court views the *Broiler Chicken* protocol as the starting point for a discussion of an applicable protocol, subject to proposed, tailored revisions in individual cases.

Rule 30(b)(6) Depositions

Rule 30(b)(6) deposition notices generate much motion practice that arises from some fundamental misunderstandings of the rule. Rule 30(b)(6) permits a party to bind another party, through the testimony of one or more representative deponents, to testimony given on the topics contained in the notice of deposition. *See* Fed. R. Civ. P. 30(b)(6). The rule is intended to streamline the discovery process and to do away with the practice of "bandying," in which business entities would present individual witnesses who would disclaim knowledge of particular issues and put the other party to a costly and burdensome task of determining which individual witnesses might be competent to testify to a variety of relevant issues. *Fed. Deposit Ins. Corp. v. Giancola*, 13 C 3230, 2015 WL 5559804, at *2 (N.D. Ill. Sept. 18, 2015), citing *SmithKline Beecham Corp. v. Apotex Corp.*, No 98 C 3952, 2000 WL 116082, at *8 (N.D. Ill. Jan. 24, 2000).

Here are some pointers on the rule:

- The rule does not require the noticed party to produce a witness "most knowledgeable" about the topics. The rule provides that the noticed party must designate representative deponents who "must testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6).

- By its terms, the rule recognizes that the task of educating and presenting a representative deponent to testify on the topics in the notice can be burdensome, and thus the rule requires the "matters for examination" to be "describe[d] with reasonable particularity." *Id.* Courts have limited or narrowed Rule 30(b)(6) topics that were found not to describe the matters for examination with reasonable particularity. *See Ball Corp. v. Air Tech of Mich., Inc.*, 329 F.R.D. 599, 604-05 (N.D. Ind. 2019). This Court also frowns upon 30(b)(6) notices that describe the topics with the vague term "including but not limited to." *See Winfield v. City of New York*, No. 15-cv-05236 (LTS)(KHP), 2018 WL 840085, at *5 (S.D.N.Y. Feb. 12, 2018) ("The Court must evaluate 'reasonable particularity' [of Rule 30(b)(6) topics] based on the nature of the topics listed in the deposition.

'Reasonable particularity' requires the topics listed to be specific as to subject area and to have discernible boundaries …. This means that the topics should not be listed as 'including but not limited to;' rather, they must be explicitly stated.").

- The 2015 amendments to Rule 26(b)(1) provide that the scope of permissible discovery is not only relevance to claims or defenses in the action but also proportionality to the needs of the case. Fed. R. Civ. P. 26(b)(1). This Court generally agrees with courts that, after the 2015 amendments, have applied the proportionality limitation on discovery under Rule 26(b)(1) to overbroad Rule 30(b)(6) notices. *See Schyvincht v. Menard, Inc.*, 18 C 50286, 2019 WL 3002961, at *2 (N.D. Ill. July 10, 2019); *Ball*, 329 F.R.D. at 602. But proportionality must be considered on an individualized basis with attention to the needs of the particular case. The amended rule dictates that judicial consideration of the needs of a particular case includes consideration of "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). As Magistrate Judge Schenkier of this district has stated, "the factual nuances of each case are what guide the courts." *Giancola*, 2015 WL 5559804, at *3, citing cases.

- Rule 30(b)(6) topics calling for representative deponents to address legal contentions or conclusions are disfavored. *See Schyvincht,* 2019 WL 3002961, at *3 (holding that legal conclusions, legal opinions, and legal positions in the case are outside the scope of permissible Rule 30(b)(6) discovery). Some courts have exercised their discretion to determine that written interrogatories (directed at a party's contentions or bases for those contentions) are a more efficient means of obtaining discovery than a 30(b)(6) deposition, while others have viewed the circumstances as making the 30(b)(6) deposition the better vehicle. *Compare Clauss Constr. v. UChicago Argonne LLC*, 13 C 5479, 2015 WL 191138, at *5 (N.D. Ill. Jan. 1, 2015) (allowing 30(b)(6) testimony where court determined that written interrogatories would not be efficient) *with Schyvincht*, 2019 WL 3002961, at *3 (concluding that inquiry into the legal bases for certain contentions is better suited to contention interrogatories than to Rule 30(b)(6) testimony). The outcome of such an analysis inevitably will depend on the factual nuances of each case.

Counsel's conduct during depositions

"Litigation is not a contest to see how much trouble you can cause your opponents. Those who treat it as such do so at their peril." *Hal Commodity Cycles Mgmt. Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987). Depositions must be conducted in a manner that avoids wasting time and protects witnesses from harassment and undue embarrassment. Fed. R. Evid. 611(a); Fed. R. Civ. P. 30(d)(3). Borrowing heavily from U.S. District Judge Steven C. Seeger's standing order on depositions (available on the Court's website at https://www.ilnd.uscourts.gov/judge-info.aspx?+q7AroZFqQJxIXbDV5X8oQ==), which is applicable to all matters in which Judge Seeger is the assigned district judge, the Court reminds the parties of the following rules or standards of conduct by which all counsel are ordered to abide:

- Counsel must behave professionally at all times during depositions. Depositions must be civil, and attorneys must be respectful to witnesses, to the court reporter, and to other attorneys. Counsel must conduct themselves as if the Court were present, and as if the jury were watching. *See* Fed. R. Civ. P. 30(c)(1).

- Objections are to be stated concisely and in a nonargumentative and nonsuggestive manner. Fed. R. Civ. P. 30(c)(2); *LM Ins. Corp. v. ACEO, Inc.*, 275 F.R.D. 490, 491 (N.D. Ill. 2011). Interruptions, by counsel defending a deposition, with words such as "if you know," or "if you remember," are improper attempts to coach witnesses or influence their testimony, and they are not permitted. Nor are "speaking objections" that go beyond a short and nonsuggestive statement of the basis for the objection. Objections to relevance during a deposition are not necessary because they generally are not waived if not made at the deposition. Fed. R. Civ. P. 32(d)(3)(A).

- There has been some confusion around when counsel might permissibly confer with the deponent during the course of questioning. In some jurisdictions, a "break" or a conference is permitted so long as it occurs when no question is pending. But in federal deposition practice, courts have construed Rule 30 to bar interruptions that reasonably may be read as an attempt to influence the witness's testimony as to a particular topic or line of questions. *ACEO*, 275 F.R.D. at 491-92. Instead of interrupting the deposition, counsel may make an appropriate, nonspeaking objection and should consider how the testimony might be supplemented during counsel's further examination later during the deposition. Counsel may also seek a protective order under appropriate circumstances as discussed below.

- Such interruptions are sometimes occasioned by examining counsel's unfair treatment of the witness. For example, the examiner may use a set of documents to induce a careless witness to acknowledge or admit facts that are stated in documents but are outside the witness's personal knowledge. Or the examiner may attempt to mislead the witness with false information. The proper objections here include lack of foundation, assumption of facts not in evidence, misstatement of facts, or even harassment of the witness. But nothing further need be said or done by defending counsel by way of interruption. Defending counsel may also maintain a standing objection to this manner of examination and may call it to the Court's attention at an appropriate time, or through a Rule 30(d)(3) motion.

- Counsel need not, and should not, state *every* ground for objection by articulating a string of grounds that turns the objection into an improper speaking objection. In those instances, pick a ground, or state that the objection is to "form," and the Court will not deem subparts of that objection to be waived.

- "Asked and answered" is not an appropriate objection during depositions, absent truly abusive conduct in extraordinary cases. It coaches the witness to say nothing more than "I incorporate what I said earlier," or "I already answered." All too often, when an attorney makes an "asked and answered" objection during a deposition, the witness has not actually answered the question, and the witness shuts down instead of answering the

question or appropriate follow-up questions. The remedy when examining counsel crosses the line from appropriate follow-up questions into harassment and undue annoyance of the witness is to seek a protective order. *See* Fed. R. Civ. P. 26(c); Fed. R. Evid. 611.

- An objection that "the document speaks for itself" also is disfavored. The Court has yet to hear a document actually speak.

- Do not instruct a witness not to answer a question except to preserve a privilege, to enforce a limitation necessary to preserve a privilege, or to present a motion under Rule 30(d)(3). Fed. R. Civ. P. 30(c)(2). In the third of those circumstances, the Court of Appeals has held that even when counsel concludes that his or her witness has been asked the most outrageous of deposition questions, counsel may not simply instruct the witness not to answer without bringing a motion for protective order under Rule 26(c). *Redwood v. Dobson*, 476 F.3d 462, 468 (7th Cir. 2007). The disputed matter may be reserved for the end of the deposition so that the deposition may otherwise continue, and counsel then may resort to the Court for intervention, but an instruction not to answer does not comply with the third circumstance stated in Rule 30(c)(2) if it not coupled with a motion for a protective order. Our Court of Appeals has spoken harshly of counsel who have not abided by this rule. *See id.* at 468-69.

- Witnesses who turn their testimony into a narrative filibuster, and counsel who encourage or permit this conduct by the witness, do so at the peril of being deemed to have obstructed the deposition, and in that event, the Court may, in its discretion, allow additional deposition time. *See Flores v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, No. 14 C 7905, 2015 WL 7293510, at *2 (N.D. Ill. Nov. 19, 2015).

- On occasion, counsel in a deposition may resort to conduct that is downright insulting, or that conveys some form of insult, including the making of faces, the rolling of the eyes, laughter, editorial comments, or other conduct that is not only unbecoming, but is flat-out improper. *See Redwood*, 476 F.3d at 491 (citing "the insult-riddled performance . . . that incensed the Supreme Court of Delaware" in *Paramount Communications Inc. v. QVC Network Inc.,* 736 A.2d 34, 52-57 (De. 1994)). Counsel must not engage in the sort of conduct of the sort exhibited in the Addendum to the *Paramount Communications* opinion.

Discovery Motions

The parties are directed to the federal rules and the local rules with respect to the filing of discovery motions. Parties also should closely adhere to the ongoing and evolving series of General Orders entered by the District Court amid the ongoing COVID-19 public health emergency and its immediate aftermath. In the wake of COVID-19 protocols, the magistrate judge has developed a practice of evaluating motions as they are filed, and determining whether they may be heard promptly for oral argument during an in-person motion call, whether further briefing should be ordered, or whether the motion may be ruled upon immediately (for example,

a denial without prejudice for failure to comply with Local Rule 37.2). The magistrate judge's motion call is a floating, in-person call, in that it is not on a set day of the week and is scheduled according to the exigencies of the moment. If any counsel reasonably requests in advance to appear by telephone, the Court will consider such a request. The practice of noticing motions for presentation already was somewhat unique to this judicial district. But after dispensing with the practice during pandemic conditions, the magistrate judge found the practice inefficient and needlessly costly to parties. Accordingly, parties should continue to file motions without noticing them for presentation, and the Court determine how they will be handled: either in person, by telephone – often, this will either rule upon them, set a telephonic oral argument for a ruling at the end of the argument or shortly thereafter, or set a briefing schedule. Consistent with the Court's practice before the pandemic, parties served with motion papers by ECF should expect that no responsive brief is necessary or appropriate unless the Court orders it. The Court may resolve a motion on review of the papers or upon a telephonic oral argument, or it may determine that a brief or response on some particular issue should be filed by one or more parties.

Magistrate Judge Fuentes has expressed that he believes relevance under Rule 26(b)(1) is broad. *See Coleman v. State of Illinois*, No. 19 C 3789, 2020 WL 5752149, at *3-4 (N.D. Ill. Sept. 25, 2020). He also has expressed that Rule 26(b)(1)'s proportionality concept may also be broad, so that courts should consider the "burden" associated with a particular discovery issue in contexts beyond the mere cost in effort and expense. *See Johnson v. Soo Line R.R. Co.,* No. 17 C 7828, 2019 WL 4037963 at *2-3 (N.D. Ill. Aug. 27, 2019) (applying proportionality concept to assess burdens that compelled production of federal income tax returns in civil discovery could place on system of voluntary tax compliance); *Washtenaw County Employees' Retirement Sys. v. Walgreen Co., et al.*, No. 15 C 3187, 2019 WL 6108220, at *5-6 (N.D. Ill. Nov. 15, 2019) (applying proportionality concept to assess burden that compelled production of settlement-related materials could place on the social policies underlying Federal Rule of Evidence 408).

Local Rule 37.2 Compliance

Local Rule 37.2 provides that the Court shall not hear a discovery dispute unless the movant certifies that it has complied with the rule. The plain language of Local Rule 37.2 requires more than an exchange of emails. *See BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc*., 343 F. Supp. 3d 742, 743-44 (N.D. Ill. 2018) (collecting cases). The Court does not consider an unanswered email, where no face-to-face or telephonic conference was requested, to be in compliance with the local rule. Nor does a motion comply with the rule if it does not identify the time, manner and persons who participated in the Local Rule 37.2 conference. Nonetheless, in some cases, the Court may exercise its discretion in favor of deciding a discovery dispute where requiring Local Rule 37.2 compliance may be futile, or where doing so may be inefficient. *See In re Fluidmaster, Inc., Water Connector Components Prod. Liab. Litig*., No. 14 C 5696, 2018 WL 505089, at *3 (N.D. Ill. Jan. 22, 2018) (internal citations and quotations omitted); *Munive v. Town of Cicero*, No. 12 C 5481, 2016 WL 8673072, at *1 (N.D. Ill. Oct. 14, 2016), report and recommendation adopted *sub nom. Colon v. Town of Cicero*, No. 12 C 5481, 2017 WL 164377 (N.D. Ill. Jan. 17, 2017). But filing a motion not in compliance with Local Rule 37.2 risks having the motion denied without prejudice.

Summary Judgment Motions

Parties should be mindful of the legal standards under which federal summary judgment motions are decided per Rule 56. No party should undertake the expense and effort involved in filing a summary judgment, and in complying with the procedural requirements of these motions, without considering carefully whether discovery in the case supports a colorable argument that there is no genuine issue of material fact. For example, in any case turning on the resolution of factual disputes over the statements or conduct of the parties or others, courts will have difficulty granting summary judgment, and a Rule 56 motion may not be a productive use of the Court's time or the parties' resources. Moreover, some attorneys believe that even a losing summary judgment motion may be productive if it "educates the judge" for purposes of a later trial. The Court does not need to review meritless summary judgment motions to become "educated" about a case.

In the event a litigant decides that a summary judgment motion is appropriate, the Court requires strict compliance with Local Rules 56.1(a) and 56.1(b) in the briefing of all summary judgment motions. In addition, to assist the Court in reviewing the factual record submitted in connection with summary judgment motions, the Court requires the following:

- A courtesy copy of the memorandum of law, depositions and other materials relied upon in support of the motion (as required by Local Rule 56.1(a)(1)-(3) or in opposition to the motion (as required by Local Rule 56.1(b)(1)-(3)) must be delivered to chambers within 24 hours of when it is filed on the CM/ECF system. The courtesy copy of the compendium must be securely bound, must separately tab each document, and must contain an index identifying what document is contained under each tab. It must also have the CM/ECF header. **NOTE: This requirement, and any and all courtesy copy delivery requirements, were suspended during the public health emergency, and they remain suspended until further notice. If the Court requires courtesy copies, court staff will make the request to counsel in individual cases.**

- All statements of undisputed material facts offered by the moving party under Local Rule 56.1(a)(3) or statements of additional facts offered by the opposing party under Local Rule 56.1(b)(3)(C), must list the facts in short, numbered paragraphs that refrain from argument. Argument must be reserved for the moving party's memorandum of law. Each numbered fact statement must contain a specific citation to affidavits, depositions or other materials that support the fact statement, as well as to the tab(s) in the compendium where those materials may be found. Failure to provide support for a statement of fact may result in that alleged "fact" being disregarded. *Friend v. Valley View Cmty. Unit Sch. Dist. 365U*, 789 F.3d 707, 710-11 (7th Cir. 2015).

- All responses to statements of undisputed material facts offered by the opposing party under Local Rule 56.1(b)(3)(B), or responses to statements of additional facts offered by the moving party under Local Rule 56.1(a), shall be in a format similar to that used in answering a complaint: that is, the response must repeat each numbered paragraph of the

fact statement, and then immediately following each numbered statement must state whether the alleged fact is "undisputed" or "disputed." As with the fact statements submitted under Local Rules 56.1(a)(3) and 56.1(b)(3)(C), the responses to those fact statements must refrain from argument. The significance or lack of significance of a disputed or undisputed fact may be argued in the respondent's legal memorandum. If a particular fact is "undisputed," nothing more should be said in the response. If a particular fact assertion is "disputed" in whole or in part, the response must state what part of the assertion is disputed and must contain a specific citation to the supporting affidavits, depositions or other materials as well as to the tab(s) in the compendium where those materials may be found. Failure to provide support for an alleged fact dispute may result in that fact being deemed admitted. *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 218-19 (7th Cir. 2015).

- In accord with Local Rule 56.1, absent prior leave of Court, a movant shall not file more than 80 separately numbered statements of undisputed material fact, and a party opposing a summary judgment motion shall not file more than 40 separately numbered statements of additional facts under Local Rule 56.1(b)(3)(C). The Court reminds parties that the fact statements under Local Rule 56.1(a)(3) and Local Rule 56.1(b)(3)(C) "shall consist of short numbered paragraphs."

- Motions to strike or to have Local Rule 56.1 statement of facts deemed admitted will not be accepted by the Court. These concerns should be raised in the parties' briefs.

Motions To Seal and for Confidentiality Orders

If the parties require a confidentiality order entered by the Court, they are directed to use the model confidentiality order approved by the full Court and set forth in the Local Rules: Form 26.2 Model Confidentiality Order, with the following two additions to make clear that with respect to filed discovery materials, (1) sealing must be justified under the law of this Circuit, and (2) rather than file a motion to seal whenever a party files discovery documents designated "confidential" under the protective order, the parties are to confer in advance about the filing of any such documents so that a motion is filed only as to documents as to which a good-faith argument for sealing may be made under the applicable law:

First Addition:

[inserted after the model order's reference to Local Rule 26.2] and the common law of this Circuit. *See Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (noting that public "has a presumptive right to access discovery materials that are filed with the court"); *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545-46 (7th Cir. 2002) (stating that filed discovery documents "that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality . . . In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the

> name of a minor victim of sexual assault) are entitled to be kept secret"); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) ("Many a litigant would prefer that the subject matter of a case . . . be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing."); *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (warning courts not to allow parties "to seal whatever they want" and urging them to apply "a neutral balancing of the relevant interests" in connection with any good-cause determination presented by a motion to seal).
>
> *Second Addition:*
>
> [inserted immediately after the First Addition] If a party wishes to file in the public record a document that another producer has designated as Confidential or Highly Confidential, the party must advise the producer of the document no later than five business days before the document is due to be filed, so that the producer may move the Court to require the document to be filed under seal. The party must review the foregoing case law, and any motion to seal will be taken by the Court as a certification that the movant has read the foregoing case law and has ensured that it is making a good-faith argument that the document in question qualifies for sealing under the Seventh Circuit's stringent standards.

The Court will also consider motions to seal settlement-related information that the parties agreed to keep confidential during a settlement conference. Accordingly, the confidentiality order or the confidentiality designation under that order is *not* a basis for a motion to seal the document. The parties should consider carefully what they choose to submit to the Court in support of any request for judicial relief in a matter. On occasion, when parties filed materials under seal under an unwarranted expectation that they would remain under seal, the Court has allowed such parties, at their request, to withdraw materials that they no longer wish the Court to consider or do not wish to see unsealed.

While the parties may deviate from the model order as modified, any additions and deletions are to be redlined. A request for entry of an agreed confidentiality order should be submitted after a corresponding motion has been filed unless the Court has given prior leave to submit an agreed confidentiality order without a motion. An agreed confidentiality order should be sent to the Court's Proposed Order Box at Proposed_Order_Fuentes@ilnd.uscourts.gov.

Under Local Rule 26.2(b), no document may be filed under seal without an order of the Court specifying the particular document or portion of a document that may be filed under seal except that a document may provisionally be filed under seal. With respect to documents filed electronically, Local Rule 26.2(c) states that a party must (1) provisionally file the document electronically under seal; (2) file electronically at the same time a public-record version of the document with only the sealed material excluded; and (3) file a motion to seal before or simultaneously with the provisional filing and notice it for presentment promptly thereafter.

Use of Medical Records in Litigation: The Court reminds counsel that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its regulations create a procedure for

obtaining authority to use medical records in litigation, including requesting a qualified protective order. 45 C.F.R. § 164.512(e). A "qualified protective order" means an order that: (1) prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation for which such information was requested and (2) requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation. 45 C.F.R. § 164.512(e)(1)(v).

Privilege Logs

If a party withholds otherwise discoverable information on the ground of privilege, the withholding party generally must provide a log of the documents withheld. *See* Fed. R. Civ. P. 26(b)(5)(A) and Advisory Committee Comments to 1993 Amendments. Any privilege log must be detailed enough to enable other parties to assess the applicability of the privilege asserted, and should include: (1) the name and capacity of each individual from whom or to whom a document and any attachments were sent (including which persons are lawyers); (2) the date of the document and any attachments; (3) the type of document; (4) the Bates numbers of the documents, (5) the nature of the privilege asserted; and (6) a description of the subject matter in sufficient detail to determine if legal advice was sought or revealed, or if the document constitutes work product. *See RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 218 (N.D. Ill. 2013).

The Court reminds the parties that the meet and confer requirements of Local Rule 37.2 apply to privilege disputes, just as they do to other discovery disputes. In addition, the Court wishes the parties to be aware that it understands the burdens and high costs associated with preparing detailed privilege logs in very complex cases in which discovery, and privileged materials, may be voluminous. The Court is open to a discussion with the parties about developing creative ways to reduce this burden or to streamline the preparation process. Parties should feel free to address these issues themselves in complex cases, or, if no resolution can be reached, to bring their proposals to the Court.

Finally, the Court also is aware that attorneys may have different approaches to preparing privilege logs. They may tend to claim privilege whenever a document is to or from an attorney, but without sufficient attention to whether the communication related to the rendering of legal advice or services. They may have varying conceptions of the degree of detail needed in the log's description of the document over which they are asserting a privilege claim. Parties should be mindful that "[t]oo many lawyers think that they can paint claims of privilege with a broad brush and sweat the details later. But some courts have been troubled with that approach, and counsel may face arguments that genuine privileges have been waived by asserting dubious ones. The Seventh Circuit has made clear that "blanket" waiver of privileges based on the technical inadequacy of a privilege log is generally disfavored, absent bad faith. *See Am. Nat'l Bank & Trust Co. v. Equitable Life Assurance Soc'y of U.S.*, 406 F.3d 867, 879 (7th Cir. 2005). Nonetheless, parties are advised to make their privilege log entries specific enough to allow the Court to determine whether the document contains a privileged communication and whether the confidentiality of that communication has been maintained. *See* David M. Greenwald & Michele L. Slachetka, 1 Testimonial Privileges § 1.69 (Thomson Reuters 2021 ed.) ("A party asserting privilege may not meet its burden through conclusory statements that the materials in question

are privileged, but instead must supply sufficient information upon which to make a determination as to each assertion of privilege."). For further guidance on the views of Judge Fuentes on privilege log content, see *Washtenaw County Employees' Retirement Sys. v. Walgreen Co., et al.*, No. 15 C 3187, 2020 WL 3977944 (N.D. Ill. July 14, 2020) and *Williams v. City of Chicago*, No. 22 C 1084, 2023 WL 3387915, at *6 & n.7 (N.D. Ill. May 11, 2023).

Matters Before the Magistrate Judge on Consent

Judge Fuentes encourages parties to consent to his jurisdiction so that he may preside over the entirety of the case, including ruling on dispositive motions and presiding over any trial and the entry of a final, appealable judgment. Because Judge Fuentes does not handle felony criminal cases, he generally is able to accommodate the requests of counsel for particular (and firm) trial dates. Parties are encouraged to read 28 U.S.C. § 636 and Fed. R. Civ. P. 73 regarding trial by consent and discuss this option with their clients and opposing counsel.

Civility

Civility is important to the Court. The Seventh Circuit's Standards for Professional Conduct are a starting point. All counsel are referred to those standards and are expected to comply with them. Counsel should take care to treat all persons with courtesy and respect. The Court will do so as well. Further, out-of-town counsel are advised that they will be treated no differently than Illinois- or Chicago-based counsel. Counsel will not be "hometowned." As noted above, the Court also invites counsel or any participants in any proceeding to inform the Court, in any manner they deem appropriate including email to the courtroom deputy, of any preferred pronoun or honorific, which the Court will make best efforts to remember and apply out of respect for the individual dignity of every person.

A Word About Inclusion of Junior and Diverse Attorneys

Judge Fuentes encourages counsel and the parties to staff their matters with junior and diverse attorneys, and to provide these attorneys with meaningful participation in important aspects of the litigation and settlement of cases, including status hearings, depositions, and settlement conferences, preferably under the active supervision of lead counsel. Counsel and client will often find that their meaningful inclusion of junior and diverse attorneys into their cases adds value. These attorneys often bring a fresh perspective to the case. Lawyers, parties and the courts benefit from the professional development of experienced and effective counsel. Parties in particular benefit from having a broader base of skilled counsel available to handle their most important matters, in an era in which litigants are demanding greater leveraging of their invoices and greater inclusion of diverse attorneys.

"Participation" means a significant speaking role – not just carrying the briefcase. "Junior attorney" means associates, not partners, or other attorneys with less than five years of experience after law school. A "diverse" attorney is one who belongs to any historically underrepresented or diverse group, and who has less than five years of experience. These

attorneys should already be integral members of the party's legal team at the time of the proceeding, and their appearance must be on file by that time.

Parties who are initially unwilling to allow counsel to add a junior or diverse lawyer to a file, out of concerns about costs, are asked to consider those costs an investment in their future relationship with junior counsel. Law firms are asked to consider exercising their judgment about "writing off," in whole or in part if necessary, the cost of including a junior or diverse lawyer as an investment in training and a cost of doing business. Counsel and clients will not likely regret making this sort of investment. Passing on knowledge and skill to younger or less-experienced lawyers is one of the most important additions senior lawyers can make to the development of our profession. Parties and clients also may wish to consider the optics, for example, of showing up at a complex hearing or mediation with a large team of lawyers who all or virtually all are senior and non-diverse. Moreover, even in the most complex of disputes, parties may already have availed themselves of the skills and lower billing rates of junior attorneys to perform the research and draft the briefs. Lawyers who have done so are often more than prepared to argue a motion effectively and have earned that opportunity.

To promote inclusion of junior and diverse attorneys, Judge Fuentes provides the following additional information:

- The Court may enter orders notifying parties that it is prepared to decide a pending motion on the papers but will schedule an oral argument if all parties will agree to allow a junior or diverse attorney to argue the motion. The Court prefers to schedule prompt hearing on motions, and occasionally, counsel have responded by stating that not enough time has been allowed to prepare a junior lawyer for the hearing. The Court disagrees and believes that part of being a skilled lawyer involves learning how to move quickly to get on top of the issues and be effective in court for a client.

- Upon a specific request of any party, with a certification that a junior or diverse attorney will argue, the Court will schedule oral argument on the motion if practicable. The request and certification may be made separately at the end of the document, without counting toward any page limit.

- The Court will not insist upon the "one-lawyer-per-side" practice, followed by many courts, on motions or other matters in which junior or diverse attorneys are arguing or examining. Parties including a junior or diverse attorney may "split" the issues in any way such parties prefer. Senior, supervising attorneys also will be permitted to add to the record or conduct additional witness examination as reasonably necessary, once junior or diverse counsel has argued or examined. The Court also will allow senior attorneys to confer as reasonably necessary, during the hearing, with the arguing attorney to make suggestions.

- The Court may allocate additional hearing time, if practicable, for hearings in which junior or diverse attorneys are arguing.

- Settlement conferences often allow multiple opportunities for a junior or diverse attorney to speak on behalf of a client or to lead negotiations, under the supervision of a senior attorney.

- In the COVID and post-COVID eras, the Court increasingly has resorted to telephonic motion hearings, and the effect, somewhat, has been to stifle the participation and training of junior and diverse attorneys. The Court is moving back to in-person oral arguments at motion calls, in the hope of encouraging the participation of more counsel in arguments held in open court.

- Again, no party is disadvantaged by agreeing or not agreeing to have a junior or diverse attorney argue a motion or otherwise participate meaningfully in a proceeding, and no inference will be drawn as to the relative importance of any motion or proceeding based on who argues it or whether it is argued orally.

All counsel are directed to provide a copy of order to their clients at the outset of the discovery referral or the consent, and to refer the client specifically to this order's discussion about inclusion of junior and diverse attorneys. Judge Fuentes recognizes that the ultimate decision as to who speaks on behalf of a party is that party and its counsel, not the Court. Further, the Court will expect that all attorneys appearing in any proceeding will meet the highest professional standards, will be prepared to address any matter that may arise, and will have a degree of authority commensurate with the proceeding, i.e., to bind the party they represent (for example, by agreeing to a briefing or discovery schedule). Overall, the Court has received positive feedback from counsel in matters in which an effort was made to allow junior or diverse attorneys a meaningful role in a proceeding.

The attorney performances have been, in a word, splendid.

SO ORDERED.

ENTER:

GABRIEL A. FUENTES
United States Magistrate Judge

Dated: May 31, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANDING ORDER RE: ARTIFICIAL INTELLIGENCE ("AI") IN CASES ASSIGNED TO JUDGE BAYLSON

If any attorney for a party, or a *pro se* party, has used Artificial Intelligence ("AI") in the preparation of any complaint, answer, motion, brief, or other paper filed with the Court and assigned to Judge Michael M. Baylson, they **MUST**, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing and **CERTIFY** that each and every citation to the law, or the record in the paper, has been verified as accurate.

DATED: 6/6/2023

BY THE COURT:

/s/ MICHAEL M. BAYLSON

MICHAEL M. BAYLSON, U.S.D.J.


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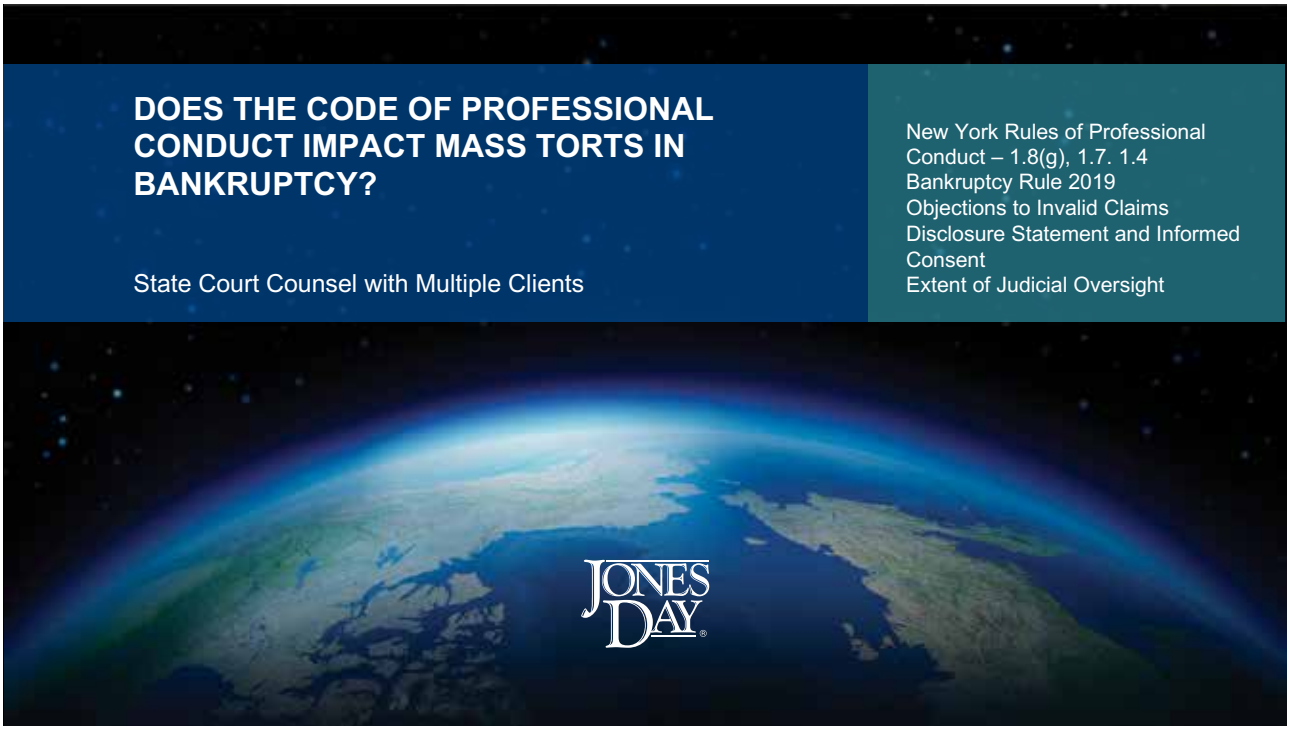
DOES THE CODE OF PROFESSIONAL CONDUCT IMPACT MASS TORTS IN BANKRUPTCY?
State Court Counsel with Multiple Clients
New York Rules of Professional Conduct – 1.8(g), 1.7. 1.4
Bankruptcy Rule 2019
Objections to Invalid Claims
Disclosure Statement and Informed Consent
Extent of Judicial Oversight
JONES DAY

ROLE OF JUDICIAL OVERSIGHT, IF ANY, IN MASS TORT (NON-CLASS) SETTLEMENTS

- The principal concerns addressed by the Rules of Professional Conduct ("RPC") in aggregate settlements are:
  - Substantive fairness
  - Conflict
  - Informed consent
  - Attorney fees
- In many aggregate settlements there is no judicial oversight.
- How do Chapter 11 and the Bankruptcy Rules interact?

THE 911 FUND LITIGATION PROVIDES GUIDANCE OUTSIDE OF BANKRUPTCY

- Judge Hellerstein exercised substantial oversight given the absence of any judicial oversight generally in mass tort aggregate settlements:
  - *Courts confronted with mass tort cases have an obligation to ensure the fairness of settlements entered into by the parties . . . . Because of multiple representations by counsel of differently situated plaintiffs, individual settlements can raise issues of conflicts of interest, as between plaintiffs' attorneys and the differently situated plaintiffs those attorneys represent. An aggregate settlement may be the result of arm's length negotiations, but the allocations to individuals tend to be directed by counsel without negotiations. Because the court has inherent authority to supervise such attorneys . . . it has the duty to ensure that the settlements among plaintiffs are fair . . .*
- *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 66 F. Supp. 3d 477, 481-82 (S.D.N.Y. 2015).

WHAT IS AN AGGREGATE SETTLEMENT? SETTLEMENTS WITH ALLOCATION ARE AGGREGATE SETTLEMENTS SUBJECT TO RPC 1.8(g)

- If the settlement agreement allocated the money to Plaintiffs in the following ways, it should be treated as an aggregate settlement: (1) lump sum settlement to settle entire group of claims, allocation determined by plaintiffs and their lawyer; (2) individual amounts negotiated for each plaintiff within a capped total amount; (3) determining each plaintiff's share by a formula or matrix based on factors such as injury, age, risk characteristics, etc.; (4) providing a fixed per capita amount for each plaintiff; or (5) setting up a claims mechanism or arbitration process to determine what each individual plaintiff receives.
- Jon W. Green, Ethical Considerations that Plaintiff's Counsel Must Address in a Multi-Plaintiff Settlement, *cited with approval in* N.Y.C. Bar Ass'n Comm. on Prof. & Jud. Ethics, Formal Op. 2020-3 (Hereinafter, "Formal Op. 2020-3")

DOES CHAPTER 11 PLAN NEGOTIATION FALL INTO N.Y.C. BAR ASS'N COMM. ON PRO. & JUD. ETHICS FORMAL OP. 2020-3 PERTAINING TO SETTLEMENTS OF MULTIPLE INTERDEPENDENT CASES (AGGREGATE SETTLEMENTS)?

- The American Law Institute in defining aggregate settlements reports that "Bankruptcy proceedings also meet this definition . . . ." American Law Institute Principles of the Law of Aggregate Litigation (2010) (hereinafter "ALI Principles") Section 1.2, comment a. ALI Principles view bankruptcy as "compulsory aggregation," *Id.* at 3.10, permitting dissidents to be dragged along, it does not relieve counsel of its obligation to present the offer in the plan and obtain informed consent to represent differing interests (those rejecting and those accepting). *Id.* at 3.17
- The analogue in the ABA Model Code and the version adopted in NY is RPC 1.8(g) which attempts to reconcile responsibilities of lawyers with multiple clients in interdependent cases with other ethical rules, including the role of court approval.
- Formal Op. 2020-3 addresses the role of court approval of an aggregate settlement, stating that, to comply, practitioners still will need to make disclosure and obtain written informed consent.

RELEVANT PROVISIONS OF RULES OF PROFESSIONAL CONDUCT

- Relevant RPC
  - Rule 1.0(j): **"Informed consent"** denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.
  - Rule 1.2(a): Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter.

POTENTIALLY RELEVANT RULES OF PROFESSIONAL CONDUCT

- Rule 1.4(a): A lawyer shall:

(1) promptly inform the client of: (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules; (ii) any information required by court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

HOW DOES NEGOTIATING A CHAPTER 11 PLAN INTERACT WITH RPC 1.8(g)?

- Rule 1.8(g): A lawyer who represents two or more clients **shall not participate** in making an aggregate settlement of the claims of or against the clients, **absent court approval, unless each client gives informed consent in a writing** signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.
- *See also Simon's New York Rules of Professional Conduct Annotated Section 1.8:101 (July 2023 Update) ("Rule 1.8(g) applies . . . where any one plaintiff or group of plaintiffs has the power to veto the offer to other plaintiffs."). See also NYUSBA Ethics Op. 639 (1992) (interpreting DR 5 – 106, the predecessor to Rule 1.8(g), to apply to claims of a lawyers' clients in "separate actions against the same defendant.")*
- *The Rule identifies aggregate settlements as inherently creating conflicts for lawyers. The Rule expressly permits aggregate settlements with court approval where client consent is not obtained. Formal Op. 2020-3 recites that lawyers should only attempt to use the "court approval" exception where client consent is not feasible.*

ISSUES AT FIRST GLANCE

- The Rule attaches when counsel "participates in negotiation."
- The Rule requires informed **written** consent from each client to participate.
- According to Formal Op. 2020-3 at 6.
  - *To comply with NY rule 1.8(g)'s court-approval exception, the court must provide the attorneys with a formal order, in writing or on the record, permitting them to participate in the negotiation and making of an aggregate . . . settlement and approve of the lawyers proceeding in the face of their potential conflicts of interest.*

WHAT IS INFORMED CONSENT?

- ABA Formal Opinion 6-438: Lawyer must disclose
  - Total amount of the aggregate statement
  - Existence and nature of all claims involved in the settlement
  - Other client's participation in the settlement
  - Total fees and costs to be paid to the lawyer
  - Method by which the costs are to be apportioned among the clients
- **Not necessarily the identity of clients.** *See* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733, 756-59, *accord* ALI Principles.

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TRANSPARENCY IN BANKRUPTCY

- Does Bankruptcy Rule 2019 apply to plaintiff counsel (sometimes referred to herein as "state court counsel") with multiple clients?
  - What responsibility does state court counsel have to disclose litigation funding borrowed against recoveries from clients? To the extent it is a "disclosable economic interest" within Bankruptcy Rule 2019(a) as "an economic interest that is affected by the value, acquisition or disposition of a claim," does the rule only apply to clients and not state court counsel?
- Potential disclosable information
  - Engagement letter
  - Contingent fee arrangement, if any
  - Granting of liens by counsel on fees payable from recovery in bankruptcy on a claim

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OTHER POTENTIAL ISSUES

- Does the appointment of a committee consisting of individual tort victims with fiduciary duties to all creditors impact the role of such individual's state court counsel?
  - the US trustee seems to have a practice of appointing to the official committee individuals that are represented by state court counsel with multiple clients
- Is an order directing mediation in which state court counsel are the primary participants provide sufficient "court approval" for such state court counsel to participate in making or negotiating an aggregate settlement (*i.e.*, plan)? Do the confidentiality requirements of such a mediation order relieve state court counsel of certain responsibilities under the RPC?
- Does an approved disclosure statement satisfy the informed consent requirements?

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HOW DO STATE COURT COUNSEL ADDRESS THE RPC CONCERN OVER CONFLICTS AMONG ITS CLIENTS?

- How are objections to claims viewed through this lens? Does the recognition of some claims filed by counsel as legally insufficient claims while the same counsel also represents those that do state a claim create a conflict issue?
- Does it impact state court counsel obligations under its litigation funding arrangements?
- Does the disclosure statement facilitate "informed consent," in order to authorize state court counsel not only to participate in negotiation but also to authorize such counsel to seek acceptance or rejection of the plan from its multiple clients?

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CHAPTER 11 HAS SUBSTANTIAL JUDICIAL OVERSIGHT

- **Chapter 11 confirmation requirements address substantive fairness**
- Chapter 11 clearly provides disclosure to all tort victims and enables state court counsel to obtain informed consent, but does it address all the RPC required disclosure?
  - Total amount of the aggregate statement
  - Existence and nature of all claims involved in the settlement
  - Other client's participation in the settlement
  - Total fees and costs to be paid to the lawyer
  - Method by which the costs are to be apportioned among the clients
  - See ABA Formal Opinion 6-438
- The last two items are not required by Chapter 11, but they clearly concerned Judge Hellerstein in the World Trade Center cases, and now bankruptcy courts seem to be concerned that state court counsel meet its obligations under the RPC

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RECENT EXAMPLES OF JUDICIAL OVERSIGHT IN MASS TORT BANKRUPTCY CASES

- *In re Diocese of Camden, New Jersey*, 653 B.R. 309, 361-62 (Bankr. D.N.J. 2023)
  - Furthermore . . . several of the claims filed are invalid on their face, and yet the plan would permit these claims to be paid, and the attorneys that filed these invalid and potentially fraudulent claims to receive one-third, or more, of the expedited distribution. The Court cannot approve a Plan which allows attorneys to file invalid and fraudulent claims without consequence, nor can the Court allow attorneys to collect contingency fees in excess of what is permitted under New Jersey Law, or in excess of what is reasonable for the work required and the risk taken. Any future plan must take steps to ensure that the Survivors' attorneys are not violating the [Rules of Professional Conduct] and taking advantage of the Survivors.

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RECENT EXAMPLES OF JUDICIAL OVERSIGHT IN MASS TORT BANKRUPTCY CASES

- Order Den. Approval of the Disclosure Statement in Supp. of Joint Chapter 11 Plan of Reorganization for the Roman Catholic Diocese of Syracuse, *In re The Roman Catholic Diocese of Syracuse*, Case No. 20-30663, ECF No. 1664 at 5 (Bankr. N.D.N.Y. Feb. 8, 2024)
  - *[T]he Court raised other concerns that need to be resolved if this case proceeds to confirmation, which are as follows: (1) the Plan documents must provide for the appointment of an independent fee reviewer or establish a process for the court to review fees of counsel for Abuse Claimants for reasonableness under the New York Rules of Professional Conduct . . . .”*

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Faculty

Rachel Ehrlich Albanese is a partner with DLA Piper LLP in New York and co-chairs its U.S. Restructuring Practice. She has more than 20 years of experience representing debtors, secured and unsecured creditors, equityholders, purchasers of distressed assets, and other parties in a wide range of restructuring matters, including chapter 11 cases, out-of-court workouts, cross-border insolvency proceedings and title III of PROMESA, the law governing Puerto Rico's restructuring efforts, which she helped to develop. Ms. Albanese has been involved in Puerto Rico's current restructuring efforts since their earliest days, when she participated in dozens of meetings with U.S. Congress members and staff to develop the law that ultimately became PROMESA. Subsequently, she has been instrumental in many of the firm's PROMESA-related matters. Ms. Albanese currently serves as a member of the firm's Policy Committee nd previously served as co-hiring partner of the firm's New York office. Ms. Albanese was selected by *Crain's New York Business* as a 2022 Notable Woman in Law and recognized by *Chambers and Partners* in 2021 for Bankruptcy and Restructuring in New York. She is an active member of ABI, the International Women's Insolvency & Restructuring Confederation and the Turnaround Management Association. After law school, she clerked for Hon. John W. Bissell, Chief Judge of the U.S. District Court for the District of New Jersey. Ms. Albanese is a contributing author of the *Bloomberg Law: Bankruptcy Treatise* and has guest lectured at Penn Law School and Duke Law School. She received her B.A. *cum laude* from the University of Pennsylvania and her J.D. from the University of Pennsylvania Law School, where she served as editor-in-chief of the *Journal of International Economic Law.*

Corinne Ball is a partner with Jones Day in New York and has four decades of experience in business finance and restructuring, with a focus on complex corporate reorganizations and distressed acquisitions, both court-supervised and extra judicial, including matters involving multijurisdictional and cross-border enterprises. She co-leads the New York Office's Business Restructuring & Reorganization Practice and leads the firm's European Distress Investing and Alternative Capital Initiatives. Ms. Ball worked extensively on the City of Detroit restructuring and led a team of attorneys representing Chrysler LLC in connection with its successful chapter 11 reorganization, which won the *Investment Dealers' Digest* Deal of the Year award for 2009. She also led a team of attorneys in the successful restructuring of FGIC and the sale of its portfolio to MBIA, as well as Dana Corp., which emerged from bankruptcy in 2008, and has orchestrated many other complex reorganizations involving companies such as Oncor, Oi, OSX, US Manufacturing, Metaldyne, Axcelis Technologies, Kaiser Aluminum, Tarragon and The Williams Communications Companies. In addition, she has counseled lenders and bondholders in the ABFS, Comdisco, Excite@Home, Exide SA, GST Communications, the Houston Sport's Authority and Jefferson County, European Wind Farms (Breeze) and the National Portuguese Railway, Loy Yang B, VARIG Airlines and Worldcom restructurings, among others. Ms. Ball has advised on loans, acquisitions and workouts involving professional sports franchises, including the Charlotte Bobcats, the Detroit Redwings, the Minnesota Wild, the New Jersey Devils and the Phoenix Coyotes. She also leads the firm's distressed M&A efforts and is the featured "Distress M&A" columnist for the *New York Law Journal*. Ms. Ball won the Turnaround Management Association's "International Turnaround Company of the Year" award, and was named "Dealmaker of the Year" by *The American Lawyer* and one of "Most Influential Lawyer of the Decade in Bankruptcy & Restructuring" by *The National Law Journal*. She has served as director for the American College of Bank-

ruptcy and ABI, and she is a member of the International Institute on Insolvency. Ms. Ball received her B.A. *cum laude* and Phi Beta Kappa in 1975 from Williams College and her J.D. in 1978 with honors from George Washington University.

Debra A. Dandeneau is a partner in Baker McKenzie's New York office and served as chair of the firm's Global Restructuring & Insolvency Group from 2016-22. Her practice has involved representing clients throughout the world at all levels of the capital structure in high-profile distressed situations, including chapter 11 debtors and acquirers of troubled businesses. She also has represented major parties in municipal bankruptcies under chapter 9. Ms. Dandeneau has received numerous awards for her work in restructuring. In 2023, she was named the Restructuring & Insolvency Lawyer for the Americas from *Women in Business Law*, honored as a Notable Woman in Law by *Crain's New York*, named as one of the Top Women in Dealmaking (Restructuring) by *The Deal*, and included in *Lawdragon*'s list of 500 Leading U.S. Bankruptcy & Restructuring lawyers. Ms. Dandeneau regularly speaks on restructuring issues and is frequently quoted in the media, including *The Economist*, *The Wall Street Journal* and BBC Radio. She received her A.B. *magna cum laude*, Phi Beta Kappa from the University of Miami in 1983 and her J.D. in 1986 from Columbia Law School, where she was a Harlan Fiske Stone Scholar.

Hon. Rosemary J. Gambardella was sworn in as a U.S. Bankruptcy Judge on May 3, 1985, in the District of New Jersey in Newark, becoming the first woman to serve on its bankruptcy court. From 1980-85, she was senior staff counsel to Hugh M. Leonard, then U.S. Trustee for the Districts of New Jersey and Delaware. Judge Gambardella served as Chief Judge of the U.S. Bankruptcy Court for the District of New Jersey from Aug. 12, 1998, to Aug. 11, 2005. She is a member of the Lawyers Advisory Committee of the U.S. Bankruptcy Court for the District of New Jersey, a member and former president of the New Jersey Bankruptcy Inn of Court, and a member of the Bankruptcy Committee of the Third Circuit Task Force on Equal Treatment in the Courts - Gender Commission. In addition, she is a member of the National Association of Women Judges, the National Conference of Bankruptcy Judges, ABI and the Turnaround Management Association, and is a former member of the Bankruptcy Judges Advisory Group for the Administrative Office of the U.S. Courts. Judge Gambardella was the bankruptcy judge representative to the Judicial Conference of the United States (2009-11) and is a Fellow of the American College of Bankruptcy. She received the Rutgers School of Law – Newark Distinguished Alumni Award in 2012, the New York Institute of Credit Women's Division Judge Cecelia H. Goetz Award, the William J. Brennan, Jr. Award in 2013 and the Conrad B. Duberstein Memorial Award in 2015. Judge Gambardella earned her B.A. in history in 1976 from Rutgers University, where she was elected to Phi Beta Kappa. After receiving her J.D. from Rutgers Law School-Newark in 1979, Judge Gambardella served as law clerk to the late Chief Bankruptcy Judge Vincent J. Commisa from 1979-80.

Dion W. Hayes is a partner with McGuireWoods LLP in Richmond, Va. He served from 2017-22 as the firm's deputy managing partner for Litigation and chaired the firm's Restructuring and Insolvency Department from 2012-17. Since 1992, Mr. Hayes has focused his practice on insolvency law and financial restructuring, including bankruptcy, out-of-court restructurings, distressed-asset acquisitions and recapitalizations, and related litigation. He has particular experience in the coal, mining, insurance, banking, retail and health care industries. He also has experience with the insolvencies in the U.S. and elsewhere of regulated entities, such as insurance companies and banks. Mr. Hayes has

appeared in bankruptcy courts and other federal courts in Delaware, Florida, New York, Texas and Virginia. He is a Fellow in the American College of Bankruptcy and has been selected for inclusion in *Chambers USA* (Tier 1) for Bankruptcy, *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights, *Super Lawyers* for Bankruptcy & Creditor/Debtor Rights, Banking, and Business Litigation, the *Legal Elite* for Bankruptcy, and the *Irish Legal 100*. He is admitted to practice in D.C., Maryland, New York and Virginia, and he teaches bankruptcy as an adjunct professor at William & Mary Law School. Mr. Hayes received his B.A. from the University of Virginia in 1989 and his J.D. from William & Mary Law School in 1992.

Mark P. Kronfeld is a managing director at Province, LLC in New York and has over 26 years of experience as a distressed and special-situations investor, restructuring advisor, bankruptcy lawyer and litigator in connection with complex restructurings and liquidations, private credit, special situations and distressed investments. He also has extensive experience in high-stakes litigation and negotiation, investigations, dispute resolution and investor activism, with particular emphasis on value creation as well as constructive and creative solutions to complex business and legal challenges. At Province, Mr. Kronfeld focuses on trustee and fiduciary services (including serving as advisor to or member of boards of directors and litigation/liquidating trustees) as well as restructuring services, litigation services, investigations, dispute resolution and expert testimony. Previously, Mr. Kronfeld was with Blackrock and was a portfolio manager at Plymouth Lane Capital, a managing director at BlueMountain Capital, a partner at Owl Creek Asset Management and a senior analyst at Aurelius Capital. Before his career in finance, he was a bankruptcy attorney and litigator, representing debtors, creditors, trustees and boards in complex chapter 11 cases. As a litigator, he handled a wide variety of commercial and bankruptcy litigation. He also served as a prosecutor in New York City, where he was a member of the elite Investigations Division and prosecuted cases involving complex white-collar crime, fraud, money laundering, corruption, organized crime and murder, achieving a 100% jury trial conviction rate. Mr. Kronfeld is a frequent lecturer, panelist and published author on corporate governance, distressed investing, litigation, restructuring and the credit markets. He also has taught at NYU Stern and lectured at Columbia Business School, where he teaches Distressed Value Investing. He also was a bankruptcy law professor at Boston University School of Law and has guest lectured at Wharton, Duke, Yale, UVA and Oxford. Mr. Kronfeld is an active member of the Turnaround Management Association and ABI, for which he served as a member of the advisory committee for its Commission to Study the Reform of Chapter 11, which submitted its 2015 Report to the U.S. Congress. He received his B.A. from the State University of New York at Albany, his M.B.A. in finance from New York University and his J.D. from Boston University School of Law, where he was an Edward F. Hennessey Scholar and a research assistant.

Deirdre A. O'Connor is managing director for corporate restructuring at Epiq in New York. With more than 30 years of restructuring experience in law, government, corporate finance and technology-enabled legal solutions, she focuses on enterprise-wide initiatives to strengthen and expand Epiq's law firm and corporate client relationships. Ms. O'Connor has several years of experience in the leveraged finance industry, most recently serving as managing director at Wells Fargo Capital Finance, where she provided finance solutions to distressed companies. She also has served as the U.S. Trustee for the Southern District of New York and oversaw the administration of some of the largest bankruptcies in history. She also served as an Assistant U.S. Attorney for the District of Connecticut in both the civil and criminal divisions. Ms. O'Connor was the inaugural recipient of IWIRC's Women of the Year in Restructuring, and she received the St. Francis Service Award by Catholic Renewal

of Catholic Charities of Greater New York. She also is a member of ABI and serves on its advisory boards for its Health Care Program and New York City Bankruptcy Conference. Ms. O'Connor is an adjunct professor at St. John's University School of Law's L.L.M. Program. She received her B.A. from New York University and her J.D. from Quinnipiac University School of Law.

Alec P. Ostrow is a partner in the New York law firm of Becker, Glynn, Muffly, Chassin & Hosinski LLP and has been specializing in bankruptcy, creditors' rights, corporate reorganizations, workouts, cross-border insolvency and commercial litigation for more than 40 years. He is a Fellow of the American College of Bankruptcy and since 2000 has been an adjunct professor at St. John's University School of Law in its LL.M. in bankruptcy program. Mr. Ostrow has been selected to *Super Lawyers* since 2006, and in 2020 he was honored with the Marquis Who's Who Albert Nelson Marquis Lifetime Achievement Award. He has lectured on numerous bankruptcy issues, including at conferences sponsored by ABI, the American Bar Association, the American Law Institute - American Bar Association, the American Institute of Certified Public Accountants, the Judicial Conference of the Second Circuit, the National Association of Bankruptcy Trustees, the Association of Insolvency and Restructuring Advisors and the New York State Society of Certified Public Accountants. He also has published many articles on diverse topics in bankruptcy law, including the *American Bankruptcy Law Journal*, the *ABI Law Review* and the *Norton Annual Survey of Bankruptcy Law*. Mr. Ostrow received his undergraduate degree *magna cum laude* from Dartmouth College in 1977 and his J.D. from New York University School of Law in 1980.

Prof. David A. Skeel, Jr. is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania Law School in Philadelphia. He is the author of *True Paradox: How Christianity Makes Sense of Our Complex World* (InterVarsity 2014), *The New Financial Deal: Understanding the Dodd-Frank Act and Its (Unintended) Consequences* (Wiley 2011), *Icarus in the Boardroom* (Oxford 2005), *Debt's Dominion: A History of Bankruptcy Law in America* (Princeto, 2001), and numerous articles on bankruptcy, corporate law, financial regulation, Christianity and law, and other topics. Prof. Skeel has also written commentaries for the *New York Times*, *Wall Street Journal*, *Books & Culture*, *The Weekly Standard* and other publications. He has received the Harvey Levin award three times for outstanding teaching as selected by a vote of the graduating class, the Robert A. Gorman award for excellence in upper-level course teaching, and the University's Lindback Award for distinguished teaching. Prof. Skeel received his B.A. in 1983 from the University of North Carolina and his J.D. in 1987 from the University of Virginia.