Docket #0283 Date Filed: 04/05/2024

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.

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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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