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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)

[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.

DEBTORS' REPLY 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

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

The above-captioned debtors and debtors in possession (collectively, the "Debtors") respectfully submit this reply (the "Reply") 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* [Docket No. 158] (the "Application") and in response to *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* [Docket No. 283] (the "Committee Objection") filed by the Official Committee of Unsecured Creditors appointed in the above-captioned chapter 11 cases (the "Committee") and the *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* [Docket No. 322] (the "U.S. Trustee Objection," and together with the Committee Objection, the "Objections"). In support of this Reply, the Debtors state as follows:[2]

[2] A detailed description of the Debtors and their businesses, including the facts and circumstances giving rise to the Debtors' chapter 11 cases, is 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* (the "First Day Declaration") [Docket No. 21]. Capitalized terms used but not immediately defined are defined later in the Application, Objection, or in the First Day Declaration, as applicable.

Reply

1. Kirkland does not hold or represent any interest adverse to these chapter 11 estates and is disinterested, as the term is defined by section 101(14) of the Bankruptcy Code. *See* 11 U.S.C. § 327(a). The Objections lack merit and should never have been filed. By seeking to disqualify Kirkland, the Committee and U.S. Trustee seek to substitute their judgment for that of a fully-independent, well-informed public company. Their actions would deprive the Company of the full benefit of its selection of counsel to assist with its corporate restructuring. Especially on the facts of these cases, that sacred choice should be fully protected.

2. Kirkland "holds" absolutely no interest adverse to these estates: it is neither a creditor of these estates nor economically motivated to do anything other than zealously represent the Debtors as fiduciaries for all stakeholders. Just as Kirkland does in every single debtor representation, irrespective of who is invested in the capital structure. The record in these cases is equally clear: Kirkland has and will continue to serve the Debtors' interests—and only the Debtors' interests—in these chapter 11 cases.

3. There is no dispute over Kirkland's qualifications. Kirkland has one of the leading restructuring practices in the world, representing companies in dozens of complex chapter 11 cases every year, including companies like the Debtors. Invitae—a public company with no preexisting relationship with Kirkland—interviewed multiple law firms and retained Kirkland because of its prominent Debtor-side practice, vast experience in chapter 11 cases like these, and Kirkland's track record in effectively acting adverse to creditors in the Debtors' capital structure (including Deerfield).

4. Kirkland also does not "represent" any interest adverse to these estates. The Committee and the U.S. Trustee seek to disqualify Kirkland because Kirkland represents Deerfield in fund formation matters entirely unrelated to these chapter 11 cases. But Kirkland has not, does

not, and will not represent Deerfield in connection with these chapter 11 cases or in matters adverse to the Debtors. Notably, Kirkland's limited funds work for Deerfield falls well short of the Committee's assertion that Deerfield is a "significant" Kirkland client. Deerfield accounts for a tiny fraction of total firm revenue: approximately 0.03% of Kirkland's annual revenue, less than $1,885,000 in 2023, and less than $2,400,000 in the aggregate for all time. Kirkland properly disclosed its ongoing unrelated representation of Deerfield consistent with the requirements of the Bankruptcy Rules and Local Rules. And Kirkland has an advance waiver from Deerfield that expressly enables Kirkland to be adverse to Deerfield in any matter, including any restructuring, bankruptcy, or litigation matter. On similar facts, the Bankruptcy Court for the District of Delaware recently overruled an objection to retention of debtors counsel that also concurrently represented a secured lender in unrelated matters, where the law firm had an applicable waiver on file and fee receipts were approximately 0.1% of firm revenues. *See In re Art Van Furniture, LLC*, 617 B.R. 509, 519 (Bankr. D. Del. 2020) (Sontchi, J.).

5. The Committee and U.S. Trustee offer no evidence that Kirkland's existing or prior unrelated representations of Deerfield would have any influence on these cases at all. Nor could they. As the record demonstrates, at all times Kirkland has been a zealous advocate for the Debtors, including in matters adverse to Deerfield. Both prepetition and throughout these chapter 11 cases, Sullivan & Cromwell has fiercely represented Deerfield's interests, which are frequently at odds with the Debtors' interests. Kirkland and Sullivan & Cromwell engaged in hard-fought negotiations on behalf of their respective clients surrounding: (i) several supplements to the Company's indenture with Deerfield; (ii) the Transaction Support Agreement, which contemplates a sale process for the Debtors' assets and resulting plan distribution scheme that subordinates Deerfield's claims to two classes of unsecured creditors; (iii) the Debtors' use of cash collateral to

facilitate these chapter 11 cases; and (iv) a competitive auction process that resulted in a third party as successful bidder. There is no objective basis in the record for the Committee to question Kirkland's impartiality.

6. The Committee's second assertion regarding Kirkland's representation of an adverse interest is a similarly meritless distortion of basic corporate governance. The Committee claims that Kirkland represents the Debtors, the Company's Board, the Special Committee, the Company's disinterested director (Jill Frizzley), and Deerfield. To be clear, Kirkland represents the Company. In doing so, Kirkland necessarily provides legal advice to the Board, the Special Committee, and a disinterested director on that Special Committee, in their capacities as the appropriate governing bodies of the Company. The manner in which Kirkland is advising Invitae as a corporate client, and the related corporate governance structure, are entirely unremarkable.

7. In situations in which a debtor's governing bodies need advice on a matter, or assistance in an investigation, and corporate counsel is either conflicted or could potentially be conflicted given its prior connection to the subject transaction, then that debtor may receive advice from separate, conflicts counsel. But here, there would be no rational basis for the Debtors to seek independent counsel here because Kirkland had no involvement—with any party—in the 2023 Exchange Transactions[3] and was in fact a complete stranger to the Company prior to being engaged in the fall of 2023. Latham & Watkins served as legal advisor to the Company on the 2023 Exchange Transactions, which were completed before the Company engaged Kirkland in any capacity. Kirkland also never represented Deerfield in the 2023 Exchange Transactions (or in this chapter 11 case or, according to its records, in ***any*** known chapter 11 case) and Kirkland has

[3] "*2023 Exchange Transactions*" means the Debtors' March 2023 debt transaction and the August 22, 2023 notes exchange transaction, as fully described in the First Day Declaration.

an advance waiver from Deerfield that expressly enables Kirkland to be adverse to Deerfield in any matter, including any restructuring, bankruptcy, or litigation matter. Kirkland was newly retained at the direction of the Debtors' fully-independent, public-company Board to advise the Debtors regarding their restructuring. As an essential part of that mandate, Kirkland prudently worked with the Special Committee—and, particularly, with a disinterested director that had no role on the Board when the 2023 Exchange Transactions were approved—to investigate whether the Debtors have valuable, or even viable, causes of actions related to those transactions. The Committee's baseless assertions that Kirkland disregarded its fiduciary duties and conducted a sham investigation into the 2023 Exchange Transactions (and somehow influenced the members of the Special Committee, including the disinterested director involved in the investigation, to do the same) because Kirkland is allegedly beholden to Deerfield defy reality.

8. The Committee and U.S. Trustee have failed to meet their burden. They have not shown that any actual conflict or adversity exists. The Objections' speculative assertions and conjectures that a conflict exists are no basis for disqualification. *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 477 (3d Cir. 1998) ("We therefore reject LaSalle's invitation to read an appearance of conflict disqualification into § 327(a)."). Under section 327(a) of the Bankruptcy Code, a conflict is deemed 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 Roper & Twardowsky, LLC*, 566 B.R. 734, 755 (Bankr. D.N.J. 2017). But here, no competing interests exist surrounding Kirkland's role in the Special Committee's independent investigation of the 2023 Exchange Transactions as Kirkland did not advise any party regarding the Company's 2023 Exchange Transactions and had not yet been engaged by the Debtors.

9. At bottom, the Committee Objection is purely tactical—a potentially value-destructive attack on the Debtors' restructuring efforts deployed to circumvent the traditional requirements for derivative standing (for the second time in this case). Similar to its objection to the cash collateral order, the Committee seeks extraordinary and unwarranted relief rather than pursuing its interests through the proper and fully available legal channel—filing a standing motion to challenge the 2023 Exchange Transactions.[4] Disqualifying Kirkland—or preventing Kirkland from engaging with the Debtors' majority secured lender— will not help the Committee reach the conclusion they appear to have already reached, but it would derail these cases, to the severe detriment of the Debtors and all stakeholders. This is precisely why disqualification motions are disfavored in this jurisdiction.[5]

10. The only question currently before the Court is whether the Debtors may retain Kirkland under section 327 of the Bankruptcy Code and this Circuit's prevailing jurisprudence. The answer is clearly yes. Kirkland (i) does not hold an interest adverse to the estates, (ii) does not represent any interest adverse to these chapter 11 estates, and (iii) is disinterested. Therefore, Kirkland clearly satisfies the standard for retention.

11. The Committee and the U.S. Trustee conflate these three distinct prongs, and ultimately fail to show that the Debtors' retention of Kirkland as counsel—a choice entitled to great deference—violates section 327(a) of the Bankruptcy Code. They have provided no basis to deprive the Debtors of their attorneys or to impose the irreparable harm that could arise if the

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4 *See Objection of the Official Committee of Unsecured Creditors to Final Approval of Debtors' Cash Collateral Motion* [Docket No. 148] (seeking automatic standing under the Debtors' Final Cash Collateral Order instead of attempting to prove the formal requirements for derivative standing).

5 *In re A & T Paramus Co., Inc.*, 253 B.R. 606, 614 (Bankr. D.N.J. 1999) ("[D]isqualification motions are often made for tactical reasons, but . . . 'even when made in the best of faith, such [disqualification] motions inevitably cause delay' in the underlying proceedings. Therefore, close judicial scrutiny of the facts of each case is "required to prevent unjust results.""") (internal citations omitted).

Debtors were now stripped of Kirkland's counsel. The Objections should be overruled, and the Application should be approved.

Argument

I. Kirkland Does Not Hold an Interest Adverse to the Estate Under Section 327(a) of the Bankruptcy Code.

12. The Bankruptcy Code requires that a retained professional "not hold . . . an interest adverse to the estate." 11 U.S.C. § 327(a). Courts 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." *In re First Jersey Sec., Inc.*, 180 F.3d 504, 509 (3d Cir. 1999). Courts have evaluated this standard based on whether facts and circumstances indicate that "counsel's attention to the concerns of the debtors' estate[s] was somehow diminished." *See In re Martin*, 817 F.2d 175, 180-181 (1st Cir. 1987).

13. Kirkland is not a creditor of the Debtors, nor does it hold any other economic interest in, against, or contrary to the estates. Kirkland has no incentive to act contrary to the Debtors' estates. In fact, it is quite the opposite. Kirkland has a leading practice representing debtors in chapter 11 proceedings, representing debtors in 42 chapter 11 cases in the past three years.[6] Over the past three years, Kirkland represented 29 debtors with liabilities of over $1 billion

[6] *See, e.g.*, *In re Thrasio Holdings, Inc.*, No. 24-11840 (CMG) (Bankr. D.N.J. Feb. 28, 2024); *In re Caresimatic Brands* LLC, No. 24-10561 (VFP) (Bankr. D.N.J. Jan. 22, 2024); *In re WeWork Inc.*, No. 23-19865 (Bankr. D.N.J. Nov. 6, 2023); *In re Rite Aid Corp.*, No. 23-18993 (Bankr. D.N.J. Oct. 17, 2023); *In re Cyxtera Techs.*, No. 23-14853 (JKS) (Bankr. D.N.J. June 4, 2023); *In re Brilliant National Services, Inc.*, No. 23-13575 (MBK) (Bankr. D.N.J. April 26, 2023); *In re Bed Bath & Beyond Inc.*, No. 23-13359 (VFP) (Bankr. D.N.J. April 23, 2023); *In re David's Bridal*, No. 23-13131 (CMG) (Bankr. D.N.J. April 17, 2023); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Nov. 28, 2022); *In re Express, Inc.*, No. 24-10831 (KBO) (Bankr. D. Del. Apr. 22, 2024); *In re Sientra, Inc.*, No. 24-10245 (JTD) (Bankr. D. Del. Feb. 12, 2024); *In re SmileDirectClub, Inc.*, No. 23-90786 (CML) (Bankr. S.D. Tex. Sept. 29, 2023); *In re Center for Autism and Related Disorders*, No. 23-90709 (DRJ) (Bankr. June 10, 2023); *In re PGX Holdings*, No. 23-10718 (CTG) (Bankr. D. Del. June 4, 2023); *In re GenesisCare*, No. 23-90614 (DRJ) (Bankr. S.D. Tex. June 1, 2023); *In re QualTek, LLC*, No. 23-90584 (CML) (Bankr. S.D. Tex. May 24, 2023); *In re Benefytt Tech., Inc.* No. 23-90566 (CML) (Bankr. S.D. Tex. May 23, 2023); *In re Envision Healthcare Corp.*, No. 23-90342 (CML) (Bankr. S.D. Tex. May 15, 2023); *In re Venator Materials* PLC, No. 23-90301 (DRJ) (Bankr. S.D. Tex. May 14, 2023); *In re Lannett Company, Inc.*, No. 23-10559 (JKS) (Bankr. D. Del. May 2, 2023*); In re SiO2 Medical Products Inc.*, No. 23-10366 (JTD) (Bankr.

in chapter 11 cases. Kirkland established this presence by providing the best legal counsel possible to further the interests of its debtor clients with the independence and impartiality required by the Bankruptcy Code. The Objections allege a vague, nondescript appearance of conflict, and their attempts to distinguish controlling precedent are both not persuasive and ignore economic reality. Acting against the Debtors' interests would cut against Kirkland's own interest in maintaining its position as one of the "go to" firms for debtors counsel in the world.

II. Kirkland Does Not Represent an Interest Adverse to the Debtors' Estates Under Section 327(a) of the Bankruptcy Code, and There Are No Actual Conflicts Under Section 327(c) of the Bankruptcy Code.

14. The Bankruptcy Code also requires that a retained professional "not . . . represent an interest adverse to the estate." 11 U.S.C. § 327(a). And the Bankruptcy Code expressly provides that "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless . . . there is an actual conflict of interest." 11 U.S.C. § 327(c).

15. Professional retentions under section 327(a) are analyzed on an individual basis by reference to the particular facts of the case. *See In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1017 (Bankr. N.D. Ill. 1993). Courts have consistently rejected any "per se" rule under which a

D. Del. March 29, 2023); *In re Avaya Inc.*, No. 23-90088 (DRJ) (Bankr. Feb. 14, 2023); *In re NBG Home*, No. 23-90071 (DRJ) (Bankr. S.D.Tex. Jan. 31, 2023); *In re Invacare*, No. 23-90068 (CML) (Bankr. S.D. Tex. Jan 31, 2023); *In re Nautical Solutions LLC*, No. 23-90002 (CML) (Bankr. S.D. Tex. Jan. 9, 2023); *In re Pipeline Health Systems*, *LLC*, No. 22-90291 (MI) (Bankr. S.D. Tex. Oct. 2, 2022); *In re Cineworld Grp. plc*, No. 22-90168 (Bankr. S.D. Tex. Sept. 7, 2022); *In re Carestream Health, Inc.*, No. 22-10778 (D. Del. Aug. 23, 2022); *In re Altera Infrastructure L.P.*, No. 22-90130 (S.D. Tex. Aug. 12, 2022); *In re Aearo Techs. LLC*, No. 22-02890 (JJG) (Bankr. S.D. Tex. July 26, 2022); *In re Global Brands Group*, No. 21-11369 (MEW) (Bankr. S.D.N.Y. July 29, 2021); *In re Celsius Network LLC*, No. 22-10964 (Bankr. S.D.N.Y. July 13, 2022); *In re Voyager Digital Holdings, Inc.*, No. 22-10943 (Bankr. S.D.N.Y. July 5, 2022); *In re HONX, Inc.*, No. 22-90035 (Bankr. S.D. Tex. Apr. 28, 2022); *In re FSO Jones, LLC*, No. 22-10196 (Bankr. E.D. La. Feb. 28, 2022); *In re Seadrill New Fin. Ltd.*, No. 22-90001 (Bankr. S.D. Tex. Jan. 11, 2022); *In re Nordic Aviation Cap. Designated Activity Co.*, No. 21-33693 (Bankr. E.D. Va. Dec. 19, 2021); *In re Riverbed Tech., Inc.*, No. 21-11503 (Bankr. D. Del. Nov. 16, 2021); *In re Carlson Travel, Inc.*, No. 21-90017 (Bankr. S.D. Tex. Nov. 11, 2021); *In re Wash. Prime Grp. Inc.*, No. 21-31948 (Bankr. S.D. Tex. June 13, 2021); *In re Alex and Ani, LLC*, No. 21-10918 (Bankr. D. Del. June 9, 2021); *In re Katerra, Inc.*, No. 21-31861 (Bankr. S.D. Tex. June 6, 2021).

professional may be disqualified for the mere allegation or appearance of conflict. As the Third Circuit recognized over 30 years ago, "[t]he naked existence of a potential for conflict of interest does not render the [arrangement] nugatory, but makes it voidable as the facts may warrant. It is for the court to decide whether the [arrangement] carries with it a sufficient threat of material adversity to warrant prophylactic action." *In re BH & P Inc.*, 949 F.2d 1300, 1312 (3d Cir. 1991).

16. A conflict is deemed 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 Roper & Twardowsky*, 566 B.R. at 755; *In re Leslie Fay Cos., Inc.*, 175 B.R. 525, 532 (Bankr. S.D.N.Y. 1994) ("[I]nterests are not considered 'adverse' merely because it is possible to conceive a set of circumstances under which they might clash."). Merely representing a creditor in unrelated matters does not give rise to an actual conflict. *See In re Marvel Ent. Grp., Inc.*, 140 F.3d 463 (3d Cir. 1998); *In re Art Van Furniture, LLC*, 617 B.R. 509 (Bankr. D. Del. 2020).

17. A "potential" conflict exists where competition between two interests "is presently dormant, but may become active if certain contingencies occur." *In re BH & P, Inc.*, 103 B.R. at 563 (internal quotations omitted). For potential conflicts, there are "better solutions than depriving [the Debtors] of [their] chosen counsel," including "the retention of conflicts counsel." *In re Caesars Ent. Operating Co., Inc.*, 561 B.R. 420, 435 (Bankr. N.D. Ill. 2015); *see In re Schwindt*, No. 12-31418 MER, 2013 WL 321297, at *6 (Bankr. D. Colo. Jan. 28, 2013); *In re E. Livestock Co., LLC*, No. 10-93904-BHL-11, 2012 Bankr. LEXIS 4052, at *13 (Bankr. S.D. Ind. Aug. 31, 2012) ("The Court determined that, by virtue of the engagement of Special Conflicts Counsel, [debtors counsel] met the standard of disinterestedness established by § 327 notwithstanding [its representation of a creditor of the debtor]."). "[I]t is not uncommon for

'conflicts counsel' to be retained, charged with the duty of undertaking specified matters in which general counsel for the debtor has a conflict." 3 Collier on Bankruptcy ¶ 327.04 (16th ed. 2022); *see*, *e.g.*, *In re HONX, Inc.*, No. 22-90035 (MI) (S.D. Tex. June 24, 2022) [Docket No. 186] (authorizing retention of conflicts counsel).

18. The appearance of a conflict or potential conflicts should ***not*** lead to disqualification: "[H]orrible imaginings alone cannot be allowed to carry the day. Not every conceivable conflict must result in sending [counsel] away to lick his wounds." *In re Marvel*, 140 F.3d at 477 (internal citations omitted). This rule is regularly enforced in practice, where professionals disclose their connections to parties in interest and yet are not disqualified because of speculation that a "potential conflict" exists. This practice recognizes that an alternative rule would wrongly permit adversaries to disqualify counsel at will by raising the specter of potential conflict at every turn. *See In re Jartran, Inc.*, 78 B.R. 524, 525 (Bankr. N.D. Ill 1987) ("[T]o rule blindly in [objector's] favor without considering the factual and economic realities of this case would result in a disqualification based on speculation, a precept previously frowned upon.") (citing *In re O'Connor*, 52 B.R. 892, 898 (Bankr. W.D. Okla. 1985)).

19. Mere speculation of a conflict does not provide grounds for the extreme and disfavored measure of disqualification. *See Truong v. 325 Broadway Assocs. LLC (In re Truong)*, 557 B.R. 326, 336 (Bankr. D.N.J. 2016) ("A motion to disqualify is viewed with disfavor, and disqualification is a 'drastic measure,' which should only be used only when necessary."). The Debtors retained Kirkland for its industry-leading experience in complex chapter 11 cases, and their choice should not disturbed merely because of the Committee's unfounded assertions.

A. Kirkland's Representation of the Debtors Does Not Create a Conflict with the Board, the Special Committee, or Jill Frizzley.

20. The Committee seeks to turn corporate governance on its head. According to the Committee, a company, its board, and any board committees all need separate counsel in all scenarios—or otherwise debtors counsel faces debilitating conflicts. Committee Objection ¶¶ 21, 29. Not true. Kirkland represents the Debtors and, in that capacity, provides legal advice to the Debtors' governing bodies and representatives, in their capacity as such. This is the only manner in which attorneys can provide advice to corporations: through the natural persons that represent them.

21. To that end, the Debtors delegated the authority to investigate the 2023 Exchange Transactions to Jill Frizzley, a newly-appointed disinterested director. Neither Ms. Frizzley nor Kirkland had any involvement for any party in the 2023 Exchange Transactions. With respect to its work on the investigation into these transactions, Kirkland reports to Ms. Frizzley, as the director of the Debtors that has received the relevant delegation. She is the duly authorized decision-maker ***for*** the Debtors with respect to the investigation, but Kirkland still only represents the Debtors.

22. The Committee provides no authority for its position that Kirkland is unable to advise the Debtors and evaluate whether estate causes of action exist. Nor could it. Indeed, as restructuring counsel, it is squarely within Kirkland's mandate to evaluate whether estate causes of action exist. Importantly, this is not a situation in which Kirkland advised a party on the transactions that were investigated, all of which occurred well ***before*** Kirkland's retention. Nor is this a situation in which Kirkland advised a private equity client that controlled the Debtors on matters directly related to the Debtors. In such scenarios, debtors retain separate counsel for those

issues so that Kirkland is not investigating a transaction or matter on which it advised either the company or its private equity sponsor.

23. None of those conflict considerations are in play here. At bottom, Kirkland advises the Debtors, including through the Special Committee consistent with its delegated authority. There was no conflict that necessitated separate counsel and would prevent Kirkland from properly investigating claims held by the Debtors related to the 2023 Exchange Transactions. The Objection should be overruled.

B. Kirkland's Representation of Deerfield in *De Minimis*, Unrelated Fund Formation Matters Is Not a Disqualifying Conflict.

24. Next, the Committee and U.S. Trustee attempt to impose a *per se* rule that debtors counsel must be disqualified if it also represents a creditor of the debtors, even if such representation is wholly unrelated to the chapter 11 cases. Both Objections are wrong on the facts and law.

25. In *Marvel*, the Third Circuit articulated the following standard to analyze each type of conflict:

> (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.

In re Marvel Ent. Grp., Inc., 140 F. 3d 463, 476 (3d Cir. 1998). Courts in the Third Circuit apply this rule when conducting a section 327 analysis, including in cases where debtors counsel's concurrent representation of a creditor in matters unrelated to the chapter 11 cases continues during the postpetition period. *See, e.g.*¸ *Art Van Furniture*, 617 B.R. at 514-15; *In re Rockaway Bedding, Inc.*, Nos. 07–14890, 07–14892, 07–14894, 07–14895, 07–14896, 07–14897, 04-14898, 2007 WL 1461319, at *3-4 (Bankr. D.N.J. May 14, 2007) (approving retention of debtors counsel under

section 327(a) of the Bankruptcy Code where counsel represented the debtors' largest secured creditor in matters unrelated to the bankruptcy for less than 1% of the law firm's annual revenue).

26. The decision of the United States Bankruptcy Court for the District of Delaware in *Art Van* is directly applicable here. In *Art Van*, the U.S. Trustee objected to the retention of debtors counsel on the basis that the law firm concurrently represented Wells Fargo in unrelated matters and also represented the Debtors in a dispute with Wells Fargo regarding an event of default under the cash collateral order. 617 B.R. 509, 511-512. Debtors counsel had received a waiver letter from Wells Fargo permitting it to represent the debtors in the chapter 11 cases, although the waiver's drafting was less than entirely clear. *Id*. at 512-513. The law firm's fee receipts from Wells Fargo in unrelated matters constituted approximately 0.1% of firm revenue. *Id.* at 519.

27. Judge Sontchi, applying *Marvel*, overruled the objection and approved the retention of debtors counsel. In so ruling, the court stated as follows:

> Notwithstanding the Waiver, the Trustee has not presented, nor does this Court find, sufficient evidence of either an actual conflict or a potential conflict that would require the denial of Benesch's Application. Benesch served as Debtors' Counsel from March 4, 2020, until April 6, 2020—when the Chapter 11 cases were converted to cases under Chapter 7 of the Bankruptcy Code. During the time Benesch represented the Debtors in Chapter 11 proceedings, Benesch did not represent Wells Fargo in these cases or in any related transactions. As Benesch has highlighted, both in relative and in absolute terms, Wells Fargo has represented a de minimis component of its aggregate revenue in each of the last three years. Benesch's revenue from its representation of Wells Fargo stood at approximately one-tenth of one percent of total firm revenue in 2018 and has declined in each subsequent year. Additionally, there is no evidence in the record that indicates that Benesch lacked zealousness in its representation of the Debtors. Lastly, this Court has previously, approved retention applications of law firms that served as debtor's counsel and counsel to Wells Fargo in unrelated transactions and cases while Wells Fargo was a party in interest in the debtor's bankruptcy proceeding.

Id. (internal citations omitted).

28. Here, the facts are similar to *Art Van*, except it is an easier call. As was the case there, Kirkland represents Deerfield only in matters entirely unrelated to the Debtors or these chapter 11 cases. And, here, Kirkland's fee receipts from Deerfield are even more minimal than those at issue in *Art Van*. And, unlike in *Art Van*, there is no ambiguity regarding the waiver Kirkland received from Deerfield: it is an advance waiver that unambiguously and without exception permits Kirkland to represent any debtor client in a bankruptcy adverse to Deerfield, including in litigation by the debtor against Deerfield. And there is no evidence whatsoever that Kirkland has been anything less than zealous in representing the Debtors.

29. The Committee provides no evidence to the contrary. Instead, it points to a sentence in Kirkland's Application which states that Kirkland will not "commence a cause of action" against current Kirkland clients in relation to these chapter 11 cases "unless Kirkland has an applicable waiver on file or first receives a waiver from such entity allowing Kirkland to commence such an action." Winters Decl. ¶ 25. But, again, Kirkland has a signed, global advance waiver from Deerfield permitting Kirkland to be adverse to Deerfield in any matter, including in any restructuring, bankruptcy, or litigation matter. So, this sentence from the Application is not relevant.

30. The law cited in the Objections is also mischaracterized and stretched in order to apply to the applicable facts here. Both the Committee and the U.S. Trustee rely on *In re Project Orange Assocs.*, LLC, 431 B.R. 363 (Bankr. S.D.N.Y. 2010) to incorrectly assert that Kirkland has an actual conflict with Deerfield. *Project Orange* is inapplicable. There, debtors proposed counsel ***conceded*** there was an actual conflict and that it could "not represent the [d]ebtor in ***many*** matters regarding [the debtor's largest creditor]." *Project Orange*, 431 B.R. at 372 (emphasis

added). Here, to the contrary, Kirkland can be adverse to Deerfield in all matters related to these chapter 11 cases. Kirkland does not represent and has not represented Deerfield in any matter related to the Debtors or these chapter 11 cases. Deerfield is a not a major client of Kirkland. And Kirkland has a signed advance waiver from Deerfield. Kirkland has already represented the Debtors adverse to Deerfield in these chapter 11 cases and can and will continue to do so. Moreover, Deerfield is represented by Sullivan & Cromwell in these chapter 11 cases.

31. The Committee also relies on *In re Leslie Fay* to assert that Kirkland has an actual conflict with Deerfield. Committee Objection ¶¶ 32-33. *Leslie Fay* is inapposite. In that case, debtors counsel was sanctioned for failing to disclose material adverse connections to members of the debtor's board of directors and one of the debtor's major unsecured creditors. 175 B.R. at 538-39. Here, by contrast, Kirkland properly disclosed its connections with Deerfield and, when applicable, all members of the board in its Application. *Id.* at 536-37.

32. Kirkland specifically disclosed these connections to allow the Court to properly assess the materiality of the connections when reviewing the Application. Winters Decl. ¶ 37. In light of this disclosure, the burden instead shifts to the objecting party to prove an actual conflict exists and that the applicant's retention violates section 327(a) of the Bankruptcy Code. *Tr. Of Hr'g Held* Nov. 10, 2022 at 8:7-9, 9:17-19, *In re Aearo Techs. LLC*, No. 22-02890 (JJG) (Bankr. S.D. Ind. Nov. 14, 2022) [Docket No. 795] ("[the burden on the debtors] is a very small initial burden, which is basically filing your 2014 disclosures and setting forth any conflicts you may have…. But I do find that looking at things in total, that the objecting parties were unsuccessful in rebutting the prima facie case."); *Caesars*, 561 B.R. at 431-32; *In re Enron Corp*., No. 01-16034 (AJG), 2002 WL 32034346, at *5 (Bankr. S.D.N.Y. 2002). The Committee's and U.S. Trustee's conclusory allegations surrounding the 2023 Exchange Transactions and related independent

investigation fail to meet that burden. This is especially true considering Kirkland's representation of Deerfield is entirely unrelated to these cases and revenue derived from such representations is *de minimis*.

33. Accordingly, Kirkland does not represent an interest adverse to the estates under section 327(a) of the Bankruptcy Code, nor, in light of Kirkland's disclosures, did any party manage to meet its burden to establish that there is an actual conflict under section 327(c). Both Objections should be overruled.

III. Kirkland is Disinterested Under Sections 327(a) and 101(14)(C) of the Bankruptcy Code.

34. The Bankruptcy Code also requires that a retained professional be a "disinterested person." 11 U.S.C. § 327(a). A disinterested person has no "interest materially adverse to the interest of the estate . . . 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). This Court has interpreted section 101(14)(C) "to implicate only the personal interests of the [professional whose disinterestedness is under consideration]." *See In re BH & P, Inc.*, 949 F.2d at 1310 & n. 12. The focus of section 101(14)(C) of the Bankruptcy Code is whether prospective counsel has a materially adverse interest at the time of retention, not whether it at some point in the past represented a party with a materially adverse interest. *In re Boy Scouts of Am.*, 35 F.4th 149, 158 n.5 (3d Cir. 2022). In *Boy Scouts*, the Third Circuit held that proposed counsel did not presently have an interest materially adverse to the estate and was thus a disinterested person under section 101(14)(C) for the same reasons it did not hold an interest adverse to the estate under section 327(a). *Id.* at 157 ("We recognize these two prongs (i.e., not holding an adverse interest and being disinterested) as formally distinct. That said, in many cases—including this one—they

effectively collapse into a single test") (internal citations omitted). This Court should reach a similar finding here.

35. Kirkland's disinterestedness is not a close call. This is not an instance in which Kirkland's concurrent representation was of a comparatively large firm client. *See Caesars*, 561 B.R. at 431 (overruling all objections and granting Kirkland's retention application when Kirkland's annual fees for two major equity holders were 0.3% and 0.1% respectively). However, even in such instances where a party alleged a conflict, Kirkland prevailed against any challenges to its disqualification, and demonstrated that Kirkland is disinterested, as the term is defined by section 101(14) of the Bankruptcy Code.

36. Here, Kirkland's relationship to Deerfield certainly does not give rise to a materially adverse interest under section 101(14)(C) of the Bankruptcy Code. As discussed above, Kirkland's representation of Deerfield accounts for a tiny fraction of total firm revenue: approximately 0.03% of Kirkland's annual revenue, less than $1,885,000 in 2023, and less than $2,400,000 in total for all time. Kirkland's limited relationship with Deerfield pales in comparison to the importance of even this one debtor matter—not to mention the revenue generated from Kirkland's entire debtor practice. It is simply not credible for the Committee or the U.S. Trustee to insinuate that Kirkland would jeopardize its debtor practice for something so comparatively insignificant.

IV. Disqualifying Kirkland Would Be Hugely Detrimental to the Debtors and All Of Their Stakeholders.

37. Disqualification is a draconian remedy that will upend these cases. *See In re Truong*, 557 B.R. at 336. Kirkland has been engaged by Debtors for months and has been diligently working to maximize value for all of the Debtors' creditors, including the Committee's constituents. In connection therewith, Kirkland has spent months understanding the Debtors'

businesses, their industry, and the circumstances surrounding these chapter 11 cases, developing a deep and unmatched institutional knowledge to represent the Debtors to Kirkland's greatest possible capacity.

38. Depriving the Debtors of the counsel of their choosing, counsel that possesses extensive chapter 11 experience and institutional knowledge, would cause irreparable harm and destroy the value of the Debtors' estates for all parties in interest, including the Committee's constituents. This irreparable harm is among the very reasons why disqualification has long been disfavored in this district. *Id.*

V. The U.S. Trustee's Other Objections Should Be Overruled.

39. In addition to the above, the U.S. Trustee's Objection raises several ancillary issues with the Order and Winters Declaration. Although the Debtors believe that they can resolve some of the outstanding issues through a supplemental disclosure or language added to the Order, certain of the U.S. Trustee's requests, which have been agreed to in other contexts and cases in order to resolve the U.S. Trustee's concerns and move the case forward, overreach or are unnecessary. Importantly, the U.S. Trustee has provided no evidence that merits their inclusion. These open items are addressed in the table below:

U.S. Trustee Objection	K&E Response
"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." U.S. Trustee Objection ¶ 25.	This assertion is unfounded. Kirkland ran every name on the parties in interest list consistent with other debtor professionals in these chapter 11 cases. The U.S. Trustee raised no issues or objections to the disclosures by the other professionals, who made the same exact representations as Kirkland.
"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	The U.S. Trustee fails to provide any evidence as to why this disclosure is necessary. As consistent with retention applications in this district, Kirkland disclosed the parties in interest that represented more than 1% of Kirkland's annual fee receipts.

U.S. Trustee Objection	K&E Response
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%." U.S. Trustee Objection at ¶ 26.	
"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." U.S. Trustee Objection at ¶ 29.	The U.S. Trustee provides no basis for this disclosure at the retention stage. Kirkland already confirmed with the U.S. Trustee that Kirkland will make this disclosure with its fee applications, as consistent with Section C(2)(k) of the U.S. Trustee Guidelines.
"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.'" U.S. Trustee Objection at ¶ 30(c).	There is no need to add this to the Order. Kirkland's Engagement Letter provides for this and Rule 1.5(d)(iv) of the Illinois Rules of Professional Conduct, which governs Kirkland's special purpose retainer and is cited in the Application and the Winters Declaration, also specifically requires this.
"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.'" U.S. Trustee Objection at ¶ 30(d).	The U.S. Trustee provides no basis for requiring this language. The Application, Winters Declaration, and proposed retention order each already state that Kirkland will comply with the U.S. Trustee Guidelines (which requires $1/10^{th}$ of an hour billing), as does the entered Administrative Fee Order. Additionally, this is inconsistent with other cases in this district. *See 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 Bed Bath & Beyond Inc*., No. 23-13359 (VFP) (Bankr. D.N.J June 5, 2023); *In re BlockFi Inc.*, No. 22-19361 (MBK) (Bankr. D.N.J. Feb. 1, 2023). There is no need to put this as a separate line in the order.
"Remove 'pending further order of the Court' from the end of paragraph 7 of the proposed order." U.S. Trustee Objection at ¶ 30(e).	This language does not require reimbursement; it merely gives Kirkland the right to seek *Court approval* for such reimbursements. In a scenario where this becomes an issue, the Court would still have to enter an order subject to the standard notice and objection process. In addition, this language was included in several cases in this district. *In re Cyxtera Techs. Inc*., (JKS) (Bankr. D.N.J. July 18, 2023); *In re Bed Bath & Beyond Inc*., No. 23-13359 (VFP) (Bankr. D.N.J June 5, 2023).

U.S. Trustee Objection	K&E Response
"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.'" U.S. Trustee Objection at ¶ 30(f).	The U.S. Trustee provides no basis in his Objection to insist that Kirkland use such a stringent standard such as "best efforts." Kirkland specifically provided the scope of their services, and the scope of Cole Schotz's services in the Application. Using such a stringent standard would create an administrative burden for both firms, as attorneys of both firms incidentally reviewing the same pleading or attending the same hearing may unwittingly violate the retention order. "Reasonable efforts" is a sufficient standard here given that Kirkland and Cole Schotz are representing the Debtors in distinct roles. Further this provision is inconsistent with Kirkland retention orders in this district. *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 Bed Bath & Beyond Inc*., No. 23-13359 (VFP) (Bankr. D.N.J June 5, 2023).

Conclusion

40. For all of the reasons stated herein, Kirkland does not hold an interest adverse to the estates, nor does Kirkland represent any interest adverse to these chapter 11 estates under section 327(a) of the Bankruptcy Code, and Kirkland is disinterested as the term is defined by section 101(14) of the Bankruptcy Code. Accordingly, the Objections should be overruled, and the Application should be granted.

[*Remainder of page intentionally left blank.*]

WHEREFORE, the Debtors respectfully request that the Court overrule the Objections and approve the Application.

Dated: April 25, 2024

/s/ Michael D. Sirota

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