

UNITED STATES BANKRUPTCY COURT	
Caption in Compliance with D.N.J. LBR 9004-2	Case No. 24-11362
FISHER BROYLES, LLP Patricia B. Fugee (Bar No. 023171990) FisherBroyles, LLP 27100 Oakmead Drive, Box 306 Perrysburg, OH 43551 Tel: (419) 874-6859 Fax: (419) 550.1515 patricia.fugee@fisherbroyles.com <i>Counsel to BrainDo LLC</i>	Chapter 11 Jointly Administered Sale Hearing Date: May 7, 2024 Hearing Time: 10:00 AM Sale Objection Date: April 29, 2024 Cure Objection Date: May 1, 2024
In re:	Judge: Michael B. Kaplan
INVITAE CORPORATION, et al.,	Docket No. 365
Debtors.	

**BRAINDO LLC’S LIMITED OBJECTION TO AND RESERVATION OF
RIGHTS REGARDING DEBTORS’ NOTICE TO CONTRACT PARTIES
TO POTENTIALLY ASSUMED EXECUTORY CONTRACTS AND
UNEXPIRED LEASES**

BrainDo LLC (“BrainDo”), a creditor and contract counter-party in the above-captioned Chapter 11 case, submits this limited objection to and reservation of rights (this “Limited Objection”) to the *Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* [Dkt. No. 365] (“Assumption Notice”), filed by Invitae Corporation, et al. (“Debtors”).

I. Introduction

1. The Debtors seek Bankruptcy Court authority to, among other things, assume and assign several executory contracts between the Debtors and BrainDo.



2. For several reasons more fully set forth below, BrainDo objects to, and reserves its rights regarding, this proposed assumption and assignment. Among other things, the proposal may include transfers of intellectual property licenses that are not assignable absent consent, the Assumption Notice contains insufficient information regarding precisely which contracts are being assigned and insufficient time in which BrainDo can compare that information with its records, the proposed Cure Amount is inaccurate, and finally, no adequate assurance information has been provided for the Purchaser.

II. Facts and Background

3. The Debtors filed the above captioned case on February 13, 2024. The Debtors continue to operate as debtors in possession.

4. On February 14, 2024, Debtors filed the Sale Motion which seeks Court authority to sell substantially all assets of the Debtors.

5. On April 24, 2024, Debtors filed a Notice of Successful Bidder With Respect to the Auction Held on April 17 and 24, 2024 [Dkt. No. 362] (“Notice”). The Notice identifies Labcorp Genetics, Inc. (“Purchaser”) as the purchaser of substantially all of the Debtors’ assets.

6. On April 25, 2024, Debtors filed the Notice of (I) Filing of the Asset Purchase Agreement and Proposed Sale Order With Respect to the Labcorp Sale Transaction, (II) Modified Cure Objection Deadline, and (III) Rescheduled Sale Hearing [Dkt. No. 364] (“APA Notice”). Attached as Exhibit B to the APA Notice is the asset purchase agreement between the Debtors and Purchaser (“APA”).

7. The APA provides, among other things, that there will be information sharing and there may be a reverse transition services agreement. These provisions do not include any detail about whether, or to what extent, the BrainDo contracts and its proprietary rights set forth in

those contracts will be implicated as a result and therefore, BrainDo reserves all rights it has with respect to those contracts and proprietary rights.

8. On April 25, 2024, the Debtors filed the Assumption Notice. Exhibit “A” to the Assumption Notice identifies (a) BrainDo’s Master Services Agreement dated 12/16/20, (b) BrainDo’s 2023 Invitae Digital Marketing Services Agreement dated 7/1/2023, and (c) ten (10) Statements of Work (“SOWs”). Some of those SOWs may be completed or expired, and it is uncertain whether those SOWs pertain to the two listed agreements or are part of other agreements with the Debtors. BrainDo is still comparing this information to its records given the very limited notice period provided by the Assumption Notice.

III. Objections

9. To the extent that the Debtors intend to assume and assign any contracts with SOWs that include intellectual property licenses, such assumption and assignment is not permitted under Section 365(c) and applicable caselaw, absent the consent of BrainDo. In this regard, BrainDo adopts the arguments made by Oracle in its recent filing (docket no. 378, pages 5-6). For the reasons set forth herein, BrainDo does not consent to assumption and assignment of any of its licenses at this time.

10. Further, the Assumption Notice has not provided BrainDo with either sufficient detail or sufficient time to verify which SOWs are part of which contract, and which remain outstanding and might properly be the subject of assumption with the underlying contract. BrainDo is diligently reviewing the information provided against its records, but may not be able to match them without additional information from the Debtors. Indeed, no information is provided as to which SOWs listed pertain to which of the two agreements; this information is essential because it is beyond contention that all parts of any agreement must be assumed or

rejected in its entirety. Debtors cannot assume or reject only part of an agreement but instead, must assume or reject the entirety of a particular agreement and all outstanding SOWs that are part thereof. Again, the caselaw cited by Oracle is referenced as if more fully set forth herein (docket no. 378, page 6).

11. Next, BrainDo disputes the stated cure amount of \$48,116.25, which matches neither its proof of claim (for \$53,466.25) nor the amount due reflected in its books of \$65,000.56. Again, without more detail to be able to match up the SOWs to its books, it is difficult to determine where the Debtors' figure comes from and how those figures pertain to the actual outstanding SOWs. Accordingly, BrainDo also reserves its right to object further to the proposed cure amount once more complete information is provided.

12. Further, BrainDo has been provided with no information regarding adequate assurance of future performance or other information about the Purchaser and therefore, objects to same absent receipt of such information. Absent any information at all, the Debtors have not met their burden under section 365 of the Code.

10. Finally, absent more information regarding the precise use of the BrainDo contracts during the interim periods contemplated under the APA, BrainDo reserves all rights with respect to such periods to the extent that the proposed uses are inconsistent with the terms of the BrianDo contracts.

IV. Conclusion

11. For these reasons, BrainDo respectfully requests that the Court deny the Debtors' request to assume and assign the BrainDo contracts until such time as the necessary information has been provided to BrainDo so that it can ascertain whether to consent or further oppose same. BrainDo reserves its rights to be heard further on this matter.

Respectfully submitted,

/s/ Patricia B. Fugée
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Dated: May 1, 2024

Certificate of Service

I hereby certify that on May 1, 2024, I served a copy of *BrianDo's Limited Objection To And Reservation Of Rights Regarding Debtors' Notice To Contract Parties To Potentially Assumed Executory Contracts And Unexpired Leases* on the parties listed on the below service list via email containing a pdf of the document. In addition, the parties entitled to receive notice by the Court's CM-ECF system were sent an email notification of such filing by the Court's CM-ECF System.

- (i) the Debtors, Invitae Corporation, 1400 16th Street, San Francisco, California 94103, Attn: Tom Brida (tom.brida@invitae.com)
- (ii) proposed co-counsel to the Debtors, Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Nicole L. Greenblatt, P.C. (nicole.greenblatt@kirkland.com); Francis Petrie (francis.petrie@kirkland.com); and Nikki Gavey (nikki.gavey@kirkland.com) and Kirkland & Ellis LLP, 300 North LaSalle, Chicago, Illinois 60654, Attn.: Spencer A. Winters, P.C. (spencer.winters@kirkland.com)
- (iii) co-counsel to the Debtors, Cole Schotz P.C., Court Plaza North, 25 Main Street, Hackensack, New Jersey 07601, Attn.: Michael D. Sirota (msirota@coleschotz.com); Warren A. Usatine (wusatine@coleschotz.com); Felice R. Yudkin (fyudkin@coleschotz.com); and Daniel J. Harris (dharris@coleschotz.com)
- (iv) the Office of the United States Trustee for the District of New Jersey, 1085 Raymond Boulevard, Suite 2100, Newark, NJ 07102, Attn: Jeffrey Sponder (jeffrey.m.sponder@usdoj.gov); and Lauren Bielskie (lauren.bielskie@usdoj.gov)
- (v) counsel to the official committee of unsecured creditors, White & Case LLP, 1221 6th Avenue, New York, NY 10020, Attn: Harrison Denman

- (harrison.denman@whitecase.com); and Brett Bakemeyer (brett.bakemeyer@whitecase.com)
- (vi) counsel to the Successful Bidder, Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067, Attn: Erin N. Brady (erin.brady@hoganlovells.com); Edward McNeilly (edward.mcneilly@hoganlovells.com); and William Intner (william.intner@hoganlovells.com)

/s/ Patricia B. Fugée