

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

TRICIDA, INC.,<sup>1</sup>

Debtor.

Chapter 11

Case No. 23-10024 (JTD)

(Jointly Administered)

**SECURITIES PLAINTIFF'S LIMITED OBJECTION AND RESERVATION OF  
RIGHTS WITH RESPECT TO SALE OF ALL, OR SUBSTANTIALLY ALL, OF  
THE DEBTOR'S ASSETS**

Jeffrey M. Fiore ("Lead Plaintiff"), the court appointed lead plaintiff in the securities class action captioned as *Michael Pardi v. Tricida, Inc. and Gerritt Klaerner, Case No. 4:21-cv-00076-HSG* (the "Securities Litigation") pending in the United States District Court for the Northern District of California, Oakland Division (the "District Court"), for himself and on behalf of the proposed class in the Securities Litigation (the "Proposed Class"), hereby submits this limited objection and reservation of rights (the "Limited Objection") with respect to the pending sale of all, or substantially all, of the assets of the above-captioned debtor (the "Debtor"). In support of this Limited Objection, Lead Plaintiff respectfully states as follows:

**RELEVANT BACKGROUND<sup>2</sup>**

**A. The Securities Litigation**

1. The Securities Litigation is a federal securities class action commenced on January 6, 2021 in the District Court against defendants Tricida, Inc. ("Tricida" or the "Debtor")

<sup>1</sup> The Debtor in this chapter 11 case, together with the last four digits of the Debtor's federal tax identification number, is Tricida, Inc. (2526). The Debtor's service address is 7000 Shoreline Court, Suite 201, South San Francisco, CA 94080.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Bidding Procedures and Sale Motion.



and Mr. Gerritt Klaerner (the “Non-Debtor Defendant” and collectively with Tricida, the “Defendants”).

2. On July 29, 2022, the District Court upheld in part a complaint against Defendants for violations of Sections 10(b) and/or 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78(a); and United States Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder.

3. Following this ruling, and after discovery commenced, Lead Plaintiff obtained documents from the United States Food and Drug Administration and used that evidence to file the *Second Amended Complaint for Violations of the Federal Securities Laws* on December 15, 2022 (the “Amended Complaint”) [Securities Litigation Docket No. 115]. The Amended Complaint re-asserts the theory already upheld and adds additional evidence of wrongdoing against Defendants on behalf of a proposed class comprised of all investors (the “Proposed Class”), other than the Defendants, who purchased or otherwise acquired Tricida common stock between June 28, 2018 through February 25, 2021 (the “Class Period”).

4. The Amended Complaint generally alleges that the Defendants engaged in a deceptive scheme and made false and misleading statements and omissions of material fact about the design and execution of certain clinical trials, which artificially inflated and/or maintained artificial inflation in the price of Tricida’s common stock during the Class Period in violation of Sections 10(b) and/or 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78(a); and United States Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder.

5. On January 12, 2023, Tricida filed a *Notice of Bankruptcy Filing and Imposition of Automatic Stay*, stating that Tricida had filed a voluntary petition for relief under chapter 11 of

the Bankruptcy Code, triggering an automatic stay of continued judicial proceedings against Tricida under 11 U.S.C. § 362(a). Lead Plaintiff has moved to voluntarily dismiss Tricida as a defendant without prejudice.

6. The Securities Litigation remains ongoing with respect to the Non-Debtor Defendant who only recently filed a motion to dismiss the Amended Complaint on February 6, 2023 [Securities Litigation Docket No. 128].

### **B. Relevant Bankruptcy Proceedings**

7. On January 11, 2023, the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Court”). The Debtor is authorized to continue to operate its business and manage its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

8. Also on January 11, 2023, the Debtor filed the *Debtor's Motion for Entry of (I) an Order (A) Approving Certain Bidding Procedures and the Form and Notice Thereof, (B) Scheduling an Auction and a Hearing on the Approval of the Sale of All or Substantially All of the Debtor's Assets, (C) Establishing Certain Assumption and Assignment Procedures and Approving the Manner of Notice Thereof, and (D) Granting Related Relief; and (II) an Order (A) Authorizing and Approving the Debtor's Entry into an Asset Purchase Agreement, (B) Authorizing the Sale of All or Substantially All of the Debtor's Assets Free and Clear of All Encumbrances, (C) Approving the Assumption and Assignment of the Assumed Contracts, and (D) Granting Related Relief* [Docket No. 11] (the “Bidding Procedures and Sale Motion”), seeking, among other relief, the approval of bidding procedures (the “Bidding Procedures”) for the sale (the “Sale”) of all or substantially all of its assets (the “Assets”), including but not limited to the equipment, intellectual property, unexpired leases, contract rights, and other assets

related to or necessary to operate the business currently operated by the Debtor, or any portion thereof, in each case free and clear of all liens, claims, and encumbrances thereon, as further described in the Bidding Procedures and Sale Motion.

9. On January 26, 2023, the Court entered an order approving the Bidding Procedures [Docket No. 100] (the “Bidding Procedures Order”), and, among other relief, scheduling an auction (the “Auction”) on February 15, 2023 and a hearing to approve the Sale on February 21, 2023 (the “Sale Hearing”). On February 16, 2023, the Debtor filed notices indicating that it had selected two winning bidders for its assets [D.I. 203, 204].

10. On February 3, 2023, the Debtor filed the *Notice of Filing of Proposed Sale Order* (the “Proposed Sale Order”) [Docket No. 125]. As discussed in further detail below, any final sale approval orders (“Final Sale Order”) should require the Purchasers to preserve books, records, and other evidence potentially relevant to the Securities Litigation for the duration of the Securities Litigation. At the very least, the Final Sale Order should incorporate an evidence preservation requirement substantially similar to the obligation imposed on parties to the Securities Litigation pursuant to the Private Securities Litigation Reform Act of 1995.

### **OBJECTION**

11. Lead Plaintiff does not object to the Sale as a general matter. Because the Purchasers appear to be purchasing all of the Debtor’s books, records, information, files, and data, the Assets to be acquired by one or both Purchasers presumably will include books, records, documents, and other evidence potentially relevant to the Securities Litigation (the “Potentially Relevant Books and Records”). However, the Proposed Sale Order does not expressly require the Debtors to retain copies of the Potentially Relevant Books and Records, nor

does the Proposed Sale Order expressly require the Purchasers to preserve Potentially Relevant Books and Records, for the duration of the Securities Litigation.

12. In fact, the only mention of document access and preservation is a recapitulation of local rule 6004-1(b)(iv)(J) in paragraph 48(i) of the Bidding Procedures and Sale Motion, which asserts that the Proposed Sale Order will provide “[that pursuant to Local Rule 6004-1(b)(iv)(J),] [t]he Debtor will retain necessary books and records, copies thereof, or include as part of the Purchase Agreement appropriate access to such information, to enable it to administer the Chapter 11 Case following any Sale.” However, this provision does *not* appear in the Proposed Sale Order, nor is there reference to access and preservation of Potentially Relevant Books and Records in any other relevant pleading.<sup>3</sup>

13. The Bankruptcy Code requires the Debtors to maintain and preserve Potentially Relevant Books and Records, unless authorized by order of the Court to abandon or sell them after notice and an opportunity to be heard. *See* 11 U.S.C. §§ 363(b)(1) and 554(a); *see also* Fed. R. Bankr. P. 6004 and 6007(a). In addition, the parties to the Securities Litigation are subject to the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), 15 U.S.C. § 78u-4, which requires such parties to preserve Potentially Relevant Books and Records, providing in pertinent part that:

any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

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<sup>3</sup> While the Debtor could have also made reference to preservation of Potentially Relevant Books and Records in an asset purchase agreement, the Debtor did not attach asset purchase agreements to either the *Notice of Successful Bidder Regarding Debtor’s Equipment Assets* [Docket No. 203] or the *Notice of Successful Bidder Regarding Debtor’s Intellectual Property Assets* [Docket No. 204].

15 U.S.C. § 78u-4(b)(3)(C)(i). This mandatory requirement is subject to “sanction for willful violation.” 15 U.S.C. § 78u-4(b)(3)(C)(ii).

14. Tricida was named as a defendant in the Securities Litigation prior to the filing of the Debtor’s Chapter 11 case. Although Lead Plaintiff has moved to dismiss Tricida as a defendant without prejudice, Lead Plaintiff and the Proposed Class may be able to pursue claims against Tricida in the future – for instance, to the extent such claims are preserved to the extent of available insurance. Lead Plaintiff also intends to timely file proofs of claim against the Debtor, both individually and on behalf of the Proposed Class.

15. Permitting the potential loss, destruction, or unavailability of any Potentially Relevant Books and Records through the sale of the Assets, even if inadvertent, would materially prejudice Lead Plaintiff and the Proposed Class in the prosecution of the Securities Litigation. Moreover, any such loss, destruction, or unavailability, even if unintentional, would contravene the very intent of the PSLRA’s evidence preservation mandate and the common-law duty of parties to preserve evidence. Significantly, by virtue of the automatic stay under section 362 of the Bankruptcy Code and/or the PSLRA discovery stay under 15 U.S.C. § 78u-4(b)(3)(C)(i), Lead Plaintiff is presently precluded from seeking discovery absent further order of the relevant courts.

16. In similar situations, courts recognize that “some action must be taken to [en]sure that documents held by the [debtors] are retained until discovery . . . can commence” in securities actions. *See Payne v. Deluca*, 2005 U.S. Dist. LEXIS 35891, at \*12 (W.D. Pa. Dec. 20, 2005). Although Lead Plaintiff is not aware of any plans to dispose of Potentially Relevant Books and Records, the possibility of Potentially Relevant Books and Records being lost, destroyed, or otherwise rendered unavailable prior to the completion of the Securities Litigation

– intentionally or not – is very real absent an affirmative obligation imposed by the Court in the context of the Sale, particularly where the Debtor is liquidating.

17. The severity of the harm that any such destruction or loss would cause warrants the imposition of an affirmative duty to preserve any Potentially Relevant Books and Records and, at the very least, to provide counsel for Lead Plaintiff and the Proposed Class with sufficient notice and an opportunity to be heard prior to any intended destruction or other disposition thereof. *Cf. In re Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246, 251 (D. Md. 2004) (recognizing that “plaintiffs’ showing of necessity to preserve evidence appear[ed] substantial” where the company was “undertaking a wide ranging corporate reorganization” which “create[s] a reasonable concern that documents may be lost”); *see also In re Massey Energy Co. Sec. Litig.*, 2011 U.S. Dist. LEXIS 111175, at \*23 (S.D. W. Va. Sept. 28, 2011) (permitting plaintiff in securities class action to issue evidence preservation subpoenas); *In re Nat’l Century Fin. Enters.*, 347 F. Supp. 2d 538, 541-52 (S.D. Ohio 2004) (granting securities plaintiffs’ motion for authority to issue preservation subpoena to non-party where relevant documents would likely be destroyed because of that party’s bankruptcy); *Vezzetti v. Remec, Inc.*, 2001 U.S. Dist. LEXIS 10462, at \*9 (S.D. Cal. July 23, 2001) (granting securities plaintiff’s motion to issue preservation subpoenas to non-parties).

18. Accordingly, to prevent the significant harm that would befall Lead Plaintiff and the Proposed Class from the destruction, loss, or unavailability of Potentially Relevant Books and Records, each Final Sale Order should include the following provision (the “Document Preservation Provision”):

Until the entry of a final order of judgment or settlement in the litigation captioned as *Michael Pardi v. Tricida, Inc. and Gerritt Klaerner*, Case No. 4:21-cv-00076-HSG (the “Securities Litigation”) pending in the United States District Court for the

Northern District of California, Oakland Division, the Debtor and the Purchaser and any other transferee of the Debtor's books, records, documents, files, electronic data (in whatever format, including native format), or any tangible object potentially relevant to the Securities Litigation, wherever stored (collectively, the "Potentially Relevant Books and Records") shall preserve and maintain the Potentially Relevant Books and Records, and shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records without providing counsel to the plaintiff in the Securities Litigation at least sixty days' advance written notice and an opportunity to object and be heard by a court of competent jurisdiction. In the event the plaintiff in the Securities Litigation timely objects to any such destruction, abandonment, or transfer, the Potentially Relevant Books and Records shall be preserved pending a final order of the Bankruptcy Court or other court of competent jurisdiction.

### **RESERVATION OF RIGHTS**

19. Lead Plaintiff reserves the right to supplement this Limited Objection on any basis whatsoever prior to the hearing to approve the Sale.

WHEREFORE, Lead Plaintiff respectfully requests that the Court decline to approve the Sale unless the Final Sale Order contains the Document Preservation Provision set forth above.

*[signature page follows]*



Dated: February 17, 2023  
Wilmington, Delaware

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**CERTIFICATE OF SERVICE**

I, Christopher P. Simon, hereby certify that, on this 17th day of February, 2023, I caused copies of the foregoing *Securities Plaintiff's Limited Objection and Reservation of Rights with Respect to Sale of All, or Substantially All, of the Debtor's Assets* to be served upon all interested parties via CM/ECF and the parties listed below by electronic mail.

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