Docket #215 Date Filed: 2/21/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
TRICIDA, INC.,[1]	Case No. 23-10024 (JTD)
Debtor.	**Re: Docket Nos. 11, 100, & 211**

DEBTOR'S REPLY TO THE OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING AND APPROVING THE DEBTOR'S ENTRY INTO ASSET PURCHASE AGREEMENTS, (II) AUTHORIZING THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS FREE AND CLEAR OF ALL ENCUMBRANCES, (III) APPROVING THE ASSUMPTION AND ASSIGNMENT OF THE ASSUMED CONTRACTS, AND (IV) GRANTING RELATED RELIEF

Tricida, Inc., as debtor and debtor in possession in the above-captioned chapter 11 case (the "Debtor"), respectfully submits this reply (this "Reply") (a) in further support of the Debtor's motion pursuant to sections 105, 363, 365, 503 and 507 of the Bankruptcy Code, Bankruptcy Rules 2002, 6004, 6006, and 9006, and Local Rules 2002-1, 6004-1 and 9006-1, and for entry of an order (i) authorizing and approving the Debtor's entry into the Purchase Agreements with the Successful Bidders; (ii) authorizing the Sale of the Assets to the Successful Bidders at the Auction, free and clear of all Encumbrances, except for certain assumed liabilities; (iii) authorizing and approving the assumption and assignment of the Assumed Contracts in connection with the Sale, including proposed cure amounts (if any); and (iv) granting related relief [Docket No. 11] (the "Sale

[1] 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.

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Motion"),[2] and (b) in response to the objection [Docket No. 211] (the "Objection") [3] of the Official Committee of Unsecured Creditors (the "Committee") to the Sale Motion.[4]

In support of this Reply, the Debtor relies on the record in this chapter 11 case, the Rohan Declaration, and the *Supplemental Declaration of Alexander V. Rohan in Support of the Debtor's Motion for the Sale of Substantially All of the Debtor's Assets* filed contemporaneously herewith (the "Supplemental Rohan Declaration," and, together with the Rohan Declaration, the "Rohan Declarations"), and is prepared to present further evidence at the upcoming hearing on February 21, 2023 (the "Sale Hearing"). In further support of this Reply, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. The development and commercialization of any new pharmaceutical product requires significant upfront investments of time and capital without any certainty of a favorable, profitable outcome. In the present case, despite initial high hopes and positive indications for the development and eventual commercialization of veverimer, that process suffered a substantial setback when the Phase 3(b) VALOR-CKD trial failed to meet its primary endpoint. As a result, the value of the Debtor's intellectual property assets, including veverimer, became highly uncertain. In response to this setback and uncertainty, the Debtor, in consultation with its advisors,

[2] Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Sale Motion.

[3] This Reply addresses only paragraphs 1–2 and 5–22 of the Objection, which relate to the proposed Sale of the Assets. The Debtor reserves the right to file a separate reply at a later date to address the portion of the Objection that relates to the *Disclosure Statement for Chapter 11 Plan of Liquidation for Tricida, Inc.* [Docket No. 72].

[4] Certain joint noteholders of 3.50% convertible notes due 2027 (the "Joint Noteholders") filed a limited joinder to the Objection (the "Joinder") [Docket No. 212]. This Reply does not address the Joinder because the Joint Noteholders have advised the Debtor that, prior to the Sale Hearing, they will either (a) consensually resolve their objection with Successful Bidder Renibus Therapeutics, Inc. ("Renibus"), in which case the Joint Noteholders will withdraw the Joinder, or (b) provide an alternative reorganization proposal to the Debtor that would provide more value to the estate than Renibus' Successful Bid, in which case the Debtor will likely continue the Sale Hearing or not seek approval of such Successful Bid.

took swift, decisive action to initiate a robust marketing process led by qualified professionals to ascertain and maximize the value of these highly complex intellectual property assets for the benefit of all constituents.

2. The Debtor's decision to sell certain Assets to the highest or otherwise best bidders, following a thorough marketing process and a competitive Auction unquestionably, constitutes a valid exercise of the Debtor's business judgment. The proposed sale price for the Assets at issue—though less than the parties in interest would have preferred—is fair and reasonable and reflects the market's well-considered evaluation of the value of the Assets. The Committee understandably hoped that these Assets would achieve a higher value at this juncture despite the development setbacks. The Committee also desires—and hypothesizes, without evidence—that the Assets will increase in value over the coming years. They are not alone in that desire. However, a mere hope for a forthcoming reversal in fortune in the face of a clear message from the market falls short of meeting the legal standard required for the Committee's judgment to supplant the Debtor's proper exercise of its business judgment.

3. As set forth more fully herein and in the Rohan Declarations, the facts before the Court provide sufficient support for the approval of the arm's-length Sale of the Assets to the Successful Bidders (or, if necessary, the Next-Highest Bidders) under section 363 of the Bankruptcy Code. The Objection's conclusory statements are unsupported by facts or applicable law, and the Committee's alternative proposed strategy would burden the estate with substantial Asset preservation costs without any certainty of a better sale result at any point in the future. The Debtor ran a robust process that achieved a disappointing, but nonetheless fair, indication of the value of the Assets. Accordingly, the Debtor urges the Court to overrule the Objection and approve the Sale of the Debtor's Assets.

BACKGROUND

A. General Case Background

4. Founded in 2013, the Debtor is a clinical-stage pharmaceutical company focused on the development and commercialization of veverimer, a drug meant to slow the progression of CKD through the treatment of chronic metabolic acidosis. Veverimer is a new chemical entity discovered by the Debtor using its own proprietary technology. In addition to veverimer, the Debtor's intellectual property portfolio includes 233 patents in 52 different countries, including compositions-of-matter, dosage unit forms, methods-of-treatment, medical use, and methods of manufacture. The Debtor spends significant funds maintaining and protecting this patent portfolio across these various jurisdictions.

5. On January 11, 2023 (the "Petition Date"), the Debtor filed a voluntary petition for relief under sections 101–1532 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"), along with various motions seeking first day relief and the Sale Motion.

6. On the Petition Date, the Debtor also entered into a Restructuring Support Agreement with the Joint Noteholders, which contemplated the continuation of the prepetition marketing process in connection with the Debtor's chapter 11 filing.

7. The Debtor continues to operate its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner.

8. On January 23, 2023, the Office of the United States Trustee appointed the Committee. In the days following the Committee's appointment, the Debtor's professionals engaged constructively with the Committee's professionals to get them up to speed on the sale process, as the Committee's counsel acknowledged at the hearing to approve the Bidding

Procedures. *See Transcript Regarding Hearing Held January 26, 2023 re: Bid Procedures and Bar Date Motions* [Docket No. 144] at 9:1-6; 11-12 ("[T]he Committee, after shortly getting appointed and up and running reached out to debtor's counsel and to the noteholders' counsel. We had extensive conversations with them. After listening to what they said, the Committee decided to move forward with the [sale] process as it currently is. . . . We look forward to actively participating in the sale[.]").

9. Additional information regarding the Debtor's business, capital structure and the circumstances preceding this chapter 11 case may be found in the *Declaration of Lawrence Perkins in Support of the Debtor's Chapter 11 Petition and First Day Pleadings* [Docket No. 2] (the "First Day Declaration").

B. Prepetition Marketing Process

10. As described in the First Day Declaration and the Rohan Declarations, beginning in late October 2022, following an unsuccessful Phase 3(b) drug trial, the Debtor determined that it was necessary to explore strategic alternatives aimed at maximizing optionality while containing costs wherever possible to best preserve available liquidity and maximize the value of the Debtor's Assets for all its stakeholders. On November 3, 2022, the Debtor retained Stifel-MB to assist in these efforts, and commencing in early November 2022, the Debtor with the assistance of its professional advisors pursued multiple work streams to evaluate a range of strategic alternatives with the goal of maximizing the value of the Debtor and its Assets. After conducting initial due diligence, the Debtor, in consultation with Stifel-MB, launched a marketing process for the Assets on November 14, 2022. In order to further ensure a robust process, the Debtor made public through

an 8-K filing (the "November 8-K") certain information regarding veverimer including potential future applications.[5]

11. Stifel-MB contacted or received inbound interest from approximately fifty-three (53) strategic and financial parties regarding a potential transaction, primarily comprised of large-cap and mid-cap public and private companies with strategic interests in nephrology or renal and metabolic therapeutic categories. With respect to this outreach process, Stifel-MB prioritized parties with both adequate commercial infrastructure and drug development capabilities along with sufficient capital resources—or a reasonable likelihood of being able to obtain such capital—to consummate a transaction that would maximize the value of the Debtor or its Assets. These parties were provided non-confidential presentation materials prepared by the Debtor that were disclosed in the November 8-K. For parties who executed a non-disclosure agreement, the Debtor provided certain confidential information, including access to a virtual data room. In addition, throughout this prepetition process, Stifel-MB and the Debtor's other advisors held a number of update calls and meetings with the advisors to the Joint Noteholders regarding, among other things, the marketing process, strategic alternatives and potential next steps.

C. Postpetition Marketing and Sale Process

12. Shortly after the Debtor commenced the chapter 11 case, Stifel-MB launched the postpetition marketing and sale process. This process was designed to build upon the prepetition efforts by marketing the Debtor's assets to an even broader group of potential buyers, which included the parties contacted prepetition, additional parties identified by the Debtor and its

[5] Tricida's presentation, dated November 2022, can be accessed via the U.S. Securities and Exchange Commission's website: https://www.sec.gov/ix?doc=/Archives/edgar/data/0001595585/000159558522000089/tcda-20221115.htm, Exhibit 99.1.

advisors, and all parties suggested by the advisors to the Joint Noteholders and the Committee.[6] The expanded process included strategic and financial parties as well as distress-oriented investors who may be interested in the Debtor's intellectual property and fixed assets. In total, the Debtor and its advisors communicated with eighty-seven (87) parties about the Assets. Those parties received information regarding the proposed Bidding Procedures (defined below) and access to non-confidential information, including a corporate presentation. In total, eight (8) parties executed a non-disclosure agreement and received additional materials, access to a virtual data room, and, in some cases, meetings with management. Throughout the postpetition process, the advisors to the Joint Noteholders and the Committee received regular updates from the Debtor's advisors.

13. On January 26, 2023, the Court entered an order [Docket No. 100] (the "Bidding Procedures Order") (a) approving certain procedures (the "Bidding Procedures") for interested parties to submit competing bids for the Assets by February 10, 2023 and, if applicable, participate in an auction on February 15, 2023 (the "Auction"), (b) approving the form and manner of the notice of the Auction and the Sale Hearing (the "Sale Notice"), and (c) establishing procedures for the assumption and assignment of the Assumed Contracts, among other things. The Bidding Procedures Order gave the Debtor broad discretion to modify the timeline and other procedures set forth in the Bidding Procedures, in consultation with the Consultation Parties,[7] in order to maximize value.[8] Following entry of the Bidding Procedures Order, the Debtor served the Sale

[6] The advisors to the Joint Noteholders suggested six (6) potential parties, all of which were contacted. None of those parties requested a non-disclosure agreement. The advisors to the Committee originally suggested five (5) potential parties, however one of those parties was already contacted during the postpetition process; the remaining four (4) parties were contacted and none of those parties requested a non-disclosure agreement.

[7] Section III of the Bidding Procedures, entitled "Determination by the Debtor" provides that the Debtor will consult with the Consultation Parties "as appropriate throughout the Bidding Process."

[8] Specifically, section XIV of the Bidding Procedures provides, "Notwithstanding any of the foregoing, the Debtor, in consultation with the Consultation Parties, reserves the right to modify these Bidding Procedures at or prior to the

Notice on the Sale Notice Parties and published the Sale Notice in both the *San Jose Mercury News* and the national edition of the *New York Times*.[9]

14. On February 9, 2023 and February 10, 2023, the Debtor received bids for various subsets of the Assets from four (4) Potential Bidders—Liquidity Services, Inc. ("Liquidity Services"), Heritage Global Partners, Inc. ("HGP"), Renibus, and Patheon Austria GmbH & Co KG ("Patheon"). In accordance with the Bidding Procedures, the Debtor provided the bids received to the Consultation Parties and conferred with such parties on the bids on the Bid Deadline. Over the following days, the Debtor worked with the Potential Bidders to improve their bids and revise their proposed Purchase Agreements, with input from and updates to the Consultation Parties.

15. On February 14, 2023, the Debtor conferred with the Consultation Parties on the status of the bids received and the upcoming commencement of an Auction for the Assets. The Debtor then informed the Potential Bidders that it intended to move forward with an in-person Auction at the offices of Sidley Austin in New York in an effort to maximize the value of the Assets. The Debtor sent the current bid from each of the Potential Bidders to the Consultation Parties in advance of the Auction.

Auction, including, without limitation, to extend the deadlines set forth herein, modify bidding increments, waive terms and conditions set forth herein with respect to any or all Potential Bidders (including, without limitation, the Bid Requirements), impose additional terms and conditions with respect to any or all potential bidders, adjourn or cancel the Auction at or prior to the Auction, and/or adjourn the Sale Hearing; provided that the Debtor may not amend these Bidding Procedures or the Bidding Process to reduce or otherwise modify its obligations to consult with any Consultation Party without the consent of such Consultation Party or further order of the Court."

[9] *See Certificate of Service of Stanley Y. Martinez re: Notice of Auction and Sale Hearing (Filed by Kurtzman Carson Consultants LLC)* [Docket No. 141] and *Affidavit of Publication of the Notice of Auction and Sale Hearing in The New York Times and San Jose Mercury News* [Docket No. 181].

D. The Auction

16. On February 15, 2023, following extensive in-person, phone, and email consultation with the Consultation Parties throughout the morning, the Auction commenced. The Debtor presented the Assets in two lots at the Auction—the first ("Lot 1") consisted of the Debtor's equipment, for which Liquidity Services and HGP presented competing bids, and the second ("Lot 2") comprised all of the Debtor's other Assets, primarily composed of its intellectual property Assets, for which Renibus and Patheon presented competing bids.[10]

17. First, with respect to Lot 1, the Debtor announced the $145,000 bid submitted by Liquidity Services as the Starting Bid, and set the Incremental Overbid amount at $10,000. Following multiple rounds of bidding between Liquidity Services and HGP, the Debtor selected Liquidity Services' $235,000[11] bid as the highest or otherwise best offer and HGP's $225,000 bid as the next highest or otherwise best offer for Lot 1.

18. The Debtor then adjourned the Auction with respect to Lot 2 to give Renibus and Patheon an opportunity to improve their existing bids and to discuss those bids with the Consultation Parties. Over approximately the next six hours, the Debtor, the Consultation Parties, Renibus, and Patheon engaged in extensive conferences and negotiations to understand the bids and resolve concerns regarding certain non-monetary terms of the Renibus and Patheon bids. The Debtor then continued the adjournment until the following morning to allow for additional conferences with the Consultation Parties to understand the relative value of the two bids.[12]

[10] It is the Debtor's understanding that the Committee intends to object only to the Sale of the Assets in Lot 2. Regardless, unless otherwise specified, all of the facts and arguments herein apply with equal force to the Assets in Lot 1 and Lot 2.

[11] *See* Rohan Decl.., Ex. 1 ("2/15/23 Auction Transcript") at 17:16–18:11 (Feb. 15, 2023).

[12] 2/15/23 Auction Tr. at 19:15–18 ("Given the late hour and the somewhat material differences in non-monetary terms between the two bidders, we're going to need to spend some time with the creditors assessing the relative value of the two bids.").

19. On February 16, 2023, the Auction re-opened at approximately 10:00 a.m. (prevailing Eastern Time). With respect to Lot 2, the Debtor announced the $250,000 bid submitted by Renibus as the Starting Bid. Additionally, the Debtor explained the Patheon bid contained various provisions not present in the Renibus bid that the Debtor evaluated as reducing the value of that bid to the estate.[13] As a result, the minimum overbid required for Patheon was set at $980,000, which equaled the Starting Bid, plus adjustments for the value deductions attributed to the Patheon bid, plus the minimum overbid increment of $100,000 set forth in the Bidding Procedures.[14]

20. The Debtor provided Patheon with an opportunity to submit a further bid, including a bid that removed Patheon's proposed acquisition of the Patheon Causes of Action, but Patheon declined.[15] As a result, the Debtor announced Renibus as the Successful Bidder and Patheon as the Next-Highest Bidder. The Consultation Parties each lodged verbal objections to the selection of the Successful Bid and the Next-Highest Bid on the record at the Auction.[16] The Auction was adjourned until Monday, February 20, 2023, to give the Consultation Parties additional time to negotiate a resolution with Renibus, or provide an alternative proposal. As part of these discussions, the Debtor communicated to the Committee and Joint Noteholders that preserving the intellectual property Assets in a "wait and see" approach would entail estimated annual

[13] The Patheon bid did not agree to acquire certain inventory, which the Debtor would be required to dispose of at a cost of $130,000. The Patheon bid also sought to acquire certain affirmative causes of action against Patheon (the "Patheon Causes of Action") which the Debtor valued at $500,000. The Consultation Parties, after consultation with the Debtor, disagreed with the Debtor's valuation of the Patheon Causes of Action. *See* Rohan Decl., Ex. 2 ("2/16/23 Auction Transcript") at 9:20–10:18 (Feb. 16, 2023).

[14] *See* 2/16/23 Auction Tr. at 9:20–10:24. The Debtor informed the Consultation Parties of the proposed adjustments to the Patheon bid and the reasons for those adjustments prior to the reopening of the Auction.

[15] 12/16/23 Auction Tr. at 12:18–23.

[16] 12/16/23 Auction Tr. at 5:15–6:18; 13:14–14:7.

maintenance costs of approximately $480,000 to $875,000, and that the estimated administrative costs to the estate would be substantially lower if the Lot 2 Assets were sold.

21. On February 16, 2023, the Debtor filed the *Notice of Successful Bidder Regarding Debtor's Equipment Assets* [Docket No. 203] and *Notice of Successful Bidder Regarding Debtor's Intellectual Property Assets* [Docket No. 204] announcing Liquidity Service and Renibus as the Successful Bidders and HGP and Patheon as the Next-Highest Bidders for Lot 1 and Lot 2, respectively, and providing notice "that Auction remains open and has been continued as set forth in the record at the Auction."

E. Settlement Negotiations

22. In light of the verbal objections that the Committee and the Joint Noteholders raised on the record at the Auction, on February 16, 2023 Renibus made an offer to provide certain contingent future milestone payments as additional consideration (the "Renibus Settlement Offer") in the hopes of consensually resolving those disputes. The Debtor offered the Committee and the Joint Noteholders certain extensions to their objection deadline for the Sale Motion to allow the parties to negotiate a consensual resolution with Renibus in the interim.

23. Between February 16, 2023 and February 20, 2023, the Debtor, the Consultation Parties, and Renibus worked around the clock to reach a negotiated settlement of the creditors' concerns, including through further improvement in the terms of the acquisition reflected by the Renibus Settlement Offer. The Renibus management team made itself available to the Consultation Parties to answer questions regarding its intellectual property development intentions, and the parties worked on acceptable documentation of the settlement offer, with the Consultation Parties providing comments on each exchanged draft of the Renibus Settlement Offer and Renibus' Purchase Agreement. Notwithstanding the extensions and ongoing negotiations, the

Committee filed the Objection and the Joint Noteholders filed the Joinder on February 17, 2023 and February 20, 2023, respectively.

24. On February 20, 2023 at approximately 10:00 a.m. (prevailing Eastern Time) the Auction re-commenced. The Debtor announced on the record that, following consultation with the Consultation Parties, in addition to its bid, Renibus had proposed substantial additional consideration in the form of the Renibus Settlement Offer in an effort to consensually resolve the outstanding creditor objections. The Debtor adjourned the Auction for several hours to facilitate the ongoing negotiations, and closed the Auction shortly after 6:00 p.m. (prevailing Eastern Time).

ARGUMENT

25. Section 363(b) of the Bankruptcy Code Section 363(b) of the Bankruptcy Code provides that a Debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b). "The standard under § 363(b) is well-settled—a debtor may sell assets outside the ordinary course of business when it has demonstrated that the sale of such assets represents the sound exercise of business judgment." *In re Antunes*, 2019 WL 913704, at *8 (Bankr. E.D. Pa. Feb. 19, 2019). In applying this standard, courts in the Third Circuit will approve the sale if the debtor demonstrates that "(1) there is a sound business purpose for the sale; (2) the proposed sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the buyer has acted in good faith." *In re Decora Indus., Inc.*, 2002 WL 32332749, at *2 (D. Del. May 20, 2002) (citing *Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)); *see also In re Exaeris, Inc.*, 380 B.R. 741, 744 (Bankr. D. Del. 2008) (applying heightened scrutiny due to debtor's insider relationship with buyer and finding standard not satisfied in light of "dearth of evidence of marketing, the absence of any evidence of the value of assets, no evidence whatsoever about the negotiations").

26. Although a debtor has the burden of proof in the first instance, courts in the Third Circuit and elsewhere recognize that "an objectant is required to produce some evidence supporting its objections." *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 155 (D. Del. 1999) (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)); *see also In re Howard*, 2011 WL 578777, at *5 (W.D. Pa. Feb. 9, 2011) ("[A] party objecting to an order of authorization under § 363(b) has the burden of advancing sufficient grounds to support its position.").

A. The Proposed Sale Satisfies All Requirements of Section 363 of the Bankruptcy Code.

27. The Debtor has demonstrated by a preponderance of the evidence that the proposed Sale of the Assets satisfies the applicable standard for approval under section 363 of the Bankruptcy Code. The Auction was conducted in a manner consistent with the Bidding Procedures approved by this Court after a four-month marketing process conducted by top professionals. The Successful Bids are the highest or otherwise best bids for the Debtor's Assets, and the Committee's attacks on the adequacy of those bids lack any meaningful factual or legal support.

1. The Debtor Reasonably Determined in its Business Judgment That the Proposed Sale Optimizes Value and Certainty for All Constituents.

28. The Court should defer to the Debtor's business rationale for selling the Assets, because the credible evidence before the Court establishes that the Debtor reasonably determined that the Sale of the Assets to the Successful Bidders or the Next-Highest Bidders remains the best course of action to maximize recovery for all stakeholders. *See Culp v. Stanziale (In re Culp)*, 545 B.R. 827, 844 (D. Del. 2016) ("Where the trustee articulates a reasonable basis for the business decision, courts will generally not entertain objections. If a valid business justification exists, then a strong presumption follows that the agreement was negotiated in good faith and is in the best interests of the estate.") (internal citations omitted). Here, having taken into account the interests of all constituents and the concerns raised in its frequent, dynamic consultations with the

Consultation Parties, the Debtor determined in a sound exercise of its business judgment to opt for certainty and finality, rather than to pursue the speculative, burdensome alternative strategy that the Committee propounds.

29. In contrast, the Committee's hope for a better result at some unknown point in the future cannot be the yardstick by which the Court measures the reasonableness of the Debtor's decision. *See In re Pursuit Cap. Mgmt., LLC*, 874 F.3d 124, 137 (3d Cir. 2017) (agreeing with the bankruptcy court's reasoning that "the integrity of the auction process, by far, trumps any potential higher bid" that objecting parties claim might have been achieved in concluding that that the successful bidder purchased the claims for fair value). The Committee repeatedly asserts, with no apparent justification or evidence, that a "wait and see" approach would be value accretive. The Debtor challenged the Committee during various consultations to provide supporting evidence, but no such evidence has materialized. Indeed, contrary to its assertion of expected value accretion, the Committee acknowledges that it has no reason to believe the Assets are increasing in value.[17] Additionally, the Committee insinuates that delaying the Sale would save professional fees, but fails to acknowledge or take into account the professional fees that necessarily would accompany the renewed marketing and sale process at a later date or the costs of maintaining the intellectual property in the interim. Despite the Committee's efforts to downplay the maintenance costs, the Debtor estimates that the costs of preserving the Assets would be $480,000 to $875,000 per year—costs that by and large would be avoided by the Debtor's proposed Sale of the Assets to the Successful Bidders. The Debtor maintains that the Committee has provided no legally

[17] Obj. ¶ 13.

cognizable basis for the Court to supplant the Debtor's rational business decision and urges the Court to approve the Sale.[18]

2. The Robust Marketing Process and Competitive Auction Produced a Fair and Reasonable Price for the Assets.

30. The Debtor has proven the fairness and reasonableness of the proposed sale price for the Assets, because, absent evidence of fraud or collusion, a market test—such as the far-reaching marketing process and public Auction in this case—generally establishes fair value in the Third Circuit. *See Pursuit*, 874 F.3d at 137 (noting that "a competitive auction strongly indicates that a purchaser has paid appropriate value for estate assets" in finding auction satisfied value element of good faith inquiry in context of section 363(m) analysis); *In re SubMicron Sys. Corp.*, 432 F.3d 448, 461 (3d Cir. 2006) (noting that [section 363] "is premised on the notion that the market's reaction to a sale best reflects the economic realities of assets' worth" and that "courts are not required first to determine the assets' worth before approving such a market sale" in context of evaluating propriety of section 363(k) credit bid); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149 (3d Cir. 1986) (acknowledging general rule that auctions establish asset value, but remanding sale order to bankruptcy court due to evidence of collusion because "no 'auction' took place [if it was tainted by collusion]; thus the 'bidding' could not, by definition, serve as the final arbiter of the 'value' of [the debtor's] assets").[19] Here, as described in the Rohan

[18] Even if the Committee follows through on its stated intention to provide evidence at the Sale Hearing that future value *could potentially* exceed the Debtor's proposed sale price, Obj. ¶ 14, the Debtor's decision to sell the assets would still satisfy the business judgment standard. *Compare Decora*, 2002 WL 32332749, at *3 (finding sound business purpose over objection because rejecting the current offer in favor of "two illusory, potential buyers would not be prudent") *with In re Sovereign Ests., Ltd.*, 104 B.R. 702, 704 (Bankr. E.D. Pa. 1989) (finding no sound business purpose for sale where debtor proposed to conduct the auction prior to receiving certain imminent subdivision approvals "despite evidence that the sales price of the property *would be* greatly enhanced, perhaps even doubled, if final subdivision approval was obtained before any attempted sale") (emphasis supplied).

[19] *See also In re 388 Route 22 Readington Holdings, LLC*, No. 20-2629, 2021 WL 4811409, at *2 (3d Cir. Oct. 15, 2021) (noting that "a competitive auction is highly probative and, if competitive, can be sufficient to determine an asset's fair value" in finding that district court property concluded non-conclusive auction was strong evidence that purchaser paid fair value); *In re Champion Enterprises, Inc.*, 2012 WL 3778872, at *35 (Bankr. D. Del. Aug. 30,

Declarations, the Assets have been adequately exposed to the market, and neither the Committee nor any other party in interest has suggested, let alone presented evidence of, fraud or collusion.[20]

31. The Committee fails to point to any specific facts or caselaw in support of its conclusory position that "saying 'the market has spoken' is not sufficient." *See Pursuit*, 874 F.3d at 136 (rejecting objecting parties' attacks as "conclusory and unpersuasive" where those parties "struggle[d] to point to specific facts that support their contentions," including their argument that "the Trustee's conduct relating to the modification of the auction procedures, and how those procedures were applied to the [objecting parties], constituted bad faith."). Contrary to the Committee's position, the Debtor submits that a market test is a *particularly* appropriate valuation source here, given the complex nature of the assets and the fact that the Debtor is a public company and used its publicly-traded status to disseminate detailed disclosures about the assets to the marketplace at large in the November 8-K. *See, e.g.*, *In re Summit Glob. Logistics, Inc.*, No. 08-11566, 2008 WL 819934, at *10 (Bankr. D.N.J. Mar. 26, 2008) ("In this case, particularly because the Debtors are a public company, a market-based valuation is proper.").

2012) ("A market test is the best evidence of a company's value at a given point in time. Here, Champion sold its assets under Court supervision, providing a true market test of the fair market value of Champion."); *In re Smurfit-Stone Container Corp.*, 2010 WL 2403793, at *10 n.6 (Bankr. D. Del. June 11, 2010) ("The Court freely acknowledges that the 'market test,' consisting of a court-approved solicitation and auction process, represents the format utilized in the overwhelming majority of asset sales seen by this Court."); *In re Allonhill, LLC*, No. 14-10663 (KG), 2019 WL 1868610, at *40 (Bankr. D. Del. Apr. 25, 2019), *aff'd in part, remanded in part*, No. 13-11482 (KG), 2020 WL 1542376 (D. Del. Mar. 31, 2020) (finding that "a market test – reflecting the actual price a willing buyer agrees to pay – is the best determination of fair market value" and an alternative "after the fact valuation cannot be substituted for the parties' actual agreement on value" once "the market has spoken" in context of post-sale claims arising from purchase agreement).

[20] The Committee's contention that the Debtor violated the Bidding Procedures Order is untrue—the Debtor engaged in ongoing, detailed consultation with the Consultation Parties and the Bidding Procedures Order expressly permits the Debtor to modify bid requirements, extend bidding deadlines, and modify Auction procedures. *See Pursuit*, 874 F.3d at 137 (rejecting argument that trustee's modification of bidding procedures constituted bad faith where the trustee "had the authority to [change the procedures] and did so precisely so that he could comply with his fiduciary duties"). But, even if such an allegation were true, the relief the Committee seeks in the Objection arguably would not be the appropriate remedy because the purported "violations" in no way call into question the integrity or fairness of the Auction.

32. In sum, the Successful Bid and Next-Highest Bid reflect the results of extensive marketing, followed by good faith, arm's-length negotiations between sophisticated parties represented by counsel, all of which constitutes compelling, uncontroverted evidence that the resulting price for the Assets is fair and reasonable. Accordingly, the Debtor respectfully asserts that it has met its burden with respect to value, and the Sale of the Assets should be approved.

3. The Debtor Provided Accurate, Reasonable Notice of the Sale to All Potentially Interested Bidders and Parties in Interest.

33. The Debtor satisfied the notice requirement by providing timely notice of the Sale, Auction, and Sale Hearing to the Debtor's creditors and all other parties in interest that are entitled to notice, as well as those parties that expressed a bona fide interest in acquiring the Assets. The Debtor's service of the Sale Notice on the Sale Notice Parties went above and beyond the minimum requirements under Bankruptcy Rules 2002(a) and (c), which require the Debtor to notify *creditors* of the Sale, the terms and conditions of the Sale, the time and place of the Auction, and the deadline for filing any objections.[21] Additionally, in order to maximize the exposure of the Assets to the market, the Debtor published of the Sale Notice in both a periodical with a national circulation and a publication with a Silicon-Valley based circulation. Importantly, no party in interest has challenged the adequacy of the notices provided by the Debtor.

4. The Successful Bidders and the Next-Highest Bidders Acted in Good Faith.

34. The Debtor has satisfied the good faith requirement because the extensive evidence before the Court regarding the marketing process, bid negotiations, and Auction provides no reason

[21] It is worth noting that, in addition to satisfying the notice requirements under the Bankruptcy Code and Bankruptcy Rules, the Debtor worked constructively with the Consultation Parties (even before entry of the Bidding Procedures Order) and kept them apprised of all relevant updates regarding the marketing outreach, bid evaluation processes, and Auction via a combination of regular email, phone and in-person communications. The Debtor's professionals also reached out to any additional parties suggested by the Committee and the Joint Noteholders and invited such parties to participate in the process.

to suspect that the Successful Bidders or Next-Highest Bidders acted in a way that would undermine the integrity of the process. *See Abbotts Dairies*, 788 F.2d at 147 ("The requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.") (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)). Despite the Debtor freely sharing information regarding all bidders with the Committee and the Committee's attendance at the Auction—where Renibus and Patheon confirmed on the record that they had not engaged in collusion—the Committee inexplicably takes the position that it "lacks sufficient information at this time" regarding the good faith requirement, rather than conceding this point outright.[22] In any event, given the absence of any evidence of fraud or collusion in the evidentiary record before the Court, the Debtor posits that it has satisfied the good faith purchaser requirement.[23]

CONCLUSION

WHEREFORE, for the foregoing reasons and those set forth in the Sale Motion, the Debtor respectfully requests that the Court grant the relief sought in the Sale Motion and overrule any remaining objections thereto.

[Signature page follows]

[22] 2/16/23 Auction Tr. at 4:16–5:8.

[23] To the extent the Committee's vague allegation that insiders somehow benefit from this transaction to the detriment of other parties in interests was intended to speak to the good faith requirement, the Court should disregard it. Obj. ¶ 13. The statement has no basis in fact whatsoever—neither the Successful Bidders nor the Next-Highest Bidders are insiders, and the Purchase Agreements do not release or transfer any of the Debtor's potential claims against insiders. Additionally, the Debtor notes that, although the Next-Highest Bidder for the Lot 2 Assets is a member of the Committee, Committee counsel has assured the Debtor that appropriate steps were taken to protect the integrity of the process. The Debtor has no evidence to the contrary.

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Wilmington, Delaware

/s/ *Sean M. Beach*

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Sean M. Beach (No. 4070)
Allison S. Mielke (No. 5934)
Andrew A. Mark (No. 6861)
Carol Cox (No. 6936)

Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
Email: sbeach@ycst.com
amielke@ycst.com
amark@ycst.com
ccox@ycst.com

SIDLEY AUSTIN LLP
Samuel A. Newman (admitted *pro hac vice*)
Julia Philips Roth (admitted *pro hac vice*)
555 West Fifth Street
Los Angeles, California 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600
Email: sam.newman@sidley.com
julia.roth@sidley.com

Charles M. Persons (admitted *pro hac vice*)
Jeri Leigh Miller (admitted *pro hac vice*)
Chelsea McManus (admitted *pro hac vice*)
2021 McKinney Avenue, Suite 2000
Dallas, Texas 75201
Telephone: (214) 981-3300
Facsimile: (214) 981-3400
Email: cpersons@sidley.com
jeri.miller@sidley.com
cmcmanus@sidley.com

Michael A. Sabino (admitted *pro hac vice*)
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: msabino@sidley.com

Attorneys for Debtor, Tricida, Inc.