

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

In re:) Chapter 11
)
Tricida, Inc.,) Case No. 23-10024 (JTD)
Debtor.)
) **Related Docket Nos. 593 and 598**

**LIQUIDATING TRUSTEE’S RESPONSE TO OPPOSITION OF DAVID
BONITA AND KLAUS VEITENGER TO THE LIQUIDATING
TRUSTEE’S OBJECTION TO CLAIMS 188 AND 189**

Jackson Square Advisors, solely in its capacity as liquidating trustee of the Tricida Liquidating Trust (the “Liquidating Trust”) established in the above-captioned chapter 11 case (the “Chapter 11 Case”) pursuant to the Debtor’s confirmed *Fifth Amended Chapter 11 Plan of Liquidation for Tricida, Inc.* [Docket No. 509] (the “Plan”), by and through its undersigned counsel, responds to the *Opposition of David Bonita and Klaus Veitenger* (“Claimants”) to the *Liquidating Trustee’s Objection to Claims 188 and 189* [Docket No. 598] (the “Opposition”) and states as follows:

RESPONSE

1. Each Claimant asserts a claim for indemnification arising from a prepetition Indemnification Agreement between the Claimant and Tricida, Inc. The Liquidating Trustee objected to the allowance of Claimants’ indemnification claims as late filed in the *First Omnibus Objection to (I) Insufficient Documentation Claims, (II) Amended and Superseded Claims, (III) Equity Claims, and (IV) Late Filed Claims (Non-Substantive)* [Docket No. 593].¹ Claimants assert that the claims were timely filed because they filed their indemnification claims prior to the deadline set by the Plan for filing claims resulting from the rejection of executory contracts and

¹ Disallowance of the Claimants’ indemnification claims will not affect the Claimants’ rights under applicable insurance policies.



unexpired leases.

2. As an initial matter, Claimants' indemnification claims clearly arose prepetition upon the execution of the respective indemnification agreements. *See In re G-I Holdings, Inc.*, 568 B.R. 731, 766 (Bankr. D.N.J. 2017) (holding that a contingent contractual indemnity claim under an express agreement arises upon the signing of the agreement). In the Opposition, while not disputing that their indemnification claims did not arise upon the execution of their respective indemnification agreements, Claimants attempt to distinguish *GI Holdings* because, in that case, the indemnity agreement at issue was assumed. *See* Opposition ¶ 8. But the fact that the agreement was assumed was not relevant to the *GI Holdings* Court's holding that claimant's claim under the indemnity agreement arose when the agreement was signed. Moreover, even *In re Frenville Co.*,² which was roundly criticized for adopting the claim accrual test for determining when a claim arises and was eventually overruled by the Third Circuit, found that "[w]hen parties agree in advance that one party will indemnify the other party in the event of a certain occurrence, there exists a right to payment, albeit contingent, upon the signing of the agreement." *Id.* at 336; *see also Olin Corporation v. Riverwood International Corporation (In re Manville Forest Products Corporation)*, 209 F.3d 125, 129 (2d Cir. 2000) ("[u]nder contract law, a right to payment based on a written indemnification contract arises at the time the indemnification agreement is executed.")

3. As a result, Claimants' assertion that their claims were timely filed because they were filed before the deadline to file rejection damage claims as set forth in Plan is not sustainable. On January 26, 2023, the Court entered its *Order (I) Setting Bar Dates for Filing Proofs of Claim; (II) Approving Notice of Bar Dates, and (III) Granting Related Relief* [Docket No. 101] (the "Bar

² 744 F.2d 332 (3d Cir. 1984) *overruled on other grounds by In re Grossman's Inc.*, 607 F.3d 114 (3d Cir. 2010).

Date Order”). The Bar Date Order established (i) March 8, 2023 (the “General Bar Date”) as the last date for all creditors holding a “claim” (as such term is defined in section 101(5) of the Bankruptcy Code) against the Debtor to file a written proof of claim for payment of any such claim, (ii) July 10, 2023 as the last day for Governmental Units holding a claim against the Debtors to file a written proof of claim for payment of any such claim, and (iii) if the Debtor amends its Schedules, twenty-one days after service of the notice of amending the Schedules. Bar Date Order ¶¶ 2-4. The Bar Date Notice provides for the same deadlines to file claims and further provides as follows:

Definition of Claim. Under section 101(5) of the Bankruptcy Code and as used herein, the word “claim” means: (i) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (ii) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Bar Date Notice § III.A. This definition of “claim” clearly encompasses Claimants’ unliquidated and contingent indemnification claims and provided notice to the Claimants that they should file their indemnification claims by the General Bar Date. Importantly, neither the Bar Date Order nor the Bar Date Notice sets a separate deadline to file rejection damages claims. Accordingly, at the time the Court entered the Bar Date Order and the Bar Date Notice was served, Claimants had prepetition claims and should have filed those claims by the General Bar Date.

4. As noted by Claimants, Section V.B of the Plan does set a deadline of thirty days after the Effective Date to file a proof of claim “[i]f the rejection of an Executory Contract or Unexpired Lease pursuant to the Plan and Confirmation Order results in a claim....” Plan § V.B. But that section further provides that this deadline applies “applies only to Claims arising from the rejection of an Executory Contract or Unexpired Lease under the Plan and Confirmation Order;

any other claims held by a party to a rejected Executory Contract or Unexpired Lease shall have been evidenced by a Proof of Claim Filed by the applicable Bar Date or shall be barred and unenforceable.” *Id.*

5. The Claimants indemnification claims do not arise from the rejection of their respective indemnification agreements. Rather, the Claimants held contingent and unliquidated indemnification claims as of the Petition Date and they continued to have contingent and unliquidated indemnification claims following the rejection of their indemnification agreements. Accordingly, because the rejection of the Claimants’ indemnification agreements did not change the Claimants’ indemnification claims in any way, the Claimants’ claims did not arise from the rejection of their indemnification agreements and Claimants should have filed their claim on or before the General Bar Date. Because the Claimants did not file their claims by the General Bar Date, the claims are barred and unenforceable pursuant to Section V.B of the Plan.

6. Claimants rely on Sections 365(g) and 502(g) in support of their argument that they timely filed their indemnification claims. But Section 365(g) only address when a breach of a rejected executory contract or unexpired lease is deemed to have occurred and Section 502(h) only addresses when a claim related to a debtor’s non-assumption of an executory contract or unexpired lease arises. Neither addresses the deadline for filing claims. In this case, that deadline was set by the Bar Date Order and Section V.B of the Plan. The Bar Date Order set the General Bar Date as March 8, 2023. And Section V.B of the Plan expressly provides that that the deadline of thirty days after the Effective Date to file a proof of claim only applies to claims resulting from the rejection of an executory contract or unexpired lease and further provides that this provision “applies only to Claims arising from the rejection of an Executory Contract or Unexpired Lease under the Plan and Confirmation Order; any other claims held by a party to a rejected Executory Contract or

Unexpired Lease shall have been evidenced by a Proof of Claim Filed by the applicable Bar Date or shall be barred and unenforceable.” Plan § V.B. As discussed above, the Claimants’ indemnification claims did not arise from the rejection of their indemnification agreements—they arose upon the execution of their respective indemnification agreements. Accordingly, the Claimants’ indemnification claims should be disallowed because they were late filed.

CONCLUSION

WHEREFORE, the Liquidating Trustee respectfully requests that the Court enter an order disallowing Claims Nos 188 and 189 and granting such other relief as the Court deems just and proper.

Date: October 4, 2023
Wilmington, DE

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