

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

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In re:	)	
	)	Chapter 11
	)	
AKORN, INC., <i>et al.</i> , <sup>1</sup>	)	Case No. 20-11177 (KBO)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	<b>Objection Deadline: June 8, 2020 at 4:00 p.m. (ET)</b>
	)	<b>Hearing Date: June 15, 2020 at 2:30 p.m. (ET)</b>
	)	
	)	<b>Re: Docket Nos. 12 &amp; 67</b>
	)	

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**NOTICE OF (A) ENTRY OF INTERIM ORDER (I) AUTHORIZING DEBTORS TO  
PAY PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS,  
FOREIGN VENDORS, IMPORT/EXPORT CLAIMANTS, 503(B)(9)  
CLAIMANTS, AND LIEN CLAIMANTS, (II) GRANTING ADMINISTRATIVE  
EXPENSE PRIORITY TO ALL UNDISPUTED OBLIGATIONS ON ACCOUNT OF  
OUTSTANDING ORDERS, AND (III) GRANTING RELATED RELIEF;  
AND (B) FINAL HEARING THEREON**

PLEASE TAKE NOTICE that, on May 21, 2020, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed the *Debtors’ Motion Seeking Entry of Interim and Final Orders (I) Authorizing Debtors to Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, Import/Export Claimants, 503(b)(9) Claimants, and Lien Claimants, (II) Granting Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief* [Docket No. 12] (the “Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Court”). A copy of

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, if any, are: Akorn, Inc. (7400); 10 Edison Street LLC (7890); 13 Edison Street LLC; Advanced Vision Research, Inc. (9046); Akorn (New Jersey), Inc. (1474); Akorn Animal Health, Inc. (6645); Akorn Ophthalmics, Inc. (6266); Akorn Sales, Inc. (7866); Clover Pharmaceuticals Corp. (3735); Covenant Pharma, Inc. (0115); Hi-Tech Pharmacal Co., Inc. (8720); Inspire Pharmaceuticals, Inc. (9022); Oak Pharmaceuticals, Inc. (6647); Olta Pharmaceuticals Corp. (3621); VersaPharm Incorporated (6739); VPI Holdings Corp. (6716); and VPI Holdings Sub, LLC. The location of the Debtors’ service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.



the Motion is attached hereto as **Exhibit A**.

PLEASE TAKE FURTHER NOTICE that, following an initial hearing to consider the Motion on May 22, 2020, the Court entered the *Interim Order (I) Authorizing Debtors to Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, Import/Export Claimants, 503(B)(9) Claimants, and Lien Claimants, (II) Granting Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief* [Docket No. 67] (the "Interim Order"). A copy of the Interim Order is attached hereto as **Exhibit B**.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Interim Order, objections or responses to the final relief requested in the Motion, if any, must be made in writing and filed with the Court on or before **June 8, 2020 at 4:00 p.m. (prevailing Eastern Time)** and shall be served on: (a) the Debtors, Akorn, Inc., 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045 Attn: Joseph Bonaccorsi; (b) proposed counsel to the Debtors, Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654, Attn: Patrick J. Nash, Jr., P.C., Gregory F. Pesce, and Christopher M. Hayes, and Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Nicole L. Greenblatt, P.C.; (c) proposed co-counsel to the Debtors, Richards, Layton & Finger, P.A., 920 N. King Street, Wilmington, Delaware 19801, Attn: Paul N. Heath; (d) the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Jane M. Leamy; (e) counsel to any statutory committee appointed in these chapter 11 cases; and (f) counsel to the Ad Hoc Group, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166, Attn: Scott J. Greenberg and Steven A. Domanowski.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Interim Order, the final hearing with respect to the Motion, if required, will be held before The Honorable Karen B. Owens, United States Bankruptcy Judge for the District of Delaware, at the Court, 824 North Market Street, 6<sup>th</sup> Floor, Courtroom 3, Wilmington, Delaware 19801 on **June 15, 2020 at 2:30 p.m. (prevailing Eastern Time)**.

PLEASE TAKE FURTHER NOTICE THAT, IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE FINAL RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Wilmington, Delaware  
May 22, 2020

*/s/ Amanda R. Steele*

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*Proposed Co-Counsel for the  
Debtors and Debtors in Possession*

**EXHIBIT A**

**(Motion)**

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

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In re:	)	
	)	Chapter 11
AKORN, INC., <i>et al.</i> , <sup>1</sup>	)	
	)	Case No. 20-11177 (___)
Debtors.	)	(Joint Administration Requested)
	)	

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**DEBTORS’ MOTION SEEKING ENTRY OF INTERIM AND FINAL  
ORDERS (I) AUTHORIZING DEBTORS TO PAY PREPETITION CLAIMS  
OF CERTAIN CRITICAL VENDORS, FOREIGN VENDORS, IMPORT/EXPORT  
CLAIMANTS, 503(B)(9) CLAIMANTS, AND LIEN CLAIMANTS, (II) GRANTING  
ADMINISTRATIVE EXPENSE PRIORITY TO ALL UNDISPUTED OBLIGATIONS ON  
ACCOUNT OF OUTSTANDING ORDERS, AND (III) GRANTING RELATED RELIEF**

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The above-captioned debtors and debtors in possession (collectively, the “Debtors”) respectfully state as follows in support of this motion:<sup>2</sup>

**Relief Requested**

1. The Debtors seek entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B** (respectively, the “Interim Order” and “Final Order”):

(a) authorizing, but not directing, the Debtors to pay, in the ordinary course of business, prepetition

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, if any, are: Akorn, Inc. (7400); 10 Edison Street LLC (7890); 13 Edison Street LLC; Advanced Vision Research, Inc. (9046); Akorn (New Jersey), Inc. (1474); Akorn Animal Health, Inc. (6645); Akorn Ophthalmics, Inc. (6266); Akorn Sales, Inc. (7866); Clover Pharmaceuticals Corp. (3735); Covenant Pharma, Inc. (0115); Hi-Tech Pharmacal Co., Inc. (8720); Inspire Pharmaceuticals, Inc. (9022); Oak Pharmaceuticals, Inc. (6647); Olta Pharmaceuticals Corp. (3621); VersaPharm Incorporated (6739); VPI Holdings Corp. (6716); and VPI Holdings Sub, LLC. The location of the Debtors’ service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

<sup>2</sup> A detailed description of the Debtors and their business, and the facts and circumstances supporting the Debtors’ chapter 11 cases, are set forth in greater detail in the *Declaration of Duane Portwood in Support of Chapter 11 Petitions and First Day Motions* (the “First Day Declaration”), filed contemporaneously with the Debtors’ voluntary petitions for relief filed under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), on May 20, 2020 (the “Petition Date”) and incorporated by reference herein. Capitalized terms used but not otherwise defined in this motion shall have the meanings ascribed to them in the First Day Declaration.

amounts owing on account of (i) Critical Vendor Claims and Foreign Vendor Claims (each as defined herein) in an aggregate amount of up to \$8.0 million on an interim basis and \$14.0 million on a final basis, (ii) Customs Broker Fees and Import/Export Claims (each as defined herein) in an aggregate amount up to \$150,000 on an interim basis and \$250,000 on a final basis, (iii) 503(b)(9) Claims (as defined herein) in an aggregate amount up to \$6.0 million on an interim basis and \$8.0 million on a final basis, and (iv) Lien Claims (as defined herein) in an aggregate amount up to \$1.0 million on an interim basis and \$1.5 million on a final basis; (b) granting administrative expense priority to all undisputed obligations on account of goods ordered by the Debtors prior to the date hereof that will not be delivered until after the Petition Date and authorizing the Debtors to satisfy such obligations in the ordinary course of business; and (c) granting related relief. In addition, the Debtors request that the Court schedule a final hearing within approximately 25 days of the Petition Date to consider entry of the Final Order.

### **Jurisdiction and Venue**

2. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory bases for the relief requested herein are sections 105(a), 363, 503, 1107(a), and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), Bankruptcy Rules 6003 and 6004, and Local Rule 9013-1(m).

### **Background**

5. Akorn, Inc., together with its Debtor and non-Debtor subsidiaries (collectively, “Akorn”) is a specialty pharmaceutical company that develops, manufactures, and markets generic and branded prescription pharmaceuticals, branded as well as private-label over-the-counter consumer health products, and animal health pharmaceuticals. Akorn is an industry leader in the development, manufacturing, and marketing of specialized generic pharmaceutical products in alternative dosage forms. Headquartered in Lake Forest, Illinois, Akorn has approximately 2,180 employees worldwide and maintains a global manufacturing presence, with pharmaceutical manufacturing facilities located in Illinois, New Jersey, New York, Switzerland, and India. Akorn’s operations generated approximately \$682 million in revenue and approximately \$124 million of Adjusted EBITDA in 2019. The Debtors commenced these chapter 11 cases to conduct an orderly sale process that will position the Debtors for sustained future success by right-sizing their balance sheet and addressing their litigation overhang.

6. On the Petition Date, each of the Debtors filed a voluntary petition with the Court under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Concurrently with the filing of this motion, the Debtors have requested procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy

Rule 1015(b). No party has requested the appointment of a trustee or examiner in these chapter 11 cases, and no committees have been appointed or designated.

**The Debtors' Business Obligations**

7. The Debtors purchase goods and services from certain vendors and independent contractors and, in many instances, the Debtors could not operate without access to the goods and services provided by these parties (collectively, the "Critical Vendors"). Due to the highly regulated nature of the Debtors' business, nearly every change to a vendor or input in the Debtors' supply chain requires regulatory approval from one or more jurisdictions, including by ensuring that any new vendor facility or processes are also in compliance with current Good Manufacturing Practice ("cGMP") regulations. Even seemingly mundane changes, such as switching bottle or label manufacturers, can require months to years of regulatory study and the concomitant expenditure of millions of dollars to execute. More complex changes take even longer and are more expensive to implement.

8. The Debtors are not able to easily switch manufacturers, suppliers, or logistics providers on short notice and would face significant risks to their supply chain if prepetition amounts owed to their Critical Vendors (collectively, the "Critical Vendor Claims") cannot be paid. Due to the highly regulated nature of the Debtors' business and the limited number of qualified vendors available, in many cases, the Debtors have limited to no options for replacement suppliers. Replacing suppliers is time consuming, cost-prohibitive, and in certain circumstances, not feasible. Moreover, any failure of a supplier to provide the necessary goods for delivery to the Debtors' customers likely would create shortages in the Debtors' supply chain and adversely affect cash flow, profitability, and the Debtors' ability to successfully restructure. Furthermore, the Debtors are party to a number of downstream pharmaceutical supply agreements and the Debtors'



failure to perform their delivery obligations thereunder could potentially create new, postpetition “failure to supply” or similar claims against the Debtors.<sup>3</sup>

**I. Critical and Foreign Vendor Claims.**

**A. Critical Vendors Claims.**

9. As discussed in further detail below, the Critical Vendors are so essential to the Debtors’ business that the lack of any of their particular goods or services, even for a short duration, could significantly disrupt the Debtors’ operations and cause irreparable harm to the Debtors’ businesses, goodwill, and market share. The Debtors’ Critical Vendors provide goods and services related to the production and packaging of pharmaceutical products (the “Pharmaceutical Vendors”), lab operations and product testing (the “Lab Vendors”), and general business operations (the “Business and Administrative Vendors”). Moreover, certain of the Debtors’ contracts with their Critical Vendors may be governed by the Federal Acquisition Regulations System, FAR 1.101–53.300 (“FAR”). For the avoidance of doubt, the Debtors seek authority, but not direction, to pay and discharge obligations pursuant to any governmental contract, FAR, or other applicable state or federal regulations as they come due in the ordinary course of business, consistent with historical practice.

**1. Pharmaceutical Vendors.**

10. To conduct their businesses, the Debtors rely on the Pharmaceutical Vendors to provide raw materials and components to manufacture and package pharmaceutical products. The Pharmaceutical Vendors supply the principal components of the Debtors’ products, including active and inactive pharmaceutical ingredients and certain packaging materials. Many of these

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<sup>3</sup> Pursuant to certain supply agreements, the Debtors are obligated to deliver contracted quantities of pharmaceutical products to certain contractual counterparties and the failure to deliver such quantities may give rise to contractual monetary penalties or a damages claim for breach of contract.

materials are available from only a single source or, in the case of many of the Debtors' products, only one supplier of raw materials has been identified and qualified. Because United States Food and Drug Administration (the "FDA") approval of drugs requires manufacturers to specify their proposed suppliers of active ingredients and certain packaging materials in their applications, qualifications, and FDA approval of any new supplier would be required if such active ingredients or such packaging materials were no longer available from the Debtors' current suppliers. The qualification of a new supplier with the FDA could delay the Debtors' development and marketing efforts, to the detriment of all of the Debtors' stakeholders. If, for any reason, the Debtors are unable to obtain sufficient quantities of raw materials or components required to produce and package their products, the Debtors may not be able to manufacture their products as planned.

11. In addition to the raw materials and components used to manufacture pharmaceutical products, the Debtors strategically partner with drug development and third-party contract manufacturing organizations ("CMOs"), which, in exchange for transfer prices, royalties, profit splits, or milestone payments, manufacture or source certain of the finished products that the Debtors market. A significant number of the Debtors' CMO partners serve as the Debtors' only supplier of certain final pharmaceutical products. In order to ensure the quality of the Debtors' products, the FDA carefully monitors the Debtors' compliance with the cGMP regulations. The Debtors' CMO partners are each required, and have each passed, the rigorous cGMP audit and certification process. To replace any of these vendors would require the Debtors to undertake an exhaustive qualification and review process to ensure that processes of the new prospective vendor were also in compliance with the cGMP regulations and could take anywhere from twenty-four to forty-eight months each to complete.

12. As of the Petition Date, the Debtors estimate that there is approximately \$5.0 million in aggregate amount outstanding on account of prepetition goods provided and/or services rendered by the Debtors' Pharmaceutical Vendors.

**2. Lab Vendors.**

13. The Debtors also rely on the Lab Vendors to provide equipment components, equipment servicing, batch release testing, monitoring, and laboratory safety and contamination prevention products and services to comply with applicable FDA regulations. Issues with any of the Lab Vendors could leave the Debtors unable to safely produce adequate amounts of pharmaceutical products and/or interrupt the Debtors' ability to timely, efficiently, and safely package and distribute pharmaceutical products. This could delay or reduce commercial sales and materially harm the Debtors' businesses as well as negatively impact patients relying on the Debtors' pharmaceutical products.

14. In addition, in the ordinary course of business, the Debtors conduct significant research and development ("R&D") operations primarily focused on the development of multisource generic products that are in "alternative dosage forms" (*i.e.*, dosage forms other than oral solid dose). The Debtors primarily focus on alternative dosage forms for which they have the capacity to manufacture: ophthalmics, injectables, oral liquids, otics, topicals, inhalants, and nasal sprays. The Debtors' R&D operations are critical to their business operations, allowing them to increase the size of their product offering. If the Debtors are unable to obtain critical lab supplies and services related to their R&D operations, the Debtors may be forced to contract their product pipeline and may face prolonged FDA approval timelines, to the detriment of all stakeholders.

15. As of the Petition Date, the Debtors estimate that there is approximately \$1.8 million in aggregate amount outstanding on account of prepetition goods provided and/or services rendered by the Debtors' Lab Vendors.

**3. Business and Administrative Vendors.**

16. To supplement their general business operations and sales and marketing infrastructure, the Debtors also rely on their Business and Administrative Vendors to provide goods and services, including, but not limited to, information technology and telecommunications, human resources, and office equipment and supplies. The Business and Administrative Vendors provide goods and services that allow the Debtors to sell their products to customers in an efficient manner and otherwise smoothly operate their business. The lack of any of the particular goods or services provided by the Business and Administrative Vendors, even for a short duration, could significantly disrupt the Debtors' operations and cause irreparable harm to the Debtors' businesses, goodwill, and market share.

17. As of the Petition Date, the Debtors estimate that there is approximately \$1.7 million in aggregate amount outstanding on account of prepetition goods provided and/or services rendered by the Debtors' Business and Administrative Vendors.

**B. Foreign Vendors Claims.**

18. A critical component of the Debtors' supply chain involves transacting with certain foreign vendors (collectively, the "Foreign Vendors"). In the case of the direct purchase of pharmaceutical ingredients by the Debtors from the Foreign Vendors, the Debtors place orders directly with foreign pharmaceutical ingredients manufacturers and suppliers and coordinate shipment, delivery, and payment directly with the Foreign Vendor. As of the Petition Date, the Debtors estimate that there is approximately \$5.5 million in aggregate amount outstanding on

account of prepetition goods provided and/or services rendered by the Debtors' Foreign Vendors (the "Foreign Vendor Claims").

19. Based on the reactions of foreign suppliers in other chapter 11 cases, the Debtors believe there is a significant and material risk that the nonpayment of even a single invoice could cause a Foreign Vendor to stop shipping pharmaceutical ingredients to the Debtors on a timely basis and/or to completely sever its business relationship with the Debtors. Suppliers and vendors located in foreign countries are often unfamiliar with the chapter 11 process and react skeptically to various debtor protections. Short of severing their relations with the Debtors, nonpayment of certain Foreign Vendor Claims may also cause Foreign Vendors to take other harmful actions, including delaying shipments of pharmaceutical ingredients and/or discontinuing their performance under product development collaboration arrangements. Timely shipment of inventory is critical to the Debtors' businesses and cash flows, and the Debtors can ill afford any delays or interruptions of this nature.

20. In light of the above, the Debtors seek entry of the Interim Order and Final Order granting them authority to make payments, in their sole discretion and business judgment, on account of the Critical Vendor Claims and the Foreign Vendor Claims in an amount not to exceed an aggregate amount of \$8.0 million on an interim basis and \$14.0 million on a final basis, which amounts represent the Debtors' best estimate as to what amounts must be paid to the Critical Vendors and the Foreign Vendors to continue an uninterrupted supply of critical goods and services. The Debtors further request that the Court grant the Debtors the authority to allocate the foregoing amounts at their discretion, without prejudice to seek additional relief, and subject to an agreement (within the Debtors' discretion) to receive terms consistent with Customary Trade Terms (as defined herein) from the Critical Vendors and the Foreign Vendors.

21. In an exercise of their business judgment, the Debtors have determined that continuing to receive goods and services from the Critical Vendors and the Foreign Vendors is necessary to operate and restructure their businesses as going concerns and to maximize value. If granted discretion to satisfy Critical Vendor Claims and Foreign Vendor Claims as requested herein, the Debtors will assess, on a case by case basis, the benefits to their estates of paying the Critical Vendor Claims and the Foreign Vendor Claims and pay any such claim only to the extent their estates will benefit. Without this relief, the Debtors believe that the Critical Vendors and the Foreign Vendors may cease providing pharmaceutical ingredients to the Debtors and/or stop providing certain critical services and thereby take action that could impede the Debtors' going concern value—a result that could be devastating for the Debtors and their stakeholders.

**C. The Debtors' Process for Identifying Critical Vendors.**

22. To effectuate their business model and ensure the uninterrupted provision of services to their customers, the Debtors rely on goods and services provided by over approximately 3,000 vendors. As of the Petition Date, the Debtors estimate that they owe approximately \$44.0 million in aggregate outstanding amount to all of their vendors on account of goods delivered and/or services rendered prior to the Petition Date.

23. Recognizing that payment of all prepetition claims of such third-party vendors outside of a plan of reorganization would be extraordinary relief, the Debtors, with the assistance of their advisors, reviewed their books and records, consulted operations management and purchasing personnel, reviewed contracts and supply agreements, and analyzed applicable laws, regulations, and historical practices to identify only those vendors that are critical to the continued and uninterrupted operation of the Debtors' business—the loss of which could materially harm their business, by, among other things, shrinking their market share, reducing their enterprise

value, and ultimately impairing the Debtors' ability to reorganize, to the detriment of the Debtors, their stakeholders, and all of the Debtors' vendors. Specifically, in identifying the Critical Vendors, the Debtors examined each of their vendor relationships with, among other things, the following criteria in mind:

- whether certain specifications or contract requirements directly or indirectly prevent the Debtors from obtaining goods or services from alternative sources;
- whether a vendor is a sole-source, limited-source, or high-volume supplier of goods or services critical to the Debtors' business operations;
- whether an agreement exists by which the Debtors could compel a vendor to continue performing on prepetition terms;
- whether alternative vendors are available that can provide requisite volumes of similar goods or services on equal (or better) terms and, if so, whether the Debtors would be able to continue operating while transitioning business thereto;
- the degree to which replacement costs (including, pricing, transition expenses, professional fees, and lost sales or future revenue) exceed the amount of a vendor's prepetition claim;
- whether the Debtors' inability to pay all or part of the vendor's prepetition claim could trigger financial distress for the applicable vendor;
- the likelihood that a temporary break in the vendor's relationship with the Debtors could be remedied through use of the tools available in these chapter 11 cases;
- whether failure to pay all or part of a particular vendor's claim could cause the vendor to hold goods owned by the Debtors, or to refuse to ship inventory or to provide critical services on a postpetition basis;
- the location and nationality of the vendor; and
- whether failure to pay a particular vendor could result in contraction of trade terms as a matter of applicable non-bankruptcy law or regulation.

24. In addition to these factors, the Debtors and their advisors examined the health of each vendor relationship, the vendor's familiarity with the chapter 11 process, and the extent to which each vendor's prepetition claims could be satisfied elsewhere in the chapter 11 process.

## **II. Customs Broker Fees and Import/Export Claims.**

25. In the ordinary course of business, the Debtors import certain pharmaceutical goods from their Foreign Vendors and export inventory to various customers throughout the world (collectively, the "Import/Export Goods"). Timely receipt or transmittal, as applicable, of the Import/Export Goods is critical to both the Debtors' domestic and foreign business operations. Any disruption or delay could adversely affect the Debtors' business operations and adversely affect the Debtors' ability to efficiently administer these chapter 11 cases. The Debtors utilize a customs broker and freight forwarder (the "Customs Broker") to facilitate distribution of imported goods from the Debtors' Foreign Vendors through customs. The Customs Broker advances certain entry fees applicable to imported goods and subsequently invoices the Debtors for its services and for the reimbursement of advanced fees and expenses (the "Customs Broker Fees"). In connection with the Import/Export Goods, the Debtors also may be required to pay various other charges, including customs duties, detention and demurrage fees, tariffs and excise taxes, and other similar obligations (the "Import/Export Claims").

26. Further, some of the Import/Export Claims may be priority claims under section 507(a)(8) of the Bankruptcy Code, which provides priority to certain governmental claims. Regardless of the possible application of section 507(a)(8) of the Bankruptcy Code, the risks associated with non-payment of Import/Export Claimants justifies the payment of the Import/Export Claims in the ordinary course of business.



27. Accordingly, the Debtors seek authority, but not direction, to pay and discharge, on a case-by-case basis, the Customs Broker Fees and Import/Export Claims incurred on account of prepetition transactions in an aggregate amount up to \$150,000 on an interim basis and up to \$250,000 on a final basis. Absent such payment, parties to whom the Debtors owe Customs Broker Fees and Import/Export Claims (the “Import/Export Claimants”) may interfere with the Debtors receipt or distribution, as applicable, of the Import/Export Goods, which could adversely affect the Debtors’ ability to manufacture and distribute products to their customers. For the foregoing reasons, the Debtors submit that payment of the Customs Broker Fees and Import/Export Claims is necessary to preserve and enhance the value of the Debtors’ estates for the benefit of all parties in interest.

### **III. 503(b)(9) Claims.**

28. The Debtors may have received goods worth millions of dollars from various vendors within the 20-day period immediately preceding the Petition Date (collectively, the “503(b)(9) Claimants”), thereby giving rise to prepetition claims to the 503(b)(9) Claimants (the “503(b)(9) Claims”). The Debtors receive large volumes of pharmaceutical ingredients and related goods from their vendors on a rolling basis to satisfy their customers’ demands.

29. The vast majority of the 503(b)(9) Claimants are also Critical Vendors. The Debtors’ relationships with these vendors, and with many of the other 503(b)(9) Claimants, are not governed by long-term contracts. Rather, the Debtors obtain goods from such claimants on an order-by-order basis. As a result, a 503(b)(9) Claimant may refuse to supply new orders if the Debtors do not pay the 503(b)(9) Claims. Such refusal would negatively affect the Debtors’ estates, as the Debtors’ business is dependent on the steady flow of pharmaceutical ingredients and related goods and services.

30. The Debtors also believe that certain 503(b)(9) Claimants could demand payment in cash on delivery—further exacerbating the Debtors’ liquidity. The Debtors believe that, as of the Petition Date, they owe approximately \$8.0 million on account of goods delivered within the 20 days immediately preceding the Petition Date, approximately \$6.0 million of which may become due within the first 25 days of these chapter 11 cases, and the value of which may be entitled to administrative priority under section 503(b)(9) of the Bankruptcy Code.

31. Accordingly, the Debtors request the authority, but not the direction, to pay the undisputed 503(b)(9) Claims as and when they come due. Importantly, the Debtors do not seek to accelerate or modify existing payment terms with respect to the 503(b)(9) Claims. Rather, the Debtors will pay the 503(b)(9) Claims as they come due in the ordinary course of business, *provided* that such claimants make commercially reasonable efforts to maintain or restore Customary Trade Terms (as defined herein).

#### **IV. Lien Claims.**

32. In the ordinary course of business, the Debtors incur obligations (the “Lien Claims”) to various shippers, maintenance workers, and other service providers (collectively, the “Lien Claimants”) for the distribution, receipt, and delivery of the Debtors’ pharmaceutical goods. The Debtors’ business depends on the uninterrupted flow of inventory and other goods through their supply chain and distribution network, including the purchase, importation, and shipment of the Debtors’ pharmaceutical goods. To maintain their operations and efficiently transport products, the Debtors employ an extensive distribution network that utilizes the services of the Lien Claimants. Under the laws of most states, these servicers or carriers will, in certain circumstances, have a lien on the goods in their possession that secures the

charges or expenses incurred in connection with the transportation of goods or the supply of labor.<sup>4</sup> Thus, if the Lien Claims are not satisfied, the Lien Claimants may refuse to release the Debtors' property, thereby disrupting the Debtors' supply chain and distribution network. The Lien Claimants generally fall into the categories discussed below.

**A. Shipper Claims.**

33. As described above, the Debtors' business depends on the uninterrupted flow of pharmaceutical goods through their supply chain and distribution network. In the second leg of the Debtors' supply chain and distribution network, carriers (the "Shippers") take possession of pharmaceutical goods delivered by the Foreign Vendors to ports and then transport such goods to the Debtors' warehousing and distribution facility located in Gurnee, Illinois (the "Distribution Facility"). With respect to pharmaceutical goods provided by domestic vendors, the vendors ship such goods to the Debtors "delivery duty paid" ("DDP"). Under the DDP arrangements, the applicable vendors use the Shippers to transport goods to the Distribution Facility, and title to such goods does not pass to the Debtors until they arrive at the Distribution Facility. The flow of pharmaceutical goods from the Debtors' vendors through their supply chain and distribution network depends on the continued service of the Shippers. While the Shippers are typically not entitled to a lien on the goods they are transporting, the Shippers do hold a possessory interest in such goods and may decline to deliver such goods until the Debtors pay any outstanding balances on account of shipping and storage charges (the "Shipper Claims").

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<sup>4</sup> For example, section 7-307 of the Uniform Commercial Code provides, in pertinent part, that a "carrier has a lien on the goods covered by a bill of lading or on the proceeds thereof in its possession for charges after the date of the carrier's receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." *See* U.C.C. § 7-307(a) (2005).

34. As of the Petition Date, the Debtors estimate that approximately \$1.5 million on account of Shipper Claims was outstanding, approximately \$1.0 million of which will come due within 25 days after the Petition Date.

**B. Maintenance Worker Claims.**

35. From time to time, in the ordinary course of business, the Debtors may also rely on third-party workers to maintain the equipment and machinery used at the Debtors' facilities (the "Maintenance Workers"). At any given time, the Maintenance Workers may perform services on, and therefore be in possession of, the Debtors' equipment. The Debtors' failure to satisfy payment obligations, if any, to the Maintenance Workers (the "Maintenance Worker Claims") could result in the Maintenance Workers' refusal to return the Debtors' equipment, thereby disrupting the Debtors' business operations. As of the Petition Date, the Debtors are not aware of any accrued but unpaid amounts on account of Maintenance Worker Claims. Nevertheless, out of an abundance of caution, the Debtors request authority to continue paying Maintenance Worker Claims in the ordinary course of business, including any prepetition amounts that may be outstanding.

**V. Customary Trade Terms.**

36. Subject to the Court's approval, the Debtors intend to pay the Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims only to the extent necessary to preserve their business. To that end, in return for paying such claims either in full or in part, the Debtors propose that they be authorized to require the Critical Vendors, the Foreign Vendors, the Import/Export Claimants, the 503(b)(9) Claimants,

and the Lien Claimants, as applicable, to provide favorable trade terms for the postpetition procurement of goods and services.

37. Specifically, the Debtors seek authorization, but not direction, to condition payment of the Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims upon such claimant's agreement to continue—or recommencement of—supplying such products and services to the Debtors in accordance with trade terms (including credit limits, discounts, pricing, timing of payments, availability, and other terms) consistent with the parties' ordinary course practice or as otherwise agreed by the Debtors in their reasonable business judgment (the "Customary Trade Terms").

38. In addition, the Debtors request that if any party accepts payment pursuant to the relief requested by this motion and thereafter does not continue to provide goods or services on Customary Trade Terms, then: (a) any payment on account of a prepetition claim received by such party shall be deemed, in the Debtors' sole discretion, an improper postpetition transfer and, therefore, immediately recoverable by the Debtors in cash upon written request by the Debtors; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the payment had not been made; and (c) if there exists an outstanding postpetition balance due from the Debtors to such party, the Debtors may elect to recharacterize and apply any payment made pursuant to the relief requested by the motion to such outstanding postpetition balance and such supplier or vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding, without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

## VI. Outstanding Orders.

39. Prior to the Petition Date and in the ordinary course of business, the Debtors may have ordered goods that will not be delivered until after the Petition Date (the “Outstanding Orders”). In the mistaken belief that they would be general unsecured creditors of the Debtors’ estates with respect to such goods, certain suppliers may refuse to ship or transport such goods (or may recall such shipments) with respect to such Outstanding Orders unless the Debtors issue substitute purchase orders postpetition—potentially disrupting the Debtors’ ongoing business operations and requiring the Debtors to expend substantial time and effort in issuing such substitute orders. As set forth in greater detail below, because the Outstanding Orders are administrative expenses of the Debtors’ estates, the Debtors are requesting that the Court confirm the administrative expense priority of the Outstanding Orders and authorize the Debtors to pay amounts due on account of Outstanding Orders, but only in the ordinary course of business.

### **Basis for Relief**

#### **I. The Court Should Grant the Relief Requested in this Motion Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code.**

40. Courts have recognized that it is appropriate to authorize the payment of prepetition obligations, including payments to critical vendors, where necessary to protect and preserve the estate. *See, e.g., Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts “have approved . . . ‘critical vendor’ orders that allow payment of essential suppliers’ prepetition invoices”); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 826 (D. Del. 1999) (finding that payment of prepetition claims to certain trade vendors was “essential to the survival of the debtor during the chapter 11 reorganization”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (“The ability of a bankruptcy court to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a

novel concept.”). In so doing, these courts acknowledge that several legal theories rooted in sections 105(a) and 363(b) of the Bankruptcy Code support the payment of prepetition claims as provided herein.

41. Pursuant to section 363(b) of the Bankruptcy Code, payment of prepetition obligations may be authorized where a sound business purpose exists for doing so. *See Ionosphere Clubs*, 98 B.R. at 175 (noting that section 363(b) of the Bankruptcy Code provides “broad flexibility” to authorize a debtor to honor prepetition claims where supported by an appropriate business justification). Indeed, courts have recognized that there are instances when a debtor’s fiduciary duty can “only be fulfilled by the preplan satisfaction of a prepetition claim.” *In re CoServ, L.L.C.*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002).

42. In addition, the Court may authorize payment of prepetition claims in appropriate circumstances based on section 105(a) of the Bankruptcy Code, which codifies the Court’s inherent equitable powers to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Under section 105(a) of the Bankruptcy Code, courts may authorize pre-plan payments of prepetition obligations when essential to the continued operation of a debtor’s business. *See Just for Feet*, 242 B.R. at 825. Specifically, the Court may use its equitable power under section 105(a) of the Bankruptcy Code to authorize payment of prepetition obligations pursuant to the “necessity of payment” rule (also referred to as the “doctrine of necessity”). *Ionosphere Clubs*, 98 B.R. at 176.

43. Indeed, the United States Court of Appeals for the Third Circuit recognized the “necessity of payment” doctrine in *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981). The Third Circuit held that a court could authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor. *Id.* (stating courts

may authorize payment of prepetition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); *see also In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding that the necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims have been paid”); *Just for Feet*, 242 B.R. at 824–25 (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to continued operation of business); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (same).

44. Moreover, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors in possession are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” *CoServ*, 273 B.R. at 497. Implicit in the fiduciary duties of any debtor in possession is the obligation to “protect and preserve the estate, including an operating business’s going-concern value.” *Id.* Some courts have noted that there are instances in which a debtor can fulfill this fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.* The court in *CoServ* specifically noted the pre-plan satisfaction of prepetition claims would be a valid exercise of the debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate . . .” *Id.*

45. The Debtors have a sound business purpose for the relief requested herein. The authority to honor unpaid, prepetition Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims in the initial days of these chapter 11 cases, without disrupting the Debtors’ operations, will maintain the integrity of the Debtors’ supply chain, facilitate the sale of the Debtors’ pharmaceutical products, and allow the Debtors to efficiently administer these chapter 11 cases.



46. The resulting harm to the Debtors' estates far outweighs the costs associated with paying the Debtors' prepetition obligations to the Critical Vendors, Foreign Vendors, Import/Export Claimants, 503(b)(9) Claimants, and Lien Claimants. Thus, the Debtors' other creditors will be no worse off, and likely fare better, if the Debtors are empowered to negotiate such payments to achieve a smooth transition into chapter 11 with minimal disruption to their operations. As such, the Debtors believe the relief sought in this motion will not burden the Debtors, but will help them maximize the value of their estates. Accordingly, for the reasons set forth herein, the Debtors submit that it is appropriate for the Court to authorize the Debtors to satisfy the Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims.

**II. The Court Should Authorize the Payment of the Critical Vendor Claims and the Foreign Vendor Claims.**

47. Allowing the Debtors to pay the Critical Vendor Claims and the Foreign Vendor Claims pursuant to all or some of the above-referenced Bankruptcy Code provisions is especially appropriate where, as here, doing so is consistent with the "two recognized policies" of chapter 11 of the Bankruptcy Code—preserving going concern value and maximizing the value of property available to satisfy creditors. *See Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'Ship*, 526 U.S. 434, 453 (1999). Indeed, reflecting the recognition that payment of prepetition claims of certain essential suppliers and vendors is, in fact, both critical to a debtor's ability to preserve any going-concern value and maximize creditor recovery—thereby increasing prospects for a successful reorganization—courts in this district regularly grant relief consistent with that which the Debtors are seeking in this motion. *See, e.g., In re Destination Maternity Corp.*, No. 19-12256 (BLS) (Bankr. D. Del. Nov. 12, 2019) (authorizing the payment of prepetition critical vendor claims); *In re Forever 21, Inc.*, No. 19-12122 (KG) (Bankr. D. Del. Oct. 28, 2019)

(same); *In re Z Gallerie, LLC*, No. 19-10488 (LSS) (Bankr. D. Del. April 9, 2019) (same); *In re ATD Corp.*, No. 18-12221 (KJC) (Bankr. D. Del. Oct. 24, 2018) (same); *In re Rockport Co., LLC*, No. 18-11145 (LSS) (Bankr. D. Del. June 12, 2018) (same).<sup>5</sup>

48. Additionally, if the Debtors do not pay certain of the Foreign Vendor Claims, certain Foreign Vendors may simply refuse to do business with the Debtors unless and until they receive payment on account of their prepetition claims. The Foreign Vendors may take other precipitous action against the Debtors under based on the incorrect believe they are not bound by the automatic stay. As a result, the Debtors would be unable to procure pharmaceutical ingredients and related products and services, potentially causing the Debtors to fail or delay providing products to their customers. Courts in this jurisdiction routinely grant authorization for debtors to pay claims owing to foreign entities against which the automatic stay cannot be enforced readily in the United States and as to which it would be unduly time-consuming and expensive to seek enforcement of an order of the bankruptcy court in the creditor's home country. *See, e.g., In re Destination Maternity Corp.*, No. 19-12256 (BLS) (Bankr. D. Del. Nov. 12, 2019) (authorizing the payment of prepetition foreign vendor claims); *In re Forever 21, Inc.*, No. 19-12122 (KG) (Bankr. D. Del. Oct. 28, 2019) (same); *In re Z Gallerie, LLC*, No. 19-10488 (LSS) (Bankr. D. Del. April 9, 2019) (same); *In re Rockport Co., LLC*, No. 18-11145 (LSS) (Bankr. D. Del. June 12, 2018) (same); *In re Gibson Brands, Inc.*, No. 18-11025 (CSS) (Bankr. D. Del. May 23, 2018) (same).<sup>6</sup>

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<sup>5</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors' proposed counsel.

<sup>6</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors' proposed counsel.

49. The Debtors depend on the supply of pharmaceutical ingredients and the provision of services by the Critical Vendors and the Foreign Vendors. Ensuring these Critical Vendors and Foreign Vendors continue to supply pharmaceutical ingredients and provide services is therefore vital to the success of these chapter 11 cases and the ability of the Debtors to maximize any going-concern value. Accordingly, for the reasons set forth herein, the Debtors submit that it is appropriate for the Court to authorize the Debtors to satisfy the Critical Vendor Claims and Foreign Vendor Claims.

**III. The Court Should Authorize the Payment of the Customs Broker Fees and Import/Export Claims.**

50. To the extent the Customs Broker Fees or Import/Export Claims are held by a governmental unit, such claims would likely be paid in full under any plan of reorganization pursuant to section 507(a)(8) of the Bankruptcy Code, which provides priority status to the claims of a governmental unit based on a customs duty arising out of the importation of certain merchandise. Thus, payment of the Customs Broker Fees and Import/Export Claims merely accelerates the distribution that certain Import/Export Claimants would receive in any event upon confirmation of a plan. Therefore, granting the relief requested herein with respect to the Customs Broker Fees and Import/Export Claims would have no substantial effect on the relative distribution of the estate's assets. Accordingly, for the reasons set forth herein, the Debtors submit that it is appropriate for the Court to authorize the Debtors to satisfy the Customs Broker Fees and Import/Export Claims.

51. Courts in this jurisdiction have authorized the payment of prepetition customs fees and import and export claims under similar circumstances in recent chapter 11 cases. *See, e.g., In re Destination Maternity Corp.*, No. 19-12256 (BLS) (Bankr. D. Del. Nov. 12, 2019) (approving payment of customs duties, detention and demurrage fees, tariffs and excise taxes, and

other similar obligations); *In re Forever 21, Inc.*, No. 19-12122 (KG) (Bankr. D. Del. Oct. 28, 2019) (same); *In re Things Remembered, Inc.*, No. 19-10234 (KG) (Bankr. D. Del. Feb. 26, 2019) (same); *In re Charming Charlie Holdings Inc.*, No. 17-12906 (CSS) (Bankr. D. Del. Jan. 10, 2018) (same); *In re Pac. Sunwear of Calif., Inc.*, No. 16-10882 (LSS) (Bankr. D. Del. Apr. 8, 2016) (approving payment of charges incurred in connection with the transportation of merchandise).<sup>7</sup>

**IV. The Court Should Authorize the Payment of Claims Entitled to Priority Pursuant to Section 503(b)(9) of the Bankruptcy Code.**

52. Section 503(b)(9) of the Bankruptcy Code provides administrative priority for “the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.” The 503(b)(9) Claims must be paid in full for the Debtors to confirm a chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(A). Consequently, payment of such claims now only provides such parties with what they would be entitled to receive under a chapter 11 plan. Moreover, the timing of such payments lies squarely within the Court’s discretion. *See In re Glob. Home Prods., LLC*, No. 06-10340 (KG), 2006 WL 3791955, at \*3 (Bankr. D. Del. Dec. 21, 2006) (agreeing with parties that “the timing of the payment of that administrative expense claim is left to the discretion of the Court”). The Debtors’ ongoing ability to obtain goods as provided herein is key to their survival and necessary to preserve the value of their estates. Absent payment of the 503(b)(9) Claims at the outset of these chapter 11 cases—which merely accelerates the timing of payment and not the ultimate treatment of such claims—the Debtors could be denied access to the

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<sup>7</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors’ proposed counsel.

goods necessary to maintain the Debtors' operations and maximize the value of the Debtors' estates.

53. Moreover, the Bankruptcy Code does not prohibit a debtor from paying such claims prior to confirmation. As administrative claims incurred in the ordinary course of business, the Debtors believe they may pay such claims in accordance with their business judgment pursuant to section 363(c)(1) of the Bankruptcy Code. *See, e.g.*, Transcript of Hearing held on October 31, 2006 at 49, *In re Dura Auto. Sys., Inc.*, No. 06-11202 (KJC) (Bankr. D. Del. Nov. 6, 2006) (“THE COURT: I think arguably the debtor could pay its 503(b)(9) claimants without court approval.”). Again, the timing of such payments lies squarely within the Court’s discretion. *See In re Glob. Home Prods., LLC*, No. 06-10340 (KG), 2006 WL 3791955, at \*3.

54. For these reasons, courts in this district have regularly authorized the payment of claims arising under section 503(b)(9) of the Bankruptcy Code in the ordinary course of business. *See, e.g.*, *In re Forever 21, Inc.*, No. 19-12122 (KG) (Bankr. D. Del. Oct. 28, 2019) (authorizing debtors to pay claims arising under section 503(b)(9) of the Bankruptcy Code); *In re Z Gallerie, LLC*, No. 19-10488 (LSS) (Bankr. D. Del. April 9, 2019) (same); *In re ATD Corp.*, No. 18-12221 (KJC) (Bankr. D. Del. Oct. 24, 2018) (same); *In re Gibson Brands, Inc.*, No. 18-11025 (CSS) (Bankr. D. Del. May 23, 2018) (same); *In re VER Techs. HoldCo LLC*, No. 18-10834 (KG) (Bankr. D. Del. May 4, 2018) (same).<sup>8</sup> Accordingly, for the reasons set forth herein, the Debtors submit that it is appropriate for the Court to authorize the Debtors to satisfy the 503(b)(9) Claims.

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<sup>8</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors’ proposed counsel.

**V. The Court Should Authorize the Payment of Lien Claims.**

55. Certain Lien Claimants may be entitled under applicable non-bankruptcy law to assert certain possessory liens on the Debtors' goods or equipment in their possession (notwithstanding the automatic stay under section 362 of the Bankruptcy Code) in an attempt to secure payment of their prepetition claim. Under section 362(b)(3) of the Bankruptcy Code, the act of perfecting such liens, to the extent consistent with section 546(b) of the Bankruptcy Code, is expressly excluded from the automatic stay.<sup>9</sup> 11 U.S.C. § 362(b)(3). As a result, the Debtors anticipate that certain Lien Claimants may assert or perfect liens, refuse to turn over goods in their possession, or stop performing their ongoing obligations. Even absent a valid lien, to the extent that certain Lien Claimants have possession of the Debtors' inventory, mere possession or retention would disrupt the Debtors' operations.

56. Additionally, pursuant to section 363(e) of the Bankruptcy Code, the Lien Claimants may be entitled to adequate protection of a valid possessory lien to the extent that the Debtors use or sell the estate property against which a Lien Claim is asserted. Given that the value of such property will generally far exceed the value of the related Lien Claim, creditors will not be harmed—and, in fact, will be benefited—by the satisfaction of certain amounts owed to the Lien Claimants. Those payments will facilitate the use and/or sale of estate property against which liens may otherwise be asserted, helping to preserve the going-concern value of the Debtors' business and enabling the Debtors to smoothly transition into chapter 11.

57. For these reasons, courts in this jurisdiction have authorized the payment of prepetition lien claims under similar circumstances in recent chapter 11 cases. *See, e.g., In re*

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<sup>9</sup> *See* 11 U.S.C. § 546(b)(1)(A) (providing that a debtor's lien avoidance powers "are subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection.").

*Destination Maternity Corp.*, No. 19-12256 (BLS) (Bankr. D. Del. Nov. 12, 2019) (authorizing payments to shippers and maintenance workers); *In re Forever 21, Inc.*, No. 19-12122 (KG) (Bankr. D. Del. Oct. 1, 2019) (same); *In re Z Gallerie, LLC*, No. 19-10488 (LSS) (Bankr. D. Del. April 9, 2019) (same); *In re Things Remembered, Inc.*, No. 19-10234 (KG) (Bankr. D. Del. Feb 26, 2019) (same); *In re VER Techs. HoldCo LLC*, No. 18-10834 (KG) (Bankr. D. Del. May 4, 2018) (same).<sup>10</sup> Accordingly, for the reasons set forth herein, the Debtors submit that it is appropriate for the Court to authorize the Debtors to satisfy the Lien Claims.

**VI. The Court Should Confirm that Outstanding Orders Are Administrative Expense Priority Claims and that Payment of Such Claims is Authorized.**

58. Pursuant to section 503(b)(1) of the Bankruptcy Code, obligations that arise in connection with the postpetition delivery of goods and services, including goods ordered prepetition, are administrative expense priority claims because they benefit the estate postpetition. *See* 11 U.S.C. § 503(b)(1)(A) (providing that the “actual [and] necessary costs and expenses of preserving the estate” are administrative expenses); *see also In re John Clay & Co.*, 43 B.R. 797, 809–10 (Bankr. D. Utah 1984) (holding that goods ordered prepetition but delivered postpetition are entitled to administrative priority). Thus, granting the relief sought herein with respect to the Outstanding Orders will not afford such claimants any greater priority than they otherwise would have if the relief requested herein were not granted and will not prejudice any other party in interest.

59. Absent such relief, however, the Debtors may be required to expend substantial time and effort reissuing the Outstanding Orders to provide certain suppliers with assurance of

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<sup>10</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors’ proposed counsel.

such administrative priority. The attendant disruption and delay to the continuous and timely flow of critical materials and other goods to the Debtors would force the Debtors to potentially halt operations and production, disrupt the Debtors' business, and lead to a loss of revenue, all to the detriment of the Debtors and their creditors.

60. Indeed, courts in this jurisdiction routinely grant the type of relief requested herein. *See, e.g., In re Clover Techs. Grp.*, No. 19-12680 (KBO) (Bankr. D. Del. Dec. 19, 2019) (granting administrative expense priority to undisputed obligations on account of outstanding orders on a final basis); *In re Blackhawk Mining LLC*, No. 19-11595 (LSS) (Bankr. D. Del. Aug. 9, 2019) (same); *In re Dolan Co.*, No. 14-10614 (BLS) (Bankr. D. Del. Mar. 25, 2014) (same).<sup>11</sup> Accordingly, the Debtors submit that the Court should confirm the administrative expense priority status of the Outstanding Orders and should authorize the Debtors to pay the Outstanding Orders in the ordinary course of business.

**Processing of Checks and Electronic Fund Transfers Should be Authorized**

61. The Debtors have sufficient funds to pay the amounts described in this motion in the ordinary course of business by virtue of expected cash flows from ongoing business operations, the proposed debtor-in-possession financing, and anticipated access to cash collateral. Under the Debtors' existing cash management system, the Debtors have made arrangements to readily identify checks or wire transfer requests relating to the Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims, as applicable. Accordingly, the Debtors believe that checks or wire transfer requests that are not related to authorized payments will not be honored inadvertently. Therefore, the Debtors

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<sup>11</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors' proposed counsel.



respectfully request that the Court authorize all applicable financial institutions, when requested by the Debtors, to receive, process, honor, and pay any and all checks or wire transfer requests in respect of the relief requested in this motion.

**The Requirements of Bankruptcy Rule 6003 are Satisfied**

62. Bankruptcy Rule 6003 empowers a court to grant relief within the first 21 days after the Petition Date “to the extent that relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. For the reasons discussed above, authorizing the Debtors to pay Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims and granting the other relief requested herein is integral to the Debtors’ ability to transition their operations into these chapter 11 cases smoothly. Failure to receive such authorization and other relief during the first 21 days of these chapter 11 cases would severely disrupt the Debtors’ operations at this critical juncture. For the reasons discussed herein, the relief requested is necessary in order for the Debtors to operate their business in the ordinary course, preserve the going concern value of the Debtors’ operations, and maximize the value of their estates for the benefit of all stakeholders. Accordingly, the Debtors submit that they have satisfied the “immediate and irreparable harm” standard of Bankruptcy Rule 6003 to support granting the relief requested herein.

**Reservation of Rights**

63. Nothing contained in the motion or any actions taken by the Debtors pursuant to relief granted in the Interim Order and Final Order is intended or should be construed as: (a) an admission as to the validity, priority, or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors’ or any other party-in-interest’s rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or

admission that any particular claim is of a type specified or defined in the motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors' or any other party-in-interest's rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party-in-interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the motion are valid and the Debtors and all other parties-in-interest expressly reserve their rights to contest the extent, validity, or perfection, or to seek avoidance of all such liens. If the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity, priority, or amount of any particular claim or a waiver of the Debtors' or any other party-in-interest's rights to subsequently dispute such claim.

**Waiver of Bankruptcy Rule 6004(a) and 6004(h)**

64. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

**Notice**

65. The Debtors will provide notice of this motion to: (a) the U.S. Trustee for the District of Delaware; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) Wilmington Savings Fund Society, FSB, in its capacity as successor administrative agent under the Term Loan Credit Agreement, or any of its predecessors or successors (the "Term Loan Agent"); (d) counsel to the Term Loan Agent; (e) counsel to the ad hoc group of the Debtors' Prepetition Lenders (the "Ad Hoc Group"); (f) the United States

Attorney's Office for the District of Delaware; (g) the Internal Revenue Service; (h) the Food and Drug Administration; (i) the Drug Enforcement Administration; (j) the Securities Exchange Commission; (k) the state attorneys general for all states in which the Debtors conduct business; and (l) any party that requests service pursuant to Local Rule 9013-1(m)(iii).

**No Prior Request**

66. No prior request for the relief sought in this motion has been made to this or any other court.

*[Remainder of page intentionally left blank]*

WHEREFORE, the Debtors respectfully request entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** and **Exhibit B**, respectively, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Wilmington, Delaware  
May 21, 2020

*/s/ Paul N. Heath*

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*Proposed Co-Counsel for the  
Debtors and Debtors in Possession*

**Exhibit A**

**Proposed Interim Order**

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

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In re:	)	
	)	Chapter 11
AKORN, INC., <sup>1</sup>	)	
	)	Case No. 20-11177 (____)
	)	
Debtors.	)	(Joint Administration Requested)
	)	<b>Re: Docket No.</b> _____

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**INTERIM ORDER (I) AUTHORIZING DEBTORS TO PAY  
PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS,  
FOREIGN VENDORS, IMPORT/EXPORT CLAIMANTS, 503(B)(9)  
CLAIMANTS, AND LIEN CLAIMANTS, (II) GRANTING ADMINISTRATIVE  
EXPENSE PRIORITY TO ALL UNDISPUTED OBLIGATIONS ON ACCOUNT  
OF OUTSTANDING ORDERS, AND (III) GRANTING RELATED RELIEF**

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Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (this “Interim Order”) (a) authorizing, but not directing, the Debtors to pay, in the ordinary course of business, prepetition amounts owing on account of (i) Critical Vendor Claims and Foreign Vendor Claims in an aggregate amount of up to \$8.0 million on an interim basis and \$14.0 million on a final basis, (ii) Customs Broker Fees and Import/Export Claims in an aggregate amount up to \$150,000 on an interim basis and \$250,000 on a final basis, (iii) 503(b)(9) Claims in an aggregate amount up to \$6.0 million on an interim basis and \$8.0 million on a final basis, and (iv) Lien Claims in an aggregate amount up to

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, if any, are: Akorn, Inc. (7400); 10 Edison Street LLC (7890); 13 Edison Street LLC; Advanced Vision Research, Inc. (9046); Akorn (New Jersey), Inc. (1474); Akorn Animal Health, Inc. (6645); Akorn Ophthalmics, Inc. (6266); Akorn Sales, Inc. (7866); Clover Pharmaceuticals Corp. (3735); Covenant Pharma, Inc. (0115); Hi-Tech Pharmacal Co., Inc. (8720); Inspire Pharmaceuticals, Inc. (9022); Oak Pharmaceuticals, Inc. (6647); Olta Pharmaceuticals Corp. (3621); VersaPharm Incorporated (6739); VPI Holdings Corp. (6716); and VPI Holdings Sub, LLC. The location of the Debtors’ service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings given to such terms in the Motion.

\$1.0 million on an interim basis and \$1.5 million on a final basis, (b) granting administrative expense priority to all undisputed obligations on account of goods ordered by the Debtors prior to the date hereof that will not be delivered until after the Petition Date and authorizing the Debtors to satisfy such obligations in the ordinary course of business, and (c) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and the First Day Declaration and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and the First Day Declaration and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis as set forth herein.
2. The final hearing (the "Final Hearing") on the Motion shall be held on \_\_\_\_\_, 2020, at \_\_: \_\_ .m., prevailing Eastern Time. Any objections or responses to entry of a final order on the Motion shall be filed on or before 4:00 p.m., prevailing Eastern Time, on \_\_\_\_\_, 2020, and shall be served on: (a) the Debtors, Akorn, Inc., 1925 W. Field Court, Suite 300, Lake Forest,

Illinois 60045 Attn: Joseph Bonaccorsi; (b) proposed counsel to the Debtors, Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654, Attn: Patrick J. Nash, Jr., P.C., Gregory F. Pesce, and Christopher M. Hayes, and Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Nicole L. Greenblatt, P.C.; (c) proposed co-counsel to the Debtors, Richards, Layton & Finger, P.A., 920 N. King Street, Wilmington, Delaware 19801, Attn: Paul N. Heath; (d) the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Jane M. Leamy; (e) counsel to any statutory committee appointed in these chapter 11 cases; and (f) counsel to the Ad Hoc Group, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166, Attn: Scott J. Greenberg and Steven A. Domanowski. In the event no objections to entry of the Final Order on the Motion are timely received, this Court may enter such Final Order without need for the Final Hearing.

3. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Critical Vendor Claims and the Foreign Vendor Claims in an aggregate amount not to exceed \$8.0 million on an interim basis, absent further order of the Court.

4. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Customs Broker Fees and Import/Export Claims in an aggregate amount not to exceed \$150,000 on an interim basis, absent further order of the Court.

5. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Lien Claims in an aggregate amount not to exceed \$1.0 million on an interim basis, absent further order of the Court.



6. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the 503(b)(9) Claims in an aggregate amount not to exceed \$6.0 million on an interim basis, absent further order of the Court.

7. All undisputed obligations related to the Outstanding Orders are granted administrative expense priority in accordance with section 503(b)(1)(A) of the Bankruptcy Code.

8. The Debtors are authorized, but not directed, to pay all undisputed amounts relating to the Outstanding Orders in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date.

9. As a condition to receiving payment hereunder, the Debtors at their discretion may require, by written agreement, such parties to continue supplying goods or services to the Debtors in accordance with trade terms at least as favorable to the Debtors as those practices and programs (including credit limits, pricing, cash discounts, timing of payments, allowances, product mix, availability, and other programs) consistent with the parties' ordinary course practice (collectively, the "Customary Trade Terms"). The Debtors reserve the right to require more favorable trade terms with any party as a condition to payment of any prepetition claim.

10. If any party accepts payment hereunder for a prepetition obligation of the Debtors premised on compliance with the above, and thereafter fails to comply with the Customary Trade Terms, or other such terms as agreed to by the Debtors, then, subject to entry of a final order on the Motion from this Court: (a) any payment on account of a prepetition claim received by such party shall be deemed, in the Debtors' sole discretion, an improper postpetition transfer and, therefore, immediately recoverable by the Debtors in cash upon written request by the Debtors; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the

payment had not been made; and (c) if there exists an outstanding postpetition balance due from the Debtors to such party, the Debtors may elect to recharacterize and apply any payment made pursuant to the relief requested by the Motion to such outstanding postpetition balance and such supplier or vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding, without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

11. Any Critical Vendor, Foreign Vendor, Import/Export Claimant, 503(b)(9) Claimant, or Lien Claimant that accepts payment from the Debtors on account of all or a portion of such party's claim pursuant to this Interim Order shall be deemed to (a) agree to the terms and provisions of this Interim Order and (b) have waived, to the extent so paid, Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, or Lien Claims of any type, kind, or priority (including any reclamation claim), against the Debtors, their assets, and properties.

12. Nothing herein shall impair or prejudice the Debtors' ability to contest, in their sole discretion, the extent, perfection, priority, validity, or amounts of any claims held by any Critical Vendor, Foreign Vendor, Import/Export Claimant, 503(b)(9) Claimant, or Lien Claimant. The Debtors do not concede that any claims satisfied pursuant to this Interim Order are valid, and the Debtors expressly reserve all rights to contest the extent, validity, or perfection, or to seek the avoidance of all such liens or the priority, of such claims.

13. Notwithstanding the foregoing, prior to entry of an order granting the relief requested in the Motion on a final basis, the Debtors are not authorized to pay any prepetition amounts on account of Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, or Lien Claims before the applicable due dates of such claims.

14. Notwithstanding the relief granted in this Interim Order and any actions taken pursuant to such relief, nothing in this Interim Order shall be deemed: (a) an admission as to the validity, priority, or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors' or any other party-in-interest's right to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Interim Order or the Motion; (e) a request or authorization to assume any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors' rights or the rights of any other party-in-interest under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party in interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the Motion are valid, and the Debtors or any other party-in-interest expressly reserved their rights to contest the extent, validity, or perfection or seek avoidance of all such liens. Any payment made pursuant to this Interim Order should not be construed as an admission as to the validity, priority, or amount of any particular claim or a waiver of the Debtors' or any other party-in-interest's rights to subsequently dispute such claim.

15. The banks and financial institutions on which checks were drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment, and all such banks and financial institutions are authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved by this Interim Order without any duty of further inquiry and without liability for following the Debtors' instructions.

16. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these chapter 11 cases with respect to prepetition amounts owed in connection with any Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims.

17. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

18. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

19. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order are immediately effective and enforceable upon its entry.

20. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

21. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Interim Order.

Dated: \_\_\_\_\_, 2020  
Wilmington, Delaware

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

**Exhibit B**

**Proposed Final Order**

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

	)	
In re:	)	Chapter 11
	)	
AKORN, INC., <sup>1</sup>	)	Case No. 20-11177 (____)
	)	
	)	(Joint Administration Requested)
Debtors.	)	
	)	<b>Re: Docket No.</b> _____

**FINAL ORDER (I) AUTHORIZING DEBTORS TO PAY  
PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS,  
FOREIGN VENDORS, IMPORT/EXPORT CLAIMANTS, 503(B)(9)  
CLAIMANTS, AND LIEN CLAIMANTS, (II) GRANTING ADMINISTRATIVE  
EXPENSE PRIORITY TO ALL UNDISPUTED OBLIGATIONS ON ACCOUNT  
OF OUTSTANDING ORDERS, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of a final order (this “Final Order”) (a) authorizing, but not directing, the Debtors to pay, in the ordinary course of business, prepetition amounts owing on account of (i) Critical Vendor Claims and Foreign Vendor Claims in an aggregate amount of up to \$8.0 million on an interim basis and \$14.0 million on a final basis, (ii) Customs Broker Fees and Import/Export Claims in an aggregate amount up to \$150,000 on an interim basis and \$250,000 on a final basis, (iii) 503(b)(9) Claims in an aggregate amount up to \$6.0 million on an interim basis and \$8.0 million on a final basis, and (iv) Lien Claims in an aggregate amount up to

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, if any, are: Akorn, Inc. (7400); 10 Edison Street LLC (7890); 13 Edison Street LLC; Advanced Vision Research, Inc. (9046); Akorn (New Jersey), Inc. (1474); Akorn Animal Health, Inc. (6645); Akorn Ophthalmics, Inc. (6266); Akorn Sales, Inc. (7866); Clover Pharmaceuticals Corp. (3735); Covenant Pharma, Inc. (0115); Hi-Tech Pharmacal Co., Inc. (8720); Inspire Pharmaceuticals, Inc. (9022); Oak Pharmaceuticals, Inc. (6647); Olta Pharmaceuticals Corp. (3621); VersaPharm Incorporated (6739); VPI Holdings Corp. (6716); and VPI Holdings Sub, LLC. The location of the Debtors’ service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings given to such terms in the Motion.

\$1.0 million on an interim basis and \$1.5 million on a final basis, (b) granting administrative expense priority to all undisputed obligations on account of goods ordered by the Debtors prior to the date hereof that will not be delivered until after the Petition Date and authorizing the Debtors to satisfy such obligations in the ordinary course of business, (c) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate and no other notice need be provided; and this Court having reviewed the Motion and the First Day Declaration and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and the First Day Declaration and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Critical Vendor

Claims and the Foreign Vendor Claims in an aggregate amount not to exceed \$14.0 million on a final basis, absent further order of the Court.

3. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Customs Broker Fees and Import/Export Claims in an aggregate amount not to exceed \$250,000 on a final basis, absent further order of the Court.

4. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Lien Claims in an aggregate amount not to exceed \$1.5 million on a final basis, absent further order of the Court.

5. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the 503(b)(9) Claims in an aggregate amount not to exceed \$8.0 million on a final basis, absent further order of the Court.

6. All undisputed obligations related to the Outstanding Orders are granted administrative expense priority in accordance with section 503(b)(1)(A) of the Bankruptcy Code.

7. The Debtors are authorized, but not directed, to pay all undisputed amounts relating to the Outstanding Orders in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date.

8. As a condition to receiving payment hereunder, the Debtors at their discretion may require, by written agreement, such parties to continue supplying goods or services to the Debtors in accordance with trade terms at least as favorable to the Debtors as those practices and programs (including credit limits, pricing, cash discounts, timing of payments, allowances, product mix, availability, and other programs) consistent with the parties' ordinary course practice (collectively,



the “Customary Trade Terms”). The Debtors reserve the right to require more favorable trade terms with any party as a condition to payment of any prepetition claim.

9. If any party accepts payment hereunder for a prepetition obligation of the Debtors premised on compliance with the above, and thereafter fails to comply with the Customary Trade Terms, or other such terms as agreed to by the Debtors, then: (a) any payment on account of a prepetition claim received by such party shall be deemed, in the Debtors’ sole discretion, an improper postpetition transfer and, therefore, immediately recoverable by the Debtors in cash upon written request by the Debtors; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the payment had not been made; and (c) if there exists an outstanding postpetition balance due from the Debtors to such party, the Debtors may elect to recharacterize and apply any payment made pursuant to the relief requested by the Motion to such outstanding postpetition balance and such supplier or vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding, without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

10. Any Critical Vendor, Foreign Vendor, Import/Export Claimant, 503(b)(9) Claimant, or Lien Claimant that accepts payment from the Debtors on account of all or a portion of such party’s claim pursuant to this Final Order shall be deemed to (a) agree to the terms and provisions of this Final Order and (b) have waived, to the extent so paid, any and all prepetition claims, of any type, kind, or priority (including any reclamation claim), against the Debtors, their assets, and properties.

11. Nothing herein shall impair or prejudice the Debtors’ ability to contest, in their sole discretion, the extent, perfection, priority, validity, or amounts of any claims held by any Critical Vendor, Foreign Vendor, Import/Export Claimant, 503(b)(9) Claimant, or Lien Claimant.

The Debtors do not concede that any claims satisfied pursuant to this Final Order are valid, and the Debtors expressly reserve all rights to contest the extent, validity, or perfection, or to seek the avoidance of all such liens or the priority, of such claims.

12. Notwithstanding the relief granted in this Final Order and any actions taken pursuant to such relief, nothing in this Final Order shall be deemed: (a) an admission as to the validity of any particular claim against a Debtor entity; (b) a waiver of the Debtors' or any other party-in-interest's right to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Final Order or the Motion; (e) a request or authorization to assume any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors' rights or the rights of any other party-in-interest under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party in interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to this Final Order are valid, and the Debtors or any other party in interest expressly reserved their rights to contest the extent, validity, or perfection or seek avoidance of all such liens. Any payment made pursuant to this Final Order should not be construed as an admission as to the validity, priority, or amount of any particular claim or a waiver of the Debtors' or any other party-in-interest's rights to subsequently dispute such claim.

13. The banks and financial institutions on which checks were drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment, and all such banks and financial institutions are authorized to rely on the Debtors'

designation of any particular check or electronic payment request as approved by this Final Order without any duty of further inquiry and without liability for following the Debtors' instructions.

14. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these chapter 11 cases with respect to prepetition amounts owed in connection with any Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims.

15. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

16. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Final Order are immediately effective and enforceable upon its entry.

17. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Final Order in accordance with the Motion.

18. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Final Order.

Dated: \_\_\_\_\_, 2020  
Wilmington, Delaware

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT B**

**(Interim Order)**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re:	)	
	)	Chapter 11
	)	
AKORN, INC., <sup>1</sup>	)	Case No. 20-11177 (KBO)
	)	
	)	(Jointly Administered)
	)	
Debtors.	)	
	)	Re: Docket No. 12

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**INTERIM ORDER (I) AUTHORIZING DEBTORS TO PAY  
PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS,  
FOREIGN VENDORS, IMPORT/EXPORT CLAIMANTS, 503(B)(9)  
CLAIMANTS, AND LIEN CLAIMANTS, (II) GRANTING ADMINISTRATIVE  
EXPENSE PRIORITY TO ALL UNDISPUTED OBLIGATIONS ON ACCOUNT  
OF OUTSTANDING ORDERS, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (this “Interim Order”) (a) authorizing, but not directing, the Debtors to pay, in the ordinary course of business, prepetition amounts owing on account of (i) Critical Vendor Claims and Foreign Vendor Claims in an aggregate amount of up to \$8.0 million on an interim basis and \$14.0 million on a final basis, (ii) Customs Broker Fees and Import/Export Claims in an aggregate amount up to \$150,000 on an interim basis and \$250,000 on a final basis, (iii) 503(b)(9) Claims in an aggregate amount up to \$6.0 million on an interim basis and \$8.0 million on a final basis, and (iv) Lien Claims in an aggregate amount up to

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, if any, are: Akorn, Inc. (7400); 10 Edison Street LLC (7890); 13 Edison Street LLC; Advanced Vision Research, Inc. (9046); Akorn (New Jersey), Inc. (1474); Akorn Animal Health, Inc. (6645); Akorn Ophthalmics, Inc. (6266); Akorn Sales, Inc. (7866); Clover Pharmaceuticals Corp. (3735); Covenant Pharma, Inc. (0115); Hi-Tech Pharmacal Co., Inc. (8720); Inspire Pharmaceuticals, Inc. (9022); Oak Pharmaceuticals, Inc. (6647); Olta Pharmaceuticals Corp. (3621); VersaPharm Incorporated (6739); VPI Holdings Corp. (6716); and VPI Holdings Sub, LLC. The location of the Debtors’ service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

<sup>2</sup> Capitalized terms used but not defined herein have the meanings given to such terms in the Motion.

\$1.0 million on an interim basis and \$1.5 million on a final basis, (b) granting administrative expense priority to all undisputed obligations on account of goods ordered by the Debtors prior to the date hereof that will not be delivered until after the Petition Date and authorizing the Debtors to satisfy such obligations in the ordinary course of business, and (c) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and the First Day Declaration and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and the First Day Declaration and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted on an interim basis as set forth herein.
2. The final hearing (the "Final Hearing") on the Motion shall be held on June 15, 2020, at 2:30 p.m., prevailing Eastern Time. Any objections or responses to entry of a final order on the Motion shall be filed on or before 4:00 p.m., prevailing Eastern Time, on June 8, 2020, and shall be served on: (a) the Debtors, Akorn, Inc., 1925 W. Field Court, Suite 300, Lake Forest,

Illinois 60045 Attn: Joseph Bonaccorsi; (b) proposed counsel to the Debtors, Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654, Attn: Patrick J. Nash, Jr., P.C., Gregory F. Pesce, and Christopher M. Hayes, and Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Nicole L. Greenblatt, P.C.; (c) proposed co-counsel to the Debtors, Richards, Layton & Finger, P.A., 920 N. King Street, Wilmington, Delaware 19801, Attn: Paul N. Heath; (d) the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Jane M. Leamy; (e) counsel to any statutory committee appointed in these chapter 11 cases; and (f) counsel to the Ad Hoc Group, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166, Attn: Scott J. Greenberg and Steven A. Domanowski. In the event no objections to entry of the Final Order on the Motion are timely received, this Court may enter such Final Order without need for the Final Hearing.

3. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Critical Vendor Claims and the Foreign Vendor Claims in an aggregate amount not to exceed \$8.0 million on an interim basis, absent further order of the Court.

4. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Customs Broker Fees and Import/Export Claims in an aggregate amount not to exceed \$150,000 on an interim basis, absent further order of the Court.

5. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the Lien Claims in an aggregate amount not to exceed \$1.0 million on an interim basis, absent further order of the Court.

6. The Debtors are authorized, but not directed, in the reasonable exercise of their business judgment, to pay all or part of, and discharge, on a case-by-case basis, the 503(b)(9) Claims in an aggregate amount not to exceed \$6.0 million on an interim basis, absent further order of the Court.

7. All undisputed obligations related to the Outstanding Orders are granted administrative expense priority in accordance with section 503(b)(1)(A) of the Bankruptcy Code.

8. The Debtors are authorized, but not directed, to pay all undisputed amounts relating to the Outstanding Orders in the ordinary course of business consistent with the parties' customary practices in effect prior to the Petition Date.

9. As a condition to receiving payment hereunder, the Debtors at their discretion may require, by written agreement, such parties to continue supplying goods or services to the Debtors in accordance with trade terms at least as favorable to the Debtors as those practices and programs (including credit limits, pricing, cash discounts, timing of payments, allowances, product mix, availability, and other programs) consistent with the parties' ordinary course practice (collectively, the "Customary Trade Terms"). The Debtors reserve the right to require more favorable trade terms with any party as a condition to payment of any prepetition claim.

10. If any party accepts payment hereunder for a prepetition obligation of the Debtors premised on compliance with the above, and thereafter fails to comply with the Customary Trade Terms, or other such terms as agreed to by the Debtors, then, subject to entry of a final order on the Motion from this Court: (a) any payment on account of a prepetition claim received by such party shall be deemed, in the Debtors' sole discretion, an improper postpetition transfer and, therefore, immediately recoverable by the Debtors in cash upon written request by the Debtors; (b) upon recovery by the Debtors, any prepetition claim of such party shall be reinstated as if the



payment had not been made; and (c) if there exists an outstanding postpetition balance due from the Debtors to such party, the Debtors may elect to recharacterize and apply any payment made pursuant to the relief requested by the Motion to such outstanding postpetition balance and such supplier or vendor will be required to repay to the Debtors such paid amounts that exceed the postpetition obligations then outstanding, without the right of any setoffs, claims, provisions for payment of any claims, or otherwise.

11. Any Critical Vendor, Foreign Vendor, Import/Export Claimant, 503(b)(9) Claimant, or Lien Claimant that accepts payment from the Debtors on account of all or a portion of such party's claim pursuant to this Interim Order shall be deemed to (a) agree to the terms and provisions of this Interim Order and (b) have waived, to the extent so paid, Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, or Lien Claims of any type, kind, or priority (including any reclamation claim), against the Debtors, their assets, and properties.

12. Nothing herein shall impair or prejudice the Debtors' ability to contest, in their sole discretion, the extent, perfection, priority, validity, or amounts of any claims held by any Critical Vendor, Foreign Vendor, Import/Export Claimant, 503(b)(9) Claimant, or Lien Claimant. The Debtors do not concede that any claims satisfied pursuant to this Interim Order are valid, and the Debtors expressly reserve all rights to contest the extent, validity, or perfection, or to seek the avoidance of all such liens or the priority, of such claims.

13. Notwithstanding the foregoing, prior to entry of an order granting the relief requested in the Motion on a final basis, the Debtors are not authorized to pay any prepetition amounts on account of Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, or Lien Claims before the applicable due dates of such claims.

14. Notwithstanding the relief granted in this Interim Order and any actions taken pursuant to such relief, nothing in this Interim Order shall be deemed: (a) an admission as to the validity, priority, or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors' or any other party-in-interest's right to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in this Interim Order or the Motion; (e) a request or authorization to assume any prepetition agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors' rights or the rights of any other party-in-interest under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party in interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the Motion are valid, and the Debtors or any other party-in-interest expressly reserved their rights to contest the extent, validity, or perfection or seek avoidance of all such liens. Any payment made pursuant to this Interim Order should not be construed as an admission as to the validity, priority, or amount of any particular claim or a waiver of the Debtors' or any other party-in-interest's rights to subsequently dispute such claim.

15. The banks and financial institutions on which checks were drawn or electronic payment requests made in payment of the prepetition obligations approved herein are authorized to receive, process, honor, and pay all such checks and electronic payment requests when presented for payment, and all such banks and financial institutions are authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved by this Interim Order without any duty of further inquiry and without liability for following the Debtors' instructions.

16. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests that are dishonored as a consequence of these chapter 11 cases with respect to prepetition amounts owed in connection with any Critical Vendor Claims, Foreign Vendor Claims, Customs Broker Fees, Import/Export Claims, 503(b)(9) Claims, and Lien Claims.

17. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).

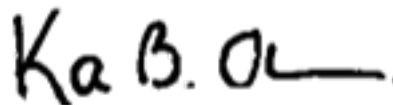
18. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

19. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order are immediately effective and enforceable upon its entry.

20. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Interim Order in accordance with the Motion.

21. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Interim Order.

**Dated: May 22nd, 2020**  
**Wilmington, Delaware**

  
**KAREN B. OWENS**  
**UNITED STATES BANKRUPTCY JUDGE**