UNITED STATES BANKRUPTCY FOR THE DISTRICT OF DELAWARE	
Caption in Compliance with D.Del. LBR 9004-1 Leslie Spoltore, Esquire Edmond M. George, Esquire (*pro hac pending*) Michael D. Vagnoni, Esquire (*pro hac pending*) Turner N. Falk, Esquire (*pro hac pending*) Obermayer Rebmann Maxwell & Hippel LLP 123 S. Justison Street, Suite 100 Wilmington, DE 19801-5364 *Attorneys for 1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, and 1199SEIU Licensed Practical Nurses Welfare Fund; AFSCME District Council 47 Health and Welfare Fund; and Sergeants Benevolent Association Health and Welfare Fund*	
In re: Akorn Inc., et al. Jointly Administered Debtors.	Chapter 11 Lead Case No. 20-11177-KBO Honorable Karen B. Owens

JOINT OBJECTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND TO THE ADEQUACY OF DEBTORS' DISCLOSURE STATEMENT (DI #102)

1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, and 1199SEIU Licensed Practical Nurses Welfare Fund, which are jointly administered health and welfare funds (together, "1199SEIU Benefit Funds"), AFSCME District Council 47 Health and Welfare Fund ("DC47 Fund") and Sergeants Benevolent Association Health and Welfare Fund ("SBA Fund")[1] by and through undersigned counsel Obermayer Rebmann Maxwell & Hippel LLP, hereby file this Objection to the Adequacy of the Disclosure Statement ("Disclosure") filed by the Debtors (the "Objections") in connection with their May 21, 2020 Plan of Reorganization ("Plan"). As stated

[1] 1199SEIU Benefit Funds, DC47 Fund and SBA Fund are referred to collectively as "Objectors."

2011177200624000000000007

more fully below, the 1199SEIU Benefit Funds, DC47 Fund and SBA Fund aver that the instant Disclosure and Plan, and in fact the entire process which set in motion the Plan and Disclosure were undertaken in bad faith. The instant bankruptcies are an effort by the Debtors and their management to deny the Objectors, as well as numerous similarly situated creditors, meaningful participation in the bankruptcy process, in violation of their respective due process rights. Astoundingly, the Plan does not disclose the existence of what are likely the largest claims against the Debtors: liability arising from certain Debtors' violations of federal and state antitrust law, which are the subject of ongoing litigation commenced in 2016. The Objectors include class representatives in this litigation. Debtors do not even acknowledge the existence of the Objectors' or any class members' or other litigants' claims, much less provide for the liquidation of these claims or for any distribution under the Plan. The Objectors further aver that the Plan is so flawed and the purpose of the bankruptcy so improper, that the Disclosure should not be approved, as it would be a waste of resources of the parties in interest and the Court. In support of its Objections, the Objectors state as follows:

FACTUAL BACKGROUND

Anticompetitive conduct in the generic pharmaceutical industry has been the subject of Congressional, federal and state investigations since at least 2015. The various investigations have, to date, resulted in admissions of guilt from four companies to criminal violations of federal antitrust laws. One company agreed to pay a fine of $195 million, the largest fine ever imposed by the Department of Justice for domestic antitrust violations. In addition, multiple executives at generic pharmaceutical companies have been indicted; two of them have even pleaded guilty and are awaiting sentencing. Lead debtor Akorn Inc. and jointly administered debtors 10 Edison Street

LLC, 13 Edison Street LLC, Advanced Vision Research, Inc., Akorn (New Jersey), Inc., Akorn Animal Health, Inc., Akorn Ophthalmics, Inc., Akorn Sales, Inc., Clover Pharmaceuticals Corp., Covenant Pharma, Inc., Hi-Tech Pharmacal Co., Inc., Inspire Pharmaceuticals, Inc., Oak Pharmaceuticals, Inc., Olta Pharmaceuticals Corp., VPI Holdings Corp., VPI Holdings Sub, LLC, VersaPharm Incorporated (the "Debtors") and related entities are implicated in these ongoing investigations.

Numerous suits have been filed by private parties and state attorneys general seeking damages caused by the anticompetitive conduct in the generic pharmaceutical industry. In 2016, the Judicial Panel on Multidistrict Litigation issued an order that transferred all related actions to In re: Generic Pharmaceuticals Pricing Antitrust Litigation, MDL 2724 (E.D. PA) (the "MDL"). As of June 15, 2020, the MDL includes more than 100 pending actions that implicate approximately 200 generic drugs and which name more than three dozen corporate manufacturers as defendants. Debtors Akorn Inc. and Hi-Tech Pharmacal Co. Inc. were named as defendants in some of the earliest of these cases, which were filed in 2016, and debtor VersaPharm Inc. was named as a defendant in later complaints. All three Debtor companies remain defendants in numerous MDL cases where they were and are actively defending themselves prior to the filing of the instant bankruptcies. These companies participated in an overarching conspiracy to artificially fix, raise, and stabilize the prices of generic drugs. Due to their participation in tortious or illegal acts, certain directors and officers of the Debtors ("Directors") may be added as additional defendants in the MDL in their personal capacity.

Various parties have asserted claims against the Debtors and other generic drug manufacturers in the MDL. One action filed is on behalf of a putative class of End-Payer Purchaser ("EPP") class plaintiffs. 1199SEIU Benefit Funds and SBA Fund are named plaintiffs for the

putative class and DC47 Fund is a member of the putative class. The EPP class includes the persons and entities that are at the end of the chain of distribution of generic pharmaceuticals. This includes consumers, insurance companies and union health and welfare benefit funds, among others. The Objectors' claims in the MDL, and those of all other EPP class members, are based on an anticompetitive conspiracy in violation of federal or state antitrust and consumer protection law, and equitable theories of unjust enrichment. As all MDL defendants and their Directors, including Debtors, participated in the conspiracy, each is potentially joint and severally liable for all damages caused by the conspiracy. The Debtors' and Directors' liability for the claims in the MDL is presently unliquidated, but likely runs to the billions of dollars.

While the MDL was being litigated, the Debtors negotiated a merger deal with Fresenius, described more extensively in the Debtors' Disclosure. Following the leaked disclosure of regulatory failures by the Debtors, Fresenius terminated the merger agreement. According to the Debtors, a whistle blower disclosed flawed or corrupt testing results to the FDA. The failure of the Fresenius merger brought on a federal securities class action by investors. On March 13, 2020, the Debtors settled this securities litigation (the "Shareholder Settlement"). Under the terms of the Shareholder Settlement, the Debtors transferred common stock and issued Contingent Value Rights ("CVR"). CVR were structured to pay out upon a bankruptcy or change of control, which was already being pursued.

On May 20, 2020, the Debtors filed the instant bankruptcies, jointly administered under lead case In re Akorn Inc., No. 20-11177-KBO. With the petition, the Debtors filed the required list of the thirty (30) largest unsecured creditors. See DI #1. The list includes Fresenius, with an unliquidated claim. The list also includes creditors with claims of as little as $252,644.00. The Debtors did not list the Objectors, the EPP putative class or any other litigant in the MDL. The

Debtors filed a list of creditors under seal (DI #17) which the Objectors and their counsel cannot access. The Objectors did not receive notice of the bankruptcy in time to seek appointment to the Official Committee of Unsecured Creditors, though they are currently requesting appointment to that Committee.

On May 26, 2020, the Debtors filed their Plan (DI #101) and Disclosure (DI #102). In complete disregard of their duty to accurately disclose, the Debtors' Disclosure does not mention the MDL, or the Objectors, or the EPP class's very substantial claims against the Debtors.

The proposed Plan contemplates a sale of the Debtors' valuable assets, with existing secured lenders as the "stalking horse" bidders with the right to credit bid the value of their claims. The purchaser assumes only certain liabilities of the Debtors, but only those arising after the closing on the purchase. The Plan contains impermissible opt-out third-party releases for the Debtors, non-Debtor affiliates and all Directors thereof. The applicability of these provisions and the Objectors' treatment under the Plan are entirely unclear. The Disclosure does not include any estimates of payment to general unsecured claims. The Disclosure Statement does not provide adequate information for the Objectors or other creditors to make an informed decision about the Plan, and is so impermissibly flawed that it should not be approved.

<u>LEGAL ARGUMENT</u>

A. Adequate Information

The purpose of a disclosure statement is to provide "adequate information" to creditors and other parties in interest about the terms of a proposed plan, allowing for both an informed vote and knowledgeable participation in the confirmation process. See 11 U.S.C. § 1125(a)(1); <u>Kunica v. St. Jean Fin., Inc.</u>, 233 B.R. 46, 54 (S.D.N.Y. 1999). Section 1125(a) of the Bankruptcy Code defines "adequate information" as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interest of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan.

Whether a disclosure statement includes "adequate information" is determined on a case-by-case basis. Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988). As the Third Circuit has recognized, the debtor's obligation to provide sufficient data to satisfy the Section 1125 standard of adequate information "cannot [be] overemphasiz[ed]," as "the importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court." Id.

The claims of the Objectors and the EPP class they represent far exceeds the amount of the smallest (and largest) creditors on the 30-creditor list. The Debtors know they must list unliquidated claims, as they did for Fresenius. Even if the Debtors dispute the claim, they must list it. There is no obvious reason why the Objectors' claims on behalf of the EPP class, or other MDL claims, are not listed as large creditors or discussed in the Disclosure.

The Debtors did not file their Schedules and Statement of Financial Affairs with the petition. A hearing on Debtors' motion to extend the time to file these Schedules is set for June 24, 2020, which is also the deadline to object to the Disclosure. As a result, the current timeline ensures that no Schedules will be available until after the objection deadline to the Disclosure. The Objectors are creditors of the Debtors, but do not know whether the Debtors will disclose their claims at all.

B. The Disclosure Does Not Provide Adequate Information About The MDL

A disclosure statement should contain information concerning the values of assets and liabilities of the debtor. See Tenn-Fla Partners v. First Union Nat'l Bank, 229 B.R. 720, 733 (W.D. Tenn. 1999), aff'd, 226 F.3d 746 (6th Cir. 2000).; In re McGrew, 60 B.R. 276 (Bankr. W.D. Ark. 1986) (disclosure statement was inadequate because it failed to account for the value of certain assets). Litigation is often the source of substantial debtor liability or substantial potential for recovery. "The duty to provide 'adequate information' in the disclosure statement has been interpreted as requiring an explanation of pending or contemplated litigation." Cleasby v. Sec. Fed. Sav. Bank, 243 Mont. 306, 311, 794 P.2d 697, 700 (1990) citing In re Malek, 35 B.R. 443, 444 (Bankr. E.D. Mich. 1983)

The Disclosure does not disclose even the existence of the MDL or mention the Objectors or similarly-situated EPP creditors. Obviously, unsecured creditors would want to know about claims in the many millions of dollars for which there is potentially no insurance coverage, and which claims will presumably share with general unsecured creditors under the Plan. As even the list of creditors was filed under seal, the Objectors do not even know if the Debtors intend to disclose or report the MDL creditors at all.

The Disclosure does not adequately address the Shareholder Settlement either. As part of the court-approved March 13, 2020 Shareholder Settlement, shareholder class members received CVR that approximated shareholder losses on stocks and options. These were transfers of valuable rights to insiders within 90 days of the petition date. Prior to the transfers, the shareholders were equity interest holders and would have received nothing in a liquidation. As such the transfers are potentially susceptible to avoidance as preferences. 11 U.S.C. § 547. To be clear, the Objectors do not allege that these grants in the Shareholder Settlement absolutely

are preferential transfers worth avoiding. However, the Disclosure does not include any analysis of any preferential or otherwise avoidable transfers the Debtors could pursue.

The Disclosure alleges that Director insurance policies were willing to contribute approximately $30 million to fund the Shareholder Settlement. It is unclear whether these insurance proceeds are still assets in the instant bankruptcy and whether they are still to be paid according to the Shareholder Settlement or *pro rata* to all general unsecureds.

The Disclosure discusses the sale of non-Debtor affiliates as a potential source of additional value. However, the Disclosure also alleges that all valuable assets aside from avoidance causes of action and some Director insurance proceeds are being sold in the purchase transaction. If the non-Debtor affiliates are being retained by the Debtors and are possible sources of additional Distributable Proceeds, the Disclosure does not give any information on how valuable they are or their chances of being monetized.

In fact, the Disclosure makes it seem as if the Debtors did not spend much time analyzing all sources of recovery once they obtained the trustee powers of a debtor-in-possession. The Disclosure does not identify if the Debtors have any affirmative claims for recovery or avoidance, or any ability to bifurcate claims the Debtors admit are undersecured.

Because the Disclosure does not address the MDL, the impact of the MDL on the Debtors' business model or valuation is not adequately addressed. This lack of disclosure also prevents the Objectors, similarly-situated EPPs, creditors in general and the proposed stalking-horse purchasers from being able to make an informed decision about the Plan. Accordingly, the Disclosure contains insufficient information for creditors to make an informed decision about the Plan.

C. The Disclosure Does Not Provide Adequate Information About the Releases and Injunctions

The Releases and supporting injunctions are not adequately explained in the Disclosure. As a result, they do not comply with the due process requirements for validity.

If a plan provides for an injunction, the plan and disclosure statement "shall describe in specific language. . . all acts to be enjoined and identify the entities that would be subject to the injunction." Fed. R. Bankr. P. 3016(c). See In re Lower Bucks Hosp., 571 Fed. Appx. 139, 144 (3d Cir. 2014) (affirming rejection of third party releases that were not adequately disclosed in debtor's disclosure statement). "In evaluating releases, courts distinguish between the debtor's release of non-debtors and third parties' release of non-debtors". In re Wash. Mut., Inc., 442 B.R. 314, 352 (Bankr. D. Del. 2011) (citing In re Exide Techs., 303 B.R. 48, 71-74 (Bankr. D. Del. 2003)). Courts use "different analyses to evaluate releases by a debtor of non-debtor third parties and releases by a non-debtor or other non-debtor third parties." Id.

Non-consensual releases by a non-debtor of other non-debtor third parties are to be granted only in "extraordinary cases." Gilbert v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212 (3d Cir. 2000). In Continental, the Third Circuit did "not establish a rule regarding conditions under which non-debtor releases and permanent injunctions are appropriate or permissible," but determined that the non-consensual release of a non-debtor party in Continental's plan did "not pass muster under even the most flexible tests for the validity of non-debtor releases. The hallmarks of permissible non-consensual releases — fairness, necessity to the reorganization, and specific factual finding to support these conclusions — are all absent here." Id. at 214.

Courts that have approved third-party releases typically have done so with the informed consent of the affected creditors. In re Congoleum Corp., 362 B.R. 167, 192 n. 20 (Bankr. D.N.J.

2007); In re Spansion, 426 B.R. 114, 144 (Bankr. D. Del. 2010) ("Courts have determined that a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan.") (citations omitted).

The Third Circuit recently clarified the outer bounds of permissible nonconsensual third-party releases, stating that "we are not broadly sanctioning the permissibility of nonconsensual third-party releases in bankruptcy reorganization plans." In re Millennium Lab Holdings II, LLC, 945 F.3d 126, 139 (3d Cir. 2019). In Millennium, the releases passed constitutional muster because without them the plan and the entire reorganization would fail. The released parties were large equity holders of the debtor and contributed value in the form of money and surrender of equity to the plan in exchange for being released. Further, the releases were part and parcel of an overall negotiated prepetition deal between ad hoc representatives of the parties granting releases.

The Releases as described in the Disclosure do not pass constitutional muster. The Releases require a creditor to affirmatively opt out, even if they abstain from voting or vote against the Plan. The Objectors and similarly-situated EPP creditors do not know if they are even considered disclosable creditors by the Debtors. Further, MDL creditors include unidentified and/or unknown direct and indirect purchasers of drugs that have not been individually contacted by the Debtors. Releasing the claims of these MDL creditors without even notice of the bankruptcy fundamentally violates due process. Even if the Releases are enforceable against creditors like the Objectors, they may not be valid and enforceable against EPPs not on notice. The current Disclosure describes a Plan that appears to release all claims, but actually releases only a subset of MDL claims. If this is so, EPPs not on notice are treated

better than the Objectors, since those EPP's claims are not released and they may pursue the Debtors and Directors.

The exact language of the Releases makes it ambiguous as to which MDL claims would be released. The Releases do not release any "claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct, fraud or gross negligence." Disclosure ¶VI.R. As most claims in the MDL are based in antitrust theories involving an intentional, and intentionally wrongful, conspiracy, they are nondischargeable by the Debtors pursuant to 11 U.S.C. §523(a)(2), (4), (6). The only way the Directors may be released from MDL claims is via the Releases. The Disclosure makes it entirely unclear whether the Releases even purport to release the Debtors or Directors from MDL claims.

This clarity is especially important because the Releases are enforced by an injunction. Under the current Disclosure, the Objectors do not know which of their claims are purportedly released, whether those releases are valid, and whether those releases validly cover Directors. If the Objectors pursue a course of action that another court considers released, that action would violate the Plan's injunction. In such a scenario, the Objectors cannot make an informed decision about the Plan because the effect of the Plan is unclear on the most vital points. Further, the injunction language as described in the Disclosure is too vague to comply with the requirement of Fed. R. Bankr. P. 3016(c), since the acts and parties enjoined are completely unspecified as to MDL claims.

It is also unclear whether there is appropriate consideration for Releases of Directors. In Millennium, third-party releases were proper when the released parties contributed value to the negotiated plan and the plan would have failed without the releases. These conditions are absent in the current Plan, as described by the Disclosure. It appears that, in return for obtaining

Releases, the Directors are contributing nothing to the Plan. To the extent that Director insurance funds the Plan, that insurance was always a Debtor asset, and cannot be seen as a contribution by the Directors. The proposed sale transaction could take place without Director releases. Director releases are not necessary to the sale of the Debtors' valuable assets.

Lastly, the Millennium court authorized the releases in that case because they were part of a deal negotiated between representatives of the relevant parties in interest. That court overruled the objections of parties with interests identical to those involved in the reorganization deal, in large part because an identical kind of interest had had a place at the table, even if the objecting parties had not. That has not occurred here: secured lenders and presumably beneficiaries of the Shareholder Settlement are on board. Had these been the only material creditors the Disclosure and Plan might have provided adequate information and constitutionally-valid releases. However, the Debtors and Directors are still implicated in issues arising out of the MDL, and no MDL parties were involved in prepetition negotiations. MDL parties like the Objectors represent a fundamentally different kind of interest from shareholder creditors. Shareholder Settlement creditors cannot, in any way, be said to represent the interests of the Objectors and other EPPs.

D. The Disclosure Does Not Provide Adequate Information About Treatment of Unsecured Creditors

Whether a disclosure statement contains "adequate information" should be assessed from the perspective of the claims or interest holders with the ability to vote. See In re Phoenix Petroleum Co., 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) citing In re Monroe Well Serv., Inc., 80 B.R. 324, 330 (Bankr. E.D. Pa. 1987).

An adequate disclosure statement must provide some degree of corroborating factual information to encourage intelligent and "enlightened" voting. In re Ferretti, 128 B.R. 16, 19 (Bankr. D.N.H. 1991) (disclosure statement must contain simple and clear language delineating the consequences of the . . . plan so that the [parties] can intelligently accept or reject the Plan); In re BSL Operating Corp., 57 B.R. 945, 950 (Bankr. S.D.N.Y. 1986) ("[D]isclosure statement…is evaluated in terms of whether it provides sufficient information to permit enlightened voting by holders of claims or interests."). The information included in the disclosure statement should consist of "all factors presently known to the plan proponent that bear upon the success or failure of the proposals contained in the plan." In re Microwave Prods., Inc., 100 B.R. 376, 377 (Bankr. W.D. Tenn. 1989) (citation omitted).

The Disclosure describes a 'waterfall' plan. There is a funding provision by the purchasers specifically for administrative expenses, generally removing these expenses from the waterfall. In relevant part, general unsecured creditors like the Objectors will be paid after priority claims are paid in full. Funding for the waterfall is not clearly described; it certainly includes any net sale proceeds, if any. It may include some $30 million from Director insurance policies.

The Disclosure does not include even an estimate of the order of magnitude of priority claims. As currently described, priority claims may consume all Distributable Proceeds many times over, or may be negligible. Since MDL claims are likely to constitute a substantial fraction of the unsecured class, and the Objectors' claims will constitute a substantial fraction of MDL claims, the Disclosure should at least attempt to estimate the value of Distributable Proceeds, the size of priority claims and the amount payable to general unsecured creditors.

The Plan does not permit a creditor to vote in favor but also opt out of the Releases. When making a decision to release or not, creditors like the Objectors must have more information in order to weigh their options. As currently proposed, the Disclosure promotes completely uninformed voting due to the lack of information and lack of clarity in the disclosed information.

E. The Plan Is Patently Unconfirmable Because it Was Proposed in Bad Faith

In addition to determining whether the Disclosure provides "adequate information," the Third Circuit has determined that a disclosure statement should not be approved if the plan it supports is determined to be "patently unconfirmable."

> [A] bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile because the plan described by the disclosure statement is patently unconfirmable. A plan is patently unconfirmable where (1) confirmation defects cannot be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.

In re Am. Cap. Equip. LLC, 688 F.3d 145, 154-55 (3d Cir. 2012); In re 266 Washington Associates, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992) ("A disclosure statement will not be approved where, as here, it describes a plan which is fatally flawed and thus incapable of confirmation").

A preliminary inquiry into plan confirmability is a prerequisite to consideration of the adequacy of the information contained in a proposed disclosure statement. In re Valrico Square Limited Partnership, 113 B.R. 794 (S.D. Fla. 1990). The point of conducting the evaluation at this juncture is to "avoid engaging in a wasteful and fruitless exercise of sending the disclosure statement to creditors and soliciting votes on a plan which is unconfirmable on its face. Such an

exercise in futility only serves to further delay a debtor's attempts to reorganize." In re Atlanta W. VI, 91 B.R. 620, 622 (Bankr. N.D. Ga. 1988).

Under Section 1129(a)(3), courts may only confirm reorganization plans proposed in good faith. "[T]he important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." In re Am. Capital Equip., LLC, 688 F.3d 145, 156 (3d Cir. 2012) (quoting In re Combustion Eng'g, 391 F.3d 190, 247 (3d Cir. 2004)).

A good faith plan must have "a true purpose and fact-based hope of either 'preserving [a] going concern' or 'maximizing property available to satisfy creditors.'" Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999). Additional permitted purposes are "giving debtors a fresh start in life," "discourag[ing] debtor misconduct," "the expeditious liquidation and distribution of the bankruptcy estate to its creditors," and "achieving fundamental fairness and justice." In re WR Grace, 729 F.3d 332, 346 (3d Cir. 2013) (internal citations omitted).

The proposed Plan does not meet these permissible purposes and was proposed in bad faith. The Plan impermissibly mixes liquidation and reorganization to create the worst of both worlds for unsecured creditors and the best of both worlds for the Debtors and purchasers. Because the true purpose of the Plan would not pass a simple test of fundamental fairness, the actual operative provisions of the Plan are vague and the Disclosure does not inform this Court of crucial relevant issues.

The Disclosure admits that the purpose of the Plan is to facilitate a sale that places the Debtors' valuable assets back into commerce as a going concern, cleansed of liability. Disclosure ¶ IV.E. The Disclosure purports that the liability at issue is that incurred in the failure

of the Fresenius deal and the ensuing shareholder suit. Those are large liabilities, but the largest of all – the MDL plaintiffs' claims – is not even mentioned. The Disclosure and Plan are written to obfuscate the fact that a byproduct of the sale would be to place the Debtors' assets beyond all practical recovery for the Objectors, and potentially release some of the Objectors' claims without payment or notice to a vast array of MDL creditors. This is especially inexcusable given that MDL liability potentially dwarfs all other liability, and was incurred in intentionally wrongful conduct that also carries criminal penalties.

The fact that the MDL is unmentioned in the Disclosure or Plan, that no MDL creditor is among the reported 30 largest creditors, that no MDL creditor received notice in time to seek appointment to the Committee of Unsecured Creditors and that the Plan contemplates a quick free-and-clear sale suggests that the intent of this bankruptcy was to defeat MDL claims as well.

As discussed above, it is not clear that some or all MDL claims are validly released against any parties. Even if the Objectors' most valuable claims are not released, they have no practical hope of recovery from the Debtors. The Debtors will be emptied of valuable assets by the sale contemplated in the Plan, and Objectors will not be able to pursue the purchasers of those assets for recovery.

The proposed Plan violates the priorities and policies of the Bankruptcy Code. The shareholder creditors are, at their most basic level, equity. In the normal course they would be paid after the Objectors and their entire class were paid in full. By conceiving of these equity interests are shareholder creditors, they have been promoted up the priority scheme into general unsecured creditors, giving them a pro rata portion of the Objectors' recovery.

The substantive effect of the sale is to cleanse the Debtors' assets of all liability – shareholder and MDL alike – while handing the entire business to the purchasers and delivering some recovery to equity.

These actions do not maximize Debtor assets: the Disclosure reports that business was improving prepetition, and the Debtors had just settled the shareholder suits. This bankruptcy could be a tool to appropriately restructure the debt owed to the secured lenders and continue reorganized operations as the Debtors' value increased. Instead, the Debtors negotiated Plan-supporting lockup agreements from those secured creditors to sell the valuable assets for a credit bid. Again, if the Plan was intended to address the <u>disclosed</u> liabilities, it might have been proposed in good faith.

Instead, the Plan does not reorganize the Debtors as a going concern, it facilitates a going-out-of-business sale that pays only secured creditors. The Plan does not deter debtor misconduct – instead it provides a roadmap for the Debtors and all similarly-situated MDL defendants to escape antitrust liability. Secured creditors take over operations, hire the recently-exculpated Directors back to the same jobs and assume the same vendor relationships. The entire business continues in roughly the same form, but MDL creditors lose all sources of recovery. The Plan accomplishes this without the requisite full and fair disclosure to the Court or other creditors.

The Objectors and other EPP creditors, as well as all MDL creditors, have massive, socially important, nondischargeable claims against the Debtors. It is fundamentally unfair to allow a quick sale that reconstitutes the Debtors in substance in the hands of the purchasers – likely the secured creditors – but varies the form sufficiently that MDL debts are effectively

nullified. This form of reorganization-by-liquidation undermines the purposes and policies of the Bankruptcy Code.

CONCLUSION

For the reasons stated above, the Plan is proposed in bad faith and is unconfirmable. The Disclosure Statement does not include vital information on the treatment of unsecured creditors, the Debtors' liabilities and assets, the scope of releases and injunctions, or the relevant background of the Debtors' involvement in the MDL. The Disclosure Statement does not provide adequate information and should not be approved by the Court.

Respectfully submitted,

Dated: June 24, 2020
Wilmington, Delaware

By: /s/Leslie B. Spoltore
Leslie B. Spoltore, Esquire (DE Bar No. 3605)
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
123 Justison Street, Suite 100
Wilmington, Delaware 19801
Telephone: (302) 238-6947
Facsimile: (302) 655-1092
Email: leslie.spoltore@obermayer.com

-and-

Edmond M. George, Esquire (*pro hac pending*)
Michael D. Vagnoni, Esquire (*pro hac pending*)
Turner N. Falk, Esquire (*pro hac pending*)
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
Centre Square West
1500 Market Street, Suite 3400
Philadelphia, PA 19102
Telephone: (215) 665-3140
Facsimile: (215) 665-3165
Email: Edmond.george@obermayer.com
Counsel to AFSCME District Council 47 Health and Welfare Fund, 1199SEIU National Benefit

Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, 1199SEIU Licensed Practical Nurses Welfare Fund and Sergeants Benevolent Association Health and Welfare Fund

<table>
<tr><td>UNITED STATES BANKRUPTCY FOR THE DISTRICT OF DELAWARE</td><td></td></tr>
<tr><td>Caption in Compliance with D.Del. LBR 9004-1
Leslie Spoltore, Esquire
Edmond M. George, Esquire (pro hac pending)
Michael D. Vagnoni, Esquire (pro hac pending)
Turner N. Falk, Esquire (pro hac pending)
Obermayer Rebmann Maxwell & Hippel LLP
123 S. Justison Street, Suite 100
Wilmington, DE 19801-5364
Attorneys for 1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, and 1199SEIU Licensed Practical Nurses Welfare Fund; AFSCME District Council 47 Health and Welfare Fund; and Sergeants Benevolent Association Health and Welfare Fund</td><td></td></tr>
<tr><td>In re:

Akorn Inc., et al.

Jointly Administered Debtors.</td><td>Chapter 11

Lead Case No. 20-11177-KBO
Honorable Karen B. Owens</td></tr>
</table>

ORDER DENYING APPROVAL OF THE DISCLOSURE STATEMENT

The relief set forth on the following page numbered two (2), is hereby **ORDERED**.

THIS MATTER having been brought before the Court upon the application to approve the Disclosure Statement file by the debtors (the "Disclosure Statement"); and upon consideration of the Joint Objection to the Adequacy of the Disclosure Statement filed by AFSCME District Council 47 Health and Welfare Fund, 1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, 1199SEIU Licensed Practical Nurses Welfare Fund and Sergeants Benevolent Association Health and Welfare Fund and any other responses filed with regard to the Disclosure Statement; and after notice and a hearing, it is hereby

ORDERED as follows:

1. The Court hereby FINDS that the Disclosure Statement does not provide adequate information as required by 11 U.S.C. §1125.
2. The Debtors' application to approve the Disclosure Statement is DENIED.

<table>
<tr><td colspan="2">UNITED STATES BANKRUPTCY FOR THE DISTRICT OF DELAWARE</td></tr>
<tr><td colspan="2">Caption in Compliance with D.Del. LBR 9004-1
Leslie Spoltore, Esquire
Edmond M. George, Esquire (pro hac pending)
Michael D. Vagnoni, Esquire (pro hac pending)
Turner N. Falk, Esquire (pro hac pending)
Obermayer Rebmann Maxwell & Hippel LLP
123 S. Justison Street, Suite 100
Wilmington, DE 19801-5364
Attorneys for 1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, and 1199SEIU Licensed Practical Nurses Welfare Fund; AFSCME District Council 47 Health and Welfare Fund; and Sergeants Benevolent Association Health and Welfare Fund</td></tr>
<tr><td>In re:

Akorn Inc., et al.

Jointly Administered Debtors.</td><td>Chapter 11

Lead Case No. 20-11177-KBO
Honorable Karen B. Owens</td></tr>
</table>

CERTIFICATION OF SERVICE

1. I, Helen Belair:

☐ represent the _________________ in this matter.

☒ am the secretary/paralegal for Edmond M. George, who represents the Creditor in this matter.

☐ am the _______________________ in this case and am representing myself.

2. On June 24, 2020, I sent a copy of the following pleadings and/or documents to the parties listed in the chart below:

- Objection to the Adequacy of the Disclosure Statement
- Proposed Order

3. I hereby certify under penalty of perjury that the above documents were sent to all parties receiving notice by CM/EFC.

Dated: June 24, 2020 /s/ *Helen C. Belair*

Signature