IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
AKORN, INC.,[1]	)	Case No. 20-11177 (KBO)
	)	(Jointly Administered)
Debtors.	)	**Re: Docket Nos. 103, 228, 233, 238, and 240**

AD HOC GROUP'S STATEMENT IN SUPPORT OF THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES WITH RESPECT TO CONFIRMATION OF THE JOINT CHAPTER 11 PLAN OF AKORN, INC. AND ITS DEBTOR AFFILIATES, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, AND (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO

The Ad Hoc Group and the DIP Lenders hereby file this statement (this "Statement") in support of the *Debtors' Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect*

[1] 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.

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Thereto [Docket No. 103] (the "Motion")[2] and in response to the Objections[3] filed in opposition to the relief requested in the Motion. In support of this Statement, and in further support of approval of the Disclosure Statement and entry of the Order (as defined in the Motion), the Ad Hoc Group and the DIP Lenders respectfully state as follows:

Preliminary Statement

1. The Disclosure Statement should be approved as it contains adequate information and permits all voting classes the ability to make an informed decision with respect to voting to accept or reject the Plan in accordance with section 1125 of the Bankruptcy Code. Importantly, the Disclosure Statement is before this Court on a largely consensual basis, which is the end-result of substantial efforts by the Debtors, the Ad Hoc Group, and the DIP Lenders, to address all legitimate concerns raised by various parties in interest. Notable among these non-objecting parties is the Committee – the fiduciary appointed to oversee the interests of unsecured creditors in these Chapter 11 Cases. Indeed, as a result of cooperative efforts by the Ad Hoc Group, the DIP Lenders, the Debtors, and the Committee, the Committee's concerns with respect to the Disclosure Statement were addressed through the inclusion of additional language, including

[2] On May 26, 2020, the Debtors filed the *Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates* [Docket No. 101] and the *Disclosure Statement for the Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates* [Docket No. 102]. Capitalized terms used but not defined herein shall have the meanings ascribed to them as set forth in the Motion, the Plan, or the Disclosure Statement, as applicable.

[3] The following objections were filed: (a) *Objection of Fresenius Kabi AG to the Debtors' Disclosure Statement Motion* [Docket No. 240] (the "Fresenius Objection" and the objector, "Fresenius"); (b) *Objection to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Docket No. 238]; (c) *Joint Objection of 1199SEIU Benefit Funds, DC47 Fund and SBA Fund to the Adequacy of Debtors' Disclosure Statement (DI #102)* [Docket No. 233]; and (d) *Opt-Out Plaintiffs' Limited Objection to Debtors' Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures With Respect to Confirmation of the Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates With Respect Thereto* [Docket No. 228] (collectively, the "Objections," and the objecting parties, collectively, the "Objectors").

language clarifying the timeline in which the Stalking Horse Bidder must make a decision with respect to assigned or excluded contracts under the Stalking Horse APA. *See* Disclosure Statement Art. VI.A.2.

2. Unfortunately, not all parties in interest were interested in pursuing a cooperative approach with respect to their Disclosure Statement concerns, electing instead to utilize the process as a vehicle to rehash prepetition grievances already adjudicated in the Delaware Chancery Court. Primary among these Objectors is Fresenius – a party well known to this Court as a result of the abundant disclosures and other statements made by the Debtors in not only the Disclosure Statement, but also the First Day Declaration. Indeed, the litigation stemming from Fresenius' decision to terminate its prepetition merger with the Debtors (and the resulting decision by the Delaware Chancery Court that the Debtors had experienced a Material Adverse Effect) is what precipitated an open and constructive dialogue between the Debtors and the Ad Hoc Group in the fall of 2018 – dialogue that eventually resulted in the Standstill Agreement and the various actions that led to these Chapter 11 Cases and the sale process contemplated herein (the "Sale").

3. While purporting to object to the adequacy of the Disclosure Statement, the Fresenius Objection also appears to be nothing more than an attempt to: (a) re-litigate the validity of its decision to terminate the merger agreement with the Debtors in April of 2018; and (b) rehash its arguments with respect to potential damages.[4] Why Fresenius is under the impression that any of this information is relevant for purposes of determining whether the Disclosure Statement contains adequate information is confusing to say the least. To the extent Fresenius has a valid claim that is otherwise "allowed," such claim will be afforded its treatment under the Plan.

[4] Indeed, Fresenius' claims with respect to damages have never been resolved, and $43,000,000 of such purported damages has already been rejected by the Delaware Chancery Court. *See* Fresenius Objection at ¶ 18, fn 6.

4. The Disclosure Statement (as modified by the Debtors at [Docket No. 259]), contains an abundance of information and gives stakeholders the ability to make an informed decision with respect to their votes. Instead of making a reasoned argument that the Disclosure Statement does not contain adequate information under Section 1125 of the Bankruptcy Code, the Objectors largely focus on arguments that the Plan is patently unconfirmable, but fall significantly short of making the showing required at this stage that confirmation of the Plan is impossible. Because the Objectors fail to meet their burden of showing that the Plan is patently unconfirmable and the Debtors have otherwise addressed any legitimate concerns with respect to the adequacy of information contained in the Disclosure Statement, there exists no basis to sustain the Objections. Accordingly, this Court should grant the relief requested in the Disclosure Statement Motion and approve the Disclosure Statement.

Argument

5. As indicated above, substantial (and successful) efforts have been made by the Debtors to address all legitimate concerns with respect to the adequacy of information contained in the Disclosure Statement, and the Ad Hoc Group and DIP Lenders believe that the Debtors have met their burden in this respect. The remaining issues to be considered by this Court, therefore, as raised in the Objections, relate to the likelihood that the Plan can be confirmed, and are accordingly, not appropriate at the Disclosure Statement hearing stage of these Chapter 11 Cases.

6. As detailed in the *Debtors' Omnibus Reply to Objections to the Debtors' Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Docket No. 261] (the "DS Reply"), courts approve disclosure statements that adequately describe a chapter 11 plan

unless the plan at issue is "so fatally flawed that confirmation is impossible." *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) (emphasis added); *see also In re Unichem Corp.*, 72 B.R. 95, 98 (Bankr. N.D. Ill. 1987). In the Third Circuit, in turn, "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. Capital Equip., LLC*, 688 F.3d 145, 154–55 (3d Cir. 2012) (internal quotations and citation omitted) (alteration in original).

7. The Ad Hoc Group and the DIP Lenders understand that, at confirmation, the Debtors must show that the proposed Plan complies with section 1129 of the Bankruptcy Code. The hearing on the adequacy of the Disclosure Statement, however, is not the time to litigate such disputes. The Objections appear to overlook (or ignore) this reality even though courts consistently determine that 1129-type objections do not rise to the level of showing that a plan is patently unconfirmable. *See, e.g.*, *Cardinal Congregate I*, 121 B.R. at 763–64 (overruling objections to issues including treatment of claims and feasibility). In the absence of consensus ahead of confirmation, the Objectors will have their chance to object, but the Objectors efforts to raise confirmation objections at this juncture are misguided and should be overruled.

A. The Third Party Release Is Consensual and Permissible.

8. The Objections, and in particular the Fresenius Objection, go to great lengths to outline the supposed impropriety of the Plan's third party releases (the "Releases"), arguing that the Releases are not consensual because of the "opt-out" mechanism originally proposed. *See* Fresenius Objection at ¶ 43-44. Acknowledging this Court's recent decision in *In re Emerge Energy Svcs. LP*, however, the Debtors have revised the Plan to now require parties in interest to "opt-in" to the Releases, ensuring that there is no dispute with respect to the consensual nature of

the Releases. No. 19-11563 (KBO), 2019 WL 7634308 (Bankr. D. Del. Dec. 5, 2019). This in turn, brings the Releases well within the range of permissibility in this jurisdiction and moots any of the Objectors arguments to the contrary. *See In re Indianapolis Downs*, 486 B.R. 286, 304–05 (Bankr. D. Del. 2013) (approving third-party release that applied to unimpaired holders of claims deemed to accept the plan as consensual); *In re Spansion, Inc.*, 426 B.R. 114, 144 (Bankr. D. Del. 2010) (same); *Wash. Mut.*, 442 B.R. at 352 (observing that consensual third-party releases are permissible); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (approving non-debtor releases for creditors that voted in favor of the plan).

B. The Plan's Exculpation Provisions are Appropriate.

9. As originally proposed, the Plan's exculpation provision contained non-estate fiduciaries. And, while arguments with respect to the propriety of such an inclusion are best left for confirmation, the Debtors (in consultation with the Ad Hoc Group and the DIP Lenders) have decided – informed by this Court's holding in *Hygea Holdings Corp.* – to remove such parties prior to solicitation. The Debtors have also made the additional change to limit the matters covered by the Plan's exculpation provision to acts or omissions that have occurred postpetition and prior to the effective date of the Plan. *See* Plan Arts. I.A, VIII.G. The Objections with respect to the scope of Plan's exculpation provisions, therefore, should be overruled. *See In re Hygea Holdings Corp.*, Hr'g Tr. 37:16 – 37:22, Case No. 20-10361 (KBO) (Bankr. D. Del. Jun. 12, 2020).

C. All Previously Unencumbered Collateral was Properly Pledged to the Term Loan Lenders or the DIP Lenders

10. The Fresenius Objection maintains that the Disclosure Statement does not include adequate information with respect to the Debtors' unencumbered assets that may be available for distribution to unsecured creditors. *See* Fresenius Objection at ¶ 38. The reason no such disclosure exists, however, is because any such unencumbered assets were either pledged to the Term Loan

Lenders in connection with the Standstill Agreement, *see* Standstill Agreement at Sec. 8(g), or the DIP Lenders under the Final DIP Order, *see* Final Dip Order at ¶ 7(a). To the extent any such unencumbered assets existed on the Petition Date, therefore, they are now subject to a "valid, binding, continuing, enforceable, fully-perfected, non-avoidable, automatically, and properly perfected first priority senior security interest" and "lien". *See id.* Accordingly, Fresenius' criticisms of the Disclosure Statement with regard to information about potential unencumbered assets are not supported by the facts and circumstances of these Chapter 11 Cases and do not support a determination that the Disclosure Statement lacks adequate information.

D. Fresenius's Sale-Based Objections Are Inapposite to Approval of the Disclosure Statement.

11. Though largely in passing, the Fresenius Objection also appears to question the validity of the Stalking Horse Bidder acquiring Avoidance Actions under the Stalking Horse APA. As correctly noted in the Debtors' DS Reply, the hearing on the Disclosure Statement is certainly not the correct time to litigate the propriety of a purchaser acquiring Avoidance Actions – though the Ad Hoc Group agrees with the Debtors that such acquisitions are entirely normal and justified under the circumstances. *See* DS Reply at ¶ 33. The Stalking Horse Bidder will be the new owner of the Debtors and is justified in wanting to ensure that it is in control of any Avoidance Actions so as to mitigate any potential disruption to the Debtors' business post-acquisition. With this being said, the Debtors have included additional language in the Disclosure Statement in an effort to provide more information on the Stalking Horse Bidder's acquisition of Avoidance Actions. *See* Disclosure Statement Art. V.F.2. To the extent Fresenius wishes to object to the acquisition of Avoidance Actions, it can properly raise such objections in connection with the Court's approval of the Sale.

Conclusion

12. For the foregoing reasons, the Ad Hoc Group and DIP Lenders respectfully request that the Court overrule any pending Objections to the adequacy of the Disclosure Statement and grant the relief requested in the Disclosure Statement Order.

Dated: June 30, 2020
Wilmington, Delaware

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