IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
AKORN, INC., *et al.*,[1]	Case No. 20-11177 (KBO)
Debtors.	(Jointly Administered)
	Hearing Date: September 1, 2020 at 10:00 a.m. (ET) **Objection Deadline: August 25, 2020 at 12:00 p.m. (ET)**
	Re: Docket Nos. 258, 318

OPT-OUT PLAINTIFFS' LIMITED OBJECTION TO JOINT CHAPTER 11 PLAN OF AKORN, INC. AND ITS DEBTOR AFFILIATES

AQR Funds – AQR Multi-Strategy Alternative Fund, AQR Absolute Return Master Account L.P., AQR DELTA Sapphire Fund, L.P., AQR DELTA XN Master Account, L.P., AQR Funds – AQR Diversified Arbitrage Fund, CNH Master Account, L.P., LUMYNA – AQR Global Relative Value UCITS Fund, AQR DELTA Master Account, L.P., AQR Global Alternative Premia Master Account, L.P., Magnetar Constellation Fund II-PRA LP, Magnetar Systematic Multi-Strategy Master Fund Ltd, Magnetar PRA Master Fund Ltd, Magnetar MSW Master Fund Ltd, MProved Systematic Merger Arbitrage Fund, MProved Systematic Multi-Strategy Fund, AMX Master – Magnetar – Passive Risk Arbitrage, Blackstone Alternative Multi-Strategy Sub Fund IV LLC, Blackstone Diversified Multi-Strategy Fund, Manikay Master Fund, LP, Manikay Merger Fund, LP, Twin Master Fund, Ltd., Twin Opportunities Fund, LP, and Twin Securities,

[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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Inc. (collectively, the "Opt-Out Plaintiffs"), by and through their undersigned counsel, hereby submit this limited objection (the "Objection") to the *Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates* [Docket No. 258] (the "Plan").[2] In support of this Objection, the Opt-Out Plaintiffs respectfully state as follows:

PRELIMINARY STATEMENT[3]

1. The Debtors' Plan, as drafted, is unconfirmable because the Debtors seek to breach their obligations to indemnify the Ds&Os for post-petition fees and expenses they have incurred as a result of lawsuits they face by reason of acts taken in their capacities as directors, officers, employees or agents of Akorn. Specifically, the Ds&Os are defendants in the Opt-Out Complaints by reason of their role as officers and directors of Akorn. After the Debtors filed these Chapter 11 Cases, they continued to retain the Ds&Os as officers and directors to run the Debtors' business and to preserve the value of their estates for the benefit of their creditors. As officers and directors of the Debtors post-petition, the Ds&Os remain entitled to the benefits of employment, including the Debtors' indemnification obligations. The Debtors' obligation to indemnify the Ds&Os stems from multiple sources, including the Debtors' bylaws, articles of incorporation, and/or employment agreements. Akorn's bylaws, specifically, do not condition the Debtors' indemnification obligations on when the alleged conduct took place and whether the conduct was pre-petition or post-petition. Yet, the Plan contains only vague provisions that touch upon these obligations and apparently does not honor them. As such, the Plan fails the "good faith" test and is not "fair and equitable" under the Bankruptcy Code.

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan.

[3] Capitalized terms used but not defined in this Preliminary Statement or the Plan are defined subsequently in this Objection.

2. Additionally, the Ds&Os' indemnification claims that arise post-petition should be treated as administrative expenses under section 503(b) of the Bankruptcy Code. These claims arose as a direct result of the continued retention of the Ds&Os to run the Debtors' business post-petition and to preserve the value of their enterprise. However, the Plan contains several conflicting provisions which fail to address the Debtors' indemnification obligations, or provide with necessary certainty that the Ds&Os indemnification claims are being assumed or entitled to administrative expense priority. Under the Plan, the Debtors seem to abdicate their responsibilities and fail to provide the Ds&Os (and thus the Opt-Out Plaintiffs) with any recourse whatsoever for fees and expenses they have accrued post-petition.

3. Also, the Confirmation Order should make clear that the Opt-Out Plaintiffs, and the claims asserted by them in the Opt-Out Complaints, are not subject to any limitations set forth in the Plan or any other documents ancillary thereto. Because the Opt-Out Plaintiffs are not "Releasing Parties" under the Plan, such clarification is appropriate.[4]

4. Based on the foregoing, and for the additional reasons set forth below, the approval of the Plan should be denied unless the issues raised herein are appropriately addressed and remedied.

RELEVANT BACKGROUND

A. The Securities Litigation and Shareholder Settlement

5. On or about March 8, 2018, a securities class action was commenced against Akorn, Inc. ("Akorn") and certain then current officers of Akorn in the United States District Court for the Northern District of Illinois (the "Illinois District Court") alleging violations of sections 10(b)

[4] The Opt-Out Plaintiffs have requested inclusion of protective language in the Confirmation Order on August 6 and again August 10, 2020. By not responding, the Debtors ignored those requests necessitating, in part, this Objection.

and 20(a) of the Securities Exchange Act of 1934 resulting from alleged false statements and omissions concerning Akorn's data integrity compliance.

6. On May 31, 2018, the Illinois District Court issued an order in the class action appointing lead plaintiffs (the "Lead Plaintiffs"), approving their selection of lead counsel and liaison counsel, and amending the case caption to *In re Akorn, Inc. Data Integrity Securities Litigation*, Civ. A. No. 1:18-cv-01713 (the "Shareholder Litigation"). Several later-filed securities lawsuits were consolidated into the Shareholder Litigation. *Id.*

7. The Opt-Out Plaintiffs filed their own independent complaints (the "Opt-Out Complaints")[5] asserting various securities and state common law fraud claims and causes of action (the "Opt-Out Plaintiffs' Claims") against Akorn and certain of its former directors and officers ("Ds&Os" and, collectively, the "Defendants") in the Illinois District Court. On February 5, 2020, the District Court denied motions by the Defendants to dismiss the Opt-Out Complaints.

8. Following mediation in 2019, Akorn and the Lead Plaintiffs agreed to settle the Shareholder Litigation and executed a definitive Stipulation and Agreement of Settlement dated as of August 9, 2019 (the "Shareholder Settlement"), which was granted final approval by the Illinois District Court pursuant to that certain *Order and Final Judgment Approving Class Action Settlement* [Shareholder Litigation Document No. 190] entered on March 13, 2020. Plan, Article I.A.120. The Opt-Out Plaintiffs timely excluded themselves and are not parties to the Shareholder Settlement.

[5] The Opt-Out Complaints are: Twin Master Fund, Ltd., *et al.* v. Akorn, Inc., *et al.*, C.A. No. 19-cv-3648 (N.D. Ill.), Manikay Master Fund, LP, *et al.* v. Akorn, Inc., *et al.*, C.A. No. 19-cv-4651 (N.D. Ill.), Magnetar Constellation Fund II-PRA LP, *et al.* v. Akorn, Inc., *et al.*, C.A. No. 19-cv-8418 (N.D. Ill.), and AQR Funds – AQR Multi-Strategy Alternative Fund, *et al.* v. Akorn, Inc., *et al.*, C.A. No. 20-cv-0434 (N.D. Ill.).

9. Under Akorn's certificate of incorporation and bylaws, Akorn has an unflagging obligation to indemnify the Ds&Os for their defense costs and, ultimately, their liability for acts taken in the course of their employment.

10. Article V, Section 1, of Akorn's Bylaws provides:

> The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any action, suit or proceeding, whether civil, criminal, administrative or investigative (including any action by or in right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another business, foreign or non-profit corporation, partnership, joint venture or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the corporation, and, with respect to any criminal action or proceeding, has no reasonable cause to believe his conduct was unlawful; provided that, in case of actions by or in the right of the corporation, the indemnity shall be limited to expenses (including attorneys' fees and amounts paid in settlement not exceeding, in the judgment of the board of directors, the estimated expense of litigating the action to conclusion) actually and reasonably incurred in connection with the defense or settlement of such action, and no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court shall determine upon application that, despite the adjudication of liability, but in view of all the circumstances of the case, he is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, and reasonable cause to believe that his conduct was unlawful (emphasis added).[6]

[6] Available at http://investors.akorn.com/static-files/e0d775fa-3226-4515-87fd-74a9f79fd273.

B. The Plan and Proposed Treatment

11. On May 20, 2020 (the "Petition Date"), each of the Debtors filed a voluntary petition with this Court under chapter 11 of the Bankruptcy Code, commencing these Chapter 11 Cases.

12. Upon commencement of these Chapter 11 Cases, the Debtors continued to retain the Ds&Os to operate their business and guide the Debtors through their bankruptcy proceedings as debtors-in-possession. Indeed, the Debtors' first-day motions were supported by affidavits from certain of the Ds&Os. Post-petition, the Ds&Os remained entitled to indemnification under Akorn's bylaws for expenses they incurred by virtue of their roles as Ds&Os.

13. On May 26, 2020, the Debtors filed their proposed *Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates* [Docket No. 101]. On June 30, 2020, the Debtors filed their revised proposed *Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates* [Docket No. 258] (the "Plan").

14. Article IV.H. of the Plan enables, but does not require, the Plan Administrator to honor the Debtors' indemnity obligations. It provides:

> The Plan Administrator and all professionals retained by the Plan Administrator, each in their capacities as such, shall be deemed exculpated and indemnified, except for actual fraud, willful misconduct, or gross negligence, in all respects by the Debtors. *The Plan Administrator may obtain, at the expense of the Debtors, commercially reasonable liability or other appropriate insurance with respect to the indemnification obligations of the Debtors. The Plan Administrator may rely upon written information previously generated by the Debtors.* (*emphasis* added).

15. Article V.A. of the Plan provides for the assumption and rejection of executory contracts, as follows:

> Except as otherwise provided herein or provided in the Sale Transaction Documentation, each Executory Contract and Unexpired Lease (other than any Executory Contract or Unexpired Lease previously rejected,

> assumed, or assumed and assigned), any employee benefit plans, severance plans, and other Executory Contracts under which employee obligations arise, shall be deemed automatically rejected on the Effective Date pursuant to sections 365 and 1123 of the Bankruptcy Code . . ..

16. Article V.A. of the Plan does not specify whether the Ds&Os' employment agreements with the Debtors are executory under section 365 of the Bankruptcy Code and, if so, whether they will be assumed or rejected.

17. Article V.D. of the Plan provides for the Debtors' assumption of the D&O Policies and indemnification obligations thereunder:

> The D&O Policies shall be assumed by the Debtors on behalf of the applicable Debtor effective as of the Effective Date, pursuant to sections 365 and 1123 of the Bankruptcy Code, and nothing shall alter, modify, or amend, affect, or impair the terms and conditions of (or the coverage provided by) any of the D&O Policies *including the coverage for defense and indemnity under any of the D&O Policies which shall remain available* to all individuals within the definition of "Insured" in any of the D&O Policies (emphasis added).

18. Article VII.E. of the Plan provides for the expungement of indemnification claims of Ds&Os to the extent that such claims are assumed under the Plan. In pertinent part, it provides:

> All proofs of claim filed on account of an indemnification obligation to a director, officer, or employee shall automatically be deemed satisfied and expunged from the claims register as of the effective date *to the extent such indemnification obligation is assumed (or honored or reaffirmed, as the case may be) pursuant to the Plan*, without any further notice to or action, order, or approval of the Bankruptcy Court (emphasis added).

OBJECTION

I. The Plan Fails to Clearly Provide for the Satisfaction of Indemnification Claims that Arise Post-Petition

19. The Plan is unclear with respect to the treatment and payment of post-petition indemnification claims, including Ds&Os' indemnification claims related to the Opt-Out Plaintiffs' Claims and the Opt-Out Complaints. The Plan Administrator may obtain, at the expense

of the Debtors, D&O insurance with respect to the indemnification obligations of the Debtors. Plan, Article IV.H. Further, indemnity obligations under the Debtors' D&O Policies "shall remain available" (see Plan, Article V.D.), and all proofs of claim filed on account of an indemnification obligation shall be deemed satisfied and expunged "to the extent such indemnification obligation is assumed." *See* Plan, Article VII.E. And, while Article V.A. of the Plan provides for the assumption and rejection of executory contracts, the Plan is silent with respect to whether Ds&Os' employment agreements with the Debtors are executory, and how they are being treated under the Plan.

20. Because the Plan provisions permit payment of post-petition indemnification obligations and Akorn's bylaws require indemnification for all officers and directors, the Plan should not be confirmed unless it is revised to clearly provide payment for post-petition indemnification claims of the Ds&Os, whether or not D&O insurance coverage exists. Indeed, courts have held that post-petition officer and director indemnification claims may be granted administrative expense status. *See, e.g., In re Sahlen & Associates, Inc.*, 113 B.R. 152, 153 (Bankr. S.D.N.Y. 1989) (finding that the indemnification claims of a debtor's directors or officers may be permitted to receive administrative expense treatment, even though the claims relate to pre-petition actions, if the directors or officers can demonstrate that their services benefited the estate*); see also In re Keene Corp.*, 208 B.R. 112, 116 (Bankr. S.D.N.Y. 1997) ("Corporate fiduciaries generally rely on the expectation of indemnification, and may recover their legal fees and expenses on an administrative basis, at least to the extent they arise from defending postpetition conduct as an officer or director."); *In re Heck's Properties, Inc.*, 151 B.R. 739, 766-768 (S.D. W. Va. 1992) (directors and officers entitled to indemnification and administrative cost priority because claim against directors and officers related to their post-petition conduct).

II. The Plan Fails to Satisfy the Requirements of Section 1129

21. The Bankruptcy Code provides that "[t]he court shall confirm a plan only if it complies with all of the applicable provisions" of section 1129(a). 11 U.S.C. § 1129(a)(1). The Debtors bear the burden of proof with respect to the confirmation requirements by preponderance of the evidence. *In re Armstrong World Industries, Inc.*, 348 B.R. 111, 120 (D. Del. 2006); *In re Global Ocean Carriers Ltd*., 251 B.R. 31, 46 (Bankr. D. Del. 2000).

22. Bankruptcy Code Section 1129(a)(3) provides that a plan must be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Although the Bankruptcy Code does not define "good faith", *see, e.g., In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 609 (Bankr. D. Del. 2001), courts in this Circuit have opined that the "good faith" standard requires that the plan be "proposed with honesty, good intentions and a basis for expecting that a reorganization can be effected with results consistent with the objectives and purposes of the Bankruptcy Code." *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001); *see also Stonington Partners, Inc. v. Official Comm. of Unsecured Creditors (In re Lernout & Hauspie Speech Prods, N.V.),* 308 B.R. 672, 675 (D. Del. 2004); *In re WR Grace & Co.*, 729 F.3d 332, 346 (3d Cir. 2013). Good faith also requires a showing that the plan "reflects fundamental fairness in dealing with creditors." *See In re Genesis Health Ventures, Inc.*, 266 B.R. at 609. "The determination of good faith must be based on the totality of the circumstances." *Id.*

23. To the extent the Plan does not provide for the payment of post-petition indemnity obligations set forth in the Debtors' bylaws, certificate of incorporation and employment agreements, the Plan was not proposed in good faith. Reliance on potential D&O insurance coverage is not enough.

24. A debtor-corporation must indemnify its officers and directors to the full extent provided by the debtor's bylaws. *In re Sahlen & Associates, Inc.*, 113 B.R. 152

(Bankr.S.D.N.Y.1989); *In re Bicoastal Corp.,* 131 B.R. 499 (Bankr. M.D. Fla.1991); *Fleischer v. Federal Deposit Ins. Corp.,* 70 F.Supp.2d 1238 (D. Kan. 1999). Plans providing for assumption and director and officer indemnification obligations are routinely confirmed in this District. *See* e.g., *In re USEC Inc.,* Case No. 14-10475 (Bankr. D. Del. Sep. 5, 2014) (Sontchi, C.J.)[7]; *In re Quicksilver Resources, Inc., et al.,* Case No. 15-10585 (Bankr. D. Del. Aug. 6, 2016) (Silverstein, J.)[8]; *In re PES Holdings, LLC, et al.,* Case No. 18-10122 (Bankr. D. Del. Apr. 2, 2018) (Gross, J.).[9]

25. By breaching their contractual obligations and eliminating the Ds&Os' (and thus limiting the Opt-Out Plaintiffs' potential of collection) relied upon rights and benefits, the Debtors' Plan fails to satisfy the good faith requirements of section 1129(a)(3).

26. The Plan is also not fair and equitable if the Debtors do not honor their post-petition indemnification obligations to the Ds&Os by assuming those obligations. If not paid, the Debtors

[7] **Article 1.1 (pp) - "Indemnification Obligation"** means any obligation of the Debtor to indemnify, reimburse, or provide contribution pursuant to by-laws, articles or certificates of incorporation, contracts, or otherwise, to the fullest extent permitted by applicable law. *See also A***rticle 6.5 (a)** - Indemnification Obligations owed to those of the Debtor's directors, officers, and employees serving prior to, on, and after the Petition Date shall be deemed to be, and shall be treated as though they are, contracts that are assumed pursuant to Bankruptcy Code Section 365 under the Plan, and such Indemnification Obligations (subject to any defenses thereto) shall survive the Effective Date of the Plan and remain unaffected by the Plan, irrespective of whether obligations are owed in connection with a prepetition or postpetition occurrence.

[8] **Article 5.11 – Indemnification Obligations**. The Debtors shall assume and assign to the Liquidation Trust their indemnification obligations to current and former directors and officers of the Company, which shall in no way affect the rights and obligations of the insureds under the "tail" directors and officers insurance coverage purchased pre-petition.

[9] **Article V (D) – Indemnification.** On and as of the Effective Date, the Indemnification Provisions will be assumed, irrevocable with respect to any claims relating to acts or omissions occurring at or prior to the Effective Date, and will survive the effectiveness of the Plan, and the New Organizational Documents will provide for the indemnification, defense, reimbursement, exculpation, and/or limitation of liability of, and advancement of fees and expenses to the Debtors' and the Reorganized Debtors' directors, officers, employees, or agents that were employed by, or serving on the board of directors (or similar governing body) of, any of the Debtors as of the Petition Date, to the fullest extent permitted by law and at least to the same extent as the organizational documents of each of the respective Debtors on the Petition Date, against any Claims or Causes of Action whether direct or derivative, liquidated or unliquidated, fixed or contingent, disputed or undisputed, matured or unmatured, known or unknown, foreseen or unforeseen, asserted or unasserted, and, notwithstanding anything in the Plan to the contrary none of the Reorganized Debtors will amend and/or restate the New Organizational Documents before or after the Effective Date to terminate or adversely affect any of the Reorganized Debtors' obligations to provide such indemnification rights or such directors', officers', employees', or agents' indemnification rights with respect to any claims relating to acts or omissions occurring at or prior to the Effective Date.

would potentially expose the Ds&Os to claims that have been covered by the Debtors' bylaws, article of incorporation and employment agreements, and limit the Opt-Out Plaintiffs' potential source of recovery.

III. The Confirmation Order Must Clarify that Opt-Out Plaintiffs' Claims are not Released or Otherwise Impacted by the Plan and Related Documents

27. The Opt-Out Plaintiffs did not vote on the Plan and did not "opt in" into the releases provided in the Plan. Pursuant to the Plan, a non-voting party that does not opt-in to the releases does not and is not deemed to grant a release. *See* Plan's definition of "Releasing Parties", section 103. As such, the Opt-Out Plaintiffs' Claims should be preserved in all respects. To avoid any ambiguity however, in light of the multitude of documents related to the Plan, and out of an abundance of caution, the Confirmation Order should include the following language:

> Notwithstanding anything to the contrary in the Plan or this Confirmation Order, or any ancillary document related thereto, nothing herein or therein does, shall, or may be construed to release, enjoin, or otherwise adversely impact the claims and causes of action asserted against any non-Debtor defendant now or hereafter named in the securities class action litigations captioned as (i) AQR Funds – AQR Multi-Strategy Alternative Fund, *et al.* v. Akorn, Inc., *et al.*, Civ. A. No. 1:20-cv-00434 (N.D. Ill.), (ii) Magnetar Constellation Fund II-PRA LP, *et al.* v. Akorn, Inc., *et al.*, Civ. A. No. 1:19-cv-08418 (N.D. Ill.), (iii) Manikay Master Fund, LP, *et al.* v. Akorn, Inc., *et al.*, Civ. A. No. 1:19-cv-04651 (N.D. Ill.), and (iv) Twin Master Fund, Ltd., *et al.* v. Akorn, Inc., *et al.*, Civ. A. No. 1:19-cv-03648 (N.D. Ill.), it being understood that any such claims are fully preserved. For the avoidance of doubt, such claims are expressly preserved and any recovery on account thereof may be secured from proceeds of available insurance, if any.

RESERVATION OF RIGHTS

28. The Opt-Out Plaintiffs reserve all rights, claims, defenses, and remedies, including, without limitation, to supplement and amend this Objection, to raise further and other objections, to introduce evidence at any hearing regarding the Plan in the event this Objection is not resolved

prior to such hearing, and to seek to introduce documents or other relevant information in support of the positions set forth in this Objection.

Dated: August 25, 2020
Wilmington, Delaware

Respectfully Submitted,

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