Docket #0582 Date Filed: 08/27/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
AKORN, INC., *et al.*,	:	Case No. 20-11177(KBO)
Debtors.	:	**Hearing Date: September 1, 2020, at 10:00 a.m.** **Confirmation Objection:** **Extended to August 27, 2020, at 12:00 p.m.**

OBJECTION BY THE UNITED STATES TO THE
JOINT CHAPTER 11 PLAN OF AKORN, INC. AND ITS DEBTOR AFFILIATES

The United States, on behalf of the Department of Veterans Affairs ("VA"), the Internal Revenue Service ("IRS"), and the Department of Health and Human Services ("HHS"), by and through the undersigned attorneys, files this objection to the Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates [Docket No. 101], as modified [Docket No. 547] ("Plan"). In support of its objection, the United States avers as follows:

BACKGROUND

1. On May 20, 2020, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. [Docket No. 1].

2. On May 26, 2020, the Debtor filed the original Plan, as modified on August 25, 2020.

3. The Debtors are contemporaneously pursuing a sale process. On May 21, 2020, the Debtors filed a motion for sale of property free and clear of liens ("Sale Motion"). [Docket No. 18]. The United States filed an objection to the sale.

4. The United States is a creditor and a party in interest in this matter. VA records indicate the Debtors owe the VA at least $265,209.00. The United States, on behalf of the IRS, filed four

estimated proofs of claim in these cases in a total priority, pre-petition amount of $21,500.00. The Debtor, Akorn, Inc., has not yet filed its 2019 corporate income tax and has obtained an extension to October 15, 2020 to file the return.

5. The Bankruptcy Court established November 16, 2020, as the deadline for Governmental Units to file proofs of claim ("Government Bar Date"). [Docket No. 214].

OBJECTION

6. **The Plan unilaterally eradicates the Debtors' obligations to pay claims.**

The Plan provides that following the assumption by the Purchaser of obligations assumed pursuant to the Sale Motion, any obligations that were assumed by the Purchaser shall cease to be Claims against the Debtors following such assumption. [Plan, Articles II(A), II(C), II(B)(4), IV(C), and IV(D)(2)]. For example, the Plan states that Allowed Priority Tax Claims that have been expressly assumed by the Purchaser under the Sale Transaction Documentation shall not be an obligation of the Debtors. [Plan, Article II(C)]. A corporation cannot divest itself of liability for taxes by a contract to which the United States is not a party, providing for payment of those taxes by another. Humbert v. Commissioner, 24 B.T.A. 828, 829 (1931). Presumably, these liquidating Debtors, who are not entitled to a discharge under the Bankruptcy Code, are relying on the onerous settlement provisions in the Plan to obtain "consent" to this waiver of liability from creditors. The United States does not consent, and objects to, this attempt by the Debtors to relieve themselves of any liability or obligations that the Debtors may have with respect to the obligations assumed by the Purchaser.

7. **The Plan does not comply with 11 U.S.C. § 1129(a)(9)(C).**

The Plan does not comply with Section 1129(a)(9)(C) of the Bankruptcy Code. It provides:

> Except to the extent that a Holder of an Allowed Priority Tax Claim, and, as applicable, the Debtors or the Plan Administrator, agree to a less

> favorable treatment, in full satisfaction, settlement, discharge, and release of, and in exchange for, each Allowed Priority Tax Claim pursuant to section 1129(a)(9)(C) of the Bankruptcy Code, each Holder of such Allowed Priority Tax Claim shall receive, at the option of the Debtors or the Plan Administrator, as applicable, in consultation with the Required Consenting Term Loan Lenders, either (i) the full unpaid amount of such Allowed Priority Tax Claim in Cash on the later of the Effective Date and the date on which such Priority Tax Claim becomes an Allowed Claim (or, if not then due, when such Allowed Priority Tax Claim is due or as soon as reasonably practicable thereafter), or (ii) equal annual installment payments in Cash, of a total value equal to the Allowed amount of such Priority Tax Claim, over a period ending not later than five (5) years after the Petition Date; provided that any Allowed Priority Tax Claim that has been expressly assumed by the Purchaser under the Sale Transaction Documentation shall not be an obligation of the Debtors. In the event an Allowed Priority Tax Claim is also a Secured Tax Claim, such Claim shall, to the extent it is Allowed, be treated as an Other Secured Claim if such Clam is not otherwise paid in full. On the Effective Date, any Liens securing any Allowed Priority Tax Claims shall be deemed released, terminated, and extinguished, in each case without further notice to or order of the Bankruptcy Court, act, or action under applicable law, regulation, order or rule, or the vote, consent authorization, or approval of any Person. [Plan, Article II(C)].

The Bankruptcy Code provides that priority tax claims of a kind specified in 11 U.S.C § 507(a)(8) are entitled to receive on account of such claim…cash of a total value as of the Effective date of the plan, equal to the allowed amount of such claim.. [11 U.S.C. § 1129(a)(9)(C)]. The United States objects to the Plan to the extent its Priority Tax Claims are: (1) treated as settled in exchange for a distribution under the Plan; (2) being paid only in consultation with the Required Consenting Term Loan Lenders; (3) not accruing interest as required by the Section 511 of the Bankruptcy Code; (4) not being paid on the Effective Date; and (5) any liens securing such claims are being released and extinguished.

8. **The Plan does not comply with 11 U.S.C. § 511**.

The Bankruptcy Code provides specific guidance about the payment of interest, including the rate and method of interest that accrues on pre-petition and post-petition tax claims. [11 U.S.C.

§ 511]. The Plan fails to provide for the payment of interest on either the pre-petition or the post-petition tax claims of the United States. Moreover, the Plan states, in relevant part, that no interest shall accrue or be paid on the unpaid amount of any distribution paid pursuant to the Plan. [Plan, Article VI(C)(4)(c)].

These Plan provisions impair the rights of creditors who do not receive the interest that they would otherwise be entitled to in accordance with the Bankruptcy Code. The United States objects to the Plan to the extent that it fails to provide for the payment of an adequate rate of interest on the claims of the United States. [Plan, Article II], See 11 U.S.C. Section 503(b)(1)(C) and Section 511; United States v. Friendship College, Inc., 737 F.2d 430 (4th Cir. 1984); In re Mark Anthony Construction, Inc., 886 F.2d 1101 (9th Cir. 1989).

9. **The Plan does not comply with 11 U.S.C. § 503(b)(1)(D) and Rule 3002-1(a) of the Delaware Local Bankruptcy Rules.**

The creation of the Administrative Claim Bar Date in the Plan does not comply with the Bankruptcy Code and the Local Rules. The United States objects to the Plan to the extent the Plan purports to set an administrative claims bar date for taxes described in 11 U.S.C. Section 503(b)(1)(B) and (C) in violation of Section 503(b)(1)(D) of the Bankruptcy Code. [Plan, Article I(A)(4)]. This provision violates not only Section 503(b)(1)(D) of the Bankruptcy Code but Delaware Local Bankruptcy Rule 3002-1(a). Delaware Local Rule 3002-1(a) provides in pertinent part:

> Chapter 11 Administrative Claims. Notwithstanding any provision of a plan of reorganization, any motion, notice, or court order in a specific case, the government shall not be required to file any proof of claim or application for allowance for any claims covered by Section 503 (b) (1) (B), (C), or (D).

10. **The Plan does not comply with 11 U.S.C. § 502(c).**

The Plan subjects ***all Claims*** to an estimation process that is much broader in scope than is contemplated in Sections 502(c) and (j) of the Bankruptcy Code. (emphasis added). Section 502(c) of the Bankruptcy Code provides:

> (c) There shall be estimated for purpose of allowance under this section –
>
> (1) Any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
>
> (2) Any right to payment arising from a right to an equitable remedy for breach of performance.

Section 502(j) of the Bankruptcy Code provides:

> (j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer to such creditor.

The Plan completely eliminates the concept of estimating "contingent and unliquidated" claims the fixing or liquidation of which would "unduly delay the administration of the case." Instead, the Plan provides that the Debtors or the Plan Administrator, as applicable, may:

> …at any time, request that the Bankruptcy Court estimate any Claim or Interest pursuant to applicable law, including pursuant to section 502(c) of the Bankruptcy Code and/or Bankruptcy Rule 3012, for any reason,….Notwithstanding section 502(j) of the Bankruptcy Code, in no event shall any Holder of a Claim or Interest that has been estimated pursuant to section 502(c) of the Bankruptcy Code or otherwise be entitled to seek reconsideration of such estimation unless such Holder has Filed a motion requesting the right to seek such reconsideration on or before seven (7) days after the date on which such Claim or Interest is estimated…. [Plan, Article VII(C)].

Creditors are entitled to have a claim that has been allowed or disallowed to be reconsidered for cause. This claim may be allowed or disallowed according to the equities of the case. The United States objects to the Plan because it deprives creditors of their rights under the Bankruptcy Code.

11. **Settlement not appropriate**.

The United States objects to the provision in the Plan which provides:

> **Settlement, Compromise, and Release of Claims, and Interests.** Pursuant to section 1123 of the Bankruptcy Code and in consideration for the distributions and other benefits provided pursuant to the Plan, the provisions of the Plan shall constitute a good-faith compromise and settlement of all Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that a Holder of a Claim or Interest may have with respect to any Allowed Claim or Interest, or any distribution to be made on account of such Allowed Claim or Interest. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all such Claims, Interests, and controversies, as well as a finding by the Bankruptcy Court that such compromise or settlement is in the best interests of the Debtors, their Estates, and Holders of Claims and Interests and is fair, equitable, and reasonable. In accordance with the provisions of the Plan, pursuant to Bankruptcy Rule 9019, without any further notice to or action, order, or approval of the Bankruptcy Court, after the Effective Date, the Plan Administrator may compromise and settle Claims against, and Interests in, the Debtors and their Estates and Causes of Action against other Entities. [Plan, ArticleVIII(A)].

Section 1123(b)(3)(A) of the Bankruptcy Code provides for the settlement or adjustment of any claim belonging to the Debtors or to the estates. The Debtors here are not settling their own claims but instead are attempting to settle the unknown claims of unknown creditors without providing adequate notice. The Debtors have not yet filed certain federal tax returns but will be required to file these returns. Since the United States had to file protective estimated claims in these cases as a result of those missing returns, under the settlement provisions of the Plan, the Debtors could conceivably argue that the United States has settled its claims for the estimated

amounts reflected in the claims. This would result in substantial injustice to the interests of the United States. By virtue of the Plan process, the United States does not waive sovereign immunity and has not consented to the compromise or settlement of its claims and this provision is unfairly prejudicial to the rights of the United States.

12. **Non-Debtor Releases**.

The United States opts out of and objects to the third party non-debtor limitation of liability, discharge, injunction, exculpation and release provisions set forth in Article VIII and elsewhere in the Plan. Although this is a liquidating Plan and the Debtors are not entitled to a discharge, the Plan currently provides for broad third party injunctions, exculpations and releases. [11 U.S.C. § 1141(d)(3)]. While the Third Circuit stopped short of adopting a per se rule that a non-debtor release in a reorganization plan is not permissible (as other circuits have done), it held that, at most, such a provision could only be valid in "extraordinary" cases. Gillman v. Continental Airlines (In re Continental Airlines), 203 F.3d 203, 212 (3d Cir. 2000). At minimum, Continental held that such a nonconsensual release of non-debtor entities must contain all of the following "hallmarks": "fairness, necessity to the reorganization, and specific factual findings to support these conclusions." Id. at 214; see also In re Wash. Mut., Inc., 442 B.R. 314, 351-52 (Bankr. D. Del. 2011) (collecting cases). This Court has interpreted Continental's holding on non-debtor releases to mean that "limiting the liability of non-debtor parties is a rare thing that should not be considered absent a showing of exceptional circumstances in which several key factors are present." In re Genesis Health Ventures, Inc., 266 B.R. 591, 608 (Bankr. D. Del. 2001) (emphasis added). This Court has previously held that a non-debtor release over a creditor's objection "would not pass muster." Wash. Mut., 442 B.R. at 352 ("This Court has previously held that it does not have the power to grant a third party release of a non-debtor."). Where this Court has even contemplated

approval of a non-consensual release, it has required the following factors be present to justify the "rare" release: "(1) the non-consensual release was necessary to the success of the reorganization, (2) the releases have provided a critical financial contribution to the Debtor's plan, (3) the releases' financial contribution is necessary to make the plan feasible, and (4) the release is fair to the non-consenting creditors, i.e., whether the non-consenting creditors received reasonable compensation in exchange for the releases." In re Tribune Co., 464 B.R. 126, 177-78 (Bankr. D. Del. 2011); see also Genesis Health Ventures, 266 B.R. at 607-09. For the Court to infer consent from nonresponsive creditors and equity holders, the Debtors must make a showing under contract principles that the Court may construe silence as acceptance. In re Emerge Energy Services LP, et al., Case No. 19-11563, page 23, (Bankr.D.Del. 2019) [Docket No. 671]. Here, setting aside the question of whether the Debtors have made such a showing against all creditors generally (and it has not), the Debtors make no adequate showing of a single factor, let alone all of the Tribune/Genesis/Emerge factors, that justifies the extraordinary release of non-debtors in these liquidating cases with respect to their potential liability to the United States.

13. **Secured Claim of the United States.**

The United States objects to the Plan to the extent that it does not treat secured claims of the United States in accordance with the Bankruptcy Code. The United States further objects to the Plan to the extent it fails to provide for the retention of federal liens. [Plan, Article IV(N)].

14. **The Plan impermissibly broadens the protections of 11 U.S.C. § 525.**

The United States objects to the Plan to the extent if impermissibly broadens the scope of Section 525 of the Bankruptcy Code. [Plan, Article VIII(I)].

15. **Setoff and Recoupment**.

Pursuant to Article VIII(H) of the Plan, the United States explicitly hereby preserves and asserts any and all rights it has to setoff and recoupment. [Plan, Article VIII(H)]. The Plan provides that all Entities holding claims that have been released or are subject to exculpation pursuant to the Plan, are permanently enjoined after the Effective Date from asserting a right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interest unless such Entity has timely asserted such setoff right in a document Filed with the Bankruptcy Court explicitly preserving such setoff, and notwithstanding an indication of a Claim or Interest or otherwise that such Entity asserts, has, or intends to preserve any right of setoff pursuant to applicable Law or otherwise. [Plan, Id.]. The United States objects to the Plan to the extent it fails to preserve the setoff and recoupment rights of the United States. Confirmation of a plan does not extinguish setoff claims when they are timely asserted. In re Continental Airlines, 134 F.3d at 542 (3d Cir. 1998). Like other creditors, the United States has the common law right to setoff mutual debts. "The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." United States v. Munsey Trust Co. of Washington, D.C., 332 U.S. 234 (1947) (citing Gratiot v. United States, 40 U.S. (15 Pet) 336, 370, 10 L.Ed. 759 (1841)); see also Amoco Prod. Co. v. Fry, 118 F.3d 812, 817 (D.C. Cir. 1997). This right – "which is inherent in the federal government – is broad and 'exists independent of any statutory grant of authority to the executive branch.'" Marre v. United States, 117 F.3d 297, 302 (5th Cir. 1997) (quoting United States v. Tafoya, 803 F.2d 140 (5th Cir. 1986)). Hence, the United States can setoff mutual prepetition debts and claims as well as postpetition debts and claims. Zions First Nat'l Bank, N.A. v.

Christiansen Bros. (In re Davidson Lumber Sales, Inc.), 66 F.3d 1560, 1569 (10th Cir. 1995); Palm Beach County Bd. of Pub. Instruction (In re Alfar Dairy, Inc.), 458 F.2d 1258, 1262 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); Mohawk Indus., Inc. v. United States (In re Mohawk Indus., Inc.), 82 B.R. 174, 178-79 (Bankr. D. Mass. 1987). The Plan makes no provision for these rights. Such treatment is impermissible, because Section 553 of the Bankruptcy Code preserves the right of setoff in bankruptcy as it exists outside bankruptcy, Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18 (1995), neither expanding nor constricting it, United States v. Maxwell, 157 F.3d 1099, 1102 (7th Cir. 1998). "[T]he government of the United States suffers no special handicap under § 553 of the Bankruptcy Code," id. at 1103, that alters this principle. Moreover, because "[s]etoff occupie[s] a favored position in our history of jurisprudence," Bohack Corp. v. Borden, Inc., 599 F.2d 1160, 1164 (2d Cir. 1979), courts do not interfere with its exercise absent "the most compelling circumstances." Niagara Mohawk Power Corp. v. Utica Floor Maintenance, Inc. (In re Utica Floor Maintenance, Inc.), 41 B.R. 941, 944 (N.D.N.Y. 1984); see also New Jersey Nat'l Bank v. Gutterman (In re Applied Logic Corp.), 576 F.2d 952 (2d Cir. 1978) ("The rule allowing setoff ... is not one that courts are free to ignore when they think application would be unjust."). Compelling circumstances generally entail criminal conduct or fraud by the creditor. In re Whimsy, Inc., 221 B.R. 69 (S.D.N.Y. 1998). No such compelling circumstances are present here, and accordingly, the Plan must provide for and preserve the federal government's setoff rights. Failure to do so violates Section 1129(a)(1). ("The court shall confirm a plan only if . . . the plan complies with the applicable provisions of this title.").

16. Similarly, the Plan improperly fails to preserve recoupment rights of the United States. Recoupment is unaffected by discharge even where it is available to debtors who are not liquidating. Megafoods Stores, Inc. v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.), 60

F.3d 1031, 1035-36 (3rd Cir. 1995) (holding that recoupment survives discharge following confirmation and implementation of chapter 11 plan even if creditor did not object to plan or seek a stay pending appeal); see also Beaumont v. Dep't of Veteran Affairs (In re Beaumont), 586 F.3d 776 (10th Cir. 2009); Saif Corp. v. Harmon (In re Harmon), 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995) ("Because recoupment only reduces a debt as opposed to constituting an independent basis for a debt, it is not a claim in bankruptcy, and is therefore unaffected by the debtor's discharge."); Lunt v. Peoples Bank (In re Lunt), 500 B.R. 9, 16 (D. Kan. 2013); Mercy Hosp. of Watertown v. New York, 171 B.R. 490, 495 (N.D.N.Y. 1994); Brown v. General Motors Corp., 152 B.R. 935, 938 (W.D. Wis. 1993) (holding right of recoupment not a claim or debt to be discharged in bankruptcy). For the same reasons as stated above with respect to setoff rights, this Plan provision dispensing creditors' recoupment rights is impermissible and impairs creditors.

17. The United States further objects to the Debtors' attempts to strip the United States of its rights to assert setoff on an expedited time schedule that is entirely for the benefit of, and mandated by, the Debtors. The Plan provides that creditors must "timely assert" setoff rights "in a document filed with the Bankruptcy Court." [Plan, Article VIII(H)]. The Plan has a similar egregious provision relating to recoupment. [Plan, Article VIII(H)]. The Debtors are seeking a sale of their assets and confirmation of the Plan weeks after filing for bankruptcy. The United States is entitled to file claims in the bankruptcy cases for a period of six months after the date the Debtors filed their Bankruptcy petitions. Fed. R. Bankr. P. 3002(c)(1). The facts of this case are unlike those considered by the Third Circuit in its Continental decision. The Third Circuit surely did not intend that where the government is forced into an expedited bankruptcy process, it would lose its setoff rights months before the government is even required to file its claims. In re Continental Airlines, 134 F.3d 536, (3d. Cir. 1998).

18. **The Plan definition of Effective Date is altered by the Plan**.

The Plan provides that distributions made after the Effective Date to holders of Disputed Claims that are not Allowed Claims as of the Effective Date but which later become Allowed Claims shall be deemed to have been made on the Effective Date. (Plan, Article VI(C)(4)). The United States objects to this alteration of the definition of Effective Date as unfair and prejudicial to creditors. This bait and switch terminology allows the Debtors to avoid the payment of interest to creditors that they would otherwise be obligated to pay.

19. **Rejection Damage Claims**.

The United States objects to the treatment of rejection damages claims as outlined in the Plan. [Plan, Article V(B)]. The Plan provides that claims based on the rejection of contracts must be filed within thirty days of the date of rejection. The United States objects to the imposition of this bar date to the extent that it effectively shortens the Government Bar Date for federal creditors. The Plan requires that any objection to the rejection of a contract or lease must be filed within fourteen days of service of the notice of the Debtors' proposed rejection. The United States objects to this procedure because it does not afford the United States sufficient time to respond to the Debtor's proposed rejection of its contracts. The United States further objects to the automatic classification of all Allowed Claims arising from rejection as being General Unsecured Claims. These Plan provisions are inequitable and prejudicial to creditors.

20. **Assumption of Contracts**.

The Plan provides that entry of the Confirmation Order constitutes approval of the assumptions and assignments contemplated in the Sale Motion pursuant to sections 365 and 1123 of the Bankruptcy Code. [Plan, Article V(A)]. The Plan provides that assumption and/or assignment of any executory contract or lease pursuant to the Plan or otherwise shall result in the

full release and satisfaction of any claims or default, including change in control provisions, at any time before the date that the Debtors' assumed such contracts and leases. [Plan, Article V(C)]. Under 11 U.S.C. § 365(c)(1) the Debtor "may not assume or assign any executory contract or unexpired lease of the debtor…if applicable law excuses such a party, other than the debtor, to such a contract or lease from accepting performance from or rendering performance to any entity other than the debtor or the debtor in possession." The Third Circuit has confirmed that under the Anti-Assignment Act, debtors may not assign or assume any executory contract with the United States without first obtaining its consent. In re West Electronics, Inc., 852 F.2d 79, 83 (3d Cir. 1988). The United States does not consent, and objects to, any attempt by the Debtors to assume and/or assign any federal contract, lease, claim or interest without first obtaining government consent and complying with all non-bankruptcy law.

21. The United States objects to the automatic expungement and disallowance of any proof of claim filed with respect to an executory contract or lease that the Debtors are purporting to assume and/or assign. [Plan, Article V(C)].

22. The United States objects to the attempts by the Debtors to have the Bankruptcy Court, through the Confirmation Order, make prospective determinations. For example, the Plan prospectively concludes that post-petition changes to a pre-petition contract does not have any effect on the pre-petition nature of that agreement. [Plan, Article V(E)].

23. **No automatic expungement of claims filed or amended on or after the Effective Date**.

The United States objects to the Plan to the extent proofs of claim that are filed or amended on or after the Effective Date, without the prior authorization of the Debtors, are deemed disallowed in full and expunged without further notice or action unless otherwise permitted by a Bankruptcy Court Order. [Plan, Article VII(F)]. The Government Bar Date will not expire for

months, possibly making this automatic expungement of claims and amended claims wholly inconsistent with Section 502(a) of the Bankruptcy Code. Moreover, in light of the federal tax returns that the Debtors have not filed, the United States anticipates it will be amending its claims on or after the Effective Date. The United States should not be forced to seek authorization from the Bankruptcy Court to amend a claim that must be amended solely as a result of actions that are entirely within the control of the Debtors.

24. **Exclusive Jurisdiction.**

The United States objects to the Plan to the extent that it provides for the retention of exclusive jurisdiction. [Plan, Article XI]. See 28 U.S.C. 1334. While "the bankruptcy court plainly [may retain] jurisdiction to interpret and enforce its own prior orders," Travelers Indem. Co. v. Bailey, 129 S. Ct. 2195, 2205 (2009), it may not divest other courts of their concurrent jurisdiction to interpret bankruptcy court orders. Rather, if for example, the United States, post-confirmation, asserts liabilities in a non-bankruptcy court of competent jurisdiction, that court may hear and determine all issues raised in the action, including whether the defendant can rely on the confirmation order as an affirmative defense. Adjudication of such a defense is a proceeding over which the bankruptcy court, as a unit of the district court, has "original but not exclusive jurisdiction." 28 U.S.C. § 1334(b) (emphasis added); see also Stern v. Marshall, 131 S.Ct. 2594 (2011); In re Mystic Tank Lines Corp., 544 F.3d 524 (3d Cir. 2008) ("No provision of the Bankruptcy Code requires the Bankruptcy Court to hear all 'related to' claims . . . the only aspect of the bankruptcy proceeding over which the district courts and their bankruptcy units have exclusive jurisdiction is 'the bankruptcy petition itself.'") (citing In re Wood, 825 F.2d 90, 92 (5th Cir.1987)); In re Combustion Eng'g, Inc., 391 F.3d 190, 224-225 (3d Cir. 2004), as amended (Feb. 23, 2005) ("Section 105(a) permits a bankruptcy court to 'issue any order, process or judgment

that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code. But as the statute makes clear, § 105 does not provide an independent source of federal subject matter jurisdiction."); In re Skyline Woods Country Club, 636 F.3d 467 (8th Cir. 2011); Whitehouse v. LaRoche, 277 F.3d 568, 576 (1st Cir. 2002). The imposition of these restrictive jurisdictional provisions impairs creditors.

25. **The Plan does not comply with Section 1127 of the Bankruptcy Code**.

The Plan provides:

> **Modification and Amendments.** Subject to the Restructuring Support Agreement and the limitations contained in the Plan, the Debtors, reserve the right to modify the Plan as to material terms and seek Confirmation consistent with the Bankruptcy Code and, as appropriate, not resolicit votes on such modified Plan. Subject to the Restructuring Support Agreement and certain restrictions and requirements set forth in section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019 and those restrictions on modifications set forth in the Plan, the Debtors, expressly reserve their rights to alter, amend, or modify materially the Plan with respect to the Debtors, one or more times, after Confirmation, and, to the extent necessary, may initiate proceedings in the Bankruptcy Court to so alter, amend, or modify the Plan, or remedy any defect or omission, or reconcile any inconsistencies in the Plan, the Disclosure Statement, or the Confirmation Order, in such matters as may be necessary to carry out the purposes and intent of the Plan and the Restructuring Support Agreement. Any such modification or supplement shall be considered a modification of the Plan and shall be made in accordance with Article X. Notwithstanding anything to the contrary herein, the Debtors shall not amend or modify the Plan in a manner inconsistent with the Restructuring Support Agreement or the consent rights i(f any) set forth in the DIP Loan Documents. [Plan, Article X(A)].

Section 1127 of the Bankruptcy Code provides in pertinent part:

> (a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files modification of such plan with the court, the plan as modified becomes the plan.
>
> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial

> consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.
>
> (c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

The Plan undermines the protections for creditors provided in Section 1127 and elsewhere in the Bankruptcy Code. The Bankruptcy Code limits the time a proponent of the plan may modify a plan after confirmation to the time period between confirmation and the substantial confirmation of a plan. The Plan sets the "Substantial Consummation" of the Plan, as defined in Section 1101(2) of the Bankruptcy Code, to be deemed to occur on the Effective Date. [Plan, Article IX(D)]. Therefore, pursuant to the terms of the Plan, the Plan may only be modified between the Confirmation Date and the Effective Date. The United States objects to any attempts by the Debtors or their lenders to substantively modify the Plan after confirmation in contravention of Section 1127 and any other provision of the Bankruptcy Code.

26. **The Plan gives certain Lenders the ability to override provisions in the confirmed Plan.**

The Plan provides in pertinent part that "[n]otwithstanding anything in the Plan to the contrary, any and all consent rights of (x) the Required Consenting Term Loan Lenders and the DIP Lenders set forth in the Restructuring Support Agreement, (y) the DIP Agent and the DIP Lenders set forth in the DIP Loan Documents (if any), and (z) the Debtors with respect to the form and substance of the Plan and the Plan Supplement are fully enforceable as if stated in full herein until such time as the Restructuring Support Agreement is terminated in accordance with its terms. In case of a conflict between the consent rights of the Required Consenting Term Loan Lenders, the DIP Agent, the DIP Lenders, or the Debtors that are set forth in the Restructuring Support

Agreement or the DIP Loan Documents (if any) with those parties' consent rights that are set forth in the Plan or the Plan Supplement, the consent rights in the Restructuring Support Agreement or the DIP Loan Documents (if any)(as applicable) shall control**."** The United States objects to the imposition of any consent rights that govern the substance of the Plan unless and until such rights are disclosed and fully stated in the Plan. [Plan, XII(M)].

27. **The immediate binding effect provisions in the Plan are inconsistent with the Federal Rules of Bankruptcy Procedure.**

The Plan provides in pertinent part that "[n]otwithstanding Bankruptcy Rules 3020(e), 6004(h), 7062, or any other Bankruptcy Rule, upon the occurrence of the Effective Date, the terms of this Plan and the Plan Supplement shall be immediately effective and enforceable and deemed binding upon the Debtors, all Holders of Claims or Interests (irrespective of whether such Claims or Interests are deemed to have accepted this Plan), all Entities that are parties to or are subject to the settlements, compromises, releases, discharges and injunctions described in this Plan, each Entity acquiring property under this Plan, and any and all non-Debtor parties to Executory Contracts and Unexpired Leases with the Debtors." [Plan, Article XII(A)]. The United States does not consent to the truncation of its statutory protections. This provision negatively affects the United States' appeal rights. If the Debtors consummate the Plan immediately after confirmation, the Debtors are effectively requesting that the Court shorten the time for appeal afforded by the federal bankruptcy rules. Pursuant to Rules 6004(h), 7062 and 3020(e) of the Federal Rules of Bankruptcy Procedure, unless otherwise ordered by the Court, an automatic fourteen-day stay is imposed from the date of entry of the order. Under the Debtors' proposed scheme, if the United States is unable immediately to obtain a hearing before the appropriate Court to seek a stay, its appeal may be contended to be moot. Particularly in light of the appellant being

a government agency, with a chain of command to be consulted, this unilateral ability of the Debtors to shorten the stay period would be unfair and prejudicial to the government.

CONCLUSION

28. **The Plan does not comply with Section 1129(a)(1) of the Bankruptcy Code.**

For the reasons stated above, the Plan does not comply with the applicable provisions of Title 11 and therefore cannot be confirmed pursuant to Section 1129(a)(1) of the Bankruptcy Code.

WHEREFORE, the United States respectfully requests that the Court deny confirmation of the Plan and grant such other and further relief as the Court deems necessary and just.

DAVID C. WEISS
United States Attorney

BY: */s/ Ellen Slights*
Ellen W. Slights (DE Bar No. 2782)
Assistant United States Attorney

Dated: August 27, 2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
AKORN, INC., *et al.*,	:	Case No. 20-11177(KBO)
Debtors.	:	**Hearing Date: September 1, 2020, at 10:00 a.m.** **Confirmation Objection:** **Extended to August 27, 2020, at 12:00 p.m.**

AFFIDAVIT OF SERVICE

I, Shane Macas, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest that on August 27, 2020, I caused to be served a copy of the **OBJECTION BY THE UNITED STATES TO THE JOINT CHAPTER 11 PLAN OF AKORN, INC. AND ITS DEBTOR AFFILIATES** by electronic service on the registered parties via the Court's CM/ECF system and upon the following parties

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