

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

In re:

AKORN, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 20-11177 (KBO)

Jointly Administered

Re: Docket No. 258

**Hearing Date: September 1, 2020 at 10:00 a.m.
Objection Deadline: Extended to August 28, 2020 at
12:00 p.m.**

**OBJECTION OF THE CHUBB COMPANIES TO THE JOINT CHAPTER 11 PLAN OF
AKORN, INC. AND ITS DEBTOR AFFILIATES.**

ACE American Insurance Company, Westchester Fire Insurance Company, Illinois Union Insurance Company, Federal Insurance Company, Chubb Custom Insurance Company and any of their U.S.-based affiliates and successors (collectively, the “Chubb Companies”), by and through their undersigned counsel, hereby object (the “Objection”) to the *Joint Chapter 11 Plan Of Akorn, Inc. And Its Debtor Affiliates* [Docket No. 258] (the “Plan”)² and, in support of the Objection, the Chubb Companies respectfully state as follows:

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.

² All capitalized terms used herein but not defined shall have the meanings ascribed to them in the Plan.



BACKGROUND

A. The Bankruptcy Case

1. On May 20, 2020 (the "Petition Date"), Akorn Inc. and certain of its affiliates (collectively, the "Debtors") each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Court").

2. Upon information and belief, since the Petition Date, the Debtors continue to act as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On June 30, 2020, the Debtors filed the Plan.

4. The Plan does not address the treatment of insurance policies generally; however, with respect to D&O Policies, the Plan provides that:

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.

Plan Art. V.D.

5. The Plan also provides for claims paid or payable by third parties and notes that:

2. Claims Payable by Insurance, Third Parties.

No distributions under the Plan shall be made on account of a Claim that is payable pursuant to one of the Debtors' insurance policies, including the D&O Policies, other non-Debtor payment agreements, or collateral held by a third party, until the Holder of such Claim has exhausted all remedies with respect to such insurance policy, other non-Debtor payment agreement, or collateral, as applicable. To the extent that one or more of the Debtors' insurers or non-Debtor-payors pays or satisfies in full or in part a Claim (if and to the extent finally adjudicated by a court of competent jurisdiction or otherwise settled), or such collateral or proceeds from such collateral is used

to satisfy such Claim, then immediately upon such payment, the applicable portion of such Claim shall be expunged without a Claim objection having to be Filed and without any further notice to or action, order, or approval of the Bankruptcy Court.

3. Applicability of Insurance Policies.

Notwithstanding anything to the contrary in this Plan or Confirmation Order, Confirmation and Consummation of the Plan shall not limit or affect the rights of any third-party beneficiary or other covered party of any of the Debtor's insurance policies with respect to such policies (including the D&O Policies), nor shall anything contained herein (a) constitute or be deemed a waiver by such insurers of any rights or defenses, including coverage defenses, held by such insurers under any insurance policy, applicable law, equity, or otherwise, or (b) establish, determine, or otherwise imply any liability or obligation, including any coverage obligation, of any insurer.

Plan Art. VI.G.2.-3.

6. Further, the Plan incorporates the Sale Transaction as a key element, noting that the certain proceeds received as a result of the Sale Transaction will fund distributions made under the Plan (*see, e.g.*, Plan Art. IV.B.); however, the intended treatment of the Insurance Programs (as defined herein) in connection therewith is unclear.³

B. The Insurance Programs

7. Prior to the Petition Date, the Chubb Companies issued certain insurance policies (as renewed, amended, modified, endorsed or supplemented from time to time, collectively, the "Policies") to one or more of the Debtors, as named insureds.

8. Pursuant to certain Policies and related agreements (collectively, the "ACE Insurance Program"), ACE American Insurance Company, Westchester Fire Insurance Company and Illinois Union Insurance Company provide, *inter alia*, international, directors' and officers',

³ The Chubb Companies also object to the Sale Transaction, with such matters being discussed at length in a separate objection being filed contemporaneously herewith.

products liability and certain other insurance for specified policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein; and the insured, including the Debtors, is required to pay to the Chubb Companies certain amounts including, but not limited to, insurance premiums (including audit premiums), deductibles, funded deductibles, expenses, taxes, assessments and surcharges, as more particularly described in the ACE Insurance Program (the “ACE Program Obligations”).

9. Pursuant to other Policies and related agreements (collectively, the “Chubb Insurance Program,” and together with the ACE Insurance Program, the “Insurance Programs”) Chubb Companies provide, *inter alia*, fiduciary liability, general liability, package, umbrella, workers’ compensation, automobile liability, cargo, property, crime, cyber liability, employment practices liability, and certain other insurance for specified policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein; and the insured, including the Debtors, is required to pay to the Chubb Companies certain amounts including, but not limited to, insurance premiums (including audit premiums), deductibles, funded deductibles, expenses, taxes, assessments and surcharges, as more particularly described in the Chubb Insurance Program (the “Chubb Program Obligations,” and collectively with the ACE Program Obligations, the “Obligations”).

10. The Debtors’ Obligations are payable over an extended period of time and are subject to future audits and adjustments.

SUMMARY OF OBJECTION

11. The Chubb Companies object to the Plan on the grounds, that: (I) while it appears that the Debtors seek to obtain the benefits of the Insurance Programs (*see* Plan at Art. V.D (related to D&O Policies) and Plan Art. VI.G.(2)-(3) (related to payment of claims by the Debtors’

insurers)), the Plan fails to address the fact that in order to do so, the Debtors' successors must remain liable for the Obligations under the Insurance Programs; (II) the terms of the Insurance Programs cannot be altered through the Plan; and (III) the Plan must provide that workers' compensation claims and direct action claims must continue in the ordinary course.

OBJECTION

I. The Debtors' Successors Cannot Continue To Receive The Benefits Of The Insurance Programs Without Remaining Liable For The Obligations Thereunder.

12. As set forth above, the Debtors appear to seek to retain the benefits of their insurance policies, including the Insurance Programs; however, the Plan fails to address the treatment of the Obligations thereunder (aside from with respect to the D&O Policies).

13. It is well-established that debtors (and their successors) cannot seek to receive benefits of a contract without being liable for obligations thereunder. *See Tompkins ex. rel. A.T. v. Troy Sch. Dist.*, 199 Fed. Appx. 463, 468 (6th Cir. 2006) (holding that it is a basic principle of contract law that a party to an agreement is constrained to accept the burdens as well as the benefits of the agreement); *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 457 F.3d 766, 773 (8th Cir. 2006) (finding that a party who accepts the benefit of a contract must also assume its burdens); *Bhushan v. Loma Alta Towers Owners Assoc., Inc.*, 148 Fed. Appx. 882, 888 (11th Cir. 2005) (stating "one who has accepted a contract's benefit may not challenge its validity in order to escape its burdens"); *S & O Liquidating P'ship v. C.I.R.*, 291 F.3d 454, 459 (7th Cir. 2002) ("A party who has accepted the benefits of a contract cannot 'have it both ways' by subsequently attempting to avoid its burdens."); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) ("In short, [plaintiff] cannot have it both ways. [It] cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage." (citations and quotations omitted)); *Ricketts v. First Trust Co. of Lincoln, Neb.*, 73

F.2d 599, 602 (8th Cir. 1934) (finding that “he who seeks equity must do equity, and that one may not accept the benefits and repudiate the burdens of his contract.”); *Meierhenry Sargent Ltd. Liab. P’ship v. Williams*, No. 16-4180, 2017 U.S. Dist. LEXIS 65739, at *20 (D.S.D. May 1, 2017) (“Various courts have held that a party may not avail itself of a favorable aspect of the contract and then disavow a non-favorable aspect.” (citations omitted)); *Power Sys. & Controls, Inc. v. Schneider Elec. USA, Inc.*, No. 10-137, 2010 U.S. Dist. LEXIS 56671 at *3 (E.D. Va. June 9, 2010) (“[A] party may not avail itself of one aspect of a contract and disavow another aspect of the contract in order to avoid its consequences. . .[.]”); *see also In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007) (“The [debtor] . . . may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.”) (internal citations omitted); *In re Texas Rangers Baseball Partners*, 521 B.R. 134, 180 (Bankr. N.D. Tex. 2014) (“A debtor may not merely accept the benefits of a contract and reject the burdens to the detriment of the other party.”).

14. Moreover, each of the Insurance Programs is an integrated insurance program and therefore must be read, interpreted and enforced in its entirety. *See Huron Consulting Servs., LLC v. Physiotherapy Holdings, Inc. (In re Physiotherapy Holdings, Inc.)*, 538 B.R. 225, 233 (D. Del. 2015) (finding that separately drafted agreements dated at different times but relating to the same subject constitute one cohesive agreement); *In re Karfakis*, 162 B.R. 719 (Bankr. E.D. Pa. 1993) (stating “two contracts which are essentially inseparable can be, and should be, viewed as a single, indivisible agreement between the parties”).

15. Accordingly, the Plan must be clarified to provide that, to the extent that the Debtors seek to retain the benefits of any portion of the Insurance Programs, the Debtors’ successors must remain liable in full for all of the Obligations arising under the Insurance Program.

II. The Plan Should Clearly Provide That Nothing Modifies, Alters Or Impairs The Insurance Programs.

16. The Plan contains provisions which provide for the release of liens, the vesting of assets in the Debtors free and clear of liens, releases of certain third-parties, and exculpation and injunctions against certain actions. *See, e.g.*, Plan Arts. VIII.D., VIII.F-H.; *see also*, Plan Art. IV.D.

17. It is well-established, however, that courts cannot alter terms of contracts, and must instead enforce them as written. *See, e.g., Wilson v. Career Educ. Corp.*, 729 F.3d 665, 679 (7th Cir. 2013) (“A court may not rewrite a contract to suit one of the parties but must enforce the terms as written.”) (citation omitted); *In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091 (9th Cir. 1997) (noting that a debtor’s estate has “no greater rights in property than those held by the debtor prior to the bankruptcy”); *Trustmark Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 484 F. Supp. 2d 850, 853 (N.D. Ill. 2007) (a “court cannot alter, change or modify the existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented, write into the contract something which the parties have omitted or take away something which the parties have included.”) (citation omitted); *In re Lloyd E. Mitchell, Inc.*, 06-13250-NVA, 2012 Bankr. LEXIS 5531 (Bankr. D. Md. Nov. 29, 2012) (noting that “insurance contracts cannot be re-written by th[e] Court”).

18. The Plan must therefore clarify that nothing in the Plan, the Plan Supplement, the Disclosure Statement, the Sale Transaction Documentation, the Sale Order, the Confirmation Order, or any other document related to the foregoing including, but not limited to those provisions identified above, shall modify, alter or impair the Insurance Programs, including the rights and obligations of the Chubb Companies and the Debtors thereunder, as well as the coverage provided thereunder.

19. Accordingly, the Chubb Companies further object to the Plan on this basis.

III. The Plan Must Provide That Workers' Compensation Claims and Direct Action Claims Must Continue In The Ordinary Course.

20. The Plan does not provide for the handling of workers' compensation claims and direct action claims.

21. Both workers' compensation claims and direct action claims are subject to state-law regulations that dictate the resolution of such claims, which cannot be modified by the terms of the Debtors' Plan. *See, e.g., Ohio v. Mansfield Tire & Rubber Co. (In re Mansfield Tire & Rubber Co.)*, 660 F.2d 1108 (6th Cir. 1981) (finding that the administration of workers' compensation claims was a valid exercise of a state's police powers and exempt from the automatic stay provisions); *see also* La. R.S. 22:1269 (2012) (Louisiana grants injured persons a right of direct action against a tortfeasor's insurer, which, in several instances, may be brought against the insurer alone, or against both the insured and insurer jointly and *in solido*); Wis. Stat. § 632.24 (2012) (Wisconsin grants injured persons a right of direct action against a tortfeasor's insurer irrespective of whether liability is presently established or is contingent and to become fixed or certain by final judgment against the insured).

22. Accordingly, the Plan must clarify that workers' compensation and direct action claims may continue to be administered, handled, defended, settled, and/or paid in the ordinary course, and relatedly, the Chubb Companies may continue to so administer, handle, defend, settle, and/or pay such covered claims in the ordinary course, and pursuant to the terms of the Insurance Programs and applicable non-bankruptcy law.

IV. Reservation of Rights.

23. The Chubb Companies specifically reserve all of their rights with respect to the Insurance Programs and their right to assert additional objections to the Plan.

WHEREFORE, the Chubb Companies respectfully request that this Court: (a) either (i) deny confirmation of the Plan, or (ii) condition confirmation of the Plan on inclusion of the modifications requested herein; and (b) grant such other relief as the Court deems appropriate.

Dated: August 28, 2020

Respectfully submitted,

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

In re:

AKORN, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 20-11177 (KBO)

Jointly Administered

CERTIFICATE OF SERVICE

I, Drew S. McGehrin, certify that I am not less than 18 years of age, and that on August 28, 2020, I caused a true and correct copy of the *Objection Of The Chubb Companies To The Joint Chapter 11 Plan Of Akorn, Inc. And Its Debtor Affiliates* to be made upon the parties set forth on the attached service list by electronic mail, and electronically, via this Court's ECF system, on all parties registered to receive electronic notice.

Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: August 28, 2020

/s/ Drew S. McGehrin

Drew S. McGehrin, Esq. (DE 6508)

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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