IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **AKORN, INC., *et al.*,** **Debtors.**	Chapter 11 Lead Case No. 20-11177 (KBO) Jointly Administered Honorable Karen B. Owens Hearing Date: Oct. 21, 2020 at 10:00 a.m. Obj. Deadline: October 2, 2020

MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND FOR A STAY OF THE ORDER CONFIRMING THE PLAN (DI #673) PENDING APPEAL

1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, and 1199SEIU Licensed Practical Nurses Welfare Fund, all of which are jointly administered health and welfare funds (together, "1199SEIU Benefit Funds"), AFSCME District Council 47 Health and Welfare Fund ("DC47 Fund") and Sergeants Benevolent Association Health and Welfare Fund ("SBA Fund")[1] by and through undersigned counsel Obermayer Rebmann Maxwell & Hippel LLP, respectfully state the following in support of this motion for a stay pending appeal (the "Stay Motion").

Relief Requested

1. By this Stay Motion, and pursuant to section 105(a) of the title 11 of the United States Code (the "Bankruptcy Code") and Rule 8007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and rule 9013-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the Objectors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), staying the order confirming the Debtors' plan and granting such other relief as the Court deems necessary or appropriate.

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

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Jurisdiction And Venue

2. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Stay Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The Objectors consent pursuant to rule 9013-1(f) of the Local Rules to the entry of a final order by the Court in connection with this Stay Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

4. The statutory bases for the relief requested herein are 11 U.S.C. §105, Bankruptcy Rule 8007.

Background

5. On May 20, 2020, the Debtors filed the instant bankruptcies, jointly administered under lead case In re Akorn Inc., No. 20-11177-KBO.

6. The Debtors proposed to effectuate their chapter 11 by a sale of substantially all assets pursuant to a motion to sell (the "Sale") (DI #18) and confirmation of a plan, as modified (the "Plan") (DI #672).

7. The Objectors filed an objection to the Sale and Plan (the "Objection") (DI #553).

8. By agreement between the Debtors and other parties in interest, the hearings on the Sale and Plan were bifurcated in order to allow the time-sensitive Sale to occur without delay.

9. A hearing on the Sale took place on September 1, 2020, after which the Court entered an order approving the Sale. (DI #656).

10. The record from the Sale hearing was incorporated into the record for the hearing on confirmation of the Plan.

11. The Plan confirmation hearing took place September 2, 2020 through September 4, 2020.

12. During this hearing, counsel for the Debtors, Unsecured Creditors' Committee and certain shareholders bound by a prepetition settlement (the "Settling Shareholders") argued that, as the Sale had already been approved, Plan confirmation did not have a practical impact on them or the other parties in interest, including the Objectors.

13. Debtors' counsel argued at the September 3, 2020 hearing that "there's nothing left to do" in the instant case. Debtors' counsel argued that "if Your Honor were to deny plan confirmation we will be in the very same place that we are right here, right now with respect to" unsecured creditors. "I certainly don't know what else we would be doing in front of your Honor." (Transcript of 9/3/20 Hearing at 70-71) (DI #685).

14. On September 4, 2020, the Court entered an order confirming the Plan (the "Order") (DI #673).

15. The Order waives the stay of a confirmation order pursuant to Fed. R. Bankr. P. 3020(e) for cause, making the Order enforceable immediately.

16. The Objectors seek to appeal the Order.

Basis For Relief

17. Fed. R. Bankr. P. 8007(a)(1)(A) requires that a party "must move first in the bankruptcy court for...a stay of a judgment, order or decree of the bankruptcy court pending appeal."

18. Fed. R. Bankr. P. 8007(b) permits such a motion for stay "before or after the notice of appeal is filed."

19. In analyzing the propriety of a stay pending appeal, courts use factors similar to those for a preliminary injunction: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987) (citations omitted).

20. The first two (2) factors are "the most critical." Nken v. Holder, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

21. The first factor, a strong showing of the likelihood of success, exists if there is "a reasonable chance, or probability, of winning" on appeal. Singer Mgmt. Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). The chance of success on the merits must be better than negligible, but need not even rise to the level of "more likely than not." In re Revel AC, Inc., 802 F.3d 558 (3d Cir. 2015).

22. The moving party must show that irreparable injury is likely, not merely possible, if a stay is not granted. Id.

23. Once the first two factors have been established, "courts balance the harms by weighing the likely harm to the movant absent a stay, the second factor, against the likely harm to

stay opponents if the stay is granted, the third factor." S.S. Body Armor I., Inc. v. Carter Ledyard & Milburn LLP, 927 F.3d 763, 772 (3d Cir. 2019).

24. Lastly, courts analyze the fourth factor by evaluating where the public interest lies by considering the "consequences beyond the immediate parties." Revel, 802 F.3d at 569. These last two (2) factors are evaluated on a "sliding scale," and a stronger case on the first factors obviates the need for a strong showing on the later factors. Id.

25. The Objectors seek to appeal, among other things, the Court's determination that the Plan complied with 11 U.S.C. §§ 1129(a)(7), (b)(2).[2]

26. The Objectors allege that the Debtors retained valuable causes of action without a contribution of new value, in violation of the absolute priority rule. 11 U.S.C. §1129(b)(2).

27. The Objectors allege that, if the case were converted to chapter 7 on the effective date of the Plan, a chapter 7 trustee would realize value from these causes of action. The current Plan provides for no such recovery and treats the Objectors worse than liquidation on the effective date, in violation of the best interest of creditors test embodied in 11 U.S.C. §1129(a)(7).

28. Both these appellate grounds hinge on the valuation of assets including retained causes of action.

29. At the hearings on Plan confirmation, the Debtors' witnesses testified that the Debtors did not value or evaluate the Debtor's assets including potential avoidance causes of action against Settling Shareholders or any other potential avoidance defendant. (See Transcript of 9/3/20 Hearing at 20-21) ("Q: Did you ever attempt to value any of the avoidance claims? A: No. I think I already mentioned that. No, we did not.").

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[2] The Objectors explicitly reserve their rights to appeal the Order on additional grounds. The instant Stay Motion focuses only these specific grounds for appeal as they most clearly and concisely indicate the necessity of a stay pending appeal.

30. The Debtors' witnesses likewise testified that the Debtors did not value or evaluate any other retained causes of action against any party. (Id. at 36-37) ("Q: So did you ever try to value any of the potential cause of action that the debtor had on the petition date? A: No we didn't.").

31. The Objectors and other parties objecting to confirmation elicited testimony and introduced evidence that D&O Insurance policy proceeds were paid to Settling Shareholder under an agreement involving the Debtors, upon a claim deriving from the Debtors, and that the settling directors and officers had a right to indemnification and defense from the Debtors.

32. The shareholder settlement became a perfected transfer within ninety (90) days of the petition date, and was also made on behalf of insiders within a year of the petition date.

33. The testimony elicited during the hearings demonstrates that the insurance proceeds paid to Settling Shareholders protected estate assets from diminution. These proceeds would have been estate property if not paid out prepetition, and so they are susceptible to avoidance under 11 U.S.C. §547. SN Liquidation, Inc. v. Icon Int'l, Inc. (In re SN Liquidation, Inc.), 388 B.R. 579, 584 (Bankr. D. Del. 2008); In re Allied Digital Techs. Corp., 306 B.R. 505, 512 (Bankr. D. Del. 2004).

34. The Objectors also elicited testimony and introduced evidence that the shareholder settlement was funded by a transfer from the Debtors of Akorn stock worth, at the time, approximately $4 million. This transfer is similarly avoidable under Section 547.

35. Parties supporting confirmation introduced fundamentally no evidence to counter the *prima facie* case for avoidance laid out by the Objectors.

36. Counsellors for the Debtors and the Unsecured Creditors' Committee argued that this avoidance cause of action was valueless. "Attorney argument is not evidence." Icon Health and Fitness, Inc. v. Strava, Inc., 849 F.3d 1034, 1043 (Fed. Cir. 2017).

37. Also in evidence, the Debtors' Amended Disclosure Statement and Statement of Financial Affairs disclosed a claim against Provepharm that the Debtors valued, prepetition, at $30 million, which might be trebled pursuant to the discretion of the relevant court. (DI #275, 318).

38. As with the avoidance claims against Settling Shareholders, there was fundamentally no evidence that this valuable claim was valueless.

39. The Debtors retain this claim under the Plan.

40. The Debtors retain their unexhausted D&O Insurance policies under the Plan.

41. The Debtors also placed the Court on notice that they were about to settle the shareholder actions with the remaining opt-outs, and would fund that settlement through the use of the remaining D&O Insurance policies.

42. These untapped insurance policies are clearly valuable estate property, for the same reasons the policies that funded the prepetition shareholder settlement are valuable estate property.

43. This postconfirmation settlement is funded by valuable property retained by the Debtors in violation of the absolute priority rule, and will pay subordinated §510(b) claimants, also in violation of the absolute priority rule.

44. None of the counterparties to these sources of recovery has opted into the Plan's releases.

45. At confirmation, a plan proponent must carry the burden of proof. In deciding whether to pursue potentially-valuable claims or effectively "settle" them by mandatory non-prosecution pursuant to a plan, the debtor must exercise its sound business judgment. Martin v.

Kane (In re A & C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986) (Settlement of debtor causes of action via plan must meet Rule 9019 standard).

46. The Rule 9019 standard is evaluated according to the Martin factors: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." In re Nutraquest, Inc., 434 F.3d 639, 644 (3d. Cir. 2006) quoting In re Martin, 91 F.3d 389, 393 (3d. Cir. 1996).

47. The Debtors did not carry their burden to demonstrate the Martin factors as to the causes of action discussed above, because the only evidence in the record demonstrated that the Debtors did not value or otherwise evaluate the estates' causes of action.

48. The only evidence in the record demonstrates that these causes of action are valuable estate property retained by the Debtors for no new value.

49. Since all senior claims were paid in full via the Sale and wind-down amount, any net recovery would redound to the benefit of unsecured creditors like the Objectors.

50. If the case were converted to chapter 7 on the effective date, the chapter 7 trustee would pursue these causes of action and provide better treatment to the Objectors than that provided by the Plan.

51. The above argument shows that the Debtors did not carry their burden of proof to demonstrate compliance with 11 U.S.C. §§1129(a)(7), (b)(2).

52. The Objectors have thus shown a chance of success on the merits that if far greater than negligible, and is sufficient to withstand a motion to dismiss. The Objectors have demonstrated the first factor necessary for a stay.

53. The Objectors will be irreparably injured unless a stay is granted. Only the estates of the Debtors have the ability to pursue the valuable recovery sources discussed above. The Plan allows the Debtors to retain these causes of action, as administered through a Plan Administrator who has no authority to pursue them.

54. If these valuable recovery sources vest in the Debtors and are handed to a powerless Plan Administrator, the Objectors will be directly harmed because they will lose any possible hope of recovery in the case. The Objectors have demonstrated the second factor necessary for a stay.

55. The issuance of a stay will not harm any parties in interest. The Debtors repeatedly testified and argued that the success or failure of confirmation had little practical effect on the remaining parties in interest, given the prior approval of the Sale of the Debtors' assets.

56. On the contrary, since no creditors receive anything under the Plan and no relevant creditors have opted into the Debtors' releases in the Plan, no party in interest has altered its behavior in reliance on the confirmation of the Plan. The Objectors have demonstrated the third factor necessary for a stay.

57. The Bankruptcy Code itself embodies a strong public policy interest that "creditors of equal priority receive pro rata shares of the debtor's property. A critical feature of this system is the ability to avoid pre-petition property transfers that benefit some creditors over others." In re Hackler and Stelzle-Hackler, 938 F.3d 473, 476 (3d. Cir. 2019).

58. There is a strong public policy interest in favor of obtaining recovery from preferred junior classes and distributing the proceeds pro rata to the Objectors and other creditors in their class.

59. Public interest also disfavors preferential prepetition settlements with equity interest-holders, since unwinding such settlements increases the administrative costs of a

bankruptcy and incentivizes wrongdoers to settle on the eve of bankruptcy in order to direct limited debtor assets to their personal favored creditors.

60. Any countervailing public policy concerns for employees, customers or vendors do not apply in the case, as the Debtors' business will continue pursuant to the approved Sale, regardless of whether the Plan is ever performed. The Objectors have demonstrated the fourth factor necessary for a stay.

61. "Courts may condition stays of plan confirmation orders pending appeal on the posting of a supersedeas bond." Tribune Media Co. v. Aurelius Capital Mgmt., L.P., 799 F.3d 272, 281 (3d Cir. 2015). The purpose of requiring such a "bond in a bankruptcy court is to indemnify the party prevailing in the original action against loss caused by an unsuccessful attempt to reverse the holding of the bankruptcy court." In re Theatre Holding Corp., 22 B.R. 884, 885 (Bankr. S.D.N.Y. 1982).

62. "The posting of a bond . . . is discretionary and is not a prerequisite to obtain a stay pending appeal." In re Suprema Specialties, Inc., 330 B.R. 93, 96 (Bankr. S.D.N.Y. 2005). The appropriate amount of a bond is determined by the amount necessary to "protect against diminution in the value of property pending appeal and to secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal." ACC Bondholder Grp. v. Adelphia Communs. Corp. (In re Adelphia Communs. Corp.), 361 B.R. 337, 350 (S.D.N.Y. 2007).

63. The Plan in this case does not substantially alter the rights of any parties in interest, as the Debtors and their allies have already admitted. An appeal, whether successful or unsuccessful, will not diminish estate property or cause any loss to the Debtors.

64. The Plan does not release any relevant parties, as all parties involved in valuable retained causes of action did not vote for the Plan or opt into the releases. If an appeal is successful,

estate assets will be augmented, not diminished. If the appeal is unsuccessful, there will be no harm to the estate since the assets are already treated as though they are valueless.

65. The Objectors' appeal will not appeal the Sale, and will not prevent any property covered by the Sale from being conveyed to or from the Debtors' estates. In any event, the order authorizing the Sale, by its own terms, controls over anything to the contrary in any confirmation order and is completely independent of confirmation.

66. No creditor will be prejudiced by the appeal, since creditors are being paid from gifting by the purchaser, and the wind-down amount, which will still be paid into the Debtors' estates pursuant to the Sale, and top-priority creditors will be entitled to that. All other creditors receive nothing in the Plan, so an appeal of the Plan cannot adversely impact these creditor's rights. The litigation creditors are the only remaining creditors of the Debtors' estates.

WHEREFORE, the Objectors respectfully request this Court enter an order staying the Order confirming the Plan pending the resolution of the Objectors' appeal, and provide such other and further relief as the court deems just and equitable.

Notice

Notice of this Stay Motion will be provided to: (a) the U.S. Trustee; (b) counsel to the Committee; (c) counsel to the Debtors; and (d) any other party that has requested notice pursuant to Local Rule 2002-1(b). The Objectors respectfully submit that no further notice of this Stay Motion is required under the circumstances.

Respectfully submitted,

Dated: September 18, 2020
Wilmington, Delaware

By: */s/Leslie B. Spoltore*
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **AKORN, INC., *et al.*,** **Debtors.**	Chapter 11 Lead Case No. 20-11177 (KBO) Jointly Administered Honorable Karen B. Owens Hearing Date: October 21, 2020 at 10:00 a.m. Obj. Deadline: October 2, 2020 Re: D.I. #673

NOTICE OF MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND FOR A STAY OF THE ORDER CONFIRMING THE PLAN (DI #673) PENDING APPEAL

TO:

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1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND (the "Movants") have filed a Motion for Stay Pending Appeal which seeks the following relief:

To stay the Order Confirming the Debtors' Plan (DI #673) pending appeal.

HEARING ON THE MOTION WILL BE HELD ON October 21, 2020, at 10:00 a.m.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER NOTICE OR HEARING. Pursuant to Local Rule 9006-1(c)(ii) you are required to file a response to the attached motion by October 2, 2020.

At the same time, you must also serve a copy of the response upon movant's attorney:

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Respectfully submitted,

Dated: September 18, 2020
Wilmington, Delaware

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **AKORN, INC., *et al.*,** **Debtors.**	Chapter 11 Lead Case No. 20-11177 (KBO) Jointly Administered Honorable Karen B. Owens

ORDER GRANTING MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND FOR A STAY OF THE ORDER CONFIRMING THE PLAN (DI #673) PENDING APPEAL

Upon consideration of the motion of the Objectors[3] for a stay of the Order (DI #673) confirming the Debtors' Plan pending appeal, the Court having reviewed the Stay Motion and all related pleadings and having heard the statements of counsel with respect thereto; the Court having determined that notice of the Stay Motion was reasonable and sufficient under the circumstances and that no further notice is required; and that the legal and factual bases set forth in Stay Motion and at the hearing establish sufficient cause for the relief granted herein; and for the reasons stated by the Court at that hearing,

IT IS HEREBY ORDERED as follows:

The Stay Motion is GRANTED, as set forth herein.

The Order confirming the Plan (DI #673) is hereby STAYED pending the resolution of the appeal by the Objectors.

[3] All capitalized terms have the meaning ascribed to them in the Stay Motion.

CERTIFICATE OF SERVICE

I, Leslie B. Spoltore represent the creditor in this matter.

On September 18, 2020, I served a copy of the following pleadings and/or documents to the parties listed below:

- Motion for Stay Pending Appeal
- Proposed Order
- Notice of Motion

I hereby certify under penalty of perjury that the above documents were sent to counsel for the Debtors, counsel for all Committees, the United States Trustee, all parties with an interest in the requested relief and all parties receiving notice by CM/EFC.

Respectfully submitted,

By: */s/Leslie B. Spoltore*

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