

**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)

OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY OF THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES WITH RESPECT TO CONFIRMATION OF THE JOINT CHAPTER 11 PLAN OF AKORN, INC. AND ITS DEBTOR AFFILIATES, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, AND (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO²

Provepharm, Inc. (“**Provepharm**”) files this objection (“**Objection**”) to the above captioned debtors (the “**Debtors**”) *Motion for Entry of an Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Docket No. 103] (the “**Motion**”)³ and would show:

**I.
PRELIMINARY STATEMENT**

1. The Motion seeks approval of (i) the adequacy of the Disclosure Statement and (ii) claims estimation procedures. The Disclosure Statement fails to provide creditors and other parties

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 The Debtors extended Provepharm’s deadline to object to the Motion to noon ET, June 26, 2020.

³ Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.



in interest with the information necessary to decide whether to support the Debtors' proposed Plan, and the proposed procedures do not allow enough time for claims estimation process.

2. Specifically, the Disclosure Statement does not contain adequate information because it fails to:

- (1) address or describe the nature or extent of claims asserted by Provepharm;⁴
- (2) adequately address the extent of the Debtors' investigation of the claims of serious malfeasance (by Akorn officers and employees) identified by Judge Laster in the Fresenius merger opinion ("**Malfeasance Claims**");
- (3) disclose the value of the Malfeasance Claims and what consideration, if any, is being received in exchange for them;
- (4) disclose or describe the consideration exchanged for the broad releases of officers, directors, employees and advisors;
- (5) disclose how the Debtors intend to treat the class action settlement agreement (which sets aside \$30 million of directors and officers insurance proceeds for the settling class action plaintiffs, while general unsecured creditors—including the opt-out plaintiffs and other litigation claimants like Fresenius and Provepharm—will receive nothing) and why this separate treatment is appropriate; and
- (6) disclose why the class action plaintiffs' claims should be classified as 510(b) claims and entitled to recover \$30 million in Director and Officer insurance proceeds under an executory prepetition settlement agreement.

3. Provepharm also objects to the Motion to the extent it appears to allow insufficient time to conduct claim estimation proceedings.

II. BACKGROUND

4. On December 5, 2017, Provepharm, Inc. sued Akorn in the United States District Court for the Eastern District of New York. Provepharm, Inc. v. Akorn, Inc., Case No. 17 cv 7087 (E.D.N.Y.) (Judge S. Feuerstein). Brought under Section 43 of the Lanham Act, 15 U.S.C. §

⁴ Provepharm believes it has an agreement with the Debtors on some proposed language to include in the Disclosure Statement that will resolve this issue, but includes this objection in an abundance of caution because the Debtors have tied resolution of this issue to resolution of all the other issues raise by Provepharm.

1125(a), and analogous New York law, the suit alleges that Akorn engaged in unfair competition, deceptive trade practice, and false advertising with regards to its methylene blue injection drug product, which it marketed in competition with Provepharm's FDA-approved and USP-compliant methylene blue product, ProvayBlue®. Provepharm seeks its own lost profits damages of \$20–25 million and disgorgement of \$37 million of the profits Akorn realized as a result of its alleged violation of the Lanham Act, for a total recovery of \$57–62 million (along with prejudgment interest and costs, and subject to enhancement at the discretion of the court pursuant to 15 U.S.C. § 1117(a)).

5. Akorn disputes the allegations in the complaint and filed its own counterclaim against Provepharm, alleging that Provepharm violated the antitrust laws in allegedly getting Akorn out of the methylene blue market. Akorn is seeking in excess of \$30 million due to Provepharm's alleged monopolistic behavior, which amount may be further increased if treble damages are also awarded. Provepharm disputes the allegations in the counterclaim.

6. The parties have completed both fact and expert discovery, and, in March 2020, filed cross summary judgment motions with the District Court. Additionally, the parties filed briefing relating to Daubert motions on the parties' respective expert witnesses in March of 2020. All of those motions remained pending upon Akorn's petitioning for bankruptcy relief.

III. **ARGUMENT**

7. The Disclosure Statement fails to address or describe the nature or extent of claims asserted by Provepharm, which are significant, and significantly affect the unsecured creditor class. Provepharm suggests addition of the "Background" section of this Objection to the Disclosure Statement would address this deficiency.

8. The Disclosure Statement fails to adequately address investigations of malfeasance the Debtors performed of the serious Malfeasance Claims. This is important because Debtors have proposed to release Malfeasance Claims and appear to suggest the claims have little or no value.

9. The Disclosure Statement fails to describe or identify how Debtors arrived at the value of the Malfeasance Claims and what consideration, if any, is being exchanged for them. This is important because Debtors have proposed to release these claims and appear to suggest the claims have little or no value.

10. The Disclosure Statement fails to disclose or describe the consideration exchanged for the broad releases of officers, directors, employees and advisors. This is important because Debtors have proposed to release these claims and appear to suggest the claims have little or no value.

11. The Disclosure Statement fails to adequately disclose how the Debtors intend to treat the class action settlement agreement (which sets aside \$30 million of directors and officers insurance proceeds for the settling class action plaintiffs, while general unsecured creditors—including the opt out plaintiffs and other litigation claimants like Fresenius and Provepharm—will receive nothing) and why this separate treatment is appropriate. This is important because it allows the class action settlement parties to unfairly recover more on their claims than other similarly situated claimants.

12. The Disclosure Statement fails to adequately disclose (i) why the class action plaintiffs' claims shouldn't be classified as 11 U.S.C. § 510(b) claims and (ii) why they are entitled to recover \$30 million in director and officer insurance proceeds under an executory prepetition settlement agreement. This is critical because it allows the class action settlement parties to unfairly recover more on their claims than other similarly situated claimants.

13. Provepharm joins in paragraph 27 of the Limited Objection of the Opt-Out Plaintiffs [Dkt 228]. The proposed Solicitation and Voting Procedures do not provide sufficient time for a creditor whose claim is objected to on or prior to seven (7) days before the proposed Voting Deadline of August 15, 2020 at 5:00 p.m. (ET) to file a motion and obtain entry of an order temporarily allowing its claim for voting purposes as the proposed deadline for obtaining such a “Resolution Event” is August 13, 2020. *See* Section 3.C. of the Solicitation and Voting Procedures, attached as Schedule 2 to the proposed Disclosure Statement Order. The proposed procedure could leave a creditor with a mere five (5) days to file a motion and obtain such an order. Accordingly, the deadline for the Debtors to file an objection to a claim that will trigger the necessity of a creditor obtaining a Resolution Event in order to vote on the Plan should be twenty-five (25) days prior to the proposed Voting Deadline, or July 21, 2020.

14. Accordingly, the approval of the Disclosure Statement should be denied unless the issues raised herein are appropriately addressed and remedied.

IV.
RESERVATION OF RIGHTS

15. Provepharm reserves 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 Disclosure Statement 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.

16. Provepharm further reserves the right to object to confirmation of the Plan on any and all appropriate grounds.

V.
PRAYER

WHEREFORE, Provepharm respectfully requests that the Court enter an order denying approval of the Disclosure Statement and granting any and all other such relief to which the Court finds Provepharm is justly entitled.

Wilmington, DE
Dated: June 26, 2020

ASHBY & GEDDES, P.A.

/s/ William P. Bowden

William P. Bowden, Esq. (DE #2553)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19801
Tel: (302) 654-1888
Fax: (302) 654-2067
Email: wbowden@ashbygeddes.com

-and-

NORTON ROSE FULBRIGHT US LLP

Michael M. Parker
State Bar No. 00788163
111 W. Houston Street, Suite 1800
San Antonio, TX 78205-3792
Telephone: (210) 224-5575
Facsimile: (210) 270-7205
michael.parker@nortonrosefulbright.com

COUNSEL FOR PROVEPHARM, INC.

CERTIFICATE OF SERVICE

I, William P. Bowden, hereby certify that on June 26, 2020, I caused one copy of the foregoing document to be served upon the parties on the attached service list via email and first class mail.

/s/ William P. Bowden
William P. Bowden (DE #2553)

KIRKLAND & ELLIS LLP
Patrick J. Nash, Jr., P.C.
Gregory F. Pesce
Christopher M. Hayes
300 North LaSalle
Chicago, Illinois 60654

KIRKLAND & ELLIS LLP
Nicole L. Greenblatt, P.C.
601 Lexington Avenue
New York, New York 10022

RICHARDS, LAYTON & FINGER, P.A.
Paul N. Heath, Amanda R. Steele, Zachary I. Shapiro
& Brett M. Haywood
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801

WILMER CUTLER PICKERING HALE AND DORR LLP
Andrew Goldman
7 World Trade Center
250 Greenwich Street
New York, New York 10007

GIBSON DUNN & CRUTCHER
Scott J Greenberg
Michael J. Cohen
200 Park Avenue
New York, New York 10166

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Robert S. Brady
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

Office of the United States Trustee
Jane M. Leamy
844 King Street, Suite 2207, Lockbox 35
Wilmington, Delaware 19801