

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	§	Chapter 11
	§	
AKORN, INC., <i>et al.</i> , ¹	§	Case No. 20-11177
	§	
Debtors.	§	Jointly Administered

LIMITED OBJECTION AND RESERVATION OF RIGHTS
OF DP WEST LAKE AT CONWAY, LLC
TO DEBTORS' PROPOSED CURE AMOUNTS

TO THE CLERK OF THE BANKRUPTCY COURT:

COMES NOW, DP West Lake at Conway, LLC (“DP West”), by and through its counsel Singer & Levick, P.C., and files this, its *Limited Objection and Reservation of Rights to Debtors’ Proposed Cure Amounts* (“**Objection**”) and, in support of same, would respectfully show as follows.

BACKGROUND

1. On or about May 21, 2020, the Debtors filed their *Motion Seeking Entry of an Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling an Auction and a Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures for the Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief (Dkt.018) (“Motion”)*.

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. On or about June 15, 2020, the Court entered its *Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling an Auction and a Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures for the Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief (Dkt.181) (“Bidding Procedures Order”)*.

3. DP West and Debtor Akorn, Inc. are parties to an Office Lease (“**Lease**”) for property located at 1925 West Field Court, Lake Forest, IL with Debtor. Such Lease expires on September 14, 2022.

4. Pursuant to the Bid Procedures Order, on or about June 22, 2020, DP West received a *Notice to Contract Parties to Potentially Assumed Executory Contract and Unexpired Leases* (“**Cure Notice**”). In such Cure Notice, DP West was listed as a potentially assumed contract and Debtors reflected the cure amount due and owing to DP West as \$0.00 (“**Proposed Cure Amount**”).

CURE OBJECTION AND BASIS THEREFORE

5. While DP West does not object to the assumption and assignment of its Lease, DP West does object to the entry of any Order that sets the Proposed Cure Amount of \$0.00 as the final cure amount for the Lease.

6. According to DP West’s books and records, as of the Petition Date, Landlord is entitled to a claim for the unpaid pre-petition rental obligations in the amount of **\$2,761.24** incurred through the month of May 2020 (“**Actual Cure Amount**”). Attached hereto as **Exhibit A**, and incorporated herein by reference, is a true and correct copy of the Landlord’s Ledger as of July 29, 2020 which shows the breakdown of such obligations. On June 30, 2020, Landlord issued a 2019 CAM Reconciliation credit to Tenant in the amount of \$24,629.61. After deducting the unpaid

pre-petition rental obligations of \$2,761.24, as well as the post-petition unpaid rental obligations of \$338.64 from such 2019 CAM Reconciliation credit, Landlord is entitled to offset the CAM Reconciliation against the Claim, leaving a credit balance in the amount of \$21,868.37.

7. Although the Actual Cure Amount is the amount due as of the date of the filing of this Objection, other amounts may accrue after this date. Prior to the date of any assumption and assignment, and regardless of when those amounts accrue, pursuant to the contractual obligations of the Lease, other amounts such as common area maintenance, taxes, insurance and potentially other amounts, including any periodic adjustment of charges, may come due to DP West. Either any cure amount should include any unpaid amounts which accrue prior to the date of any assumption and assignment or the Purchaser must be responsible for payment of these amounts.

8. Additionally, the Proposed Cure Amount does not include amounts that may become due under the Lease after the date of the assumption and assignment that relate to the pre-assumption and assignment period (i.e., real estate taxes, etc.). Any proposed Order establishing a cure amount in connection with the assumption of the Lease must provide for the payment of all charges due and/or accrued in the ordinary course under the terms of the Lease, notwithstanding the Proposed Cure Amount or Actual Cure Amount. If the Lease is assigned, the Purchaser must be responsible and liable for the payment of these charges as and when they become due under the terms of the Lease, regardless of the period to which such charges may relate. 11 U.S.C. § 365(a).

9. Additionally, there may also be unknown and/or unasserted claims that may exist presently or may exist in the future against DP West for which the Debtors may be obligated to indemnify and defend DP West. DP West reserves its rights under the Lease and all applicable law to assert a claim for any and all amounts which may be due and owing for any currently unknown and/or unasserted claim against DP West that may presently exist or may exist in the

future for which the Debtors may be obligated to indemnify and defend DP West. Any assumption of the Lease must include these obligations.

10. In addition, the Purchaser must execute a document in a form acceptable by the Landlord in which it ratifies the Lease and assumes the obligations so that the Purchaser will be in privity of contract with the Landlord.

11. To assume an executory contract or unexpired contract, a debtor-in-possession must, at the time of assumption: (a) cure all existing defaults; (b) compensate the non-debtor party for any actual pecuniary loss resulting from such defaults; and (c) provide adequate assurance of future performance under the contract. 11 U.S.C. § 365(b)(1). When assuming a contract, the debtor must do so *cum onere*, with all the burdens as well as the benefits. *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984) (“[s]hould the debtor in possession elect to assume the executory contract, ... it assumes the contract cum onere”); *In re Fleming Companies, Inc.*, 499 F.3d 300, 308 (3d Cir. 2007) (citations omitted). If a contract is proposed to be assigned to a purchaser or other third party, the requirement of adequate assurance of future performance is applicable to such assignee. *See* 11 U.S.C. § 365(f)(2)(B); *In re Fleming Companies, Inc.*, 499 F.3d at 305.

12. Accordingly, any Order that is entered establishing a cure amount with respect to the Lease must require the Debtors to (1) pay DP West the Actual Cure Amount, subject to the offset leaving a credit for the Debtors, (2) comply with all obligations under the Lease pursuant to 11 U.S.C. § 365(d)(3) pending the actual assumption of the Lease, (3) cure any additional defaults that may occur under the Lease between the date of this Objection and the effective date of any assumption by the Debtors (*see* 11 U.S.C. § 365(b)(1), and (4) ensure that the Purchaser will be expressly responsible and liable for the payment of any charges that come due under the Lease

post-assumption and assignment, but that may relate to a pre-assumption and assignment period. In addition, the Purchaser must execute a document in a form acceptable by the Landlord in which it ratifies the Lease and assumes the obligations.

RESERVATION OF RIGHTS

13. DP West reserves the right to supplement this Objection prior to any sale hearing and/or final determination by the Court regarding assumption and assignment of the contracts and/or leases, including the amount and payment required for purposes of cure under Section 365 of the BANKRUPTCY CODE.

14. DP West further reserves the right to object to any other relief sought by the Debtors in connection with the proposed asset sale, including without limitation, any proposed showing of adequate assurance of future performance for any alternative buyer to the Bidder.

15. This Reservation of Rights is not intended to be, nor should be construed as, a waiver by DP West of any of its rights under the Lease, the BANKRUPTCY CODE, or applicable law. DP West files this Objection and Reservation of Rights to reserve and preserve any and all rights in connection with any proposed assumption and assignment of its Lease and adequate assurance including, without limitation, issues regarding the financial condition and ability of any proposed assignee to meet the heightened requirements for assumption and assignment of contracts and leases as set forth in Section 365 of the Bankruptcy Code.

PRAYER

WHEREFORE, PREMISES CONSIDERED, DP West Lake at Conway, LLC requests that the Court enter an Order:

- (a) establishing the Actual Cure Amount with respect to the DP West Lease to be
\$2,761.24;

- (b) requiring Debtors to comply with all obligations under the Lease pursuant to 11 U.S.C. § 365(d)(3) pending the actual assumption of the Lease;
- (c) requiring Debtors to cure any additional defaults that may occur under the Lease between the date of this Objection and the effective date of any assumption by the Debtors;
- (d) requiring Debtor to ensure that the Purchaser will be expressly responsible and liable for the payment of any charges that come due under the Lease post-assumption and assignment, but that may relate to a pre-assumption and assignment period and that such Purchaser will execute a document in a form acceptable by the Landlord in which it ratifies the Lease and assumes the obligations; and
- (e) granting DP West such additional and further relief as the Court may deem to be just and proper.

DATED this 25th day of August, 2020.

Respectfully submitted,

SINGER & LEVICK, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that Notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District, and to the parties listed below via electronic mail (if known) or first-class mail, postage prepaid, on this 25th day of August, 2020.

<p><u>US TRUSTEE:</u> Office of the United States Trustee J. Caleb Boggs Federal Building 844 King Street, Suite 2207 Lockbox 35 Wilmington, DE 19801 Attn: Jane M. Leamy Email: jane.m.leamy@usdoj.gov</p>	<p><u>COUNSEL FOR THE DEBTORS:</u> Kirkland & Ellis LLP 601 Lexington Avenue New York, New York 10022 Attn: Nicole L. Greenblatt Email: nicole.greenblatt@kirkland.com</p>
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/s/ Michelle E. Shriro
Michelle E. Shriro

Exhibit A

Lease Ledger

Date: 07/29/2020

Property: br30026

Tenant: t0001072 Akorn Inc.

From Date: 06/30/2016 To Date: 09/14/2022

Move In Date: 06/15/2008

Unit(S): 0300, PARK2

Date	Description	Unit	Charge	Payment	Balance	Chg/Rec	Hold
6/26/2019	WO#420448608 Akorn		64.47	0.00	64.47	C-351920	No
6/26/2019	WO#42173945 Akorn		25.80	0.00	90.27	C-351922	No
6/26/2019	WO#42198932 Akorn		38.69	0.00	128.96	C-351923	No
6/26/2019	WO#42173930 Akorn		51.59	0.00	180.55	C-351925	No
6/26/2019	WO#45876008 Akorn		236.64	0.00	417.19	C-351928	No
6/26/2019	WO#42673144 Akorn		34.18	0.00	451.37	C-351933	No
1/8/2020	WO#40877137 Akorn		154.77	0.00	606.14	C-535593	No
1/8/2020	10.19 WO#51059369 Akorn		712.50	0.00	1,318.64	C-535595	No
1/8/2020	WO#49634643 Akorn		64.49	0.00	1,383.13	C-535596	No
1/8/2020	WO#25996658-43 Omron		303.00	0.00	1,686.13	C-535597	No
2/7/2020	WO#52798984 Akorn		25.80	0.00	1,711.93	C-575500	No
2/12/2020	WO#52027720 Akorn		12.90	0.00	1,724.83	C-577042	No
3/10/2020	Chk# 246559 WO#420448608 Akorn & WO#25996658-43 Omron		0.00	1,686.13	38.70	R-199292	
3/11/2020	Labor charge Inv # TS0315435P		25.80	0.00	64.50	C-689114	No
3/11/2020	09/2019 - WO#47365931 Akorn - TS0287666P		12.90	0.00	77.40	C-689124	No
3/11/2020	09/2019 - WO#47538627 IDEX - TS0287666P		12.90	0.00	90.30	C-689125	No
3/11/2020	09/2019 - WO#47844181 Akorn - TS0287666P		38.69	0.00	128.99	C-689126	No
3/11/2020	09/2019 - WO#48311869 IDEX - TS0287666P		25.80	0.00	154.79	C-689127	No
3/11/2020	09/2019 - WO#48314032 Omron - TS0287666P		25.80	0.00	180.59	C-689128	No
3/11/2020	09/2019 - WO#49650492 Akorn - TS0287666P		1,801.48	0.00	1,982.07	C-689129	No
3/11/2020	10/2019 - WO#49671988 Akorn - TS0296064P		12.90	0.00	1,994.97	C-689158	No
3/11/2020	12/19 - WO#52509337 Akorn - TS0308591P		103.18	0.00	2,098.15	C-689199	No
3/11/2020	12/19 - WO#52782309 Akorn - TS0308591P		71.78	0.00	2,169.93	C-689200	No
3/11/2020	02/2020 WO#53195712 Omron TS0315435P		472.62	0.00	2,642.55	C-689219	No
3/11/2020	02/2020 WO#53491191 Akorn TS0315435P		12.90	0.00	2,655.45	C-689220	No
3/11/2020	02/2020 WO#53876177 Akorn P-300074		409.43	0.00	3,064.88	C-689221	No
3/23/2020	01/2020 - WO#51584075 Akorn - TS0302503P		51.59	0.00	3,116.47	C-800117	No
4/2/2020	09/2019 - WO#47538627 IDEX - TS0287666P		-12.90	0.00	3,103.57	C-801481	No
4/2/2020	Charge Reversal						
4/2/2020	09/2019 - WO#48311869 IDEX - TS0287666P		-25.80	0.00	3,077.77	C-801482	No
4/2/2020	Charge Reversal						

4/2/2020	09/2019 - WO#48314032 Omron - TS0287666P Charge Reversal	-25.80	0.00	3,051.97	C-801483 No
4/2/2020	02/2020 WO#53195712 Omron TS0315435P Charge Reversal	-472.62	0.00	2,579.35	C-801484 No
4/2/2020	02/2020 - WO#53189738 Akorn - TS0315435P	25.80	0.00	2,605.15	C-801495 No
4/2/2020	02/2020 - WO#53256911 Akorn - TS0315435P	25.80	0.00	2,630.95	C-801496 No
4/6/2020	WO#50730183 - #inv TS0300795	25.80	0.00	2,656.75	C-802153 No
4/6/2020	WO#51274189 - #inv TS0300795	25.80	0.00	2,682.55	C-802154 No
4/6/2020	WO#51165404 - #inv TS0300795	38.69	0.00	2,721.24	C-802155 No
4/6/2020	WO#54771932 Akorn - 65870	40.00	0.00	2,761.24	C-802411 No
7/15/2020	WO#53007684 Akorn - #inv 204633	325.74	0.00	3,086.98	C-1074696 No
7/15/2020	WO#54772444 - #inv TS0331669P	12.90	0.00	3,099.88	C-1074698 No
6/30/2020	2019 CAM Reconciliation	-24,629.61	0.00	-21,868.37	C-1020437 No