**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)**
	:	**Hrg. Date: 9/1/20 @ 10:00a.m.**
	:	**Obj. Deadline: 8/25/20 @ Noon**

PROVEPHARM, INC.'S OBJECTION TO CONFIRMATION OF THE JOINT CHAPTER 11 PLAN OF AKORN, INC. AND ITS DEBTOR AFFILIATES

Provepharm, Inc. ("**Provepharm**"), an unsecured litigant asserting a claim in excess of $136 million for Debtors' violations of the Lanham Act (as more fully described below), files its objection (the "**Objection**") to confirmation of the Joint Chapter 11 Plan *(*the **"Plan**") (Dkt. 258) [2] of Akorn, Inc. and its Debtor Affiliates (collectively, the "**Debtors**"), and respectfully states:

**I.
PRELIMINARY STATEMENT**

1. The Debtors' Plan is not confirmable because it fails to meet the requirements of sections 1129(a) and (b) of the Bankruptcy Code. At bottom, the Plan and the Sale Transaction do nothing more than deliver the Debtors' businesses to the Term Loan Lenders, shield the Debtors directors and officers and others from liability for the wrongdoing that lead to the Debtors' bankruptcy proceedings, and reward a favored group of shareholders, all without providing any consideration to unsecured creditors disfavored by the Debtors.

[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] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan.

2. Specifically, as set forth below, the Plan: (i) fails the best interest of the creditors test of section 1129(a)(7) of the Bankruptcy Code; (ii) improperly gerrymanders classification by elevating claims stemming from the Shareholder Settlement from claims subject to subordination under section 510(b)[3] of the Bankruptcy Code to the status of general unsecured claims, and allocates to this Debtors-favored group the entirety of the $27.5 million of the Debtors directors and officers insurance (the "**D&O Proceeds**") on account of a "Bankruptcy Protection Claim" in the amount of $30 million; (iii) is not proposed in good faith, as required by sections 1122, 1123, and 1129(a)(3) of the Bankruptcy Code; and (iv) violates the absolute priority rule and is not "fair and equitable" to Provepharm as required by section 1129(b) of the Bankruptcy Code. The Plan also improperly insulates the Debtors directors and officers and other third parties from any possible culpability (derivative or direct), including without limitation for the misconduct that lead to the Debtors' significant regulatory problems and their financial crisis, by either releasing them outright or transferring them to the Term Loan Lenders in the Sale Transaction.[4]

3. The Plan treatment is unfair to disfavored creditors (such as Provepharm, which holds a $136 million unsecured claim) whose claims will not (according to Debtors' financial projections) receive a dime and are generally ignored. The lack of consideration for the proposed releases lays bare this unfairness and lack of good faith.

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[3] Section 510(b) of the Bankruptcy Code provides: "For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, <u>shall be</u> subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock." (Emphasis added).

[4] While the Creditors Committee has been investigating some of Debtors' insiders and certain of the concerns of Provepharm and others, the Committee, on information and belief, is comprised of (a) trade creditors whose claims are being assumed by the Term Loan Lenders in the Sale Transaction (McKesson Corporation, Douglas Pharmaceuticals America Ltd., Walgreen Co., and Rising Pharma Holdings, Inc.), and (b) participants in the Shareholder Settlement (Gabelli Funds, LLC) who are shareholders being treated as "creditors" in the Plan in violation of the absolute priority rule. Accordingly, the Creditors Committee may lack the appropriate incentive to object to this unfair treatment of non-trade unsecured creditors.

4. Even if the Court were inclined to confirm the Plan, certain revisions are necessary to restrict the overly broad release, exculpation and injunctive provisions.

II.
BACKGROUND

5. On December 5, 2017, Provepharm sued Akorn, Inc. ("**Akorn**") in the United States District Court for the Eastern District of New York in an action captioned *Provepharm v. Akorn, Inc.*, Case No. 2:17-cv-007087 (SJF-AKT) (the "**Lawsuit**").

6. Brought under Section 43 of the Lanham Act, 15 U.S.C. § 1125(a), and analogous New York law, Provepharm 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®. Specifically, Akorn lied to the FDA about the availability of methylene blue to convince the FDA to grant Akorn a six month exception window to market and sell its impure, non-USP-compliant methylene blue product, and using that exception window, Akorn then falsely advertised and sold its methylene blue as an pure, USP-compliant product for the next two and half years, substantially damaging Provepharm.

7. Provepharm has its own lost profits damages in the amount of $20–25 million and disgorgement recovery of $37 million in profits Akorn realized as a result of its alleged violation of the Lanham Act, for a total estimated recovery of $57–62 million (before prejudgment interest and costs, and subject to enhancement (trebling) at the discretion of the District Court pursuant to 15 U.S.C. § 1117(a)).

8. Provepharm timely submitted its Proof of Claim on July 14, 2020, seeking **$136,572,441** (as enhancement would allow) from Akorn, making Provepharm one of the largest unsecured creditors in these cases.

9. The Lawsuit is almost ripe for trial. The parties have completed both fact and expert discovery and, in March 2020, filed cross motions for summary judgment with the District Court. Additionally, the parties briefed Daubert motions on the parties' respective expert witnesses in March of 2020. All of these motions remained pending upon Akorn's petitioning for bankruptcy relief.

III.
ARGUMENT

A. The Fundamental Problems

10. Provepharm's objections to confirmation emanate primarily from the following structural infirmities in the Plan:

a. The Plan improperly (i) treats and classifies the shareholders participating in the Shareholder Settlement as unsecured creditors with claims similar in priority to Provepharm rather than as subordinated claims under Section 510(b) junior in priority to unsecured creditors like Provepharm, (ii) grants these shareholders a claim in the amount of $30 million per the Shareholder Settlement. Plan (Dkt 101), Art. I. 113 (Section 510(b) Claim), 118 (Shareholder Litigation Claims), 119 (Shareholder Litigation), 120 (Shareholder Settlement); Art. III.A (Summary of Classification) and B (Treatment); Disclosure Statement (Dkt. 259), Art. IV. B; DIP Credit Agreement (Exhibit D to Disclosure Statement), at 302.

b. The Plan improperly allocates to settling shareholders $27.5 million in value in the form of the D&O Proceeds pursuant to the Shareholder Settlement (an executory contract capable of rejection under section 365 of the Bankruptcy Code)[5] which would otherwise be available for unsecured creditors. Disclosure Statement (Dkt. 259), Art. IV. B; Plan Art. VIII.E. (Debtors Releases), F (Releases by Holders of Claims and Interests); Disclosure Statement (Dkt. 259), Art. II. D (0% recovery for General Unsecured Claims), G (Only Fresenius and Non-Settling Shareholder Claimants Subordinated) and H (Claims, Contingent Value Rights and Payouts of Settling Shareholders not Subordinated); and Art. IV. B (Akorn Securities Class Action and Opt-Out Litigation); DIP Credit Agreement (Exhibit D to Disclosure Statement), at 302.

[5] To the extent the Debtors seek to assume the Shareholder Settlement under section 365, Provepharm argues that Debtors can't achieve under section 365 that which is prohibited by sections 510(b) and 1129.

c. The Plan improperly treats the Shareholder Settlement as being a fully performed, non-executory contract enforceable against the Debtors, and that has the corollary effect of enforcing the releases contained in the Shareholder Settlement for the benefit of insiders; Plan (Dkt 101), Art. I. 113 (Section 510(b) Claim) and 120 (Shareholder Settlement); Disclosure Statement (Dkt. 259), Art. IV. B; Disclosure Statement (Dkt. 259), Art. II. G (Only Fresenius and Non-Settling Shareholder Claimants Subordinated) and H (Claims, Contingent Value Rights and Payouts of Settling Shareholders not Subordinated).

d. To the extent not included in the releases contained in the Shareholder Settlement, the Plan inexplicably either releases or transfers to the Term Loan Lenders causes of actions for what the Chancery Court found to be wrongdoing by the Debtors' former and current directors and officers and other third parties, for no consideration whatsoever to Debtors' disfavored classes of unsecured creditors. Plan Art. I.A.102 (Released Parties), 103 (Releasing Parties), 108 (Retained Causes of Action), and 131 (Transferred Causes of Action); Art. VI.B (Sources of Consideration) and P (Causes of Action); Art. VIII.E (Debtors Releases), F (Releases by Holders of Claims and Interests) and H (Injunction).

e. Additionally, the Plan and the Sale Transaction allow the Term Loan Lenders to purchase (for no allocable consideration) causes of action against Akorn's employees, including claims relating to the $13.8 million in payments made to certain of the Debtors' executives, some of whom, on information and belief, are directly implicated in the prepetition regulatory misconduct that is the subject of the Shareholder Litigation and substantially contributed to the Debtors' entry into chapter 11.[6] Plan Art. I.A.102 (Released Parties), 103 (Releasing Parties), 108 (Retained Causes of Action), and 131 (Transferred Causes of Action); Art. VI.B (Sources of Consideration) and VI.P (Causes of Action); Art. VIII.E. (Debtors Releases), F (Releases by Holders of Claims and Interests), and H (Injunction); Disclosure Statement Art. III.B.4 ($13.8 Million in Retention Bonus Money paid in Feb. 2020).

f. The Debtors fail to substantiate how their assertion that they do not have any material causes of action against any of the Released Parties is justified in light of the findings of the Court of Chancery. Plan Art. I.A.108 (Retained Causes of Action) and 131 (Transferred Causes of Action); Plan Art. VI.P (Causes of Action); Plan Art. VIII.E. (Debtors Releases), F (Releases by Holders of Claims and Interests), and H (Injunction); Disclosure Statement Art. IV.A.4 ("On October 1, 2018, the Delaware Chancery Court issued a 246-page post-trial opinion (the "Chancery Opinion")[7] denying Akorn's

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[6] In fact, the Retained Causes of Action identified with particularity in Exhibit A to the Plan Supplement are almost exclusively actions in which the Debtors are defendants.
[7] *Akorn, Inc. v. Fresenius Kabi AG, C.A.* No. 2018-0300-JTL (Del Ch.).

claims for relief and concluding that Fresenius had validly terminated the Merger Agreement.") and E ("the Delaware Chancery Court issued a public ruling criticizing Akorn's FDA regulatory compliance.").

g. The Plan shields from challenge approximately $13.8 million in prepetition retention payments paid to directors and officers, some of whom on information and belief are wrongdoers identified in the Fresenius Litigation, at the expense of unsecured creditors. Plan Art. I.A.102 (Released Parties), 103 (Releasing Parties), 108 (Retained Causes of Action), and 131 (Transferred Causes of Action); Plan Art. II.D (Projected Recovery for Classes); Plan Art. VI.P (Causes of Action); Plan Art. VIII.E. (Debtors Releases), F (Releases by Holders of Claims and Interests), H (Injunction); Disclosure Statement Art. III.B.4 ($13.8 Million in Retention Bonus Money paid in Feb. 2020); Disclosure Statement Art. III.B.4 ($13.8 Million in Retention Bonus Money paid in Feb. 2020).

B. <u>The Plan Fails The Best Interest of the Creditors Test (§ 1129(a) (7))</u>

11. The Plan cannot be confirmed because it violates the "best interests of creditors test" set forth in section 1129(a)(7) of the Bankruptcy Code with respect to Provepharm.

12. To confirm the Plan the Debtors must demonstrate that the holders of general unsecured claims—which the Debtors project will receive no recovery under both the Plan or chapter 7—will in fact receive at least as much under the Plan as they would receive in a chapter 7 proceeding.

13. The "best interests of creditors" test requires that with respect to each impaired class of claims or interests, each individual holder of a claim or interest has either accepted the plan or will receive or retain property having a present value, as of the effective date of the plan, of not less than what such holder would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code at that time. 11 U.S.C. § 1129(a)(7)(A). The "best interests" test applies to individual dissenting creditors or interest holders, rather than classes of claims and interests, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical liquidation of that debtor's estate under chapter 7 of the Bankruptcy Code against the estimated recoveries under that debtor's chapter 11 plan. *See Bank of Am. Nat.'l Trust & Sav.*

Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 441 n.13 (1999) (explaining that "[t]he 'best interests' test applies to individual creditors holding impaired claims even if the class as a whole votes to accept the plan"); *see also In re Larson, Inc.*, 300 B.R. 227, 232 (Bankr. D. Del. 2003) ("Section 1129(a)(7)(A) requires a determination whether 'a prompt chapter 7 liquidation would provide a better return to particular creditors or interest holders than a chapter 11 reorganization.'").

14. The Debtors, however, cannot meet that burden because (i) they have improperly gerrymandered the Plan's classification scheme to allocate $27.5 million in D&O Proceeds to the shareholders participating in the Shareholder Settlement that in chapter 7 would otherwise be available for distribution to unsecured creditors, and (ii) the releases the Plan provides to the Debtors' former and current directors, officers and other insiders would *not* be available in chapter 7, and the chapter 7 trustee would be able to pursue these potentially lucrative causes of action to judgement or settlement for the benefit of unsecured creditors.

15. Moreover, the Plan's Liquidation Analysis is unpersuasive because it fails to place any value, much less adequate value, on the claims and causes of action released under the Plan. Rather, the Debtors apparently intend for the Court to be persuaded by the Debtors' self-serving statement that they do not believe their estates have any valuable claims against their directors and officers. This begs credulity given the Chancery Opinion, § 510(b)'s mandate to subordinate shareholder interests like those asserted in the Shareholder Settlement, the retention of the Retained Causes of Action, the sale of the Transferred Causes of Action to the Term Loan Lenders (or a successful buyer), and the expansive release, exculpation and injunction provisions in the Plan.

16. By failing to place value on the released causes of action, the Plan's Liquidation Analysis misrepresents the Debtors' ability to provide unsecured creditors more value under the Plan, than such creditors might receive in a liquidation proceeding.

17. In short, chapter 7 provides a better recovery to the Debtors' disfavored unsecured creditors. Pursuing $27.5 million in available D&O Proceeds and the causes of actions against insiders of the Debtors found by the Chancery Court to have acted wrongfully in chapter 7 is in the best interest of and offers a much better prospect of recovery for unsecured creditors than the "$0.00" they will recover under the Plan. Given the choice between the release of the causes of action against Debtors' insiders, directors, officers and others in return for $0.00 on the one hand, and no release of the Debtors' insiders and others on the other and the prosecution of these claims by a disinterested chapter 7 trustee, the latter is preferable to the Debtors' Plan.

C. <u>The Plan is not Proposed in Good Faith (§ 1129(a)(3))</u>

18. To confirm the Plan, the Debtors are required to demonstrate that the Plan is proposed in "good faith and not by any means forbidden by law" under section 1129(a)(3) of the Bankruptcy Code. The Third Circuit has held that the "touchstone" of a good faith inquiry under Bankruptcy Code section 1129(a)(3) is whether the plan will "achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re W.R. Grace & Co*., 475 B.R. 34, 87 (D. Del. 2012), *aff'd* 729 F.3d 332 (3d Cir. 2013) (internal citations omitted). To determine whether a debtor proposed its plan in good faith, courts consider "the totality of the circumstances *See, e.g.*, *In re Genesis Health Ventures, Inc*., 266 B.R. 591, 609 (Bankr. D. Del. 2001) (citations omitted). The factors that a Court should consider in making a determination of good faith are: (i) whether the plan fosters a result consistent with the Bankruptcy Code's objectives; (ii) whether the plan has been proposed with honesty and good intentions and with a basis for expecting that reorganization can be effected; and (iii) whether the plan exhibits fundamental fairness in dealing

with the creditors. *See, e.g.*, *In re Genesis Health Ventures, Inc.*, 266 B.R. at 609 (citations omitted); *In re W.R. Grace*, 475 B.R. at 87.

19. Provepharm submits that the Plan fails this requirement because it (i) improperly elevates the claims of equity holders under the Shareholder Settlement, which are plainly subject to subordination under section 510(b) of the Bankruptcy Code, to creditor class status (at a $30 million unsecured claim amount), (ii) allocates to such settling shareholders $27.5 million in D&O Proceeds that would otherwise benefit legitimate unsecured creditors, (iii) improperly dilutes the general unsecured creditor class, favoring shareholders over creditors, and (iv) without adequate consideration, explanation or justification, releases or transfers valuable causes of action that would benefit unsecured creditors.

20. Moreover, the Plan does not (i) foster a result consistent with the Bankruptcy Code, (ii) was not proposed with honesty and good intentions as to Provepharm or similarly situated creditors and (iii) does not exhibit "fundamental fairness" in dealing with creditors because it improperly gerrymanders votes in Class 4 by placing two entirely separate classes of creditors in Class 4. Under the Sale Transaction nearly all[8] of Debtors' trade creditors, who are placed in Class 4, will have their obligations assumed in full by the Purchaser. *But see* Plan Supplement (Dkt. 434), Ex. B. Litigation claimants, like Provepharm, are also placed in Class 4, but litigation claimants will receive nothing, and their obligations will obviously not be assumed. *See* Disclosure Statement at II.D ("0%" recovery), II.J ("The Debtors do not anticipate any distribution to Class 4, Class 7, or Class 8 at this time."), and Art. I.A, IV.E ("significant lingering litigation overhang as a result of the Opt-Out Cases and the Fresenius Litigation . . . have deterred new

[8] On information and belief, under a deal struck with the Creditors Committee, but not yet announced, the obligations to all of Debtors' trade creditors in Class 4 will be assumed by the Purchaser, in exchange for the Committee's support of the Plan.

financing sources from investing in and/or acquiring the Debtors' business."). Therefore, Class 4 contains two separate categories of claims: those entitled to full satisfaction from the Purchaser (through assumption or other Purchaser commitment), and those that are not. The former (trade creditor) category is not impaired, and therefore should not be eligible to vote on the Plan. §1126(f). The latter (litigation creditor) category is impaired and will receive nothing under the Plan and should be deemed to reject the Plan. See §1126(g). Placing both categories of claims in the same class in order to assure an (artificially) impaired accepting vote from the trade creditors, whose obligations are being assumed and paid in full, is impermissible gerrymandering and done in bad faith. Creditors whose claims will be fully satisfied improperly skew the true number of accepting Class 4 votes for purposes of §1126(c).

D. <u>The Plan Unfairly Discriminates, Is Not Fair and Equitable, and Violates the Absolute Priority Rule (§ 1129(b)(2)(A))</u>

21. Section 1129(b)(2) of the Bankruptcy Code specifies what is necessary for a plan to be "crammed down" on dissenting classes of secured claims, unsecured claims, and interests. With respect to a class of unsecured claims, a plan must provide that either: (i) the holders of claims in the rejecting class will receive value, as of the effective date, equal to the allowed amount of their claims; or (ii) the holders of claims or interests in a more junior class will not receive or retain any property under the plan on account of their claims or interests. The "fair and equitable" requirement as to unsecured creditors thus includes a form of the "absolute priority rule," which implicates the Bankruptcy Code's priority-of-distribution scheme. The absolute priority rule mandates that the claims of junior creditors cannot receive any recovery until the claims of more senior creditors are paid in full, absent consent from the affected senior creditors. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). Yet this is exactly what the Plan purports to do.

22. The Chancery Court found the Debtors' conduct sufficiently egregious to trigger the "materially adverse change" provision of Debtors' merger agreement with Fresenius. That conduct spawned the Shareholder Litigation pursuant to which settling shareholders make their claims against Debtors. Less than two weeks after Fresenius disclosed its investigation into the Debtors' data integrity compliance violations, the Akorn Shareholders filed the putative class action complaint that ultimately became the Shareholder Litigation captioned *In re Akorn, Inc. Data Integrity Securities Litigation* in which Gabellie & Co. Investment Advisors, Inc. and Gabelli Funds, LLC, (the "**Lead Plaintiffs**" or "**Objecting Shareholders**"), were appointed as a Lead Plaintiffs. Disclosure Statement at IV.B.

23. The Akorn Shareholder Litigation Complaint alleges, among other things, that (i) the Debtors and their co-defendants knew or recklessly disregarded widespread institutional data integrity problems at Akorn while making or causing Akorn to make contrary misleading statements and omissions of material fact concerning Akorn's data integrity, and (b) that corrective information was provided to the market on two separate dates, causing non-insider shareholders to lose over $1.07 billion and $613 million in value, respectively.

24. Under the Shareholder Settlement, settling shareholders were (i) promised insurance proceeds payment of $27.5 million, and (ii) issued Contingent Value Rights ("**CVR**"), which upon the filing of Akorn's bankruptcy case, were converted to a pro rata share of a $30 million claim against Debtors. In short, the Shareholder Settlement sought to convert equity interests damaged by Debtors conduct to creditor claims through the Shareholder Settlement.

25. The Shareholder Litigation Claims, as their name suggests, sought damages based on the Shareholders' equity ownership of Akorn and the investment losses the Shareholders suffered in that capacity. The Third Circuit's *Telegroup* ruling frames the classification result here:

> Congress enacted § 510(b) to prevent disappointed shareholders from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding.
>
> …
>
> More important than the timing of the actionable conduct, from a policy standpoint, is the fact that the claims in this case seek to recover a portion of claimants' equity investment. In enacting § 510(b), Congress intended to prevent disaffected equity investors from recouping their investment losses in parity with general unsecured creditors in the event of bankruptcy.
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> …
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> The policy considerations underlying the Congressional judgment in § 510(b) [is] that those who purchase the debtor's stock, rather than general unsecured creditors, should bear the risk of loss caused by illegality in the issuance of the stock[.]

Baroda Hill Investments, Ltd. v. *Telegroup, Inc.* (*In re Telegroup, Inc.*), 281 F.3d 133, 142-43 (3d Cir. 2002).

26. The Shareholder Litigation Claims, including claims based on the consideration that Akorn paid to the Shareholders in the Shareholder Settlement, are quintessential losses resulting from the Shareholders' equity investment. These claims fall squarely within the language and purpose of section 510(b) and must be subordinated. *Telegroup*, 281 F.3d at 142 ("Congress enacted § 510(b) to prevent disappointed shareholders from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding.").

27. Deciding what types of claims are subject to mandatory subordination is fairly straightforward in the Third Circuit: Section 510(b) subordination applies where the damages at issue are connected to the declining value of the debtor's stock, and the claimant's damages reflect the lost investment potential or financial expectations of a shareholder.

28. The elevation of the claims under the Shareholder Settlement to the status of unsecured claims also constitutes "unfair discrimination" contrary to section 1129(b). While the

Bankruptcy Code does not define "unfair discrimination," courts agree the purpose underlying the requirement is to "ensure [ ] that a dissenting class will receive relative value equal to the value given to all other similarly situated classes." *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), aff'd, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, 843 F.2d 636 (2d Cir. 1988); accord *In re SunEdison, Inc.*, 575 B.R. 220 (Bankr. S.D.N.Y. 2017); *In re 20 Bayard Views, LLC*, 445 B.R. 83 (Bankr. E.D.N.Y. 2011); *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 121 (D. Del. 2006).

29. Although the Third Circuit has not yet discussed what standard should apply when assessing unfair discrimination, courts, including those in the District of Delaware, have applied the test articulated by Bruce A. Markell (the "**Markell test**") in his article, A New Perspective on Unfair Discrimination in Chapter 11, 72 Am. Bankr. L.J. 227, 249 (1998).[9]

30. Under the Markell test, a rebuttable presumption that a plan unfairly discriminates will arise when the following elements exist:

a. A dissenting class;

b. another class of the same priority;

c. a difference in the plan's treatment of the two classes that results in either (a) a materially lower percentage recovery for the dissenting class (measured in terms of the net present value of all payments), or (b) regardless of percentage recovery, an allocation under the plan of materially greater risk to the dissenting class in connection with its proposed distribution.

In re Dow Corning Corp., 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999); *Tribune*, 587 B.R. at 617; *Nuverra*, 590 B.R. at 90-91.

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[9] See, e.g., *In re Nuverra Envt'l. Solutions, Inc.*, 590 B.R. 75, 89-90 (D. Del. 2018). *Law Debenture Trust Co. of New York v. Tribune Media Co. (In re Tribune Media Co.)*, 587 B.R. 606, 618 (D. Del. 2018); *In re Armstrong World Indus., Inc.*, 348 B.R. 111 (D. Del. 2006); *In re Quay Corp., Inc.*, 372 B.R. 378 (Bankr. N.D. Ill. 2007); *In re Exide Techs.*, 303 B.R. 48 (Bankr. D. Del. 2003); *In re Dow Corning Corp.*, 244 B.R. 705 (Bankr. E.D. Mich. 1999), aff'd in relevant part, 255 B.R. 445 (E.D. Mich. 2000), aff'd in part and remanded, 280 F.3d 648 (6th Cir. 2002).

31. The Debtor has the burden to rebut the presumption by demonstrating that "outside of bankruptcy, the dissenting class would similarly receive less than the class receiving a greater recovery, or that the alleged preferred class had infused new value into the reorganization which offset its gain." *In re Dow Corning Corp*., 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999); *Tribune*, 587 B.R. at 617.

32. Clearly, the participants in the Shareholder Settlement are not providing "new value" to the Debtors' reorganization. Nor is there any credible basis on which to contend that outside of bankruptcy Provepharm would recover less on account of its claims in the Lawsuit than the shareholders would recover on their claims or the Shareholder Settlement.

33. Additionally, even were the court to find the Shareholder Settlement gives rise to unsecured claims (which Provepharm respectfully submits it should not) the allocation of $27.5 million in D&O Proceeds to the exclusion of other unsecured creditors like Provepharm constitutes "unfair discrimination" in violation of section 1129(b).

34. On its face, the Plan also appears to unfairly discriminate between Class 4 and Class 5, [10] and elevate Class 6 above Class 4 in violation of the Absolute Priority Rule.[11]

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[10] The Plan is not fair and equitable to, and unfairly discriminates against. Provepharm's Class 4 Claim when compared to Class 5 (Intercompany) claims. Unlike Class 4, which receives a pro rata share of nothing, Class 5 claims "will either be Reinstated, distributed, contributed, set off, settled, cancelled and released or otherwise addressed at the option of the Debtors, in consultation with the Required Consenting Term Loan Lenders . . . ." Plan Art. III.B.5. "Reinstated" means that "the Claim or Interest shall be rendered unimpaired in accordance with section 1124 of the Bankruptcy Code." Plan Art. I(A)(101). The Plan appears to give discretion to the Debtors "in Consultation with the Required Consenting Term Loan Lenders" to give these claims whatever treatment they want, including treatment superior to Class 4 claims. The Plan provides the following caveat for Class 5 Claims : "provided, that no distributions shall be made on account of any such Intercompany Claims," Plan Art. III.B.5, suggesting Debtors may argue Class 5 Claims will receive nothing more than Class 4 Claims.

[11] With respect to a class of unsecured claims not provided with the full value on its claims, the term "fair and equitable" is defined under the Bankruptcy Code to require that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property . . . ." § 1129(b)(2)(B), also called the Absolute Priority Rule. Under the Plan, however, even though Class 4 claims are not being paid in full, holders of Class 6 interests, which are comprised of intercompany equity interests, are "Reinstated," violating the Absolute Priority Rule.

E. <u>The Third Party Releases are Impermissibly Broad.</u>

35. The Third Circuit has made it clear that third party releases have a tenuous footing at best under the Bankruptcy Code. *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 211 (3d Cir. 2000) (citations omitted) ("Section 524(e) of the Bankruptcy Code makes clear that the bankruptcy discharge of a debtor, by itself, does not operate to relieve non-debtors of their liabilities. The Bankruptcy Code does not explicitly authorize the release and permanent injunction of claims against non-debtors…").

36. The Third Circuit has further stated: "Our precedents regarding nonconsensual third-party releases and injunctions in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted, and suggest that courts considering such releases do so with caution." *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3rd Cir. 2019), *cert. denied sub nom. ISL Loan Tr. V. Millennium Lab Holdings*, 19-1152, 2020 WL 2621797 (U.S. May 26, 2020).

37. Under this guidance, courts in the Third Circuit may only authorize releases of non-debtor parties by creditors and interest holders in certain limited circumstances. *Continental*, 203 F. 3d at 214 ("hallmarks of permissible non-consensual releases - fairness, necessity to the reorganization, and specific factual findings to support these conclusions."); *Millennium II*, 945 F.3d at 139. Typically, such releases are only allowed with the consent of the releasing party. *In re Emerge Energy Services LP*, 2019 WL 7634308, *17-18 (Bankr. D. Del. 2019); *In re Washington Mutual, Inc.*, 442 B.R. 314, 355 (Bankr. D. Del. 2011); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335-37 (Bankr. D. Del. 2004).

38. In this case, the Plan has not met the standards set forth by the Third Circuit or this Court. Although the Plan has been revised to require an "opt-in" to the third-party release, there is no, let alone adequate, consideration for these releases. Debtors modification of its releases to

make them "opt in" releases did not resolve the Debtors failure to obtain or identify any consideration for such releases, or allow them to otherwise satisfy applicable legal standards.

F. Releases and Exculpation in Plan Sections VIII (E), (F), (G) and (H) Do Not Meet Standards of This Court.

39. The Debtors' releases, Claim and Interest Holder releases, exculpations and the Plan injunction set forth in Plan Sections VIII (E), (F), (G) and (H) do not meet the standards of this Court.

40. The Debtor Releases are only permitted in "certain limited circumstances," and then, only after consideration of five factors: "(1) an identity of interest between the debtor and non-debtor such that a suit against the non-debtor will deplete the estate's resources, (2) a substantial contribution to the plan by the non-debtor, (3) the necessity of the release to the reorganization, (4) the overwhelming acceptance of the plan and release by creditors and interest holders, and (5) the payment of all or substantially all of the claims of the creditors and interest holders under the plan." *Washington Mutual*, 442 B.R. at 346; *Coram*, 315 B.R. at 335. These factors "are neither exclusive nor conjunctive requirements," but provide guidance to a court in determining the fairness of the releases. *Washington Mutual*, 442 B.R. at 346.

41. There is no evidence that the litany of third parties being released by the Debtors substantially contributed to the Debtors' restructuring efforts or that the releases were necessary to the reorganization. In fact, to the extent Debtors insurance providers may have provided coverage for damages sustained by Provepharm, there is no reason (and no consideration provided) to release third party insurance companies from potential liabilities to Provepharm.

42. Certainly, the fifth factor (*i.e.*, the payment of all or substantially all of the claims under the plan) is not met because the Plan promises no recovery to the Debtors' unsecured claimants, notwithstanding the $35 million Wind-Down Budget. The virtually limitless scope of

these releases is particularly egregious in light of the Debtors' failure to conduct an independent investigation of potential claims (despite Vice Chancellor Laster's extensive findings of gross misconduct by the Debtors' management). The Plan cannot be confirmed unless the releases, exculpations and injunction are substantially tailored to meet the applicable legal standards in this Circuit.

43. It is not enough that before the Petition Date the Debtors evaluated potential claims its shareholders had against the Debtors and their officers and directors in connection with the Debtors' entry into the Shareholder Settlement with a *subset* of their equity holders. The Debtors are now in bankruptcy and are fiduciaries for all of their stakeholders. There may be valid, valuable claims against officers, directors and other third parties that could be asserted on behalf of the Debtors' estates for the benefit of unsecured creditors, *including* litigation claimants like Fresenius, the MDL plaintiffs or Provepharm. The Debtors' prepetition settlement of *some* of these claims with a subset of shareholders should not preclude the remaining stakeholders from pursuing the same or similar causes of action.

IV.
RESERVATION OF RIGHTS

44. Provepharm reserves all rights, claims, defenses, and remedies, including, without limitation, to supplement and amend this Objection, to raise further and other objections, and to introduce evidence at the confirmation hearing.

45. 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 confirmation of Debtors' Plan of Reorganization and granting any and all other such relief to which the Court finds Provepharm is justly entitled.

Dated: August 25, 2020

NORTON ROSE FULBRIGHT US LLP

/s/Michael M. Parker

Michael M. Parker
michael.parker@nortonrosefulbright.com

111 W. Houston Street, Suite 1800
San Antonio, TX 78205-3792
Telephone: (210) 224-5575
Facsimile: (210) 270-7205

and

ASHBY & GEDDES

/s/ William P. Bowden

William P. Bowden (#2553)
500 Delaware Avenue, 8^{th} Fl.
Wilmington, DE 19899
P: (302) 654-1888
F: (302) 654-2067
wbowden@ashbygeddes.com

COUNSEL FOR PROVEPHARM, INC.

CERTIFICATE OF SERVICE

I, William P. Bowden, hereby certify that on August 25, 2020, I caused one copy of the foregoing document to be served upon the parties on the attached service list via Electronic Mail.

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

Patrick J. Nash, Jr., P.C.
Gregory F. Pesce
Christopher M. Hayes
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
patrick.nash@kirkland.com
gregory.pesce@kirkland.com
christopher.hayes@kirkland.com

Nicole L. Greenblatt, P.C.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
nicole.greenblatt@kirkland.com

Paul N. Heath
Amanda R. Steele
Zachary I. Shapiro, Brett M. Haywood
RICHARDS, LAYTON AND FINGER, PA
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801
heath@rlf.com
steele@rlf.com
shapiro@rlf.com
haywood@rlf.com

Catherine Steege
Landon Raiford
William Williams
JENNER & BLOCK LLP
353 N. Clark St.
Chicago, IL 60654
csteege@jenner.com
lraiford@jenner.com
wwilliams@jenner.com

Mark Minuti
Luke Murley
SAUL EWING ARNSTEIN & LEHR LLP
1201 North Market Street, Suite 2300
Wilmington, DE 19801
mark.minuti@saul.com
luke.murley@saul.com

Andrew Goldman
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center,
250 Greenwich Street,
New York, NY 10007
andrew.goldman@wilmerhale.com

Scott J Greenberg
Michael J. Cohen
GIBSON DUNN & CRUTCHER LLP
200 Park Avenue,
New York, New York 10166
sgreenberg@gibsondunn.com
mcohen@gibsondunn.com

Robert S. Brady
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
rbrady@ycst.com

Jane M. Leamy
OFFICE OF THE UNITED STATES TRUSTEE
for the District of Delaware
844 King Street, Suite 2207, Lockbox 35
Wilmington, Delaware 19801
Jane.m.leamy@usdoj.gov