

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)
	§	

LOUISIANA DEPARTMENT OF REVENUE'S OBJECTION TO
CONFIRMATION OF JOINT CHAPTER 11 PLAN OF AKORN, INC.
AND ITS DEBTOR AFFILIATES

The Secretary of the Louisiana Department of Revenue ("LDR"), through undersigned counsel objects to confirmation of the Joint Chapter 11 Plan of Akorn, Inc., and its Debtor Affiliates for the following reasons:

1.

The plan fails to except governmental units with post-petition administrative expense claims of the kind set forth in 11 U.S.C. §503(b)(1)(B)-(C) from filing a request for payment in order to have an allowable administrative expense claim. Accordingly, the plan violates 11 U.S.C. §503(b)(1)(D) and is not confirmable pursuant to 11 U.S.C. §1129(a)(1). Further, the plan fails to provide for interest in the event that an administrative claim for taxes is not paid on the effective

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 LLC. The location of the Debtors' service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.



date at the rate required pursuant to 11 U.S.C. §511. Otherwise the administrative claim is impaired. LDR has not administrative claims filed as of yet, but that does not mean there will not be any filed before the bar date.

2.

The Plan does not expressly state which Priority Taxes are to be assumed by the purchaser pursuant to the Asset Purchase Agreement; the plan states that Priority Taxes shall not be the responsibility of the Debtors, and purports to relieve the Debtor and Plan Administrator of the responsibility for payment of taxes “expressly assumed” under the APA without more definitive identification of which taxes are being assumed. The APA reflects in Section 1.3 that there is an assumption of certain liabilities, under which is included “Assumed Taxes.” Section 1.3 does not set forth which taxes, *if any*, are being assumed. Section 1.3 does not include a reference to any Exhibit where such liabilities will be located if assumed by the purchaser, if any. That is, the APA does not reference any attachment to be included at the closing containing this information. The Debtor should have to provide a list of the expressly assumed tax liabilities under the APA, if any, or make no reference to expressly “Assumed Taxes” and file same within the court docket where it may be located in a transparent manner. In the event no Priority Taxes are being assumed under the APA by the Purchaser, this should be removed from the plan to avoid unnecessary confusion.

3.

The Plan fails to reflect that Priority taxes, *if assumed by the Purchaser*, shall be paid in accordance with 11 U.S.C. §1129(a)(9)(C) with all post-effective date interest at the rate required by Section 511. LDR has not agreed to any lesser treatment than that provided by 11 U.S.C. §1129(a)(9)(C) and 11 U.S.C. §511. In the event that the claims will be paid in installments, the plan fails to provide the date that the installments shall commence, and the intervals on which the

payments shall be paid. LDR objects to any payment of installments on less than a calendar quarter basis commencing with the first date of the first quarter after which LDR's claims becomes an Allowed Claims for purposes of distribution.

4.

The LDR objects to third party releases contained within the plan. The plan proposes to "deem" affiliates, including individuals who are non-debtors, as "Debtors," and release them from liabilities. The discharge of such affiliates could eliminate liability for withholding trust taxes to the LDR in violation of the bankruptcy code. Based on information and belief, Akorn, Inc. has an outstanding pre-petition withholding tax return which must be filed for the quarter ending 12/31/2019. ***LDR does not consent to the release of any non-debtor for trust tax liabilities for which such individuals are liable pursuant to La. Rev. Stat. §47:1561.1.*** The third party- release of affiliates who are non-debtors makes the plan objectionable pursuant to 11 U.S.C. §1129(a)(1).

5.

The 2019 Louisiana Corporate Taxes for Akorn, Inc. and Akorn Sales, Inc. are pre-petition tax periods but the returns not due pursuant to extension ***until after the effective date of the plan.*** And based on the date of the Sale, this will not be the final return that is due. LDR is entitled to assurance of who is actually responsible ***for the filing of the pre-petition tax returns.*** At this time, the 2019 Louisiana Corporate tax payments, if any ultimately are due, are delinquent because the extension of time to file is not an extension of time to pay under Louisiana law. Also, Akorn, Inc. has an outstanding fourth quarter withholding tax return which is due for 12/31/2019 that is delinquent. The plan says that "After the Effective Date, the Plan Administrator shall complete and file all final or otherwise required federal, state, and local tax returns..." but does not expressly

include any of the outstanding pre-petition corporate tax returns and/or withholding tax returns which have not been filed by the Debtors to date.

6.

The returns are due because at all times relevant, the Debtors did not withdraw from the state of Louisiana and were exercising their charter in the state of Louisiana and/or doing business in the state of Louisiana.² “All corporations ... taxed as corporations for federal income tax purposes ... shall be taxed on their Louisiana taxable income, except as otherwise exempted.” La. Rev. Stat. Ann. §47:287.11(A)-(B). *See also* La. Rev. Stat. Ann. § 47:102. “Every corporation deriving income from Louisiana sources shall file a return on forms secured from the secretary or by electronically filing a return, unless expressly exempt from the tax.” is imposed pursuant to La. Rev. Stat. Ann. §601 which provides in relevant part:

Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do or doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this chapter shall pay an annual tax at a rate of fifty-cents for each one thousand dollars, or major fraction thereof on the first three hundred thousand dollars of taxable capital and at the rate of three dollars for each one thousand dollars, or major fraction thereof, which exceeds three hundred thousand dollars of taxable capital. Taxable capital shall be determined as hereinafter provided. The tax levied herein is due and payable on any one of the following alternative incidents:

(1) The qualification to carry on to do business in this state or the actual doing of business within the state or the actual doing of business within the state in a corporate form. The term doing business as used herein shall mean and include each and every act, power, right, privilege or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organization, *as well as the buying, selling or procuring of services or property.*

² Akorn, Inc. last filed an annual report with the Louisiana Secretary of State on 1/23/2020. Akorn Sales, Inc. last filed an annual report with the Louisiana Secretary of State on 5/17/2017, but has not withdrawn from doing business in the state to date.

(2) The exercise of a corporation's charter or the continuance of its charter within this state.

(3) The owning or using any part of its capital plant or other property in this state

(a) Due Date of CFT Return: The CFT due date is governed by La. Rev. Stat.

§ 47:609, which provides:

The tax levied by [Title 47, Chapter 5 Franchise Tax] is for the annual accounting period, fiscal, or calendar year, regularly uses by the taxpayer in keeping its books, with no proration for a portion of the year in the case ofwithdrawal from the state by foreign corporations or where a corporation otherwise ceases to become taxable under this Chapter. The *tax is due* on the first date of each ... fiscal year and annually thereafter and is computed on the basis of the previous ... fiscal year closing. The tax is payable to the secretary on or before the fifteenth date of the fourth month following the month *in which the tax is due.* However, if the date on which the tax is payable falls on a Saturday, Sunday or legal holiday, the tax shall be payable on the next business day. With its payment, the taxpayer shall deliver to the secretary a full, accurate, and complete report and a statement signed by a fully authorized official of the corporation containing such information as the secretary may require.

7.

The plan proposes to violate Louisiana law with respect to the wind down of the debtors. Louisiana law requires a foreign corporation to actually withdraw from the state of Louisiana and the plan proposes to bypass this step and “deem” that they have done so, and relieve the debtor for paying any tax which accrues after that date. Title 28 U.S.C. §959 requires a debtor in possession to operate the business in accordance with state laws. And state law requires corporate franchise tax returns to be filed until such time as they have withdrawn from the state and ceased doing business. The franchise tax in Louisiana *is not pro-ratable* and is paid in advance, computed on the basis of the previous year closing. See La. Rev. Stat. Ann. §47:609.

WHEREFORE, the LDR prays that after all due legal proceedings are had, that this Honorable Court will deny confirmation of the plan and for all other relief that may be just in the premises.

Respectfully submitted,

LOUISIANA DEPARTMENT OF REVENUE

/s/ Florence Bonaccorso-Saenz

Florence Bonaccorso-Saenz (La. Bar No. 25493)

Bankruptcy Counsel, Litigation Division

617 N. Third St., Office 780

Post Office Box 4064 (Zip Code 70821-4064)

Baton Rouge, LA 70802

Tele: (225) 219-2083, Fax: (225) 231-6235

Email: Florence.Saenz@la.gov