

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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

**LIMITED OBJECTION OF CRAVATH, SWAINE & MOORE LLP (“CRAVATH”) TO  
THE ASSIGNMENT AND ASSUMPTION OF THE ENGAGEMENT LETTER  
BETWEEN CRAVATH AND THE DEBTORS**

Cravath, Swaine & Moore LLP (“Cravath”) hereby submits this limited objection (the “Objection”) in response to: (1) the Debtors’ *Motion Seeking Entry of an Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling an Auction and Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures for Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief* [Docket No. 18] (the “Sale Motion”); and (2) the *Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases*, which Cravath received from the Debtors on August 20, 2020 (the “Assignment Notice”).<sup>f</sup>

<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, 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.



### **BACKGROUND**

1. At various times, Cravath has entered into agreements with one or more of the above-captioned Debtors (collectively, the “Debtors”) contemplating legal services to be provided by Cravath for the benefit of the Debtors (each, an “Engagement Letter”). Such Engagement Letters specify that the agreement set forth therein and the Debtors’ retention of Cravath is governed by New York law.

2. On May 20, 2020, the Debtors filed a voluntary petition under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Court”).

3. On May 21, 2020, the Debtors filed the Sale Motion.

4. On June 15, 2020, the Court entered the *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* [Docket No. 181] (the “Bidding Procedures Order”).

5. As relevant here, the Bidding Procedures Order authorizes the Debtors to conduct the Auction<sup>2</sup> pursuant to which all or substantially all of the Debtors’ assets would be sold in accordance with certain procedures. The Bidding Procedures Order also provides that the Debtors may assume and assign to the Stalking Horse Bidder or other

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<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Sale Motion or the Bidding Procedures Order, as applicable.

Successful Bidder certain executory contracts and leases pursuant to specified procedures provided therein.

6. On August 7, 2020, the Debtors filed a *Notice of No Auction* [Docket No. 429], providing that the Auction would not take place because no Qualified Bids were received by the bid deadline of August 3, 2020 at 5:00 p.m. (prevailing Eastern Time).

7. On August 11, 2020, the Debtors filed a *Notice of Adjournment of Confirmation Hearing and Sale Hearing* [Docket No. 438], which moved the hearing to approve the sale of the Debtors' assets to the Stalking Horse Bidder and confirmation of the Debtors' plan of reorganization from August 20, 2020 to September 1, 2020 at 10:00 a.m. (prevailing Eastern Time).

8. On August 20, 2020, Cravath received the Assignment Notice, a copy of which is attached hereto as **Exhibit A**. The Assignment Notice identifies an Engagement Letter as an executory contract that may potentially be assumed and assigned to the Successful Bidder. The Engagement Letter is the only contract identified on the Assignment Notice. The Assignment Notice lists the cure amount for the Engagement Letter as \$29,169.00.

#### **LIMITED OBJECTION**

9. Cravath objects to the potential assumption and assignment of the Engagement Letter as set forth in the Assignment Notice only on grounds that the Debtors are prohibited from taking such action under section 365(c)(1) of the Bankruptcy Code without Cravath's consent, which has not been provided. Further, because the Assignment Notice does not make clear which Engagement Letter is the subject of the notice, Cravath respectfully requests that the Court enter an order denying the proposed assumption and

assignment of any Engagement Letter, including the Engagement Letter as set forth in the Assignment Notice.

10. As discussed further below, applicable state law holds that contracts for personal services may not be assigned or assumed, and therefore, the Debtors are prohibited from assigning or assuming the Engagement Letter under section 365 of the Bankruptcy Code without Cravath's consent.

11. Sections 365(a) and 365(f) of the Bankruptcy Code allow a trustee or debtor-in-possession to assume or assign executory contracts. Section 365(a) provides that "[e]xcept as provided in . . . subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a). And in relevant part, Section 365(f) provides that:

Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

11 U.S.C. 365(f)(1). Thus, while sections 365(a) and 365(f) of the Bankruptcy Code permit a chapter 11 trustee to assume and assign an executory contract, the statutes make clear that the trustee's right to do so is subject to the limitations set forth in section 365(c). In relevant part, section 365(c) provides:

The trustee may not assume or assign any executory contract . . . of the debtor, whether or not such contract or lease prohibits or restricts assignment . . . if –

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor . . . whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment.

11 U.S.C. § 365(c)(1)(A)-(B).

12. In the Third Circuit, the “applicable law” provision in section 365(c)(1)(A) includes applicable state law. *See In re EBC I, Inc.*, 380 B.R. 348, 363 (Bankr. D. Del. 2008) (“Pursuant to section 365(c) of the Bankruptcy Code, a debtor may not assume or assign an executory contract if applicable state law excuses a party to the contract (other than the debtor) from accepting performance or rendering performance to an entity other than the debtor.”); *In re Planet Hollywood Int’l, Inc.*, No. 99-3612, 2000 WL 36118317 at \*10 (Bankr. D. Del. Nov. 21, 2000) (finding that “because applicable state law prohibits the assignment of the [personal service] contracts, . . . the [d]ebtors cannot assume the [] [c]ontracts under Section 365 of the Bankruptcy Code”).

13. As noted above, each Engagement Letter is governed by New York law. Under New York law, contracts providing for personal services may not be assigned or assumed without the consent of the other party. *See In re Adelphia Comm’cns Corp.*, 359 B.R. 65, 73 n.20 (Bankr. S.D.N.Y. 2007) (noting that “a personal services contract may be the epitome of the kind of contract that ‘applicable law’ prohibits assignment without counterparty consent”); *Eisner Computer Solutions, LLC v. Gluckstern*, 741 N.Y.S.2d 511 (App. Div. 2002) (holding that while non-compete covenants in an agreement may be assignable without the counterparty’s consent, “personal services contracts are not freely assignable”). “Personal services” contracts under New York law are defined as contracts that involve a special relationship, knowledge or skill based on which the parties contracted. *See, e.g., Artists Rights Enft Corp. v. Estate of King (King I)*, 224 F. Supp. 3d 231, 236 (S.D.N.Y. 2016) (noting that “[t]he central feature of a personal services contract

is that the contract primarily entails the skill and labor of a particular individual" and "[i]n determining whether a contract is one for personal services, courts consider many factors, including: '[t]he importance of trust and confidence in the relation between the parties, the difficulty of judging the quality of the performance rendered and the length of time required for performance'"); *In re Compass Van & Storage Corp.*, 65 B.R. 1007, 1011 (Bankr. E.D.N.Y. 1986) (describing a "personal services" contract as one that "contemplates the performance of personal services involving the exercise of special knowledge, judgment, taste, skill, or ability" (citation omitted)); *see also In re Planet Hollywood*, 2000 WL 36118317 at \*5 (finding that the "essence of a personal service contract is the parties' reliance on such qualities as character, reputation, taste, unique skill or unique talent").

14. Non-assignable "personal services" contracts "include an agreement to render professional services". 6 Am. Jur. 2d § 28 (including a physician as one type of professional whose contract cannot be assigned without consent because the agreement is a "personal services" contract); *see In re Montgomery's Estate*, 272 N.Y. 323, 329 (1936) (holding that "[a] contract for services to be rendered by an attorney, like other contracts for personal services requiring skill, [] can only be performed by the person named" (citations and internal quotation marks omitted)).

15. Following applicable law regarding "personal services" contracts, several bankruptcy courts have found that section 365 prohibits debtors from assigning or assuming "personal services" contracts. *See In re Shick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (reasoning that "a court must . . . uphold the restriction under section 365(c) if the identity of the contracting party is material to the agreement" and "[a] duty is not delegable if the obligee has relied on the obligor's 'personality' (*i.e.*, his honesty, skill,

reputation, character, ability, wisdom or taste)"); *see also In re Compass Van & Storage Corp.*, 65 B.R. at 1011 (noting that a personal services contract "is not assignable . . . without the consent of the other party to the contract" (citation omitted)).

16. Under applicable New York law, the Engagement Letter is a non-assignable "personal services" contract, and therefore, section 365(c)(1) prohibits the Debtors from assuming or assigning the Engagement Letter.

17. The nature of the services that Cravath provides to the Debtors is one that undoubtedly requires special knowledge, judgment and skill that is unique to the lawyer-client relationship between Cravath and the Debtors. *See* 6 Am. Jur. 2d § 28; *In re Montgomery's Estate*, 272 N.Y. at 329. Indeed, the nature of the legal profession is such that it relies on the ability of practitioners to draw on these qualities, which in turn are tailored to each client and each matter in a bespoke manner. Cravath's engagement by the Debtors was specific to the Debtors and the matters specified in the Engagement Letter and therefore cannot be assumed and assigned under section 365(c)(1) of the Bankruptcy Code.

18. Based on the highly personal and specialized nature of services Cravath provides to the Debtors, as well as the prevailing view of courts (including those in Delaware and New York) that describes "personal services" contracts in a manner that clearly supports a finding that the Engagement Letter is a "personal services" contract, the Debtors are not permitted to assume and assign the Engagement Letter absent Cravath's consent.

19. Cravath does not consent to the assumption and assignment of the Engagement Letter as set forth in the Assignment Notice in connection with the sale of the Debtors' business. Thus, Cravath respectfully requests the Court to deny any attempt to

assume and assign the Engagement Letter listed in the Assignment Notice. Further, and for the reasons described above, Cravath respectfully requests the Court to deny any attempt to assume and assign any Engagement Letter.

**RESERVATION OF RIGHTS**

Cravath reserves all rights to be heard before the Court in connection with the Objection (and any joinders thereto), to amend, supplement, or otherwise modify the Objection prior to or during the hearing on the Objection, and to assert such other and further objections prior to the final adjudication of the matter.

**CONCLUSION**

WHEREFORE, Cravath respectfully requests that the Court enter an order denying the proposed assumption and assignment of any Engagement Letter, including the Engagement Letter as set forth in the Assignment Notice, and granting such other and further relief as is just and proper.

Dated: August 25, 2020

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP

by

/s/ Paul H. Zumbro

Paul H. Zumbro  
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**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	
	)	Chapter 11
AKORN, INC., <i>et al.</i> , <sup>3</sup>	)	
	)	Case No. 20-11177-KBO
Debtors.	)	
	)	(Jointly Administered)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 25, 2020, a copy of the foregoing *Limited Objection of Cravath, Swaine & Moore LLP (“Cravath”) To The Assignment and Assumption of The Engagement Letter Between Cravath and The Debtors* was electronically filed and served on all parties receiving electronic notification in these cases from the Court CM/ECF system, including the parties listed on the attached service list.

Dated: August 25, 2020

/s/ Paul H. Zumbro

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New York, NY 10019-7475  
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PZumbro@cravath.com

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<sup>3</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, 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.

**Service List**

**Counsel to the Debtors**

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**Counsel to the Term Loan Agent Under the Debtors' Term Loan Agreement**

**Wilmer Cutler Pickering Hale and Dorr LLP**

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Jane M. Leamy	Jane.M.Leamy@usdoj.gov
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**Counsel to the Official Committee of Unsecured Creditors**

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**EXHIBIT A**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re:

AKORN, INC., *et al.*,<sup>1</sup>

Debtors.

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)  
) Chapter 11  
)  
) Case No. 20-11177 (KBO)  
)  
) (Jointly Administered)  
)

**NOTICE TO CONTRACT PARTIES TO POTENTIALLY  
ASSUMED EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

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<p><b>YOU ARE RECEIVING THIS NOTICE BECAUSE YOU OR ONE OF YOUR AFFILIATES IS A COUNTERPARTY TO AN EXECUTORY CONTRACT OR UNEXPIRED LEASE WITH ONE OR MORE OF THE DEBTORS AS SET FORTH ON <u>EXHIBIT A</u> ATTACHED HERETO.</b></p>
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**PLEASE TAKE NOTICE** that on June 15, 2020, the United States Bankruptcy Court for the District of Delaware (the “Court”) entered the *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* [Docket No. 181] (the “Bidding Procedures Order”),<sup>2</sup> authorizing the Debtors<sup>3</sup> to conduct an auction (the “Auction”) to select the party to purchase the Debtors’ assets. The Auction will be governed by the bidding procedures approved pursuant to the Bidding Procedures Order (attached to the Bidding Procedures Order as Exhibit 2, the “Bidding Procedures”).

**PLEASE TAKE FURTHER NOTICE** that, pursuant to the Bidding Procedures and the terms of any Successful Bid, the Debtors **may** assume and assign to the Successful Bidder the contract or agreement listed on Exhibit A to which you are a counterparty, upon approval of the Sale. The Debtors have conducted a review of their books and records and have determined that

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<sup>1</sup> 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.

<sup>2</sup> All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Bidding Procedures Order or the Sale Motion.

<sup>3</sup> This relief granted in the Bidding Procedures Order is solely limited to the Debtors.

the cure amount for unpaid monetary obligations under such Assigned Contracts is as set forth on **Exhibit A** attached hereto (the “Cure Amounts”).

**PLEASE TAKE FURTHER NOTICE** that if you disagree with the proposed Cure Amounts, object to a proposed assignment to the Successful Bidder of any Assigned Contract, or object to the ability of the Successful Bidder to provide adequate assurance of future performance with respect to any Assigned Contract, your objection must: (i) be in writing; (ii) comply with the applicable provisions of the Bankruptcy Rules, Local Bankruptcy Rules, and any order governing the administration of these chapter 11 cases; (iii) state with specificity the nature of the objection and, if the objection pertains to the proposed Cure Amounts, state the correct cure amount alleged to be owed to the objecting Contract Counterparty, together with any applicable and appropriate documentation in support thereof; and (iv) be filed with the Court and served and **actually received no later than August 25, 2020, at 12:00 p.m. (prevailing Eastern Time)** (the “**Contract Objection Deadline**”) by the Court and the following parties: (i) proposed counsel to the Debtors, Kirkland & Ellis LLP, 601 Lexington Avenue, New York, New York 10022, Attn: Nicole L. Greenblatt, email: nicole.greenblatt@kirkland.com, and Kirkland & Ellis LLP, 300 North LaSalle, Chicago, Illinois 60654, Attn: Patrick J. Nash, Jr. P.C., Gregory F. Pesce, and Christopher M. Hayes, email: patrick.nash@kirkland.com, gregory.pesce@kirkland.com, and christopher.hayes@kirkland.com; (ii) proposed Delaware counsel to the Debtors, Richards, Layton & Finger, 920 N. King Street, Wilmington, Delaware 19801, Attn: Paul M. Heath, Amanda R. Steele, Zachary I. Shapiro, and Brett M. Haywood, email: heath@rlf.com, steele@rlf.com, shapiro@rlf.com, and haywood@rlf.com; (iii) counsel to the Stalking Horse Bidder and counsel to the Ad Hoc Group, Gibson Dunn & Crutcher, 200 Park Avenue, New York, New York, 10166, Attn: Scott J Greenberg and Michael J. Cohen, e-mail: sgreenberg@gibsondunn.com and mcohen@gibsondunn.com; (iv) co-counsel to the Stalking Horse Bidder and co-counsel to the Ad Hoc Group, Young Conaway Stargatt & Taylor, 1000 North King Street, Wilmington, Delaware 19801, Attn: Robert S. Brady, e-mail: rbrady@ycst.com; (v) counsel to the Term Loan Agent under the Debtors’ Term Loan Agreement, Wilmer Cutler Pickering Hale and Dorr LLP, 7 World Trade Center, 250 Greenwich Street, New York, New York 10007, Attn: Andrew Goldman, email: andrew.goldman@Wilmerhale.com; (vi) the counsel to the agent under any post-petition financing; (vii) the Office of the U.S. Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Jane M. Leamy, email: Jane.M.Leamy@usdoj.gov; (viii) counsel to the official committee of unsecured creditors, Jenner & Block LLP, 353 N. Clark Street, Chicago, Illinois 60654, Attn: Landon Raiford and William Williams, email: lraiford@jenner.com and wwilliams@jenner.com; (ix) co-counsel to the official committee of unsecured creditors, Saul Ewing Arnstein & Lehr, 1201 North Market Street, Suite 2300, Wilmington, Delaware 19801, Attn: Mark Minuti and Luke Murley, email: mark.minuti@saul.com and luke.murley@saul.com; (x) counsel to any official committee appointed in these Chapter 11 Cases; and (xi) any other party that has filed a notice of appearance in these chapter 11 cases.

**PLEASE TAKE FURTHER NOTICE** that if no objection to (a) the Cure Amounts(s), (b) the proposed assignment and assumption of any Assigned Contract, or (c) adequate assurance of the Successful Bidder’s ability to perform is filed by the Contract Objection Deadline, then (i) you will be deemed to have stipulated that the Cure Amounts as determined by the Debtors are correct, (ii) you will be forever barred, estopped, and enjoined from asserting any

additional cure amount under the proposed assigned Assigned Contract, and (iii) you will be forever barred, estopped, and enjoined from objecting to such proposed assignment to the Successful Bidder on the grounds that the Successful Bidder has not provided adequate assurance of future performance as of the closing date of the Sale.

**PLEASE TAKE FURTHER NOTICE** that any objection to the proposed assumption and assignment of an Assigned Contract or related Cure Amounts in connection with the Successful Bid that otherwise complies with these procedures yet remains unresolved as of the commencement of the Sale Hearing, shall be heard at a later date as may be fixed by the Court.

**PLEASE THAT FURTHER NOTICE** that, notwithstanding anything herein, the mere listing of any Assigned Contract on the Cure Notice does not require or guarantee that such Assigned Contract will be assumed by the Debtors at any time or assumed and assigned, and all rights of the Debtors and the Successful Bidder with respect to such Executory Contracts and/or Unexpired Leases are reserved. Moreover, the Debtors explicitly reserve their rights, in their reasonable discretion, to seek to reject or assume each Assigned Contract pursuant to section 365(a) of the Bankruptcy Code and in accordance with the procedures allowing the Debtors and/or the Successful Bidder, as applicable, to designate any Assigned Contract as either rejected or assumed on a post-closing basis.

**PLEASE TAKE FURTHER NOTICE** that, nothing herein (i) alters in any way the prepetition nature of the Assigned Contracts or the validity, priority, or amount of any claims of a counterparty to any Assigned Contract against the Debtors that may arise under such Assigned Contract, (ii) creates a postpetition contract or agreement, or (iii) elevates to administrative expense priority any claims of a counterparty to any Assigned Contract against the Debtors that may arise under such Assigned Contract.

**PLEASE TAKE FURTHER NOTICE** that you may obtain additional information concerning the above-captioned chapter 11 cases at the website maintained in these chapter 11 cases at [www.kccllc.net/akorn](http://www.kccllc.net/akorn).

*[Remainder of page intentionally left blank]*

Wilmington, Delaware  
August 20, 2020

*/s/ Paul N. Heath*

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*Co-Counsel for the Debtors  
and Debtors in Possession*

**Exhibit A**

<b>Debtor Party</b>	<b>Contract Counterparty</b>	<b>Contract Name / Description</b>	<b>Cure Amount (if any)</b>
Akorn, Inc.	Cravath, Swaine & Moore LLP	Engagement Letter (Legal Services)	\$29,169.00