

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

In re:	:	Chapter 11
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AKORN, INC., <i>et al.</i> ,	:	Case No. 20-11177 (KBO)
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	:	Hearing Date: September 1, 2020, at 10:00 a.m.
Debtors.	:	Sale Objection:
	:	Extended to August 27, 2020, at 12:00 p.m.
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**OMNIBUS OBJECTION BY THE UNITED STATES TO: (1) THE ASSUMPTION AND
ASSIGNMENT OF FEDERAL CONTRACTS; AND (2) THE DEBTORS' SALE MOTION**

The United States, on behalf of its agencies, the Department of Veterans Affairs ("VA"), the Internal Revenue Service ("IRS"), the Environmental Protection Agency ("EPA") and the Department of Health and Human Services ("HHS"), through undersigned counsel, objects to : (1) the assumption and assignment of any federal contract or other agreement; and (2) the Debtors' 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 ("Sale Motion"). [Docket No. 18]. The United States hereby incorporates the objection it filed to the Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates, as modified ("Plan"), which adversely affect the rights of the United States. [Docket Nos. 101 and 547]. In support of its objection, the United States avers as follows:



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BACKGROUND

1. On May 20, 2020, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. [Docket No. 1].

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

3. On May 26, 2020, the Debtors filed the Plan, as subsequently modified on August 25, 2020. On August 27, 2010, the United States filed an objection to the Plan.

4. The United States is a creditor and party in interest in this matter. VA records indicate the Debtors owe the VA at least \$265,209.00 under the VA Contracts. The IRS has filed estimated priority, prepetition proofs of claim in the approximate aggregate amount of \$21,500.000.

5. 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 (“Sale Procedures Order”) [Docket 181].

6. The Sale Procedures Order directed that within one business day of the entry of the Order, the Debtors serve a notice by email or overnight delivery to all of the counterparties of contracts to be assumed pursuant to the Sale Motion (“Notice”). The Court required the Notice to include a good faith estimate of any Cure payment owed to the counterparty. The undersigned was not aware of any federal agency having received a Notice until August 25, 2020. Upon information and belief, the Debtors are seeking to assume and assign multiple government contracts, including Department of Veterans Affairs Federal Supply Schedule Contract Numbers V797P-5209B and 36F79720D0129 (“VA Contracts”).

7. On August 25, 2020, the Debtors provided the undersigned counsel with seven Notices that purportedly were sent to the VA (“Notices”). VA personnel was able to locate one notice that had been sent by email to the VA late on the night of August 20, 2020, five business days ago. Upon information and belief, many of the Notices appear to have been emailed to an employee who changed jobs within the agency and did not receive the emails.

8. The Notices set a zero cure amount for all of the VA contracts. The United States is still in the process of reviewing its records to determine the nature and extent of its interests in the Debtors.

OBJECTION

9. **No adequate notice.** The United States objects to the Sale Motion because it has not been afforded an adequate opportunity to determine how its interests are being affected by the Debtors’ proposed sale.

10. **Section 363 of the Bankruptcy Code does not absolve the Debtors of liabilities.** The liquidating Debtors are seeking to eliminate obligations and liabilities through the Section 363 sale process of the Bankruptcy Code. [11 U.S.C. § 363]. Although the Debtors have not filed a recent version of their sale order, attached to the Sale Motion is a proposed sale order (“Sale Order”). [Sale Motion, Exhibit B]. The Sale Order provides that creditors are barred and estopped from asserting claims or interests against the Debtors for liabilities and obligations transferred to the Purchaser. The Sale Order provides in pertinent part:

21. Except as provided in the APA or this Sale Order, after the Closing, the Debtors and their estates shall have no further liabilities or obligations with respect to any Assumed Liabilities or Permitted Encumbrances, and all holders of such Encumbrance, lien, claim, and interest are forever barred and estopped from asserting such Claims against the Debtors, their successors or assigns, their property, or their assets or estates. [Sale Order, ¶ 21].

Section 363 of the Bankruptcy Code governs the sale of property free and clear of any interest in such property of an entity only if certain criteria, enumerated below, are met. Although Congress did not expressly define “interest in property”, the Third Circuit interprets the phrase as authorizing a bankruptcy court to bar interests that could potentially travel with the property being sold, even if the asserted interest is unsecured. United States v. Knox-Schillinger (In re Trans World Airlines, Inc.), 322 F.3d 283 (3d Cir. 2003). Here, the Debtors are seeking to enjoin not only successor liability travelling with the interests being sold in the sale of their assets, but are also attempting to enjoin creditors from having their claims paid by the Debtors’ estates. The United States objects to any attempt by the liquidating Debtors to bar or estop the United States from asserting any obligation, claim or liability against the Debtors in accordance with applicable law.

11. **Environmental Liabilities.** The United States, through the EPA, is charged with regulatory responsibility to oversee the protection of public health and the environment under several environmental statutes, including the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., Oil Pollution Act (OPA), 33 U.S.C. §§ 2701 et seq., Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq., Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 et seq., and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq. These statutes and similar statutes under state law are designed, inter alia, to ensure that owners of facilities using or releasing hazardous substances or waste in the United States take necessary steps to protect the public from serious environmental dangers.

12. It is well-established that anyone who owns or operates property acquired from a debtor must comply with environmental law. No one is entitled to ignore hazards or disregard laws that

protect the public and the environment. See, e.g., Ohio v. Kovacs, 469 U.S. 274, 285 (1985) (“[A]nyone in possession of [a] site . . . must comply with . . . environmental laws . . . Plainly that person . . . may not maintain a nuisance, pollute the waters . . . [,] or refuse to remove the source of such conditions.”); In re General Motors Corp., 407 B.R. 463, 508 (S.D.N.Y. 2009) (a free and clear purchaser “would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer’s responsibility”) (Gerber, J.); cf. In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992) (a reorganized debtor that owns property that was contaminated prior to confirmation is liable to EPA as the present owner of the property).

13. Purchasers are subject to the same compliance obligations as all other owners of property. The law does not put the purchaser in a privileged position, by freeing it from obligations with which all other owners must comply. If the purchaser could contend that it is somehow exempt from obligations that apply to all other owners, the public would be placed at risk. The purchaser cannot evade its environmental obligations, including with respect to hazards that exist even at the outset of its ownership. See General Motors, 407 B.R. at 508.

14. Thus, for example, if a purchaser owns or operates a contaminated facility, it must protect the public from hazards as required by law – regardless of whether the hazardous conditions derive in whole or part from actions of Debtors. And, if a purchaser owns or operates equipment or a facility that has a defective condition, it is responsible to prevent and may have liability for the consequences of, for example, an explosion or release, notwithstanding that the explosion or release may have derived in whole or part from a defective condition caused prior to purchase. The Debtors and purchasers should not be asking this Court to countenance exposing the public to these kinds of hazards and risks.

15. Section 363(f) of the Bankruptcy Code, 11 U.S.C. § 363(f), does not allow purchasers to acquire a debtor's property free and clear of the obligation to comply with environmental law. Rather, section 363(f) permits property to be sold free and clear of an entity's "interest in such property" only if at least one of the following five conditions is satisfied:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. [11 U.S.C. § 363(f)].

16. None of these conditions is satisfied with respect to compliance obligations of an owner under environmental law. The Government does not consent to a transfer free and clear of such obligations (condition 2), the obligations are not a lien (condition 3), and the obligations of owners under environmental law are not in dispute (condition 4). Similarly, "applicable nonbankruptcy law" (condition 1) does not permit a sale free and clear of an owner's obligations under environmental law. Finally, the Government cannot be "compelled . . . to accept a money satisfaction" (condition 5) in lieu of the purchaser's compliance with environmental law. No provision of environmental law allows an owner to force the Government to accept money instead of action to protect the public. Likewise, bankruptcy law does not require the Government to elect a monetary remedy over compliance. See In re Mark IV Indus., Inc., 438 B.R. 46, 470 (Bankr. S.D.N.Y. 2010), *aff'd*, 459 B.R. 173, 186 (S.D.N.Y. 2011) (the Bankruptcy Code does not require a governmental agency entitled to an equitable remedy to select a suboptimal remedy of money

damages, citing In re Davis, 3 F.3d 113, 116 (5th Cir. 1993)); see also Gouveia v. Tazbir, 37 F.3d 295, 299 (7th Cir. 1994) (a debtor could not force neighboring landowners to accept money in lieu of equitable relief). In sum, bankruptcy law cannot be used to place a buyer in a position above the law, leaving the public at risk without the protection of health and safety requirements. See, e.g., Zerand-Bernal, Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994) (“[N]o one believes . . . that a bankruptcy court enjoys a blanket power to enjoin all future lawsuits against a buyer at a bankruptcy sale [or] . . . immunize such buyer from all state and federal laws that might reduce the value of the assets bought from the bankrupt.”).

17. Likewise, nonbankruptcy law requirements for approval of the transfer of environmental permits or licenses are important protections of public health and safety that need to be complied with. There is no authority under bankruptcy law to avoid these important safeguards.

18. The United States is concerned about, and objects to, language in the proposed Sale Order that is contrary to the above well-established requirements of law and would in any preclude the government from pursuing environmental liabilities for any obligation of the Debtors relating to the property or the Debtors or the operation of the Debtors' business. See, e.g., Sale Order ¶¶ O, P, 5, 6, and 11.

19. **No Assumption or Assignment of government interests.** The United States is a party to numerous agreements with the Debtors. The United States objects to the Sale Motion because it contains provisions which are highly prejudicial to the rights of the United States and contravene Sections 363 and 365 of the Bankruptcy Code. The Sale Order provides:

17. With respect to the Assigned Contracts: (1) each Assigned Contract is an executory contract or unexpired lease under section 365 of the Bankruptcy Code; (b) the Debtors may assume each of the Assigned Contracts in accordance with section 365 of the Bankruptcy Code; (c) the

Debtors may assign each Assigned Contract in accordance with sections 363 and 365 of the Bankruptcy Code, and any provisions in any Assigned Contract that prohibit or condition the assignment of such Assigned Contract or allow the party to such Assigned Contract to terminate, recapture, impose any penalty, condition, renewal, or extension, or modify any term or condition upon the assignment of such Assigned Contract, constitute unenforceable anti-assignment provisions which are void and of no force and effect; (d) all other requirements and conditions under sections 363 and 365 of the Bankruptcy Code for the assumption by the Debtors and assignment to Purchaser of each Assigned Contract, in accordance with the APA, have been satisfied; (e) the Assigned Contracts shall be transferred and assigned to, and following the Closing Date, remain in full force and effect for the benefit of Purchaser in accordance with the APA, notwithstanding any provision in any such Assigned Contract (including those of the type described in sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer and, pursuant to section 365(k) of the Bankruptcy Code the Debtors shall be relieved from any further liability with respect to the Assigned Contracts after such assignment to and assumption by Purchaser in accordance with the APA; and (f) upon the Closing Date, in accordance with sections 363 and 365 of the Bankruptcy Code, Purchaser shall be fully and irrevocably vested in all right, title and interest of each Assigned Contract. [Sale Order, ¶ 17].

Under 11 U.S.C. § 365(c)(1) the Debtor “may not assume or assign any executory contract or unexpired lease of the debtor...if applicable law excuses such a party, other than the debtor, to such a contract or lease from accepting performance from or rendering performance to any entity other than the debtor or the debtor in possession.” Moreover, the Anti-Assignment Act, 41 U.S.C. § 6305, provides:

The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party. A purported transfer in violation of this subsection annuls the contract or order so far as the Federal Government is concerned, except that all rights of action for breach of contract are reserved to the Federal Government.

Applicable regulations in addition to the Anti-Assignment Act are the Federal Acquisition Regulation (“FAR”) codified at Title 48, Chapter 1 of the United States Code of Federal Regulations. [48 CFR § 1.105-2]. The FAR governs the acquisition process by which the federal

government contracts, including the VA contracts, acquire goods and services and it regulates the activities of government personnel in carrying out this process. The Third Circuit has confirmed that under the Anti-Assignment Act, debtors may not assign or assume any executory contract with the United States without first obtaining its consent. In re West Electronics, Inc., 852 F.2d 79, 83 (3d Cir. 1988). It is imperative to preserve the Government's ability to determine with whom to contract.

20. The United States objects to the setting of any cure amount with respect to any federal lease, contract, agreement or other interest of the United States. [Sale Order, ¶ 19].

21. The United States objects to any attempt by the Debtors to extinguish its setoff and recoupment rights. [Sale Order, ¶ 20].

22. **No waiver.** The Sale Motion requests that the Sale Order be effective immediately upon its entry by providing that the stays under Bankruptcy Rules 6004(h) and 6006(d) are waived. [Sale Motion, ¶ 69]. The United States does not consent to the truncation of its statutory protections. This provision negatively affects the United States' appeal rights. If the Sale Order is immediately effective, the Debtors are essentially requesting that the Court shorten the time for appeal afforded by the federal bankruptcy rules. Pursuant to Rules 6004(h) and 6006(d) of the Federal Rules of Bankruptcy Procedure, unless otherwise ordered by the Court, an automatic fourteen-day stay is imposed from the date of entry of the order. Under the Debtors' proposed scheme, if the United States is unable immediately to obtain a hearing before the appropriate Court to seek a stay, its appeal may be contended to be moot. Particularly in light of the appellant being a government agency, with a chain of command to be consulted, this unilateral ability of the Debtors to shorten the stay period would be unfair and prejudicial to the government.

WHEREFORE, the United States requests that the Court deny the relief set forth in the Sale Motion and grant such other and further relief as the Court deems necessary and just.

DAVID C. WEISS
United States Attorney

BY: /s/ Ellen Slights
Ellen W. Slights (DE Bar No. 2782)
Assistant United States Attorney

Dated: August 27, 2020

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AFFIDAVIT OF SERVICE

I, Shane Macas, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest that on August 27, 2020, I caused to be served a copy of the **OMNIBUS OBJECTION BY THE UNITED STATES TO: (1) THE ASSUMPTION AND ASSIGNMENT OF FEDERAL CONTRACTS; AND (2) THE DEBTORS' SALE MOTION** by electronic service on the registered parties via the Court's CM/ECF system and upon the following parties

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