

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

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

Debtors.

)  
) Chapter 11  
)  
) Case No. 20-11177 (KBO)  
)  
) (Jointly Administered)  
)  
) Objection Deadline: Sept. 23, 2020 at 4:00 p.m. (ET)  
) Hearing Date: Oct. 21, 2020 at 10:00 a.m. (ET)  
)

DEBTORS' MOTION FOR  
ENTRY OF AN ORDER APPROVING THE SETTLEMENT  
AGREEMENT BY AND AMONG DEBTORS AKORN, INC. AND HI-TECH  
PHARMACAL CO., INC. AND CLAIMANT RISING PHARMA HOLDINGS, INC.

The above-captioned debtors and debtors in possession (collectively, the "Debtors") respectfully state as follows in support of this motion:<sup>2</sup>

**Relief Requested**

1. The Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Order") approving a settlement and compromise of claims by and among Akorn, Inc. ("Akorn"), Hi-Tech Pharmacal Co., Inc. ("Hi-Tech"), and Rising Pharma Holdings, Inc. ("Rising Pharma") and together with Akorn and Hi-Tech, the "Parties") pursuant to the terms

<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> A detailed description of the Debtors and their business, and the facts and circumstances supporting the Debtors' chapter 11 cases, are set forth in greater detail in the *Declaration of Duane A. Portwood, Chief Financial Officer of the Debtors, in Support of Debtors' Chapter 11 Petitions and First Day Motions* (the "First Day Declaration"), filed contemporaneously with the Debtors' voluntary petitions for relief filed under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), on May 20, 2020 (the "Petition Date").



and conditions of that certain Agreement dated as of August 27, 2020 (the “Agreement”),<sup>3</sup> a copy of which is attached hereto as **Exhibit B**.

### **Jurisdiction and Venue**

2. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory bases for the relief requested herein are sections 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019.

### **Background**

5. Akorn, together with its Debtor and non-Debtor subsidiaries, is a specialty pharmaceutical company that develops, manufactures, and markets generic and branded prescription pharmaceuticals, branded as well as private-label over-the-counter consumer health products, and animal health pharmaceuticals. Akorn is an industry leader in the development,

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<sup>3</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Agreement. In the event of any inconsistency or discrepancy between a description in this motion and the terms and provisions of the Agreement, the Agreement shall govern for all purposes.

manufacturing, and marketing of specialized generic pharmaceutical products in alternative dosage forms. Headquartered in Lake Forest, Illinois, Akorn has approximately 1,916 employees worldwide and maintains a global manufacturing presence, with pharmaceutical manufacturing facilities located in Illinois, New Jersey, New York, and Switzerland. Akorn's operations generated approximately \$682 million in revenue and approximately \$124 million of Adjusted EBITDA in 2019. The Debtors commenced these chapter 11 cases to conduct an orderly sale process that will position the Debtors for sustained future success by right-sizing their balance sheet and addressing their litigation overhang. On September 2, 2020, the Court entered an order approving the sale of substantially all of the Debtors' assets [Docket No. 656] (the "Sale Order"), and on September 4, 2020, the Court entered the *Order Confirming the Modified Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates* [Docket No. 673].

6. On the Petition Date, each of the Debtors filed a voluntary petition with the Court under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and managing their properties as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On May 22, 2020, the Court entered an order [Docket No. 57] authorizing the joint administration and procedural consolidation of the chapter 11 cases pursuant to Bankruptcy Rule 1015(b). On June 3, 2020, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed an official committee of unsecured creditors (the "Committee") [Docket No. 125]. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases.

### **The Product and Settlement Agreement**

7. On November 28, 2011, Hi-Tech, Rising Pharma, and HH&P LLC entered into (a) that certain *Asset Purchase Agreement* (together with any amendments, supplements, exhibits,

riders, and adjustments, the “APA”) and Hi-Tech and Rising Pharma entered into (b) that certain *Master Collaboration Agreement* (together with any amendments, supplements, exhibits, riders, and adjustments, the “Master Collaboration Agreement”), whereby Hi-Tech manufactured, and Rising Pharma distributed, Flunisolide Nasal Solution (the “Product”). Pursuant to the Master Collaboration Agreement, Hi-Tech and Rising Pharma each own a 50% interest in the Product. On April 19, 2013, Hi-Tech and Rising Pharma entered into that certain *Agreement to Stage Product Under Quarantine* (the “Staging Agreement” and together with the APA and the Master Collaboration Agreement, the “Flunisolide Agreements”).

8. Pursuant to the Flunisolide Agreements, Hi-Tech and Rising Pharma each have certain rights, title, and interest, as the case may be, in the Product.

9. Rising Pharma has asserted claims [Claim Nos. 45 and 47] (the “Asserted Claims” and together with any other claims, rights, and causes of action arising out of or relating to the dealings and relationship between the Debtors and Rising Pharma prior to the Petition Date, the “Claims”) in the Bankruptcy Cases against Akorn and Hi-Tech based on the Flunisolide Agreements. Akorn and Hi-Tech dispute the Claims.

10. Akorn’s interest in the Product and Related Materials were specifically excluded from the assets sold pursuant to the Sale Order. *See* Sale Order ¶ 27(vii).

11. The Agreement represents the negotiated resolution of the dispute between Akorn, Hi-Tech, and Rising Pharma regarding the Claims. The Parties have agreed that, in exchange for Rising Pharma waiving its Claims, the Debtors will transfer any and all rights, title, and interest in the Product to Rising Pharma on the terms set forth in the Agreement. The Agreement requires the Debtors to transfer the Product and Related Materials to Rising Pharma free and clear of any liens, claims, encumbrances, and other interests to the extent permitted by the Bankruptcy Code.

The Agreement also provides that the Flunisolide Agreements shall be deemed terminated in all respects, and none of the Parties shall have any further obligations under the Flunisolide Agreements. Further, pursuant to the Agreement, Rising Pharma agrees to reduce the Asserted Claims to \$0 and to waive and not assert any and all Claims against the Debtors. The Debtors submit that the terms and conditions of the Agreement are fair and reasonable and should be approved.

12. The Agreement is a mutually beneficial resolution by and among the Parties that was heavily negotiated at arm's length by sophisticated parties. The Product and Related Materials have limited value to the Debtors' Estates because the Product and Related Materials cannot be easily marketed to third parties, given that: (a) pursuant to the Master Collaboration Agreement, Rising Pharma owns a 50% interest in the Product, and (b) the Product is currently not compliant with certain regulatory requirements and substantial effort would be required to bring it into compliance. The Agreement reflects a favorable outcome for the Debtors because, in exchange for the transfer of assets of limited value to the Debtors' Estates, it allows the Parties to avoid potentially costly, significant, and uncertain disputes regarding the Claims. Accordingly, for the reasons set forth herein, the Debtors submit that performance under the Agreement represents a sound exercise of their business judgment.

### **Basis for Relief**

#### **I. The Settlement is Fair, Reasonable, and in the Best Interests of the Estate.**

13. The Debtors seek Court approval of the Agreement pursuant to Bankruptcy Rule 9019(a), which provides, in relevant part: "On motion by the [debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a).

14. Settlements and compromises are tools often utilized to expedite case administration and to reduce unnecessary administrative costs. As such, they are favored in bankruptcy. *See In re Nutraquest, Inc.*, 434 F.3d 639, 646 (3d Cir. 2006) (“[i]t is axiomatic that settlement will almost always reduce the complexity and inconvenience of litigation”). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may, after appropriate notice and a hearing, approve a compromise or settlement so long as the proposed compromise is fair, reasonable, and in the best interest of the estate. *See In re Marvel Entm’t Grp., Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (“[T]he ultimate inquiry [is] whether ‘the compromise is fair, reasonable, and in the interest of the estate.’”); *In re Nw. Corp.*, 2008 WL 2704341, at \*6 (Bankr. D. Del. July 10, 2008) (“[T]he bankruptcy court must determine whether the compromise is fair, reasonable, and in the best interests of the estate.”); *In re Key3Media Grp., Inc.*, 336 B.R. 87, 92 (Bankr. D. Del. 2005) (“[T]he bankruptcy court has a duty to make an informed, independent judgment that the compromise is fair and equitable.”). A proposed compromise need not be the best result that a debtor could have achieved, but only must fall within the “reasonable range of litigation possibilities.” *In re Coram Healthcare Corp.*, 315 B.R. 321, 330 (Bankr. D. Del. 2004).

15. In determining whether a compromise is fair and equitable, the Third Circuit has adopted a four-factor balancing test under which a bankruptcy court should decide whether to approve a particular compromise or settlement: “(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors.” *Nutraquest*, 434 F.3d at 643; *see also Key3Media Grp.*, 336 B.R. 87 at 93 (when determining whether a compromise is in the best interests of the estate, courts must “assess and balance the

value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal” (internal citations omitted)).

16. In addition, section 363(b)(1) of the Bankruptcy Code authorizes a bankruptcy court, after notice and a hearing, to authorize a debtor to “use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). A debtor may use, sell, or lease property of the estate where a sound business purpose justifies such actions. *Dai-ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 242 B.R. 147, 153 (D. Del. 1999) (“In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions.”) (citing to *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (setting forth the “sound business purpose” test in the context of a sale of assets under § 363(b)). Specifically, once a debtor articulates a valid business justification for a particular form of relief, the court reviews the debtor’s request under the business judgment rule. *See In re Commercial Mortg. and Fin. Co.*, 414 B.R. 389, 394 (Bankr. N.D. Ill. 2009) (noting that a debtor in possession “has the discretionary authority to exercise his business judgment in operating the debtor’s business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation”).

17. The Debtors submit that the Agreement satisfies the requirements for approval under Bankruptcy Rule 9019 and section 363(b)(1) of the Bankruptcy Code for two key reasons. **First**, the Agreement is the product of an arms-length process, heavily negotiated between sophisticated parties. The Agreement immediately resolves the dispute regarding the Claims in a consensual manner through the assignment of the Product to Rising Pharma in exchange for a

reduction of the Claims to \$0. The Agreement is a mutually beneficial resolution that allows the Parties to avoid uncertainty and distraction to the estates.

18. **Second**, the Agreement is in the paramount interest of the Debtors' creditors. Given Rising Pharma's existing 50% interest in the Product, Rising Pharma represented the most viable counterparty to take assignment of Akorn's 50% interest. As such, the Debtors are able to exchange their interest in assets with little to no marketable value for resolution of a \$5 million asserted claim, which will facilitate the efficient resolution of these bankruptcy cases and avoid any further cost or expense related to resolving the Claims.

19. Accordingly, the Debtors believe settlement embodied in the Agreement is fair and equitable and in the best interests of their estates and respectfully request that the Court approve the settlement pursuant to Bankruptcy Rule 9019.

## **II. Assignment of the Product and Related Materials Should Be Approved Free and Clear of Liens, Claims, and Other Encumbrances.**

20. Section 363(f) of the Bankruptcy Code permits a debtor to sell property free and clear of another party's interest in the property if: (a) applicable nonbankruptcy law permits such a free and clear sale; (b) the holder of the interest consents; (c) the interest is a lien and the sale price of the property exceeds the value of all liens on the property; (d) the interest is the subject of a bona fide dispute; or (e) the holder of the interest could be compelled in a legal or equitable proceeding to accept a monetary satisfaction of its interest. *See* 11 U.S.C. § 363(f).

21. Section 363(f) of the Bankruptcy Code is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will suffice to warrant the Debtors' assignment of the Product and Related Materials free and clear of all interests (*i.e.*, all liens, claims, rights, interests, charges, or encumbrances). *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793



(Bankr. D. Del. 2002) (“[I]f any of the five conditions are met, the debtor has the authority to conduct the sale free and clear of all liens.”).

22. The Debtors’ prepetition secured lenders have consented to the Debtors’ assignment of the Product to Rising Pharma on the terms of the Agreement, and the Debtors believe there are no other valid third-party property interests in the Product; however, to the extent there are any interests related to the Product, any such interest satisfies or will satisfy at least one of the five conditions of section 363(f) of the Bankruptcy Code. The Debtors accordingly request authority to convey the Product to Rising Pharma free and clear of all liens, claims, rights, interests, charges, and encumbrances.

### **Reservation of Rights**

23. Nothing contained in the motion or any actions taken by the Debtors pursuant to relief granted in the Order is intended or should be construed as: (a) an admission as to the validity, priority, or amount of any particular claim against a Debtor entity; (b) a waiver of the Debtors’ or any other party-in-interest’s rights to dispute any particular claim on any grounds; (c) a promise or requirement to pay any particular claim; (d) an implication or admission that any particular claim is of a type specified or defined in the motion; (e) a request or authorization to assume any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) a waiver or limitation of the Debtors’ or any other party-in-interest’s rights under the Bankruptcy Code or any other applicable law; or (g) a concession by the Debtors or any other party in interest that any liens (contractual, common law, statutory, or otherwise) satisfied pursuant to the motion are valid and the Debtors and all other parties-in-interest expressly reserve their rights to contest the extent, validity, or perfection, or to seek avoidance of all such liens.

**Notice**

24. The Debtors will provide notice of this motion to: (a) the U.S. Trustee for the District of Delaware; (b) counsel to the Committee; (c) Wilmington Savings Fund Society, FSB, in its capacity as successor administrative agent under the Term Loan Credit Agreement, or any of its predecessors or successors (the “Term Loan Agent”); (d) counsel to the Term Loan Agent; (e) counsel to the ad hoc group of the Debtors’ Prepetition Lenders (the “Ad Hoc Group”); (f) the United States Attorney’s Office for the District of Delaware; (g) the Internal Revenue Service; (h) the Food and Drug Administration; (i) the Drug Enforcement Administration; (j) the Securities Exchange Commission; (k) the state attorneys general for all states in which the Debtors conduct business; (l) counsel to Rising Pharma; and (m) any party that requests service pursuant to Bankruptcy Rule 2002.

**No Prior Request**

25. No prior request for the relief sought in this motion has been made to this or any other court.

*[Remainder of page left intentionally blank]*

WHEREFORE, the Debtors respectfully request entry of an order, substantially in the form attached hereto as **Exhibit A**, (a) granting the relief requested herein and (b) granting such other relief as is just and proper.

Wilmington, Delaware  
September 9, 2020

/s/ Paul N. Heath

**RICHARDS, LAYTON & FINGER, P.A.**

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

**IN THE 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)
	)	
	)	<b>Objection Deadline: Sept. 23, 2020 at 4:00 p.m. (ET)</b>
	)	<b>Hearing Date: Oct. 21, 2020 at 10:00 a.m. (ET)</b>

**NOTICE OF MOTION AND HEARING**

**PLEASE TAKE NOTICE** that, on September 9, 2020, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed the *Debtors’ Motion for Entry of an Order Approving the Settlement Agreement by and Among Debtors Akorn, Inc. and Hi-Tech Pharmacal Co., Inc. and Claimant Rising Pharma Holdings, Inc.* (the “Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Court”).

**PLEASE TAKE FURTHER NOTICE** that any responses or objections to the relief requested in the Motion, if any, must be in writing and filed with the Clerk of the United States Bankruptcy Court for the District of Delaware, 3rd Floor, 824 Market Street, Wilmington, Delaware, 19801, on or before **September 23, 2020 at 4:00 p.m. (prevailing Eastern Time)**.

**PLEASE TAKE FURTHER NOTICE** that if any objections to the Motion are received, the Motion and such objections shall be considered at a hearing before The Honorable Karen B. Owens, United States Bankruptcy Judge for the District of Delaware, at the Bankruptcy

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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.

Court, 824 Market Street, 6th Floor, Courtroom No. 3, Wilmington, Delaware, 19801 on  
**October 21, 2020 at 10:00 a.m. (prevailing Eastern Time).**

**PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS TO THE  
MOTION ARE TIMELY FILED IN ACCORDANCE WITH THIS NOTICE, THE  
COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT  
FURTHER NOTICE OR HEARING.**

Wilmington, Delaware  
September 9, 2020

*/s/ Paul N. Heath*

**RICHARDS, LAYTON & FINGER, P.A.**

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

**Exhibit A**

**Proposed Order**

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

---

In re:

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

Debtors.

---

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

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**ORDER GRANTING MOTION TO APPROVE SETTLEMENT  
AGREEMENT BY AND AMONG DEBTORS AKORN, INC. AND HI-TECH  
PHARMACAL CO., INC. AND CLAIMANT RISING PHARMA HOLDINGS, INC.**

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Upon the motion (the “Motion”)<sup>2</sup> of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order (this “Order”) approving the Agreement with Rising Pharma, as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors’ notice of the Motion and opportunity for a hearing on the Motion were appropriate and no other notice need be provided; and this Court having reviewed the Motion and

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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> Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

having heard the statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. The Agreement, including all terms and conditions therein, are approved in all respects.
3. The Debtors and Rising Pharma are authorized and directed to perform all obligations under the Agreement.
4. Pursuant to sections 105(a), 363(b), and 363(f) of the Bankruptcy Code, the Debtors are authorized to transfer the Product and Related Materials to Rising Pharma in accordance with the Agreement, and such transfer shall constitute a legal, valid, binding and effective transfer of the Product and shall vest Rising Pharma with title in and to the Product and Related Materials and Rising Pharma shall take title to and possession of the Product and Related Materials free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever.
5. The lack of any specific description or inclusion of any particular provision of the Agreement in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of this Court that the Agreement be approved in its entirety.
6. In the event of any discrepancy between the Agreement and this Order, the terms of this Order shall govern.
7. Notwithstanding any provision in the Bankruptcy Rules to the contrary,  
(a) the Agreement is not subject to any stay in the implementation, enforcement, or realization of



the relief granted in this Order, unless otherwise provided herein or in the Agreement, and (b) the Debtors and Rising Pharma, in their discretion, and without further delay, may take any action and perform any act authorized under this Order.

8. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

10. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

**EXHIBIT B**

**Agreement**

**AGREEMENT REGARDING ASSIGNMENT  
OF FLUNISOLIDE AND WAIVER OF CLAIMS**

Akorn, Inc. (“Akorn”), Hi-Tech Pharmacal Co., Inc. (“Hi-Tech”), and Rising Pharma Holdings, Inc. (“Rising Pharma” and together with Akorn and Hi-Tech, the “Parties”) enter into this *Agreement Regarding Assignment of Flunisolide and Waiver of Claims*, entered into as of August 27, 2020 (this “Agreement”).

**RECITALS**

A. On November 28, 2011, Hi-Tech, Rising Pharma, and HH&P LLC entered into (a) that certain *Asset Purchase Agreement* (together with any amendments, supplements, exhibits, riders, and adjustments, the “APA”) and Hi-Tech and Rising Pharma entered into that certain *Master Collaboration Agreement* (together with any amendments, supplements, exhibits, riders, and adjustments, the “Master Collaboration Agreement”), whereby Hi-Tech manufactured, and Rising Pharma distributed, Flunisolide Nasal Solution (the “Product”).

B. Pursuant to the Master Collaboration Agreement, Hi-Tech and Rising Pharma each own a 50% interest in the Product.

C. On April 19, 2013, Hi-Tech and Rising Pharma entered into that certain *Agreement to Stage Product Under Quarantine* (the “Staging Agreement” and together with the APA and the Master Collaboration Agreement, the “Flunisolide Agreements”).

D. On May 20, 2020 (the “Petition Date”), Akorn, Hi-Tech, and certain of their affiliates (collectively, the “Debtors”), each filed a voluntary petition for relief under chapter 11 of 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Court”).

E. The Debtors continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. These chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered under the lead case, *In re Akorn, Inc.*, Case No. 20-11177 (KBO) (collectively, the “Bankruptcy Cases”), pursuant to Bankruptcy Rule 1015(b) [Docket No. 57]. On June 3, 2020, the United States Trustee for the District of Delaware appointed a committee of unsecured creditors [Docket No. 125]. No party has requested the appointment of a trustee or examiner in these chapter 11 cases.

F. On July 2, 2020, the Court entered an order [Docket No. 318] (a) authorizing the Debtors to solicit acceptances for the *Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates* [Docket No. 101] (as modified, amended, or supplemented from time to time, the “Plan”); (b) approving the *Disclosure Statement for Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates* [Docket No. 102] (as modified, amended, or supplemented from time to time, the “Disclosure Statement”) as containing “adequate information” pursuant to section 1125 of the Bankruptcy Code; (c) approving the solicitation materials and documents to be included in the solicitation packages; (d) approving procedures for soliciting, receiving, and tabulating votes on

the Plan and for filing objections to the Plan; and scheduling a hearing to consider confirmation of the Plan.

G. Pursuant to the Flunisolide Agreements, Hi-Tech and Rising Pharma each have certain rights, title, and interest, as the case may be, in the Product.

H. Rising Pharma has asserted claims [Claim Nos. 45 and 47] (the “Asserted Claims” and together with any other claims, rights, and causes of action arising out of or relating to the dealings and relationship between the Debtors and Rising Pharma prior to the Petition Date, the “Claims”) in the Bankruptcy Cases against Akorn and Hi-Tech based on the Flunisolide Agreements.

I. Akorn and Hi-Tech dispute the Claims.

J. Hi-Tech desires to assign, and Rising Pharma desires to receive, all of Hi-Tech’s right, title, and interest in the Product.

K. The Parties have agreed that, in exchange for waiving its Claims, the Debtors will transfer any and all rights, title, and interest in the Product to Rising Pharma on the terms set forth below:

### **AGREEMENT**

1. **Assignment of the Product.** As consideration for Rising Pharma’s performance under this Agreement, Akorn and Hi-Tech agree to assign all of their right, title, and interest in the Product to Rising Pharma; *provided* that such assignment shall be on an “as is, where is” basis; *provided, further*, that, subject to paragraphs 2, 3, and 4 hereof, the Debtors shall have no obligation to provide development, manufacturing, regulatory, or other technical support for the Product.

2. **Delivery of Regulatory Documentation.** Akorn and Hi-Tech shall use commercially reasonable efforts to deliver to Rising Pharma all regulatory documents in their possession pertaining to the Product ANDA and shall file a transfer letter in a form similar to **Exhibit A** with the U.S. Food and Drug Administration (the “FDA”). Rising Pharma shall file a transfer letter in a form similar to **Exhibit B** with the FDA.

3. **Product Transfer.** With respect to the Product, Akorn and Hi-Tech agree to transfer to Rising the following:

- a. Its fifty percent (50%) interest in the Product;
- b. The Product ANDA;

4. **Related Materials Transfer.** Akorn and Hi-Tech agree to use commercially reasonable efforts to collect the following materials and to transfer all such collected materials (the “Related Materials”) to Rising:

- a. Product commercial batch records;

- b. Reports related to the Product, including but not limited to, any development reports, annual reports, PADER reports and/or any reports related to any attempts to address ongoing issues related to the Product Out of Specification and related device failures;
- c. Books and records related to the Product; and
- d. Reports related to any serious and non-serious adverse events associated with the Product ANDA from Spontaneous or Medical literature during any reporting period.

5. **“As-Is,” No Representation, Warranty, or Further Obligation.** The Debtors’ assignment and transfer of their rights, title, and interest in the Product shall be on an “as-is” basis, “with all faults,” without representation, warranty, or further obligations of any kind (including, without limitation, indemnification and non-compete obligations) other than as specifically set forth in paragraph 2 hereof.

6. **Free and Clear Transfer.** To the extent permitted by the Bankruptcy Code, the Plan, and any order confirming the Plan, Akorn and Hi-Tech shall transfer the Product and Related Materials to Rising free and clear of any liens, claims, encumbrances and/or interests.

7. **Termination of Flunisolide Agreements.** The Flunisolide Agreements shall be deemed terminated in all respects, and none of the Parties shall have any further obligations under the Flunisolide Agreements.

8. **Reduction and Waiver of Claims.** Rising Pharma agrees to reduce the Asserted Claims to \$0 and to waive and not assert any and all Claims against the Debtors.

9. **Support of Plan.** Rising Pharma agrees to support, and to vote any claims it may have against the Debtors in favor of, the Plan.

10. **Effectiveness; Bankruptcy Court Approval.** This Agreement is subject to approval by the Court in all respects, and such approval shall be included in an order confirming the Plan or other order of the Bankruptcy Court pursuant to a motion under Section 363 of the Bankruptcy Code and/or Rule 9019 of the Federal Rules of Bankruptcy Procedure. If by motion, the Debtors shall file such motion within seven (7) days of execution of this Agreement. Upon such approval, (a) the Product shall be deemed assigned to Rising Pharma as set forth herein and (b) the Parties agree that Kurtzman Carson Consultants LLC, the Debtors’ claims and noticing agent in the Bankruptcy Cases, is authorized to modify and adjust the Claims (including the Asserted Claims) as filed on the claims register to \$0 and to expunge any such Claims therefrom.

11. **Carveout from the Sale APA.** The following language shall be included in any Order approving any sale authorized pursuant to the Debtors’ motion seeking authority to sell substantially all their assets [Doc. No. 18]:

“Notwithstanding anything to the contrary in this Order and/or the Asset Purchase Agreement related to the Sale and any other associated transaction documents, the following assets are excluded from such Sale:

- (1) Flunisolide Nasal Solution (the “Product”)
- (2) The Product ANDA;
- (3) Any agreements related to the Product and Product ANDA; and
- (4) Books and records related to the Product, including but not limited to, commercial batch records, and Product reports (inclusive of any development reports, annual reports, PADER reports and/or any reports related to any attempts to address ongoing issues related to the Product Out of Specification and related device failures).”

12. **No Third-Party Beneficiary.** Nothing in this Agreement, whether express or implied, shall be construed to give to any person or entity other than the Parties any legal or equitable right, remedy, interest, or claim under or in respect of this Agreement.

13. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior discussions, agreements, and understandings, both written and oral, among the Parties with respect to such subject matter.

14. **Multiple Counterparts.** This Agreement may be executed in multiple counterparts, any of which may be transmitted by facsimile, e-mail, or mail and each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

15. **Miscellaneous.** The Parties each further agree that: (a) the Court has exclusive jurisdiction and power over any and all matters arising from or related this Agreement, including any disputes with respect thereto, and the Parties each expressly submit to such jurisdiction of the Court; (b) it has the full requisite power and authority to execute and deliver this Agreement and to perform hereunder; (c) this Agreement constitutes the valid and binding agreement of Akorn, Hi-Tech, and Rising Pharma, each as the case may be, and is enforceable against such party in accordance with the terms hereof; (d) this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and permitted assigns; and (e) neither this Agreement nor any right or interest hereunder may be assigned in whole or in part by any of the Parties without the prior written consent of the other Parties.

*[Remainder of page intentionally left blank]*

Agreed to as of the date first set forth above.

AKORN:

**AKORN, INC.**

By: J. Busaccorsi  
Name: J. Busaccorsi  
Its: EVP

HI-TECH:

**HI-TECH PHARMACAL CO., INC.**

By: J. Busaccorsi  
Name: J. Busaccorsi  
Its: EVP

RISING PHARMA:

**RISING PHARMA HOLDINGS, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Agreed to as of the date first set forth above.

AKORN:

**AKORN, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

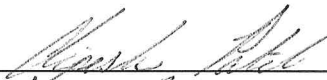
HI-TECH:

**HI-TECH PHARMACAL CO., INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

RISING PHARMA:

**RISING PHARMA HOLDINGS, INC.**

By:   
Name: SHRESH PATEL  
Its: GENERAL COUNSEL



**EXHIBIT A**  
**TEMPLATE FOR ANDA TRANSFER DOCUMENT FOR HI-TECH**

[DATE]

Office of Generic Drugs (HFD-600)  
Center for Drug Evaluation and Research  
Central Document Room (CDR)  
Food and Drug Administration  
5901-B Ammendale Rd.  
Beltsville, MD 20705-1266

**RE: General Correspondence - Change of ANDA Ownership  
ANDA 077704 (Flunisolide 0.025 mg Spray)**

Dear Sir or Madam:

Please refer to ANDA 077704 Flunisolide 0.025 mg Spray. The original ANDA was approved on August 3, 2006.

Pursuant to 21 CFR 314.72, we are writing to inform you that effective [DATE OF COURT APPROVAL] the ownership of ANDA 077704 has been transferred to:

Rising Pharma Holdings, Inc.  
Attention: Sharath Koripally, 2 Tower Center Blvd., Suite 1401A, East Brunswick, NJ 08816  
Telephone: 718-510-6822  
Fax: +1-201-961-1234  
Email: skoripally@risingpharma.com

Hi-Tech Pharmacal Co., Inc. ("Hi-Tech") conveys to Rising Pharma Holdings, Inc. ("Rising Pharmaceuticals") all rights to the application including all agreements, promises, commitments and conditions previously made by Hi-Tech and detailed in the application. Hi-Tech has provided Rising Pharmaceuticals with a complete copy of ANDA 077704, including amendments, supplements and correspondence relating to ANDA 077704.

Please be advised that effective as of the date of the transfer of ownership noted above, all sponsor notifications and submissions required by the FDA concerning Flunisolide 0.025 mg Spray ANDA 077704 will now be the responsibility of Rising Pharmaceuticals.

If you have any questions regarding this submission please feel free to contact me in writing, or by telephone at (631) 789-8228 Ext. 4949, or by e-mail at john.franolic@akorn.com.

Sincerely,  
John Franolic  
Vice President, Regulatory Affairs

**EXHIBIT B**  
**TEMPLATE FOR ANDA TRANSFER DOCUMENT FOR RISING PHARMA**

[DATE]

Office of Generic Drugs  
Via Electronic Submission Gateway (ESG)  
Central Document Room  
Center for Drug Evaluation and Research  
Food and Drug Administration  
5901-B Ammendale Rd.  
Beltsville, MD 20705-1266

**Re: General Correspondence – Change of ANDA Ownership  
ANDA Products (see Attachment 1)**

Dear Sir/Madam:

Rising Pharma Holdings, Inc. (“Rising Pharma”) which is located at 2 Tower Center Blvd., Suite 1401A, East Brunswick, NJ 08816 is hereby providing notice of a change of ownership of the ANDAs listed in Attachment 1, from Akorn Inc., located at 1925 West Field Court, Suite 300, Lake Forest, IL 60045, to Rising Pharma, effective [DATE OF COURT APPROVAL]. All rights to the attached ANDAs are now owned by Rising Pharma.

Further, pursuant to 21 CFR 314.72(a)(2),

- i. Rising Pharma commits to all agreements, promises, and conditions made by the former owner which are contained in the application;
- ii. Rising Pharma certifies that the change in ownership was effective DATE ; and
- iii. Rising Pharma certifies that it has a complete copy of the application, including all amendments and correspondence records that are required to be kept under 314.81.

Please note that if any changes are to be made to the conditions in the approved application, Rising Pharma will inform the Agency via amendment (pre-approval) or supplemental application (post approval) under 314.70. A revised FDA 356h accompanies this submission. Please direct all future regulatory correspondence for these ANDAs to the undersigned.

Regards,