

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

AKORN, INC., *et al.*,

Debtors.

Chapter 11

Lead Case No. 20-11177 (KBO)

Jointly Administered

Honorable Karen B. Owens

Hearing Date: December 18 at 10:00 a.m.

Obj. Deadline: November 27, 2020

**MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND TO STRIKE  
ITEMS FROM APPELLATE RECORD**

1199SEIU National Benefit Fund, 1199SEIU Greater New York Benefit Fund, 1199SEIU National Benefit Fund for Home Care Workers, and 1199SEIU Licensed Practical Nurses Welfare Fund, all of which are jointly administered health and welfare funds (together, “1199SEIU Benefit Funds”), AFSCME District Council 47 Health and Welfare Fund (“DC47 Fund”) and Sergeants Benevolent Association Health and Welfare Fund (“SBA Fund”)<sup>1</sup> by and through undersigned counsel Obermayer Rebmann Maxwell & Hippel LLP, respectfully state the following in support of this motion to strike items from the counter-designated record on appeal (the “Motion”).

**Relief Requested**

1. By this Motion, and pursuant to section 105(a) of the title 11 of the United States Code (the “Bankruptcy Code”) and Rule 8009 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and rule 9013-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Movants seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), striking items from the Debtors’ counter-designation of the record on appeal.

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<sup>1</sup> 1199SEIU Benefit Funds, DC47 Fund and SBA Fund are referred to collectively as the “Movants.”



**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 as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The Movants consent pursuant to rule 9013-1(f) of 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.

4. The statutory bases for the relief requested herein are 11 U.S.C. §105, Bankruptcy Rule 8009.

**Background**

5. On May 20, 2020, the Debtors filed the instant bankruptcies, jointly administered under lead case In re Akorn Inc., No. 20-11177-KBO.

6. The Debtors proposed to effectuate their chapter 11 by a sale of substantially all assets pursuant to a motion to sell (the “Sale”) (DI #18) and confirmation of a plan, as modified (the “Plan”) (DI #672).

7. The Movants filed an objection to the Sale and Plan (the “Objection”) (DI #553).

8. By agreement between the Debtors and other parties in interest, the hearings on the Sale and Plan were bifurcated in order to allow the time-sensitive Sale to occur without delay.

9. A hearing on the Sale took place on September 1, 2020, after which the Court entered an order approving the Sale. (DI #656).

10. The record from the Sale hearing was incorporated into the record for the hearing on confirmation of the Plan.

11. The Plan confirmation hearing took place September 2, 2020 through September 4, 2020.

12. On September 4, 2020, the Court entered an order confirming the Plan (the “Order”) (DI #673).

13. Movants appealed the Order timely to the District Court, commencing case No. 20-cv-2154 (MN).

14. Movants filed their designation of the record on October 2, 2020. (DI # 753, 754). This designation included all pleadings invoking legal arguments in support or opposition to confirmation, plus all factual evidence actually placed on the record at the confirmation hearing.

15. Creditor Provepharm Inc. (“Provepharm”) timely filed its own appeal of the Order to the District Court, with Movants as parties, commencing case No. 20-cv-1336 (MN) (collectively with case No. 20-cv-2154 (MN), the “Appeals”).

16. Provepharm filed its own designation of the record on October 15, 2020, which was substantially identical to the designation filed by Movants. (DI #781).

17. The Debtors filed counter-designations of the record for the Appeals on October 16 (DI #786) and October 29, 2020 (DI #816) (collective the “Counter-Designations”).

18. The Counter-Designations add sworn certifications of facts to the appellate record when these certifications of facts were neither offered as evidence at trial nor actually admitted as exhibits.

19. The Movants seek to strike the factual material in the Counter-Designations from the appellate record.

**Basis For Relief**

20. Pursuant to Fed. R. Bankr. P. 8009(e)(1), “if any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item.”

21. Pursuant to 11 U.S.C. §105(a), this Court may “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

22. “[T]he record on appeal from a bankruptcy court decision consists of designated materials that became part of the bankruptcy court's record in the first instance.” Zer-Ilan v. Frankford (In re CPDC, Inc.), 337 F.3d 436, 443 (5th Cir. 2003) (citations omitted).

23. The appeals court – in this instance the District Court – “cannot consider material on appeal that is outside of the [trial] court record.” Falco v. Zimmer, 767 F. App'x 288, 297 (3d Cir. 2019) quoting In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89, 96 (3d Cir. 1990) (collecting cases).

24. The Counter-Designations include numerous items that are not legal argument, but are factual evidence in the form of exhibits or sworn statements.

25. The following items in the Counter-Designations (the “Stricken Items”) contain factual evidence that was not introduced at the confirmation hearing:

- a. DI #15: Declaration of Duane Portwood in Support of Chapter 11 Petitions and First Day Motions
- b. DI #112: Transcript regarding Hearing Held 5/22/2020 RE: Telephonic/Zoom Hearing

- c. DI #329: Transcript regarding Hearing Held 07/01/2020 RE: Disclosure Statement
- d. DI #541: Transcript regarding Hearing Held 8/20/20 RE: Omnibus
- e. DI #624 Transcript regarding Hearing Held 8/27/2020 RE: Telephonic Hearing

26. The Stricken Items were not introduced at the confirmation hearing, and cannot serve as the factual basis for confirmation.

27. Since the Stricken Items cannot serve as the factual basis for confirmation, they are outside the appropriate record on appeal and the appeals court should not consider them.

WHEREFORE, the Movants respectfully request this Court enter an order striking the Stricken Items from the record on appeal, and such other and further relief as the Court deems just and equitable.

**Notice**

Notice of this Motion will be provided to: (a) the U.S. Trustee; (b) counsel to the Committee; (c) counsel to the Debtors; and (d) any other party that has requested notice pursuant to Local Rule 2002-1(b). The Movants respectfully submit that no further notice of this Motion is required under the circumstances.

Respectfully submitted,

Dated: November 12, 2020  
Wilmington, Delaware

By: /s/Leslie B. Spoltore  
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-and-

Edmond M. George, Esquire (*pro hac vice*)  
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and Welfare Fund, 1199SEIU National Benefit  
Fund, 1199SEIU Greater New York Benefit Fund,  
1199SEIU National Benefit Fund for Home Care  
Workers, 1199SEIU Licensed Practical Nurses  
Welfare Fund and Sergeants Benevolent  
Association Health and Welfare Fund*

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Lead Case No. 20-11177 (KBO)  
Jointly Administered

Honorable Karen B. Owens  
Hearing Date: December 18 at 10:00 a.m.  
Obj. Deadline: November 27, 2020  
Re: D.I. # 786, 816

**NOTICE OF MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND  
TO STRIKE ITEMS FROM APPELLATE RECORD**

TO:

JENNER & BLOCK LLP  
Catherine L. Steege (admitted pro hac vice)  
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Counsel to the Official Committee of  
Unsecured Creditors of Akorn, Inc. et al.

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OFFICE OF THE UNITED STATES  
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844 King Street, Suite 2207  
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1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND (the “Movants”) have  
filed a Motion to Strike Items from the Record on Appeal which seeks the following relief:

To strike certain items from the Counter-Designated Record on Appeal (DI # 786, 816).

HEARING ON THE MOTION WILL BE HELD ON December 18, 2020 at 10:00 a.m.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF DEMANDED BY THE MOTION WITHOUT FURTHER NOTICE OR HEARING. Pursuant to Local Rule 9006-1(c)(ii) you are required to file a response to the attached motion by November 27, 2020.

At the same time, you must also serve a copy of the response upon movant's attorney:

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Respectfully submitted,

Dated: November 12, 2020  
Wilmington, Delaware

By: /s/Leslie B. Spoltore

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*Fund, 1199SEIU Greater New York Benefit Fund,  
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**ORDER GRANTING MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA  
FUND TO STRIKE ITEMS FROM THE RECORD ON APPEAL**

Upon consideration of the motion of the Movants<sup>2</sup> to strike items from the record on appeal, the Court having reviewed the Motion and all related pleadings and having heard the statements of counsel with respect thereto; the Court having determined that notice of the Motion was reasonable and sufficient under the circumstances and that no further notice is required; and that the legal and factual bases set forth in Motion and at the hearing establish sufficient cause for the relief granted herein; and for the reasons stated by the Court at that hearing,

IT IS HEREBY ORDERED as follows:

The Motion is GRANTED, as set forth herein.

The Stricken Items are STRICKEN from the record on appeal.

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<sup>2</sup> All capitalized terms have the meaning ascribed to them in the Motion.

**CERTIFICATE OF SERVICE**

I, Leslie B. Spoltore represent the creditor in this matter.

On November 12, 2020, I served a copy of the following pleadings and/or documents to the parties listed below:

- Motion to Strike Items from Record on Appeal
- Proposed Order
- Notice of Motion

I hereby certify under penalty of perjury that the above documents were sent to counsel for the Debtors, counsel for all Committees, the United States Trustee, all parties with an interest in the requested relief and all parties receiving notice by CM/EFC.

Respectfully submitted,

By: /s/Leslie B. Spoltore

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