IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
AKORN, INC., *et al.*,[1]	)	Case No. 20-11177 (KBO)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket No. 843**

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

The above-captioned debtors and debtors in possession (collectively, the "Debtors") respectfully state as follows in support of this objection to the *Motion of 1199SEIU Benefit Funds, DC47 Fund and SBA Fund to Strike Items From Appellate Record* [Docket No. 843] (the "Motion") filed by 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") (the "Movants"):[2]

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: Akorn, Inc. (7400); 10 Edison Street LLC (7890); 13 Edison Street LLC; Advanced Vision Research, Inc. (9046); Akorn (New Jersey), Inc. (1474); Akorn Animal Health, Inc. (6645); Akorn Ophthalmics, Inc. (6266); Akorn Sales, Inc. (7866); Clover Pharmaceuticals Corp. (3735); Covenant Pharma, Inc. (0115); Hi-Tech Pharmacal Co., Inc. (8720); Inspire Pharmaceuticals, Inc. (9022); Oak Pharmaceuticals, Inc. (6647); Olta Pharmaceuticals Corp. (3621); VersaPharm Incorporated (6739); VPI Holdings Corp. (6716); and VPI Holdings Sub, LLC. The location of the Debtors' service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Motion.

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Preliminary Statement

1. According to the Movants, this Court should strike five documents from the record on appeal notwithstanding that those five documents come from this Court's *very own docket* in this bankruptcy case. That bears repeating: the Movants contend that five documents that are unquestionably part of the record in this bankruptcy case are nonetheless "outside the appropriate record on appeal," and so the Debtors may not designate them for inclusion in the record on appeal, and the appellate court may not invoke them for any reason. (Mot. ¶ 27.) That position is as wrong as it sounds. Because the record of a bankruptcy case consists of all documents and exhibits filed in the case, and because all five documents at issue here were filed in this bankruptcy case, the Debtors quite obviously may designate them for inclusion in the record on appeal. To the extent that the Movants believe that the Debtors will use these properly designated documents to make appellate arguments unsupported by those documents, they can—and should—assert those objections in the appellate court in their briefing on the merits. But there is no basis in law or common sense to strike the documents from the record on appeal in the first place.

Background

2. As this Court is aware, the Debtors filed for Chapter 11 bankruptcy on May 20, 2020 (DI #1) and submitted their modified Chapter 11 plan on August 25, 2020 (DI #547). The Movants subsequently objected to the plan (DI #553), as did another party—Provepharm, Inc. ("Provepharm") (DI #552). Following a three-day hearing, this Court confirmed the plan over those objections on September 4, 2020. (DI #673).

3. The Movants and Provepharm separately appealed from the plan confirmation order to the U.S. District Court for the District of Delaware. (DI #718, #746.) The District Court later entered an order procedurally consolidating the two appeals. *See Provepharm, Inc. v. Akorn,*

Inc., 20-cv-1254 (D. Del.), ECF No. 10. Pursuant to Federal Rule of Bankruptcy Procedure 8009, both parties submitted filings that designated various documents and exhibits from this bankruptcy case for inclusion in the record on appeal. (DI #753, #754, #781.)

4. In response to those designations, and likewise pursuant to Federal Rule of Bankruptcy Procedure 8009, the Debtors submitted a filing that counter-designated several other documents and exhibits from this bankruptcy case for inclusion in the record on appeal. (DI #786, #816.) As relevant here, in both appeals, the Debtors counter-designated (among other things) a declaration from Akorn, Inc.'s Chief Financial Officer, which the Debtors filed in this Court on May 21, 2020, and four transcripts of hearings held in this Court on May 22, July 1, August 20, and August 27, 2020—*i.e.*, five documents from this bankruptcy case that are available on the case docket and that preceded this Court's plan confirmation order. (DI #15, #112, #329, #541, #624.)

5. On November 12, 2020, the Movants filed the instant Motion to strike those five documents from the record on appeal—not only in their own appeal, but in Provepharm's appeal too, even though Provepharm did not join in the Motion. (Mot. ¶¶ 14–19). In their Motion, the Movants assert, among other things, that these five documents "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." (*Id.* ¶ 18.) The Motion further adds that, because the five documents purportedly "cannot serve as the factual basis for confirmation, they are outside the appropriate record on appeal and the appeals court should not consider them." (*Id.* ¶ 27.)

6. The Movants did not confer with the Debtors before filing the Motion.

Argument

7. This Court should deny the Motion, which is fatally flawed from start to finish. Text, precedent, and common sense leave no doubt that the Debtors properly designated the five

documents at issue for inclusion in the record on appeal. None of the authorities that the Movants invoke even remotely disturbs that conclusion. The Movants' real concern appears to be that the Debtors will use these properly designated documents for appellate arguments unsupported by the documents or beyond the scope of their appeal. But the proper forum for the Movants to assert such objections is the appellate court, in their briefing on the merits—not here, as part of the basic housekeeping matter of designating the record.

I. The Debtors Properly Designated The Five Documents At Issue, Which Were All Filed In This Bankruptcy Case, For Inclusion In The Record on Appeal.

8. Federal Rule of Bankruptcy Procedure 8009 governs the composition of the record on appeal in bankruptcy appeals. *See* FED. R. BANKR. P. 8009. That Rule is "derived from" Federal Rule of Appellate Procedure 10, which applies in ordinary civil appeals and "provides that the record on appeal consists of *all the documents and exhibits filed in the case*." FED. R. BANKR. P. 8009 advisory committee's note to 2014 amendment (emphasis added); *see also* FED. R. APP. P. 10(a). Federal Rule of Bankruptcy Procedure 8009 "differs" from Federal Rule of Appellate Procedure 10 in one respect relevant here: because "thousands of items might have been filed in the overall bankruptcy case," Federal Rule of Bankruptcy Procedure 8009 requires the parties to a particular appeal to "designate" only those documents and exhibits filed in the bankruptcy case that they wish to include in the record on appeal. FED. R. BANKR. P. 8009 advisory committee's note to 2014 amendment.

9. Accordingly, within 14 days of filing a notice of appeal, the appellant must submit a filing containing its record designations, and within 14 days of that filing, the appellee may submit a filing containing its record counter-designations. *See* FED. R. BANKR. P. 8009(a)(1)-(2). The plain text of Federal Rule of Bankruptcy Procedure 8009, however, imposes no restrictions on *which* documents and exhibits that a party may designate from the overall bankruptcy case. As

a result, so long as the designated materials reflect "what occurred in the bankruptcy court," FED. R. BANKR. P. 8009(e)(1)—that is, so long as the designated materials were actually filed in the overall bankruptcy case—a party to the appeal may properly designate them for inclusion in the record on appeal.[3]

10. The Third Circuit reached just that conclusion in a decision interpreting the predecessor to Federal Rule of Bankruptcy Procedure 8009.[4] In *Nantucket Investors II v. California Federal Bank (In re Indian Palms Associates, Ltd.)*, 61 F.3d 197 (3d Cir. 1995), the Third Circuit addressed whether, in a dispute over a motion to lift the automatic stay, a party to the appeal could designate "only" materials "from the record created in connection" with that particular motion, or instead whether it could designate materials "from the record of the bankruptcy case." *Id.* at 204. The district court concluded that, although the documents were "not submitted to or reviewed by the bankruptcy court" in connection with the resolution of the motion at issue, those documents "had all been filed with the bankruptcy court as part of the debtor's Chapter 11 proceeding, and were therefore part of the bankruptcy court record"—and thus appropriate for inclusion in the record on appeal. *Id.* at 201. The Third Circuit affirmed that determination and disagreed with the "limited" view to the contrary. *Id.* at 203–05. Although the Third Circuit noted that a party may not necessarily *use* a document included in the record on appeal for "any purpose" whatsoever in its appeal on the merits—for example, a "previously filed" court document "cannot be put to a hearsay use for most purposes," *id.* at 205—it rejected the

[3] Indeed, Federal Rule of Bankruptcy Procedure 8009(a)(4) states that "[t]he record on appeal *must* include the … items designated by the parties," indicating that once a party designates an item that was filed in the bankruptcy court record, that item *cannot* be stricken from the record on appeal. FED. R. BANKR. P. 8009(a)(4).

[4] In relevant part, Federal Rule of Bankruptcy Procedure 8009 is materially identical to that predecessor rule.

notion that the possibility of an improper use on appeal precludes a party from designating a document for the record on appeal in the first place. *Id.*

11. Other courts have agreed with the seemingly obvious conclusion that a party to a bankruptcy appeal may designate any documents or exhibits filed in a bankruptcy case for inclusion in the record on appeal—regardless whether a party formally entered those documents or exhibits as evidence during a particular bankruptcy proceeding, and regardless of the precise relation between those documents and the issues on appeal. *See, e.g., Hartford Fire Ins. Co. v. Norwest Bank Minn., N.A. (In re Lockwood Corp.)*, 223 B.R. 170, 174 (B.A.P. 8th Cir. 1998) ("None of the documents which Norwest seeks to have stricken from the record were newly presented in the appellate stage of these proceedings. Rather, each of the documents was filed or entered in the bankruptcy case record; indeed, many among them constitute orders of the bankruptcy court, itself, in this matter. Accordingly, these documents constitute part of the record on this appeal, and Norwest's motion will be denied."); *In re Adkins*, No. 12-10314-rlj-7, 2014 WL 5801679, at *1 (Bankr. N.D. Tex. Nov. 7, 2014) ("The items [designated for inclusion in the record on appeal] need not be formally entered into evidence, but should be 'of record and available for consideration by the bankruptcy court when it rendered its decision.'") (citation omitted); *In re Heitmeier*, No. CIV.A. 13-6787, 2014 WL 1513886, at *1 (E.D. La. Apr. 16, 2014) ("Whitney Bank contends that various items designated by Heitmeier to be included in the record on appeal should be excluded because they were not considered by the bankruptcy court. Whitney argues that these items were never entered into evidence. … The Court is persuaded that the challenged items may properly be included in the record on appeal. The items were of record and available for consideration by the bankruptcy court when it rendered its decision. Despite Whitney

Bank's contention to the contrary, there is no requirement that an item be formally entered into evidence for it to have been considered by the bankruptcy court.").

12. These principles yield an exceedingly straightforward conclusion here. All five documents to which the Movants object were filed in this bankruptcy case before this Court issued the plan confirmation order, which is the subject of the Movants' appeal. (DI #15, #112, #329, #541, #624.) That being so, it follows that the Debtors did not act improperly when they "designat[ed]" those documents "to be included in the record." FED. R. BANKR. P. 8009(a)(2). Because those documents constitute "items designated" from the record in this bankruptcy case, the "record on appeal must include" them. FED. R. BANKR. P. 8009(a)(4).

II. The Movants' Contrary Position Is Plainly Wrong.

13. The Movants advance a handful of arguments in their novel quest to strike the five documents from the record on appeal. Those arguments are uniformly meritless.

14. The Movants begin by invoking Federal Rule of Bankruptcy Procedure 8009(e)(1), which provides: "[I]f 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." (Mot. ¶ 20 (quoting FED. R. BANKR. P. 8009(e)(1).) That rule is of no help to the Movants: they do not (and could not) assert that the five disputed documents fail to "accurately disclose[] what occurred in the bankruptcy court." Those five documents, after all, appear on this Court's case docket for a simple reason: the Debtors did, in fact, file in this bankruptcy case a declaration from Akorn's CFO on May 21, 2020, and this Court did, in fact, hold hearings in this bankruptcy case on May 22, July 1, August 20, and August 27, 2020. (DI #15, #112, #329, #541, #624.)

15. The Movants further complain that, instead of containing exclusively "legal argument," these five documents "contain factual evidence" and "factual material" "that was not introduced at the confirmation hearing" or "admitted as exhibits"—and so "they are outside the appropriate record on appeal." (Mot. ¶¶ 18, 24, 25.)[5] As just explained, however, courts (including the Third Circuit) have consistently and repeatedly rejected the idea that the record on appeal may consist only of materials introduced and formally entered into evidence at the hearing resolving the specific issue that gives rise to an appeal. *See* ¶¶ 10–11, *supra*. Nor is there such a thing as a "legal" record and a "factual" record in a bankruptcy case; there is just *the* record in a bankruptcy case, and any documents and exhibits in that record are "appropriate" for inclusion in the record on appeal, as the Federal Rules of Bankruptcy Procedure make clear (and always have). *See* FED. R. BANKR. P. 8009.[6]

16. The lone two cases that the Movants cite do not suggest otherwise. The Movants first cite the Fifth Circuit's decision in *Zer-Ilan v. Frankford (In re CPDC, Inc.)*, 337 F.3d 436, 443 (5th Cir. 2003), for the proposition that "[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." (Mot. ¶ 22.) But that statement is fully consistent with the Debtors' position, as

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5 The Movants do not argue that the five disputed documents are comprised *only* of objectionable "factual material," which suggests that those documents contain at least *some* material (perhaps "legal argument") that, even under the Movants' unusual theory, the Debtors may legitimately add to the record on appeal. But surely Federal Rule of Bankruptcy Procedure 8009 is not a vehicle to parse every single document or exhibit designated for inclusion in the record on appeal to determine which specific material is permissible and which material is impermissible.

6 The Movants' arguments also run headlong into the considerable problem that, under Federal Rule of Bankruptcy Procedure 8009(a)(4), the record on appeal "*must* include" *all* "docket entries kept by the bankruptcy clerk." FED. R. BANKR. P. 8009(a)(4). Of course, those docket entries include the very entries containing the five documents at issue here. Presumably the Movants would have this Court strike those docket entries from the record on appeal too (along with numerous other entries), for they would inappropriately alert the District Court to documents "contain[ing] factual evidence that was not introduced at the confirmation hearing." (Mot. ¶ 25.)

the five documents at issue are clearly "part of the bankruptcy court's record in the first instance." The Movants next cite the Third Circuit's unpublished decision in *Falco v. Zimmer*, 767 F. App'x 288, 297 (3d Cir. 2019), for the proposition that an appellate court "cannot consider material on appeal that is outside of the [trial] court record." (Mot. ¶ 23.) Once again, that statement is fully consistent with the Debtors' position, as the documents at issue here plainly are not "outside of the [trial] court record."

17. In the end, the Movants appear to be concerned that the Debtors will (in the Movants' view) improperly use the five properly designated documents in their merits arguments on appeal—for example, by contending that the documents, or information within them, "serve as the factual basis for confirmation," which the Movants would dispute. (Mot. ¶¶ 26–27.) But as case law indicates, the time to make those arguments is on appeal, during briefing on the merits. If the Debtors do, in fact, invoke any of these five documents to support an argument in their response brief on appeal, the Movants can argue in their reply brief that, in their view, a document does not support the Debtors' argument because (for example) it "w[as] not introduced at the confirmation hearing." (*Id.* ¶ 26.) But it makes little sense, and conflicts with case law, for those disputes to be litigated now, before it is even known whether the Debtors have, in fact, used any of the five documents in their response brief, and for what purposes. *See In re Indian Palms Assocs. Ltd.*, 61 F.3d at 205 (noting that there are "many issues" for which designated documents may be used on appeal).

18. As all of this underscores, the Motion has no support in law or logic. Making matters worse, the Movants filed the Motion without even conferring with the Debtors (or, apparently, Provepharm). Had the Movants extended that basic courtesy, the parties may very well have resolved this dispute amicably. At a minimum, the Debtors could have explained to the

Movants that their concerns and arguments were groundless, and that it would be in no one's interest to waste this Court's time—and the Estate's resources—adjudicating them.

Conclusion

19. For the foregoing reasons, the Debtors respectfully request that the Court deny the Motion to strike items from the appellate record.

WHEREFORE, the Debtors respectfully request that the Court deny the Movants' request to strike items from the appellate record.

Wilmington, Delaware
November 25, 2020

/s/ Paul N. Heath

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