

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

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

**CERTIFICATION OF COUNSEL REGARDING ORDER APPROVING
STIPULATION BETWEEN THE DEBTORS AND FRESENIUS KABI AG
AND FRESENIUS SE AND CO. KGAA RESOLVING
CERTAIN GENERAL UNSECURED CLAIMS**

The undersigned hereby certifies as follows:

1. On May 20, 2020, the above-captioned post-effective date debtors (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, commencing their chapter 11 cases (the “Chapter 11 Cases”).

2. On July 30, 2020, Fresenius SE and Co. KGaA and Fresenius Kabi AG (collectively, “Fresenius”) filed proofs of claim numbers 271 and 275 (the “Fresenius Claims”) on their own behalf in the Chapter 11 Cases, asserting a general unsecured claim against Akorn Inc. in the amount of \$74,343,503.79 in connection with allegations asserted in certain prepetition litigation.

¹ The Debtor in this chapter 11 case, along with the last four digits of the Debtor’s federal tax identification number, is: Akorn, Inc. (7400). The Chapter 11 Cases of the following entities, formerly administratively consolidated with the foregoing case, have been closed: 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 Debtor’s service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.



3. On September 4, 2020, the Bankruptcy Court entered the *Order Confirming the Modified Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates* [Docket No. 673] (the “Confirmation Order”), confirming the *Modified Joint Chapter 11 Plan of Akorn, Inc. and Its Debtor Affiliates* [Docket No. 673-1] (the “Plan”).

4. On October 1, 2020, the Plan became effective pursuant to its terms (the “Effective Date”).

5. On December May 5, 2022, the Debtor, Fresenius, and DriveTrain LLC (the “Plan Administrator,” and together with the Debtor and Fresenius, the “Parties”), appointed as Plan Administrator pursuant to the Plan, by and through their respective counsel, entered into that certain *Stipulation Between the Debtors and Fresenius Kabi AG and Fresenius Se and Co. KGaA Resolving Certain General Unsecured Claims* (the “Stipulation”),² resolving the Fresenius Claims subject to the Bankruptcy Court’s approval.

6. A copy of the Stipulation is attached as **Exhibit 1** to the proposed form of order approving the Stipulation (the “Order”) which is attached hereto as **Exhibit A**.

[Remainder of page intentionally left blank]

² Capitalized terms used but not otherwise defined shall have the meaning ascribed to such terms in the Stipulation.

WHEREFORE, the Debtors respectfully request that the Order, substantially in the form attached hereto as **Exhibit A**, be entered at the earliest convenience of the Bankruptcy Court.

Wilmington, Delaware
May 5, 2022

/s/ Amanda R. Steele

RICHARDS, LAYTON & FINGER, P.A.

Paul N. Heath (No. 3704)
Amanda R. Steele (No. 5530)
Zachary I. Shapiro (No. 5103)
J. Zachary Noble (No. 6689)
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701
Email: heath@rlf.com
steele@rlf.com
shapiro@rlf.com
noble@rlf.com

*Co-Counsel for the
Post-Effective Date Debtors and the
Plan Administrator*

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

Patrick J. Nash, Jr., P.C. (admitted *pro hac vice*)
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
Email: patrick.nash@kirkland.com

-and-

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

Nicole L. Greenblatt, P.C. (admitted *pro hac vice*)
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: nicole.greenblatt@kirkland.com

*Co-Counsel for the
Post-Effective Date Debtors and the Plan
Administrator*

EXHIBIT A

Proposed Order

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

In re:

AKORN, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 20-11177 (KBO)

Re: Docket No. _____

**ORDER APPROVING STIPULATION BETWEEN THE DEBTORS AND
FRESENIUS KABI AG AND FRESENIUS SE AND CO. KGAA
RESOLVING CERTAIN GENERAL UNSECURED CLAIMS**

Upon consideration of the *Certification of Counsel Regarding Order Approving Stipulation Between the Debtors and Fresenius Kabi AG And Fresenius Se And Co. KGaA Resolving Certain General Unsecured Claims* (the “Stipulation”)², attached hereto as Exhibit 1; it is HEREBY ORDERED THAT:

1. The Stipulation is approved.

The Debtor in this chapter 11 case, along with the last four digits of the Debtor's federal tax identification number, is: Akorn, Inc. (7400). The Chapter 11 Cases of the following entities, formerly administratively consolidated with the foregoing case, have been closed: 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 Debtor's service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Stipulation.

2. The Parties are authorized to take all actions necessary to effectuate the terms of the Stipulation.

EXHIBIT 1

Stipulation

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

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

**STIPULATION BETWEEN THE DEBTORS AND
FRESENIUS KABI AG AND FRESENIUS SE AND CO. KGAA
RESOLVING CERTAIN GENERAL UNSECURED CLAIMS**

The above-captioned post-effective date debtors (collectively, the “Debtors”) in these chapter 11 cases (the “Chapter 11 Cases”) and Fresenius SE and Co. KGaA and Fresenius Kabi AG (collectively “Fresenius” and, together with the Debtors, the “Parties”), by and through their respective counsel, hereby enter into this stipulation (the “Stipulation”)² and stipulate and agree as follows:

WHEREAS, on April 23, 2018, Debtor entity Akorn, Inc. filed a verified complaint (the “Akorn Complaint”) alleging breach of contract related to the prepetition merger agreement against Fresenius in the Delaware Court of Chancery in the civil litigation captioned *Akorn, Inc. v. Fresenius Kabi AG, et al.*, C.A. No. 2018-0300-JTL (Del. Ch.) (the “Chancery Court Action”).

¹ The Debtor in this chapter 11 case, along with the last four digits of the Debtor’s federal tax identification number, is: Akorn, Inc. (7400). The Chapter 11 Cases of the following entities, formerly administratively consolidated with the foregoing case, have been closed: 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 Debtor’s service address is: 1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045.

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to them in the Plan.

WHEREAS, on April 30, 2018, Fresenius filed an Answer, Defenses, and Verified Counterclaim against Debtor entity Akorn, Inc. in the Chancery Court Action, which sought, among other things, damages and costs (“Fresenius’ Damages Claims”).

WHEREAS, on October 1, 2018, the Delaware Court of Chancery filed a post-trial Memorandum Opinion (“Opinion”) resolving certain matters presented at trial against Debtor entity Akorn, Inc.;

WHEREAS, on October 17, 2018, the Delaware Court of Chancery entered a Partial Final Judgment in the Chancery Court Action, which entered judgment against Debtor entity Akorn, Inc. and in favor of Fresenius on the Akorn Complaint and the claims asserted therein, and which directed that Fresenius’ Damages Claims be held in abeyance pending an appeal by Debtor entity Akorn, Inc. of the Opinion.

WHEREAS, on December 7, 2018, the Supreme Court of the State of Delaware affirmed the Opinion.

WHEREAS, on May 20, 2020, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

WHEREAS, upon Debtors’ filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code, the Chancery Court Action was stayed pending the Chapter 11 Cases.

WHEREAS, on September 4, 2020, the Bankruptcy Court entered an order [D.I. 673] confirming the *Modified Joint Chapter 11 Plan of Akorn, Inc. and its Debtor Affiliates* [D.I. 673-1] (the “Plan”).

WHEREAS, on October 1, 2020, the Plan became effective pursuant to its terms and DriveTrain LLC was appointed as Plan Administrator pursuant thereto.

WHEREAS, on July 30, 2020, the following proofs of claim asserting general unsecured claims against Debtor entity Akorn, Inc. were filed:

- a. Fresenius filed proof of claim numbers 271 and 275 each asserting a general unsecured claim in the amount of \$74,343,503.79 in connection with damages arising from the Debtors' breach of its prepetition merger agreement with Fresenius;
- b. Fresenius Kabi Austria GMBH filed proof of claim number 348 asserting a general unsecured claim in the amount of \$150,186.43 and unliquidated secured amount in connection with claims arising under a supply agreement with the Debtors. Fresenius Kabi Austria GMBH is not a party to this Agreement.

WHEREAS, proof of claim number 348 was assumed and satisfied by Purchaser as a Qualified Unsecured Claim in accordance with, and pursuant to, the Plan;³

WHEREAS, notwithstanding anything to the contrary in proofs of claim 271 and 275 (collectively, the "Proofs of Claim"), the Parties have agreed to consensually resolve all matters between the Parties, including the Proofs of Claim, on the terms set forth in this Stipulation.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the Parties to this Stipulation that:

1. The above recitals are true and correct and are incorporated herein by reference.
2. Upon the entry of an order from the Bankruptcy Court approving this Stipulation, Proof of Claim 271 shall survive and Fresenius shall have an Allowed General Unsecured Claim in the amount of \$125 million against Debtor Akorn, Inc. (the "Allowed Claim"). Distributions under the Plan on account of the Allowed Claim shall be made as soon as practicable in accordance with the Plan.

³ See Notice of Filing of *Qualified Unsecured Claims Schedule* [ECF No. 749] dated October 1, 2020.

3. Proof of Claim 275 shall be disallowed and expunged. Proof of Claim 348 has been fully satisfied by Purchaser. The Debtors may adjust the claims register consistent with the terms of this Stipulation.

4. Fresenius shall be deemed to have released and discharged the Debtors and the Plan Administrator, on behalf of themselves and their current and former affiliates and their respective estates, officers and directors (collectively, the “Debtor Released Parties” and each a “Debtor Released Party”) of and from any and all past, present and future actions, causes of action, demands, suits, claims, liabilities, encumbrances, lawsuits, adverse consequences, amounts paid in settlement, costs, damages, debts, deficiencies, diminution in value, disbursements, expenses, losses, and other obligations of any kind or nature whatsoever, whether in law, equity or otherwise, whether known or unknown, fixed or contingent, direct, indirect, or derivative, asserted or unasserted, foreseen or unforeseen, suspected or unsuspected, now existing, heretofore existing or which may hereafter accrue against any of the Debtor Released Parties, whether held in a personal or representative capacity, and which are based on any act, fact event or omission or other matter, cause or thing occurring at any time prior to and including the Effective Date in any way directly or indirectly arising out of, connected with or relating to the Akorn Complaint or the Fresenius Damages Claim; provided, however, that nothing herein shall release any Debtor Released Party from (a) its obligations under this Stipulation or with respect to the payment of the Allowed Claim, or (b) any act or omission of such Debtor Released Party to the extent that such act or omission is determined in a final, non-appealable order or judgment of this Court or another court of competent jurisdiction to have constituted fraud gross negligence, or willful misconduct, provided, however, this provision (b) shall not include claims or causes of action asserted in the Chancery Court Action

or the Proofs of Claim and such claims shall be deemed released against the Debtor Released Parties pursuant to this stipulation.

5. Each of the Debtor Released Parties shall be deemed to have released and discharged Fresenius, on behalf of itself and its current and former affiliates and their respective estates, officers and directors (collectively, the “Fresenius Released Parties” and each a “Fresenius Released Party”) of and from any and all past, present and future actions, causes of action, demands, suits, claims, liabilities, encumbrances, lawsuits, adverse consequences, amounts paid in settlement, costs, damages, debts, deficiencies, diminution in value, disbursements, expenses, losses, and other obligations of any kind or nature whatsoever, whether in law, equity or otherwise, whether known or unknown, fixed or contingent, direct, indirect, or derivative, asserted or unasserted, foreseen or unforeseen, suspected or unsuspected, now existing, heretofore existing or which may hereafter accrue against Fresenius Released Parties, whether held in a personal or representative capacity, and which are based on any act, fact event or omission or other matter, cause or thing occurring at any time prior to and including the Effective Date in any way directly or indirectly arising out of, connected with or relating to the Akorn Complaint or the Fresenius Damages Claim; provided, however, that nothing herein shall release the Fresenius Released Parties from (a) their obligations under this Stipulation, or (b) any act or omission of the Fresenius Released Parties to the extent that such act or omission is determined in a final, non-appealable order or judgment of this Court or another court of competent jurisdiction to have constituted fraud, gross negligence or willful misconduct.

6. Upon entry of an order approving this Stipulation, the Parties will file the necessary documents to dismiss the Chancery Court Action with prejudice.

7. Each of the Parties understands and agrees that this Stipulation reflects a compromise of disputed claims and does not constitute, nor shall it be construed as, in any way, an admission of liability, fault, violation, responsibility, or wrongdoing by any of the Parties hereto such liability and wrongdoing being expressly denied.

8. This Stipulation is governed by the law of the State of Delaware, exclusive of its choice-of-law provisions. Each Party irrevocably consents to the jurisdiction of the Bankruptcy Court with respect to any action to enforce the terms and provisions of this Stipulation. Each Party waives any right to commence any such action in any other forum.

9. The undersigned persons represent and warrant that they have full authority to execute this Stipulation.

10. This Stipulation constitutes the entire agreement between the Parties and supersedes all prior agreements and understandings, both written and oral, between the Parties with respect to the matters addressed herein.

11. This Stipulation has been drafted through a cooperative effort of the Parties, and no Party shall be considered the drafter of this Stipulation so as to give rise to any presumption or convention regarding construction of this Stipulation.

12. This Stipulation may be executed in counterparts, any of which may be transmitted by facsimile or electronic mail, and each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

STIPULATED AND AGREED TO:

/s/ Amanda R. Steele

RICHARDS, LAYTON & FINGER, P.A.

Paul N. Heath (No. 3704)
Amanda R. Steele (No. 5530)
Zachary I. Shapiro (No. 5103)
One Rodney Square
920 N. King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701
Email: heath@rlf.com
steele@rlf.com
shapiro@rlf.com

*Co-Counsel for the
Post-Effective Date Debtors and the Plan
Administrator*

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

Patrick J. Nash, Jr., P.C. (admitted *pro hac vice*)
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
patrick.nash@kirkland.com

-and-

KIRKLAND & ELLIS LLP

KIRKLAND & ELLIS INTERNATIONAL LLP

Nicole L. Greenblatt, P.C. (admitted *pro hac vice*)
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: nicole.greenblatt@kirkland.com

*Co-Counsel for the
Post-Effective Date Debtors and the Plan
Administrator*

/s/ Kelley A. Cornish

**PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP**

Kelley A. Cornish
Claudia R. Tobler
1285 Avenue of the Americas
New York, NY 10019-6064
Email: kcornish@paulweiss.com
ctobler@paulweiss.com

*Counsel for the Fresenius Kabi AG and
Fresenius SE and Co. KGaA*