

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

In re:

AKORN, INC., *et al.*,

Debtors.¹

Chapter 11

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

Re: Docket No. 181

**OBJECTION OF EXELA PHARMA SCIENCES LLC TO
THE NOTICE TO CONTRACT PARTIES TO POTENTIALLY
ASSUMED EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Exela Pharma Sciences LLC (“Exela”), by and through undersigned counsel, hereby objects to Debtor’s *Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* (the “Notice”), and respectfully states as follows:

Background

1. On May 20, 2020, each of the above captioned debtors (collectively, the “Debtors”) filed a voluntary petition under Chapter 11 of the Bankruptcy Code in this Court. Upon information and belief, the Debtors continue to operate their businesses and manage their properties as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

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. Debtor Akorn Animal Health, Inc. (“Debtor AAH”) is party to a certain Development and Supply Agreement dated February 23, 2017 (the “Contract”) with Exela. Pursuant to the Contract, Exela develops and manufactures certain products for Debtor AAH and Debtor AAH purchases such products pursuant to purchase orders (each a “PO”) issued by Debtor AAH.

3. On May 21, 2020, the Debtors filed their *Motion Seeking Entry of an Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling an Auction and Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures for Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief* (the “Sale Motion”) [Docket No. 18].

4. On June 15, 2020, this Court entered its *Order (A) Authorizing and Approving Bidding Procedures, (B) Scheduling an Auction and Sale Hearing, (C) Approving the Form and Manner of Notice Thereof, (D) Establishing Notice and Procedures for Assumption and Assignment of Certain Executory Contracts and Leases, and (E) Granting Related Relief* [Docket No. 181] (the “Bidding Procedures Order”).

5. Among other things, the Bidding Procedures Order authorizes the Debtors to conduct an auction and sale of the Debtors’ assets pursuant to certain bidding procedures. The Bidding Procedures Order also provides that the Debtors may assume and assign to a successful bidder certain of the Debtors’ executory contracts.

6. In accordance with those procedures, the Debtors were required to provide Notice to Exela. However, the Debtors did not file a cure notice on the docket and failed to provide a copy of the Notice to Exela. There was no way for Exela to know the proposed cure amount or that its Contract was subject to possible assumption. Exela only learned of the existence of the

Notice after Exela began asking questions of assurance of payment for its imminent performance which includes expending significant amount of monies, i.e., in excess of \$500,000, and after its counsel searched the docket, and reviewed the Bidding Procedures Order. The Debtors finally provided the Notice to Exela, after an explicit request by Exela, on August 12, 2020.

7. In Exhibit A to the Notice, the Debtor claims that the cure amount for the Contract is \$0.00. The Notice also provides that failure of a contract counter-party to respond to the Notice will be waiver by the counter-party of the right to compel a prospective assignee to provide adequate assurance of future performance. Finally, the Notice provides a reservation of rights to the Debtors, including that any contract listed on the Notice may not be assumed and assigned.

Objection

8. Given the reservation of rights asserted by the Debtors in the Notice, at this time, Exela is unsure whether the Contract will be assumed and assigned, or rejected. Nevertheless, Debtor AAH has recently issued purchase orders to Exela. The parties are currently attempting to address how to proceed given the possibility that the Contract may not be assumed and assigned.

9. Further, Exela objects to any assignment of its Contract to the extent that neither the Debtors nor any potential assignee has yet provided adequate assurance of future performance.

Basis for Objection

10. Bankruptcy Code § 365(b) requires that the Debtors cure all defaults in conjunction with the assumption of the Contract. Additionally, the Debtors and any potential assignee must acknowledge, and any order approving cure amounts and assumption and assignment must provide, that the assignee takes the Contract subject to all of its terms and conditions and, *inter alia*: (i) shall be liable for any and all accrued but not yet billed charges, whether those charges

relate to pre-petition or pre-assumption periods of time; and (ii) shall comply with any and all indemnification-related obligations under the Contract, whenever any such obligations may arise.

11. While the Debtors do not currently have any unpaid invoices, Exela continues to perform under the Contract and may incur significant expense unnecessarily if the Contract is not assumed and assigned. To the extent the Debtors seek to assume and assign the Contract, the Debtors must, as noted above, assume and assign the Contract in its entirety. Further, as more particularly described in the Contract, the Debtors are required to pay certain obligations, and therefore, amounts may become due and owing under the Contract either prior to or after the assumption and assignment thereof.

12. Accordingly, as a condition for the assignment of the Contract, the assignee must remain liable for all of the Debtors' obligations and liabilities, whether now existing or hereafter arising, under the Contract including, without limitation, paying obligations as they become due.

13. Further, although the Debtors have identified a Stalking Horse Bidder, it is currently unknown whether the Stalking Horse Bidder or another successful bidder will be the ultimate purchaser of the Debtors' assets, and Exela has therefore not yet been definitively advised as to whether any successful bidder intends to seek assignment of the Contract.

14. Pursuant to § 365(f)(2) of the Bankruptcy Code, any assignee of a contract must provide adequate assurance of future performance. Exela objects to the assumption and assignment of the Contract as no potential purchaser/assignee has yet provided adequate assurance of future performance of the obligations under the Contract or has definitively indicated that the Contract will be assigned. Adequate assurance may be given by demonstrating, among other things, the proposed assignee's financial health and experience in managing the type of enterprise or property to be assigned. *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986). To

date, Exela has not been given any information with regard to the identity, financial health or business experience of any potential purchaser/assignee. The Debtors need to disclose the identity of any potential assignee of the Contract, and the proposed assignee must provide adequate assurance of future performance under the Contract. Exela should be given the opportunity to assess the qualifications of any assignee.

15. Considering the fact that the potential purchaser/assignee is not yet known, Exela does not have, and the Debtors have not supplied, sufficient information or a reasonable amount of time, to determine if any potential purchaser/assignee would be capable of providing adequate assurance of future performance. Debtor AAH has not provided adequate assurances to Exela regarding the assumption, assignment and future performance of its obligations under the Contract. Accordingly, Exela is unable, at this time, to assess whether any potential purchaser/assignee would satisfy those criteria, and thus objects on the basis that Exela has not received adequate assurance as required by § 365(f)(2) of the Bankruptcy Code.

16. Finally, Exela reserves any and all other rights to object to adequate assurance of future performance under the Contract after the proposed assignee provides its adequate assurance packages. In the event that the Contract is rejected, Exela reserves all rights to file appropriate claims, including administrative claims, rejection damages claims, and all other claims that might arise in connection with the Contract or any POs. Exela further reserves all rights to amend the cure amount as set forth in this Objection.

WHEREFORE, Exela respectfully request that any assumption of the Contract be conditioned upon full payment of the cure amount as of the date of assignment, the provision of adequate assurance of future performance of the obligations contemplated by the Contract, and such other and further relief as this Honorable Court deems just and proper.

Dated: August 25, 2020
Wilmington, Delaware

CROSS & SIMON, LLC

/s/ Kevin S. Mann

Christopher P. Simon (No. 3697)
Kevin S. Mann (No. 4576)
1105 North Market Street, Suite 901
Wilmington, Delaware 19801
Telephone: (302) 777-4200
Facsimile: (302) 777-4224
csimon@crosslaw.com
kman@crosslaw.com

Counsel to Exela Pharma Sciences LLC

CERTIFICATE OF SERVICE

I, Kevin S. Mann, hereby certify that, on August 25, 2020, I caused copies of *the Objection of Exela Pharma Sciences LLC to the Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* to be served upon all interested parties via CM/ECF and the parties listed on the attached service list via electronic mail.

/s/ Kevin S. Mann

Kevin S. Mann (No. 4576)

SERVICE LIST

Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022
Attn: Nicole L. Greenblatt
nicole.greenblatt@kirkland.com

Gibson Dunn & Crutcher
200 Park Avenue, New York
New York, 10166
Attn: Scott J. Greenberg
Michael J. Cohen
sgreenberg@gibsondunn.com
mcohen@gibsondunn.com

Richards, Layton & Finger
920 N. King Street
Wilmington, Delaware 19801
Attn: Paul M. Heath
Amanda R. Steele
Zachary I. Shapiro
Brett M. Haywood
heath@rlf.com
steele@rlf.com
shapiro@rlf.com
haywood@rlf.com

Kirkland & Ellis LLP
300 North LaSalle
Chicago, Illinois 60654
Attn: Patrick J. Nash, Jr. P.C.
Gregory F. Pesce,
Christopher M. Hayes
patrick.nash@kirkland.com
gregory.pesce@kirkland.com
christopher.hayes@kirkland.com

Young Conaway Stargatt & Taylor
1000 North King Street
Wilmington, Delaware 19801
Attn: Robert S. Brady
rbrady@ycst.com

Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Attn: Andrew Goldman
andrew.goldman@wilmerhale.com

Office of the U.S. Trustee
for the District of Delaware
844 King Street, Suite 2207
Lockbox 35
Wilmington, Delaware 19801
Attn: Jane M. Leamy
Jane.M.Leamy@usdoj.gov

Jenner & Block LLP
353 N. Clark Street
Chicago, Illinois 60654
Attn: Landon Raiford
William Williams
lraiford@jenner.com
wwilliams@jenner.com

Saul Ewing Arnstein & Lehr
1201 North Market Street, Suite 2300
Wilmington, Delaware 19801
Attn: Mark Minuti
Luke Murley
mark.minuti@saul.com
luke.murley@saul.com