

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: Akorn Inc., *et al.*

Provepharm Inc., *et al.*,

Appellants,

v.

Akorn Inc., *et al.*,

Appellees.

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

Appeals from the Bankruptcy Court  
Civil Action No. 20-cv-1254 (MN)  
BAP No. 20-29

Civil Action No. 20-cv-1336 (MN)  
BAP No. 20-37

**MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA FUND FOR LEAVE  
TO SUPPLEMENT THE RECORD ON APPEAL**

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 for leave to supplement the record on appeal (the “Motion”).

**Relief Requested**

1. By this Motion, and pursuant to section 105 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”) the Appellants seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), authorizing the Appellants to file a supplemental designation of the record to include the Postconfirmation Materials (defined below).

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



**Jurisdiction And Venue**

2. The United States Bankruptcy Court for the District of Delaware (the “Bankruptcy 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 United States District Court for the District of Delaware (the “Court”) has jurisdiction over appeals from the Bankruptcy Court pursuant to 28 U.S.C. §158.

4. The Appellants consent pursuant to rule 9013-1(f) of the Local Bankruptcy 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.

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

**Background**

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

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

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

9. 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.

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

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

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

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

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

15. Movants filed their designation of the record in this case on October 2, 2020. (DI #5). 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.

16. 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”).

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

18. On September 18, 2020, the Movants filed a motion for a stay pending appeal in the Bankruptcy Court (BKR. DI #720), to which the Debtors objected (BKR. DI #756).

19. On September 9, 2020, the Debtors filed a motion to approve a settlement with creditor Rising Pharma Holdings Inc. in the Bankruptcy Court (BKR. DI #691).

20. The Movants objected to this motion (BKR. DI #731) and the Debtors replied in further support of it (BKR. DI #783).

21. On September 30, 2020, the Debtors filed a motion to approve a settlement with certain shareholder derivative suit opt-out plaintiffs in the Bankruptcy Court (BKR. DI #743).

22. The Movants objected to this motion (BKR. DI #775) and the Debtors replied in further support of it (BKR. DI #784).

23. The Debtors filed counter-designations of the record for the Appeals on October 16 (DI #15) and October 29, 2020 (DI #18) (collective the “Counter-Designations”).

24. The Counter-Designations add numerous items to the appellate record, including the motion for stay pending appeal, filed after the confirmation hearing.

25. The Bankruptcy Court held a hearing on the settlement motions and the stay motion on October 21, 2020.

26. During this evidentiary hearing, the Bankruptcy Court heard testimony about certain previously-undisclosed preconfirmation dealings of the Debtors.

27. Following the hearing the Bankruptcy Court denied the motion for stay pending appeal and approved the settlement motions. (BKR. DI # 799, 800, 801).

28. The transcript of the October 21, 2020 hearing (BKR. DI #808) plus all filings related to the contested motions resolved at that hearing (BKR. DI # 691, 731, 743, 756, 775, 783,

784, 799, 800, 801) (collectively the “Postconfirmation Materials”) contain facts and context which bear upon the Appeals but which Movants could not have known at the time of confirmation.

29. The Movants seek to add the Postconfirmation Materials to the record in the Appeals.

### **Basis For Relief**

30. Pursuant to Fed. R. Bankr. P. 8009(e)(3), “All other questions as to the form and content of the record must be presented to the court where the appeal is pending.” This includes issues related to supplementing the record.

31. 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.”

32. The record considered by the trial court constitutes the “base” of the record on appeal. In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts, 913 F.2d 89, 96 (3d Cir. 1990) (collecting cases). But this rule “is subject to the right of an appellate court in a proper case to take judicial notice of new developments not considered by the lower court.” Falco v. Zimmer, 767 F. App'x 288, 297 (3d Cir. 2019) quoting United States v. Lowell, 649 F.2d 950, 966 n.26 (3d Cir. 1981).

33. Beyond materials which may be the subject of judicial notice, the court where an appeal is pending may, upon motion, grant leave to supplement the record on appeal. Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ., 574 F.3d 214, 224 n.10 (3d Cir. 2009).

34. The purpose of the limited record on appeal is to place all fact-finding responsibilities upon the trial court, since it is inappropriate for an appeals court to consider new evidence ‘in the first instance.’ Sewak v. INS, 900 F.2d 667, 673 (3d Cir. 1990).

35. Leave to supplement the record should be granted on consideration of “(1) whether the proffered addition would establish beyond any doubt the proper resolution of the pending issue; (2) whether remanding the case to the district court for consideration of the additional material would be contrary to the interests of justice and the efficient use of judicial resources; and (3) whether the appeal arose in the context of a *habeas corpus* action.” In re Capital Cities/ABC, Inc.'s Application etc., 913 F.2d 89, 97 (3d Cir. 1990).

36. The Appellants have shown that they should be granted leave to supplement the record and add the Postconfirmation Materials to the record in the Appeals.

37. The Postconfirmation Materials consist largely of publicly-filed motions and responses which are the proper subject of judicial notice. Since these motions largely deal with the Debtors’ postconfirmation disposition of improperly-retained property, which is highly relevant to the issues on appeal, these pleadings clearly belong in the appellate record.

38. The Postconfirmation Materials also consist of evidentiary exhibits to those motions and the transcript of the hearing on those motions. These materials are factual and may not be the subject of judicial notice.

39. To the extent that the factual materials within the Postconfirmation Materials cannot be judicially noticed, this Court should grant leave to supplement the record.

40. The policy rationale behind a “closed” appellate record is to place fact-finding responsibility where it belongs: with the trial court. The Postconfirmation Materials have already been through the fact finding process before the Bankruptcy Court, so there is no policy rationale for preventing their addition if they are otherwise appropriate for consideration on appeal.

41. The Postconfirmation Materials would establish beyond a doubt certain key facts that are likely to be at issue in the Appeals.

42. The Debtors are likely to raise the issue of “equitable mootness,” the idea that once a Plan is confirmed and performed no appeal is possible because the appeals court cannot “unscramble the egg” and unwind a consummated Plan. In re One2One Commc'ns, LLC, 805 F.3d 428, 443 (3d Cir. 2015). The Postconfirmation Materials will show that, even if the Plan has been substantially consummated, it has been performed in a manner that may be easily undone by this Court.

43. The Appellants, for example, allege that certain causes of action for avoidance of preferences pursuant to 11 U.S.C. §547 worth approximately \$34.6 million were retained by the Debtors in their Plan with the intent to never pursue them. Testimony and representations by the Debtors’ counsel in the Postconfirmation Materials shows that those causes of action have not been fatally compromised by the Debtors as of yet.

44. If this Court finds that the Bankruptcy Court erred in allowing the Debtors to retain valuable causes of action in violation of the absolute priority rule (11 U.S.C. §1129(b)(2)), then the Postconfirmation Materials confirm that this Court can easily grant relief by placing control of those causes of action with an appropriate non-Debtor party.

45. The Postconfirmation Materials also include sworn testimony of a Debtor employee that the Debtors retained certain interests in a product that would generate a perpetual revenue stream of millions of dollars per year, did not attempt to value or market these interests, and engaged in secret preconfirmation settlement talks with one specific creditor to convey these products in exchange for support at confirmation.

46. This testimony bears strongly on the Debtors’ good faith, retention of valuable assets and preferential payments to certain creditors, all live and vital issues to be determined in this appeal.



47. Lastly, the Debtors themselves have designated certain items within the Postconfirmation Materials as part of the appellate record. Though they have done so without leave of this Court, the designations of the record filed by the Debtors show that the Debtors already believe pleadings and evidence that came to light postconfirmation are appropriately part of the record before this Court.

48. This Court should grant leave to supplement the record, and not remand to the Bankruptcy Court, because this Court is best placed to determine what evidence it needs to adjudicate the Appeals. That is why Bankruptcy Rule 8009(e)(3) gives the appeals court the exclusive right to determine issues relating to a supplementation of the record. A remand to the Bankruptcy Court would simply result in duplicative motion practice and in all likelihood an identical substantive outcome.

49. Lastly, this request to supplement the record does not arise in a habeas proceeding, so that factor does not weigh in favor of or against granting leave to supplement.

50. For the foregoing reasons, Appellants respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, authorizing the Appellants to supplement the record on appeal.

Dated: November 12, 2020  
Wilmington, Delaware

Respectfully submitted,

By: /s/Leslie B. Spoltore

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Workers, 1199SEIU Licensed Practical Nurses  
Welfare Fund and Sergeants Benevolent  
Association Health and Welfare Fund*

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**ORDER GRANTING MOTION OF 1199SEIU BENEFIT FUNDS, DC47 FUND AND SBA  
FUND FOR LEAVE TO SUPPLEMENT THE RECORD ON APPEAL**

Upon consideration of the motion of 1199SEIU Benefit Funds,<sup>2</sup> DC47 Fund and SBA Fund to supplement the record and any responses thereto,

IT IS HEREBY ORDERED as follows:

The Motion is GRANTED, as set forth herein.

The Appellants are GRANTED LEAVE to file a supplemental designation of the record including the Postconfirmation Materials in the Appeals.

Dated: \_\_\_\_\_

J.

<sup>2</sup> All capitalized terms have the same meaning as in the Motion.

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**CERTIFICATE OF SERVICE OF MOTION OF 1199SEIU BENEFIT FUNDS, DC47  
FUND AND SBA FUND FOR LEAVE TO SUPPLEMENT THE RECORD**

1. I, Leslie B. Spoltore represent the creditor/appellant in this matter.
2. On November 12, 2020, I sent a copy of the following pleadings and/or documents to the parties listed in the chart below:
  - Motion to Supplement the Record on Appeal
  - Proposed Order
3. 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,

Dated: November 12, 2020  
Wilmington, Delaware

By: /s/Leslie B. Spoltore

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