

**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.)	(Jointly Administered)
)	
)	Related to Docket Nos. 18, 181, 438
)	Obj. Deadline: August 25, 2020 at 12:00 p.m.
)	Hearing Date: September 1, 2020 at 10:00 a.m.

RESERVATION OF RIGHTS OF AMERISOURCEBERGEN DRUG CORPORATION AND AFFILIATES RELATING TO SALE AND ASSUMPTION

AmerisourceBergen Drug Corporation (“ABDC”), ASD Specialty Healthcare, LLC. (“ASD”), for itself and through its divisions (i) ASD Healthcare (“ASD Healthcare”), (ii) Besse Medical Supply (“Besse”), (iii)Oncology Supply (“Oncology Supply”), AmerisourceBergen Global Manufacturer Services GmbH (“GMS”), Integrated Commercialization Solutions, Inc. (“ICS,” collectively with ABDC, ASD (including ASD Healthcare, Besse, and Oncology Supply), and GMS, “Amerisource”), by and through its undersigned counsel, hereby submits the following reservation of rights regarding the sale of the assets of the above captioned debtors and debtors in possession (collectively, the “Debtors”), and in support thereof, respectfully states as follows:

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.



BACKGROUND

1. On May 20, 2020 (the “Petition Date”), the Debtors each commenced a case by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) with the United States Bankruptcy Court for the District of Delaware (the “Court”). Since the Petition Date, the Debtors have continued in possession of their properties and have continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

2. On May 21, 2020, the Debtors filed a motion seeking authority to sell substantially all of their assets (Docket No. 18, the “Sale Motion”). The Sale Motion seeks the approval of a sale transaction (the “Sale”) pursuant to a stalking horse asset purchase agreement (the “APA”). A proposed version of an order approving the APA was attached to the Sale Motion (the “Sale Order”).

3. On June 15, 2020, the Court entered an order approving bidding procedures with respect to the Sale Motion (Docket No. 181, the “Bidding Procedures Order”).

4. On August 7, 2020, the Debtors filed a Notice of No Auction [Docket No. 429, the “Auction Cancellation”). Pursuant to the Auction Cancellation, the Debtors intend to seek approval of the Sale pursuant to the APA.

RESERVATION OF RIGHTS

5. Amerisource does business with the Debtor by purchasing product and distributing it to retailers through distribution agreements (the “Distribution Agreements”) and transporting and warehousing the Debtor’s goods pursuant to logistics agreements (the “Logistics Agreements,” together with the Distribution Agreements, the “Agreements”).

6. The Debtors have provided several notices to Amerisource relating to potentially assumed contracts, specifically:

- ABDC
 - Letter re: Contract Pricing and Chargebacks with ABDC (\$0 proposed cure)
 - Attachment II re: Drug Quality and Security Act (DQSA) and Title II, Drug Supply Chain Security Act (DSCSA) with ABDC (\$0 proposed cure)
 - Amendment to Distribution Services Agreement 01.01.2009 with ABDC (\$0 proposed cure)
 - ABC Amendment to MSDA 2019.01.08 with ABDC (\$0 proposed cure)
 - ABC Addendum to MDSA 2019.01.19 with ABDC (\$0 proposed cure)
 - AmerisourceBergen 3rd party Manufacturer Letter 6.6.18 with ABDC (\$0 proposed cure)
- ASD Healthcare
 - Third Addendum to Distribution Services Agreement Dated May 1, 2010 with ASD (\$0 proposed cure)
- Besse
 - Distribution Services Agreement with Besse (\$0 proposed cure)
- GMS
 - AmerisourceBergen Addendum to MSA 2018.12.28 with GMS (\$0 proposed cure)
- ICS
 - Logistics Services Agreement re: Shipping and Purchasing with ICS (\$0 proposed cure)
- Oncology Supply
 - Master Distribution Services Agreement with Oncology Supply (\$0 proposed cure)

7. The list of potentially assumed contracts appears to be missing certain contracts that would naturally go along with the list of potentially assumed contracts (the “Missing Contracts”). For example, the Debtors proposed to assume certain amendments and addendums to the distribution services agreements with ABDC and ASD Healthcare, but do not list the underlying distribution services agreements.

8. Under the Distribution Agreements and their ancillary documents, Amerisource is entitled to certain claims and credits (the “DSA Credits”) including, but not limited to, prompt pay discounts, distribution fees, chargebacks, rejected inventory claims, inventory shortage claims, inventory price discrepancy claims, and returned product claims.

9. Certain of the DSA Credits arise and accrue from time to time and can take a considerable amount of time to discover, such as returns of product from the end-customer to Amerisource. Amerisource continues to do business with the Debtor and thus the debits and credits change regularly.

10. Amerisource is not aware of any current monetary defaults with respect to the Agreements. Amerisource continues to do business with the Debtor and anticipates that the potential DSA Credits will continue to change. Amerisource hereby reserves the right to amend the cure amount to reflect such additional amounts, which have not yet been billed or become due under the Agreements.

11. Section 1.3(d) of the APA indicates that the Purchaser will assume liabilities relating to rebates, returns, recalls, chargebacks, coupons, discounts, failure to supply claims and similar obligations. This section appears to address the DSA credits that may arise and provides for the assumption of such liabilities by the Purchaser.

12. Amerisource reserves its rights to object to the assumption and assignment of any of its Agreements, including the Missing Agreements, to the extent that the APA or Sale Order are modified to exclude the assumption of the DSA Credits by the Purchaser. Amerisource also requests that the list of assumed contracts be modified either through the sale process or by separate agreement with the Purchaser to assure any necessary Missing Contracts are included so as to preserve the efficient business transactions between Amerisource and the Purchaser going forward.

Dated: August 14, 2020
Wilmington, Delaware

/s/ Michael W. Yurkewicz

**KLEHR HARRISON HARVEY
BRANZBURG LLP**

Michael W. Yurkewicz, Esq. (DE Bar No. 4165)
919 Market Street, Suite 1000
Wilmington, Delaware 19801-3062
Telephone: (302) 426-1189
Facsimile: (302) 426-9193
Email: myurkewicz@klehr.com

-and-

Morton R. Branzburg, Esq.
**KLEHR HARRISON HARVEY
BRANZBURG LLP**

1835 Market Street, Suite 1400
Philadelphia, Pennsylvania 19103
Telephone: (215) 569-2700
Facsimile: (215) 568-6603
Email: mbranzburg@klehr.com

*Counsel for AmerisourceBergen Drug Company and
affiliates*

**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.)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of August, 2020, he cause a copy of the forgoing *Reservation of Rights of AmerisourceBergen Drug Corporation and Affiliates Relating to Sale and Assumption* to be served via CM/ECF and via email on the parties on the service list attached hereto as **Exhibit 1**.

/s/ Michael W. Yurkewicz

Michael W. Yurkewicz (DE Bar No. 4165)

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.

Exhibit 1
Service List

<p>Kirkland & Ellis LLP Attn: Patrick J. Nash, Jr. Gregory Pesce Christopher M. Hayes Nicole L. Greenblatt patrick.nash@kirkland.com gregory.pesce@kirkland.com christopher.hayes@kirkland.com nicole.greenblatt@kirkland.com</p>	<p>Richards, Layton, & Finger, P.A. Attn: Paul N. Heath Amanda R. Steele Zachary I. Shapiro Brett M. Haywood heath@rlf.com steele@rlf.com shapiro@rlf.com haywood@rlf.com</p>
<p>Jenner & Block LLP Attn: Catherine Steege Landon Raiford William Williams csteege@jenner.com lraiford@jenner.com wwilliams@jenner.com</p>	<p>Saul Ewing Arnstein & Lehr Attn: Mark Minuti Luke Murley mark.minuti@saul.com luke.murley@saul.com</p>
<p>Office of the United States Trustee for the District of Delaware Attn: Jane M. Leamy Jane.m.leafy@usdoj.gov</p>	<p>Gibson Dunn & Cruthcer Attn: Scott J. Greenberg Michael J. Cohen sgreenberg@gibsondunn.com mcohen@gibsondunn.com</p>
<p>Young Conaway Stargatt & Taylor Attn: Robert S. Brady rbrady@ycst.com</p>	<p>Wilmer Cutler Pickering Hale and Dorr LLP Attn: Andrew Goldman Andrew.goldman@wilmerhale.com</p>