

AKORN INC
Form 10-K/A
March 20, 2013

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Form 10-K/A
(Amendment No. 1)

R Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the fiscal year ended December 31, 2012

£ Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Commission File Number: 001-32360

AKORN, INC.
(Exact name of registrant as specified in its charter)

LOUISIANA
(State or other jurisdiction of
incorporation or organization)

72-0717400
(I.R.S. Employer Identification No.)

1925 W. Field Court, Suite 300, Lake Forest, Illinois 60045
(Address of principal executive offices and zip code)

Registrant's telephone number, including area code: (847) 279-6100

SECURITIES REGISTERED PURSUANT TO SECTION 12(b) OF THE ACT:

| Title of each class | Name of each exchange on which registered |
|----------------------------|---|
| Common Stock, No Par Value | The NASDAQ Stock Market LLC |

SECURITIES REGISTERED PURSUANT TO SECTION 12(g) OF THE ACT:
(None)

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.
Yes R No £

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes £ No R

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes R No £

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Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes No

Indicate by check mark if disclosure of delinquent filers in response to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definition of "large accelerated filer", "accelerated filer", and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (check one):

Large accelerated filer: Accelerated filer: Non-accelerated filer: Smaller reporting company:

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes No

The aggregate market value of the voting stock of the registrant held by non-affiliates (affiliates being, for these purposes only, directors, executive officers and holders of more than 5% of the registrant's common stock) of the registrant as of June 30, 2012 was approximately \$934,248,000 based on the closing market price of \$15.77 reported on the Nasdaq Stock Market LLC on Friday, June 29, 2012.

The number of shares of the registrant's common stock, no par value per share, outstanding as of February 25, 2013 was 95,921,212.

Documents incorporated by reference: Definitive Proxy Statement for the 2013 Annual Meeting incorporated by reference into Part III, Items 10-14 of this Form 10-K.

EXPLANATORY NOTE

This Form 10-K/A is being filed as Amendment No. 1 to the Form 10-K of Akorn, Inc. filed with the U.S. Securities and Exchange Commission on March 1, 2013 solely for the purpose of including Exhibit 23.1, the Consent of Independent Registered Certified Public Accounting Firm, which was inadvertently omitted from the Form 10-K as originally filed. Item 15 of Part IV is also being amended to reflect the addition of Exhibit 23.1 to the exhibit index. There are no other changes to the Form 10-K filed by Akorn, Inc. on March 1, 2013. Pursuant to Rule 12b-15 under the Securities Exchange Act of 1934, as amended, this Form 10-K/A also contains new certifications pursuant to Section 302 of the Sarbanes-Oxley Act of 2002, which are attached hereto. Because no financial statements have been included in this Form 10-K/A and this Form 10-K/A does not contain or amend any disclosure with respect to Items 307 and 308 of Regulation S-K, paragraphs 3, 4, and 5 of the certifications have been omitted.

This Form 10-K/A speaks as of the original filing date of the Form 10-K and does not reflect events that may have occurred subsequent to the original filing date.

PART IV

Item 15. Exhibits, Financial Statement Schedules

(a) Documents filed as part of this report.

(1) Financial Statements. The consolidated financial statements listed on the index to Item 8 of this Annual Report on Form 10-K are filed as a part of this Annual Report.

(2) Financial Statement Schedules. All financial statement schedules have been omitted since the information is either not applicable or required or is included in the financial statements or notes thereof.

(3) Exhibits. Those exhibits marked with a (*) refer to exhibits filed with the original Form 10-K and those exhibits marked with a (***) refer to exhibits filed with the Form 10-K/A. The other exhibits are incorporated herein by reference, as indicated in the following list. Those exhibits marked with a (†) refer to management contracts or compensatory plans or arrangements. Portions of the exhibits marked with a () are the subject of a Confidential Treatment Request under 17 C.F.R. §§ 200.80(b)(4), 200.83 and 240.24b-2. Omitted material for which confidential treatment has been requested has been filed separately with the SEC.

Exhibit Description
No.

- 2.1 W Asset Sale and Purchase Agreement dated December 22, 2011 between Oak Pharmaceuticals, Inc. and Lundbeck, Inc., incorporated by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on December 30, 2011.
- 2.2 W Share Purchase Agreement, dated May 3, 2011, by and among Akorn, Inc., AVR Business Trust, Advanced Vision Research, Inc., Advanced Vision Pharmaceuticals, LLC, and the Shareholders of AVR Business Trust, incorporated by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on May 9, 2011.
- 2.3 Business Transfer Agreement dated as October 6, 2011 among Akorn, Inc., Akorn India Private Limited, Kilitch Drugs (India) Limited, and members of the promoter group of the Kilitch Drugs (India) Limited, incorporated by reference to Exhibit 2.1 to Akorn Inc.'s report on Form 8-K filed on October 6, 2011.
- 3.1 Restated Articles of Incorporation of Akorn, Inc. dated September 16, 2004, incorporated by reference to Exhibit 3.1 to Akorn, Inc.'s Registration Statement on Form S-1 filed on September 21, 2004(Commission file No. 001-32360).
- 3.2* Amended and Restated By-laws of Akorn, Inc., dated June 18, 2009.
- 4.1 Form of Securities Purchase Agreement dated March 1, 2006, between Akorn, Inc. and certain investors incorporated by reference to Exhibit 4.1 to Akorn, Inc.'s report on Form 8-K filed on March 7, 2006 (Commission file No. 001-32360).
- 4.2 Securities Purchase Agreement dated March 10, 2010, between Akorn, Inc. and Serum Institute of India Ltd, incorporated by reference to Exhibit 10.1 to our report on Form 8-K filed on March 16, 2010.
- 4.3 Akorn, Inc. Common Stock Purchase Warrant, dated April 13, 2009, in favor of EJ Funds LP, incorporated by reference to Exhibit 4.1 of Akorn, Inc.'s report on Form 8-K filed on April 17, 2009.

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- 4.4 Modification, Warrant and Investor Rights Agreement, dated April 13, 2009, among Akorn, Inc., Akorn (New Jersey), Inc., and EJ Funds LP, incorporated by reference to Exhibit 4.2 to Akorn, Inc.'s report on Form 8-K filed on April 17, 2009.
- 4.5 Akorn, Inc. Common Stock Purchase Warrant, dated April 15, 2009, in favor of John N. Kapoor Trust dated 9/20/89, incorporated by reference to Exhibit 4.1 to Akorn, Inc.'s report on Form 8-K filed on April 21, 2009.
- 4.6 Common Stock Purchase Warrant dated August 17, 2009, in favor of EJ Funds LP, incorporated by reference to Exhibit 10.2 to Akorn, Inc.'s report on Form 8-K filed on August 21, 2009.
- 4.7 Common Stock Purchase Warrant dated August 17, 2009, in favor of John N. Kapoor Trust Dated 9/20/89, incorporated by reference to Exhibit 10.4 to Akorn, Inc.'s report on Form 8-K filed on August 21, 2009.
- 4.8 Warrant, dated March 10, 2010, granted by Akorn, Inc. to Serum Institute of India Ltd, incorporated by reference to Exhibit 4.1 to Akorn, Inc.'s report on Form 8-K filed on March 16, 2010.
- 4.9 Amended and Restated Registration Rights Agreement dated June 28, 2010, between Akorn, Inc. and The John N. Kapoor Trust Dated September 20, 1989 and EJ Funds LP, incorporated by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on July 2, 2010.

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- 4.10 Indenture dated as of June 1, 2011 by and between Akorn, Inc. and Wells Fargo Bank, National Association, as trustee, including the form of 3.50% Convertible Senior Note due 2016 (included as Exhibit A to the Indenture), incorporated by reference to Exhibit 4.1 to Akorn, Inc.'s report on Form 8-K filed on June 2, 2011.
- 10.1† Form of Akorn, Inc. Non-Qualified Stock Option Agreement, incorporated by reference to Exhibit 10.36 to Akorn, Inc.'s report on Form 10-K for the fiscal year ended December 31, 2003, filed on March 30, 2004 (Commission file No. 001-32360).
- 10.2† Form of Akorn, Inc. Incentive Stock Option Agreement, incorporated by reference to Exhibit 10.37 to Akorn, Inc.'s report on Form 10-K for the fiscal year ended December 31, 2003, filed on March 30, 2004 (Commission file No. 001-32360).
- 10.3† Amended and Restated Akorn, Inc. 2003 Stock Option Plan, as amended, incorporated by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on March 8, 2012.
- 10.4† Amended and Restated Employee Stock Purchase Plan incorporated by reference to Appendix B to the Akorn, Inc. definitive proxy statement on Schedule 14A filed on July 24, 2009.
- 10.5† Form of Amendment to Executive Consulting Agreement between Akorn, Inc. and Raj Rai, dated December 8, 2009, incorporated by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on December 22, 2009.
- 10.6† Form of Second Amendment to Executive Consulting Agreement between Akorn, Inc. and Raj Rai, its Chief Executive Officer, effective December 8, 2010, incorporated by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on December 28, 2010.
- 10.7† Form of Employment Agreement, dated December 22, 2010, between Akorn, Inc. and Timothy Dick, its Chief Financial Officer, incorporated by reference to Exhibit 10.2 to Akorn, Inc.'s report on Form 8-K filed on December 28, 2010.
- 10.8† Form of Employment Agreement, dated December 22, 2010, between Akorn, Inc. and Joe Bonaccorsi, its Secretary, incorporated by reference to Exhibit 10.3 to Akorn, Inc.'s report on Form 8-K filed on December 28, 2010.
- 10.9 Series A-2 Preferred Stock Purchase Agreement dated as of August 1, 2011 by and between Akorn, Inc. and Aciex Therapeutics, Inc., incorporated by reference to Exhibit 10.1 to Akorn Inc.'s report on Form 10-Q filed on November 9, 2011.
- 10.10 Amendment #1 to Series A-2 Preferred Stock Purchase Agreement dated as of September 30, 2011 by and between Akorn, Inc. and Aciex Therapeutics, Inc., incorporated by reference to Exhibit 10.1 to Akorn Inc.'s report on Form 10-Q filed on November 9, 2011.
- 10.11 Lease Agreement dated July 15, 2010, by and between Veronica Development Associates, a New Jersey general partnership, and Akorn (New Jersey), Inc., an Illinois corporation, for the Company's 50,000 square foot manufacturing facility at 72-6 Veronica Avenue, Somerset, New Jersey, incorporate by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on July 30, 2010.
- 10.12

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Commitment Letter dated November 2, 2008, by and between Akorn, Inc. and General Electric Capital Corporation, incorporated by reference to Exhibit 10.1 to Akorn Inc.'s report on Form 8-K filed on November 5, 2008.

- 10.13 Subordinated Promissory Note dated July 28, 2008, issued by Akorn, Inc. to The John N. Kapoor Trust Dated September 20, 1989, in the principal amount of \$5,000,000, incorporated by reference to Exhibit 10.1 to Akorn, Inc.'s report on Form 8-K filed on August 1, 2008.
- 10.14 Subordination and Intercreditor Agreement dated July 28, 2008, by and among Akorn, Inc., The John N. Kapoor Trust Dated September 20, 1989, LaSalle Bank National Association, as administrative agent for all senior lenders party to the senior credit agreement, and Akorn (New Jersey), Inc., incorporated by reference to Exhibit 10.2 to Akorn, Inc.'s report on Form 8-K filed on August 1, 2008.
- 10.15 Credit Agreement dated January 7, 2009, by and between Akorn, Inc., Akorn (New Jersey), Inc. and General Electric Capital Corporation, incorporated by reference to Exhibit 10.1 to Akorn Inc.'s report on Form 8-K filed on January 9, 2009.
- 10.16 Memorandum of Agreement, dated March 31, 2009, among EJ Funds LP, Akorn Inc., and Akorn (New Jersey), Inc., incorporated by reference to Exhibit 10.1 to Akorn Inc.'s report on Form 8-K filed on April 6, 2009.
- 10.17 Assignment, dated March 31, 2009, among General Electric Capital Corporation, EJ Funds LP, Akorn, Inc., and Akorn (New Jersey), Inc., incorporated by reference to Exhibit 10.2 to Akorn Inc.'s report on Form 8-K filed on April 6, 2009.

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- 10.18 Reimbursement and Warrant Agreement, dated April 15, 2009, among Akorn, Inc. Akorn (New Jersey), Inc., John N. Kapoor Trust dated 09/20/89, and EJ Funds LP, incorporated by reference to Exhibit 10.1 to Akorn Inc.'s report on Form 8-K filed on April 21, 2009.
- 10.19 Amended and Restated Credit Agreement dated August 17, 2009, by and among the Company, Akorn (New Jersey), Inc., a wholly owned subsidiary of the Company, other persons party thereto that are designated as credit parties, EJ Funds LP, and the other financial institution from time to time party thereto, incorporated by reference to Exhibit 10.1 of a Form 8-K filed on August 21, 2009.
- 10.20 Form of First Amendment to \$10,000,000 Credit Facility, Amended and Restated Credit Agreement by and among Akorn, Inc. and Akorn (New Jersey), Inc., as Borrowers and EJ Funds, LP, as Lender, incorporated by reference to Exhibit 10.84 to the Akorn Inc. 2010 Annual Report on Form 10-K filed on March 14, 2011.
- 10.21 Amended and Restated Subordinated Note dated August 17, 2009, made by the Company and Akorn (New Jersey), Inc., in favor of John N. Kapoor Trust Dated 9/20/89, incorporated by reference to Exhibit 10.3 of a Form 8-K filed on August 21, 2009.
- 10.22 Amended and Restated Subordination Agreement dated as of August 17, 2009 by and among John N. Kapoor Trust Dated 9/20/89, the Company, Akorn (New Jersey), Inc. and EJ Funds LP, incorporated by reference to Exhibit 10.6 of a Form 8-K filed on August 21, 2009.
- 10.23 Loan and Security Agreement dated as of October 7, 2011 among Akorn, Inc., a Louisiana corporation, and its domestic subsidiaries, with certain financial institutions as lenders (Lenders), and Bank of America, N.A. as agent (Agent) for the Lenders, incorporated by reference to Exhibit 10.1 to Akorn Inc.'s report on Form 8-K filed on October 13, 2011.
- 21.1 * Listing of the Subsidiaries of Akorn, Inc.
- 23.1 ** Consent of Ernst & Young LLP.
- 31.1* Certification of the Chief Executive Officer pursuant to Rule 13a-14(a).
- 31.2* Certification of the Chief Financial Officer pursuant to Rule 13a-14(a).
- 32.1* Certification of the Chief Executive Officer pursuant to 18 USC Section 1350.
- 32.2* Certification of the Chief Financial Officer pursuant to 18 USC Section 1350.
- 101 The financial statements and footnotes from the Akorn, Inc. Annual Report on Form 10-K for the year ended December 31, 2012, filed on March 1, 2013, formatted in XBRL: (i) Condensed Consolidated Balance Sheets, (ii) Condensed Consolidated Statements of Operations, (iii) Condensed Consolidated Statement of Shareholders' Equity, (iv) Condensed Consolidated Statements of Cash Flows and (v) Notes to Condensed Consolidated Financial Statements.

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

AKORN, INC.

Date: March 19, 2013

By: /s/ RAJAT RAI
Rajat Rai
Chief Executive Officer
(Principal Executive Officer)

Date: March 19, 2013

By: /s/ TIMOTHY A. DICK
Timothy A. Dick
Chief Financial Officer
(Principal Financial Officer)

EXHIBIT INDEX

Exhibit Description
No.

- 23.1 Consent of Ernst & Young LLP (filed herewith).
- 31.1 Certification of the Chief Executive Officer pursuant to Rule 13a-14(a) (filed herewith).
- 31.2 Certification of the Chief Financial Officer pursuant to Rule 13a-14(a) (filed herewith).
- 32.1 Certification of the Chief Executive Officer pursuant to 18 USC Section 1350 (filed herewith).
- 32.2 Certification of the Chief Financial Officer pursuant to 18 USC Section 1350 (filed herewith).

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