

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:

Zosano Pharma Corporation,¹

Debtor.

Chapter 11

Case No. 22-10506 (JKS)

**MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER AUTHORIZING THE
(I) DEBTOR TO (A) CONTINUE PREPETITION INSURANCE POLICIES AND (B)
PAY ALL PREPETITION OBLIGATIONS IN RESPECT THEREOF, AND
(II) BANKS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

The above-captioned debtor and debtor-in-possession (the “**Debtor**”) submits this motion (the “**Motion**”), pursuant to sections 105, and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”) and Rules 6003 and 6004(h) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), for entry of an order, substantially in the form attached hereto as **Exhibit B** (the “**Proposed Order**”), (i) authorizing, but not directing, the Debtor to (a) continue to maintain and administer prepetition insurance policies and revise, extend, renew, supplement, or change such policies, as needed, and (b) pay or honor obligations outstanding on account of prepetition insurance policies; and (ii) authorizing banks and other financial institutions (collectively, the “**Banks**”) to honor and process all checks and electronic transfer requests related to the foregoing. In support of the Motion, the Debtor respectfully represents as follows:

Jurisdiction and Venue

1. The United States Bankruptcy Court for the District of Delaware (the “**Court**”) has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended*

¹ The business address and the last four (4) digits of the Debtor’s federal tax identification number is Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, California 94555 (8360).



Standing Order of Reference from the United States District Court for the District of Delaware, dated as of February 29, 2012. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), the Debtor consents to the entry of a final judgment or order with respect to this Motion if it is determined that the Court lacks authority under Article III of the United States Constitution to enter such final order or judgment absent consent of the parties.

Background

3. On June 1, 2022 (the “**Petition Date**”), the Debtor commenced this case (the “**Case**”) by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Court.

4. The Debtor continues to operate its business and manage its property as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date hereof, no trustee, examiner, or official committee of unsecured creditors has been appointed in the Debtor’s chapter 11 case.

5. Additional information regarding the Debtor’s business and operations, as well as the events precipitating the commencement of this case, is set forth in the *Declaration of Steven Lo in Support of the Debtor’s Chapter 11 Petition and Requests for First Day Relief* (the “**First Day Declaration**”), filed on or shortly following the Petition Date and incorporated herein by reference.

Insurance Policies

6. In connection with the operation of its business, the Debtor maintains insurance policies with various insurance companies (collectively, the “**Insurers**”) providing coverage for, among other things, general liability, property, cargo, cyber, package and product liability, directors and officers, and automobile (collectively, the “**Insurance Policies**”).² A list of the Insurance Policies, Insurers and the term of the Policies is attached hereto as **Exhibit A**.³ The Insurance Policies are essential for the Debtor to continue to operate its business and protect its assets.

7. Under the Insurance Policies, the Debtor is required to pay premiums based on fixed rates set by the Insurers. The annual premiums for the Insurance Policies total approximately \$1.2 million, with premiums on certain of the Insurance Policies having been paid in full at the beginning of the policy term and premiums on other Insurance Policies paid in quarterly installments of approximately \$30,000.00. Although the Debtor believes that no prepetition amounts are due and owing under the Insurance Policies, the Debtor requests authorization to pay any such amounts that may become due and to proceed in the ordinary course of business to maintain the Insurance Policies, including to renew the Insurance Policies and pay premiums associated with such renewals. As of the Petition Date, the Debtor is not party to any premium financing agreements for the Insurance Policies.

² The descriptions of the Insurance Policies are intended only as a summary, and the actual terms of the Insurance Policies shall govern in the event of any inconsistency with the descriptions set forth herein.

³ In addition to the Insurance Policies listed on Exhibit A, the Debtor maintains an insurance policy with respect to the Debtor’s workers compensation program (the “**Workers Compensation Program**”), which is described in the Debtor’s *Motion of the Debtor for Entry of Interim and Final Orders (I) Authorizing the Debtor to Pay (A) All Prepetition Employee Obligations and (B) Prepetition Withholding Obligations and Dues, and (II) Directing Banks to Honor Related Transfers* (the “**Employee Wage Motion**”), filed concurrently herewith. Except as otherwise set forth herein, any relief requested with respect to the Workers Compensation Program is requested in the Employee Wage Motion.

Relief Requested

8. By the Motion, the Debtor requests that the Court enter the Proposed Order, (i) authorizing, but not directing, the Debtor to continue and, to the extent necessary, renew the Insurance Policies and pay any policy premiums arising thereunder or in connection therewith, including prepetition obligations arising in the ordinary course of business, and (ii) authorizing the Banks to honor and process check and electronic transfer requests related thereto.

Basis for Relief Requested

A. The Court Should Authorize, but Not Direct, the Debtor, in Its Discretion, to Make Necessary Payments Related to the Insurance Policies to Maintain Existing Insurance Coverage.

9. Maintaining the Debtor's insurance coverage under the Insurance Policies is a crucial ordinary-course-of-business transaction. Authority to pay any prepetition amounts that may be due and owing related to the Insurance Policies—to the extent that the Debtor determines that such payment is necessary to avoid cancellation, default, alteration, assignment, attachment, lapse, or any form of impairment of the coverage, benefits, or proceeds provided under the Insurance Policies—is necessary, as the insurance coverage provided under the Insurance Policies is essential for preserving the value of the Debtor's assets and, in many cases, such coverage is required by the various contracts and state, federal, and international laws that govern the Debtor. *E.g.*, 28 U.S.C. § 959(b) (obligating chapter 11 debtors under federal law to operate their business and manage their property according to the laws of the states where such business and property are located). Further, under the *Operating Guidelines for Chapter 11 Cases* issued by the United States Trustee for Region 3 pursuant to 28 U.S.C. § 586, the Debtor is obligated to maintain certain types of insurance coverage during the Case, which is provided by certain of the Insurance Policies.

10. In addition, the Debtor may need to renew or replace certain of its Insurance Policies during the pendency of the Case. The nonpayment of any premiums, deductibles, or related fees under any of the Insurance Policies could result in one or more of the Insurers increasing future insurance premiums, declining to renew the Insurance Policies, or refusing to enter into new insurance agreements with the Debtor. If the Insurance Policies lapse without renewal, the Debtor may be exposed to substantial liability for first-party property claims and third-party liability claims, to the detriment of all parties-in-interest.

11. Section 105(a) of the Bankruptcy Code empowers the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). A bankruptcy court may use its equitable powers under § 105 of the Bankruptcy Code to permit a debtor-in-possession to pay prepetition claims when payment is necessary to effectuate a debtor’s bankruptcy goals and essential to the continued operation of the business. *Miltenberger v. Logansport. C. & S.W.R. Co.*, 106 U.S. 286 (1882); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981); *In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999) (under the necessity of payment doctrine, prepetition claims may be paid if they are essential to the continued operation of the business during reorganization); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 192 (Bankr. D. Del. 1994) (recognizing that the necessity of payment doctrine authorizes payment of prepetition claims when “such payment is essential to the continued operation of the business”).

12. In addition, the Court may authorize the Debtor to pay prepetition premiums to maintain insurance coverage under § 363(b) of the Bankruptcy Code. In particular, § 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. §

363(b)(1). Thus, under this section, a court may authorize a debtor to pay certain prepetition claims. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175–77 (S.D.N.Y. 1989) (affirming lower court order authorizing payment of prepetition wages pursuant to § 363(b) of the Bankruptcy Code).

B. The Court Should Authorize the Banks to Honor and Process the Debtor’s Payments Related to the Insurance Programs.

13. The Debtor also requests that the Court authorize the Banks, when requested by the Debtor, to honor and process checks or electronic fund transfers drawn on the Debtor’s bank accounts to pay prepetition obligations as described herein, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Debtor further requests that all Banks be authorized to rely on the Debtor’s designation of any particular check or electronic payment request as approved pursuant to the Motion.

Bankruptcy Rule 6003 Is Satisfied and Request for Waiver of Stay

14. The Debtor further submits that because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor for the reasons set forth herein and in the First Day Declaration, Bankruptcy Rule 6003 has been satisfied and the relief requested herein should be granted.

15. Specifically, Bankruptcy Rule 6003 provides:
Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting the following: . . . (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001

Fed. R. Bankr. P. 6003.

16. The Third Circuit Court of Appeals has interpreted the “immediate and irreparable harm” language in the context of preliminary injunctions. In that context, irreparable harm has been interpreted as a continuing harm that cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation. *See, e.g., Norfolk S. Ry. Co. v. City of Pittsburgh*, 235 F. App’x 907, 910 (3d Cir. 2007) (citing *Glasco v. Hills*, 558 F.2d 179, 181 (3d Cir. 1977)). Further, the harm must be shown to be actual and imminent, not speculative or unsubstantiated. *See, e.g., Acierno v. New Castle Cty.*, 40 F.3d 645, 653-55 (3d Cir. 1994). As explained in more detail above, the Debtor’s inability to maintain the Insurance Policies in the ordinary course will result in immediate and irreparable harm to the Debtor’s business.

17. The Debtor further seeks a waiver of any stay of the effectiveness of an order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As set forth above, the relief requested herein is essential to prevent immediate and irreparable damage to the Debtor’s operations, going concern value and its efforts to pursue a resolution to the Case. Accordingly, the relief requested herein is appropriate under the circumstances and under Bankruptcy Rules 6003 and 6004(h).

Request for Waiver of Bankruptcy Rules 6004(a) and 6004(h)

18. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As set forth throughout the Motion, any disruption in, among other things, the Debtor’s insurance coverage would be detrimental to the Debtor, its creditors, and its estate, and would impair the Debtor’s ability to optimize its business performance at this critical time as it begins the chapter 11 process. For this

reason and those set forth above, the Debtor submits that ample cause exists to justify a waiver of the fourteen day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable to the Proposed Order.

19. To implement the foregoing immediately, the Debtor also respectfully requests a waiver of the notice requirements of Bankruptcy Rule 6004(a) to the extent they are deemed applicable to the Proposed Order.

Debtor's Reservation of Rights

20. Nothing in the Proposed Order or the Motion (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to § 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtor and its estate, (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtor and its estate with respect to the validity, priority, or amount of any claim against the Debtor and its estate, (iii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtor and its estate with respect to any and all claims or causes of action against any of the Insurers, or (iv) shall be construed as a promise to pay a claim.

Notice

21. Notice of the Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the District of Delaware; (b) creditors holding the twenty (20) largest unsecured claims against the Debtor; (c) the Office of the United States Attorney for the District of Delaware; (d) the Internal Revenue Service; (e) the Securities & Exchange Commission; (f) the Delaware Secretary of State; (g) the Delaware State Treasury; (h) the Insurers listed in the Insurance Policies on **Exhibit A**; (i) the Banks; (j) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (k) any other party

entitled to notice pursuant to Local Rule 9013-1(m)(iii). As the Motion is seeking “first day” relief, within two business days of the hearing on the Motion, the Debtor will serve copies of the Motion and any order entered with respect to the Motion in accordance with Local Rule 9013-1(m)(iv). The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

22. No prior Motion for the relief requested herein has been made to this or any other court.

[Signature on Next Page]

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court enter the Proposed Order granting the relief requested herein and granting such other and further relief as is just and proper.

Dated: June 2, 2022

GREENBERG TRAURIG, LLP

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*Proposed Counsel for the Debtor
and Debtor-in-Possession*

Exhibit A**Insurance Policies**

Type of Policy	Insurance Carrier	Policy Number	Effective Dates
Business Auto	Berkley Life Sciences, LLC / Berkley Regional Insurance Company	LCA 5055382 - 12	01/01/2022– 01/01/2023
Cargo	Falvey Cargo Underwriting / Underwriters at Lloyd's, London	MC-1000389	01/01/2022– 01/01/2023
Cyber Liability	Underwriters at Lloyd's, London	W2D777220201	01/01/2022– 01/01/2023
D&O Excess	Berkley Insurance Company	BPRO8074244	01/27/2022– 01/27/2023
D&O Primary	XL Specialty Insurance Company	ELU180744-22	01/27/2022– 01/27/2023
D&O Side A DIC	Old Republic Insurance Company	ORPRO 12 101718	01/27/2022– 01/27/2023
Employment Practices Liability	Chubb Group of Insurance Companies	8250-9661	01/27/2022– 01/27/2023
Fiduciary	Chubb Insurance Co. / Federal Insurance Co.	8261-3406	01/01/2022– 01/01/2023
Package	Berkley Life Sciences, LLC / StarNet Insurance Company	LPK 5051841-13	01/01/2022– 01/01/2023
Product Liability	Berkley Life Sciences, LLC / Gemini Insurance Company	GL_16081-4	01/01/2022– 01/01/2023
Workers Compensation	Berkley Life Sciences, LLC / Tri State Insurance Company of Minnesota	LWC 5051880-13	01/01/2022– 01/01/2023

Exhibit B

Proposed Order

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:

Zosano Pharma Corporation,¹

Debtor.

Chapter 11

Case No. 22-10506 (JKS)

Ref. Docket No.

**ORDER AUTHORIZING THE (I) DEBTOR TO (A) CONTINUE PREPETITION
INSURANCE POLICIES AND (B) PAY ALL PREPETITION OBLIGATIONS
IN RESPECT THEREOF, AND (II) BANKS TO HONOR AND
PROCESS RELATED CHECKS AND TRANSFERS**

Upon consideration of the motion (the “**Motion**”)² of the above-captioned debtor and debtor-in-possession (the “**Debtor**”) for the entry of an order, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, (i) authorizing, but not directing, the Debtor to (a) continue to maintain and administer prepetition insurance policies and revise, extend, renew, supplement, or change such policies, as needed, and (b) pay or honor obligations outstanding on account of prepetition insurance policies; and (ii) authorizing the Banks to honor and process all checks and electronic transfer requests related to the foregoing; and upon consideration of the Motion and all pleadings related thereto, including the First Day Declaration; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that the Court has jurisdiction to consider the Motion in accordance with 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 February 29, 2012; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this

¹ The business address and the last four (4) digits of the Debtor’s federal tax identification number is Zosano Pharma Corporation, 34790 Ardentech Court, Fremont, California 94555 (8360).

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

proceeding and the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion and provided for herein is in the best interest of the Debtor, its estate, and creditors; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. The Debtor is authorized to maintain the Insurance Policies without interruption and renew, supplement, modify, or extend the Insurance Policies, or enter into new insurance policies, and to incur and pay premiums, claims, deductibles, retentions, retrospective adjustments, administrative fees, broker fees, and any other obligations arising thereunder or in connection therewith, in accordance with the same practices and procedures as were in effect prior to the Petition Date.
3. The Debtor is authorized, but not directed, in its discretion, to pay, honor, or otherwise satisfy premiums, claims, deductibles, retentions, retrospective adjustments, administrative fees, broker fees, and any other obligations that (a) were either due and payable on or related to the period prior to the Petition Date on account of the Insurance Policies, and (b) are, or become, due and payable or related to the period after the commencement of the Case.
4. The Banks are authorized, when requested by the Debtor, in the Debtor's discretion, to honor and process checks or electronic fund transfers drawn on the Debtor's bank accounts to pay prepetition obligations authorized to be paid hereunder, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Banks may rely on the representations of the Debtor with respect to whether any check or other transfer drawn or

issued by the Debtor prior to the Petition Date should be honored pursuant to the Interim Order, and any such Bank shall not have any liability to any party for relying on such representations by the Debtor, as provided for in the Interim Order.

5. Nothing in the Interim Order (a) is intended or shall be deemed to constitute an assumption of any agreement pursuant to § 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtor and its estate, (b) shall impair, prejudice, waive, or otherwise affect the rights of the Debtor, its estate, or any other party-in-interest with respect to the validity, priority, or amount of any claim against the Debtor and its estate, (c) shall impair, prejudice, waive, or otherwise affect the rights of the Debtor and its estate with respect to any and all claims or causes of action against any of the Insurers, or (d) shall be construed as a promise to pay a claim.

6. The Debtor is authorized to take any and all actions necessary to effectuate the relief granted herein.

7. The requirements of Bankruptcy Rule 6003(b) are satisfied.

8. Notwithstanding the applicability of Bankruptcy Rule 6004(h), the terms and conditions of the Interim Order shall be effective and enforceable immediately upon its entry.

9. Notice of the Motion as provided therein shall be deemed good and sufficient and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

10. The Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of the Interim Order.