Docket #0064 Date Filed: 6/22/2022

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
Zosano Pharma Corporation,[1]	Case No. 22-10506 (JKS)
Debtor.	**RE: Doc. 40**

OBJECTION OF PATHEON MANUFACTURING SERVICES LLC TO APPLICATION OF THE DEBTOR FOR ENTRY OF AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF SIERRACONSTELLATION PARTNERS, LLC AS FINANCIAL ADVISOR TO THE DEBTOR

Patheon Manufacturing Services LLC ("Patheon"), the largest unsecured creditor in this case (this "Case")[2], hereby respectfully objects to the *Application of the Debtor for Entry of an Order Authorizing the Retention and Employment of SierraConstellation Partners, LLC as Financial Advisor to the Debtor Effective as of the Petition Date* (Doc. 40) (the "SCP Retention Application") for the reasons set forth below.

BACKGROUND

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

2. The Debtor continues to operate its business and manage its property as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or official committee of unsecured creditors has been appointed in this Case.[3]

[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] According to the Debtor's list of its 20 largest unsecured creditors, Patheon's claim is $2,436,788; the claim of the next largest unsecured creditor is $438,368.

[3] On June 16, 2022, the Office of the United States Trustee filed a *Statement that Unsecured Creditors' Committee Has Not Been Appointed* due to insufficient response (Doc. 57).

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3. 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* (Doc. 15) (the "Lo Declaration"), filed shortly following the Petition Date and incorporated herein by reference.

BASIS FOR OBJECTION

A. Conversion of Case to Chapter 7

4. Concurrently with the filing of this Objection, Patheon also has filed in this Case its *Motion of Patheon Manufacturing Services LLC to Convert Chapter 11 Case to Chapter 7* (the "Motion to Convert"). The many sound arguments as to why this Case should be administered by a Chapter 7 Trustee, and not by a host of highly compensated professionals in Chapter 11, are set forth in the Motion to Convert and are incorporated herein by reference.

5. Patheon is firmly of the view that its Motion to Convert is well-taken and should be granted in all respects. However, if the Court does not grant the Motion to Convert, then Patheon objects to the Debtor's proposed retention of SierraConstellation Partners LLC ("SCP").

B. Debtor's Unsuccessful Pre-Petition Sale Efforts

6. As set forth in the Motion to Convert, in January, 2022 the Debtor engaged SCP to explore a possible sale of the Debtor's assets – which are comprised almost entirely of certain specialized manufacturing equipment and the intellectual property related to M207. "[U]sing its extensive network in the biopharmaceutical space, along with the Debtor's contacts, beginning in March, 2022 SCP distributed targeted teaser materials to over 150 potential transaction parties likely to have an interest in pursuing a strategic transaction with the Debtor." Lo Declaration at ¶11. Despite its "considerable efforts," however, the Debtor did not receive *any* expressions of interest that contemplated a going concern sale. *Id*. at ¶11;30. Rather, the Debtor received proposals to acquire only discrete assets and even those proposals were on terms "that would net

– after accounting for associated fees and expenses – *no recovery* to the Debtor's estate." *Id*. (emphasis added).

7. Despite its notable lack of success in procuring any satisfactory offers for any of the Debtor's assets prior to the Petition Date, SCP nonetheless was handsomely rewarded by the Debtor. In particular, between February, 2022 and the Petition Date, the Debtor paid SCP a total of $863,045.83. *See* SCP Retention Application, Exhibit B (Declaration of Lawrence Perkins) at ¶20.

C. Proposed Re-Engagement of SCP

8. Given the failure of its extensive, and expensive, pre-petition sale efforts, the Debtor makes no secret of the fact it filed this Case to "liquidate its assets in an orderly manner in chapter 11." Lo Declaration at ¶¶12;32-33. To that end, the Debtor indicates "negotiations with interested transaction parties seeking to acquire certain assets of the Debtor – *but not for a going concern sale* – remain ongoing." *Id*. at ¶31 (emphasis added). In other words, even according to its own President and CEO, the Debtor's days as a viable business finally have come to an end.

9. The Debtor's professionals, however, evidently have their own ideas and profess to hold out hope that a going concern sale may yet miraculously "materialize." *Id*. Based on that wishful thinking, the Debtor now seeks to re-engage SPC, this time on behalf of the bankruptcy estate, to do what SCP has been conspicuously unable to accomplish for the past five months.[4] That is, the Debtor proposes to engage SCP on a straight hourly fee basis, at rates that range from $275-$1,005 per hour, to continue their, to date, fruitless efforts to sell the Debtor's assets. *See* SCP Retention Application, Schedule 1 (Engagement Letter).

[4] The now defunct Debtor ostensibly seeks to re-engage SCP as its "financial advisor." It is evident, however, the Debtor no longer needs a financial advisor and, by its own admission, instead intends for SCP to resume its failed pre-petition search for a "going concern or all asset sale." Lo Declaration at ¶31.

10. In certain respects it is not surprising that SCP has been unable to procure any satisfactory offers for the Debtor – particularly its intellectual property which, given the FDA's latest adverse ruling, is unlikely to interest any prospective strategic or financial buyers. That is all the more reason why, however, SCP should not be re-engaged by the Debtor, especially on the terms set forth in SCP's engagement letter; that is, based on time charges and hourly rates regardless of its success or continued failure. At this point there simply is no reasonable basis upon which to conclude that SCP's efforts now will not result in the same thing those efforts produced before: a very large fee with nothing to show for it.

D. Proposed Engagement of Liquidators

11. The unjustifiable burden that SCP's re-engagement would bring to bear upon the Debtor's bankruptcy estate is further highlighted by the Debtor's proposed engagement of two auctioneers, Onyx Asset Advisors, LLC ("Onyx") and Rabin Worldwide, Inc. ("Rabin"). According to the Debtor, Onyx and Rabin will be tasked with conducting simple "as-is, where is" auctions of the Debtor's tangible assets; that is, its "machinery, equipment, rolling stock, facility and lab equipment, and other personal property" (the "Personal Property"). The Debtor proposes to pay Onyx and Rabin a non-refundable $50,000 commitment fee plus a handsome 18% commission on all sales of Personal Property plus up to $37,500 in expenses. *See Application of the Debtor for Entry of an Order Authorizing the Retention and Employment of Onyx Asset Advisors, LLC and Rabin Worldwide, Inc. as Sales Agent* (Doc. 41).

12. The Debtor claims the engagement of SCP, and also Onyx and Rabin, will proceed on a dual-track and will not overlap. To the contrary, a needless and expensive duplication of effort is inevitable based on the parallel sale/auction process the Debtor's professionals fancy. The Debtor proposes to pay SCP on a non-contingent, hourly basis to re-market the Debtor's business

and, if SCP continues to be unsuccessful in those efforts, then to pay Onyx and Rabin a commission on the sale of the same assets SCP has been unable to sell. This overlap of effort, and resulting additional cost, is unwarranted and unjustified.

13. In addition, according to its website (www.thinkonyx.com), Onxy has "extensive and global" experience in liquidating the assets of companies in the biotechnology space – including their equipment and intellectual property. That capability and experience is even more reason why the Debtor's proposed retention of SCP is not necessary and will only add needless expense to the bankruptcy estate.

APPLICABLE LAW

14. The standard for approval of the retention of a professional is set forth in Bankruptcy Code section 328(a), which provides:

> The [debtor], . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment…"

In making its assessment, the Court "must protect the estate, lest overreaching attorneys or other professionals drain it of wealth which by right should inure to the benefit of unsecured creditors." *In re Fleming Cos.*, 304 B.R. 85, 89 (Bankr. D. Del. 2003) *citing In re Busy Beaver Building Centers, Inc.*, 19 F.3d 833, 844 (3d Cir. 1994).

15. In this Case, the Debtor concedes SCP already has made extensive efforts to sell the Debtor's assets, all to no avail. The Debtor also holds out no hope that SCP's resumption of those efforts now will be any more successful than they were prior to the Petition Date. Instead, by all indications SCP's substantial, non-contingent fees and expenses will be borne entirely by the unsecured creditors without any realistic expectation that those costs will be covered by the

net proceeds from sales of the Debtor's property that SCP, this time, possibly might be able to procure.

16. For these reasons, if the Court does not convert this Case from Chapter 11 to Chapter 7, then at the very least the Debtor's proposed engagement of SCP should not be approved.

CONCLUSION

WHEREFORE, for the foregoing reasons, Patheon respectfully requests that the Court deny the SCP Retention Application and for such additional relief as the Court deems appropriate.

Dated: June 22, 2022
Wilmington, Delaware

Respectfully submitted,

ASHBY & GEDDES, P.A.

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