

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:

Zosano Pharma Corporation,¹

Debtor.

Chapter 11

Case No. 22-10506 (JKS)

Hearing Date: June 29, 2022 at 1:00 p.m. (ET)

Ref Docket Nos. 40 and 64

**REPLY TO 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**

The above-captioned debtor and debtor-in-possession (the “**Debtor**”) submits this reply to the *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* [Docket No. 64] (the “**Objection**”) filed by Patheon Manufacturing Services LLC (“**Patheon**”). In support of this Reply, the Debtor respectfully states as follows:

Introduction

In its Objection and related Motion to Convert, Patheon, a disputed creditor, has embarked on a wasteful litigation path that distracts from the Debtor’s efforts to maximize the value of its assets. Patheon proceeds from the mistaken notion that a debtor that did not sell its assets prepetition must scuttle its sale process and simply liquidate under chapter 7. In fact, the Debtor had several prepetition offers to purchase some or all of its assets, but determined that a sale through a chapter 11 process would maximize the value of its assets.

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).



Further, Patheon's argument is at odds with the present state of the Debtor's sale process, in which SierraConstellation Partners, LLC ("SCP") is playing a lead role. SCP has been marketing the Debtor's assets for sale for months and is currently engaged in discussions with several prospective purchasers. Accordingly, the Debtor needs SCP to assist in the sale process and other aspects of this case. Patheon's Objection is based on conjecture and mischaracterizations of the Debtor's filings and fails to show that the Debtor is not entitled to retain professionals needed to facilitate the sale process and the efficient administration of this case. As discussed in more detail below, the Objection should be overruled.

Argument

I. The Debtor is entitled to retain professionals.

Section 328(a) of the Bankruptcy Code authorizes the employment of a professional on any reasonable terms and conditions of employment, including on an hourly basis. *See* 11 U.S.C. § 328(a). Further, Rule 2014(a) of the Bankruptcy Rules requires that an application for retention include:

[S]pecific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a).

Despite Patheon's feeble arguments to the contrary, the requirements set forth by Rule 2014 are satisfied. As set forth in SCP's application and the supporting declaration, SCP's retention is necessary to the Debtor's sale process and it has been having nearly daily interactions with prospective buyers of the Debtor's assets. Further, SCP is assisting the Debtor

with other aspects of the case including, without limitation, financial analysis, reporting, and the preparation of its schedules and statement of financial affairs.²

II. Patheon raises no valid objection to SCP's retention.

Patheon fails to identify any legitimate reason why SCP should not be retained. With no knowledge of the current state of the sale process or appreciation for the lengths to which the Debtor is going in an effort to maximize the value of its assets, Patheon claims that the prepetition absence of a going concern sale warrants (a) the denial of SCP's retention and (b) the conversion of this case. If that were true, every liquidating chapter 11 case filed without a stalking horse bidder for a going concern sale would be converted, which is not consistent with the Bankruptcy Code, caselaw, or the practice of bankruptcy courts in this district or nationwide.

SCP's retention is necessary to support, among other things, the sale process, which will maximize value for all creditors including those (unlike Patheon) who do not hold disputed claims. Since the Petition Date, SCP has been interfacing with prospective buyers of the Debtors' assets on a daily or nearly daily basis. In recent weeks, multiple prospective bidders have emerged that have indicated an intent to submit bids by the proposed deadline set forth in the Debtor's proposed bidding procedures. To remove SCP from this process at this juncture would be very disruptive, if not fatal, to the sale process at great prejudice to the Debtor's stakeholders.

Despite sharing non-confidential information with Patheon's counsel about the sales process, *i.e.* that the Debtor is actively engaging with bidders, Patheon has refused to withdraw the Objection and its related Motion to Convert. This refusal leads the Debtor to suspect that

² See *Declaration of Lawrence Perkins* [Docket No. 40-2], ¶ 3.

Patheon is operating in bad faith with an alternative agenda that seeks to derail the Debtor's sale efforts fail for competitive reasons. The Objection seems to be motivated by this same animus.

III. The Objection is based upon misrepresentations to the Court.

Patheon primarily relies on misrepresentations to the Court regarding SCP's prepetition engagement. First, it claims that "between February, 2022 and the Petition Date, the Debtor paid SCP a total of \$863,045.83," yet it fails to note, as is made clear in the Application, that of this amount, \$225,000 is a prepetition retainer of which \$165,345.00 has not been drawn upon as of the Petition Date. Further, it suggests that all of the prepetition amounts paid were to conduct a sale process when it is clear that SCP's prepetition engagement was much broader. Third, Patheon repeatedly refers to the "failed" or "fruitless" efforts of the Debtor to sell assets. The fact of the matter is that the Debtor could have entered into multiple asset purchase agreements prepetition. However, it determined, in its business judgment, to proceed with the sale process in this chapter 11 case to maximize value.

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court: (i) overrule the Objection and approve the Application; and (ii) grant such other and further relief as this Court deems just and proper.

Dated: June 27, 2022
Wilmington, Delaware

Respectfully submitted,

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