**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| In re: | Chapter 11 |
| Zosano Pharma Corporation, | Case No. 22-10506 (JKS) |
| | **Obj. Deadline: April 4, 2025 at 4:00 p.m. (ET)**<br>**Hearing Date: May 8, 2025 at 1:00 p.m. (ET)** |
| Debtor. | **RE: D.I. 465** |

**RESPONSE OF PATHEON MANUFACTURING SERVICES LLC TO LIQUIDATING TRUSTEE'S OBJECTION TO ALLOWANCE OF CLAIMS FILED BY PATHEON MANUFACTURING SERVICES LLC**

Patheon Manufacturing Services LLC ("Patheon"), by and through its undersigned counsel, hereby submits this response (this "Response") to the *Liquidating Trustee's Objection to Allowance of Claims Filed by Patheon Manufacturing Services LLC Pursuant to Section 502 of the Bankruptcy Code and Bankruptcy Rule 3007* [D.I. 465] (the "Objection") and in support thereof states as follows:

## BACKGROUND

### I. Debtor's Prepetition Activity.

1. The Debtor was a clinical-stage biopharmaceutical company which, prior to its demise, devoted the majority of its research, development and clinical efforts on a proprietary product designed to treat migraine headaches and on a related transdermal microneedle patch to administer the product to patients. Patheon is, among many other things, a contract manufacturer that from 60 locations across 25 countries provides highly specialized, technical and sophisticated manufacturing support services to the biopharma industry.

2. Prior to its collaboration with Patheon, the Debtor used its own manufacturing processes and equipment to produce limited volumes of the product and the patches for customer



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feasibility studies. When certain feasibility studies initially proved to be promising, the Debtor decided to produce the product and the patch in larger quantities. In order to secure the necessary manufacturing expertise, experience and capacity, on September 28, 2018, the Debtor engaged the services of Patheon pursuant to two commercial agreements: a Technology Transfer Agreement (the "TTA") and a Manufacturing and Supply Agreement (the "MSA"). Under the TTA, Patheon agreed, among other things, to construct a special dedicated production suite at its Greenville, North Carolina manufacturing facility; to procure and/or validate the equipment necessary to manufacture the product and the patches; and to provide certain related engineering and technical services. In return for these services, the Debtor agreed to pay Patheon certain budgeted fees in excess of $1.76 million.

3. Pursuant to the MSA, Patheon also agreed, among other things, to procure and supply certain raw materials; to manufacture the product and the patches; to store the finished goods; to properly dispose of waste materials; and to maintain a sufficient number of qualified personnel necessary to fulfill its duties and obligations under the MSA. In return for these manufacturing services, the Debtor agreed to pay Patheon certain Product Fees and Base Fees as more particularly set forth in the MSA.[1] The Base Fees due and payable for the 3-month period from October 1 – December 31, 2018 were $300,000 per month and then escalated each calendar year thereafter. The Base Fees due and payable for 2022 were $380,000 per month. [2]

[1] Inasmuch as both the TTA and MSA contain proprietary and highly confidential information, and both agreements are in the Debtor's possession, Patheon has not attached to this Response a copy of either agreement. Patheon will provide the Court with complete copies of both agreements in advance of any hearing on the Objection.

[2] The Base Fees (with all amounts payable in 12 equal monthly installments) originally were: 2019 - $1 million; 2020 - $2 million; 2021 - $2.8 million; 2022 - $5 million; 2023 - $11.5 million; 2024 and thereafter - $14 million. However, as an accommodation to the Debtor, at the end of 2021 Patheon agreed to reduce the monthly Base Fee for 2022 from $416,666.67 to $380,000 per month.

4. Despite the Debtor's initial optimism, ultimately the United States Food and Drug Administration (FDA) twice denied the Debtor's new drug applications, the first time in October, 2020 and then again in February, 2022. Unable to raise the funding necessary to address the concerns raised by the FDA, the Debtor began to pursue strategic alternatives, including a possible sale of the company as a going concern. When those efforts failed, on June 1, 2022 (the "Petition Date"), the Debtor filed this Chapter 11 case.

**II. Account Status as of Petition Date.**

5. As of the Petition Date, the TTA and the MSA both were still in full force and effect and, as such, were executory contracts for purposes of Section 365 of the Bankruptcy Code. Also as of the Petition Date, the Debtor owed Patheon over $2 million for the pre-petition services that Patheon had provided to and on behalf of the Debtor under the TTA and the MSA. At no time prior to the Petition Date did the Debtor dispute or otherwise question or complain in any way about Patheon's services or the amounts Patheon had charged the Debtor for those services.

**III. Post-Petition Events.**

6. Promptly after the Petition Date, the Debtor resumed its pre-petition efforts to locate a suitable buyer for its business. *See Disclosure Statement for Chapter 11 Plan of Liquidation of Zosano Pharma Corporation* [D.I. 179 (the "Disclosure Statement") at 12-13]. Those efforts culminated when, on August 3, 2022, the Debtor and Emergex USA Corporation ("Emergex"), an affiliate of a U.K.-based company, entered into an Asset Purchase Agreement ("the Sale Agreement") pursuant to which the Debtor agreed to sell substantially all its assets to Emergex. On August 8, 2022 this Court approved the sale pursuant to its *Order (I) Authorizing the Sale of Assets of the Debtor Free and Clear of All Liens, Claims, Encumbrances, and Interest; (II) Approving the Final Asset Purchase Agreement; (III) Authorizing the Assumption and*

*Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief* [D.I. 164] and, on August 15, 2022, the Debtor and Emergex closed the sale [D.I.. 172].

7. The TTA and the MSA remained in full force and effect throughout the Debtor's entire marketing and sale process. Only after Emergex decided, shortly before the closing of the Sale Agreement, that it did not wish to assume either the TTA or the MSA did the Debtor file, on August 22, 2022, its *Omnibus Motion of Debtor for Entry of an Order Authorizing Debtor to Reject Certain Executory Contracts and Unexpired Lease of Nonresidential Real Property* [D.I. 175] (the "Rejection Motion") in which the Debtor asked this Court to authorize the Debtor's rejection of those two agreements effective as of August 22 2022. The Court subsequently granted that request.[3]

**SPECIFIC RESPONSES TO EACH CLAIM OBJECTION**

**I. Claim No. 208.**

8. Claim No. 208, in the amount of $2,855,256, represented the amount Patheon determined the Debtor owed Patheon on the Petition Date and, as such, was filed as a general, unsecured pre-petition claim. In its Objection, the Liquidating Trustee contends Claim No. 208 should be reduced by: (1) $166,641.07 in charges for which there purportedly is no support or documentation (Objection at p. 8, ¶29); and (2) four invoices, in the total amount of another $166,429.55, on the grounds that, according to the Liquidating Trustee, "there is no evidence such items actually were purchased." *Id*. at p. 8, ¶30.

9. Upon receipt of the Liquidating Trustee's Objection, Patheon re-examined its records and has determined that:

[3] *See Omnibus Order Authorizing Debtor to Reject Certain Executory Contracts and Unexpired Leases of Nonresidential Real Property Effective as of the Rejection Date* [D.I. 195].

- Patheon does not oppose the deduction of the $166,641 from Claim No. 208 subject to the allowance of the amount specified immediately below.

- The four invoices in the face amount of $166,429.55 are both supported by underlying invoices from Patheon vendors which evidence the purchases made by Patheon and those underlying invoices total $302,111 - $135,681.45 more than the amount for which Patheon invoiced the Debtor.[4] Hence, Claim No. 208 should not be decreased by $166,429.55, it should instead be increased by $135,681.45.

- Patheon does not oppose the deduction from Claim No. 208 of $760,000 and $38,256.38 which are, as the Liquidating Trustee posits, duplicative of amounts included in Claim No. 318, if and to the extent those amounts are allowed as general, unsecured claims. *See* fns. 10 and 11 *infra*.

- Claim No. 208 should be increased by the $56,036.30 Patheon paid Gamewell Mechanical that was originally included in Claim No. 318. *See* p. 11 *infra*.

## II. Claim No. 304.

10. Claim No. 304, in the amount of $3,784,500 also was filed as a general, unsecured claim and was based on Patheon's good faith estimate, at the time, of the expenses and other costs it would incur as a result of the Debtor's rejection of the TTA and the MSA.[5] Those expenses and other costs would have included the substantial time and resources it would have taken Patheon to disassemble, crate and remove the highly sophisticated, complex and delicate equipment – which the Debtor previously had owned and which Emergex had purchased – and

[4] The outside vendor invoices to Patheon which support the $302,111 will be separately provided to the Liquidating Trustee's counsel and, in part, supply the "missing" invoices as to which the Liquidating Trustee has objected.

[5] While the Debtor would have been responsible for these costs in any event as the result of its rejection of the MSA, the MSA specifically provides that "Upon expiration or termination of this Agreement for any reason [other than by Zosano as the result of Patheon's default], . . . [Zosano] will pay to Patheon any and all: (i) dismantling costs, (ii) removal costs and (iii) Make Goods Costs" associated with ending the Manufacturing Services or removal of the [Zosano] Manufacturing Equipment from the Facility. 'Make Good Costs' means the reasonable costs to clean, decontaminate or repair the Facility and return it to a clean, safe and usable area based on the contamination caused by the Manufacturing Services or repair of damage caused by the installation or removal of [Zosano's] Manufacturing Equipment." *See* MSA § 8.3(d).

then to repair and restore Patheon's Greenville facility to its condition prior to the date it entered into the TTA and the MSA with the Debtor.

11. Again, at the time, it was unclear if Emergex – which primarily was interested in the Debtor's intellectual property – would make that effort and, if it did, whether it would do so in a responsible manner. Consequently, as the claims bar date approached, Patheon prepared a good faith estimate of those expenses and other costs which totaled $3,784,500 and then filed Claim No. 304 in the event it was forced to seek recourse against the Debtor's bankruptcy estate.

12. Fortunately, Emergex ultimately did, in fact, responsibly disassemble, crate and remove the equipment it had purchased from the Debtor and largely repaired and restored Patheon's facility. Even so, Patheon still incurred a modest amount of expenses and costs ($91,000) in connection with the de-commissioning of the Debtor's manufacturing suite and billed Emergex for that amount.[6] Emergex has never contested, but also inexplicably has never paid, that amount despite Patheon's requests for payment.

13. In its Objection, the Liquidating Trustee contends that Patheon's remaining claim should be disallowed because it has been "superseded and resolved by the Sale Agreement." Objection at 9, ¶ 32. In other words, according to the Liquidating Trustee, since Emergex promised the Debtor it would reimburse Patheon in an amount up to $250,000, that promise excuses the Debtor's obligations and liability to Patheon under the MSA and Section 365(g) of the Bankruptcy Code (". . . the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . . ."). The Liquidating Trustee is wrong, however,

[6] As the Liquidating Trustee notes in the Objection, in the Sale Agreement Emergex agreed to reimburse Patheon in an amount up to $250,000 for the costs Patheon incurred to "dismantle and remove" the equipment from Patheon's Greenville facility. A copy of Patheon's $91,000 invoice to Emergex will be separately provided to the Liquidating Trustee's counsel.

because Patheon was not a party to the Sale Agreement and otherwise never agreed to release the Debtor from its obligations under the MSA and Section 365(g). Rather, the Debtor and Emergex agreed, between themselves, that Emergex would bear up to $250,000 of the decommissioning expenses incurred by Patheon. The fact Emergex to date has failed to do so, if anything, entitles the Debtor to make a claim against Emergex for breach of the Sale Agreement. It does not extinguish the Debtor's liability to Patheon under Section 365(g).

14. As such, Patheon agrees its Claim No. 304 should be reduced from $3,784,500 to $91,000.

**III. Claim No. 318.**

15. Claim No. 318, in the amount of $1,234,293.15, was filed as an administrative expense claim and is based on the post-petition payments the Debtor was required to make to Patheon under the MSA between the Petition Date and the date (August 22, 2022) the Debtor rejected the MSA.

**A. Monthly Base Fees.**

16. The lion's share ($1,140,000)[7] of Claim No. 318 is comprised of the "Base Fees" – $380,000 per month – the Debtor was required to pay Patheon under the terms of the MSA for a host of services including:

> "• The provision by Patheon of sufficient members of adequately trained and experienced staff . . . at the Facility in order to carry out essential Facility support activities.
>
> • Performance of those activities necessary to maintain a GMP compliant status of the manufacturing lines and areas of the Manufacturing Suite applicable to the Manufacture of the Product."

[7] The $94,293.10 balance of Claim No. 318 is comprised of two out-of-pocket expenses that Patheon incurred in connection with the performance of its duties and obligations under the MSA: a $56,036.30 charge from Gamewell Mechanical and another $38,256.85 based on four charges from outside vendors. *See* p. 11 *infra*.

In other words, as long as the MSA remained in effect Patheon was required to dedicate, and make available to the Debtor, the resources necessary to maintain the manufacturing suite in accordance with good manufacturing practices and otherwise to support the Debtor's business needs.

17. The Liquidating Trustee has objected, pursuant to Section 503(b)(1)(A) of the Bankruptcy Code, to this portion of Claim No. 318 on the grounds Patheon cannot demonstrate the MSA conferred any benefit on the estate "given the limited operations of the Debtor between the Petition Date and the Rejection Date." This is the classic wishful "have your cake and eat it, too" thinking. True, the Debtor had substantially ceased its active business operations as of the Petition Date but chose not to reject the TTA or the MSA – as it easily could have done – until August 22, 2022. Why? The answer is simple. The Debtor had embarked on a sale process and, by its own admission, wanted to "[retain] the flexibility to pursue a going concern or all asset sale, should one materialize through the sale process."[8] In order to credibly and effectively do so, the Debtor wanted to afford prospective purchasers the opportunity to assume the TTA and the MSA so the Debtor's business could be sold on a turnkey basis and, as such, for a higher price than a piecemeal, fire sale would bring. Consequently, in its *Notice of Proposed Assumption and Assignment of Executory Contracts*, filed on July 7, 2022 [D.I. 123], the Debtor included the TTA and the MSA among its commercial agreements that prospective buyers could assume. *See* [D.I. 123-1 at 12].

18. It is no coincidence – to the contrary, it speaks volumes – that the Debtor decided to reject the TTA and the MSA only *after* Emergex decided it did not wish to assume either

[8] *See Disclosure Statement* at 10.

agreement and the Sale Agreement had closed (on August 15, 2022). One week later, on August 22, 2022, in its Rejection Motion, the Debtor represented to the Court that:

> As set forth above, the Debtor sold substantially all of its assets to the Buyer. In connection with the Sale, the Buyer did not take assignment of the Rejected Contracts and the Rejected Contracts provide no ***further*** benefit to the Debtor's estate following the Sale (emphasis added).

*See* Rejection Motion at p. 4, ¶ 10.[9]

19. The relevant legal authority supports Patheon's position. *See, e.g.,* 4 COLLIER ON BANKRUPTCY ¶ 503.06 (rev. 16th ed. 2009): "Benefit does not always equate to actual use if a debtor in possession induces a creditor to make services available. As explained by the Court of Appeals for the Fifth Circuit, "conducting business as usual often requires that certain goods and services be available, even if ultimately not used." (*citing Nabors Offshore Corp. v. Whistler Energy II, L.L.C. (In re Whistler Energy II, L.L.C.)*, 931 F.3d 432 (5th Cir. 2019) (overturning the denial of an administrative expense claim where the debtor had secured the availability of a drilling rig during its reorganization case despite not using it)).

20. In *Kimzey v. Premium Casing Equip., LLC*, 2018 U.S. Dist. LEXIS 42744 (W.D. La. 2018), the District Court affirmed the Bankruptcy Court's award of an administrative expense to an equipment lessor even though the debtor did not use the equipment post-petition and, like here, the purchaser of the debtor's assets pursuant to a 363 sale decided not to assume the lease.[10] The District Court rejected the debtor's assertion that, for purposes of Section 503(b)(1)(A), a "benefit" is restricted to goods or services that lead to a direct economic enhancement of the

[9] In a footnote to the Rejection Motion the Debtor included a self-serving reservation of rights regarding the post-petition benefit the TTA and the MSA had, until then, provided to the estate, setting the stage for the Debtor's present attempt to have it both ways.

[10] Just like the Debtor's ploy in this case, the debtor in *Kimzey* waited until the closing of the 363 sale and only then filed a motion to reject the equipment lease.

estate. The District Court further agreed the Bankruptcy Court justifiably had based its ruling on the debtor's "conscious decision" to retain the lease, in part, due to the "risk of destroying the company's enterprise value while it was being marketed for a section 363 auction." *Id*. at 42744 *8. *See also In re Sanchez Energy Corp.*, 2021 Bankr. LEXIS 578 (Bankr. S.D. Tex. 2021) (allowing administrative expense claim of drilling contractor at the contractual standby rate, even after the oil rigs were decommissioned, because the rigs still were available to the debtor during its chapter 11 case). Again, pertinent to the instant case, the Bankruptcy Court held "[T]he benefit requirement did not permit 'the [d]ebtor to argue *ex post* that certain costs incidental to providing beneficial services [did not] relate to a direct benefit to the estate." *Id*. at *18. A contrary conclusion, the Bankruptcy Court reasoned, unfairly "would allow a hypothetical debtor to escape from post-petition obligations by suspending work prior to the end of a term, then paying cents on the dollar for any outstanding rates or damages." *Id*. at *24.

21. Likewise in this case, the Debtor's calculated decision to keep the TTA and the MSA in place demonstrates those agreements conferred a substantial post-petition benefit on the Debtor and the bankruptcy estate by affording the Debtor the ability to market its business to prospective purchasers as a going-concern. The fact Emergex ultimately decided not to assume either the TTA or the MSA does not diminish in any respect the important role those agreements played in connection with the Debtor's marketing and sale strategy. Consequently, the $380,000 per month for the months of June, July and August, 2022 that the Debtor was obligated to pay Patheon pursuant to the MSA should be allowed as an administrative expense.[11] *See generally In re Highway Techs, Inc*., 2015 Bankr. LEXIS 308 (Bankr. D. Del. 2015)("When determining the

[11] The Liquidating Trustee is correct in one respect. The $380,000 in Base Fees for each of June and July, 2022 also are included in Claim No. 208 and, therefore, upon the allowance of that $760,000 as an administrative expense, Claim No. 208 should be reduced by that same amount.

reasonable value of services for the purposes of calculating an administrative expense claim, 'there is a presumption that the contract terms and rate represent the reasonable value of the services or good provided under the contract.'"). *Id*. at *11 *citing In re ID Liquidation One, LLC,* 503 B.R. 392, 399 (Bankr. D. Del.); *Compass Bank v. North Am. Petroleum Corp. USA (In re North Am. Petroleum Corp. USA)*, 445 B.R. 382, 401 (Bankr. D. Del.).

**B. Other Charges.**

22. As to the remaining two charges – $56,036.30 and $38,256.85 – which together comprise the balance of Patheon's administrative expense claim, the $56,036.30 charge represents the final installment that Gamewell Mechanical charged Patheon under the parties' October 30, 2020 contract pursuant to which Patheon agreed to pay Gamewell $659,648.10 for services related to the installation of the Debtor's equipment at Patheon's Greenville facility. The $38,256.85 represents the sum of the charges invoiced to Patheon by four vendors related to the support and maintenance of that same equipment which Patheon, in turn, invoiced to the Debtor post-petition.

23. Since filing Claim No. 318 Patheon has determined that although those amounts, which together total $94,293.15, were invoiced to the Debtor post-petition, the underlying charges were incurred by Patheon before the Petition Date and, hence, Patheon agrees they should be re-classified as general, unsecured claims and allowed as such.[12]

[12] Patheon also agrees the $38,256.38 is included in Claim No. 208 and, therefore, upon its allowance Claim No. 208 should be reduced by that amount.

**RESERVATION OF RIGHTS**

Patheon reserves the right to supplement or otherwise modify this Response as necessary or appropriate prior to the hearing on the Objection. Nothing contained in this Response constitutes a waiver of any of the claims, entitlements, rights or remedies of Patheon, each of which is expressly reserved.

Dated: April 4, 2025
Wilmington, Delaware

Respectfully submitted,

**ASHBY & GEDDES, P.A.**

*/s/ Gregory A. Taylor*

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**CERTIFICATE OF SERVICE**

I, Gregory A. Taylor hereby certify that on April 4, 2025, I caused one copy of the *Response of Patheon Manufacturing Services LLC to Liquidating Trustee's Objection to Allowance of Claims Filed by Patheon Manufacturing Services LLC* to be served upon (i) all parties of record via CM/ECF and (ii) the parties on the list below via email, unless otherwise indicated.

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