

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

Zosano Pharma Corporation,

Debtor.

Chapter 11

Case No. 22-10506 (JKS)

Hearing Date: July 15, 2025 at 10:00 a.m. (ET)

RE: D.I. 465, 472

NOTICE OF FILING OF
(PROPOSED) PRETRIAL ORDER

Sierra Constellation Partners, LLC, as Liquidating Trustee (the “Trustee”), and Patheon Manufacturing Services LLC (“Patheon”), by and through their undersigned counsel, pursuant to Local Rule 7016-2(d) hereby jointly submit the (Proposed) Pretrial Order attached hereto as **Exhibit A** in connection with and in anticipation of the scheduled July 15, 2025 hearing before the Court on 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] and Patheon’s *Response* thereto [D.I. 472].

Dated: July 9, 2025
Wilmington, Delaware



Respectfully submitted,

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Counsel for Patheon Manufacturing Services LLC

CERTIFICATE OF SERVICE

I, Dennis A. Meloro, hereby certify that on July 9, 2025, I caused one copy of the Notice of Filing of (Proposed) Pretrial Order to be served upon all parties of record via CM/ECF and on the Office of the United States Trustee as follows:

Via Email and Hand Delivery

Office of the United States Trustee for the
District of Delaware
Attn: Joseph F. Cudia, Esq.
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/s/ Dennis A. Meloro

DE Bar No. 4435

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(PROPOSED) PRETRIAL ORDER

1. Nature of the Proceeding.

This Pretrial Order pertains 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 Patheon’s *Response* [D.I. 472] thereto (the “Response”). In particular, the Trustee has objected to the amounts of three Proofs of Claim (Nos. 208, 304 and 318) filed by Patheon and, as to one of those Claims (No. 318), also has objected to Patheon’s classification of that Claim as an administrative expense claim rather than as a general unsecured claim.

2. Basis of Court’s Jurisdiction.

The Court has jurisdiction over this matter pursuant to 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 as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Trustee and Patheon consent, pursuant to Local Rule 9013-1(f), to the entry of a final order by the Court in connection with this matter to the extent that it is later

determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Fed. R. Bankr. P. 7016-2.

This Pretrial Order addresses the subject matters required to be addressed by Fed. R. Bankr. P. 7016(b).

4. Uncontested Facts.

a. 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 contract manufacturer that provides highly specialized, technical and sophisticated manufacturing support services to the biopharma industry

b. 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 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”).

c. Under the terms of the TTA, Patheon agreed, among other things, to construct and maintain for Zosano’s use a special dedicated production suite at its Greenville, North Carolina manufacturing facility (the “Greenville Manufacturing Suite”); to procure and/or

validate the equipment necessary to manufacture the product and the patches; and to provide certain related engineering and technical services.

d. The Greenville Manufacturing Suite represented approximately 2.5% of Patheon's entire Greenville facility.

e. The utility expenses incurred by Patheon that were associated with the Greenville Manufacturing Suite were less than 10% of the overall utility expense of Patheon's entire Greenville facility.

f. Patheon's Greenville facility was not built for Zosano as it was originally constructed in 1970.

g. Thermo Fisher did not acquire the facility in anticipation of Zosano's use of the facility.

h. Pursuant to the terms of 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.

i. 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 proved to be unsuccessful, on June 1, 2022 (the "Petition Date"), the Debtor filed this Chapter 11 case.

j. Promptly after the Petition Date, the Debtor resumed its pre-petition efforts to locate a suitable buyer for its business. The Debtor had not rejected the TTA and the MSA during the Debtor's post-petition marketing and sale process and, on July 7, 2022, the Debtor filed its *Notice of Proposed Assumption and Assignment of Executory Contracts* [D.I. 123] which included the TTA and the MSA among the commercial agreements that the Debtors could assume and assign to prospective buyers. [D.I. 123-1 at 12].

k. The Debtor's efforts to sell its business culminated on August 3, 2022, when 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.

l. On August 8, 2022 the Court approved the Sale Agreement and the sale to Emergex 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].

m. The Sale Agreement provided, at section 2.5(b), that a portion of the consideration for the sale was:

(b) reimbursement by Buyer of up to, but not more than, \$250,000 in actual, reasonable, and documented costs to dismantle and remove the Client Manufacturing Equipment (as defined in the Patheon Agreements) from the facility owned by Patheon, located at 5900 Martin Luther King Jr. Highway, Greenville, NC 27834 (the "Patheon Facility") and the Make Good Costs (as defined in, and provided for, under the Patheon Agreements) (collectively, the "Reimbursable Patheon Costs"), subject to Patheon's agreement to provide reasonable cooperation with the relocation of such removed Client Manufacturing Agreement to the location designated by Buyer. Buyer shall pay the Reimbursable Patheon Costs to

Patheon by the later of (i) 30 calendar days after Buyer is provided with a final invoice or the Reimbursable Patheon Costs, and (ii) December 31, 2022.

Patheon asserts that it incurred \$91,000 of Reimbursable Patheon Costs. Patheon has not collected that amount and has not filed suit to collect that amount from Buyer, i.e. Emergex.

n. Because neither Emergex nor any other party wished to take assignment of either the TTA or the MSA, the Debtor filed, 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] in which the Debtor asked the Court to authorize the Debtor's rejection of those two agreements, among many others, effective as of August 22 2022. The Court subsequently granted that request. [D.I. 195].

o. The Greenville Manufacturing Suite was idle, and its production capabilities were not utilized by or on behalf of, the Debtor, during the entire post-petition, pre-rejection period.

p. Patheon's direct overhead expenses associated with the Greenville Manufacturing Suite would have been incurred regardless of whether Zosano used the facility or not.

q. Mr. Perkins testified during his deposition that, to his knowledge, during the sale process, no prospective purchaser of Zosano's assets visited the Greenville Manufacturing Suite.

r. Mr. Perkins testified during his deposition that, to his knowledge, Patheon did not have potential customers interested in the Greenville Manufacturing Suite.

s. Mr. Perkins testified during his deposition that, to his knowledge during June, July, and August, 2022, Patheon was not approached by any party interested in utilizing space similar to the Greenville Manufacturing Suite.

t. The Greenville Manufacturing Suite is currently vacant.

u. Subsequent to the Petition Date, Patheon timely filed three Proofs of Claim – two general unsecured claims (U) and one administrative expense claim (A) – as indicated below. As the result of subsequent events and investigations, Patheon has since agreed to reduce its Claims as indicated below:

Claim No.	Original Claim Amount		Basis of Claim	Reduced Claim
208	\$2,855,256.00	U	pre-petition charges	\$2,151,292.30
304	\$3,784,500.00	U	estimated contract rejection damages	\$91,000.00
318	\$1,234,293.15	A	post-petition, pre-rejection Base Fees	\$1,140,000.00

5. Contested Facts

As to Claim No. 318, the Trustee contends that, because the Greenville Manufacturing Suite was idle during that entire post-petition, pre-rejection period, neither the TTA nor the MSA conferred any actual and necessary benefit upon the Debtor's bankruptcy estate and, therefore, the monthly Base Fees due and payable under the terms of the MSA for that post-petition, pre-rejection period (\$380,000 per month x 3 months = \$1,140,000) are not entitled to administrative expense priority under Section 503(b)(1)(A) of the Bankruptcy Code. The Trustee further contends that Patheon has not, and cannot, present any evidence that it provided any benefit to Zosano's bankruptcy estate.

Patheon, on the other hand, contends that because the Trustee did not reject the MSA (or the TTA) during its efforts to sell itself as a going concern, that the pre-rejection existence of the MSA, and the ongoing availability of the dedicated Greenville Manufacturing Suite, conferred

a benefit on the bankruptcy estate and, therefore, is entitled to administrative expense priority under Section 503(b)(1)(A) of the Bankruptcy Code.

6. Contested Issues of Law

A. Trustee's Position

Patheon has the burden of proof with respect to establishing its entitlement to an administrative expense such as the amount contained in Claim No. 318. *In re Goody's Family Clothing, Inc.*, 610 F.3d 812, 818 (3d Cir. 2010). In support of the Trustee's objection to Claim No. 318, the Trustee maintains that Patheon provided no services to the estate and if the mere availability of the Greenville Manufacturing Suite is considered a service, it provided no actual and necessary benefit to the estate.

In support of its position, the Trustee intends to rely upon: *In re Energy Future Holdings Corp.*, 990 F.3d 728, 742 (3d Cir. 2021); *In re Continental Airlines*, 146 B.R. 520, 526 (Bankr. D. Del. 1992); *In re Whistler Energy*, 931 F.3d 432, 441 (5th Cir. 2019); *In re Eagle-Picher Indus.*, 447 F.3d 461, 464 (6th Cir. 2006); Norton Bankr. Law & Practice § 49:19 (3d ed. 2020); *In re IDL Dev., Inc.*, 2019 Bankr. LEXIS 3419 (Bankr. D. Mass. Nov. 1, 2019); *In re Enron Corp.*, 279 B.R. 79 (Bankr. S.D.N.Y. 2002).

B. Patheon's Position

In support of its position, as to *its entitlement* to an allowed administrative expense claim, Patheon intends to rely on *In re Kimzey v. Premium Casing Equip., LLC*, 2018 U.S. Dist. LEXIS 42744 (W.D. La. 2018); *In re Sanchez Energy Corp.*, 2021 Bankr. LEXIS 578 (Bankr. S.D. Tex. 2021); and 4 COLLIER ON BANKRUPTCY ¶ 503.06 (rev. 16th ed. 2009) (*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)). As to *the amount* of its administrative expense claim, Patheon intends to rely on *In re*

Highway Techs, Inc., 2015 Bankr. LEXIS 308 (Bankr. D. Del. 2015) (citing *In re ID Liquidation One, LLC*, 503 B.R. 392, 399 (Bankr. D. Del.); and *Compass Bank v. North Am. Petroleum Corp. USA (In re North Am. Petroleum Corp. USA)*, 445 B.R. 382, 401 (Bankr. D. Del.). The pertinent facts and holdings of these cases are summarized in Patheon's Response to the Objection [D.I. 472 at 9-11].

7. List of Premarked Exhibits

Patheon intends at the hearing to offer into evidence the following documents:

- a. September 28, 2018 Patheon-Zosano Technology Transfer Agreement
- b. September 28, 2018 Patheon-Zosano Manufacturing and Supply Agreement
- c. Claim No. 208
- d. Claim No. 304
- e. Claim No. 318

The Trustee intends to offer into evidence the following documents:

- a. Deposition transcript of Ryan Perkins dated June 24, 2025
- b. Sale Order and Asset Purchase Agreement

8. Witnesses

Patheon intends to call one witness: Ryan Perkins, Patheon's Director of Finance.

The Trustee intends to call Bill Partridge, Liquidating Trustee, and Christine Matthews as witnesses.

9. Patheon Intended Proof

Patheon intends to demonstrate that its three Proofs of Claim, as reduced, are legitimate and should be allowed in the amounts and as classified above.

10. Trustee's Intended Proof

The Trustee intends to show that the Proofs of Claim are not allowable as filed.

11. Statements of Counterclaims or Crossclaims

None.

12. Desired Amendments of the Pleadings

None.

13. Certification

The Trustee and Patheon have engaged in a good faith effort to explore the full resolution of the controversy by settlement.

14. Other Matters

None.

THIS ORDER SHALL CONTROL THE SUBSEQUENT COURSE OF THE ACTION
UNLESS MODIFIED TO PREVENT MANIFEST INJUSTICE.