

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

In re:	:	Chapter 11
	:	
GRITSTONE BIO, INC., <sup>1</sup>	:	Case No. 24-12305-KBO
	:	
Debtor.	:	Related to Doc. No. 309
	:	

**OBJECTION TO AND RESERVATION OF RIGHTS BY FISHER  
BIOSERVICES, INC WITH RESPECT TO DEBTOR’S AMENDED FOURTH  
OMNIBUS MOTION FOR THE ENTRY OF AN ORDER (A) AUTHORIZING  
REJECTION OF EXECUTORY CONTRACTS EFFECTIVE AS OF THE  
APPLICABLE REJECTION DATE; (B) ABANDONING ANY REMAINING  
PERSONAL PROPERTY; AND (C) GRANTING RELATED RELIEF**

Fisher BioServices, Inc. (“**Fisher BioServices**”) files this Objection to and Reservation of Rights with respect to the rejection of certain BioServices Agreements (as defined herein) and abandonment of various medical products, drugs and Inventory (as defined herein) in the Debtor’s *Amended Fourth Omnibus Motion for the Entry of an Order (A) Authorizing Rejection of Executory Contracts Effective as of the Applicable Rejection Date; (B) Abandoning Any Remaining Personal Property; and (C) Granting Related Relief* (the “**Motion to Reject**”) [Doc. No. 309], stating as follows.

**PROCEDURAL HISTORY**

1. Gritstone bio, Inc.<sup>2</sup> (the “**Debtor**”) filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) on October 10, 2024 (the “**Petition Date**”).

2. Fisher BioServices is a counterparty to certain ongoing executory contracts (the “**BioServices Agreements**”) with the Debtor for *inter alia*, the storage of certain medical and

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<sup>1</sup> The Debtor’s mailing address is 4698 Willow Road, Pleasanton, CA 94588, and the last four digits of the Debtor’s federal tax identification number is 9534.

<sup>2</sup> From 2015 through 2021, Debtor was “Gritstone Oncology Inc.” and changed its name on or about May 3, 2021.



pharmaceutical products that are not over the counter products<sup>3</sup>, and perhaps biological samples,<sup>4</sup> (the “**Inventory**”) stored in warehouses, including specialty refrigerated warehouses, owned by Fisher BioServices subject to the BioServices Agreements. Pursuant to the BioServices Agreements, the Debtor is presently storing Inventory in Fisher BioServices’ warehouses.

3. On December 24, 2024, the Debtor filed its Fourth Omnibus Motion to Reject, seeking Court approval to reject, *inter alia*, the BioServices Agreements, as identified on Schedule 1 to the Motion to Reject, as well as request to abandon property located in any “leased” property.

4. The Motion to Reject provides for the rejection of the BioServices Agreements and the abandonment of the Inventory retroactive to December 23, 2024.

### **OBJECTION**

#### **A. The Debtor may not use 11 U.S.C. § 365 to abandon the Inventory and forego its obligations under the BioServices Agreements to lawfully dispose of the same.**

5. Bankruptcy Code Section 365(d)(3) provides that “[t]he trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” Section 365(d)(3) is not ambiguous and requires

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<sup>3</sup> For example, one of the products stored by Gritstone includes a product that is described publicly by the FDA as a drug that can result in “severe and fatal immune-mediated adverse reactions. These immune-mediated reactions may involve any organ system; however, the most common severe immune-mediated adverse reactions are enterocolitis, hepatitis, dermatitis (including toxic epidermal necrolysis), neuropathy, and endocrinopathy.” This product can cause Embryo-fetal Toxicity and can cause fetal harm. Doctors are told to advise females of reproductive potential to use effective contraception during treatment and for 3 months after the last dose. Females who may have been exposed to this product during pregnancy are directed to contact the drug manufacturer because of such adverse effects. See [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2015/125377s0731bl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2015/125377s0731bl.pdf).

<sup>4</sup> In the Asset Purchase Agreement (Doc. 324) Seattle as buyer states that they bought all of the Debtor’s “Samples” which means all biological samples (including without limitation all nucleic acid, blood, biopsy and other tissue samples) in possession of Seller and used in any studies in conjunction with the Software. See Section 2.1(e), Doc. 324-1, page 19 or 197. Stored Inventory also includes certain mRNA SARS-CoV-2 vaccine boosters.

Debtor to timely perform all obligations that arose after the Petition Date through any rejection date.

6. It is inappropriate to allow the Debtor to retroactively reject the BioServices agreements and abandon the Inventory, as it is a post-petition responsibility of the Debtor to make the appropriate arrangements for the safe and lawful transfer or disposal of the Inventory (the “Disposition”).

7. Fisher BioServices does not own the Inventory and is not responsible for the custody, maintenance, or disposition of the Inventory. Indeed the Disposition of the stored Inventory is an express performance obligation of the Debtor.

8. Moreover, the Inventory does not consist of things like paper records or furniture that can be thrown in a dumpster. It includes medicines and drugs which are not over the counter products. As noted it includes products that can have harmful side effects to persons using or exposed to them. So these products must be disposed of in a controlled manner.

9. Debtor has just now, post-filing of the Motion to Reject, requested that Fisher BioServices undertake the Disposition. Per its Agreements with Debtor, Fisher BioServices, or its designated disposal facility, will now (prior to any Court approved rejection of the Agreement) provide a characterization of Wastes that are hazardous under the federal Resource Conservation and Recovery Act, as amended (“RCRA”), 42 U.S.C. § 6901 *et seq.* or any applicable law similar to RCRA insofar as such law defines, or authorizes regulation of, a waste as hazardous or toxic, or are non-hazardous industrial “residual” waste under the applicable law of the jurisdiction in which the Wastes are located upon BioServices’ receipt of the Disposal Notice. Those services potentially involve the EPA. Accordingly, it will take Fisher BioServices up to two (2) weeks to receive a quotation for the Disposition of the Inventory.

10. In the interim, right now Debtor is obligated to dispose of the Inventory in accordance with the contract and governmental regulations, if any, that control the way to safely dispose of unused or expired prescription and nonprescription drugs and medicines.

11. Debtor has requested that Fisher BioServices undertake that disposition. That request came after the Petition Date and Fisher BioServices is awaiting the written confirmation. Thus using a date any earlier than the date of any order on rejection is inappropriate as Debtor are still seeking performance by Fisher BioServices under the Agreement. Further under the Master Services Agreement with Fisher Bio Services, the Debtor agreed to pay any and all fees and expenses associated with the removal or Disposition of the Inventory.

12. Unless and until the Debtor provides proof and assurance that the Inventory will be appropriately handled, transferred and/or disposed of, the request for retroactive rejection of the Fisher BioServices Agreement and the abandonment of the Inventory must be denied.

13. Debtor' obligations with respect to the Disposition of the Inventory, including paying for the cost of Disposition, ARE POST-PETITION OBLIGATIONS. Those obligations should not be deemed to have arisen prior to the Petition Date or be characterized as "pre-petition obligations" like past due rent is sought to be characterized.

14. As a debtor-in-possession, the Debtor is obligated to "manage and operate" the property in its possession "according to the requirements of the valid laws of the State in which such property is situated." *See* 28 U.S.C. § 959.

15. A debtor cannot use a bankruptcy abandonment to avoid its legal obligations to appropriately maintain and dispose of this material. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 502 (1986), the United States Supreme Court expressly held that the abandonment of property is not appropriate if made in

“contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.” 474 U.S. at 507.

16. The Inventory and disposition thereof may be subject to and governed by various federal laws and regulations, including RCRA. The Debtor’s “just dump it” attitude seeking abandonment is certainly contrary to various federal regulatory requirements for maintenance and disposal of expired and possibly toxic substances.

17. Citing 28 U.S.C. § 959, the Supreme Court in *Midlantic National Bank v. New Jersey* concluded that “[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public’s health and safety.” *Id.* at 506-07.

18. The Debtor may not abandon the Inventory because such abandonment would violate the applicable rules and regulations and because Debtor’s proposed abandonment fails to adequately protect the public’s health and safety.

19. In fact, the Motion to Reject includes no conditions or requirements to govern the proposed abandonment.

20. Section 959 of the United States Code precludes the Debtor from walking away from its obligations to maintain and dispose of the Inventory in a proper and lawful way, and the Debtor must be foreclosed from simply leaving these materials on Fisher BioServices’ property.

21. Accordingly, the Motion to Reject must be denied and the Debtor must be foreclosed from abandoning the Inventory without proper disposal.

**B. The retroactive rejection of the BioServices Agreements is inappropriate and should be prohibited.**

22. While the Court of Appeals for the Third Circuit has neither endorsed nor prohibited the retroactive rejection of an executory contract, courts within the Third Circuit have

found the retroactive rejection of an unexpired lease or executory contract to be appropriate only under exceptional circumstances. *See, e.g., In re KDA Group, Inc.*, 574 B.R. 556, 560-61 (Bankr. W.D.Pa. 2017).

23. A bankruptcy court's ability to provide retroactive relief arises from its use of equitable powers to further the purposes of section 365, and "[t]he decision to grant retroactive rejection of a lease or contract is dictated by equitable considerations." *In re Philadelphia Newspapers, LLC*, 424 B.R. 178, 184 (Bankr. E.D. Pa. 2010).

24. "The 'equities' considered by these courts include situations where the lease rejection is allowed retroactive to the date the motion to reject was filed, or the date when the premises were surrendered." *In re Jughandle Brewing Co., LLC*, No. 23-15703 (CMG), 2024 Bankr. LEXIS 1305, at \*30 (Bankr. D.N.J. June 3, 2024).

25. In the Motion to Reject, the Debtor seeks to reject the BioServices Agreements retroactive to December 23, 2024.

26. However, the Debtor failed to aver that any exceptional circumstances exist that would warrant retroactive relief. And, as of the date the Motion to Reject was filed, the Debtor has not removed the Inventory from the premises of Fisher BioServices' warehouses.

27. Regardless, retroactive relief would be inappropriate here because, as set forth in detail above, the Debtor is obligated to fulfill its contractual and regulatory obligations to properly dispose of the Inventory and, even after the Motion to Reject was filed, Debtor has asked Fisher BioServices to provide services under the Agreement and therefore the Debtor needs to continue to use, and have access to, the warehouses to fulfill its legal obligations.

28. For these reasons, the Motion to Reject must be denied.

29. Finally, in the event that Debtor is permitted to “abandon” the Inventory, the future cost and expense of the undertaking by Fisher BioServices for Disposition of the Inventory at the recent request of Debtor is entitled to administrative expense status. The Inventory is currently owned by the Debtor and is property of the Estate. The agreements with Fisher BioServices have not yet been rejected. The Debtor has requested that Fisher BioServices undertake the Disposition which is both a contractual and government-mandated obligation of the Debtor. Accordingly pursuant to Section 365, this is a post-petition obligation entitled to administrative expense status.

### **RESERVATION OF RIGHTS**

30. Fisher BioServices reserves all rights including, *inter alia*, those under the BioServices Agreements, the right to receive a proper cure amount pursuant to 11 U.S.C. § 365, and any other rights with respect to any purported rejection and abandonment of property subject to the BioServices Agreements.

31. Fisher BioServices reserves its rights with respect to all payments owed for both prepetition and post-petition goods and services and with respect to any executory contracts with the Debtor. Such rights include, but are not limited to, the right to receive any cure or damages for rejection of any executory contract and to enforce their rights and remedies under applicable law or as otherwise authorized by the Court.

32. Fisher BioServices reserves the right to amend or supplement the foregoing objections, to join in other objections filed and to further revise and/or amend the foregoing, or to enforce other rights and remedies under applicable law, or as otherwise authorized by the Court.

WHEREFORE, Fisher BioServices, Inc. respectfully requests that this Honorable Court enter an Order denying the Debtor’s *Amended Fourth Omnibus Motion for the Entry of*

*an Order (A) Authorizing Rejection of Executory Contracts Effective as of the Applicable Rejection Date; (B) Abandoning Any Remaining Personal Property; and (C) Granting Related Relief* and granting such other and further relief as is just and proper.

Dated: March 23, 2023  
Wilmington, Delaware

Respectfully submitted,  
  
HILLER LAW, LLC

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TADMS:20666506-3:025268-203824



**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that I caused the foregoing *Objection and Reservation of Rights* to be served by email upon the following:

1. Proposed counsel for the Debtor:

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Dated: January 7, 2025  
Wilmington, Delaware

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