

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

In re:

VYAIRE MEDICAL, INC., *et al.*,¹

Debtors,

Chapter 11

Case No. 24-11217 (BLS)

(Jointly Administered)

Re: Docket No. 462

**OBJECTION OF EWALD FLEET SOLUTIONS LLC TO FIRST SUPPLEMENTAL
NOTICE TO CONTRACT PARTIES OF POTENTIALLY ASSUMED AND
ASSIGNED EXECUTORY CONTRACTS AND UNEXPIRED LEASES
AND RESERVATION OF RIGHTS**

Ewald Fleet Solutions, LLC (“Ewald”), by and through its undersigned counsel, files this objection and reservation of rights (collectively, the “Objection”) to the Debtors’ proposed cure amounts set forth in the *First Supplemental Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [D.I. 462] (the “Supplemental Notice”). In support of the Objection, Ewald states as follows:

BACKGROUND

1. On June 9, 2024, Vyair Medical, Inc. (“Vyair”) and certain of its subsidiaries filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their business and managing their property as debtors in possession pursuant to section 1107(a) and 1108 of the Bankruptcy Code.

¹ The last four digits of Debtor Vyair Medical, Inc.’s federal tax identification number are 6495. A complete list of each of the Debtors in these chapter 11 cases and each such Debtor’s federal tax identification number may be obtained on the website of the Debtors’ claims and noticing agent at <https://omniagentsolutions.com/Vyair>. The location of Debtor Vyair Medical, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 26125 North Riverwoods Boulevard, Mettawa, Illinois, USA 60045.

2. On July 11, 2024, the Court entered the *Order (I) Approving Bidding Procedures in Connection with the Sale of Substantially All of the Debtors' Assets, (II) Authorizing the Debtors to Enter into a Stalking Horse Agreement and Provide Bid Protections, (III) Approving the Form and Manner of Notice Thereof, (IV) Scheduling an Auction and Sale Hearing, (V) Approving Procedures for the Assumption and Assignment of Contracts, (VI) Approving the Sale of the Debtors' Assets Free and Clear, and (VII) Granting Related Relief*[Docket No. 249] (the “Bidding Procedures Order”).

3. Also on July 11, 2024, the Debtors filed the *First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [D.I. 256] (the “First Notice”). Exhibit A thereto listed Potentially Assumed and Assigned Contracts. Rows 2413 to 2428 on Exhibit A to the Notice of Potential Assumption and Assignment appeared to assert multiple executory contracts and unexpired leases between Ewald and Vyaire.

4. Ewald, as Lessor, currently leases 46 vehicles to Vyaire, as Lessee, pursuant to Master Lease No. 19-17941 dated February 13, 2019. Master Lease No. 19-17941 includes forty-six (46) Schedule A's that are expressly incorporated by reference and made a part of said Master Lease. (Master Lease No. 19-17941 including the Schedule A's thereto are collectively referred to herein as the “Master Lease Agreement”).

5. On July 24, 2024, Ewald filed the *Limited Objection of Ewald Fleet Solutions LLC to First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [D.I. 310] (the “Limited Objection”). In sum, the Limited Objection asserted that: 1) the First Notice of Assumption and Assignment did not accurately identify the potentially assumed and assigned executory contract and unexpired lease which is the Master Lease

Agreement; 2) the Debtors' asserted cure amounts of \$0.00 as to Ewald were incorrect; and 3) any assumption and assignment of the Master Lease Agreement must be *cum onere*.

6. Thereafter, Ewald and the Debtors discussed appropriate revisions to the First Notice which resulted in the Debtors adding the Master Lease Agreement, removing all of the Schedule A's, and removing the purported "Vehicle Lease" dated 2-08-2019. Ewald confirmed that no such vehicle lease was entered by the parties on 2-08-2019. The Debtors provided the following chart to Ewald confirming the reflected revisions to the First Notice:

Unique Vendor Name	Debtor Entity	Description	Total Agg. Cure Amount
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet 2022-11-01 CDA	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2018-10-03 CDA	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2024-22-03 Schedule A (6549)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2019-06-07 Schedule A (VIN 2031)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2020-02-20 Schedule A (VIN 5520,5523,5526,5527)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2020-03-10 Schedule A (VIN 5524)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2019-06-07 Schedule A (VIN 2035)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2019-06-07 Schedule A (VIN 2025)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2019-06-07 Schedule A (VIN 2027)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2020-03-03 Schedule A (VIN 5521)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2019-02-08 Vehicle Lease	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2020-01-23 Schedule A (VIN 5428)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2020-01-23 Schedule A (VIN 5434)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2019-06-07 Schedule A (VIN 2026)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2019-06-24 Letter re Vyair Signature Authority	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 2024-03-22 Schedule A (7496)	\$0.00
Ewald Fleet Solutions, LLC	Vyair Medical, Inc.	Ewald Fleet Solutions, LLC 02-13-2019 Master Lease Agreement No.19-17941	\$0.00

7. On August 24, 2024, the Debtors filed the Supplemental Notice. The Master Lease Agreement appears at Row 8249 thereon and the Debtors assert a cure amount of \$0.00.

8. As of the filing of this Objection, the monthly lease payment due on September 1, 2024 under the Master Lease Agreement (Invoice No. 81524 in the amount of \$42,120.40) has not been received by Ewald.

OBJECTION

9. Section 365(b) of the Bankruptcy Code provides in pertinent part as follows:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default...
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

10. The total cure amount due as of September 1, 2024 to assume and assign the Master Lease Agreement, excluding attorney's fees and any late fees, is \$42,120.40. The cure amount owed to Ewald will continue to accrue and is subject to adjustment based, among other things, on the assumption and assignment date, whether the Debtors makes subsequent monthly lease payments when due between the filing date of this Objection and the date of any assumption and assignment, and Ewald's attorney's fees.

11. Contractual attorneys' fees may be recovered as part of the cure amount to the extent the contract being assumed provides for recovery or it is allowable under applicable law. *In re Williams*, 2011 WL 2533046, *1 (Bankr. D. Del. 2011) (citing *In re Crown Books Corp.*, 269 B.R. 12, 15 (Bankr. D. Del. 2001) ("It is beyond cavil that attorneys' fees incurred because of actions taken to enforce the underlying lease or contract may be properly recoverable as part of a cure payment if such lease or contract provides for attorneys' fees.")).

12. Pursuant to Section 9 of the Master Lease Agreement, "[l]essee shall pay all costs and attorney's fees incurred by Lessor in the enforcement of this Lease." Therefore, the cure amounts set forth above should be increased by the amount of Ewald's attorneys' fees through the date of assumption. Given that these bankruptcy cases are ongoing, the amount of Ewald's attorney's fees continue to accrue. Ewald will provide a liquidated amount of attorney's fees in the event of assumption and assignment for inclusion in the final cure amount.

13. As a condition to assumption and assignment, Ewald is also entitled to adequate assurance of future performance pursuant to Section 365 of the Bankruptcy Code, including the assignee's financial ability to cure all defaults and perform moving forward under the assumed and assigned contract. Ewald requests adequate assurance of the Successful Bidder's financial ability and intention to promptly cure all defaults under the Master Lease Agreement in the event of assumption and assignment. To the extent such adequate assurance of future performance is not promptly provided or is insufficient, Ewald also objects herein on the basis of lack of adequate assurance of future performance.

RESERVATION OF RIGHTS

14. Ewald hereby reserves the right to revise and/or supplement this objection and make such other and further objections as may be appropriate, including, but not limited to, the assertion of additional cure amounts.

CONCLUSION

For the reasons set forth above, Ewald respectfully request that this Court: (a) sustain this Objection; (b) enter an order requiring the Debtors or Successful Bidder, as applicable, to pay all amounts owing to Ewald under the Master Lease Agreement or any other agreement through the date of any such assumption and assignment, including the cure amounts set forth herein and any additional cure amounts accruing after the date of this Objection; and (c) grant Ewald such further relief as it deems proper.

Dated: September 6, 2024

Respectfully submitted,

AUSTRIA LEGAL, LLC

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