

**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. 256

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

Ewald Fleet Solutions, LLC (“Ewald”), by and through its undersigned counsel, files this limited objection (the “Limited Objection”) to the Debtors’ proposed cure amounts set forth in the *First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [D.I. 256] and reserves its rights with regard to the proposed assumption and assignment to a yet-to-be identified Successful Bidder. In support of the Limited 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 “Notice of Potential Assumption and Assignment”). Exhibit A thereto lists Potentially Assumed and Assigned Contracts. Rows 2413 to 2428 on Exhibit A to the Notice of Potential Assumption and Assignment appear 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”). A copy of the Master Lease Agreement is attached hereto as Exhibit A. Pursuant to Section 1.b of the Master Lease Agreement, the Lessee agreed to pay the total monthly rent set forth on the applicable Schedule A's in advance without deduction, setoff or counterclaim, on the first day of each month during the term of the Lease. The Lessee is obligated to pay various other amounts under the Master Lease Agreement including, but not limited to, maintenance, repair, and storage costs per Sections 2.a and 2.b, insurance costs per

Section 3, taxes, licensing and registration costs and fees per Section 4, and repair and replacement costs per Section 5.

LIMITED OBJECTION

5. 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).

A. The Notice of Potential Assumption and Assignment Does Not Accurately Identify the Potentially Assumed and Assigned Executory Contract and Unexpired Lease

6. Exhibit A to the Notice of Potential Assumption and Assignment lists 16 Cure Amounts of \$0.00 at Rows 2413 to 2428 with Ewald as the Vendor. The “Description” column in those Rows lists two “CDA’s” at Rows 2413 and 2414, respectively, various Schedule A’s, a “2019-02-08 Vehicle Lease” at Row 2423, and a “2019-06-24 Letter re Vyair Signature Authority” at Row 2427. As there is no vehicle lease between Ewald and Vyair dated February 8, 2019, it is possible the “Vehicle Lease” identified by the Debtors at Row 2423 was intending to refer to the Master Lease Agreement dated February 13, 2019. However, only a few of the Schedule A’s listed on Exhibit A to the Notice of Potential Assumption and Assignment align with

the 46 Schedule A's to the Master Lease Agreement.² Therefore, the Notice of Potential Assumption and Assignment does not accurately describe the potentially assumed and assigned executory contract and unexpired leases with regard to Ewald and it is unclear which agreement(s) with Ewald the Debtors are proposing to potentially assume and assign. Ewald objects to the Notice of Potential Assumption and Assignment to the extent it is purporting to identify any vehicle lease(s) with Ewald other than the Master Lease Agreement.

B. The Debtors' Asserted Cure Amounts of \$0.00 are Incorrect

7. In the interest of clarity, a spreadsheet itemizing the portion of the cure amount due under the Master Lease Agreement attributable to each leased vehicle is attached hereto as Exhibit B. The total cure amount due as of August 1, 2024 to assume and assign the Master Lease Agreement, excluding attorney's fees, is \$47,613.70. It is noted that the cure amount owed to Ewald will continue to accrue and is subject to adjustment based on the assumption and assignment date, whether the Debtors continue to make lease payments when due between the filing date of this Limited Objection and the date of any assumption and assignment, and Ewald's attorney's fees. To the extent that the Notice of Potential Assumption and Assignment purports to identify multiple lease agreements between Ewald and Vyaire with separate cure amounts due under each such lease, Ewald objects on the basis that the Master Lease Agreement is the only lease agreement between the parties that is subject to potential assumption and assignment and, as such, the cure amount is due under the Master Lease Agreement.

8. 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*

² With regard to any Schedule A with VIN No. listed in Rows 2413 to 2428 of the Notice of Potential Assumption and Assignment that is not included in the 46 Schedule A's attached hereto as Exhibit A as part of the Master Lease Agreement, Ewald has determined that the lease term on the corresponding vehicle terminated prior to the Petition Date.

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.”)).

9. 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. As of July 22, 2024, the estimated amount of Ewald’s attorney’s fees is approximately \$8,500.00. As such, the total cure amount is no less than \$56,113.70. Ewald will provide a liquidated amount of attorney’s fees in the event of assumption and assignment for inclusion in the final cure amount.

10. The Notice of Potential Assumption and Assignment does not accurately reflect the Master Lease Agreement between the parties and the total cure amount owed thereunder as set forth on Exhibit B hereto. Absent full payment of the total cure amount including attorney’s fees owed under the Master Lease Agreement through the effective date of assumption, and confirmation that the Master Lease Agreement is the lease agreement being potentially assumed and assigned, Ewald objects to the assumption and assignment.

C. Any Assumption and Assignment Must Be Cum Onere

11. Ewald further objects to the Notice of Potential Assumption and Assignment to the extent the Debtors are asserting that separate executory contracts and/or unexpired leases exist with Ewald as to each leased vehicle. The Master Lease Agreement expressly states in Section 1.a that the Schedule A’s “which may now or from and at any time hereafter be signed by Lessor and

Lessee, which Schedule(s) (including their terms and conditions) are hereby expressly incorporated by reference and made a part hereof in the same manner and with the same legal effect as though they had been executed and attached hereto contemporaneously with the execution of this Agreement.” Further, each Schedule A states “IT IS UNDERSTOOD AND AGREED that Schedule A is hereby made a part of the Vehicle Lease Agreement between the Parties hereto dated the 13th day of February, 2019 and that all of the terms and conditions of said Vehicle Lease Agreement are incorporated by reference as the agreement between the parties upon Lessee signing this Schedule A.” The Master Lease Agreement attached to this Limited Objection as Exhibit A dated February 13, 2019 is the only lease agreement entered by the parties on that date.

12. A debtor seeking to assume a lease must do so *cum onere*, accepting both its benefits and burdens. *See In re Fleming*, 499 F.3d 300, 308 (3d Cir. 2007) (“Section 365(f) requires a debtor to assume a contract subject to the benefits and burdens thereunder”), citing *In re ANC Rental Corp.*, 277 B.R. 226, 238 (Bankr.D.Del. 2002) (holding that debtor may not assume only part of a contract but must assume the entire agreement). “Should the debtor-in-possession elect to assume the executory contract...it assumes the contract *cum onere*.” *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984); citing *In re Italian Cook Oil Corp.*, 190 F.2d 994, 996 (CA3 1951). As the Master Lease Agreement is the only lease agreement between the parties, any potential assumption and assignment must include the assumption and assignment of the entire Master Lease Agreement, including the 46 Schedule A’s thereto, and the total cure amount corresponding with Vyair’s lease of the 46 vehicles thereunder.

RESERVATION OF RIGHTS

13. Ewald hereby reserves its rights to revise this objection and make such other and further objections as may be appropriate, including but not limited to, objecting to the assumption and assignment based on the lack of adequate assurance of future performance and any other grounds.

CONCLUSION

For the reasons set forth above, Ewald respectfully request that this Court (a) sustain this Limited Objection; (b) require that any order authorizing the assumption and assignment of the Master Lease Agreement or any other agreement between the Ewald and Vyaire affirmatively compel the Debtors to pay all amounts owing thereunder as set forth herein through the effective date of any such assumption and assignment, including attorney's fees; and (c) grant Ewald such further relief as it deems proper.

Dated: July 24, 2024

Respectfully submitted,

AUSTRIA LEGAL, LLC

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