IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: VYAIRE MEDICAL, INC., *et al.*, Debtors.[1]	Chapter 11 Case No. 24-11217-BLS Jointly Administered

REQUEST BY HARTFORD FIRE INSURANCE COMPANY TO ALLOW AND REQUIRE PAYMENT OF AN ADMINISTRATIVE EXPENSE CLAIM

Hartford Fire Insurance Company (individually, and with its affiliated surety and/or sureties, the "Surety"), by and through its undersigned counsel, hereby files this Request to Allow and Require Payment of an Administrative Expense Claim (the "Request"), and states as follows:

GENERAL BACKGROUND

A. Background and Basis for Administrative Expense Claim

1. On June 9, 2024 (the "Petition Date"), Vyaire Medical, Inc. and certain of its affiliates (collectively, the "Debtors") each filed a voluntary petition for bankruptcy relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). The Debtors continue to operate their businesses as debtors in possession and their chapter 11 cases are being jointly administered.

2. Prior to the Petition date, the Surety, as a surety company, issued and/or executed surety bonds and/or related instruments. The bonds identified in the below chart are currently in effect/active, subject to their respective terms.

[1] The last four digits of Debtor Vyaire 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' proposed claims and noticing agent at https://omniagentsolutions.com/Vyaire. The location of Debtor Vyaire 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.

3. Upon information and belief, the following chart generally describes the surety bonds, which are in effect/active:

Principal	Bond No.	Obligee	Nature of Bond	Bond Amount
Vyaire Medical, Inc. and Vyaire Medical 211, Inc.	20BSBAA2688	California State Board of Pharmacy	Pharmaceutical Bond	$100,000.00
Vyaire Medical, Inc. and Vyaire Medical 211, Inc.	20BSBIL8800	Nevada State Board of Pharmacy	Pharmaceutical Bond	$100,000.00
Vyaire Medical, Inc.	20BSBAA2687	Maryland Board of Pharmacy	Pharmaceutical Bond	$100,000.00
Vyaire Medical, Inc.	22C000T8M	Bureau of Customs and Border Protection	Custom Duty	$400,000.00
			Total:	**$700,000.00**

4. The bonds generally described above, and their related documents (such as, without limitation, rider(s) and/or amendment(s) thereto), as well as any and all other bond(s), related documents, issued and/or executed on behalf of any of the Debtors, or their non-debtor affiliates, shall hereafter be referred to as the “Bonds.”

5. In connection with the Surety’s execution and/or issuance of the Bonds, the Debtors and/or their non-debtor affiliates agreed to indemnify, exonerate and hold harmless the Surety.

6. More specifically, certain of the Debtors and/or their non-debtor affiliates executed a general indemnity agreement dated December 15, 2020, (the “2020 Indemnity Agreement”) and an indemnity agreement dated April 9, 2018, (the “2018 Indemnity Agreement) (together, the 2020 Indemnity Agreement and the 2018 Indemnity Agreement are collectively referred to herein as the “Indemnity Agreements”), each in favor of the Surety. A redacted copy of the Indemnity Agreements are annexed hereto as **Exhibit A** and **Exhibit B**, respectively**.**

7. The 2020 Indemnity Agreement, among other provisions, provides, in pertinent part:

> "Indemnitor" or "Indemnitors" means all person or entities executing this Agreement, their direct and indirect subsidiaries and affiliates and their respective heirs, successors, assigns and co-ventures, whether now existing or hereafter created.
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> "Loss" means any and all payments and interest thereon from the date of payment, including but not limited to, attorney fees, court costs, and all other fees or costs, made by Hartford: (i) in the belief that it was or may be liable as a consequence of Underwriting any Bond;
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> (ii) because of the failure of any Indemnitor or Principal to discharge its obligations under any Bond; (iii) in investigating and responding to any notice, demand, claim, suit, regulatory proceeding or request received by or made to Hartford; or (iv) in enforcing the terms and obligations of this Agreement.
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> Indemnitors shall indemnify, hold harmless and exonerate Hartford from and against any and all Loss claims, demands, liabilities, expenses, suits, orders, judgments, or causes of action arising out of or related to the underwriting of any Bond.

See Exhibit "A," redacted 2020 Indemnity Agreement.

8. The 2018 Indemnity Agreement, among other provisions, provides, in pertinent part:

> Indemnitor(s) agree to indemnify Hartford and save it harmless from any and all loss and expense of whatsoever kind or nature, including, but not limited to interest, court costs, attorney fees, incurred by Hartford in connection with or by reason of furnishing any bond hereunder. The undersigned Indemnitor(s) hereby agree to deposit upon demand with Hartford an amount sufficient to discharge any claim or any such bond, which deposit may be held by Hartford as collateral security against any loss or cost on this bond.

See Exhibit "B," redacted 2018 Indemnity Agreement.

9. The Indemnity Agreements provide that each of the Debtors, and any of their non-debtors affiliates, are contractual indemnitors and, as such, they are, among other things, jointly and severally liable to the Surety for, without limitation, any and all losses, costs, and/or expenses incurred and/or to be incurred in relation to the Bonds and/or the surety program described herein.

10. As noted above, certain of the Debtors, among other(s), are contractually and/or under the common law, obligated to, among other things, indemnify and hold the Surety harmless in connection with losses, costs and expenses, including attorneys' fees, in connection with, among other things, the Surety's furnishing of any bond or related instrument, including the Bonds, as more fully set forth in either or both of the Indemnity Agreements and applicable law.

11. On September 27, 2024, the Surety filed claim no. 25 in bankruptcy case no. 24-11234 (Vyaire Medical 211, Inc.) and filed claim no. 184 in bankruptcy case no. 24-11217 (Vyaire Medical, Inc.).

12. On November 14, 2024, the Bankruptcy Court confirmed the *Second Amended Joint Chapter 11 Plan of Reorganization of Vyaire Medical, Inc. and Its Debtor Affiliates* [Docket No. 719) by way of a confirmation order ("Confirmation Order")[Docket No. 745].

13. The Confirmation Order provides in pertinent part that "on the Effective Date, any rights, claims and obligations, including without limitation, trust and/or subrogation rights arising under any surety bonds issued by Hartford Fire Insurance Company (the "Surety") shall continue in full force and effect …." (Confirmation Order at ¶ 113).

14. The Confirmation Order also provides in pertinent part that "the rights, claims, and defenses of the Debtors and any subrogee on and/or beneficiary or current or future claimant under any bond … are fully preserved." (*Id.* at ¶ 114).

15. The Effective Date occurred on November 27, 2024. [*See*, Docket No. 810, *Notice of (I) Entry of Confirmation Order, (II) Occurrence of Effective Date, and (III) Related Bar Dates*).

B. Summary of Administrative Expense Claim

16. Pursuant to Section 503(b) of the Code, as well as its right of subrogation to the claims, rights and interest of the U.S. Customs Bureau and Border Protection and the California, Nevada and Maryland State Boards of Pharmacy (collectively, the "Obligees" or singularly, an "Obligee"), Surety asserts an administrative expense claim for not less than $28,206.83, which constitutes the unreimbursed fees and costs incurred by the Surety during the administrative expense claim period (June 9, 2024 through November 27, 2024).

18. In addition, the Surety asserts an administrative expense claim for any bond claim arising during and/or pertaining to the administrative expense claim period, along with any fees and costs incurred in addressing such claims.

19. In so doing, the Surety reserves all rights, remedies and interest in connection with any liens, setoff and recoupment rights, all of which have been expressly preserved at confirmation.

ARGUMENT

A. The Surety Is Entitled To An Administrative Expense Claim Based on Section 503

20. Pursuant to §§ 503(a) and (b) of the Bankruptcy Code, the Surety is entitled to receive payment for the actual, necessary costs and expenses of preserving the estate. Section 503(a) and (b) provide as follows:

> (a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
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> (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under

> section 502(f) of this title, including –
>
> > (1) (A) the actual, necessary costs and expenses of preserving the estate . . .

11 U.S.C. §§ 503(a) and (b). *See In re M Group, Inc*., 268 B.R. 896, 898-899 (Bankr. D. Del. 2001) (provides that administrative expenses include "the actual, necessary costs and expenses of preserving the estate….") (citation omitted).

21. The principal purpose of § 503(b)(1)(A) is to give creditors the incentive to continue dealing with the debtor-in-possession and supply it goods and services. *See e.g., Camelot Music, Inc. v. MHW Advertising & Public Relations Inc., (In re CM Holdings, Inc.)*, 264 B.R. 141, 151 (Bankr. D. Del. 2000) (recognizes that a creditor benefits the estate by providing postpetition services); *In re Southern Soya Corp*., 251 B.R. 302 (Bankr. D. S.C. 2000) (citing *Merry-Go- Round Enter. v. Simon DeBartolo Group (In re Merry-Go-Round Enter.*, 180 F.3d 149, 158 (4th Cir. 1999)). Normally, to be granted an administrative expense claim, a creditor must establish: (1) that the claim arose out of a transaction between the creditor and the bankrupt's trustee or debtor-in-possession; and (2) that the claim directly benefited the estate. *See Merry-Go-Round Enter*., 180 F.3d at 157; *Microsoft Corp. v. DAK Indus., Inc. (In re DAK Indus., Inc.)*, 66 F.3d 1091, 1094 (9th Cir. 1995).

22. However, Courts have also awarded administrative expense claims under the *Reading* exception which applies to variety of circumstances and under which notions of "fundamental fairness" demand that an injured party be compensated by the estate. *See Reading Co. v. Brown*, 391 U.S. 471, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968); *Sanchez v. Northwest Airlines, Inc.*, 659 F.3d 671, 677 (8^{th} Cir. 2011) (finding that *Reading* reached its conclusion "after balancing the objective of the debtor's rehabilitation against the desirability of allowing those injured by the operation of the business during the bankruptcy process to recover ahead of those

for whose benefit the business was carried out"); *see also, In re ATP Oil & Gas Corp.*, 2014 Bankr. LEXIS 1050, at * 26 – 28 (Bankr. S.D. Tex. Mar. 18, 2014) (allowing an administrative expense even if contractually provided services did not "actually benefit the estate"); *In re Shreyas Hospitality, LLC*, 2010 Bankr. LEXIS 2074 (Bankr. C.D. Ill. 2010) (allowing administrative expense claim to compensate for debtor's use of a trade name during the case). Such exception interprets "actual and necessary" costs under Section 503(b) to include amounts incurred ordinarily incident to the continued operation of a debtor's business or its orderly liquidation. *Reading*, 391 U.S. at 475; 4 Collier on Bankruptcy P 503.06 (16th 2023) (citing *Reading).*

23. During the postpetition period, the Debtors maintained the Bonds and Indemnity Agreement, which together form an integrated contract. These Bonds benefited the Debtors' estate by preserving it during the bankruptcy. Costs associated with these Bonds would thus be actual and necessary, and would be required to paid to the Surety under the Indemnity Agreement. In addition, notions of "fundamental fairness" require that the Surety receive an administrative expense claim for these amounts as they would be expected as part of the Debtors' operation and indeed reorganization during these pendency of these bankruptcy cases.

24. By way of Section 503(b) and/or the holding in *Reading* and its progeny, the Surety asserts an administrative expense claim for the unreimbursed fees and costs it has incurred during the administrative expense claim period which total not less than $28,206.83. Surety also asserts administrative expense claim for any bond claim arising during and/or pertaining to the administrative expense claim period, along with the associated fees and costs incurred in addressing this claim.

B. <u>The Surety Is Entitled To An Administrative Expense Claim Based on Its Right of Subrogation</u>

25. In the alternative, the Surety asserts an administrative claim for any losses based on its right of subrogation to the claims, rights and interest of the Obligees.

26. The Surety has equitable subrogation rights that arise by common law to the extent that the Surety pays any claim under any bond that it has issued. "The doctrine of equitable subrogation applies 'whenever any person, other than a mere volunteer, pays a debt or demand which in equity and good conscience should have been paid by another*…" See e.g., Pearlman v. Reliance Ins. Co,* 371 U.S. 132, 135 – 36 (1962) ("there are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed*"); Prairie State Nat'l Bank v. United States*, 164 U.S. 227, 232 – 33 (1896) (holding surety had subrogation rights to contract funds after satisfying bonded obligations); *In re B.C. Rogers Poultry, Inc.*, 455 B.R. 524, 566 (Bankr. S.D. Miss. 2011). Subrogation rights sometimes arise even before a surety actually makes payment to an oblige. *See In Re Jones Constr. & Renovation, Inc.*, 337 B.R. 579 (Bankr. E.D.Va. 2006) (holding when a debtor-contractor breaches its contract with a project owner, it precludes debtor's entitlement to retained funds, and thus those funds are not property of the estate, with the doctrine of equitable subrogation applicable to entitle the surety to any funds that may be due on the bonded contracts to satisfy any bond claims).

27. Hence, to the extent an Obligee asserts a claim under the Bonds based on an amount due from the Debtors under the administrative expense claim period and certainly by the time the Surety satisfied the amount due to any Obligee, the Surety is entitled to assert such a claim against the Debtor under the doctrine of equitable subrogation.

28. The Obligees would have an administrative expense claim for any unpaid duties or fees, as applicable, arising from and/or pertaining to activities that took place during the

administrative expense claims period. To the extent that the Surety satisfies the amounts due and owing to an Obligee during this period, the Surety, who steps in the shoes of the Obligee, will inherit that same administrative expense claim.

RESERVATION OF RIGHTS

29. Nothing contained in this request for allowance of administrative expense shall constitute a waiver of: (a) the right to have final orders in non-core matters entered only after *de novo* review by a District Court Judge; (b) the right to trial by jury in any proceeding triable in this case or any case, controversy, or proceeding related to this case; (c) the right to have the District Court withdraw the reference in any matter subject to mandatory or discretionary abstention; (d) any objection to the jurisdiction or venue of this Court; (e) an election of remedy; (f) the right to amend this request for allowance of administrative expense claim; (g) the right to assert claims for attorneys' fees and costs which may accrue or have accrued; and/or (h) any other right, claim, defense, action, setoff, or recoupment, in law or in equity, under any agreement, all of which are expressly reserved.

30. The Surety reserves the right to amend and/or supplement this request for allowance of an administrative expense at any time and in any manner including, without limitation, as necessary or appropriate to amend, quantify or correct amounts, to provide additional detail of the claims set forth herein, and/or file additional proofs of claim and/or requests for allowance of administrative expense claims for any additional amounts owing to USSIC. USSIC's request for allowance of administrative expense claims are made without prejudice to USSIC's rights under the Bankruptcy Code, applicable non-bankruptcy law, or otherwise.

31. The Surety reserves all of its rights, claims, defenses and/or exclusions with respect to all non-debtors and nothing herein shall be construed as a waiver of such rights, claims, defenses

and/or exclusions, or as an admission against the Surety's interests.

WHEREFORE, based on the foregoing, the Surety respectfully requests the entry of an Order (1) allowing the administrative expense claim of the Surety against the estate of the Debtors in the amount of $28,206.83, as well as for any bond claim arising during and/or pertaining to the administrative expense claim period along with any associated fees and costs and (2) for such further and other relief as the Court may deem just and proper.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

Dated: December 23, 2024

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