UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: VYAIRE MEDICAL, INC., *et al*. Debtors	Chapter 11 Case No. 24-11217(BLS) (Jointly Administered) Related Docket Nos. 250, 575

LIMITED OBJECTION OF QUAD DBC HOLDINGS, LLC TO FIRST NOTICE OF REJECTION OF CERTAIN EXECUTORY CONTRACTS

Quad DBC Holdings, LLC ("Landlord"), by and through its undersigned counsel, hereby objects, on a limited basis, to the Debtors' *First Notice of Rejection of Certain Executory Contracts* [D.I. 575] (the "Rejection Notice"), and respectfully states as follows:

Background

1. Landlord and debtor, Vyaire Medical Inc., ("Tenant") are parties to an unexpired lease of two buildings of non-residential real property located at 510 Technology Drive and 520 Technology Drive in Irvine, California, (the "Lease"). On the Petition Date herein, Tenant was in default under the Lease.

2. On June 10, 2024, the above captioned Debtors filed the *Motion of Debtors for Entry of an Order (1) 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. 16] ("Sale Motion"). Through the Sale

Motion, Debtors sought this Court's Approval of the sale of substantially all of their assets to one or more to-be-determined purchasers.

3. On July 11, 2024, this 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] ("Sale Procedures Order").

4. On July 11, 2024, pursuant to the Sale Procedures Order, the Debtors filed the *Frist Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [Docket No. 256] (the "Cure Notice). The Cure Notice includes several entries corresponding to the Landlord ("Landlord Listings"). All Landlord Listings propose cure amounts of $0.00 (the "Proposed Cure Amount").[1]

5. On August 1, 2024, Landlord filed the *Objection of Quad DBC Holdings, LLC to First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [Docket No. 346] (the "Cure Objection"). Through the Cure Objection, the Landlord asserts that the actual cure costs were $713,051.00. *See, Cure Objection* at ¶ 7.

6. On August 15, 2024, the Debtors file a notice indicating that Zoll Medical Corporation ("Zoll") was the successful bidder for the Debtors' ventilation business. [Docket No. 388] (the "Zoll Sale").

[1] Of the 8240 contracts identified in the Cure Notice, the Debtors identified a zero cure amount in all but approximately sixty contracts. *See, Cure Notice, Ex. A.*

7. Part of the Debtors' ventilation business is located at the Landlord's Property subject to the Lease (the "Property") in which the Debtors would utilize the space as a laboratory. Landlord believes that Zoll will purchase the assets located inside the Property and continue its operations uninterrupted on a smaller portion of the Property subject to a new lease between Zoll and the Landlord.

8. Any new lease between Zoll and the Landlord is effectively only upon entry of an Order rejecting the Lease and Zoll closing on the sale from the Debtors.

9. The Court approved the Zoll Sale at a hearing on August 30, 2024. On September 4, 2024, the Court entered an order approving Zoll Sale [Docket No. 388].

10. On September 27, 2024, the Debtors filed the Rejection Notice [Docket No. 575]. The only leases identified in the Rejection Notice are contracts including the Landlord. Importantly, the Debtors indicated a rejection effective date of September 30, 2024 (the "Rejection Date").

11. As set forth in the *Emergency Motion of the Official Committee of Unsecured Creditors Requesting a Status Conference Regarding the Zoll Sale Order and Asset Purchase Agreement* [Docket No. 611], no executed asset purchase agreement between the Debtors and Zoll was filed on the docket. Furthermore, the closing date for the Zoll Sale was pushed back from the approximately October 4th to October 11th. The Court has scheduled a status conference regarding the Zoll Sale for October 15, 2024. *See, Docket No.* 616.

12. From the Petition Date to the present, the Debtors' agents have continually conducted business the Property. The Debtors' equipment remains on the Property undisturbed, and personnel are frequently entering and exiting the Property. As set forth in more detail in the

Certification of David Udden (the "Udden Certification"),[2] the Debtors have not vacated the Property. In fact, the Debtors and Zoll have even placed new signage on the exterior doors indicating that Vyaire and Zoll are conducting business on such Property.

13. The Debtors have not paid any post-petition rent to the Landlord. *See, Udden Certification.*[3] The Landlord intends to file a motion seeking allowance and payment of an administrative expense at the appropriate time.

14. Furthermore, as set forth in the Udden Certification, the Debtors have not turned over access of the Property to the Landlord. There are portions of the Property that remain inaccessible to the Landlord, posing a substantial safety risk. The Debtors assured the Landlord that they would receive the necessary codes and/or key fobs to gain access, but still have not provided them to the Landlord, as of the filing of this Objection.

Objection

15. The Landlord does not object to the Debtors' rejection of the Lease; however, the Rejection Date should occur only when the Debtors no longer utilize the Property or have otherwise surrendered possession. Presumably, this cannot occur until the Zoll Sale closes, and the equipment and operations are transferred from the Debtors to Zoll. As set forth in the Udden Certification, the Tenant is currently maintaining a continuance presence at the Property and conducting business.

16. It appears that the Debtors seek to use the Property until the Zoll Sale closes and then permit Zoll to continue operations uninterrupted. The Landlord supports this concept, but it

[2] The Udden Certification is incorporated by reference as if it were fully restated herein.
[3] The Debtors may attempt to argue that any proceeds of a pre-petition letter of credit draw down reduce the Debtors' liability for post-petition rent. However, as the Landlord is prepared to show that the letter of credit was to be used exclusive for construction related to one of the buildings the Debtors rented and could not be used for rental obligations. Furthermore, the proceeds of that draw are held in escrow pursuant to the Landlord's agreement with its secured lender.

should not be required to provide free rent and/or storage in the gap between the proposed Rejection Date and when the Zoll sale closes. The Landlord is entitled to be compensated for the Debtors' use.

17. Since the effective date of the new Zoll lease will not occur until: (i) the rejection is approved by this Court, and (ii) the Zoll sale closes, the Debtors are effectively seeking this Court's permission to holdover on the Landlord's Property until Zoll is formally operating at the Property under an executed lease.

18. The appropriate rejection date is the when the debtor has surrendered control of the property back to the landlord. *In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Del. Bankr. 2004). In *Chi-Chi's,* this Court denied retroactive rejection *nunc pro tunc* to the petition date because the debtor failed to surrender the property in question. The Court also observed that normally the rejection date occurs when the rejection order is entered, but retroactive rejection can be the later of when the rejection motion is filed or the property surrendered in certain circumstances. *In re Fleming Cos.*, 304 B.R. 85, 95-96 (Del. Bankr. 2003).

19. This Court should not permit retroactive rejection when the Debtors continue to conduct business on the Property for their benefit, are holding the Debtors' equipment until it can be sold to Zoll, and have excluded the Landlord from access to portions of the Property.

20. Section 365 contemplates that rejection turns over the landlord's property back to it so can be utilized by the landlord for other reasons. Permitting the Debtors to occupy and use the Property after the rejection date would create a windfall to the Debtors, be inequitable to the Landlord, and violate the intention of Section 365.

WHEREFORE, Landlord respectfully requests that this Court hold that the effective date of the proposed Rejection be conditioned upon the date that the Debtors fully surrender the Property, or otherwise no longer own any assets or conduct business activity on the Property.

Date: October 11, 2024

FLASTER/GREENBERG, P.C.

By: */s/ Damien Nicholas Tancredi*

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