IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
VYAIRE MEDICAL, INC., *et al.*,[1]	)	Case No. 24-11217 (BLS)
Debtors.	)	(Joint Administration Requested)

MOTION OF DEBTORS FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO FILE UNDER SEAL THE FEE LETTERS RELATED TO THE DIP FACILITY

The above-captioned debtors and debtors in possession (collectively, the "Debtors" and, each, a "Debtor") state as follows in support of this motion:[2]

Relief Requested

1. The Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Order"), (a) authorizing the Debtors to file the Fee Letters (as defined herein), of which the Debtors are seeking approval pursuant to the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Granting Adequate Protection to Prepetition Secured Parties, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief*, filed contemporaneously

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1 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.

2 A detailed description of the Debtors and their business, including the facts and circumstances giving rise to the Debtors' chapter 11 cases, is set forth in the *Declaration of John Bibb, Group Chief Executive Officer of Vyaire Medical, Inc., in Support of Chapter 11 Filing and First Day Motions* (the "First Day Declaration"), filed contemporaneously herewith on June 10, 2024 (the "Petition Date") and incorporated by reference herein. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

herewith (the "DIP Motion") filed contemporaneously herewith; (b) directing that the redacted portions of the Fee Letters shall remain under seal and not be made available to anyone, without the prior written consent of both the Debtors and the DIP Agent, except to (i) the United States Bankruptcy Court for the District of Delaware (the "Court"), (ii) the United States Trustee for the District of Delaware (the "U.S. Trustee"), (iii) counsel to any official committee appointed in these cases (the "Committee"); and (iv) any other party as may be ordered by the Court or agreed to by the Debtors and the DIP Agent, in each case under appropriate confidentiality agreements reasonably satisfactory to the Debtors and the DIP Agent that preserve the confidentiality of the Fee Letters (and any information derived therefrom); and (c) granting related relief.

Jurisdiction and Venue

2. The United States District Court for the District of Delaware has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, which was referred to the Court under 28 U.S.C. § 157 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. The Debtors confirm their consent, pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory bases for the relief requested herein are section 107(b) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"), Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Local Rule 9018-1.

Background

5. Contemporaneously with the filing of this Motion, the Debtors filed the DIP Motion, which seeks entry of an order authorizing the Debtors to, among other things, obtain postpetition secured financing and undertake payment of related fees with respect to the $180 million senior secured, superpriority, priming debtor-in-possession credit facility (the "DIP Facility"), by and among the DIP Borrowers, the DIP Guarantors, the several banks and other financial institutions or entities from time to time party thereto, as lenders (collectively, the "DIP Lenders"), and Wilmington Savings Fund Society, FSB, as administrative and collateral agent (in such capacities, and together with its successors and permitted assigns, the "DIP Agent" and, together with the DIP Lenders, the "DIP Secured Parties").

6. By this motion, the Debtors seek authorization to file under seal the form of execution version of certain fee letters by and between the DIP Borrowers and the DIP Agent, which sets forth certain fees in connection with the DIP Facility (the "Fee Letters"). The Fee Letters contain sensitive and confidential commercial information regarding the structure and amount of the fees relating to the DIP Facility (the "Confidential Information"). Because the disclosure of this Confidential Information could harm the Debtors and the DIP Secured Parties if made publicly available, the Debtors seek authority to file the Fee Letters under seal, subject to the limited approved disclosures as provided herein.

Basis for Relief

7. Pursuant to section 107(b) of the Bankruptcy Code, a bankruptcy court must protect entities from potential harm that may result from the disclosure of certain confidential information. *See* 11 U.S.C. § 107(b). Specifically, section 107(b) provides, in relevant part, as follows:

> On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—

> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information;

Id. Section 105(a) of the Bankruptcy Code, in turn, codifies the inherent equitable powers of bankruptcy courts and empowers them to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

8. Further, Bankruptcy Rule 9018 sets forth the procedures by which a party may obtain a protective order authorizing the filing of a document under seal. *See* Fed. R. Bankr. P. 9018. Bankruptcy Rule 9018 provides, in relevant part, that "[o]n motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information[.]" *Id.* Further, Local Rule 9018-1(d) provides, in relevant part, that "any entity seeking to file a document . . . under seal must file a motion to requesting such relief[.]" Del. Bankr. L.R. 9018-1(d)(i).

9. If the material sought to be protected satisfies one of the categories identified in section 107(b) of the Bankruptcy Code, "the court is *required* to protect a requesting party and has no discretion to deny the application." *Video Software Dealers Ass'n v. Orion Pictures Corp.* (*In re Orion Pictures Corp.*), 21 F.3d 24, 27 (2d Cir. 1994) (emphasis in original); *accord In re Alterra Healthcare Corp.*, 353 B.R. 66, 75–76 (Bankr. D. Del. 2006) (citing *Orion Pictures*); *In re Altegrity, Inc.*, 2015 WL 10963572, at *3 (Bankr. D. Del. July 6, 2015) ("[I]f it is established that the documents sought to be sealed fall within the enumerated statutory exception, the Court must grant the requested relief (or such other relief that protects the moving party)."). Stated differently, section 107(b) of the Bankruptcy Code does not require a party seeking its protections to demonstrate "good cause." *Orion Pictures*, 21 F.3d at 28. "Courts have supervisory powers over their records and files and may deny access to those records and files to prevent them from

being used for an improper purpose." *In re Kaiser Aluminum Corp.*, 327 B.R. 554, 560 (D. Del. 2005); *see also In re A C & S Inc.*, 775 Fed. Appx. 78, 79 (3d Cir. 2019) (mem.) (finding that "every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes"). Courts are required to provide such protections "generally where open inspection may be used as a vehicle for improper purposes." *Orion Pictures*, 21 F.3d at 27; *accord In re Motions Seeking Access to 2019 Statements*, 585 B.R. 733, 753 (Bankr. D. Del. 2018) (citing *Orion Pictures*). Indeed, the "authority goes not just to the protection of confidential documents, but to other confidentiality restrictions that are warranted in the interests of justice." *In re Global Crossing Ltd*, 295 B.R. 720, 724 (Bankr. S.D.N.Y. 2003).

10. "Commercial information"—"information which would result in an unfair advantage to competitors by providing them information as to the commercial operations of the debtor"—is one category of information within the scope of section 107(b) of the Bankruptcy Code. *Alterra Healthcare*, 353 B.R at 75 (quoting *Orion Pictures*); *Altegrity*, 2015 WL 10963572, at *3; *see also Global Crossing*, 295 B.R. at 725 (holding that the purpose of Bankruptcy Rule 9018 is to "protect business entities from disclosure of information that could reasonably be expected to cause the entity commercial injury"). Commercial information need not rise to the level of a trade secret to be protected under section 107(b) of the Bankruptcy Code. *See Orion Pictures,* 21 F.3d at 27–28 (holding that section 107(b)(1) creates an exception to the general rule that court records are open to examination by the public and, under this exception, an interested party has to show only that the information it wishes to seal is "confidential" and "commercial" in nature); *accord Altegrity*, 2015 WL 10963572, at *3 (citing *Orion Pictures*).

11. The disclosure of the terms of the Fee Letters would cause confidential commercial information to be revealed, thereby exposing the Debtors and the DIP Secured Parties to substantial harm, create an unfair advantage for competitors, and violate the Debtors' agreement with the DIP Agent to keep the terms of the Fee Letters confidential. Indeed, the Fee Letters reflect detailed proprietary commercial information describing fees to be paid in connection with the DIP Facility, which information is customarily considered by the DIP Secured Parties in particular, as well as in the financial services industry in general, to be highly sensitive and confidential commercial information not typically disclosed to the public or competing financial institutions. Such a broad publication of confidential commercial information contained in the Fee Letters would be inappropriate and materially harmful to the businesses of the DIP Secured Parties.

12. The DIP Motion discloses the aggregate amount of fees to be paid to the DIP Agent and DIP Lenders, but given the highly competitive nature of the investment banking and lending industries, it is of the utmost importance that the details of the fee structures set forth in the Fee Letters be kept confidential so that competitors cannot use the commercial information contained therein to gain a strategic advantage in the marketplace. The Debtors submit that parties in interest will not be materially prejudiced by the relief sought herein because the unredacted Fee Letters will be reviewed by the Court, the U.S. Trustee, counsel to the Committee, and any party ordered by the Court. Further, any party-in-interest can request that the Debtors and the DIP Agent permit them to review the Fee Letters.

13. Courts in this jurisdiction have previously determined that certain documents entered into in connection with postpetition financing, such as fee or expense letters, qualify as "confidential commercial information" within the meaning of section 107(b) of the Bankruptcy Code and have authorized the filing of such documents under seal. *See, e.g.*, *In re Lannett*

Company, Inc., No. 23-10559 (JKS) (Bankr. D. Del. June 9, 2023) (granting debtors' motion to file a fee letter under seal); *In re Extraction Oil & Gas Inc.*, No. 20-11548 (CSS) (Bankr. D. Del. June 14, 2020) (same); *In re Forever 21, Inc.*, No. 19-12122 (KG) (Bankr. D. Del. Oct. 2, 2019) (same); *In re CTI Foods, LLC*, No. 19-10497 (CSS) (Bankr. D. Del. Mar. 12, 2019) (same).

14. The Debtors therefore submit that good cause exists to authorize the Debtors to file the Fee Letters under seal because of the harm that would ensue if the sensitive and confidential commercial information contained in the Fee Letters became public information.

Compliance with Local Rule 9018-1(d)

15. Pursuant to Local Rule 9018- 1(d)(iii), the undersigned proposed counsel have conferred with the DIP Lenders in good faith and reached an agreement concerning what information contained in the Fee Letters must remain sealed.

Notice

16. The Debtors will provide notice of this motion to: (a) the United States Trustee for the District of Delaware; (b) the holders of the 30 largest unsecured claims against the Debtors (on a consolidated basis); (c) the office of the attorney general for each of the states in which the Debtors operate; (d) the United States Attorney's Office for the District of Delaware; (e) the Internal Revenue Service; (f) the United States Securities and Exchange Commission; (g) the agent of the DIP Facility and counsel thereto; (h) First Lien Credit Agreement Agent and counsel thereto; (i) the Second Lien Credit Agreement Agent and counsel thereto; (j) the agent of the First Lien Notes and counsel thereto; and (k) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtors request entry of the Order, substantially in the form attached hereto as **Exhibit A**, (a) granting the relief requested herein and (b) granting such other relief as the Court deems appropriate under the circumstances.

Dated: June 10, 2024
Wilmington, Delaware

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Exhibit A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
VYAIRE MEDICAL, INC., *et al.*,[1]	)	Case No. 24-11217 (BLS)
Debtors.	)	(Joint Administration Requested) **Re: Docket No. __**

ORDER AUTHORIZING THE DEBTORS TO FILE UNDER SEAL THE FEE LETTERS RELATED TO THE DIP FACILITY

Upon the motion (the "Motion")[2] of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for the entry of an order (this "Order"), (a) authorizing the Debtors to file the Fee Letters under seal; (b) directing that the Fee Letters shall remain under seal and not be made available to anyone, without the prior written consent of both the Debtors and the DIP Agent, except to (i) the Court, (ii) the U.S. Trustee, (iii) counsel to the Committee, and (iv) any other party as may be ordered by the Court or agreed to by the Debtors and the DIP Agent, in each case under appropriate confidentiality agreements reasonably satisfactory to the Debtors and the DIP Agent that preserve the confidentiality of the Fee Letters (and any information derived therefrom); and (c) granting related relief; all as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C.

[1] 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.

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

§ 157(b)(2); and this Court having found that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.

2. The Debtors are authorized to file under seal the Fee Letters. The Fee Letters shall remain under seal, and shall not be made available to anyone, other than as provided in paragraph 3 of this Order, without the prior written consent of the Debtors and the DIP Agent or further order of the Court.

3. The Debtors are authorized to cause the unsealed versions of the Fee Letters to be served on and made available, on a confidential basis, to: (a) the Court; (b) the U.S. Trustee; (c) counsel to the Committee; and (d) any other party as may be ordered by the Court or agreed to by the Debtors and the DIP Agent in each case under appropriate confidentiality agreements reasonably satisfactory to the Debtors and the DIP Agent that preserve the confidentiality of the Fee Letters (and any information derived therefrom).

4. The Debtors and any party authorized to receive the sealed Fee Letters pursuant to this Order is authorized to and shall, subject to Local Rule 9018-1 and without further order of the Court: (a) redact specific references to the information set forth therein from pleadings filed on the public docket maintained in these chapter 11 cases; and (b) not use or refer to information contained in the Fee Letters in any hearing unless appropriate safeguards have been put in place to protect the confidentiality of the information.

5. Any Bankruptcy Rule (including Bankruptcy Rule 6004(h)) or Local Rule that might otherwise delay the effectiveness of this Order is hereby waived, and the terms and conditions of this Order shall be effective and enforceable immediately upon its entry.

6. This Order is without prejudice to the rights of any party in interest to seek to unseal and make public any portion of the material filed under seal.

7. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

8. This Court retains jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.