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.	)	(Jointly Administered)
	)	
	)	**Objection Deadline: Jul. 24, 2024 at 4:00 p.m. (ET)**
	)	**Hearing Date: Jul. 31, 2024 at 2:00 p.m. (ET)**
	)	**Related to Docket Nos. 217, 242**

APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO RETAIN AND EMPLOY BERKELEY RESEARCH GROUP, LLC, AS FINANCIAL ADVISOR EFFECTIVE AS OF JUNE 28, 2024

The Official Committee of Unsecured Creditors (the "Committee") of Vyaire Medical, Inc., *et al.*, as debtors and debtors in possession (the "Debtors" or "Vyaire"), submits this application (the "Application") for an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Sections 327, 328 and 1103 of Title 11 of the United States Code (the "Bankruptcy Code"), Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 2014-1 of the Local Rules of the Bankruptcy Court for the District of Delaware (the "Local Rules"), authorizing the employment of Berkeley Research Group, LLC ("BRG"), as financial advisor to the Committee. In support of this Application, the Committee submits the Declaration of David Galfus (the "Galfus Declaration") which is incorporated herein as **Exhibit B**. In further support of this Application, the Committee respectfully represents as follows:

[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' 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.

JURISDICTION

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction in 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. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Committee confirms its consent pursuant to Local Rule 9013-l(f) to the entry of a final order by the Court in connection with this Application 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.

2. The statutory predicates for the relief sought herein are sections 327, 328, and 1103(a) of the Bankruptcy Code, Bankruptcy Rule 2014(a), and Local Rule 2014-1.

BACKGROUND

3. On June 9, 2024 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Cases") with the Court. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Cases.

4. The Cases are being jointly administered pursuant to Bankruptcy Rule 1015(b) and the Court's *Order (I) Directing Joint Administration of Chapter 11 Cases and (II) Granting Related Relief* [Docket No. 84], entered on June 11, 2024.

5. On June 26, 2024 (the "Formation Date"), the Office of the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed the Committee. The Committee is presently comprised of the following members: (i) Sunmed Group Holdings, LLC (d/b/a AirLife);

(ii) Zensar Technologies Inc.; (iii) Cognizant Worldwide Ltd.; (iv) Presido; (v) Vizient, Inc.; (vi) David M. Lewis Company; and (vii) Data Modul, Inc.

6. On June 28, 2024, the Committee selected BRG to serve as its financial advisor. The Committee has also selected McDermott Will & Emery LLP ("MWE" or "Counsel") as its proposed counsel.

REQUESTED RELIEF AND REASONS THEREFOR

7. The Committee respectfully requests entry of an order pursuant to sections 328, 330, and 1103(a) of the Bankruptcy Code authorizing BRG to perform financial advisory services for the Committee that will be necessary during these Cases. The Debtors are a large, complex enterprise, and the Committee requires the services of an experienced financial advisor such as BRG to provide financial advisory services that are critical to the discharge of the Committee's duties and powers.

8. The Committee has determined that the services of BRG are necessary to enable the Committee to assess and monitor the efforts of the Debtors and their professionals, to ensure that the Debtors are able to successfully reorganize (through a standalone reorganization and/or asset sale(s)), and to maximize the value of the Debtors' estates for the benefit of the unsecured creditors.

9. Immediately upon its selection, BRG commenced work on several time-sensitive matters and promptly devoted substantial resources to these Cases pending submission and approval of this Application. In order to allow BRG to be compensated for work performed prior to and after the submission of this Application, the Committee seeks to employ BRG as its financial advisor effective as of June 28, 2024, the date of its retention.

A. Qualifications of Professionals

10. BRG has significant qualifications and experience in providing the services contemplated herein. BRG's practice consists of senior financial, management consulting, accounting, and other professionals who specialize in providing restructuring, transaction advisory, litigation support, solvency, and valuation assistance and providing a focus on viable solutions that maximize value for companies and creditors, typically in distressed business settings. BRG has acted as financial advisor, crisis manager, and corporate officer in middle market to large multinational restructurings across a wide array of industries. BRG's services include forensic analysis, plan development and implementation, and advice on sale/merger transactions. Moreover, the professionals at BRG have assisted and advised debtors, creditors, creditors' committees, bondholders, investors, and others in numerous bankruptcy cases, including Endo International, plc; Genesis Care Pty Limited; Sientra, Inc.; SVB Financial Group; Genesis Global Holdco, LLC; WeWork Inc.; Aralez Pharmaceuticals US Inc.; 21st Century Oncology Holdings, Inc.; Hooper Holmes Inc. (a.k.a. Provant Health); Egalet Corporation; Desolation Holdings LLC. (a.k.a Bittrex); The Collected Group, LLC; CBC Restaurant Corp.; Sorrento Therapeutics, Inc.; The Hertz Corporation; Verity Health System of California; ViewRay, Inc.; Zymergen, Inc.; Proterra Inc.; Aluminum Shapes, L.L.C.; Centric Brands, Inc.; LifeCare Holdings, Inc.; CBL & Associates Properties, Inc.; General Wireless Operations, Inc (a.k.a. RadioShack Inc.); GNC Holdings, Inc.; Molycorp Inc.; Southern Foods Group, LLC (a.k.a. Dean Foods); Speedcast International Limited; Briggs & Stratton Corporation; and Vitamin World, Inc.[2]

11. The Committee chose BRG to act as its financial advisor in these Cases based in large part on the experience outlined above. The Committee believes that BRG's services are

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[2] The professionals were employed in certain of these engagements prior to joining BRG.

necessary to enable the Committee to assess and monitor the Debtors' restructuring and/or sale efforts in furtherance of the Committee's obligations to protect the interests of, and maximize value for, all unsecured creditors. Moreover, based on the experience of BRG's professionals in large, complex chapter 11 cases, the Committee believes that BRG is well-qualified to provide such services in a cost-effective, efficient, and timely manner.

B. <u>Services to be Provided</u>

12. BRG will provide such financial advisory services to the Committee as the Committee deems appropriate and necessary in order to advise the Committee during the course of these Cases. The services to be rendered by BRG, which services may be subject to modification at the Committee's request, are necessary to enable the Committee to faithfully execute its statutory duties to unsecured creditors.

13. Subject to further order of this Court, the Committee has requested that BRG render financial advisory services with respect to the following areas:

a) Analyze the Debtors' assets (tangible and intangible) and possible recoveries to creditor constituencies under various scenarios and develop strategies to maximize recoveries, including development of recovery models for use by the unsecured creditors;

b) Review and provide analysis of any filed plan of reorganization and disclosure statement, including the assessment of projections to ensure any plan of reorganization is supported by credible business and operational plans, and if appropriate, the development of alternative bankruptcy plans proposed by the Committee to assess their achievability;

c) Advise and assist the Committee in its analysis and monitoring of the historical, current and projected financial affairs of the Debtors, including, schedules of assets and liabilities and statements of financial affairs;

d) Develop and issue periodic monitoring reports to enable the Committee to evaluate effectively the Debtors' performance relative to projections, any 363 sale process (and, if applicable, any subsequent wind-down activities), ability to realize or settle claims for avoidance actions, and any relevant operational issues, including liquidity, on an ongoing basis;

e) Evaluate and participate in any 363 sale process to ensure the adequacy of such process and that it proceeds in the most efficient manner to maximize recoveries to the unsecured creditors;

f) Advise and assist the Committee with respect to any debtor-in-possession financing arrangements and/or the use of cash collateral including evaluation of asserted liens thereon;

g) Evaluate relief requested in cash management motion, including proper controls related to and financial transparency into intercompany and related party transactions including cross-border transactions and debtor to non-debtor transactions;

h) Monitor liquidity and cash flows throughout these Cases and scrutinize cash disbursements and capital requirements on an ongoing basis;

i) Analyze both historical and ongoing related party transactions and/or material unusual transactions with affiliates of the Debtors.

j) Advise the Committee and Counsel in evaluating any court motions, applications, or other forms of relief, filed or to be filed by the Debtors, or any other parties in interest;

k) Advise and assist the Committee in its assessment of the Debtors' employee needs and related costs, including the appropriateness of any proposed employee retention plan or incentive plan;

l) Analyze the Debtors' business plan and monitor the implementation of any strategic initiatives and prepare reports related thereto;

m) Assist Counsel in evaluating all purported lien claims by creditors, including the validity and enforcement of such claims;

n) Evaluate and advise on the Debtors' assumption and or rejection of executory contracts and or leases;

o) Work with the Debtors' tax advisors to ensure that any restructuring or sale transaction is structured in a tax efficient manner as well as assist with the Committee's review of any tax issues;

p) Monitor Debtors' claims management process, including analyzing claims and guarantees, and summarizing claims by entity;

q) Advise the Committee in connection with any potential claims and causes of action, including preference payments, fraudulent conveyances, and other potential causes of action that the Debtors' estates may hold against insiders and/or third parties;

r) Participate in meetings, discussions, and negotiations with the Committee, the Debtors, and the other parties in interest and with their respective professionals and attending court hearings as may be required;

s) Provide any expert reports and/or testimony as requested by the Committee and Counsel; and

t) Perform other matters as may be requested by the Committee or Counsel from time to time, including: preparing litigation, valuation, and/or forensic analyses that have not yet been identified but as may be requested by the Committee and Counsel, consistent with the role of a financial advisor.

14. In addition to services related to these areas, BRG understands that it may be requested to participate, at the Committee's request and to the extent appropriate, in meetings and discussions with the Committee, the Debtors, and the other parties-in-interest and with their respective professionals.

C. <u>No Duplication of Services</u>

15. The services to be provided by BRG will be at the request and direction of the Committee so as to avoid duplicative efforts among the Committee's professionals retained in these Cases.

16. BRG intends to communicate regularly with the Committee and its Counsel to ensure that the actual financial advisory services performed are appropriate based on the status of the case and needs of the Committee. BRG will coordinate all tasks with Counsel to achieve case efficiencies and avoid duplication of efforts. The Committee believes it is necessary to employ BRG as its financial advisor to render the foregoing professional services. In light of BRG's

substantial experience and expertise and the complex nature of the Debtors' business and financial affairs, the Committee believes that BRG is well qualified to advise it in these Cases.

D. Use of Contractors

17. Notwithstanding anything in this Application to the contrary, BRG shall (i) to the extent that it uses the services of independent contractors or subcontractors (the "Contractors") in these Cases, pass-through the cost of Contractors to the estates at the same rate that BRG pays the Contractors; (ii) seek reimbursement for actual costs only; (iii) ensure that the Contractors are subject to the same conflict checks and compensation procedures as required for BRG; and (iv) file with the Court such disclosures required by Bankruptcy Rule 2014.

E. Limitation of Liability

18. The Committee understands that BRG's decision to accept this engagement is contingent upon its ability to be retained in accordance with the terms and conditions set forth below (the "Limitation of Liability Provisions").

19. Except in the case of conduct by BRG or its agents involving gross negligence, willful misconduct, reckless misconduct, or fraud, BRG shall not be liable under this retention to the Committee or their respective successors, assigns or affiliates for consequential, incidental, special, or punitive damages nor shall BRG be liable for direct compensatory damages in excess of the amount of the fees paid hereunder to BRG. The terms of this paragraph shall survive the termination of this retention and such commitments shall extend upon the terms set forth in this paragraph to any controlling person, director, officer, employee, or affiliate of BRG.

20. The Committee has agreed that BRG shall not be liable for any delays resulting from circumstances or causes beyond its reasonable control, including, without limitation, fire or other casualty, act of God, strike or labor dispute, war or other violence, or any law, order or

requirement of any governmental agency or authority.

21. The Committee submits that the Limitation of Liability Provisions outlined above, which include qualifications and limitations on the indemnifications and limitation on liability provisions that are customary in chapter 11 cases in Delaware, as may be modified by Court order, are customary and reasonable terms of engagement for financial advisors for engagements of this type in cases in this and other districts and thus should be approved.

F. <u>Disinterestedness of Professionals</u>

22. To the best of the Committee's knowledge and based upon and subject to the disclosures made in the Galfus Declaration filed contemporaneously herewith, BRG (inclusive of its affiliates, subsidiaries and parent entities) is a "disinterested person" as that term is defined in section 101(14) of the Bankruptcy Code and the Committee is satisfied that (i) BRG represents no interest adverse to the Committee, the Debtors, their estates, or any other party in interest in the matters upon which it is to be engaged and that its employment is in the best interest of the estates; (ii) BRG together with its Managing Directors and Directors do not have any financial interest in or business with the Debtors; (iii) BRG has no connection with the U.S. Trustee or any other person employed in the office of the U.S. Trustee; and (iv) BRG has no connection with the bankruptcy judge approving the employment of BRG as the Committee's financial advisor. BRG has not provided, and will not provide, any professional services to the Debtors, any other creditors, other parties in interest, or their respective attorneys and accountants with regard to any matter related to these Cases.

G. <u>Professional Compensation</u>

23. BRG advised the Committee that it intends to charge its standard hourly rates for professional services rendered, plus reimbursement of actual and necessary expenses incurred by

BRG. The professional fees shall be calculated by multiplying the hours worked by the standard hourly billing rates in effect for the specific personnel involved. The hourly rates charged by BRG for the services provided by its personnel differ based upon, among other things, each professional's level of experience, geographic differentials, and types of services being provided. In the ordinary course of business, BRG periodically revises its hourly rates to reflect promotions and other changes in personnel responsibilities, increases in experience, and increases in the cost of doing business.

24. BRG has advised the Committee that its fees will be commensurate with the fees charged to its other clients and in other cases of this size (provided such clients are billed hourly). BRG has also advised the Committee that it intends to make application to the Court for allowance of its compensation and reimbursement of expenses in accordance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and the terms of any order establishing procedures for interim compensation that may be entered in this case. BRG's compensation for services rendered on behalf of the Committee shall be fixed by the Court after due application.

25. For professional services, fees are based on BRG's standard hourly rates. The proposed rates of compensation, subject to final Court approval, are the customary hourly rates in effect when services are performed by the professionals and paraprofessionals who provide services to the Committee. The current standard hourly rates for BRG personnel that will work on this engagement are as follows:[3]

[3] The below ranges are for BRG professionals in the Corporate Finance practice group who may practice in bankruptcy and non-bankruptcy related matters. They exclude BRG professionals in other industry practice groups who may also provide specialized services in these Chapter 11 Cases. To the extent such other professionals provide services, they will charge their standard hourly rates as they would in non-bankruptcy matters and in no event do their standard hourly rates exceed the ranges set forth below for the Corporate Finance practice group.

Position	Hourly Rate
Managing Directors	$1,095 - $1,325
Associate Directors & Directors	$865 - $1,050
Professional Staff	$420- $850
Support Staff	$175 - $375

26. These standard hourly rates are subject to periodic adjustment, which shall be noted on the invoices for the first time period in which the revised rates become effective. The standard hourly rates for the BRG staff anticipated to be assigned to this engagement are as follows: David Galfus ($1,325), Evan Hengel ($1,210), Rob Shapiro ($1,095), Ron Zaidman ($1,095), and Ed Buthusiem ($1,075) (together with any additional assigned professionals the "BRG Personnel"). BRG believes that its standard hourly rates are at or below those of firms it considers its peers.

27. To the extent BRG requires services of personnel from specialized practices or its international divisions, the standard hourly rates for that specialized practice or international division will apply.

28. Consistent with BRG's policy with respect to its other clients, BRG will charge for all other services provided and for other charges and disbursements incurred in rendering services to the Committee. These customary items include, among other things, travel and lodging expenses, business meals, costs of reproduction, research, communications, our legal counsel, any applicable sales or excise taxes and other direct expenses. Internal costs or overhead cost and document production services (including regular secretarial and word processing time) will not be charged for separately.

29. BRG will also request compensation for any time and expenses (including, without limitation, reasonable legal fees and expenses, except in the case of legal fees pertaining to any fee defense) that may be incurred in considering or responding to discovery requests or other requests

for documents or information, or in participating as a witness or otherwise in any legal, regulatory, or other proceedings, including, without limitation, those other than the instant matter, as a result of BRG's performance of these services.

30. BRG acknowledges that neither the Committee, its constituents, nor any of its advisors or professionals (including, but not limited to Counsel), shall be liable for the fees, expenses or other amounts payable to BRG.

31. Regardless of the time and manner of interim compensation, BRG understands that, subject to this Court's orders, BRG will be required to follow the procedures for final allowance of fees at the end of the Cases.

32. No promises have been received by BRG, nor any employee thereof, as to payment or compensation in connection with these Cases other than in accordance with the provisions of section 504 of the Bankruptcy Code. Except for internal agreements among the employees of BRG regarding the sharing of revenue or compensation, neither BRG nor any of its employees has entered into an agreement or understanding to share compensation with any other entity as described in Bankruptcy Code section 504 and Bankruptcy Rule 2016.

NOTICE

33. Notice of the Application has been given to the following parties or, in lieu thereof, to their counsel, if known: (i) counsel to the Debtors; (ii) U.S. Trustee; and (iii) all parties entitled to notice pursuant to Bankruptcy Rule 2002 and Local Rule 2002-1(b). The Committee submits that, in light of the nature of the relief requested and the circumstances surrounding these Chapter 11 Cases, no other or further notice is required or necessary.

NO PRIOR REQUEST

34. No previous application for the relief sought herein has been made to this or any other court.

WHEREFORE, the Committee respectfully requests that it be authorized to employ BRG as its financial advisor on the terms set forth herein, effective as of June 28, 2024, and that BRG be paid such compensation as may be allowed by this Court, and for such other further relief as is just and proper.

Dated: July 10, 2024
Wilmington, Delaware

Respectfully submitted,

The Official Committee of Unsecured Creditors
of Vyaire Medical, Inc., *et al.*,

/s/ Sasha L. Azar
Sasha L. Azar, solely in their capacity as an authorized signatory of Zensar Technologies, Inc., the Chair of the Committee and not in their personal capacity.