

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
	:	
VYAIRE MEDICAL, INC., <i>et al.</i> ,	:	Case No. 24-11217 (BLS)
	:	(Jointly administered)
	:	
Debtors. ¹	:	Re: D.I. 238
	:	Hearing Date: July 31, 2024, at 2:00 p.m.
-----	o	Obj. Deadline: July 23, 2024, at 4:00 p.m.

**LIMITED OBJECTION OF THE UNITED STATES TRUSTEE
TO DEBTORS' APPLICATION TO EMPLOY BDO USA P.C.**

Andrew R. Vara, United States Trustee for Region 3 (the "U.S. Trustee"), through his undersigned counsel, objects on a limited basis to the *Debtors' Application for Entry of an Order Authorizing the Retention and Employment of BDO USA P.C. as Tax Accountant for the Debtors and Debtors in Possession Effective as of the Petition Date, and Modifying Certain Timekeeping Requirements* [D.I. 238] (the "Application"), and in support of his limited objection respectfully states:

JURISDICTION & STANDING

1. Pursuant to 28 U.S.C. § 1334, applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and resolve the Application and this limited

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.

objection.

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with monitoring the federal bankruptcy system. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that 11 U.S.C. § 307 gives the U.S. Trustee “public interest standing”); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a “watchdog”). The U.S. Trustee is specifically authorized to monitor retention applications filed under 11 U.S.C. § 327 and, whenever the U.S. Trustee deems it appropriate, to file comments about such applications with the Court. *See* 28 U.S.C. § 586(a)(3)(I).

3. The U.S. Trustee has standing to be heard on the Application pursuant to 11 U.S.C. § 307.

BACKGROUND

4. On June 9, 2024, the above-captioned debtors (the “Debtors”) filed chapter 11 petitions in this Court.

5. On July 9, 2024, the Debtors filed the Application. The Application seeks to employ BDO USA, P.C. (“BDO”) as tax accountant to the Debtors.

6. The Debtors propose to compensate BDO on an hourly basis, and the Debtors also propose that BDO be permitted to keep time in 0.5-hour increments. *See* Application ¶¶ 14 & 16.

7. The form of order accompanying the Application provides in para. 3:

BDO shall file fee applications and be compensated in accordance with sections 330 and 331 of the Bankruptcy Code, applicable Bankruptcy Rules, the Local Rules, this Order and any other applicable orders of this Court; *provided, however*, that the requirements of the Bankruptcy Code, the Bankruptcy Rules, and

Local Rules are hereby modified such that BDO shall not be required to keep contemporaneous time records of the services performed in one-tenth (0.1) hour increments and by project category, but instead BDO shall provide, as an exhibit to each fee application that BDO files in these Chapter 11 Cases: (a) a narrative describing in summary detail the services rendered; and (b) time records maintained contemporaneously in one-half (0.5) hour increments.

ARGUMENT

8. The U.S. Trustee objects to BDO's keeping time in 0.5-hour increments, and to BDO's not providing detailed time entries to support its fees.

9. Section 328(a) of the Bankruptcy Code authorizes a trustee, with the Court's approval, to retain professional persons under section 327 "on any reasonable terms and conditions of employment, including . . . on an hourly basis[.]"

10. Fed. R. Bankr. P. 2016(a) required fee applications to set forth "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

11. Del. Bankr. L.R. 2016-2(d)(iv) provides that fee applications "shall include activity descriptions which shall be sufficiently detailed to allow the Court to determine whether all the time, or any portion thereof, is actual, reasonable and necessary[.]" To that end, "All motions shall include complete and detailed activity descriptions;" and "Activities shall be billed in tenths of an hour (six (6) minutes)[.]" L.R. 2016-2(d)(ii) & (iv).

12. Del. Bankr. L.R. 2016-2(h) allows the Court to waive the information requirements of the Rule "for cause[.]"

13. Bankruptcy Courts have an independent duty to review fee applications, regardless of whether a party in interest objects. *See In re Busy Beaver Bldg. Centers., Inc.*,

19 F.3d 833, 841 (3d Cir. 1994). “[T]he bankruptcy court must protect the estate, lest overreaching attorneys or other professionals drain it of wealth which by right should inure to the benefit of unsecured creditors.” *Id.* at 844. The Third Circuit has observed that the bankruptcy court “has an obligation to prevent unnecessary expenditures in the administration of an estate.” *In re Congoleum Corp.*, 426 F.3d 675, 693 (3d Cir. 2005) (citing *Busy Beaver*).

14. The Court should require BDO to keep detailed activity descriptions in 0.1-hour increments. The Local Rule 2016-2(d)(iv) requires this. The Application makes no attempt to show cause exists under Local Rule 2016-2(h). There is no reason a professional that is being paid hourly and that is keeping time in 0.5-hour increments cannot keep time in more precise, 0.1-hour increments. If the Application is approved, then BDO would be paid for 30 minutes of work for every task (e.g. reviewing a brief e-mail, making a quick phone call, etc.) that it completed in six minutes or less.² BDO’s hourly rates top out at \$1,150 per hour.

15. Tax advisors or accountants can and do keep time in 0.1-hour increments to support their hourly fees. *See, e.g., In re Paragon Offshore plc*, 16-10386 (CSS) D.I. 1415 ¶ 7 (“for all services PwC performs on an hourly basis PwC shall maintain detailed descriptions of those services in 0.1-hour increments and include that time detail in its fee applications.”); *In re Cano Health, Inc.*, 24-10164 (KBO) D.I. 250 ¶ 6 (“For all services rendered on an hourly basis, KPMG will maintain detailed records in one-tenth hour increments.”).

² Same goes for tasks completed in 12, 18, or 24 minutes or less.

CONCLUSION

16. The U.S. Trustee reserves any and all rights, remedies and obligations to complement, supplement, augment, alter and/or modify this limited objection, file an appropriate motion or conduct any and all discovery as may be deemed necessary or as may be required, and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny the Application unless BDO agrees to keep detailed time entries in 0.1-hour increments.

Dated: July 23, 2024
Wilmington, DE

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE,
REGIONS 3 & 9

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