IN UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 24-11217 (BLS)
VYAIRE MEDICAL, INC, *et al*.,	)	
	)	(Jointly Administered)
Debtors.	)	
	)	Hearing Date: July 31, 2024 at 2:00 pm
	)	Obj Deadline: August 2, 2024 at 4:00 pm

OBJECTION TO DETBORS' FIRST NOTICE TO CONTRACT PARTIES OF POTENTIALLY ASSUMED AND ASSIGNED EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Kuehne + Nagel Inc. ("**K+N**"), by its undersigned counsel, hereby submits this objection to the Debtors' First Notice to Contract Parties of Potentially Assumed and Assigned Contracts and Unexpired Leases [Docket No. 256] (the "**Assumption Notice**"). In support of the Objection, K+N respectfully alleges as follows:

1. As the Court is aware, in the pre-petition period the Debtors employed the services of K+N pursuant to that certain Logistics Services Agreement dated June 1, 2019 (as amended) between K+N and the Debtors (the "**Agreement**"). Under the Agreement, K+N provided logistics and warehousing services to the Debtor.

2. K+N previously interposed its Limited Objection and Reservation of Rights [Document No. 133] (the "**Sale Objection**")[1] to the Debtor's Motion of Debtors for Entry of an 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

[1] K+N respectfully incorporates by reference the Sale Objection in this Objection.

Contracts, (VI) Approving the Sale of the Debtors' Assets Free and Clear, and (VII) Granting related relief [Docket No. 16] (the "**Sale Motion**"). The legal and factual basis for the Sale Objection stems from the inability of the Debtors under section 363 of the Bankruptcy Code to sell or otherwise seek to transfer the goods being warehoused by K+N subject to K+N's statutory and contractual possessory lien rights. Nevertheless, in their Assumption Notice, the Debtors list the Agreement as a contract which may be assumed and assigned to the successful bidder and lists the cure cost as zero. *See* Assumption Notice at p. 102. The proposed cure cost related to the Agreement is in actuality in excess of $2.3MM and increasing.

Objection

3. Any assumption and assignment of the Agreement must be conditioned on the Debtors' compliance with the requirements of section 365 of the Bankruptcy Code, including, but not limited to, paying all amounts due and owing under the Agreement through the effective date of any assumption and assignment of the same

4. As evidenced in the secured of proof of claim filed on the official claims register on July 15, 2024 and designated as Claim No. 35, the Debtors owe K+N no less than $2,298,309.55 for services performed under the Agreement as of the date of the proof through June 2024 (the "**K+N POC**"). A copy of the K+N POC is attached as **Exhibit A**. Thus, the actual cure cost associated with the potential assumption and assignment of the Agreement will be in excess of $2,298,309.55.

5. Pursuant to its possessory lien rights, K+N continues to warehouse the Debtors' goods consisting of medical device parts and inventory with an estimated commercial value of approximately $16,253,195.02 (the "**K+N Collateral**") at a designated warehouse facility. A scheduled of the K+N Collateral is attached as exhibit A to the Sale Objection. The

K+N Debt continues to accrue warehousing costs related to the K+N Collateral, including, but not limited to, monthly rent and cost of labor to maintain the goods in the facility.[2]

6. Pursuant to section 365 of the Bankruptcy Code, K+N is entitled to adequate assurance of any proposed assignee's future performance of the Agreement obligations, including but not limited to the assignee's financial wherewithal to meet its payment obligations. To the extent the Agreement is to be assumed and assigned, K+N requests that such information be promptly provided to K+N and its counsel, Moreover, K+N reserves its rights to object if it is not timely provided with adequate assurance of any proposed assignee's ability and intent to cure all defaults under the Agreement and to provide adequate assurance of future performance, or if the information provided is inadequate in any respect.

Reservation of Rights

7. Nothing in this Objection is intended to be, or should be construed as, a waiver by K+N of any of its rights as a possessory lien holder and secured creditor under the Agreement, the Bankruptcy Code, and applicable law. K+N expressly reserves all such rights, including, without limitation, the right to: (a) supplement and/or amend this Objection and to assert any additional objections with respect to the proposed cure amount and adequate assurance of future performance; (b) amend the cure Amount; and (c) assert any further objections as it deems necessary or appropriate.

[2] It is undisputed that K+N is a secured creditor due by virtue of its possession of the K+N Collateral under the Agreement, applicable state law, including but not limited to, sections 7-209, 7-210, and 9-333 of the Uniform Commercial Code, and the common law on possession of freight forwarders and warehousemen. A possessory lien holder's collateral cannot be sold free and clear under section 363 of the Bankruptcy Code unless such entity's claim is satisfied or otherwise consents. *See* 11 U.S.C. 363(f)(2)

Conclusion

WHEREFORE, K+N respectfully requests that this Court enter an Order: (a) sustaining this Objection; (b) sustaining K+N's Sale Objection; (c) in the event of any proposed assumption and assignment of the Agreement, requiring the Debtors to pay all amounts due and owing to K+N in the amount of $2,298,309.55 plus the costs accrued through the effective date of any assumption and assignment as well as providing evidence of adequate assurance of future performance by any proposed assignee; and (d) granting K+N such other and further relief as this Court deems just and proper.

Respectfully submitted,

Date: July 25, 2024
Wilmington, Delaware

BIELLI & KLAUDER, LLC

<u>/s/ David M. Klauder</u>
David M. Klauder, Esquire (No. 5769)
1204 N. King Street
Wilmington, DE 19801
Phone: (302) 803-4600
Email: dklauder@bk-legal.com

-and-

HALPERIN BATTAGLIA BENZIJA, LLP
Walter Benzija, Esquire
(*pro hac vice admission pending)*
40 Wall Street, 37th Floor
New York, NY 10005
Telephone (212) 765-9100
wbenzija@halperinlaw.net

Co-counsel for Kuehne + Nagel Inc.