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

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

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF COVINGTON & BURLING LLP AND REED SMITH LLP TO THE PROPOSED SALE TRANSACTION**

Covington & Burling LLP ("Covington") and Reed Smith LLP ("Reed Smith" and, together with Covington, the "Law Firms") file this Limited Objection and Reservation of Rights (the "Objection") with respect to the above-captioned debtors' and debtors-in-possession's (collectively, "Debtors") proposed sale of substantially all of their assets free and clear of liens, claims, encumbrances, and other interests and related assumption and assignment of executory contracts (collectively, the "Sale Transaction").[2] The Law Firms object to the Sale Transaction to

[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.

[2] *See Motion of the 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 Contracts, (VI) Approving the Sale of the Debtors' Assets Free and Clear, and (VII) Granting Related Relief* [D.I. 16] (the "Sale Motion"); and *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* [D.I. 249] ("Bidding Procedures Order").

the extent that it contemplates or would effect (i) a sale of the Debtors' rights in insurance coverage claims that are subject to an attorney charging lien and related vested ownership interests of the Law Firms free and clear of such interest and lien; and (ii) an assumption and assignment of the Covington Engagement Letter (as defined below) without Covington's consent and with an incorrect cure amount of $0.[3]

**PRELIMINARY STATEMENT**

1. The Law Firms represent Vyaire Medical, Inc. and Vyaire Holding Company (together, the "Vyaire Plaintiffs") in an insurance coverage action on a vested contingency fee basis. On or about June 11, 2020, Covington commenced an action on behalf of the Vyaire Plaintiffs against the four issuers of the Vyaire Plaintiffs' product recall insurance policies between 2018 and 2020 (the "Insurer Defendants") in the Supreme Court of the State of New York (Index No. 652428/2020) (the "Insurance Coverage Action"). The Law Firms subsequently undertook joint representation of the Vyaire Plaintiffs in the Insurance Coverage Action. Following 4 years of pre-trial matters, the Insurance Coverage Action is now trial ready and the Law Firms began preparing for trial before June 9, 2024 (the "Petition Date").

2. Under New York law, the Law Firms have an attorney's lien and vested ownership interest in the Vyaire Plaintiffs' claims and related attorney's files and in any proceeds that result from those claims (the "Vested Ownership Interest"). N.Y. Judiciary Law § 475. In short, the

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[3] The schedule of executory contracts to be assumed and assigned in connection with the Sale Motion does not include the Reed Smith Engagement Letter (as defined below). This Objection, therefore, does not address the legal incapacity of the Debtors to assign or authorize assumption of the Reed Smith Engagement Letter, nor does it address Reed Smith's non-consent to any assignment and assumption thereof. Reed Smith reserves all its rights to object to any future proposed assumption and assignment of the Reed Smith Engagement Letter.

Law Firms own a material portion of one of the assets purportedly subject to the Sale Transaction, as further described below.

3. The Vyaire Plaintiffs' rights in the Insurance Coverage Action cannot be sold "free and clear" of the Vested Ownership Interest under section 363(f) because none of the conditions under section 363(f) for such a sale have been met. *See* 11 U.S.C. §§ 101, *et seq.* ("Bankruptcy Code").

4. The Law Firms also object under section 365(c)(1) of the Bankruptcy Code to the Debtors' proposed assumption and assignment of the Covington Engagement Letter. The Covington Engagement Letter is a personal services contract under section 365(c)(1) that cannot be assumed and assigned without Covington's consent. Moreover, the Reed Smith Engagement Letter is a personal services contract under section 365(c)(1) that incorporates the Covington Engagement Letter by reference. Thus, assumption and assignment of the Covington Engagement Letter would also impermissibly alter Reed Smith's client under the Reed Smith Engagement Letter without Reed Smith's consent.

5. Finally, Covington objects to the Debtors' proposed cure amount for the Covington Engagement Letter.

## BACKGROUND

### A. The Covington Contingency Fee Agreement.

6. Pursuant to Covington's engagement letter with the Vyaire Plaintiffs, dated as of April 1, 2020 ("Covington Engagement Letter"),[4] Covington represents the Vyaire Plaintiffs in an insurance coverage dispute against the Insurer Defendants relating to the recovery of the Vyaire

[4] A true and correct copy of the Covington Engagement Letter, redacted solely to keep confidential a conflicts-related disclosure identifying a client of Covington's that is unrelated to the Debtors, is attached as Exhibit A.

Plaintiffs' insured losses attributable to the recall of the Vyaire Plaintiffs' enFlow product ("Dispute"). The Covington Engagement Letter provides that, in exchange for representing the Vyaire Plaintiffs, Covington will be paid a fee equal to "35% of any recovery resulting from the Dispute, whether a judgment, settlement or other type of payment or award" (the "Fee"). The Fee is subject to a "Trial Exception," which provides that, if trial preparation and trial are necessary to resolve the Dispute, Covington and the Vyaire Plaintiffs will "in good faith discuss and agree upon a supplemental fee to represent [the Vyaire Plaintiffs] in those and any subsequent proceedings" (the "Supplemental Fee"). The Covington Engagement Letter further states that the Fee, plus any applicable Supplemental Fee, will be the Vyaire Plaintiffs' "sole payment" for Covington's services.[5]

**B. The Insurance Coverage Action.**

7. On June 11, 2020, Covington commenced the Insurance Coverage Action against the Insurer Defendants in the Supreme Court of the State of New York, County of New York. *See Vyaire Holding Co., et al. v. Westchester Surplus Lines Ins. Co., et al.*, Index No. 652428/2020 (N.Y. Sup. Ct. June 11, 2020). The Insurance Coverage Action asserts claims for breach of contract and declaratory relief against the Insurer Defendants related to their wrongful denial of coverage to the Vyaire Plaintiffs for losses arising out of the Vyaire Plaintiffs' recall of their enFlow medical device.

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5 Under the Covington Engagement Letter, the Vyaire Plaintiffs agreed that they will be responsible for paying "the fees and costs of experts, court filing fees, the fees of mediators (if any), the costs of court reporters and transcripts, including deposition transcripts, and the costs of other third parties" engaged with the Vyaire Plaintiffs' consent ("Third Party Costs"). The Covington Engagement Letter provides that the Vyaire Plaintiffs will pay such Third Party Costs either directly to the relevant third parties or to Covington, for its payment to those third parties.

8. Covington has expended significant resources prosecuting the Insurance Coverage Action on the Vyaire Plaintiffs' behalf over the past four years. For example, through the close of discovery, Covington: opposed preliminary motions filed by the Insurer Defendants; served and responded to written discovery requests; reviewed and produced voluminous documents; participated in two mediations; took and defended numerous fact and expert depositions; and assisted in the preparation of several expert reports.[6]

9. In addition, after the close of discovery, Covington: prepared a motion for partial summary judgment; responded to the Insurer Defendants' motions for summary judgment; briefed interlocutory appeals of the trial court's decision on the cross-motions for summary judgment; briefed cross-motions for reargument in the Appellate Division; and conducted a portion of the necessary preparation for trial.[7]

10. On May 9, 2022, the Debtors filed a Note of Issue in the Insurance Coverage Action stating that all discovery known to be necessary had been completed and that the Insurance Coverage Action was ready for trial. All summary judgment motions and appeals thereof have been decided and the Insurance Coverage Action is ready for trial.

11. In prosecuting the Insurance Coverage Action through the date of this Objection, Covington has incurred millions of dollars in attorneys' fees and costs that, in accordance with the Covington Engagement Letter have not been charged to the Vyaire Plaintiffs. Through its work, Covington has satisfied the requirements under the Covington Engagement Letter for the Fee, whether such recovery is in the form of a judgment, settlement, or other type of payment or award.

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[6] *See, e.g.*, *Vyaire Holding Co., et al. v. Westchester Surplus Lines Ins. Co., et al.*, No. 652428/2020, Dkt. 46, 66, 75, 85, 113, 125, 133, 140, 165, 169 (N.Y. Sup. Ct.).

[7] *See, e.g.*, *id.* at Dkt. 196, 322, 364, 652, 655, 762; *Vyaire Holding Co., et al. v. Westchester Surplus Lines Ins. Co., et al.*, No. 2022-05619, Dkt. 16, 23, 37 (N.Y. 1st Dep't).

Covington also began trial preparation before the Petition Date, and the conditions to the Trial Exception under the Covington Engagement Letter were thus satisfied pre-petition. Accordingly, Covington has also satisfied the requirements under the Covington Engagement Letter for the Supplemental Fee in an amount to be determined.

**C. Vyaire's Engagement of Reed Smith, and the Law Firms' Fee-Sharing Arrangement.**

12. Mr. Wells, one of the lead attorneys representing the Vyaire Plaintiffs at Covington, left Covington as of September 30, 2023, and joined Reed Smith as of October 1, 2023. Reed Smith and the Vyaire Plaintiffs entered into an engagement letter, dated as of October 1, 2023 ("Reed Smith Engagement Letter," and together with the Covington Engagement Letter, "Engagement Letters"). The Reed Smith Engagement Letter provides that Covington and Reed Smith are co-counsel for the Vyaire Plaintiffs in the Insurance Coverage Action.[8]

13. On October 24, 2023, the Law Firms entered into a fee sharing agreement (the "Fee Sharing Agreement") consistent with their joint representation of the Vyaire Plaintiffs in the Insurance Coverage Action that addresses the sharing of the Fee.

14. Reed Smith expended significant resources prosecuting the Insurance Coverage Action on the Vyaire Plaintiffs' behalf since its engagement as of October 1, 2023. For example, Reed Smith argued interlocutory appeals of the trial court's decision on the cross-motions for summary judgment; briefed cross-motions for reargument in the Appellate Division; and conducted a portion of the necessary preparation for trial.[9]

15. In prosecuting the Insurance Coverage Action through the date of this Objection, Reed Smith has incurred hundreds of thousands of dollars in attorneys' fees and costs that, in

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[8] A true and correct copy of the Reed Smith Engagement Letter is attached as Exhibit B.

[9] *See, e.g.*, *Vyaire Holding Co., et al. v. Westchester Surplus Lines Ins. Co., et al.*, No. 2022-05619, Dkt. 37, 41 (N.Y. 1st Dep't).

accordance with the Engagement Letters, have not been charged to the Vyaire Plaintiffs. Through its work, Reed Smith has satisfied the requirements under the Covington Engagement Letter for the Fee, whether such recovery is in the form of a judgment, settlement, or other type of payment or award. Reed Smith also began trial preparation before the Petition Date, and the conditions to the Trial Exception under the Engagement Letters were thus satisfied pre-petition. Accordingly, Reed Smith has also satisfied the requirements under the Engagement Letters for the Supplemental Fee in an amount to be determined.

**D. The Proposed Sale Transaction.**

16. On June 10, 2024, the Debtors filed the Sale Motion, and on July 11, 2024, the Court entered the Bidding Procedures Order.

17. Under the Sale Motion and pursuant to the Bidding Procedures Order, the Debtors propose to sell all, substantially all, or a portion of their assets free and clear of, *inter alia*, all liens, claims, rights and interests. *See* Bidding Procedures Order ⁋ D. Though not expressly stated in the Sale Motion or Bidding Procedures Order, the Vyaire Plaintiffs' claims asserted in the Insurance Coverage Action are property of the Debtors' estates that would be subject to sale under the Bidding Procedures Order.

18. The Bidding Procedures Order also establishes procedures for the Assumption and Assignment of executory contracts and unexpired leases.[10] Under the Assumption and Assignment Notice, the Debtors have identified the Covington Engagement Letter and certain related agreements (but not the Reed Smith Engagement Letter) as contracts that may be assumed and

[10] *First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [D.I. 256] (the "Assumption and Assignment Notice").

assigned. *See* Assumption and Assignment Notice at 52-53. The Debtors propose a cure amount of $0 for expenses related to the Covington Engagement Letter. *Id.*

## OBJECTION

19. The Debtors cannot sell the claims in the Insurance Coverage Action free and clear of the Vested Ownership Interest, because the Debtors cannot satisfy any of the conditions of a sale free and clear of such interest under section 363(f) of the Bankruptcy Code. In addition, the Covington Engagement Letter cannot be assumed and assigned without the Law Firms' consent because applicable nonbankruptcy law does not permit a personal services contract such as the Covington Engagement Letter to be assigned without the nondebtor party's consent. The Law Firms do not consent to assumption and assignment of the Covington Engagement Letter.

### A. The Law Firms Have an Attorney's Lien and Vested Ownership Interest in the Vyaire Plaintiffs' Claims.

20. Under section 475 of the New York Judiciary Law ("Judiciary Law"),[11] "[f]rom the commencement of an action, special or other proceeding in any court or before any state, … the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come."

21. This attorney charging lien "does not merely give an attorney an enforceable right against the property of another, it gives the attorney an equitable ownership interest in the client's cause of action." *LMWT Realty Corp. v. Davis Agency Inc.*, 649 N.E.2d 1183, 1186 (N.Y. 1995).

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[11] New York law governs the determination of whether the Law Firms have attorney's charging liens related to the Insurance Coverage Action, which is being litigated in New York court by attorneys based in New York. *See In re Am. Metrocomm Corp.*, 274 B.R. 641, 661 (Bankr. D. Del. 2002) ("[T]he place of performance is the most substantial factor to be considered in determining which state's law governs the determination of whether [law firm] has a valid lien on the Attorney Files.").

A "client's property right in his own cause of action is only what remains after transfer to the attorney of the agreed-upon share upon the signing of the retainer agreement." *Id*. Thus, a client who engages counsel pursuant to a contingency fee arrangement "equitably assigns a proportionate share of the cause of action to counsel. The client is left with only the remaining balance of any eventual judgment after the attorney receives his agreed upon share." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 178 (2d Cir. 2001).

22. The Vyaire Plaintiffs agreed to a contingency fee agreement with Covington, thereby equitably assigning 35% of the Vyaire Plaintiffs' claims to Covington, plus any additional portion agreed between the parties as part of the Trial Exception. In accordance with the requirements of section 475 of the Judiciary Law, Covington commenced the Insurance Coverage Action and appeared for the Vyaire Plaintiffs in the Insurance Coverage Action. The Vyaire Plaintiffs subsequently engaged Reed Smith as co-counsel with Covington, and the Law Firms entered into a fee sharing arrangement respecting the allocation between them of the contingency fee set out in the Covington Engagement Letter. Accordingly, the Law Firms acquired the Vested Ownership Interest in the Vyaire Plaintiffs' claims in the Insurance Coverage Action and related attorney's files. The Vested Ownership Interest attaches to any verdict, report, determination, decision, award, settlement, judgment or final order in the Vyaire Plaintiffs' favor, and any proceeds thereof in whatever hands they may come, including any acquirer of the Debtors' rights in the Insurance Coverage Action. N.Y. Judiciary Law § 475; *LMWT*, 649 N.E.2d at 1186.

23. The Vested Ownership Interest came into existence and was fully perfected upon commencement of the Insurance Coverage Action. *In re A. Tarricone, Inc.*, 76 B.R. 53, 56 (Bankr.

S.D.N.Y. 1987).[12] The Law Firms did not need to do anything further in order to perfect their lien and equitable ownership interest before the Petition Date. *Id.* ("The attorney need not file or record a charging lien in order to perfect it; the lien takes effect from the time the services were commenced, and a trustee in a subsequent bankruptcy case involving the client takes the property of the estate subject to such lien.").

24. Thus, in accordance with the Engagement Letters, and as a result of the significant legal services they have provided to the Vyaire Plaintiffs in the Insurance Coverage Action, the Law Firms hold a vested equitable ownership interest in and perfected lien on the claims in the Insurance Coverage Action (and related attorney's files).

**B. The Debtors Cannot Satisfy the Requirements for a Free and Clear Sale of the Vested Ownership Interest under Section 363(f) of the Bankruptcy Code.**

25. The Vested Ownership Interest constitutes an equitable ownership interest or a lien that, in either case, constitutes an "interest" protected under section 363(f). *See* Collier on Bankruptcy ¶ 363.01 (16th 2024) ("Section 363 also provides protection for the rights of third parties that have interests in the subject property."). Section 363(f) of the Bankruptcy Code provides that a debtor may sell property free and clear of "any interest in such property," <u>only if</u> one of the following conditions is met:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

[12] The fact that the Vyaire Plaintiffs filed for chapter 11 protection before any recovery was obtained in the Insurance Coverage Action does not interfere with or diminish the Law Firms' interest in the Vyaire Plaintiffs' claims because the attorney's lien "relates back to the initiation of the action." *In re A. Tarricone*, 76 B.R. at 56.

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1-5). None of these conditions is met here.

26. Section 363(f)(1) is not applicable here. Applicable non-bankruptcy law does not permit the sale of the claims in the Insurance Coverage Action free and clear of the Vested Ownership Interest because the interest is not only secured and enforceable under section 475 of the Judiciary Law, but also "may not be defeated by subsequent assignments by the client." *In re Maggio's Est.*, 169 Misc. 1039, 1041 (N.Y. Sur. Ct. 1938); *see Chadbourne & Parke, LLP v. AB Recur Finans*, 18 A.D.3d 222, 223 (N.Y. App. Div. 2005) ("A charging lien is a security interest" that ensures "that the attorney can collect his fee.").

27. Section 363(f)(2) is not met here because the Law Firms do not consent to a sale free and clear of the Vested Ownership Interest.

28. Section 363(f)(3) likewise is not available to the Debtors. The Law Firms hold both a lien on and a vested equitable ownership interest in the Insurance Coverage Action claims. The exception in section 363(f)(3) is inapplicable because the interest held by the Law Firms is an equitable ownership interest to which section 363(f)(3) does not apply. *See In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002) (explaining that a sale cannot be accomplished under section 363(f)(3) if the creditor's interest is not a lien). Further, to the extent that the Vested Ownership Interest does constitute a lien, the Debtors must demonstrate that the sale (which has not yet occurred) will result in proceeds greater than the aggregate value of all liens on the relevant property. *See id.* at 793 (holding that if the interest was a lien, sale would not have been permitted because sale price was not sufficient to pay all secured claims in full).

29. Section 363(f)(4) cannot be satisfied here because there is no bona fide dispute—or any dispute at all—regarding the Vested Ownership Interest.

30. Finally, the Law Firms cannot be compelled to accept a monetary satisfaction of their interests in the Insurance Coverage Action claims. To meet the burden of section 363(f)(5), the Debtors would need to "do more than show that it is theoretically possible to compel a creditor to accept a money satisfaction." *In re Ferris Properties, Inc.*, No. 14-10491, 2015 WL 4600248, at *2 (Bankr. D. Del. July 30, 2015). In order to sell the claims in the Insurance Coverage Action free and clear under section 363(f)(5), the Debtors are required to show that under applicable state law, the Law Firms can be compelled to accept cash in "amount[] less than the actual amount[]" of the Vested Ownership Interest. *In re Halt Medical, Inc.*, No. 17-10810, 2017 WL 5434575, at *8 (Bankr. D. Del. June 8, 2017). This condition has not and cannot be met by the Debtors with respect to the Vested Ownership Interest because there is no provision under applicable state law that would require the Law Firms to give up the Vested Ownership Interest for less than the amounts due to them under the Engagement Letters.

31. Accordingly, there is no legal or factual basis that would allow the sale of claims in the Insurance Coverage Action free and clear of the Vested Ownership Interest. But even if such a basis existed, this Court would be required under the terms of section 363(e) to prohibit or condition the sale on the provision of adequate protection of the Law Firms' interests. *In re Delaware & Hudson Railway Co.*, 124 B.R. 169, 175 (D. Del. 1991) ("At the request of any party in interest in the property to be sold, the Bankruptcy Court shall prohibit the sale or condition the sale as necessary to provide for adequate protection of the party's interest."); *see also* Collier on Bankruptcy ¶ 363.05[2] (16th Ed. 2024) (explaining that "the requirement of adequate protection in section 363(e) is mandatory").

### C. The Covington Engagement Letter, Cannot Be Assumed and Assigned Without the Law Firms' Consent under Section 365(c)(1).

32. The Law Firms object to the potential assumption and assignment of the Covington Engagement Letter as set forth in the Assignment Notice on the ground that applicable state law prohibits the Debtors from assigning this personal services agreement without the Law Firms' consent. Therefore, assumption and assignment of the Covington Engagement Letter is not permitted under section 363(c)(1) of the Bankruptcy Code absent the Law Firms' consent, which has not been provided. Covington also objects to the proposed cure amount listed in the Assignment Notice. Such cure amount should be listed as $506.81 and assumption of the Fee obligation, as set forth in Covington's proofs of claim. *See* Covington's Proofs of Claim Nos. 113 and 2 filed against Vyaire Medical and Vyaire Holding, respectively; Reed Smith's Proofs of Claim Nos. 144 and 4 filed against Vyaire Medical and Vyaire Holding, respectively (collectively, "POCs").

33. Section 365(c) provides that a Debtor's right to assume and assign an executory contract is subject to applicable state law. *See In re EBC I, Inc.*, 380 B.R. 348, 363 (Bankr. D. Del. 2008) ("Pursuant to section 365(c) of the Bankruptcy Code, a debtor may not assume or assign an executory contract if applicable state law excuses a party to the contract (other than the debtor) from accepting performance or rendering performance to an entity other than the debtor.").

34. Under the law of each of New York, Delaware, and the District of Columbia, contracts providing for personal services may not be assigned or assumed without the consent of the other party. *See Eisner Comput. Sol., LLC v. Gluckstern*, 741 N.Y.S.2d 511, 511 (App. Div. 2002) ("personal services contracts are not freely assignable"); *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, No. 3718, 2010 WL 338219, at *11 (Del. Ch. Jan. 29, 2010) (same); *Evening News Ass'n v. Peterson*, 477 F.Supp 77, 81 (D.C. Cir. 1979) (same). Personal services

include "agreement[s] to render professional services." 6 Am. Jur. 2d § 28; *see also Spencer-Smith v. Ehrlich*, No. 23-cv-2652, 2024 WL 3291803, at *16 (Bankr. S.D.N.Y. July 3, 2024) (holding that an attorney engagement letter was "of the nature of a personal services agreement"). Since Covington's services are professional services, the Covington Engagement Letter cannot be assigned without Covington's consent. *See In re Planet Hollywood Int'l, Inc.*, 2000 WL 36118317, at *10 (Bankr. D. Del. Nov. 21, 2000) (finding debtors could not assume and assign contracts pursuant to section 365(c) when applicable state law prohibited the assignment of the personal service contracts at issue).

35. The Law Firms do not consent to the assumption and assignment of the Covington Engagement Letter in connection with the sale of the Insurance Coverage Action. The Law Firms would not oppose the assumption and assignment of the Covington Engagement Letter in connection with a sale of the Insurance Coverage Action to a buyer acceptable to the Law Firms as the assignee of the Debtors. However, because no buyer, much less an acceptable buyer, has been identified at this time, the Law Firms do not consent to assignment of the Covington Engagement Letter.[13]

36. In addition, the proposed cure amount for the Covington Engagement Letter should be $506.81 and assumption of the Fee obligation, instead of $0. Under the terms of the Covington Engagement Letter, the Debtors are required to reimburse Covington for Third Party Costs paid by Covington. As of the Petition Date, $506.81 in reimbursable expenses were due and owing. *See* POCs.

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[13] Notably, the Assumption and Assignment Notice lists certain engagement letters with third parties that were entered in connection with the Insurance Coverage Action. *See* Assumption and Assignment Notice at #1703-1707, 6184. Covington reserves the right to object to the assumption and assignment of these engagement letters and the engagement letter with Harold ("Wally") Pellerite at Pellerite Medical Device Consulting, LLC, which was not listed in the Assumption and Assignment Notice.

37. The Law Firms respectfully requests that the Court (i) deny any assumption and assignment of the Covington Engagement Letter without the Law Firms' express consent, and (ii) order the cure amount for the Covington Engagement Letter as $506.81 and assumption of the Fee obligation.

## RESERVATION OF RIGHTS

38. The Law Firms reserve all rights to be heard before the Court in connection with the Objection (and any joinders thereto), to amend, supplement, or otherwise modify the Objection prior to or during the hearing on the Objection, and to assert such other and further objections prior to the final adjudication of the matter. The Law Firms also expressly reserve the right to object to any sale on the grounds that proposed buyer has not provided adequate assurance of future performance under the Engagement Letters as required under section 365 of the Bankruptcy Code.

## CONCLUSION

WHEREFORE, the Law Firms respectfully request that the Court (i) deny the Debtors' request in the Sale Motion to sell any interest of the Debtors in the Insurance Coverage Action free and clear of the Vested Ownership Interest; (ii) deny the Debtors' request to assume and assign the Covington Engagement Letter; (iii) order that the cure amount for the Covington Engagement letter in any assumption and assignment is $506.81 and assumption of the Fee obligation; and (iv) grant such other and further relief as the Court deems just and proper.

Dated: August 2, 2024

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