UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In Re:	)	Chapter 11
	)	Case No. 24-11217 (BLS)
VYAIRE MEDICAL, INC., *et al.*,[1]	)	
	)	(Jointly Administered)
Debtors.	)	**Related Docket Nos. 16 and 249**

LIMITED OBJECTION AND RESERVATION OF RIGHTS OF FISCHER USA, INC. TO DEBTORS' MOTION 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 DEBTOR'S ASSETS FREE AND CLEAR, AND (VII) GRANTING RELATED RELIEF

Fischer USA, Inc. ("Fischer") by its attorneys, hereby files this limited objection ("Objection") to the *Debtors' Motion 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* [Docket No. 16] (the "Sale Motion"). In support of this Objection, Fischer states:

[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.

Background

1. On June 9, 2024, (the "Petition Date"), the Debtors each filed a voluntary petition for relief pursuant to Chapter 11 of the Bankruptcy Code.

2. On July 11, 2024, the Court entered its *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* (the "Sale Order"). [Dkt. No. 249].

3. On August 7, 2024, the Debtors filed a *Third Notice of Extension of Certain Key Dates and Deadlines* extending the time for interested parties to object to the Debtors' proposed sale to August 13, 2024. [Dkt. No. 353].

4. On August 12, 2024, Debtors held an auction to sell substantially all of their assets. [Dkt. No. 353].

5. A sale hearing on the auction is set for August 19, 2024, at 11:00 a.m. EST. [Dkt. No. 353].

6. Before the Petition Date, the Debtors were in the business of providing respiratory solutions to hospitals, health centers, and private practices.

7. In their respiratory products, the Debtors use a Shaft Ventilator Assembly, which consists of a shaft, key, retaining ring, and rotor ("Rotor Assemblies").

8. Prior to the Petition Date, Fischer serviced the Debtor's Rotor Assemblies pursuant to certain purchase orders between Fischer and the Debtors. Under those purchase orders, the

Debtors would deliver the raw material for the Rotor Assemblies to Fischer, and Fischer would perform certain repairs and other services to the Rotor Assemblies including grinding, balancing, and reassembly. The Rotor Assemblies would then be shipped back to the Debtors and Fischer would invoice the Debtors for the work.

9. Prior to the Petition Date, between January 17, 2024, and April 26, 2024, Fischer, at the Debtor's request assembled and balanced certain rotor assemblies for the Debtors' ventilators as more particularly described in the attached Exhibit A, and returned those completed rotor assemblies to the Debtors (the "**Returned Equipment**"). The invoice for the work completed on the Returned Equipment was for $67,622.00, and accrued $686.19 in interest prior to the Petition Date. *See* Account Statement attached hereto as **Exhibit A.** Also prior to the Petition Date, the Debtors delivered to Fischer certain parts and materials for rotor assemblies owned by the Debtors. Fischer, at the Debtors' request, assembled and balanced 800 rotor shafts for Debtors' ventilators. This work has not yet been invoiced, and Fischer remains in possession of the 800 rotor shafts and parts (the "**Retained Equipment**"). The amount due for the completed work on the Retained Equipment is $46,400.00. *See* Pro Forma Invoice attached hereto as **Exhibit B**. In total, the Debtor owes Fischer $114,708.19 for work completed on the Retained Equipment and the Returned Equipment. The work performed on both the Returned Equipment and the Retained Equipment was performed pursuant to the Purchase Order attached hereto as **Exhibit C**.

10. Fischer currently remains in possession of the Retained Equipment.

11. As described below, Fischer asserts a first-priority possessory lien against the Retained Equipment in an amount of $100,766.98, which is the estimated value of the Retained Equipment.

12. The Debtors wish to sell substantially all of their assets free and clear of liens, claims and encumbrances. The Sale Motion indicates that the Debtors intend to sell substantially all, or any portion of their assets, which necessarily includes their raw material and equipment "free and clear of all liens, claims, rights, interests, pledges, obligations, limitations, charges, encumbrances, and other interests . . . ." [Doc. No. 16, Sale Motion at ¶ 1].

13. To date, the Debtors have not identified a stalking horse bidder, nor have they filed an asset purchase agreement.

Objection to Sale

14. Fischer objects to the Sale Order to the extent that the Debtors intend to strip Fischer's possessory liens and/or sell the Retained Equipment free and clear of Fischer's possessory liens without providing adequate protection under 11 U.S.C. 363(e).

15. Fischer's right to assert possessory liens on the Retained Equipment arise under Wisconsin statutory and common law because all of Fischer's work performed on the Retained Equipment was done in Wisconsin, and the Retained Equipment has remained in Fischer's possession at its facility in Wisconsin. Wis. Stats. § 779.41(1); *see also In re Cuff*, 54 B.R. 424, 425-426 (Bankr. W.D. Wis. 1985).

A. Fischer's Statutory Lien.

16. Fischer has a lien on the Retained Equipment under Wis. Stats. § 779.41(1), which is Wisconsin's "Mechanic's Lien" statute. Fischer's mechanic's lien secures the amount due for work performed and materials expended on the Retained Equipment ($46,400.00), and takes

priority over prior-perfected security interest to the extent of $1,500.00.[2] Section 779.41(1) of the Wisconsin Statutes reads, in part:

> Every mechanic and every keeper of a garage or shop, and every employer of a mechanic who transports, makes, alters, repairs or does any work on personal property at the request of the owner or legal possessor of the personal property, **has a lien on the personal property for the just and reasonable charges therefor, including any parts, accessories, materials or supplies furnished in connection therewith and may retain possession of the personal property until the charges are paid.** The lien provided by this section is subject to the lien of any security interest in the property which is perfected as provided by law prior to the commencement of the work for which a lien is claimed unless the work was done with the express consent of the holder of the security interest, but only for charges in excess of $1,500 . . . .

Wis. Stat. § 779.41(1) (emphasis added).

B. Fischer's Common Law Bailee's Lien.

17. More importantly, under Wisconsin statutory and common law, Fischer has a first-priority possessory lien against the Retained Equipment, which secures the value of Fischer's labor performed on both the Retained Equipment ***and*** the labor performed on the Returned Equipment (i.e., $114,708.19). *See* Wis. Stat. § 779.41(1) (providing for possessory mechanic's lien) and *Moynihan Assoc. Inc. v. Hanisch*, 56 Wis. 2d. 185, 190 (1972) (describing operation of Wisconsin's common law bailee's lien, which provides first-priority possessory lien for value of work performed and materials expended); *see also Butner v. United States*, 440 U.S. 48, 49 (1979); *In re Cuff*, 54 B.R. at 425-426; and *In re Farrenkopf*, 305 B.R. 382, 385 (Bankr. D. Mass. 2004).

18. Wisconsin law recognizes a common law bailee's lien in instances where "a person who has bestowed labor upon an article or done some other act in reference to it by which its value

[2] To the extent Fischer's work was done with the express written consent of the holder of a prior-perfected security interest, Fischer's lien under Wis. Stat. § 779.41(1) takes priority over such prior security interest to the full extent of Fischer's statutory lien ($46,400).

has been enhanced," and the bailee has the right to detain the article until the bailee is reimbursed for its expenditures and labor. *See Moynihan*, 56 Wis. 2d at 190. Such is the case here.

19. A Wisconsin common law bailee's lien arises when the following elements are present:

> 1. There is an agreement, express or implied, to redeliver the property bailed when the purpose of the bailment has been fulfilled;
>
> 2. Possession of the chattel must be temporarily transferred while general title of the chattel remains in the hands of the original owner; and
>
> 3. The general title holder must be out of possession of the chattel, and the bailee must have possession of it.

See Moynihan, 56 Wis. 2d at 190-191.

20. Each of the above elements are present here. Debtors delivered the Retained Equipment (and related materials) to Fischer with the understandings that Fischer would perform the necessary assembly, balancing, and other services to the Rotor Assemblies and then redeliver the assemblies to the Debtors once the work was completed, and Fischer currently remains in possession of the Retained Equipment even though the Debtors have the general title to it.

21. In such cases, the work to be done upon the bailed property may be regarded as a single transaction, agreement, or unit the lien attaches to all property in the bailee's possession to secure payment of work completed on the property in the bailee's possession, <u>as well as work completed on property that has already been returned to the owner of the property.</u> *Moynihan*, 56 Wis. 2d at 192 ("The fact that part of the goods was returned is immaterial. The rule is that the work to be done upon the bailed article may be regarded as a unit, and the lien attaches to all of the property.").

22. As explained, Fischer serviced the Debtors' Rotor Assemblies under an agreed upon purchase order. It follows that, all work performed to the Rotor Assemblies pursuant to the

purchase order constitutes a single transaction, agreement, or unit. Thus, Fischer has a common law bailee's lien against the Retain Equipment that secures the entire $114,708.19for services completed and materials expended by Fischer on the Returned Equipment *and* the Retained Equipment.

23. Fischer's common law bailee's lien is a first-priority possessory lien against the Retained Equipment. Article 9-333 of the Uniform Commercial Code, adopted by Wisconsin at Wis. Stats. § 409.333, defines "possessory lien" as a lien "(a) [w]hich secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business; (b) [w]hich is created by statute *or rule of law* in favor of the person; and (c) [w]hose effectiveness depends on the person's possession of the goods." Wis. Stats. § 409.333(1)(a) – (c) (emphasis added).

24. Further, "a possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise." Wis. Stat. § 409.333(2).

25. Here, Fischer's common law bailee's lien meets all of the elements for a possessory lien because Fischer's lien secures payment for services and materials, created by common law rule of law and is based on Fischer's possession of the Retained Equipment. Because the common law bailee's lien is not created by a statute that curtails its priority, Fischer has a first-priority lien in the entire amount of $114,708.19 (up to the value of the Retained Equipment, which Fischer estimates to be $100,766.98).

C. Fischer is entitled to Adequate Protection under 11 U.S.C. §§ 363(3) and 361.

26. Section 363(e) of the Bankruptcy Code states "[n]otwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or with a

hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e).

27. Section 361 of the Bankruptcy Code defines "adequate protection." A debtor may satisfy section 363(e)'s adequate protection requirement by providing cash payments, or periodic cash payments, additional or replacement liens, or other relief that will result in the realization of the "indubitable equivalent" of an entity's interest in the property. *See* 11 U.S.C. § 361.

28. Fischer is entitled to adequate protection to the extent that the Sale Order and forthcoming sale of the Debtors' assets seek to strip Fischer's possessory liens and/or sell the Retained Equipment "free and clear" of Fischer's possessory liens. The Sale Motion does not provide for adequate protection of Fischer's possessory lien rights in the Retained Equipment. To the contrary, the Sale Motion and Sale Order contemplate a sale of the Debtors' assets "free and clear of liens, claims, interests, and other encumbrances," which purportedly includes the future sale of the Retained Equipment free and clear of Fischer's possessory lien rights without payment to Fischer of any identifiable proceeds.

29. The Court should not allow the Debtors to strip Fischer's possessory liens, nor allow the Debtors to sell the Retained Equipment free and clear of Fischer's first-priority liens on a contingent basis or otherwise, without the provision that the Debtors provide Fischer adequate protection.

Reservation of Rights

30. Fischer hereby reserves the right to appear at the August 19, 2024, sale hearing and to supplement this Objection.

WHEREFORE, the undersigned requests that the Court: (a) deny the sale of the Debtors' assets to the extent that such sale strips Fischer of its possessory liens and/or the sale of the

Retained Equipment free and clear of Fischer's possessory liens without the provision of adequate protection to Fischer; and (b) grant such other and further relief as the Court deems appropriate.

Date: August 13, 2024
Wilmington, DE

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