IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

HARTFORD FIRE INSURANCE COMPANY AND HARTFORD INSURANCE COMPANY OF THE MIDWESTS' RESERVATION OF RIGHTS AND LIMITED OBJECTION TO THE DEBTORS' SUCCESSFUL BIDDER NOTICE TO BE FILED PURSUANT TO THE DEBTOR'S 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

Hartford Fire Insurance Company and Hartford Insurance Company of the Midwest (collectively, "Hartford" or the "Sureties"), by and through its undersigned counsel, hereby submits this limited objection (the "Limited Objection") to any sale agreement or Notice of Successful Bidder to be filed by the Debtors pursuant to the 1) *First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [Docket No. 256] (the "Assumption Notice"); and 2) the *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)*

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[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' proposed 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.

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 "Bid Procedures Motion"). In support of the Objection, Hartford respectfully states the following:

1. On June 9, 2024 (the "Petition Date"), Vyaire Medical, Inc. and certain of its affiliates (collectively, the "Debtors") each filed a voluntary petition for bankruptcy relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

2. On the Petition Date, the Debtors filed the Bid Procedures Motion seeking entry of an order approving, inter alia, one or more proposed Sale Transaction(s) and procedures for the assumption and assignment of contracts in connection therewith.

3. Prior to the Petition date, Hartford issued certain Pharmaceutical and Customs bonds on behalf of certain Debtors.

4. In connection with Hartford's execution and/or issuance of the Bonds, certain of the Debtors and/or their non-debtor affiliates executed in favor of Hartford, a General Indemnity Agreement (the "Indemnity Agreement").

5. On June 10, 2024, the Debtors filed a *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing The Debtors to (A) Maintain Insurance and Surety Coverage Entered into Prepetition and Pay Related Prepetition Obligations, and (B) Renew, Supplement, Modify or Purchase Insurance and Surety Coverage, and (II) Granting Related Relief* [ECF No. 9] (the "Surety Motion").

6. The Surety Motion identifies the following bonds (the “Bonds”) issued on behalf of the Debtors, by Hartford, as surety, totaling $700,000.00:

Principal	**Bond No.**	**Obligee**	**Nature of Bond**	**Expiration Date**	**Bond Amount**
Vyaire Medical, Inc. and Vyaire Medical 211, Inc.	20BSBAA2688	California State Board of Pharmacy	Pharmaceutical Bond	04/30/2025	$100,000
Vyaire Medical, Inc. and Vyaire Medical 211, Inc.	20BSBIL8800	Nevada State Board of Pharmacy	Pharmaceutical Bond	10/21/2024	$100,000
Vyaire Medical, Inc.	20BSBAA2687	Maryland Board of Pharmacy	Pharmaceutical Bond	04/30/2025	$100,000
Vyaire Medical, Inc.	22C000T8M	Bureau of Customs and Border Protection	Custom Duty	06/07/2025	$400,000

7. On July 11, 2024, the Bankruptcy Court entered the *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. 249] (the “Bid Procedures Order”) granting the relief requested in the Bid Procedures Motion.

8. Pursuant to the Bid Procedures Order, on July 11, 2024, the Debtors filed the Assumption Notice.

9. On the Assumption Notice, the Debtors identify the following potentially assumed and assigned contract that may be assumed and assigned to a Successful Bidder in connection with a Sale Transaction and the proposed Cure Amount with respect to the same:

Row #	**Unique Vendor Name**	**Debtor Entity**	**Description**	**Cure Amount**
2946	Hartford Fire Insurance Company	Vyaire Medical, Inc.	Hartford Fire Insurance Company 2019-04-15 NDA	$0.00

10. On August 7, 2024, the Debtors filed a *Third Notice of Extension of Certain Key Dates and Deadlines* [ECF No. 353] (the "Notice") setting the deadline for the Debtors to file a successful bidder notice on August 12, 2024 (or as soon as reasonably practicable). Further, the Notice set the Deadline for any Post-Auction Objections for August 13, 2024.

11. As of the date of this Limited Objection, the Debtors have failed to file a successful bidder notice.

12. Based on the Assumption Notice, the only contract listed involving Hartford is an NDA. Therefore, the Debtors do not appear to contemplate a potential sale or other transfer of at least a portion of the Bonds in connection with the proposed Sale Transaction(s). Hartford, therefore, as a precaution object to any Sale Transaction to the extent that the Debtors seek to assume and assign or otherwise transfer any portion of the Bonds and/or any of the rights, benefits, interests, and/or proceeds thereunder.

13. Further, Hartford files this Limited objection as a precaution until the Debtors file a successful bidder notice. Hartford reserves its right to amend this limited objection once the Debtors file a successful bidder notice and sale agreement.

OBJECTION

14. By way of this Limited Objection, Hartford does not object to the concept of the proposed sale of Debtors' assets or the concept of bidding procedures being approved, as contemplated in the Bidding Procedures Motion. However, Hartford hereby objects and puts all parties on notice that, inter alia, the Indemnity Agreement and Bonds cannot be sold, transferred and/or assumed and assigned without the consent of Hartford, which consent is currently not granted by Hartford, but which may or may not be granted by Hartford, after Hartford has more information concerning a proposed sale.

15. With respect to the Debtors' request seeking to have the Bankruptcy Court authorize assumption and assignment of executory contracts, to the extent that the Debtors seek to assume and assign any of the Bonds or the Indemnity Agreement, such assumption and assignment is not allowed pursuant to 11 U.S.C. § 365(c)(2) (absent the Surety's consent). The Indemnity Agreement is a "financial accommodation" contract through which the Bonds, among other things, are executed, issued and/or controlled, and thus all of these and related assets of the Surety may not be assumed or assigned without prior consent of the Surety.

16. Specifically, the ability of a debtor to assume and assign a contract is not unlimited. The Bankruptcy Code specifically prohibits debtors from assuming certain contracts. Section 365 (c)(2) provides the following in pertinent part:

> (c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if— …
>
> (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor….

(emphasis added).

17. The Bankruptcy Code does not define the term “financial accommodation.” See e.g. *In re Adana Mortg. Bankers, Inc.*, 12 B.R. 977, 986 (Bankr. N.D. Ga. 1980) (regarding “financial accommodations” as used in Section 365(e)(2)(B)).

18. However, in *In re Adana*, the Court found the following regarding guaranty agreements:

> The debtor contends that the Guaranty Agreements do not constitute contracts to make financial accommodations to or for the benefit of debtor. To the contrary, the facts show that the Guaranty Agreements are contracts to make financial accommodations to or for the benefit of debtor. First, the debtor asserts that the securities constitute a type of liability of the debtor. Second, GNMA is obligated to pay the securities holders if the debtor fails to do so. In other words, GNMA is required by the Guaranty Agreements to make payments promptly on liabilities of the debtor, should the debtor fail to make them. The obligation to pay money on the obligation of another is a financial accommodation.

Id. at 987.

19. Surety bonds are considered “financial accommodations” because they represent obligations to pay money based on the obligations of another. *In re Wegner Farms Co.*, 49 B.R. 440 (Bankr. N.D. Iowa 1985). The Wegner Farms Court explained that:

> Certainly a surety bond does not fit neatly within the framework of traditional debt financing. Nonetheless, as noted by the court in In re Adana Mortgage Bankers Inc., 12 B.R. 977, 987 (Bkrtcy.N.D.Ga.1980) (Adana I), even giving the term financial accommodation a narrow construction, “[t]he obligation to pay money on the obligation of another is a financial accommodation” within the meaning of section 365(c) and (e).

Id. at 444. Further, as set forth in *Matter of Edwards Mobile Home Sales, Inc.*, 119 B.R. 857, 859 (Bankr. M.D. Fla. 1990):

> This Court agrees with the finding in Wegner and Adana I that an obligation to pay the debts of another is a “financial accommodation” and as such is encompassed by Section 365(c)(2). Accordingly, the Court finds the Ohio Casualty surety bond to be a

> financial accommodation which cannot be assumed pursuant to Section 365(c)(2).

20. Here, the Surety issued Bonds on behalf of certain of the Debtors and/or their nondebtor affiliates by virtue of, among other things, the Indemnity Agreement. The Bonds and the Indemnity Agreement, without limitation, are financial accommodation contracts and therefore, they are not assignable by the Debtors at this time.

21. The Surety also objects to any assumption or assignment of either of the Bonds, as they are not property of the Debtor or its estate and therefore cannot be assigned. "[T]he 'overwhelming weight of authority,' under both the Bankruptcy Act and Code holds that a contractor [principal] has no property interest in a surety bond issued by a third-party [surety] to guarantee the contractor's performance on its commercial or personal services contracts." *O'Malley Lumber Co. v. Lockard (In re Lockard)*, 884 F.2d 1171, 1177 (9th Cir. 1989). Moreover, because the Debtor has no property rights in the Bonds, the Debtor cannot simply transfer the Bonds to a winning bidder. The Bonds do not assure performance of any party other than the named principal. In fact, the law of suretyship is clear that a surety is discharged from liability under its bond if there is an involuntary substitution of the principal under the bond, since such a change is a material modification to the underlying bonded contract that is prejudicial to the surety. *See, e.g., Becker v. Faber*, 19 N.E.2d 997, 999 (N.Y. 1939). Accordingly, the Bonds and surety's obligations thereunder are not assignable to a new principal without the surety's consent.

22. The auction, if any, was to take place on August 12, 2024, the day before any objections to the Sale Agreement would be due. The winning bidder is not yet known, and the Surety does not know the form of proposed asset purchase agreement, sale order and/or other documents related to any final sale.

23. Language should be added in the Sale Agreement, if not already in the Sale Agreement, in which the Winning Bidder is required to replace the Bonds such that they are fully released and discharged, and that the Winning Bidder indemnify the Surety from losses, costs and expenses incurred by the Surety to the extent, if any, the Surety is exposed to same under a formal or informal transition agreement (and language should be added to the Sale Order consistent with this paragraph).

24. Further, Beneficiaries/obligees on the Bonds may have recoupment or setoff rights, by which the Surety may be subrogated to if it makes payment of a claim under any of the Bonds. Recoupment is a creditor's right, long recognized in bankruptcy proceedings that is not in the nature of a mere lien, but is a defense to a claim for payment. *Lee v. Schweiker,* 739 F. 2d 870, 875 (3d Cir. 1984) ("[W]here the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim . . . ."). In other words, the recoupment is used to determine the proper liability on amounts owed. *Reiter v. Cooper*, 507 U.S. 258, 265 n.2 (1993).

25. Setoff "gives a creditor the right 'to offset a mutual debt owing by such creditor to the debtor,' provided that both debts arose before commencement of the bankruptcy action and are in fact mutual." *In re University Medical Center,* 973 F.2d 1065, 1079 (3d Cir. 1992) (*quoting in re Davidovich*, 901 F.2d 1533, 1537 (10th Cir. 1990). While setoff rights are defined and delineated by applicable non-bankruptcy law, the Bankruptcy Code recognizes and preserves these rights: "11 U.S.C. § 553(a) provides that with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy." *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16, 18 (1995); *see also In re Luongo*, 259 F.3d 323, 333 (5th Cir. 2001) ("It is impossible for us to

ignore the clear statement of § 553 that 'this title . . . does not affect any right of a creditor to offset . . . .'") (internal quotation source omitted).

26. Setoff "gives a creditor the right 'to offset a mutual debt owing by such creditor to the debtor,' provided that both debts arose before commencement of the bankruptcy action and are in fact mutual." *In re University Medical Center*, 973 F.2d 1065, 1079 (3d Cir. 1992) (*quoting in re Davidovich*, 901 F.2d 1533, 1537 (10th Cir. 1990). While setoff rights are defined and delineated by applicable non-bankruptcy law, the Bankruptcy Code recognizes and preserves these rights: "11 U.S.C. § 553(a) provides that with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy." *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995); *see also In re Luongo*, 259 F.3d 323, 333 (5th Cir. 2001) ("It is impossible for us to ignore the clear statement of § 553 that 'this title . . . does not affect any right of a creditor to offset . . . .'") (internal quotation source omitted).

27. Because a purchaser's interest is wholly derivative of the Debtor's interest, a winning bidder would have no greater right to payment than the Debtors. Put simply, the Debtors cannot assign greater rights than the Debtors possess. Further, any security interests granted to a lender remains subject to a Bond obligee's (or the Surety's, to the extent subrogated), setoff and recoupment rights. *See Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1403 (9th Cir. 1996) (holding that recoupment does not impair third party's security interest, but "merely serves to determine the value of the claim in which the third party holds its interest"). Accordingly, language should be added to any Sale Agreement, if not already in the Sale Agreement, protecting those rights of the Surety's obligees and the Surety (and language should be added to the Sale Order consistent with this paragraph).

RESERVATION OF RIGHTS

28. The submission of this Limited Objection by the Surety is not intended as, and shall not be construed as: (a) the Surety's admission of any liability or waiver of any defenses or limitation of any rights of Surety with respect to any claims against any one or more of the Bonds or under any indemnity agreement in favor of the Surety, including the Indemnity Agreement; (b) the Surety's waiver or release of any right to exoneration it may have against anyone with respect to any of the Bonds; (c) the Surety's waiver or release of its right to be subrogated to the rights of one or more of the parties paid in connection with the Bonds; (d) an election of remedy; or (e) consent to the determination of any of the Debtors' liability to the Surety by any particular court, including, without limitation, the Bankruptcy Court.

29. The Surety reserves the right to object and put forth any argument in relation to any sale proposed by the Debtors, after an auction or otherwise, and to raise any arguments by any other party in their objection(s) to the Motions or any future sale hearing.

30. The Surety reserves the right to object and put forth any argument in relation to any motion filed by the Debtors for the Bankruptcy Court's authorization of assumption and assignment of executory contracts and unexpired leases, and to raise any arguments by any other party in their objection(s) to the Motion.

31. The Surety expressly reserves, and does not waive, any and all of its rights, claims, defenses, limitations, and/or exclusions in connection with its and any of the Debtors' or its affiliates' rights and obligations under the Indemnity Agreement, the Bonds, applicable law, or otherwise. Surety further reserves all rights to assert any and all such rights, claims, defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including, without limitation, any of its rights to have any non-core matter relating to the interpretation of its

contractual rights and Debtors' contractual obligations adjudicated by the United States District Court).

32. Surety further reserves all of its rights to raise any issues contained in this Limited Objection and any other related issues in any procedurally appropriate contested matter and/or adversary proceeding, including, without limitation, (i) objections to confirmation of any plan; (ii) a separate adversary proceeding requesting any appropriate declaratory and/or injunctive relief; (iii) or an objection to any subsequent motion seeking approval of an asset sale to any prospective asset purchaser with respect to any contractual rights that may be adversely affected by a sale motion or the confirmation of any plan.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Hartford respectfully objects on limited basis to any Sale Agreement or Notice of Successful Bidder entered by the Debtors for the reasons set forth above and for such other relief as the Bankruptcy Court may allow.

MCELROY DEUTSCH MULVANEY & CARPENTER, LLP

Dated: August 13, 2024

By: */s/ Gary D. Bressler*

Gary D. Bressler
300 Delaware Avenue, Suite 1014
Wilmington, DE 19801
Tel: 302-300-4515
gbressler@mdmc-law.com

-and-

Michael R. Morano
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962
Tel: 973-993-8100
mmorano@mdmc-law.com

Counsel to Hartford Fire Insurance Company and Hartford Insurance Company of the Midwest