IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
VYAIRE MEDICAL, INC., *et al.*,[1]	)	Case No. 24-11217 (BLS)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 16, 249, 255, 437**

SUPPLEMENTAL RESERVATION OF
RIGHTS AND LIMITED OBJECTION OF THE
OFFICIAL COMMITTEE OF UNSECURED CREDITORS
WITH RESPECT TO THE SALE OF THE DEBTORS' ASSETS

The Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 cases of Vyaire Medical, Inc. and certain of its affiliates as debtors and debtors in possession (collectively, the "Debtors") files this supplemental reservation of rights and limited objection with respect to the Debtors' request for entry of the Proposed Sale Orders (as defined below) approving of the sale of certain of the Debtors' assets (the "Supplemental Reservation of Rights and Limited Objection"). In support of this Supplemental Reservation of Rights and Limited Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT[2]

1. While the Committee remains supportive of the proposed sales of the Debtors' assets, the Committee cannot condone or support the attempts by the Debtors and the DIP Lenders/First Lien Group to saddle unsecured creditors with all the risk in these cases, particularly

[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] Capitalized terms not otherwise defined in this preliminary statement shall have the meanings ascribed to such terms elsewhere in this Supplemental Reservation of Rights and Limited Objection.

when most unsecured creditors are continuing to do business with the Debtors on a postpetition basis in furtherance of the goal of achieving going concern sales of the Debtors' businesses. The Committee was compelled to file this Supplemental Reservation of Rights and Limited Objection in light of information that has come to its attention this week. More specifically, following the August 26th Hearing, the Committee, much by accident, became aware that the Debtors and the DIP Lenders/First Lien Group entered into a case-dispositive agreement on August 11, 2024, which, among other things, (a) provided that the new money portion of the DIP Facility approved under the Final DIP Order[3] would be reduced by $5 million, and (b) set in stone distributions on account of claims under a chapter plan that has yet to be filed (as described more fully below, the "Allocation Agreement"). The terms of the Allocation Agreement are embodied in both the Holdback Schedule and the Proposed Sale Orders, meaning that if the Proposed Sale Orders are entered in their current form, unsecured creditors have no path to recoveries and will have been completely disenfranchised in these cases.

2. Putting aside both the lack of Committee engagement with respect to the Allocation Agreement and the Holdback Schedule and the fact that the Debtors and the DIP Lenders/First Lien Group have unilaterally effectuated material modifications to the DIP Facility without Court approval or notice to parties, by agreeing to forgo $5 million of available financing under the DIP Facility, the Debtors are placing these cases in a precarious position.[4]

3. As discussed below, the Committee has already identified serious concerns with the Holdback Schedule in the scant days since the Committee became aware of its existence. Put

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[3] *Final Order (I) Authorizing the Debtors to Obtain Postpetition Financing, (II) Authorizing the Debtors' Use of Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, and (VI) Granting Related Relief* [Docket No. 248].

[4] *See* Zoll Sale Order, ¶ 29; Trudell Sale Order, ¶ 29.

simply, there are too many unknown variables and moving parts to justify the Court's approval or the Holdback Schedule and its implementation of the Allocation Agreement at this point in these cases.

4. And, as noted above, approval of the Holdback Schedule at this stage through the Proposed Sale Orders would, among other things, (a) inappropriately dictate the treatment of, and distributions on account of, the claims of unsecured creditors under the Debtors' eventual chapter 11 plan, (b) deprive the Debtors' creditors of the numerous statutory protections afforded to them under the Bankruptcy Code in the plan confirmation process, and (c) would be tantamount to approving a *sub rosa* plan.

5. For these reasons and those set forth below, the Committee requests that the Court enter orders approving the proposed sale transactions, but that the Court decline to approve the portions of the Proposed Sale Orders that incorporate the Holdback Schedule, the DIP Payout Amount, and the Allocation Agreement, and forestall the Debtors' and DIP Lenders/First Lien Group's attempts to unilaterally make material modifications to this Court's Final DIP Order so that the Committee may be provided with an appropriate amount of time to engage with the Debtors and the DIP Lenders/First Lien Group with respect to the formulation of a chapter 11 plan.

BACKGROUND

6. On August 22, 2024, the Committee filed the *Reservation of Rights of the Official Committee of Unsecured Creditors With Respect to the Sale of the Debtors' Assets* [Docket No. 437] (the "Initial Reservation of Rights"), which the Committee incorporates herein by reference as if set forth in full.[5]

[5] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Initial Reservation of Rights.

7. On August 24, 2024, the Debtors filed the *First Supplemental Notice to Contract Counterparties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [Docket No. 462] (the "Supplemental Cure Notice").

8. On August 25, 2024, the Debtors, approximately two weeks after the Committee's initial request to see a winddown budget demonstrating that the Debtors would have sufficiently liquidity to bridge the additional time to close the sale transactions, the Debtors provided the Committee with a proposed winddown schedule (the "Holdback Schedule").[6]

9. On August 26, 2024, the Court held a hearing with respect to the Debtors' proposed sales (the "August 26th Hearing"). During the hearing, counsel for the Debtors informed the Court that the Debtors, the DIP Lenders/First Lien Group (as defined in the Final DIP Order), and the Committee had not agreed to the application of the proceeds of the proposed asset sales and that the parties required additional time to discuss and potentially reach a resolution with respect to same.[7]

10. Following the August 26th Hearing, the Committee, much by accident, was made aware of the fact that on August 11, 2024, the Debtors and the DIP Lenders/First Lien Group had reached an agreement dictating modifications to the DIP Credit Agreement and Final DIP Order,

[6] The Approved Budget (as defined in the Final DIP Order) in these cases outlined the Debtors' liquidity through September 6, 2024 (*see* Docket No. 103, Ex. B), which was 18 days after the outside date to consummate a sale transaction under the DIP Credit Agreement. See DIP Credit Agreement, Annex I. Currently, the closing dates of the sale transactions are anticipated to take place during the week ending October 4, 2024 (for the Zoll sale transaction) and the week ending October 18, 2024 (for the Trudell sale transaction). As noted in its Initial Reservation of Rights, the Committee raised concerns with respect whether the Debtors would have sufficient liquidity to bridge the additional 42 days to the closing of the Trudell sale transaction.

The Holdback Schedule referenced in this Supplemental Reservation of Rights and Limited Objection is more akin to a winddown budget and is not the document that the Debtors attached to the Proposed Sale Order as an exhibit.

[7] Following discussions amongst the parties, the Debtors adjourned the hearing to approve the Debtors' proposed sales to Zoll and Trudell to August 30, 2024 at 12:00 p.m. (prevailing Eastern Time) [Docket No. 467] (the "Sale Hearing").

which, among other things, (a) provided that the Debtors would forgo $5 million of the $45 million new money portion of the debtor-in-possession financing (the "DIP Facility") approved under the Final DIP Order; (b) allocated the proceeds of the sales and dictated the timing of payments with respect to same; (c) included the Debtors' stipulation that the claims of the DIP Lenders/First Lien Group will not be waived; and (d) determined the amount of funds that would be left behind for the winddown of the Debtors' estates and their non-Debtor foreign subsidiaries.

11. On August 27, 2024, the Debtors filed revised Proposed Sale Orders approving the sales to Zoll and Trudell, which incorporated the terms of the Allocation Agreement and the Holdback Schedule.[8]

RESERVATION OF RIGHTS

12. The Committee learned of the Allocation Agreement following the August 26th Hearing after counsel inadvertently solicited information that resulted in the Debtors' disclosure of same. Further, despite having requested a winddown budget for weeks, the Committee did not receive the Holdback Schedule until August 25th.

13. Among other things, the Allocation Agreement and the Holdback Schedule provide for: (a) a reduction of the total amount available under the DIP Facility from $45 million to $40 million; (b) the allocation of the proceeds of the sale transactions and the timing of payments to the DIP Lenders/First Lien Group; (c) the Debtors' stipulation that the claims of the DIP Lenders/First Lien Group will not be waived following the proposed payments; and (d) the portion

[8] *See* Docket No. 470, ¶ EEE (authorizing the release of $5 million from the Escrow Account); ¶ FFF (preserving any deficiency claims of the DIP Lenders/First Lien Group and the Prepetition Secured Parties (as defined in the Final DIP Order); ¶¶ JJ, DDD, EEE, 4, 5, and 10 (authorizing the DIP Payment Amount). *See also*, Docket No. 471, ¶ FFF (preserving any deficiency claims of the DIP Lenders/First Lien Group and the Prepetition Secured Parties (as defined in the Final DIP Order); ¶¶ KK, EEE, FFF, 4, 5, and 10 (authorizing the DIP Payment Amount).

of the sale proceeds that will be left behind to wind down the Debtors' estates following the closings of the sale transactions.

14. Through the Proposed Sale Orders, the Debtors seek approval of the Holdback Schedule and the Allocation Agreement, neither of which include any input from the Committee. While the Committee supports the proposed sale transactions, for the reasons outlined below, the Committee opposes entry of any sale order that approves or implements the terms of the Allocation Agreement or the Holdback Schedule.

15. First, while the Holdback Schedule effectively reduces the DIP financing that was approved by this Court, the Debtors will remain liable for approximately $1.4 million of interest and fees attributable to (i) the incremental $5 million that will no be longer available to administer these cases, and (ii) the related $15 million of prepetition debt that was rolled up as a result of such $5 million commitment from the DIP Lenders/First Lien Group.

16. Among other things, this unilateral reduction in borrowings under the DIP Facility violates the terms of the Final DIP Order, which requires that the Debtors: (a) provide Committee counsel with at least one business days' notice of any non-material amendments to the DIP Documents (as defined in the Final DIP Order);[9] (b) obtain Court approval of any material modification of or amendments to the DIP Documents;[10] and (c) coordinate weekly calls with the Committee "to discuss, among other things, the financial performance with the Company, including any variance and liquidity reporting, the sale process, the investigation, and the general

[9] Final DIP Order, ⁋ 3(d)(2).

[10] *Id.*

administration of the Chapter 11 Cases."[11] The Committee specifically negotiated the inclusion of each of these provisions in the Final DIP Order.

17. In addition, under the Bid Procedures, the Debtors are required to "regularly and timely" consult with the Committee throughout the sale process.[12] Again, the Committee specifically negotiated for extensive consultation rights under the Bid Procedures.

18. The Debtors have plainly failed to fulfill these obligations. The Debtors did not provide notice to the Committee of the reduction of the amounts available to be drawn under the DIP Facility prior to entering the Allocation Agreement on August 11, 2024, and failed to seek, let alone obtain, this Court's approval of this material modification to the DIP Facility. Furthermore, despite repeated requests by Committee counsel, Debtors' counsel has failed to regularly consult with Committee counsel regarding the sale process. The fact that the Committee learned of the Allocation Agreement *two weeks after the fact* demonstrates that the Debtors are in blatant violation of their obligations to engage with the Committee under the Final DIP Order and the Bid Procedures and have disregarded the Committee's mandate under the Bankruptcy Code and role in these cases.

19. Second, the Committee has serious concerns with respect to the Debtors' liquidity position under the Allocation Agreement and following the DIP Paydown Amount (as that term is defined in the Proposed Sale Orders). For one, the list of contracts to be assumed and assigned to Zoll under the Zoll Asset Purchase Agreement reflect aggregate cure amounts of approximately \$9.1 million.[13] Under the Zoll Asset Purchase Agreement, Zoll is responsible for satisfying up to \$5 million of cure costs (the "Zoll Cure Cap") and the Debtors are responsible for satisfying all

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[11] Final DIP Order, ⁋ 4(c).

[12] Bid Procedures Order, Ex. 1 (*passim*).

[13] *See* Supplemental Cure Notice.

cure costs over and above the Zoll Cure Cap – i.e., approximately \$4.1 million.[14] The Holdback Schedule, however, *allocates no funds* for the payment of cure costs, let alone \$4.1 million. The Debtors offer no reasonable explanation as to how these amounts will be paid and ignore the fact that the \$5 million of liquidity available under the full DIP Facility that they are voluntarily giving up *would cover these cure costs*.

20. Further, no administrative bar date has been set in these cases, nor has the governmental bar date passed. Accordingly, the Debtors' estimates of the administrative claims pool likely understate the total amount of claims, as the Debtors will only have a complete understanding of that number once the bar dates have passed. To the extent that there are any delays in the closings of the sales or consummation of a plan (which the Debtors are anticipating due in part to the need for the purchasers to obtain certain regulatory approvals), there will be incremental costs to fund the Debtors' estates, which serve to exacerbate the Committee's concerns, as there is scant room for error under the Holdback Schedule.[15]

21. Moreover, the Holdback Schedule and related budget run through October 18, 2024, the anticipated closing of the Trudell Sale. The Committee does not know whether the Debtors intend for the effective date of a plan to coincide with the closing of the Trudell Sale, but either way, the math does not make sense. The Debtors have yet to file a plan or disclosure

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[14] *See* Zoll Purchase Agreement, § 1.4(h) (stipulating that the Debtors are liable for all Cure Costs in excess of \$5 million).

[15] The DIP Lenders/First Lien Group have been limiting the Debtors' access to the DIP Facility throughout these cases. Under the DIP Credit Agreement (as defined in the Final DIP Order), the Debtors did not receive access to the \$45 million DIP Facility; instead, the Debtors are required to request withdrawals from the escrow account holding these funds in increments of not more than \$2 million.[15] *See* Final DIP Order, ⁋ 3(e); DIP Credit Agreement, § 4.02(e). After the initial DIP funding during the week ending June 14, 2024, the Debtors made withdrawal requests and received funding from the DIP Facility as follows: (i) the week ending July 26, 2024, the Debtors requested \$4 million and received \$3 million; (ii) the week ending August 2, 2024, the Debtors requested \$4 million and received \$3 million the week ending August 16, 2024; and (iii) the week ending August 16, 2024, the Debtors requested \$4 million and received that amount the week ending August 23, 2024. In light of this, the Committee is concerned that there may be additional, unpaid administrative expenses that would further strain the Debtors' liquidity.

statement and even if the Debtors were to successfully avail themselves of the expedited procedures of a combined plan and disclosure statement process under this Court's Local Rules, the Debtors would have had to file a plan and disclosure statement on August 13, 2024.[16] Even if the Debtors filed a plan and disclosure statement next week (which is unlikely as the Committee has yet to lay eyes on a draft), the Debtors will continue to incur additional administrative expenses well beyond October 18, 2024, which, again, are not adequately accounted for in the Holdback Schedule and related budget.

22. The Committee's concerns about the lack of funding are further heightened by the treatment of certain liabilities of non-Debtor foreign entities. As noted in the Initial Reservation of Rights, certain Foreign Accounts Payable are Assumed Liabilities (as defined in the Zoll Asset Purchase Agreement) and will therefore be transferred to Zoll upon the close of the sale.[17] Thus, the creditors of these non-Debtor entities holding liabilities for Foreign Accounts Payable will be paid in full, while, through the Allocation Agreement and the Holdback Schedule, the Debtors' own creditors in the United States are slated to receive no recovery.[18]

23. In light of the foregoing, it is impossible for the Committee to determine whether the amounts earmarked are sufficient to pay administrative expenses between now and the

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[16] Pursuant to Rule 3017-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the Debtors must provide at least 14 days' notice of the deadline to object to conditional approval of a disclosure statement. *See* Local Rule 3017-2(b)(i). The Debtors would then require an additional 35 days before the hearing to approve the disclosure statement on a final basis and confirm the plan. *See* Local Rule 3017-2(b)(iv); *see also* Federal Rule of Bankruptcy Procedure 2002(b). Thus, at a bare minimum, the Debtors require 66 days to confirm and plan under Local Rule 3017-2. Working backwards from October 18, 2024, the Debtors would have had to have filed a plan and disclosure statement on August 13, 2024.

[17] *See* Zoll Asset Purchase Agreement, § 1.3(k).

[18] In addition, there are no funds in the Holdback Schedule that are earmarked to fund a litigation trust for the benefit of general unsecured creditors, and even if there were such funds available, all available proceeds of any litigation pursued by such trust would be paid directly to the DIP Lenders/First Lien Group in the first instance, and then to those same lenders on account of their prepetition claims. Approval of the Allocation Agreement and the Holdback Schedule would deprive the Committee's ability to advocate for the estates' retention of the proceeds as a source of recovery for general unsecured creditors.

effective date of a yet to be filed plan or whether a chapter 11 plan would be confirmable under these circumstances.[19] These are but a few examples of the glaring deficiencies with respect to the Holdback Schedule and the Committee fears that there are significant other expenses that have not been accounted for and/or cannot be anticipated at this point in time.

24. Third, by including the terms of the Allocation Agreement embodied in the Holdback Schedule and incorporated into the Proposed Sale Orders, the Debtors and the DIP Lenders/First Lien Group are effectively seeking approval of a *sub rosa* plan. The Holdback Schedule functionally predetermines the distribution waterfall under a future chapter 11 plan—a plan that egregiously disenfranchises general unsecured creditors and operates solely to benefit one creditor, the DIP Lenders/First Lien Group. If the Allocation Agreement and the Holdback Schedule are approved through the Proposed Sale Orders, the Debtors and DIP Lenders/First Lien Group will have succeeded in foreclosing any input the Committee would have in negotiating the terms of the chapter 11 plan during the solicitation period and extinguishing the opportunity of all other creditors and parties in interest to vote to accept or reject these terms.

25. The Committee appreciates that the sale process in these chapter 11 cases has been delayed, and that the Debtors face tremendous pressure to quickly finalize a sale of these assets, but "the need for expedition . . . is not a justification for abandoning proper standards." *Lionel*, 722 F.2d at 1071 (quoting *Prot. Comm. for Indep. Stockholders v. Anderson*, 290 U.S. 414, 450 (1968)). The plan is the north star of the chapter 11 process, providing the default mechanism to resolve a chapter 11 case. *See In re Columbia Gas Sys., Inc.*, No. 91-803, 1995 WL 404892, at *2 (Bankr. D. Del. June 16, 1995) (noting that a plan of reorganization should be the goal of every

[19] Among other things, it is unclear whether a chapter 11 plan in these cases would meet the feasibility requirements under section 1129(a)(11) of the Bankruptcy Code.

chapter 11 proceeding); *In re Ditech Holding Corp.*, 606 B.R. 544, 586 (Bankr. S.D.N.Y. 2019) ("[T]he chapter 11 plan is the crucible by which the parties' claims and rights in property dealt with under the plan are transformed and governed postconfirmation.") (internal quotation marks omitted). Accordingly, it is critical that the Debtors and other parties in interest not be able to circumvent the requirements the chapter 11 plan confirmation process by seeking approval of a sale that improperly dictates the ultimate terms of the plan. *See Pension Benefit Guar. Corp. v. Braniff Airways, Inc*. (*In re Braniff Airways, Inc*.), 700 F.2d 935, 940 (5th Cir.1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of a plan sub rosa in connection with a sale of assets."); *see also* October. 31, 2023 Hr'g Tr. 33:16-22, *In re The RP. Co. Liquidating LLC, et al.*, No. 23-10774 (BLS) (Bankr. D. Del.) ("The [Bankruptcy] Code requires that, in exchange for relief in connection with finishing a reorganization case, that a [p]lan be solicited with a disclosure statement and an opportunity to evaluate it, to make an informed decision, to vote and more . . . relief and broader relief is available, generally in the context of a confirmed plan than would typically be available in a settlement.").[20]

26. Here, the Allocation Agreement and its implications are exactly the type of subversion of the plan process that should be avoided at all costs.

<u>CONCLUSION</u>

27. The Committee wholeheartedly supports approval of the sale transactions but cannot support the Allocation Agreement or the Holdback Schedule at this time for the reasons

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[20] This Court's holding in *RP Co. Liquidating* (hereinafter, "<u>Rockport</u>"), is instructive. In that case, this Court declined to approve a settlement under Federal Rule of Bankruptcy Procedure 9019 between the debtors, their lenders, and the official committee of unsecured creditors that, in part, created a reserve to be distributed to general unsecured creditors in exchange for their agreement to release certain non-debtor entities. The Office of the United States Trustee objected. In declining to approve the settlement, the Court observed, "we don't know exactly where we are going. But I guess the way that I would look at this is, if this is not a *sub rosa* Plan, I don't know what is. And if this were approved over an objection deeming it a *sub rosa* Plan, I don't know what the

outlined above. Therefore, the Committee respectfully requests that the Court enter orders approving only the sale transactions and not the Holdback Schedule or the Allocation Agreement so that the Committee may participate in the formulation of a chapter 11 plan.

Dated: August 29, 2024
Wilmington, Delaware

McDermott Will & Emery LLP

/s/ Maris J. Kandestin
David R. Hurst (I.D. No. 3743)
Maris J. Kandestin (I.D. No. 5294)
The Brandywine Building
1000 N. West Street, Suite 1400
Wilmington, DE 19801
Telephone: (302) 485-3900
Facsimile: (302) 351-8711
E-Mail: dhurst@mwe.com
mkandestin@mwe.com
- *and* -

Darren Azman (admitted *pro hac vice*)
Kristin Going (admitted *pro hac vice*)
One Vanderbilt Avenue
New York, NY 10017
Telephone: (212) 547-5400
Facsimile: (212) 547-5444
E-Mail: dazman@mwe.com
kgoing@mwe.com

Counsel to the Official Committee of Unsecured Creditors

line would be. . . There is a limited pool of money and we need to get across a finish line. Regrettably, this structure is not sufficient to get across that finish line and it seems to me that . . . many of these features are common in a Plan . . . but this is not a Plan and it doesn't have the procedures requirements and protections that a Plan requires." October. 31, 2023 Hr'g Tr. 33:1-13, *In re The RP. Co. Liquidating LLC, et al.*, No. 23-10774 (BLS) (Bankr. D. Del.). Attempts by the Debtors and the DIP Lenders/First Lien Group to implement the Allocation Agreement and the Holdback Schedule through the Proposed Sale Orders is exactly the type of arrangement this Court highlighted in Rockport as running afoul of the Bankruptcy Code.