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)
	)	**Related to Docket Nos.: 16, 249, 470, 471**

REPLY OF DEBTORS IN SUPPORT OF ENTRY OF THE PROPOSED SALE ORDERS

The debtors and debtors in possession (collectively, the "Debtors" and, together with their non-Debtor subsidiaries, the "Company") submit this reply (the "Reply") (a) in further support of entry of (i) the proposed *Order (I) Approving the Zoll Asset Purchase Agreement and Authorizing the Sale of Certain Ventilation Assets of the Debtors Outside of the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances, (III) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection therewith and (IV) Granting Related Relief* [Docket No. 470] (as may be modified or supplemented, the "Vents Sale Order") and (ii) the proposed *Order (I) Approving the Trudell Asset Purchase Agreement and Authorizing the Sale of Certain Respiratory Diagnostics Assets of the Debtors Outside of the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances, (III) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection therewith and (IV) Granting Related Relief* [Docket No. 471]

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.

(as may be modified or supplemented, the "RDx Sale Order" and, together with the Vents Sale Order, the "Sale Orders"),[2] and (b) in response to the reservation of rights [Docket No. 437] and limited objection [Docket No. 480] filed by the Committee, and respectfully state as follows:[3]

Reply

1. The Court should enter the Sale Orders, including the provision reducing the DIP commitments from $45 million to $40 million and the provision providing for a $56 million paydown on the DIP and a $25 million holdback amount. These provisions were necessary to induce the Debtors' secured lenders to consent to the two proposed sale transactions that, together, barely clear the new-money portion of the DIP and only make a small dent in the rollup portion of the DIP. The Debtors will present evidence at the hearing demonstrating that both the reduced DIP funding and the holdback amount are sufficient to fund closing of the sales and to confirm a chapter 11 plan.

2. The Committee's objection—which was filed less than 24 hours before the sale hearing, long after any objection deadline, without any notice to any party or seeking leave from the Court—is riddled with falsehoods. The Court should overrule the Committee's reservation of rights and objection.

I. The Partial DIP Paydown and Holdback Reserve Are Expressly Required by the Bidding Procedures Order Entered Seven Weeks Ago and, Accordingly, Are Not a Surprise.

3. Contrary to the Committee's assertions, the concept of the DIP paydown and the holdback reserve should come as no surprise to the Committee or any party that has been paying

2 Capitalized terms used but not otherwise defined shall have the meaning ascribed to them in the Sale Orders, the Zoll APA (as defined in the Vents Sale Order), the Trudell APA (as defined in the RDx Sale Order), and the Bidding Procedures Order (as defined in the Sale Orders), as applicable.

3 In support of entry of the Sale Orders and this Reply, the Debtors incorporate by reference the Braley Declaration [Docket No. 404] and the Schlappig Declaration [Docket No. 405].

attention in these cases. In fact, the Bidding Procedures Order, which the Court entered on July 11, 2024, provides for the paydown and holdback in no fewer than seven places.[4] Below is an example:

> For the avoidance of doubt, a Bid or series of Bids shall not constitute a "Qualified Bid" unless such Bid(s) (a) meets the Minimum Bid Requirement and (b) contemplates that ***the aggregate cash sale proceeds of such Bid(s) shall be indefeasibly paid to the DIP Lenders immediately upon the closing of the Sale Transaction(s) subject to deductions for wind-down costs and expenses required to be paid pursuant to the DIP Orders and the RSA (which such deducted amounts shall be paid to the Debtors)***.

Bidding Procedures Order ¶ 9 (emphasis added). The Bidding Procedures Order also provides that a Bid cannot constitute a Successful Bid unless the same conditions are met. *Id.* at pp. 40-41. Moreover, the DIP Credit Agreement approved by the Court's Final DIP Order also requires the paydown, subject to an agreed holdback. *See* DIP Credit Agreement, Art. VI(s). The Committee did not object to entry of the Bidding Procedures Order nor the Final DIP Order and instead provided informal comments to both orders, which the Debtors incorporated into the orders, which were then entered on a consensual basis.

4. On August 11, 2023—the day before the auction—Debtors' counsel and lenders' counsel agreed over email to a set of bullets regarding how to establish the proposed holdback and paydown amounts pursuant to the Bidding Procedures Order, depending on the outcome of the auction. This email agreement included a proposed reduction in the DIP commitments from $45 million to $40 million. All of this was to be subsequently included in the proposed Sale Orders for approval by the Court, which it was.

---

4 *See* Bidding Procedures Order, at ¶¶ 6, 9, 18 and pp. 35, 38, 41, and 44.

5. Indeed, the concept of the DIP reduction was first included in the initial proposed sale orders that the Debtors filed on August 20, 2024, after the auction for the Ventilation business was concluded and the bid for the Respiratory Diagnostics business was finalized. *See, e.g.*, Proposed Zoll Sale Order ¶ FFF [Docket No. 399-1] (requesting court approval to reduce the DIP commitments from $45 million to $40 million); Proposed Trudell Sale Order ¶ GGG [Docket No. 401, Exh. A] (same). Accordingly, the Debtors have, in fact, provided the requisite notice, and are requesting Court approval, of the proposed change to the DIP amount.

6. Consistent with the entered Bidding Procedures Order, the initial proposed sale orders filed on August 20, 2024 also provided for the DIP paydown and the holdback schedule, the amounts of which were still under negotiation with the secured lenders. Those amounts and detail were then presented to the Committee advisors on August 25, 2024. The Committee then requested that the Debtors adjourn the sale hearing to Friday, August 30, 2024, to provide the Committee additional time to diligence those amounts. The Debtors agreed to that adjournment, and have provided additional information to the Committee throughout the week.

7. Moreover, throughout the entire marketing process, BRG, the financial advisor to the Committee, discussed the ongoing marketing process nearly daily with either PJT, the Debtors' investment banker, or AlixPartners, the Debtors' restructuring advisor. The Committee was provided with the bids, the draft APAs and schedules thereto, and sale process updates in real time. The Committee attended the three-day auction, and Debtor professionals made every effort to keep the Committee advisors updated and looped in as the auction unfolded. At no point, until now, did the Committee ever complain of a lack of access or visibility into the marketing and sale process. In sum, the Committee's allegations of surprise or lack of consultation are surprising themselves, and are inconsistent with the facts.

II. The Partial Paydown Does Not Constitute an Impermissible *Sub Rosa* Plan.

8. The Sale Orders do not constitute a *sub rosa* plan. "An objector arguing that a proposed sale constitutes a *sub rosa* plan must clearly articulate the rights and benefits the [] creditor is being deprived of through the sale that it would gain through a Chapter 11 plan."[5] The Committee has made no such clear articulation.

9. To the contrary, in all circumstances, a chapter 11 plan would need to repay the DIP claims in full in cash, which have a priming first lien on all assets of the Debtors and is a super-priority administrative claim. Paying off these super-priority DIP claims upon the sale closings—which would need to be paid first in line to confirm any chapter 11 plan—is not an end run around the plan process. Rather, it is a necessary step toward confirmation of any plan, which is why it has always been contemplated and fully disclosed since the Petition Date and was included repeatedly in the Court-approved Bidding Procedures Order. Moreover, the Debtors' extensive marketing process has proven, beyond any doubt, that the fair market value of the Debtors today is well below the sum of the Debtors' secured debt—and, indeed, below the amount of the DIP Facility when the rollup is included. That is, the claims of the DIP and secured lenders are significantly impaired, so no economic recovery would or could, under any realistic scenario or model, be distributed to creditors below secured lenders. Contrary to the Committee's

5 *In re Summit Global Logistics, Inc.*, 2008 WL 819934, at *16 (Bankr. D.N.J. Mar. 26, 2008) (citing *In re Torch Offshore, Inc.*, 327 B.R. 254, 257 (Bankr. D. La. 2005) (citing *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1228 (5th Cir. 1986) (concluding that the objecting creditor's "inability to establish its detriment through the sale . . . and the Debtors' satisfaction of the sound business judgment and good faith requirements given their severe liquidity crisis, mandate a finding that the proposed asset sale does not constitute a *sub rosa* plan"))). *See also*, *e.g.*, *In re Boston Generating, LLC,* 440 B.R. 302, 331 (Bankr. S.D.N.Y. 2010) (concluding that the chapter 11 debtors, in seeking bankruptcy court approval for proposed sale of substantially all of their assets outside plan confirmation process, were not improperly seeking to establish terms of a *sub rosa* plan, where debtors had proper business justification for seeking to sell their assets before they ran out of funds to operate, and where debtors sought merely to sell their assets, with proceeds to be distributed in accordance with priority of creditors' competing liens and terms of any subsequent plan).

contentions, the economic reality of the outcome of a fulsome sale and marketing process is what drives the distribution waterfall, not the paydown or holdback terms in the Sale Orders.

10. The Committee's real complaint is with the economic reality that general unsecured claims are unlikely to receive any recovery in these chapter 11 cases. But that is not a result of any provision of the Sale Orders. Rather, that is the result of a robust marketing process in which the aggregate proceeds of the sales do not clear the DIP facility. The Committee has no basis to assert to the contrary. Indeed, the Committee's challenge period expired on August 26, 2024, with no challenge having been asserted. *See* Final DIP Order ¶ 12; *see also* Bidding Procedures Order ¶¶ 6, 9.

11. Accordingly, the Sale Orders are not a *sub rosa* plan, and the Committee's objection provides no basis to conclude the terms of the Sale Orders constitute a *sub rosa* plan. The Sale Orders do, however, provide a clear path to getting a chapter 11 plan confirmed—an extraordinary result under the circumstances and one that the Committee's ill-advised objection threatens to derail.

III. The Terms of the Proposed Sales, Including the DIP Reduction and Holdback Amount, Are Reasonable Under the Circumstances, Provide a Clear Path to Close the Sales and Confirm a Chapter 11 Plan, and Represent a Sound Exercise of the Debtors' Reasonable Business Judgment.

12. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." To approve a sale pursuant to section 363(b) of the Bankruptcy Code, courts require a debtor to demonstrate that a sound business purpose exists for the proposed transaction.[6] The business judgment rule shields a debtor's management decisions from judicial second-

6 *See, e.g.*, *In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) ("Under Section 363, the debtor in possession can sell property of the estate . . . if [the debtor] has an 'articulated business justification' . . . .").

guessing. Once a debtor articulates a valid business justification, "[t]he business judgment rule 'is a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith,' and in the honest belief that the action was in the best interests of the company."[7] The Debtors submit that the proposed sales, including the terms related to the use of proceeds embodied in the Sale Orders, satisfy this standard and are a sound exercise of the Debtors' reasonable business judgment.[8]

13. The Debtors' agreement to reduce the DIP commitments from $45 million to $40 million, and to set the holdback reserve at $25 million, are a sound exercise of business judgment. The Debtors' will present evidence that $40 million of aggregate DIP financing is sufficient to fund the chapter 11 cases until the projected closing of the sales and that, from there, the $25 million winddown budget is sufficient to fund confirmation and implementation of a chapter 11 plan. Moreover, the Debtors will present evidence that these concessions were necessary to induce the secured lenders to consent to sale transactions that do not satisfy the Minimum Bid Requirement and barely clear the funded portion of the DIP.

14. The Committee's only arguments to the contrary amount to second-guessing the Debtors' business judgment and nitpicking the Debtors' budgets. *First*, the Committee asserts that the $40 million budget is insufficient because it assumes the second sale closes in mid-October but

7 *In re S.N.A. Nut Co.*, 186 B.R. 98, 102 (Bankr. N.D. Ill. 1995) (citations omitted); *see also In re Filene's Basement, LLC*, 11-13511 (KJC), 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014).

8 No party argues that the proposed sales to Zoll and Trudell are not a sound exercise of the Debtor's business judgment or are not in the best interest of all stakeholders. As set forth in the Schlappig Declaration and Braley Declaration, and which is not meaningfully contested by any party in interest, the proposed Sale Transactions represent the highest or otherwise best offer for the Debtors' assets. *See* Schlappig Decl. ¶ 16; Braley Decl. ¶ 15. Indeed, the Successful Bid for the Debtors' Respiratory Diagnostics Assets represents the only actionable offer received by the Debtors. *See* Braley Decl. ¶ 15. Nonetheless, the Committee objects to the necessary bargain the Debtors struck with the Debtors' DIP Lenders to pursue the sales by agreeing to use the sale proceeds to paydown certain DIP Obligations and fund the Holdback Reserve.

a plan would take additional weeks to confirm. But the wind down will commence upon closing of the second sale—at which point the Debtors will no longer have material ongoing operations—irrespective of whether a plan has yet been confirmed. The Debtors can begin relying on the $25 million winddown budget at that time. Further, the Debtors will see reduced operations after the close of the first sale.

15. *Second*, the Committee asserts that the $25 million holdback amount is too low because Zoll has only agreed to pay up to $5 million of cures and there are potentially up to $9.1 million of cures. But Zoll has not yet decided what contracts will be assigned to it pursuant to its designation rights. The list the Committee refers to is merely a list of *potential* assigned contracts and the amount of cures the Committee refers to are merely *asserted*, non-final cure amounts. The Debtors have been clear with the buyer that it cannot assign contracts to the buyer to the extent cures are excess of $5 million. Accordingly, cures will either need to be negotiated or litigated to fit within the $5 million cap, contracts will need to be rejected, the cap will need to be increased, or alternative funding will need to be obtained. None of this makes it unreasonable to agree to a $25 million holdback amount or unlikely that the transactions can be consummated.

16. Ultimately, the paydown of DIP Obligations and reservation for winddown expenses are features commonly approved in DIP financings.[9] Courts have also approved paydowns from sale proceeds to parties with secured claims against the assets sold.[10] Absent this deal with the DIP Lenders, the Debtors faced the likelihood that the lenders would decide to

9 *See, e.g.*, *In re Allied Systems Holdings*, 2013 WL 12301178 (Bankr. D. Del. 2013) (providing for paydown of DIP loans upon sale closing and provision of a winddown budget).

10 *See In re San Jacinto Glass Indus., Inc.,* 93 B.R. 934, 942–43 (Bankr. S.D. Tex. 1988) (finding no reason to delay a secured creditor's receipt of sale proceeds in which it has undisputed priority claim and explaining that distribution of proceeds to the creditor would not "materially dictate the terms of the debtor's reorganization nor otherwise endanger the creditor protections available to" the objecting unsecured creditor).

terminate the sale process (as they were permitted to do under the Bidding Procedures Order) and which would have been to the detriment of the estate and other stakeholders, including health facilities, vendors, and patients. Facing this reality, after good-faith and hard-fought negotiations, the Debtors and DIP lenders agreed to the amounts for the paydown of the DIP Obligations and Holdback Reserve, which the Debtors believe to be appropriate in light of the Debtors' reasonably anticipated winddown expenses and a sound exercise of their business judgment.

Reservation of Rights

17. The Debtors reserve their rights to present additional evidence and legal argument at the sale hearing in response to any matter raised in opposition to the terms of the proposed sale transactions, including the matters referenced in the Committee's reservation of rights and objection.

WHEREFORE, the Debtors respectfully request that the Court overrule the Committee's reservation of rights and objection, approve the Sale Transactions, enter the Sale Orders, and grant the Debtors such other and further relief as this Court deems just and proper.

Dated: August 30, 2024
Wilmington, Delaware

/s/ Patrick J. Reilley
COLE SCHOTZ P.C.
Patrick J. Reilley, Esq. (DE Bar No. 4451)
500 Delaware Avenue, Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 652-3131
Facsimile: (302) 652-3117
Email: preilley@coleschotz.com

- and -

Michael D. Sirota, Esq. (admitted *pro hac vice*)
Warren A. Usatine, Esq (admitted *pro hac vice*)
Court Plaza North, 25 Main Street
Hackensack, New Jersey 07601
Telephone: (201) 489-3000
Facsimile: (201) 489-1536
Email: msirota@coleschotz.com
wusatine@coleschotz.com

Co-Counsel to the Debtors
and Debtors in Possession

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Joshua A. Sussberg, P.C. (admitted *pro hac vice*)
601 Lexington Ave
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: joshua.sussberg@kirkland.com

- and -

Spencer A. Winters, P.C. (admitted *pro hac vice*)
Yusuf U. Salloum (admitted *pro hac vice*)
333 West Wolf Point Plaza
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
Email: spencer.winters@kirkland.com
yusuf.salloum@kirkland.com

Co-Counsel to the Debtors
and Debtors in Possession