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 Docket No. 256, 462, 497**

RESERVATION OF RIGHTS OF
PROSYMMETRY LLC TO PROPOSED CURE AMOUNT

ProSymmetry LLC ("ProSymmetry"), by and through its undersigned counsel, hereby files this reservation of rights (the "Reservation of Rights") with respect to the *First Notice to Contract Counterparties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* (Dkt. No. 256, the "First Cure Notice"), the *First Supplemental Notice to Contract Counterparties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* (Dkt. No. 462, the "Supplemental Cure Notice"), and the *Order (I) Approving the Trudell Asset Purchase Agreement and Authorizing the Sale of Certain Respiratory Diagnostics Assets of the Debtors Outside 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* (Dkt. No. 497, the "Sale Order").[2] In support of this Reservation of Rights, ProSymmetry states as follows:

---

[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 that not defined herein have the meanings in the Sale Order.

BACKGROUND

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

2. Prior to the Petition Date, ProSymmetry and the Debtor Vyaire Medical, Inc. (the "Debtor") entered into that certain Software Subscription Agreement dated December 4, 2023 (the "ProSymmetry Agreement") pursuant to which ProSymmetry agreed to provide software services to the Debtor.

3. 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* (Dkt. No. 249, the "Bid Procedures Order").

4. On August 1, 2024, ProSymmetry filed a proof of claim asserting a claim against the Debtor in an amount of not less than \$52,616.40 for amounts then due and owing under the ProSymmetry Agreement.

5. On August 24, 2024, the Debtors filed the Supplemental Cure Notice, which reflected a cure amount of \$52,616.40 (the "Original Cure Amount") for ProSymmetry 2023-12-04 Order Form—which Order Form expressly incorporates the ProSymmetry Agreement.[3] *See*

[3] The Order Form contains confidential information but can be provided upon request, although ProSymmetry believes that the Debtors have a copy of the Order Form

Supplemental Cure Notice at 3.[4] Prior to the filing of the Supplemental Cure Notice, ProSymmetry and the Debtors discussed the correct cure amount and agreed that the Original Cure Amount reflected the current defaulted amounts under the ProSymmetry Agreement as of the date that the Supplemental Cure Notice was filed.

6. On September 4, 2024, the Court entered the Sale Order approving the Sale Transaction. *See* Dkt. No. 497.

7. The Sale Order provides that the Cure Amounts (as defined in the Supplemental Cure Notice) "shall be satisfied by the Purchaser in accordance with the terms of the Trudell APA." *See* Sale Order, ¶ RR.

8. The Sale Order also provides that any non-debtor counterparty to an Assumed Contract that has failed to timely object to a proposed Cure Amount "shall be prohibited from challenging, objecting to, or denying the validity and finality of the Cure Amount [as listed in the Supplemental Cure Notice]". *See* Sale Order, ¶ UU.

9. Despite entrance of the Sale Order on September 4, 2024, as of October 25, 2024, the Sale Transaction approved in the Sale Order has yet to be consummated.

10. Per the terms of the ProSymmetry Agreement, the Agreement will automatically renew as of November 9, 2024, with an annual payment of $54,194.89 due thereafter. Specifically, paragraph 2 of the ProSymmetry Agreement provides "[e]xcept as otherwise expressly provided in an Order, each Order will have a one (1) year term and will automatically renew on an annual basis, unless either Party provides at least thirty (30) days' advance notice of non-renewal." *See* ProSymmetry Agreement, https://www.prosymmetry.com/software-terms-and-conditions. The Debtor did not provide the requisite 30 days' notice of non-renewal of the

[4] The First Cure Notice also listed two ProSymmetry agreements with the Debtors with zero cure amounts—"ProSymmetry LLC 2020-07-20 CDA (Vyaire signed)" and "Prosymmetry 2021-11-09 Order Form" *See* First Cure Notice at 151. ProSymmetry does not object to these cure amounts.

ProSymmetry Agreement; therefore, the ProSymmetry Agreement will automatically renew for another year.[5]

11. Because the ProSymmetry Agreement will automatically renew on November 9, 2024—and the Sale Transaction has not yet closed—the Original Cure Amount set forth in the Supplemental Cure Notice may fail to accurately reflect the total balance owing to ProSymmetry by the Debtor under the ProSymmetry Agreement at the time of the closing of the Sale Transaction. As such, if the Sale Transaction closes after the renewal term invoice comes due (currently estimated to be December 9, 2024), then the amount by which the Debtor will be in default under the ProSymmetry Agreement will be not less than $106,811.29 (the "Cure Amount").

12. Although the Supplemental Cure Notice had an objection deadline of September 7, 2024,[6] ProSymmetry did not file a cure objection prior to such deadline because ProSymmetry (i) agreed with the Original Cure Amount as listed in the Supplemental Cure Notice as of the date the Notice was filed; and (ii) through its counsel had informally objected to the Sale Order capping the Original Cure Amount if additional post-petition amounts accrued during the period between entry of the Sale Order and closing of the Sale Transaction. *See* **Exhibit A**, August 2024 Emails between ProSymmetry counsel and Debtors' counsel. Now the exact situation raised by ProSymmetry's counsel has occurred, and, as a result, depending on the timing of the closing of the Sale Transaction, the Original Cure Amount may increase to the full Cure Amount of $106,811.29—reflecting all amounts due and owing to ProSymmetry by the Debtor under the

[5] Notice of non-renewal pursuant to paragraph 2 of the ProSymmetry Agreement was not received by ProSymmetry on or before October 10, 2024—30 days prior to the automatic renewal date—therefore, the Debtor is bound to the renewal term.

[6] The Supplemental Cure Notice provided that cure objections to New Potentially Assumed and Assigned Contracts was "the later of (a) September 6, 2024 or (b) the date that is 14 calendar days after service of this notice . . . ." Supplemental Cure Notice at 2. The Supplemental Cure Notice was filed and served on August 24, 2024; therefore, 14 calendar days later is September 7, 2024.

ProSymmetry Agreement as of the Sale Transaction closing date—should the Debtor want to assume and assign the ProSymmetry Agreement to the Seller under the Trudell APA.

RESERVATION OF RIGHTS

13. Section 365 of the Bankruptcy Code provides in pertinent part:

> (b)(1) If there has been **a default** in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease the trustee –
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, **such default** . . . .

11 U.S.C. § 365(b)(1) (emphasis added).

14. Currently, the Debtor owes to ProSymmetry the Original Cure Amount in the amount of $52,616.40, accounting for pre-petition services rendered to the Debtor under the ProSymmetry Agreement. The Original Cure Amount, however, will soon increase to reflect the full Cure Amount of $106,811.29 in connection with the November 9, 2024 automatic renewal of the ProSymmetry Agreement following entrance of the Sale Order.

15. If the Debtor intends to assume and assign the ProSymmetry Agreement to the Purchaser in accordance with the terms of the Sale Transaction, the plain language of Bankruptcy Code Section 365(b)(1)(A) requires the Debtors to pay (or provide adequate assurance that they will promptly pay) all defaulted amounts due and owing under the executory contract, including all amounts that may accrue through the date of any sale closing and contract assumption or assignment.

16. The Original Cure Amount of $52,616.40 represents all amounts currently due and owing to ProSymmetry by the Debtor under the ProSymmetry Agreement as of the date hereof. While not yet due and owing at this time, the Original Cure Amount will increase to the Cure Amount of $106,811.29 in the coming weeks. ProSymmetry files this Reservation of

Rights to make clear that, if the Sale Transaction closes following renewal of the ProSymmetry Agreement and the ProSymmetry Agreement is assumed and assigned to the Seller, the full Cure Amount must be paid at the time of assumption and assignment or must otherwise be paid in full as an administrative expense claim for ongoing services rendered during these Chapter 11 cases.

17. ProSymmetry expressly reserves the right to amend or supplement this Reservation of Rights and the Cure Amount should any additional amounts become due and owing under the ProSymmetry Agreement prior to the closing of the Sale Transaction, thereby further increasing the Cure Amount. ProSymmetry also reserves the right to seek allowance and payment of administrative claims for amounts coming due post-petition under the ProSymmetry Agreement.[7]

[7] Despite ProSymmetry holding an administrative claim for amounts that became due and owing as a result of the ProSymmetry Agreement's automatic renewal, the existence of such administrative claim does not reduce the Cure Amount owed to ProSymmetry if the ProSymmetry Agreement is assumed and assigned to the Purchaser while the renewal term invoice is in default.

WHEREFORE, based on the foregoing, ProSymmetry reserves its right to object to the assumption and assignment of the ProSymmetry Agreement to the Purchaser under the Trudell APA following renewal of the ProSymmetry Agreement, to the extent the full Cure Amount of $106,811.29 is due and owing at the time that the Sale Transaction closes but not timely paid to ProSymmetry in accordance with Bankruptcy Code section 365.

Dated: October 28, 2024
Wilmington, Delaware

WOMBLE BOND DICKINSON (US) LLP

/s/ Morgan L. Patterson
Morgan L. Patterson (Bar No. 5388)
Marcy J. McLaughlin Smith (Bar No. 6184)
1313 North Market Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
Email: morgan.patterson@wbd-us.com
Email: marcy.smith@wbd-us.com

Counsel to ProSymmetry LLC