IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: VYAIRE MEDICAL, Inc.,[1] Debtor.	Chapter 11 Case No. 24-11217 (BLS) **Hearing Date: November 14, 2024 at 10:00 a.m. (ET)** **Objection Deadline: November 7, 2024 at 4:00 p.m. (ET)**

MOTION OF ZENSAR TECHNOLOGIES INC. FOR ENTRY OF AN ORDER (I) COMPELLING ASSUMPTION OR REJECTION OF EXECUTORY CONTRACTS AND (II) ALLOWING ADMINISTRATIVE EXPENSES AND COMPELLING PAYMENT THEREOF

Zensar Technologies Inc. ("Zensar") files this motion ("Motion") for entry of an order pursuant to sections 105(a), 365(d)(2), 503(b)(1)(A), and 507(a)(2) of title 11 of the United States Code (11 U.S.C. §§ 101 *et seq*., "Bankruptcy Code") (i) compelling Debtor Vyaire Medical, Inc. ("Vyaire") to assume or reject its executory contracts with Zensar ("Zensar Executory Contracts") and (ii) allowing administrative expenses due and owing to Zensar ("Zensar Administrative Expenses") for postpetition services provided to the above-captioned debtors' estates (collectively, "Debtors") pursuant to the Zensar Executory Contracts and compelling payment thereof. In support of the Motion, Zensar respectfully states as follows:[2]

[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 used but not otherwise defined herein shall have the meaning ascribed such terms *supra* or in the amended *Joint Chapter 11 Plan of Vyaire Medical, Inc. and Its Debtor Affiliates* [D.I. 581] ("Plan"), as applicable.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012.

2. This is a core proceeding under 28 U.S.C. §157(b).

3. Venue of these cases and this Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. Zensar consents, pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware ("Local Rules"), to the entry of a final order by this Court in connection with this Motion to the extent that it is later determined that this Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

5. The statutory bases for the relief requested herein are Bankruptcy Code sections 105(a), 365(d)(2), 503(b)(1)(A), 507(a)(2), Rules 6006, 9014 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") and Local Rule 9013-1.

BACKGROUND

Parties' Relationship Prepetition

6. Zensar and Vyaire entered into that certain IT Outsourcing Agreement dated as of September 24, 2018 ("IT Agreement") and certain statements of work (collectively, "SOWs," and together with the IT Agreement, "Zensar Agreements")[3] pursuant to which Zensar provides certain information technology infrastructure support and cybersecurity operations to Vyaire. *See*

[3] Upon information and belief, Debtors have copies of the Zensar Agreements and all related invoices, which contain confidential and proprietary information. Copies of the Zensar Agreements and the invoices are available upon reasonable written request and execution of any required confidentiality agreement.

Declaration of Pratik Maroo in Support of Motion of Zensar Technologies Inc. for Entry of An Order (I) Compelling Assumption or Rejection of Executory Contracts and (II) Allowing Administrative Expenses and Compelling Payment Thereof ("Maroo Decl.") filed contemporaneously herewith at ¶ 2.

7. Prior to the Petition Date, Vyaire's payment of Zensar's invoices was more than six (6) months in arrears, aggregating in excess of $1.77 million (*See* Maroo Decl., ¶ 3), thereby making Zensar the Debtors' second largest unsecured creditor.

Nature and Stage of Proceedings

8. On June 9, 2024 ("Petition Date"), Vyaire and certain of its subsidiaries filed voluntary petitions for relief under chapter 11.

9. On June 26, 2024, the United States Trustee for the District of Delaware ("U.S. Trustee") appointed an official committee of unsecured creditors ("Creditors Committee") that consists of Sunmed Group Holdings, LLC (d/b/a AirLife), Zensar, Cognizant Worldwide Ltd., Presidio, Vizient, Inc., David M. Lewis Company, and Data Modul, Inc. *See* [D.I. 121]

10. In order to alleviate Zensar's insecurity that Vyaire would fail to perform its obligations under the Zensar Agreements, Vyaire's management communicated to Zensar shortly after the chapter 11 filing that Vyaire considered Zensar an important and critical vendor in the chapter 11 cases. *See* Maroo Decl., ¶¶ 4-5.

11. On July 11, 2024, the Debtors filed the *First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [D.I. 256] ("Initial Potentially Assumed Contracts List"), which purported to list the Zensar Executory Contracts with cure amounts.

12. On or about July 26, 2024, Vyaire provided Zensar with a proposed critical vendor agreement, to which Zensar provided required information and returned it to Vyaire for execution. *See* Maroo Decl., ¶ 6.

13. Thereafter, the Debtors did not formally respond to Zensar with respect to execution of the critical vendor agreement. *See* Maroo Decl., ¶ 7.

14. On the same day, Zensar timely filed proof of claim numbered 74 ("Zensar POC"). *See* Zensar POC. Among other things, the Zensar POC asserts aggregate administrative expenses in an amount of no less than $284,715.18 for postpetition services provided by Zensar to Vyaire (i.e., the Zensar Administrative Expenses). *Id*.

15. On August 24, 2024, after receipt of Zensar's informal response to the Initial Potentially Assumed Contract List and further diligence by the Debtors, the Debtors filed the *First Supplemental Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [D.I. 462] ("Potentially Assumed Contracts List"), which sets forth the parties' agreement as to which of the Zensar Agreements remain executory (i.e, the Zensar Executory Contracts) and the respective cure amounts for each as of such date, as follows:

8199	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2021-04-15 MSA SOW Change Order	$41,091.00
8277	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2022-11-23 Change Request for ADM Applications Support	$24,300.00
8278	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2022-10-22 Change Request for SAP Applications Support	$35,366.00
8279	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2023-12-15 Change Order and Amendment	$1,256,416.00
8280	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2023-11-14 Change Request for SAP Applications Support	$154,484.00
8281	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2023-11-15 Change Request for ADM Applications Support	$97,204.00
8282	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar Purchase Order 4201090861	$16,009.34
8283	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar Purchase Order 4201090887	$6,425.35
8284	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2024-04-18 Zensar Vyaire SOC as a Service for the period May 2024 till Sept 2025	$28,065.70
8285	Zensar Technologies Inc.	Vyaire Medical, Inc.	Zensar 2024-04-18 Zensar Vyaire Infra Support for the period May 2024 till Sept 2025	$147,820.40

16. More specifically, the parties agreed the total cure amount owing to Zensar by Vyaire as of such date was $1,901,889.69, consisting of a prepetition claim in the amount of $1,807,181.79 and administrative expenses then due and owing in the amount of $94,707.90. *See* Maroo Decl., ¶ 10.

17. On September 11, 2024, the Debtors filed the *Joint Chapter 11 Plan of Vyaire Medical, Inc. and Its Debtor Affiliates* [D.I. 518] ("Initial Plan"), which was amended by the Plan filed on September 30, 2024.

18. The Plan provides the following treatment with respect to Executory Contracts and Unexpired Leases, in relevant part:

> On the Effective Date, except as otherwise provided herein or in the Sale Orders, each Executory Contract or Unexpired Lease not previously assumed, assumed and assigned, or rejected shall be deemed automatically rejected, pursuant to sections 365 and 1123 of the Bankruptcy Code, unless such Executory Contract or Unexpired Lease is: (1) identified on the Schedule of Assumed Executory Contracts and Unexpired Leases; (2) the subject of a motion to assume (or assume and assign) such Executory Contract that is pending on the Confirmation Date; (3) a contract, instrument, release, indenture, or other agreement or document entered into in connection with the Plan; (4) a D&O Liability Insurance Policy; (5) an Asset Purchase Agreement; or (6) to be assumed by the Debtors and assigned to any Purchaser in connection with any Sale Transaction and pursuant to any Sale Transaction Documentation.
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> …
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> Notwithstanding anything to the contrary in the Plan or the Sale Transactions Documentation, the Debtors, the Wind-Down Debtors, and the Plan Administrator, as applicable, reserve the right to alter, amend, modify, or supplement the Schedule of Assumed Executory Contracts and Unexpired Leases, the Schedule of Rejected Executory Contracts and Unexpired Leases, and the Schedule of Retained Causes of Acton identified in this Article V of the Plan and in the Plan Supplement at any time through and including 90 days after the Effective Date. The Debtors or the Wind-Down Debtors, as applicable, shall provide notice of any amendments to the Schedule of Assumed Executory Contracts and Unexpired Leases or the Schedule of Rejected Executory Contracts and Unexpired Leases to the parties to the Executory Contracts or Unexpired Leases affected thereby. For the avoidance of doubt, this Article V relates to
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> Executory Contracts or Unexpired Leases other than such agreements assumed, assumed and assigned, or rejected in accordance with the terms of any Sale Order.

Plan, Article V.A.

19. On October 4, 2024, the Debtors filed the *Notice of Filing Assumed Contracts Exhibit In Connection With Zoll Asset Purchase Agreement* [D.I. 605] (as amended on October 9,

2024 at D.I. 614, "Zoll Assumed Contracts List") reflecting the Debtors' executory contracts to be assumed and assigned to Zoll Medical Corporation ("Zoll") under the order [D.I. 496] ("Zoll Sale Order") approving the sale of the Debtors' assets to Zoll. *See* Zoll Assumed Contract List.

20. The Zensar Executory Contracts do not appear on the Zoll Assumed Contracts List. *Id.*

21. Vyaire's management apprised Zensar of Vyaire management's recommendation to Zoll not to assume the Zensar Executory Contracts with respect to the business(es) purchased by Zoll. *See* Maroo Decl., ¶ 11.

22. Also on October 4, 2024, the Court entered the order [D.I. 497] ("Trudell Sale Order") approving sale of the Debtors' assets to Trudell Medical Limited ("Trudell").

23. The Trudell Sale Order does not include a schedule of any Executory Contracts or Unexpired Leases (never mind the Zensar Executory Contracts) to be assumed and assigned to Trudell. *See* Trudell Sale Order, "Assumed Contracts Exhibit" appended as Exhibit 2.

24. Vyaire's management apprised Zensar of Vyaire management's recommendation to Trudell not to assume the Zensar Executory Contracts with respect to the business purchased by Trudell. *See* Maroo Decl., ¶ 11

25. On October 28, 2024, the Debtors filed a *Plan Supplement* [D.I. 689] attaching a "Rejected Executory Contracts and Unexpired Leases Schedule" as Exhibit "A" and an "Assumed Executory Contracts and Unexpired Leases Schedule" as Exhibit "B."

26. The Zensar Executory Contracts do not appear in either of Plan Supplement exhibits. *See* Plan Supplement.

27. In fact, the Plan Supplement merely restates the language of Article V.A. of the Plan, which provides that "the Debtors, the Wind-Down Debtors, and the Plan Administrator, as

applicable reserve the right to alter, amend, modify or supplement" schedules assuming and/or rejecting Executory Contracts and Unexpired Leases *through and including 90 days after the Plan's effectiveness*. *Id.* The effect of this language is to extend the time for the Debtors' estate to assume or reject executory contracts beyond the Plan's confirmation.

28. Zensar has provided and continues to provide postpetition services to Vyaire under the Zensar Executory Contracts, which have yet to be rejected, assumed, or assumed and assigned.

RELIEF REQUESTED

29. By this Motion, Zensar requests entry of an order (a) compelling the assumption or rejection of the Zensar Executory Contracts, (b) allowing the Zensar Administrative Expenses in the amount of $359,244, (c) compelling payment to Zensar in connection with the Plan's effectiveness, and (d) granting related relief as the Court may deem just, proper, and necessary.

BASIS FOR RELIEF REQUESTED

I. ZENSAR IS ENTITLED TO ASSUMPTION OR REJECTION OF THE ZENSAR EXECUTORY CONTRACTS PURSUANT TO BANKRUPTCY CODE SECTION 365(d)(2).

30. Pursuant to Bankruptcy Code section 365(d)(2), a trustee, and by extension a chapter 11 debtor-in-possession, "may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease."

31. Pursuant to Bankruptcy Code section 365(b)(1), if a debtor-in-possession is in default under an executory contract, the debtor may not assume such contract unless the debtor "cures or provides adequate assurances that the trustee will promptly cure, such default…; compensates, or provides adequate assurance that the trustee will promptly compensate, a party

other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and (C) provides adequate assurance of future performance under such contract or lease." 11 U.S.C. § 365(b)(1).

32. Adequate assurance of future performance "is to be given a practical, pragmatic construction based upon ... the circumstances of [the] case." *In re Prime Motor Inns, Inc.*, 166 B.R. 993, 997 (Bankr. S.D.Fla. 1994) quoting *In re Carlisle Homes, Inc.*, 103 B.R. 524, 538 (Bankr. D.N.J. 1988).

33. To provide adequate assurances, a trustee must, in a practical sense, show that it can promptly cure any default, pay for damages caused by the default and continue in the contract without immediate subsequent default. *In re Texas Health Enterprises, Inc.*, 246 B.R. 832, 835 (Bankr. E.D. Tex. 2000).

34. While courts generally apply the "business judgment" standard to a decision to assume or reject, that business judgment must be reasonably exercised. *Sharon Steel Corp. v. National Fuel Gas Distribution*, 872 F.2d 36, 39-40 (3d Cir. 1989).

35. The Zensar Executory Contracts are executory contracts because Zensar and the Debtors each have ongoing duties, which are material such that the breach of those duties would excuse performance by the other. *See* Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN.L.REV. 439, 442–44 (1973); *In Re Exide Technologies*, 607 F.3d 957, (3d. Cir. 2010) (applying Countryman test).

36. On the Petition Date, the Debtors were in default of the Zensar Executory Contracts due to their failure to make payments when due.

37. The Zensar Executory Contracts have not previously been rejected, assumed, or assumed and assigned to Zoll or Trudell or another party. Importantly, however, the treatment

under the Plan allows for the Debtors, Wind-Down Debtors, and/or the Plan Administrator to continue to demand performance from Zensar even as postpetition administrative expenses remain outstanding and unpaid but fails to provide a firm deadline by which the Zensar Executory Contracts must be assumed or rejected -- including for an additional 90 days after Plan confirmation. Such treatment is utterly unfair and prejudicial to Zensar.

38. Because the Debtors have not cured the postpetition defaults or provided adequate assurances that it will do so, this Court should require the Debtor to assume or reject the Zensar Executory Contracts in connection with Plan confirmation.

II. ZENSAR IS ENTITLED TO ALLOWANCE OF ADMINISTRATIVE EXPENSES PURSUANT TO BANKRUPTCY CODE SECTIONS 503(b)(1)(A) AND 507(a)(2).

39. Bankruptcy Code section 507(a)(2) establishes a second priority for administrative expenses allowed under Bankruptcy Code section 503(b). *See* 11 U.S.C. §507(a)(2). These administrative expenses include the actual and necessary costs and expenses of preserving the estate. *See* 11 U.S.C. §503(b)(1)(A).

40. To show that a claimant is entitled to an administrative expenses, "(1) there must be a post-petition transaction between the creditor and the debtor; and (2) the estate must receive a benefit from the transaction." *In re Waste Systems Intern., Inc.*, 280 B.R. 824, 826 (Bankr. D. Del. 2002). A debtor's acceptance of a non-debtor party's post-petition performance under an executory contract satisfies the transaction-with-the-estate requirement for administrative expense priority. *See In re ID Liquidation One, LLC*, 503 B.R. 392, 399 (Bankr. D. Del. 2013) (noting "administrative expense priority is available to contract parties when the debtor enjoys the benefits of the contract pending assumption or rejection.").

41. The purpose of section 503 is to permit the debtor's business to operate for the benefit of its prepetition creditors. *See In re Transamerican Natural Gas Corp.*, 978 F.2d 1409,

1415 (5th Cir. 1992). "The policy behind allowing administrative expense priority is to provide an incentive for creditors and vendors to continue doing business with the debtor in possession." *In re ATP Oil & Gas Corp.*, 2014 Bankr. LEXIS 1050 *6-7 (Bankr. S.D. Tex. Mar. 18, 2014). Absent such an incentive, third parties would be far more inclined to refrain from dealing with a debtor in bankruptcy, thereby harming other creditors. *Id* at *7.

42. The Third Circuit has stated, that "for a claim to be given priority as an administrative expense under this provision of the Code, it must be (1) a cost or expense that is (2) actual and necessary to (3) preserving the estate." *Pennsylvania Dep't of Envt'l. Res v. TriState Clinical Labs, Inc.*, 178 F.3d 685, 689 (3d Cir. 1999) (internal quotation marks omitted). In construing the meaning of these words, the Third Circuit relied upon the Supreme Court's decision in *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968), wherein the Supreme Court observed that "necessary costs" are those "costs ordinarily incident to operation of a business" but are "not [ ] limited to costs without which rehabilitation would be impossible." *Id.* at 689.

43. The Zensar Administrative Expense was incurred as a result of Zensar's postpetition services provided to the Debtors' estates. Those transactions conferred a benefit on the Debtors' estates because without those services, the Debtors' business would not have been able to operate during the pendency of these cases. Accordingly, the Zensar Administrative Expenses are entitled to the resulting administrative priority under Bankruptcy Code section 507.

III. THIS COURT SHOULD COMPEL PAYMENT IN CONNECTION WITH EFFECTIVENESS OF THE PLAN.

44. Bankruptcy Code section 105(a) provides that this Court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. §105(a). The timing of the payment of an administrative claim is within the discretion of this Court. *In re Garden Ridge Corporation*, 323 B.R. 136 (Bankr. D. Del. 2005). In

determining the time of payment, courts consider prejudice to the debtor, hardship to the claimant, and potential detriment to other creditors. *HQ Global Holdings, Inc.*, 282 B.R. 169, 174 (Bankr. D. Del. 2002). A review of each of these factors militate in favor of ordering payment to Zensar in connection with effectiveness of the Debtors' Plan.

45. First, there is no prejudice to the Debtors because the Plan contemplates payment of allowed administrative claims upon the Plan's effectiveness.

46. Second, the Debtors' failure to pay will cause substantial hardship to Zensar since the Debtors' nonpayment of amounts due and owing have effectively forced Zensar to be a lender to the Debtors (without the ability to have bargained for rights).

47. Third, there will be no detriment to other creditors because the Plan contemplates payment in full for all allowed administrative expenses. Accordingly, to prevent further hardship to Zensar – and to avoid Zensar becoming a *de facto* financier of the Debtors' chapter 11 cases – this Court should exercise its discretion to compel payment of the Zensar Administrative Expense in connection with effectiveness of the Debtors' Plan.

RESERVATION OF RIGHTS

48. Zensar reserves the right to amend, modify and/or supplement this Motion and to assert any additional administrative expense claims prior to the hearing on this Motion.

NOTICE

Notice of this Motion will be provided to: (a) the U.S. Trustee; (b) counsel to the Committee; (c) counsel to the Debtor; and (d) any other party that has requested notice pursuant to Local Rule 2002-1(b). Zensar respectfully submits that no further notice of this Motion is required under the circumstances.

CONCLUSION

WHEREFORE, Zensar respectfully requests this Court enter an order compelling the Debtor to assume or reject the Zensar Executory Contracts, allowing the postpetition amounts due as an administrative expense, and directing the Debtors to pay such administrative expenses in connection with the Plan's effectiveness, and provide such other and further relief as the Court deems just and equitable.

Dated: October 31, 2024
Wilmington, Delaware

BLANK ROME LLP

/s/ Stanley B. Tarr

Stanley B. Tarr (DE No. 5535)
Lawrence R. Thomas III (DE No. 6935)
Jordan L. Williams (DE No. 7128)
1201 N. Market Street, Suite 800
Wilmington, Delaware 19801
Telephone: (302) 425-6400
Facsimile: (302) 425-6464
Email: stanley.tarr@blankrome.com
lorenzo.thomas@blankrome.com
jordan.williams@blankrome.com

Counsel to Zensar Technologies Inc.