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)
	)	**Hearing Date: December 11, 2024, at 11:00 a.m. (ET)**
	)	**Obj. Deadline: December 4, 2024, at 4:00 p.m. (ET)**

MOTION OF DEBTORS FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO ASSUME AND ASSIGN CONTRACTS TO ZOLL MEDICAL CORPORATION

The above-captioned debtors and debtors in possession (collectively, the "Debtors and, each, a "Debtor"), state as follows in support of this motion (the "Motion").

Relief Requested

1. The Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), pursuant to sections 105 and 365(a) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code") and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing the assumption and assignment of the executory contracts (as amended, modified, or altered) set forth on **Exhibit 1** to the Proposed Order (the "Contracts"), to ZOLL Medical Corporation (the "Assignee") effective as of November 22, 2024.

[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.

Jurisdiction and Venue

2. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction to consider this Motion under 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 February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b) and, pursuant to Rule 9013-1(f) of the Local Rules of Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. Venue of these cases and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

4. The statutory and legal predicates for the relief requested herein are sections 105 and 365 of the Bankruptcy Code and Bankruptcy Rule 6006.

BACKGROUND

A. General Background

5. On June 9, 2024 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their business and managing their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On June 11, 2024, the Court entered an order authorizing the procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1. *See* Docket No. 84. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases.

6. On June 26, 2024, the Office of the United States Trustee for the District of Delaware appointed the Official Committee of Unsecured Creditors. *See* Docket No. 121.

7. On November 14, 2024, the Court entered the *Findings of Fact, Conclusions of Law, and Order Approving the Debtors' Disclosure Statement for, and Confirming the Second Amended Joint Chapter 11 Plan of Vyaire Medical, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 745] (the "Confirmation Order") approving and confirming the *Second Amended Joint Chapter 11 Plan of Vyaire Medical, Inc. and Its Debtor Affiliates* (the "Plan") [Docket No. 719].[2]

8. Paragraph 86 of the Confirmation Order and Article V.A of the Plan provide that except as otherwise provided in the Plan or in the Sale Orders, each Executory Contract or Unexpired Lease not previously assumed, assumed and assigned, or rejected shall be rejected on the Effective Date, unless such Executory Contract or Unexpired Lease is, among other things, "(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." *See* Confirmation Order ¶ 86 and Plan, Art. V.A.

B. The Zoll Transaction

9. On July 11, 2024, the 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*

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Plan (as defined herein) or the Confirmation Order (as defined herein)

Sale of the Debtors' Assets Free and Clear, and (VII) Granting Related Relief [Docket No. 249] (the "Bidding Procedures Order").

10. Pursuant to the Bidding Procedures Order, on August 12, the Debtors initiated a three-day auction for the Ventilation Business and after multiple rounds of competitive bidding, on August 15, 2024, the Debtors selected the Assignee as the successful bidder.

11. On September 4, 2024, the Court approved the sale of the Ventilation Business to the Assignee under the Zoll APA and entered the *Order (I) Approving the Zoll Asset Purchase Agreement and Authorizing the Sale of Certain Ventilation 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* [Docket No. 496] (the "Sale Order").

12. Pursuant to the Bidding Procedures Order, Sale Order, and Zoll APA, the Debtors were authorized to assume and assign certain Executory Contracts and/or Unexpired Leases to the Assignee.

13. On October 9, 2024, the Debtors filed the *Notice of Filing of First Amended Assumed Contracts Exhibit in Connection With Zoll Asset Purchase Agreement* [Docket No. 614] setting forth the Executory Contracts and Unexpired Leases assumed and assigned to the Assignee pursuant to the Sale Order and Zoll APA.

14. On October 11, 2024, the Debtors filed the *Notice of Closing of Sale of Certain of the Debtors' Ventilation Assets to Zoll Medical Corp.* [Docket No. 626] setting forth the closing of the sale to the Assignee as of October 11, 2024, and further attaching the *First Amendment to Asset Purchase Agreement* as Exhibit 1 thereto (the "APA Amendment").

15. Pursuant to the section 1(v) of the APA Amendment, the Debtors and Assignee agreed that (i) for thirty (30) days following the closing, the Debtors would not reject contracts from the list of contracts set forth on Schedule 6.24 (the "Additional Contracts") without written approval of the Assignee; (ii) within the thirty (30) days, the Assignee may request the assumption and assignment of the Additional Contracts, and (iii) the Assignee shall reimburse the Debtors for costs incurred by the Debtors from the closing through the date the Assignee either provides notice to reject an Additional Contract or the Court enters an Order authorizing the assumption and assignment of an Additional Contract.

16. Subsequent to the APA Amendment, the Debtors agreed to extend the deadline to assume and assign or reject the Additional Contracts through the Effective Date of the Plan.

17. The Contracts are included within the Additional Contracts subject to the APA Amendment and generally consist of distributor agreements between the Debtors and such counterparties.

18. Following the closing of the sale transaction to the Assignee, the Assignee contacted all but two of the contract counterparties to the Contracts advising that it had purchased a part of the Ventilation Business from the Debtors and requested that contracts be amended for the purpose of maintaining a go forward relationship between the contract counterparties and the Assignee.

19. The contacted contract counterparties executed such amendment and the Debtors understand from the Assignee, such parties have further consented to the assumption and assignment of the Contracts, as amended, to the Assignee.

BASIS FOR RELIEF REQUESTED

20. Section 365(a) of the Bankruptcy Code provides that a debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a).

21. Courts apply the "business judgment" standard in evaluating a debtor's decision to assume or reject an executory contract. *See In re AbitibiBowater Inc.*, 418 B.R. 815, 831 Bankr. D. Del. 2009) (finding that a debtor's decision to assume or reject an executory contract will stand so long as "a reasonable business person would make a similar decision under similar circumstances"); *In re Armstrong World Indus., Inc.,* 348 B.R. 136, 162 (D. Del. 2006) ("Under section 365 of the Bankruptcy Code, a debtor may assume an executory contract or unexpired lease if (i) outstanding defaults under the contract or lease have been cured under section 365(b)(1) of the Bankruptcy Code, and (ii) the debtor's decision to assume such executory contract or unexpired lease is supported by valid business justifications."). The business judgment test "requires only that the trustee [or debtor-in possession] demonstrate that [assumption or] rejection of the executory contract will benefit the estate." *Wheeling-Pittsburgh Steel Corp. v. W. Penn Power Co. (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987).

22. Section 365(b)(1) of the Bankruptcy Code establishes certain conditions that must be satisfied before the assumption of an executory contract:

> 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 . . . ;

> (B) 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).

23. Lastly, section 365(f)(2) of the Bankruptcy Code provides in the pertinent part that:

> The trustee may assign an executory contract or unexpired lease of the debtor only if –
>
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

24. Here, the Debtors have determined, in the exercise of their business judgment, that it is in the best interests of their estates to assume and assign the Contracts to the Assignee. Pursuant to the APA Amendment, the Debtors agreed to make efforts to assume and assign the Contracts to the Assignee. Further, the Assignee has agreed to pay any costs associated with the assumption and assignment of the Contracts, including any cure costs.

25. In addition, the Debtors have sold their businesses, confirmed the Plan, and are in the process of winding down their affairs. Therefore, but for their obligations under the APA Amendment, the Debtors have no further need for the Contracts. In addition, the Debtors understand that all but two of the contract counterparties consent to the assignment of the Contracts to the Assignee. As such, the Debtors submit that the requirements of section 365(b)(1)(A) of the Bankruptcy Code are satisfied.

26. The Debtors further believe that adequate assurance of future performance is demonstrated since the Assignee will continue to perform under the Contracts, as amended, in the same manner as the Debtors. Accordingly, the Debtors submit "adequate assurance of future performance" exists within the meaning of section 365 of the Bankruptcy Code.

27. For the reasons set forth herein, the Debtors believe that they have satisfied the requirements for assumption and assignment of the Lease set forth in section 365 of the Bankruptcy Code.

WAIVER OF BANKRUPTCY RULES 6006(d)

28. Bankruptcy Rule 6006(d) provides that an "order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Given that all affected parties have consented to the relief and would like the assignment to occur as soon as possible, there is no reason to delay the effectiveness of the assumption and assignment. Therefore, the Debtors request that the order authorizing the assumption and assignment of the Contracts be effective immediately by providing that the 14-day stay under Bankruptcy Rule 6006(d) is waived.

RESERVATION OF RIGHTS

29. Nothing contained in this Motion is (i) an admission as to the validity of any claim against any Debtors or the existence of any lien against the Debtors' assets; (ii) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (iii) a promise to pay any claim; or (iv) an implication or admission that any particular claim would constitute an allowed claim.

NOTICE

30. The Debtors will provide notice of this Motion to: (a) the United States Trustee for the District of Delaware; (b) counsel to the Committee; (c) the agent of the DIP Facility and counsel

thereto; (d) the Contract counterparties, or their counsel if known; (e) counsel for the Assignee; and (f) any party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

NO PRIOR REQUEST

31. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

CONCLUSION

WHEREFORE, for the reasons stated herein, the Debtors respectfully request that the Court enter the Proposed Order granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: November 22, 2024
Wilmington, Delaware

/s/ Patrick J. Reilley

COLE SCHOTZ P.C.
Patrick J. Reilley (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