IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: VYAIRE MEDICAL, INC., *et al.*, Debtors.[1]	Chapter 11 Case No. 24-11217 (BLS) **Objection Deadline: 1/7/25 @ 4:00 p.m. (ET)** **Hearing Date: TBD**

AYMING USA, INC.'S MOTION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSES FROM VYAIRE MEDICAL, INC.

Ayming USA, Inc. ("Ayming"), a creditor and party-in-interest in the above-captioned cases, files this Motion for Allowance and Payment of Administrative Expenses (the "Motion") for post-petition services provided to the above-captioned debtors' estates (collectively, the "Debtors"). In support of this Motion, Ayming submits the *Declaration of Nicholas Moringo in Support of Ayming USA Inc.'s Motion for Allowance and Payment of Administrative Expenses from Vyaire Medical, Inc.* ("Moringo Decl.") filed contemporaneously herewith and fully incorporated by reference, and respectfully states as follows:

I. 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).

[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.

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

4. Ayming 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 503(b)(1)(A) and 507(a)(2) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") and Local Rule 9013-1.

II. BACKGROUND

A. General Background

6. On June 9, 2024 (the "Petition Date"), Debtor Vyaire Medical, Inc. ("Vyaire") and its affiliated debtors each filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). *See* Dkt. No. 1.

8. Ayming is a company that provides a number of business performance services, including consulting services related to certain tax credits availability to companies for certain research and development investments.

B. Ayming Services Provided To Vyaire.

9. On January 1, 2023, Ayming and Vyaire entered into a contract (the "R&D Agreement") for Ayming to perform consulting services by performing analysis related to Vyaire's eligibility for certain Research and Development ("R&D") Tax Credits. *See* Moringo Decl. at ¶¶ 2–3; Ex. A. On November 20, 2023, the parties entered into an addendum (the "Section 174 Addendum") to the R&D Agreement to incorporate further services specifically with regard to

analysis of Section 174 of the Internal Revenue Code ("Section 174"). *See* Moringo Decl., ¶¶ 4–5; Ex. B.

10. Pursuant to their agreement, Vyaire contracted to pay Ayming fees for the analysis of the R&D Tax Credit as follows:

> The initial term of this R&D engagement is for all open tax years as well as tax years 2018 through 2023. The fee for our Services is defined below for each of the applicable tax years. Fees shall be billed in accordance with the terms and conditions attached hereto.
>
> - 14% Success Based Fee for Net Federal and State Credits Identified for the first $1,000,000 in credits;
> - 12% Success Based Fee for Net Federal and State Credits identified from $1,000,001 to $3,000,000 in credits; and
> - 10% Success Based Fee for Net Federal and State Credits identified for credits in excess if $3,000,000.

Ex. A at 1.

11. With regard to the Section 174, Vyaire contracted to pay Ayming a "Success Based" fee of "10% of the fee associated with the R&D analysis beginning with tax year ending in September 2023." Ex. B at 1.

12. In order to support their review and assessment, Ayming continued to gather documents and information from Vyaire and its agents through approximately April 2024. *See* Moringo Decl., ¶ 6.

13. Ayming continued to perform and complete that analysis after the Petition Date at the request of Vyaire, and, as late as July 30, 2024, Vyaire continued to assure Ayming that it be compensated for those services, with Vyaire's James Talfourd-Cook specifically stating that "any amount will certainly be post-petition on but I will need to clarify with the legal team (Kirkland & Ellis) how that will wok [*sic*] in practice." Ex. C at 1; Moringo Decl., ¶¶ 6–7.

14. Ultimately, Ayming identified the following Federal and California R&D Tax Credits for Vyaire Holding Company and its subsidiaries:

Gross Federal and StateR&D Tax Credits				
	2020	**2021**	**2022**	**Totals**
Federal	$ 3,984,864.00	$ 1,594,676.00	$ 905,697.00	$ 6,485,237.00
California	$ 2,435,336.00	$ 1,436,830.00	$ 844,334.00	$ 4,716,500.00
	$ 6,420,200.00	$ 3,031,506.00	$ 1,750,031.00	$ 11,201,737.00

Moringo Decl., ¶ 9. Pursuant to the parties' written agreement, Ayming's fees for its analysis of those identified R&D Tax Credits of $11,201,738 is $1,200,173.48:

R&D Tax Credit Fee			
$1 - $1,000,000	**$1,000,001 - $3,000,000**	**$3,000,001+**	**Total R&D Tax Credit Fee**
14%	**12%**	**10%**	
$ 140,000.00	$ 239,999.88	$ 820,173.60	$ 1,200,173.48

Moringo Decl., ¶ 10.

15. Additionally, with regard to the Section 174, Ayming is entitled to an additional fee of $17,500.31. Moringo Decl., ¶ 11.

16. Thus, in total, Ayming is owed total fees of $1,217,673.79 (the "Administrative Claim").

17. On August 2, 2024, out of an abundance of caution, Ayming filed a proof of claim for these fees (Claim No. 148).

III. RELIEF REQUESTED AND BASIS FOR RELIEF

18. The Bankruptcy Code grants administrative expense priority for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A); *see also* 11 U.S.C. § 507(a)(2).

19. "An administrative expense claim is entitled to priority under Section 503(b)(1)(A) if: (1) there was a 'post-petition transaction between the claimant and the estate,' and (2) those

expenses yielded a 'benefit to the estate.'" *In re Energy Future Holdings Corp.*, 990 F.3d 728, 741 (3d Cir. 2021) (quoting *In re Women First Healthcare, Inc.*, 332 B.R. 115, 121 (Bankr. D. Del. 2005)). Section 503(b)(1)(A) "designates 'wages, salaries, or commissions *for services rendered* after the commencement of the case' as 'actual, necessary costs and expenses of preserving the estate.'" *Pennsylvania Dep't of Envtl. Res. v. Tri-State Clinical Labs., Inc.*, 178 F.3d 685, 689 (3d Cir. 1999) (quoting 11 U.S.C. § 503(b)(1)(A)) (emphasis in original). It contemplates "a quid pro quo pursuant to which the estate accrues a debt in exchange for some consideration necessary to the operation or rehabilitation of the estate" and, thus, priority is "afforded such expenses to compensate the providers of necessary goods, services or labor." *Id.* at 689–90.

20. "The purpose of Section 503 is to permit the debtor's business to operate for the benefit of its prepetition creditors." *Matter of TransAmerican Nat. Gas Corp.*, 978 F.2d 1409, 1415 (5th Cir. 1992) (citing *In re Coastal Carriers Corp.,* 128 B.R. 400, 403 (Bankr. D. Md.1991)). "The purpose of priority treatment for administrative expenses under § 503 of the Bankruptcy Code is to encourage parties 'to continue to do business with a debtor post-petition,' and 'to encourage third parties to provide necessary goods and services to the debtor-in-possession.'" *In re Fleming Steel Co.*, 482 B.R. 765, 768–69 (Bankr. W.D. Pa. 2012) (quoting *In re North American Petroleum Corp. USA*, 445 B.R. 382, 400 (Bankr. D. Del. 2011)). "Absent this incentive, third parties would be far more inclined to refrain from dealing with a debtor in bankruptcy, thereby harming other creditors." *In re ATP Oil & Gas Corp.*, No. 12-36187, 2014 WL 1047818, at *3 (Bankr. S.D. Tex. Mar. 18, 2014).

21. Vyaire's bankruptcy estate has received services from Ayming after the Petition Date pursuant the R&D Agreement and Section 174 Addendum. In performance of its services, Ayming has provided consulting and analysis that resulted in the identification of $11,201,737 in

R&D Tax Credits, previously unidentified assets that benefit the estate. Without the identification of these tax credit assets, the estate would never have obtained this multi-million-dollar benefit, which Vyaire sought to have Ayming continue work on after the Petition Date. *Cf. In re Kosting*, 350 F. Supp. 1071, 1075 (D. Conn. 1972) (holding that a real estate broker was entitled to reasonable compensation for his post-petition services, that resulted in the sale of real property, as an as administrative expense where the broker was "encouraged . . . to continue to serve the estate" after the petition was filed).

22. Accordingly, Ayming is entitled to an allowed claim for administrative expenses and payment of the Administrative Claim.

IV. RESERVATION OF RIGHTS

23. Ayming 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.

V. CONCLUSION

WHEREFORE, Ayming respectfully requests this Court enter an order, substantially in the form attached hereto, allowing the post-petition amounts due as an administrative expense, and provide such other and further relief as the Court deems just and equitable.

Dated: December 24, 2024
Wilmington, Delaware

Respectfully submitted,

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