

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: VYAIRE MEDICAL, INC., <i>et al.</i> Debtors	Chapter 11 Case No. 24-11217(BLS) (Jointly Administered) Objection Deadline: January 10, 2025 Hearing Date: TBD
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MOTION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE

Quad DBC Holdings, LLC (“Landlord”), by and through its undersigned counsel, hereby files this Motion for Allowance and Immediate Payment of Administrative Expense and respectfully states as follows:

Background

1. Landlord and debtor, Vyair Medical Inc., (“Vyair”) were parties to an unexpired lease of two buildings of non-residential real property located at 510 Technology Drive and 520 Technology Drive in Irvine, California (the “Lease”) dated October 3, 2017. On the Petition Date herein, Tenant was in default under the Lease. The Lease is attached hereto as Exhibit “A.”

2. On June 10, 2024, the above captioned Debtors filed the *Motion of Debtors for Entry of an 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* [Docket No. 16] (“Sale Motion”). Through the Sale

Motion, Debtors sought this Court's Approval of the sale of substantially all of their assets to one or more to-be-determined purchasers.

3. On July 11, 2024, this 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 Sale of the Debtors' Assets Free and Clear, and (VII) Granting Related Relief* [Docket No. 249] ("Sale Procedures Order").

4. On July 11, 2024, pursuant to the Sale Procedures Order, the Debtors filed the *First Notice to Contract Parties of Potentially Assumed and Assigned Executory Contracts and Unexpired Leases* [Docket No. 256] and identified the Lease as a potentially assumed Lease.

5. On August 1, 2024, Landlord filed proof of claim numbered 132, asserting an unsecured claim in the amount of \$24,439,923.00.

6. On August 15, 2024, the Debtors file a notice indicating that Zoll Medical Corporation ("Zoll") was the successful bidder for the Debtors' ventilation business. [Docket No. 388] (the "Zoll Sale").

7. The Court approved the Zoll Sale at a hearing on August 30, 2024. On September 4, 2024, the Court entered an order approving Zoll Sale [Docket No. 388].

8. On September 27, 2024, the Debtors filed the First Notice of Rejection of Certain Executory Contracts [Docket No. 575]. The only leases identified in the Rejection Notice related to the Landlord's Lease.

9. Importantly, the Debtors indicated a rejection effective date of September 30, 2024 (the “Rejection Date”).

10. On October 11, 2024, the Landlord filed the Limited Objection to First Notice of Rejection of Certain Executory Contracts [Docket No. 625].

11. On October 23, 2024, the Court entered an Order confirming the Landlord and Debtors’ agreement that the date of rejection shall be set to October 10, 2024 (the “Rejection Date”) [Docket No. 676].

12. The Landlord and Zoll subsequently entered into a lease whereby Zoll now occupies a portion of the leasehold, however, the lease with Zoll did not become effective until the Debtors vacated the Property on the Rejection Date.

13. From the Petition Date to Rejection Date (the “Administrative Period”), the Vyaire’s and/or the Debtors’ agents have continually conducted business on the Property. During the Administrative Period, the Vyaire’s and/or the Debtors’ equipment remained on the Property undisturbed, and personnel were frequently entering and exiting the Property, meaning the Vyaire and/or the Debtors did not vacate the Property during the Administrative Period.

14. The Debtors constructively vacated the Property on the Rejection Date since all the personal property remaining on the Property is believed to have been transferred to Zoll as of October 10, 2024.

15. Neither Vyaire nor the Debtors have not paid all the post-petition rent and other expenses due to the Landlord. Zoll did not pay any portion of the Administrative Claim defined below.

16. Attached hereto as Exhibit “B” is a breakdown of all unpaid charges that are properly categorized as administrative expenses.

17. The total charges attributable to 510 Technology Drive during the Administrative Period are \$936,905.65.

18. The total charges attributable to 510 Technology Drive during the Administrative Period are \$1,92,355.64.

19. The total legal expenses incurred by the Landlord during the Administrative Period are \$66,760.01

20. The total administrative expense requested is \$2,685,021.30 (the “Administrative Claim”).

Relief Requested

21. The amounts in the Administrative Claim are properly categorized as administrative expenses and should be classified and treated as such.

22. Section 365(d)(3) provides that a debtor is required to “timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected[.]” 11 U.S.C. § 365(d)(3). *See also, In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 209 (3d Cir. 2001) (holding that section 365 requires a debtor in possession to perform all obligations when due under a lease of nonresidential real property until such lease is rejected).

23. The purpose of section 365(d)(3) is to ensure immediate payment of lease obligations so that a landlord is not forced to provide services to the debtor without being compensated. *See, Morris v. Newman (In re McCrory Corp.)*, 210 B.R. 934, 936 (S.D.N.Y. 1997). Such a section prevents landlords from becoming involuntary creditors of a post-petition estate, which is precisely what has occurred in these bankruptcies.

24. Costs and expenses incurred for post-petition, pre-assumption or rejection performance under an unexpired commercial lease must be allowed as an administrative expense without regard to Section 503(b)(1)(A). A debtor's obligation under Section 365(d)(3) is independent of, and not subject to, the requirements for allowance of administrative expenses pursuant to Section 503(b)(1). *See In re Valley Media, Inc.*, 290 B.R. 73, 77 (Bankr. D. Del. 2003).

25. In addition, Section 503(b)(1) provides for an administrative expense claim for "the actual, necessary costs and expenses of preserving the estate." *See* 11 U.S.C. § 503(b)(1). A landlord's administrative claim under Section 503(b)(1) is equal to the lease contract rate. *In re ZB Co., Inc.* 302 B.R. 316, 319 (Bankr. D. Del. 2003). Section 507(a) of the Bankruptcy Code provides that administrative expense claims that are allowed under 503(b) of the Bankruptcy Code enjoy first-priority status. 11 U.S.C. § 507(a)(2). The Debtors here clearly benefitted from the post-petition use of the Property because they were able to occupy such Property while deciding whether to assume or reject the lease and then also to make the space and equipment inside the space available to potential purchasers.

26. The charges sought through this Motion are all defined as "rent" within the scope of the applicable lease and therefore constitute a proper entitlement to an administrative expense. Section 14.1(a) of the Lease states that upon the Vyaire's default, all payments due from Vyaire to Landlord set forth in the lease shall constitute "rent" due to the Landlord.¹ These rental amounts include the Vyaire's obligation to indemnify the Landlord for all losses, including the payment of attorneys' fees. Here, all rent due, costs, and expenses identified on Exhibit B constitute an administrative expense.

¹ A copy of the applicable lease is attached hereto as Exhibit B.

27. Further, all other related post-petition fees and costs, including attorneys' fees as provided for in Section 10.3 of the Lease are entitled to the same status as an administrative expense.

28. In addition, the Landlord asserts an administrative expense for the attorneys' fees and costs incurred between the Petition date and the Rejection Date. *In re Crowne Brooks Corporation*, 269 B.R. 12, 15 (Bankr. D. Del. 2001) ("attorneys' fees are recoverable as part of a cure claim only if the contract or lease specifically requires their payment.").

29. Landlord reserves and preserves all rights to amend or supplement this request as needed.

WHEREFORE, Landlord requests that this Court award an administrative expense in the amount of \$2,685,021.30 and all other relief that it determines to be just and appropriate.

Date: December 27, 2024

FLASTER/GREENBERG, P.C.

/s/ Damien Nicholas Tancredi

By: _____

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