

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

In re:

VYAIRE MEDICAL, INC., *et al.*,

Debtors.

Chapter 11

**Case No. 24-11217 (BLS)
(Jointly Administered)**

RE: D.I. 988

**Objection Deadline: February 26, 2025 at 4:00 pm (ET)
Hearing Date: March 5, 2025 at 10:30 am (ET)**

**AMENDED MOTION OF DATASITE LLC TO ALLOW
LATE FILED ADMINISTRATIVE EXPENSE CLAIM UNDER 11 U.S.C. §503(b)(1)(A)
AND FOR ALLOWANCE AND IMMEDIATE PAYMENT OF AN
ADMINISTRATIVE EXPENSE CLAIM**

Datasite LLC ("Datasite") files this amended motion (the "Amended Motion") to allow late filed Administrative Expense Claim under 11 U.S.C. §503(b)(1)(A) (the "Administrative Expense Claim") and for allowance and immediate payment of the Administrative Expense Claim for amounts owed by Vyair Medical, Inc., *et al.* (the "Debtors") to Datasite under a cloud service agreement as set forth below in the above-captioned Chapter 11 Bankruptcy cases. In support thereof, Datasite respectfully states the following:

I. JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over these Chapter 11 Cases, and this Amended Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District for the District of Delaware, dated February 29, 2012.

2. The venue is proper in this District under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

3. The statutory and legal foundations for the relief sought herein are Sections

364(a), 503(b)(1) and 507(a)(2) of the Bankruptcy Code (the “Bankruptcy Code”) and Bankruptcy Rule 9006(b)(1).

4. Pursuant to Local Bankruptcy Rule 9013-1(f), Datasite confirms its consent to the entry of a final judgment or order by the Court in connection with this Amended Motion if it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

II. BACKGROUND

5. On June 9, 2024 (the “Petition Date”), the Debtors each filed a voluntary petition for relief pursuant to Chapter 11 of the Bankruptcy Code. [Docket No. 1]

6. The Debtors are engaged in the business of manufacturing and selling products and solutions relating to breathing technology. [*Declaration of John Bibb, the Group Chief Executive Officer of Vyaire Medical, Inc. and its affiliated debtors and debtors in possession in support of Chapter 11 Petitions and First Day Papers.* ¶6, Docket No. 15]

7. Datasite is a Delaware limited liability company located at 733 S. Marquette Ave., Minneapolis, MN 55402, USA. It is engaged in the business of providing cloud technology.

8. On May 8, 2024, Debtor Vyaire Medical, Inc. (“Vyaire Medical”) entered into a service agreement comprising of “Americas General Terms and Conditions” and “Statement of Work: Datasite DiligenceTM” (the “Agreement”) pursuant to which Datasite provided to the Debtors, cloud services, specifically called “Datasite DiligenceTM”, which is a virtual data room with complete support for sell and buy side financial transactions (the “Services”). A copy of the Agreement is attached as ***Exhibit A*** and incorporated herein by reference.

9. Pursuant to the Agreement, on May 18, 2024, the virtual data room for project ‘Crystal’ was opened. Since the opening of the data room, Datasite provided the Debtors the Services pursuant to the Agreement and continued to do so even after the Petition Date.

10. On November 14, 2024, the Bankruptcy Court confirmed the Second Amended Joint Chapter 11 Plan of Reorganization of Vyair Medical and its debtor-affiliates (Docket No. 719, the “Plan”), which was attached as Exhibit A to the Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Chapter 11 Plan of Reorganization of Vyair Medical, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 745, the “Confirmation Order”].

11. On November 27, 2024, the Debtors filed their Notice of (I) Entry of Confirmation Order, (II) Occurrence of Effective Date, and (III) Related Bar Dates [Docket No. 810], indicating that the Effective Date¹ i.e. the deadline for creditors to file requests for payment of administrative expense claims under the Plan and Confirmation Order, was December 27, 2024 (the "Administrative Claims Bar Date").

12. On December 5, 2024, an Affidavit of Service was filed in the Court by Omni Agent Solutions, Inc., the claims agent for the Debtors, notifying that the Notice of Confirmation Order was served on November 27, 2024, to the entities in the Service List. Datasite was listed in the Service List. [Docket No. 821]

13. As per the Plan, as on the Effective Date, barring certain exceptions, each Executory Contract or Unexpired Lease not previously assumed, assumed and assigned, or

¹ Capitalized terms not defined herein have the meaning attributed to them in the Plan and Confirmation Order

rejected was deemed automatically rejected, pursuant to sections 365 and 1123 of the Bankruptcy Code. The Debtors' executory contract with Datasite was not assumed or rejected prior to the Effective Date.

14. As of November 27, 2024, the executory contract with Datasite was designated for rejection. However, the Debtors continued to engage in business with Datasite in the ordinary course and continued to utilize its services. Notably, as evidenced by the activity report for the virtual data room, the Debtors accessed the data room multiple times in December 2024² and again on January 14, 2025, through representatives of ZOLL Medical Corporation, AlixPartners, and Trudell Medical Limited. A summary of the data room information and a list of the users accessing the data room is attached as *Exhibit B*. It is evident from the list of the users that majority of the persons accessing the data room represent ZOLL Medical Corporation.

15. On January 13, 2025, in the ordinary course of business, Datasite followed up with the Debtors via e-mail regarding an outstanding payment for an invoice. The e-mail was directed to Ms. Rynetta Carter. On January 14, 2025, Datasite received a reply from Mr. Joel Amico of

² The data room was accessed on the following dates and by the following users:

- Dec 04, 2024 - Kerry Onda from ZOLL Medical
- Dec 06, 2024 - John Tutty from AlixPartners
- Dec 06, 2024 - Kerry Onda from ZOLL Medical
- Dec 09, 2024 - Jackie Engel from ZOLL Medical
- Dec 09, 2024 - John Tutty from AlixPartners
- Dec 10, 2024 - Monicaun Marchioni from ZOLL Medical
- Dec 13, 2024 - Leanna Dinsmore from ZOLL Medical
- Dec 19, 2024 - Jen Izzo from ZOLL Medical
- Dec 23, 2024 - Kerry Onda from ZOLL Medical
- Dec 23, 2024 - John Tutty from AlixPartners
- Dec 23, 2024 - Dylan Friesner from PJT
- Jan 14, 2025 - John Tutty from AlixPartners

AlixPartners, who indicated that AlixPartners was advising the Debtors during the wind-down process following their Chapter 11 filing. Mr. Amico also requested additional information from Datasite, regarding the claim. Datasite provided the requested information to Mr. Amico.

16. On January 15, 2025, Mr. Amico sent an e-mail to Datasite's representatives, informing them that the executory contract with Datasite had been rejected as of the Effective Date pursuant to the Plan and Confirmation Order. This e-mail was the first notice Datasite received regarding the Confirmation Order. Any prior service of the Notice of Confirmation Order and the deadline to file administrative expense claims by December 27, 2024, did not reach the appropriate official at Datasite, primarily due to mailing issues and reduced office staffing during the holiday season.

17. On January 15, 2025, Datasite's virtual data room to the Debtors was closed, and an archive was opened the same day.

18. As of the filing of this Amended Motion, the following invoices for post-petition Services by Datasite remain unpaid:

S. No.	Invoice No.	Invoice Date	Billing Period	Invoice Amount	Invoice Due Date
1	INV-752689	1/05/2025	12/1/2024 to 12/31/2024	\$91,133.43	2/4/2025
2	INV-756657	1/16/2025	1/1/2025 to 1/18/2025	\$52,916.14	2/15/2025
3	INV-756688	1/17/2025	11/19/2024 to 11/27/2024	\$27,340.03 (prorated amount for the Services)	2/16/2025
			Total	\$171,389.60	

The copies of the invoices for the unpaid post-petition Services are attached as ***Exhibit C***.

19. Between January 15, 2025, and February 7, 2025, the representatives of Datasite and Mr. Amico continued to communicate regarding the unpaid invoices for Datasite's Services.

20. On February 7, 2025, Datasite engaged the undersigned counsel to represent them.

21. The Plan defines “Administrative Claim” as “a Claim against a Debtor arising on or after the Petition Date and before the Effective Date for the costs and expenses of administration of the Chapter 11 Cases under sections 503(b), 507(a)(2), 507(b), or 1114(e)(2) of the Bankruptcy Code, including (a) the actual and necessary costs and expenses of preserving the Estates and operating the businesses of the Debtors incurred on or after the Petition Date and through the Effective Date; (b) Allowed Professional Fee Claims in the Chapter 11 Cases; (c) all fees and charges assessed against the Estates pursuant to section 1930 of chapter 123 of title 28 of the United States Code, 28 U.S.C. §§ 1911– 1930; and (d) adequate protection claims provided for in the DIP Orders.” *Plan Art. I, A.4* The claims of trade creditors such as Datasite, who provided valuable goods and services to the Debtors in connection with the business operation of the Debtors, fall within this definition.

22. The amount of \$171,389.60 for Datasite’s post-petition Services remains unpaid as of this Amended Motion's filing date.

III. AMENDED MOTION TO ALLOW A LATE-FILED CLAIM

Datasite’s failure to file its Administrative Expense Claims in a timely manner resulted from excusable negligence.

23. By this Amended Motion, Datasite requests that this Court enter an order allowing its late-filed administrative claim for \$171,389.60 pursuant to Sections 364(a), 503(b)(1), and 507(a)(2) of the Bankruptcy Code for the actual and necessary post-petition costs and expenses of preserving the Debtors' estates in the ordinary course of their business after the Petition Date, as timely filed. Datasite extended unsecured credit in the ordinary course of business to post-

petition Debtors to help preserve the estates by supplying beneficial and valuable Services to the Debtors and allowing the Debtors' business to be sold as a going concern and not as a liquidation.

24. Datasite requests the Court to allow its administrative claim because its failure to file an administrative expense claim resulted from excusable neglect.

25. Section 503(a) of the Bankruptcy Code provides that “[a]n entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.” 11 U.S.C. § 503(a).

26. Pursuant to Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, the Court may enlarge the time for filing a proof of claim where the failure to file a proof of claim was “the result of excusable neglect.” Fed. R. Bankr. P. 9006(b)(1). Many courts apply the “excusable neglect” standard under Rule 9006(b)(1) in determining whether “cause” exists under section 503(a). Fed. R. Bankr. P. 9006. See, e.g., *In re AMF Bowling Worldwide, Inc.*, 520 B.R. 185, 196 (Bankr. E.D. Va. 2014); *In re Bluestem Brands, Inc.*, 2021 Bankr. LEXIS 1980 (*Bankruptcy Court for the District of Delaware, decided on July 27, 2021*).

27. The Supreme Court identified four factors for determining excusable neglect: “the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship.*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (adopting test applied by a lower court to a consideration of creditor's late-filed claim). See also, *In re Am. Classic Voyages Co.*, 405 F.3d 127, 133 (3d Cir. 2005) (affirming denial of a request to file a late claim because the creditor had not established excusable neglect); *In re O'Brien Envtl. Energy*,

Inc., 188 F.3d 116, 126-27 (3d Cir. 1999) (concluding that the creditor had met the Pioneer standards and remanding for consideration of late-filed claim). “Not all factors need to favor the moving creditor to warrant acceptance of [the] creditor’s late-filed proof of claim on [the] ‘excusable neglect theory.’” *In re Enron Corp.*, 298 B.R. at 525 (S.D.N.Y. 2003)

28. Further, in *Pioneer*, the Supreme Court explained that “‘excusable neglect’ under Rule 9006(b)(1) is a somewhat ‘elastic concept’ and is not limited strictly to omissions caused by circumstances beyond the control of the movant.” *Pioneer*, 507 U.S. at 392. The debtor argued that Rule 9006(b)(1) required showing that the movant's failure to comply with the Court's deadline was caused by circumstances beyond its reasonable control. *Id.* at 388. The Supreme Court disagreed, however, because “the Rule grants a reprieve to out-of-time filings that were delayed by ‘neglect’.” *Id.* The Court found that “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond party’s control. *Id.* The Supreme Court continued, “[W]e conclude that the determination is at bottom an equitable one.” *Id.* at 395. See also, *In re 50-Off Stores, Inc.* 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998) (holding the four-factor test has “necessarily elastic quality,” requiring the Court to look to “the totality of the circumstances” and *In re Kmart Corp.*, 381 F. 3d 709, 714 (7th Cir. 2004) (“court may consider ‘all relevant circumstances’ in its excusable neglect analysis.”)

29. An equitable analysis of the facts at issue clearly is in favor of Datasite:

30. Datasite’s late-filed claim totaling \$171,389.60 is relatively small when viewed in the context of the estate's total assets and liabilities.

31. The delay was not long, and the Debtor only recently began objecting to claims

and allowing Datasite's claim will not impact the judicial proceedings. See *In re Premier Membership Services, LLC*, 276 B.R. 709 (S.D. Fl. 2002). In *Premier Membership*, the claimant filed a Motion for Enlargement of Time, similar to this Motion for Leave, six and a half months after the claims bar date and the Debtors' Plan had already been confirmed—*Id.* at 715. The Court held that the delay had no impact on the judicial proceedings, and as of the filing of the claimant's Motion, substantial matters remain to be resolved in the case post-confirmation, including claims objections. *Id.* In the present case, the Debtors have recently begun filing objections to claims.

32. Datasite did not file a timely claim due to the mailing issues and limited staff during the holiday season, which delayed the relevant officer receiving the Notice of the Confirmation Order and the applicable Administrative Claims Bar Date. Further, Datasite relied on Debtors' e-mail communication, believing that the debt would be paid in the ordinary course of business. See *In re Franciscan Vineyards, Inc.*, 597 F.2d 181, 182-83 (9th Cir. 1979) (Bankruptcy Act case holding that a letter delivered to the trustee prior to the bar date qualified as a timely filed proof of claim because it was “a statement in writing that is signed by an agent of the creditor, and, ‘reasonably construed’ sets for the ‘consideration’ (or ‘ground of liability,’ Official Form 15) therefore, that no payments have been made thereon, and that the sum is justly owing” and further noting that “[w]hether formal or informal, a claim must show ... the creditor’s intention to hold the estate liable.” (citations omitted)).

33. Finally, Datasite has acted in good faith in filing this Amended Motion, was unaware of the Administrative Claims Bar Date until after the date had passed, and has not delayed filing its claims for any tactical reason.

34. Additionally, based upon the circumstances here, both equity and case law

mandate the entry of an Order granting this Amended Motion.

35. WHEREFORE, for the foregoing reasons, Datasite respectfully requests that this Court enter an Order allowing Datasite's late-filed Administrative Expense Claim in the amount \$171,389.60, as timely filed for allowance and immediate payment of the Administrative Expense Claim and such additional relief that the Court deems equitable and just.

Dated: February 17, 2025

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