IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
VYAIRE MEDICAL, INC.,[1]	)	Case No. 24-11217 (BLS)
Liquidating Debtor.	)	
	)	**Hearing Date: TBD**
	)	**Obj. Deadline: May 27, 2025**

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

David M. Barse, solely in his capacity as the Plan Administrator of Vyaire Medical, Inc., *et al.* (the "Plan Administrator"), appointed pursuant to the *Second Amended Joint Chapter 11 Plan of Vyaire Medical, Inc. and Its Debtor Affiliates* [Docket No. 719] (the "Plan"), which was confirmed by the Order of the United States Bankruptcy Court for the District of Delaware (the "Court") on November 14, 2024 [Docket No. 745] (the "Confirmation Order"), hereby files this objection (the "Objection") to *Ayming USA, Inc.'s Motion For Allowance and Payment of Administrative Expenses From Vyaire Medical, Inc.* [Docket No. 885] (the "Motion") filed by Ayming USA, Inc. ("Ayming"). In support of the Objection, the Plan Administrator respectfully represents as follows:

[1] This chapter 11 case is now being administered by the Plan Administrator pursuant to the terms of 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"). The Plan Administrator's mailing address is Vyaire Medical, Inc., Attn: David M. Barse, Plan Administrator, c/o Cole Schotz P.C., 500 Delaware Avenue, Suite 1410, Wilmington, DE 19801

PRELIMINARY STATEMENT

Ayming asserts an entirely unsupported administrative claim against Vyaire Medical Inc. ("Vyaire") in the amount of approximately $1.2 million based on an unconscionable rejected prepetition agreement pursuant to which Ayming provided **no benefit** to these debtors' estates.

Vyaire engaged Ayming in January 2023 to provide tax consulting services related to certain research and development tax credits. Ayming asserts that the agreement provides for a "Success Fee" based on the mere **identification** of tax credits. The agreement was ambiguous at best as it did not define any of the relevant terms. Vyaire had always understood the agreement to provide for a "success" fee based on the actual "success" that benefitted Vyaire. Irrespective, the tax credits Ayming was engaged to identify could only be used to offset a company's taxable income. Had Ayming done the most basic due diligence before performing services or during the consulting period, it could have advised Vyaire that there was no likelihood that it could use the credits identified because it had no taxable income. Instead, Ayming now seeks to take advantage of Vyaire and claim an administrative expense for avoidable services which it should have known would never benefit Vyaire. Thus, the agreement was unconscionable and unenforceable.

In addition, Ayming conceded that its claims, if any, are non-priority general unsecured claims when it filed a non-priority general unsecured proof of claim under penalty of perjury for the **exact amount** and for the **exact claims** as asserted in the Motion. Indeed, the claim could only be a non-priority general unsecured claim as the claims all arise from a prepetition agreement, substantially all the services were performed before the bankruptcy filing, and the agreement was rejected in the bankruptcy case.

Further, even assuming the claims asserted could be considered as administrative expenses, Ayming could never meet the standard for allowance for an administrative expense as Vyaire received **no benefit** from the services, let alone, an actual and necessary benefit.

For the reasons identified above, and set forth in more detail below, the Court should deny the Motion.

BACKGROUND

I. General Background

1. On June 9, 2024 (the "Petition Date"), Vyaire and its affiliated debtors (collectively, the "Debtors") each commenced a voluntary case under title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") with the Court.

2. Once in chapter 11, the debtors continued to actively market their assets and ultimately concluded sales for their businesses to Trudell Medical Limited as the successful bidder for the respiratory diagnostics business and ZOLL Medical Corporation as the successful bidder for its ventilation business. Neither of the sales resulted in any consideration paid to Vyaire on account of any tax credits asserted to be identified by Ayming in the Motion.

3. On November 14, 2024, the Court entered the Confirmation Order.

4. On November 27, 2024 (the "Effective Date"), the Plan became effective in accordance with its terms [Docket No. 810].

5. On the Effective Date, David M. Barse, in his capacity as Plan Administrator, became the sole representative of the Debtors' estates for the purpose of, *inter alia*, reconciling claims filed against the Debtors' estates and facilitating distributions in accordance with the Plan. *See* Plan, Art. IV.E., VII.

6. Pursuant to Art. V. of the Plan, executory contracts not previously assumed or assumed and assigned were deemed automatically rejected by the debtors on the Effective Date without any further notice or order.

7. The Agreement (defined below) was rejected on the Effective Date.

8. On January 25, 2025, the Court entered a *Final Decree Closing Certain Cases* [Docket No. 974], *inter alia*, closing all cases other than the above-captioned case and authorizing that relief in connection with any of the Debtors be filed in the above-captioned case.

9. On February 11, 2025, the Court entered an *Order Approving the Plan Administrator's First Motion to Extend the Administrative Claims Objection Deadline* [Docket No. 987], pursuant to which the (i) Administrative Claims Objection Bar Date was extended to May 27, 2025, and (ii) deadline to respond to any motions or requests for payment of an administrative claim was extended May 27, 2025.

II. The Debtors' Tax Position, the Ayming Agreement, and the "Tax Credits"

10. The Debtors operated under a fiscal tax year ending September of each year. Prior to the Petition Date, the Debtors with the assistance of their tax advisors filed federal and relevant state tax returns for, among others, the years ending September 2020 through September 2022 (the "<u>Tax Filings</u>"), as follows:

- Year ending September 2020 federal return filed on or about July 15, 2021, and California state return filed on or about July 15, 2021;
- Year ending September 2021 federal return filed on or about July 15, 2022, and California state return filed on or about August 15, 2022; and
- Year ending September 2022 federal return filed on or about July 15, 2023, and California state return filed on or about July 28, 2023.

11. Based on the tax filings, the Debtors had no California state or Federal "taxable income" for tax years 2020, 2021, or 2022.

12. On January 27, 2023, Vyaire entered into a consulting agreement with Ayming to provide certain research and development ("R&D") tax credit consulting services, which agreement was amended on November 13, 2023 (the "Agreement").[2]

13. The Agreement provided that Ayming's responsibilities included a "Feasibility Analysis" pursuant to which Ayming would advise Vyaire whether it could qualify for an R&D tax credit.

14. Following the feasibility analysis, if credits were applicable, Ayming was then responsible to perform the diligence of quantifying the credits, preparing supporting documentation and tax forms, and representing Vyaire through any exemption or appellate process with respect to any challenge by the Internal Revenue Service or state taxing authorities.

15. Following feasibility, qualification, and reporting obligations, the Agreement provided for a "Success Based Fee" based on "Net Federal and State Credits identified."

16. The terms "Success Based Fee" and "Net Federal and State Credits" are not defined in the Agreement. These terms had always been understood and interpreted by Vyaire to mean that Ayming would only earn a fee to the extent the services resulted in actual benefits to Vyaire.

17. Following its retention, on February 28, 2023, Vyaire sent to Ayming its 2021 tax return. In addition, following its retention, Ayming had the opportunity to perform additional due diligence and obtain copies of other already filed tax returns.

18. A cursory review of the 2021 return would have immediately made clear to Ayming that Vyaire had no ability to apply any R&D tax credits that Ayming was consulting on

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2 The Agreement is attached as Exhibits A and B to the Motion.

for that tax year as Vyaire had no federal or California taxable income. With that understanding, Ayming should have also inquired into the applicability of credits for other tax years.

19. Had Ayming performed such due diligence as required by the Agreement it would have learned that the services it would be performing under the Agreement would provide no benefit to Vyaire as it had no federal or California taxable for the relevant years.

20. In addition, the November 2023 amendment to the Agreement provided that Ayming would provide an invoice to Vyaire following its credit calculations equal to 75% of "Net Credits identified and delivered to the Company." "Net Credits" again was not a defined term and no such invoice was ever delivered to Vyaire.

21. Following the Petition Date, Vyaire was not aware of any services performed by Ayming. To the contrary, Ayming refused to release any workpapers or calculations to Vyaire.

III. Ayming's Proof of Claim and Motion for Allowance of Administrative Claim

22. On August 2, 2024, Ayming filed a non-priority general unsecured claim in the amount of $1,217,673.79 (the "POC").[3]

23. Part 8 of the POC states that the "basis of the claim" is for "Breach of Contract / Unpaid Tax Consulting Services."

24. At Part 12 of the POC questioning whether the claimant is asserting any priority for its claim, Ayming checked the box "No."

25. In the Addendum to POC, Ayming indicated that the non-priority general unsecured amounts asserted in the POC were based on the Agreement and services performed under the Agreement related to "analysis and consultation related to: 1) Research & Development ("R&D") Tax Credits; and 2) expenses under I.R.C. Section 174."

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[3] A copy of the POC is attached hereto as **Exhibit 1**.

26. The Addendum further provided that the fees were "premised upon the tax credits identified between 2020 and 2022."

27. On December 24, 2024, Ayming filed the Motion seeking allowance and payment of an administrative expense claim in the amount of $1,217,673.79 for services alleged to be rendered by Ayming to Vyaire under the Agreement (the "Administrative Claim").

28. The Administrative Claim is entirely premised on the same fees for services previously identified by Ayming in its non-priority general unsecured POC.

29. Vyaire is unaware of any services performed by Ayming after the Petition Date.

30. Ayming did not deliver to Vyaire any work product, analysis, or other materials following the Petition Date. Instead, Ayming refused to deliver any work product for any alleged services performed.

31. To date, Vyaire has received no tax refund from any R&D tax credits alleged to be identified by Ayming.

32. To date, Vyaire has received no offset against any tax liability from any R&D tax credits alleged to be identified by Ayming.

33. Based on information available to it, Vyaire has no reason to believe that it will receive any refund or be able to offset any tax liability from any R&D tax credits alleged to be identified by Ayming.

OBJECTION

34. The Plan Administrator objects to the allowance and payment of an Administrative Claim for the following reasons.

A. The “Success” Fee in the Agreement is Ambiguous and Unenforceable, and Ayming Should Not be Entitled to Windfall

35. The Agreement is governed by Texas law. Under Texas law, when a contract is “ambiguous,” or subject to more than one reasonable interpretation, the contract is construed “strictly” against the drafter. *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990); *Liberty Surplus Ins. Corp. v. Exxon Mobil Corp.*, 483 S.W.3d 96, 101 (Tex. App. 2015). Here, Ayming drafted the Agreement which provided for a “Success Based Fee” for “Net Credits.” Neither of those terms was defined in the Agreement creating ambiguity as to their respective meanings. Vyaire had always understood that the “Success Based Fee” would mean just that. A fee based on the relative “success” to Vyaire for credits identified by way of actual “net” benefits it received in the form of avoidance of tax liability or receiving a refund.

36. Since the terms were ambiguous at best, they should be strictly construed against the drafter, Ayming, and no fee has been earned to date because Vyaire has received no benefit to date.

37. Even assuming Ayming’s interpretation of the Agreement is correct, the Agreement is unenforceable. Under Texas law unconscionable contracts are unenforceable. *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2008). A contract is considered unenforceable if “the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.” *Id.*

38. In general, R&D tax credits were intended to incentivize companies to perform development activities within the U.S. and motivate additional domestic R&D growth. Companies who qualify for such credits can apply those credits to amounts “paid” or incurred by the taxpayer during the applicable tax year. *Betz v. Comm'r of Internal Revenue*, T.C.M. (RIA) 2023-084 (T.C.

2023). In other words, to obtain a benefit from the credits, the company must have applicable taxable income.

39. As discussed above, during the relevant tax years, Vyaire had no taxable income to apply any R&D tax credits. At the time Vyaire engaged Ayming to perform R&D related consulting services it had already filed returns for tax years 2020 and 2021 and therefore Ayming should have already been aware of this fact. Similarly, by July 2023, Vyaire's 2022 tax returns were filed and Ayming should have become aware that Vyaire also had no taxable income for tax year 2022 to apply any R&D tax credits.

40. However, rather than negotiate a "Success Based Fee" in good faith based on actual potential benefits, Ayming construes the Agreement as providing for a fee based on the identification of tax credits which could never provide any benefit to Vyaire. Ayming, which describes itself as being able to provide "expert guidance" which can "reduce [a company's] tax liability…"[4] clearly understood that the identification of R&D tax credits was insufficient to provide a benefit to Vyaire. Accepting Ayming's interpretation would render the fee provision entirely one-sided under the circumstances. On this basis, the Agreement is unenforceable.

41. In addition, the Agreement contained a "feasibility" requirement whereby Ayming was required to gather information to "validate" whether Vyaire "qualifies" for any R&D tax credits and "develop a credit range estimate for the approximate benefits." In other words, Ayming was required to perform sufficient due diligence to determine, how if at all, Vyaire could benefit from identifying R&D tax credits.

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4 *See* *https://www.aymingusa.com/expertise/us-expertise/?gad_source=1&gclid=Cj0KCQjwkN--BhDkARIsAD_mnIo30leTWf55FCFqbgEHUg1TKSc1O8yNDTp-eUVDcjpFBojM2nlr_s4aAqMJEALw_wcB*

42. Ayming wholly missed the mark here. A basic review of Vyaire's tax filings would have immediately apprised it that any further services would be for naught. Instead, ceasing on the opportunity, Ayming proceeded in identifying over $11 million in unusable R&D tax credits to extract an exorbitant fee.

43. Ayming failed to act reasonably and in good faith when performing the "feasibility" obligations under the Agreement and should not be rewarded for such behavior.

B. Ayming's Claim Could Only Be a Non-Priority General Unsecured Claim

44. Ayming initially filed the same claims being asserted in the Motion as non-priority general unsecured claims in its POC under penalty of perjury. Indeed, the POC is filed for the same exact amount as the Motion and is based on the very same contractual obligations asserted in the Motion. Therefore, Ayming itself admittedly believed that the claims asserted in the Motion, if they existed at all, were only entitled to non-priority general unsecured treatment. Ayming's admission in the POC is correct and consistent with applicable law.

45. *First,* in assessing administrative claim priority, courts look to when the acts giving rise to a liability took place, not when they accrued. *In re M Grp., Inc.,* 268 B.R. 896, 901 (Bankr. D. Del. 2001). More specifically, a claim for breach of a prepetition contract, whether that breach occurred prepetition or postpetition, is merely a prepetition claim, and not entitled to administrative priority. *In re Trans World Airlines, Inc.,* 275 B.R. 712, 724 (Bankr. D. Del. 2002); *In re Waste Sys. Int'l, Inc.*, 280 B.R. 824, 827 (Bankr. D. Del. 2002) (holding that obligations arose when consulting agreement was executed prepetition irrespective of whether obligation is dependent upon a postpetition event). Ayming admits in its POC that its claim is for breach of the Agreement, a prepetition contract. This alone is dispositive.

46. *Second*, the Agreement was rejected on the Effective Date of the Plan. It is well-established that the rejection of a contract gives rise to a breach of contract claim which is treated as a prepetition claim. *In re Lavigne*, 114 F.3d 379, 387 (2d Cir. 1997); *Matter of Cont'l Airlines, Inc.*, 146 B.R. 520, 532 (Bankr. D. Del. 1992) ("Because the rejection constitutes a pre-petition breach, the damages are paid with other general unsecured claims"). This concept is codified in section 365(g) of the Bankruptcy Code providing that claims for rejection of an executory contract constitute a breached deemed to have occurred "immediately before the date of the filing." 11 U.S.C. § 365(g); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 374, 139 S. Ct. 1652, 1658, 203 L. Ed. 2d 876 (2019) ("the debtor's breach is deemed to occur 'immediately before the date of the filing of the [bankruptcy] petition,' rather than on the actual post-petition rejection date. [ ] By thus giving the counterparty a pre-petition claim, Section 365(g) places that party in the same boat as the debtor's unsecured creditors").

47. Based on the above, even assuming Ayming maintains a claim against Vyaire, that claim would only be entitled to non-priority general unsecured treatment and therefore the Motion should be denied.

C. Ayming Also Cannot Meet the Burden of Proof to Establish Entitlement to an Administrative Expense Claim

48. Section 503(b)(1) of the Bankruptcy Code ("Section 503(b)(1)") provides in the relevant part that:

> (b) after notice and a hearing, there shall be allowed, administrative expenses…including –
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate. …

11 U.S.C. § 503(b)(1).

49. Section 503(b)(1) allows for the collection of administrative expenses from a bankruptcy estate with first priority in distribution of the assets of a debtor. *In re Hechinger Inv. Co. of Delaware*, 298 F.3d 219, 224 (3d Cir. 2002). As such, it is intended to limit priority to solely those claims that are truly actual and necessary, to avoid "the estate being consumed by administrative expenses" and to "preserve[] the estate for the benefit of creditors." *In re Marcal Paper Mills, Inc.,* 650 F.3d 311, 315 (3d Cir. 2011)

50. In interpreting Section 503(b)(1), the Third Circuit has held that to qualify for administrative priority, the claimant has the heavy burden of establishing that the expenses need to both (1) arise from a postpetition transaction with the debtor and (2) be beneficial to the debtor in the operation of its business. *Marcal Paper Mills,* 650 F.3d at 314-15; *In re O'Brien Env't Energy, Inc*., 181 F.3d 527, 533 (3d Cir. 1999). In addition, the Third Circuit has further explained that the benefit "must be *actual*, not hypothetical." *In re Energy Future Holdings Corp.*, 990 F.3d 728, 742 (3d Cir. 2021). Ayming fails to meet both requirements.

51. *First,* as discussed above, the claim is entirely based upon a prepetition agreement with Vyaire and not a post-petition transaction.[5]

52. *Second,* Ayming provided no evidence whatsoever, that it performed any post-petition services,[6] or how any post-petition services meet the "heavy burden" of providing an "actual" benefit to Vyaire. Indeed, Ayming cannot provide any such evidence because Vyaire has

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[5] Although the Claimant attaches a postpetition email with a Vyaire employee, the employee clearly also understood that any claim was a "conditional fee arrangement" and he needed to clarify with counsel on payment following any California credit payment to Vyaire. Had Ayming informed Vyaire that the tax credits were of no use to it, Vyaire would have immediately informed Ayming to cease any further services. In fact, subsequent to the referenced email Vyaire representatives had a call with Ayming and informed it that it only intended to pay a fee to the extent Vyaire received a benefit from any services by way of tax avoidance or refund. Thereafter, Ayming refused to provide any calculations or work product to Vyaire.

[6] While Ayming alleges to have completed its services in July 2024, no evidence of any such services were attached to the Motion.

never and could never benefit from any of the services performed by Ayming since the R&D tax credits identified could not be used to offset non-existent taxable income. This Court has routinely denied motions seeking allowance of an administrative expense where no benefit was conferred upon a debtor. *See e.g., In re Bernard Techs., Inc.*, 342 B.R. 174 (Bankr. D. Del. 2006) (denying creditors' request for administrative claim where debtor did not benefit from expenses); *In re Insilco Techs., Inc.*, 309 B.R. 111, 116 (Bankr. D. Del. 2004) (same); *In re Exide Techs.*, 601 B.R. 271, 288 (Bankr. D. Del. 2019) (same).

53. Allowing an approximately $1.22 million administrative expense claim under these circumstances is highly inequitable and exactly what the Third Circuit cautioned against in *Marcal Paper Mills. Id.* at 315 (explaining that administrative claims should be scrutinized to avoid an "estate being consumed by administrative expenses" and to preserve value for the benefit of all creditors). Because the Administrative Claim stems from a prepetition transaction and Ayming has failed to establish how any alleged post-petition services provided an actual and necessary benefit to Vyaire, the Motion should be denied.

RESERVATION OF RIGHTS

54. The Plan Administrator hereby reserves the right to amend, modify, and supplement this Objection prior to the hearing before the Court on this Objection, if any; *provided, however*, that nothing in this Objection shall affect the Plan Administrator's right to object to the claims at a future date on a basis other than as set forth in this Objection as permitted by bankruptcy and nonbankruptcy law, subject to any limitations set forth in the Local Rules or in the Order.

CONCLUSION

WHEREFORE, the Plan Administrator respectfully requests that the Court (i) enter an order denying the Motion, and (ii) grant such other relief as the Court may deem just and proper.

Dated: March 31, 2025
Wilmington, Delaware

COLE SCHOTZ P.C.

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