Exhibit "D"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: VYAIRE MEDICAL, INC., *et al.*,[1] Debtor.	Chapter 11 Case No. 24-11217 (BLS)
COVINGTON & BURLING LLP[2] and REED SMITH LLP, Plaintiffs, v. VYAIRE MEDICAL, INC. and VYAIRE HOLDING CO., as WIND-DOWN DEBTORS, DAVID M. BARSE, in his capacity as Plan Administrator of Vyaire Medical, Inc., and JOHN DOE LIQUIDATING TRUST, Defendants.	Adv. Proc. No.: 25-52381 (BLS)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Dated: November 24, 2025
Wilmington, Delaware

CIARDI CIARDI & ASTIN

/s/ John D. McLaughlin, Jr.
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[1] The 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 he 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 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 600, Wilmington, DE 19801.
[2] Capitalized, yet undefined, terms herein have the meaning ascribed to them in the Plaintiff's Complaint [Adversary Docket No. 1] or the Plan [Docket No.348].

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STATEMENT OF THE NATURE AND STAGE OF PROCEEDINGS

After failing to recover for Vyaire in the Insurance Coverage Action over the course of five (5) years, Plaintiffs filed the Complaint seeking declaratory and monetary relief to enforce their alleged attorney charging liens on the Settlement Proceeds under New York law. Specifically, Plaintiffs seek to recover contingent fees and costs from the Defendants and, otherwise, to obtain payment for the reasonable attorney time they incurred in representing Vyaire in the Insurance Coverage Action – a matter counsel for the Plan Administrator settled less than two (2) months after the Plaintiffs withdrew their representation in the Insurance Coverage Action. Indeed, Defendants submit they have several defenses to the alleged attorney charging liens – not the least of which is a claim against the Plaintiffs. Significantly, the Defendants believe Plaintiffs violated their duty to the Defendants when they failed to adequately represent the Defendants, unnecessarily delayed the Insurance Coverage Action, and, after the Petition was filed, attempted to enhance their recovery from the Defendants by renegotiating better terms for themselves in a new engagement letter. This ultimately harmed the Defendants' position in the Insurance Coverage Action by forcing the Defendants to replace the Plaintiffs. While none of these claims are before the Court now, the Court should be aware that this is a contested matter.

On June 9, 2024 (more than four (4) years after the commencement of the Insurance Coverage Action), Vyaire (along with its Debtor affiliates, collectively the "Debtors") filed for relief under chapter 11 of the Bankruptcy Code. *See* Complaint, ¶ 28. This Court entered an order confirming the Debtors' Plan on November 14, 2024 [Docket No. 745] (the "Confirmation Order"). *Id.* at ¶ 30. The Confirmation Order became effective by its terms on November 27, 2024. *Id.* at ¶ 4. On the Effective Date, (i) both the Covington Engagement

Letter and Reed Smith's engagement letter with Vyaire were deemed rejected; (ii) the Plan Administrator became the sole director, officer, and representative of the Wind-Down Debtors and was charged with administering the Wind-Down in accordance with the Plan; and (iii) the Wind-Down Debtor Assets and Retained Causes of Action, including the Insurance Claims, immediately vested in the Wind-Down Debtors. *Id.* at ¶ 5. On January 24, 2025, this Court entered a *Final Decree Closing Certain Chapter 11 Cases*, leaving Vyaire Medical's Chapter 11 Case as the only remaining bankruptcy case. *Id.* at ¶ 7; *see also* Docket No. 974.

Following the Effective Date of the Plan, the Defendants settled the Insurance Coverage Action *without* the assistance of the Law Firms. *Id.* at ¶ 8. Subsequently and pursuant to the Settlement Agreement, the Defendants received the Settlement Proceeds. *Id.* at ¶ 9. Defendants retain the Settlement Proceeds in a Wind-Down Debtor account under the control of the Plan Administrator pursuant to the Plan. *See* Docket No. 719. Defendants now move pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable in this proceeding under Federal Rule of Bankruptcy Procedure 7012(b), to dismiss Count II [Conversion / Misappropriation of Funds – Theft of Settlement Proceeds] of the Complaint, for failure to state a claim, with prejudice.

SUMMARY OF THE ARGUMENT

The Complaint, at Count II, asserts, "Defendants have knowingly and intentionally exercised dominion or interference over the Settlement Proceeds in derogation of the Law Firms' rights and interests." *See* Complaint at ¶ 55. Count II further alleges that, "[a]s a direct and proximate result of Defendants' conversion and misappropriation, the Law Firms have been deprived of specifically identifiable Settlement Proceeds and have suffered damages in the amount of their respective shares of those proceeds…" *Id.* at ¶ 56. Count II is based upon a false premise (that the Settlement Proceeds are not the property of the Defendants, in the first place, or

that the unknown, alleged amount of the contingency fee owed to Plaintiffs is an asset that is fundamentally separable from the Settlement Proceeds) and should be dismissed with prejudice. Simply, Defendants cannot convert their own property, in this case the Settlement Proceeds. Plaintiffs allege they are owed "a fee equal to 35% of any recovery resulting from the Dispute, whether a judgment, settlement or other type of payment or award" and that the "Defendants' refusal to disclose the settlement agreement or remit the Law Firms' contractual share constitutes an intentional interference with and conversion of property to which the Law Firms hold equitable title under New York law." *See* Complaint ¶¶ 20 and 36. Indeed, throughout the Complaint, Plaintiffs liken themselves to the holders of an equitable interest (lien, mortgage, whatever term fits the scenario) in real property. But it cannot be said that Defendants have converted (misappropriated or committed civil theft of) their own property the same way it cannot stand that the owner of a car is liable, to the holder of their car loan, for conversion, if a payment is missed. Finally, the Complaint, and specifically, Count II is silent on the *timing* of payment of the contingency fee to the Plaintiffs. Indeed, the Plaintiffs have demanded several things: the Settlement Agreement to which they are not parties, information related to the Settlement Proceeds that resulted from the Settlement Agreement, and payment despite the fact they are aware the Defendants have several defenses to the alleged charging liens – not the least of which is a malpractice claim. However, each of these demands and the Complaint are silent as to the timing of payments and the length of the alleged interference and deprivation. How long have the Plaintiffs been deprived of their assets by the Defendants? Based on the allegations in the Complaint, no one knows.

STATEMENT OF FACTS

Vyaire engaged Covington in April 2020 to represent them in the Insurance Coverage Action. *See* Complaint ¶ 1. Reed Smith later joined Covington as co-counsel in the Insurance Coverage Action. *Id.* at ¶ 2. More than four (4) years later and prior to a costly and precarious trial on the Insurance Coverage Action, the Debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* *Id.* at ¶ 3. The Debtors obtained the Confirmation Order on November 14, 2024 [Docket No. 745] over the objection of the Plaintiffs. In this regard, the Confirmation Order provides,

> Nothing in Article IX.C or any other provision of the Plan or Confirmation Order shall affect the attorney's liens and ownership interests asserted by the Law Firms…in the claims asserted in the [Insurance Coverage Action] (the "Coverage Claims"), the related attorney files, and any proceeds resulting from the Coverage Claims. For the avoidance of doubt, nothing in this Confirmation Order shall be deemed a finding or determination as to whether any such liens or ownership interests exists. Both the Law Firms and the Debtors and/or Wind-Down Debtors reserve all rights and defenses with respect to such claims, liens, and ownership interests.

See Confirmation Order, ¶ 111. Because the Engagement Letters were rejected by operation of the confirmation of the Plan and because the Defendants and the Plaintiffs were unable to negotiate a new engagement letter and contingency fee arrangement for the Insurance Coverage Action, at the Plan Administrator's request, the Law Firms moved to withdraw as counsel in the Insurance Coverage Action in February 2025. *See* Complaint, ¶ 31. This request to withdraw as counsel was granted by the New York State Supreme Court in April 2025. *Id.* Less than two months later, counsel for the Plan Administrator settled the Insurance Coverage Action and caused to be filed a stipulation of discontinuance. *Id.* at ¶ 31. The Defendants subsequently received and continue to retain the Settlement Proceeds.

STANDARD OF REVIEW

Defendants move to dismiss Count II of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this case by Rule 7012 of the Federal Rules of Bankruptcy Procedure. As this Court has previously explained:

> With the Supreme Court's decisions in *Bell Atlantic Corp v. Twombly* and *Ashcroft v. Iqbal*, "pleading standards have shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss." As a threshold matter, therefore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim [for] relief that is plausible on its face.'" Given this heightened standard, it is insufficient to simply provide "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Thus, a complaint "must contain either direct or indirect allegations respecting all the material elements necessary to sustain recovery under some *viable* legal theory."

In re LMI Legacy Holdings, Inc., No. 13-12098, 2017 WL 1508606, at *3 (Bankr. D. Del. Apr. 27, 2017) (citations omitted).

ARGUMENT

I. Count II should be dismissed because Plaintiffs fail to State a Claim for Relief that is Plausible on its Face.

Section 475 of the New York Judiciary Law provides:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination.

> The court upon the petition of the client or attorney may determine and enforce the lien.

See N.Y. Judiciary Law § 475. It is plain from the language of section 475 that the attorney's lien attaches "[f]rom the commencement" of the relevant action. *In re Rivera*, No. 18-11855 (MEW), 2020 WL 5047422, at *4–5 (Bankr. S.D.N.Y. Aug. 26, 2020); *see also In re E.C. Ernst, Inc.*, 4 B.R. 317, 320 (Bankr. S.D.N.Y. 1980) (the lien attaches by operation of law to the cause of action when commenced and to the judgment or final order when it is rendered). The statute also states explicitly that the lien attaches to the cause of action itself and to the proceeds thereof, "in whatever hands they may come." *Id.*

A retained attorney often is replaced by other counsel, but under New York law that replacement does not terminate the original attorney's lien under section 475. *Id.* Instead, the original attorney retains a lien for the "reasonable value" of the services that the attorney provided. *Ellis*, 193 Misc. 956, 85 N.Y.S.2d 398; *Kodenski*, 5 Misc.2d 809, 161 N.Y.S.2d 301; *Grossgold*, 7 Misc.2d 922, 167 N.Y.S.2d 72; *Paulsen v Halpin*, 74 A.D.2d 990, 427 N.Y.S.2d 333, 335 (4th Dep't 1980). That "reasonable value" may represent a percentage recovery (to be determined after the conclusion of the litigation), but it does not have to be the original contractual percentage. *Paolillo v. Am. Exp. Isbrandtsen Lines, Inc.*, 305 F. Supp. 250 (S.D.N.Y. 1969); *Antaya v. Majett*, 12 Misc. 2d 585, 177 N.Y.S.2d 242 (1958). In the absence of an agreement on a percentage recovery the former attorney retains a charging lien, and the value of services may be determined by the Court at the conclusion of the case. *Id.* The relevant factors to consider "include the difficulty of the matter, the nature and extent of the services rendered, the time reasonably expended on those services, the quality of performance by counsel, the qualifications of counsel, the amount at issue, and the results obtained (to the extent known)." *Id.* *(citing In re Emanuel*, 422 B.R. 443, 449 (Bankr. S.D.N.Y. 2009), *aff'd sub nom, Heller v.*

Emanuel (In re Emanuel), 450 B.R. 1 (S.D.N.Y. 2011), *aff'd* 460 F. App'x 48 (2d Cir. 2012), *cert. denied*, 568 U.S. 816, 133 S. Ct. 131, 184 L.Ed.2d 28 (2012)). At best, therefore, Plaintiffs have a lien on the property of the Defendants (the Settlement Proceeds) in an undetermined amount that will later be found by the Court. Defendants, if you believe the Plaintiffs' claims, therefore took possession of the Settlement Proceeds subject to the Defendants' alleged charging lien. The Plaintiffs' cases describing a charging lien indicate Plaintiffs could have a "vested ownership interest" in the Settlement Proceeds unless they were discharged for cause. This situation is akin to a lien or judgment on real property in a specific amount. The real property owner holds the real property subject to that lien or judgment, payable upon sale or dissolution, but cannot be said to have converted the lienholder's interest (or property) simply by possessing (and not selling) the subject real property to which it holds title.

A conversion (or civil theft), on the other hand, takes place when someone, ***intentionally and without authority***, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (emphasis added). *Colavito v. New York Organ Donor Network, Inc.* 8 N.Y. 3d 43, 49-50 (2006). In order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right. *Giardini v. Settanni*, 159 A.D.3d 874, 875, 70 N.Y.S.3d 57, 58 (2018)(*see Mackey Reed Elec., Inc. v. Morrone & Assoc., P.C.*, 125 A.D.3d 822, 824, 6 N.Y.S.3d 65; *Zendler Const. Co., Inc. v. First Adj. Group, Inc.*, 59 A.D.3d 439, 873 N.Y.S.2d 134). Importantly, Defendants had the authority to settle the Insurance Coverage Action and the authority to receive and retain the Settlement Proceeds until such time as their defenses to the alleged charging liens are heard by

the appropriate trier of fact. To be clear, there is no dispute that the Defendant owned the cause of action and owns the Settlement Proceeds. Without a claim to ownership or unrestricted possession, the conversion claim fails as a matter of law.

Generally, conversion requires a more active interference with property than a simple failure to pay an alleged debt. Similarly, a conversion claim cannot be predicated upon a mere breach of contract for failure to pay for services rendered. *Yeterian v. Heather Mills N.V. Inc.*, 183 A.D.2d 493, 494, 583 N.Y.S.2d 439, 440 (1992) (An action for conversion cannot be predicated on a mere breach of contract, plaintiff's conversion claim was properly dismissed because it merely restates the cause of action for breach of contract and alleges no independent facts sufficient to give rise to tort liability.) *citing* (*Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883, 452 N.Y.S.2d 599)).

Here, Plaintiffs have not demonstrated an immediate right to ownership to the exclusion of the Defendants. Indeed, throughout the Complaint, Plaintiffs claim Defendants are the owners of the Settlement Proceeds subject to their charging lien. Because Defendants cannot convert their own property, have not disposed of the Settlement Proceeds, and have not otherwise taken anything from or deprived the Plaintiffs of a future payment, a cause of action based in conversion, civil theft, or misappropriation cannot stand and should be dismissed with prejudice. Defendants maintain several defenses to the alleged charging lien, not the least of which is a malpractice claim against the Law Firms. Because these defenses have not yet been raised or decided, it simply cannot be said that the Defendants are depriving the Plaintiffs of an interest in the Settlement Proceeds.

CONCLUSION

For the reasons and arguments stated herein, Defendants respectfully requests that the Court dismiss Count II of the Plaintiffs' Complaint with prejudice.

Dated: November, 2025
Wilmington, Delaware

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