

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

In re:

Vyera Pharmaceuticals, LLC, *et al.*,¹

Debtors.

Chapter 11, Subchapter V

Case No. 23-10605

(Joint Administration Requested)

MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER (I) AUTHORIZING THE DEBTORS TO MAINTAIN AND CONTINUE PAYMENT OF EMPLOYEE COMPENSATION, DIRECTOR FEES AND EMPLOYEE BENEFITS ON A POSTPETITION BASIS, (II) AUTHORIZING AND DIRECTING BANKS TO HONOR AND PROCESS CHECKS AND TRANSFERS RELATED TO SUCH EMPLOYEE OBLIGATIONS AND (III) GRANTING RELATED RELIEF

Vyera Pharmaceuticals, LLC (“Vyera”) and its above-captioned affiliated debtors and debtors in possession (collectively, the “Debtors”), by and through their proposed counsel, DLA Piper LLP (US), hereby submit this motion (the “Motion”) for entry an order, substantially in the form attached hereto as **Exhibit A** (the “Proposed Order”), pursuant to sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of title 11 of the United States Code (the “Bankruptcy Code”), (i) authorizing, but not directing, the Debtors to: (a) continue in the ordinary course of business the employee wages, salaries, and other compensation including compensation to temporary workers, independent contractors and director fees; (b) honor prepetition obligations in respect of, and continue in the ordinary course of business, the Debtors’ paid time off policies, and employee benefits programs and plans (all as described more fully below, the “Employee Benefits”); and (c) continue their Workers Compensation Programs (as defined below) and honor obligations related

¹ The Debtors in these subchapter V cases, along with the last four digits of each Debtor’s federal tax identification number, if applicable, are as follows: Vyera Pharmaceuticals, LLC (1758); Oakrum Pharma, LLC (3999); SevenScore Pharmaceuticals, LLC (2598); Phoenixus AG (1091); Dermelix Biotherapeutics, LLC (4711); and Orpha Labs AG. The Debtors’ headquarters and the mailing address for the Debtors is 600 3rd Avenue, 19th Floor, New York, NY 10016.

thereto (items (a) through (c), and any additional obligations to employees not expressly included herein, collectively, the “Employee Obligations”); (ii) authorizing and directing banks and other financial institutions (the “Banks”) to honor and pay all checks and transfers drawn on the Debtors’ accounts related to the foregoing obligations; and (iii) granting such other and further relief as the Court deems just and proper. The facts and circumstances supporting this Motion are set forth in the concurrently filed *Declaration of Lawrence R. Perkins in Support of Filing of the Debtors’ Subchapter V Petitions and First Day Pleadings* (the “First Day Declaration”).² In further support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (this “Court”) has jurisdiction over these subchapter v cases, the Debtors, property of the Debtors’ estates, and this matter under 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 February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. 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 (the “Local Rules”), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent 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.

² Capitalized terms used herein but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

4. The statutory bases for the relief requested in this Motion are sections 105(a), 363(b)(1), 507(a), 1107, 1108, and 1184 of the Bankruptcy Code, Rules 4001, 6003, and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rule 9013-1(m).

BACKGROUND

A. General Background

5. On the date hereof (the “Petition Date”), each Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code and elected to proceed under subchapter V thereunder. Additional information about the Debtors’ businesses and the events leading to the commencement of these subchapter V cases can be found in the First Day Declaration, which is incorporated herein by reference.

6. The Debtors are continuing in possession of their respective properties and are continuing to operate and maintain their businesses as debtors in possession pursuant to sections 1107(a), 1108, and 1184 of the Bankruptcy Code. As of the date hereof, no subchapter V trustee has been appointed and no date has been set for a meeting pursuant to section 341 of the Bankruptcy Code.

B. The Debtors’ Employees

7. As of the Petition Date, the Debtors employ approximately twelve (12) salaried employees (collectively, the “Employees”): nine (9) employees in the United States (the “US Employees”) and three (3) employees in Switzerland (the “Swiss Employees”). Further, as of the Petition Date, the Debtors employ two (2) independent contractors that, among other things, provides data advocate services, project management and oversee operational work for the Debtors (the “Independent Contractors”). Finally, the Debtors, in the ordinary course of business, employ temporary workers who are paid on an hourly basis (the “Temporary Workers”) through Robert Half International Inc. and Willory, LLC to perform various functions subject to

operational needs and resource availability. As of the Petition Date, the Debtors employ approximately three (3) Temporary Workers.

8. The Debtors' Employees are their most valuable asset and are essential to the Debtors' business and the plan process. The Employees are central to preserving the Debtors' customer and vendor relationships, maintaining brand value, contributing to the integrity of the Debtors' products, and building commercial relationships in the Debtors' highly competitive industry. If the Debtors' payroll is interrupted, or the Debtors cannot continue and maintain its Employee Obligations and continue to honor their Employee Benefits as described in this Motion, Employees may prematurely seek employment elsewhere, potentially with the Debtors' competitors. Absent the requested relief, many Employees will suffer undue hardship and, in many instances, face serious personal and financial duress. The negative impact on morale, and the potential loss of Employees at this critical juncture, would have a material adverse impact on the Debtors' business and ability to maximize value through the plan process.

9. The Debtors' Employees have the requisite knowledge, skill, and experience in the pharmaceutical industry to ensure that the Debtors continue to deliver value for all of the Debtors' stakeholders. Put simply, the Debtors' businesses depend on the availability, skills, and institutional and specialized knowledge of their Employees; thus, maintaining the Debtors' workforce is essential to the Debtors' ability to maintain their operations successfully and facilitate their efforts under the proposed plan. Therefore, by this Motion, the Debtors request authority to continue and maintain the Debtors' various employee compensation and benefit policies during these subchapter V cases in the ordinary course on a postpetition basis.

C. Prepetition Wages and Related Obligations

(i) Wages, Salaries and Other Compensation

10. The Employees perform a broad spectrum of functions for the Debtors, including product distribution, research and development, sales, marketing, and administrative functions. The Debtors' average gross annual Employee compensation (including wages and salaries, the "Employee Compensation") totals approximately \$3.0 million.

11. The Debtors retain Paylocity Holding Corporation ("Paylocity") as their third-party payroll processor to manage the Debtors' payroll functions for the US Employees. In the ordinary course of business, the Debtors' transfer monthly Employee Compensation for all current US Employees to Paylocity and Paylocity administers the payroll to Employees via direct deposit, and administer all tax and social security withholdings, including employer taxes, due from the Debtors. In addition, the Debtors retain Steuerrechtspraxis Blum AG ("Blumthax") as their third-party payroll processor to manage all of the Debtors' payroll functions for the Swiss Employees. The Debtors' transfer Employee Compensation for all current Swiss Employees to Blumthax and Blumthax administers the payroll to the Swiss Employees via direct deposit and administer all employee tax and social security withholdings.

12. In the ordinary course of business, the Debtors pay their Employees according to the following payment cycles: (i) the US Employees are paid bi-monthly on the 15th and the last day of the month in arrears, (ii) the Swiss Employees are paid at the end of the month in arrears (collectively, the "Payroll Process"). The most recent, regularly scheduled payroll cycles prior to the Petition Date occurred (i) for the U.S. Employees, on May 8, 2023, which covered the pay period of May 1, 2023 through May 15, 2023 and (ii) for the Swiss Employees, on May 8, 2023, which covered the pay period of May 1, 2023 through May 31, 2023. On average, the Debtors'

aggregate gross payroll per pay period for the (i) US Employees is approximately \$100,000 and (ii) Swiss Employees is CHF 47,700.

13. Prior to the Petition Date, the Debtors prefunded the Employee Compensation under the Payroll Process and, therefore, subject to minor exceptions, do not believe any amounts are current owed to Employees based on prepetition periods. Notwithstanding the foregoing, due to a clerical mistake on the part of one Employee, the Debtors withheld payment of payroll to such Employee, which payment may be settled postpetition. Therefore, a de minimis amount may remain due as Employee Compensation (the “Residual Compensation”). For the avoidance of doubt, by this Motion, the Debtors are seeking authority to pay Employee Compensation by way of the Payroll Process in the ordinary course if the funds do not clear the Debtors’ accounts prior to the Petition Date and to pay any Residual Compensation.

14. As noted above, the Debtors routinely engage Independent Contractors and Temporary Workers. Upon information and belief, the Debtors may owe the Independent Contractor and Temporary Workers as of the Petition Date for prepetition periods. Similar to the above, by this Motion, in an abundance of caution, the Debtors seek authority to compensate their Independent Contractors and Temporary Workers, either through the Payroll Process or through the applicable staffing agencies in the ordinary course of business.

(ii) Employee Administrator Obligations

15. The Debtors contract with Paylocity and Blumthax (collectively the “Payroll Administrators”) to process their payroll and reimbursements and coordinate the payment of Withholding Taxes and Obligations (the “Payroll Administrator Obligations”). The ongoing services of Paylocity is imperative to the smooth functioning of the Debtors’ payroll system. On average, the Debtors pay Paylocity \$450 per month and pay Blumthax CHF 750 per month.

The Debtors seek authority, but not direction, to pay the Payroll Administrator Obligations in the ordinary course.

(iii) Employee Business Expenses

16. Prior to the Petition Date, and in the ordinary course of business, the Debtors employ a reimbursement program (the “Reimbursement Program”) to reimburse Employees for eligible business expenses incurred in the scope of their employment (the “Reimbursement Program”). Through the Reimbursement Program, the Debtors reimburse (a) US Employees for (i) costs incurred for the use of their personal vehicle for work-related purposes and (ii) gym membership fees, and (b) Swiss Employees for (i) gym membership fees up to CHF \$1,500 per year, (ii) work related travel expenses when required to travel for business on an ad hoc basis, and (iii) an annual public transport ticket. As of the Petition Date, there are de minimis amounts that have been incurred and remain unpaid to the Employees under the Reimbursement Program.

17. To avoid harming individual Employees who have incurred, and will continue to incur, reimbursable expenses while the Debtors continue their operations, the Debtors request authority to continue the Reimbursement Program and make reimbursement payments thereunder.

(iv) Prepetition Withholdings and Deductions

18. As required by law, the Debtors withhold from the Employee Compensation the necessary payroll taxes (the “Withholding Taxes”) and remit the withheld amounts to the appropriate taxing and other governmental authorities (the “Tax Authorities”) through Paylocity for the US Employees and through Blumthax for the Swiss Employees. In the United States, Paylocity administers all Withholding Taxes for the US Employees, including Debtors’ tax obligations as employers. In Switzerland, on a quarterly basis, the Tax Authorities provide the Debtors with an invoice for the employer tax due and payable for the period, which is then remitted by the Debtors (the “Swiss Tax Obligations”, collectively with the Withholding Taxes, the

“Withholding Taxes and Obligations”). The Debtors seek authority through this Motion to continue with this practice in the ordinary course.

D. Employee Benefits and Programs

19. In the ordinary course of business, the Debtors maintain various employee benefit plans and policies, including, but not limited to, medical plans, dental plans, vision plans, life insurance plans, and short-term and long-term disability plans (collectively, the “Employee Benefit Programs”). The Employee Benefit Programs are, in each case, available to all Employees with the requisite hours per week for a given benefit (the “Eligible Employees” and, with respect to each plan or program in which they participate, the “Plan Participants”).

20. By this Motion, the Debtors seek authority, but not direction, to pay all prepetition amounts due and owing, to the extent applicable, to honor obligations, and to continue programs in the ordinary course of business and consistent with prior practice relating to the Employee Benefit Programs, subject to the Debtors’ ability to modify or discontinue any Employee Benefit Programs in their discretion and to reduce applicable costs, the scope of benefits provided, or reporting periods permitted thereunder.

(a) *Health Care Program*

21. The Debtors offer various health care programs to their full-time US Employees and their eligible dependents (collectively, the “Health Care Program”), as set forth below, for which the Debtors seek authority to continue in the ordinary course of business:

Plan	Description	Administrator	Average Monthly \$
Medical Plan (only US)	In-patient, out-patient services, prescription drug coverage, urgent care	United Healthcare Insurance Company	\$23,000
Dental and Vision Plans (only US)	Comprehensive dental coverage	United Healthcare Insurance Company	\$2,000

Difference Card Program (US)	Reimbursement for out-of-pocket medical expenses, including, without limitation, in-patient/out-patient services, prescription drug coverage. The Difference Card Program costs are deducted from the Debtors' account on a daily basis.	EB Employee Solutions	\$900 processing fee plus monthly actual claims which vary by month
Supplemental Employee Insurance	Supplemental coverage for serious accidents or illness	American Family Life Assurance Company ("AFLAC")	\$215
Income Protection Plans	Voluntary short-term disability, voluntary long-term disability, management long-term disability, basic life insurance, voluntary life insurance	Principal Life Insurance Company	\$2,600

22. With respect to the Swiss Employees, the Debtors offer a monthly reimbursement of up to CHF \$500 towards the premium of a private healthcare insurance of the Swiss Employees' choice, which they take out in their own names (the "Healthcare Reimbursement"). The Healthcare Reimbursement, if utilized by the Swiss Employee, is paid through the Payroll Process.

23. Supplemental Employee Insurance. The Debtors maintain certain secondary and supplemental insurance for their US Employees and families in the event of serious accidents or illnesses through AFLAC (the "Supplemental Insurance"). Supplemental Insurance, in aggregate, cost the Debtors approximately \$215 per month. As of the Petition Date, there are no prepetition liabilities for the Supplemental Insurance that remain unpaid.

(b) *Time Off Benefits*

24. The Debtors maintain a range of time off and paid leave benefit programs for Employees (collectively, the "Time Off Benefits"), as set forth below, for which the Debtors seek authority to continue in the ordinary course of business:

Time Off Benefit	Description	No. of Days	Conditions / Cost
Vacation Time (US PTO)	Paid time off for personal time (i.e., personal appointments, family matters, school activities, religious observances, rest and relaxation, other personal obligations)	Unlimited (no rollover)	No payout of PTO in event of termination
Vacation Time (Swiss PTO)	Paid time off for personal time (i.e., personal appointments, family matters, school activities, religious observances, rest and relaxation, other personal obligations)	25 per year (rollover until following April)	In event of termination, Swiss PTO may be set-off against termination notice period
Sick Leave (US)	Absences due to medical, doctor appointments, personal illness, injury	10 per year (no rollover)	
Parental Leave	Parental leave for birth mother, birth father, domestic partner, or adoptive parent to care for and bond with newborn or newly adopted child	2 weeks (within one year of birth or adoption of child)	Approx. \$4,000 / year
Additional Leave	Bereavement leave, leave to conduct civic duties, voting leave	Unlimited	

(c) *Additional Programs*

25. The Debtors also maintain a range of other programs for the benefit of their Employees including, (i) pet insurance for electing Employees, (ii) Payroll Mart, which provides access to the Paylocity portal, (iii) Benefit Mall, a services platform for employee benefit plans, (iv) the Employees may enroll onto certain well-being benefits through an online platform provided by Progressive Benefits Solutions LLC; and (v) annual health checkup (collectively the “Additional Benefit Program”). The estimated monthly payment by the Debtors for the Additional Benefit Program totals approximately \$1,400. The Debtors estimate that as of the Petition Date they owe no accrued prepetition liabilities for the Additional Benefit Program, which are paid in advance. As of the Petition Date, the Debtors believe that any outstanding prepetition amounts

related to the Additional Benefits Program are de minimis; however, in an abundance of caution, the Debtors seek authority to make all such payments in the normal course of business.

(d) *Retirement Program*

26. The Debtors provide a 401(k)-retirement savings plan (the “401(k) Plan”) for eligible US Employees. The Debtors maintain the 401(k) Plan through Voya Financial Inc. and Associated Pension Consultants, Inc. in accordance with section 401 of the Internal Revenue Code. Eligible US Employees may contribute to the 401(k) Plan on a pre- and post-tax basis, up to the IRS annual limit. The Debtors currently make matching contributions equal to 2% of an employee’s salary deferral and an annual aggregate cap of \$285,000. Paylocity administers approximately \$4,000 each payroll period from active 401(k) Program Participants’ paychecks on account of contributions to the 401(k) Plan (the “401(k) Savings Plan Withholdings”).

27. Additionally, the Debtors maintain a pension plan for the Swiss Employees through RSGR ASGA (the “Swiss Pension Plan” and collectively with the 401(k) Plan, the “Pension Plans”). Under the Swiss Pension Plan, the Swiss Employees contribute 30% of the funds thereunder and the Debtors contribute the remainder. The Debtors estimate that they contribute approximately CHF \$12,000 per month to the Swiss Pension Plan.

28. The Debtors pay approximately \$1,000 semiannually to Associated Pension Consultants, Inc. and \$11,000 twice a month to Voya Financial Inc. for the administration of the 401(k) Plan, and also pay approximately CHF 35,000 per quarter to RSGR ASGA for administering the Swiss Pension Plan. As of the Petition Date, the Debtors believe that they are up to date on all payments under the Pension Plans. However, in an abundance of caution, the Debtors request authority, but not direction, to make all such payments in the ordinary course of business and to maintain the Pension Plans during the administration of these subchapter V cases.

E. Workers Compensation Programs

29. The laws of various states in the United States and in Switzerland require the Debtors to maintain workers compensation insurance (the “Workers’ Compensation Programs”) to provide their Employees with coverage for injury claims arising from or related to their employment with the Debtors.

30. The Debtors maintain worker’s compensation policies through The Hartford Insurance Group and the Zurich Insurance Group, which run from January to December each year. The annual premium payments due to The Hartford Insurance Group and the Zurich Insurance Group in aggregate of \$5,000 were paid prior to the Petition Date. As of the Petition Date, the Debtors believe that they are up to date on all payments under the Workers’ Compensation Programs.

31. As of the Petition Date, the Debtors estimate that there are no outstanding claims asserted under the Workers’ Compensation Programs. However, in an abundance of caution, in case there are any unknown outstanding amounts, the Debtors seek authorization to pay prepetition costs of the Workers Compensation Programs in the ordinary course of.

F. Severance Program

32. In the ordinary course of business, the Debtors maintain severance programs for eligible Employees (the “Severance Program”). Among other things, the Severance Program provides that, on a discretionary basis, qualifying terminated Employees are entitled to receive severance pay based on the respective Employee’s grade level and completed years of service, as set out in their respective employment contracts. The Debtors estimate that, as of the Petition Date, there are no accrued but unpaid obligations under the Severance Program.

G. Bonus and Other Incentive Programs

33. The Debtors maintain a bonus program for Employees across all lines of business. These bonus plans include non-discretionary bonuses pursuant to employment agreements and discretionary bonuses (collectively, the “Bonus Programs”). Certain non-discretionary bonuses (“Non-Discretionary Bonus”) are set out in the employment contracts of each eligible Employee. For all of the Employees who receive them, bonuses are an important aspect of their overall compensation. Maintaining the Debtors’ historical prepetition practices with regard to the bonuses is essential to maximizing the value of the Debtors’ estates through the continued operation their businesses through the plan process.

34. Prior to the Petition Date, the Debtors paid Averill Powers, the current Chief Executive Officer of Vyera Pharmaceuticals LLC, a Non-Discretionary Bonus of \$270,000, which the Debtors’ deemed necessary, in their business judgment, to retain his employment as an essential employee with legacy knowledge of the Debtors’ operations and businesses.

35. The Debtors do not believe that there are any cash Bonus Program payments owed to any Employees as of the Petition Date. Accordingly, the Debtors seek authority, but not direction, solely to maintain all Bonus Programs in the ordinary course of business during these subchapter V cases. Notwithstanding, in an effort to stymie the departure of employees immediately prior to and after the Petition Date, shortly before the Petition Date, the Debtors entered into certain retention agreements with six (6) of the Debtors’ employees. The aggregate amount of such retention bonuses was approximately \$163,000. The Debtors initiated payment of a portion of these retention bonuses (\$124,850) prepetition, while the remaining amounts (\$38,150) are due on or before August 31, 2023. In connection therewith, however, immediately prior to the Petition Date, the Debtors learned that the above-referenced first installment of the retention bonuses may not have cleared the Debtors’ bank accounts as of the filing. Instead, the

Debtors expect such funds to clear overnight—postpetition. Similar to the request above with respect to Residual Compensation, for the avoidance of doubt, by this Motion, the Debtors are seeking authority to pay these retention bonuses by way of the Payroll Process in the ordinary course if the funds did not, in fact, clear the Debtors' accounts prior to the filing.

H. Director Payments

36. Debtor Phoenixus AG's Board of Directors comprises three (3) independent Directors (collectively, the "Directors"). The Debtors pay each Director fees between \$1,000 to \$2,500 for each board meeting attended (depending on the length of the meeting) (the "Board Fees"). In addition, the Debtors reimburse the Directors for reasonable out-of-pocket expenses incurred in connection with board meeting attendance. In the lead up to the commencement of these subchapter V cases, the Directors held board meetings on a consistent basis to evaluate various restructuring alternatives. As of the Petition Date, the Debtors believe that certain prepetition Board Fees remain due and unpaid to the Directors. By this Motion, the Debtors seek authority to make all such payments in the ordinary course of business.

RELIEF REQUESTED

37. By this Motion, the Debtors request the Court enter an order under sections 105(a), 363(b), 507(a)(4), and 507(a)(5) of the Bankruptcy Code to: (a) continue to honor their Employee Obligations; (b) continue their Employee Benefit Plans and their Workers Compensation Programs on a postpetition basis; and (c) pay all fees and costs related thereto. For the reasons set forth herein, the Debtors submit that the relief requested is in the best interest of the Debtors, their estates, their creditors, and other parties-in-interest, and therefore, should be granted.

BASIS FOR RELIEF REQUESTED

38. The Debtors request authority, but not direction, to continue to maintain the aforementioned obligations to their Employees and all related expenses in the ordinary course of

their business. Failure to maintain the Debtors' Employee Obligations could severely disrupt the Debtors' relationship with their Employees and dedicated non-employee personnel and irreparably harm morale at the very time that Employee dedication, confidence, support, and cooperation is most critical. As the Debtors pursue a parallel liquidation and reorganization of Debtor Orpha Labs AG through the plan process, the Debtors cannot risk the substantial disruption to their business operations that would attend any decline in workforce morale.

39. In addition, absent postpetition payment of the Employee Compensation and Employee Benefits, the Employees, Temporary Workers and Independent Contractors would suffer hardship and, in many instances, financial duress. The Debtors' workforce depends on their Employment Wages and Employment Benefits to meet personal financial obligations.

A. The Employee Obligations are entitled to priority treatment under section 507 of the Bankruptcy Code.

40. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code grants priority status of up to \$15,150 for prepetition wages, salaries, commissions, vacation, sick leave, and employee benefit contributions (to the extent such amount accrued within 180 days of the Petition Date). Indeed, "[w]age priority has been a feature of the bankruptcy law since 1898." *In re Garden Ridge Corp.*, No. 04-10324 (KJC), 2006 WL 521914, at *2 (Bankr. D. Del. Mar. 2, 2006). Its purpose is to "alleviate hardship on workers . . . who may have no other source of income and "to encourage employees to stand by an employer in financial difficulty." *Id.* (citing 4 *Collier on Bankruptcy* ¶ 507.05[1]).

41. As of the Petition Date, the Debtors do not owe any of the Employees amounts for accrued and unpaid prepetition wages or salaries, including outstanding and uncashed payroll checks. Granting the relief requested herein is consistent with the Bankruptcy Code's purpose in ensuring employees are paid in full on account of the priority status afforded to their claims, up to

the statutorily imposed limit. Accordingly, the Debtors submit that no prejudice to creditors or other parties in interest would result from granting the relief requested herein.

B. The Court should authorize the Debtors to continue the Employee Obligations under sections 1107(a) and 1108 of the Bankruptcy Code.

42. The Debtors, operating as debtors in possession under sections 1107(a), 1108, and 1184 of the Bankruptcy Code, are fiduciaries “holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners.” *In re CoServ, LLC*, 273 B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the duties of a chapter 11 debtor in possession is the duty “to protect and preserve the estate, including an operating business’s going-concern value.” *Id.*

43. Courts have noted that there are instances in which a debtor in possession can fulfill its fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” *Id.* The *CoServ* court specifically noted that preplan satisfaction of prepetition claims is a valid exercise of a debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” *Id.* The court provided a three-pronged test for determining whether a preplan payment on account of a prepetition claim is a valid exercise of a debtor’s fiduciary duty:

First, it must be critical that the debtor deal with the claimant. Second, unless it deals with the claimant, the debtor risks the probability of harm, or, alternatively, loss of economic advantage to the estate or the debtor’s going concern value, which is disproportionate to the amount of the claimant’s prepetition claim. Third, there is no practical or legal alternative by which the debtor can deal with the claimant other than by payment of the claim.

Id. at 498.

44. Continuing to maintain and satisfy the Employee Obligations as set forth herein meets each element of the *CoServ* court’s standard. The Debtors’ operations are complex and rely on the skill and expertise of their Employees. Many Employees possess unique knowledge

regarding specific aspects of the Debtors' operations, which would be virtually irreplaceable should such Employees be lost through a failure to pay their obligations. In addition, any failure by the Debtors to maintain and fulfil the Employee Obligations as set forth herein would negatively impact employee morale at a critical time for the Debtors and their businesses.

45. The Debtors have determined in their business judgment that, to avoid significant disruption to their business operations, there exists no practical or legal alternative to the maintenance of the Employee Obligations as set forth herein. Therefore, the Debtors can meet their fiduciary duties as debtors-in-possession under sections 1107(a), 1108, and 1184 of the Bankruptcy Code by payment of the Employee Obligations as set forth herein.

C. Sections 105(a) and 363 of the Bankruptcy Code warrant the maintenance of the Employee Obligations.

46. Sections 105(a) and 363(b) of the Bankruptcy Code authorize the requested relief. Section 105(a) of the Bankruptcy Code codifies the inherent equitable powers of this Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code.]” 11 U.S.C. § 105(a). A bankruptcy court’s use of its equitable powers to “authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989); *see also Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (noting that courts are authorized to approve orders allowing payment of prepetition claims, which is necessary for the debtors to have a successful reorganization). Moreover, “[u]nder Section 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor.” *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177). Such authority is known as the “necessity of payment” rule (also referred to as the “doctrine of necessity”).

47. This rule authorizes postpetition payment of prepetition obligations were necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors. *See, e.g., Miltenberger v. Logansport, C. & S.W. Ry. Co.*, 106 U.S. 286, 311 (1882) (articulating legal theory later termed the “doctrine of necessity” or the “‘necessity of payment’ doctrine” and holding that payment of pre-receivership claim prior to reorganization was permitted to prevent stoppage of crucial business relations); *In re Boston & Maine Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors’ continued operation); “doctrine of necessity” or the “‘necessity of payment’ doctrine” (granting approval to pay prepetition claims of certain trade vendors which were critical to the debtors’ reorganization); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del. 1994) (noting that the debtors may pay prepetition claims that are essential to continued operation of business).

48. Debtors frequently invoke the necessity of payment doctrine early in a chapter 11 case when preservation of the estate proves most critical and often extremely difficult. For that reason, bankruptcy courts routinely invoke their equitable powers to authorize a debtor to pay certain critical prepetition claims under section 105(a) if “authorizing the payment of the prepetition debt creates ‘the greatest likelihood . . . payment of creditors in full and at least proportionately,’” *In re Structurelite Plastics Corp.*, 86 B.R. 922,932 (Bankr. S.D. Ohio 1998); *see also In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (stating that “to justify payment of a prepetition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the [c]hapter 11 process); *In re Ionosphere Clubs*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (explaining that the “necessity of payment” rule “recognizes the

existence of the judicial power to authorize a debtor in a chapter 11 case to pay prepetition claims where such payment is essential to the continued operation of the debtor”).

49. Courts in this District have routinely approved the payment of prepetition claims of employees and independent contractors for wages, salaries, expenses and benefits, on the grounds that the payment of such claims was necessary to a successful chapter 11 outcome. *See, e.g., In re The Wet Seal, Inc.*, Case No. 1510081 (CSS) (Bankr. D. Del. Jan. 20, 2015) (Docket No. 96); *In re Deb Stores Holding LLC*, Case No. 1412676 (MFW) (Bankr. D. Del. Dec. 5, 2014) (Docket No. 50); *In re Unitek Global Services, Inc.*, Case No. 14-12471 (PJW) (Bankr. D. Del. Nov. 4, 2014) (Docket No. 64); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Jan. 26, 2009); *In re Nortel Networks, Inc.*, Case No. 09-10138 (KG) (Bankr. D. Del. Jan. 14, 2009).

50. Similarly, section 363(b)(1) of the Bankruptcy Code authorizes a debtor to use property of the estate other than in the ordinary course of business after notice and a hearing where the debtor has articulated a valid business justification for the requested use of estate assets. *See* 11 U.S.C. § 363(b)(1); *see also In re Ionosphere Clubs, Inc.*, 98 B.R. at 175 (explaining that section 363(b) gives the court “broad flexibility” to make payments outside of ordinary course of business as long as the debtor articulates a business justification); *In re Cont’l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (“[T]here must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.”).

51. The Debtors’ success in these subchapter V cases hinges in large part on the continued efforts of the Employees. Through the continuation of the Employee Obligations and the various programs thereunder, the Debtors seek to preserve the status quo and keep the Employees’ minds at ease during this transition into subchapter V and throughout the plan

process. Accordingly, this Court should grant the requested relief under section 363 of the Bankruptcy Code.

D. Maintaining certain Withholding Taxes and Obligations is appropriate under section 541 of the Bankruptcy Code.

52. The Debtors submit that further cause exists to continue payment to the appropriate Tax Authorities which principally comprise Employee earnings that governments, Employees, and judicial authorities have designated for deduction from pay. The Debtors do not believe that such amounts are property of the Debtors' estates under section 541 of the Bankruptcy Code, and, therefore, such funds are not available for general distribution to the Debtors' creditors. *See* 11 U.S.C. § 541(b)(7) (amounts withheld from employee paychecks by employer for contribution to employee benefit plan are not property of the estate).

53. In addition to causing undue hardship to certain Employees, the failure to continue to pay the Withholding Taxes and Obligations to Tax Authorities may result in the Debtors being inundated with inquiries from taxing authorities regarding their failure to submit, among other things, taxes, which are required under applicable law to be withheld from Employee paychecks. Moreover, if the Debtors cannot continue to remit these amounts, the affected Employees may face legal action and the Debtors will incur penalties for delayed payments.

54. Further, many federal, state and local taxing authorities impose personal liability on the officers and directors of entities responsible for collecting taxes from employees to the extent any such taxes are collected but not remitted. Accordingly, nonpayment poses a significant personal to the Debtors' officers and Directors, which would distract such officers and Directors away from their critical functions during these subchapter V cases. To avoid the serious disruption of the Debtors' reorganization efforts resulting from the nonpayment of Withholding Taxes and

Obligations, the Debtors seek to continue payment of all Withholding Taxes and Obligations through their Payroll Process on behalf of the Employees to the applicable Tax Authorities.

E. The Court should authorize applicable Banks and other processors to honor checks and electronic fund transfers in accordance with the Motion.

55. In connection with the foregoing, the Debtors respectfully request that the Court (a) authorize all applicable Banks to receive, process, honor, and pay all checks and transfers issued by the Debtors in accordance with this Motion, without regard to whether any checks or transfers were issued before or after the Petition Date; (b) provide that all Banks may rely on the representations of the Debtors with respect to whether any check or transfer issued or made by the Debtors before the Petition Date should be honored pursuant to this Motion (such Banks having no liability to any party for relying on such representations by the Debtors provided for herein); and (c) authorize the Debtors to issue replacement checks or transfers to the extent any checks or transfers that are issued and authorized to be paid in accordance with this Motion are dishonored or rejected by the Banks.

THE DEBTORS SATISFY THE REQUIREMENTS OF BANKRUPTCY RULE 6003

56. Pursuant to Bankruptcy Rule 6003(b), any motion seeking to use property of the estate pursuant to section 363 of the Bankruptcy Code or to satisfy prepetition claims within twenty-one days of the Petition Date requires the Debtors to demonstrate that such relief “is necessary to avoid immediate and irreparable harm.” As set forth throughout this Motion, the Debtors’ failure to honor their Employee Obligations and continued their Employee Benefit Plans as provided herein would substantially diminish or impair the Debtors’ efforts in these subchapter V cases.

57. For this reason and those set forth above, the Debtors respectfully submit that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

REQUEST FOR WAIVER OF BANKRUPTCY RULE 6004(h)

58. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As set forth throughout this Motion, failure to honor their Employee Obligations and continue their Employee Benefit Plans would be detrimental to the Debtors, their creditors and estates, and would impair the Debtors’ ability to optimize their business performance at this critical time as they begin the subchapter V process.

59. For this reason and those set forth above, the Debtors submit that ample cause exists to justify a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable.

RESERVATION OF RIGHTS

60. Nothing contained in this Motion is intended or shall be construed as (i) an admission as to the validity of any claim against the Debtors; (ii) impair, prejudice, waive, or otherwise affect the rights of the Debtors or their estates to dispute the amount of, basis for, nature, validity, or priority of any claim against the Debtors; (iii) impair, prejudice, waive or otherwise affect the rights of the Debtors or their estates with respect to any and all claims or causes of action which may exist against any third party; (iv) be construed as an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy between any Debtor and any third party under section 365 of the Bankruptcy Code; or (v) create any rights in favor of, or enhance the status or nature of any claim held by, any person.

NOTICE

61. Notice of this Motion will be provided in accordance with the Local Rules to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Delaware Secretary of State, (iii) the Office of the Attorney General of the states in which the Debtors operate; (iv) the Federal Trade Commission; (v) the United States Food and Drug Administration; (vi) the Internal Revenue Service; (vii) the Debtors' 30 largest unsecured creditors; (viii) the subchapter V trustee (once appointed); (ix) the Banks; (x) the Employees; (xi) Payroll Administrators and (xii) all others that are required to be noticed in accordance with Bankruptcy Rule 2002 and Local Rule 9013-1(m). Due to the nature of the relief sought, the Debtors respectfully submit that no other or further notice of this Motion is required.

[Remainder of Page Intentionally Left Blank]

WHEREFORE, the Debtors respectfully request entry of an order, substantially in the form of the Proposed Order attached to this Motion as **Exhibit A**, granting the relief requested herein, and grant such other and further relief as this Court deems just and proper.

Dated: May 10, 2023
Wilmington, Delaware

Respectfully submitted,

DLA PIPER LLP (US)

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Proposed Counsel to the Debtors

EXHIBIT A

Proposed Order

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

In re:

Vyera Pharmaceuticals, LLC, *et al.*,¹

Debtors.

Chapter 11, Subchapter V

Case No. 23-10605

(Jointly Administered)

**ORDER (I) AUTHORIZING THE DEBTORS TO MAINTAIN AND CONTINUE
PAYMENT OF EMPLOYEE COMPENSATION AND EMPLOYEE BENEFIT
PROGRAMS (II) AUTHORIZING AND DIRECTING BANKS TO HONOR AND
PROCESS CHECKS AND TRANSFERS RELATED TO SUCH EMPLOYEE
OBLIGATIONS AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”),² filed by the above-captioned debtors (collectively, the “Debtors”) for entry of an order (this “Order”) (A) authorizing, but not directing, the Debtors, in their sole discretion, to: (i) maintain and continue to pay wages, salaries, and other compensation including in respect to temporary workers, independent contractors and director fees; (ii) continue to reimburse their employees for business expenses incurred on behalf of the Debtors in the ordinary course of business; (iii) continue to honor obligations in respect of, and continue in the ordinary course of business, certain of the Debtors’ leave policies, and employee benefits programs and plans (the “Employee Benefits”); (v) continue to pay payroll taxes and other deductions and withholdings; and (vi) continue their workers compensation programs and honor obligations related thereto (the “Workers Compensation Obligations”); and (B) authorizing and directing banks and other financial institutions (the “Banks”) to honor and pay all checks and transfers drawn

¹ The Debtors in these subchapter V cases, along with the last four digits of each Debtor’s federal tax identification number, if applicable, are as follows: Vyera Pharmaceuticals, LLC (1758); Oakrum Pharma, LLC (3999); SevenScore Pharmaceuticals, LLC (2598); Phoenixus AG (1091); Dermelix Biotherapeutics, LLC (4711); and Orpha Labs AG. The Debtors’ headquarters and the mailing address for the Debtors is 600 3rd Avenue, 19th Floor, New York, NY 10016.

² Capitalized terms used but not otherwise defined in this Order shall have the respective meaning ascribed to such terms in the Motion.

on the Debtors' accounts related to the foregoing obligations; all as further described in the Motion; and upon consideration of the First Day Declaration and the record of these subchapter V cases; and this Court having found that (i) this Court has jurisdiction to consider the Motion and the relief requested therein 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 February 29, 2012, (ii) this Court may enter a final order herewith consistent with Article III of the United States Constitution; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A); (iv) venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (v) no further or other notice of the Motion is required under the circumstances; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted in this Order; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED, as set forth in this Order.
2. The Debtors are authorized, but not directed, to maintain and continue to pay wages, salaries, and other compensation including in respect to temporary workers and independent contractors; and continue to reimburse their employees for business expenses incurred on behalf of the Debtors in the ordinary course of business.
3. The Debtors are authorized, but not directed, to continue to honor obligations in respect of, and continue in the ordinary course of business, the Employee Benefits, Workers Compensation Obligations and continue to pay payroll taxes and other deductions and withholdings; and honor obligations related thereto.
4. The Debtors are authorized to continue to pay any and all Board Fees accrued in the ordinary course of business.

5. Nothing in this Order shall be deemed or construed as an admission as to the validity or priority of any claim against the Debtors, an approval or assumption of any agreement, contract or lease pursuant to section 365 of the Bankruptcy Code, or a waiver of the right of the Debtors, or shall impair the ability of the Debtors, or any other party in interest, to the extent applicable, to contest the validity and amount of any payment made pursuant to this Order.

6. The Banks are authorized and directed to honor payroll checks, drafts and transfers on or after the Petition Date and the Banks are authorized and directed to process and honor all other checks and transfers issued for payments approved by this Order and/or reissue checks for any payments approved by this Order where checks may have been dishonored postpetition.

7. Nothing in the Motion or this Order shall be construed to authorize any payments governed by section 503(c)(3) of the Bankruptcy Code.

8. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order are effective immediately and enforceable upon its entry.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

10. This Court shall retain jurisdiction with respect to all matters arising from or related to the interpretation and enforcement of this Order.