

CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

In re:

LASER SPINE INSTITUTE, LLC,¹

Assignor,

Case No. 19-CA-2762

to

SONEET KAPILA,

Assignee.

Emergency Relief Requested

**ASSIGNEE'S EMERGENCY MOTION FOR AUTHORITY TO
MAKE A DISTRIBUTION TO PAY CLAIMS OF RETAINED EMPLOYEES**

Assignee, Soneet Kapila of KapilaMukamal, LLP (“Assignee”), by and through his undersigned attorneys, hereby moves the Court by this motion (the “**Motion**”) for authority to make a distribution to pay claims of certain retained employees, as further set forth below. In support of the Motion, the Assignee states as follows:

Background

1. On March 14, 2019, Laser Spine Institute, LLC (“**LSI**”) executed and delivered an assignment for the benefit of creditors to the Assignee. The Assignee filed a Petition with the Court on March 14, 2019, commencing an assignment for the benefit of creditors proceeding pursuant to Section 727 of the Florida Statutes (the “**LSI Assignment Case**”).

¹ Prior to filing this motion, the Assignee sought to administratively consolidate the assignment case of Laser Spine Institute, LLC with the assignment cases of the following entities: LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC.

2. Simultaneous with the filing of the LSI Assignment Case, the Assignee filed fifteen other Petitions commencing assignment for the benefit of creditors proceedings for 15 affiliates of LSI (the “**Affiliated Assignment Cases**”): LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC (collectively, together with LSI, the “**Assignors**”).

3. By separate motion, the Assignee has sought to administratively consolidate the Affiliated Assignment Cases with the LSI Assignment Case (collectively, the “**Assignment Cases**”) pursuant to Florida Rule of Civil Procedure 1.270(a).

4. In the years leading up to the Assignment Cases, LSI and its affiliates comprised one of the nation’s leaders in minimally invasive spine surgery, operating state-of-the-art outpatient surgery centers located in Tampa, Florida and in several other states with over 500 employees.² The Assignors ceased all business operations on March 1, 2019. The Assignment Cases provide a statutorily authorized procedure for the orderly liquidation of the Assignors’ assets for the benefit of their creditors.

5. The Assignors’ Schedule A reflects that the largest secured creditor of the Assignment Cases is Texas Capital Bank, N.A., as Administrative Agent (the “**Bank**”), with outstanding loans totaling approximately \$144 million, secured by substantially all of the assets of

² The other locations were Cincinnati, Ohio; Scottsdale, Arizona; St. Louis, Missouri; Cleveland, Ohio; Oklahoma City, Oklahoma; Warwick, Rhode Island; and Philadelphia, Pennsylvania.

the LSI and certain other Assignors. Thus, all of the cash and accounts receivable now held by the Assignee appear to be encumbered by the Bank's liens. Prior to the commencement of these cases, the Bank froze the funds in the Assignors' accounts and asserted a lien on those funds as "cash collateral."

Brief Summary of the Efforts of the Assignee to Date

6. Prior to and since the filing of the Assignment Cases, the Assignee has worked to quickly come up to speed, marshal the assets, and begin analyzing the Assignors' businesses and making necessary preparations to allow him to effectively perform his duties as Assignee. To date, the Assignee has, *inter alia*:

- a. Met with numerous members of the Assignors' Tampa-based management team and certain employees to receive briefing on details surrounding the Assignors' assets, liabilities, ongoing litigation, and operations.
- b. Selected Stichter, Riedel, Blain & Postler, P.A. ("**Stichter Riedel**") as his counsel in the Assignment Cases and filed a motion to employ counsel.
- c. Hired KapilaMukamal, LLP as forensic accountants and financial advisors.
- d. Identified key employees that must be retained to assist the Assignee in performing his duties, as described further below.
- e. Safeguarded and preserved assets and records of the Assignors and formulated a strategy to monetize assets and address pending litigation.
- f. Began review and investigation of financial records and contractual agreements, enabling the filing of motions to reject leases in order to reduce the administrative burdens on the assignment estates.
- g. Focused on revenue management including maximizing collection of accounts receivable.
- h. Entered into negotiations with the Bank to use cash collateral and proceeds of accounts receivable to pay vital ongoing expenses of the assignment estates, which negotiations are ongoing but have been partially successful to allow the payment of the wages of the Retained Employees (as defined below) and other expenses related to the preservation of the collateral.

- i. Engaged in discussions with some of the largest creditors of the Assignors regarding the Assignment Cases.
- j. Through Stichter Riedel, communicated with the Assignors' counsel to, *inter alia*, arrange the appropriate execution of the assignment petitions and the compilation of the requisite assignment schedules.
- k. Hired Centurion Service Group, LLC to perform manual inventories and appraisals of assets owned by the Assignors.
- l. Hired E-Hounds Computer Evidence Services to locate, extract, and preserve records and electronically stored information.
- m. Began to coordinate risk management and various insurance coverages, including a premium financing arrangement to allow the Assignee to obtain ongoing property and casualty insurance for the assignment estate assets, thereby reducing the cash outlay for insurance for the estates.
- n. Began the preliminary process of identifying potential purchasers of assets, including initiating discussions with the landlord for the Tampa location with a goal towards a collaborative approach to maximizing value through "going concern" or "in place" sales of the equipment and inventory at the Tampa location.
- o. Commenced a preliminary investigation into potential causes of action.

7. The Assignee has identified a core group of approximately 44³ critical employees (the "**Retained Employees**") necessary to retain for a limited period to assist the Assignee with the items discussed above and the overall wind-down of operations. The Retained Employees will also assist the Assignee with, *inter alia*, compliance with health care regulations, disposition of assets, collection of accounts receivable, and compilation and preservation of books and records.

Relief Requested and Memorandum of Law

8. The Assignee seeks authority to make a distribution to pay the accrued pre-assignment payroll obligations and related withholding obligations with respect to the Retained Employees for the week beginning March 11, 2019 through the assignment date, totaling

³ This number may vary depending upon the Assignee's continued analysis and investigation.

approximately \$117,000.00 (the “**Retained Employee Claims**”). Payment of the Retained Employee Claims is necessary to gain the Retained Employees’ continued assistance with the Assignee’s execution of his duties.

9. The Bank has agreed to allow the Assignee to fund the payment of the Retained Employee Claims from its cash collateral, which includes the funds held in LSI’s bank account and the proceeds of accounts receivable collections. Because the Bank appears to have a lien secured by substantially all of the Assignors’ assets, the Retained Employee Claims could not be paid without the consent of the Bank.⁴ Arguably, only the Bank has a clear interest in this issue as the Bank would otherwise be entitled to apply the funds to reduce its secured claim, leaving the Assignee no funds to pay the expenses.

10. Pursuant to § 727.114 of the Florida Statutes, employee wage claims are priority claims up to the amount of \$10,000 per employee. The statute provides fourth-level priority for:

Claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay, or contributions to an employee benefit plan earned by employees of the assignor within 180 days before the filing date or the cessation of the assignor’s business, whichever occurs first, but only to the extent of \$10,000 per individual employee.

Fla. Stat. § 727.114(1)(d).

11. The obligations comprising the Retained Employee Claims do not exceed the \$10,000 per-employee cap. Thus, the Retained Employee Claims qualify as priority claims under § 727.114(1)(d).

⁴ The Assignee does not waive any rights, claims or defenses with respect to the amount or validity of the Bank’s liens and claims. Because the Assignee has a statutory judgment lien on all assets of the Assignors that would “prime” unperfected liens, one of the important duties of the Assignee is to review the validity of other liens and security interests.

12. The Assignee requests authority to pay the Retained Employee Claims on the regularly scheduled payroll date, to be funded on March 27, 2018, as opposed to waiting until final distributions are made in the Assignment Cases. Section 727.108 of the Florida Statutes provides that one of the Assignee's duties is to "[p]ay dividends and secured or priority claims as often as compatible with the best interests of the estate" Fla. Stat. § 727.108(12). Further, § 727.109 confers the Court with the power to "[a]pprove . . . interim and final distributions to creditors." Fla. Stat. § 727.109(9). Moreover, Section 727.109(15) of the Florida Statutes permits the Court to "[e]xercise any other powers that are necessary to enforce or carry out the provisions of this chapter." Fla. Stat. § 727.109(15).

13. Based on the above, the Assignee submits that the Court has the requisite statutory authority to grant the relief requested. The Retained Employee Claims are "priority" claims and their payment is in the best interest of the estate. *See* Fla. Stat. § 727.108(12). The Court's entry of an order granting the relief requested falls soundly within the authority conferred by Sections 727.109(9) and 727.109(15).

14. Additionally, the relief sought in this motion is similar to relief sought in almost every chapter 11 bankruptcy case, where the debtor-in-possession asks for court authority to pay pre-petition wages of retained employees up to the statutory priority amount. "State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceedings involving assignments for the benefit of creditors." *Moecker v. Antoine*, 845 So. 2d 904, 912 n.10 (Fla. 1st DCA 2003).

15. In bankruptcy, it is well-settled that courts may authorize the payment of prepetition obligations under the "necessity of payment" doctrine. *See, e.g., In re News Pub. Co.*, 488 B.R. 241, 245 (Bankr. N.D. Ga. 2013) ("[C]ourts often authorize payment of pre -petition wages prior

to plan confirmation as a business necessity.”); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174 (Bankr. S.D.N.Y. 1989) (approving payment of certain prepetition wage, salary, medical benefit and business expense claims justified under the necessity of payment of doctrine). In reviewing a request for payment of pre-petition wages, bankruptcy courts typically consider whether the debtor has articulated a “some business justification” for the payment. *See Ionosphere Clubs*, 98 B.R. at 175. Bankruptcy Courts are loath to substitute their business judgment for that of the debtor.

16. If the Court were to import the bankruptcy standard, the payment requested in this Motion satisfies the standard articulated by bankruptcy courts. The Assignee requires the services of the Retained Employees to assist him in carrying out his duties to maximize the value of the assignment estates. The Retained Employees’ knowledge of and familiarity with the Assignors’ business operations is irreplaceable. Absent payment of the Retained Employee Claims, the Assignee believes most, if not all, of the Retained Employees will leave. One bankruptcy court succinctly stated: “If employees are not paid, they will leave. If they leave the Debtor’s business, the bankruptcy case fails shortly after the filing. No one will benefit from the process.” *In re CEI Roofing, Inc.*, 315 B.R. 50, 61 (Bankr. N.D. Tex. 2004). The same basic concerns are present here and weigh on the Assignee’s ability to successfully effectuate the wind-down process.

17. The Assignee requests a hearing on this Motion on or before March 28, 2019 because that is the day on which the payroll is due to be funded.

WHEREFORE, the Assignee respectfully requests that the Court enter an order authorizing the Assignee to pay the Retained Employee Claims and granting such other and further relief as is just and proper.

Dated: March 18, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been sent by electronic mail on this 18th day of March, 2019 to:

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