

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

In re:

Laser Spine Institute, LLC ¹	Case No. 2019-CA-2762
CLM Aviation, LLC	Case No. 2019-CA-2764
LSI HoldCo, LLC	Case No. 2019-CA-2765
LSI Management Company, LLC	Case No. 2019-CA-2766
Laser Spine Surgery Center of Arizona, LLC	Case No. 2019-CA-2767
Laser Spine Surgery Center of Cincinnati, LLC	Case No. 2019-CA-2768
Laser Spine Surgery Center of Cleveland, LLC	Case No. 2019-CA-2769
Laser Spine Surgical Center, LLC	Case No. 2019-CA-2770
Laser Spine Surgery Center of Pennsylvania, LLC	Case No. 2019-CA-2771
Laser Spine Surgery Center of St. Louis, LLC	Case No. 2019-CA-2772
Laser Spine Surgery Center of Warwick, LLC	Case No. 2019-CA-2773
Medical Care Management Services, LLC	Case No. 2019-CA-2774
Spine DME Solutions, LLC	Case No. 2019-CA-2775
Total Spine Care, LLC	Case No. 2019-CA-2776
Laser Spine Institute Consulting, LLC	Case No. 2019-CA-2777
Laser Spine Surgery Center of Oklahoma, LLC	Case No. 2019-CA-2780

Assignors,

Consolidated Case No:
2019-CA-2762

To:

Soneet Kapila,

Division L

Assignee.

**MOTION FOR ENTRY OF AN ORDER PURSUANT
TO FLA. STAT. § 727.109(15): (I) AUTHORIZING THE
USE OF CASH COLLATERAL; (II) PROVIDING ADEQUATE
PROTECTION TO LENDERS; (III) ESTABLISHING A LIEN
CHALLENGE DEADLINE; AND (IV) GRANTING RELATED RELIEF**

¹ On April 8, 2019, the Court entered an order administratively consolidating this case 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.

Soneet Kapila, as assignee (“**Assignee**”) for the entities listed in footnote one below, by and through his undersigned attorneys, seeks the entry of an order: (i) authorizing the use of cash collateral; (ii) providing adequate protection to the Lenders (as hereinafter defined); (iii) establishing a deadline by which the Assignee or any other party in interest must file an action challenging the extent, validity, perfection, and amount of the asserted liens of Texas Capital Bank, as administrative agent; and (iv) granting related relief. In support of this motion (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**”).

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**,” and together with the LSI Assignment Case, the “**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 (each, an “**Assignor**” and collectively, the “**Assignors**”).

3. Texas Capital Bank, National Association, in its capacity as Administrative Agent (“**TCB**” or “**Agent**”) to the lender group (“**Lenders**”), asserts properly perfected liens on

substantially all personal property of the Assignors, including but not limited to accounts receivable and any proceeds generated from accounts receivable, under a Credit Agreement (or any related documents or agreements) dated as of July 2, 2015 by and between certain of the Assignors, as borrowers and/or guarantors, and TCB, as lender (as amended, the “**Credit Agreement**”).² Pursuant to the Credit Agreement, and collectively with any other agreements and documents executed or delivered in connection therewith, each as may be amended, restated, supplemented, or otherwise modified from time to time, the “**Loan Documents**”), the Lenders and the Agent provided revolving and term loan credit and other financial accommodations to, and issued letters of credit for the account of, the Borrowers pursuant to the Loan Documents (the “**Loan Facility**”).

4. The Loan Facility provided the borrowers with, among other things, (i) \$15,000,000 in Revolving Loan Commitments, and (ii) \$131,250,000 in Term Loan Commitments. As of the filing of the LSI Assignment Case, the principal amount of “Loans” outstanding under the Loan Facility was not less than \$154,000,000 (collectively, together with accrued and unpaid interest, any fees, expenses and disbursements (including, without limitation, attorneys’ fees, accountants’ fees, auditor fees, appraisers’ fees and financial advisors’ fees, and related expenses and disbursements), treasury, cash management, bank product and derivative obligations, indemnification obligations, guarantee obligations, and other charges, amounts and costs of whatever nature owing, whether or not contingent, whenever arising, accrued, accruing, due, owing, or chargeable in respect of any of the Loan Parties’ obligations pursuant to the Loan Documents, including all “Obligations” as defined in the Credit Agreement.

² Capitalized terms not otherwise defined herein maintain the same meanings ascribed to them in the Credit Agreement.

5. The Agent asserts that, as more fully set forth in the Loan Documents, prior to the filing of the Assignment Case, the Loan Parties granted to the Agent and the Lenders a security interest in and continuing lien on (the “**Liens**”) substantially all of their assets and property, including, without limitation, a first priority security interest in and continuing lien on the Collateral (as defined in the Loan Documents) (which, for the avoidance of doubt, includes Cash Collateral) and all proceeds, products, accessions, rents, and profits thereof, in each case whether then owned or existing or thereafter acquired or arising.

6. Immediately prior to the filing of the Assignment Cases, the Assignors maintained their funds in sixteen different bank accounts at Texas Capital Bank (the “**TCB Accounts**”). Most of the TCB Accounts were created to allow the appropriate Assignor to receive payments on accounts receivable payable to the specific Assignor, primarily insurance and Medicare reimbursements. All receipts flowed into the TCB Accounts. Through the Credit Agreement, TCB asserts a security interest in all funds held in the TCB Accounts.

7. After the filing of the Assignment Cases, the Assignee set up a separate account with Signature Bank (the “**Signature Account**”). Post-assignment, all receipts have continued to flow directly to the appropriate TCB Accounts, which remain subject to the asserted liens of the Lenders. The Agent, however, has authorized certain transfers from the TCB Accounts to the Signature Account to fund approved costs of the Assignment Cases on an as-needed basis. Approval of the use of the Assignors’ assets that are or may become cash collateral of the Lenders (the “**Cash Collateral**”)³ is required to fund the wind-down. The Agent has committed to allow the use of Cash Collateral to fund necessary wind-down expenses, including the professional fees

³ In bankruptcy, cash collateral is defined as “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents,” 11 U.S.C. § 363(a), in which a creditor has a lien.

(the “**Carveout**”) and expenses in accordance with the terms herein and subject to the Budget (as hereinafter defined). As set forth in more detail below, during the Assignment Cases, the Assignee will use Cash Collateral in accordance with the Budget, subject to a ten percent variance in the aggregate.

Relief Requested and Basis for Relief

8. Pursuant to Fla. Stat. § 727.109(15), this Court has jurisdiction to adequately protect the Lenders in a manner that is akin to the protections afforded to secured lenders in bankruptcy cases. In consideration for the Agent’s commitment to allow the use of its Cash Collateral to fund items set forth in a cash collateral budget (the “**Budget**”), including professional fees and expenses, the Assignee seeks the entry of an order (i) authorizing the use of Cash Collateral as provided herein, (ii) providing adequate protection to the Lenders, (iii) establishing a lien challenge deadline, upon expiration of, the claims, liens, and security interests of the Agent granted in accordance with the Loan Documents shall be deemed valid, perfected, and enforceable as to all creditors and parties-in-interest, and shall be subject to no further challenge, unless the Assignee or a party in interest: (x) shall have commenced a supplementary proceeding against the Agent for the purpose of challenging the validity, extent, priority, perfection, and enforceability of the Credit Agreement or Agent’s claims, mortgages, and security interests or otherwise asserting any claims or causes of action against the Agent, no later than forty (40) days after entry of the order granting this Motion (the “**Lien Challenge Review Period**”), and (y) the Court rules in favor of the plaintiff in any such timely filed supplementary proceeding. Any person or entity, including, without limitation, the Assignee, that fails to commence such a supplementary proceeding within the Lien Challenge Review Period shall be forever barred from doing so.

9. The following chart contains a summary of the essential proposed terms of the order granting this Motion (the “**Cash Collateral Order**”):

<p>Use of Cash Collateral</p>	<p>The Assignee is authorized to use Cash Collateral, in each case in a manner consistent with the terms and conditions of the Cash Collateral Order and in accordance with the Budget (subject to a ten percent variance in the aggregate) for: (a) permitted payment of costs of administration of the Assignment Cases; (b) payment of such pre-Assignment Case expenses as set forth in the Budget or as otherwise consented to by the Agent, in its sole discretion and as approved by the Court; and (c) payment of the Carveout in accordance with the Cash Collateral Order.</p>
<p>Liens, Adequate Protection Provided for Use Of Cash Collateral</p>	<p>The Assignee proposes to grant adequate protection to the Lenders, to the extent of any diminution in the value of its interests in its Collateral since the filing of the Assignment Cases as a result of the use of its cash collateral to fund expenses that benefit creditors as a whole, as follows: as adequate protection of the interests of the Lenders in the Collateral, pursuant to Fla. Stat. § 727.109(15) the Assignee proposes to grant to the Lenders, a lien on all claims and causes of action of each Assignor or its respective estate (including, without limitation, all commercial tort claims of every kind and description) and any and all proceeds therefrom, and any and all proceeds arising from insurance policies.</p>
<p>Carveout</p>	<p>The Cash Collateral Order provides that all claims and liens granted by the Cash Collateral Order shall be subject to the Carveout, to the extent provided for in the Cash Collateral Order. As used in the Cash Collateral Order, the term Carveout shall mean an amount equal to the sum of (a) allowed claims for unpaid fees, costs, and expenses incurred by persons or firms retained by the Assignee whose retention is approved by the Court, the Assignee, and KapilaMukamal, LLP.</p>
<p>Lien Challenge Deadline</p>	<p>Establishment of a lien challenge deadline, upon expiration of which, the claims, liens, and security interests of the Agent granted in accordance with the Loan Documents shall be deemed valid, perfected, and enforceable as to all creditors and parties-in-interest, and shall be subject to no further challenge, unless the Assignee or a party in interest: (x) shall have commenced a supplemental proceeding against the Agent for the purpose of challenging the validity, extent, priority, perfection, and enforceability of the Credit Agreement or Agent’s claims, mortgages, and security interests or otherwise</p>

	asserting any claims or causes of action against the Agent, no later than forty (40) days after entry of the order granting this Motion, and (y) the Court rules in favor of the plaintiff in any such timely filed supplemental proceeding. Any person or entity, including, without limitation, the Assignee, that fails to commence such a supplementary proceeding within the Lien Challenge Review Period shall be forever barred from doing so. For the avoidance of doubt, the Agent does not consent to the use of its Cash Collateral for any party to challenge in a supplemental proceeding or other litigation the Lenders' claims or liens or to assert any claims against the Lenders in a supplemental proceeding or other litigation.
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10. Nothing would seemingly prevent the Agent from executing on its Collateral (including its Cash Collateral) immediately under the applicable provisions of Chapter 727 of the Florida Statutes. *See Fla. Stat. § 727.105* (providing no execution proceedings can be commenced against assignment assets “except in the case of a consensual lienholder”). For that reason, this Motion is filed with the consent of the Lenders.

11. In the event that the Lenders decided to foreclose on and liquidate their Collateral themselves, they would themselves have to fund the legal costs associated with enforcing their liens and the actual costs of securing and preserving, protecting and insuring, and collecting and liquidating their Collateral.

12. As a general rule, the alternatives available to secured creditors under Article 9 of the Uniform Commercial Code are inefficient and present numerous legal and practical challenges, particularly where (as here) the collateral is located in leased, as opposed to owned, facilities in different states. It is particularly difficult for secured creditors to maintain the underlying information technology system of the borrower, which in these Assignment Cases (and in many other cases) is essential to the maintenance of the collateral values - including the collection of accounts receivable.

13. Largely because the Assignment Cases offer a centralized forum to collect and dispose of assets, deal with landlords and other third parties, and identify prospective purchasers, the Agent has consented to the Assignee's use of Cash Collateral to fund the costs associated with these Assignment Cases in accordance with the terms herein and the Budget. In turn, based upon the commitment of the Lenders to fund these costs, the Assignee undertook the duties as Assignee and, in addition, did not exercise his right under Fla. Stat. §727.108(11) to abandon the Collateral to the Lenders.

14. The Lenders' commitment to fund pursuant to the Budget is consistent with Florida Law allocating costs of disposing of collateral to secured creditors. Florida Statutes §727.114(1) states: "Creditors with liens on assets of the estate, which liens are duly perfected pursuant to applicable law, shall receive the proceeds from the disposition of their collateral, *less the reasonable, necessary expenses of preserving or disposing of such collateral to the extent of any benefit to such creditors.*" (Emphasis added.)

15. The Assignee has made significant progress in his efforts to dispose of the collateral in an orderly fashion. Because these efforts primarily benefit the Lenders, it is the position of the Assignee that the lien sought in this Motion should be reduced by the costs benefiting the Lenders, although the Assignee recognizes that there may be some overlap that will require pro-ratio or other adjustment. The Agent reserve all rights to challenge the allocation of costs borne by the Lenders. To the extent the parties cannot resolve the allocation of "gray area" expenses, the Court will retain jurisdiction to do so.

16. At the same time, the Assignee has undertaken efforts to identify sources of recovery, particularly litigation, that will benefit all creditors, not just the Lenders. To the extent that the Lenders' cash collateral is being used essentially as a litigation investigation and support

credit facility, the Lenders should be entitled to a lien on the first funds recovered, just as any third party lender would require.

A. The Assignee's Request to Use Cash Collateral and Proposed Adequate Protection Are Appropriate

17. The Assignee has no unencumbered funds and continues to incur expenses, some of which benefit the Lenders specifically and some of which benefit all creditors generally. Therefore, access to Cash Collateral is crucial. Without the ability to use Cash Collateral, the Assignee will lose the opportunity to preserve value not only for the Lenders, but for the Assignment estates' other stakeholders as well. Accordingly, the interests of the Lenders (as well as those of the Assignors' other creditors and parties in interest) will be best served by permitting the Assignee's continued use of Cash Collateral.

18. Entry of an order granting the Motion is necessary to maintain the Assignee's ability to fund wind-down expenses through the use of Cash Collateral. Under Section 727.109(15) of the Florida Statutes, this Court is authorized to "[e]xercise any other powers that are necessary to enforce or carry out the provisions of this chapter." Fla. Stat. § 727.109(15).

19. "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).

20. Adequate protection under the Bankruptcy Code is designed to protect the secured lenders from diminution in the value of their interest in the collateral as a result of the debtor's proposed use or disposition of such collateral. As applied to the circumstances of the Assignment Cases, the Lenders should be adequately protected for financing the wind-down of the Assignment Cases to the extent that the Assignee's use of Cash Collateral to administer the wind down efforts benefits all of the creditors of the Assignment estates.

21. With that said, in exchange for the continued use of Cash Collateral, the Assignee has agreed to provide certain adequate protection to the Lenders. Specifically, the Assignee and Agent have negotiated, and the Assignee requests that the Court approve, as of the filing of the Assignment Cases, certain protections of the Lenders' interests in the Collateral from any diminution in value. Subject to the Carveout, such protections for the Lenders include: (i) a lien on all claims and causes of action of each Assignor or its respective estate (including, without limitation, all commercial tort claims of every kind and description) and any and all proceeds therefrom, and any and all proceeds arising from insurance policies to the extent of the diminution of the Lenders' Collateral as a result of the funding of expenses that benefit creditors as a whole; and (ii) compliance with the Budget. Ultimately, the precise amount of the Lenders' lien will be subject to the allocation of costs related to the litigation investigation and pursuit facility.

22. The Assignee's requested use of Cash Collateral, and the protections afforded to the Lenders pursuant to Fla. Stat. § 727.109(15), are, in light of the circumstances (given that the Lenders are, at least in part, financing the administration of the Assignment Cases for the benefit of all creditors), reasonable, appropriate, and sufficient to satisfy the legal standard of "adequate protection."

B. The Establishment of a Lien Challenge Deadline is Warranted Under the Circumstances.

23. The Agent has indicated that it will not continue to fund these proceedings unless it has certainty about the validity of its claims and liens. The setting of a bar date for the challenge of liens and claims of a secured creditor that allows for the use of its cash collateral is fairly customary in bankruptcy cases. *See In re AOG Entm't, Inc*, 558 B.R. 98, 103 (Bankr. S.D.N.Y. 2016) (recognizing the setting of a lien challenge deadline in cash collateral and financing orders as "common practice in this Court" and refusing to extend challenge deadline at request of

creditor); *see also In re DirectBuy Holdings, Inc.*, No. 16-12435 (CSS), 2017 WL 5496218, at *7 (Bankr. D. Del. Jan. 10, 2017) (setting lien challenge deadline in cash collateral order); *In re Central Beef Ind., LLC*, Case No. 8:16-bk-02366-CPM, Doc. No. 85, at ¶ 17 (Bankr. M.D. Fla. May 26, 2016); *In re Old Corkscrew Plantation, LLC*, Case No. 9:11-bk-14559-BSS, Doc. No. 101 (Bankr. M.D. Fla. Sept. 2, 2011).

WHEREFORE, the Assignee respectfully requests that this Court enter an order granting this Motion and for such other and further relief as is just and proper.

Dated: May 24, 2019

/s/ Edward J. Peterson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Motion for Entry of an Order Pursuant to Fla. Stat. § 727.109(15): (I) Authorizing the Use of Cash Collateral; (II) Providing Adequate Protection to Lenders; (III) Establishing a Lien Challenge Deadline; and (IV) Granting Related Relief* has been furnished on this 24th day of May, 2019 by the Court's electronic system to all parties receiving electronic service and by either U.S. mail or electronic mail to the parties listed on the Limited Notice Parties list attached.

/s/ Edward J. Peterson
Edward J. Peterson

MASTER LIMITED NOTICE SERVICE LIST

May 24, 2019

Assignors and Assignor's Counsel: (via the Court's electronic servicing system)

CLM Aviation, LLC
LSI HoldCo, LLC
LSI Management Company, LLC
Laser Spine Surgery Center of Arizona, LLC
Laser Spine Surgery Center of Cincinnati, LLC
Laser Spine Surgery Center of Cleveland, LLC
Laser Spine Surgical Center, LLC
Laser Spine Surgery Center of Pennsylvania, LLC
Laser Spine Surgery Center of St. Louis, LLC
Laser Spine Surgery Center of Warwick, LLC
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