

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

In re:

Laser Spine Institute, LLC	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.

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**ASSIGNEE'S REPLY TO  
LASERSCOPIC SPINAL CENTERS OF AMERICA, INC.,  
LASERSCOPIC MEDICAL CLINIC, LLC AND LASERSCOPIC SPINE  
CENTERS OF AMERICA, INC.'S RESPONSE IN LIMITED OPPOSITION  
TO SONEET KAPILA, AS ASSIGNEE'S 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**

Assignee, Soneet Kapila of KapilaMukamal, LLP, as assignee of Laser Spine Institute, LLC and the above-captioned affiliate assignors (the "Assignee"), by and through his undersigned attorneys, files this reply to the Response in Limited Opposition (the "Response") filed by

Laserscopic Spinal Centers of America, Inc., Laserscopic Medical Clinic, LLC, and Laserscopic Spine Centers of America, Inc. (collectively, the “**Laserscopic Parties**”) to the Assignee’s motion to authorize the use of cash collateral and for related relief (the “**Motion**”).<sup>1</sup> The Response misconstrues the nature of the relief sought in the Motion and raises several inapposite arguments. For the reasons set forth below, the objections raised in the Response should be overruled and the Motion should be granted.

First, the Laserscopic Parties object to the establishment of a deadline by which parties-in-interest must object to the Agent’s claim and secured status. On this point, the Laserscopic Parties claim they do not have sufficient information to evaluate the Agent’s security interests. The Assignee, however, provided the Agent’s loan documents to certain representatives of the Laserscopic Parties or their affiliates over six weeks ago, allowing them ample time to evaluate the Agent’s security position. In any event, as of June 18, 2019, the Agent has served its claims (on behalf of the Lenders) on the Assignee and has filed a notice of filing on the Court’s docket, which includes instructions on how to obtain copies of the Agent’s claims and supporting documentation. The deadline requested in the Motion, forty (40) days from the entry of an order granting this Motion, allows for a thorough review of the Agent’s claims and security position.

Second, the Laserscopic Parties take issue with the Assignee’s proposed grant of security interests in the estates’ unencumbered assets—litigation claims and insurance refund proceeds—to the Lenders in return for their funding of the Assignment Cases. At the outset, it is important to clarify the limited effect of the proposed adequate protection liens. Throughout the Response, the Laserscopic Parties imply that the lien rights requested by the Assignee would elevate the Lenders’ unsecured claims above other unsecured claims. The proposed adequate protection liens

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<sup>1</sup> Capitalized terms not otherwise defined herein maintain the meanings ascribed to them in the Motion.

would not, however, provide additional security for the Lenders' entire claim amount. The liens would only act as additional security for the Lenders "to the extent of any diminution in the value of its interests in the 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." (Motion ¶ 9) (emphasis added). The practical effect of this arrangement is to allow for interest-free financing of the Assignment Cases to enable the Assignee to perform his duties, including analyzing and pursuing causes of action, in addition to pursuing other potential sources of recovery for the benefit of general unsecured creditors.

Third, the Laserscopic Parties argue there is no authority for the granting of liens under Chapter 727 of the Florida Statutes. Section 727.109(15) of the Florida Statutes, however, provides a broad grant of authority, authorizing 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). And no provision contained in Chapter 727 expressly prohibits an assignee from obtaining financing or granting lien rights to a secured lender in exchange for continued use of the lender's cash collateral. Moreover, Florida state courts have recognized that the Bankruptcy Code serves as a useful analogue to Florida's assignment for the benefit of creditors statute: "State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceeding involving assignments for the benefit of creditors." *Moecker v. Antoine*, 845 So. 2d 904, 912 n.10 (Fla. 1st DCA 2003).

In bankruptcy, the granting of liens on unencumbered estate property is commonly included as "adequate protection" to protect a secured lender from the risk of decrease in its cash collateral during a bankruptcy case. The Bankruptcy Code automatically stays all collection action by a secured lender and allows the debtor to use a secured lender's cash collateral so long as the lender's interest in the funds is "adequately protected." See 11 U.S.C. § 363(c), (e). Granting

“additional or replacement lien[s]” to the lender is an explicitly approved form of adequate protection. *See* 11 U.S.C. § 361(2); *see also Matter of Mickler*, 9 B.R. 121, 123 (Bankr. M.D. Fla. 1981) (providing as an example of adequate protection “an additional or replacement lien to the secured party to the extent the use of the cash by the Debtor produces a decrease in the cash collateral”).

Unlike in bankruptcy, however, nothing prevents a secured creditor in an assignment case from seizing its collateral immediately. The arrangement proposed through the Motion represents a compromise designed to provide the Lenders protection similar to that which they would receive in bankruptcy, in exchange for allowing the Assignee to use the Lenders’ Cash Collateral to fund expenses that benefit the estates’ creditors as a whole. Without such an agreement, the Lenders could, at any time, immediately freeze the Assignee’s accounts, prohibit access to the Cash Collateral, and cease funding any expenses that are not specifically designed to benefit the Lenders. All creditors, including the Laserscopic Parties, would suffer under such a scenario.

Fourth, the Laserscopic Parties generally allege that the Agent and the Lenders waived any right to recoveries from litigation proceeds by executing a covenant not to sue in connection with a Limited Waiver and First Amendment to Credit Agreement, dated November 18, 2016. The Assignee is still in the process of reviewing all of the Lenders’ loan documents, and is not yet prepared to express an opinion on the impact of the covenant not to sue on the Lenders’ rights to recoveries as a general unsecured creditor. However, the effect of a covenant not to sue potential fraudulent transfer targets has absolutely no relation to the relief requested in the Motion. As explained above, the Assignee proposes to grant the Lenders *additional* liens as adequate protection for the Assignee’s use of the Cash Collateral. The Lenders’ right to receive a distribution of fraudulent transfer proceeds as a general unsecured creditor must be viewed

separately from the new, additional lien rights requested in the Motion.

Fifth, the Response argues that because the Laserscopic Parties may have competing independent claims against certain of the potential targets of the Assignee's fraudulent transfer claims, the lien rights will interfere with the Assignee's ability to reach an agreement with the Laserscopic Parties to cooperatively pursue such claims. But the Assignee only seeks to place a lien on the *estates'* causes of action and any proceeds recovered from such claims. The Assignee is not proposing to somehow encumber any independent claims the Laserscopic Parties may hold, and the Assignee cannot see how the proposed adequate protection would impede an agreement between the Assignee and the Laserscopic Parties on allocating litigation proceeds against common targets. In such a scenario, only the Assignee's "share" would be subject to the proposed adequate protection liens.

In any event, only the Assignee has standing to pursue avoidance and recovery of fraudulent transfers initiated by the Assignors. *See Moffatt & Nichol, Inc. v. B.E.A. Int'l Corp.*, 48 So. 3d 896, 899 (Fla. 3d DCA 2010) ("Under the statutory scheme as it now exists, only an assignee has standing to pursue fraudulent transfers, preferential transfers or other derivative claims."); *accord Smith v. Effective Teleservices, Inc.*, 133 So. 3d 1048, 1052 (Fla. 4th DCA 2014) ("[I]n the context of a Chapter 727 assignment for the benefit of creditors, only the assignee may bring a Chapter 726 fraudulent transfer claim.").

To conclude, the Assignee again emphasizes the limited extent of the relief requested. The adequate protection liens contemplated by the Motion are limited to diminution in value of the Lenders' Cash Collateral resulting from the Assignee's use of encumbered funds for expenses that serve to benefit the creditor body as a whole. The adequate protection liens will not extend to the Lenders' unsecured deficiency claim and will not extend to expenses incurred solely for the benefit

of the Lenders. The funding arrangement achieved through the relief requested in the Motion benefits the unsecured creditor body as a whole by providing an interest-free funding source for the Assignee's necessary expenses. The Motion should be granted.

DATED: June 18, 2019

/s/ Edward J. Peterson  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing *Assignee's Reply to Laserscopic Spinal Centers of America, Inc., Laserscopic Medical Clinic, LLC and Laserscopic Spine Centers of America, Inc.'s Response in Limited Opposition to Soneet Kapila, as Assignee's 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 18<sup>th</sup> day of June, 2019 by the Court's electronic system to all parties receiving electronic service.

/s/ Edward J. Peterson  
Edward J. Peterson