

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.

**ASSIGNEE'S REPLY TO HIGHWOODS REALTY LIMITED
PARTNERSHIP RESPONSE TO ASSIGNEE'S MOTION FOR
ORDER AUTHORIZING REJECTION OF TAMPA, FLORIDA LEASE**

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 (the “Response”) filed by Highwoods Realty Limited Partnership (“Highwoods”) to the Assignee’s Motion for Order Authorizing Rejection of Tampa, Florida Lease (the “Rejection Motion”).¹

¹ Unless otherwise defined herein capitalized terms shall have the same meaning ascribed to them in the Rejection Motion.

Highwoods' only issue with the Motion is the landlord's insistence that the assignment estates must pay, as a condition for rejection, the cost to remove "Non-Standard Improvements" installed at the leased facility by the Assignors. Payment of these costs is not a condition to rejection of the lease. Further, any such costs should, at best, be treated as part of Highwoods' general unsecured rejection damages claim. There is no basis to treat such costs as administrative expenses to be borne by the creditors of the assignment estates.

Background

1. Soon after the filing of the Assignment Cases, the Assignee and Highwoods began negotiations to allow the Assignee time to explore the possibility of an in-place sale of the equipment and other assets owned by the assignment estates located at the Tampa facility. Both the Assignee and Highwoods recognized that the sale of the assets in-place, and Highwoods' ability to market the facility as "turn key," had potential to bring value to both parties.

2. To that end, the Assignee and Highwoods entered into a Standstill Agreement dated March 26, 2019 (the "**Standstill Agreement**"), under which the parties agreed to pursue a collaborative sale-lease transaction. The Assignee agreed to leave the tangible personal property in place at the facility, and Highwoods agreed that it would not charge rent to the Assignee.

3. The Assignee filed a motion to approve the Standstill Agreement on April 3, 2019 (the "**Standstill Motion**"). As stated in that motion, the Assignee had identified that, "absent a Standstill Agreement with the Tampa Landlord, the Lease would be financially burdensome and require immediate rejection of the Lease and vacation of the Premises." (Standstill Motion ¶ 3.) Thus, from the Assignee's perspective, the elimination of go-forward financial burden to the assignment estates was the critical piece of the Standstill Agreement. The Court entered an order granting the Standstill Motion.

4. The Assignee and Highwoods diligently explored prospects for an in-place sale-lease transaction, but they were ultimately unsuccessful. Thus, the Assignee proceeded to sell the assets at auction. The auction was held on October 2-4, 2019, the assets were sold, and the proceeds were held for the benefit of the secured lenders. After the auction, having no further need for the facility, the Assignee filed the Rejection Motion.

5. Highwoods now claims that, pursuant to the Lease, the assignment estate is obligated to pay certain restoration costs—estimated at \$300,000 to \$1,000,000—as a condition to rejecting the lease. Payment of such costs, however, have no bearing on whether the Assignee is authorized to reject the lease.

Lease Rejection Is Not Conditioned on Performance of Lease Obligations

6. Florida’s assignment statute, Chapter 727, contains no requirement that rejection be conditioned on performing onerous obligations imposed by a pre-assignment lease to which the Assignee was not a party. Indeed, the entire purpose of lease rejection is to relieve an assignment estates and their creditors from having to shoulder the costs of complying with costly and burdensome lease provisions.

7. Section 727.110(3)(a) of the Florida Statutes sets forth the procedure for rejecting a lease, which required notice to the landlord. Section 727.109 empowers the Court to “[a]uthorize the assignee to reject an unexpired lease of nonresidential real property or of personal property under which the assignor is the lessee pursuant to s. 727.108(5).” Fla. Stat. § 727.109(6). Nowhere found in Chapter 727 is a requirement that an assignment estate must comply with lease obligations prior to rejection, as such a provision would go against the entire purpose of lease rejection.

8. By analogy to federal bankruptcy law, it is clear that lease rejection cannot be conditioned on performance of onerous lease obligations. “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).

9. In bankruptcy, courts apply the “business judgment” rule when evaluating a debtor’s or trustee’s motion to reject a lease. *See, e.g., Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658, 203 L. Ed. 2d 876 (2019) (“The bankruptcy court will generally approve that choice, under the deferential “business judgment” rule.”); *In re Colony Beach & Tennis Club Ass’n, Inc.*, No. 808-BK-16972-KRM, 2010 WL 746708, at *3 (M.D. Fla. Mar. 2, 2010). “The business judgment test requires a showing that rejection of the contract will likely benefit the [bankruptcy] estate.” *Colony Beach*, 2010 WL 746708, at *3.

10. Here, the Assignee identified at the outset of the case that the Tampa Lease would be unduly burdensome to the assignment estates and would have rejected the Lease immediately had the parties not agreed to the Standstill Agreement. (Standstill Motion ¶ 3.) The Lease’s monthly rent is over \$600,000 per month, and the restoration costs sought by the landlord here illustrate precisely why rejection of the Lease should be approved. The assignment estates’ other creditors should not be saddled with paying these onerous costs.

11. The bankruptcy court decision in the case of *In re Ames Dept. Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004) is directly on point. In that case, the debtor sought to reject a lease for one of its department store locations. The lease contained a provision requiring the tenant, at the termination of the lease, to leave the premises clean and/or free of goods and effects. However, after the tenant sold all the valuable personal property at the location, the tenant abandoned personal property at the premises that would be costly to remove. The debtor/tenant then filed a motion to reject the lease.

12. The landlord objected to rejection, arguing that the debtor could not reject the lease

until it paid to remove the property and debris from the premises. The court soundly rejected the landlord's argument, stating:

A rejection is a court-authorized breach of an executory contract. When the exercise of business judgment makes such advisable, the estate can, by rejection, be relieved of the duty of continuing post-petition performance on a contract, and the landlord's claim for any damages arising from the rejection is a pre-petition claim for breach of contract. The ability to reject provides the trustee or debtor-in-possession with the means to relieve the estate of the duty to perform on burdensome obligations at the expense of all of the estate's other creditors, and to avoid the incurrence of additional administrative expenses which lack a corresponding benefit to the estate.

Ames, 306 B.R. at 51–52 (internal citations omitted).

13. Thus, for the very same reasons, Highwoods' assertion of entitlement to payment of restoration costs is not a legitimate reason for denying the Assignee's motion to reject the lease. The main point of rejection is to relieve the assignment estates, and in turn the creditors, from having to shoulder burdensome and costly lease obligations that provide no benefit to the assignment estates.

14. Highwoods does not, and cannot, point to any action of the Assignee that resulted in Highwoods having to incur any restoration costs. The damages Highwoods seeks to recover relate solely to the pre-assignment activity of the Assignors and result solely from rejection of the Tampa Lease.

15. Highwoods' assertion that the Standstill Agreement somehow imposed payment of restoration costs as a condition of lease rejection is misplaced. The Standstill Agreement contains no mention of lease rejection. In any event, the Standstill Agreement only governed the parties' rights and duties under the lease *prior to* rejection. In no way did the Assignee waive any rights of the assignment estates to avail themselves of the benefits of rejection under Chapter 727, which primarily include avoidance of burdensome costs such as those sought by Highwoods.

The Restoration Costs are Not Entitled to Administrative Expense Priority

16. If Highwoods believes the restoration costs should be afforded administrative expense priority, it is free to file a motion for payment of an administrative expense. To be sure, the Assignee would strenuously object to such treatment. Chapter 727 of the Florida Statutes provides no basis to treat such costs as an administrative expense.

17. The priority scheme for assignment cases is set forth in Section 727.114 of the Florida Statutes. The statute confers priority, after payment of secured claims, to specific kinds of obligations:

Expenses incurred during the administration of the estate, other than those expenses allowable under paragraph (a), including allowed fees and reimbursements of all expenses of the assignee and professional persons employed by the assignee under s. 727.108(7), and **rent** incurred by the assignee in occupying any premises in which the assets of the assignment estate are located or the business of the assignor is conducted, from and after the date of the assignment, through and until the earlier of the date on which the lease for such premises is rejected pursuant to an order of the court or the date of termination of such lease.

Fla. Stat. § 727.114(b) (emphasis added).

18. Although the statute confers priority for *rent* incurred by the assignment estates, “in occupying any premises in which the assets of the assignment estates are located or the business of the assignor is conducted,” the statute confers no similar priority to other costs or expenses incurred by a landlord as a result of the rejection of its lease. Under the Standstill Agreement, the landlord agreed to abatement of post-assignment rent.

19. Indeed, Chapter 727 expressly contemplates that restoration costs are to be treated as part of a landlord’s unsecured “rejection damages” claim. Section 727.112, which sets for the procedures for creditors to file claims with the assignment estate, provides:

(6) If a claim for damages results from the assignee’s rejection of a lease of real property, the claim shall be limited to:

(a) The rent reserved by such lease, without acceleration, for the greater of 1 year or 15 percent of the remaining term of the lease, following the earlier of the date of assignment or the date on which the lessor repossessed, or the lessee surrendered, the leased property; and

(b) 1. Any unpaid rent due under the lease, without acceleration, on the earlier of the dates specified in paragraph (a);

2. Reasonable attorney's fees and costs incurred by the lessor in connection with the lease; and

3. **The lessor's reasonable costs incurred in reletting the premises previously leased by the assignor.**

Fla. Stat. § 727.112(6) (emphasis added). The language above makes clear that restoration costs sought by Highwoods, so long as they are reasonable, would be included in its general unsecured lease rejection damages claim, not treated as an administrative expense of the estates.

20. Looking to bankruptcy law for guidance, the court in the *Ames* case discussed above also considered—and denied—the landlord's claim for administrative expense. *See In re Ames Dept. Stores, Inc.*, 306 B.R. 54 (Bankr. S.D.N.Y. 2004). The landlord in *Ames* asserted a request for an administrative expense claim for the cleanup and removal costs of the personal property left at the premises. In bankruptcy, statutory priorities are narrowly construed because granting administrative expense claims cuts against the general goal of distributing assets equally among similarly situated creditors. *Id.* at 54. Assignments for the benefit of creditor cases share the same goal. *See* Fla. Stat. § 727.101 (“The intent of this chapter is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter.”).

21. As the court in *Ames* noted, in bankruptcy, there is a two-prong test for determining whether a claim qualifies as a general administrative expense: (1) the expense must arise from a post-petition transaction between the creditor and the debtor/trustee, and (2) the transaction must have been “actual and necessary” to preserve the estate, i.e., the estate must receive some benefit.

See *Ames*, 306 B.R. at 55; *In re Unidigital, Inc.*, 262 B.R. 283, 289 (Bankr. D. Del. 2001) (“[A]bsent a benefit to the estate, no priority claim is allowable.”); see also *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1383 (11th Cir. 1994) (“The threshold requirement for an administrative expense is that it be actual and necessary to the preservation of the estate; the benefit must run to the debtor and be fundamental to the conduct of its business.”). “[A] debt is not entitled to administrative expense treatment merely because the right to payment arises after the debtor-in-possession has begun managing the debtor’s affairs.” *Ames*. at 54–55.

22. Addressing whether the cleanup costs were entitled to administrative expense priority, the court in *Ames* explained that such expenses are not entitled to priority treatment. The *Ames* court explained that “claims arising from contractual breaches of this character are not entitled to administrative expense treatment—at least under the facts in this case, where the cleanup obligation arises upon lease termination.” *Id.* at 55; see also *In re Unidigital, Inc.*, 262 B.R. 283, 289 (Bankr. D. Del. 2001) (holding that lessor was not entitled to administrative expense claim for cost to remove 30,000-pound printer from leases premises). Just like the cleanup costs in *Ames* and the cost of removing the printer in *Unidigital*, the restoration costs asserted by Highwoods occurred only upon lease termination and constitute, at best, a pre-assignment unsecured claim.

23. In any event, the issue of whether such costs are entitled to priority under the statutory scheme is not properly before the Court. Highwoods can file a motion with the Court requesting payment of an administrative expense claim, and Highwoods will bear the burden of proving that the costs are entitled to administrative priority. See *Unidigital, Inc.*, 262 B.R. at 288. If Highwoods does file such a claim, the Assignee will be prepared to respond in due course.

WHEREFORE, the Assignee requests that the Court grant the Rejection Motion, overrule Highwoods' objection, and grant such other and further relief the Court deems just.

DATED: December 20, 2019

/s/ Edward Peterson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing *Assignee's Reply to Highwoods Realty Limited Partnership Response to Assignee's Motion for Order Authorizing Rejection of Tampa, Florida Lease* has been furnished on December 20, 2019 by the Court's electronic system to all parties receiving electronic service.

/s/ Edward Peterson
Edward J. Peterson