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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

SOUND SHORE MEDICAL CENTER
OF WESTCHESTER, et al.

Debtors.

Chapter 11

Case No. 13-22840 (RDD)

(Jointly Administered)

**DE LAGE LANDEN FINANCIAL SERVICES, INC.'S (I) OBJECTION TO THE
DEBTORS' (A) MOTION FOR ENTRY OF AN ORDER APPROVING THE PRIVATE
SALE OF THE DEBTORS' ASSETS TO THE BUYER; AND (B) THE PROPOSED
PRIVATE SALE; AND (II) MOTION REQUESTING RELIEF FROM THE
AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(D)**

De Lage Landen Financial Services, Inc. ("De Lage Landen"), by and through its attorneys, Fox Rothschild LLP, files this (I) Objection (the "Objection") to (A) the Motion of Sound Shore Medical Center of Westchester ("SSMC"), and certain of its debtor affiliates, as debtors and debtors-in-possession (each a "Debtor" and collectively the "Debtors") for entry of an order pursuant to section 105, 363, and 365 of title 11 of the United States Code (the "Bankruptcy Code") and Federal Rules of Bankruptcy Procedure 2002(a)(2) and 6004 for the entry of an Order (the "Sale Order") (x) approving a sale of the Acquired Assets (as defined in the Restated Purchase Agreement), free and clear of all liens, claims and encumbrances, except as expressly assumed in the Restated Purchase Agreement, to Montefiore SS Operations, Inc.,

Montefiore MV Operations, Inc., Montefiore HA Operations, Inc. and Montefiore SS Holdings, LLC, Montefiore MV Holdings, LLC and Montefiore HA Holdings, LLC (collectively, the “Buyer”) or any other successful bidder at the Auction as determined by the bidding procedures (the “Bidding Procedures”), (y) approving the assignment procedures (the “Assignment Procedures”) related to the assumption and assignment of certain executory contracts and unexpired leases related to the Acquired Assets, and fixing the Cure Amounts (as defined in the Restated Purchase Agreement), and (z) granting related relief (the “Sale Motion”); (B) the proposed private sale of the Acquired Assets to Buyer (the “Private Sale”); and (II) Motion (the “Stay Relief Motion”) for entry of an order granting relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). In support of the Objection and Stay Relief Motion, De Lage Landen respectfully represents as follows:

BACKGROUND

A. Entry Into the Da Vinci Contract By and Between Debtor SSMC and De Lage Landen

1. Shortly before the Petition Date (as defined below), on March 28, 2013, Debtor SSMC signed that certain Master Lease Schedule No. 01, dated March 28, 2013 (the “Da Vinci Contract”), pursuant to which Debtor SSMC intended to lease from De Lage Landen one (1) da Vinci SI (single-console) surgical system with skills simulator, including all software, accessories and attachments (the “Surgical Equipment”).¹ Section 2 of the Da Vinci Contract states “[t]he Lease shall commence on the day that Lessee executes a Delivery and Acceptance Certificate with respect to the Equipment (“Commencement Date”).” On May 29, 2013, the day the Debtors filed for bankruptcy, Debtor SSMC emailed the Delivery and Acceptance Certificate to De Lage Landen, which was dated April 26, 2013.

¹ The Da Vinci Contract is governed by the laws of the Commonwealth of Pennsylvania.

2. Pursuant to the Da Vinci Contract, De Lage Landen remained the holder of all right, title, and interest in the Surgical Equipment until Debtor SSMC performed all of its duties and obligations under the Da Vinci Contract.

3. Debtor SSMC represented and warranted that “there were no suits or proceedings pending or threatened in court or before any regulatory commission, board or other administrative governmental agency against or affecting [Debtor SSMC] which will have a material adverse effect on the ability of [Debtor SSMC] to fulfill its obligations” under the Da Vinci Contract.

4. Debtor SSMC has failed to make any payments to De Lage Landen for its use of the Surgical Equipment.

5. An Event of Default occurs under the Da Vinci Contract when Debtor SSMC “fail[s] to make any Lease Payment, or any other payment, as it becomes due and such failure is not cured within 10 days.” Da Vinci Contract at 2, Art. 13.

6. An Event of Default occurs under the Da Vinci Contract when “[a]ny representation or warranty made by [Debtor SSMC] herein or otherwise furnished [to] [De Lage Landen] in connection with this [Da Vinci Contract] . . . shall prove at any time to have been untrue or misleading in any material respect.” Da Vinci Contract at 2, Art. 13.

7. An Event of Default also occurs under the Da Vinci Contract when Debtor SSMC “enter(s) into any transaction or merger or consolidation in which it is not the surviving entity or otherwise disposes of substantially all of its assets (“Assets”) unless the surviving entity or the entity acquiring such assets assumes all of the duties and obligations of [Debtor SSMC] hereunder and which merger, consolidation, sale or transfer must be approved in writing by [De Lage Landen].” Da Vinci Contract at 2, Art. 13.

8. Upon the occurrence of an Event of Default, De Lage Landen may exercise any one or more of the following remedies, including: (a) declare the entire unpaid balance of the Da Vinci Contract immediately due and payable; (b) require Debtor SSMC to assemble the Surgical Equipment at Debtor's SSMC's expense at a place reasonably designated by De Lage Landen and (c) take possession of the Surgical Equipment from the place where the Surgical Equipment is located.

B. Debtors' Bankruptcy Filing And Proposed Private Sale to Buyer

9. On May 29, 2013 (the "Petition Date"), only sixty-two (62) days after signing the Da Vinci Contract and only thirty-three (33) days after allegedly signing the Delivery and Acceptance Certificate to commence the Da Vinci Contract, which De Lage Landen received on the Petition Date, each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court").

10. By Order entered on May 31, 2013, this Court consolidated the Debtors' cases, for procedural purposes only, and ordered the joint administration of the Debtors' cases. [D.I. 30].

11. On May 29, 2013, the Debtors filed the Sale Motion to approve the Sale of the Acquired Assets pursuant to the Purchase Agreement. [D.I. 17].

12. Also on May 29, 2013, the Debtors entered into the Asset Purchase Agreement (the "Purchase Agreement") with Buyer pursuant to which the Buyer agreed to purchase from the Debtors substantially all of the Debtors' real property and operating assets (the "Acquired Assets").

13. On June 27, 2013, the Debtors filed a Restated Asset Purchase Agreement with the Buyer (the "Restated Purchase Agreement").

14. Section 2.1(c) of the Restated Purchase Agreement provides that the Debtors shall sell, transfer, convey, assign, and deliver to the Buyer all of their right, title and interest in the Acquired Assets, which include:

(c) Sellers' Furniture and Equipment and Inventory other than the Furniture, Equipment and Inventory identified by the Buyer on Schedule 2.1(c), no later than sixty (60) days following the Effective Date;

Revised Purchase Agreement at 15, Sec. 2.1(c).

15. Pursuant to Section 3.1 of the Revised Purchase Agreement, the Buyer shall "pay, satisfy or assume liabilities equal to . . . (\$58,750,000) plus the appraised value of the Furniture and Equipment and Inventory acquired by the Buyer pursuant to Section 2.1(c) (as determined by an appraisal firm within thirty (30) days following the Effective Date, with such firm being acceptable to the Sellers, Buyer, and the Creditors' Committee) (the "Purchase Price")." Revised Purchase Agreement at 18, Sec. 3.1.

C. Events of Default Under the Da Vinci Contract

16. Upon information and belief, the Buyer intends to purchase substantially all of the Debtors' Assets without assuming all of the duties and obligations of Debtor SSMC under the Da Vinci Contract.

17. The Debtors' Private Sale of the Acquired Assets to the Buyer constitutes an Event of Default under Article 13 of the Da Vinci Contract. As set forth above, an Event of Default occurs under the Da Vinci Contract when Debtor SSMC "otherwise disposes of substantially all of its assets ("Assets") unless the surviving entity or the entity acquiring such assets assumes all of the duties and obligations of [Debtor SSMC] hereunder and which merger, consolidation, sale or transfer must be approved in writing by [De Lage Landen]." Da Vinci Contract at 2, Art. 13.

18. Pursuant to the Restated Purchase Agreement, the Debtors are selling substantially all of their Assets to the Buyer.

19. De Lage Landen has not approved the Private Sale in writing.

20. As such, the Debtor SSMC has defaulted under the Da Vinci Contract.

21. Additionally, Debtors SSMC has defaulted under the terms of the Da Vinci Contract by its failure to pay amounts as they become due under the Da Vinci Contract. Despite Debtor SSMC's failure to make any payments that were due under the Da Vinci Contract, it continues to use the Surgical Equipment, as evidenced by its purchase of \$7,900 of instruments for use in connection with the Surgical Equipment. As of the date of this Objection, Debtor SSMC has not taken any steps to cure the payment default. As such, Debtor SSMC has defaulted a second time under the Da Vinci Contract.

22. Lastly, Debtor SSMC has defaulted for a third time under the Da Vinci Contract based on its false representation and warranty that there were no threatened or imminent legal proceedings at the time it entered into the Da Vinci Contract.

23. Upon information and belief, at the time that Debtor SSMC entered into the Da Vinci Contract, Debtor SSMC knew that the bankruptcy filings were imminent, it was insolvent, and would be unable to meet its obligations due and owing under the Da Vinci Contract.

24. Debtor SSMC's knowledge of the imminent bankruptcy filings caused its representation and warranty to be untrue or materially misleading. As such, Debtor SSMC defaulted under the Da Vinci Contract.

25. These Events of Default permit De Lage Landen to exercise its rights and remedies under the Da Vinci Contract, including, but not limited to, acceleration of the indebtedness due under the Da Vinci Contract, and taking possession of the Surgical Equipment.

OBJECTION

26. By this Objection, De Lage Landen requests that this Court deny the Debtors' Sale Motion and Private Sale of the Acquired Assets to the Buyer, to the extent that the Debtors'

seek to sell the Surgical Equipment to the Buyer without immediately paying all indebtedness due and owing under the Da Vinci Contract to De Lage Landen.

BASIS FOR OBJECTION

27. In accordance with Bankruptcy Rule 6004, sales of property rights outside of the ordinary course of business may be by private sale or public auction.

28. Section 363(b)(1) of the Bankruptcy Code provides that a trustee, “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” See 11 U.S.C. § 363(b)(1). Although Bankruptcy Code section 363 does not specify a standard for determining when it is appropriate for a court to authorize the use, sale or lease of property of the estate, courts have required that such use, sale or lease be based upon a debtor’s (or trustee’s) sound business judgment. See, e.g., In re Decora Indus., Inc., 2002 WL 32332749, *2 (D. Del. May 20, 2002); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991); In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (Bankr. D. Del. 1999).

29. Additionally, to obtain approval in a chapter 11 case before confirmation of a plan of a sale of substantially all of the assets of the estate, the Debtors must show a sound business reason, that there has been adequate and reasonable notice, and that the sale has been proposed in good faith. See In re Abbots Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986) any such sale must be bound by a finding of good faith on the part of the purchaser).

30. However, the Da Vinci Contract and the Surgical Equipment are not property of the Debtors’ bankruptcy estates because they were obtained through Debtor SSMC’s fraud and cannot be sold unless the total obligations under the Da Vinci Contract are paid in full. Debtor SSMC fraudulently entered into the Da Vinci Contract because it knew that the bankruptcy filings were imminent, that it was insolvent, and would be unable to meet its obligations due and

owing under the Da Vinci Contract. As such, the Da Vinci Contract and the Surgical Equipment are not property of the Debtors' bankruptcy estate.

31. Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. However, a bankruptcy estate is only comprised of property interest cognizable under non-bankruptcy law. In re Chapman, 265 B.R. 796, 821 (Bankr. N.D. Ill. 2001). The analysis must begin with the basic principle that "[t]he legislative history of the 1978 Bankruptcy Code makes clear that despite the broad scope of § 541(a) [that defines what creates the bankruptcy estate], it 'is not intended to expend [sic] the debtor's rights against others more than they exist at the commencement of the case.'" S. Rep. No. 95-989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868; see also In re Vote, 276 F.3d 1024, 1026 (8th Cir. 2002); In re Sanders, 969 F.2d 591, 593 (7th Cir. 1992) (estate takes property subject to burdens and limitations of state law rights).

32. "Property obtained by a debtor's fraud is not part of the debtor's estate." Chapman, 265 B.R. at 821. See also In re Teltronics, Ltd., 649 F.2d 1236 (7th Cir. 1981).

33. Under Pennsylvania law, fraud consists of the following elements: (1) a misrepresentation; (2) material to the transaction; (3) made falsely; (4) with the intent of misleading another to rely on it; (5) justifiable reliance resulted; and (6) injury was proximately caused by the reliance." Bral Corp. v. Johnstown America Corp., No. 3:08-232, 2013 WL 241066, (W.D. Pa. Jan. 22, 2013). See also In re Tap, Inc. 52 B.R. 271, 279 (Bankr. Mass. 1982) ("[u]nder Massachusetts law, 'if one makes as of his own knowledge a false statement respecting a material fact which is susceptible of knowledge, he has committed an actionable fraud on another who with right has relied upon it to his damage, even though the maker of the statement did not know it to be false.'").

34. If a debtor made false statements to the other contracting party “when it knew that it was insolvent and unable to fill the contract, such fact would show actual fraud and entitle the [other contracting party] to . . . the property.” In re Tate-Jone & Co., 85 F.Supp. 971, 983 (W.D. Pa. 1949).

35. Debtor SSMC fraudulently entered into the Da Vinci Contract in order to obtain an interest in the Surgical Equipment.

36. Under the terms of the Da Vinci Contract, Debtor SSMC represented that there were no threatened or imminent legal proceedings. This representation was false, materially misleading, and constitutes an Event of Default under the Da Vinci Contract. Debtor SSMC knew that the bankruptcy filings were imminent, it was insolvent, and would be unable to meet its obligations due and owing under the Da Vinci Contract.

37. Debtor SSMC’s false and material misrepresentation was material to the Da Vinci Contract. De Lage Landen would not have entered into the Da Vinci Contract with Debtor SSMC if it had known of Debtor SSMC’s insolvency, imminent bankruptcy, and inability to meet the obligations due and owing under the Da Vinci Contract.

38. Debtor SSMC intended De Lage Landen to rely on its false and material misrepresentation, and that reliance was justified.

39. Debtor SSMC’s false and material misrepresentation constitutes an Event of Default under the Da Vinci Contract, thereby injuring De Lage Landen. De Lage Landen’s injury was proximately caused by its reliance on Debtor SSMC’s false and material misrepresentation.

40. As such, Debtor SSMC committed fraud under Pennsylvania law.

41. Based on the principal that Debtor SSMC can be afforded no greater rights in bankruptcy than it was afforded under non-bankruptcy law, Debtor SSMC’s fraud excludes the

Da Vinci Contract and the Surgical Equipment from being property of the Debtors' estates under 11 U.S.C. § 541 and cannot be sold unless the Buyer immediately pays De Lage Landen all indebtedness due and owing under the Da Vinci Contract.

42. Therefore, this Court must deny the Sale Motion and the proposed Private Sale of the Acquired Assets to the Buyer unless the Buyer immediately pays De Lage Landen all indebtedness due and owing under the Da Vinci Contract.

WHEREFORE, De Lage Landen Financial Services, Inc., respectfully requests that this Court (1) sustain its Objection; (2) deny the Sale Motion and the proposed Private Sale of the Acquired Assets to the Buyer, unless the Buyer immediately pays De Lage Landen Financial Services, Inc. all indebtedness due and owing under the Da Vinci Contract; and (3) for such other relief as is just and proper.

MOTION FOR RELIEF FROM THE AUTOMATIC STAY

43. Even if this Court were to find that either the Da Vinci Contract or Surgical Equipment were property of the Debtors' bankruptcy estates, "cause" exists pursuant to 11 U.S.C. § 362(d)(1) to terminate the automatic stay as to De Lage Landen in order for it to exercise its remedies under the Da Vinci Contract and take possession of the Surgical Equipment.

BASIS FOR RELIEF

44. Section 362(d) of the Bankruptcy Code provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay...(1) for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1). Accordingly, the bankruptcy court "shall" lift the automatic stay for "cause." 11 U.S.C. § 362(d)(1).

45. The party seeking relief for “cause” must establish a prima facie case that “cause” exists for relief. In re Project Orange Assoc., LLC, 432 B.R. 89, 102-103 (Bankr. S.D.N.Y. 2010). See also Wang v. Kurtz (In re Wang), Adv. No. 09-01865, 2010 WL 6259970, *4 (9th Cir. Nov. 10, 2010) (citing Duvar Apt., Inc. v. FDIC (In re Duvar Apt., Inc.), 205 B.R. 196, 200 (9th Cir. 1996) (granting the creditor relief from the automatic stay to initiate foreclosure proceedings because the creditor demonstrated a prima facie case of a bad faith filing, which constituted “cause” for granting relief from the stay pursuant to § 362(d)). Once the prima facie case that “cause” exists has been demonstrated, the burden shifts to the debtor to show that stay relief is unwarranted. Id.

46. However, Section 362(d)(1) does not define “cause,” leaving courts to consider what constitutes cause based on the totality of the circumstances in each particular case. Project Orange Assoc., LLC, 432 B.R. at 103; Baldino v. Wilson (In re Wilson), 116 F.3d 87, (3d Cir. 1997); Izzarelli v. Rexene Products Co. (In re Rexene Products), 141 B.R. 574, 576 (Bankr. D. Del. 1992). See also In re Brown, 311 B.R. 409, 412-13 (E.D. Pa. 2004) (“cause” is an intentionally broad and flexible concept that must be determined on a case-by-case basis and permits a bankruptcy court, as a court of equity, to use its discretion to do what is just when examining inherently fact-sensitive situations); In re Texas State Optical, Inc., 188 B.R. 552, 556 (Bankr. E.D.Tex. 1995) (finding that “cause” for modification of the automatic stay is “an intentionally broad and flexible concept that permits the Bankruptcy Court, as a court of equity, to respond to inherently fact-sensitive situations”) (citations omitted). The “legislative history indicates that cause may be established by a single factor.” In re Rexene Products, 141 B.R. at 576 (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 343-344 (1977) U.S.Code Cong. & Admin.News pp. 5787, 6300).

47. “Cause” has been found to exist for relief from the automatic stay for a debtor’s failure to make post-petition payments when due under a contract. See In re Oare, 181 B.R. 16, 18 (Bankr. N.D.N.Y. 1995) (granting the financing company relief for “cause” from the automatic stay because the debtors failed to make post-petition payments when due); In re Hinchliffe, 164 B.R. 45, 51 (Bankr. E.D. Pa. 1994) (the debtors failure to make any post-petition payments was “cause” for relief from the automatic stay).

48. “Cause” exists to lift and terminate the automatic stay as to De Lage Landen because the Debtors have defaulted under the terms of the De Vinci Contract. Particularly, Debtor SSMC’s first default under the Da Vinci Contract occurred when it made the false representation and warranty that there were no threatened or imminent legal proceedings at the time it entered into the Da Vinci Contract. Debtor SSMC’s second default occurred when it failed to make any payments to De Lage Landen. Debtor SSMC’s failure to make any post-petition payments to De Lage Landen is sufficient “cause” for relief from the automatic stay. Debtor SSMC’s third default occurred when it entered into the Restated Purchase Agreement to sell the Acquired Assets, without requiring the Buyer to assume Debtor SSMC’s obligations and duties under the Da Vinci Contract or immediately pay De Lage Landen all indebtedness due and owing under the Da Vinci Contract. As such, De Lage Landen asserts that “cause” exists to lift and terminate the automatic stay as to De Lage Landen.

49. Accordingly, De Lage Landen is entitled to exercise all of its rights and remedies under the Da Vinci Contract and under applicable non-bankruptcy law and equity, including, but not limited to, acceleration of the indebtedness due under the Da Vinci Contract, and taking possession of the Surgical Equipment.

WHEREFORE, De Lage Landen respectfully requests that the Court enter an Order (i) granting the Stay Relief Motion; (ii) terminating the automatic stay as to De Lage Landen and

declaring that De Lage Landen is entitled to possession of the Surgical Equipment and to exercise all rights under the Da Vinci Contract and under applicable non-bankruptcy law and equity, including sale or other disposition of the Surgical Equipment; (iii) ordering the Debtors to surrender the Surgical Equipment to De Lage Landen without further delay; and (v) granting such other and further relief as the Court may deem appropriate.

Respectfully submitted,

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