

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY
Caption in Compliance with D.N.J. LBR 9004-2(c) WASSERMAN, JURISTA & STOLZ, P.C. 110 Allen Road, Suite 304 Basking Ridge, NJ 07920 Phone: (973) 467-2700 Fax: (973) 467-8126 Counsel to Debtor-in-Possession DANIEL M. STOLZ, ESQ. LEONARD C. WALCZYK, ESQ.
In Re: FLORHAM PARK SURGERY CENTER, LLC, <p style="text-align: center;">Debtor.</p>

Chapter 11
Case No. 16-16964
Hearing Date:
Honorable John K. Sherwood

DEBTOR’S MOTION TO ASSUME MANAGEMENT SERVICES AGREEMENT

Pursuant to 11 U.S.C. Section 365, Florham Park Surgery Center, LLC (“FPSC” or the “Debtor”) respectfully submits this Motion to Assume Management Services Agreement (the “Motion”) and respectfully represents to this Court as follows:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the motion pursuant to 28 U.S.C. §§ 157 and 1334(b). This matter is a core proceeding and the motion to proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.
2. The statutory predicate for the requested relief is 11 U.S.C. § 365.

II.

FACTUAL BACKGROUND

A. The Bankruptcy Case

3. On April 11, 2016 (the "Petition Date"), the Debtor commenced this case by filing a Voluntary Petition under Chapter 11 of the Bankruptcy Code. The Debtor owns and operates a surgical center in Florham Park, New Jersey (the "Surgical Center").

4. To date no Official Committee of Unsecured Creditors has been appointed.

5. No request for a Trustee or an Examiner has been made.

B.

THE MANAGEMENT AND OPERATION OF THE SURGICAL CENTER

6. Pursuant to the Corporate Governance Provisions of the Debtor, Associated Ambulatory Services, LLC and its affiliate Unify Surgery Center at Florham Park ("Unify") has managed and operated the Debtor's surgical center on a day-to-day basis since November 10, 2015.

7. Specifically, Associated Ambulatory Services, LLC ("AAS") manages and operates the Debtor's Surgical Center pursuant to the Management Services Agreement and Amendment between the Debtor and Associated Ambulatory Services, LLC. ("AAS") dated November 10, 2015 (the "Management Services Agreement").

8. In addition, the principal manager of Associated Ambulatory Services, LLC -- Kishor Solanki -- manages the Surgical Center through AAS, which employs all the employees that operate the Surgical Center and Human Resources Management and other "back office" employees dedicated to servicing the Debtor's operations.

9. Section 1. (a) of the Management Services Agreement appoints AAS “to supervise and manage the Surgical Facility pursuant to the terms of this Agreement.

10. Section 3. (a) of the Management Services Agreement provides that AAS “shall assist [the Debtor] with regard to equipment purchases, hiring of personnel, coordination of activities necessary to renovate the Surgery Facility and enable it to commence operations as an ambulatory surgery center in accordance with applicable Federal, New Jersey and municipal laws, regulations and ordinances, and related matters.” Pursuant to Section 3. (b) of the Management Services Agreement, AAS “shall manage and monitor the business operations of the Surgical Facility on behalf [the Debtor] including, but not limited to, the following activities of the Surgical Facility, subject to approval by [the Debtor]:

(i) establishing policies and procedures relating to non-medical functions and non-professional services at [the Debtor’s] Surgical Facility including the conduct and administration of admittance, pre-operative, surgical and post-operative activities and services at the Surgical Facility,

(ii) recommending the organization and arrangement of surgery schedules,

(iii) the hiring, leasing, or termination of qualified personnel from time to time and the training of such personnel, and supervising non-patient care functions of the Surgical Facility's non-professional personnel including, clerks, secretaries, technical personnel, and non-professional supervisory personnel,

(iv) supervising the maintenance of books and records relating to the Surgical Facility, consistent with law or regulations relating to the Surgical Facility and [the Debtor,

(v) supervising the operations of the Surgical Facility in compliance with its quality assurance program,

(vi) monitoring procedures at the Surgical Facility from time to time,

(vii) the making of recommendations from time to time to enhance the operations of the Surgical Facility,

(viii) the negotiation of business arrangements on behalf of [the Debtor] in connection with the business or operations of the Surgical Facility including, but not limited to, agreements with vendors and suppliers, subject to the [Debtor's] approval to the extent required in this Paragraph 3,

(ix) arranging for insurance and payor contracts with respect to the Surgical Facility as may be appropriate (including the negotiation of managed care contracts),

(x) supervising the preparation and filing of any reports or documents (but not tax returns or similar documents) that may be required by any state or local regulatory authority in connection with the Surgical Facility,

(xi) assisting the [Debtor] with respect to maintaining compliance with laws and regulations applicable to the Surgical Facility (which shall not include legal advice, legal guidance or recommendations of a legal nature regarding any actions, or the failure to take actions, with respect to any matters relating to the Surgical Facility or its ownership structure) such as assisting with the adoption of appropriate policies and requirements, including compliance with HIPAA (but not including the preparation of security policies or privacy policies with respect to patient health information or electronic health information or the use, disclosure and requests for protected health information that the Debtor will adopt with respect to the Surgical Facility);

(xii) upon request of the [Debtor], the recruiting of physicians to perform their surgical procedures at the Surgical Facility from time to time, provided, however that in the

performance of any such recruitment activities, the Manager [AAS] shall not furnish or offer to furnish any remuneration to any physician, monetary or otherwise, as an inducement perform surgical procedures at the Surgical Facility; and

(xiii) the placement of the appropriate electronic connections at the Surgical Facility, to be integrated with the Manager [AAS's] computer resources used in the performance of services under this Agreement so that the [Debtor] has access to the same data as the AAS's Manager;

(xiv) assisting the [Debtor] in the evaluation of all quality control aspects of the Surgical Facility and its operations, and the implementation, at the [Debtor's] direction, of quality control programs designed to bring about a high standard of care;

(xv) arranging for or obtaining, subject to [Debtor's] approval, contracts in the ordinary course of business to provide the Surgical Facility with all necessary utilities, janitorial and maintenance services, pest control, telephone service, and such other non-professional services and concessions which are reasonably necessary for the operation of the Surgical Facility;

(xvi) at the request and subject to the approval of the [Debtor], the negotiation of leases, subleases or other contractual arrangements on behalf of the [Debtor] for such equipment, fixtures and furnishings at the Surgical Facility and any replacement thereof determined by the [Debtor] to be necessary for the operation of the Surgical Facility;

(xvii) arranging for the maintenance of the Surgical Facility's equipment, fixtures and furnishings in good condition, repair and working order, reasonable wear and tear excepted, and arranging for refurbishment or replacement of the Surgical Facility's equipment, fixtures and furnishings as they become worn out or obsolete; and

(xviii) reviewing the payables of the [Debtor], and subject to rules, regulations and/or guidelines which the [Debtor] may from time to time impose, supervising the payment thereof by employees of the Surgical Facility to be made out of the funds of the [Debtor].

11. Paragraph 3 (e) provides that “In addition to the services set forth [above], the Manager [AAS] will perform the following services:

(i) preparation of quarterly unaudited, internal financial statements, consisting of a balance sheet and statement of operations and any operational reports that may be reasonably requested by the [Debtor] from time to time (which shall be delivered by the Manager [AAS] to the [Debtor] within forty-five (45) days of the end of the applicable quarter);

(ii) preparation of draft capital equipment and operating budgets, and of a projection of cash receipts and disbursements based upon the proposed capital and operating budgets, for the Surgical Facility each year, by December 15th, for the forthcoming calendar year, for approval by the Board, provided the Board of the [Debtor] is responsive to the Manager [AAS's] requests for specific information, which shall be requested by the Manager [AAS] in writing, and the Board provides such specific information required by the Manager [AAS] to prepare such budgets in a timely fashion, provided that the [Debtor] shall retain complete authority to amend, approve and adopt such budgets;

(iii) preparation of periodic written reports regarding material events that may have occurred between quarterly meetings, including but not limited to written reports regarding any events or omissions which are required to be reported to any governmental regulatory authority or to any accreditation body;

(iv) the immediate preparation of serious event or incident reports, after the discovery or confirmation of a serious event or incident, which are required to be reported to any

governmental regulatory authority; and

(v) assisting the [Debtor] with its various policy and operational requirements in seeking AAAHC accreditation and re-accreditation including assisting with all inspections in connection therewith.

Paragraph 6 of the Management Services Agreement provides that nothing contained in the Agreement shall be construed to create a joint venture, partnership or similar relationship between the [Debtor] and the Manager AAS other than that an independent contractor and principal and agent (provided, however, that the Manager AAS shall serve as the [Debtor's] agent only to the limited extent provided for in the Management Services Agreement where necessary for the Manager to perform its duties under the Agreement and the Manager shall not otherwise have the authority or hold itself out as having the authority to act as the [Debtor's] agent or to legally bind the [Debtor]), or be deemed to render the Manager an employee of the [Debtor].

12. Paragraph No. 4 of the Management Services Agreement provides for the payment of compensation to AAS as Manager. Specifically, Section 4. (a) requires payment of a fixed compensation in the amount of 7% of ALL revenue paid to or collected by the [Debtor] from any source. Any revenue received by the [Debtor] as compensation for an anesthesiologist's professional services performed at the Surgical Facility shall be exempted from the Manager's Compensation. The compensation to the Manager shall be automatically deducted on the 10th day of each month following the month in which the compensation has been earned by way of automatic ACH deduction from the [Debtor's] operating account. The [Debtor] shall authorize the banking institution to make arrangements for such payments. In further consideration, Paragraph 4. (b) of the Management Services Agreement provides that the

[Debtor] has entered into, or will enter into, an Asset Purchase Agreement to sell all of the [Debtor's] assets to AAS or its Assignee.

13. In accordance with their contractual obligations as set forth more particularly in the annexed Management Services Agreement and Amendment, AAS has been providing substantial and necessary services and personnel to ensure that the Debtor remains a viable ongoing concern prior to and since the petition date.

B. AAS Has Not Been Paid Substantial Management Fees

14. Despite its day to day management and operation of the Debtor's Surgical Facility, AAS has not been paid its monthly management fee pursuant to Management Services Agreement since November 10, 2015. In particular, the following pre-petition amounts are due and owing to AAS pursuant to the Management Services Agreement:

FPSC Monthly Deposits

Date	Valley 1172	FPSC BOA 4041	Unify BOA 6151	Unify BOA 6067	Unify BOA 4024	Total	Commissions (7%)
Nov-15	\$144,359.29	\$18,656.19				\$163,015.48	\$11,411.08
Dec-15	\$102,544.67		\$5,400.00		\$14,212.91	\$122,157.58	\$8,551.03
Jan-16	\$35,036.95	\$15,969.38	\$6,210.18		\$36,898.56	\$94,115.07	\$6,588.05
Feb-16	\$203,082.17		\$9,950.00	\$54,526.28	\$37,567.38	\$305,125.83	\$21,358.81
Mar-16	\$221,198.00		\$9,208.95	\$55,745.63	\$51,196.59	\$337,349.17	\$23,614.44
						Total	\$71,523.42

15. Given his corporate finance background his role as the principal manager of AAS, Mr. Solanki has overseen the preparation of the Debtor's final, closed books prior to and since the petition date. He has also overseen the calculation of the management fees due to AAS under the Management Services Agreement prior to and since the petition date. The foregoing management fees have been properly calculated in accordance with generally accepted accounting principles and pursuant to the other terms of the Management Services Agreement.

III.

APPLICABLE LEGAL STANDARDS

16. Pursuant to 11 U.S.C. Section 365, the bankruptcy estate, “subject to the Court’s approval, may assume or reject any executory contract . . . of the Debtor.” See 11 U.S.C. Section 365(a); see also, Stewart Title Guaranty Company v. Old Republic National Title Insurance Company, 83 F.3d 735, 741 (5th Cir. 1996). “It is well established that as a general proposition an executory contract must be assumed or rejected in its entirety.” Stewart Title Guaranty Company v. Old Republic National Title Insurance Company, 83 F.3d 735, 741 (5th Cir. 1996).

17. An “executory contract” is not defined by the Bankruptcy Code but is generally deemed to exist “if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party.” See Id. (internal quotations and citation omitted).

18. In the event that a Debtor-in-Possession assumes an executory contract on which it has defaulted, it must, at the time of assumption, cure or provide adequate assurance that it will promptly cure such default, compensate or provide adequate assurance that it will promptly compensate the non-breaching party for any actual pecuniary loss resulting from such default, and provide adequate assurance of future performance under the contract. See 11 U.S.C. Section 365(b)(1).

19. The decision to assume or reject the contract is generally left to the Debtor-in-Possession’s sound business judgment. See In re Pilgrim’s Pride Corp., 403 B.R. 413, 422 (Bankr. N.D.Tex. 2009) (citing Richmond Leasing Company v. Capital Bank, N.A. (In re Richmond Leasing Company), 762 F.2d 1303, 1309 (5th Cir. 1985)). Nevertheless, the Court must ensure that the decision making process employed by the Debtor-in-Possession to assume

or reject an executory contract is sensible and rational taking into account the risks of the proposed transaction, the available alternatives, and the danger of prejudicing the objecting parties. See Id. at 427 (discussing Richmond Leasing Company, 762 F.2d at 1312n. 11).

20. Importantly, the decision by the Debtor-in-Possession to assume or reject an Executory Contract may occur “at any time before the confirmation of a Plan but the Court, on the request of any party to such contract . . . may order the Trustee to determine within a specified period of time whether to assume or reject such contract. . .” See 11 U.S.C. Section 365(d)(2).

IV.

ARGUMENT AND AUTHORITIES

21. AAS has managed and operated the day to day affairs of the Debtor Surgical Center and has employed all of the Debtor’s employees and the “back office” employees serving the Debtor’ Surgical Center since the execution of the Management Services Agreement as of November 5, 2015. AAS has faithfully continued to do so to keep the Debtor’s Surgical Center open and operating seven days a week, 365 days a year, despite the failure of the Debtor to pay monthly management fees due and owing to AAS.

22. The Debtor needs AAS to continue to manage and operate the Debtor’s Surgical Facility without the cloud of uncertainty inherent in the bankruptcy process in general. Additionally, AAS must be compensated with its monthly management fee according to the Management Services Agreement. It is the exercise of the Debtor’s sound business judgment that the Management Services Agreement be assumed by the Debtor-in-Possession. The services rendered by AAS pursuant to the Management Services Agreement to continue to manage and operate the Debtor’s Surgical Facility on a day to day basis and supply the Debtor’s employees is

necessary to the Debtor's effective reorganization efforts. Otherwise, without such services, the Debtor will cease to function.

V.

CONCLUSION AND REQUEST FOR RELIEF

23. For all of the foregoing reasons, the Court should grant the motion for the Debtor to assume the Management Services Agreement and grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

WASSERMAN, JURISTA & STOLZ, P.C.
Counsel for Debtor, Florham Park
Surgery Center, LLC

By: /s/ Leonard C. Walczyk
LEONARD C. WALCZYK

Date: April 19, 2016