

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

LASER SPINE INSTITUTE, LLC

Case No.: 2019-CA-002762

Assignor

v.

SONEET KAPILA

Assignee.

_____ /

**NOTICE OF PROOF OF CLAIM OF
LASERSCOPIC SPINAL CENTERS OF AMERICA, INC.**

LASERSCOPIC SPINAL CENTERS OF AMERICA, INC., by and through its undersigned counsel, and pursuant to §727.112, Florida Statutes, hereby files (with supporting documents) and gives notice of its Proof of Claim against Assignor, LASER SPINE INSTITUTE, LLC, by delivering the Proof of Claim, attached hereto as **Exhibit A**, upon the Assignee, Soneet Kapila and Edward J. Peterson, Esquire of Stichter, Riedel, Blain & Postler, P.A.

DATE: May 8, 2019.

/s/ Kenneth G. M. Mather
William J. Schifino, Jr., Esq.
Florida Bar Number 564338
Kenneth G.M. Mather, Esq.
Florida Bar Number 619647
Justin P. Bennett, Esq.
Florida Bar Number 112833
GUNSTER, YOAKLEY & STEWART P.A.
401 E. Jackson Street, Suite 2500
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(813) 228-9080 (telephone)
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Attorneys for Judgment Creditors, Joe Samuel Bailey, Mark Miller, Ted Suhl, Laserscopic Spinal Centers Of America, Inc., Laserscopic Medical Clinic, LLC, Laserscopic Surgery Center Of Florida, LLC, Laserscopic Diagnostic Imaging And Laserscopic Physical Therapy, LLC, Laserscopic Spinal Center Of Florida, LLC, And Tim Langford

CERTIFICATE OF SERVICE

I CERTIFY that on May 8, 2019 a true and correct copy of the foregoing has been electronically filed with the Clerk of Court through the Florida Courts E-Filing Portal, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Kenneth G. Mather
Kenneth G. Mather, Esq.

Exhibit A

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,
To:

Consolidated Case No.
2019-CA-2762

Soneet Kapila,

Division L

Assignee

PROOF OF CLAIM

TO RECEIVE ANY DIVIDEND IN THESE PROCEEDINGS (THE "ASSIGNMENT CASES"), YOU
MUST COMPLETE THIS PROOF OF CLAIM AND DELIVER IT TO THE ASSIGNEE, OR THE
ASSIGNEE'S COUNSEL, NO LATER THAN:

JULY 12, 2019

THE ASSIGNEE'S NAME AND ADDRESS ARE AS FOLLOWS:

SONEET KAPILA, ASSIGNEE
1000 SOUTH FEDERAL HIGHWAY, SUITE 200
FORT LAUDERDALE, FL 33316

ASSIGNEE'S COUNSEL IS:
EDWARD J. PETERSON, ESQUIRE
STICHTER, RIEDEL, BLAIN & POSTLER, P.A.
110 E. MADISON ST., SUITE 200
TAMPA, FL 33602

JSB

1. PLEASE SPECIFY THE ASSIGNOR AGAINST WHICH YOU ASSERT A CLAIM:
Laser Spine Institute, LLC – Case No. 2019-CA-2762
(IF YOU HAVE A CLAIM AGAINST MORE THAN ONE ASSIGNOR, YOU MUST FILE A SEPARATE CLAIM AGAINST EACH ASSIGNOR).
2. CREDITOR NAME (Your name): Laserscopic Spinal Centers of America, Inc.
ADDRESS: c/o Kenneth G. Mather, Esquire, Gunster, Yoakley & Stewart, P.A.
ADDRESS: 401 E. Jackson Street, Suite 2500
CITY, STATE, ZIP: Tampa, FL 33602
TELEPHONE NUMBER: (813) 222-6630
E-MAIL ADDRESS: kmather@gunster.com

Please be sure to notify us if you have a change of address.

Check box if address on claim differs from address to which this notice was sent: ☐

3. BASIS FOR CLAIM:
- | | | |
|---|--|---|
| <input type="checkbox"/> Goods Sold | <input type="checkbox"/> Wages, Salaries and Compensations | <input type="checkbox"/> Secured Creditor |
| <input type="checkbox"/> Services Performed | <input type="checkbox"/> Taxes | |
| <input type="checkbox"/> Money Loaned | <input type="checkbox"/> Customer Deposit | |
| <input type="checkbox"/> Shareholder | <input checked="" type="checkbox"/> Other: <u>see attached Exhibit "A"</u> | |
4. DATE DEBT WAS INCURRED: Please see attached Second District Court of Appeals Orders dated December 28, 2019 and April 8, 2019, attached hereto as Exhibits "A" and "B" and the proposed Second Amended Final Judgment as Exhibit "C."
5. AMOUNT OF CLAIM: Principal amount of \$264,000,000, plus interest of \$87,976,680, plus the principal amount of \$5,000,000, plus interest of \$1,666,225, for an overall total of \$358,642,905, plus attorneys' fees and costs as to be determined. (Note: Separate Claims are being filed by each of the judgment creditors identified in Exhibits "A", "B" and "C", but such judgment creditors are entitled to one recovery for the applicable amounts).
6. Does Claim amend, replace, or supplement a prior claim? If so, please state the date and amount of the prior claim(s): No
7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, purchase order, invoices, itemized statement of running accounts, court judgments, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.
8. SIGNATURE: Sign and print name and title, if any, of the creditor or other person authorized to file this claim:

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As required by law, the proof of claim and any supporting documentation you submit shall become a part of the public record related to the Assignment Cases. As a result, the Assignee and his professionals shall be permitted, and may be directed by the Court, to include such documentation, including to the extent provided, protected health information, in any subsequent pleading, notice, document, list, or other public disclosure made in connection with the Assignment Cases. Such inclusion by the Assignee and his professionals shall not constitute a "wrongful disclosure" under HIPAA, the Florida Information Protection Act of 2014, or any regulations promulgated thereunder.

DATED: 5-7-2019

Laserscopic Spinal Centers of America, Inc.

BY: Jer S. Bailey
Signature of Claimant or Representative
Jer S. Bailey, CEO
Print Name and Title Here

For Assignee's Use Only:
Claim Number: _____
Date: _____

Exhibit A

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

In re:

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Assignors,
To:

Consolidated Case No.
2019-CA-2762

Soneet Kapila,

Division L

Assignee

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JULY 12, 2019

THE ASSIGNEE'S NAME AND ADDRESS ARE AS FOLLOWS:

SONEET KAPILA, ASSIGNEE
1000 SOUTH FEDERAL HIGHWAY, SUITE 200
FORT LAUDERDALE, FL 33316

ASSIGNEE'S COUNSEL IS:
EDWARD J. PETERSON, ESQUIRE
STICHTER, RIEDEL, BLAIN & POSTLER, P.A.
110 E. MADISON ST., SUITE 200
TAMPA, FL 33602

JSB

1. PLEASE SPECIFY THE ASSIGNOR AGAINST WHICH YOU ASSERT A CLAIM:
Laser Spine Institute, LLC – Case No. 2019-CA-2762
(IF YOU HAVE A CLAIM AGAINST MORE THAN ONE ASSIGNOR, YOU MUST FILE A SEPARATE CLAIM AGAINST EACH ASSIGNOR).
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ADDRESS: c/o Kenneth G. Mather, Esquire, Gunster, Yoakley & Stewart, P.A.
ADDRESS: 401 E. Jackson Street, Suite 2500
CITY, STATE, ZIP: Tampa, FL 33602
TELEPHONE NUMBER: (813) 222-6630
E-MAIL ADDRESS: kmather@gunster.com

Please be sure to notify us if you have a change of address.

Check box if address on claim differs from address to which this notice was sent: ☐

3. BASIS FOR CLAIM:
- | | | |
|---|--|---|
| <input type="checkbox"/> Goods Sold | <input type="checkbox"/> Wages, Salaries and Compensations | <input type="checkbox"/> Secured Creditor |
| <input type="checkbox"/> Services Performed | <input type="checkbox"/> Taxes | |
| <input type="checkbox"/> Money Loaned | <input type="checkbox"/> Customer Deposit | |
| <input type="checkbox"/> Shareholder | <input checked="" type="checkbox"/> Other: <u>see attached Exhibit "A"</u> | |
4. DATE DEBT WAS INCURRED: Please see attached Second District Court of Appeals Orders dated December 28, 2019 and April 8, 2019, attached hereto as Exhibits "A" and "B" and the proposed Second Amended Final Judgment as Exhibit "C."
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DATED: 5-7-2019

Laserscopic Spinal Centers of America, Inc.

BY: *Jer S. Bailey*
Signature of Claimant or Representative
Jer S. Bailey, CEO
Print Name and Title Here

For Assignee's Use Only:
Claim Number: _____
Date: _____

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOE SAMUEL BAILEY,
LASERSCOPIC SPINAL CENTERS OF
AMERICA, INC.; LASERSCOPIC
MEDICAL CLINIC LLC;
LASERSCOPIC DIAGNOSTIC
IMAGING AND PHYSICAL THERAPY
LLC; LASERSCOPIC SPINAL
CENTER OF FLORIDA, LLC; and
LASERSCOPIC SURGERY CENTER
OF FLORIDA,

Appellants/Cross-Appellees,

v.

Case No. 2D17-895

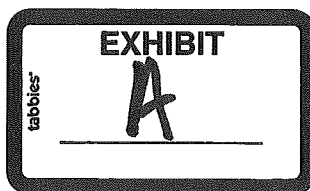
JAMES S. ST. LOUIS, D.O.;
MICHAEL W. PERRY, M.D.; EFO
HOLDINGS L.P.; EFO GENPAR, INC.;
EFO LASER SPINE INSTITUTE, LTD.;
LASER SPINE INSTITUTE, LLC;
LASER SPINE MEDICAL CLINIC, LLC;
LASER SPINE PHYSICAL THERAPY,
LLC; and LASER SPINE SURGICAL
CENTER, LLC,

Appellees/Cross-Appellants.

Opinion filed December 28, 2018.

Appeal from the Circuit Court for
Hillsborough County; Richard A. Nielsen,
Judge.

William J. Schifino of Burr & Forman LLP
Tampa; Stuart C. Markman, Kristin A.



Norse, and Robert W. Ritsch of Kynes, Markman & Felman, P.A., Tampa; Jennifer G. Altman and Shani Rivaux of Pillsbury Winthrop Shaw, Pittman LLP, Miami, for Appellants/Cross-Appellees.

Stacey D. Blank and Joseph H. Varner, III of Holland & Knight LLP, Tampa, for Appellees/Cross-Appellants.

KELLY, Judge.

This is the second appeal from a final judgment entered in favor of the appellants/cross-appellees in an action against the appellees/cross-appellants for breach of fiduciary duty, conspiracy, defamation, slander per se, tortious interference, and violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The factual background underlying this litigation is fully set forth in Bailey v. St. Louis, 196 So. 3d 375 (Fla. 2d DCA 2016) (Bailey I), and repeating it here is unnecessary. In Bailey I, we affirmed the final judgment but reversed the damages awarded by the trial court. On remand, with the exception of adding an award for punitive damages, the trial court awarded the same damages this court had previously reversed. Again, we reverse those awards. As to the remaining issues raised in the appeal and in the cross-appeal, we affirm without further comment.

In Bailey I, the appellants had prevailed on claims for breach of fiduciary duty, conspiracy, slander per se, tortious interference, and violation of FDUTPA. We reversed the damages awarded for everything but slander per se because, as explained in our opinion, we could not square the awards with the evidence or the trial court's findings, which were quite limited with respect to damages. See 196 So. 3d at 377. We

also reversed the trial court's decision not to award monetary damages for the appellees' FDUTPA violations and not to award punitive damages. See id. We determined that the trial court incorrectly ruled that it could not award monetary damages under FDUTPA and that it also erroneously found that the facts did not support an award of punitive damages. See id.

There were two components to the total damage award of \$1,600,000 at issue in Bailey I. The first was an award of \$300,000 to Laserscopic Spine Centers of America, Inc. (Spine), for out-of-pocket damages for tortious inference. With respect to this award we stated, "In its order, the trial court accepted the calculations of only one of the experts 'as to out of pocket losses,' and it found that the expert testified that the Appellants suffered out-of-pocket damages of \$6,831,172." 196 So. 3d at 377 (footnote omitted). Yet, the *total* award of damages was only \$1,600,000. The trial court offered no explanation as to how it ended up entering a total award that was less than one-fourth of the amount it cited for out-of-pocket damages alone, and the record provided no insight into the basis for the award.¹

On remand, the trial court again awarded \$300,000. By way of explanation, the court stated that it had rejected the appellants' expert's testimony as to out-of-pocket losses. However, as explained in Bailey I, the trial court had expressly accepted the expert's calculation regarding out-of-pocket losses. The court purports to

¹The appellees' argument to the trial court was not helpful in terms of understanding the award. Their approach to damages had been to simply argue that the appellants had not proved they suffered *any* damages as a result of the appellees' conduct. They did not challenge the appellants' out-of-pocket figure, nor did they offer any alternative theory upon which the trial court might have based its award of \$300,000.

explain how it determined that \$300,000 was the proper award. Its reasoning, however, is nearly a verbatim repeat of the arguments the appellees unsuccessfully urged us to accept in Bailey I. Moreover, the court's explanation rests on the flawed premise that it had rejected the expert's calculations. Accordingly, we again reverse the trial court's award to Spine and remand for entry of an award in the amount of \$6,831,172, which is the amount the trial court found was established by the appellants' expert's testimony.

The remaining \$1,050,000 of the damage award was the second component at issue in Bailey I. Appellant Laserscopic Spinal Centers of America, Inc. (Spinal), was awarded damages for breach of fiduciary duty, conspiracy, and tortious interference, while appellant Laserscopic Medical Clinic, LLC (LMC), received an award on a claim for breach of fiduciary duty. The appellants had sought damages under various theories, including disgorgement. On appeal, the appellants argued that the trial court had awarded no disgorgement damages, while the appellees argued that the entire \$1,050,000 was an award of "lost profits measured by the yardstick of [Laser Spine Institute's] allegedly ill-gotten profits, which [it] was similarly required to disgorge." Because of the way the trial court had prepared its order, it was not possible to determine with certainty whether all or a portion of the award was for disgorgement. What we could determine, however, was that if it was for disgorgement, it was "grossly insufficient." Id. at 378.

The appellants had sought disgorgement of approximately \$264,000,000. This figure represented the value of Laser Spine Institute (LSI) in 2009 plus \$77.5

million in distributions paid to the owners between 2005 and 2009.² In their argument to the trial court, the appellees had taken the position that even if the court found some wrongdoing, any profits LSI earned were attributable solely to the efforts of management and not to any wrongdoing; therefore, the court should not award anything to the appellants.³ Because it was their position that the appellants were not entitled to any damages, the appellees did not put on any evidence as to what amount of LSI's profits short of \$264,000,000 could be attributed to their wrongful conduct.

On appeal, and without explaining how the court might have arrived at \$1,050,000 rather than \$264,000,000, the appellees argued the award reflected the trial court's conclusion that only this portion of LSI's profits was attributable to the appellees' wrongdoing. In support of this, the appellees pointed to the "Damages" section of the trial court's order and specifically to the trial court's citation to Pidcock v. Sunnyland America, Inc., 854 F. 2d 443, 447-48 (11th Cir.1988). The trial court cited Pidcock for the proposition that a plaintiff may only recover profits attributable to the underlying

²While the parties have referred to the recovery the appellants sought as disgorgement of profits, it would be more accurate to describe it as disgorgement of the appellees' wrongful gain. See Restatement (Third) of Restitution and Unjust Enrichment § 3 (Am. Law. Inst. 2011). A conscious wrongdoer is liable for the "net profit attributable to the underlying wrong." Restatement (Third) of Restitution and Unjust Enrichment § 51(4). As used in section 51(4), "[p]rofit includes any form of use value, proceeds, or consequential gains." Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(a). The appellees have not challenged, nor have we considered, the use of these particular elements to calculate "profit" for the purposes of disgorgement. Nor have they challenged the accuracy of the amounts testified to by the appellants' expert. At trial they offered no alternative method by which to calculate the amount of profits subject to disgorgement because it was their position that *none* of the profits LSI earned were subject to disgorgement.

³In Bailey I we discussed at length the trial court's findings regarding the appellees' wrongful conduct. 196 So. 3d at 377-78. When we reference "wrongdoing" in this opinion we are referring to the conduct we detailed in Bailey I.

wrong and not profits attributable to a defendant's "special or unique efforts" and that "aggressive or enterprising" management activities "may break the causal chain" between the wrongdoing and the defendant's profits. This, according to the appellees, was the reason the trial court limited the award. We will not repeat our discussion of Pidcock here. Suffice it to say that we thoroughly analyzed its applicability to the facts as found by the trial court, and we concluded that the limiting principles Pidcock discusses were inapplicable. See Bailey I, 196 So. 3d at 378. Thus, we held that if the award was for disgorgement, it was "grossly insufficient." See id.

Although we did not address it in our opinion, the appellees also argued that "in cases involving the misappropriation of proprietary information, a court will limit the disgorgement of a defendant's profits 'to the amount of time it would have taken the defendant to independently develop its product without the benefit of the plaintiff's trade secrets—in other words, the "head start" period.'" Thus, they argued that the trial court awarded "lost profits/disgorgement damages in an amount equal to the profits LSI derived from this head start." However, the trial court had found the appellants' misappropriation claims were barred by the statute of limitations. Further, at trial the appellants' did not seek to recover lost profits, instead focusing on disgorgement, business destruction damages, and out-of-pocket damages. Accordingly, we rejected this argument as well.

On remand, the trial court confirmed it was awarding disgorgement damages but then entered the same award we had reversed as "grossly inadequate." This appears to have happened because the appellees convinced the trial court that we had not actually found the award to be inadequate, we had simply found it to be

inadequately explained. And as was the case with the out-of-pocket award, the appellees apparently convinced the trial court it could explain its award by adopting the arguments the appellees had made and we had rejected in Bailey I.

In explaining the award on remand, the trial court's overarching focus is on why it believed Spinal was not successful, which as we explain below, is not part of the equation for determining the degree to which a wrongdoer's profits are attributable to its wrongful conduct. First, the trial court points to the appellants' "lack of business skills" and states that because of their lack of skill and poor business decisions they "should not be awarded disgorgement damages beyond the amounts in the final judgment." It also states it is rejecting the appellants' demand for disgorgement damages equal to all the profits earned by LSI because there is no causal relationship between the appellees' tortious conduct and all the profits. The court elaborates, stating that the appellees succeeded because of a "unique combination of individual, skilled medical doctors; highly effective and inventive executives, managers and administrators; creative marketing and advertising programs; and the availability and use of proper capital" and that even though Spinal "followed the same business model, it was not able to succeed."

The trial court's focus on the appellants' supposed lack of business skills as a basis to limit disgorgement shows a complete misapprehension of the principles applicable to disgorgement. Disgorgement is a remedy designed to deter wrongdoers by making it unprofitable to engage in the wrongful behavior. See Duty Free World, Inc. v. Miami Perfume Junction, Inc., 253 So. 3d 689, 698 (Fla. 3d DCA 2018) ("Disgorgement is an equitable remedy intended to prevent unjust enrichment.")

(quoting S.E.C. v. Monterosso, 757 F. 3d 1326, 1337 (11th Cir. 2014))); Restatement (Third) of Restitution and Unjust Enrichment § 1 (Am. Law Inst. 2011) ("A person who is unjustly enriched at the expense of another is subject to liability in restitution."); Restatement (Third) of Restitution and Unjust Enrichment § 3 ("A person is not permitted to profit by his own wrong."). The point of disgorgement is to deter wrongdoers by stripping them of the gains from their conduct:

Restitution requires full disgorgement of profit by a conscious wrongdoer, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior. If A anticipates (accurately) that unauthorized interference with B's entitlement may yield profits exceeding any damages B could prove, A has a dangerous incentive to take without asking—since the nonconsensual transaction promises to be more profitable than the forgone negotiation with B. The objective of that part of the law of restitution summarized by the rule of § 3 is to frustrate any such calculation.

Id. § 3 cmt. c; see also § 51 cmt. e ("The object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment.").

This case is a classic example of what this comment from the Restatement describes. As we detailed in Bailey I, when the appellants did not accept the appellees' offer to invest in Spinal, the appellees told them "you're going to accept this offer or we're going to take your doctors and we're going to take your company. And we're going to go up the street and we're going to do it ourselves." 196 So. 3d at 380. When threatened with litigation, the appellees said they were not concerned because the business would make ten times whatever damages they might have to pay in a lawsuit. See id. at 380-81.

Had the appellants been limited to recovering under a lost profits theory, that prediction would unquestionably be accurate. However, the measure of damages for disgorgement is not the profits the appellants might have made absent the wrongdoing—the measure of damages for conscious wrongdoing is the appellees' "net profit attributable to the underlying wrong." Restatement (Third) of Restitution and Unjust Enrichment § 51(4); see also Duty Free, 253 So. 3d at 698 ("The equitable remedy of disgorgement is measured by the defendant's ill-gotten profits or gains rather than the plaintiff's losses."). "When the defendant has acted in conscious disregard of the claimant's rights, the whole of the resulting gain is treated as unjust enrichment, even though the defendant's gain may exceed" the claimant's loss. Restatement (Third) of Restitution and Unjust Enrichment § 3 cmt. c. In fact, disgorgement may be awarded even if the claimant has not sustained any loss. Restatement (Third) of Restitution and Unjust Enrichment § 3, reporter's note a. ("[I]t is clear not only that there can be restitution of wrongful gain exceeding the plaintiff's loss, but that there can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever."). The trial court's comments regarding the appellants' business acumen are misplaced in determining a disgorgement award.

To the extent the trial court's order can be read to rely on the limiting principles articulated in Pidcock, we specifically considered and rejected the applicability of those principles in Bailey I. See 196 So. 3d at 378-79. Our rejection of this as a basis to limit the award of disgorgement was the law of the case, and the trial court was bound by our determination. See Specialty Rests. Corp. v. Elliott, 924 So. 2d 834, 837 (Fla. 2d DCA 2005) ("[Q]uestions of law that have actually been decided on appeal must

govern the case in the same court and in the trial court through all subsequent stages of the proceedings."). Moreover, the "business model" to which the court attributes the appellees' success is the one it stole from the appellants along with its doctors, key employees, and everything else. In other words, what the trial court said amounts to a finding that the appellees' success was in fact attributable to their wrongdoing.

Lastly, the trial court sets out the reasoning it used to arrive at the figure of \$1,050,000. However, it relies on the "head start" formula the appellees unsuccessfully argued in support of the award in Bailey I. As explained above, we rejected that argument as inapposite. Further, the trial court took this "head start" concept and more or less turned it on its head. The trial court reasoned that Spinal's operations were interrupted for approximately six months; therefore, the appellants were only entitled to six months of LSI's profits. Again, the trial court misapprehends the nature of the disgorgement remedy by measuring the award based on what the *appellants lost*—six months of profits—not what the appellees gained. See Guyana Tel. & Tel. Co., Ltd. v. Melbourne Int'l Commc'ns, Ltd., 329 F. 3d 1241, 1249 (11th Cir. 2003) (reversing where a jury was instructed to measure the plaintiff's right to restitution in terms of its loss rather than the benefit conferred on the defendants because "[r]estitution is a remedy that is often available to victims of a wrong. Restitution measures a plaintiff's recovery according to the defendant's, rather than the plaintiff's, rightful position").

Accordingly, we again reverse the awards for breach of fiduciary duty, conspiracy, and tortious interference and remand for the court to enter an award of disgorgement. Because the only testimony regarding the manner in which the disgorgement award should be measured came from the appellants' expert, the award

should be calculated according to the formula he proposed. Specifically, the court should enter an award based on the total value of LSI in 2009 combined with the total of the distributions to the owners of LSI between 2005 and 2009.⁴ We also reverse the award for out-of-pocket damages and remand for entry of an award of \$6,831,172.

Reversed and remanded for entry of a judgment in accordance with this opinion.

CASANUEVA and CRENSHAW, JJ., Concur.

⁴It appears from the evidence in the record that the proper amount of the award at a minimum falls between \$264,000,000 and \$265,000,000.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

April 08, 2019

CASE NO.: 2D17-0895

L.T. No.: 06-CA-008498

JOE SAMUEL BAILEY, ET AL

v.

JAMES S. ST. LOUIS, ET AL

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellees' motion for rehearing is denied.

Appellees' motion for rehearing en banc is denied.

Appellees' motion to certify questions of great public importance is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.


Served:

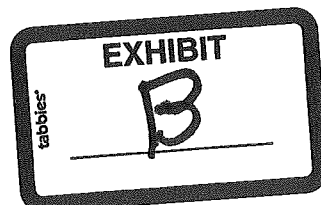
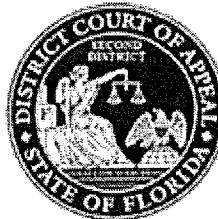
Louis X. Amato, Esq.
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Kristin A. Norse, Esq.
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Justin P. Bennett, Esq.
Pat Frank, Clerk

Stuart C. Markman, Esq.
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Joseph H. Varner, Esq.
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Robert V. Williams, Esq.
Phillip J. Duncan, Esq.

mep


Mary Elizabeth Kuenzel
Clerk



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

JOE SAMUEL BAILEY, *et al.*,
Plaintiffs,

Case No. 06-08498

Division L

vs.

JAMES S. ST. LOUIS, *et al.*,
Defendants.

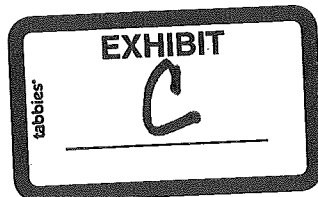
SECOND AMENDED FINAL JUDGMENT

Pursuant to the Court's Order on Non-Jury Trial dated October 9, 2012:

It is ADJUDGED that:

1. Plaintiff Joe Samuel Bailey, whose address is 308 Wallick Drive, Cotter, AR 72626, does have and recover from Defendants James S. St. Louis, D.O., whose address is 4728 N. Habana Avenue, Suite 202, Tampa, FL 33614; Michael W. Perry, M.D., whose address is 5332 Avion Park Drive, Tampa, FL 33607; EFO Holdings L.P., whose principal address is 2828 Routh Stet, Suite 500, Dallas, TX 75201; EFO Genpar, Inc., whose principal address is 500 N Akard Street, Suite 1500, Dallas, TX 75201; and EFO Laser Spine Institute, Ltd., whose principal address is 2828 Routh Stet, Suite 500, Dallas, TX 75201, jointly and severally, the sum of \$250,000, **ALL FOR WHICH LET EXECUTION ISSUE FORTHWITH.**

2. Plaintiff Joe Samuel Bailey does have and recover from Defendants James S. St. Louis, D.O.; Michael W. Perry, M.D.; EFO Holdings L.P.; EFO Genpar, Inc.; and EFO Laser Spine Institute, Ltd., jointly and severally, the sum of \$750,000 in punitive damages, **ALL FOR WHICH LET EXECUTION ISSUE FORTHWITH.**



3. Plaintiffs Laserscopic Spinal Centers of America, Inc., whose address 308 Wallick Drive, Cotter, AR 72626, and Laserscopic Medical Clinic, LLC, whose address is 308 Wallick Drive, Cotter, AR 72626, do have and recover from Defendants James S. St. Louis, D.O.; EFO Holdings L.P.; EFO Genpar, Inc.; EFO Laser Spine Institute, Ltd.; Laser Spine Institute, LLC, who address is 5332 Avion Park Drive, Tampa, FL 33607; Laser Spine Medical Clinic, LLC, whose address is 3001 N. Rocky Point Drive E, Suite 380, Tampa, FL 33607; Laser Spine Physical Therapy, LLC, whose address is 3001 N. Rocky Point Drive E, Suite 380, Tampa, FL 33607; and Laser Spine Surgical Center, LLC, whose address is 5332 Avion Park Drive, Tampa, FL 33607, jointly and severally, the sum of \$264,000,000, **ALL FOR WHICH LET EXECUTION ISSUE FORTHWITH.**

4. Plaintiffs Laserscopic Spinal Centers of America, Inc., and Laserscopic Medical Clinic, LLC, do have and recover from Defendants James S. St. Louis, D.O.; EFO Holdings L.P.; EFO Genpar, Inc.; EFO Laser Spine Institute, Ltd.; Laser Spine Institute, LLC; Laser Spine Medical Clinic, LLC; Laser Spine Physical Therapy, LLC; and Laser Spine Surgical Center, LLC, jointly and severally, the sum of \$5,000,000 in punitive damages, **ALL FOR WHICH LET EXECUTION ISSUE FORTHWITH.**

5. Plaintiff Laserscopic Spine Centers of America, Inc., whose address is 308 Wallick Drive, Cotter, AR 72626, does have and recover from Defendants EFO Holdings, L.P.; EFO Genpar, Inc.; James S. St. Louis, D.O.; EFO Laser Spine Institute, Ltd.; Laser Spine Institute, LLC; Laser Spine Medical Clinic, LLC; Laser Spine Physical Therapy, LLC; and Laser Spine Surgical Center, LLC, jointly and severally, the sum of \$6,831,172, **ALL FOR WHICH LET EXECUTION ISSUE FORTHWITH.**

6. These sums shall bear interest at the rate of 4.75% from October 9, 2012 to December 31, 2016; 4.97% from January 1, 2017 through December 31, 2017; and, 5.72% from January 1, 2018 through December 31, 2018 in accordance with Florida Statute §55.03. Thereafter, on January 1st of each succeeding year until the judgment is paid, the interest rate will adjust in accordance with Florida Statute § 55.03.

7. This Court reserves jurisdiction to award attorney's fees and costs to Plaintiffs.

8. It is further ordered and adjudged that the judgment debtors shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed. Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtors to complete form 1.977, including all required attachments, and serve it on the judgment creditor's attorney, or the judgment creditor if the judgment creditor is not represented by an attorney.

9. The Court retains jurisdiction over this action to enter further Orders that are proper and to award further relief, including without limitation, equitable relief, writs of possession, and to conduct proceedings supplementary, to implead third parties, as this Court deems just, equitable, and proper.

DONE AND ORDERED in Chambers in Hillsborough County, Florida, this ____ day of January, 2019.

Judge Richard Nielsen

cc: All Counsel of Record