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

In re:

Laser Spine Institute, LLC[1]	Case No. 2019-CA-2762
CLM Aviation, LLC	Case No. 2019-CA-2764
LSI HoldCo, LLC	Case No. 2019-CA-2765
LSI Management Company, LLC	Case No. 2019-CA-2766
Laser Spine Surgery Center of Arizona, LLC	Case No. 2019-CA-2767
Laser Spine Surgery Center of Cincinnati, LLC	Case No. 2019-CA-2768
Laser Spine Surgery Center of Cleveland, LLC	Case No. 2019-CA-2769
Laser Spine Surgical Center, LLC	Case No. 2019-CA-2770
Laser Spine Surgery Center of Pennsylvania, LLC	Case No. 2019-CA-2771
Laser Spine Surgery Center of St. Louis, LLC	Case No. 2019-CA-2772
Laser Spine Surgery Center of Warwick, LLC	Case No. 2019-CA-2773
Medical Care Management Services, LLC	Case No. 2019-CA-2774
Spine DME Solutions, LLC	Case No. 2019-CA-2775
Total Spine Care, LLC	Case No. 2019-CA-2776
Laser Spine Institute Consulting, LLC	Case No. 2019-CA-2777
Laser Spine Surgery Center of Oklahoma, LLC	Case No. 2019-CA-2780
Assignors,	Consolidated Case No: 2019-CA-2762
To:	
Soneet Kapila,	Division L
Assignee.	

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ASSIGNEE'S MOTION FOR BOTH PRELIMINARY AND PERMANENT INJUNCTION AGAINST JOHN AND SHIRLEY LANGSTONS' CLAIMS AGAINST THE FORMER MANAGERS OF THE ASSIGNORS

[1] On April 8, 2019, the Court entered an order administratively consolidating this case with the assignment cases of the following entities: LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC .

Soneet Kapila, as assignee ("**Assignee**") for the entities listed in footnote one above, by and through his undersigned attorneys, files this motion seeking to enjoin the efforts by John and Shirley Langston (the "**Langstons**") to file a second amended complaint (the "**Proposed Complaint**") that attempts to pursue claims against the former managers of the Companies (defined below). These claims belong to the Assignee and, indeed, the Assignee is already asserting such claims against the same parties the Langstons seek to pursue. Allowing the Proposed Complaint to go forward would infringe on the exclusive property of the Assignment Estates (as defined below) and detrimentally impair the ability of the Assignee to recover assets for the benefit of all unsecured creditors of the Assignment Estates. In support of this motion (the "**Motion**"), the Assignee states as follows:

I. Background

1. On March 14, 2019, Laser Spine Institute, LLC ("**LSI**") executed and delivered an assignment for the benefit of creditors to the Assignee. The Assignee filed a Petition with the Court on March 14, 2019, commencing an assignment for the benefit of creditors proceeding pursuant to Chapter 727 of the Florida Statutes (the "**LSI Assignment Case**").

2. Simultaneous with the filing of the LSI Assignment Case, the Assignee filed fifteen other Petitions commencing assignment for the benefit of creditors proceedings for 15 affiliates of LSI (the "**Affiliated Assignment Cases**," and together with the LSI Assignment Case, the "**Assignment Cases**"): LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC ("**LSI Holdco**"); Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC;

Total Spine Care, LLC; and Spine DME Solutions, LLC (each, an "**Assignor**" and collectively, the "**Assignors**" or the "**Companies**").

3. The Assignee's duties include the liquidation of each of the Assignors' assets for the benefit of the estates created by the filing of the Assignment Cases (the "**Assignment Estates**"). As the Assignment Cases unfolded, the Assignee and his team of professionals began investigating causes of action that exist in favor of the Assignment Estates related to conduct that occurred in the years leading up to LSI's ultimate demise.

4. Securing recoveries from litigation claims by the Assignee is particularly crucial in these Assignment Cases, where substantially all of the Assignors' assets were encumbered by a blanket lien in favor of Texas Capital Bank, as Administrative Agent for a consortium of lenders (the "**Lenders**"). The Assignee quickly realized that the liquidation value of the Assignors' assets paled in comparison to the Lenders' $155 million secured claim. As such, the Assignee expects that recoveries on litigation claims will be the key source of recovery for unsecured creditors in these Assignment Cases.

5. Thus far, the Assignee has filed complaints against 29 defendants on behalf of the Assignment Estates, while other potential claims and causes of action are the subject of tolling agreements. The complaints fall into two general categories. First, the Assignee has brough claims against the former officers of LSI and LSI Holdco (the "**Officers**") and members of LSI Holdco's board of managers (the "**Managers**") related to various breaches of their fiduciary duties owed to LSI and LSI Holdco. Second, the Assignee has filed complaints against former equity holders of LSI Holdco to avoid and recover fraudulent transfers they received in the form of dividends. In some cases, the Assignee's complaint is pursuing both sets of claims against the same defendants.

A copy of one of the complaints asserting both sets of claims that was filed against an Officer and Manager is attached hereto as **Exhibit A** (the "**Assignee's Complaint**").

6. The Assignee's efforts have already borne fruit for the Assignment Estates. In recent months, the Assignee has reached pre-suit settlements with ten different fraudulent transfer defendants. The Court approved these settlements by orders entered on March 12, 2020 and March 17, 2020. These settlements alone have brought nearly $1.6 million in unencumbered funds into the Assignment Estates.

7. The Assignee's Complaint identifies numerous wrongful acts forming the basis of liability for breach of fiduciary duty, including *inter alia* (individually and collectively, the "**Wrongful Acts**"):

(i) causing the Companies to incur in excess of $150,000,000 in debt (the "**Dividend Loan**") on or about July 2, 2015, which indebtedness the Managers and the Companies knew or should have known could not be repaid by the Companies and which caused the Companies to become insolvent,

(ii) causing the Companies shortly thereafter to distribute an amount equal to approximately $110,000,000 of the proceeds of the Dividend Loan to the ultimate equity owners of the Companies in order to "take money off the table" in violation of applicable law and while facing millions of dollars in pending litigation claims,

(iii) knowing that the Companies were in default of at least twenty (20) different provisions of the Dividend Loan by no later than November 2016, the Managers of the Companies not only failed and refused to cause the Companies to pursue claims and causes of action that existed at that time in favor of the Companies to recover some or all of the proceeds of the Dividend Loan that were unlawfully transferred, they instead attempted to release and insulate/exonerate the equity owners from any liability in connection therewith,

(iv) despite being in default of the Dividend Loan, having become increasing insolvent, facing millions of dollars in litigation claims, needing to substantially restate its financial results as of the end of 2015 by lowering the Companies' revenue and EBITDA by in excess of $50 million each, the officers and directors continued to allow the Companies to pay exorbitant

salaries and bonuses and otherwise failed to take appropriate action to address the Companies' financial difficulties, including continuing with the completion of its $56 million custom built corporate and surgical facility in Tampa through calendar year 2016,

(v) despite their increased insolvency, the multiple defaults under the Dividend Loan and significant creditor litigation, the Managers failed to cause the Companies to seek protection from their creditors, including through the filing and prosecution of an orderly reorganization and/or insolvency proceeding, but instead proceeded, among other things, to renew the lease for their location in Arizona in October 2018 for a period of twelve (12) more years, thereby incurring millions of dollars of additional debt,

(vi) the failure of the Managers to implement and/or follow adequate safeguards and controls in regard to material business, operational, regulatory functions and legal compliance functions, including the Worker Adjustment and Retraining Notification Act (the "**WARN Act**") compliance,

(vii) the failure of the Managers to appropriately wind down the Companies' operations, including the failure to provide notice of the Companies' impending closure to hundreds of employees under the WARN Act, thereby giving rise to potentially millions of dollars of additional liabilities, and

(viii) the continuation or implementation of self-insurance programs for employees, doctors, and patients at a time that the Companies were insolvent knowing that the Companies were unable to cover their self-insured retention amounts or pay medical bills, leaving those individuals without any health or malpractice coverage when the Companies closed, resulting in claims against the Companies that should have been covered by insurance.

8. The Proposed Complaint not only contains many of the same allegations, approximately forty paragraphs from the Assignee's Complaint are copied word for word, including headings.

9. The last item (¶ 8(viii) above) is a point of emphasis in the Proposed Complaint, discussed further below. In the course of dealing with numerous issues that arose in the Assignment Cases relating to medical malpractice insurance coverage, the Assignee learned that LSI operated under a "self-insurance" framework for medical malpractice insurance coverage. In general terms, LSI was responsible to pay the first $1 million of defense costs and other liability resulting from a

particular medical malpractice claim (the "**Self-Insured Retention**"). LSI had an excess coverage policy in place with National Fire & Marine Insurance Company that provided coverage only after defense costs and/or liability on a particular covered claim exceeded the $1 million Self-Insured Retention.

10. As the Companies slid deeper into insolvency and ultimately filed the Assignment Cases, LSI was unable to pay many of its obligations, including covering the Self-Insured Retention.

11. The Assignee has asserted claims against the Officers and Managers for failure to maintain adequate capital to pay debts that the Companies were obligated to pay as they came due. In the Assignee's Complaint, the Assignee has also asserted numerous claims against the Officers and Managers related to the Dividend Loan, failure to issue WARN Act notices, the Self-Insured Retention, and numerous other Wrongful Acts.

II. The Langston Lawsuit and Motion to Amend Complaint

12. Before the filing of the Assignment Cases, LSI was a defendant in several medical malpractice lawsuits filed by former patients. One such lawsuit was filed by the Langstons against LSI and Dr. Thomas Francavilla, which commenced Case No. 17-CA-10423 in the Circuit Court of Hillsborough County (the "**Langston Case**").

13. The Langstons filed their first complaint on November 17, 2017 against LSI and Dr. Francavilla. The initial complaint asserts classic medical malpractice causes of action: negligent retention, rescission of informed consent, medical negligence, and loss of consortium. The first amended complaint, filed on February 12, 2018, asserts similar medical malpractice claims.

14. From the filing of the initial complaint through the filing of the Assignment Cases, the Langston Case and other medical malpractice lawsuits were defended by LSI's in-house counsel, Christopher Knopik, Esq. On March 29, 2019, Mr. Knopik filed a motion to withdraw from the Langston Case as his employment with LSI ceased. Mr. Knopik's motion to withdraw was granted on April 24, 2019.

15. As a result of the filing of the Assignment Cases, any recovery on the claims of medical malpractice claimants against LSI, including the Langstons' claims, are channeled through the assignment for the benefit of creditors claims process established by Section 727.112 of the Florida Statutes. Accordingly, the Assignee stopped defending any of the medical malpractice lawsuits pending against LSI upon the filing of the Assignment Cases.

16. Recently, on January 31, 2020, the Langstons filed a motion in the Langston Case (the "**Motion to Amend**") seeking to amend their complaint to add claims against the Managers. The Langstons allege that, because doctors practicing under a self-insured framework are required by Florida Statute to maintain certain letter of credit or escrow requirements, the Managers caused LSI to be in violation of certain insurance laws and/or laws governing medical providers. A copy of the Motion to Amend—which attaches the Proposed Complaint as an exhibit—is attached hereto as **Exhibit B**.

17. The Proposed Complaint's new claims seek to hold the Managers liable for the Langstons' medical malpractice claims by piercing the corporate veil of LSI and, in turn, LSI Holdco (the parent company of LSI). (*See* Proposed Complaint, Counts 11–60.) In its veil piercing allegations, the Langstons copy allegations from the Assignee's Complaint to form their claims—all of which are general allegations of wrongdoing that apply equally to all creditors of LSI. The Proposed Complaint then repeats the allegations as to each Manager, attempting to hold the

Managers liable for the medical malpractice claims through Florida Statute § 605.04093(b)(5).[2] The key, however, is that the allegations copied from the Assignee's Complaint form the entire basis for the Langstons' proposed claims against the Managers.

18. Indeed, the Motion to Amend acknowledges that the facts uncovered through the Assignee's litigation efforts form the basis of the new claims against the Managers. As to the added claims against the Managers, the Motion to Amend states:

> In addition to reframing the counts as to these Defendants, the Second Amended and Supplemental Complaint to add four counts each to new Defendants on **facts revealed by the Assignee's litigation in the ABC** that justify piercing the corporate (limited liability company) veil and hold the Board of Managers personally liable for damages to Shirley Langston. **The Second Amended and Supplemental Complaint restates verbatim allegations of lawsuits filed against the Board of Managers**, and pleads four counts of direct liability against each member of Holdco's Board of Managers: medical malpractice, battery, loss of consortium for medical malpractice, and loss of consortium for battery.

(Motion to Amend ¶ 10) (emphasis added).

19. The Assignee's efforts to maximize the recovery for creditors from litigation claims will be hindered by the claims the Langstons are now seeking to assert against the Managers. Moreover, the claims asserted in the Assignee's Complaint are the exclusive property of the Assignment Estates. The assertion of claims or liability against the Managers based on the same conduct already being pursued in the Assignee's Compliant is an improper attempt by a single

[2] This section effectively nullifies the "business judgment rule" for managers Florida limited liability companies where a manager's failure to perform his duties to the company constitutes "recklessness or an act or omission that was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Fla. Stat. § 605.04093(b)(5). As an initial observation, it is difficult to see how this statute could apply to the Managers of LSI Holdco, which is a Delaware limited liability company. *See* Fla. Stat. § 605.0102(36) (defining "limited liability company" for purposes of Chapter 605 as "an entity formed or existing under this chapter").

creditor to recover damages that should be recovered for the benefit of all creditors of the Assignment Estates.

20. The Langstons' Motion to Amend is scheduled for hearing in the Langston Case on April 7, 2020.

III. Relief Requested and Basis for Relief

21. The Assignee seeks a temporary and permanent injunction, pursuant to Section 727.109(15) of the Florida Statutes, prohibiting the Langstons from pursuing the claims against the Managers that are the subject of the Proposed Complaint. The Langstons' claims against the Managers so closely overlap with the Assignee's pending claims against the Managers that, to allow the Langstons' claims to proceed, would have a detrimental impact on the Assignee's ability to recover on one of the Assignment Estates' largest assets for the benefit of all creditors and allow one creditor to make an end-run around the Assignment for the Benefit of Creditors statute. *See Moffatt & Nichol, Inc. v. B.E.A. Intern. Corp., Inc.*, 48 So. 3d 896, 901 (Fla. 3d DCA 2010). As discussed below, Florida case law and analogous case law under the federal Bankruptcy Code supports the issuance of an injunction against the Langstons.

A. The Court Has Authority to Enter an Injunction to Prohibit the Langstons' From Pursuing Claims Against the Managers

22. Chapter 727 of the Florida Statutes, which sets forth the framework for assignment for the benefit of creditors proceedings, provides the Court with authority to enjoin a creditors' actions that seek to exercise control over property of the Assignment Estates.

23. The assignment statutes are clear that causes of action of the Companies—that is, derivative actions—became property of the Assignment Estates upon filing of the Assignment Cases. The statutes define "Asset" as "a legal or equitable interest of the assignor in property, which includes anything that may be the subject of ownership, whether real or personal, tangible

or intangible, **including claims and causes of action, whether arising by contract or in tort**, wherever located, and by whomever held at the date of the assignment, except property exempt by law from forced sale." Fla. Stat. § 727.103(1) (emphasis added).

24. Section 727.105 of the Florida Statutes protects assets of the Assignment Estates from creditors, providing: "Proceedings may not be commenced against the assignee except as provided in this chapter, but nothing contained in this chapter affects any action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. Except in the case of a consensual lienholder enforcing its rights in personal property or real property collateral, there shall be no levy, execution, attachment, or the like in respect of any judgment against assets of the estate in the possession, custody, or control of the assignee." Fla. Stat. § 727.105.

25. Chapter 727 also confers a broad grant of equitable power to courts presiding over assignment for the benefit of creditors proceedings, allowing them to fashion appropriate remedies to protect assignment estates and safeguard assignment estate assets. Section 727.109(15) authorizes courts to "[e]xercise any other powers that are necessary to enforce or carry out the provisions of this chapter." Fla. Stat. 727.109(15).

26. Although the undersigned located no case law interpreting the extent of the powers afforded by Section 727.109(15), "[s]tate 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). Indeed, Section 727.109(15) of the Florida Statutes is nearly identical to its Bankruptcy Code[3] analogue, which authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

[3] "Bankruptcy Code" refers to 11 U.S.C. § 101 *et seq*.

27. Bankruptcy courts have often used Section 105(a) of the Bankruptcy Code to issue injunctions against a creditor pursuing claims belonging to the bankruptcy estate, or where the claims are so related to the bankruptcty estate's claims that to permit the creditors' lawsuit to proceed would detrimentally affect the bankruptcy estate's pursuit of interrelated claims for the benefit of all creditors. *See, e.g.*, *In re EZ Pay Servs., Inc.*, 389 B.R. 751, 756 (Bankr. M.D. Fla. 2007) ("It is well-established that the power to issue 'any order' under § 105(a) includes the power to enter injunctions that are necessary to carry out the provisions of the Bankruptcy Code."); *In re Madoff*, 848 F. Supp. 2d 469, 486 (S.D.N.Y. 2012) ("Under Section 105, bankruptcy courts may extend the automatic stay to enjoin suits by third parties against third parties if they threaten to thwart or frustrate the debtor's reorganization efforts."); *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998) (affirming bankruptcy court's stay under Bankruptcy Code § 105(a) of creditors' claims against third parties because creditors' claims were so closely related to trustee's claims against the same defendants).

28. The Assignee is entitled to the entry of an order enjoining the Langstons from pursuing the new claims against the Managers asserted in the Proposed Complaint. As discussed below, the Langstons' new claims against the Managers are general claims belonging to the Assignment Estates or, at the very least, so closely overlap with the claims advanced in the Assignee's Complaint that their continued pursuit by the Langstons would have a detrimental impact on the Assignment Estates.

B. The Assignee is the Proper Party to Bring Claims Against the Managers Arising from the Wrongful Acts

29. Recoveries from the pursuit of the claims set forth in the Assignee's Complaint against the Managers will be the key source of funds to pay general unsecured creditors. By attempting to assert claims directly against the Managers, the Langstons are, in effect, attempting

to "skip the line" and subvert the priority scheme laid out by Chapter 727 of the Florida Statutes. This priority scheme provides that all general unsecured creditors receive a *pro rata* share of the funds available to distribute to general unsecure creditors. *See* Fla. Stat. § 727.114. Both Florida case law and analogous bankruptcy case law support the fact that claims against the Managers arising out of their Wrongful Acts can *only* be brought by the Assignee.

30. Florida's Third District Court of Appeal considered these issues in *Moffatt & Nichol, Inc. v. B.E.A. International Corp., Inc.*, 48 So. 3d 896 (Fla. 3d DCA 2010). In *Moffatt*, the court considered "whether one particular creditor has standing to pursue derivative claims, alleging loss or damage to a person or entity, against a debtor company, which has made a statutory assignment for the benefit of creditors pursuant to Chapter 727 of the Florida Statutes after the assignment has been made." *Id.* at 897. The court answered the question in the negative, finding that only the assignee had standing to pursue such claims. *Id.*

31. The circumstances in *Moffatt* are similar to those present here. The appellant, Moffatt, obtained a judgment against the assignor entity, B.E.A. International ("**B.E.A.**"), which prompted B.E.A. to file an assignment for the benefit of creditors under Chapter 727 of the Florida Statutes. Moffatt then attempted to assert claims against non-assignor entities based on various theories, including successor liability, alter ego, and fraudulent transfer theory, in an effort to recover on its judgment. *See id.* at 898. The assignee for B.E.A. opposed Moffatt's efforts to add third-party defendants on the grounds that the claims were assets of the assignment estate, but Moffatt argued that because it was pursuing third parties, its claims did not seek to reach any assets of the assignment estates. *Id.*

32. The trial court and the appellate court disagreed with Moffatt, holding that only the assignee had standing to pursue these claims. After examining the statutory framework, including

the above-cited definition of "Asset" in the assignment statutes and the fact that *all* assets are conveyed to the assignee upon filing of the assignment case, the appellate court held that "[u]nder the statutory scheme as it now exists, only an assignee has standing to pursue fraudulent transfers, preferential transfers or other derivative claims." *Id.* at 899. The appellate court approved the denial of Moffatt's motion to add third-party defendants.

33. Similar issues often arise in bankruptcy proceedings. In the multi-billion dollar Ponzi scheme of Bernard Madoff ("**Madoff**"), this issue arose where a group of creditors brought a class action lawsuit against alleged co-conspirators of Madoff in Florida state court seeking to recover on conversion, unjust enrichment, conspiracy, and state law RICO violation claims. *See In re Madoff*, 848 F. Supp. 2d 469, 475 (S.D.N.Y. 2012). There, the district court approved both preliminary and permanent injunctive relief against the class action plaintiffs' suit, stating that "[i]f a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *Id.* at 479.

34. In *Madoff*, the court observed that the factual allegations in the class action plaintiffs' Florida complaints were "virtually identical" to the allegations made by the trustee in his lawsuit against the same defendant. *Id.* at 479. Further, the court found that the Florida class action lawsuit was "based upon the same conduct" of the defendants complained of by the trustee. *See id.* "Put bluntly, the wrongs pleaded in the Florida Actions and in the Trustee's action are the same." *Id.* And although the class action claimants attempted to distinguish their claims from the estate's claims through artful pleading, the court found that it is more appropriate to look at the *substance* of the creditors' claims rather than the nominal title of such claims. *See id.* at 482.

35. Even after recognizing that the class action plaintiff's claims were "general" claims belonging to the estate, the court also approved an alternative basis for the injunction because the overlap of the claims meant that their pursuit outside the bankruptcy forum would have a detrimental impact on the estate. *See id.* at 485–87. In rebuffing the appellants' arguments on the Section 105(a) injunction, the district court stated:

> The Appellants do not address the Bankruptcy Court's conclusion that the Florida Actions would have an immediate adverse economic consequence for the debtor's estate, by jeopardizing the BLMIS estate's ability to recover billions of dollars. Because the Florida Actions plainly did jeopardize the estate's ability to recover fraudulently transferred assets from the Picower Defendants, either through litigation or through settlement, the Bankruptcy Court's granting a § 105(a) injunction on this basis was proper.

Id. at 486.

36. In summarizing its holding on the issue, the district court emphasized the "overlap" of the claims asserted by both parties and the parties' pursuit of a common fund to recover from on their claims:

> In short, as the Bankruptcy Court correctly recognized, its broader powers under § 105(a) could appropriately enjoin the Appellants from prosecuting the Florida Actions even if the claims asserted in those actions were not the property of the estate, because "the overlap between the claims" asserted in the New York Action and the Florida Actions is "so closely related that allowing the [Appellants] to convert the bankruptcy proceeding into a race to the courthouse would derail the bankruptcy proceedings."

Id. at 487 (citations omitted).

37. The *Madoff* court is not alone in issuing injunctions against creditors of bankruptcy estates from pursuing overlapping claims against common defendants, particularly where both the trustee and the creditor are seeking to recover from a common, limited fund on closely related claims. For example, in *Fisher v. Apostolou*, 155 F.3d 878 (7th Cir. 1998), the appellate court

affirmed the bankruptcy court's decision to enjoin creditors' claims against a common defendant where the other litigation may affect the amount of property in the bankruptcy estate, or the allocation of property among creditors. *See id.* at 882. The appellate court reasoned that the creditors' claims were "claims to the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy." *Id.* In affirming the injunction, the appellate court considered the seminal question of whether both parties' claims were "so closely related that allowing the creditors to convert the bankruptcy proceeding into a race to the courthouse would derail the bankruptcy proceedings." *Id.* at 883.

38. Further, in the case of *In re EZ Pay Services, Inc.*, 389 B.R. 751 (Bankr. M.D. Fla. 2007), a Florida bankruptcy court imposed an injunction under Section 105(a) of the Bankruptcy Code preventing a creditor from pursing claims where the claims against common defendants were the same. The *EZ Pay* court reasoned that because the issues raised in both parties' claims overlapped, the determinations made in the separate state court action, if permitted to proceed, could adversely affect the trustee's recovery in its own lawsuit, impeding the trustee's efforts to recover for general unsecured creditors. *See id.* at 760. The court ultimately found that "a Chapter 7 Trustee's statutory responsibility to recover assets for the benefit of an estate may outweigh the harm suffered by an individual creditor who is required to pursue its claims through the bankruptcy process." *Id.*

39. To summarize, case law supports imposition of an injunction against creditors' claims against third parties where the trustee has already filed suit against that party in certain scenarios. One scenario is where the claims asserted by the creditor are, in actuality, "general" claims that could be asserted against the defendant by any creditor. Another scenario is where the

creditor's claims and the trustee's claims against the defendants overlap. In either scenario, to allow the creditor's lawsuit to continue would harm the estate's ability to recover a significant asset of the estate and injunction is appropriate to prevent such harm.

C. A Preliminary Injunction Against the Langstons' Claims Against the Managers is Warranted

40. A preliminary injunction is necessary in this case to prohibit the Langstons from pursuing the Managers in the Langston Case. Under Florida Rule of Civil Procedure 1.610, a temporary injunction may be granted, with or without notice to the adverse party, if the movant establishes: (a) a substantial likelihood of success on the merits; (b) unavailability of an adequate remedy at law; (c) likelihood that irreparable harm will occur unless immediate injunctive relief is granted; and (d) injunctive relief serves the public interest. *Liberty Counsel v. Fla. Bar Bd. Of Governors*, 12 So. 3d 183, 186 n.7 (Fla. 2009) (quoting *Reform Party of Fla. V. Black*, 885 So. 2d 303, 305 (Fla. 2004)); *see also Masters Freight, Inc. v. Servco, Inc.*, 915 So.2d 666 (Fla. 2d DCA 2005).

i. *Substantial Likelihood of Success on the Merits*

41. As discussed at length above, ample bankruptcy case law, and the analogous Florida Statute 727.109(15), allows this Court to issue an injunction prohibiting the Langstons from pursuing their proposed claims against the Managers. To issue a preliminary injunction, the Court must fund that the Assignee has a substantial likelihood of success in obtaining a permanent injunction against the Langstons' pursuit of the claims against the Managers set forth in the Proposed Complaint.

42. The Langstons' claims for liability against the Managers inextricably overlap with the Assignee's claims against the Managers, which is clear from the fact that a significant portion of the factual allegations in the Proposed Complaint were copied word-for-word from the

Assignee's Complaint. In addition, the theories of liability are not unique to the Langstons and could be asserted by any creditor of LSI.

43. Boiled down, the Langstons argue that the Managers' mismanagement of LSI Holdco and, in turn, LSI, resulted in LSI's failure to maintain reserves or meet certain requirements for the Self-Insured Retention under the medical malpractice coverage. The Assignee, however, has already brought nearly identical claims against the Managers arising from "the continuation or implementation of self-insurance programs for employees, doctors, and patients at a time that the Companies were insolvent knowing that the Companies were unable to cover their self-insured retention amount, leaving those individuals without any health or malpractice coverage when the Companies closed, resulting in claims against the Companies that should have been covered by insurance." (Exh. A ¶ 8).

44. From a broader point of view, the additional claims in the Proposed Complaint plead the same exact wrongs as those pleaded by the Assignee. Indeed, the Langstons admit this fact, stating that "[t]he Second Amended and Supplemental Complaint restates verbatim allegations of lawsuits filed against the Board of Managers, and pleads four counts of direct liability against each member of Holdco's Board of Managers . . . ." (Motion to Amend ¶ 10).

45. The Langstons assert that the Managers' breach of their fiduciary duties—failure to comply with statutory insurance requirements—caused the Langstons damages, resulting in personal liability. But the Langstons are in no different situation than the many other unfortunate medical malpractice plaintiffs. Further, how can one distinguish between the Managers' mismanagement of medical malpractice insurance, their failure to fund reserves for employee medical expenses, and their failure to issue statutorily required WARN Act notice to employees? What would stop employees from pursuing analogous litigation against the Managers, arguing that

the failure to fund reserves dictates piercing the corporate veil, resulting in personal liability to the Managers? What would stop the WARN Act claimants from pursuing analogous litigation against the Managers, arguing that their failure to provide WARN Act notice dictates piercing the corporate veil, resulting in personal liability to the Managers? Any party harmed by the Companies' demise would be encouraged to craft a novel theory as to why the Managers' conduct harmed them and to seek to pierce the corporate veil to recover damages against the Managers for such conduct. At their core, the Langtons' claims against the Managers related to their mismanagement of the Companies are common to all creditors and can only be brought by the Assignee.

46. The Assignee's litigation claims against the Managers, in addition to his fraudulent transfer claims against equity holders, will be a significant source of recovery for unsecured creditors in these Assignment Cases. Allowing the Langstons to freely pursue competing claims against the Managers on claims so closely related to the Assignee's claims will convert the proceedings "into a race to the courthouse" which could derail these Assignment Cases. *See In re Madoff*, 848 F. Supp. 2d 469, 487 (S.D.N.Y. 2012); *Fisher v. Apostolou*, 155 F.3d 878, 883 (7th Cir. 1998).

47. The Assignee has a reasonable likelihood of success in obtaining an injunction against the Langstons pursuant to Section 727.109(15) of the Florida Statutes. Their claims are general claims against the Managers arising from their mismanagement of the Companies. Accordingly, under *Moffatt & Nichol, Inc. v. B.E.A. International Corp., Inc.*, 48 So. 3d 896 (Fla. 3d DCA 2010), and the bankruptcy decisions cited above, only the Assignee has standing to bring the claims. Additionally, the Langstons' Proposed Complaint asserts the same claims against the Managers, or claims against the Managers so closely overlap with the Assignee's claims, that an

injunction is warranted to prevent the Langstons from jeopardizing the Assignee's recovery from his litigation against the Managers—recoveries that would inure to the benefit of *all* unsecured creditors.

ii. ***Unavailability of Adequate Remedy at Law***

48. There is no adequate remedy at law which would allow the Assignee to prohibit the Langstons from pursuing their proposed claims against the Managers. In evaluating whether an "adequate remedy at law" exists, courts typically focus on whether monetary damages would afford complete relief to the movant. *See, e.g.*, *State Agency for Health Care Admin. v. Cont'l Car Servs., Inc.*, 650 So. 2d 173, 176 (Fla. 2d DCA 1995) (finding adequate remedy at law existed where damages were capable of being determined). Under the circumstances here, no monetary damages would suffice to prevent harm to the Assignment Estates by the Langstons (and ostensibly any other medical creditor of LSI) pursuing the same claims against the Managers, resulting in a "race to the courthouse."

iii. ***Likelihood That Irreparable Harm Will Occur Unless Immediate Injunctive Relief Is Granted***

49. If the Court does not enter a preliminary injunction, the Assignment Estates are likely to suffer immediate and irreparable harm. First, because the Assignee's claims and the Langstons' claims against the Managers are the same (or closely overlapping), the Assignment Estate bears the risk that findings or rulings will be made in the Langston Case that could have a detrimental impact to the viability of the Assignee's same or similar claims against the Managers. The court found this reason compelling in the *EZ Pay* case, discussed above. *See In re EZ Pay Services, Inc.*, 389 B.R. 751 (Bankr. M.D. Fla. 2007). Like in *EZ Pay*, the Langson Case "could be on a faster track" than the Assignee's litigation, and "determinations may be made in the [Langston Case], if it is permitted to proceed, that could adversely affect the [Assignee's] recovery

from [the Managers].” *Id.* at 760. Relying on this rationale, the Court found the analogous federal preliminary injunction element was met.

50. Additionally, the Assignee’s lawsuits against the Managers—which have been removed to the District Court for the Middle District of Florida—have been ordered to mediation beginning in June 2020. The Assignee has been advised that the pendency of additional claims against the Managers through the Langston Case could severely impact the potential for a successful outcome at the mediation. An injunction over the Langstons’ claims against the Managers is critical to facilitate a successful mediation and a potential resolution of the litigation against the Managers.

iv. *Injunctive Relief Serves the Public Interest*

51. Injunctive relief against the Langstons serves the public interest by ensuring uniform treatment of all unsecured creditors of the Assignment Estates and promoting uniform distributions consistent with the priority scheme in assignment for the benefit of creditors cases established by the Florida Statutes. Indeed, Florida Statute § 727.101—describing the intent of the assignment for the benefit of creditors statutory scheme—provides “[t]he 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.” Fla. Stat. § 727.101.

The Florida appellate court in the *Moffatt & Nichol* case, discussed *supra*, recognized the overriding public interest inherent in the assignment for the benefit of creditors’ priority and distribution scheme, finding that the creditor’s “stratagem is an impermissible end-run around the Assignment for the Benefit of Creditors statute, and an improper attempt to get to the head of the line, in front of all the other creditors of [the assignor], in violation of the spirit, if not the letter, of the

Assignment for the Benefit of Creditors statute." *Moffatt & Nichol, Inc. v. B.E.A. Intern. Corp., Inc.*, 48 So. 3d 896, 901 (Fla. 3d DCA 2010). In this case, enjoining the Langtons' claims against the Managers is consistent with the public interest in maximizing the recoveries of the Assignment Estates, ensuring equal distribution to creditors, and preventing certain creditors from getting "to the head of the line."

IV. Conclusion

The Langstons' pursuit of the Managers for their sole benefit for wrongs arising from the same conduct that forms the basis of the Assignee's Complaint would jeopardize the Assignee's efforts to maximize recovery for all general unsecured creditors of the Assignment Estates. Under the circumstances, an injunction precluding the Langstons from asserting claims against the Managers is warranted to protect the assets of the Assignment Estates and ensure that the Assignee's performance of his statutory duties is not impeded.

WHEREFORE, the Assignee respectfully requests that this Court enter an order (i) granting this Motion; (ii) enjoining the Langstons from amending their complaint in the Langston Case to add claims against the Managers; (iii) and for such other and further relief as is just and proper.

Dated: April 1, 2020

/s/ Scott A. Stichter

Scott A. Stichter (FBN 0710679)
Edward J. Peterson (FBN 0014612)
Matthew B. Hale (FBN 0110600)
Stichter, Riedel, Blain & Postler, P.A.
110 E. Madison Street, Suite 200
Tampa, Florida 33602
Telephone: (813) 229-0144
Facsimile: (813) 229-1811
Email: epeterson@srbp.com; mhale@srbp.com
Counsel for Assignee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Assignee's Motion for Both Preliminary and Permanent Injunction Against John and Shirley Langstons' Claims Against the Former Managers of the Assignors* has been furnished on this 1st day of April, 2020 by the Court's electronic system to all parties receiving electronic service and by either U.S. mail or electronic mail to the parties listed on the Limited Notice Parties list attached.

/s/ Scott A. Stichter
Scott A. Stichter

MASTER LIMITED NOTICE SERVICE LIST
January 14, 2020

Assignors and Assignor's Counsel: (via the Court's electronic servicing system)

CLM Aviation, LLC
LSI HoldCo, LLC
LSI Management Company, LLC
Laser Spine Surgery Center of Arizona, LLC
Laser Spine Surgery Center of Cincinnati, LLC
Laser Spine Surgery Center of Cleveland, LLC
Laser Spine Surgical Center, LLC
Laser Spine Surgery Center of Pennsylvania, LLC
Laser Spine Surgery Center of St. Louis, LLC
Laser Spine Surgery Center of Warwick, LLC
Laser Spine Institute, LLC
Medical Care Management Services, LLC
Spine DME Solutions, LLC
Total Spine Care, LLC
Laser Spine Institute Consulting, LLC
Laser Spine Surgery Center of Oklahoma, LLC
c/o Nicole Greensblatt, Esq.
Kirkland & Ellis, LLP
601 Lexington Avenue
New York, NY 10022
Email: ngreenblatt@kirkland.com

Assignee and Assignee's Counsel (via the Court's electronic servicing system)

Soneet Kapila
c/o Stichter Riedel, Blain & Postler, P.A.
Attn: Edward J. Peterson, Esq.
110 E. Madison Street, Suite 200
Tampa, Florida 33602

Soneet Kapila
c/o Genovese Joblove & Battista, P.A.
Attn: Greg Garno, Esq. and Paul Battista, Esq.
100 Southeast Second Street, Suite 4400
Miami, Florida 33131
Email: pbattista@gjb-law.com, ggarno@gjb-law.com

Soneet Kapila
c/o Rocke, McLean & Sbar, P.A.
Attn: Robert Rocke, Jonathan Sbar, Andrea Holder
2309 S. MacDill Avenue
Tampa, FL 33629
Email: rrocke@rmslegal.com, aholder@rmslegal.com, jsbar@rmslegal.com

Secured Creditors:

CarePayment, LLC (MAIL RETURNED)
5300 Meadow Rd., #400
Lake Oswego, OR 97035

Steris Corporation
5960 Heisley Rd.
Mentor, OH 44060
CIT Bank, N.A.
10201 Centurion Pkwy., #400
Jacksonville, FL 32256

Medport Billing, LLC (MAIL RETURNED)
6352 S. Jones Blvd., #400
Las Vegas, NV 89118

U.S. Bank Equipment Finance
1310 Madrid St.
Marshall, MN 56258

Maricopa County Treasurer
c/o Peter Muthig, Esq.
222 N. Central Ave., #1100
Phoenix, AZ 85004
Email: muthigk@maco.maricopa.gov

Those Parties and Attorneys Formally Requesting Notice (via the Court's electronic servicing system unless otherwise noted)

Highwoods Realty Limited Partnership
c/o Eric E. Ludin, Esq.
Tucker & Ludin, P.A.
5235 16th Street North
St. Petersburg, FL 33703-2611
Email: ludin@tuckerludin.com; erin@ludinlaw.com

Terry and Sherry Legg
c/o Colling Gilbert Wright & Carter, LLC
801 N. Orange Avenue, Ste. 830
Orlando, FL 32801
Email: JGilbert@TheFloridaFirm.com; RGilbert@TheFloridaFirm.com;
CertificateofService@TheFloridaFirm.com

Joe Bailey; Mark Miller; Ted Suhl; Laserscopic Spinal Centers of America, Inc.; Laserscoppic Medical Clinic, LLC; Laserscopic Surgery Center of Florida, LLC; Laserscopic Diagnostic Imaging; Laserscopic Spinal Center of Florida, LLC; and Tim Langford
c/o Gunster, Yoakley & Stewart, P.A.
401 E. Jackson Street, Ste 2500
Tampa, FL 33602
Email: wschifino@gunster.com (primary)
kmather@gunster.com (primary)
jbennett@gunster.com (primary)
cwarder@gunster.com (secondary)
tkennedy@gunster.com (secondary)

Deanna Ali
c/o Jessica Crane, Esq.
Crane Law, P.A.
13555 Automobile Blvd., Ste 560
Clearwater, FL 33762
Email: Jessica@CraneLaw.com

Heather Emby
c/o Jessica Crane, Esq.
Crane Law, P.A.
13555 Automobile Blvd., Ste 560
Clearwater, FL 33762
Email: Jessica@CraneLaw.com

Deanna Ali
c/o Kwall Barack Nadeau PLLC
304 S. Belcher Rd. Ste C
Clearwater, FL 33765
Email: rbarack@employeerights.com
mnadeau@employeerights.com
Jackie@employeerights.com

Heather Emby
c/o Kwall Barack Nadeau PLLC
304 S. Belcher Rd. Ste C
Clearwater, FL 33765
Email: rbarack@employeerights.com
mnadeau@employeerights.com
Jackie@employeerights.com

Texas Capital Bank, N.A.
c/o Trenam Kemker
101 E. Kennedy Blvd., Ste 2700
Tampa, FL 33602
Primary Email: slieb@trenam.com
Secondary Email: mmosbach@trenam.com
Tertiary Email: dmedina@trenam.com

DBF-LSI, LLC
c/o Michael C. Markham, Esq.
401 E. Jackson Street, Suite 3100
Tampa, Florida 33602
Email: mikem@jpfirm.com; minervag@jpfirm.com

Shirley and John Langston
c/o Donald J. Schutz, Esq.
535 Central Avenue
St. Petersburg, Florida 33701
Email: donschutz@netscape.net; don@lawus.com

Jared W. Headley
c/o Cameron M. Kennedy, Esq.
Searcy Denney Scarola, et al
517 North Calhoun Street
Tallahassee, Florida 32301
Email: kennedyteam@searcylaw.com; cmk@searcylaw.com

Deanna E. Ali
c/o Brandon J. Hill, Esq.
Wenzel Fenton Cabassa P.A.
1110 N. Florida Avenue, Suite 300
Tampa, Florida 33602
Email: bhill@wfclaw.com; twells@wfclaw.com

MedPro Group
c/o Jeffery Warren, Esq. and Adam Alpert, Esq.
Bush Ross, P.A.
P.O. Box 3913
Tampa, FL 33601-3913
Email: jwarren@bushross.com; aalpert@bushross.com;
mlinares@bushross.com; ksprehn@bushross.com

Cosgrove Enterprises, Inc.
c/o Walters Levine Lozano & Degrave
601 Bayshore Blvd., Ste 720
Tampa, Florida 33606
Email: **hdegrave@walterslevine.com; jduncan@walterslevine.com**

Cherish Collins
c/o Heather N. Barnes, Esq.
The Yerrid Law Firm
101 E. Kennedy Boulevard, Suite 3910
Tampa, FL 33602
Email: hbarnes@yerridlaw.com; evento@yerridlaw.com

Timothy Farley and Marilyn Farley
c/o Heather N. Barnes, Esq.
The Yerrid Law Firm
101 E. Kennedy Boulevard, Suite 3910
Tampa, FL 33602
Email: hbarnes@yerridlaw.com; evento@yerridlaw.com

Holland & Knight, LLP
c/o W. Keith Fendrick, Esq.
Post Office Box 1288
Tampa, Florida 33601-1288
Email: keith.fendrick@hklaw.com; andrea.olson@hklaw.com

Kenneth Winkler
c/o William E. Hahn, Esq.
310 S. Fielding Ave.
Tampa, FL 33606
Email: bill@whahn-law.com; Kelly@whahn-law.com

Ray Monteleone
c/o Hill, Ward & Henderson, P.A.
101 East Kennedy Boulevard
Bank of America Plaza, Suite 3700
Tampa, Florida 33601-2231
dennis.waggoner@hwhlaw.com; julie.mcdaniel@hwhlaw.com; patrick.mosley@hwhlaw.com;
tricia.elam@hwhlaw.com; ghill@hwhlaw.com; jessica.simpson@hwhlaw.com

William Horne and WH, LLC
c/o Hill, Ward & Henderson, P.A.
101 East Kennedy Boulevard
Bank of America Plaza, Suite 3700
Tampa, Florida 33601-2231
dennis.waggoner@hwhlaw.com; julie.mcdaniel@hwhlaw.com; patrick.mosley@hwhlaw.com; tricia.elam@hwhlaw.com; ghill@hwhlaw.com; jessica.simpson@hwhlaw.com

Jonna Lemeiux
Law Offices of Scott M. Miller
Cambridge Square
1920 Boothe Circle, Suite 100
Longwood, Florida 32750
service@scottmillerlawoffice.com; amy@scottmillerlawoffice.com

Robert Kimble, Administrator and Personal Rep of
Estate of Sharon Kimble
c/o Luis Martinez – Monfort
400 North Ashely Drive, Suite 1100
Tampa Florida 33602
Primary Email: lmmonfort@gbmmlaw.com; litigation@gbmmlaw.com

Weiss Family Management, LLLP
c/o V. Stephen Cohen, Esq.
100 North Tampa Street, Suite 1900
Tampa, FL 33602
Primary: scohen@bajocuva.com; lheckman@bajocuva.com

Michael C. Weiss, D.O. **(via USPS mail)**
Independent Orthopedics, P.A.,
3225 South Macdill Avenue
STE 129-348
Tampa, FL 33629
Cell: (954) 494-7995
Cell: (954) 328-9441
Email: spinedoc@me.com; partyplans2@aol.com

Robert P. Grammen
William P. Esping
James S. St. Louis, D.O.
Michael W. Perry
M.D., MMPerry Holdings, LLLC
EFO Holdings, L.P.,
EFO Genpar, Inc.
EFO Laser Spine Institute, Ltd.
BERGER SINGERMAN LLP
350 East Las Olas Boulevard, Suite 1000
Fort Lauderdale, Florida 33301
Email drt@bergersingerman.com; jwertman@bergersingerman.com; guso@bergersingerman.com; fsellers@bergersingerman.com

Cystal and Leonard Tinelli
c/o Donald J. Schutz, Esq.
535 Central Avenue
St. Petersburg, Florida 33701
Email: donschutz@netscape.net; don@lawus.com

Dr. James St. Louis
c/o Herbert Donica, Esq.
Donica Law Firm, P.A.
307 South Boulevard, Suite D
Tampa, FL 33606
Email: herb@donicalaw.com

Jonathan Lewis
c/o Peter A. Siddiqui, Esq.
Katten Muchin Rosenman
525 West Monroe Street
Chicago, IL 60661-3693
Email: peter.siddiqui@kattenlaw.com

Robert P. Grammen
William P. Esping
Michael W. Perry, M.D.
MMPerry Holdings, LLLC
EFO Holdings, L.P.
EFO Genpar, Inc.
EFO Laser Spine Institute, Ltd.
c/o Samuel J. Capuano
BERGER SINGERMAN LLP
1450 Brickell Avenue, Suite 1900
Miami, FL 33131
Email: Primary: drt@bergersingerman.com; scapuano@bergersingerman.com;
fsellers@bergersingerman.com