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,	Division L
To:	
Soneet Kapila,	
Assignee,	
_____ /	

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

Shirley and John Langston, by and through undersigned counsel, now oppose Assignee's Motion For Both Preliminary and Permanent Injunction Against John and Shirley Langstons' Claims Against the Former Managers of the Assignors ("Assignee's Injunction Motion") and state:

Introduction:

The Assignee's Injunction Motion conflates factual allegations of misconduct with causes of action. The Assignee owns causes of action of the LLC to directly sue its former directors for breach of fiduciary duty and direct claims based on factual misconduct including claims pursuant to § 605.04093 (1) (a) and (b) (4). Separately, third parties, such as the Langstons, own causes of action against the same individuals based, at least in part, on the same factual claims of misconduct pursuant to § 605.04093 (1) (a) and (b) (5). In the Assignee's Injunction Motion, the Assignee is essentially claiming a copyright on factual allegations of misconduct by the former managers, claiming that factual allegations of misconduct alleged by the Assignee that underlie the Assignee's causes of action against the former managers cannot be used by the Langstons to raise the Langstons' direct statutory causes of action against the same individuals. The Assignee does not claim it owns the Langstons' causes of action, and the Assignee does not claim that it is pursuing the Langstons' causes of action. Instead, the Assignee's theory, without any authority and in contravention of the express authority it cites, is that, "claims against the Managers arising out of their Wrongful Acts can *only* be brought by the Assignee," Assignee's Injunction Motion, P. 11. The Assignee's claim is frivolous.

The target defendants of both the Assignee and the Langstons, the former managers of the Assignor LLCs and entities, are exposed to liability to multiple parties. The Assignee does not have the power to immunize the former managers from the Langstons' direct claims by the Assignee suing them. The Assignee has no power to prevent the Langstons from suing the former managers for causes of action owned by the Langstons any more than the Langstons have the power to stop the Assignee from suing the former managers. The Langstons and the Assignee each own causes of action against former managers, no party has a copyright on allegations of fact, and no party can immunize the former managers from claims of the other.

This Court has no subject matter jurisdiction in this case to affect or enjoin claims belonging to Shirley and John Langston. The Petition filed in this case gives this court subject matter jurisdiction only over causes of action owned by LSI and its affiliate assignors. Shirley and John Langston's claims of medical malpractice and battery on Shirley Langston and related loss of consortium that the Assignee seeks to enjoin are the Langstons' direct claims against the former managers and, as will be explained hereinafter, the Assignee does not own or control the Langstons' claims.

This court also has no personal jurisdiction or subject matter jurisdiction because the Assignee's initial Petition does not seek injunctive relief, and there is no pleading filed seeking permanent injunctive relief against anyone, let alone the Langstons. Both Chapter 727 governing Assignments for the Benefit of Creditors and Florida law require the filing of a pleading seeking permanent injunctive relief as a precondition to entering either a preliminary or permanent injunction. No such pleading has been filed against the Langston, eliminating subject matter jurisdiction to enter an injunction. No such pleading has been served on the Langstons, eliminating personal jurisdiction.

Factual Background:

In 2017, in the Circuit Court of Hillsborough County, Florida, the Langstons sued LSI and Dr. Thomas Francavilla for medical malpractice and rescission of informed consent. In that litigation, both LSI and Dr. Francavilla falsely claimed to be "self-insured." In March of 2019, Defendant Laser Spine Institute, LLC ("LSI") filed this Petition for Assignment of Benefit of Creditors, Circuit Court of Hillsborough County Case No. 19-CA-002762, together with multiple petitions of its affiliates (the "ABC"). In the ABC, the Langstons filed a Motion to Determine Self-Insurance Compliance in the ABC, several medical malpractice plaintiffs joined in those motions, and on August 12, 2019, this Court entered an order granting said motion in part, and

denying it in part, stating, "[t]he Assignee has found no evidence that any letters of credit or escrow accounts were ever established in connection with any self-insurance programs." In this ABC, the Assignee also initiated a series of lawsuits against managers and members outlining a continuing course of conduct that ultimately rendered LSI insolvent. The last round of Assignee's lawsuits was filed on November 17, 2019. These lawsuits identified:

a. The business structure of LSI, which is that LSI is a common Florida manager managed LLC, which is managed by LSI Holdco, LLC, a Delaware LLC authorized to do business in Florida, which in turn is managed by a Board of Managers.

b. The ABC lawsuits identified the following persons as being on Holdco's Board of Managers:

i. Robert P. Gramman,

ii. William E. Horne,

iii. Jonathan Lewis,

iv. Raymond Monteleone,

v. Dr. Michael W. Perry,

vi. Dr. James St. Louis Iii,

vii. Chris Sullivan,

viii. Robert Basham,

ix. Edward Debartolo, and

x. William Esping.

Before the ABC was filed, the Defendant LSI and the Defendant Dr. Francavilla both filed false sworn answers to interrogatories in the Langstons' medical malpractice case, falsely claiming that LSI was "self-insured" for $1,000,000.00. No such self-insurance existed. In fact, LSI and Dr. Francavilla were uninsured for the first $1,000,000.00 in claims in violation of the financial

responsibility requirements of Florida law, § 458.320, Fla. Stat. In 2015-2016, Dr. Francavilla filed a false application for medical license, falsely claiming:

> I have hospital staff privileges or I perform surgery at an ambulatory surgical center and I have professional liability coverage in an amount not less than $250,000 per claim, with a minimum aggregate of not less than $750,000 from an authorized insurer as defined under x. 624.09, F.S., from a surplus lines insurer as defined under s. 626.914 (2) F.S., from a risk retention group as defined under s. 627.942, F.S., from the Joint Underwriting Association established under s. 627.351 (4), F.S., or through a plan of self insurance as provided in s. 627.357, F.S.

Without parsing the intricacies of the above statutes, LSI and Dr. Francavilla did not comply with any of the required financial responsibility options provided by § 458.320, F.S. in 2016, which were falsely sworn to by Dr. Francavilla in the above excerpt from his application. Instead, LSI and Dr. Francavilla operated without statutorily compliant insurance or any statutorily compliant alternative for the first one million dollars in individual claims.

In this ABC, the Assignee uncovered a litany of alleged misconduct by the former managers of LSI and its affiliates and sued former managers alleging a wide ranging course of misconduct including allegations in the Assignee's lawsuits that they:

a. Admitted that LSI and affiliates were experiencing serious financial difficulties but still decided to pay dividends to equity owners;

b. Borrowed substantial sums from Texas Capital Bank to make dividend payments;

c. Collateralized the loan with substantially all assets;

d. Distributed $110,473,942 as dividend distributions;

e. Rendered LSI and the affiliates insolvent;

f. By at least the middle of 2016, the companies had committed defaults under the dividend loan;

g. and the Assignee alleged in the lawsuits that, "the Companies implemented in 2014, and continued thereafter, self-insurance programs for employees, doctors, and patients. As a result and after the Companies became insolvent, 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 substantial claims against the Companies that should have been covered by insurance,"

h. In July of 2015, had engaged in fraudulent transfers; and

i. The managers breached fiduciary duties.

The Langstons' lawsuits against the Former Managers

On January 31, 2020, the Langstons filed a motion to amend their pending medical malpractice case add the former managers, and separately, and filed a stand-alone lawsuit, 20-CA-000930, Circuit Court of Hillsborough County, Florida as a protective action in the event that the motion to amend was not granted (the "Protective Action"). By order rendered April 14, 2020, the circuit court denied, in part, the Langstons' motion to add the former managers, and on May 14, 2020, the Langstons have filed a Petition for Writ of Certiorari to the Second District Court of Appeals, case no. 20-1571 which is currently pending. The Protective Action continues to be pending. The proposed amended complaint in the Langstons' malpractice action:

a. Adds 13 defendants that include LSI Holdco, LLC, the manager of LSI, and 11 individuals who were the managers of LSI Holdco, LLC.

b. Adds counts for fraudulent inducement of informed consent seeking rescission based on allegations that Dr. Francavilla assumed a position of trust and confidence, knew that Shirley Langston was relying on Dr. Francavilla as a properly licensed physician, Dr. Francavilla accepted this role and accepted an obligation to fully inform Shirley Langston that he was practicing medicine in compliance with the laws of Florida, Dr. Francavilla had

the duty to know whether he was in compliance with the financial responsibility requirements of Chapter 458, Fla. Stat., Dr. Francavilla filed a false application and was practicing medicine in violation of Chapter 458, Fla. Stat., the omissions of material facts were made to induce Shirley Langston to consent to surgery, Shirley Langston relied on the omission of material facts and was induced to execute all informed consent documents and any oral consent through Dr. Francavilla's reckless disregard and indifference for the truth. For these reasons, all informed consent documents and agreements should be rescinded.

c. Adds counts for battery based on surgery without consent.

d. Adds counts for loss of consortium relating to the primary counts.

e. The counts that the Circuit Court denied leave to amend begin at Count Eleven through Count Sixty. The Defendants in these counts are the former managers, and other than Counts Fifty-Five and Fifty-Six, each of the former managers have four counts against them: (1) direct liability for medical malpractice (2) direct liability for battery (3) loss of consortium for medical malpractice and (4) loss of consortium for battery. The common allegations allege the hierarchical structure of the LLCs and identifies the managers, alleges that the LLCs were manager managed, alleges that foreign LLCs authorized to do business in Florida are not authorized to exercise powers that a limited liability company may not exercise in Florida, alleges that for the period 2016 through March of 2019, the named individual defendants, comprised the Board of Mangers of LSI Holdco, LLC, which in turn was the manager of LSI, were prohibited from causing employee physicians to practice medicine in violation of the financial responsibility requirements of Chapter 458, Fla. Stat., that when the Langstons served their Notice of Intent to Initiate Malpractice Litigation in July of 2017, the defendants knew that the required financial responsibility requirements were not maintained, the Board of Managers cancelled the statutorily required insurance,

diverted funds necessary to pay for financial responsibility compliance for other purposes including distributions to managers, and caused its physician employees to commit fraud on patients by performing surgery without compliance with the financial responsibility requirements of Chapter 458. The Langstons then allege, verbatim, the Assignee's factual allegations of misconduct in the Assignee's lawsuits against the former managers for the Assignee's causes of action against the former managers. The Langstons allege that the Board of Managers operated labyrinthine layers of LLCs to shield themselves from the ultimate liability of LSI, Holdco directed fraud at parties in the State of Florida, by causing physician employees to practice medicine without required compliance with the financial responsibility laws, Holdco employed LSI to defraud patients and illegally divert money to be paid for financial responsibility compliance to other uses, and rendered LSI insolvent and unable to pay medical malpractice claims. Counts Fifty-Five and Fifty-Six are respondeat superior counts against Medical Care Management Services, Inc. but were dismissed along with counts Eleven through Sixty.

f. The Langstons then allege that Holdco, through its Board of Managers, took actions that "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, and thereby is personally liable for damages to Plaintiffs caused by LSI and MCMS pursuant to § 605.04093 (b) (5),". One of the Defendants is a corporation, so allegations are included to support the same corporate action, § 607.0831 (b) (4). Following the common counts, the specific individual paragraphs are realleged as appropriate in Counts Eleven through Fifty-Four and Fifty-Seven through Sixty.

2. This Court has no Subject Matter Jurisdiction to Enter a Permanent Injunction against the Langstons.

Under Florida law, a preliminary injunction cannot be entered unless the movant has filed a pleading seeking permanent injunctive relief, *Int'l Vill. Ass'n v. Schaaffee*, 786 So. 2d 656 (Fla. 4th DCA 2001) ("A pleading seeking an injunction or temporary restraining order must still be filed before either can be entered."). A motion is not a pleading, *N.S. v. Dep't of Child. & Families*, 119 So. 3d 558, 561 (Fla. 5th DCA 2013) ("[i]t is well-settled that "[a] motion is not a pleading." (internal citations omitted)." The Pleading in this case, the Petition, does not seek injunctive relief, and therefore, does not qualify to give this Court subject matter jurisdiction for the entry of an injunction against the Langstons.

To claim jurisdiction over the Langstons' causes of action against anyone, including the former managers, the Assignor (LSI and affiliaites) would have to have a "legal or equitable interest" in the Langstons' causes of action, § 727.103. The Assignee does not and cannot allege that the Assignee has a legal or equitable interest in the Langstons' causes of action, and therefore, this Court has no subject matter jurisdiction to enjoin the Langstons from pursuing claims.

§ 727.110 (1) (b) Fla. Stat. states that the Assignee must bring "[a]n action by the assignee to determine the validity, priority, or extent of a lien or other interest in property or to subordinate or avoid an unperfected security interest under s. 727.109(8)(b)," by supplemental proceeding and not by motion.

Accordingly, the Assignee's Injunction Motion seeking "both a preliminary and permanent" injunction is a nullity. If the Assignee seeks to obtain an injunction, the Assignee has to sue Plaintiffs for permanent injunction in a supplemental proceeding, and then and only then, could the Assignee attempt to move for the entry of a preliminary injunction. The Assignee cannot bring such an action because the Assignee cannot allege that it has an interest in the Langstons' causes of action. The Assignee's Injunction Motion is frivolous and should not have been filed.

This Court's subject matter jurisdiction is limited by § 727.109, Fla. Stat., which limits the power of the Court to enforcing Chapter 727, and there is nothing in Chapter 727 that can be construed to give this Court subject matter jurisdiction to enjoin the Langstons from suing individuals on the Langstons' direct claims because the Langstons' claims do not arguably come within the definition of "Assets" that are subject to the jurisdiction of the Court:

> 727.103 Definitions.—As used in this chapter, unless the context requires a different meaning, the term:
> (1) "Asset" means 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.

The liability of a former manager of a manager-managed LLC is set forth in § 605.04093, Fla. Stat.:

> 605.04093 Limitation of liability of managers and members.—
> (1) A manager in a manager-managed limited liability company or a member in a member-managed limited liability company is not personally liable for monetary damages to the limited liability company, its members, or any other person for any statement, vote, decision, or failure to act regarding management or policy decisions by a manager in a manager-managed limited liability company or a member in a member-managed limited liability company unless:
> (a) The manager or member breached or failed to perform the duties as a manager in a manager-managed limited liability company or a member in a member-managed limited liability company; and
> (b) The manager's or member's breach of, or failure to perform, those duties constitutes any of the following:
> 1. A violation of the criminal law unless the manager or member had a reasonable cause to believe his, her, or its conduct was lawful or had no reasonable cause to believe such conduct was unlawful. A judgment or other final adjudication against a manager or member in any criminal proceeding for a violation of the criminal law estops that manager or member from contesting the fact that such breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the manager or member from establishing that he, she, or it had reasonable cause to believe that his, her, or its conduct was lawful or had no reasonable cause to believe that such conduct was unlawful.
> 2. A transaction from which the manager or member derived an improper personal benefit, directly or indirectly.
> 3. A distribution in violation of s. 605.0406.

4. In a proceeding by or in the right of the limited liability company to procure a judgment in its favor or by or in the right of a member, conscious disregard of the best interest of the limited liability company, or willful misconduct.
5. In a proceeding by or in the right of someone other than the limited liability company or a member, 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.
(2) As used in this section, the term "recklessness" means acting or failing to act in conscious disregard of a risk known, or a risk so obvious that it should have been known, to the manager in a manager-managed limited liability company or the member in a member-managed limited liability company, and known to the manager or member, or so obvious that it should have been known, to be so great as to make it highly probable that harm would follow from such action or failure to act.
(3) A manager in a manager-managed limited liability company or a member in a member-managed limited liability company is deemed not to have derived an improper personal benefit from any transaction if the transaction has been approved in the manner as is provided in s. 605.04092 or is fair to the limited liability company as defined in s. 605.04092(1)(c).
(4) The circumstances set forth in subsection (3) are not exclusive and do not preclude the existence of other circumstances under which a manager in a manager-managed limited liability company or a member in a member-managed limited liability company will be deemed not to have derived an improper benefit.

An LLC can sue its former managers for conscious disregard of the best interest of the LLC or willful misconduct, § 605.04093 (a) and (b) (4). Separately, under § 605.04093 (a) and (b) (5), any person, such as the Plaintiffs, can sue the managers for damages to the third party caused by the former managers through recklessness or an act or omission committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. There is obviously nothing in this statute that suggests that if the LLC sues a former manager under subparagraph 4, that the manager is thereby insulated or immune from lawsuits by third parties under subparagraph 5. Since the LLC cannot insulate its managers from third party lawsuits under Subparagraph 5, the Assignee cannot declare the former managers insulated or immune from third party lawsuits or seek to enjoin the Langstons from suing the same persons. The Assignee only has whatever property rights the LLC had, as stated in 727.103 (1). If the LLC has no claim or cause of action, then the Assignee has no claim or cause of action. The Assignee is

the assignee of the assets of the LLC, nothing more. Since the LLC cannot stop third parties from suing its former managers by suing them, the Assignee cannot stop third parties from suing the former managers by suing them. The Assignee's Motion is facially frivolous.

3. Piercing the Corporate Veil is Not a Cause of Action.

In Florida, there is no cause of action to pierce the corporate veil. "Piercing a corporate veil is not itself a cause of action any more than the doctrine of respondeat superior is." *Turner Murphy Co. v. Specialty Constructors*, 659 So. 2d 1242, 1245 (Fla. 1st DCA 1995).

> A valet who worked for Carrousel Concessions, Inc., a sister corporation of Dania Jai-Alai Palace, Inc., crushed a jai alai aficianada between two cars. Recovery against the valet required proof of his negligence. Recovery against Carrousel Concessions, Inc. required proof, in addition, of the valet's employment. Recovery against Dania Jai-Alai Palace, Inc. and the common corporate parent depended, in addition, on evidence that Carrousel Concessions, Inc. was an alter ego of the other two corporate entities. For statute of limitations purposes, however, the entire proceeding can only be viewed as an "action founded on negligence." § 95.11(3)(a), Fla. Stat. (1993). *Turner Murphy Co. v. Specialty Constructors*, 659 So. 2d 1242, 1245 (Fla. 1st DCA 1995).

To "pierce the corporate veil," the individual is sued directly for the claim and is liable where the creditor can prove the additional elements to impose individual liability. The Langstons are not suing the former managers to force them to pay debts of the LLC, but instead, the Langstons are suing the former managers directly for their reckless misconduct.

The Action is a Direct Cause of Action.

Rescission. The Counts in the Langstons' lawsuits against the former managers seeking recission of informed consent state a cause of action. In Florida, fraud exists where the representing party displays a reckless disregard of the truth, *Parker v. State Bd. of Regents ex rel. FSU*, 724 So. 2d 163 (Fla. 1st DCA 1998). Also, concealment of a material fact is the equivalent to a false representation, *Nourachi v. First Am. Title Ins. Co.*, 44 So. 3d 602 (Fla. 5th DCA 2010).

> If a false representation of a material fact is made to a person ignorant thereof with the intention that it shall be acted upon, and the action and reliance thereon amounts to a substantial change in position, actionable fraud will be deemed to exist even if the representor did not know the representation to be false where (1) there is an implication by the positive character of the assertion that the representor had such knowledge, or (2) the representor makes the statement under circumstances where he should have known of the falsity. In the latter case the element of scienter, i.e., knowledge of the falsity of a statement by the representor, is inferred because of the duty imposed upon the representor to know of the falsity. *Tinker v. De Maria Porsche Audi, Inc.*, No. 82-201, 1984 Fla. App. LEXIS 11821, at *16 (3d DCA Feb. 14, 1984) (emphasis added).

Here, Dr. Francavilla signed an application for a medical license under oath that he had read Chapter 458, represented in his application that he was in compliance with the financial responsibility requirements thereof, had a statutory duty to know, and therefore, the element of scienter is inferred because the duty to know whether or not he was insured is imposed on him. The Court in *Billian v. Mobil Corp*., 710 So. 2d 984, 990 (Fla. 4th DCA 1998) cited *Hirschman v. Hodges, O'Hara & Russell Co.*, 59 Fla. 517, 51 So. 550, 554 (1910), in which the Florida Supreme Court cited the following paragraph from *Stephens v. Orman*, 10 Fla. 9, 86-87 (1862):

> It is well settled that a suppression of truth, or suggestion of what is not true in some material point, will be ground for setting aside any contract. . .. Again, concealment of a material fact by a party to a contract is ground for relief, where he had better opportunity to know than the other; but where the facts lie equally open to the vendor and vendee with equal opportunity of examination, and the vendee undertakes to examine for himself, without relying upon the vendor's statements, it is no evidence of fraud that the vendor knew facts not known to the vendee, and does not make them known to him. (emphasis added). *Stephens v. Orman*, 10 Fla. 9, 86-87 (1862).

There is no authority for the proposition that a fraudulently induced informed consent agreement is not subject to the general law of rescission of "any contract." Dr. Francavilla had the better opportunity to know if he was insured and practicing medicine in conformance with Florida law, and since he made affirmative misrepresentations on his publicly available application, he effectively prevented any patient including the Langstons from learning that he was practicing without professional liability compliance in violation of § 458.320, Fla. Stat. Accordingly, under

the above doctrines, rescission is available to any contract, and an informed consent agreement is one of such contracts.

As pled in the Second Amended and Supplemental Complaint, Dr. Francavilla affirmed to the Florida Board of Medicine that he had read Chapter 458, he falsely represented in his 2016 application that he was in compliance with the financial responsibility requirements, and he did not disclose the fact that he was practicing medicine in violation of Chapter 458 to Shirley Langston. In the Florida Supreme Court's landmark ruling on fraudulent non-disclosure:

> In theory, the difference between misfeasance and nonfeasance, action and inaction is quite simple and obvious; however, in practice it is not always easy to draw the line and determine whether conduct is active or passive. That is, where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and, in fact, both essentially have the same effect. *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985).

A patient has a fraud claim against a physician where the physician practices medicine in violation of Florida's financial responsibility requirements. There is no medical standard to commit fraud. Just as the sexual assault during a medical examination in *Burke v. Snyder*, 899 So. 2d 336 (Fla. 4th DCA 2005) was determined to not arise from medical negligence, the reckless misrepresentations of Dr. Francavilla in falsely claiming to the Board of Medicine to be in compliance with Chapter 458, and practicing medicine without compliance with financial responsibility requirements, and the subsequent nondisclosure of Dr. Francavilla's statutory violations to his patient Shirley Langston, are not medical negligence and are not part of the rendering of care. No physician can opine that it is acceptable to practice medicine in violation of Chapter 458, or that there is some medical standard of care for whether or not Dr. Francavilla should know if he is insured. Dr. Francavilla's failure to disclose to Shirley Langston that he was

practicing medicine while violating Florida's financial responsibility requirements is fraud through reckless nondisclosure of material facts, and there is no medical standard of care on how a physician may commit fraud on patients. "The Florida Supreme Court has stated that "publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions." *Rollinson v. State*, 743 So. 2d 585, 589 (Fla. 4th DCA 1999). Simply stated, a physician has a duty to know what the laws governing his practice of medicine are, and he does not have the discretion to violate those laws.

The former managers made the decision to cause Dr. Francavilla to practice medicine in violation of law and are thereby personally liable for damages because their action meets the pleading standard of under § 605.04093 (a) and (b) (5), because the damages to the Langstons were caused by the former managers through recklessness or an act or omission committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Causing physicians to practice medicine in violation of the law without medical malpractice insurance, while stripping the company that is supposed to be providing the insurance of assets, is behavior that exhibits a wanton and willful disregard of human rights, safety, or property. Accordingly, the former managers are directly liable to the Langstons.

Battery. Performing medical procedures without consent is battery. The battery counts are not based on negligent informed consent, but the fact that the informed consent statements were induced through fraud based on a non-disclosure of the lack of compliance with mandatory financial responsibility requirements, are subject to rescission, and are null and void. Due to the fraudulent inducement, any consent is null and void. Shirley Langston did not consent to surgery by an uninsured physician, and did not authorize any surgery by Dr. Francavilla for that reason. This is not negligence, instead, it is an absence of consent.

The requirement for such medical expert testimony in cases based on a claim of absence of informed consent, *Bowers v. Talmage,* 159 So. 2d 888 (Fla. 3d DCA 1963); *Ditlow v. Kaplan,* 181 So. 2d 226, 228 (Fla. 3d DCA 1966); *Thomas v. Berrios,* 348 So. 2d 905, 908 (Fla. 2d DCA 1977); section 768.46(3) and (3)(a)1, Florida Statutes (1977), is not applicable in a case based on a claim of want of consent (as distinguished from a claim of absence of informed consent), or for an operation claimed to have been performed contrary to the patient's instructions. *Gouveia v. Phillips,* 823 So. 2d 215, 226 (Fla. 4th DCA 2002). The battery counts allege that any informed consent was induced through fraudulent non-disclosure and are null and void, and therefore, all surgeries were without consent and constituted a battery. *Meretsky v. Ellenby,* 370 So. 2d 1222 (Fla. 3d DCA 1979). The former managers caused the battery as stated above by terminating the professional liability insurance while causing the physicians to practice medicine in violation of Chapter 458, Fla. Stat., and are therefore individually liable. Section 605.04093 states, in pertinent part:

> 605.04093 Limitation of liability of managers and members.—
> (1) A manager in a manager-managed limited liability company or a member in a member-managed limited liability company . . is not personally liable for monetary damages to . . .any other person for any statement, vote, decision, or failure to act regarding management or policy decisions by a manager in a manager-managed limited liability company . . . unless:
> (a) The manager . . . failed to perform the duties as a manager in a manager-managed limited liability company ; and
> (b) The manager's . . . breach of, or failure to perform, those duties constitutes any of the following:
> . . .
> 5. In a proceeding by or in the right of someone other than the limited liability company or a member, 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.

This is a direct cause of action against the manager. The statute states that a manager is not liable for monetary damages for a failure to act regarding management decisions in a proceeding by

someone other than the LLC or a member for 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. The statute is written in the negative—the manager is not liable unless--; the converse is that the manager is liable for damages caused to third parties for the failure to act as to policy and management decisions for recklessness in an act or omission committed in a manner exhibiting wanton and willful disregard of human rights, safety and property. In their causes of action against the former managers, the Langstons have satisfactorily alleged that the managers cancelled the statutorily required professional liability insurance, caused physician employees to practice medicine without insurance in violation of law, stripped the companies of their assets and gave themselves and members illegal dividends in excess of one hundred million dollars while incurring liabilities to patients, rendered the companies insolvent, and then filed the ABC. These are the Langstons' direct causes of action permitted by § 605.04093 (a) and (b) (5), and in order to preclude the Langstons from bringing them, the Assignee has to point to a statutory prohibition. For example, in *Williams v. Spears*, 719 So. 2d 1236 (Fla. 1st DCA 1998), the Court held that a statute granting grandparents the right to seek visitation was unconstitutional. Statutes modify and supersede common law, *Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 358 So. 2d 21 (Fla. 1978) unless unconstitutional, *Williams v. Spears*, 719 So. 2d 1236 (Fla. 1st DCA 1998). The Assignee obviously cannot make a constitutional argument for an injunction to enjoin the Langstons from bringing the Langstons' statutory causes of action. Moreover, there is no "common law" protection of LLC managers from individual liability, but instead, the entire jurisprudence relating to the protection of shareholders, officers, directors, LLC managers, and LLC members is statutory, *Advertects, Inc. v. Sawyer Indus., Inc.*, 84 So. 2d 21 (Fla. 1955). The extent of liability protection of a manager or member of an LLC, or an officer or director of a corporation, is created by statute and limited by statute, *Mysels v. Barry*, 332 So. 2d

38 (Fla. 2d DCA 1976) ("[I]n the absence of statutory sanction, the officers and shareholders of a foreign corporation cannot be held personally liable for corporate debts incurred within the state by reason of the failure to qualify to do business in Florida.").

In Florida, § 605.04093 (1) sets the standard for pleading and proof to impose liability on managers of limited liability companies and out-of-state LLCs registered to do business in Florida may not exercise any power to shield its managers that a Florida LLC may not exercise, § 605.0901 (3), Fla. Stat. ("(3)A certificate of authority does not authorize a foreign limited liability company to engage in any business or exercise any power that a limited liability company may not engage in or exercise in this state."). Since this is a specific statute authorizing the Langstons' lawsuits against the former managers, the Assignee's request for the Court to rely on implications of bankruptcy law or general resort to "equity" fails. The Langstons have a statutory right to sue the former managers, and this right cannot be eliminated by the Assignee's inapplicable comparison to bankruptcy laws.

There is obviously nothing in Chapter 605 (LLCs) or Chapter 607 (corporations) that can be construed to mean that if the LLC sues a former manager that the former manager is thereby insulated or immune from lawsuits by third parties. Since the LLC cannot insulate its managers from third party lawsuits by suing them, the Assignee cannot declare the former managers insulated or immune from third party lawsuits. The Assignee only has whatever property rights the LLC had, as stated in 727.103 (1), cited above, in the definition of "asset." If the LLC has no right to stop lawsuits against its former managers by third parties, then the Assignee has no such right. The Assignee is the assignee of the assets of the LLC, nothing more. Since the LLC cannot stop third parties from suing its former managers, the Assignee cannot stop third parties from suing its former managers.

Pleading hearsay on information and belief is proper pleading.

The Second Amended and Supplemental Complaint filed in the Langstons' medical malpractice action, and the Complaint in the Protective Action, plead verbatim the factual allegations (not the causes of action) of the Assignee's complaints against the former managers, on information and belief, which is proper pleading. As observed by one court:

> Likewise, the Court has reviewed the paragraphs [pled on information and belief] of the Complaint that Defendant claims should be stricken due to immaterial, irrelevant and inflammatory allegations and finds nothing improper about these allegations. They serve to provide either meaningful context for the claims or necessary background facts. With respect to Defendant's complaint about "hearsay allegations," hearsay is a rule of evidence, not applicable to a pleading. Whether Plaintiffs can prove the allegations with admissible evidence at trial is another matter which need not be resolved at this stage of the proceeding. *Pronman v. Styles*, No. 12-80674-CIV, 2013 U.S. Dist. LEXIS 104995, at *8-9 (S.D. Fla. July 26, 2013) (refusing to strike allegations on "information and belief").

Because ""[h]earsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," § 90.801 (1) (c) Fla. Stat., when correctly pleading hearsay on information and belief, verbatim pleading of the hearsay statement avoids a later claim that the pleading does not accurately allege the hearsay statement. There is nothing wrong with pleading in a complaint, verbatim, a hearsay statement. To the contrary, that is proper pleading of hearsay factual statements as the factual basis for the complaint. Moreover, the Langstons' Second Amended and Supplemental Complaint and the Protective Action are not "basically cut and pasted" from other parties' complaints in the assignment against LSI, but instead, the Proposed Second Amended and Supplemental Complaint in the pending medical malpractice action is 85 pages long and pled verbatim "on information and belief" the factual allegations (not "claims") from the ABC complaints as a factual basis to support the statutory allegations of misconduct required by § 605.04093 (1) (a) and (b) (5) to impose personal liability on the managers for the reckless misconduct of causing physicians to practice medicine without professional liability financial responsibility compliance in violation of the law.

The Langstons could not and did not plead the Assignee's causes of action against the former managers. The Langstons did not sue the former managers for breach of fiduciary duty owed to the entities, as they do not own and control that cause of action. Similarly, the Assignee did not, and indeed cannot, sue the former managers to impose personal liability against the former managers for Dr. Francavilla's medical malpractice and battery as to the Langstons pursuant to § 605.04093 (1) (a) and (b) (5) because the Assignee does not have standing to bring the Langstons' claims against the former managers. Only the Langstons can sue anyone, including but not limited to the former managers, for the Langstons' causes of action for medical malpractice, battery, and loss of consortium. The Langstons' claims are not owned by the LLC, and are therefore, not property of the Assignee's estate, as clearly defined in § 727.103 (1), Fla. Stat., cited above. § 727.105, Fla. Stat., (stating, "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") does not impose any form of automatic stay, limited or otherwise, as to the Langstons' causes of actions directly against the former managers because the Langstons' causes of action directly against the former managers are not a "legal or equitable interest of the assignor (LSI and affiliates)" as defined by § 727.103, Fla. Stat., and are therefore not "assets of the estate in the possession, custody, or control of the assignee," as provided by § 727.105, Fla. Stat.

In the ABC, it was Langstons who first raised the lack of professional liability insurance in the ABC by filing motions to determine the self-insurance compliance, and that did not give the Langstons a copyright on the factual allegations of misconduct against the former managers that only Langstons could plead as the factual basis for causes of action against the former managers that no other party could plead in bringing causes of action owned by the other parties. The Assignee, having access to internal records, ferreted out specific factual allegations of misconduct by the former managers, and that does not give the Assignee a copyright on that factual

information that the Assignee made public in the public lawsuits that only the Assignee can plead as the factual basis for causes of action the Assignee holds against the former managers. The Langstons and the Assignee own and control separate causes of action against the former managers. The factual allegations of misconduct of the former managers of diverting assets, paying illegal dividends, and causing physicians to practice medicine without insurance while stripping the assets of the company in order to render the company insolvent in violation of law are facts, not causes of action, that are relevant to the causes of action separately owned and controlled by the Assignee and the Langstons, respectively. The Langstons and the Assignee cannot prevent each other from using facts to plead and prove their respective causes of action against the same individuals.

4. The Assignee Would Fare No Better in Bankruptcy.

The Assignee's theory that it can stop the Langstons from suing the former managers is purely derived from the United States Bankruptcy Code and bankruptcy case law, which Assignee urges the Court to adopt as rights owned by an ABC. A state court assignment for benefit of creditors assigns the assets, not the entity, and is not a bankruptcy. Further, the theory is derived from bankruptcy statutes including 11 U.S.C. § 544 because "federal bankruptcy law permits the trustee to recover property on behalf of all creditors for equitable distribution," *Koch Refining v. Farmer's Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1346 (2" Cir. 1987). § 544 is inapplicable to a state court proceeding pursuant to the assignment for benefit of creditors. But bankruptcy courts have routinely rejected efforts by bankruptcy trustees to attempt to enjoin third parties from filing direct actions on veil piercing theories except where (1) the trustee can file the exact action and (2) the action must be a general claim common to all creditors, *Baillie Lumber Co., LP v. Thompson,* 413 F.3d 1293 (11th Cir. 2005). Obviously, the Assignee cannot file the Langstons' claims against the former managers, and the Langstons' claims are not common to all creditors. Only the

Langstons can sue the former managers to impose personal liability on the former managers for medical malpractice and battery by Dr. Francavilla. The action filed by Shirley and John Langston is a direct action to hold former managers directly liable for medical malpractice and battery because the former managers recklessly and in a manner exhibiting wanton and willful disregard of human rights, safety, or property cancelled medical malpractice policies of employee physicians and caused the physicians to practice medicine in violation of the financial responsibility provisions governing physicians.

The Assignee cannot sue the former managers for the same claims that Shirley and John Langston may sue them for — the Assignee has no standing to bring the Langston's claims against the former managers for medical malpractice and battery committed against Shirley Langston. In fact, the Assignee is actively opposing the Langstons' claims. Here, the interests of the Assignee, the LLC, and the former managers are all aligned against the Langstons, the Assignee cannot bring the same claim as the Langstons' and the theory would fail under bankruptcy law. The Langstons' claims are not general claims common to all creditors. The claims the Langstons are bringing are based only on the actions of Dr. Thomas Francavilla, who filed false applications with the Florida Board of Medicine, falsely claiming to be in compliance with Florida's medical malpractice laws, and falsely and fraudulently inducing Shirley Langston to consent to surgery. The damages sought are damages only the Langstons incurred. Here, the Assignee has no authority to prosecute or settle the Langstons' claims against the LLCs' former managers. In actuality, what the Assignee is trying to do is to insulate the former managers from the Langstons' claims so the Assignee can settle the Assignee's claims against the former managers and use the proceeds to pay parties other than the Langstons with the purpose and intent of keeping the Langstons' causes of action against the former managers from ever seeing the light of day. Instead of claiming that the Langstons' causes of action are property of the ABC estate and attempting to liquidate the Langstons' claims

of damages, the Assignee's stated intent is to prevent the Langstons' claims from being brought or liquidated. For example, the Assignee's Injunction Motion alleges on Page 8, that the Assignee's efforts will be hindered by the Langston's claims. The Assignee then claims a case holding that the Assignee can exclusively bring derivative claims, *Moffatt & Nichols, Inc. v. B.E.A International Corp*., 48 So.3d 896 (Fla. 3d DCA 2010) is relevant, when the case is facially inapplicable. Obviously, the Langstons' direct claims under § 605.04093 are not derivative claims because they are not the claims of the LLC, *Sinibaldi v. Sinibaldi ex rel. Get Strong, Inc*., 100 So. 3d 72, 73 (Fla. 2d DCA 2011) ("[A] derivative action is by definition brought by a shareholder on behalf of a corporation."). "[I]t is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) citing *Caplin v. Marine Midland Grace Trust Co*., 406 U.S. 416, 34 (1972). The Langstons' causes of action seek damages caused to the Langstons and seek to hold the former managers directly liable for the reckless misconduct of the former managers. If, "the right to relief and the benefits of relief are peculiar to individual or groups of creditors, the right is not a generalized one that belongs to the debtor's estate." *Picard v. JPMorgan Chase & Co*., 460 B.R. 84, 96 (S.D.N.Y. 2011). "[A] creditor has standing to bring an alter-ego claim when the harm alleged in support of the claim is personal to them; a creditor lacks standing to bring such a claim when the harm alleged is general." *In re Cabrini Medical Center*, 489 B.R. 7, 17 (S.D.N.Y. 2012).

The transparent fallacy of the Assignee's assertion is on Page 11 of the Assignee's Injunction Motion, "[r]ecoveries from pursuit of the claims set forth in the Assignee's Complaint against the mangers will be the key source of funds to pay general unsecured creditors." The Assignee intends to prevent the Langstons' recovery of direct damages and use the settlements achieved by <u>not</u> liquidating the Langstons' claims to pay other creditors. The Assignee relies on *In*

re Madoff, 848 F. Supp. 2d 469, 475 (S.D.N.Y. 2012) ('[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"). Obviously, the Langstons' claims for damages arising from medical malpractice and battery due to the reckless misconduct of the former managers who caused physician employees to fraudulently induce Shirley Langston to consent to surgery without disclosing that they were practicing medicine in violation of Florida law can only be brought by the Langstons. Trade creditors or other general unsecured creditors cannot show any "particularized injury" arising from the misconduct relating to the decision to cause physicians to practice medicine in violation of Florida law. The Assignee's reliance on *In Re EZ Pay Services, Inc.*, 389 B.R. 751 (Bkrtcy. M.D. Fla. 2007) is also misplaced. In *EZ Pay Services, Inc.* the parties were litigating over patient accounts. The debtor claimed it owned the patient accounts. The creditor asserted that it assigned only 6% of each patient account to the Debtor, and the creditor asserted that it retained 94% of each patient account. The creditor attempted to sue third parties on its alleged 94% interest in patient accounts. The Court states, "[a]lthough the Contract gives Davis & Dingle the right to receive 94% of the amount owed on each patient account - from the Debtor -- the Contract does not appear to support Davis & Dingle's assertion that it retained an actual ownership interest in the underlying accounts, " *Altman v. Davis & Dingle Fam. Dentistry (In re EZ Pay Servs.),* 389 B.R. 751, 758 (Bankr. M.D. Fla. 2007). Here, the suggestion that the Assignee owns the Langstons' claims against anyone, including the former managers, has not been made. The Assignee does not claim that it can bring the Langstons' claims. Instead, the Assignee frames its proposition in the baseless and unsupported claim that, "claims against the Managers arising out of their Wrongful Acts can *only* be brought by the Assignee," Assignee's Injunction Motion, P. 11. There is no authority supporting the Assignee's claim. There is no authority that

states that only the Assignee can sue the former managers for misconduct. The *In Re EZ Pay Services Case* shows the invalidity of the Assignee's claims – the debtor and the creditor were both suing the same party for the same patient accounts – the debtor claimed it owned and could collect the patient accounts and the creditor's claim would be processed as a claim in bankruptcy, and the creditor claimed that it owned and could collect directly 94% of the same patient accounts. Here, the Assignee is not suing the former managers for the Langstons claims. The Assignee is not claiming that it can, or intends to, sue the former managers for the damages caused to the Langstons. Instead, the Assignee claims that it can stop the former managers from ever being held accountable for the damages caused to the Langstons, and thereby, induce the former managers to settle with the Assignee and in doing so clothe the former managers with immunity for their statutorily actionable misconduct. Simply stated, the Assignee's contentions have no basis in law or fact. None of the authority cited allows an Assignee to kill third party claims so the claims will never be liquidated to give the Assignee leverage to command a better settlement by protecting the target defendants from the Langstons' claims.

5. The Assignee has no Standing to Raise Defenses of the Former Managers.

The only parties who have standing to raise the defense that the Langstons have no standing to sue them for the Langstons' claims, and that the Langstons' claims are now somehow owned and controlled by the Assignee, is the defendants themselves.

> Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation. See *Nedeau v. Gallagher*, 851 So. 2d 214, 215 (Fla. 1st DCA 2003). The interest cannot be conjectural or merely hypothetical. See id. at 216. Furthermore, the claim should be brought by, or on behalf of, the real party in interest. See id. Standing encompasses not only this "sufficient stake" definition, but also the requirement that the claim be brought by or on behalf of one who is recognized in the law as a "real party in interest," that is the person in whom rests, by substantive law, the claim sought to be enforced. *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005).

Obviously, the Defendants who Plaintiffs propose to add are the real parties in interest. The Assignee's concern that, should the Plaintiffs sue its former managers, that will somehow impair Assignee's efforts to sue the same people, is not a stake in the "justiciable controversy." The Assignee does not intend, and in fact cannot, sue the former managers for the justiciable controversy set forth in the Second Amended and Supplemental Complaint in the medical malpractice action, or in the Protective Action. The Assignee does not intend, and cannot, sue the former managers for the recovery of damages to the Langstons. In fact, should the Langstons prevail and recover full payment for the Langstons' claims from the former managers, it will benefit the Assignee by satisfying the Langstons' claims against the Assignee's estate. Only the proposed Defendants have standing to raise the frivolous claims the Assignee is attempting to articulate — that the Assignee's lawsuit against the former managers immunizes the former managers from the Langstons' claims. The Assignee cannot raise defenses on behalf of the proposed Defendants to insulate those Defendants from the Langstons' claims. Any defense to Plaintiffs' standing to raise claims may solely be raised by the Defendants in the Second Amended Complaint.

CONCLUSION

This Court has no subject matter or personal jurisdiction to enjoin the Langstons from suing the former managers. The Langstons claims are not property owned by the LLCs or Corporations that acted as Assignors, and therefore, are not property of the Assignee's estate. This Court only has subject matter jurisdiction over property of the Assignor's assets, and the Langstons claims cannot be defined as causes of action that were ever owned or controlled by the Assignors. Moreover, the Assignee has failed to file the requisite lawsuit and have that lawsuit served on the Langstons, which is the necessary precondition for both subject matter and personal jurisdiction seeking injunctive relief.

The Assignee cannot immunize former managers against third party claims because the Assignors cannot immunize former managers from the Langstons' claims. The Assignee cannot cite any authority to eliminate the Langstons' statutory claims, and its reference to bankruptcy cases is irrelevant because this is not a bankruptcy. Moreover, as stated above, the Assignee would fare no better in bankruptcy because, by the exact quote cited by the Assignee, "if 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," *In re Madoff,* 848 F. Supp. 2d 469, 475 (S.D.N.Y. 2012). The Langstons' claims obviously cannot be brought by any creditor of the debtor, and the Assignee, therefore, is not entitled to an injunction designed to kill the Langstons' claims and prevent the former managers from being held accountable to the Langstons for their reckless misconduct. The LLCs cannot clothe their former managers with immunity by suing them, the Assignee has no copyright on facts, and the Assignee is not the only party who can sue former managers for misconduct.

For the foregoing reasons, the Assignee's Injunction Motion should be denied.

Certificate of Service: I hereby certify that the foregoing has been efiled and service will be made through the Court's efiling service this 22 day of May, 2020.

/s/Donald J. Schutz
Donald J. Schutz, Esq.
Fla. Bar No. 382701
535 Central Avenue
St. Petersburg, FL 33701
727-823-3222
727-480-4425 Cell
727-895-3222 Fax
Attorney for Plaintiffs