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,
_____/

OPPOSITION IN PART OF SHIRLEY AND JOHN LANGSTON AND CRYSTAL AND LEONARD TINELLI TO ASSIGNEE'S MOTION FOR ORDER AUTHORIZING COMPROMISE OF CONTROVERSY WITH TEXAS CAPITAL BANK, N.A., AS ADMINISTRATIVE AGENT FOR LENDER'S GROUP AND MOTION TO DETERMINE PAYMENT OF MEDICAL MALPRACTICE CLAIM DEDUCITIBLE IS ADMINISTRATIVE EXPENSE AND/OR IMPOSE CONSTRUCTIVE TRUST ON TORT RECOVERY AND ALLOW DISCOVERY ON EQUITABLE SUBROGATION ISSUES AS TO TCB BANK

Shirley and John Langston and Crystal and Leonard Tinelli, by and through undersigned counsel, now oppose in part the Assignee's Motion (the "TCB Motion") for Order Authorizing Compromise of Controversy with Texas Capital Bank, N.A., as

Administrative Agent for Lender's Group ("TCB" or "Agent"), as to the awarding of a priority lien to TCB, the confirmation of Assignee's "waterfall" distribution, and further requests this Honorable Court to determine that payments in the amount of one million dollars for the deductible portion of Assignees' medical malpractice policy is properly payable as a priority expense of administration, or in the alternative to award a priority constructive trust on all recoveries of tort claims representing damages to the Langstons and Tinellis, respectively, and to grant discovery relating to TCB's liens, and in support hereof, state as follows:

1. This Opposition and Motion is filed pursuant to Sec. 727.109 (providing that the Court has the power to enforce the provisions of Chapter 727, allow claims and determine priority, determine the validity and priority of liens or other interests in assets of the estate and other listed powers), 727.110 ("All matters requiring court authorization under this chapter shall be brought by motion . . ."), and 727.114 (providing for the priority of claims). Section 727.110 limits the right to file a supplemental proceeding to proceedings by the Assignee, so this request for relief is filed as a Motion pursuant to the provisions of Sec. 727.110 (1).

2. The Langstons and the Tinellis are medical malpractice claimants represented by undersigned counsel who have both filed timely proofs of claim in this case and also filed timely notices of claim on Assignee's medical malpractice insurance carrier. The Langstons and the Tinellis are separately proceeding to prosecute their respective medical malpractice claims pursuant to Florida law. This Court has previously entertained arguments regarding the illegal pre-petition conduct of Laser Spine Institute, LLC ("LSI") in causing its employee physicians to practice medicine in violation of Florida's financial responsibility laws as described in §

458.320, Fla. Stat. which provides, in part and as applicable here, a physician must comply with Florida's financial responsibility laws by obtaining and maintaining professional liability coverage in an amount not less than $250,000 per claim, with a minimum annual aggregate of not less than $750,000.00. While Assignee has earlier claimed that Laser Spine Institute functioned through a self-insured retention platform, LSI did not and could not comply with the statutorily eligible plan of self-insurance stated in § 458.320, as provided in § 627.357, or through a plan of self-insurance which meets the conditions specified for satisfying financial responsibility in § 766.110. Laser Spine Institute's ("LSI") physician employees practiced medicine in violation of law. § 458.320, Fla. Stat. provides that a physician may comply with self-insurance requirements by either a plan of self-insurance pursuant to § 627.357 or § 766.110. Laser Spine Institute, LLC did not (and could not) comply with § 627.357 because the statute requires the establishment of a Medical Malpractice Risk Management Trust Fund to provide coverage against professional medical malpractice liability and the approval of the Department of Insurance. Laser Spine Institute LLC did not establish the required trust fund or obtain approval of the Department of Insurance. Self-insurance compliance under § 627.357, Fla. Stat., is regulated by § 69O-187, Florida Administrative Code, and § 69O-187.009 FAC provides that, to close out the trust fund, the self-insurance plan must notify the Department of Insurance of the intention to terminate, provide a plan of termination subject to the approval of the Department, and continue in a "run-off mode, which is a common insurance industry term which means that the assets are not released until the last claim has been fully settled," and requires a n actuary to create a reserve analysis, § 69O-187.009 FAC. Stated simply, the Defendants did not make any effort

to comply with this self-insurance alternative of § 458.320. Accordingly, it is impossible for this statutory alternative to be rendered insolvent while medical malpractice claims remain outstanding and unpaid.

The second self-insurance alternative under § 458.320 is pursuant to § 766.110, Fla. Stat., which provides that hospitals licensed under Chapter 395 may carry a $1.5 million dollar policy to cover all medical injuries to patients resulting from negligent acts or omissions on the part of those members of its medical staff who are covered. Laser Spine Institute was never a "hospital licensed under Chapter 395" and therefore does not qualify to even begin to create a purported Self Insurance Retention plan under § 766,110, and further, it did not carry the requisite insurance required by this section, which is a $1.5 million dollar claim policy.

As stated above, it is impossible for a statutorily compliant self-insurance program under § 458.320 to become "insolvent," because it either has to be a $1.5 million dollar insurance policy, § 766.110, or a trust fund subject to run-off and settlement of all claims before the escrow account is closed, § § 69O-187.009 FAC.

For these reasons, there was no statutorily compliant self-insurance program, or "SIR," as has been claimed. Instead, LSI was uninsured for the statutory requirement, and instead, carried a statutorily non-compliant $1 million dollar deductible policy from MedPro, and MedPro claims that per the terms of the excess policy amounts under the excess policy are not payable because (as MedPro claims) a condition precedent to the payment of the excess policy is the payment of the deductible. So—LSI claims it is insolvent and cannot pay the deductible, and MedPro then claims that since LSI is insolvent and cannot pay the deductible so MedPro does not have to pay under the excess policy. Laser Spine Institute caused its

physicians to practice medicine in violation of Florida's financial responsibility laws with the ultimate outcome that LSI and its affiliates were rendered insolvent, filed a Petition for the Benefit of Creditors, and now essentially claim that the deductibles will not be paid and no insurance is therefore available. Based on TCB's secured claim, the possibility of a recovery of by unsecured creditors is effectively zero.

3. The Assignee has now filed on September 4, 2020, on 11 day notice, the TCB Motion, with hearing set for September 15, 2020, in which:

a. Assignee alleges that TCB holds a perfected security interest in substantially all personal property of the Assignors, including all accounts receivable.

b. Assignee and TCB have entered a Stipulation of Settlement (the "Stipulation") agreeing on a proposed administrative expense claim to be awarded to TCB representing what is characterized as a reasonable allocation of expenses funded by TCB that benefitted the estate, generally.

c. Assignee proposes what is characterized as a "Waterfall" payout that would treat all medical malpractice plaintiffs as general unsecured creditors. From the understanding of undersigned counsel, the likelihood of any dividend to be payable to unsecured creditors is effectively zero.

d. At Page 9 of the Assignee's Motion, the Assignee proposes that all recoveries of litigation proceeds will be payable pursuant to the "Waterfall" allocation, and proposes to grant a priority lien to TCB as security for the allowed administrative

expense claim.

e. The Stipulation also proposes an October 15, 2020 "Lien Challenge Deadline" by which all parties in interest, including Movants, are required to challenge TCB's liens or be otherwise barred.

4. The Langstons and the Tinellis do not contest the allocation of the "Overlap" expenses as a reasonable allocation of an amount to be payable as an administrative claim of TCB.

5. The Langstons and the Tinellis do contest:

a. The awarding of a lien in favor of TCB for an administrative claim, as that effectively creates a priority administrative claim over other allowed administrative claims in contravention of Section 727.114, which provides that expenses of the same class are paid pro rata. Granting a lien to TCB results in the priority of TCB's claim over other administrative claims of the same class. The Assignee and TCB earlier moved for an award of administrative expenses, which was not granted, and any unsecured post-Petition funding by TCB has been without the benefit of lien protection. There is no legal basis to grant TCB a lien or priority over other administrative claims.

b. A Court Order adopting the "waterfall" payout, which is irrelevant to any proposed compromise with TCB. The TCB issue deals with the amount of an allowed administrative claim, and whether TCB is entitled to a priority lien as against other

administrative claimants. There is no basis for the Assignee to seek to leap-frog the claim allowance process or to obtain a court order relating to asset distributions unrelated to TCB's administrative claim. The Assignee has on 11 day notice without any opportunity for discovery by interested parties filed a motion that is effectively a case close out motion. This is premature and unnecessary for the approval of any compromise with TCB.

c. The October 15, 2020 lien contest deadline, which is irrelevant to any proposed award of administrative expenses. Whether or not TCB is entitled to an administrative claim is unrelated to whether or not TCB's pre-assignment secured claim based on prepetition lien claims is allowable as a secured claim or whether it is subject to some type of equitable subordination.

d. There is no basis to grant TCB a priority over other administrative expenses as sought on Page 9 of the motion.

6. The Assignee has stated on Page 14 of the Motion that the Assignee has examined the applicable security agreements and UCC-1 financing statements, and has determined that there is not any legitimate basis to object to the Agent's proof of claim as filed. The issue from the point of view of both the Langstons and the Tinellis is whether TCB knew that Laser Spine Institute was operating in violation of Florida's financial responsibility laws as provided by Section 420.358, Fla. Stat. and whether there is a basis to equitably subordinate TCB's lien. Florida recognizes equitable subordination:

> Equitable subordination is an "extraordinary remedy" typically sought in a bankruptcy proceeding to address "gross misconduct" or actions by a creditor that are "egregious and severely unfair to other creditors." *Toy King Dist. v. Liberty Sav. Bank*, 256 B.R. 1 (M.D. Fla. 2000). The elements of equitable subordination are:
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> > (1) "The claimant must have engaged in some type of inequitable conduct." (2) "The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant." (3) "Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code."
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> Id. 256 B.R. at 195 (quoting *Benjamin v. Diamond* (*In re Mobile Steel C*o.), 563 F.2d 692, 699-705 (5th Cir. 1977)). In *Pepper v. Litton*, 308 U.S. 295, 311, 60 S. Ct. 238, 84 L. Ed. 281 (1939), the Supreme Court of the United States observed that the common thread in such cases is "the violation of rules of fair play and good conscience by the claimant . . . in disregard of the standards of common decency and honesty." There is simply no evidence of any of these elements in this case.
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> *Carlton Fields, P.A. v. LoCascio*, 59 So. 3d 246, 247-48 (Fla. 3d DCA 2011).

The Langstons and the Tinellis move herein for authority to implement discovery for the purpose of determining whether TCB bank or any related lien claimants knew of or participated in the illegal conduct of Laser Spine Institute sufficient to warrant an objection to the secured claim seeking the equitable subordination of TCB's lien claims to the medical malpractice recoveries of the Langstons and the Tinellis.

7. **The Payment of Required Deductible Payments on the Medical Malpractice Insurance Policy should be Allowed as an Administrative Expense.**

When this Petition was filed on March 14, 2019, the Assignees maintained a one million dollar deductible medical negligence insurance policy (the "MedPro Policy"). By Motion dated May 17, 2020, Assignee sought to terminate the MedPro Policy, which was granted by Order dated May 24, 2019, which granted the motion

terminating the policy and set a claims date of 30 days for claimants to assert claims under the Policy. Both the Tinellis and the Langstons filed timely proofs of claim and separately filed timely notices to MedPro of said claims.

Since the MedPro policy was in full force and effect as of the date of the Petition, and remained in effect post-petition, and this Court set a deadline for filing claims, the payment of the deductible for timely filed claims is properly allowed as an administrative expense. Section 727.114 refers to administrative expenses as "[e]xpenses incurred during the administration of the estate," which is different that the U.S. bankruptcy code's definition in 11. U.S.C. § 503, "the actual, necessary costs and expenses of preserving the estate including . . ." The payment of insurance deductibles will come due during the administration of the estate and since the insurance policy remained in effect during the administration of the estate, the deductible payments are properly characterized as expenses incurred during the administration of the estate.

Since medical malpractice coverage is a legal obligation of all physicians who practice medicine in Florida, and since:

a) Laser Spine Institute and its affiliates incurred medical malpractice claims through their employee physicians; and
b) The MedPro Policy was in effect as of the date of the Petition; and
c) Deductible payments will come due post-petition; and
d) Florida law requires Assignee's employee physicians to both carry medical malpractice insurance and to pay judgments; and
e) The Assignee did not default on the MedPro policy post-petition, but instead, post-petition, the Assignee obtained authority to maintain the

policy in full force and effect post-petition through a notice bar deadline of June 24, 2019; then

f) By virtue of the foregoing, payments of medical malpractice insurance deductibles that are required to satisfy LSI's obligations under the MedPro policy are properly characterized as expenses incurred during the administration of the estate and receive administrative priority.

LSI does not have the statutory alternative to cause its employee physicians to practice medicine in violation of the law. Since the insurance deductibles are properly characterized as claims that become due and payable during the administration of the estate, they are properly paid as administrative claims from unencumbered assets of the estate, and in this case, those payments will come from the tort claim recoveries. For this reason, it is unfair and inequitable to impose a priority lien on the tort recoveries in favor of TCB for TCB's post-petition unsecured lending.

8. Movants are Entitled to the Imposition of a Constructive Trust on Damages Recovered against Former Managers Attributable to Damages to Claimants.

Independent of allowing deductible payments as administrative expenses, the Langstons and the Tinellis contend that as medical malpractice plaintiffs they are entitled to the imposition of a constructive trust as to any tort recoveries of the Assignee where the damages recovered from the former managers are the damages sustained by the individual medical malpractice plaintiffs. The Assignee is suing certain former managers for, in part, their failure to obtain statutorily required medical malpractice insurance. The ultimate determination of the damages to the

estates due to the former managers' misconduct is the amount of the uninsured damages recovered by the Langstons and the Tinellis, respectively. The Assignee has to date contended that recoveries from the former managers for damages sustained by Laser Spine Institute, LLC for failure to obtain insurance is property of the estate not payable to medical malpractice plaintiffs.

To the contrary, the Langstons and the Tinellis contend that any recovery obtained by the Assignee from the former managers in the amount of damages sustained by the medical malpractice plaintiffs are payable only to the medical malpractice plaintiff who sustained the underlying damage. Laser Spine Institute's claim against its former managers is that the former managers were legally obligated to have medical malpractice insurance in place, the former managers breached that duty, and Laser Spine Institute is claiming that the former managers must pay Laser Spine Institute for damages caused due to the lack of insurance.

Laser Spine Institute cannot recover from the former managers for causing the med mal plaintiff's uninsured claims unless Laser Spine Institute actually pays the med mal plaintiff's uninsured claims. To the extent that Laser Spine Institute recovers from the former managers in an amount of the damages that would have been paid by insurance, those proceeds must be paid to the med mal plaintiffs. Damages are not recoverable for claims unless the Plaintiff actually pays the claims, *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547, 549 (Fla. 4th DCA 2003) (Since Medicare requires the provider to whom payment is made to accept such amount in full satisfaction of the total charge even though the amount charged exceeds the amount paid by Medicare, evidence of total charge inadmissible). Just as a plaintiff cannot recover medical charges that have been satisfied for a lesser amount

through Medicare, the Assignee cannot recover damages from the former managers for causing damagers that are not actually paid by Assignee. Barring actual payment by Laser Spine Institute to the med mal plaintiffs, Laser Spine Institute is not damaged by the misconduct of the former managers, and so could not recover damages from the former managers. Said another way, should a medical malpractice plaintiff lose and recover nothing, then the former manager would not be liable for damages. Under this hypothetical, although there was a breach of fiduciary duty by a failure to obtain insurance, there are no recoverable damages against the former managers. No harm, no foul. This is not a matter where the former managers are joint tortfeasors. To the contrary, the former managers are only liable to pay the estate of Laser Spine Institute the amount of damages that Laser Spine Institute actually pays to the medical malpractice plaintiff. Barring actual payment by Laser Spine Institute, Laser Spine Institute is not damaged and cannot recover damages from the former managers. The former managers only have to pay Laser Spine Institute if Laser Spine Institute is in turn paying the uninsured claims. For this reason, the Langstons and the Tinellis are each entitled to the imposition of a constructive trust over any recoveries by the Assignee from the former managers of damages to the extent that the recoveries are for damages to the individual med mal plaintiffs. TCB is not entitled to a priority lien on such recoveries because those recoveries must be paid to the med mal plaintiffs.

9. Movants are Entitled to Discovery on the Issue of Equitable Subordination of TCB's liens.

The Assignee has determined that there are no defenses to the enforcement of TCB's liens, however, there is no indication that the Assignee explored the doctrine

of equitable subordination and any determination that TCB's liens should be subordinated, at least as to all receivables, because LSI's physicians were practicing medicine in violation of the financial responsibility requirements of Section 458.320, Fla. Stat. This motion filed on 11 day notice is insufficient to allow parties in interest a reasonable opportunity to conduct discovery. Now that the motion to allow the claim has been filed and the issues ripe for determination, parties in interest should be given a reasonable time to conduct discovery and a reasonable time to file objections to TCB's liens. The October 15, 2020 deadline is too soon. The Langstons and the Tinellis submit that discovery should be open for at least 60 days, and the lien contest deadline should be at least 90 days.

Wherefore; the Langstons and the Tinellis:

1) Do not oppose the awarding of the "overlap" amount as an administrative priority claim;
2) Oppose all other relief in the Motion, including but not limited to, the granting of a lien to TCB, the granting of an administrative claim as a priority over other administrative claims, the adoption of the "waterfall," the lien contest deadline of October 15, 2020; and
3) Move the Court to determine that any deductible amounts due are properly paid as administrative expenses and/or that any tort recoveries for damages attributable to the Langstons or the Tinellis, respectively, are imposed with a constructive trust and any such recoveries are paid to the Langstons and the Tinellis, respectively; and

Such other relief as the Court deems appropriate.

Certificate of Service: I hereby certify that a copy of the foregoing has been filed and service will be made through the Court's efiling service this 14 day of September, 2020.

/s/Donald J. Schutz
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