

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,

Consolidated Case No:  
2019-CA-2762

To:

Soneet Kapila,

Assignee

Division L

**LASERSCOPIC SPINAL CENTERS  
OF AMERICA, INC., LASERSCOPIC MEDICAL  
CLINIC, LLC AND LASERSCOPIC SPINE CENTERS OF  
AMERICA, INC.'S RESPONSE TO DECLARATION OF SONEET  
KAPILA SUPPORTING ASSIGNEE'S MOTION FOR ORDER  
AUTHORIZING COMPROMISE OF CONTROVERSY WITH TEXAS  
CAPITAL BANK, N.A. AS ADMINISTRATIVE AGENT FOR LENDER GROUP**

Laserscopic Spinal Centers Of America, Inc. ("LSCA"), Laserscopic Medical Clinic, LLC ("LMC") and Laserscopic Spine Centers of America, Inc. ("Spine") (collectively the "Laserscopic Claimants"), acting by and through the undersigned counsel, file their Response to the "*Declaration of Soneet Kapila in Support of Assignee's Motion for Order Authorizing*

*Compromise of Controversy with Texas Capital Bank, N.A. as Administrative Agent for Lender Group*” (the “Declaration” and the underlying Motion shall be referred to as the “Motion”). In support, the Laserscopic Claimants allege and state as follows:

### **SUMMARY**

The Laserscopic Claimants represent the largest claimants against the Laser Spine Institute, LLC (“LSI”) Assignment for the Benefit of Creditors estate (the “LSI Estate”). The Laserscopic Claimants filed Proofs of Claim totaling over \$372,000,000.00. By this Response, the Laserscopic Claimants respond to the Declaration offered by Soneet Kapila in support of the Motion as to the allocation as to the “Overlap Expenses” as defined in the Motion. The Laserscopic Claimants request that this Court conduct further evidentiary inquiry into the allocation of the Overlap Expenses agreed to by and between the Assignee and the Texas Capital Bank, N.A. as the Administrative Agent for the Lender Group (“TCB”).

### **STATEMENT OF THE CASE**

1. LSCA and LMC have actual damage claims of \$264,000,000 plus interest in the amount of \$87,976,680, for a total compensatory damages award of \$351,976,680; LSCA and LMC were also awarded punitive damages in the amount of \$5,000,000 plus interest of \$1,666,225, for a total award of \$6,666,225 in punitive damages against the LSI Estate. These amounts are currently accruing post-judgment interest at Florida’s statutory rate.

2. Spine holds a claim for \$6,831.172 plus interest of \$2,266,066 or \$9,097,238 total against the LSI Estate, which is likewise accruing post-judgment interest. The Laserscopic Claimants’ claims are based upon the Opinion entered by the Second District Court of Appeals. The Laserscopic Claimants are aware of no opposition to their Proofs of Claim filed against the LSI Estate.

3. The only assets available for distribution to the unsecured creditors of the LSI Estate are, or will be the proceeds from litigation currently being prosecuted on behalf of the LSI Estate.

4. Virtually all other assets of the LSI Estate were subject to the secured lien claims of TCB, which such lien claims were unopposed by the Assignee. TCB also claims to hold a material and significant unsecured claim against the LSI Estate and if such unsecured claim is allowed then TCB would seek its pro rata portion of any distributions paid out of the litigation proceed recoveries and, in doing so, will reduce the amounts available to the unsecured creditors of the LSI Estate, including the Laserscopic Claimants.

5. For this reason, the allocation of the Overlap Expenses is of critical importance to the unsecured creditors of the LSI Estate. The unsecured creditors should not have to bear any of the expenses relating to the administration of assets which were subject to the lien claims of TCB. In order to maximize recovery on its secured lien claims, TCB had to incur administrative costs and expenses that have no relevance to the sole asset of the LSI Estate which is available to the unsecured creditors, the litigation claims. TCB benefits as to the administration of the assets covered by its secured claims by every dollar which it can cause to be shared with the unsecured creditors of the LSI Estate. The larger the portion of the Overlap Expenses that is allocated to the LSI Estate, the greater the benefit to TCB. The inquiry as to the proper allocation of the administrative expenses of the LSI Estate must focus on the detail of the actual services provided and whether such services were of direct benefit to TCB as a holder of a secured claim against all assets of the LSI Estate, or whether such services provided direct benefit to establishing or enhancing the litigation claims, which currently is the sole asset category available to the unsecured creditors of the LSI Estate.

6. The Declaration identifies the following categories of services provided by the Assignee as falling within the Overlap Expenses sought to be allocated between TCB and the LSI Estate:

- a. Claims administration;
- b. Tax compliance and issues;
- c. Services related to the wind-down of the Assignors' 401K plan and other employee benefits;
- d. Expenses related to wind-down of the Assignors' operations;
- e. payment of critical employee wages;
- f. management;
- g. retention and maintenance of the Assignors' information technology systems;
- h. preservation of patient records including electronic health and medical records; and
- i. responding to records requests (collectively the "Overlap Expenses Categories").

7. The Declaration goes on to say that "Overlap Expenses include professional fees incurred by attorneys and accountants employed by the Assignee. Such professionals' invoices invariably include services provided that directly benefit the Lenders, but also services rendered for the general benefit of the Assignment Estates and general unsecured creditors, such as those related to identifying and pursuing sources of recovery, particularly litigation claims, that will benefit all creditors, not just the Lenders."

8. The allocation method for the Overlap Expenses disclosed in the Declaration was stated as "[T]he most logical and reasonable way to allocate the Overlap Expenses between the Lenders' Portion of Overlap Expenses and the Estates' Portion of Overlap Expenses was based on the same level of allocation of the services of the professionals. The attached chart illustrates how the professional fees were allocated among various services on a month by month basis and how that corresponds to allocation of the Overlap Expenses all on a month by month basis." (referring to the Exhibit attached to the Declaration).

9. In the Exhibit attached to the Declaration, the costs attributable to KapilaMukamal and which the assignee and TCB agreed to allocate to TCB are set forth as follows:

- a. Asset Disposition (100%) (\$820,595);
- b. Business Interruption Claim (100%) (\$18,483);
- c. Operations (50%) (\$229,693);
- d. Document Management (50%) (\$26,457);
- e. Employee Benefits/Pensions (0%) (\$0);
- f. Tax Issues (0%) (\$0);
- g. Claims Administration (0%) (\$0);
- h. Forensic Investigation (0%) (\$0);
- i. D&O Litigation (0%) (\$0).

Therefore, according to the Exhibit, of the \$2,349,059 of the fees of KapilaMukamal (excludes hard costs), TCB was allocated \$1,095,228 and the Estate was allocated \$1,253,831. This allocation was then, apparently, combined with the fees of the law firms to arrive at the percentages used by the Assignee and TCB in requesting in the Motion that the \$1,707,691 in Overlap Expenses should be allocated \$939,823 to TCB and \$767,868 to the LSI Estate.

10. The Laserscopic Claimants submit that each of the Overlap Expenses Categories must be evaluated from the viewpoint of whether such Category was necessary and beneficial to the pursuit of the sole asset being attributable to the benefit of the unsecured creditors of the LSI Estate, being the litigation claims brought, or to be brought on behalf of the LSI Estate. Any Category that is not of direct benefit to the pursuit of the litigation claims must be viewed as being a Category that is attributable to the recovery for the secured claim of TCB. Absent proof that such a Category is directly related to the litigation claims, such Category must be fully allocated to TCB.

11. For example, the Category of "Operations" under the KapilaMukamal Fees and Expenses are reflected on the Exhibit as being allocated to TCB at 50%, meaning the other 50% would be allocated to the LSI Estate. However, "Operations" appears to be a Category that

relates solely to the non-litigation assets of the LSI Estate and benefitted TCB only due to its holding liens against such assets. So such Category appears to be entirely for the benefit of TCB. Said the other way, it is nearly impossible to see that “Operations” benefitted the Assignee in the pursuit of the LSI Estate’s litigation claims.

12. As to Overlap Expenses Categories that may appear to benefit both TCB and the unsecured creditors of the LSI Estate, then either the nature of the services provided within such Category need to be analyzed and a reasonable allocation made accordingly, or identification of the actual services provided must be analyzed to determine which services benefitted TCB and which services advanced the litigation claims.

13. The proposed allocation of the Overlap Expenses by comparing to the resulting ratios derived from professionals providing legal services is incongruent. Simply put, it would be expected that the legal professionals would spend greater percentages of their time on legal issues, including those related to the litigation claims. As for the non-legal services, such as most of the services provided by KapilaMukamal, those would be expected to be administrative costs and, by virtue of TCB having a lien on all assets other than the litigation claims, those administrative services and costs would be more closely associated with the assets secured by the liens of TCB and therefore allocable to TCB.

14. The Laserscopic Claimants accordingly request that the Assignee provide further and more detailed information so that the unsecured creditors can determine: 1) which Overlap Expenses Categories actually conferred any benefit upon the unsecured creditors by advancing the litigation claims; and 2) as to any Categories found to truly benefit the unsecured creditors of the LSI Estate, a fair allocation between TCB administrative services and litigation claim services based upon how the time allocated to such services was actually spent.

15. The Laserscopic Claimants submit that the Overlap Expenses, at first blush, appear to be more properly allocable as follows:

- a. Claims administration (allocable to both TCB and the LSI Estate);
- b. Tax compliance and issues (allocable to TCB);
- c. Services related to the wind-down of the Assignors' 401K plan and other employee benefits (allocable to TCB);
- d. Expenses related to wind-down of the Assignors' operations (allocable to TCB);
- e. payment of critical employee wages (allocable to TCB);
- f. management (allocable to TCB);
- g. retention and maintenance of the Assignors' information technology systems (allocable to TCB);
- h. preservation of patient records including electronic health and medical records (allocable to TCB); and
- i. responding to records requests (allocable to TCB).

16. The Laserscopic Claimants request that the Motion be denied in the absence of any further evidence being put on by the Assignee or TCB as to these issues.

WHEREFORE, the Laserscopic Claimants pray for an Order of this Court denying the Motion in the absence of any further evidence being put on by the Assignee or TCB which establishes that as to each of the Overlap Expenses Categories a benefit was conferred upon the LSI Estate, and for such other relief as this Court may equitably grant the Laserscopic Claimants.

Dated: October 13, 2020.

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**CERTIFICATE OF SERVICE**

I CERTIFY that on October 13, 2020, a true and correct copy of the foregoing has been electronically filed with the Clerk of Court through the Florida Courts E-Filing Portal, which will send a Notice of Electronic Filing to all counsel of record or electronic mail to the parties listed on the Limited Notice Parties attached.

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January 14, 2020

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