

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

**ASSIGNEE'S MOTION FOR (A) ORDER APPROVING SETTLEMENT AND  
COMPROMISE OF CLAIMS AGAINST FORMER DIRECTORS AND OFFICERS,  
(B) ORDER AUTHORIZING PAYMENT OF PROFESSIONAL FEES, AND (C) FINAL  
JUDGMENT AS TO SETTLED CLAIMS IN LAWSUITS**

TO CREDITORS AND OTHER INTERESTED PARTIES  
NOTICE OF OPPORTUNITY TO OBJECT

**PLEASE TAKE NOTICE** that, pursuant to Section 727.111(4), Florida Statutes, the Assignee and Court may consider the instant motion to compromise without further notice or hearing unless a creditor or party in interest files an objection within 21 days from the date this motion to compromise is served. If you object to the relief requested in this motion, you must file your objection with the Clerk of Court for Hillsborough County, Florida at 800 E. Twiggs Street, Tampa, Florida 33602,

and serve a copy on the Assignee's attorney, Edward J. Peterson, Stichter, Riedel, Blain & Postler, P.A., 110 E. Madison Street, Suite 200, Tampa, Florida 33602, and any other appropriate person.

A hearing on this motion is scheduled for **April 19, 2021, at 3:00 p.m.**, before the Honorable Darren D. Farfante via Zoom (need to provide zoom info).

You should read these papers carefully and discuss them with your attorney if you have one. If you do not file an objection within the time permitted, the Assignee and the Court will presume that you do not oppose the granting of the relief set forth in this motion, will proceed to consider the motion at the hearing, and may grant the relief requested.

Soneet R. Kapila, as assignee (the “**Assignee**”) for the benefit of creditors for Laser Spine Institute, LLC (“**LSI**”) and fifteen (15) of LSI’s affiliates<sup>1</sup> (collectively the “**LSI Entities**”), by and through his undersigned attorneys, files this motion seeking the entry of (a) an order approving the settlement and compromise reached between the Assignee and the former managers and/or officers of the LSI Entities, including specifically Jonathan Lewis, Sean Dempsey, Mark Andrzejewski, William Esping, Edward DeBartolo, Chris Sullivan, William E. Horne, Robert Basham, Geza Henni, Dr. James St. Louis III, Dr. Michael W. Perry, Raymond Monteleone, and Robert Grammen (collectively, the “**Defendants**”), and (b) an order approving the payment of fees to the Assignee’s special litigation counsel, Genovese Joblove & Battista, P.A. (“**Genovese Joblove**”) and Rocke, McLean & Sbar (“**Rocke McLean**”), and (c) a final judgment as to settled Claims in the Lawsuits (each as defined below). In support of this motion (the “**Motion**”), the Assignee states as follows:

### **Background**

1. On March 14, 2019, LSI executed and delivered an assignment for the benefit of creditors to the Assignee. The Assignee filed a Petition with the Court on March 14, 2019,

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<sup>1</sup> LSI’s affiliates are: LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC (the “**Affiliated Companies**”).

commencing an assignment for the benefit of creditors proceeding pursuant to Chapter 727 of the Florida Statutes (the “**LSI Assignment Case**”).

2. Simultaneous with the filing of the LSI Assignment Case, the Assignee filed fifteen other Petitions commencing the following assignment for the benefit of creditors proceedings for the Affiliated Companies of LSI (the “**Affiliated Assignment Cases**,” and together with the LSI Assignment Case, the “**Assignment Cases**”): LSI Management Company, LLC; Laser Spine Institute Consulting, LLC; CLM Aviation, LLC; Medical Care Management Services, LLC; LSI HoldCo, LLC; Laser Spine Surgical Center, LLC; Laser Spine Surgery Center of Arizona, LLC; Laser Spine Surgery Center of Cincinnati, LLC; Laser Spine Surgery Center of St. Louis, LLC; Laser Spine Surgery Center of Pennsylvania, LLC; Laser Spine Surgery Center of Oklahoma, LLC; Laser Spine Surgery Center of Warwick, LLC; Laser Spine Surgery Center of Cleveland, LLC; Total Spine Care, LLC; and Spine DME Solutions, LLC (each, an “**Assignor**” and collectively, the “**Assignors**”).

3. Upon his appointment, the Assignee and his special litigation counsel conducted a fulsome investigation of the claims and causes of action that existed in favor of the Assignee. Based on that investigation, the Assignee, through his special litigation counsel, filed the following thirteen lawsuits (collectively referred to as the “**Lawsuits**”) against the Defendants:

- a. Soneet R. Kapila v. Jonathan Lewis  
United States District Court, Middle District of Florida  
Case No. 8:19-cv-1800
- b. Soneet R. Kapila v. Sean Dempsey  
United States District Court, Middle District of Florida  
Case No. 8:19-cv-1802
- c. Soneet R. Kapila v. Mark Andrzejewski  
United States District Court, Middle District of Florida  
Case No. 8:19-cv-2812

- d. Soneet R. Kapila v. William Esping  
United States District Court, Middle District of Florida  
Case No. 8:20-cv-436
- e. Soneet R. Kapila v. Edward DeBartolo  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-6817
- f. Soneet R. Kapila v. Chris Sullivan  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-6820
- g. Soneet R. Kapila v. William E. Horne  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-6821
- h. Soneet R. Kapila v. Robert Basham  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-6822
- i. Soneet R. Kapila v. Geza Henni  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-6823
- j. Soneet R. Kapila v. Dr. James St. Louis III  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-6880
- k. Soneet R. Kapila v. Dr. Michael W. Perry  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-11753
- l. Soneet R. Kapila v. Raymond Monteleone  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-11754
- m. Soneet R. Kapila v. Robert Grammen  
Thirteenth Judicial Circuit, Hillsborough County, Florida  
Case No. 19-CA-11755

4. The Lawsuits, in some cases through multiple amendments, assert claims against the Defendants as former managers and/or officers of the Assignors for multiple wrongful acts, including claims for breaches of duties owed to the Assignors; aiding and abetting breaches of

fiduciary duty; willful misconduct and bad faith; breach of fiduciary duty and the duty of loyalty; failing to exercise diligence in the administration of the affairs of the Assignors and in the use and preservation of their property and assets; failing to conduct the affairs of the Assignors in a manner so as to make it possible to provide the highest quality performance of their business; failing to avoid wasting the Assignors' assets; failing to maximize the value of the Assignors for the benefit of all those having an interest in the Assignors;; avoidance and recovery of alleged fraudulent transfers (as to certain Defendants); failing to act in the best interests of the Assignors and their creditors, failing to comply with the Worker Adjustment and Retraining Notification Act, and failing to obtain adequate insurance coverage for the Assignors and improperly implementing or continuing self-insurance programs for professional liability insurance, medical malpractice insurance, and employees' health insurance (collectively, the "**Claims**"). The Defendants vigorously disputed the Assignee's allegations in each Lawsuit, moving to dismiss and raising numerous defenses.

5. On January 24, 2020, the four Defendants in the federal Lawsuits filed motions to dismiss the Assignee's amended complaint. On July 17, 2020, the United States District Court, Middle District of Florida, entered an order granting in part the motions to dismiss and permitting the Assignee leave to file second amended complaints. After the second amended complaints were filed, on August 21, 2020, the four Defendants in the federal Lawsuits moved to dismiss the second amended complaints. Those motions remain pending. In addition, each of the Defendants in the nine state court Lawsuits have filed motions to dismiss, which remain pending.

6. Preliminarily, the Assignee and Defendants identified at least 21 fact witnesses whose testimony would be required in connection with the Lawsuits. In addition, more than 20 non-parties were subpoenaed to produce documents in connection with the Lawsuits.

7. Document production in the Lawsuits was not complete but the parties and non-parties had already gathered and/or produced over 30,000 documents.

**Relief Requested**

8. After engaging in lengthy and good faith settlement discussions, including through two separate mediation sessions with sophisticated third party mediators, the Assignee and the Defendants, together with their insurance carriers, reached an agreement on the terms of a settlement and compromise of the Claims asserted in the Lawsuits (the “**Settlement**”). In connection therewith, the Assignee and the Defendants have entered into a written Settlement Agreement which is attached hereto as **Exhibit A** (the “**Settlement Agreement**”).

9. Pursuant to this Motion, the Assignee seeks the entry of an order approving the Settlement in accordance with the terms of the Settlement Agreement. In the context of a Chapter 727 assignment, the Assignee has the sole authority and standing to prosecute the Claims and enter into the Settlement. *Moffatt & Nichol, Inc. v. B.E.A. International Corp, Inc.*, 48 So.3d 896, 899 (Fla. 3d. DCA 2010) (finding that an assignee is the only party who has standing to pursue and settle fraudulent transfer, preferential transfer and other derivative claims); *Smith v. Effective Teleservices, Inc.*, 133 So.3d 1048, 1053 (Fla. 4th DCA 2014) (same).

10. The key terms of the Settlement are as follows:<sup>2</sup> (i) the Defendants shall pay or cause to be paid to the Assignee the total sum of \$9,000,000, (ii) the Assignee and the Defendants will provide mutual general releases to each other, subject to the reservation of certain claims and causes of action for the avoidance and recovery of fraudulent transfers, as more specifically described in the Settlement Agreement, (iii) the Assignee will dismiss with prejudice each of the

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<sup>2</sup> The foregoing is a summary only of the terms of the Settlement Agreement. The terms of the Settlement Agreement shall control in the event of any inconsistencies.

Lawsuits against the Defendants, and (iv) the Court will enter a final judgment in this action confirming that the dismissals with prejudice of the Lawsuits totally dispose of the entire Lawsuits as to the Defendants, as contemplated by Rule 9.110(k), Fla. R. App. P.

### **Basis for Relief**

11. The statutory framework provided for assignment for the benefit of creditors cases authorizes the Court to approve the Settlement Agreement. Section 727.109 of the Florida Statutes specifically empowers the Court to enter an order approving “the compromise or settlement of a controversy” upon motion by the Assignee. Fla. Stat. § 727.109(7). Further, the Court is authorized to “[e]xercise any other powers that are necessary to enforce or carry out the provisions of this chapter.” Fla. Stat. § 727.109(15).

12. Although the assignment statutes provide for court approval of settlements proposed by an assignee, the statutes do not set forth any specific criteria for approving settlements. The Assignee submits that analogous bankruptcy principles should guide this Court’s evaluation of the Settlement Agreement. “State courts often look to federal bankruptcy law for guidance as to legal issues arising in proceedings involving assignments for the benefit of creditors.” *Moecker v. Antoine*, 845 So. 2d 904, 912 n.10 (Fla. 1st DCA 2003).

13. It is generally recognized that the law favors compromise of disputes over litigation. *In re Bicoastal Corp.*, 164 B.R. 1009, 1016 (Bankr. M.D. Fla. 1993) (Paskay, C.J.). Some bankruptcy courts have held that a proposed settlement should be approved unless it yields less than the lowest amount that the litigation could reasonably produce. *In re Holywell Corp.*, 93 B.R. 291, 294 (Bankr. S.D. Fla. 1988) (Weaver, J.). In *In re Justice Oaks II, Ltd.*, 898 F.2d 1544 (11th Cir. 1990), *cert. denied* 498 U.S. 959, (1990), the court enunciated certain factors which must be considered in determining whether to approve a compromise. These factors include the following:

- (i) The probability of success in the litigation;
- (ii) The difficulties, if any, to be encountered in the matter of collection;
- (iii) The complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and
- (iv) The paramount interest of the creditors and a proper deference to their reasonable views in the premises.

*Id.*

14. ***The Probability of Success in Litigation.*** The terms of the Settlement Agreement satisfy the above *Justice Oaks* factors. The first factor of probability of success weighs in favor of approval of the Settlement Agreement when considered with the remaining factors. While the Assignee is confident in the merits of the Claims asserted, there is no certainty in litigation, including on appeal. Under the Settlement Agreement, the Claims are being resolved, thereby eliminating the risk and expense of prosecuting the Claims and, in turn, will allow the parties and the Court to avoid protracted litigation in which the Defendants would continue to vigorously defend such Claims with the benefit of being paid defense costs from the insurance policies in place. The litigation would require a number of factual determinations that would likely preclude summary judgment and require a trial, including expert testimony.

15. ***The Collection Factor.*** The second factor involving difficulties in collection weighs heavily in favor of approval of the Settlement Agreement because the insurance coverage is based on “wasting” or declining balance policies that are reduced dollar for dollar with the expenditure of defense costs by the Defendants. Without insurance coverage, there is substantial doubt as to the collectability of any judgment that might be obtained against the Defendants. Therefore, in the Assignee’s business judgment, the difficulty in collection factor was a critical component supporting the Settlement Agreement and weighs heavily in favor of approval of the Settlement Agreement.



16. ***Complexity of Litigation***. The third factor of the complexity of the litigation weighs in favor of approval of the Settlement Agreement. Specifically, the Claims, which arise from the alleged actions of the Defendants as officers and managers of the Assignors under both Florida and Delaware law, are complex in nature, and will likely require a trial on the merits and expert testimony of multiple experts. In view of the foregoing, the complexity of the Claims would result in multi-year litigation and a significant investment in legal and professional fees and costs with no assurances of success or collection.

17. ***Paramount Interests of Creditors***. The last factor as to whether the Settlement is in the paramount interest of creditors weighs in favor of approval of the Settlement. The Assignee believes that the creditors of the Assignment Cases will support the approval of this Motion and the Settlement Agreement. The Settlement assures that unsecured creditors will receive a distribution. Therefore, the Assignee believes that the Settlement Agreement is in the best interest of the creditors of the Assignment Estates.

18. For the foregoing reasons, the Assignee submits that the Settlement satisfies the *Justice Oaks* factors and falls well above the lowest point in the range of reasonableness and, accordingly, should be approved.

#### **Approval of Fees**

19. On June 24, 2019, the Assignee filed a *Motion to Employ Genovese Joblove & Battista, P.A. and Rocke, McLean & Sbar, P.A. as Special Litigation Counsel and to Pay Fees on a Contingency Fee Basis* (the “**Employment Motion**”). On July 29, 2019, the Court entered an order granting the Employment Motion on the terms set forth in the Contingency Fee Contract (the “**Contract**”) attached hereto as **Composite Exhibit B** and further provided that any payment of compensation was subject to final approval by the Court.

Since that time, the Assignee's special litigation counsel have investigated claims and causes of action available to the Assignee and filed and pursued the thirteen Lawsuits. In those Lawsuits, the Assignee's special litigation counsel have responded to multiple motions to dismiss, prepared and filed amended pleadings, engaged in extensive discovery productions, worked closely with expert witnesses who have prepared and served expert reports, and engaged in intensive settlement discussions and formal mediation.

20. The fact-intensive claims against the former officers and managers in the thirteen Lawsuits involved different forums, voluminous documents, and complex issues of corporate governance requiring analysis under both Florida and Delaware law, and the use of multiple expert witnesses, including experts in corporate governance and accounting with respect to evaluation of assets specific to the healthcare industry and the determination of insolvency. The Assignee's special litigation counsel both specialize in the handling of complex business disputes involving insolvent entities and were specifically approved by the Court to represent the Assignee.

21. The combined efforts of the Assignee's special litigation counsel secured an aggregate settlement payment of \$9,000,000.00.

22. In the aggregate, under the terms of the Contract approved by the Court, the total contingency fee to be paid to Genovese Joblove and Rocke McLean is \$2,050,800, and by agreement between such law firms is to be allocated with \$1,025,400 paid to Genovese Joblove and \$1,025,400 paid to Rocke McLean.

23. Section 727.109(10) empowers the Court to "[a]pprove reasonable fees and the reimbursement of expenses for the assignee and all professional persons retained by the assignee, upon objection of a party in interest or upon the court's own motion." The Assignee requests authority to pay the professional fees and costs set forth above. The fees to be paid equate to a

23% contingency fee, which is eminently reasonable given the complexity of the Lawsuits, the risk involved, the delay in payment and in light of the excellent results achieved.<sup>3</sup>

### **Final Judgment**

24. In connection with the approval of the Settlement, the Assignee seeks the entry of a final judgment in this action confirming that the dismissals with prejudice of the Lawsuits totally dispose of the entire Lawsuits as to the Defendants, as contemplated by Rule 9.110(k), Fla. R. App. P.

WHEREFORE, the Assignee respectfully requests that this Court enter an order, in substantially the form of the order attached hereto as **Exhibit C**, (i) granting this Motion, (ii) approving the Settlement pursuant to Section 727.109(7) of the Florida Statutes, (iii) approving the payment of the professional fees requested herein, (iv) granting such other and further relief as is just and proper, and (v) that this Court enter Final Judgment confirming that the dismissals with prejudice of the Lawsuits totally dispose of entire Lawsuits as to the Defendants.

*/s/ Edward J. Peterson*

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<sup>3</sup> The contingency fee limitations provided for in Rule 4-1.5(f) of the Rules Regulating the Florida Bar do not apply to commercial litigation cases. The Commentary to Rule 4-1.5 specifically states that “Rule 4-1.5(f) should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context. In any event, the Court held a hearing on June 27, 2019 wherein the contingency fee agreement was specifically approved by the Court.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished on this 26<sup>th</sup> day of March, 2021 by the Court's electronic system to all parties receiving electronic service and by either U.S. mail or electronic mail to the parties listed on the Limited Notice Parties list attached.

*/s/ Edward J. Peterson* \_\_\_\_\_

Edward J. Peterson

MASTER LIMITED NOTICE SERVICE LIST  
October 1, 2020

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

CLM Aviation, LLC  
LSI HoldCo, LLC  
LSI Management Company, LLC  
Laser Spine Surgery Center of Arizona, LLC  
Laser Spine Surgery Center of Cincinnati, LLC  
Laser Spine Surgery Center of Cleveland, LLC  
Laser Spine Surgical Center, LLC  
Laser Spine Surgery Center of Pennsylvania, LLC  
Laser Spine Surgery Center of St. Louis, LLC  
Laser Spine Surgery Center of Warwick, LLC  
Laser Spine Institute, LLC  
Medical Care Management Services, LLC  
Spine DME Solutions, LLC  
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Medport Billing, LLC (MAIL RETURNED)  
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**Those Parties and Attorneys Formally Requesting Notice (via the Court's electronic servicing system unless otherwise noted)**

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